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A DIGEST

OF THE

LAW OF CARRIERS.

A DIGEST

OF THE

LAW OF CARRIERS

OF

GOODS AND PASSENGERS

BY LAND AND INTERNAL NAVIGATION.

BY

WALTER HENRY MACNAMARA,

OF THE INNER TEMPLE, BARRISTER-AT-LAW,

REGISTRAR TO THE RAILWAY COMMISSION.

"The Law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases."—LORD MANSFIELD.

LONDON:

STEVENS AND SONS, 119, CHANCERY LANE,

Law Publishers and Booksellers.

1888

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE—E.C.

PREFACE.

This work is an attempt to reduce the statute and case law of carriers by land into a code or series of articles. The writer originally intended to confine the articles themselves entirely to principles, and to make a scientific treatise on this particular branch of the law of bailments; but he found that to carry out this principle strictly would be to make the work far less useful to those interested in the law relating to the transit by railway of merchandise and passengers, and therefore it is that many of the articles, though important in themselves, are only examples of a principle contained in a previous article. To this extent the writer has laid himself open to the objection of not having given effect to the dictum of Lord Mansfield, set out on the title page of the book. For the same reason, in many of the articles dealing with statutory enactments, the verbatim words of the Act of Parliament are set out instead of the effect of them.

Whether this branch of mercantile law is capable of codification is a matter upon which there must be a diversity of opinion. If codification is ever thought feasible or desirable, the writer is ambitious enough to hope that this Digest may afford facilities for that operation. At all events, by throwing the whole law of carriers by land into a systematic form, it enables the law reformer to criticise it as a whole, and to appreciate

the nature and effect of the amendments which it may require.

It will be found throughout the book that there are frequent references to decisions in the American Courts. No treatise on the law of carriers would be complete unless it contained references to cases decided in the United States. The enormous distance between the different towns in that country has made this branch of the law one of extreme importance there, and the treatises of Story and Angell on it are held in reverence by lawyers throughout the world.

The writer hopes a generous allowance will be made for shortcomings, as the branch of law dealt with contains somewhat intricate questions connected with the receiving and forwarding of traffic, and the equal treatment of the public by railway and canal companies.

The Railway and Canal Traffic Act, 1888, is set out in the Appendix, and noticed in the text.

The writer has not dealt with the practice before the Railway and Canal Commissioners, as the procedure is not yet settled; and he intends hereafter to devote a separate work to the subject.

The writer desires to acknowledge valuable assistance in revision of the proofs which has been rendered to him by his friend, Mr. Yarborough Anderson, of the North-Eastern Circuit.

W. H. M.

November, 1888.

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LIST OF ABBREVIATIONS

USED IN THIS WORK.

A. & E.	Adolphus & Ellis's Reports, K. B.
A. & E. Ry. Co.	American and English Railway Cases (published in New York).
Ala.	Alabama Reports.
Aleyn	Aleyn's Select Cases, K. B.
Allen	Allen's Reports.
Angell	Angell on Law of Carriers (5th ed. by Lathrop, 1877).
App. Cas.	Law Reports, Appeal Cases.
B. & A.	Barnewall & Alderson's Reports, K. B.
B. & Ad.	Barnewall & Adolphus's Reports, K. B.
B. & B.	Broderip & Bingham's Reports, C. B.
B. & C.	Barnewall & Cresswell's Reports, K. B.
B. N. P.	Buller's Nisi Prius.
B. & S.	Best & Smith's Reports, Q. B.
Bacon Ab.	Bacon's Abridgement.
Bailey	Bailey's Law Reports, South Carolina.
Barb.	Barbour's Reports, Supreme Ct., N. Y.
Beav.	Beavan's Reports, Rolls Court.
Bing.	Bingham's Reports, C. P.
Bing. N. C.	Bingham's New Cases.
Binn.	Binney's Reports, Pennsylvania.
Bl. C.	Blackstone's Commentaries.
Black	Black's Reports, U. S. Sup. Ct.
Black, H.	Henry Blackstone's Reports.
B. Monr.	Ben Monroe's Kentucky Reports.
Bos. & Pul.	Bosanquet & Puller's Reports, C. P.
Bosw.	Bosworth's Reports.
Bro. & B.	Broderip & Bingham's Reports, C. P.
Bull. N. P.	Buller's Nisi Prius.
Burr.	Burrow's Reports, K. B.
C. B.	Common Bench Reports.
C. B. (N. S.)	Common Bench Reports, New Series.
C. & F.	Clark & Finelly's Reports, H. L.
C. & J.	Crompton & Jervis's Reports, Ex.
C. M. & R.	Crompton, Meeson, & Roscoe's Reports, Ex.
C. P. D.	Law Reports, Common Pleas Division.
Cal.	California Reports.
Camp.	Campbell's Reports, Nisi Prius.
Car. & K. Car. & Kir.	Carrington & Kirwan's Reports, N. P.
Car. & M.	Carrington & Marsham's Reports.
Car. & P.	Carrington & Payne's Reports, N. P.
Carth.	Carthew's Reports, K. B.
Ch. D.	Law Reports, Chancery Division.
Chit. & T.	Chitty & Temple on Carriers.
Chit. Rep.	Chitty's Reports, Bail Court.
Co.	Coke's Reports, K. B.
Co. Lit.	Coke on Littleton (1st Inst.).
Conn.	Connecticut Reports
Cow.	Cowen's Reports, N. Y.
Cowp.	Cowper's Reports, K. B.
Cr. & M.	Crompton & Meeson's Reports, Ex.
Cush.	Cushing's Reports, Massachusetts.

Dana ..... Dana's Reports, Kentucky.
Daveis ..... Daveis's Reports, U. S.
Dev. Ct. of Cl..... Devereux's Reports, U. S. Ct. of Claims.
Disn. ..... Disney's Reports, S. C. of Cincinnatti.
Doug..... Douglas's Reports, K. B.
Dow. & L. ..... Dowling & Lowndes' Reports, Bail Ct.
Dow. & R. ..... Dowling & Ryland's Magistrates' Cases.
Dowl..... Dowling's Practice Cases.
E. & B. ..... Ellis & Blackburn's Reports, Q. B.
E. B. & E. ..... Ellis, Blackburn & Ellis's Reports, Q. B.
East ..... East's Reports, K. B.
East, P. C. ..... East's Pleas of the Crown.
Eden ..... Eden's Reports, Chancery.
Esp. ..... Espinasse's Reports.
Ex..... Welbsby, Hurlstone & Gordon's Reports, Ex.
Ex. D. ..... Law Reports, Exchequer Division.
F. & F. ..... Foster & Finlayson's Reports, N. P.
Ga..... } Georgia Reports.
Geo. ..... }
Gow ..... Gow's Nisi Prius Cases.
Gray ..... Gray's Reports, Massachusetts.
H. & C. ..... Hurlstone & Coltman's Reports.
H. L..... } Clark & Finnelly's House of Lords' Reports, N. S.
H. L. Ca. ..... }
H. & N..... Hurlstone & Norman's Reports, Ex.
Harr. & J..... Harris & Johnson's Reports, Maryland.
Harrington, Del. .. Harrington's Delaware Reports.
Harper ..... Harper's Reports, South Carolina.
Hawk. P. C..... Hawkins' Pleas of the Crown.
Heisk. ..... Heiskell's Reports, Tennessee.
Hill, N. Y. ..... Hill's Reports, N. Y.
Hilt. ..... Hilton's Reports, Common Pleas, N. Y.
Holt ..... Holt's Reports, K. B.
How. ..... Howard's Reports, U. S. Supreme Court.
Hume..... Hume's Decisions, Court of Session.
Humph..... Humphrey's Reports, Tennessee.
Ir. C. L. R. ..... Irish Common Law Reports.
Ir. E. R. ..... Irish Equity Reports.
Ir. Rep. C. L. .... Irish Law Reports, C. L.
Ir. Rep. Eq. ..... Irish Law Reports, Equity.
Ill. ..... Illinois Reports.
Ind. ..... Indiana Reports.
Iowa ..... Iowa Reports.
Irvine..... Decisions in Court of Justiciary, Scotland.
Johns. ..... } Johnson's Cases, N. Y.
Johns. Cas. ..... }
Jur. ..... Jurist Report.
Kent Com..... Kent's Commentaries on the Law of the United States.
Kernan ..... Kernan's Reports, Appeal Court, N. Y.
L. J. ..... Law Journal Reports in all the Courts.
L. R. ..... Law Reports in all the Courts.
L. R. Ir. ..... Law Reports, Ireland.
L. T. ..... Law Times Reports in all the Courts.
Ld. Raym. ..... Lord Raymond's Reports, K. B.
Leach ..... Leach's Crown Cases.
M. & G..... Manning & Granger's Reports, C. P.
M. & S. ..... Maule & Selwyn's Reports, K. B.
M. & W. ..... Meeson & Welsby's Reports, Ex.
Maine ..... Maine's Reports, U. S.
Man. & R..... Manning & Ryland's Reports.
Mason ..... Mason's Reports, U. S.

Mass. ..... Massachusetts Reports.
M'Cl. & Y. ..... M'Cleland & Younge's Reports, Ex.
McMul. ..... MacMullen's Reports.
Md. ..... Maryland Reports.
Met. ..... Metcalfe's Reports, Massachusetts.
Mich. ..... Michigan Reports.
Minn. ..... Minnesota Reports.
Miss. ..... Mississippi Reports.
Mo. ..... Missouri Reports.
Mod. R. ..... Modern Reports, K.B.
Moo. & P. ..... Moore & Payne's Reports, C. P.
Moo. & R. ..... Moody & Robinson's Reports, N. P.
Moore, C. P. ..... Moore's Common Pleas Reports.
N. C. ..... Bingham's New Cases.
N. H. ..... New Hampshire Reports.
N. Y. ..... New York Court of Appeal Reports.
Neb. ..... Nebraska Reports.
Ohio ..... Ohio Reports.
P. & D. ..... Perry & Davidson's Reports, K. B.
Pa. St. ..... Pennsylvania State Reports.
Peake, N. P. C. .. Peake's Nisi Prius Cases.
Pet. Ab. ..... Petersdorff's Abridgment.
Pick. ..... Pickering's Reports, Massachusetts.
Price ..... Price's Reports, Exchequer.
Q. B. ..... Adolphus & Ellis' Queen's Bench Reports, N. S.
Q. B. D. ..... Law Reports, Queen's Bench Division.
Ry. Ca. ..... Railway Cases.
Ry. & Ca. Tr. Ca... Reports of Cases before the Railway Commission. Vols. 1-3, by Neville and Macnamara; Vols. 4-6, by Browne & Macnamara.
Ry. & M. ..... Ryan & Moody's Reports, N. P.
Salk. ..... Salkeld's Reports, K. B.
Seld. ..... Selden.
Selw. N. P. ..... Selwyn's Nisi Prius.
Sess. Ca. ..... Decisions in the Court of Session, Scotland; 4 series.
Sco. N. R. ..... } Scott's New Reports, C. P.
Scott, N. R. ..... }
Show. ..... Shower's Reports, K. B.
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Smith, E. D. ..... E. D. Smith's Reports, Common Pleas, N. Y.
Smith, L. C. ..... Smith's Leading Cases, 8th ed.
Stark. ..... } Starkie's Reports, Nisi Prius.
Stark. N. P. ..... }
Story ..... Story's Reports.
Story on Bailm. .. Story on Bailments (8th ed., by Bennett).
Stra. ..... Strange's Reports, K. B.
Sumner's R. ..... Sumner's Reports, U. S.
T. R. ..... Term Reports.
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Tex. ..... Texas Reports.
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Vent. ..... Ventris' Reports, K. B.
Vt. ..... Vermont Reports.
W. R. ..... Weekly Reporter of Cases in all the Courts.
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Watts & S. ..... Watts and Sargeant's Reports, Pennsylvania.
W. Bl. ..... Sir William Blackstone's Reports, K. B.
Wend. ..... Wendell's Reports, N Y.
Wils. ..... Wilson's Reports, K. B.
Wms. Saund. .... Notes to Saunders' Reports by Williams.
Wy. ..... Wyoming Reports.

CORRIGENDA.

Page 38, line 18, *for* "*Brook* v. *Pickwith*," *read* "*Brooke* v. *Pickwick*."
,, 44 ,, 19, *for* Art. "174," *read* "176."
,, 49 ,, 11 from bottom, *for* "3" Bos. & Pul., *read* "2."
,, 55, last 2 lines, *omit the words* "As to parliamentary trains, see 7 & 8 Vict. c. 85, s. 10."
,, 86, line 8, *for* "*Combs* v. *Bristol Ry. Co.*, 3 H. & N. 1," *read* "*Coombs* v. *Bristol & Ex. Ry. Co.*, 3 H. & N. 510."
,, 87 ,, 20, *for* "*Garrett* v. *Willan*," *read* "*Garnett* v. *Willan*."
,, 143 ,, 11, *omit the words* "and 16."
,, 180 ,, 9 from bottom, *for* "*Aberdeen Commercial Co.*" *read* "*Aberdeen Lime Co.*"
,, 200 ,, 11 ,, *for* "*Symes* v. *Chaplain*," *read* "*Syms* v. *Chaplin*."
,, 228, last line, *for* "203," *read* "205."
,, 396, *for* Article "313," *read* "312;" *and for* Article "314," *read* "313."
,, 488, line 12 from bottom, *for* "8 & 9 Vict." *read* "9 & 10 Vict."
,, 490 ,, 9 ,, *for* "c. 23," *read* "c. 93."

A DIGEST

OF THE

LAW OF CARRIERS.

PART I.

CARRIERS OF GOODS BY LAND, GENERALLY.

CHAPTER I.

CARRIERS WITHOUT HIRE.

1. If a person undertakes to carry goods for another gratuitously, he is bound to use diligence in doing so, but not in so high a degree as one who receives payment; he is only liable for gross negligence.

The liability of the carrier without reward is derived from his undertaking, which, being gratuitous, excuses him in the absence of that aggravated degree of negligence which is called gross negligence.

The reason given by Sir William Jones in his work on Bailments why actions against gratuitous bailees have been so rare is, that it is very uncommon for a person to undertake any office of trouble without compensation. "But, perhaps," says Story, "a large survey of human life might have furnished a more charitable interpretation of this absence of litigation: first, because, from the great facilities of a wide and cheap intercourse in modern times, there is the less reason to burden friends with the execution of such trusts; and, secondly, because, in cases of loss, there is an extreme reluctance on the part of bailors to make their friends the victims of a meritorious, although it may be a negligent, kindness." (See Story on Bailm., Chap. VI.)

Chap. I. Art. 2.

2. *Primâ facie* a gratuitous carrier of goods for another, who keeps them with the same care that he keeps his own of the same description, is not guilty of gross negligence; but this presumption may be repelled by evidence of actual negligence, or of conduct, which, though applied to his own goods as well as to those of the bailor, would be deemed negligence in a man of ordinary prudence. (*Tracy* v. *Wood*, 3 Mason, 132.)

In considering what is gross negligence, the nature and value of the property delivered to a carrier to be carried gratuitously must be considered. (*Ib.*)

In the case of a carrier, who is a person who holds himself out for the careful and skilful performance of a particular duty, gross negligence seems to include the want of that reasonable care, skill, and expedition which may properly be expected from a person so holding himself out, and his servants. (*Beal* v. *S. Devon Ry. Co.*, 3 H. & C. 337; 11 L. T. N. S. 184.)

For all practical purposes the rule may be stated thus:—That the failure to exercise reasonable care, skill, and diligence is gross negligence; that what is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire; that from the former is reasonably expected such care and diligence as persons not specially conversant with the carrying business ordinarily use in their own affairs, and such skill as he has; but from the latter such care and diligence as are usual in persons who are so specially conversant, or, in the absence of usage, are to be expected by analogy to the ordinary and usual course of such business, and such skill as he undertakes to have, namely, the skill usual in the business for which he receives payment. (*Ib.*)

"Gross negligence" is the failure to exercise reasonable care,

skill, and diligence. (See notes to *Coggs* v. *Bernard*, 1 Smith's L. C., and Chit. & T. 9.)

"Where a person does not carry for hire he is bound to take proper and prudent care of that which is committed to him; and if he ascertains that the article is of great value, he is bound to watch with great care and diligence." (Per Lord Ellenborough in *Nelson* v. *Macintosh*, 1 Stark. N. P. 237.)

If the subject-matter of the bailment consists of living animals, such as oxen, horses, or sheep, the degree of care to be exercised by a carrier must be consistent with the character of the trust and the nature of the property. (Angell, 24.)

In *Tracy* v. *Wood* (*supra*), it was held that gross negligence is to be considered with reference to the nature of the goods delivered to a bailee without reward, and that if money is delivered, it is to be kept with more care than common property.

In *Lord* v. *Midland Rail. Co.* (L. R. 2 C. P. 344), Willes, J., said: "Any negligence is gross in one who undertakes a duty and fails to perform it. The term 'gross negligence' is applied to the case of a gratuitous bailee, who is not liable unless he fails to exercise the degree of skill which he possesses."

3. If a person gratuitously undertakes to carry goods to the best of his skill, when his situation or profession is such as to imply skill, an omission to use that skill is imputable to him as gross negligence. (*Shiells* v. *Blackburne*, 1 Black. H. 158.)

This proposition is not an exception to Article 1, viz., that gratuitous carriers are liable for gross negligence only, since in the case of a skilled person that may be considered gross negligence which in an ordinary unskilled person would be only a slight want of care. (See *Wilson* v. *Brett*, 11 M. & W. 113.)

4. If a person undertakes to carry goods safely, he is responsible for any damage they may sustain in the

Chap. I. Art. 4.

carriage, through his neglect, though he was not a common carrier, and was to have nothing for the carriage. (*Coggs* v. *Bernard*, 1 Smith's L. C.)

This Article forms part of a general proposition in the law of principal and agent, which has been stated in the following words, viz. :—the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. (See *Shillibeer* v. *Glyn*, 2 M. & W. 143.)

5. A person who carries goods gratuitously, as a general rule, is excused from liability where their loss is occasioned by theft.

If there be great suspicion attending the circumstances under which the theft is alleged to have been committed, a jury would be inclined to disbelieve the theft, and treat the loss as unaccounted for. (Chit. & T. 13.)

6. A gratuitous carrier has, by reason of the bailment and his possession of the goods entrusted to him, such a special property or interest in the goods as will enable him to bring an action against a wrongdoer for an injury to the goods.

If such a carrier violate the terms of the bailment upon which he received the goods, the case would be otherwise. (*Miles* v. *Cattle*, 6 Bing. 743.) In that case the plaintiff received a parcel from C. to book for London at the office of the defendants, common carriers. The plaintiff, instead of obeying his instructions, put the parcel into his bag, intending to take it to London himself. The defendants having lost the bag, it was held that the plaintiff could not recover damages from them in respect of the parcel.

7. A gratuitous carrier has no lien or right to detain goods entrusted to him until he has received

payment of the expenses he may have incurred in reference to such goods.

But if he must necessarily incur expenses in the execution of the commission entrusted to him, he has an implied authority from the owner to defray such expenses, and an action for money paid is maintainable. Thus, if a person request a friend to carry goods for him in a stage-coach to another town, for which goods carriage hire is usually paid, a like duty to pay the bill is presumed. (See Chit. & T. 13.)

8. The contract of a person who contracts to carry goods gratuitously is *nudum pactum*, and no action can be maintained against him for omitting to do so.

Lord Holt, in giving judgment in *Coggs* v. *Bernard*, draws a distinction where the contract is executory, and says that if the defendant in that case had assumed to carry the goods, and had not done so, no action could have been maintained.

CHAPTER II.

PRIVATE CARRIERS FOR HIRE.

Chap. II. Art. 9.

9. Any person carrying for hire, who does not come within the definition given in Article 19 of a common carrier, is a private carrier.

A private carrier has been defined to be a person whose trade is not that of conveying goods from one person or place to another, but who undertakes upon occasion to carry the goods of another and receives a reward for so doing. (See Browne on Carriers, 29.)

10. A common carrier (with certain exceptions) may become a private carrier for hire by a special acceptance limiting his liability as a carrier.

See *post*, Chap. VI.; and also Angell, 47.

Before the Carriers Act, 1830, common carriers might become private carriers for hire by a public notice limiting their liability, of which the owner of the goods had knowledge. (*Post*, Chap. VI.)

As to how a railway company may limit the extraordinary liability which the law imposes upon them as common carriers, so as to occupy the position of a private carrier for hire, see *post*, Chap. XI.

11. A private carrier for hire is bound to use ordinary diligence only with regard to the goods. (*Coggs* v. *Bernard*, Smith's L. C.; *Brind* v. *Dale*, 8 Car. & P. 207.)

In the latter case Lord Abinger said: "If a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good all losses arising from the negligence of his servants, although he would not be liable for losses by thieves or any taking by force." (See Story on Bailm. and Angell.) The very occurrence of loss or damage to the goods delivered to a private carrier for hire appears to be cogent evidence of want of care. (*Mackenzie* v. *Cox*, 9 Car. & P. 632; *Ross* v. *Hill*, 2 C. B. 877.) But in most cases it is a question of fact for a jury whether ordinary diligence has been used (*Duff* v. *Budd*, 6 Moore (C. P.), 469; *Beckford* v. *Crutwell*, 5 Car. & P. 242; *Beck* v. *Evans*, 16 East, 244); and depends much upon particular facts and circumstances, the nature and value of the property, &c. (*Walker* v. *Jackson*, 10 M. & W. 161; *Green* v. *Hollingsworth*, 5 Dana. 173.)

12. The ordinary diligence to which a private carrier for hire is bound, is such diligence as every prudent man commonly takes of his own goods.

See notes to Article 13.

13. A private carrier for hire is not liable for "losses by thieves or by any taking by force." (*Brind* v. *Dale*, 8 Car. & P. 207; see note to Article 11.)

In the civil law a distinction was made between a public palpable robbery by force and a secret theft or purloining of goods. In the one case the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery. In the other case he was bound to make good the loss unless he could show that he had taken the greatest care of the thing entrusted to him, and that it had been purloined notwithstanding every precaution for its safety. (Vin. Com. ad Inst. lib. 3, tit. 15, § 5; Pothier, Pret à Usage, Art. 53; *Robinson* v. *Ward*, Ry. & M. 276, n. (*a*); *Fay* v. *Steamer New World*, 1 Cal. 348.)

Chap. II. Art. 13.

There are cases in which it has been held that a loss by secret purloining of goods in the hands of a carrier for hire is *primâ facie* evidence of a want of ordinary diligence, and this presumption the carrier must rebut by showing that he had taken ordinary diligence, or, in other words, that he had taken all such precautions as appear to be necessary to guard against the theft. (*Hatchwell* v. *Cooke*, 6 Taun. 576, and cases there cited.)

14. If the owner of the goods in the hands of a private carrier should in any way conduce to their loss or damage, or the loss is as likely to have arisen from the misconduct of the owner, or his want of care, the carrier is not responsible for the loss or damage. (Angell, 48.)

This Article should be read as controlled by the two following ones as regards a private carrier for hire in England.

The plaintiff gave to the defendant, a private carrier for hire, or a town carman, certain goods to be taken care of and safely carried from one wharf to another. The plaintiff agreed to go with the cart which was to carry the goods, and to look after them, as the driver had explained that he could not watch both the horse and the goods. Upon the arrival of the cart at its destination, one of the parcels was missing, and the plaintiff, who had not followed the cart, brought an action for the loss of the package through the negligence of the defendant's servant. Lord Abinger, C. B., in summing up, said: "I take it, that if a man agrees to carry goods for hire, although not a common carrier, he would not be liable if the owner accompanies the goods to take care of them, and was himself guilty of negligence, for it is a rule of law that a party cannot recover if his own negligence was as much the cause of the loss as that of the defendant. It appears that the defendant lets out carts, which ply at different stands; and if, when this cart was let, the plaintiff agreed to go with the goods and watch them, it is manifest that he did not rely solely on the defendant's

servant." (*Brind* v. *Dale*, 8 Car. & P. 207; see also *White* v. *Winnisimmet Co.*, 7 Cush. 159.)

15. If the owner goes by the same conveyance as his goods, and has them placed in such a part of the conveyance that they are in his entire control, and not in the control of the carrier, the duty of the carrier is modified; and in case of loss occasioned by want of reasonable care on the part of the owner, the carrier is not liable.

See *Talley* v. *G. W. Ry. Co.*, L. R. 6 C. P. 44; and *post*, Art. 57, p. 49, and Chap. XVII.

16. If the owner of the goods deliver them to the carrier in such a way that they are in the entire control of the carrier, the latter will be liable for them, even though the owner may exercise a certain supervision over their transport.

Where the plaintiff employed the defendant to carry goods, and the defendant said to the plaintiff at starting, "I will warrant the goods shall go safe," it was held that the defendant was liable for any damage sustained by the goods, notwithstanding the plaintiff sent one of his own servants along with the cart to look after them. (*Robinson* v. *Dunmore*, 2 Bos. & Pul. 416. See *post*, Chaps. V. and XI.)

17. Although the degree of care required of a private carrier for hire extends only to the responsibility for want of ordinary diligence, yet that responsibility may be increased or diminished by special contract.

The parties to a contract of bailment may modify the terms almost indefinitely, so long as they do not attempt to exempt

Chap. II. Art. 17.

themselves for fraudulent acts, and the contract is not contrary to morals or statutory enactment.

A contract to tow a boat, "at the risk of the master and owners thereof," has been held to discharge the paid contractor from liability for every risk arising from a want of ordinary skill. (*Alexander* v. *Greene*, 3 Hill, N. Y. 9.)

18. A private carrier for hire can, by expressly warranting the safety of the goods, assume the greater responsibility which devolves upon common carriers. (*Robinson* v. *Dunmore*, 2 Bos. & Pul. 417; Angell, 51.)

In the above case the plaintiff employed the defendant to carry his goods, and the defendant said to the plaintiff at starting, "I will warrant the goods shall go safe;" it was held that, although the defendant was "not a common carrier by trade, he had put himself into the situation of a common carrier by his particular warranty." (See also *Gibbons* v. *United States*, Dev. Ct. of Cl. 26.)

But even an express promise to carry goods "safely and securely" is but the undertaking implied by law to carry them with ordinary diligence, and does not insure against losses by robbers or any taking by force. (2 Bl. C. 452; Story on Bailm.)

CHAPTER III.

COMMON CARRIERS.

1. *Who are* ..... *Arts.* 19, 20.
2. *Who are not* ..... *Art.* 21.

19. A common carrier is a person who undertakes for hire to transport, from a place within the realm to a place within or without the realm, the goods or money of all such persons as think fit to employ him.

To render a person liable as a common carrier, he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation *pro hac vice*. (*Coggs* v. *Bernard*, 1 Smith, L. C.; *Gisbourne* v. *Hirst*, 1 Salk. 249; *Ingate* v. *Christie*, 3 Car. & Kir. 61; *Ansell* v. *Waterhouse*, 2 Chit. Rep. 1; *Nugent* v. *Smith*, 1 C. P. D. 19, 423; 45 L. J. Ex. D. 697.)

When the acts or conduct of the individual in the ordinary course of business will lead the public to conclude that he is carrying on the business of a common carrier, and when such an understanding as the ground of an agreement is not modified by a

Chap. III. Art. 19.

special contract, the individual so acting will be held to be a common carrier. (*Palmer* v. *Grand Junction Rail. Co.*, 4 M. & W. 49; *Walker* v. *Jackson*, 10 M. & W. 161; 12 L. J. Ex. 165.)

A person may be a common carrier of one thing, while he is not a common carrier of another; but if he has been accustomed to carry all kinds of goods, he cannot by his own free will limit his duty to one particular class of articles, or limit his liability to a responsibility for these only. (*M'Andrew* v. *Electric Telegraph Co.*, 25 L. J. C. P. 26.)

There is no substantial difference between a carrier within the realm and one who carries from a place in the realm to a place beyond it. (*Benett* v. *P. & O. Steamboat Co.*, 18 L. J. C. P. 85; *Crouch* v. *L. & N. W. Ry. Co.*, 23 L. J. C. P. 73; see *post*, p. 48.)

"Everyone who undertakes to carry for anyone who asks him is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you or me only, that is a matter of special contract." (Alderson, B., in *Ingate* v. *Christie*, 3 Car. & Kir. 61.)

A person who holds himself out to the public to carry for hire is a common carrier as much in his first trip as in any subsequent one. (*Fuller* v. *Bradley*, 25 Pa. St. 120; *Kirton* v. *Hildebrand*, 9 B. Monr. 72; *Simmons* v. *Law*, 8 Bosw. 213.)

A common carrier may be of money as well as of goods, and he will be bound as such for the carriage of money as well as of goods, if such is his own practice or the common usage of the business in which he is engaged. (Story on Bailm., and cases there cited.)

It is necessary that the carriage be for hire and reward; for if it be gratuitous the carrier is not liable as a common carrier,

although such is his business, but only for want of ordinary diligence. (*Fay* v. *Steamer New World*, 1 Cal. 348.)

In order to charge a person as a common carrier, it is not necessary that a specific sum should be agreed on for the hire; for if none is agreed on, he is entitled to reasonable compensation. (*Coggs* v. *Bernard*, *ante*; *Bastard* v. *Bastard*, 2 Show. 81.)

20. The following are common carriers:—

(1) Railway companies; as regards goods which they are bound by Statute to carry, or profess to carry, or actually carry for persons generally, including (subject to statutory exemptions) live animals, and also passengers' personal luggage, which under their several Acts of Parliament they are bound to carry free of charge.

See *post*, Chap. X., where the subject is fully discussed.

(2) Canal and navigation companies; as regards goods which they are bound by Statute to carry, or profess to carry, or actually carry for persons generally.

See 8 & 9 Vict. c. 42, ss. 5, 6.

A company maintaining a canal for the use of the public on payment of tolls is bound to take only reasonable care that the canal may be navigated without danger. It is not a common carrier. (*Exchange Ins. Co.* v. *Delaware Canal Co.*, 10 Bosw. 180. See also the judgments in *Redhead* v. *Midland Ry. Co.*, 38 L. J. Q. B. 168; *Arnold* v. *Halenbake*, 5 Wend. 33.)

(3) Owners and masters of sailing and steam vessels employed as general ships trading regularly from port to port for the transportation of goods

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to be conveyed for hire to the port of destination, and of the ordinary luggage of passengers, &c.

(4) Proprietors of barges and lighters, hoymen, lightermen (*Ingate* v. *Christie*, 3 Car. & Kir. 61), and canal and other boatmen carrying goods for all persons indifferently for hire. (2 Ld. Raym. 909, 18; 5 Term Rep. 27; Bac. Ab. Carriers, A.)

A person who exercises the ordinary employment of a lighterman, by carrying goods in his flats for reward, although not bound as a common carrier to receive the goods of all comers indifferently, nevertheless incurs the liability of a common carrier for the safety of goods carried by him. (*Liver Alkali Co.* v. *Johnson*, L. R. 9 Exch. 338; 43 L. J. Ex. 216. But see judgment of Cockburn, L. C. J., *post*, Art. 21 (4).)

In that case a barge owner let out his barges to all that came to him, and to only one person for each voyage, each being made under a separate agreement, and the customer fixing the termini. (But see *Scaife* v. *Farrant*, L. R., 10 Ex. 358; and remarks of Cockburn, L. C. J., in *Nugent* v. *Smith*, 1 C. P. D. 423; 45 L. J. C. P. 697.)

A hoyman who undertakes to carry goods must deliver them safely, except damaged by the act of God or by the Queen's enemies. (*Richardson* v. *Sewell*, 2 Smith, 205.)

A wharfinger who undertakes to convey goods from his wharf to the vessel in his own lighter, is a common carrier. (*Maving* v. *Todd*, 1 Stark. N. P. 72; *Goff* v. *Clinkard*, 1 Wils. 282.)

(5) Ferrymen, *but only* if they hold themselves out to the public as common carriers of goods. (*Willoughby* v. *Horridge*, 12 C. B. 742; 2 Kent, Com. 599; *Rabrosk* v. *Herbert*, 3 Ala. 392.)

The owners of a private ferry may so use it as to subject them-

selves to the liability of common carriers; and they do so, if they notoriously undertake for hire to convey across the river all persons indifferently, with their carriages and goods. (*Littlejohn* v. *Jones*, 2 McMul. 365.)

A ferryman seems not to be a common carrier where he takes the passengers along with the goods. (*Payne* v. *Partridge*, 1 Salk. 12; *Walker* v. *Jackson*, 10 M. & W. 161; 12 L. J. Exch. 165.)

(6) Proprietors of stage coaches; of goods which they usually carry for hire, and hold themselves out to carry for all persons indifferently, and of the personal luggage of passengers so carried, although they receive no specific compensation therefor, but simply receive their fare for the conveyance of the passengers.

The doctrine is now firmly established, both in England and America, that the responsibility of coach proprietors, carrying passengers with their luggage, stands, as to their luggage, upon the ordinary footing of common carriers. (*Brooke* v. *Pickwick*, 4 Bing. 218, 222; *Christie* v. *Griggs*, 2 Camp. 80; *Allen* v. *Sewall*, 2 Wend. 327.) They are responsible for the safety of such luggage and for proper care thereof, because it constitutes a part of the service for which the fare is paid, and the passengers are thereby induced to travel in the coach, and the custody of the luggage may be properly deemed, as in the case of an innkeeper, an accessory to the principal contract. (Lord Holt, in *Lane* v. *Cotton*, 12 Mod. R. 473.)

As to Goods.—It must be clear that the proprietors hold themselves out as persons exercising a public employment, and as being ready to carry goods for hire for persons in general. The mere fact that the drivers of their coaches are accustomed to carry packages of money or other things for hire, for their own personal emolument, will not make the proprietors responsible therefor as

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common carriers. (*Middleton* v. *Fowles*, 1 Salk. 282; *Bean* v. *Sturtevant*, 8 N. H. 146.)

An established practice of conveying for hire in a stage coach parcels not belonging to passengers renders the proprietors liable as common carriers. (*Dwight* v. *Brewster*, 1 Pick. 50; *McHenry* v. *Ry. Co.*, 4 Harring. Del. 448.)

(7) Hackney coachmen; as regards the ordinary baggage of the passengers they carry, and hold themselves out to carry with their baggage.

Hackney coachmen are not common carriers of goods or merchandize, their employment being for the conveyance of passengers, and not the carriage of goods. (Jeremy on Carriers, 13, 14; *Aston* v. *Heaven*, 2 Esp. 533.)

"It is ordinarily the case that hackney coachmen are accustomed to carry the baggage of passengers, although they receive no specific compensation therefor, but simply receive the fare for the transportation of the traveller; yet, like common carriers, they are responsible for the safety of such baggage; since it constitutes a part of the service for which the fare is paid, and the passengers are thereby induced to travel in the coach, and the custody of the baggage may be deemed, as in the case of an innkeeper, an accessory to the principal contract." (Angell.) Still it is a question of fact whether a hackney coachman or a cabman professes to carry both passengers and baggage; and if it so appear, he is clothed with the obligations and responsibilities of a common carrier of goods for hire. (*Ross* v. *Hill*, 2 C. B. 877; 3 Dow. & L. 788; *Dickinson* v. *Winchester*, 4 Cush. 114; see *Case* v. *Storey*, L. R. 4 Ex. 319.)

An omnibus proprietor is liable as a common carrier for the baggage of a passenger. (*Dibble* v. *Brown*, 12 Ga. 217; *Parmelee* v. *McNulty*, 19 Ill. 556.)

A street railway corporation will be responsible as common

carriers if they allow their drivers and conductors to take, carry, and deliver trunks and parcels for hire. And what is done by the conductors with the knowledge and consent, express or implied, of the superintendents, will bind the company. (*Levi* v. *Lynn and Boston Rail. Co.*, 11 Allen, 300; see *post*, Chap. IV. Arts. 34, 35.)

(8) Proprietors of wagons, carts, &c. who, as a public and common employment for hire, carry goods from one town to another, or from one part of a town to another. (*Gisbourn* v. *Hurst*, 1 Salk. 249; *Hyde* v. *Trent Nav. Co.*, 5 T. R. 389.)

A wagoner who carries freight and parcels for all who apply is responsible as a common carrier even when he does not make that his regular and principal business. (*Gordon* v. *Hutchinson*, 1 Watts & S. 285; *Chevallier* v. *Strahan*, 2 Tex. 115; see note to *Ingate* v. *Christie*, 3 Car. & K. 62.)

(9) "Express" companies, who in America receive parcels and goods to be carried, and "transportation" companies, who are employed by such expressmen to perform the transportation. (*Mercantile Mutual Ins. Co.* v. *Chase*, 1 E. D. Smith, 115; *The American Express Co.*, 23 Ill. 197.)

"It cannot be questioned, we think, that the express companies who receive goods for transportation to remote points, without any special undertaking except what is implied from the manner of accepting the charge, are responsible as common carriers, and so are also the companies employed by such expressmen to perform the transportation, without being entitled to claim any exemption from the full measure of their responsibility for care and diligence, on the ground of any special arrangement between themselves and

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those from whom they accepted the goods." (Redfield on Carriers, p. 36.)

In England and upon the continent, it is the uniform practice for the railway companies themselves to carry parcels, but in America it is done by others, chiefly under contract with the railway company.

Express companies for the transportation of articles of great value in small compass were first instituted in America, when it was held that in the ordinary railway transportation by common carriers of goods there is no obligation after the "goods" reach their appointed destination, but to put them safely in a warehouse, and that the railway company were not bound to deliver at the consignee's residence. (*Farmers and Mechanics Bank* v. *Champlain Transportation Co.*, 23 Vt. 186, 209; *Pfister* v. *Central Pacific Ry. Co.*, 27 A. & E. Ry. Ca. 246; Redfield on Carriers, 38, 86.) It has been frequently held in the American courts that express companies are bound to personal delivery. (*Baldwin* v. *American Express Co.*, 23 Ill. 197; S. C., 26 *id.* 504.)

21. The following are not common carriers:—

(1) A person who conveys passengers only. (*Aston* v. *Heaven*, 2 Esp. 533; *Christie* v. *Griggs*, 2 Camp. 79; *Sharp* v. *Grey*, 9 Bing. 457.)

(2) Railway companies; as regards passengers, and also goods which they do not profess to carry, or only carry under special circumstances, or subject to express stipulations, limiting their liability in respect of them.

This proposition must be read subject to the duty now cast upon railway companies by sect. 2 of the Railway and Canal Traffic Act, 1854. See *post*, Chap. X.

As to railway companies not being common carriers of passengers, see *Blake* v. *G. W. Ry. Co.*, 31 L. J. Ex. 346; *Redhead* v.

Midland Ry. Co., L. R. 4 Q. B. 379; 38 L. J. Q. B. 169; *Wright* v. *Midland Ry. Co.*, L. R. 8 Ex. 137; 42 L. J. Ex. 89; and *post*, tit. "Carriers of Passengers by Railway."

(3) The owner of a cart or carriage who does not ply regularly for hire to a particular destination, but merely lets it out for a special bargain, with horses and driver by the hour, day, or job, to proceed to any destination ordered by the hirer.

A London cabdriver or hackney coachman is not a common carrier (*Brind* v. *Dale*, 8 Car. & P. 207; 2 Moo. & R. 80; *Ross* v. *Hill*, 2 C. B. 887), *ante*, p. 16; nor is a furniture remover, *infra*, Art. 21 (4).

A town carman, not conveying goods from any one known terminus to another, but plying for hire near the wharves, and undertaking jobs as he can get them, is not a common carrier. (*Brind* v. *Dale*, *supra*. See notes to *Ingate* v. *Christie*, 3 Car. & K. 62.)

(4) A contractor who undertakes to pack goods as well as to carry them, and who enters into an express contract by which he undertakes "risk of breakage (if any) not exceeding £5 on any one article," is not liable as a common carrier. (*Scaife* v. *Farrant*, L. R. 10 Exch. 358; 44 L. J. Ex. 234.)

The defendant was the agent of a railway company for collecting and delivering goods and parcels, and also carried on upon his own account the business of a carrier, removing goods and furniture for hire for all persons indifferently who applied to him, in his own vans, which he sent by road or rail to all parts of England, the goods and furniture being previously inspected before any contract was made. Generally in such contracts the van or vans were hired by and filled with the goods of one person only.

Chap. III. Art. 21.

Cockburn, C. J., in delivering judgment in the Exchequer Chamber, said, "I quite agree that the liabilities of a common carrier did not arise in this case, and I entirely concur in the judgment of the court, or should have felt bound to enter into the larger question and say whether the defendant was a common carrier at all; and I emphatically say that, though I am bound by the decision in this court in the case of the *Liver Alkali Co.* v. *Johnson* (L. R. 9 Exch. 338; 43 L. J. Ex. 216), after a careful examination of all the authorities, I have arrived at the conclusion that the question therein is one which ought to be further considered. It is unnecessary to consider that question, inasmuch as our opinion is that there was in this case a special contract, and not a common law liability of the carrier."

(5) The Postmaster-General; postmasters and deputy-postmasters. (*Lane* v. *Cotton*, 1 Salk. 17; Holt, 582.)

See cases cited in Pet. Ab. tit. Carriers, and in Chit. & T. pp. 19—22.

"The comparison between a postmaster and a carrier, or the master of a ship, seems to me to hold in no particular whatsoever. There is no analogy between the case of the postmaster and a common carrier." (Lord Mansfield, in *Whitfield* v. *Despencer*, 2 Cowp. 754; see also *Nicholson* v. *Mounsey*, 15 East, 384.)

(6) A person who receives and forwards goods, and who takes upon himself the expenses of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight. (See Story on Bailm. c. VI.; Angell, p. 68.)

He is a mere warehouseman and agent, and not a common carrier. (*Roberts* v. *Turner*, 12 Johns. Cas. 232; *Platt* v. *Hibbard*, 7 Cow. 497.)

CHAPTER IV.

THE OBLIGATIONS OF A COMMON CARRIER WITH REFERENCE TO THE RECEIVING OF GOODS FOR CONVEYANCE AND THEIR DELIVERY TO HIM.

1. *The Carrier's Duty to receive Goods* ..... *Arts.* 22—29.
2. *The Consignor's Duty* ..... *Arts.* 30—33.
3. *What is a sufficient Delivery of the Goods* ..... *Arts.* 34—37.
4. *The effect of an Acceptance of the Goods* ..... *Arts.* 38—43.

22. It is the duty of a common carrier to receive and carry the goods of any person offering to pay his hire, unless his conveyance be already full, or the goods are of such a kind as to be liable to extraordinary danger, or such as he is unable to convey, or is not in the habit of conveying, and does not profess to carry.

Such a duty does not arise until the carrier is ready to set out on his accustomed journey. (Bac. Ab. Carriers, B.; *Lane* v. *Cotton*, 1 Ld. Raym. 652.)

There need not be an actual tender of the money for the carriage. It is enough if he carries for all persons who are ready and willing to pay him his customary hire. (*Pickford* v. *Grand June. Ry. Co.*, 8 M. & W. 372.)

"He must take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage." (Per Best, J., in *Riley* v. *Horne*, 5 Bing. 217.) In an action against a coachmaster for refusing to carry goods, it appeared that the coach was full, upon which ground the defendant

refused to take charge of the goods, and it was allowed to operate as a sufficient excuse. (*Jackson* v. *Rogers*, 2 Show. 327; *Batson* v. *Donovan*, 4 B. & A. 32; and see *Crouch* v. *L. & N. W. Ry. Co.*, 14 C. B. 255.)

In *McManus* v. *Lanc. & York. Ry. Co.* (28 L. J. Ex. 353), Erle, J., said:—"The carrier's duty to receive is always limited to his convenience to carry."

In *Batson* v. *Donovan*, *supra*, Holroyd, J., held:—"That if the carrier had not a sufficiently secure conveyance for the goods (bank-notes), he might lawfully have refused to take them."

23. If a common carrier refuse to carry goods offered to him, having no reasonable excuse for such refusal, he may be indicted for his neglect of duty. (Per Patteson, J., in *Pozzi* v. *Shipton*, 1 P. & D. 12; 4 Bl. C. 168; 1 Hawk. P. C. c. 78, s. 2; *Rex* v. *Ivens*, 7 Car. & P. 213.)

It is upon the same principle that innkeepers are by the common law bound to receive and entertain guests, and are indictable for their refusal to do so.

As to the carrier's liability to an action for refusing to carry, see *post*, Art. 27.

24. A common carrier may limit his business to the carriage of particular classes of merchandize or chattels, his obligation in this respect depending upon what he publicly professes to carry, and is in the habit of carrying.

But as to railway and canal companies, see *post*, Chap. X.

If the carriage of certain commodities is attended with inconvenience or some peculiar risk, he may refuse to receive and carry such articles as a common carrier (*Johnson* v. *Midland Ry. Co.*, 4 Ex. 371; *McManus* v. *Lanc. & York. Ry. Co.*, 28 L. J. Ex.

353), but may nevertheless accept and carry them under a special contract, throwing the risk of damage to them from ordinary accidents during the transit upon the owner or the consignor. (*Peck* v. *N. Staff. Ry. Co.*, 32 L. J. Q. B. 241; *Phillips* v. *Edwards*, 28 L. J. Ex. 52; *Austin* v. *Manch. Ry. Co.*, 16 Q. B. 600; *Carr* v. *Lanc. & York. Ry. Co.*, 7 Ex. 707; *Martin* v. *Gt. Indian Pen. Ry.*, L. R. 3 Ex. 9.) See *post*, Arts. 87, 88.

"At common law, a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." (Parke, B., in *Johnson* v. *Midland Ry. Co.*, *supra*.)

It would be a reasonable excuse for not carrying goods of *great value*, either if it appeared that the carrier did not hold himself out as a person ready to convey all sorts of goods, or that he had no convenient means of conveying *with security* such articles. (*Batson* v. *Donovan*, 4 B. & A. 32.)

It has been held that a refusal to carry was reasonable when it appeared that it was a time of public commotion, and that the goods which the carrier was desired to carry were the object of public fury, and would be attended with a risk against which the carrier's precautions would be inadequate to secure him. (*Edwards* v. *Sherratt*, 1 East, 604; and see *Tyly* v. *Morrice*, Carth. 485.)

25. A common carrier may refuse to receive and carry articles of a perishable nature (such as fish), or of a very delicate and fragile nature (such as statuary, sculptured alabaster, or marble), which he does not commonly profess to carry, and which may be easily injured, except under a special contract exonerating him from all responsibility for damage done to them *in transitu* not occasioned by the gross negligence or default of himself or his servants. (*Beal* v. *South Devon Ry. Co.*, 29 L. J. Ex. 441; 5 H. & N. 875; *Peek* v.

N. Staff. Ry. Co., 32 L. J. Q. B. 241; *Leeson* v. *Holt*, 1 Stark. 186.)

But see as to railway companies, *post*, Chap. X.

As to whether a carrier is not bound to carry without a special contract if the sender of the goods tender a reasonable sum for their carriage, see *post*, Art. 27.

26. A common carrier is not obliged to receive goods until he is ready to set out on his accustomed journey. (*Lane* v. *Cotton*, 1 Ld. Raym. 652; S. C., 1 Comyns, 105.)

A common carrier can refuse to carry if the goods are tendered at an unreasonable time. (*Garton* v. *Bristol and Exeter Ry. Co.*, 30 L. J. Q. B. 273; 1 B. & S. 112; *Pickford* v. *Grand Junction Ry. Co.*, 12 M. & W. 766; *post*, Art. 157.)

"A common carrier may refuse to admit goods into his warehouse, before he is ready to take his journey; but yet he cannot refuse to do the duty incumbent upon him by virtue of his public employment." (Lord Holt, in *Lane* v. *Cotton*, *supra*.)

27. A common carrier is entitled to be paid the amount of his hire before he undertakes the responsibility of having the goods in his possession; but the amount demanded must be reasonable; and if a person brings him goods to be conveyed, and tenders him a reasonable amount of remuneration, and he refuses to convey the goods upon those terms, he will be liable to an action for having refused. (*Batson* v. *Donovan*, 4 B. & A. 28; *Pickford* v. *Grand Junction Ry. Co.*, 10 M. & W. 399.)

"The carrier is entitled to have his reward paid to him before

he takes the package into his custody." (Best, J., in *Batson* v. *Donovan*, *supra*.)

In *Pickford* v. *Grand Junction Ry. Co.*, *supra*, Parke, B., said, "The acts to be done by both parties, namely, the receipt of the goods and the payment of a reasonable sum for their carriage, being contemporaneous acts."

If payment of a reasonable sum is refused, the carrier may avoid his common law duty and liability, and make terms for the carriage of the goods, exactly as a private carrier for hire may. (*Ib.*)

The sum demanded by the carrier must be reasonable. A carrier is entitled to make a higher charge for the greater risk attending the carriage of valuable goods, but the charge must be reasonable. (*Harris* v. *Packwood*, 3 Taun. 264.)

"The obligation which the common law imposed upon a person holding himself out as a common carrier of goods was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so), on being paid a *reasonable* compensation for so doing. And if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid under protest a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive in an action for money had and received, as being money extorted from him." (Per Blackburn, J., in *Sutton* v. *G. W. Ry. Co.*, 38 L. J. Ex. (H. L.) 177.)

"If the plaintiff had meant to make the defendants liable as common carriers, the course for him to take was to refuse to enter into the special contract, and to tender them the price for the carriage of the goods, and on their refusal to carry to bring an action against them for not carrying." (Per Parke, B., in *Carr* v. *Lanc. & York. Ry. Co.*, 21 L. J. Ex. 261.)

"I take it that the law with respect to the obligation entered into by persons holding themselves out to the world as common carriers is clear; namely, that it is their duty to carry for any person who tenders to them the proper charge, all goods which they

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have convenience for carrying, and in respect of which they hold themselves out as carriers, without subjecting that person to the liability of signing a note containing an unreasonable condition." (Per Cockburn, C. J., in *Garton* v. *Bristol & Ex. Ry. Co.*, 30 L. J. Q. B. 273.)

28. A common carrier is not bound to convey goods except on payment of the full price for the carriage, according to their value; and if that is not paid, it is competent to him to limit his liability by special contract. (*Wyld* v. *Pickford*, 8 M. & W. 443.)

See note to preceding Article.

29. If a person send to a carrier's office to know his rate of charges, the carrier is bound by the representation there made by his clerks or servants who are transacting the business there; and if the goods are sent upon the faith of such representation, the carrier cannot charge more than the sum named, although the clerk may have inadvertently fallen into a mistake. (*Winkfield* v. *Packington*, 2 Car. & P. 600.)

See *post*, Chap. XI., Art. 186, as to the duty of a railway company to have servants authorized to give directions and act for the company on all occasions as the exigency of the traffic may require.

30. If the package delivered to the carrier does not contain goods which are within the provisions of the Carriers Act (see *post*, Chap. VI.), there is no occasion to inform him, nor has he any absolute right in all cases to insist on being informed as to its contents or their value before he will accept it. (*Tichburne* v. *White*, 1 Stra. 145; *Crouch* v. *L. & N. W. Ry. Co.*, 23 L. J. C. P. 73.)

It may be reasonable, in some cases, that the carrier should have such information, and it is then his duty to make inquiry, as if he wishes to have a reward proportionate to their value, or to know whether they are goods of that quality for which he has a sufficiently secure conveyance. (*Batson* v. *Donovan*, 4 B. & A. 31; *Morse* v. *Slue*, 1 Vent. 190, 238; *Webb* v. *Page*, 6 M. & G. 196; per Parke, B., in *Walker* v. *Jackson*, 10 M. & W. 161; 12 L. J. Ex. 165.)

As to misrepresentation of value, see *post*, Art. 33.

In *Riley* v. *Horne* (5 Bing. 217), Chief Justice Best said, "If the owner of the goods will not tell the carrier what his goods are, and what they are worth, the carrier may refuse to take them." A dictum which cannot be supported, per Maule, J., in *Crouch* v. *L. & N. W. Ry. Co.* (*supra*). In that case, Chief Justice Jervis said, "No authority has been cited to show that a carrier is entitled in every case to know the nature and quality of the goods tendered to him to be carried; and on looking at the other provisions of the Act of Parliament there seems to be no reason why the company should make the inquiry. With reference to dangerous articles, they are entitled by the Act to know the nature and quality, and such must be discovered to them at the time of the delivery; and if the company suspect articles to be of a dangerous nature, they may open the packages."

In *Great Northern Ry. Co.* v. *Shepherd* (21 L. J. Ex. 286; 8 Exch. 30) and *Macklin* v. *Waterhouse* (2 Moo. & P. 319), it was held that if the carrier did not ask the sender of the goods what the goods were, and what they were worth, or if, when he asked, and was not answered, he took charge of the goods, he waived the right to know their contents and value, and was answerable for their amount.

In *Walker* v. *Jackson* (*supra*), it was held that a party receiving a parcel to be carried, ought to inquire as to its contents; and if

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nothing be done by the party delivering it to deceive him, or to give the transaction a false complexion, he is answerable for the parcel.

See also Chap. X.

31. A person who sends an article of a dangerous nature, to be carried by a carrier, is bound to take reasonable care that its dangerous nature is communicated to the carrier, and his servants who have to carry it; and if he does not do so, he is responsible for the probable consequences of such omission. (*Farrant* v. *Barnes*, 31 L. J. C. P. 137; 11 C. B. N. S. 553.)

In that case the defendant caused a carboy containing nitric acid to be delivered to the plaintiff, who was one of the servants of a carrier, in order that it might be carried by such carrier for the defendant, and the defendant did not take reasonable care to make the plaintiff aware that the acid was dangerous, but only informed him that it was an acid, and the plaintiff was burnt and injured by reason of the carboy bursting whilst, in ignorance of its dangerous character, he was carrying it on his back from the carrier's cart; and it was held, that the defendant was liable to the plaintiff in an action for damages for such injury.

Willes, J., in delivering judgment, said, "I apprehend that a person who gives a carrier goods of a dangerous character to carry, which require more caution in their carriage than ordinary merchandise, as without such caution they would be likely to injure the carrier and his servants, is bound in law to give notice of the dangerous character of such goods to the carrier, and that if he does not do so he is liable for the consequences of such omission. An illustration of this is when a person puts on board a vessel goods which are of a combustible and inflammatory nature, and therefore dangerous, and it is clear that such person is liable to anyone who is injured thereby, in consequence of the wrongful omission of such person to give notice of the dangerous character of such goods when

he puts them on board. (*Brass* v. *Maitland*, 26 L. J. Q. B. 49; *Williams* v. *East India Company*, 3 East, 192.) No doubt what the court there laid down as to shipment on board a vessel, at least so far as concerns any criminal responsibility, may not apply to a case of goods sent by a carrier, as in the present case. The case of putting goods on board a ship is a very strong and almost an extreme case, but it may be used to test the principle; and I am of opinion that persons employing others to carry dangerous articles are bound to give reasonable notice of the character of such articles, and are liable, if they do not do so, for the probable consequences of such neglect of duty:" and Keating, J., said, "It seems to me to be clear that a party who sends a dangerous material by a carrier is bound to give reasonable notice that it is dangerous. Without, however, defining the extent of such duty, I think it ought to go at least to the extent of including the plaintiff, because he was the person whom the defendant may be considered to have actually known was employed to carry the article, and to whom in fact it was delivered by the defendant to be carried."

As to the carriage of dangerous goods by railway, see *post*, Chap. X., Arts. 149—151.

32. Goods delivered to a carrier for conveyance ought to be fully and legibly addressed, so that the owner or consignee may be easily known; and if, in consequence of omitting to do so, without any fault on the part of the carrier, the owner sustains a loss, or any inconvenience, he must bear the same. (*The Huntress*, Davies, 83; *Bradley* v. *Dunipace*, 1 H. & C. 521; 7 H. & N. 200; and cases in the Court of Session, see *post*, Art. 160.)

As to the duty of the sender of goods to see that they are properly packed, see *post*, Chap. V., Art. 62.

33. It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to

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deceive him, whereby his risk is increased, or his care and diligence may be lessened. (*Edwards* v. *Sherratt*, 1 East, 604; *Batson* v. *Donovan*, 4 B. & A. 21; Story on Bailm. 519; Angell on Carriers, 252.)

If the consignor fraudulently conceals the value and risk from the carrier, in order to be charged at a lower rate for carriage, he cannot recover on account of a loss occasioned through such concealment. (*M'Cance* v. *L. & N. W. Ry. Co.*, 31 L. J. Ex. 65.)

If any fraud or deceit be practised on the carrier, as if the real value of the goods be deceitfully misrepresented to or fraudulently concealed from him, whereby he is induced to regard them as of trifling value, he is not liable in case they be lost or stolen from him. (*Kenrig* v. *Eggleston*, Aleyn, 93; *Tichburne* v. *White*, 1 Stra. 145; *Gibbon* v. *Paynton*, 4 Burr. 229; *Mayhew* v. *Eames*, 1 Car. & P. 550; 3 B. & C. 601; *Bradley* v. *Waterhouse*, 3 Car. & P. 318; *Walker* v. *Jackson*, 10 M. & W. 161; *Tyly* v. *Morrice*, Carth. 485.)

If a person intentionally makes false answers to the carrier's inquiries, the contract is void on account of fraud. (*Walker* v. *Jackson*, 10 M. & W. 161.)

34. A person delivering goods to a carrier to be conveyed by him, is bound to procure them to be booked, or to deliver them to the carrier himself, or to some person who can be proved to be his agent for the purpose of receiving them. (*Buckman* v. *Levi*, 3 Camp. 414.)

If a carrier directs that goods shall be left at a particular booking-office, or, if he has been in the habit of universally undertaking the duty of carriage in reference to goods or parcels left at a particular

place, he is to be regarded as willing to receive goods at that place to keep and to carry safely, and he will consequently be answerable for the negligence of the keeper of the booking-office, or of the person appointed by him to receive the goods sent there to be forwarded. (*Colpepper* v. *Good*, 5 Car. & P. 380; *Upston* v. *Slark*, 2 Car. & P. 598; and *Southern Express Co.* v. *Newby*, 36 Geo. 635.)

If it be the constant usage and practice for a carrier to receive and carry goods left at a particular place, without any special notice of such deposit, a delivery at such place will be a sufficient delivery to charge the carrier, although no express notice was given to him, or to his agent, of such deposit. (*Merriman* v. *Hartford and N. H. Ry. Co.*, 20 Conn. 354.)

Delivery to the carrier may also be made at a different place, as well as at a different hour, from the one established by notice and by usage. (*Phillips* v. *Earle*, 8 Pick. 182.)

If goods are placed in the carrier's cart or coach, without the knowledge and acceptance of the carrier, his servants, or agents, there being no bailment, he cannot, of course, be responsible for the loss of them. (*Lovett* v. *Hobbs*, 2 Show. 127; *Leigh* v. *Smith*, 1 Car. & P. 640.)

Where goods were left in the yard of an inn, where the carrier and other carriers put up, but no actual delivery to the carrier or his servant was proved, it was deemed not a complete delivery to the carrier so as to charge him with the custody. (*Selway* v. *Holloway*, 1 Ld. Raym. 46.) Where goods were delivered at a wharf to an unknown person there, and no knowledge of the fact was brought home to the wharfinger or his agents, this was held not to be a sufficient delivery to charge him, either as a wharfinger or as

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a carrier, with the custody of the goods. (*Buckman* v. *Levi*, 3 Camp. 414; *Trowbridge* v. *Chapin*, 23 Conn. 595.)

If a package is received by the agent of a common carrier for conveyance at his suggestion, at a place other than the office of the carrier, and is entered on the way-bill, the carrier will be held answerable. (*Phillips* v. *Earle*, 8 Pick. 182.)

In *Burrell* v. *North* (2 Car. & K. 680), Erle, J., said, "If the defendant allow these persons to receive parcels, to be conveyed by him as a carrier, this is quite enough."

The delivery will be sufficient to bind the carrier, although the owner of the goods travel by the same conveyance, and keep an eye on the goods, if he does not exclude the care of the carrier. (*Robinson* v. *Dunmore*, 2 Bos. & Pul. 419; *Clarke* v. *Gray*, 4 Esp. 177; and see cases in Chit. & T. p. 28, n. (*d*); also *post*, Chap. XVII.)

35. A delivery to the servant, or duly authorized agent of a common carrier, who is in the habit of receiving packages, is a sufficient delivery. (Jeremy on Carr. 61.)

If an article be delivered to the servant of a carrier, it must be to such an one as is intrusted to receive goods, and not to one engaged in other duties. (*Blanchard* v. *Isaacs*, 3 Barb. 388.)

See *Cobban* v. *Downe*, 5 Esp. 41, and *Trowbridge* v. *Chapin*, 23 Conn. 595.

As to who are held to be a railway company's servants, see *post*, Chap. XI., Art. 186.

36. In cases within the Carriers Act a delivery of a parcel at any office, warehouse, or receiving house used or appointed for the receiving of parcels, is sufficient to render the carrier liable for its loss or injury, if the

nature and value are declared. (11 Geo. 4 & 1 Will. 4, c. 68, s. 5.)

See *post*, Chap. VI.

37. It is not necessary to constitute a complete delivery to the carrier, that the goods should be left at the usual place of delivery at or before the hour appointed for receiving them, in order that they may be forwarded on the same day, if they are received at a later hour under a special contract that they shall be forwarded the same day. (*Pickford* v. *Grand Junction Ry. Co.*, 12 M. & W. 766.)

This case shows that a special agreement to convey goods within a certain time, or by a particular train, may sometimes be inferred from circumstances. The company published and affixed over the door of their goods receiving office a notice that all goods received after 4 p.m. would only be forwarded the next day. A person, who brought goods for carriage after that hour, asked the company's weigher if there was time for the goods to proceed that evening. The weigher said there was. The same person had on previous occasions taken goods of the same kind to the station at even a later hour, which were never refused as too late, and had always been forwarded the same evening. And it was held that was evidence of a special contract with the company to forward the goods on the evening on which they were delivered for carriage.

An acceptance by the carrier at an unusual place will be sufficient to charge them. It seems always sufficient that the goods are "put into the charge of the carrier." (Lord Ellenborough, C. J., in *Boehm* v. *Combe*, 2 M. & S. 172.)

What is a sufficient putting in charge of the carrier must always be a question of fact, to be judged of by the jury, with reference to all the circumstances of the case, and the usual course of business in similar transactions, at the same place and with the same

carrier. And it will be found ordinarily to resolve itself into this inquiry, whether the owner of the goods did all to effect a secure delivery to the carrier which it was reasonable to expect a prudent man to have done under the circumstances.

38. The responsibility of a common carrier is fixed by the acceptance of the goods whether the acceptance be in a special manner, or according to the usage of his business.

The responsibility commences with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put *in itinere*. (*Randleson* v. *Murray*, 8 A. & E. 109; *Dale* v. *Hall*, 1 Wils. 281. See also Story on Bailm. ch. vii.)

An acceptance in some way is indispensable; for if it appears that there is no intention to trust the carrier with the custody of the goods, he will not be held liable. (*Brind* v. *Dale*, 8 Car. & P. 207.) Many questions have arisen as to what amounts to a delivery, so as to put the goods into the constructive custody and risk of the carrier. If the goods are delivered at the usual place of receiving similar articles, and notice given to the proper servant of the company, there is little chance for any question upon this subject.

It is not necessary to a delivery that goods should be entered upon any freight list or way-bill, or that the contract of hire should be verified by any written memorandum. (*Parker* v. *Gt. West. Ry. Co.*, 7 M. & G. 253; *Citizen Bank* v. *Nantucket Steam Co.*, 2 Story, 16.)

In *Packard* v. *Getman*, 6 Cow. 757, it was held to be a sufficient delivery if the goods intended for carriage are left by or near the canal boat, according to the usages of business; yet, with the

qualification, that such delivery must be accompanied with express notice to the master.

Of course it is no delivery to the carrier or acceptance by him if the goods are placed in the carrier's vehicle without his knowledge or consent. (*Lovett* v. *Hobbs*, 2 Show. 127; *Leigh* v. *Smith*, 1 Car. & P. 640.)

If there is no agreement that the goods shall be delivered to the carrier in a special manner the delivery must be in conformity with the known course of the carrier's business, or it will not bind him, see *post*, Chap. X., Art. 163.

As to an acceptance of goods for carriage with an injunction from sender that goods must be delivered before a particular time for a particular event, as a race meeting, show, or otherwise, see *post*, Chap. XII., Arts. 198, 199.

A person having goods to send by a railway applied to the company for a truck, which was run on a side track to his warehouse. The goods were loaded and the agent of the railway company notified. It was the custom of the company on receiving such notice to have the packages counted, sign a bill of lading, and then to send an engine and remove the truck. Before these steps were taken the goods were burned, and it was held that there was a delivery to the carrier. (*Illinois Ry. Co.* v. *Smyser*, 38 Ill. 354.)

39. In the absence of special limitation of liability in the contract, an acceptance of goods makes the carrier responsible for them until they reach the final destination to which they are addressed or consigned. (*Duff* v. *Budd*, 6 Moore (C. P.) 469; *Muschamp* v. *L. & P. Ry. Co.*, 8 M. & W. 421; *Hyde* v. *Trent Nav. Co.*, 5 T. R. 389; *Teals* v. *D. & Newry St. Co.*, 6 Ir. Rep. C. L. 536.)

In the last case, Fitzgerald, J., said :—"We are told that when a common carrier receives goods addressed to a certain place, a contract is implied on his part to carry to that place, that is, how-

Chap. IV. Art. 39.

ever, only where the carrier is a general carrier; but here the defendants are carriers by sea only, every document produced shows that they undertake to carry by sea only."

Where goods are transferred from the original contracting carrier, his liability continues if such transfer is only accessory to the discharge of his own duty, or the terms of his own contract. (*Machu* v. *L. & S. W. Ry. Co.*, 2 Ex. 415.)

See *post*, Chap. XI.

40. Where the carrier delivers a ticket or other notice to the person from whom he receives the goods specifying the terms on which he agrees to carry, and the customer assents (or does not dissent), the terms of the notice will establish a special agreement, and will exclude the common law contract so far as it is varied by those terms. (*Wyld* v. *Pickford*, 8 M. & W. 443; *Gt. N. Ry. Co.* v. *Morville*, 21 L. J. Q. B. 319; *Phillips* v. *Edwards*, 28 L. J. Ex. 52; *Zunz* v. *S. E. Ry. Co.*, L. R. 4 Q. B. 539.)

If the customer in such a case declines the terms, and wishes to fix the carrier with the common law liability, he must tender or offer a reasonable compensation, and sue for the refusal to receive the goods. (*Carr* v. *Lanc. & York. Ry. Co.*, 7 Exch. 707; 21 L. J. Ex. 261; *Garton* v. *Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J. Q. B. 273, *ante*, Article 27, p. 24.)

Such a liability can only exist in the case of goods which the carrier's public calling requires him to carry.

Such a specific notice is not "a public notice or declaration" within sect. 4 of Carriers Act, set out *post*, p. 72. (*Walker* v. *York & N. Midland Ry. Co.*, 23 L. J. Q. B. 73; 2 E. & B. 750.)

41. A person who is a common carrier may at the same time be a warehouseman, and after he receives

the goods, and before they are put *in itinere*, they may be lost or injured. In such case, if the carrier receives the goods into his own warehouse, for the accommodation of himself and his customers so that the deposit there is a mere accessory to the carriage, such person's responsibility, as a common carrier, begins with the receipt of the goods. (Per Buller, J., in *Hyde* v. *Trent Nav. Co.*, 5 T. R. 389; *Grand Tower, &c. Ry. Co.* v. *Ullman*, 89 Ill. 244.)

That is, he then becomes responsible for all losses not occasioned by inevitable casualty; whereas, if he were a mere warehouseman, he is not liable, unless he has been guilty of want of ordinary care. (*Forward* v. *Pittard*, 1 T. R. 27.)

An innkeeper, if he is at the same time a common carrier is liable, as such, for any loss to goods sent to his inn (and received there to be forwarded), which happens before they are put in transit. (*Hyde* v. *Trent Nav. Co.*, *supra*.)

In *Hickox* v. *Naugatack Ry. Co.* (31 Conn. 281), where a trunk was delivered at a railway station at 11 a.m., to go in a train at 3 p.m., it was held that the railway company was liable as a carrier from the time of delivery, although the trunk was not checked until fifteen minutes before three, in accordance with the practice of the company.

In *Barron* v. *Eldredge* (100 Mass. 455), it was held that if anything remained to be done by the consignor of the goods or his agents after the delivery of the goods to a railroad company, before they were ready for transportation, the company were only responsible for them as warehousemen.

And see *post*, Chap. XVII.

42. Where the goods are delivered to the carrier to be kept in his warehouse until further orders, the liability of the carrier as a common carrier will not

attach until the goods are ordered to be carried. But when this order is given, and also when the goods are left in the first instance to be carried presently, the responsibility of the carrier attaches at once. (*Spade* v. *Hudson River Ry. Co.*, 16 Barb. 383.)

Instructions to forward forthwith may be inferred from the course of business in the absence of express proof. (*Moses* v. *Boston and Maine Ry. Co.*, 4 Foster, 71.)

43. If a person is at the same time a common carrier and a forwarding merchant, and he receives goods into his warehouse to be forwarded according to the future orders of the owners, if the goods are lost or damaged by fire, or otherwise, before such orders are received, or the goods are put in transit, he is not chargeable as a common carrier, but only as a warehouseman. (*Forward* v. *Pittard*, 1 T. R. 27; *Platt* v. *Hibbard*, 7 Cowen, 499; *Roskell* v. *Waterhouse*, 2 Stark. 461; *Brook* v. *Pickwith*, 4 Bing. 218.) See also the American cases cited in Angell, p. 125.

A warehouseman is not liable unless he has been guilty of negligence. (*Forward* v. *Pittard*, *supra*.) In that case twelve pockets of hops had been accepted at Weyhill, where an annual fair was held, to carry to Shaftsbury by road. The hops were stored by the carrier in a booth, which took fire from a neighbouring booth, and the hops were burnt. Lord Mansfield held that the contract of carriage had commenced, that the carrier was an insurer, that the fire was not by the act of God, as lightning, and that the carrier was responsible.

It would seem that a wharfinger is bound only to the same degree of care as a warehouseman, and is not liable to the same extent as a common carrier. (*Platt* v. *Hibbard*, *supra*.)

44. A carrier of goods is always bound to follow instructions given by the owner or his agent where reasonably practicable.

Where an order is given to a carrier antecedently to the delivery of the goods to him, who assents to deal with them when delivered in a particular manner, a duty is imposed on him on the receipt of the goods to deal with them according to the order previously given; and the law implies a promise by him to perform such duty. (*Streeter* v. *Horlock*, 1 Bing. 34; 7 Moore (C. P.) 283.)

See as to the consignor's right to alter the destination of the goods, or to demand their delivery back to himself, *post*, Chap. VII., Art. 93.

45. A licence to deal in game cannot be held by "the owner, guard, or driver of any mail coach, or other vehicle employed in the conveyance of the mails of letters, or of any stage coach, stage waggon, van, or other public conveyance, or by a carrier or higgler," or by anyone in the employment of any of the above-mentioned persons. (1 & 2 Will. 4, c. 32, s. 18.)

Some of the earlier railway companies' special Acts made the officers of the company liable to a penalty for carrying on the railway nets and guns for destroying game. (See Appendix No. 31, Table XVIII., to Second Report of the Select Committee on Railways, 1839.)

CHAPTER V.

THE OBLIGATIONS OF A COMMON CARRIER DURING THE TRANSIT OF THE GOODS.

Chap. V. Art. 46.

46. A common carrier is liable by the custom of the realm in case of loss of or injury to the goods, unless the loss or injury arises from:—

(1) The act of God.
(2) The Queen's enemies.
(3) Contributory negligence on the part of the bailor.
(4) Inherent vice in or natural deterioration of the thing carried.

As to the commencement of the carrier's risk, see *ante*, Art. 38. As to the termination of, see *post*, Art. 96.

It is a general maxim in law, that *Actus Dei nemini facit injuriam*, that is, the act of God is so treated by the law as to affect no one injuriously.

"To give due security to property, the law has added to the responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies." (Per Best, C. J., in *Riley* v. *Horne*, 5 Bing. 217.)

Accident produced by any physical cause which is irresistible,

such as a loss by lightning or storms, by the perils of the sea, by an inundation or earthquake, or by sudden death or illness, is the "act of God." (Story on Bailm.)

The peculiar responsibility of the common carrier is usually said to arise out of the custom of the realm. This is a prevalent mode of expression to account for a legal principle of which lawyers do not know or care to acknowledge the real source. And the real source is to be found in the Roman law. The principles of the Roman law upon the subject were based upon the well-known passage in the edict of the Prætor: "Nautæ caupones stabularii quod cujusque salve fore receperint, nisi restituent, in eos judicium dabo" [D. iv. 9]. And the public utility of the principle led to its extension to carriage by land as well as by sea, and its adoption into the law-merchant of the civilized world. (See Campbell on Negligence, p. 35.)

"It appears from all the cases for one hundred years back, that there are events for which the carrier is liable, independently of his contract. By the nature of his contract he is liable for all due care and diligence, and for any negligence he is suable on his contract; but there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer." (Per Lord Mansfield, in *Forward* v. *Pittard*, 1 T. R. 27, 33.)

"The law of England has from the earliest times established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to re-deliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed and is so universally known that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm, or the common law declared long ago, that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into such contracts on reasons of supposed convenience." (Per Mon-

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tague Smith, J., in *Redhead* v. *Midland Ry. Co.*, 38 L. J. Q. B. 169.)

The exception of foreign enemies is derived from the principle, that in that particular case the carrier can have no remedy by action against the hundred; it includes under that term only those foreign enemies of the Queen which are such by open declaration of war, and not such domestic enemies as are considered so by reason of any temporary insurrection or riot; in which cases, as the county or hundred are responsible for not preserving the peace, the carrier might recover under the statutes against them for losses occasioned thereby. (Jeremy on Carriers, p. 57; Chit. & T. p. 38. See *post*, Art. 49.)

47. In order to come within the exception of loss by the act of God, the loss need not have been caused directly and exclusively by such a direct and violent, and sudden and irresistible act of nature as the carrier could not by any amount of ability foresee, or (if he could foresee it) could not by any amount of care and skill resist so as to prevent its effect.

A loss is a loss by the act of God if it is occasioned by the elementary forces of nature, directly and exclusively, unconnected with the agency of man or other cause; and if it can be shown that it could not have been prevented by any amount of foresight, pains and care reasonably to be required of the carrier, he is then not liable for the loss.

If the loss is occasioned partly by the act of God as above defined, and partly by some other cause (as for example a defect in the thing carried), which, if it had been the sole cause of the loss, would have furnished a defence, yet if both together formed an irresistible cause of the loss in the sense that by no

reasonable precaution on the part of the carrier could the damage have been prevented, the carrier is not liable; and (per Cockburn, C. J.) in such cases a common carrier has done all that is reasonably to be required of him if he has used all the means to which prudent and experienced carriers ordinarily have recourse to ensure the safety of goods entrusted to them under similar circumstances. (*Nugent* v. *Smith*, 1 C. P. D. 441; 45 L. J. C. P. 697.)

In the Court below it was held that to constitute the "act of God" a loss must arise from "such a direct and violent and sudden and irresistible act of nature" as could not be foreseen, or, if foreseen, prevented." (Per Brett, J., 1 C. P. D. 34.)

In that case the defendant, a common carrier by sea, received from the plaintiff a mare to be carried from London to Aberdeen. In the course of the voyage the ship met with rough weather, and the mare, being much frightened and struggling violently, suffered injuries of which she died. No negligence was proved against the defendant, but the Common Pleas Division held him to be liable, on the ground that the rough weather was not so violent and unusual as to amount to the "act of God," nor was the struggling of the mare alone enough to show that it was from her inherent vice that she was injured. But the Court of Appeal reversed this decision.

A fall of rain, of a kind which could not reasonably have been anticipated, amounts to *vis major*. (*Nichols* v. *Marsland*, L. R. 10 Ex. 258; 2 Ex. D. 1; 44 L. J. Ex. 114; 46 L. J. Ex. Div. 174.)

The act of God means not merely an accidental circumstance but something overwhelming (*Oakley* v. *Portsmouth, &c. Steampacket Co.*, 25 L. J. Ex. 101), which could not happen by the intervention of man, as storms, lightning, and tempests. (*Forward* v. *Pittard*, 1 T. R. 33.)

A frost of extraordinary severity has been held to constitute *vis*

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major, or, in this sense, an act of God (*Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781); so, too, has a great and unexpected fall of snow (*Briddon* v. *Gt. N. Ry. Co.*, 28 L. J. Ex. 51); as, also, a violent tempest. (*Nugent* v. *Smith*, *ante*; *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743, 749; 47 L. J Q. B. 193.)

In *Wing* v. *New York and Erie Ry. Co.* (1 Hilt. 235), it was held that the freezing of perishable articles by reason of an unusual intensity of cold was not such an intervention of the *vis major* as excused the carrier, if the accident might have been prevented by the exercise of due diligence and care upon his part; that the fact that the carrier had done what was usual, was not sufficient to exempt him from a charge of negligence; that he must show that he had done what was necessary to be done under all the circumstances.

48. A common carrier is not bound to use extraordinary efforts or incur extra expense in order to surmount obstructions caused by the act of God, as a fall of snow. (*Briddon* v. *Gt. N. Ry. Co.*, 28 L. J. Ex. 51. See *post*, Art. 174.)

49. If the loss or injury to the goods by the act of God or the Queen's enemies is conduced by the carrier's negligence or want of skill, or by insufficiency of vehicle, the carrier is liable. (Angell on Carriers, p. 48; *Gill* v. *Man., Sheff., &c. Ry. Co.*, 42 L. J. Q. B. 89; L. R. 8 Q. B. 186: per Lush, J.)

This rule of the responsibility of common carriers includes not only damage occasioned by the act of God as operating upon, or as secondary to, the negligence or misfeasance of the carrier or his servants, but extends to the intervention of the agency of a third person. (Angell, p. 175.)

If goods are taken by the public enemy, the carrier is liable if his negligence has contributed to the loss. (*Holladay* v. *Kennard*, 12 Wall. 254; *Amies* v. *Stevens*, 1 Stra. 128; *Forward* v. *Pittard*, 1 T. R. 27; *Whalley* v. *Wray*, 3 Esp. 74.)

It is the carrier's duty to do what he can, by reasonable skill and care, to avoid all perils, including the excepted perils. If, notwithstanding such skill and care damage does occur, he is relieved from liability; but if his negligence has brought about the peril, the damage is attributable to his breach of duty and the exception does not aid him. (See *Gill's case*, *supra*.)

A common carrier impliedly promises that he will provide conveyances reasonably fit for the purpose to which they are put, and servants of competent skill. (*Lyon* v. *Mells*, 5 East, 428; *Camden, &c. Ry. Co.* v. *Burke*, 13 Wend. 611; *Chippendale* v. *Lanc. & York. Ry. Co.*, 12 L. J. Q. B. 22.)

50. The act of God does not exonerate the carrier if there be negligence, apart from which the act of God would not have resulted in the loss. (*Phillips* v. *Clark*, 2 C. B. N. S. 156.)

51. If the goods have been wetted, destroyed, or swept away by rains and floods, the circumstances attendant thereupon must be regarded, in order to determine whether it has been occasioned by the act of God, or the act, misconduct, or negligence of the carrier. (*Smith* v. *Shepherd*, cited in Abbott on Shipping, 12th ed. p. 328; *Amies* v. *Stevens*, 1 Stra. 128.)

In order that an extraordinary natural event, such as a very high tide, should be, in the legal sense of the words, an act of God, it is not necessary that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected. If such an event has happened once, but there is nothing to lead to the inference that it is likely to

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recur, it does not, if it happens a second time, cease to be an act of God. (*Nitrophosphate, &c. Manure Co.* v. *London and St. Katherine Docks Co.*, 9 Ch. D. 503; *Read* v. *Spalding*, 30 N. Y. 630; and see Redfield on Carriers, p. 19.)

52. A common carrier, being an insurer of goods, is responsible for damage or loss occasioned by accidental fire, resulting neither from the act of God, nor of the Queen's enemies. (Per Dallas, C. J., in *Thorogood* v. *Marsh*, 1 Gow. 105; *Collins* v. *B. & Ex. Ry. Co.*, 29 L. J. Ex. (H. L.) 41.)

He is liable for the loss of the goods occasioned by fire, even though the fire was not occasioned by any actual negligence of the carrier, and did not arise upon his premises. (*Forward* v. *Pittard*, 1 T. R. 27.)

See also *Dale* v. *Hall*, 1 Wils. 281; 1 Inst. 80; *Covinton* v. *Willan*, Gow. 115.

A loss through fire occasioned by lightning would be a loss by the act of God. (*Forward* v. *Pittard*, 1 T. R. 27.)

In *Miller* v. *Steam Navigation Co.*, 6 Seld. 431, the carrier was held liable for a loss by fire, although the proximate cause of the loss was the driving of the fire from a distance to the goods by a sudden gust of wind.

As to liability for goods destroyed by fire in a carrier's warehouse, see *ante*, p. 38.

In *Ins. Co.* v. *Ind. & Cin. Ry. Co.*, Disn. 480, it was held that in losses by fire the carrier is *primâ facie* liable. (See Redfield on Carriers, p. 20.)

By the Roman law the carrier's responsibility extended to fire; and the policy of the English law has adopted a similar rule, on the ground that fire may be collusively raised in order to favour depredations. Until the passing of the Mercantile Law Amendment Act (19 & 20 Vict. c. 60, s. 17), a different rule prevailed in Scotland, fire being regarded as *damnum fatale*.

53. A carrier is liable where the loss or damage is occasioned by the irresistible force and violence of robbers and mobs. (*Coggs* v. *Bernard*, 1 Smith, L. C.; *Forward* v. *Pittard*, 1 T. R. 27.)

In *Forward* v. *Pittard*, Lord Mansfield puts the case of the riot in London, of 1780, by which the great destruction of property in that city could not be prevented by a considerable military force, as even an instance which could not be received to protect, in that capacity, a common carrier.

Lord Mansfield held, in *Barclay* v. *Cuculla-y-Gaud* (3 Doug. 389, cited 1 T. R. 33, nom. *Barclay* v. *Heygena*), that the master of a ship on board of which goods have been laden in the River Thames for a foreign port, is liable for the loss of the goods occasioned by a forcible robbery while the ship is lying in the river. "At first the rule appears to be hard, but it is settled on principles of policy, and when once established every man contracts in reference to it, and there is no hardship at all."

54. Where goods entrusted to a common carrier, to be carried for reward, are lost otherwise than by the act of God or the Queen's enemies, it is a *præsumptio juris et de jure* that they are lost by negligence, fraud, or connivance on his part. (Bull. N. P. 70, n. (a).)

"This is an extremely severe presumption, but one which public policy appears to require; although both by the common law, and by virtue of various modern statutes, common carriers can in many cases limit their liability." (Best on Evidence, p. 545.)

55. A common carrier by land or by water (both inland and sea) is liable for all losses or accidents to the goods in his possession, except those occasioned by causes mentioned in Art. 46, although there may

have been no actual negligence on his part, and the injury may have been occasioned by the negligent act of a third person. (*Trent Nav. Co.* v. *Ward*, 3 Esp. 127; 4 Doug. 287; *Dale* v. *Hall*, 1 Wils. 282.)

In *Trent Nav. Co.* v. *Wood*, *supra*, the ship of a common carrier, in a voyage from Hull to Gainsborough, drove on to an anchor in the River Trent, and was in consequence sunk, and the goods on board injured, and the accident was occasioned by the neglect of the third party in not having his buoy out to mark the place where his anchor lay, it was held that the carrier was bound to make good the loss. Ashurst, J., said, "If this sort of negligence were to excuse the carrier when he finds that an accident had happened to goods from the misconduct of a third person, he would give himself no further trouble about the recovery of them."

If the misconduct of the third person is caused by the orders of the owner of the goods, the carrier of course will not be responsible. (*Butterworth* v. *Brownlow*, 34 L. J. C. P. 267.)

56. A common carrier from a place within to a place without the realm, is subject to the same liabilities at common law as a common carrier who carries only within the realm, and is, therefore, bound to accept all goods which are reasonably tendered to him for conveyance between those limits. (*Crouch* v. *L. & N. W. Ry. Co.*, 23 L. J. C. P. 73; 14 C. B. 255; *Nugent* v. *Smith*, *ante*, Art. 47.)

By 31 & 32 Vict. c. 119, carriers by land *and* sea may limit their liability. (See *post*, Chap. XI., Art. 173.)

In *Crouch* v. *L. & N. W. Ry. Co.*, Jervis, C. J., said, "If it is admitted that when once they have held themselves out as common carriers, there is engrafted on their acceptance of the goods the common law liability to carry, even if they are to carry beyond the realm; it would seem, also, that they are subject to the other part

of the common law liability, namely, to accept within reasonable limits all goods that may be tendered to them to carry. If, therefore, being carriers within the realm, they are bound to take the goods offered to them to be carried within the realm, it follows that if they profess to be carriers beyond the realm, being themselves at the time they so profess within the realm, they are bound to accept and to carry goods beyond the realm upon the terms on which they profess to contract."

As to goods received without the realm, see *Bramley* v. *S. E. Ry. Co.*, 31 L. J. C. P. 286; *Le Couteur* v. *L. & S. W. Ry. Co.*, L. R. 1 Q. B. 54; 35 L. J. Q. B. 40.

57. If the owner of the goods assumes the care and custody of them himself, instead of trusting them to the carrier, the carrier is not liable for the loss. (*Brind* v. *Dale*, 2 M. & W. 755; *India Co.* v. *Pullen*, 1 Stra. 690; *Tower* v. *Utica & S. Ry. Co.*, 7 Hill, N. Y., 47. See *post*, Chap. XVII.)

But the fact that the owner or his servant accompanies the goods to keep an eye upon them, if he does not exclude the care of the carrier's servants, will not excuse the carrier. (*Robinson* v. *Dunmore*, 3 Bos. & Pul. 416.)

But a carrier may, of course, be liable upon a special contract for the safe delivery of the goods, and therefore where A. sent goods to B. who said, "I will warrant they shall go safe," it was held that this amounted to a warranty, and B. was liable for damage sustained by the goods, notwithstanding A. sent one of his own servants in B.'s cart to look after them. (*Robinson* v. *Dunmore*, *supra*.)

58. The duty of a common carrier to carry safely is independently of any contract made by him, and no

contract need be proved in an action founded on the custom of the realm. (*Pozzi* v. *Shipton*, 1 P. & D. 4; 8 A. & E. 963.)

59. The loss of or injury to the goods is *primâ facie* presumed to be due to a cause for which the carrier is responsible, and the *onus probandi* is on the carrier to exempt himself.

As to burden of proof where the carrier limits his liability by special contract, see *post*, Art. 86. "Everything is negligence which the law does not excuse." (*Dale* v. *Hall*, 1 Wils. 281.)

"It is enough to show the damage done in order to render the common carrier liable; and the burden of proof is on him to show that it was occasioned by such cause as will exempt him from liability." (Per Harper, J., in *Ewart* v. *Sweet*, 2 Bailey, 16. See also American cases in Angell, p. 187).

60. A common carrier is not liable for any losses which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the transit, or from their inherent natural infirmity and tendency to damage, or which arise from the negligence or fraud of the owner or consignor thereof. (Story on Bailm.; per Willes, J., in *G. W. Ry. Co.* v. *Blower*, L. R. 7 C. P. 655; 41 L. J. C. P. 268; *Hutchinson* v. *Guyon*, 28 L. J. C. P. 63; 5 C. B. 149.)

Where the deterioration is caused by the default of the carrier, he is liable. (*Wilson* v. *Lanc. Ry. Co.*,

30 L. J. C. P. 232; *Gill* v. *M. S. & L. Ry. Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89; *G. W. Ry. Co.* v. *Blower*, *supra*.)

If the goods to be carried require airing or ventilating during the journey, for the purpose of preservation, as fruit and such like articles do, the neglect of this duty will render the carrier liable. (*Davidson* v. *Gwynne*, 12 East, 381.)

If a load of goods weighing a certain weight be delivered to a common carrier to be carried for hire, and the load on its arrival at its destination is deficient in weight, there is a *primâ facie* presumption of negligence on the part of the carrier, which the latter must rebut by showing that the deficiency of weight arose from causes over which he had no control. (*Hawkes* v. *Smith*, Car. & M. 72.)

The carrier is not liable for any damage from the ordinary decay of oranges, or other fruits in the course of their journey. (3 Kent's Com. 299—301; *Ship Howard* v. *Wissman*, 18 How. 231; *The Brig Collenberg*, 1 Black. 170.) But the carrier is, nevertheless, bound to take all reasonable care of such *bona peritura*, and if they require to be aired or ventilated, he must take the usual and proper methods for this purpose. (Abbott on Shipp. 371; *Davidson* v. *Gwynne*, 12 East, 381; *The Collenberg*, *supra*.)

The carrier is not responsible for the ordinary diminution or evaporation of liquids, or the ordinary leakage of the casks, in which the liquors are put, in the course of transportation, or from their acidity or tendency to effervesce; as his implied obligation does not extend to such cases (*Nelson* v. *Woodruff*, 1 Black. (U. S.) 156), unless to prevent loss from such causes is within his control.

If a pipe of wine, upon the ferment, burst in the wagon, when gently driven, the carrier is not liable; for the fault is in the wine, and the insurer does not insure against the defects of the thing itself. (*Farrar* v. *Adams*, Bull. N. P. 69.)

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But if a cask of brandy should leak during the journey, and the carrier take no means to stop the leak when it comes to his knowledge, he would be liable for the loss. (*Beck* v. *Evans*, 16 East, 244; 3 Camp. 267.)

See also *post*, Chap. X.

61. A condition that the carrier shall not be liable "for leakage or breakage" only exempts him for liability for leakage or breakage which is the result of accident, and not where it is caused by his negligence or want of care. (*Phillips* v. *Clark*, 2 C. B. N. S. 156; *Czech* v. *G. S. Nav. Co.*, L. R. 3 C. P. 14.)

62. A common carrier is not responsible for damage accruing to the goods carried from improper packing by the sender; at all events, where there has been nothing to indicate to the carrier the defective nature of the packing. (See *post*, Art. 155.)

But the carrier cannot absolve himself from liability, where he has the means of observing the risk he runs in accepting goods in the state in which they are presented to him, and with such knowledge gives a receipt. (*Beck* v. *Evans*, 16 East, 244; 3 Camp. 267; *Stuart* v. *Crawley*, 2 Stark. R. 323.)

Insufficient packing does not necessarily relieve the carrier, but it may materially affect the amount of damage to be recovered. (*Higginbotham* v. *Gt. N. Ry. Co.*, 2 F. & F. 796; *Cox* v. *L. & N. W. Ry. Co.*, 3 F. & F. 77.)

In *Webb* v. *Page* (12 L. J. C. P. 329), Cresswell, J., said, "Though the defendant was not a common carrier, yet I think it was undoubtedly a part of his duty to see that the goods were properly packed, as well as properly carried."

In America it has been held that it is no excuse for the carrier that a greyhound delivered to him, and for which he gave a receipt, was not properly secured at the time of delivery. He was bound to know what was a proper fastening, and advise the owner if anything more was required. (*Stuart* v. *Crawley*, 2 Stuart's L. C. 323. See also *Shriver* v. *Sioux City & Ry. Co.*, 24 Minn. 506.)

63. A common carrier, when he is expressly directed to carry goods delivered to him in a particular manner and position, is bound to carry them in that manner and position; and if he carries them otherwise and they are lost or damaged, the burden will be upon him to prove that the loss or damage was in no degree attributable to his breach of contract, but was occasioned solely by one of the exemptions mentioned in Art. 46. (*Hastings* v. *Pepper*, 11 Pick. 41.)

In that case a box containing a glass bottle filled with the oil of cloves was delivered to a common carrier, marked "Glass—with care—this side up"; and it was held, that this was a sufficient notice of the value and nature of the contents, to charge him with the loss of the oil occasioned by his disregarding such direction. It was proved that the box was stowed in such a manner that the marked side was not kept up, and consequently the large bottle, which was broken by some means in the passage, after it was stowed and before its arrival, bore its weight upon its side, and not its bottom. (And see *Sayer* v. *Portsmouth Ry. Co.*, 31 Maine, 228.)

64. If any brittle or perishable commodity, requiring great care for its safe conveyance, is bailed to a carrier, enclosed in boxes, and no directions are given as to how the boxes are to be carried, and no notice of

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the peculiar nature of their contents, the carrier is only bound to take the ordinary care of the boxes which their general character and appearance seem to require. (Angell on Carriers, p. 253; *Webb* v. *Page*, 6 Scott, N. R. 956.)

In such a case the owner of the boxes is culpable for concealing the peculiar nature of their contents. (See *Baldwin* v. *London, Chatham & Dover Ry. Co.*, 9 Q. B. D. 582; *post*, Art. 159. See also *Coxe* v. *Heisley* (19 Pa. St. 243), where the owner represented the goods to be of much less value than they were, and thereby induced the carrier to exercise less watchfulness in regard to them. See also *Relf* v. *Rapp*, 3 Watts & Serg. 21.)

65. If goods are injured by any cause for which the carrier is not responsible, he is still bound to take all proper and reasonable care of them, to preserve them from further injury. He is not bound to repair them. (*Charleston S. B. Co.* v. *Bason*, Harper, p. 262; *Notara* v. *Henderson*, L. R. 7 Q. B. 225; 41 L. J. Q. B. 158.)

But if the goods are wet he should, if possible, unpack and dry them. (*Chouteaux* v. *Leech*, 18 Pa. St. 224.) And to do this he may open the packages in which the goods are. (*Bird* v. *Cromwell*, 1 Miss. 81.) He is not, however, bound to delay his journey for this purpose. (See American cases, cited in Angell, p. 202. See *post*, Chap. XI., Art. 184.)

66. A common carrier is liable if the goods entrusted to him be damaged by rats, although the carrier may have kept cats on board the vessel in which the goods are to be carried, or in his warehouse where they may

be deposited by him in his character of carrier. (*Laveroni* v. *Drury*, 8 Ex. 166; *White* v. *Humphery*, 11 Q. B. 43; *Dale* v. *Hall*, 1 Wils. 281.)

67. A carrier who fraudulently takes or converts goods entrusted to him for conveyance to his own use or the use of any person other than the owner, is guilty of larceny, although he do not break bulk or otherwise determine the bailment. (24 & 25 Vict. c. 96, s. 3.)

68. "No carrier with any horse or horses, ... shall travel upon the Lord's day, commonly called Sunday, upon pain that every person so offending shall lose and forfeit 20 shillings for every such offence." (3 Car. 1, c. 2.)

The driver of a van, travelling to and from distant towns (as London and York), was held to be a carrier within the meaning of this Act. (*Ex parte Middleton*, 3 B. & C. 164.) Neither this Act, nor 29 Car. 2, c. 7, make it illegal for a stage-coach to run on Sunday. (*Sandiman* v. *Breach*, 7 B. & C. 96.)

Drivers of hackney coaches may ply, and are compellable to drive, on a Sunday. (1 & 2 Will. 4, c. 22, s. 37.) As to parliamentary trains, see 7 & 8 Vict. c. 85, s. 10.

CHAPTER VI.

THE LIMITATION OF THE OBLIGATIONS OF A COMMON CARRIER OF GOODS.

1. *By the Carriers Act*, 1830 ..... *Arts.* 69—83.
2. *By Special Contract or Notice* ..... *Arts.* 84—90.

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1. *By the Carriers Act*, 1830.

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69. A common carrier by land, for hire, is not liable for the loss of or injury done to—

(1) Bank notes of any bank in England, Scotland, or Ireland.

(2) Bills of exchange.

A document in the form of a bill of exchange, accepted by the person to whom it was directed, but having no drawer, and found by the jury to be of no value when delivered to the carriers, is not within the Act as a "bill," though it might be as a writing. (*Stoessiger* v. *S. E. Ry. Co.*, 23 L. J. Q. B. 293; 3 E. & B. 549.)

(3) Cheques on bankers.

(4) China.

(5) Clocks.

(6) Coins (gold or silver) of any country.

(7) Deeds.

(8) Engravings.

This includes prints and coloured prints. (*Boys* v. *Pink*, 8 Car. & P. 361.)

(9) Foreign coins (gold or silver).

(10) Furs.

This does not include hat bodies, made partly of fur and partly of wool. (*Mayhew* v. *Nelson*, 6 Car. & P. 58.)

(11) Glass.

This includes looking-glasses (*Owen* v. *Burnett*, 3 L. J. Ex. 76; 2 Car. & M. 357); also smelling-bottles and the like. (*Bernstein* v. *Baxendale*, 6 C. B. (N. S.) 251; 28 L. J. C. P. 265.)

(12) Gold coin.

(13) Gold in a manufactured or unmanufactured state.

(14) Gold plate or plated articles.

(15) Jewellery.

See Trinkets.

(16) Lace.

But not machine-made lace. (28 & 29 Viet. c. 94.)

(17) Maps.

See *Wyld* v. *Pickford*, 8 M. & W. 443.

(18) Money (gold or silver).

(19) Notes of any bank of the United Kingdom.

(20) Notes for the payment of money.

(21) Orders for the payment of money.

(22) Paintings.

This includes artist's pencil sketches. (*Mytton* v. *Midland Ry. Co.*, 28 L. J. Ex. 385; 4 H. & N. 615.)

The word "paintings" in this Act is used in its ordinary and popular sense to denote works of art. They must be articles of artistic value, as paintings, and not mere designs or patterns.

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(*Woodward* v. *L. & N. W. Ry. Co.*, 47 L. J. Ex. D. 263; 3 Ex. D. 121.) In that case coloured imitations of rugs and carpets and coloured working designs, each of them valuable and designed by skilled persons and hand painted, but having no value as works of art, were held not to be "paintings" within the Act.

(23) Pictures.

If a package, containing pictures in frames exceeding 10*l.* in value, is delivered to a carrier to be carried for hire, without any declaration as to the value and nature of the articles, the picture and frame are to be considered as one article; and the carrier is protected from liability as well in respect of damage done to the frames as in respect of damage done to the picture itself. (*Henderson* v. *L. & N. W. Ry. Co.*, L. R. 5 Ex. 90; 39 L. J. Ex. 55.) Hawkins, J., in delivering judgment in *Woodward's case*, *supra*, said: "That the articles in question are of a similar character to those in respect of which the Carriers Act has afforded protection to carriers there can be no question, but unfortunately the language of the Act is not such as to include them, and the defect in the Act, if it be one, can only be remedied by the Legislature. It may be asked, how is one to tell whether that which is painted is a painting or a mere painted design? I answer this question by adopting the language of Pollock, C. B., in *Brunt* v. *Midland Ry. Co.* (33 L. J. Ex. 187):— 'The line is shifted according to the circumstances. But the question that we have to answer is, not where to draw the line, but whether this is within the line? I think for all practical and reasonable purposes, wherever the line may be, and leaving the line in a state of doubt (which is a doubt which belongs to every line attempted to be drawn, either in nature or in the social exigencies of life), that this is without the line.'"

(24) Plate or plated articles (gold or silver).

(25) Precious stones.

(26) Promissory notes.

(27) Securities for payment of money.

(28) Silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials.

This includes silk hose (*Hart* v. *Baxendale*, 20 L. J. Ex. 338; 6 Ex. 769), elastic silk web (*Brunt* v. *Midland Ry. Co.*, 33 L. J. Ex. 187; 2 H. & C. 889), a truss of silk (*Butt* v. *G. W. Ry. Co.*, 20 L. J. C. P. 241; 11 C. B. 140), and a silk dress made up for wearing (*Flowers* v. *S. E. Ry. Co.*, 16 L. T. N. S. 329); also silk watchguards.

(29) Silver, coin, or plate or plated articles.

(30) Stamps.

(31) Stones (precious).

(32) Timepieces of any description.

This includes a ship's chronometer. (*Le Couteur* v. *L. & S. W. Ry. Co.*, L. R. 1 Q. B. 54; 35 L. J. Q. B. 40.)

(33) Title deeds.

(34) Trinkets.

It was said in *Bernstein* v. *Baxendale*, *ante*, p. 57, that it is impossible, with precise accuracy, to define what are "trinkets" within the meaning of the Act. But as the closest approximation to this, it was said that they must be articles of mere ornament, or if ornament and utility be combined, the former must be the predominant quality. And, as instances, it was said bracelets, shirt-pins, rings, brooches, and ornamented shell and tortoise-shell portmonnaies, however small their intrinsic value, are trinkets.

(35) Watches.

(36) Writings.

See Bills of Exchange, *ante*, p. 56.

or any of them contained in any parcel or package which shall have been delivered either to be carried

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for hire or to accompany the person of any passenger, when the value of such article or articles contained in such package shall *exceed* the sum of 10*l.*, unless at the time of delivering the parcel or package containing them to the carrier its value and nature has been declared, and an increased charge for the carriage, if required, has been paid, or an engagement to pay the same been accepted by the person receiving such parcel or package. (The Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 1.)

As to the words "if required" in this Art., see Art. 73, *post*, p. 64.

The Carriers Act was passed in consequence of common carriers putting up in their receiving offices notices of terms and conditions of carriage, restrictive of their common law undertaking and liability,—a practice which produced frequent litigation upon the question how far a person delivering goods for carriage became bound by such notices, and what evidence was sufficient to incorporate them into the contract for carriage.

The decisions on the constructions of these notices are stated in Addison on Contracts; Chitty on Contracts, and Browne on Carriers.

"Several witnesses have complained that the enumeration of goods in the Carriers Act is unsuitable and not based on any recognized principles of traffic, and they suggest that it should be adapted to the present condition of industry and trade. We think there is great force in this suggestion, and are of opinion that the enumeration of articles in the Carriers Act requires revision." (Report of Royal Commission on Railways, 1867.)

The Carriers Act extends to all the articles enumerated in the first section, even although they do not come within the words of the preamble, as being articles "of great value in small compass." (*Owen* v. *Burnett*, 2 Car. & M. 353.)

"Value" means intrinsic value at the time the parcel is delivered. (*Stoessiger* v. *S. E. Ry. Co.*, *ante*, p. 56.)

The question whether an article is of the description mentioned in sect. 1 is a question of fact for a jury. (*Brunt* v. *Midland Ry. Co.*, 33 L. J. Ex. 187.)

Pictures exceeding the value of 10*l.* were laid upon one another without any covering or tie in the owner's waggon, which had sides, but no top; and the waggon was delivered to a railway company, and placed by their servants on one of their trucks for carriage by the railway; and it was held, that the pictures were "contained in a parcel or package" within the meaning of sect. 1 of the Carriers Act, so as to give the company the protection of that statute. (*Whaite* v. *Lancashire and Yorkshire Ry. Co.*, L. R. 9 Ex. 67; 43 L. J. Ex. 47.)

Bramwell, B., in delivering judgment, said, "I think that this waggon, with what was in it, was a 'parcel or package' within the meaning of the Carriers Act. The words are, 'articles or property of the descriptions' specified 'contained in any parcel or package.' Although, commonly speaking, a person would say, 'This is a waggon, not a parcel or package,' yet, looking at the statute, its object and meaning, we are not only justified but compelled to say, that it was a parcel or package within the meaning of the Act. It is remarkable that there is an authority for this view in the words of the plaintiff's manager, who said 'I *packed* these goods.' No one would doubt that this was a correct expression. Then if the goods were packed, this was a package. Moreover, there is this quality of a package about it, that though the waggon was so packed that the defendants could see they were pictures of some sort, yet they could not see what pictures, nor of what nature they were, their exact character being concealed by the mode of packing adopted by the plaintiff."

Where a packing case contains articles some within the statute and some not, the value of the case and of the articles not within the statute may be recovered, though the statute has not been complied with as regards the articles within the statute. (*Treadwin* v. *G. E. Ry. Co.*, L. R. 3 C. P. 308; 37 L. J. C. P. 83.)

Willes, J., in delivering judgment, said, "I own that I think, looking to sects. 3, 5, 7 and 9 of the Carriers Act, and construing

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sect. 1 by the light of these sections, that what the Legislature intended was the same as what was laid down in *Wyld* v. *Pickford* (10 L. J. Ex. 382); and that if the principal thing carried was within the statute, then the package also was to be within it."

The term "loss," in sect. 1, means a loss by the carrier, such as by abstraction by a stranger, or by his own servants not feloniously, or by losing them from vehicles in the course of carriage, or by mislaying them, so as not to know where to find them, and the like; it includes temporary as well as permanent loss; so that if a carrier temporarily lose undeclared goods, and on finding them deliver them to the owner within a reasonable time, he will not be liable: if, however, he do not so deliver them, he is liable for this detention. (*Hearn* v. *L. & S. W. Ry. Co.*, 24 L. J. Ex. 180; 10 Ex. 793, as explained by *Millen* v. *Brasch*, 10 Q. B. D. 142, 145, 147; and see *post*, Art. 81.)

A loss by robbery is within the words "loss or injury." (*Covinton* v. *Willan*, Gow. 115; *De Rothschild* v. *Royal Mail Steam Packet Co.*, 7 Ex. 734.) But see Art. 77.

70. Under the Carriers Act the carrier is entitled to have an express declaration from the owner or his agent, of the contents of a package, at the time of delivery to the carrier, however obvious to conjecture the nature of the contents may be. (*Boys* v. *Pink*, 8 Car. & P. 361; *Owen* v. *Burnett*, 2 Car. & M. 353.)

In *Baxendale* v. *Hart* (6 Ex. 769; 21 L. J. Ex. 123), the Court said, "We think that the Act requires the person who sends the goods to take the first step by giving that information to the carrier which he alone can give, and that if the sender does not take that first step, then he cannot maintain this action by the force of the 1st section, which expressly says, that the carrier shall not be liable unless the declaration is made. Such declaration, when made, will lead to other consequences; the carrier will know what he is to have more, according to the tariff which he has stuck up in his office; if that sum is paid and the goods are lost, then of course

he would be liable; on the other hand, if he refuses to give a receipt as provided by the statute, or has omitted to comply with any provision of that kind on his part to be performed, he would lose the protection given by the Act;" and Maule, J., said, "The great object of the declaration is, that greater care may be taken of the goods."

At common law, there was no duty incumbent on a party sending a package to declare the nature and value of the contents. (*Walker* v. *Jackson*, 11 L. J. Ex. 346; 10 M. & W. 161.) See *ante*, Art. 30, p. 26.

71. The refusal to declare the contents of a package will not justify the carrier in refusing to carry it, but only excuses the loss. (*Pinciani* v. *L. & S. W. Ry. Co.*, 18 C. B. 226; *Crouch* v. *L. & N. W. Ry. Co.*, 23 L. J. C. P. 73.)

The carrier has an insurable interest in the goods, the value of which has not been declared in accordance with the Act. (*L. & N. W. Ry. Co.* v. *Glyn*, 28 L. J. Q. B. 188; and *post*, Art. 114, p. 94.)

72. The increased rate of charge is to be notified by some notice affixed in legible character in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by the carrier for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles at such office are bound by such notice without further proof

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of the same having come to their knowledge. (The Carriers Act, 1830, s. 2.)

The notice must be so legible and conspicuous that a person delivering goods at the office cannot fail to read it without gross negligence. (*Clayton* v. *Hunt*, 3 Camp. 27; *Butler* v. *Heane*, 2 Camp. 415.)

73. Where the nature and value of the goods have been declared by the sender, the Act exempts the carrier from his common law responsibility as to such goods, only where he has notified the increased rate of charge in the manner required by the Act, and demanded such increased rate of charge; or where there is a special contract. (*Baxendale* v. *Hart*, 6 Ex. 769; 21 L. J. Ex. 123; *Behrens* v. *G. N. Ry. Co.*, 31 L. J. Ex. 299; 7 H. & N. 950.)

In the latter case the plaintiff sent a valuable picture by railway and declared its nature and value at the time of its delivery for carriage, and the company did not demand any increased rate to which they were entitled under sect. 2 of the Carriers Act, and only the ordinary charge was paid, the carrier was held not protected by the statute for an injury to the picture during the journey.

In delivering judgment in *Behrens' case*, Bramwell, B., said: "It has been said that there ought to have been a notice affixed at the place where the parcel was received. If we look to the 1st section of the Act, we find that parcels may be received by any carrier, or by their book-keeper, coachman or other servant. So that it is quite clear that section contemplated the sending parcels not alone to an office, but their being given to some servants of the company who were engaged in the business of carrying. When we look at the 1st section, we at once find that the language of the 2nd section, as to the sticking up the notice, is not applicable to

the 1st section. I think that is an answer to the argument that the statute intended there should be a notice affixed at the place where the things were actually delivered, because it would be impossible that could be done, having regard to the alterations which modern modes of transit have introduced into the trade of carriers, seeing now that carts go round from the different railway companies to collect parcels in a way that did not exist at the time of the passing of this statute. It may be that this matter with regard to the notice is a *casus omissus*. Had the trade been carried on then as it is now, the statute would perhaps have said that the notice should be affixed on any cart that went round to collect parcels in this way. Such a thing might be a matter of policy, but the railway companies are much better judges of their own business than we are . . . . It might be desirable, however, either that a notice should be put upon the cart, or that those going about with the cart should be directed to refuse to take parcels when the value is declared . . . . but this is really a matter that has reference more to the mode in which railway companies carry on their trade than to any question of what is the law upon the subject."

74. If the carrier refuse, on demand, to give a receipt for the goods and extra charge, this will deprive him of the protection of the Act, and he is liable to refund the extra charge. (The Carriers Act, 1830, s. 3.)

75. A delivery of a parcel at any "office, warehouse or receiving house," used or appointed for the receiving of parcels, is sufficient to render the carrier liable for its loss or injury, if the nature and value are declared. (The Carriers Act, 1830, s. 5.)

An inn, at which a coach regularly stops for the purpose of taking up parcels, is a receiving house within the Act. (*Syms* v. *Chaplin*,

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5 A. & E. 634; *Stephens* v. *L. & S. W. Ry. Co.*, 18 Q. B. D. 121; 56 L. J. Q. B. 161; *Burrell* v. *North*, 2 Car. & Kir. 680; *Boys* v. *Pink*, 8 Car. & P. 361.)

It is a good delivery within the Act to a servant of the carrier on the road. (*Baxendale* v. *Hart*, 21 L. J. Exch. 123.)

It is also a good delivery to the carrier if it is made to his book-keeper, coachman or other servant; sect. 1.

It has been held that the contract entered into by the booking-office keeper, who takes in parcels to be forwarded by carriers, is only to deliver safely to the carrier, not to the consignee. (*Gilbart* v. *Dale*, 5 A. & E. 543; *Midland Ry. Co.* v. *Bromley*, 17 C. B. 378.)

76. Nothing in the Carriers Act is to extend, annul, or affect any special contract for the conveyance of goods and merchandize. (The Carriers Act, 1830, s. 6.)

The fact of goods being received by a common carrier under a special contract does not deprive him of the protection of the Act, unless the terms of the contract are inconsistent with the exemption thereby conferred. (*Baxendale* v. *G. E. Ry. Co.*, L. R. 4 Q. B. 244; 39 L. J. Q. B. 137.)

In that case Kelly, C. B., said, "It is clear that sect. 6 applies only to contracts the provisions of which are inconsistent with the exemption claimed by the carrier under sect. 1. Any contract which would render the carriers liable for the loss of goods beyond the value of 10*l.*, whether they shall have had notice of the value or not, is a special contract which is not to be affected at all, but shall have full force and effect, notwithstanding the exemption conferred upon them as common carriers by the 1st section."

77. The Carriers Act does not protect the carrier from any loss arising from the felonious act of any

servant in his employ. (The Carriers Act, 1830, s. 8.)

Every person actually engaged in the performance of the contract of carriage and delivery is a servant of the carrier within the meaning of this section.

Where a carrier enters into a sub-contract with other parties with respect to the carriage of goods which he has undertaken to carry, the servants employed by the latter are "servants in the employ" of the carrier within the meaning of the Act. (*Machu* v. *L. & S. W. Ry. Co.*, 2 Ex. 415; *Doolan* v. *Midland Ry. Co.*, 2 App. Cas. 792, 810; *Stephens* v. *L. & S. W. Ry. Co.*, 18 Q. B. D. 121; 56 L. J. Q. B. 161.)

A mere suspicion that the loss arose from felony by the carrier's servant is not sufficient: it must be proved. (*Rimmell* v. *G. W. Ry. Co.*, 27 L. J. C. P. 201.)

The plaintiff must establish a *primâ facie* case that the loss has arisen from such felonious acts, and it is not sufficient to show that it is more probable that the loss has arisen from such felonious acts than by the act of some person not in the employment of the carrier. (*M'Queen* v. *G. W. Ry. Co.*, L. R. 10 Q. B. 569; 44 L. J. Q. B. 130.)

It is not necessary to show a loss by the felony of any particular servant of the carrier (*Vaughton* v. *L. & N. W. Ry. Co.*, L. R. 9 Ex. 93; 43 L. J. Ex. 75), or a loss by felony through the negligence of the carrier. (Per Jervis, C. J., and Willes, J., see 18 C. B. 575; *Metcalfe* v. *London, Brighton & S. C. Ry. Co.*, 4 C. B. N. S. 307.)

In *Kirkstall Brewery Co.* v. *Furness Ry. Co.* (L. R. 9 Q. B. 468; 43 L. J. Q. B. 142) information given by the defendants' station-master to a police constable that one of defendants' servants was suspected of having stolen the missing parcel, was held to have been rightly admitted in evidence to show a felony by the defendants' servants.

In *Way* v. *Great Eastern Ry. Co.* (1 Q. B. D. 692; 45 L. J.

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Q. B. D. 174), certain pictures, above the value of 10*l.*, were delivered to the defendants to be carried, and were by them placed in a van in their yard preparatory to their transmission. A man, by representing himself to be one C. (who was a driver in the employ of M., the defendants' sub-contractor), obtained from the defendants' delivery clerk, a pass and other documents, which enabled him to take the van from the yard, and so to steal the pictures. An action having been brought for their value, the material issue was whether they were lost through the felonious act of the defendants' servants. A case embodying the above facts, with power to the Court to draw all necessary inferences, having been stated, it was held that the defendants were not estopped from denying that the thief was their servant, and that the Court would not infer that he was.

If the loss or injury be occasioned by the personal neglect or misconduct of the coachman, guard, book-keeper or other servant of the carrier in a case in which the carrier himself is not responsible, such coachman, &c. may be sued by the owner of the goods for the consequent damage. (Story on Bailm. 510.)

78. If goods within the Act be sent to a carrier for conveyance without a declaration of the nature and value of such goods, and without paying, or engaging to pay, an increased charge, the carrier is not liable for their loss, though it happen by the *gross negligence* of himself or his servants. (*Hinton* v. *Debbin*, 2 Q. B. 646.)

In that case, Lord Denman said, "The question for our decision is, whether, since the passing of the Act, a carrier is liable for the loss of goods, therein specified, by reason of gross negligence. . . . In deciding upon this statute, we must, of course, be regulated by its language; and the state of the law at the time of its passing is material only so far as it enables us to discover the mischief for which it was intended to apply a remedy. . . . . By the first section, the exemption of the carrier from liability is absolute and

complete, unless the preliminary thereby made indispensable is complied with by the owner of the goods. . . . . By section 4, it is provided that no public notice or declaration shall exempt any carrier from his liability at common law for the loss of or injury to any articles other than those in the first section enumerated, but that, as to such other articles, his liability, as at common law, shall remain notwithstanding such notice. From which exception, as to the liability of the carrier in respect of goods not enumerated, it seems impliedly to follow, that as to those which are, protection is afforded to him in the manner above set forth."

79. Though the carrier is not liable for loss of or injury to the goods even in cases of gross negligence if the nature and value has not been declared, yet if such negligence amounts to a wilful misfeasance, or wrongful act (*Hinton* v. *Debbin*, 2 Q. B. 646), inconsistent with his character of carrier, and with his contract to convey, such as not carrying or forwarding them (*Garnett* v. *Willan*, 5 B. & A. 61; *Hearn* v. *L. & S. W. Ry. Co.*, 24 L. J. Ex. 180, per Parke, B.), or forwarding them otherwise than agreed upon (*Sleat* v. *Fagg*, 5 B. & A. 342), or if he deviates from the usual route (*Davis* v. *Garrett*, 6 Bing. 716), or if he send them beyond the place of their destination (*Bodenham* v. *Bennett*, 4 Price, 41; *Ellis* v. *Turner*, 8 T. R. 531), he is liable. (*Hearn* v. *L. & S. W. Ry. Co.*, *supra*.)

80. A carrier is not deprived of the protection afforded by the Carriers Act, 1830, by the fact that the loss or injury to the goods happens after they have been negligently taken by him beyond their

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point of destination. (*Morritt* v. *N. E. Ry. Co.*, 1 Q. B. D. 302; 45 L. J. Q. B. D. 289.)

In that case the plaintiff, a passenger by the defendants' railway, took with him, along with other luggage, two pictures which were duly labelled to D. The value of the pictures, which exceeded 10*l.*, was not declared, nor was any increased rate of charge paid. The pictures were accidentally carried beyond D. and considerably damaged, and it was held that the defendants were not liable, on the ground that they were protected by the provisions of the Carriers Act.

Lord Justice Mellish, in delivering judgment in the Court of Appeal, said: "The simple question is, whether goods, which are within the section, up to the point of destination, are within the section if they are unintentionally carried on and damaged beyond that point. I am of opinion that they are. If it were not so, a man might fill his portmanteau with bank notes, and not declare them, nor pay any higher rate, and then if the portmanteau were carried on by mistake and lost, and lost beyond the destination, the whole protection of the statute would be withdrawn. This would be unreasonable. It seems to me that if one of the most ordinary causes of loss and injury, namely, mistake in not taking the goods out at their destination, were excluded from the operation of the Act, its protection would be of very little value to the carriers. It is not necessary to decide what would be the liability of the company if after they discovered the mistake they neglected to take proper care of the pictures, as there is no evidence in this case of whether the damage was done before or after the mistake was discovered."

81. A carrier is protected by the provisions of the Carriers Act, s. 1, not only from liability for the loss, whether temporary or permanent, of undeclared goods, but also from liability for the consequences resulting from such a loss, and consequently is not liable in

damages for the detention of undeclared goods, where such detention is the result of a loss in respect of which he is protected by the Carriers Act. (*Millen* v. *Brasch*, 10 Q. B. D. (C. A.) 142; 52 L. J. Q. B. D. (App.) 127.)

In that case the plaintiff delivered to the defendants, carriers for hire from London to Rome, a trunk to be sent from London to Liverpool, and thence by ship to Italy. The trunk contained wearing apparel, consisting of silk dresses and other articles within the Carriers Act, exceeding 10*l.*, but no declaration of their value was made. Owing to the negligence of the defendants, the trunk was sent to the Victoria Docks, in London, and thence shipped to New York. It was eventually recovered, and after considerable delay delivered to the plaintiff in Rome. Some of the contents were injured owing to the Custom House officer in New York unpacking and negligently repacking the trunk. The plaintiff having claimed for the loss of the trunk and injury to its contents, and also for the repurchase of other articles in Rome at enhanced prices, it was held—first, that the trunk was lost within the meaning of the Carriers Act, and that the defendants were protected by the provisions of that Act for the loss and injury to its contents, notwithstanding that the loss was temporary; secondly, that the plaintiff was not entitled to recover, as consequential damages for nondelivery of the undeclared articles within due time, the cost of the repurchase of other articles at Rome at enhanced prices, inasmuch as such nondelivery was the result of a loss in respect of which the defendants were protected by the Carriers Act.

82. A person bringing an action for the loss or injury to articles specified under the Act, is entitled to recover back such increased charges as are payable under sect. 2, in addition to the value of the parcel or package. (The Carriers Act, 1830, s. 7.)

The carrier is not concluded as to the value of a

Chap. VI. Art. 82.

parcel by the declared value, but may require from the party suing proof of the actual value for which he is liable, so that it do not exceed that declared. (The Carriers Act, 1830, s. 9.)

If the consignor declares the value of the goods, he is bound by his declaration, and cannot afterwards show that the value of the goods exceeded that declared. (*M'Cance* v. *L. & N. W. Ry. Co.*, 34 L. J. Ex. 39.)

83. Where there is one entire contract to carry partly by land and partly by sea, the carrier is entitled to the benefit of the Carriers Act in respect of so much of the journey as is performed by land (*Le Couteur* v. *L. & S. W. Ry. Co.*, L. R. 1 Q. B. 54; 35 L. J. Q. B. 40), and to the protection of the Merchant Shipping Acts, as to so much of the journey as is performed by sea. (*London & S. W. Ry. Co.* v. *James*, L. R. 8 Ch. 241; 42 L. J. Ch. 337.)

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2. *By Special Contract or Notice.*

84. A common carrier cannot by *public notice* or declaration limit or otherwise affect his liability at common law for any articles or goods carried by him other than articles or goods mentioned in the Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68, s. 4).

This section (4) only applies to public notices such as were very common before the Carriers Act—notices addressed to the public at large, raising a question in every case whether the notice was

brought home to the particular person. It is not applicable to a notice specifically delivered to form the basis of a special contract. (*Walker* v. *York and N. Mid. Ry. Co.*, 23 L. J. Q. B. 75; 2 Ell. & B. 761; *Van Toll* v. *S. E. Ry. Co.*, 31 L. J. C. P. 241.) The history of the public notices issued by carriers is to be found in Addison on Contracts (8th ed.), pp. 535, 537. "The contradictory decisions upon the proof and effect of these notices, and the confused state of the law respecting them, at last rendered the interference of the legislature necessary in order to protect the common carrier on the one hand from fraud and concealment on the part of the consignor of parcels and packages, and to protect the consignor, on the other, from fraud, negligence, and misconduct on the part of the common carrier."

In America the weight of authority is against the validity of public notices seeking to restrict the carrier's liability, although the existence of such notice be brought home to the owner of the goods. (See cases cited in Story on Bailm., 7th ed. p. 506.)

Where, before the Carriers Act, a carrier had published two different notices, each of which was before the public at the time of the carriage, that one was held to bind him which was least beneficial to himself; and where at the time of the carriage he delivered a written notice without any limitation of responsibility, that was held to nullify his prior notice containing a limitation. (*Munn* v. *Baker*, 2 Stark. 255; *Cobden* v. *Bolton*, 2 Camp. 108; *Phillips* v. *Edwards*, 3 H. & N. 813, 820.) This decision is founded on the legal maxim, *verba chartarum fortius accipiuntur contra proferentem*. (Co. Lit. 36 a.)

A ticket or paper with printed conditions upon it of which the consignor has notice, whether signed by him or not, was held to be a special contract within sect. 6 of the Carriers Act, and not a public notice under sect. 4. (*G. N. Ry. Co.* v. *Morville*, 21 L. J. Q. B. 319; *Walker* v. *York and N. Mid. Ry. Co.*, 2 E. & B. 750; *York, Newcastle and Berwick Ry. Co.* v. *Crisp*, 23 L. J. C. P. 125.) This would, of course, not be so now in the case of railway and canal companies. (See *post*, Chap. XI., Art. 168.)

Chap. VI. Art. 85.

85. A common carrier may limit his common law responsibility by receiving the goods subject to certain conditions, or in any other manner making a special contract with his customer (subject, in the case of railway and canal companies, to the provisions of the Railway and Canal Traffic Act, 1854, stated *post*, Chap. XI., Art. 168). (The Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 6.)

This section expressly enacts that nothing contained in the Carriers Act is to annul or in anywise affect any special contract between common carriers and any other parties, for the conveyance of goods and merchandize, thus recognizing the right of a carrier which existed at common law to protect himself by special agreement or special acceptance. Upon the question whether a notice or condition has been so brought to the knowledge of the contracting party, as to render it part of the contract. (*Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. App. 470; *Harris* v. *G. W. Ry. Co.*, 1 Q. B. D. 515; 45 L. J. Q. B. 729.)

It would seem that even if a *knowledge* of a public notice (*i. e.* a general notice affixed in the offices of carriers, or advertised in newspapers attempting to limit the carriers' common law liability) could be brought home to the customer, it would not now protect the carrier. (See Art. 84.) There ought to be proof of a specific agreement between the carrier, or his agent, and the individual tendering the goods.

It has never been questioned since the case of *Southcote* (4 Co. 83), that any bailee might stipulate for an increased or a diminished degree of responsibility from that which the law imposed upon his general undertaking. Upon principle, it is difficult to distinguish between an express contract, exonerating the carrier from his ordinary responsibility, and a notice from the carrier, that he would not assume such responsibility, brought home and assented to by the owner of goods delivered to be carried.

Carriers may generally limit or modify their common law liability by contract where persons are willing to enter into such stipulations with them. (See *Scaife* v. *Farrant*, 44 L. J. Ex. 234.)

86. Where a notice by the carrier limiting his liability is personally served on a person, who afterwards sends goods to a carrier to be carried, it is a question for the jury whether they were not sent subject to the terms of such notice, and whether such notice did not form the basis of a special agreement between the parties, the Carriers Act merely applying to *public notices*, such as those usually stuck up in offices, or published in newspapers. (*Walker* v. *Y. & N. Midland Ry. Co.*, 2 E. & B. 750; *Palmer* v. *Grand Junction Ry. Co.*, 4 M. & W. 749; *Crouch* v. *L. & N. W. Ry. Co.*, 14 C. B. 255; *Crouch* v. *Great Northern Ry. Co.*, 9 Ex. 556.)

In the cases above cited as authorities for the proposition in the text the defendants were railway companies. These cases were, of course, decided before the Railway and Canal Traffic Act, 1854, which requires a signed special contract. (*Post*, Chap. XI., Art. 166.)

Where the notice cannot be brought home to the person interested in the goods, directly or constructively, it is a mere nullity; and the burden of proof is on the carrier to show that the person with whom he deals is fully informed of the terms and effect of the notice. (See Angell on Carriers, p. 239.)

In *Crouch* v. *L. & N. W. Ry. Co.* (23 L. J. C. P. at p. 82), Maule, J., said, "A common carrier who makes no stipulation, and gives no notice with respect to the insurance of goods, is, no doubt, liable as an insurer of the goods, but a common carrier who by notice

Chap. VI. Art. 86.

limits his liability and says, 'I will not contract as an insurer,' or 'I will only contract to such and such an extent, or to the extent of such a value,' still remains in all other respects a common carrier, because although the incident of being an insurer does not apply to him, that is simply because it is specifically provided for."

87. Where the common carrier is not a common carrier of the particular description of goods tendered him for conveyance, and has the option of refusing and rejecting them at his own good will and pleasure, he may prescribe his own terms of conveyance; and if the party delivering goods to be carried has been personally served with a notice of the terms on which the common carrier carries goods, and, after seeing the notice, sends the goods, he must be taken to agree that they shall be carried on those terms: and there is then a special contract between him and the common carrier for their conveyance (per Wightman, J., in *Walker* v. *York & N. Mid. Ry. Co.*, 2 E. & B. 760), unless the carriage is by railway or canal, so as to necessitate a signed special contract under the Railway and Canal Traffic Act, 1854.

But this is not the case with regard to such articles as the common carrier is bound by his public profession and employment to carry. With regard to them the owner has a right to insist that the common carrier shall receive the goods subject to all the responsibilities incident to his employment. (*Kirkman* v. *Shawcross*, 6 T. R. 17; *Garton* v. *Bristol and Exeter Ry. Co.*, 30 L. J. Q. B. 276; 1 B. & S. 162.) "If the delivery of goods under such circumstances authorises an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist

on his legal rights, as it is that he was willing to yield to the wishes of the carrier." (*Hollister* v. *Nowlen*, 19 Wend. 247; *New Jersey St. Nav. Co.* v. *Merchants Bank*, 6 How. 344; *Crouch* v. *L. & N. W. Ry. Co.*, 23 L. J. C. P. 73; and see Addison on Contracts (8th ed.), 540; Art. 24, *ante*, p. 22.)

88. A common carrier may refuse to receive and carry articles of a perishable nature, or of a very delicate and fragile nature which he does not commonly profess to carry, and which may be readily injured, except under a special contract exonerating him from all responsibility for damage done to them *in transitu*, not occasioned by the gross negligence or default of himself or his servants. (*Beal* v. *South Devon Ry. Co.*, 29 L. J. Ex. 441; 5 H. & N. 875; *Peek* v. *N. Staffordshire Ry. Co.*, 32 L. J. Q. B. 241; *Leeson* v. *Holt*, 1 Stark. 186.)

89. Though there be a special acceptance by the carrier, and he seeks to exempt himself from liability under certain specified stipulations, he does not thereby altogether discharge himself from his character or responsibilities of a common carrier, or protect himself where there has been negligence or misfeasance on his part. (*Wyld* v. *Pickford*, 8 M. & W. 443.)

See *ante*, Art. 61.

As to a special contract lessening general responsibility not excusing negligence, see *Goldney* v. *Penn. Ry.*, 30 Pa. St. 242.

90. A special contract will not exclude the carrier from the benefit of sect. 1 of the Carriers Act, unless

there is something in the terms of the contract inconsistent with the goods having been received by him in his capacity of a common carrier. (*Baxendale* v. *G. E. Ry. Co.*, L. R. 4 Q. B. 244; 38 L. J. Q. B. 137.)

See *ante*, Art. 76.

CHAPTER VII.

THE OBLIGATIONS OF A COMMON CARRIER WITH REFERENCE TO THE DELIVERY OF THE GOODS TO THE CONSIGNEE, AND THE TERMINATION OF THE CARRIER'S LIABILITY.

Articles.

1. *The place where the Goods are to be delivered* .. 91—96.
2. *Delay in delivery* ..... 97.
3. *The Carrier's duty on the arrival of the Goods*.. 98—106.
4. *Refusal of the Consignee to accept* ..... 107—109.
5. *The Carrier's liability as a Warehouseman* .... 96, 105, 110, 111.

91. Every person who undertakes to carry as a common carrier impliedly engages to proceed without deviation from the usual and ordinary course, to the place of delivery (*Davis* v. *Garrett*, 6 Bing. 716), and there deliver the goods according to the usage of trade, the ordinary course of business, or the terms of his contract.

92. A common carrier is bound to carry by the route which he professes to be his route, and must use reasonable diligence in delivering the goods, having reference to the means at his disposal for forwarding them. (*Hales* v. *L. & N. W. Ry. Co.*, 32 L. J. Q. B. 292; 4 B. & S. 66.)

A common carrier, in the absence of an express contract, is not bound to carry goods by the shortest route, but only by the route by which he usually carries them,

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and which he professes to go. (Per Willes, J., in *Myers* v. *L. & S. W. Ry. Co.*, L. R. 5 C. P. 3; 39 L. J. C. P. 57. See the facts of this case *post*, Chap. XII. Art. 194.)

If a carrier deviate from the usual route, and the goods be lost, even by inevitable accident, he is liable; for, under such circumstances, the loss is traced back through all the intermediate causes to the first departure from duty. (*Davis* v. *Garrett*, *supra*.) In that case Tindal, C. J., uses the words "without *unnecessary* deviation," which imply that deviation is sometimes justifiable. (See *post*, Chap. XII. Art. 194.)

93. Where goods are delivered to a carrier, to be delivered at a particular place, the owner of the goods may countermand the direction at any moment of their transit, and require the carrier to deliver at a different destination to that originally named, or may demand back his goods on payment of the carriage to their original destination, unless the unpacking and re-delivering would be productive of great inconvenience. (*Scotthorn* v. *S. Staff. Ry. Co.*, 22 L. J. Ex. 121; 8 Ex. 34. See *post*, Chap. XII. Art. 202.)

94. A common carrier may deliver the goods wherever he and the consignee agree, if there has been no special contract between the consignor and the carrier as to the place of delivery. (*Cork Distilleries Co.* v. *Gt. South. & West. Ry. Co.* (*Ireland*), L. R. 7 H. L. 269; 8 Ir. R. C. L. 334. See *post*, Chap. XII. Art. 202.)

A special contract entered into by the carrier or his servant to deliver in any particular time or place, even beyond the terminus of his particular route, is binding.

95. If the goods a carrier receives for conveyance are directed to a place beyond the place to which he ordinarily professes to carry, it is his duty, in the absence of any special contract, to see that they are delivered at the place to which they are directed.

Ante, Art. 39, p. 35. As to the through traffic of railway companies, see *post*, Chap. XI. Art. 192.

96. The responsibility of a common carrier in that character continues until the carrier has discharged his duty as such with respect to the goods.

When a person has received goods in the capacity of a common carrier, he is not discharged from liability in that capacity until he has either delivered the goods to the consignee or his assignees, or until a reasonable time has elapsed after the consignee has notice of the arrival of the goods, for him to come and receive them. (*Bourne* v. *Gatliffe*, 11 C. & F. 45; 8 Scott, N. R. 604; 3 M. & G. 643.)

So long as a carrier retains the possession of, or the control over, the goods, or is to perform any further duty, either by custom or contract as a carrier, he is responsible for their safety. (*Cairns* v. *Robins*, 8 M. & W. 258.)

It is for a jury (where there is no written contract) to determine the extent of the agreed transit.

It is the duty of a carrier to keep goods which are to be fetched away a reasonable time for the consignee to come and fetch them. (*Bourne* v. *Gatliffe*, *supra*; *Patscheider* v. *G. W. Ry. Co.*, 3 Ex. D. 153.) But if the consignee is *in morâ* by delaying to take the goods

away within a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, and is confined to taking proper care of the goods as a warehouseman (*Chapman* v. *G. W. Ry. Co.*, 5 Q. B. D. 278; 49 L. J. Q. B. 420); and this is so even if the goods are consigned "to be left till called for."

In the case of goods carried across a ferry, it is for the jury to determine from evidence of practice at the ferry whether the owners of the ferry have undertaken to carry goods up a slip, or only to land them on the shore. (*Walker* v. *Jackson*, 10 M. & W. 161.)

97. A common carrier of goods is not, in the absence of a special contract to deliver at a particular time, bound to deliver within any given time, but only within a time which is reasonable, looking at all the circumstances of the case; and he is not responsible for the consequences of delay arising from causes beyond his control; and since his first duty is to carry safely, he is justified in incurring delay, if delay is necessary to secure the safe carriage. (*Taylor* v. *G. N. Ry. Co.*, L. R. 1 C. P. 385; 35 L. J. C. P. 210.)

In that case the defendants, a railway company, were prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a reasonable) time. The obstruction was caused by an accident resulting solely from the negligence of another company who had statutory running powers over their line, and it was held that the defendants were not liable to the plaintiff for damage to his goods caused by the delay.

Erle, C. J., in delivering judgment, said, "I think that the duty which the law imposes upon a common carrier to deliver the goods

safely has nothing to do with the time for delivery; the time at which he is to deliver is part of the contract. I think that a carrier using all reasonable diligence to get goods to their destination would fulfil his duty to deliver them within a reasonable time." And Montague Smith, J., said, "No doubt a common carrier is an insurer to the extent that the goods shall be delivered safely and securely, but there is no authority for holding that he insures their arrival at any particular time, or according to any usual course of delivery. He is bound to deliver them within a reasonable time, and the usual course of delivery would in most cases be *primâ facie* evidence of what is a reasonable time; but it must depend on all the circumstances of the particular transaction as to what is a reasonable time. His duty is to convey the goods in a reasonable time without unnecessary delay; but it may be necessary in order safely to deliver, to make a delay or even to deviate, and if the delay or the deviation are necessary for that purpose, then delay or deviation may be incurred, and the delivery of the goods may be retarded without any responsibility being cast on the carrier to make good the loss occasioned by the delay."

A common carrier, if the road is obstructed by snow, is not bound to use extraordinary means, involving additional expense, for accelerating the conveyance of cattle or goods, though the delay may be prejudicial to the goods or their owner, and though by extra exertions they might have been forwarded. (*Briddon* v. *G. N. Ry. Co.*, 28 L. J. Ex. 51.) This decision would, of course, apply to other obstructions caused by the act of God. (See *ante*, p. 44.) "The duty to deliver within a reasonable time being merely a term ingrafted by legal application upon a promise or duty to deliver generally." (Tindal, C. J., in *Raphael* v. *Pickford*, 5 M. & G. 558.)

As to what damages a carrier is liable for in consequence of a late delivery of the goods, see *post*, Chap. XII. Art. 199.

98. A carrier is bound to give notice to the consignee of the arrival of the goods, where it is not,

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under the circumstances, part of his duty to deliver them. (*Bourne* v. *Gatliffe*, 7 M. & G. 850, 865; 8 Sco. N. R. 604; *Golden* v. *Manning*, 2 W. Bl. 916; *Duff* v. *Budd*, 3 B. & B. 177; *Garnett* v. *Willan*, 5 B. & A. 58.)

As to the duty of a railway company, see *post*, Chap. XII. Art. 203.

99. A common carrier by land is bound, in the absence of any established usage, or any special contract to the contrary, to deliver the goods at the house of the consignee if his residence be known. (*Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389; *Storr* v. *Crowley*, 1 M'Cl. & Y. 129; *Duff* v. *Budd*, 3 B. & B. 182.)

If a common carrier conveys goods specially addressed, and tenders them for delivery at a reasonable hour at the address given, his liability as a common carrier will cease.

Whether the carrier is bound to deliver at the residence of the consignee seems to depend on the circumstances of each particular case. If it be the carrier's course of trade to deliver goods at the consignee's residence, he is clearly bound to do so. (*Golden* v. *Manning*, 2 W. Bl. 916.)

In the case of railway companies acting as carriers, see *post*, Chap. XII. Art. 204.

In *Hyde* v. *Trent and Mersey Nav. Co.*, *supra*, the subject was considerably discussed, whether the carrier was bound to deliver to the individual at his house, or whether he discharged himself from liability by delivery to a porter, at the inn in the place of destination. The opinion of Lord Kenyon was, that the

carrier was thus discharged, but the three other judges, Buller, Ashurst, and Grose, were of opinion, that the risk of the carrier continued until a personal delivery at the house or place of deposit of the consignee. Buller, J., said, "According to the argument, from the inconvenience that carriers are not bound to deliver goods, I think the same argument tends to establish a much greater inconvenience, the necessity of three contracts in all cases where the goods are sent by a coach or wagon; one with the carrier, another with the innkeeper, and a third with the porter. But, in fact, there is but one contract; there is nothing like any contract, or even communication, between any other person than the owner of the goods and the carrier."

A distinction may be drawn between the two parts of a contract made by a common carrier to carry goods from A. to Z., and there deliver them at some particular address. The carriage from A. to Z. is undertaken in the capacity of a common carrier; but can a person be said to be a common carrier between the terminus at Z. and the various addresses in Z. to which the goods may be consigned?

But this makes little practical difference, because he cannot avail himself by way of defence of any distinction between the special undertaking and the undertaking of a common carrier. (See Campbell on Negligence.)

The *primâ facie* obligation of a carrier with respect to delivery may be affected by a well-established and generally well-known custom and usage; but, to have that effect, it must be so uniformly acquiesced in, by length of time, that the jury will feel themselves constrained to say that it entered into the minds of the parties, and made a part of the contract. (*Cahn* v. *Michigan, &c. Ry. Co.*, 71 Ill. 96.)

American cases decide that "express" carriers *primâ facie* assume the responsibility of common carriers, and are bound, ordinarily, to make personal delivery on arrival at the place of destination. (*Haslam* v. *Adams' Express Co.*, 6 Bosw. 235.)

100. A delivery of the goods to a duly-authorized agent of the owner, or consignee, is a sufficient delivery. (*D'Anjou* v. *Beayle*, 3 Harr. & J. 206; *Lewis* v. *Western Ry. Co.*, 11 Met. 509.)

But in an action for non-delivery, if the defence is that a delivery was made to an agent, it must be clearly proved that the person to whom the goods were delivered as agent was duly authorized as such. (*Combs* v. *Bristol Ry. Co.*, 3 H. & N. 1.) In *Ostrander* v. *Brown* (15 Johns. 39), the goods were taken away from the wharf where they were landed without the direction of the consignee, by a carman usually or always employed to transport his goods; yet this was not held to be evidence of a delivery, as the carman was not to be deemed the general agent of the consignee for receiving his goods. "Because," said the Court, "a merchant usually selects a carman, and employs him exclusively in carrying goods according to his orders, it by no means follows he is his general agent for receiving goods without orders."

101. If the carrier delivers the goods at the place directed in accordance with the ordinary usage, he has fulfilled his obligation, and is not liable, though he has delivered them to a person the consignor did not intend. (*M'Kean* v. *M'Ivor*, L. R. 6 Ex. 36; 40 L. J. Ex. 30.)

Martin, B., in delivering judgment, said: "I think the carriers obeyed the directions given to them, and therefore, for that reason, I am of opinion they have been guilty of no wrong, because they dealt with these goods in the manner in which they were directed to do. For the purpose of making carriers guilty of a conversion of goods, there must be something beyond this—some fault or some wrong; and, in my judgment, it is a question of fact, whether or not their conduct with respect to the delivery of the

goods was negligent. If they, by reason of the directions given by the consignor, were naturally led to act as they did, I do not think that would be a conversion; nor would the mere fact of the person who received the goods not being the person to whom the goods were addressed, there being no such person there, in my judgment make the carriers responsible as for a conversion." (See *post*, Chap. XII.)

It has been held in America, that if a common carrier delivers goods to the wrong person, he is responsible, although the address of the consignee was erroneously given. (*McCulloch* v. *McDonald*, 91 Ind. 240.)

The rule that the owner must bear the loss in case of a misdelivery arising from his improperly addressing the package, has been applied in America, where the package was carried to the wrong place, and there destroyed by fire, without any fault of the carrier. (*South. Exp. Co.* v. *Kaufman*, 12 Heisk. 161.)

102. If the carrier deliver the goods to a person not entitled to receive them, this is a conversion of the goods, for which he is responsible. (*Gosling* v. *Higgins*, 1 Camp. 451; *Garrett* v. *Willan*, 5 B. & A. 58.)

See *post*, Chap. XII.

A carrier is bound to deliver goods intrusted to him at the place to which they are addressed; and if he delivers them elsewhere, trover lies against him. (*Stephenson* v. *Hart*, 1 Moo. & P. 357; 4 Bing. 476.)

A common carrier is not estopped from disputing the title of the person from whom he has received goods to carry. And it is an answer to trover against the carrier by such person, that the goods have been delivered to the real owner on his claiming them. (*Sheridan* v. *New Quay Co.*, 28 L. J. C. P. 58.)

103. If any carrier employed to deliver iron, leather, fur or hemp to any workman, to be prepared

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or wrought up, designedly delivers the same to any other person than the person to whom such materials were ordered or intended to be delivered by the owner thereof, he is liable to be prosecuted. (17 Geo. 3, c. 57, s. 9.)

104. If the carrier fails in the discovery of the person mentioned as the consignee, his duty is to hold the goods in some way for the use of the consignor.

See *post*, Chap. XII. Art. 207, and Chap. IX. Art. 136.

105. When goods have arrived at the end of the transit the carrier is bound to keep them a reasonable time for the consignee to claim or fetch them, during which time his liability as an insurer continues; after a reasonable time this extraordinary liability ceases, and he becomes a mere bailee of the goods for hire. (See *ante*, Art. 96, p. 81.) Whilst the goods are in the possession of the carrier, he is bound to take proper means for their preservation. (*Taff Vale Ry. Co.* v. *Giles*, 2 E. & B. 823.) If the goods are destroyed by fire after they are deposited in the carrier's warehouse, and before a reasonable time has elapsed for the consignee to fetch them away, the carrier is liable. (*Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389; *White* v. *Humphrey*, 11 Q. B. 43.)

Goods were sent by a carrier, who delivered them to the consignee accompanied by a printed bill, which stated that "any goods which shall have remained three months in the warehouse without being claimed, or on account of the nonpayment of the charges thereon, will be sold to defray the carriage and other

charges thereon, or the general lien, as the case may be, together with warehouse rent and expenses." The consignee sent them back to the carrier's warehouse to await his orders. They remained there more than a year and then were lost. It was held that the carrier was not, under these circumstances, a mere gratuitous bailee of the goods at the time of their loss, and therefore that the consignee might recover against him the value of the goods. Lord Abinger, C. B., said, "A distinction has been properly drawn between the duties of a carrier and a warehouseman. But the party may have so large a compensation as a carrier, as to be sufficient also to remunerate him for acting as a warehouseman, as is the case with many of the canal companies; and it is quite consistent with both these characters, that he will for a certain time, until further orders, or for a reasonable time, keep the goods, considering the general remuneration for carrying sufficient to cover this risk also." (*Cairns* v. *Robins*, 8 M. & W. 258.)

A railway company, as carriers, brought some goods by their railway to one of their stations, and immediately gave the consignee notice of their arrival, and that they held the goods "not as common carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges." The consignee acquiesced in this, and the goods remained in the charge of the company, and, by their negligence, were damaged. In an action by the consignee against the company:—*Held*, that on the true construction of the notice, the company were not exempted from all liability, but were bound as bailees to take reasonable care of the goods. (*Mitchell* v. *Lancashire and Yorkshire Ry. Co.*, L. R. 10 Q. B. 256; 44 L. J. Q. B. 107.)

See *post*, Chap. XII. Art. 207.

106. Where goods are sent by a carrier to be paid for on delivery, the consignee is entitled to a reasonable time in which to inspect the goods before he accepts them, and the carrier does not make himself

Chap. VII. Art. 106.

responsible for the price by affording reasonable opportunity for such inspection, even where he places them in the hands of the consignee, for that purpose, receiving from him the price, as a pledge for their return, if not accepted. (*Lyons* v. *Hill*, 46 N. H. 49.)

As to the duty of a consignee to examine the goods and to ascertain whether they are in good order, see *post*, Chap. XII. Art. 210.

107. If the goods are tendered to the consignee, and he refuses to receive them, the carrier is not necessarily bound to give the consignor notice of the refusal, but he is bound to do what under the circumstances may be reasonable. (*Hudson* v. *Baxendale*, 2 H. & N. 575; 27 L. J. Ex. 93.) Whether the circumstances of the case make it reasonable that the carrier should give such notice, is a question for the jury. (*Ib.*)

See note to next Article.

In that case the carriers, on the refusal by the consignee to receive a puncheon of rum, put it into a warehouse, and left it there for two months without giving notice to the consignor. At the end of this period, it was found that a portion of its contents was gone. In an action by the consignor it was held that the carriers had acted in a reasonable manner, and were not liable. Bramwell, B., said: "I doubt if a consignor has a right to impose on a carrier the burden of doing anything after he has tendered the goods. But assuming that he has, it is sufficient if the carrier does what is reasonable. It was urged that the carrier must inform the consignor if the consignee refuses to receive the parcel. I wholly deny that as a rule of law. There may be cases in which such a course may be reasonable. But in others the consignor may not be known."

When a carrier by land has carried goods to their destination,

in pursuance of a contract with one who is both consignor and consignee, and through the default of the latter the goods are left in the carrier's hands, he is bound to take reasonable measures for the preservation of the goods, and can recover from the consignee payments he has made on account of expenses so incurred. (*Gt. N. Ry. Co.* v. *Swaffield*, 43 L. J. Ex. 89; L. R. 9 Ex. 132. See *post*, Arts. 118 and 207.)

108. A common carrier, after a refusal of the goods at the consignee's address, is an involuntary bailee, and only bound to act with reasonable care and caution with respect to the custody of the goods. (*Heugh* v. *L. & N. W. Ry. Co.*, L. R. 5 Ex. 51; 39 L. J. Ex. 48; *Cox* v. *Petersen*, 30 Ala. 608.)

Baron Martin, in giving judgment in the case of *Heugh* v. *L. & N. W. Ry. Co.* (*supra*), said: "If a person undertakes the duty of a carrier, there is a most onerous duty imposed upon him. He becomes, in point of fact, an insurer; but when he has done all he has contracted to do *as carrier*, that condition ceases, and he may be in the condition of a man with goods forced upon him: and that imposes upon him the duty of acting as a reasonable and prudent man would act."

It was decided in *Crouch* v. *G. W. Ry. Co.* (27 L. J. Ex. 346; 3 H. & N. 183), that where goods are tendered by a carrier to the consignee, who refuses to pay the carriage, whereupon the carrier refuses to deliver the goods, it is the duty of the carrier to retain the goods at their place of destination, at least, for a reasonable time, and during that time to await the directions from, if not to communicate with, the consignor. (See Art. 107.)

109. If a carrier tender goods for delivery at the house of the consignee, and they are not accepted (the consignee not being in a position at the time to pay for their carriage), the carrier's liability ceases,

Chap. VII. Art. 109.

he not being obliged to bring the goods more than once for delivery. (*Storr* v. *Crowley*, 1 M'Cl. & Y. 129.)

110. If a common carrier from A. to B. receives goods to be carried from A. to B., and by the known usage and course of business the goods are to be deposited in the carrier's warehouse at B., the responsibility as a common carrier is limited to the arrival of the goods at B., when he holds them not as a common carrier, but as a mere warehouseman. (*Rowe* v. *Pickford*, 8 Taun. 83; *In re Webb*, *id.* 443; *McCarty* v. *New York Ry.*, 30 Pa. St. 247; Angell, 286.)

The keeping of the goods in the warehouse in such cases is, as was observed by Buller, J., in *Garside* v. *Trent Navigation Co.*, "not for the convenience of the carrier, but of the owner of the goods; for when the voyage is performed, it is for the interest of the carrier to get rid of them directly."

If the carrier agrees to let goods remain on his boat for 90 days after arrival without extra charge, he is liable only as a warehouseman after arrival. (*Hathorn* v. *Ely*, 28 N. Y. 78.)

111. A warehouseman does not use ordinary diligence about the goods intrusted to him if he have not his tackle in proper order to crane them into the warehouse, whereby they fall, and are injured. (*Thomas* v. *Day*, 4 Esp. 262.) But he is not liable for a loss by mere accident not resulting from his negligence. (*Garside* v. *Trent Nav. Co.*, 4 T. R. 581.)

CHAPTER VIII.

THE RIGHTS AND REMEDIES OF COMMON CARRIERS OF GOODS.

	Articles
1. *Special Property in the Goods*	112
2. *Insurable Interest in the Goods*	113
3. *Reasonable Hire for the Carriage of the Goods*	114—116
4. *Recovery of Money paid on account of the Goods*	117, 118
5. *Lien*	119—128

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1. *Special Property in the Goods.*

112. A common carrier has a special property in the goods delivered to him, and having once acquired the lawful possession of the goods for the purpose of carriage, he is not obliged to restore them to the owner again, even if the carriage be dispensed with, unless upon being paid his due remuneration; for by the acceptance of the goods he has already incurred risks. (Story on Bailm.; *Scotthorn* v. *South Staffordshire Ry. Co.*, 8 Ex. 341.)

A common carrier may maintain an action against any person who takes the goods out of his possession, or does any injury to them (2 Wms. Saund., ed. of 1871, p. 94); or if he be robbed he may indict the person robbing him. (*Deakin's case*, 2 Leach, 862.)

This right arises from the carrier's general interest in conveying the goods, and his responsibility for any loss or injury to them

during their transit. (Bacon, Abridg. *Contract*, C; Jones on Bailm. 80.)

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2. *Insurable Interest in the Goods.*

113. A common carrier may insure goods which are in his possession for the purpose of conveyance. (*Chase* v. *Washington Mutual Insurance Co. of Cincinnati*, 12 Barb. 595. And see 21 A. & E. Ry. Cas. 112.)

This insurable interest continues so long as the liability of the carrier continues, even where he employs other carriers. (*Ibidem*; *Miller* v. *Steam Nav. Co.*, 13 Barb. 361.)

Common carriers may insure goods in their possession, as carriers, describing them as "goods in trust as carriers," and such an insurance will cover the whole value of the goods, and if the goods are destroyed by fire, the carrier will be entitled to recover of the insurer their full value, and it will make no difference that under the statute, or by special contract, the carriers were not responsible for losses by fire. (*L. & N. W. Ry. Co.* v. *Glyn*, 28 L. J. Q. B. 188; 5 Jur. N. S. 1004.)

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3. *Reasonable Hire for the Carriage of the Goods.*

114. A common carrier is entitled to his reasonable hire for the carriage of the goods, and may in the first instance refuse to take charge of goods unless previously paid the price of their carriage; or, having conveyed them to their place of destination, he may decline delivering them until payment. (*Wright* v. *Snell*, 5 B. & A. 353.)

If the price of carriage is not paid before the goods are received, the carrier cannot sue for such price till

they are delivered. (*Barnes* v. *Marshall*, 18 Q. B. 785.)

The price charged by the carrier for the conveyance of the goods must be no more than a reasonable remuneration (*Harris* v. *Packwood*, 3 Taun. 264); but apart from any Act of Parliament, he is not bound to charge all persons equally. (Per Willes, J., in *Branly* v. *S. E. Ry. Co.*, 31 L. J. C. P. 288; *Baxendale* v. *Eastern Counties Ry. Co.*, 27 L. J. C. P. 137.)

A common carrier is entitled to make a higher charge for the greater risk attending the carriage of valuable goods, but the charge must be reasonable. (*Harris* v. *Packwood*, *supra*.)

To support an action for refusing to carry, it is sufficient if the consignor was ready and willing to deal for ready money, and notifies that readiness and willingness to the carrier; the money is not required to be paid down until the carrier receives the goods which he is bound to carry. (*Pickford* v. *Grand Junc. Ry. Co.*, 8 M. & W. 372.)

115. The person primarily liable to pay the carriage is the person with whom the carrier contracts. This is in general the owner of the goods. The consignor is, therefore, as a rule, primarily liable, unless he be forwarding the goods as vendor, in pursuance of a contract of sale; in that case, as the property in the goods usually passes on delivery to a common carrier, the consignor is deemed (in absence of special circumstances) to enter into the contract as agent of the consignee, the owner of the goods, so that the latter is liable.

But there is nothing to prevent the consignor making the contract on his own account, and so becoming personally liable; and even if he does so, yet where the consignee receives the goods, and promises, either expressly or by implication, to pay the carriage, such consignee may also in general be sued for the carriage of the goods, as the waiving by the carrier of his lien on the goods affords sufficient consideration to support the contract to pay such carriage. (*Jesson* v. *Solly*, 4 Taun. 52; *Moller* v. *Young*, 25 L. J. Q. B. 94; 5 E. & B. 755.)

116. The carrier has a right to recover the hire and charges paid, although the goods may have suffered damage before they reached him, while in the hands of a preceding carrier. (*Bowman* v. *Hilton*, 11 Ohio, 303; *Bissel* v. *Price*, 16 Ill. 408; *White* v. *Vann*, 6 Humph. 70.)

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4. *Recovery of Money paid on account of the Goods.*

117. Where goods necessarily pass through the hands of several distinct carriers, the last carrier is entitled to be reimbursed any money he may have paid out to the carrier from whom he received the goods, and who has carried them during the earlier part of the journey.

A carrier has also a right to recover from his employer what he may have paid in booking a parcel where he has been employed to carry the same, and

to deliver it to some other carrier entitled to make a charge for booking.

118. A common carrier by land is entitled to recover expenses necessarily incurred by him in the preservation of the goods from extraordinary perils, not properly arising from his ordinary duty as a common carrier. (Story on Bailm.)

As if a sudden flood or storm should do injury to the goods, and some immediate expense for their preservation should become necessary, the carrier would be bound to incur it, and would be entitled to call upon the owner for reimbursement.

See note to Art. 107.

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5. *Lien* (*a*).

119. A common carrier has a particular or specific lien at common law, which empowers him to retain goods carried by him until the price of the carriage of those particular goods has been paid, unless he has entered into some special contract by which it is waived. (*Skinner* v. *Upshaw*, Ld. Raym. 752.)

A common carrier's claim to a general lien can be supported only by proof of general usage, special agreement, or mode of dealing supporting such claim. (*Rushforth* v. *Hadfield*, 6 East, 519; 7 East, 244; *Wright* v. *Snell*, 5 B. & A. 350.)

The lien of a common carrier being a common law lien, he cannot, in the absence of express contract or usage from which a

(*a*) As to the lien of railway companies, see *post*, Chap. XIII. Art. 229.

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contract may be implied, detain the goods of his employers for anything beyond the price of the carriage of the goods so conveyed (*Skinner* v. *Upshaw*, Ld. Raym. 752), as, for instance, for booking or warehouse room. (*Lambert* v. *Robinson*, 1 Esp. 119; *G. N. Ry. Co.* v. *Swaffield*, L. R. 9 Ex. 137, per Pollock, B.)

The claim of a common carrier to retain goods for his *general balance* is not encouraged by the Courts. (*Aspinall* v. *Pickford*, 3 Bos. & Pul. 44, n.; *Holderness* v. *Collinson*, 7 B. & C. 212.)

By express stipulation with their customers, carriers may undoubtedly secure to themselves a general lien. Railway companies and other carriers have attempted to obtain it by issuing a general notice to that effect. (The cases on these notices are set out in Cross on Liens, p. 283; Angell on Carriers, p. 334.)

In no case can the carrier stop the goods at the *commencement* of the journey and hold them there under a claim of lien. (Per Martin, B., in *Wiltshire* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 776, 780.)

The goods must be carried and ready for delivery, or the carrier has no right to detain them for freight, the performance of the contract, on the part of the carrier, being a condition precedent to the right to demand freight. (*Palmer* v. *Lorillard*, 16 Johns. 348.)

In England the right of lien exists whether the goods are the property of the person who has tendered them for conveyance, or the property of third parties from whom they have been fraudulently taken or stolen. (*Exeter Carriers' case*, 2 Ld. Raym. 867.) In America it is held that a common carrier who innocently receives goods from a wrongdoer, without the consent of the owner, express or implied, has no lien upon them for their carriage against the owner, "no man can be divested of his property without his consent." (See cases cited in Angell on Carriers, p. 340.)

120. The existence of a special contract between a common carrier and his employer, regarding the services to be performed, and the compensation to be

paid, does not deprive the former of his lien, unless there is something in that contract inconsistent with such lien. (Per Lord Ellenborough, in *Chase* v. *Westmore*, 5 M. & S. 180.)

Credit given, by the contract, to the employer for the price of carriage, beyond the time when the goods carried are to be delivered and placed out of the carrier's control, is inconsistent with a lien. (*Raitt* v. *Mitchell*, 4 Camp. 149; *Crawshay* v. *Homfray*, 4 B. & A. 50.)

This principle has been extended to cases where there was no express agreement to give credit, but where, by the usage of trade, a credit might be claimed. (*Ibid.*)

121. Where goods are carried over several successive routes, there is a custom sanctioned by law, for each carrier to collect his freight of the one to whom he delivers the goods, and the last carrier has a lien on them for his own freight and for the advances paid by him.

122. A carrier who, by the custom of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee, who has paid the price of them, for a general balance due for the carriage of other goods of the same sort sent by the consignor. (*Butler* v. *Woolcott*, 2 Bos. & Pul. 64.)

123. Where goods are consigned to an individual, or to his order, the carrier has a right to consider him as the owner of the goods for the purpose of delivery, but not for the collateral purpose of creating a lien on

Ch. VIII. Art. 123.

the goods as against the owner, in respect of a general balance due from the consignee. (*Wright* v. *Snell*, 5 B. & A. 350.)

In that case a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners, and goods were sent to the order of J. S., a factor, the Court held that the carrier had not as against the real owner, any lien for the balance due from J. S.

124. A carrier by delivering part of the goods does not abandon his lien upon the rest for his unpaid carriage. He is bound to deliver up to the extent of the freight which has been paid; but the moment that he has delivered enough to satisfy that, he has his lien upon the whole of the remainder of the goods for the unpaid balance of the carriage. (*Ex parte Cooper*, 11 Ch. D. 68; 48 L. J. Bkcy. 49.)

It has been held in America that delivery by a common carrier, of a part of the goods transported, without payment of freight does not discharge the lien upon the remainder for the whole amount, unless such was the intention of the parties; and the question of intention is for the jury. (*New Haven and Northampton Co.* v. *Campbell*, Mass. 104.)

125. The general rule, that a lien is defeated by delivering up possession of the goods after the lien has attached, is applicable to carriers to the same extent as in other cases. (See Addison on Contracts, 8th ed. p. 569.)

But if the carrier loses the possession by fraud, the lien revives if possession is recovered. (*Wallace* v. *Woodgate*, Ry. & M. 194.)

A delivery of the goods to a common carrier for conveyance to the buyer is such a delivery of actual possession to the buyer through his agent, the carrier, as suffices to put an end to the vendor's lien. (See cases in n. 3, p. 602, of 1st ed. of Benjamin on Sales.)

As to suing the consignee for the price of the goods received by him from the carrier under an express or implied promise to pay the carriage, see Chap. VIII. Art. 115.

126. A lien does not authorize the carrier to sell the goods over which the lien extends. (See *Mulliner* v. *Florence*, 3 Q. B. D. 484; 47 L. J. Q. B. 700.)

If the goods are sold, the lien is waived, and the seller is liable for the value of the goods, and cannot set off the amount of his lien. (*Ibid.*)

It has been held in America that the carrier can only sell the goods upon unquestionable proof that the consignee cannot be found, and that they are perishable. In the absence of a controlling necessity to sell the goods, the carrier can only enforce his lien by due process of law; meanwhile carefully storing them. (*Rankin* v. *Memphis, &c. Packet Co.*, 9 Heisk. 564.)

The case of *Mulliner* v. *Florence*, *supra*, was decided before the passing of the Innkeepers Act, 1878, which enables a landlord to dispose of goods left with him after six weeks.

127. A carrier is not entitled to make any charge for warehousing the goods, during such time as he may be retaining them as a lien for his carriage. (*British Empire Shipping Co.* v. *Somes*, 8 C. & F. 338; E. B. & E. 353.)

In that case Lord Campbell, C. J., said:—"The right of detaining goods, on which there is a lien, is a remedy for the party aggrieved which has to be enforced by his own act; and where

Ch. VIII. Art. 127.

such a remedy is permitted, the common law does not seem generally to give him the costs of enforcing it."

128. The lien which a carrier has on goods carried for the carriage money is to be exercised subject to the obligation of keeping the goods for such a time in such a place as may be reasonably adapted for allowing the consignee means of taking possession of them on payment of the charge. (*Crouch* v. *G. W. Ry. Co.*, 27 L. J. Ex. 345; *post*, Chap. XII. Art. 206.)

A carrier has in no case a right to use the goods detained by him. And if perishable articles be detained he is bound to exercise every care in their preservation. (*Scarfe* v. *Morgan*, 4 M. & W. 270.)

CHAPTER IX.

THE RIGHTS AND DUTIES OF THE VENDOR AND VENDEE OF THE GOODS IN RELATION TO THEIR CONVEYANCE BY A CARRIER.

1. *Generally* ..... *Arts.* 129—137.
2. *Stoppage in Transitu* ..... *Arts.* 138—146.

1. *Generally.*

129. The delivery of goods by the vendor to a common carrier, for the purpose of transmission to the vendee, will, in the absence of any special arrangement, and where the contract is otherwise binding, amount to a delivery to the vendee, so as to vest the property in the goods in him.

Where the vendor is bound to send the goods to the purchaser, the delivery of the goods to a common carrier, *à fortiori*, to one specially designated by the purchaser, for conveyance to him, or to a place designated by him, constitutes an actual receipt by the purchaser. (*Dawes* v. *Peck*, 8 T. R. 330; *Cusack* v. *Robinson*, 30 L. J. Q. B. 261; *Smith* v. *Hudson*, 34 L. J. Q. B. 145; and judgment of Lord Cottenham, in *Dunlop* v. *Lambert*, 6 C. & F. 620; Blackburn on Contract of Sale (2nd ed.), p. 246.)

In such cases the carrier is, in contemplation of law, the bailee of the person *to* whom, not *by* whom, the goods are sent, the latter

Chap. IX. Art. 129.

in employing the carrier being considered as an agent of the former for that purpose. If the vendor, however, expressly agrees to deliver *at a certain place*, he will be assumed to undertake the risks of carriage to that place; and a carrier taking goods on the way to that place would be presumed to be his agent, and not the buyer's. (*Dunlop* v. *Lambert*, *supra*; *G. W. Ry. Co.* v. *Bagge*, 15 Q. B. D. 625; 54 L. J. Q. B. D. 599.)

It must not be forgotten that the carrier only represents the purchaser for the purpose of *receiving*, not *accepting*, the goods. (See Art. 132.)

If the reason why the delivery of the goods to the carrier appropriates them to the contract of sale, and vests the property in the purchaser, is that the carrier is an agent of the purchaser, having authority to receive the goods for him, it follows that when the carrier receives the goods under a contract with the vendor, by which he agrees to keep possession of the goods subject to the vendor's orders, the property is not transferred: for in such a case it is clear that the carrier does not receive the goods as an agent for the purchaser. (See Blackburn on Contract of Sale, 2nd ed. p. 140.)

130. If the vendor sell goods, undertaking to make the delivery himself at a distant place, thus assuming the risks of the carriage, the carrier is the vendor's agent. (*Dunlop* v. *Lambert*, 6 C. & F. 600.)

See Art. 129.

131. The receipt of goods by a carrier, although appointed by the purchaser, does not constitute an acceptance within the Statute of Frauds, the carrier being only an agent for the purpose of receiving and carrying the goods for his employer. (*Astey* v. *Emery*, 4 M. & S. 262; *Smith* v. *Hudson*, 34 L. J. Q. B. 145;

and cases cited in Benjamin on Sales, 3rd ed. p. 143; and Blackburn on Contract of Sale, 2nd ed. pp. 17, 139.)

If the purchaser deals with the carrier so as to convert him into an *agent for custody*, holding the goods as the purchaser's servant or agent, then the carrier's receipt and acceptance is the receipt and acceptance of the purchaser.

An agent for custody is a person who has received goods by the direction and authority of the purchaser as a depositary or bailee invested with authority to receive goods and sell them for the purchaser, or to hold them generally on account of the latter at his disposal, and not for the purpose of helping the goods on a stage further in a direct course of transmission to him. (See Addison on Contracts, 8th ed. p. 962.) The delivery to such agent is a delivery to the principal, and the *transitus*, consequently, is determined as soon as the goods reach his hands; and if the transit be once at an end, it cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination. (*Dixon* v. *Baldwin*, 5 East, 184; *Ex parte Cooper*, 11 Ch. D. 68, *post*, Art. 142.)

Delivery at a railway station named by the purchaser, in pursuance of a parol order by him, is not evidence of acceptance. (*Smith* v. *Hudson*, 34 L. J. Q. B. 145.)

132. Although the acceptance and receipt of a carrier to whom goods are delivered to be conveyed to a purchaser are not the acceptance and receipt of the purchaser within the meaning of the Statute of Frauds, yet a delivery, by a vendor to a carrier, of goods sold is a sufficient delivery to the purchaser to enable the vendor (if the contract of sale is properly authenti-

Chap. IX. Art. 132.

cated) to maintain an action for the price. (Addison on Contracts, 8th ed. p. 950.)

The delivery of the goods to the carrier operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happens to the goods, it is at his risk (*Dutton* v. *Solomonson*, 3 Bos. & Pul. 584; *Tregelles* v. *Sewell*, 7 H. & N. 574), unless by the terms of the contract the transfer of the right of property and risk are made dependent on the arrival of the goods at their place of destination. (*Calcutta, &c. Steam Nav. Co.* v. *De Mattos*, 33 L. J. Q. B. 214.) The only exception to the purchaser's rights over the goods is that the vendor, in case of the insolvency of the purchaser, may stop them *in transitu*. (*Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560.)

133. If the vendor is authorized and empowered to select the goods and forward them to the purchaser, the selection by the vendor, and the delivery of the goods to a carrier to be conveyed to the purchaser, will have the effect of transferring the ownership and risk to such purchaser, provided there is a binding contract by note in writing, by part payment, or by part acceptance, and the selection is made according to the orders or authority given. (*Fragano* v. *Long*, 4 B. & C. 221; *Browne* v. *Hare*, 29 L. J. Ex. 6; 4 H. & N. 822.)

134. The vendor is bound, when delivering to a carrier, to take the usual precautions for ensuring the safe delivery to the vendee. (*Clarke* v. *Hutchins*, 14 East, 475; *Buckman* v. *Levy*, 3 Camp. 414; *Cothay* v. *Tute*, 3 Camp. 129.)

In *Clarke* v. *Hutchins*, the vendor, in delivering goods to a

trading vessel, neglected to apprise the carrier that the value of the goods exceeded 5*l.*, although the carriers had published, and it was notorious in the place of shipment, that they would not be answerable for any package above that amount unless entered and paid for as such. The package was lost, and on the vendor's action for goods sold and delivered, it was held by the King's Bench, Lord Ellenborough giving the decision, that the vendor had not made a delivery of the goods; not having "put them in such a course of conveyance as that, in case of a loss, the defendant might have his indemnity against the carriers." (See Benjamin on Sales, 3rd ed. p. 687.)

135. Where goods are ordered from a distant place, the vendor's duty to deliver them in merchantable condition is complied with if the goods are in proper condition when delivered *to* the carrier, provided the injury received during the transit does not exceed that which must necessarily result from the transit. (*Bull* v. *Robison*, 24 L. J. Ex. 165; 10 Ex. 342.)

In that case iron was sold in Staffordshire, deliverable in Liverpool in the winter, and the vendor was held to have made a good delivery, although the iron was rusted and unmerchantable when delivered in Liverpool, it being proved that this deterioration was the necessary result of the transit, and that the iron was bright and in good order when it left Staffordshire.

136. When the purchaser refuses to receive the goods from the carrier, the latter holds them as the agent of the consignor from whom he received them, and there is no acceptance and actual receipt by the purchaser within the meaning of the Statute of Frauds, although the latter has directed the mode of conveyance, and pointed out the particular carrier to be em-

ployed. (*Astey* v. *Emery*, 4 M. & S. 262; *Norman* v. *Phillips*, 14 M. & W. 277.)

137. Where goods delivered to a carrier to deliver to a consignee are lost through the default of the carrier, the consignee is the proper person to sue, for the consignor was his agent to employ the carrier; but it is otherwise when the property in the goods has not yet passed to the vendee, as where there is no writing sufficient to satisfy the Statute of Frauds, and the carrier was not of his selection (*Coates* v. *Chaplin*, 3 Q. B. 483; *Coombs* v. *Brist. and Ex. Ry. Co.*, 3 H. & N. 510); or where the goods are sent merely for approval (*Swain* v. *Shepherd*, 1 M. & Rob. 224), or the consignee is the agent of the consignor (*Sargent* v. *Morris*, 3 B. & A. 277), or the carrier has contracted to be liable to the consignor in consideration of the latter's becoming responsible for the price of the carriage. (*Moore* v. *Wilson*, 1 T. R. 659; *Davis* v. *James*, 5 Burr. 2680.)

See *ante*, Art. 130.

As to the measure of damages where goods are lost by the carrier, see *post*, Chap. XII., Art. 200.

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2. *Stoppage in Transitu.*

138. If the purchaser of the goods becomes bankrupt or insolvent before payment of the price, the vendor is entitled, so long as the goods are *in transitu*, and have not reached their final destination or come

into the manual possession of the purchaser, or that of any other party whom he may have appointed his agent finally to take possession of and keep the goods for him, to retake them and put himself into the same situation as if he had never parted with the actual possession of them. (*Gibson* v. *Carruthers*, 8 M. & W. 331; *Grice* v. *Richardson*, 3 App. Cas. 319; Addison on Contracts, 8th ed. p. 959.)

This is a right which arises solely upon the *insolvency* of the buyer, and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts. (Per Lord Northington, C., in *D'Aquila* v. *Lambert*, 2 Eden, 77.)

The stoppage to be effectual must be on behalf of the vendor, in the assertion of his rights as paramount to the rights of the buyer. (*Wilson* v. *Anderton*, 1 B. & Ad. 450; *Siffkin* v. *Wray*, 6 East, 371.)

"There is no necessity that the buyer should have been formally a bankrupt, if he have become insolvent. There must, however, be great practical difficulty in establishing the actual insolvency of one who still continues to pay his way; and as the carrier obeys the stoppage *in transitu* at his peril if the consignee be in fact solvent, it would seem no unreasonable rule to require that, at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act." (Blackburn on Contract of Sale, 2nd ed. p. 382.)

Lord Justice James said that a company was insolvent when its assets and existing liabilities were such as to make it reasonably certain that the existing and probable assets would be insufficient to meet the existing liabilities. A man is insolvent, said Willes, J., when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do.

"It is sufficient for the purpose of stoppage *in transitu* to show

Chap. IX. Art. 138.

that the vendee was in such circumstances as not to be able to meet his engagements." (*Schotsmans* v. *Lanc. and York. Ry. Co.*, L. R. 1 Eq. 360.)

139. Goods delivered to a carrier to be conveyed from a vendor to a purchaser are held to be *in transitu;* although they may have been consigned to a carrier specially appointed by the purchaser to receive them, and they remain *in transitu* until they have reached the hands of the vendee, or of one who is his agent to give them a new destination. (*Bolton* v. *Lanc. and York. Ry. Co.*, L. R. 1 C. P. 431; 35 L. J. C. P. 137; *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560; *Bethell* v. *Clark*, 20 Q. B. D. 615; 57 Q. B. D. 302.)

The principle to be deduced from the decided cases is that the *transitus* is not at an end until the goods have reached the place named by the buyer to the seller as the place of their destination. (See cases cited in Roscoe's Nisi Prius Evidence, 14th ed. p. 912.)

But the mere arrival of the goods at their destination will not suffice to defeat the vendor's rights. The vendee must take actual, if he has not obtained constructive, possession. (See Benjamin on Sales, 3rd ed. p. 847.)

If the goods are in the custody of the carrier, as a warehouseman and not as a carrier, the unpaid vendor has no right to stop them. (*Wentworth* v. *Outhwaite*, 12 L. J. Ex. 172; 10 M. & W. 436; *Smith* v. *Hudson*, 34 L. J. Q. B. 145.)

Erle, C. J., in giving judgment in *Bolton* v. *Lanc. & York. Ry. Co.*, *supra*, said :—"Before the goods arrived notice had been given by the vendee that he intended to dispute his liability to take them, and after they arrived orders were given to the railway company to take them back. The vendor refused to receive them, and, being refused both by vendor and vendee, they remained in the defendants, the railway company's, hands. I am of opinion that they

never ceased to be *in transitu*. (*James* v. *Griffin*, 6 L. J. Ex. 241; 2 M. & W. 623.) . . . . Carriers, no doubt, may become warehousemen for the consignee, and in many cases do; but there must be a change from their position as carriers to the position of warehousemen, and the parties concerned must make this change; but there was no contract here to make the railway company warehousemen." And Willes, J., said:—"Different opinions have been held on the question of whether a part delivery is a constructive delivery of the entire goods comprised in the contract, so as to put an end to the right to stop *in transitu* as to the whole of the goods. At one time it was held that there was a constructive delivery of the whole. This, however, has since been questioned and dissented from; and it has been said only to be a constructive delivery of the whole if the vendor gives and the vendee takes possession of part, meaning thereby respectively to give and take possession of the whole."

140. If the vendee takes the goods out of the possession of the carrier into his own before their arrival at their destination, the right to stop *in transitu* is at an end. (*Whitehead* v. *Anderson*, 9 M. & W. 518, 529.)

A mere demand by the vendee before the end of the journey will not defeat the right. (*Jackson* v. *Nichol*, 5 N. C. 508; *Coventry* v. *Gladstone*, L. R. 6 Eq. 44; 37 L. J. Ch. 492.)

Whether the *transitus* is terminated by the buyer prematurely taking possession against the will of the carrier, and so tortiously against him, has been questioned. (See Blackburn on Contract of Sale, 2nd ed. p. 375.) "The law in general discountenances violence, and it would seem not consistent with its general policy to give a man a benefit in consequence of his forcible or fraudulent wrong against a third party."

Chap. IX. Art. 141.

141. When goods are placed in the possession of a carrier to be carried and delivered, the *transitus* is not at an end so long as the carrier continues to hold the goods as carrier, and is not at an end until the carrier by agreement between himself and the consignee agrees to hold the goods for the consignee, not as carrier, but as his agent, or as a warehouseman or wharfinger. (*In re M'Laren, Ex parte Cooper*, 11 Ch. D. 68; 48 L. J. Bkcy. 49; *Ex parte Barrow*, 46 L. J. Bkcy. 71; 6 Ch. D. 783.)

If the carrier enters expressly, or by implication, into a new agreement with the purchaser, distinct from the original contract for carriage, to hold the goods for the purchaser as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new or further order to be given by him, the *transitus* is at an end, and the goods are constructively in the possession of the purchaser, and cannot be retaken by the vendor. (*Whitehead* v. *Anderson*, 9 M. & W. 518; Addison on Contract of Sale, 8th ed. p. 962.)

But the assent of the carrier to hold the goods as an agent for custody on behalf of the purchaser must be clearly established in order to put an end to the *transitus*, and deprive the vendor of his right to stop the goods. (*Bolton* v. *Lanc. & York. Ry. Co.*, L. R. 1 C. P. 431; 35 L. J. C. P. 137.)

A mere promise by the carrier to deliver the goods to the purchaser as soon as they can be got at is not enough to bring them into the possession, actual or constructive, of the purchaser. (*Coventry* v. *Gladstone*, *supra*.)

Where goods are delivered to a middleman in the first instance in the capacity of a carrier, any act of the buyer whereby he constitutes the carrier his warehouseman will be equivalent to actual receipt.

142. If the carrier delivers the goods at their intended destination to some person other than the buyer, as to a wharfinger or warehouseman, the transit still continues, unless he takes as agent for the buyer. (*In re Worsdell*, 6 Ch. D. 783.)

143. Though the goods remain in the actual possession of the carrier, yet, if the purchaser has done any act equivalent to taking possession, the right of the vendor to stop them is determined. (*Ellis* v. *Hunt*, 3 T. R. 464; *L. & N. W. Ry. Co.* v. *Bartlett*, 31 L. J. Ex. 92; 7 H. & N. 400.)

144. The vendor's right to stop *in transitu* cannot be defeated by a usage for carriers to retain goods as a lien for a general balance of accounts between them and their consignees. (*Oppenheim* v. *Russell*, 3 Bos. & Pul. 42, 119.)

145. A stoppage *in transitu* can be effected by a notice to the carrier having charge of the goods stating the vendor's claim, forbidding delivery to the consignee, or requiring that the goods shall be held subject to the vendor's orders. (Benjamin on Sales (3rd ed.), p. 849.)

The carrier is entitled to express notice from the consignor before he will be liable for not stopping goods in transit.

If the notice is given to an employer whose servant has the custody, it must be given at such a time, and under such circumstances, that the employer may be able to communicate it to his servant in time to prevent a delivery to the consignee. (*Whitehead* v. *Anderson*, 9 M. & W. 518.)

Chap. IX. Art. 145.

In a recent case in the Court of Appeal (*Phelps, Stokes & Co.* v. *Comber*, 29 Ch. D. 813), it was doubted whether, under any circumstances, a notice to stop goods *in transitu* can be effectual, if addressed to the consignees only, and not to the owner or master of the ship which carries them.

No particular form of notice is required. In *Ex parte Falk* (14 Ch. D. 446), the notice was by cable from Liverpool to Calcutta, and the Court held the notice sufficient.

146. Whenever the right of stoppage *in transitu* exists, and notice has been given to the carrier, after he has received the goods for carriage, and during their transit, not to deliver them over, the carrier is not only excused for non-delivery to the consignee, but he is also subject to an action, if, after such notice and tender of freight, he should refuse to re-deliver the goods. (Angell, p. 322.)

PART II.

CARRIERS OF GOODS BY RAILWAY (a).

CHAPTER X.

THE OBLIGATIONS OF A RAILWAY COMPANY TO RECEIVE GOODS FOR CONVEYANCE, AND THEIR DELIVERY TO THEM.

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147. Section 2 of the Railway and Canal Traffic Act, 1854, imposes on a railway company the duty to afford reasonable facilities for carrying all goods

(a) In connection with this chapter reference should be made to Chap. IV. (*ante*, p. 21), on "The obligations of a common carrier to receive goods," as being applicable to a great extent to the carriage of goods by railway; and also to Chap. XIV., as to the obligation of a railway company to give due and reasonable facilities for the receiving and forwarding of traffic.

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(other than specially dangerous goods). Therefore a railway company cannot absolutely refuse to carry traffic which they have facilities for carrying, even if they do not profess to carry, and do not generally carry, such traffic. The Railway and Canal Traffic Act, 1854, does not make a railway company liable as common carriers in respect of goods which they do not carry as such. (*Dickson* v. *G. N. Ry. Co.*, 18 Q. B. D. 176; 56 L. J. Q. B. 111.)

A railway company are under the same obligations as a common carrier who undertakes to carry in accordance with the provisions of the Railway and Canal Traffic Act, 1854; therefore questions as to how far a railway company are liable to carry goods of every kind, or for all persons alike, or as to how far a sender of goods may require delivery at any station he may appoint, are to be determined in each case, not with reference to what a railway company may choose to do, or may ordinarily do, but with reference to what may be within their powers, and at the same time a reasonable requirement. (*Thomas* v. *North Staffordshire Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 1. Decided by the Railway Commissioners.)

"The Railway Commissioners have jurisdiction to say that reasonable facilities shall be given, and I think that under their powers they had a right to say that the railway company should carry those articles which they said they would not carry." Bramwell, L. J., in *Brown* v. *G. W. Ry. Co.* (*post*, Chap. XIV.). The Commissioners, in *Innes' case* (*post*, Chap. XIV.), said, "The question whether a railway company could under that Act of 1854 be compelled to become carriers does not appear to us to be a part of the present case, because here both companies are carriers, and

to them as such we have no doubt that every portion of the second section of that Act does apply, and that it obliges them to conduct their business so as to give to the public all reasonable facilities, and makes them amenable to our jurisdiction for any failure in that respect."

In *Garton* v. *Bristol & Ex. Ry. Co.* (30 L. J. Q. B. 293), Cockburn, C. J., said, "I do not see that there is any distinction between railway companies and the ordinary common carriers. . . . I think that where a company have opened the line, and have put carriages upon it, it is no longer optional with them to say 'we will or will not carry goods which are brought to us,' if those goods are brought at reasonable times, and a proper amount is tendered for the carriage."

In *Thomas* v. *North Staffordshire Ry. Co.* (*supra*), the railway company delivered minerals at T. station, but refused to deliver there damageable traffic consigned to the applicant, and delivered such traffic at L., one mile and a half from T., which was their general goods station for T. It being proved that the accommodation at T. station was insufficient to receive all the T. goods traffic, and that the railway company had no power to enlarge it, the Commissioners held that the applicant was not entitled to have damageable goods delivered at that station. It appears from the judgment that if the accommodation at T. station had been sufficient to receive all traffic similarly sent, the railway company would have been ordered to deliver damageable goods to the applicant at T. station. The Commissioners, in giving judgment, said: "It was part of the defence made for the company, that they were entitled, on common law principles, to put such restrictions as they pleased on their occupation as carriers by railway; and it was contended by their counsel that the duties of railway companies were not more extensive than those of other land carriers, and that a railway company had the right of a common carrier to refuse to carry goods, or any particular kind of goods, to places to which the company was not in the habit of carrying, or to carry otherwise than in accordance with such conditions as it might hold out

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to the public. But there are several Acts which have extended the duties of railway companies beyond those of common carriers, and amongst them is the Traffic Act of 1854, which seems to us to put every railway company under the same obligations as a common carrier would put himself under, who might possess or undertake to carry in accordance with its provisions, and which requires every railway company, according to its powers, to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from its railways. Questions, therefore, as to how far a sender of goods may require delivery at any station he may appoint, or as to how far a company is liable to carry goods of every kind, or for all persons alike, should, we think, be determined in each case, not with reference with what a railway company may choose to do or may ordinarily do, but with reference to what may be within its powers and at the same time a reasonable requirement." (See also *Aberdeen Lime Co., &c.* v. *Gt. N. Scotland Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 205; and note p. 96 of 1 Ry. & Ca. Tr. Ca.)

As to the power of a railway company to close a passenger station, see Art. 236.

It was formerly held that the obligation of railway companies as to the receiving of goods for carriage was not more extensive than that of ordinary carriers; the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20, s. 86), and the special Acts of the companies not making it obligatory on them to carry. (*Johnson* v. *Midland Ry. Co.*, 4 Ex. 367; *Oxlade* v. *N. E. Ry. Co.*, 15 C. B. (N. S.) 680.) And that, therefore, railway companies were only common carriers of such things as they publicly professed to carry. (*York, Newcastle and Berwick Ry. Co.* v. *Crisp*, 14 C. B. 529.)

The power to carry derived from the 86th section of the Railways Clauses Act, 1845, is clearly permissive. Sometimes the special Act imposes upon the company the obligation to act as carriers. (See Gt. Northern Ry. Act, 13 & 14 Vict. c. lxi.; Lanc. & York. Ry. Act, 22 & 23 Vict. c. cx., and Man. Sheff. & Linc. Ry. Act.)

"It is important, however, to observe that the railway company only obtains a permissive right to charge a maximum rate for the goods it elects to carry, and is not bound to carry every class of goods or minerals which may be offered to it by the public. Thus railway companies who become carriers may decline to carry such classes of articles as they think fit; and as the railways are not ordinarily accessible to the use of private persons with their engines and carriages, the public fail to obtain the benefit of those provisions of the general Act (except so far as the companies may choose to afford them), empowering all persons to use the railways, which were intended to render the railways a general means of conveyance. Considering how much of the whole traffic of the country must now go by railway, we recommend that railway companies should be bound by law to provide means of conveyance for, and to convey all articles tendered to them, subject to such restrictions as the circumstances of the railway may require, which should be defined by bye-laws to be approved as provided by the Act for the Regulation of Railways."—Report of Royal Commission on Railways, 1867. The law was stated as above in this Report. This must, however, now be read subject to the judgment in *Dickson* v. *Gt. N. Ry. Co.* (*ante*, p. 116), where Lindley, L. J., said as follows :—

"There are few enactments which, in plain and distinct terms, impose upon railway companies the duty of carrying any particular things. They are bound to carry troops (7 & 8 Vict. c. 85, s. 12) and mails (36 & 37 Vict. c. 48, s. 18), but until the passing of the Railway and Canal Traffic Act, 1854, the duty of railway companies to carry any particular class of goods depended upon whether they did or did not profess to carry such goods as common carriers. The Railways Clauses Consolidation Act, 1845, did not impose on railway companies any duty to carry goods of which they were not common carriers by reason of their own conduct and profession. This was decided by *Johnson* v. *Midland Ry. Co.* (4 Exch. 367), and was recognised as clear and settled law by Vice-Chancellor Wood in *Hare* v. *L. and N. W. Ry. Co.* (2 J. & H. 80).

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"The Railway and Canal Traffic Act, 1854, materially altered the law in this respect, for it enacts, by sect. 2, that every railway company shall afford all reasonable facilities for receiving, forwarding, and delivering traffic; and by sect. 1 the word 'traffic' includes passengers and their luggage, and goods, animals, and other things. This Act imposes on railway companies the duty to afford reasonable facilities for carrying all passengers, goods, and animals. There may be an exception in the case of specially dangerous goods (see the Railways Clauses Consolidation Act, 1845, s. 105), but these are not now in question. The duty thus imposed on railway companies is inconsistent with their right to refuse to carry any particular class of goods or animals which they have facilities for carrying, and is inconsistent with their right to refuse to carry such goods or animals except upon terms which are unreasonable. The machinery for enforcing this duty is provided by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), to which it is unnecessary to allude further on the present occasion. The important point is that railway companies are bound to carry goods and animals which they have facilities for carrying. It would, however, be a mistake to suppose that railway companies are bound to carry as common carriers everything which they can be required to carry under the provisions of the Railway and Canal Traffic Act, 1854. Railway companies are bound by that Act to provide reasonable facilities for carrying passengers, but they are not common carriers of passengers. So railway companies are bound to provide reasonable facilities for carrying animals or particular classes of goods, but it by no means follows that they are liable as common carriers for what they are bound by statute to carry. This distinction is important, and requires to be borne in mind. Whether railway companies are common carriers of particular classes of goods depends upon what they habitually do, or profess to do, with respect to such goods. The Railway and Canal Traffic Act, 1854, does not make railway companies liable as common carriers in respect of goods which they do not profess to carry as such. This was, in fact, decided in *Oxlade* v. *North Eastern Railway Company* (1 C. B. (N. S.) 454, at p. 498)."

"Generally railway companies, like other carriers, were common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried, for persons generally, but not of goods which they did not profess to carry, and were not in the habit of carrying, or only carried under special circumstances, or subject to express stipulations limiting their liability in respect of them. In 1830 the Carriers' Act was passed for the protection of common carriers against the loss of or injury to parcels delivered to them, the value and contents of which were not declared. In 1845 the Railways Clauses Act was passed. Sect. 86 of that Act is permissive, and railway companies are not as such bound to be carriers; and sect. 89 provides that nothing in the Act contained is to make railway companies liable further or in any other case than they would have been liable as common carriers. So that up to 1854 railway companies, unless compelled by some statute, could have refused to carry dogs or any other traffic which they did not profess to carry, and did not generally carry, as common carriers, and no action would lie to compel them.

"Two important matters are aimed at and hit by the Railway and Canal Traffic Act, 1854. It provides that railway companies shall afford all reasonable facilities for receiving, forwarding, and delivering traffic without delay and without partiality ('traffic' by the interpretation clause including animals), and gives a remedy, if facilities are withheld, on application to the Court of Common Pleas, a jurisdiction now transferred to the Railway Commissioners.

"Since the passing of that Act railway companies cannot, in my opinion, absolutely refuse to carry traffic which they have facilities for carrying, even if they did not profess to carry and did not generally carry such traffic, but would be compellable to carry it, not as common carriers, but with the liabilities of ordinary bailees, and subject to reasonable conditions limiting that liability." *Per* Lopes, L.J., *ibidem.*

148. The Railway and Canal Traffic Act, 1854, s. 2, gives a customer a right to require any number of railway companies in Great Britain to combine to form a continuous route by which his traffic may be sent at a single booking and for a single payment.

That Act gives every individual customer the absolute right to select what railway company he pleases to deliver his traffic to, to deliver that traffic to that company, and to require, without any second booking or any second payment, that the traffic shall be delivered at the station to which he desires it to be sent; provided always that he tenders the traffic to the company at a station where there are proper facilities for receiving it, and that he names as the delivery station a station where there are proper facilities for delivering it, and that there is a continuous route connecting the two stations. In such a case (apart from the particular facility of a through rate) the sum which the customer will have to pay for the transit of his traffic will be ascertained by adding together the local rates of the various companies over whose line it passes.

A railway company has the right (apart from the question of through rates) to collect what traffic it can, to carry it as far as it can by its own line, and there, at the point which is most convenient to itself, to hand it over to the company which is to forward it. (*The G. W. Ry. Co.* v. *The Severn and Wye and Severn Bridge Ry. Co. and The Midland Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 170.)

149. No person is entitled to carry, or to require a

railway company to carry, upon the railway, any aquafortis, oil of vitriol, gunpowder, lucifer matches, or any other goods which in the judgment of the company may be of a dangerous nature; and if any person send by the railway any such goods without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing to the bookkeeper or other servant of the company with whom the same are left, at the time of so sending, he shall forfeit to the company 20*l.* for every such offence. It is lawful for the railway company to refuse to take any parcel that they may suspect to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact. (Railways Clauses Act, 1845 (8 Vict. c. 20), s. 105).

A guilty knowledge is necessary to support a conviction under this section. (*Hearne* v. *Garton*, 28 L. J. M. C. 216.)

"We consider that a railway company should be bound to carry, if required, 'dangerous goods' at a reasonable maximum rate for their conveyance, and subject to such regulations for safety as may be defined by their byelaws." (Report of Royal Commission on Railways, 1867.)

150. Every railway company, and every canal company, over whose railway or canal any gunpowder or other explosives are carried, or intended to be carried, shall, with the sanction of the Board of Trade, make byelaws for regulating the conveyance, loading and unloading of such gunpowder or other explosives on the railway or canal of the company making the byelaws. (38 Vict. c. 17, s. 35.)

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The byelaws adopted by the railway companies are as follows:—

"Byelaws made with the sanction of the Board of Trade for the regulation, of the loading, unloading, and conveyance of explosives on the Railways of the

Railway Company (hereinafter called the Company) made under and in pursuance of the Explosives Act, 1875 (38 Vict. chap. 17), and every other power and authority vested in the Company.

"(a.) The words and expressions used in the following byelaws shall respectively have and include the several meanings assigned to them or defined in 'The Explosives Act, 1875,' and in the Order of Her Majesty in Council, dated the 5th of August, 1875, made in pursuance of section 106 of the said Act, unless the subject or context otherwise requires.

"(b.) The term 'explosive' means and shall include and apply to every article and substance mentioned as or defined to be an explosive in and by the 3rd section of the said Act, or the said Order in Council, or any Order in Council which may hereafter be made in pursuance of the said Act.

"(c.) Where by any of these byelaws any time is prescribed or allowed for giving any notice to the company, or for the doing of any act by the company, such time shall be computed exclusively of Sunday, Christmas Day, Good Friday, and any statutory Bank Holiday.

"1. No carriage containing any explosive which the company shall, by any notice or regulation for the time being in force, notify that they will not receive, forward, or carry, shall be delivered to the company for conveyance, or be brought, sent, or forwarded to or upon any railway of the company.

"2. No person shall send to the company any consignment of explosive, unless he has given to the company forty-eight hours previous notice in writing of his intention to send such consignment, and stating the true name, description, and quantity of the explosive proposed to be conveyed, and his own name and address,

and also the name and address of the proposed consignee, and has had an intimation in writing from the company that they are prepared to receive such consignment.

"3. Consignments of explosive shall be sent to the company's forwarding station, and shall be received by their servants, only at such times during the hours of daylight, that is to say, between sunrise and sunset, as the company may appoint; and every consignment and package containing any explosives proposed to be conveyed on any railway of the company, shall immediately on the arrival thereof at the company's station, wharf, or railway, be delivered to and be received by the company's servants authorised to receive dangerous goods, and by no other person whatsoever.

"4. No explosive shall be loaded or unloaded on the company's premises by the consignor or consignee thereof, or their servants, except between sunrise and sunset.

"5. Safety cartridges and percussion caps and safety-fuze (for blasting), may be conveyed by passenger train, provided all due precautions be taken by the sender for the prevention of accident by fire or explosion; also railway fog signals for the company's own use; but, except as aforesaid, no explosive whatever shall be conveyed by passenger train.

"6. Gunpowder, or any explosive made with gunpowder, included in the 2nd division of the 6th (ammunition) class of explosives, as classified by the said Order in Council of the 5th of August, 1875, if packed in metallic cylinders of a pattern approved by the company, and similar in construction and security to those used by Government for the conveyance of small quantities of gunpowder by railway, may be conveyed along with ordinary goods traffic in a carriage not containing any article or substance liable to cause or communicate fire or explosion.

"7. No explosive of the 5th (fulminate) class, nor any explosive of the 6th (ammunition) class, containing its own means of ignition, nor any explosive of the 7th (firework) class, shall be conveyed in the same carriage with any explosive not of the class and division to which it belongs, unless it be sufficiently separated therefrom to

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prevent any fire or explosion which may take place in one such explosive being communicated to another.

"8. There shall not be conveyed in the same carriage with any explosive, any lucifer matches, fuzees, pipe-lights, acids, naphtha, paraffin, petroleum, to which the Petroleum Act, 1871, or any Act repealing or amending the same applies, or any other volatile spirit, or substance liable to give off an inflammable vapour at a temperature below 100° Fahrenheit, or liable to spontaneous ignition, or to cause or communicate fire or explosion.

"9. On each side of every carriage containing any explosive there shall be affixed in conspicuous characters, by means of a securely attached label or otherwise, the word 'explosive,' or the name of the explosive with the word 'explosive,' except when containing gunpowder or ammunition packed in metallic cylinders as provided for in the 6th of these byelaws; and every carriage containing explosive shall be placed as far as practicable from the engine attached to the train.

"10. Not more than five carriages containing explosive shall be loaded or unloaded at or on any railway station or wharf of the company, or be attached to or conveyed by any one train at any one time; and the quantity of explosive to be contained or loaded in any one such carriage at any one time shall not exceed 10,000 lbs. in weight; provided always that the quantity of explosive to be contained or loaded in any one such carriage, shall not exceed one ton in weight, unless the carriage shall be a covered van.

"11. If the explosive to be conveyed is not effectually protected from accident by fire from without, by being placed in the interior of a carriage which is enclosed on all sides with wood or metal, then the explosive shall be completely covered with painted cloth, tarpaulin, or other suitable material so as to effectually protect it against communication of fire.

"12. There shall not be any iron or steel in the interior of the portion of the carriage where the explosive is deposited, unless the same be covered either permanently or temporarily with leather, wood, cloth, sheet-lead, or other suitable material.

"13. When the stowing of explosive in any carriage or the loading or unloading of any explosive is undertaken by any person other than the company, all due precautions shall be taken by such person by careful stowing and loading and unloading and otherwise to prevent and secure such explosive from being brought into contact with or endangered by any other article or substance liable to cause fire or explosion.

"14. In loading or unloading any explosive, the casks and packages containing the same shall, as far as practicable, be passed from hand to hand and not rolled upon the ground, and in no case shall any such casks or packages be rolled, unless hides, cloths, or sheets have been previously laid down on the platform or ground over which the same are to be rolled. Casks or packages containing explosive shall not be thrown or dropped down, but shall be carefully deposited and stowed.

"15. No person while employed in loading, stowing in any carriage, or unloading any explosive included in classes 1, 2, 3, 4, or 5 of the classification of explosives as classified by the said Order in Council, dated August 5th, 1875, shall wear boots or shoes with steel or iron nails, steel or iron heels, or tips of any kind, or have about his person any lucifer match, explosive, or means of striking a light; and all persons employed in the loading, stowing, or unloading of any explosive shall, while such loading, stowing, or unloading is going on, abstain from smoking.

"16. While the loading, unloading, or conveyance of explosive is going on, all persons engaged in such loading, unloading, or conveyance shall observe all due precautions for the prevention of accidents by fire or explosion, and for preventing unauthorized persons having access to the explosive so being loaded, unloaded, or conveyed, and shall abstain from any act whatever which tends to cause fire or explosion, and is not reasonably necessary for the purpose of loading, unloading, or conveyance of such explosive, or of any other article carried therewith, and for preventing any other person from committing any such act; and such other person who,

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after being warned, commits any such act shall be deemed to commit a breach of these byelaws.

"17. The loading or unloading of explosive into or out of any carriage, when once begun, shall be proceeded with with all due diligence until the same is completed.

"18. Packages containing any explosive must be removed by the consignee from the station, wharf, or depôt of the company to which they have been conveyed, as soon as practicable and with all due diligence after arrival; and if not removed within twelve hours after arrival the packages and contents may be forthwith sold by the company, or otherwise disposed of as they think fit; and such packages shall in the meantime, and until such removal, sale, or disposal, be completely covered over with painted cloth, tarpaulin, or other suitable material.

"19. The company may refuse to receive, forward, carry, or allow to be brought or carried upon their railway, any carriage or package which they suspect to be packed or sent, or to contain any article or thing packed or sent in contravention of the said Act, or of any of these byelaws or not in accordance therewith, and in case any carriage or package which the company suspect to be so packed or sent, or to contain any such article or thing as aforesaid, shall be upon any railway of the company, the company may open, or require such carriage or package to be opened, to ascertain the fact.

"20. These byelaws are supplemental to the Explosives Act, 1875; and in the event of any breach (by any act or default) of any of them, or any attempt to commit such breach, the following penalties and consequences will be incurred and ensue; that is to say,

"(1) The explosive in respect of which, or being in the carriage, or train or carriages in respect of which, the offence is committed, may, unless the offence be committed by the company, be forfeited to the company.

"(2) The person committing the offence shall be liable to a penalty not exceeding 20*l.* for each offence, and to a

further penalty of 10*l.* for each day during which the offence continues; and the owner of the carriage, or train of carriages in respect of which, or containing the explosive in respect of which, the offence is committed, the person in charge of such carriage, and the owner of such explosive, shall each be liable to a similar penalty, if he was a party or contributed to such offence, or neglected to supply the proper means, or to issue proper orders for the observance, or has not used due diligence to enforce the observance of these byelaws.

"21. Copies of these byelaws shall be exhibited in a conspicuous place at the stations on the company's railways, and may be obtained on application to the secretary of the company.

"22. The above byelaws (with the exception of byelaw No. 5) do not apply to small packages of percussion caps, safety cartridges, or gunpowder, carried by passengers for private use and not for sale, not exceeding in the whole for one passenger at any one time 5,000 percussion caps, and 1,000 safety cartridges in number, and 3 lbs. in weight of gunpowder, provided such gunpowder is contained in a substantial case, bag, canister, or other receptacle, made and closed so as to prevent the gunpowder from escaping.

"Given under the common seal of the

this day of 188 .

——— *Secretary.* (*Seal of the Company.*)

"The Board of Trade hereby signify their sanction of the above Byelaws.

Signed by order of the Board of Trade this day of 188 .

An Assistant Secretary to the Board of Trade.

NOTICE.

"The company hereby give notice that they are not common carriers of explosives, and do not undertake the carriage of any

explosive except on special conditions signed by the sender thereof, or by the person delivering the same to the company for carriage."

151. A person who sends an article of a dangerous nature to be carried by a railway company is bound to take reasonable care that its dangerous nature is distinctly communicated to the railway company or their servants. (*Farrant* v. *Barnes*, 31 L. J. C. P. 137; 11 C. B. (N. S.) 553.)

In that case a person sent a carboy of nitric acid, merely informing the carrier that it was acid. (The facts are fully stated *ante*, Art. 31, p. 28.)

152. A railway company are bound to carry such goods as are tendered to them for the purpose of being carried, together with the proper charge for such carriage; and they cannot insist upon the sender signing such conditions as are unreasonable. (*Garton* v. *Bristol & Exeter Ry. Co.*, 30 L. J. Q. B. 273; and *ante*, Arts. 127 and 147.)

As to what conditions are reasonable or not, see *post*, Chap. XI. Art. 171.

153. A railway company may decline to carry goods or fix a higher rate for the carriage if it be sought to impose on them an extra liability. (*Per* Lush, J., in *Horn* v. *Midland Ry. Co.*, 42 L. J. C. P. 59; 7 C. P. 583; *Riley* v. *Horne*, 5 Bing. 212.)

Martin, B., in *Pardington* v. *South Wales Ry. Co.* (26 L. J. Ex. 105; 1 H. & N. 392), expresses a doubt whether when an animal has a vice known to the owner who communicates it to the carrier, the carrier is bound to carry the animal.

154. A railway company (subject to their obligation under Art. 147) may refuse to receive and carry articles of a perishable nature (such as fish) or of a very delicate and fragile nature (such as statuary, sculptured alabaster or marble), which they do not commonly profess to carry, and which may be easily injured; except under a special contract exonerating them from all responsibility for damage done to them *in transitu* not occasioned by the gross negligence or default of themselves or their servants. (*Beal* v. *S. Devon Ry. Co.*, 29 L. J. Ex. 441; *Peek* v. *N. Staff. Ry. Co.*, 32 L. J. Q. B. 241; *ante*, Chap. IV. Art. 25.)

Where goods are perishable, and the carrier has not the means to forward them, he should peremptorily decline to receive them. (*Tierney* v. *New York Central Ry. Co.*, 76 N. Y. 305.)

155. A railway company may refuse to receive goods where the packing is so defective that, owing to the character of the goods and the nature of the journey, their condition will entail upon the company extra care and extra risks. (*Munster* v. *S. E. Ry. Co.*, 27 L. J. C. P. 308; 4 C. B. N. S. 676.) Goods ought to be plainly and legibly marked by the consignor. (See *ante*, Art. 32, p. 29.)

See *ante*, Art. 62, p. 52, as to a carrier's liability for loss occasioned by negligent packing; and Art. 64, as to his liability for perishable commodities requiring great care; and *post*, Art. 180.

"There may, no doubt, be cases where articles of this description (bales of rugs and shawls) may be so carelessly and improperly packed as reasonably to justify a refusal on the part of the company to accept them. But it does not follow that they would

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be justified in rejecting every package which may be imperfectly packed." (Williams, J., in *Munster* v. *S. E. Ry. Co.*; see also *Cox* v. *L. & N. W. Ry. Co.*, 3 F. & F. 77; *Higginbotham* v. *Gt. N. Ry. Co.*, 2 F. & F. 796; and *Hart* v. *Baxendale*, 16 L. T. N. S. 396; *Union Exp. Co.* v. *Graham*, 26 Ohio St. 595.)

156. A railway company may (subject to their obligation under Art. 147, *ante*, p. 115) refuse to carry if their trains be full. (*McManus* v. *Lanc. & York. Ry. Co.*, 28 L. J. Ex. 353; 4 H. & N. 327.)

In that case Erle, J., said: "The carrier's duty to receive is always limited to his convenience to carry."

See Art. 22, p. 21.

It has not been decided under the Railway and Canal Traffic Act, 1854, how far a railway company are bound to provide extra train accommodation if their ordinary trains be full. It seems that a railway company should take precautions to prepare for additional traffic which they might reasonably anticipate. (*Wallace* v. *Gt. South. & West. Ry. Co.*, 17 W. R. 464; *post*, Art. 199.)

In that case the plaintiff, on the 10th of September, delivered machinery to the railway company at D., addressed to and to be delivered at the Agricultural Show yard at W., where an Agricultural Show was then being held. In the ordinary course of traffic, the machinery would have reached W. on the 11th of September. The machinery was sent from D. in due course, but when it arrived at B., a station between D. and W., the rails were in a slippery condition, and a great increase of traffic had taken place. The railway company's servants, therefore, uncoupled the trucks which contained the plaintiff's machinery, and substituted trucks containing cattle which had been left behind by a previous train. The machinery was thus delayed till a late train, and so arrived too late for the show. The railway company had taken no precaution to provide for the additional traffic, though they might

have anticipated it. It was held, upon these acts, by the Irish Court of Queen's Bench, that there was a contract to deliver the machinery within a reasonable time, and that through the default of the railway company it had not been so delivered. Whiteside, C. J., in delivering judgment, said: "The practical question involved is of great interest and importance. It appears that when the train, of which the waggons containing the machinery for the Agricultural Show formed part, arrived at Ballyhale station, those waggons were unhooked and were replaced by four waggons filled with cattle, which an earlier train had been unable to take past Ballyhale. The principle thus brought before us is one which should not receive our approval; and I cannot lay it down as law that the plaintiff, who merely gave his goods to the company to carry, is to be a loser by such a change as was made at Ballyhale by the servants of the company. If they give a preference to the carriage of live-stock, and thereby delay the delivery of others' goods, that is an arrangement which I shall not sanction. Carriers are bound to deliver within reasonable time the things entrusted to them, and this binds them to do no act of themselves which will prevent them from using due diligence in delivering the goods. Overwhelming necessity will alone excuse them, and of such overwhelming necessity no evidence was produced." And George, J., said: "The reasons offered for the delay are very loose. The state of the rails might have excused the company if they merely left behind at Ballyhale the waggons containing the machinery; but as they substituted for those waggons certain other waggons, I think their conduct was not justifiable. Besides, they took no precautions to prepare for the additional traffic which they might have anticipated in consequence of there having been a cattle fair at Kilkenny."

It may be remarked as to this decision, that in leaving the machinery and taking on instead certain waggons of cattle, the defendants observed the usual custom of railway companies, by which, when unable to take both goods and cattle, they elect to take the latter, leaving the former to be conveyed by some subsequent train. (See *post*, Art. 196.)

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157. A railway company can refuse to carry if the goods are tendered at an unreasonable time. (See *ante*, Art. 26, p. 24; *Garton* v. *Bristol & Exeter Ry. Co.*, 30 L. J. Q. B. 273; *Pickford* v. *Grand Junction Ry. Co.*, 12 M. & W. 766.)

"There is no reason why the railway company may not prescribe a certain hour, after which they will not receive goods to go by the next train." (*Per* Williams, J., in *Garton* v. *Bristol & Exeter Ry. Co.*, 28 L. J. C. P. 306; and *Pickford* v. *Grand Junction Ry. Co.*, *supra*.) On the other hand, a railway company can refuse to receive traffic an unreasonable time before they are ready to despatch in ordinary course a train embracing that particular class of traffic. (See Art. 26.)

Where a train was advertised to leave at 11 o'clock, and in fact left at 8 minutes past 11, and goods marked "perishable" arrived at the station at 11, or one minute past the hour, and were booked and on the platform when the train left, it was held that the railway company were justified in forwarding them by the next train. (*Nicholls* v. *N. E. Ry. Co.*, 59 L. T. 137.)

See *ante*, Art. 37, as to when a delivery to a carrier is complete, although goods received after the hour appointed for receiving them.

158. A railway company are bound to receive packed parcels (*i.e.* a package addressed to one consignee containing a quantity of parcels addressed to different persons); and they are not justified in demanding any higher rate on account of the nature of such a package. (*Sutton* v. *Gt. W. Ry. Co.*, L. R. 4 H. L. 226; 38 L. J. Ex. (H. L.) 177, and cases there cited.) Neither are a railway company justified in opening a package with a view to ascertain whether

it consists of packed parcels. (*Crouch* v. *L. & N. W. Ry. Co.*, 2 Car. & K. 789, and Art. 33.)

See *post*, Chap. XV., "Undue Preference."

159. The sender of the goods ought to inform the railway company at the time of the delivery for conveyance, if special care is required in dealing with the goods. (*Baldwin* v. *Lon. Chat. & Dov. Ry. Co.*, 9 Q. B. D. 582. See *ante*, Chap. V. Arts. 63, 64.)

The facts of that case were as follows: On the 19th of December, 1881, eighteen bales marked "Rags" were delivered by the plaintiffs in London to the defendants for conveyance to W. station in Kent, where, in the ordinary course, they should have been delivered within twenty-four hours. By mistake they were forwarded to another place and did not reach the W. station until the fourth of January, 1882, when, finding them to have become heated (through being packed in a damp state), and, therefore, unfit for the manufacture of paper, the consignees rejected them; and ultimately the rags were found useless for any purpose, and were destroyed. There being an admitted breach of duty on the part of the defendants, and it being conceded that the rags would have sustained no injury if they had been packed dry, the County Court judge gave a verdict for the plaintiffs, but for nominal damages only, on the ground that the loss was attributable to the plaintiff's own act in packing the rags in a damp state, without informing the defendants that special care was necessary. Upon a motion to enter a verdict for the plaintiffs for the admitted value of the goods, it was held that the ruling of the judge was correct.

In that case Mathew, J., said: "The company had a right to assume that the bales contained dry rags, not damp. The plaintiffs gave them no notice that they were in a condition to be destroyed by a delay of three weeks. The true measure of damages in a case of this kind is that which may fairly be said to have been in the

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contemplation of the parties at the time as the natural consequence of a breach of contract on the part of the defendants. The goods in question were not delivered or tendered to the consignees until fourteen days after the time at which they ought to have been delivered. What were the natural or necessary damages resulting from that delay? If the rags had been dry when delivered to the company, the damage would have been *nil*. The rags, however, were then damp, and hence their destruction. But the company did not know that they were damp."

160. Goods delivered to a railway company for conveyance ought to be fully and legibly addressed, that the owner or consignee may be easily known, and if in consequence of omitting to do so, without any fault on the part of the railway company, the owner sustained a loss or any inconvenience, he must bear the same. (*Caledonian Ry. Co.* v. *Hunter & Co.* 20 Sess. Ca. (2nd Ser.) 1097; *Wilson & Son* v. *Scott*, Hume, 302; *Weir* v. *Howie*, Hume, 304; *Stewart & Co.* v. *Gordon*, 14 Sess. Ca. (2nd Ser.) 434; *The Huntress*, Davies, 83; *Bradley* v. *Dunipace*, 1 H. & C. 521; 7 H. & N. 200.)

In the first of these cases, goods delivered to a railway agent in Glasgow, addressed to "W. Rae, Sudbury," were sent along several lines of railway to Sudbury in Derbyshire, not to Sudbury in Suffolk, for which they were intended. All correspondence with a view to discovering the proper destination was, according to usual practice, sent by goods trains instead of by post, in consequence of which the goods were not delivered to the consignee till thirty-six days after they had been despatched, and he then refused them. It was held that the originating cause of the goods being mis-sent being the imperfect address, the company were not liable for the conse-

quences of the delay, and this though their own conduct in the matter was not free from blame. "There is no doubt," said the Lord Justice Clerk Hope, "that in order to enforce that liability which ought to exist in the case of railway carriers as well as ordinary carriers, we ought to require a full, distinct, and ample address. If the address be such, and anything afterwards arises from the fault or negligence of the railway company, whether from misreading or from having an imperfect notion of the destination of the goods where there is a full address, or by sending them by a wrong line, or by negligence on the part of those for whom the railway company is responsible, from whatever cause, the company is liable for delay or neglect when the address of the goods is full and distinct. If the address be not ample, full, and distinct, the delay or interruption which takes place arises from fault on the part of the sender, who is the means of putting the whole thing wrong. With him the fault begins, and he is the cause of the goods not going to their proper destination."

See *post*, Chap. XII. Art. 207, as to the duty of a railway company when they are unable to deliver goods owing to an imperfect address.

161. If the package delivered to the railway company does not contain goods which are within the provisions of the Carriers Act (*ante*, Chap. VI. p. 56) and the Railway and Canal Traffic Act, 1854 (*post*, Chap. XI. Art. 168), there is no occasion to inform them, nor have they any absolute right in all cases to insist on being informed as to their contents or their value before they will accept it. (*Crouch* v. *L. & N. W. Ry. Co.*, 23 L. J. C. P. 73. See *ante*, Art. 30, p. 26.)

The right of a railway company to have parcels opened only extends to those suspected to contain dangerous articles (*ante*, Art. 149, p. 123).

It has been held in America that the duty of making any

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inquiry as to the character and value of the contents of a package intrusted to a carrier is upon the carrier. The consignor is not bound to disclose, unless he is asked. (*Merchants' Despatch Co.* v. *Bolles*, 80 Ill. 473.)

162. A railway company are entitled to be paid the amount chargeable for the carriage of the goods before they undertake the responsibility of having the goods in their possession. (*Pickford* v. *Grand Junction Ry. Co.*, 10 M. & W. 399; *ante*, Art. 27, p. 24.)

163. As to what is a sufficient delivery of goods to a railway company to make them responsible as carriers, see *ante*, Chap. IV. Arts. 33—37.

The delivery must be in conformity with the known course of the railway company's business as carriers, or it will not bind them. (*Slim* v. *Gt. N. Ry. Co.*, 14 C. B. 647.)

In *Evershed* v. *L. & N. W. Ry. Co.* (47 L. J. Q. B. D. 228), Brett, L. J., said, "The company undertake not merely to carry goods, but they must receive and deliver them. They may or may not receive and deliver at the edge of their rails; but be that as it may, it seems to me that from the time they receive them they are carriers of them. Under certain circumstances they do not receive them at the edge of their rails, but before. Sometimes they collect at receiving houses, or sometimes, as at Burton, at the houses of the consignors; but, as has been held, from the moment of their receipt of them they are liable as common carriers, and that only, as it seems to me, because they are conveyers of the goods. If that be not so, in collecting the goods the company would be carrying on a business they are not authorized to carry on; but I do not doubt they are authorized, even if not specially empowered by their Acts to do so, as such transaction is a necessary part of their business."

To render the company liable there must be an actual delivery to them or some servant, agent or other person authorized or placed by them in a position to hold himself out to the public as authorized to act on their behalf for this purpose, and the goods must be placed under their control. (*Bergheim* v. *Gt. East. Ry. Co.*, 3 C. P. D. 22; 47 L. J. C. P. 318; Story on Bailm., *ante*, Arts. 35, 37.)

If an agent has general authority to receive goods and to contract for their carriage, this general authority cannot be restricted by special instructions of which the customer is ignorant.

The acquiescence of the company is necessary to a delivery. See *ante*, Art. 34.

As to a railway company's liability for goods received into their warehouse to be forwarded according to the future orders of the owners, or for the accommodation of the company and their customers, see *ante*, Chap. IV. Arts. 41—43.

It has recently been decided in America, that one who delivers goods to a carrier, is properly deemed by him their owner, in the absence of knowledge otherwise (*Nanson* v. *Jacob*, 12 Moo. App. 125); but that where the carrier receives the goods from one known by him to be an agent, and not the owner of the goods, he must make inquiry as to the agent's authority to make a contract for carriage, subjecting the goods to charges for dead freight and demurrage. (*Hayes* v. *Campbell*, 63 Cal. 143.)

A., by parol, made arrangements with a railway company to convey cattle for him to K. station; he at the same time, without noticing its contents, signed a consignment note, by which the cattle were directed to be taken to E., an intermediate station on the line to K., and it was held that parol evidence was admissible to show that the railway company had agreed to carry on the cattle to K., as it did not contradict, but only supplemented the written contract. (*Malpas* v. *L. & S. W. Ry. Co.*, L. R. 1 C. P. 336; 35 L. J. C. P. 166.)

164. In cases not within sect. 7 of the Railway and

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Canal Traffic Act, 1854 (*post*, Art. 168), a railway company may make a special contract, as at common law. So that where the railway company delivers a ticket or other notice to the person from whom they receive the goods, specifying the terms on which they agree to carry, and the customer assents (or does not dissent), the terms of the notice will establish a special agreement, and will exclude the common law contract so far as it is varied by those terms. (*Gt. Northern Ry. Co.* v. *Morville*, 21 L. J. Q. B. 319; *Zunz* v. *S. E. Ry. Co.*, L. R. 4 Q. B. 539.)

If the customer in such a case declines the terms, and wishes to fix the railway company with the common law liability, he must tender or offer a reasonable compensation, and sue for the refusal to receive the goods. (*Carr* v. *Lanc. & York. Ry. Co.*, 21 L. J. Ex. 261; *Garton* v. *Bristol & Exeter Ry. Co.*, 30 L. J. Q. B. 273. See *ante*, Arts. 27, 28, p. 24.)

"In the case of carriers by land an absolute failure to carry goods, in the sense of never commencing the carriage, seldom occurs. In the well-known instance of the war waged by the railway companies against carrying packed parcels, it was intimated by Martin, B., that very heavy damages might be given, if it were established that the defendants designedly refused to take parcels which they were bound by law to take, for the purpose of getting a monopoly in their hands, and destroying the plaintiff's trade." (Mayne on Damages, 4th ed. p. 282; *Crouch* v. *Gt. N. Ry. Co.*, 11 Ex. 742; 25 L. J. Ex. 137.)

A railway company contracted with the plaintiff to provide, within a reasonable time, a particular description of large waggons, at a specified rate of freight per waggon, for the carriage of a quantity of hay from a station on their line to G., a town about

twenty-five miles distance, where the hay was intended for sale. Five tons of hay were delivered to the railway company, but carried by them in smaller waggons, for which they charged and were paid the same rate per waggon, thus increasing the cost of carriage per ton. The company not having provided waggons of the description agreed for, the plaintiff did not deliver to them for conveyance the rest of the hay which he kept for some time, and, after notice to the company, sold and disposed of under cost price. It was held that if the hay had been delivered to the railway company for conveyance, or had been otherwise conveyed in a reasonable manner to its destination, the proper measure of damages would have been the extra cost of conveyance, and that the only damages which the plaintiff could recover was the extra cost of conveyance, in respect of the five tons actually delivered and conveyed, arising upon the freight being calculated upon a waggon of less carrying power. (*Irvine* v. *Midland Gt. W. of Ireland Ry. Co.*, 6 L. R. Ir. 55.)

"Where there is a contract to supply a thing which is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for, if it be equally good; or if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had, and the best substitute you can get upon the occasion for the purpose." (Blackburn, J., in *Hobbs* v. *L. & S. W. Ry. Co.*, L. R. 10 Q. B. 120.)

A railway company having failed to provide horse-boxes, pursuant to contract, for the conveyance of horses for sale by auction in Dublin on the day but one following, the owner was compelled to send them by road, a distance of twenty-four miles, in order that they might arrive in due time for the sale and for previous inspection by purchasers. The horses, which were valuable hunters, were in soft condition at the time. They were deteriorated in appearance by the fatigue of the road journey; one of them was lamed; and such as were sold realized prices below what would have been otherwise obtained, the others being left on the owner's hands.

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It appeared that if they had been in hardfed condition they would have borne the journey without injury. The company's station-master was, at the time of the contract, aware of the intended sale, and of the day on which it was to take place. It was held, that the company were not liable in damages for all the loss which the owner sustained in consequence of the injuries occasioned to the horses by the road journey, but that the measure of damages was the deterioration which the horses, if in ordinary condition and fit to make the journey, would have suffered thereby, and the time and labour expended on the road. (*Walker* v. *Midland Gt. W. of Ireland Ry. Co.*, 4 L. R. Ir. 376. And see *Pickford* v. *Gd. June. Ry. Co.*, 8 M. & W. 372.)

As to the measure of damages for delay in delivering goods, and for the loss of the goods by the carrier, see *post*, Chap. XII. Arts. 199, 200.

165. A special contract to carry goods, though not signed by the consignor, is binding upon a railway company, as it is not within sect. 7 of the Railway and Canal Traffic Act, 1854 (*post*, Art. 168), which provides that no special contract shall be binding upon the party unless signed by him or the person delivering the goods to be carried. (*Baxendale* v. *Gt. Eastern Ry. Co.*, L. R. 4 Q. B. 244; 38 L. J. Q. B. 137.)

166. A railway company are not bound to provide booking offices for traffic at places off their railway, nor to arrange for the conveyance by road of goods between such places to the nearest station on their railway. (*Dublin & Meath Ry. Co.* v. *Midland Gt. Western of Ireland Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 379.)

CHAPTER XI.

THE OBLIGATIONS OF A RAILWAY COMPANY DURING THE TRANSIT OF THE GOODS (*a*).

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(*a*) In connection with this chapter reference should be made to Chapter V. (*ante*, p. 40) on the "Obligations of a common carrier during the transit of the goods," as being applicable to some extent to the carriage of goods by railway, and to Chapter VI. (*ante*, p. 56) on the "Limitation of the responsibility of a common carrier of goods by the Carriers Act, 1830."

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I.—By Statute.

167. A railway company when carrying goods by land are entitled to the protection of the Carriers Act, 1830. (Railway Clauses Act, 1845 (8 Vict. c. 20, s. 89).)

Sect. 89 of the Railway Clauses Consolidation Act, 1845, enacts as follows:—"Nothing in this or the special Act contained shall extend to charge or make liable the company, further or in any other case than where according to the laws of the realm, stage coach proprietors and common carriers would be liable, nor shall extend in any degree to deprive the company of any protection or privilege which common carriers or stage coach proprietors may be entitled to; but, on the contrary, the company shall at all times be entitled to the benefit of every such protection or privilege."

This section cannot be taken to affect the general jurisdiction of the Railway Commissioners (see *ante*, Art. 147), nor the particular obligations imposed by the special Act of the company.

The common law obligations of railway companies as carriers appear to be co-extensive with those of carriers not owning the road.

When the contract for the conveyance of the goods is for a transit which is to be partly by land and partly by water, the benefit of the Carriers Act only avails the railway company during the land transit. (See *ante*, Art. 83, p. 72.)

The Carriers Act is set out and fully dealt with in Chap. VI., *ante*, p. 56.

Any statutory exemption from liability must be pleaded specially. (Jud. Act Rules, 1883, Ord. XIX. r. 15.)

168. Every railway company is liable for loss of or injury done to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; and

every such notice, condition, or declaration is null and void.

A railway company may make a special contract with the consignor respecting the receiving, forwarding, and delivering of goods, provided that:—

(1) It is in writing.

(2) It is signed by the consignor, or the person delivering the goods for carriage.

(3) Its conditions are just and reasonable. (The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31, s. 7).)

Nothing in the above Act is to alter or affect the rights and liabilities of the railway company under the Carriers Act, 1830, with respect to the articles mentioned in that Act.

A railway company cannot exempt themselves from liability on the ground that the consignor, &c. has not signed the special contract, as the proviso of sect. 7 only applies where the company are seeking to exempt themselves from liability by reason of there being a special contract. (*Baxendale* v. *Gt. Eastern Ry. Co.*, L. R. 4 Q. B. 244; 38 L. J. Q. B. 137.)

The provisions of sect. 7 apply not only to the risks of carriage and conveyance, but also to those which attend the receiving and delivery. (*Hodyman* v. *West Midland Ry. Co.*, 33 L. J. Q. B. 233.) The section does not apply to goods received not in the capacity of carriers, as luggage left in the cloak-room after the completion of the journey. (*Van Toll* v. *S. E. Ry. Co.*, 31 L. J. C. P. 241; and see *Moore* v. *Gt. N. Ry. Co.*, *post*, p. 156.)

A condition on a passenger's ticket as to liability for luggage carried for a passenger without extra charge is within this section. (*Cohen* v. *S. E. Ry. Co.*, 2 Ex. D. 253; 46 L. J. Ex. D. 416; and see *post*, Chap. XVII.)

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The law as to the limitation of the responsibility of railway companies by special contract or notice before the passing of the Railway and Canal Traffic Act, 1854, is referred to in Chapter VI., *ante*, p. 73.

169. Since the passing of the Railway and Canal Traffic Act, 1854, no general notice given by a railway company is valid in law for the purpose of limiting the common law liability of the company as carriers; but such common law liability may be limited by such conditions as the Court or judge shall determine to be just and reasonable; and such conditions must be embodied in a special contract in writing, to be signed by the owner or person delivering the goods.

It is the duty of a railway company setting up a condition in qualification and restriction of their common law liability to make out that the condition is just and reasonable. (*Peek* v. *N. Staff. Ry. Co.*, 10 H. L. Cas. 473; 32 L. J. Q. B. (H. L.) 241.)

The question of reasonableness is generally a mixed question of law and fact. (*Dickson* v. *Gt. Northern Ry. Co.*, *post*, p. 162.)

In that case it was held that a contract for the carriage of goods as "not insured" was not a sufficient reference to incorporate the conditions of the company as to liability for not insured goods, one of which was that the company was not to be liable for any loss or injury of such goods.

Lord Cranworth said that to constitute a written contract in the sense of the Act there must be a written document signed by the sender of the goods, either in itself stating the terms on which it is agreed that the goods shall be sent, or making reference to some other document in which these terms are embodied.

Lord Watson, in delivering judgment in the case of *Manchester, &c. Ry. Co.* v. *Brown* (*post*, Art. 171), says, "The case of *Peek* v.

North Staff. Ry. Co. authoritatively decides, upon the statute, these three points—in the first place, that a condition of this kind must be in writing in order to bind the trader; in the second place, that it must be proved to the satisfaction of the Court to be a reasonable condition; and in the third place, that the onus of showing that it is a reasonable condition rests upon the railway company who allege it.

"But the question as to what constitutes a reasonable condition is not a question which judges can decide, as against their successors by anticipation; it is a question of fact in each case, depending upon the discretion of the judge who is dealing with it, and, according to my view, not of law, and must be judged of according to the circumstances in each case."

And Bramwell, B., in *Gregory* v. *West Midland Ry. Co.* (33 L. J. Ex. 155), said, "It is difficult to see how there can be any abstract reasonableness in any condition for carrying goods or cattle all over the world; whether a condition be reasonable or not cannot be decided as a pure matter of law. It is a question which should be decided by the judge at the trial." And see judgment of the Lord President Inglis in the Court of Session in *Rain* v. *Glasgow & S. W. Ry. Co.*, 7 Sess. Ca. (3rd Ser.) 439.

"Inasmuch as the Act declares that *primâ facie* all such conditions are to be null and void, it seems to me that it lies on the company to show that any condition upon which they may rely is just and reasonable. If the case is tried before a judge and jury, I think it is for the judge to say whether the condition is reasonable, although, I think, if he needs any assistance with regard to facts material for the determination of that question, he may ask the jury to find such facts. But where there are no special facts in question, it is for the judge to say upon the construction of the condition, bringing to bear his knowledge of the world, whether it is just and reasonable." (*Per* Lord Esher in *Dickson* v. *Gt. Northern Ry. Co.*, 18 Q. B. D. 176; 56 L. J. Q. B. 111.)

Lord Bramwell, in *Manc. Sheff. & Linc. Ry. Co.* v. *Brown* (*post*, Art. 171), said: "The case of *Peek* v. *North Staff. Ry. Co.* was decided twenty years ago. At the time it was decided, and from

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thence continuously until now, I have always thought it was wrongly decided, and this case confirms me in that opinion; and although it has been in existence for twenty years, and has been acted upon in Courts of law, if it were within my competency to overrule it I would do so, because it is impossible to say that people have regulated their contracts in reference to it: they have done nothing of the sort. What they have done is this: they have entered into their contracts without reference to it, and when it has become convenient they have broken those contracts; and having had the benefit of them, they have turned round and have sought to avoid them."

170. If the sender of goods fills up and signs a receiving note on which conditions of carriage are printed, the presumption is that he understood and assented to these conditions. (*Lewis* v. *G. W. Ry. Co.*, 29 L. J. Ex. 425; *per* Cockburn, C. J., in *Zunz* v. *S. E. Ry. Co.*, L. R. 4 Q. B. 544; 38 L. J. Q. B. 209.)

But where it was proved that the plaintiff, when asked by the company's clerk, at the time of delivering the goods, to sign a paper, refused to do so on the ground that he could not see to read it, and that the clerk said it was of no consequence, and that the signature was mere matter of form, and that the plaintiff, relying on that assurance, signed the paper, it was held that the jury were warranted in finding that the goods were not received subject to the special contract. (*Simons* v. *G. W. Ry. Co.*, 2 C. B. (N. S.) 620.) Where goods were delivered to a railway company for carriage, along with a forwarding note, on the back of which certain conditions were printed, and which forwarding note was a printed document supplied by the railway company containing certain blanks, it was held that the fact of one of these blanks being filled up with the name of the sender, as being the party by whom the carriage was payable, was not evidence, such as the Act requires, that he had agreed to the conditions on the back of the note.

(*Scottish Central Ry. Co.* v. *Ferguson*, 2 Sess. Ca. (3rd Ser.) 781.) So, where the railway company granted a receipt for the goods on the back of which certain conditions of carriage were printed, it was held that the sender's signature attached to an indorsement on the back of the receipt, "Deliver the within to Messrs. F., R. & Co.," must have been presumed to have been written for the purpose of sending the receipt to the consignees, and could not be taken, at least without proof to that effect, to have been intended to authenticate the printed conditions as in a question between the sender and the railway company. (*Ibidem;* and see *Peck* v. *North Staff. Ry. Co.*, *ante*, Art. 169.)

The signature of a railway agent, employed by the sender to deliver, and by the company to receive the goods, has been held to be a signature within the meaning of the Act. (*Aldridge* v. *G. W. Ry. Co.*, 33 L. J. C. P. 161.)

And see *post*, Chap. XVII., Art. 314, and Chap. XVIII.

171. A condition is reasonable which reduces a railway company's liability to a minimum if it is coupled with compensating advantages to the customer (such as cheapness of carriage), and the latter has the alternative of getting rid of the condition by paying a reasonably higher rate.

The fact that there are ordinary rates in practical operation on a railway for the carriage of goods with ordinary liability is very strong evidence that an agreement between the railway company and a customer for the carriage of goods at another rate is reasonable. (*Man., Sheff. and Linc. Ry. Co.* v. *Brown*, 8 App. Cas. 703; 53 L. J. Q. B. (H. L.) 124.)

If a railway company charge two rates for the conveyance of certain articles—one the ordinary parliamentary rate, when they take the ordinary liability of

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the carrier, and the other a reduced rate, in which case they make it a condition of carriage that the sender relieves them of all liability for loss or damage,—except upon proof that such loss or damage arose from wilful misconduct on the part of the company's servants; the condition relieving the company when goods are carried at the lower rate is "just and reasonable," within sect. 7 of the Railway and Canal Traffic Act, 1854. (*Lewis* v. *G. W. Ry. Co.*, 3 Q. B. D. (C. A.) 195; 47 L. J. Q. B. (C. A.) 131; *Robinson* v. *G. W. Ry. Co.*, 35 L. J. C. P. 123.)

Sect. 7 of the Railway and Canal Traffic Act, 1854, gives no power to a railway company to exceed the maximum rate fixed by their special Act for the conveyance of goods, and the higher "alternative rate" must be within it. (*Per* Cockburn, C. J., in *Peek* v. *N. Staff. Ry. Co.*, *ante*, Art. 169.)

We have seen that (Art. 168) a railway company may, by a special contract signed as required by the Railway and Canal Traffic Act, 1854, s. 7, limit their liability for their own neglect or default, and this limitation is subject to but one restriction—that it be adjudged to be just and reasonable. The principle deducible from the authorities is, that a contract of this nature, *primâ facie* unjust and unreasonable, becomes just and reasonable if an alternative is left to the party forwarding or delivering the goods to enter into a contract which is just and reasonable.

The following are the principal decisions on alternative rates:—

1. In *Brown's case* (*supra*), a fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one-fifth lower than where no such

undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market; and it was held that upon the facts the merchant had a *bonâ fide* option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within sect. 7 of the Railway and Canal Traffic Act, 1854, and covered the delay; and that the company were not liable for the loss.

Lord Blackburn, in delivering judgment, said, "The spirit and object of the enactment in the Railway and Canal Traffic Act are very well expressed in *Beal* v. *S. Devon Ry. Co.* (3 H. & C. 337)." "The real question," says Mr. Justice Crompton, in delivering the judgment of the Exchequer Chamber, "is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly.

"Now, I think it will be seen that in the present case there was really a reasonable means of the goods being carried, and that the company offered to fulfil their duty as common carriers in saying, 'We will carry all goods that are brought to us, fish and otherwise, on being paid a reasonable remuneration—we will carry them according to the custom of the English realm, and will safely deliver the goods, unless certain excepted things prevent their being so delivered.' There is superadded that which is not part of the custom of the realm, also an obligation to use reasonable care and reasonable skill to deliver the goods within a reasonable time. That is superadded, I think, by the law to the duty which by the custom of the realm is cast upon a carrier; there is that duty to deliver with reasonable despatch and without unreasonable delay."

2. In *Lewis* v. *G. W. Ry. Co.* (*ante*, p. 150), the plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses to be carried from L. to S. "at owner's risk." As the plaintiff knew, the defendants had two rates of carriage: a higher

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rate when they took the ordinary liability of carriers, and a lower when they were relieved of all liability except that arising from the wilful misconduct of their servants. In using the words "owner's risk," the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendants' liability. The defendants' servants packed the cheeses in such a manner that during their transit upon the defendants' railway they were damaged, but the defendants' servants did not know that damage would result from the mode in which the cheeses were packed. It was held that, as the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable within the meaning of sect. 7 of the Railway and Canal Traffic Act, 1854, and that the injury to the cheeses had not arisen from the wilful misconduct of their servants.

3. A railway company had two rates for the carriage of goods—one, the ordinary or higher rate, when it undertook the ordinary liability of the carrier; the other a reduced rate, when the sender relieved the company of all liability for loss, or damage or delay, except upon proof that such loss, or damage or delay, arose from wilful misconduct on the part of its servants. It was held that the higher rate not being shown to be prohibitive or excessive, the alternative afforded to the public was just and reasonable; and therefore that a contract founded upon the latter branch of it was valid. (*Gallagher* v. *Great Western Ry. Co.*, 8 Ir. R. C. L. 326.)

4. A railway company contracted to carry the plaintiffs' cattle from Dublin to certain towns in England. During the sea part of the journey some of the animals were injured and others killed, through alleged negligence in securing and stowing them. In an action for the loss of the cattle the company pleaded that the ordinary rate charged by them for the carriage of the cattle to the places to which the plaintiffs' cattle were booked was a reasonable rate, and that at such rate they undertook the carriage of cattle to those places, without, as regarded the sea portion of the journey, any limitation to their liability so far as imposed by law, and, as

regarded the land portion, without any unjust or unreasonable conditions, of which the plaintiffs had notice when delivering their cattle for carriage; and that the plaintiffs elected and contracted to have their cattle carried at a certain reduced rate, upon a special contract that the same should be conveyed at the owners' sole risk in connection with the sea part of the transit.

The plaintiffs, by their reply, alleged that the alternative contract of carriage at ordinary rates offered by the company was not, as regarded the land portion of the carriage, without any unjust and unreasonable conditions imposed, but was subject to a condition "that, where the charge of conveyance is per waggon, as the owner or his servant is required to superintend the loading of the stock, and is allowed to place as many animals in such waggon as he considers may be conveyed with safety, the company will not be responsible for loss arising in any way from the overcrowding of such waggons, or for injuries done in the loading or unloading thereof, or in consequence of one animal injuring another." It was held, on demurrer to the replication, that both the condition respecting the sea part of the transit to which the special contract was subject, and the condition alleged in the replication to have been annexed to the alternative contract of carriage offered, were unjust and unreasonable, and that, therefore, the demurrer should be overruled.

Query, whether the principle that in such a case the special contract may be supported by the option of a just and reasonable alternative contract applies where the alternative offered is subject to conditions limiting the common law liability of the carrier? (*Corrigan* v. *Great Northern and Manchester, Sheffield, and Lincolnshire Ry. Co.*, 6 L. R. Ir. Ex. 90.)

5. The plaintiff delivered cattle, carriage prepaid, to the defendant railway company for carriage on the terms of signed conditions, whereby, in consideration of an alternative reduced rate, it was agreed that the company were "not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except

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upon proof that such loss, detention, or injury, arose from the wilful misconduct of the company or its servants." The cattle were carried; but, on application made for them by the plaintiff, the defendants, in consequence of their clerk having negligently omitted to enter the cattle on the consignment note as "carriage paid," refused to deliver them, and alleged that the carriage was not paid. The cattle were kept exposed to the weather until the next day, when the mistake having been ascertained they were delivered. They were damaged by the exposure. In an action for damages by reason of wrongful detention and negligence, it was held, that the withholding of the cattle, under a groundless claim to retain them, at the end of the transit was not "detention" within the conditions, and the company were therefore liable. (*Gordon* v. *Gt. W. Ry. Co.*, 8 Q. B. D. 44; 51 L. J. Q. B. 58.)

6. As an alternative to a carriers' contract which admittedly contained unreasonable conditions, the carriers offered to carry at certain reasonable rates, but subject to a condition "that they would not be accountable for the correct selection of the owner's cattle on landing, nor on loading into the waggon at L." (the termination of the sea journey), "nor on unloading at destination." It was held, that this condition, upon its fair construction, would extend to exempt the carriers from responsibility for negligence or default on their own part in the selection of the cattle on landing, and was therefore unreasonable and unjust.

In considering whether conditions annexed to carriers' special contracts are just and reasonable, such conditions must be construed according to the ordinary meaning of their language, without implying any limitation or exception not expressed. (*M'Nally* v. *Lancashire and Yorkshire Ry. Co.*, 8 L. R. Ir. Ex. (App.) 81.)

7. In an action against a railway company, as carriers, for negligence, whereby a horse delivered to them by the plaintiff was injured at one of their stations, Gormanstown, the defendants pleaded that they received the horse under a special contract, containing a condition that, in case of animals for which a contract note with two rates of carriage should be offered to the customer,

the defendants would give him the alternative of carrying at either rate; that at the full rate, which would be charged when the contrary was not expressed, the defendants would undertake the ordinary duties of carriers, subject to the conditions in the said contract note and their statutory rights; but that at the reduced rate the defendants would carry at the owner's risk, exempt from all liability not occasioned by the wilful misconduct of their servants acting within the scope of authority; and that the plaintiff elected to have his horse carried at the lower rate; and that the injuries were not caused by the wilful misconduct of the defendants' servants acting as aforesaid. They also pleaded that another condition in the said contract was that the defendants should not be liable for injuries occasioned by the fear or restiveness of animals; and that the injuries complained of were solely occasioned by the restiveness of the said horse. The plaintiff signed a contract note containing the above conditions. It was held, that the condition exempting the defendants "in all cases from liability for injuries caused by fear or restiveness of animals," did not embrace cases in which the injury immediately flowed from the fear or restiveness of the animals, directly occasioned by some act of negligence or want of care on the part of the defendants, but applied only to injury from fear or restiveness caused by the transit, with its ordinary incidents, and without any negligence or default on the part of the company; and that, taken in this limited sense, the condition was not unreasonable. It was also held, that it was unnecessary that the two alternative rates should appear on the face of the contract note, but that it was sufficient that the contract note referred to the defendants' tariff containing all the rates.

The contract note also contained, amongst others, the two following conditions:—No. 8, that no claim in respect of goods would be allowed unless made within three days after delivery; and No. 9, that all goods were received subject to the company's general lien both for carriage thereof and all other charges against the customer. It was held, that "goods" in these conditions meant inanimate, not horses or cattle, and that the conditions were reason-

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able; but, *semble*, that they did not properly come before the Court for decision under the 17 & 18 Vict. c. 31, s. 7, which only deals with the receiving, forwarding or delivering of animals, goods and things, and these conditions related to something occurring after delivery. (*Moore* v. *Gt. N. Ry. Co.* (*Ireland*), 10 L. R. Ir. C. L. 95.)

8. A special contract for the conveyance of cattle by railway contained the following conditions:—"The owner undertakes all risks of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station, platform, or other places of loading or unloading, or of the carriage in which the cattle may be loaded or conveyed, or from any other cause whatsoever." "The company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them:" and it was held that the first of these conditions was unreasonable, and that its unreasonable character was not removed by the fact that the company under the second condition granted, and the owner accepted, a free pass for a person who travelled with the cattle sent. (*Rooth* v. *N. East. Ry. Co.*, L. R. 2 Ex. 173; 36 L. J. Ex. 83.)

9. By arrangement between a railway company and a steamship company, cattle were carried by sea from Dublin to Liverpool, with an alternative lower rate, imposing upon the owner all risk connected with the sea part of the journey, and it was held (Murphy, J., *diss.*), that a stipulation exempting the railway company, in contracts for conveyance at the lower rate, from liability for injury caused to cattle by the negligence or misconduct of the crew of the steamships was unreasonable. (*Ronan* v. *Midland Ry. Co.*, 14 L. R. Ir. 157.)

10. A railway company entered into a special contract, by which they agreed to carry cattle at a lower rate, on condition that they should be liable for negligence only. It was held, that this was not an unreasonable condition within the meaning of sect. 7 of the Railway and Canal Traffic Act, 1854.

It was also decided in that case that the condition took the com-

pany out of the category of common carriers, and that accordingly, in an action against the railway company for damage to the cattle during the journey, the *onus* of proving negligence was on the plaintiff. (*Harris* v. *Midland Ry. Co.*, 25 W. R. 63.)

11. Cattle were carried by a railway company under a special contract signed by the consignor, which stated that the company had two rates for the conveyance of cattle: one the ordinary rate when they took the ordinary liability of the carrier; the other a reduced rate; that these cattle were to be carried at the reduced rate, the company to be relieved from all liability in case of damage or delay except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the company's servants. A notice was posted up in the company's office which stated that the company had two rates, namely the owner's risk rate upon the terms above given, and the company's risk rate, which was 10 per cent. above the owner's risk rate, at which the company undertook the ordinary risk of carriers in respect of rail transit, limited for neat cattle to 15*l.*, for pigs and sheep to 2*l.*, but did "not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck." The consignor had never seen any rate but the owner's risk rate. After two trials cattle had ceased to go at the higher rate. The higher rate was less than the maximum allowed by the company's Acts. No list of rates was exhibited.

The cattle having been injured through the negligence (but not the wilful misconduct) of the company's servants, it was held by the House of Lords that the notice of the higher rate was not invalidated by the limitation as to value, nor by the fact that it did not mention the terms upon which cattle could be carried without limitation of value, as provided by the Railway and Canal Traffic Act, 1854, sect. 7; that the clause as to not admitting liability meant only that the liability must be established by proof; that so construed the condition was just and reasonable within sect. 7; that the consignor might have known and must be taken to have known the terms of the higher rate, and had the offer of a just and

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reasonable alternative; and that the company were therefore protected by the special contract. (*Great Western Ry. Co.* v. *McCarthy*, 12 App. Cas. 218; 56 L. T. 582.)

And see *Candy* v. *Midland Ry. Co.* (38 L. T. N. S. 226); *Wrexham Ry. Co.* v. *Little Mountain Co.* (38 L. T. N. S. 290); *Robinson* v. *G. W. Ry. Co.* (35 L. J. C. P. 123); *D'Arc* v. *L. & N. W. Ry. Co.* (L. R. 9 C. P. 325); and *Finlay* v. *N. British Ry. Co.* (8 Sess. Ca. (3rd Ser.), p. 959).

In addition to the decisions just quoted, where the question was whether the customer was offered by the railway company a *bonâ fide* and reasonable alternative as to rate or otherwise, it may be useful to give a list of conditions which have been held to be reasonable or unreasonable.

The following conditions have been held to be reasonable:—

1. "Goods conveyed at special or mileage rates must be loaded and unloaded by the owners or their agents, and the company will not be responsible for any risk of stowage, loss or damage, however caused, nor for discrepancy in the delivery as to either quantity, number or weight, nor for the condition of articles so carried, nor for detention or delay in the conveying or delivery of them, however caused." (*Simons* v. *Great Western Ry. Co.*, 26 L. J. C. P. 25.)

2. "That the company will not, under any circumstances, be liable for loss of market or other claim arising from delay or detention of any train, whether at starting or at any of the stations or in the course of the journey;" in answer to a claim arising from loss of market. (*White* v. *Great Western Ry. Co.*, 26 L. J. C. P. 158. See *Beal* v. *South Devon Ry. Co.*, *post*; *Lord* v. *Midland Ry. Co.*, 36 L. J. C. P. 170; L. R. 2 C. P. 339; *Mathews* v. *Dublin and Drogheda Ry. Co.*, 17 Ir. C. L. R. 87.)

3. "The company is to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation or from being trampled on, bruised, or otherwise injured in transit, from fire, or from any other cause

whatever. The company is not to be held responsible for carriage or delivery within any certain or definite time, nor in time for any particular market;" in answer to a claim for suffocated and injured cattle sent by rail. (*Pardington* v. *South Wales Ry. Co.*, 26 L. J. Ex. 105; but see *M'Manus* v. *Lancashire and Yorkshire Ry. Co.*, 28 L. J. Ex. 353; 4 H. & N. 327; and *Rooth* v. *N. E. Ry. Co.*, 36 L. J. Ex. 83.)

4. "No claim for deficiency, damage, or detention shall be allowed unless made within three days after delivery of the goods, nor for loss unless made within seven days after the time when they should have been delivered." (*Simons* v. *G. W. Ry. Co.*, *supra*; *Lewis* v. *G. W. Ry. Co.*, 29 L. J. Ex. 425; 5 H. & N. 867.)

5. "The company will not be answerable for the loss or detention of any goods untruly or incorrectly described or declared in the declaration or receiving-note furnished by the company." (*Lewis* v. *G. W. Ry. Co.*, *supra*.)

6. "The company will not undertake to convey fish except under the general conditions published at the railway stations in the train tables, and except under the following special conditions:—'That the company shall not be responsible under any circumstances for loss of market, or other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud.'"

In the time tables of the company the regulations for conveying fish were as follows:—

"Fish, under special conditions, will be conveyed by (certain specified trains). No fish will be conveyed by the 10.45 a.m. up-train. The company will not undertake to carry fish by the 7.10 p.m. up-train, but in limited quantities, subject in all cases to the immediate convenience and arrangements of the company." "The company hereby give notice that fish conveyed upon the railway is so conveyed by special agreement only, and on the express condition that the sender or his agent shall, on delivering the fish at the company's station or other place whence the same is to be conveyed, sign an order and declaration exempting the

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company from all liability for loss or injury arising from delay or detention of train, or from any cause other than gross neglect or fraud." (*Beal* v. *South Devon Ry. Co.*, 29 L. J. Ex. 441; 5 H. & N. 875: affirmed in Ex. Ch. 12 W. R. 1115; 11 L. T. N. S. 184; 3 H. & C. 337.)

7. "The company will not be answerable for the loss or detention in respect of goods destined for places beyond the limits of the company's railway; and as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money which may be received by the company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignors, and for the purpose of being paid to the other carrier." (*Aldridge* v. *Great Western Ry. Co.*, 33 L. J. C. P. 161; 15 C. B. (N. S.) 582.)

The following conditions have been held to be unreasonable:—

1. "The company will not be accountable for the loss, detention, or damage of any package insufficiently or improperly packed, marked, directed or described, or containing a variety of articles liable by breakage to damage each other." (*Simons* v. *Great Western Ry. Co.*, 26 L. J. C. P. 25; *Garton* v. *Bristol and Exeter Ry. Co.*, 30 L. J. Q. B. 273; 1 B. & S. 112.)

2. "This ticket is issued subject to the owner's undertaking all risk of conveyance, loading and unloading whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." (*M'Manus* v. *Lancashire and Yorkshire Ry. Co.*, 28 L. J. Ex. 353; 4 H. & N. 327; *M'Cance* v. *L. and N. W. Ry. Co.*, 7 H. & N. 477; 34 L. J. Ex. 39; *Gregory* v. *West Midland Ry. Co.*, 33 L. J. Ex. 155.)

3. "The bearer undertakes all risk of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the

station, platform or other places of loading or unloading, or of the carriage in which they may be loaded or conveyed, or from any other cause whatsoever." (*Rooth* v. *N. E. Ry. Co.*, L. R. 2 Ex. 173; 36 L. J. Ex. 83.)

4. "The company shall not be responsible for the loss of or injury to any marbles, musical instruments, toys or other articles, which from their brittleness, fragility, delicacy or liability to ignition are more than ordinarily hazardous, unless declared and insured according to their value." (*Peek* v. *N. Staff. Ry. Co.*, 32 L. J. Q. B. 241; 10 H. L. Cas. 473.)

5. "The company will not be answerable for the loss or detention of or damage to wrappers or packages of any description charged by the company as 'empties.'" (*Aldridge* v. *G. W. Ry. Co.*, 33 L. J. C. P. 161; 15 C. B. (N. S.) 582.)

6. "The company are not to be answerable for any consequences arising from overcarriage, detention or delay in or in relation to the conveying or delivery of the said animals, however caused." (*Allday* v. *G. W. Ry. Co.*, 34 L. J. Q. B. 5; 5 B. & S. 903; *Kirby* v. *G. W. Ry. Co.*, 18 L. T. N. S. 658.)

7. "The railway company will not be liable 'in any case' for loss or damage to a horse or dog above certain specified values delivered to them for carriage, unless the value is declared." (*Ashenden* v. *London & Brighton Ry. Co.*, 5 Ex. D. 190; 42 L. T. 586.)

Hawkins, J., in delivering judgment in that case, said: "Had the defendants by their conditions stipulated, as they easily might in a very few words, simply that they would not be responsible for loss resulting from mere accident without neglect or default; such restriction of their common law liability would have been both just and reasonable, and if embodied in a signed contract, would have protected them against liability for the loss which occurred."

8. "The company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for

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the loss thereof, or for injury thereto beyond the sum of 2*l.*, unless a higher value be declared at the time of delivery to the company, and a percentage of 5 per cent. paid upon the excess of value beyond the 2*l.* so declared." (*Dickson* v. *Gt. N. Ry. Co.*, 18 Q. B. D. 176; 56 L. J. Q. B. 111.)

9. "Every stipulation or condition professing to exempt a railway company from liability for its own negligence or misconduct, or that of its servants or agents." (*Per* Lord Wensleydale in *Peek* v. *N. Staff. Ry. Co.*, *ante*, p. 146; *Lyon* v. *Mells*, 5 East, 438; *Doolan* v. *Midland Ry. Co.*, 2 App. Cas. 792.)

In the latter case Lord Ellenborough said: "It is impossible, without outraging common sense, to allow carriers to say, 'We will receive your goods, but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross or injurious.'" (And see *Illinois Central Rail. Co.* v. *Joute*, 13 Ill. 424.)

As to the unreasonableness of part of the contract avoiding that part only, see *M'Cance* v. *L. & N. W. Ry. Co.*, 31 L. J. Ex. 65; 7 H. & N. 477; and *per* Kelly, C. B., in *Booth* v. *N. E. Ry. Co.*, L. R. 2 Ex. 178.

Where conditions are in the alternative, if either of them is unreasonable, both are so. (*Lloyd* v. *Limerick & Waterford Ry. Co.*, 15 Ir. C. L. Rep. 37.)

172. Where a railway company under a contract for carrying goods by sea, procure the same to be carried in a vessel not belonging to them, their liability in respect of loss or damage to such goods is the same as though the vessel had belonged to them. (The Regulation of Railways Act, 1871, 34 & 35 Vict. c. 78, s. 12.)

By a proviso to section 12 this liability only attaches when the loss or damage to the goods happens during the carriage of the

same in such vessel, the proof to the contrary to lie upon the railway company.

173. Where a railway company by through booking contract to carry any goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, *a condition* exempting the company from any loss or damage which may arise during the carriage of such goods by sea from the act of God, the King's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the sea, rivers and navigation of whatever kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such goods, be valid as part of the contract between the consignor of such goods and the company in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. (The Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 14.)

The object of this enactment was to give to railway companies the same protection with regard to losses by sea as the ordinary shipowner has. Sect. 16 of the same Act provides that where a company are authorized to use, maintain, and work steam vessels, tolls are to be charged equally to all persons using the vessels, and that no advantage is to be given to persons by reason of their having previously travelled over the railway (*post*, Art. 263). To this clause was appended a proviso that the provisions of the Railway and Canal Traffic Act, 1854, should extend to the steam vessels, and to the traffic carried on thereby; the intention being that goods

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traffic should also be protected from undue preference and undue prejudice, and that the railway companies should give all facilities for forwarding traffic by these steamers as by the railway. All this is provided for by the Railway and Canal Traffic Act, 1854, as amended by the subsequent Acts. By sect. 12 of the Regulation of Railways Act, 1871 (*ante*, Art. 172), it was provided that where a railway company make a contract for the conveyance of goods by vessels not belonging to them, they shall be liable to the same extent as if they owned the vessels, or were party to the working of them. The effect of this was to make the proviso to sect. 16 of the Act of 1868 applicable to all traffic through booked by sea by railway companies, whether they had any control over the vessels or not. In *Doolan* v. *Midland Ry. Co.* (2 App. Cas. 792), it was decided that the effect of the said sect. 16, taken with sect. 12 of the Act of 1871, was to extend all the provisions of the Railway and Canal Traffic Act, 1854, to railway companies in respect of their carrying merchandize under a contract in vessels not belonging to them.

The effect of this was, amongst other things, to decide that notwithstanding the express provisions of sect. 14 (in this Article), the railway companies could only protect themselves from losses by sea by means of a contract signed in accordance with sect. 7 of the Act of 1854 (*ante*, Art. 168).

The Railway and Canal Traffic Act, 1888, repeals the proviso to sect. 16 of the Act of 1868, and by sect. 28 enacts in specific terms what portions of the Traffic Act are applicable to traffic by steamers. (See 51 & 52 Vict. c. 25, s. 28, *post*, Art. 262.)

See *ante*, Art. 83, p. 72.

II.—Generally.

174. The employment of a railway company by delivery to them of goods to be carried, presumptively

fixes them with all the liabilities attached by the custom of the realm, recognized as law, to the occupation of a common carrier, such as the obligation of carrying and delivering within a reasonable time, and at a reasonable charge, and of insuring the goods during the carriage.

A railway company being, in the absence of any contract to the contrary with the customer, insurers of the goods entrusted to them, impliedly undertake safely and securely to carry and deliver the goods in the same condition in which they received them. (*Higginbotham* v. *G. N. Ry. Co.*, 10 W. R. 358, *per* Pollock, C. B.)

But a railway company are not liable for loss or injury to the goods occasioned by the act of God or the Queen's enemies, or resulting from the ordinary wear and tear and chafing of the goods in the course of their transit, or from their ordinary loss, deterioration in quantity or quality in the course of the transit, or from their inherent natural infirmities or intrinsic qualities, or which arise from the negligence or fraud of the owner or consignor thereof. (See *ante*, Art. 61, p. 51; *per* Willes, J., in *Blower* v. *G. W. Ry. Co.*, L. R. 7 C. P. 655; 41 L. J. C. P. 268; Story on Bailm.)

If the owner of the goods assumes the care and custody of them himself, instead of trusting them to the railway company, the company are not liable for any loss or damage. (See *ante*, Art. 56, p. 49, and *post*, Chap. XVII.)

As to when a railway company are not insurers of goods, see *ante*, p. 145.

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As to what is a loss by the act of God or the Queen's enemies, see *ante*, Chap. V.

If perishable articles, as fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. (*Kendall* v. *L. & S. W. Ry. Co.*, 41 L. J. Ex. 184; L. R. 7 Ex. 373.)

The railway company are not liable for the heating of grain, or for the fermentation, acidity, or effervescence of fluids, when these changes are the results of ordinary processes going on in the goods themselves, without the aid of causes introduced by the carriers. So, a railway company are not liable for the ordinary wasting on the journey of goods which are naturally liable to waste; such as the ordinary evaporation or leakage of fluids contained in casks. It follows, therefore, that the railway company are not liable when the damage is due to the goods having been sent for conveyance in a condition unfit to travel. See *Baldwin* v. *L. C. & D. Ry. Co.* (*ante*, Art. 159), where the plaintiff was not allowed to recover the value of some rags which had been improperly delayed in transit, and had consequently become rotten; that being due to their having been packed in a damp state, and the railway company having had no notice of their condition.

See *ante*, Arts. 61—65, p. 51.

175. It is the duty of a railway company to do what they can by reasonable skill and care to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, they are released from liability; but if their negligence or want of skill has brought on the peril, the damage is attributable to their breach of duty, and the exception does not aid them. (*Gill* v. *Man. Sheff. & Lin. Ry. Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 95; *Phillips* v. *Clarke*, 26 L. J. C. P. 167; *Wilson* v. *Lanc.*

& *York. Ry. Co.*, 30 L. J. C. P. 232; *ante*, Chap. V. Art. 65.)

The precise degree of care which it is the duty of a carrier to use in dealing with the goods entrusted to him, must depend upon and vary with the nature and condition of the thing carried, and the ever-varying circumstances under which the goods are dealt with. "Some goods require much more tender handling than others; and the line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier's place, and had to deal with the goods or animals under the circumstances and subject to the condition in which the carrier is placed, and under which he is called on to act." (Per Blackburn and Lush, JJ., in *Gill's Case*, *supra*.)

176. A railway company are not bound to use extraordinary efforts or incur extra expense in order to surmount obstructions caused by the act of God, as a fall of snow. (*Briddon* v. *G. N. Ry. Co.*, 28 L. J. Ex. 51.)

The duty of a railway company is to carry goods intrusted to them to be forwarded by a goods train with all due expedition under ordinary circumstances, but when a snowstorm has occurred to impede the running of heavy trains without much extra exertion, they are not bound at all hazards and at any extra cost to expedite the transit. It seems to have been the opinion of Bramwell, B., in that case, that they might be bound to divide the train, so as to forward it as quickly as practicable. (See *ante*, p. 43, and *post*, Art. 290.)

177. A railway company, being insurers of the goods carried, are responsible for damage or loss occasioned by accidental fire, while such goods are in their custody or possession, resulting neither from the act of God, nor of the Queen's enemies. (*Collins* v. *Bristol* &

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Exeter Ry. Co., 29 L. J. Ex. (H. L.) 741. See *ante*, Chap. V. Art. 51, pp. 45, 46.)

When a carrier contracts for exemption from liability for losses occurring by fire, the owner of the goods lost by fire cannot recover for them without affirmative proof that the fire was the result of negligence. (*Little Rock Ry. Co.* v. *Harper and Wilson*, 21 A. & E. Ry. Ca. 97.)

178. A railway company are responsible for any loss or damage happening from any defect in the vehicle (in the absence of any contract exonerating them). (*Redhead* v. *Midland Ry. Co.*, L. R. 2 Q. B. 412; 38 L. J. Q. B. 169; *Chippendale* v. *Lanc. & York. Ry. Co.*, 21 L. J. Q. B. 22; *Camden, &c. Ry. Co.* v. *Burke*, 13 Wend. 611.)

In the case of *Redhead* v. *Midland Ry. Co.*, *supra*, it was said in the Exchequer Chamber (L. R. 4 Q. B. 383) to be extremely doubtful whether carriers of goods were so responsible. But in the Court below, Lush and Blackburn, JJ., both considered it established that carriers of goods, whether by land or water, warranted the fitness of their vehicles or vessels for the purpose, and were responsible for the consequences of latent defects. Montague Smith, J., in giving judgment, said: "The learned counsel for the plaintiff felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers, but he contended for and mainly relied on the proposition that there was at least a warranty that the carriage in which the passenger travelled was roadworthy, and that the liability of the carrier of goods in this respect ought to be imported into the contract with the passenger. But it is extremely doubtful whether such warranty can be predicated to exist in the contract of the common carrier of goods. His obligation is to carry and re-deliver the goods in safety, whatever happens; in the words of Lord Holt, 'He is bound to answer for the goods at all events.' Again, 'The law

charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the King.' And this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle, for if the goods are safely carried and re-delivered, it would be immaterial whether the carriage was roadworthy or not, and if the goods are lost or damaged the carrier is liable on his broad obligation to be answerable 'at all events,' and it is unnecessary to inquire how that loss or damage arose." (See also *Kopitoff* v. *Wilson*, 1 Q. B. D. at p. 383; *Beckford* v. *Crutwell*, 5 Car. & P. 242; and *The Glenfruin*, 10 P. D. 103.)

In *M'Manus* v. *Lanc. & York. Ry. Co.* (28 L. J. Ex. 353), the plaintiff was held entitled to recover, on the ground that he had employed the defendants to carry his horses safely, and that they had used an insufficient and improper vehicle, whereby the horses had been injured. Williams, J., in delivering the judgment of the Court, said: "The sufficiency or insufficiency of the vehicles by which the company are to carry on their business is a matter, generally speaking, which they, and they alone, have, or ought to have, the means of fully ascertaining. And it would, we think, not only be unreasonable, but mischievous, if they were to be allowed to absolve themselves from the consequences of neglecting to perform properly that which seems naturally to belong to them as a duty."

A railway company are not bound to submit "foreign" trucks and carriages to the same rigid tests to which they would be bound to submit a new truck or carriage before using it.

The nature of the examination of "foreign" rolling stock must depend upon circumstances, it cannot be such as must necessarily interfere with the traffic or business of the road. (*Richardson* v. *Gt. E. Ry. Co.*, L. R. 10 C. P. 486; 1 C. P. D. 342; *Aitchison, &c. Ry. Co.* v. *Ledbetter*, 21 A. & E. Ry. Ca. 555. And see *post*, Art. 289.)

179. It is the duty of a railway company to have their stations and station premises in a safe and

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proper condition, so that those who use them by the company's invitation for the purposes of transit between the railway and highway may do so without injury to themselves or the traffic they bring or remove. (*Rooth* v. *North E. Ry. Co.*, L. R. 2 Ex. 173; 36 L. J. Ex. 83.)

Kelly, C. B., in delivering judgment in that case, said: "But as to securing the railway company against liability for negligence in respect of defects in the station, I think it quite impossible that the stipulation permitting the owner and his servants to accompany the cattle can affect the duty imposed by the common law upon the company of taking care that the stations belonging to them, over which persons have to pass, goods to be carried, and cattle to be driven, shall be in a fit and proper condition, so as to secure reasonable security for persons, property, or cattle, in the transit from the railway or trucks to the highway. Under no circumstances can it be contended that the railway company are discharged from their liability to provide a safe station for the transit of these cattle. . . . . It is clear that while some protection is required in a railway station, it is impossible to say as a matter of law, without information as to the circumstances of the locality, that any specific precaution ought to have been taken so as to constitute a legal obligation upon the railway company."

180. A railway company are not liable for damage accruing to the goods carried from improper packing by the sender, at all events where there has been nothing to indicate to the company the defective nature of the packing. (See *ante*, Chap. V. Arts. 62, 64, and 155.)

The case of *Richardson* v. *N. E. Ry. Co.* (L. R. 7 C. P. 75; 41 L. J. C. P. 60) is generally cited for the proposition that where goods are apparently properly packed and secured in the manner in which such goods are usually packed or secured, but are in fact

imperfectly packed, the defect not being patent, a loss resulting from this defect would be within the exception arising from the neglect of the customer. But it was not the case of a common carrier, and negligence had to be proved against the company. The Court held them not liable, on the ground that if the facts proved negligence at all, they necessarily also proved contributory negligence by the plaintiff.

"No person is entitled to claim compensation from others for damage occasioned by his neglect to do something which it was his duty to do." (*Per* Cleasby, B., in *Barbour* v. *S. E. Ry. Co.*, 34 L. T. 67.)

If a carrier receives goods which are afterwards lost, he cannot set up as a defence that they were not properly secured when delivered to him. (*Stuart* v. *Crawley*, 2 Stark. 323.)

If packages containing goods are plainly defective, or become so, during the transit, and the railway company have notice of the defects, and might remedy them, they may be liable if they fail to do so. (*Notara* v. *Henderson*, L. R. 7 Q. B. 225.)

181. If the consignor fraudulently conceals the value and risk from the railway company in order to be charged at a lower rate for carriage, he cannot recover on account of a loss occasioned through such concealment. (*M'Cance* v. *L. & N. W. Ry. Co.*, 31 L. J. Ex. 65. See *ante*, Chap. IV. Art. 33, p. 30, and cases cited in Roscoe on Evidence (15th ed.) p. 580.)

If the customer delivers to the carrier an article which he knows to be likely to suffer injury from coming in contact with other goods, but does not communicate that fact to the carrier, and injury does result, the carrier is not responsible. Nor does it make any difference that the carrier might and ought to have known—the article being well known in commerce—that it possessed those injurious qualities. (*Hutchinson* v. *Guion*, 5 C. B. (N. S.) 149, 163.) Although the consignor is not in general bound to volunteer information as to the nature of the goods, yet if he

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intentionally make false answers to the carrier's inquiries, there is fraud, which avoids the contract. (*Per* Parke, B., in *Walker* v. *Jackson*, 10 M. & W. 168, 169; and *ante*, Art. 64, p. 54.)

182. Where a railway company undertakes to haul along their line waggons belonging to private traders, the extent of their obligation is to use reasonable care and diligence. (*Watson* v. *North British Ry. Co.*, 3 Sess. Ca. (4th Series) 637.)

In the American case of *Mallory* v. *Tioga Ry. Co.* (39 Barb. 488), it was held that a railway company was not exonerated from its liability as a common carrier because the owner of the goods provided his own truck in which the property is transported, and assumes the loading and unloading, and furnishes a brakesman to accompany the truck.

183. A railway company are not to be considered as gratuitous bailees, but as common carriers, in respect of empty packages which have already traversed their line of railway when full, and for the return carriage of which, when empty, it is the custom not to make any further charge. (*Aldridge* v. *G. W. Ry. Co.*, 33 L. J. C. P. 161; 15 C. B. (N. S.) 582.)

In that case, a condition that "the company will not be answerable for the loss, or detention of, or damage to wrappers or packages of any description charged by the company as 'empties,'" was held not to be a just and reasonable condition within the meaning of sect. 7 of the Railway and Canal Traffic Act, 1854. Erle, C. J., in delivering the judgment of the Court (Erle, C. J., Williams, Willes, and Keating, JJ.), said: "We may observe that we are by no means prepared to accede to the suggestion that, because no charge is made for the return of empty packages, therefore the company necessarily convey them on their line gratuitously. The company may justly be considered as having

had the carriage of the empties prepaid in the shape of the previous payment for the carriage of the same packages when full, including an obligation on the railway to carry the empties back without further charge."

184. If goods are injured by any cause for which the railway company are not responsible, the railway company are still bound to take all proper and reasonable care of them to preserve them from further injury. (*Taff Vale Ry. Co.* v. *Giles*, 2 E. & B. 823; 23 L. J. Q. B. 43.)

See *ante*, Art. 65, p. 54.

A common carrier by land, upon an emergency or accident happening, becomes agent by necessity for the owner to take care of the goods, and to pledge his credit for that purpose. (*G. N. Ry. Co.* v. *Swaffield*, L. R. 9 Ex. 132; 43 L. J. Ex. 89, *post*, Art. 294.)

185. A stipulation by a railway company that the goods shall be carried "at the owner's risk" is construed to except from the contract their general liability as insurers, but not their liability for negligence as bailees undertaking the charge of the goods, nor for breach of their undertaking to carry them within a reasonable time, and the consequences of not doing so. (*Robinson* v. *G. W. Ry. Co.*, 35 L. J. C. P. 123; *D'Arc* v. *L. & N. W. Ry. Co.*, L. R. 9 C. P. 325; *S. & N. Alabama Ry. Co.* v. *Henlein*, 52 Ala. 606.)

Where a carrier, after carrying the goods to their destination, gave notice that he continued to hold them as a warehouseman only, upon the usual charges, but "at the owner's sole risk," and the owner left them upon those terms; the words were held merely to refer to the previous liability as a carrier and to have no greater

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effect; and he remained liable for negligence in keeping the goods as a warehouseman. (*Mitchell* v. *Lane. & York. Ry. Co.*, L. R. 10 Q. B. 256; 44 L. J. Q. B. 107; *ante*, p. 89, *post*, p. 205.)

A railway company cannot compel the senders of goods to put on the consignment note the words "owner's risk" or any other words. They cannot claim the right of compelling any person to enter into a contract with them, but merely the right to place before their customers an alternative coming within the maximum rate which they are entitled to charge—an alternative which they are not bound to offer, and which is entirely for the advantage of the sender in one respect, inasmuch as he is not bound to accept it, and the company might have refused it to him altogether. (See Art. 169, p. 146.)

A stipulation or condition that goods are to be carried "at owner's risk" is frequently followed by a clause excepting "wilful misconduct or negligence of the carrier's servants;" but that exception is one which the law always implies, and no condition or stipulation will dispense with the use of reasonable care on the part of carriers or their servants on receiving, carrying, and delivering goods. The definition of wilful misconduct and negligence laid down by Lord Justice Cotton in *Lewis* v. *The Great Western Ry. Co.* (47 L. J. Q. B. 138; L. R. 3 Q. B. Div. 213), is as follows:—viz., the "doing an unusual thing with reference to the matter in hand without care, regardless whether it will or will not cause injury to the goods carried or other subject-matter of the transaction." (See also *Gill* v. *The Manchester Ry. Co.*, 42 L. J. Q. B. 89; L. R. 8 Q. B. Div. 187.)

When a company desires to impose special and stringent terms upon its customers, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted. (*Henderson* v. *Stevenson*, L. R. 2 H. L. (Sc.) 470.)

A railway company, carrying goods at "owner's risk rate," on condition that they shall not be liable "in respect of loss or detention," are liable for an intentional refusal to deliver in virtue of a claim of lien. (*Gordon* v. *Great Western Ry. Co.*, *ante*, p. 154.)

186. It is the duty of a railway company trading as carriers to have servants authorised to give directions and act for the company on all occasions as the exigency of the traffic may require. (*Taff Vale Ry. Co.* v. *Giles*, 23 L. J. Q. B. 43; 2 E. & B. 823.)

See note to next article.

187. Where a railway company have on their premises a person who alone appears to act as their agent, upon occasions where it is necessary to act with promptness and decision, there is evidence for the jury that he is invested with a general authority to do all that is right and proper on behalf of those of whom he is the apparent representative. (*Goff* v. *Gt. N. Ry. Co.*, 30 L. J. Q. B. 148; 3 E. & E. 672.)

See *Poulton* v. *L. & S. W. Ry. Co.* (L. R. 2 Q. B. 534; 36 L. J. Q. B. 294), where the above case was distinguished; and it was held that although a railway company under 8 Vict. c. 20, ss. 103, 104, had power to apprehend a person travelling on the railway without having paid his own fare, they had power only to detain the goods for the non-payment of the carriage; consequently, as the railway company themselves would have had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the station-master to detain the plaintiff on this assumption, and they were therefore not liable for this act of the station-master.

In *Taff Vale Ry. Co.* v. *Giles*, *supra*, Pollock, C. B., in delivering judgment, said:—"In the present case I cannot distinguish between a railway company and any other large establishment of any sort. If you go to a house of business and there make a demand for goods, it is not necessary before you bring trover to have a refusal by one of the partners. It is enough to have a refusal by

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the person who has the management of the business. I must understand by the term "managing director" the man who has the management of the business. So, also, with respect to the office of superintendent. I entirely agree that it is the duty of the company to have some person clothed with a discretion to meet any exigency that may arise and to grant any reasonable demand. This is such a duty of the company that when I find that there is a superintendent and a managing director, it is the reasonable conclusion that they are there for the purpose of giving such answer, and doing what the company would be bound to do. Then it is said that it could not be in performance of any part of the duty of the company that these quicks were planted. I do not agree in that view. It is not enough for the company to carry goods and then throw them out into the street. Different sorts of articles are carried. Something may occur which may make it a duty of the company to take steps to prevent the goods from being spoiled. Cattle on a long journey must be fed. Some articles require warehousing, some not. Here trees were taken; the company must have known that it might be a matter of great convenience to have these trees placed in a place of safety until they could be removed. I think it was a question for the jury whether what was done to these trees was done on behalf of the company and by their authority. I think that what was done was done as part of the company's business."

"I concur in the opinion that there is sufficient evidence that the persons who are said to be general superintendent and managing director had power to bind the company as to all things within the scope of the business of the company by any contract within the limits of their employment. If they act beyond the scope of their ordinary business in order to bind the company, it must be shown that they are acting under a special authority from the company, that is, from the board of directors. A refusal by the superintendent to deliver goods carried by the company in the ordinary course of his business would be binding on the company, and amount to a conversion by the company. I only doubt

whether the transaction as to the quicks at the navigation station was within the scope of the superintendent's ordinary authority, and whether the permitting them to be planted on the land there was within the scope of his authority, or whether it was not rather an act of favour to the plaintiff. The case seems to me to resolve itself into this question—Was the planting of the quicks incident to the business of the company as carriers? It rather struck me that it was not." Per Parke, B.

"I think that what was done was within the scope of the general superintendent's powers. These quicks are a bulky article. Being living, they could not be kept alive without being stuck into the ground. It is proper that that should be done, and near to the station, as otherwise the expense of carriage would have been incurred, which would be considerable with reference to their value. A railway carrier should be ready to afford such accommodation as this. There ought to be some one on the part of the company authorized to receive and deliver out goods, and to do things promptly that require immediate attention; and who are the persons who can do these things but the general superintendent, the managing director, and the station clerk? and to all of these did the plaintiff apply for his goods." Per Maule, J.

"The planting the quicks seems to me to be merely the mode adopted by the company for warehousing them, without which they would have perished." Per Platt, B.

In *Roe* v. *Birkenhead, Lancashire & Cheshire Junc. Ry. Co.* (21 L. J. Ex. 9), Pollock, C. B., said:—"The law lays down the same rule for all, and we cannot make a different rule in the case of a servant of a railway company and an ordinary tradesman. The principle is, that the master is not liable for the tortious act of the servant unless he has either given him express directions or an implied authority to do the act. If the act, indeed, had been one that the company were legally authorized to do, it might have been put as having been done with the authority of the company." And Parke, B., said:—"I agree with the Lord Chief Baron that the same rule must be applied to railway companies as to indivi-

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duals, and that we ought not to stretch the law as against those bodies merely because they are capable of paying for injuries done by their servants."

It has been held that the station-master of a railway company has not, although the general manager of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance, bestowed at his request on a servant of the company injured by an accident on their railway. (*Walker* v. *G. W. Ry. Co.*, L. R. 2 Ex. 228; 36 L. J. Ex. 123.)

Kelly, C. B., said:—"It appears to me that there is a great distinction between a station-master and the general manager of the company. If the general manager has no authority for this purpose, no official of the company has. Must a board be convened before a man who has both his legs broken can have medical assistance?"

Martin, B., said that, at the time when *Coe* v. *Midland Counties Ry. Co.* (3 Ex. 268) was decided, the notion prevailed much more extensively than at present, that a company could not be bound except by an instrument under seal.

As to who are a carrier's servants for the purpose of receiving the goods, see *ante*, Art. 35, p. 32.

As to a railway company's servants entering into a special contract to deliver in any particular time or place, even beyond the terminus of their particular route, see *post*, Art. 198, p. 192.

The station-master is agent for the railway company to deliver the goods. (*Post*, Art. 201, p. 202.)

Porters, carters, and other subordinate persons employed by the carrier to deliver the goods, are in general to be regarded as his servants, and the goods, so long as they are in their hands, are not to be considered as delivered. (Bell's Com. 7th ed. vol. 1, p. 494; *Shepherd* v. *Bristol and Exeter Ry. Co.*, L. R. 3 Ex. 189; Redman on Railways, p. 42.)

188. A railway company are bound, in the course of their business as carriers, by the contract of the

agent whom they put forward as having the management of that part of their business. (*Pickford* v. *Grand Junc. Ry. Co.*, 12 M. & W. 766; *Heald* v. *Carey*, 11 C. B. 977.)

In the first of those cases it appeared from the evidence that certain goods were undoubtedly received by a railway company for transmission on some contract or other, and that the only person spoken to respecting such transmission was the party stationed to receive and weigh the goods. It was held that this party must have an implied authority to contract for sending the goods, and that the company were consequently bound by that contract.

Ratification of directors can be of no avail as against a company if the contract is one by which the company would not have been bound, even if all proper formalities had been observed; nor will ratification by the shareholders amount to a ratification by the company if the contract is *ultra vires* of the company. If, on the other hand, the contract would have been binding on the company, if all proper formalities had been observed, or if all the shareholders had concurred in it, ratification by or on behalf of the company is perfectly possible. (See Lindley on Partnership, i. 273 (3rd ed.).)

189. A railway company may be estopped from setting up the illegality of their acts in defence to an action by a person who has been damaged by such acts, even though the person so damaged would not be estopped from setting up the illegality against the company if it would assist his case. (*Doolan* v. *Midland Ry. Co.*, 2 App. Cas. 792.)

In that case a railway company was guilty of an illegality by working steamboats, not being authorized by law to work them; and it was held, that the company could not set up the illegality

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in answer to a claim for damages arising out of the working of the steamboats.

190. The special Act of a railway company is to be construed strictly against the company, and liberally in favour of the public. (Per Tindal, C. J., Maule, J., and Cresswell, J., in *Parker* v. *G. W. Ry. Co.*, 13 L. J. C. P. 105; 7 M. & G. 253.)

"The language of this Act of Parliament is to be treated as the language of the promoters of it; they ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public." (See *Stourbridge Canal Co.* v. *Wheeley*, 2 B. & Ad. 790; Angell on Carriers (5th ed.), p. 121.)

Where an Act of Parliament confers upon a landowner a private right, creating a burden upon a railway, and restraining the directors from regulating the traffic so as best to accommodate the public, it must be construed strictly. (*Turner* v. *L. & S. W. Ry. Co.*, L. R. 7 Eq. 561; 43 L. J. Ch. 430.)

"We were properly reminded by counsel that toll clauses are to be construed with strictness, and that it is the public rather than the parties who have obtained the special Act containing such clauses, in whose favour any ambiguity of meaning should be determined." (Per the Railway Commissioners in *Aberdeen Commercial Co.* v. *Gt. North of Scotland Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 213.)

A private Act of Parliament will be construed more strictly than a public one as regards provisions made by it for the benefit of the persons who obtained it, but when once the true construction is ascertained, the effect of a private Act is the same as that of a public Act. (*Altrincham Union* v. *Cheshire Lines Committee*, 15 Q. B. D. 597.)

"Acts of Parliament such as that under consideration are framed and offered to Parliament by the companies who are asking for powers and privileges which the common law does not give them. They take power to make a railway and other works over the lands of other people, and that power is only conceded to them upon the footing that it is for the benefit of the public as well as themselves. This benefit they profess to secure to the public by giving the use of the line to all comers, or undertaking to carry their goods, upon payment of certain charges or tolls. The nature and limits of these tolls and charges they fix for themselves, and submit them to the legislature in their bill expressed in their own language, and I think it is a fair and reasonable thing to say to them, that by the language of that bill, when it becomes law, they are strictly bound.

"If the language of their clauses, strictly construed, puts them at any disadvantage in their dealings with the public which the legislature did not intend, it is the fault of those who had the opportunity of insisting upon language which would adequately express that intention; and they are asking courts of justice to tread on dangerous ground, as it seems to me, when they seek to supply a deficiency in the actual language of legislation by what they assert to be a reasonable intendment to be inferred from the probabilities of the case. It may well be that in dealing with the legislature a charge, reasonable enough in itself in one direction, was surrendered by the company in consideration of benefits secured in lieu of it in some other direction; and in this state of things, unless the clauses as they stand do not admit of any reasonable meaning at all, without the addition of something else which has not been expressed, I think the rule hitherto established and acted upon of giving effect to the language strictly construed, and nothing more, is one that ought to be adhered to." (Lord Penzance, in *Pryce* v. *Monmouthshire Ry. Co.*, 49 L. J. Q. B. (H. L.) 130.)

191. A railway company from a place within to a

place without the realm, are subject to the same liabilities at common law as a railway company who carry only within the realm, and are, therefore, bound to accept all goods which are reasonably tendered to them for conveyance between those limits. (*Crouch* v. *L. & N. W. Ry. Co.*, 23 L. J. C. P. 7; *ante*, Chap. V. Art. 55, p. 47.)

A railway company contracting by through booking to carry goods from place to place, partly by railway and partly by sea, may limit their liability as to the carriage by sea (31 & 32 Vict. c. 119, s. 14; *ante*, Art. 173, p. 164.)

192. A railway company who receive goods for conveyance to a place beyond the limits of their own line (in the absence of any special contract to the contrary, and especially where they receive an entire payment for the whole journey) impliedly undertake the responsibility of the complete transit, and are, therefore, not discharged of their liability by handing over the goods to a second company for further conveyance, and are liable for a loss of or injury to the goods although the same may not have happened on their own line of railway. (*Muschamp* v. *Lanc. & Preston Ry Co.*, 8 M. & W. 421; 10 L. J. Ex. 460; *Scotthorn* v. *South Staff. Ry. Co.*, 22 L. J. Ex. 121; *Webber* v. *Gt. W. Ry. Co.*, 33 L. J. Ex. 170; *Bris. & Ex. Ry. Co.* v. *Collins*, 29 L. J. Ex. 41; 7 H. L. Ca. 194.)

A railway company may, however, stipulate, at the time they receive the goods, that they will not be

liable for the loss of or damage to goods destined to places beyond their own line of railway after they have delivered them over to another railway company in the usual course of further conveyance. (*Aldridge* v. *Gt. W. Ry. Co.*, 33 L. J. C. P. 161; 15 C. B. (N. S.) 582; *Fowles* v. *Gt. W. Ry. Co.*, 22 L. J. Ex. 76.) To claim exemption under such a condition, it must be proved that the goods passed into the custody of some other railway company who would be responsible before they were lost or injured. (*Kent* v. *Midland Ry. Co.*, L. R. 10 Q. B. 1; 44 L. J. Q. B. 18.)

It is estimated that half the railway traffic of Great Britain is carried by means of through booking, where the receiving and contracting company undertake to carry goods over their own railway and several other railways to the point of final destination, using each company as an agent in fulfilment of the contract.

The real test of liability is who was *dominus itineris?* The cases cited for the first proposition in this Article only decided that where there was nothing said there was *primâ facie* a liability on the part of the company receiving the goods. This consequence ensues whether the carriage be or be not prepaid; or whether the goods, after being carried some distance on the company's railway, are transported for the remainder of the journey on the line of another company or companies; or are forwarded by coach or canal. (*Hooper* v. *L. & N. W. Ry. Co.*, 50 L. J. Q. B. 103; *Burke* v. *S. E. Ry. Co.*, 5 C. P. D. 1.) It makes no difference that the goods are directed by the sender to be sent part of the way by sea, and by a different route to that which would have been adopted if no such direction had been given. (*Wilby* v. *West Cornwall Ry. Co.*, 27 L. J. Ex. 121.)

"In our opinion, if a carrier contracts to convey to and deliver goods at a particular place, his duty at that place is precisely the

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same whether his own conveyance goes the entire way or stops short at an intermediate place, and the goods are conveyed on by another carrier; and that this carrier or his clerk at the place of destination is the agent of the original carrier for all purposes connected with the conveyance and delivery and dealing with the goods to the same extent as his own clerk would have been at the place where his own conveyance stops with regard to goods to be there delivered." (From the judgment of the Court in *Crouch* v. *G. W. Ry. Co.*, 26 L. J. Ex. 418.)

In *Shepherd* v. *Bristol and Exeter Ry. Co.* (37 L. J. Ex. 113; L. R. 8 Ex. 189), Martin, B., said: "When two railway companies are connected in business together, so that one of them receives goods to be conveyed over the line of the other, I think there is but one contract, and that it is made between the customer and the receiving railway company, and that their liability is just the same as if they had been the owners of the railway the whole way upon which the goods are to be conveyed. This I have understood to be the law ever since *Muschamp* v. *Lanc. & Pres. Ry. Co.*, and in my opinion it should be steadily adhered to."

Where goods are transferred from the original contracting railway company, their liability continues if such transfer is only accessory to the discharge of their own duty, or the terms of their own contract. (*Machu* v. *L. & S. W. Ry. Co.*, 2 Ex. 415.)

Where goods are accepted by a railway company to be carried to a place beyond their line, subject to special conditions, the conditions apply throughout the whole distance. (*Collins* v. *Brist. and Ex. Ry. Co.*, 29 L. J. Ex. 41; 7 H. L. Ca. 264; *Hall* v. *N. E. Ry. Co.*, L. R. 10 Q. B. 437; 44 L. J. Q. B. 164.)

It has been recently held in America that the liability of a common carrier ceases, in the absence of a special contract, when he "seasonably" and safely delivers the goods to the succeeding carrier; that the giving of a through rate does not increase his liability, nor the giving of a receipt showing that the goods were consigned to a point beyond his line. (*Goldsmith* v. *Chicago and Alton Ry. Co.*, 12 Mo. App. 479.)

The following decisions in the American Courts may here be noticed :—

A railway company issuing through tickets beyond their own line are liable for the safe transportation of the purchaser to his destination, though the ticket contains a provision exempting the company from liability beyond their own line. (*Central Ry. Co.* v. *Combs*, 70 Ga. 533 ; 48 Am. Rep. 582.)

A railway company cannot be compelled to give a consignment note making them responsible for the goods beyond their own line. (*Lotspeich* v. *Central, &c. Ry. Co.*, 73 Ala. 306.)

A railway company receiving goods from a prior carrier apparently in good order is not obliged to open the packages for further examination. (*Knight* v. *Providence, &c. Ry. Co.*, 43 Am. Rep. 46.)

In case of the carriage of goods by successive carriers, it must be shown in an action to recover for damage to the goods against an intermediate carrier, at least that the goods were in good condition when delivered to the first carrier. To show that they were in good condition when packed at the consignor's house before delivery to the carrier for conveyance is not sufficient. (*Lake Erie, &c. Ry. Co.* v. *Oakes*, 11 Ill. 489 ; *Marquette, &c. Ry. Co.* v. *Kirkwood*, 45 Mich. 51.)

Where goods have been carried by several successive carriers, and it appears that they are in good condition when delivered to the first carrier, the jury may, in the absence of evidence to the contrary, presume that the goods reached the hands of the last carrier in good condition. (*Leo* v. *St. Paul, &c. Ry. Co.*, 30 Minn. 438 ; *Central Ry. Co.* v. *Rogers*, 66 Ga. 251.)

193. The carrying railway company, so far as concerns their own line (including a line over which running powers are exercised) and their own acts or omissions, are under same obligations in reference to the safety of the goods carried, as they would have

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been if they had directly contracted for the carriage of such goods. (*Foulkes* v. *Met. Dist. Ry. Co.*, 5 C. P. D. 157; 49 L. J. C. P. 361; *Hooper* v. *L. & N. W. Ry. Co.*, 50 L. J. C. P. 153.)

In the latter case Lindley, J., said, "The plaintiff, no doubt, entered into an express contract with the Great Western Railway Company to carry him and his luggage to Euston; at Birmingham it was transferred into the van of the defendant company. Whether there would be an implied contract with the defendant company may be a question of difficulty, but, as a matter of fact, the portmanteau was lawfully in their charge, and the fact of its not forthcoming at Euston involves the default of some one of the defendants' servants. The defendant company, having received the portmanteau, are responsible for its loss, in accordance with the principle of *Foulkes* v. *Met. Dist. Ry. Co.*"; and Denman, J., said, "The doctrine laid down in *Foulkes* v. *The Met. Ry. Co.*, namely, that there is a duty owing by a railway company towards the passengers they are carrying, would apply to goods."

CHAPTER XII.

THE OBLIGATIONS OF A RAILWAY COMPANY WITH RESPECT TO THE DELIVERY OF THE GOODS TO THE CONSIGNEE (*a*).

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(*a*) In connection with this Chapter reference should be made to Chapter VII. (*ante*, p. 79), on "the obligations of a common carrier with reference to the delivery of the goods to the consignee, and the termination of the carrier's liability," as being applicable to a great extent to the carriage of goods by railway.

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194. A railway company, in the absence of an express contract, are not bound to carry goods by the shortest route, but only by the route by which they usually carry them, and which they profess to go, and which is a reasonable route. (*Myers* v. *L. & S. W. Ry. Co.*, L. R. 5 C. P. 3; 39 L. J. C. P. 57. See *ante*, Chap. VII. Art. 92.)

In *Davis* v. *Garratt* (6 Bing. 725), Tindal, C. J., uses the words "without *unnecessary* deviation" in describing the duties of carriers, which imply that deviation is sometimes justifiable.

In *Myers' case* the goods in question were collected from the plaintiff's premises at Southampton by the defendants to be carried by them as common carriers, and to be delivered according to the direction, which was "Luton to order, viâ Great Northern." The goods were conveyed in the same truck, without unloading, on the defendants' railway from Southampton, through Clapham Junction, on to Nine Elms, where the defendants have a large goods station, from thence back to Clapham Junction, from Clapham Junction to Blackfriars on the London, Chatham and Dover Railway, from Blackfriars to Kings Cross on the Metropolitan and Great Northern Railways, and from Kings Cross to Luton by the Great Northern Railway. It was contended on behalf of the plaintiff that the defendants were not entitled to charge for the distance between Clapham Junction and Nine Elms and back. Willes, J., in delivering judgment, said, "In the old coach days, two coaches often travelled between the same two towns by different routes, one longer than the other, and I apprehend that if the Act now under discussion had applied to such coaches they would each have been entitled to charge for the distance they actually went. So the South Eastern Railway Company, who have made a new and shorter line through Sevenoaks might keep that for passenger traffic, and use their old line for the carriage of goods, and might charge for the longer distance, which they would thus actually carry them."

Where the contract gives the carrier an option between modes of transportation, the option must be exercised with a view to the owner's interest. (*Blitz* v. *Union S. S. Co.*, 51 Mich. 558.)

195. A railway company undertaking to carry goods from A. to B., must deliver them within a reasonable time, having reference to the means at their disposal for forwarding them; and they are not justified in delaying the delivery by adopting a particular mode of forwarding the goods merely because that is the usual mode adopted. (*Hales* v. *L. & N. W. Ry. Co.*, 32 L. J. Q. B. 292; 4 B. & S. 66.)

Cockburn, C. J., in delivering judgment, said, "If it were necessary to lay down any rule as to what should be the law in such cases, where no time is mentioned as to the carrying, the obligation of the carrier is to convey within a reasonable period; but the party who sends is not entitled to call upon the carrier to go out of his ordinary accustomed course, or to have recourse to extraordinary means of despatch for the conveyance of the goods; but he is entitled to expect that the carrier will do, not that which is unusual, but that which is within his means and power for the purpose of transmitting the goods." And Blackburn, J.: "I think that the carrier is bound to carry according to the course which he professes; and as stated in *Johnson* v. *Midland Ry. Co.* (18 L. J. Ex. 366), his obligation depends on what his conduct professes. I think he is bound to carry by the route which he holds forth, and which he professes to be his route; and when he carries goods by that route, he is bound to deliver in a reasonable time, having of course reference to the route by which he is carrying. I think it is no breach on the part of the carrier if he does not carry by a shorter route, if that shorter route is not the route which he professes to follow. If the customer wishes to go by some other route he should ask; and then he can choose whether he will send by the carrier, or make a special bargain. But when he sends by the

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usual route, the carrier must use reasonable diligence; and whether he has done so or not is a question of fact for the jury."

In America it has been held in respect to the liability of a railway company for delay in transportation and delivery of goods that all that can be required of the company is the exercise of due care to forward and deliver promptly; and that there is no absolute duty resting upon a carrier by railway to deliver goods within what is, under ordinary circumstances, a reasonable time. (*Greismer* v. *Lake Shore, &c. Ry. Co.*, 26 A. & E. Ry. Ca. 287; *Wibert* v. *N. Y. & Erie Ry. Co.*, 12 N. Y. 245, and 20 N. Y. 48. See *post*, Art. 290.)

196. If a railway company make no special contract to deliver in any particular time, they are not liable for delay in the conveyance of the goods caused by a sudden and unusual press of business not known to the railway company at the time they received the goods for carriage; the company having a reasonable equipment for all ordinary purposes, and the goods being carried with as much expedition as is practicable under the circumstances. (*Wibert* v. *N. Y. & Erie Ry. Co.*, 19 Barb. 36; 2 Kernan, 245; *Houston and Texas Central Ry. Co.* v. *Smith*, 22 A. & E. Ry. Ca. 421, 427. *Ante*, Art. 156, p. 132.)

Although these are American decisions it is submitted that the rule is the same in this country. If the pressure of traffic is such as the company might reasonably have anticipated and provided for, it is assumed they would not be released from the liability to receive goods on the ground of want of convenience.

Where there is a "blockade of freight," goods should be forwarded in the order of time in which they are received by the railway company for transportation. (*Page* v. *Gt. N. Ry. Co.*,

2 Ir. Rep. C. L. 288; *Acheson* v. *N. Y. & Central Ry. Co.*, 61 N. Y. 52.)

"Where there is a blockade of freight well known to the railway company at the time they receive the goods for transportation, there is some doubt whether the company is liable for a delay in case it receives the goods without notifying the consignor of the blockade. Some cases hold that the railway company must give notice to shippers of facts within their knowledge likely to cause delay, and in case of failure so to do, assume the responsibility of transporting the goods within the usual time." Judgment in *Houston, &c. Ry. Co.* v. *Smith*, *supra*.

197. In the absence of special agreement there is no implied contract on the part of a railway company to deliver with punctuality, but the contract is to carry and deliver within a time which is reasonable, having regard to all the circumstances, and the railway company are not responsible for the consequences of delay arising from causes beyond their control. (*Taylor* v. *G. N. Ry. Co.*, L. R. 1 C. P. 385; 35 L. J. C. P. 210; see *ante*, Chap. VII. Art. 97.)

In *Raphael* v. *Pickford* (5 M. & G. 588) Tindal, C. J., says, "The duty to deliver within a reasonable time being merely a term ingrafted by legal application upon a promise or duty to deliver generally." In *Briddon* v. *G. N. Ry. Co.* (28 L. J. Ex. 51), it was held that the railway company were not liable for delay arising from a snow storm. "We consider that although, theoretically, the rights of the public in the use of railways cannot be completely assured unless the traffic which is conveyed at defined rates is to be delivered within a definite time, on the whole the public will be better served by adhering to the present rule, that the delivery is to take place within a reasonable time, leaving the question of what is reasonable to be decided by a

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court of law. We see the less objection to this as the County Court affords facilities, and is largely resorted to for this purpose at the present time." Report of Royal Commission on Railways, 1867.

198. A contract by a railway company to carry goods by a given train which ordinarily arrives at a particular place at a particular hour, does not amount to a warranty that it will so arrive, although the company's servants be informed that the object of the sender requires that it should so arrive. (*Lord* v. *Midland Ry. Co.*, L. R. 2 C. P. 339; 36 L. J. C. P. 170.)

Willes, J., in delivering judgment, said, "It is only reasonable that the company should say that they would not be liable for any extraordinary damage, such as that arising by loss of market. The loss of the market is not like the loss of the season (*Wilson* v. *Lancashire & Yorkshire Ry. Co.*, 30 L. J. C. P. 232); it is an extraordinary loss, and depends on the arrival of the goods at a particular hour, and the company would not be liable for such loss unless they had notice of the purpose for which the goods were sent by them, and then, having such notice, it is very reasonable for them to say, 'We will not be answerable for such loss.' A case may be put of a person having a valuable appointment in India, who chooses to start by the last train, and then, because of some delay in the train he might fail to catch the steamer, and so claim to be compensated for a loss in the receipt of an income of several thousand pounds a year because he did not arrive in India in proper time."

In that case meat was carried by the defendants for the plaintiff under a consignment note on the back of which was printed the conditions upon which it was carried, one of which was as follows:—"The company will not be responsible for any damage to any meat, on the ground of loss of market, provided the same be delivered within a reasonable time after the arrival thereof at the

station from whence delivery is made," and this was held to be a reasonable condition.

Bovill, C. J., in delivering judgment, said, "I have no doubt it was the wish and expectation of the plaintiffs, and also of the company, that the meat would arrive in time for market. But there was no contract that it should arrive by that time. It is common knowledge that extraordinary efforts are made on the part of railway companies to attain perfect regularity and exactness in the departure and arrival of trains. But, so far as concerns passenger trains, the companies almost invariably protect themselves against the consequences of any irregularity, by inserting notices in their time-tables that they do not warrant that the trains will arrive and depart at the precise times indicated. . . The condition now before us does not profess to absolve the company from all liability in respect of the carriage of goods of a particular kind, but only to relieve them from the consequences of loss of market. In my judgment, it is competent to railway companies or other common carriers to say that they will decline to carry particular goods, except upon condition that they shall not be liable for the loss of market. There is nothing unreasonable in that. The charge for carriage would be regulated accordingly. To hold otherwise might involve railway companies in consequences most ruinous."

199. A railway company are liable for an unreasonable delay in the delivery of the goods, and the measure of damages is in general to be based upon the value of the goods at the place and time at which they ought to have been delivered. (*Rice* v. *Baxendale*, 30 L. J. Ex. 371.)

The value of the goods at the place and time appointed for delivery is ascertained by the market price, if there be a market for such goods; but if there be no market price, the value at the time and place

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must be ascertained as a matter of fact by the circumstances; thus in the case of goods intended for commerce the value at the place of destination, where there is no market for such goods, may be estimated to include a reasonable profit to the importer beyond the cost price and cost of carriage. (*O'Hanlon* v. *G. W. Ry. Co.*, 34 L. J. Q. B. 154.)

Therefore, the consignee may recover damages for a fall in the market price during the interval of delay. (*Collard* v. *S. E. Ry. Co.*, 30 L. J. Ex. 393, *post*, p. 195.)

And in the case of goods of which the price varies with the season he may recover damages for losing the season for selling by delay in delivery. (*Wilson* v. *Lanc. & York. Ry. Co.*, 30 L. J. C. P. 232, *post*, p. 195.)

The railway company are further responsible for all such damages as may reasonably be taken to have been in the contemplation of both parties, as a consequence of a default in the carriage and delivery of the goods, at the time of giving and receiving them for carriage. (Leake on Contracts, p. 1067.)

"Whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object." (Per Cockburn, C. J., in *Simpson* v. *L. & N. W. Ry. Co.*, 1 Q. B. D. 274; 45 L. J. Q. B. 182.)

But damages that could not reasonably be contem-

plated by both the parties as the consequence of a default in delivery are not recoverable. (*Hadley* v. *Baxendale*, 23 L. J. Ex. 179, *post*, p. 199; *Hammond* v. *Bussey*, 57 L. J. Q. B. D. 58; *Gee* v. *Lanc. & York. Ry. Co.*, 30 L. J. Ex. 11; 6 H. & N. 211; *Wilson* v. *Lanc. & York. Ry. Co.*, 30 L. J. C. P. 232; *Redmayne* v. *G. W. Ry. Co.*, L. R. 1 C. P. 329, *post*, p. 199.)

If the railway company or their servant (within the scope of his employment and duty) enter into any special contract to deliver in any particular time or place, even beyond the terminus of their particular route, it will be binding, and the owner, it would seem, may recover damages, with reference to expected profits, had the goods been delivered in time. (*Wilson* v. *York, Newcastle, and Berwick Ry. Co.*, 18 L. J. Q. B. 557; *Hughes* v. *G. W. Ry. Co.*, 25 L. J. Q. B. 347.)

In *Wilson* v. *Lanc. & York. Ry. Co.* (30 L. J. C. P. 232), Willes, J., said: "The damage in respect of the goods being depreciated in value in consequence of their arrival at a time when they were less in demand and less capable of being applied usefully by the plaintiff, is the ordinary, natural, and immediate consequence of the delay, for which the carrier is answerable."

In *Collard* v. *S. E. Ry. Co.* (30 L. J. Ex. 393), the defendants had no notice that the goods were sent for sale; but Martin, B., said: "It was proved that if they had been brought to market on the proper day they would have fetched a certain price, but, not being brought until a later day, the market price in the meantime fell, and the value of the hops was diminished by the amount of 65*l.* If that be not a direct, immediate and necessary consequence of the defendants' breach of duty, it is difficult to understand what would be"; and therefore the plaintiff was held entitled to recover as damages the difference between the market value on the day the goods ought to have been brought to market, and the day on which

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they are afterwards brought to market, although no notice be given to the carrier that the goods are intended for market. (See *Simpson* v. *L. & N. W. Ry. Co.*, 45 L. J. Q. B. D. 182; 1 Q. B. D. 274.)

Two consignments of fish for transport by special train and tidal boat from London *viâ* Folkestone to Boulogne, were made to a railway company, who advertised special trains and boats at special rates, subject to the conditions contained in their tables. One of these conditions was that the company would not be answerable for loss occasioned by the trains or boats not starting or arriving at the time specified; and another, that the boats started "wind, weather, and tide permitting." In each case, on arrival at Folkestone, it was found that it was not prudent to load the fish on the tidal boat, owing to the state of the weather, and the fish had to be sent in the cargo boat, in consequence of which the Paris train at Boulogne was missed, the fish delayed for twenty-four hours, and deteriorated, besides losing the market; it was held that there was no absolute guaranty they would go by that particular train and boat, but that it was for the jury to say whether under the circumstances the railway company had been guilty of negligence, or whether they had substantially fulfilled their contract, and also that in estimating the damages, the loss of the market in Paris by the non-arrival of the fish at Boulogne in time to catch the train for Paris was not to be taken into account. (*Hawes & Son* v. *S. E. Ry. Co.*, 54 L. J. Q. B. D. 174.)

A manufacturer forwarded a bale of cloth by railway consigned to a shipping agent at Grimsby, who was to ship it for Germany. On arrival at Grimsby the package was found to be frayed, and some slight damage done to the cloth. The shipping agent refused to take delivery, being of opinion that the goods could not be safely forwarded in their damaged package. The railway company thereupon returned them to the manufacturer, who repacked them and forwarded them to Germany. On arrival there they were rejected as being too late. The manufacturer having sued the railway company for damages for loss of market, it was held

by the Court of Session that the loss of market was the direct result of the damage done to the package by the railway company, who were therefore liable for it. (*Keddie, Gordon & Co.* v. *North British Ry. Co.*, 14 Sess. Ca. (4th Ser.) 233.)

As regards perishable goods, however, destined for a particular market, there may, in certain circumstances, considering the facilities of railway traffic, the obligations imposed by the Traffic Act, 1854, and the certainty with which times of transit may now be calculated, arise an implied obligation to deliver in time for that particular market. (See *post*, Art. 234; *Bates* v. *Cameron & Co.*, 28 Jur. 77; *Finlay* v. *N. Brit. Ry. Co.*, 8 Sess. Ca. (3 Ser.) 959; per Lord President, 970.) Such matters, however, are generally made the subject of special contract.

In the case of *The Notting Hill* (9 P. D. 105), it was held that loss of market was too remote a consequence to be considered as an element of damage.

In *Candy* v. *Midland Ry. Co.* (31 L. T. 226), it was held that merely labelling a box "Travellers' goods, deliver immediately," was not sufficient notice to in any way affect the company with special notice of the facts, so as to make particular damages recoverable against them.

In *Jameson* v. *Midland Ry. Co.* (50 L. T. 426), the plaintiff delivered a parcel at the receiving office of the defendants in London, addressed to "W. H. Moore & Co., Stand 23, Show-ground, Lichfield, Staffordshire, van train." Nothing was said by the person who delivered the parcel at the receiving office as to the purpose for which it was being sent to Lichfield, or to draw attention to the label; and it was held that the label was sufficient notice to the defendants that the goods were being sent to a show, and that the plaintiffs were entitled to recover damages for loss of profits and expenses incurred by the goods being delayed and not delivered at Lichfield in time for the show.

In *Woodyer* v. *G. W. Ry. Co.* (L. R. 2 C. P. 318; 36 L. J. C. P. 177), a commercial traveller delivered a parcel of samples to the railway company to be carried to A., but did not state the contents of the parcel or the purpose for which it was required. By

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the negligence of the railway company the parcel was delayed, and the traveller spent three days at A. unemployed, waiting for it. In an action for negligence it was held that the hotel expenses of the traveller during the time he was waiting for the parcel could not be recovered as damages, being too remote.

In *Hales* v. *L. & N. W. Ry. Co.* (32 L. J. Q. B. 292; 4 B. & S. 66), expenses incurred in inquiring for goods were held recoverable, but not loss of hire caused by their not arriving by the day for which they were hired.

In *Horne* v. *Midland Ry. Co.* (L. R. 8 C. P. 131; 42 L. J. C. P. 59), the plaintiffs delivered goods to the railway company at Kettering, and directed that they should be delivered to Messrs. Hickson, in London, on the 3rd of February, and further intimated that they should be delivered then as otherwise they would be thrown back on their hands. And the goods not having been then delivered, and having been thrown back on the plaintiffs' hands, the question was, what was to be the measure of damages? Kelly, C. B., in delivering judgment, said: "On the one hand the company has no power to say they will not accept the goods unless an extra charge for carriage be paid, nor on the other has the consignor power to compel them to accept an additional remuneration and liability. Neither can impose such a contract on the other. In the absence of an express contract, I cannot see how a notice that the damage will be large can create a contract making the company liable for it." Blackburn, J., in his judgment, said: "If there be a contract to carry goods and they be lost, the carrier ordinarily must pay their value, though it may be more than he anticipated; whilst there is no doubt, on the other hand, that if the damage be such as would not ordinarily be expected, it is not recoverable if notice be not given at the time of the contract. If notice of special damage be given it may be that it would be in some cases evidence of a contract to bear the loss, and if such a contract be made of course it binds. But here, even if there be notice, there is no special contract: the contract is to carry and deliver within a reasonable time, with notice to deliver on 3rd of February . . . . Now comes a question on which I speak

with reserve. In *Hadley* v. *Baxendale* (23 L. J. Ex. 179), it is said that if special notice be given the damage is recoverable, though there be no special contract, and this has been repeated in various cases, but it is noticeable that there seems to be no case where it has been held that if notice be given abnormal damages may be recovered; and I should be inclined to agree with my brother Martin that they cannot unless there be a contract. But it is not necessary to decide this question, because here in fact there was no such notice, the notice here given conveys full information that the day is of consequence, and that the goods should be delivered on the 3rd of February if the defendants could; from which a contract of sale on which there was a profit might be inferred, but there was no notice that the defendants would have to pay the amount of loss claimed. Therefore it is not necessary to decide whether the dictum in *Hadley* v. *Baxendale* is law, though I confess that at present I think it a mistake." Lush, J., and Pigott, B., did not agree with the majority of the Court, and thought that the plaintiffs were entitled to recover what they had lost.

In *Redmayne* v. *G. W. Ry. Co.* (L. R. 1 C. P. 329), the plaintiff sent goods from Manchester by the defendants' railway to his traveller at Cardiff; the delivery of the goods was, through the negligence of the defendants, delayed until after the traveller had left Cardiff, and the plaintiff, in consequence, lost the profits which he would have derived from a sale at Cardiff; and it was held that in the absence of notice to the defendants of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay.

A railway company having negligently failed to deliver a parcel which to the knowledge of the company contained samples until the season at which the samples could be used for procuring orders had passed, so that the samples had become valueless, is liable in damages for the value of the samples at the time when they should have been delivered. (*Schulze* v. *G. E. Ry. Co.*, 19 Q. B. D. 30; 56 L. J. Q. B. 442.)

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Goods consigned to B. & Co. were carried by a railway company at the owner's risk rate, the contract containing a condition that the company were not to be liable for loss, damage, or delay, except upon proof that such loss, damage, or delay arose from wilful misconduct on the part of the company's servants. The goods were delivered to another firm, and, on being found, were tendered to the consignees, who refused to accept them; and it was held that, in the absence of evidence on the part of the plaintiffs as to the cause of the mis-delivery, it did not amount to wilful misconduct so as to render the defendants liable. (*Stevens* v. *G. W. Ry. Co.*, 52 L. T. 324.)

When the mark upon goods in the hands of a common carrier differs from the way bill, the carrier is justified in exercising caution in delivering the goods; and it is a question for the jury whether the delay is reasonable. Detaining beef for five days under such circumstances was held reasonable. (*Baltimore, &c. Ry. Co.* v. *Pamphrey*, 59 Md. 390.) It is submitted that the address or direction upon the goods determine the place of their delivery, and if through the mistake of the consignor (who is the consignee's agent for this purpose) in addressing or directing the goods they are mis-delivered or non-delivered, neither the consignor nor the consignee can maintain an action against the railway company. (See per Lord Denman, C. J., in *Symes* v. *Chaplain*, 5 A. & E. 642.) It is further submitted that there is no duty cast upon carriers to communicate with the consignor or the consignee when there appears to be a discrepancy between the consignment note and the address upon the goods consigned.

200. Where goods are entrusted to a railway company for conveyance, and they are lost or delivered in such a condition as to be valueless, the owner is entitled to recover their value.

If such goods consist of articles of commerce, the amount recoverable is the market value of the goods

at the place to which they were consigned (*Rice* v. *Baxendale*, 30 L. J. Ex. 371) at the time they ought to have reached their destination (*Brandt* v. *Bowlby*, 2 B. & Ad. 932), first deducting from the amount the price of the carriage, unless it has been paid in advance.

If the goods are only partially destroyed, or are deteriorated in quality, the damage recoverable is the difference in their value if they had been delivered sound at their destination and their value as it was at the time, place and condition in which they were actually delivered. (*Collard* v. *S. E. Ry. Co.*, 30 L. J. Ex. 393.)

If from the smallness of the place, or the scarcity of the article, or other reasons, there is no market price, the real value at the time and place must be ascertained, as a fact, by the jury, taking into consideration the circumstances which would otherwise have influenced the market price if there had been one—price at the place of manufacture, cost of carriage, and a reasonable sum for importer's profit. (*O'Hanlan* v. *G. W. Ry. Co.*, 34 L. J. Q. B. 154.)

Wherever the owner or consignor represents the goods to be of a particular value, he will not be permitted, in case of a loss, to recover from the carrier any amount beyond that value. (*Batson* v. *Donovan*, 4 B. & A. 21; *Riley* v. *Horne*, 5 Bing. 217; *Chic.* v. *Aur. Ry. Co.*, 19 Ill. 578.)

In an action by the plaintiffs, alleging that they caused to be delivered to the defendants, as common carriers, a parcel of goods for carriage, and that the goods were lost by the careless conduct of the defendants, the defendants having paid a sum of 12*l.* 3*s.* 4*d.* into Court, which was accepted by the plaintiffs, it was held that the action was "founded on contract" within the meaning of the County Courts Act, 1867, s. 5, and that the plaintiffs were not

entitled to costs. (*Fleming* v. *Man., Sheff. & Lin. Ry. Co.*, 4 Q. B. D. 81. And see *Pontifex* v. *Midland Ry. Co.*, 3 Q. B. D. 23; 47 L. J. Q. B. 28.)

201. The station-master is agent for the railway company to deliver goods, and if he assents to some other mode of delivery than the usual one he will bind the company thereby. (Per Field, J., in *Wright* v. *L. & N. W. Ry. Co.*, 44 L. J. Q. B. 120.)

If goods are brought by mistake, and without right, and delivered at a railway station, the station-master has no right to detain them, after demand by the owner and the tender of any reasonable expenses due upon them. (*Rooke* v. *Midland Ry. Co.*, 16 Jur. 1069.)

In that case the station-master said, in answer to a demand of some goods, "The goods were brought to our station by an intermediate line, which has no right to send goods here, and I shall send them back;" and it was held that the railway company were liable for the conversion of the goods. But in order to fix the company, it must be shown that the wrongful act was done by some person acting for them within the scope of his authority. (*Glover* v. *L. & N. W. Ry. Co.*, 5 Ex. 66.)

202. Where goods are delivered to a railway company, to be delivered at a particular place, the owner of the goods may countermand the direction at any moment of their transit, and require the railway company to deliver at a different destination to that originally named; and in such a case the railway company are bound to do so, and are liable for a loss occasioned by their not obeying the instructions given to them.

Such a person may demand back his goods, on pay-

ment of the carriage to their original destination, unless, perhaps, when the unpacking and redelivering them would be productive of much inconvenience. (*Scotthorn* v. *South Staffordshire Ry. Co.*, 22 L. J. Ex. 121; 8 Exch. 341; *Reg.* v. *Frere*, 24 L. J. M. C. 68.)

In the case of *Scotthorn* v. *South Staffordshire Ry. Co.*, *supra*, the plaintiff delivered at a station of that company certain goods addressed to the East India Docks, London, and paid one sum for their carriage the whole distance. By the practice of that railway company, all goods delivered at that station for London are forwarded on their own line to Birmingham, and from thence by the London and North Western Railway. Before the goods in question arrived in London, the plaintiff directed a clerk at the London station of the latter company to forward them to another place, which the clerk promised to do. The goods were, however, delivered according to the original address, and thereby lost, and it was held that the South Staffordshire Railway Company were responsible for the loss.

Platt, B., in delivering judgment, said, "If a carrier undertakes to carry goods from A. to B., he does so subject to a right in the owner to countermand the direction at any point of the journey, and though he may be bound to pay the carrier for his trouble, yet the latter has no right to carry them further against the will of the owner of the goods."

And Martin, B., said, "A carrier is employed as a bailee of another's goods, to obey his directions respecting them; and I have no hesitation in saying that, generally, at any period of the transit he may have them back. It may, indeed, be different when the subsequent direction to the bailee is unreasonable. I can conceive a case where goods having been put into a place from which they could not be removed without the greatest inconvenience, the carrier would be entitled to refuse to deliver them up before the end of the journey."

When goods are delivered by a consignor to a railway company

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to be conveyed to a certain place, with the added words, "for Messrs. & Co.," these persons thus appearing to be the consignees of the goods, may demand them of the railway company at another place; and if on such demand, and on receiving payment for the carriage, the railway company (who have not received from the consignor any special communication on the subject of the place of delivery) deliver them up to the consignees, they will not be responsible to the consignor for any damages which may arise to the consignor from such delivery. (*Cork Distilleries Co.* v. *Gt. Southern & Western Ry. Co.* (*Ireland*), L. R. 7 H. L. 269; 8 Ir. R. C. L. 334.)

It was held in *L. N. W. Ry. Co.* v. *Bartlett* (31 L. J. Ex. 92; 7 H. & N. 400), that although the consignor of goods directs a carrier to deliver them to the consignee at a particular place, the carrier may deliver them wherever he and the consignee agree. But from the above decision in the House of Lords, it appears that if there had been a special contract between the consignor and the carrier it would have been different.

In *Bartlett's Case*, Bramwell, B., said it would "probably create a laugh anywhere except in a Court of law, if it was said a carrier could not deliver to the consignee short of the particular place specified by the consignor. The obvious meaning of the contract is to deliver to the consignee at the place mentioned, unless the consignee chooses, and the carrier is willing that they shall be delivered somewhere else." (See also *Butterworth* v. *Brownlow*, 34 L. J. C. P. 266.)

If one railway company receives goods to carry part of the way, and then transfers them to another company to carry to the place of destination, the agents of the latter company are agents of the first company for receiving notice of countermand; and if they receive such notice and pay no attention to it, the first company is responsible for the neglect. (*Scotthorn* v. *South Staff. Ry. Co.*, *ante*, p. 203; *Crouch* v. *G. W. Ry. Co.*, 27 L. J. Ex. 345.)

Where goods are left with a common carrier to be delivered to the consignee without any qualification or restriction, the consignor

parts with the goods and all control over them, and cannot, by a subsequent direction to the carrier, prevent their delivery to the consignee, unless such facts are shown as will justify the stoppage of the goods *in transitu*. (*Philadelphia, &c. Ry. Co.* v. *Vireman*, 88 Pa. St. 264.)

A common carrier's unauthorized delivery of goods may be ratified by the consignee. (*Converse* v. *Boston, &c. Ry. Co.*, 58 N. H. 521.)

203. It is ordinarily the duty of a railway company to give notice to consignees of the arrival of the goods, at all events when delivery is to be taken at the station of the company; for the time the consignees ought to call for the goods is when the company is ready to deliver, and they alone are in a position to notify when that is. (*Neston Colliery Co.* v. *L. & N. W. Ry. Co., and G. W. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 258; *Mitchell* v. *Lanc. & York. Ry. Co.*, L. R. 10 Q. B. 256; 44 L. J. M. C. 107.) On the giving of such a notice it becomes the consignee's duty to remove the goods in a reasonable time. (*Ibid.*)

As to whether a railway company hold the goods as carriers or warehousemen during that reasonable time, see *post*, Art. 206.

The mere fact that the goods are at their intended destination, and not in course of transit, but in the carrier's warehouse, is not sufficient to change his responsibility to that of a warehouseman simply. (*Hyde* v. *Trent, &c. Nav. Co.*, 5 T. R. 389.)

In *Mitchell* v. *Lanc. & York. Ry. Co.* (*supra*), the railway company, as carriers, brought some goods by their railway to one of their stations, and immediately gave the consignee notice of their arrival, and that they held the goods "not as common carriers but as warehousemen, at owners' sole risk, and subject to the usual warehouse charges." Soon after the receipt of this notice, the consignee went to the station and removed some of the goods,

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but left the rest at the station for more than two months. There were no warehouses at the station, and the goods (flax) remained on the open ground insufficiently covered, and became damaged by wet; and it was held that, on the true construction, the railway company were not exempted from all liability, but were bound as bailees to take reasonable care of the goods. Blackburn, J., in delivering judgment, said: "I take it the law is clear, that when the defendants, as carriers, received the goods, they took them with the liability of carriers as insurers. When the goods arrived at their destination the defendants complied with their duty when they gave notice, and then they ceased to be carriers, and incurred from that time a liability as bailees. There are several cases in which the question has been discussed when the carrier's liability ceased and the other liability began, as in *Bourne* v. *Catliff* (8 Scott, N. R. 604), and in *Cairns* v. *Robins* (10 L. J. Exch. 452; 8 M. & W. 258); but I do not know of any case that supports the proposition that where the owner is in delay in removing the goods, the bailee, in consequence, holds them—discharged from all responsibility. I think the defendants had a general responsibility in holding these goods as bailees for reward, especially when they charged for the warehousing. . . . The stipulation is to be construed against the company who make it, and I do not think that its proper meaning is that the defendants have none of the liability of warehousemen. I think the words mean that the defendants would hold as warehousemen, and no longer as carriers with a liability (with the exception of one or two excepted perils) as absolute insurers. Field, J., said: "When the goods arrived it was the railway company's duty to give notice to the consignee of their arrival, and it became the consignee's duty to remove them in a reasonable time. It might be a question whether the company held the goods as carriers or warehousemen during that reasonable time; but the company gave notice to the consignees to take away the goods, and said that if this were not done, they would not hold them as carriers but as warehousemen."

The master of a ship is not bound to notify the arrival of the

ship to the consignees of the cargo; they are bound to watch for it, and to take notice of it without communication. (See per Brett, L. J., in *Nelson* v. *Dahl*, 12 Ch. D. p. 583; Carver's Carriage by Sea, p. 443. But see, *contra*, Addison on Contracts, 8th ed. p. 563.)

In some of the United States it is held that a railway company's liability as a common carrier does not cease upon the arrival of the goods at the station to which they are sent until the consignee has had notice of their arrival and a reasonable opportunity to remove them. This is held in Vermont, New Hampshire, Wisconsin, Kentucky, New Jersey, Louisiana, Ohio and Kansas. In Tennessee, common carriers are required by statute to give the consignee a notice of the arrival of the goods. In Massachusetts, a different rule is established. It is there held that the liability of the railway company as a common carrier ceases as soon as the goods arrive at their destination, and are removed from the cars to a place of safety. (*Norway Plains Co.* v. *Boston & Maine Ry. Co.*, 1 Gray, 263.) The Massachusetts rule has been followed or adopted in North Carolina, Pennsylvania, Iowa, California, Indiana, Illinois and Georgia.

In the case of *Norway Plains Co.* v. *Boston & Maine Ry. Co.* (*supra*), the Court said: "The immediate and safe storage of the goods on arrival, in warehouses provided by the railway company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrivals of goods, at the larger places to which goods are thus sent, are so numerous, frequent and various in kind, that it would be nearly impossible to send special notice to each consignee of each parcel of goods or single article forwarded by the trains."

In States where the carrier is in general required to give notice, he need not give notice in the following cases:—(*a*) Where the consignee knows that the goods have arrived and are ready to be delivered. (*Fenner* v. *Buffalo, &c. Ry. Co.*, 44 N. Y. 505.) (*b*) Where the carrier is ignorant of the address of the consignee, and is unable, after due inquiry, to ascertain the same. (*Pelton* v.

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Rensselaer & Saratoga Ry. Co., 54 N. Y. 214; 21 A. & E. Ry. Ca. 133.) In such cases the carriers' liability as common carriers ceases after a reasonable time for the removal of the goods has elapsed. "When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them." (Per the Court in *Sherman* v. *Hudson River, &c. Ry. Co.*, 64 N. Y. 254.) A consignee who neglects after notice to remove his goods is liable for demurrage. (*Kansas Pacific Ry. Co.* v. *McCann*, 2 Wy. 3.)

204. A railway company are not bound to make a personal delivery of the goods in the absence of any usage or special contract to the contrary. (*Michigan Central Ry. Co.* v. *Ward*, 2 Mich. 538; *Michigan Ry. Co.* v. *Bivens*, 13 Ind. 263; *New Albany Ry. Co.* v. *Campbell*, 12 Ind. 55.)

Although these are American decisions, it is submitted that the rule is the same in this country. (See *ante*, Art. 99, p. 84.) If a railway company, receiving goods for conveyance, exacts the payment of cartage in advance of carrying, this will constitute an express contract to deliver at the consignee's house, and the company's liability will not cease until this is done.

205. A railway company has no right to impose a charge for the conveyance of goods to or from their station, where the customer does not require such service to be performed by them. (*Garton* v. *Bristol & Exeter Ry. Co.*, 28 L. J. C. P. 306.) Where goods are sent at collection and delivery rates, and the consignee sends a special order referring to a particular consignment, directing that it shall be delivered at the station instead of at his own house, the railway com-

pany are bound to deliver the consignment to the person producing the order.

If no order as to delivery is presented to the railway company at all, they are entitled to deliver themselves, and are released from all obligation, both to consignor and consignee, by tendering delivery at the address named on the consignment. (*Menzies* v. *Caledonian Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 306.)

This was a case before the Railway Commissioners, and Sir Frederick Peel, in the course of his judgment, said: "Where traffic arrives in Aberdeen, and has to be delivered to persons in the town, it appears that the railway company refuse altogether to deliver any such traffic to the applicant, and this although the applicant has produced in more than one case an order from such person upon the company—it is true an order of a general kind—directing the company to deliver their consignments to the carrier. I gather from the carriers' cases that were decided under the Railway and Canal Traffic Act, before the administration of that Act was transferred to the Railway Commissioners, that a railway company cannot force a person against his will to employ them to cart by road in addition to the service of conveyance by railway, and that a consignee has the right if he pleases to receive his goods at the station and to relieve the carrier from any further duty of carriage in that case. It does not seem to be disputed that if the consignee sends a special order referring to a particular consignment, directing that it should be delivered at the station instead of at his own house, the railway company would in that case be bound to deliver the consignment to the person producing the order. But in this case the order is of a general kind, to deliver all consignments present or to come for the person who sends the order. I confess that if the consignee has the right to receive his goods if he pleases at the station instead of at his own address, I do not myself see any distinction in principle between a special order referring to a particular consignment

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and a general order referring to all kinds of consignments. But as regards the effect that we are to give to a general order we are in this difficulty, that there is a conflict of view between the decisions that were given under the Traffic Act by the Court of Common Pleas in this country and those given by the Court of Session in Scotland. In this country, in the case of *Baxendale* v. *The Great Western Railway Company* (28 L. J. C. P. 81; 5 C. B. (N. S.) 336), and in the case of *Garton* v. *The Great Western Railway Company* (28 L. J. C. P. 306; 6 C. B. (N. S.) 639), and more particularly in *Parkinson* v. *The Great Western Railway Company* (L. R. 6 C. P. 544), the Court of Common Pleas held that a railway company were bound by a general order of that kind. On the other hand, in *Wannan* v. *Scottish Central Railway Company* (2 Sess. Ca., 3rd Ser. 1373), and again in *Pickford* v. *The Caledonian Railway Company* (4 Sess. Ca., 3rd Ser. 755), the Court of Session held that the railway company were not bound by any such general order, and they laid it down, as I understand, as a proposition of law, that although such a general order might be given by a consignee to a railway company, the railway company had the option to take no notice of the order and to deliver the goods according to the address that they had received. That is a proposition of law, and, in a Scotch case, this being a Scotch case, I think we have no choice but to hold that it is a ruling by which we are bound. That being so, we must, I think, treat the Caledonian Railway Company in this case as if no order had been given to them at all. And on the supposition that there has been no order at all from the consignees to deliver goods to the applicant, the company cannot be held to have done anything of which any complaint can be made if they have thought proper to deliver the goods according to the address in the consignment."

In another case before the Commissioners, it appeared that F. & Co., carriers, delivered to a railway company at their station goods for conveyance addressed to the consignees. With such goods a consignment note was handed to the railway company, containing, in addition to the names and addresses of the consignees, the words

"To the care of F. & Co." The railway company refused to recognise the latter words, and delivered the goods to the consignees by their own agents or other carriers. The Commissioners held, that the words "To the care of F. & Co." imported that the goods on their arrival at the terminal stations were to be given to F. & Co., or their agents, for delivery to the consignees; that as between the railway company and F. & Co. the latter were the consignors, and that the railway company accepted the goods upon the terms stated in the consignment note; and that the railway company were precluded by the consignment note from being at liberty to employ their own or other carriers to deliver the goods from their railway to the consignees, and should have delivered the same to F. & Co., or their agents. (*Fishbourne & Co.* v. *Midland Gt. Western of Ireland Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 224.)

206. When goods have arrived at the end of the transit the railway company are bound to keep them a reasonable time for the consignee to claim or fetch them in, during which time their liability as insurers continues. After a reasonable time this extraordinary liability ceases, and they become mere bailees of the goods for hire. (*Chapman* v. *G. W. Ry. Co.*, 5 Q. B. D. 278; 49 L. J. Q. B. 420; *In re Webb*, 8 Taun. 443.)

Whilst the goods are in the possession of the railway company, they are bound to take proper means for their preservation. (*Taff Vale Ry. Co.* v. *Giles*, 2 E. & B. 823.)

The amount of time a railway company ought to allow a consignee to unload and remove a consignment depends upon the varying circumstances of each particular case. (*Coxon* v. *N. E. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 284.)

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Where the consignee makes default in receiving the goods, the railway company are entitled to recover from him the expenses reasonably incurred in taking care of the goods. (*G. N. Ry. Co.* v. *Swaffield*, 43 L. J. Ex. 89; L. R. 9 Ex. 132. See *ante*, Art. 96.)

In the latter case the defendant sent a horse by railway consigned to himself at a station on the line, and paid the fare. When the horse arrived at the station there was no one on the defendant's behalf to receive it, and the railway company therefore placed it with a livery stable keeper; and the railway company were held entitled to recover from the defendant the reasonable charges which they had paid to the stable keeper.

A carrier's contract to deliver goods at a certain place is performed by the carriage of the goods to their destination and an offer to deliver them there to the consignee; and consequently, after completion of the carriage and a tender of the goods, the liability of the carrier, as such, under the contract, ceases; and he remains liable, so long as the goods continue in his possession, only for acts of negligence respecting them, and no longer as an insurer of their absolute safety. (*Shepherd* v. *Bristol & Ex. Ry. Co.*, L. R. 3 Ex. 189; 37 L. J. Ex. 113; *Heugh* v. *L. & N. W. Ry. Co.*, L. R. 5 Ex. 51; 39 L. J. Ex. 48; and see Leake on Contracts, p. 852.)

A railway company cannot charge demurrage for freight standing in their cars in absence of contract, statute, or usage tantamount to law. (*Burlington and Missouri, &c. Ry. Co.* v. *Chicago Lumber Co.*, 15 Neb. 390; 22 A. & E. Ry. Ca. 432; *N. E. Ry. Co.* v. *Cairns*, 32 W. R. 829.)

It is the duty of a carrier by railway, when the goods are conveyed to its station, to unload and place them in a convenient place for delivery, and, if the consignee is then ready to receive them, to deliver them to him; but if he is not, the carrier must then safely store them under the charge of competent and careful servants, ready to be delivered when called for by those entitled to receive them. When this is done, the carrier's duty is discharged,

and his liability as a carrier ceases. (*Cahn* v. *Michigan, &c. Ry. Co.*, 71 Ill. 96.)

A common carrier does not discharge his obligation to keep the goods until a reasonable time has elapsed for removal by the consignee, by delivering them to a third person to keep before the reasonable time has elapsed. (*Bell* v. *St. Louis, &c. Ry. Co.*, 6 Mo. App. 363.)

A "reasonable time" is such as would enable one residing in the vicinity of the place, and informed of the probable time of arrival, to inspect and remove the goods during business hours. (*Ibidem.*)

What will amount to reasonable time is a question of fact and not of law, and must depend on the circumstances of the particular case. (*Chapman* v. *G. W. Ry. Co.*, *supra.*) Specially directing goods "to be left till called for" does not affect the liability of the railway company, either as carriers or warehousemen. (*Ibidem.*)

207. If, in consequence of an imperfect address, or the consignee's removal from the place, he cannot be found, or if he refuse to receive the goods at the stated address, the usual course of business is for the carrier to give notice to the consignor that the goods have been rejected, and to wait his instructions. The goods will then be held at the order of the consignor (*Metzenberg* v. *Highland Ry. Co.*, 7 Sess. Ca. (3rd Ser.) 919), and will be at his risk.

There is, however, no absolute rule of law to this effect, and the question whether it would have been reasonable in the circumstances that such notice should have been given is properly one for a jury. (*Hudson* v. *Baxendale*, 27 L. J. Ex. 93; 2 H. & N. 575.)

208. Where there has been a delivery, actual or constructive, though the goods remain on the railway

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company's premises, they are no longer liable as carriers, but only as warehousemen, or on any special terms they may think proper to impose on the customer, and the contract is not affected by any of the statutes relating to carriers. (*Shepherd* v. *Br. & Ex. Ry. Co.*, L. R. 3 Ex. 189; 37 L. J. Ex. 113.)

In that case cattle delivered by the plaintiff to the defendants arrived in London at noon on Sunday. If the defendants' train had kept its time, it would have arrived at seven in the morning. As the police regulations prevented the cattle being driven through the streets till midnight, they were placed in pens at the station by the defendants' servants, assisted by a man who was employed by the plaintiff. After midnight, when the plaintiff's drover went to fetch them away, he found that two were dead; and the defendants' servants would not let him take the rest away unless he signed a receipt for the whole number. Afterwards the plaintiff came himself and took them away; but in the meantime the Monday's market was lost. It was held by Bramwell, B., and Channell, B., that the defendants' liability as carriers was over before the damage occurred. *Contra*, per Martin, B., that, at the time of the damage, there had been no delivery of the cattle to the plaintiff, and that the defendants were responsible for the consequences of their servant's refusal to deliver.

A carrier has been held liable as a bailee for reward of goods warehoused by him after the transit was complete, the warehousing being accessory to the contract of carriage. (See Angell on Carriers, 41.)

It seems a warehouseman may be liable as an insurer by the custom of a particular trade. (*Nor. Brit. Ins. Co.* v. *Lon. & Globe Ins. Co.*, 5 Ch. D. 569; 46 L. J. Ch. 537.)

Goods entrusted to a railway company having been tendered by them for delivery at the address of the consignees, were refused acceptance, and the company thereupon took them back to their own premises. They then (in accordance with their practice

under such circumstances) sent an advice note to the consignees' address by post, stating that the goods remained at the risk of the consignees, and would be delivered to the person producing the note. They subsequently delivered the goods to a person who had formerly been in the service of the consignees, and who, having obtained the advice note fraudulently, produced it at the company's premises:—held, that upon the goods being returned on the company's hands, their duty as carriers was at an end, and they became involuntary bailees; and that in an action brought against them by the consignors for misdelivery and conversion, it was a question of fact whether they had acted under the circumstances with due and reasonable care and diligence. (*Heugh* v. *L. & N. W. Ry. Co.*, L. R. 5 Ex. 51; 39 L. J. Ex. 48.)

Where the railway company took back a parcel the very next morning after a refusal to receive it, from Plymouth to London, they were held liable for so doing, the jury having found that the parcel was sent back before the expiration of a reasonable time. (*Crouch* v. *G. W. Ry. Co.*, *post*, p. 220.)

A railway company carried coals to the station to which they were addressed, and gave notice to the consignee of their arrival, upon which, according to the usual course of practice between them and the consignee, it lay upon him to send for them and take them away; and he not having done so within a reasonable time, they unloaded the coals and left them on the siding, where they were lost. It was held, in an action against them as common carriers, for non-delivery, that they had performed their contract by a constructive delivery. (*Bradshaw* v. *Irish North Western Ry. Co.*, 7 Ir. C. L. R. 252.)

In *Chapman* v. *Great Western Ry. Co.* (5 Q. B. D. 278; 49 L. J. Q. B. 420), certain goods were consigned by the defendants' railway to W., addressed to the plaintiff, "to be left till called for." On their arrival at W. they were placed in the station warehouse to await their being called for. Two days afterwards, without default on the part of the defendants, the warehouse was burnt down, and the plaintiff's goods were consumed by fire. Held,

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that after the interval of time which the plaintiff had suffered to elapse since the arrival of the goods, the liability of the defendants as common carriers in respect of the goods had ceased, and they had become mere warehousemen of them, and consequently the defendants were not liable to an action for the loss of the goods, in the absence of any evidence of negligence on their part.

In that case Cockburn, C. J., in delivering the judgment of the Court (Cockburn, C. J., Lush, and Manisty, JJ.), said: "The question is, whether the goods in question are to be considered as having been in the custody of the defendants as carriers—in which case the defendants would be liable for the loss, though not arising from any default of theirs; or as warehousemen—in which case they would be liable only for want of proper care, which is not alleged to have been the case here. . . . . The question of where the liability of the carrier ceases—or, rather, becomes exchanged for that of an ordinary bailee for hire—is sometimes one of considerable nicety, and by no means easy of solution. . . . The contract of the carrier being not only to carry but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond, as well as precede, the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure—sometimes one of considerable duration. Next there is the time which in most instances must necessarily intervene between their arrival at the place of destination, and the delivery to the consignee, unless the latter—which, however, is seldom the case—is on the spot to receive them on their arrival. Where this is not the case, some delay, often a delay of some hours—as, for instance, when goods arrive at night, or late on a Saturday, or where the train consists of a number of trucks which take some time to unload—unavoidably occurs.

"In these cases, while, on the one hand, the delay being unavoidable cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee, on the other

hand, the obligation of the carrier not having been fulfilled by the delivery of the goods, the goods remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of carrier. *A fortiori*, will this be the case where there is unreasonable delay on the part of the carrier, if the consignee is ready to receive. The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable not to the carrier, but to the consignee of the goods. Here, again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to reasonable time to demand and receive delivery. He cannot be expected to be present to receive delivery of goods, which arrive in the night time, or of which the arrival is uncertain, as of goods coming by sea, or by a goods train, the time of arrival of which is liable to delay. On the other hand, he cannot, for his own convenience, or by his own laches, prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance —at all events where the carrier has no means of communicating with him—which was the case in the present instance—cannot avail him in prolonging the liability of the carrier, as such, beyond a reasonable time. When once the consignee is *in morâ*, by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident. What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such it must depend on the circumstances of the particular case.

"Such being the general rule, it is of course competent to the parties to modify that contract by the introduction of any terms or conditions they may please. The question arises whether they have done so, and, if so, to what extent in the present instance. The goods were specially directed 'to be left till called for.'

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What is the meaning of these words? What effect, if any, have they on the contract, as affecting the liability of the defendants? In our opinion, none. They amount to no more than an intimation to the carrier that the goods are not to be delivered elsewhere, but will be fetched from the station. They are words which have been long in use, and had their origin in former times when the carrier generally had his office in the town to which he carried, and was in the habit of delivering at the house or place of business of the person to whom goods were addressed. To prevent goods, which it better suited the convenience of the consignee to receive at the office of the carrier—more especially when he had no residence or office at the particular place—from being sent out for delivery, and, possibly, misdelivery, and to insure their being kept at the office of the carrier ready for delivery, they were specially so addressed. There are still places at which railway companies send out goods from the station. The consignors of the goods now in question were probably unaware whether the defendant company did so at Wimborne, or not. They no doubt knew that the plaintiff did not reside or carry on business there, except in passing. They were probably aware that he was going about the country with his goods, and that it was uncertain at what precise moment it would suit him to receive them. They therefore directed them to be left at the station till called for—obviously for the plaintiff's convenience, not for that of the company. No doubt some effect must be given to the words. Having contracted to carry the goods subject to the condition of keeping them till called for, the company would be bound to keep them—possibly not for an indefinite, but, at all events, for a reasonable time. But in what capacity? As carriers or as warehousemen? In our opinion no change in the conditions of liability is introduced by these words. It would be in the highest degree unreasonable that the company, having agreed to keep the goods for the convenience of the owner, should be saddled with a more onerous liability than would otherwise have attached to them. It cannot be supposed that they undertook to keep the goods till it suited the convenience of the plaintiff to take

them away, with the intention of prolonging their responsibility throughout the time whatever it might be. In our opinion, as soon as a reasonable time for delivering had passed, the defendants were fully entitled to treat their responsibility as carriers as at an end, and exchanged for that of warehousemen.

"This view of the case receives support from the decision of the Court of Common Pleas in *Re Webb* (8 Taun. 443), which, in principle, is quite analogous to the present case, though the facts are not precisely the same. There the defendants, the carriers, in order to obtain their exclusive custom, had agreed with the plaintiffs to store all goods arriving for them in the defendants' warehouse free of charge, till it suited the plaintiffs to take them away. A fire having accidentally broken out, and goods of the plaintiffs, which had been lying at the defendants' warehouse upwards of a month, having been destroyed, it was held that the goods having been in the keeping of the defendants for the convenience of the plaintiffs, the defendants were not liable for the loss. Here, too, the goods were equally in the keeping of the defendants for the convenience of the plaintiff, and the same result must ensue."

It is the duty of a railway company to keep its warehouses in as safe a condition, and provided with such means and appliances, if any, for extinguishing fires, as ordinarily prudent and cautious men would do under like circumstances. (*Leland* v. *Chicago, &c. Ry. Co.*, 21 A. & E. Ry. Ca. 108.) A warehouseman is only answerable for loss occasioned by the want of ordinary care and skill; but he may restrict his liability by contract, except as to loss occurring through his fraud or want of good faith. (*Gashweiler* v. *Wabash, &c. Ry. Co.*, 25 A. & E. Ry. Ca. 403.)

209. If the consignee refuses to pay the carriage upon the goods being tendered to him, the railway company has the option of adopting either of two courses: they may deliver the goods to the consignee, and trust to their right of action for the recovery of the amount

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for carriage, or they may retain them in virtue of their lien for that amount. (See *ante*, Chap. VIII. and *post*, Art. 229.)

It is the duty of a railway company, if they keep goods for their lien on refusal of the consignee to pay for the carriage, to deal with them in a reasonable manner, and to keep them in a reasonable place; and this duty will generally impose upon them the obligation of keeping the goods at the place of delivery for a reasonable time, if they have a convenient place of deposit there. (Per Willes, J., in *Crouch* v. *Great Western Ry. Co.*, 27 L. J. Ex. 345.)

In that case the defendants carried a parcel from London consigned to the plaintiff at Plymouth. At Plymouth the charge was disputed, and thereupon the defendants next morning sent back the parcel from Plymouth to London. The majority of the Court—Cockburn, C. J., Williams, Crompton, and Willes, JJ.—held that the railway company were guilty of a wrongful act in sending the parcel, in a time found by the jury to be unreasonably short after the refusal to pay the hire, to a place where it was, as found by the jury, unreasonable to send it.

Crompton, J., in delivering the judgment of himself and Cockburn, C. J., said: "It may be too much to say that a carrier cannot in any possible case send a parcel back; but, certainly, it is very much too strong to say that in every case a carrier can send the parcel back to the consignor on a refusal to pay for the carriage;" and Willes, J., said: "When the parcel was refused at the end of the line they were entitled to retain it in respect of their lien; but they might, if they had chosen, have delivered the parcel trusting to their action for the recovery of the proper sum for the carriage. They did not think proper to do so, but retained it, and retaining it, it appears to me, they were not entitled to dispose of it as they thought proper themselves. They could not have

sent it to any foreign part; they could not have sent it to any part of the kingdom where it would be expensive and troublesome for the plaintiff to go to receive it. I think that those are plain propositions. If so, there must be in effect some duty imposed upon them by law, and that duty is to take reasonable care of a parcel and to deal with it in respect of time and place in a reasonable manner. I entirely agree with what was laid down by the Court of Exchequer in the case of *Hudson* v. *Baxendale* (27 L. J. Ex. 93). That appears to me to have been the true view of the case, and, generally speaking, dealing with a parcel under such circumstances, in a reasonable manner, and keeping it in a reasonable place, would impose upon the carrier the duty of keeping it for a reasonable time, if he had the means of doing it, at the place at which it was originally delivered to be carried to."

As to the lien of railway companies, see *post*, Chap. XIII. Art. 229; and *ante*, Chap VIII.

210. When goods are delivered by a railway company at the proper place, and at the proper time, the consignee is bound to examine them and ascertain whether they are in good order, and if he does not intimate objection, it will be presumed that they were delivered in good order. (*Stewart* v. *North British Ry. Co.*, 5 Sess. Ca. (4th Series) 426.)

The consignee is entitled to a reasonable time in which to inspect the goods before he accepts them. (*Ante*, Chap. VII. Art. 106.) It was said in *Skinner* v. *Chicago & Rock Island Ry. Co.* (12 Iowa, 191), that a railway company has a right to require a receipt from the consignee showing that the goods were in good order when delivered. (See 2 Redfield on Railways, 68.)

211. If the consignee of the goods, with the assent of the railway company, is engaged for the conveni-

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ence of both parties in taking delivery in a particular way, the railway company are bound to see that while he is so engaged he is not injured through the negligence of themselves or their servants in the performance of their contract. (*Wright* v. *L. & N. W. Ry. Co.*, 1 Q. B. D. 252; 45 L. J. Q. B. (App.) 570.)

In that case the plaintiff sent a heifer (which was put into a horse-box) by defendants' railway to their P. station. On the arrival of the train at the station, there being only two porters available to shunt the horse-box to the siding from which alone the heifer could be delivered to the plaintiff, in order to save delay he assisted in shunting the horse-box, and while he was so assisting he was run against and injured through a train being negligently allowed by the defendants' servants to come out of the siding. There was evidence that the station-master knew that the plaintiff was assisting in the shunting, and assented to his doing so. The Court of Appeal held that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises with their consent for the purpose of expediting the delivery of his own goods, and the defendants were therefore liable to him for the negligence of their servants, according to the principle of *Holmes* v. *N. E. Ry. Co.*, *infra*.

Lord Justice Mellish said, "It is very convenient for railway companies to receive the assistance of the consignees of goods at a small station like Penrith, and if they rely upon a practice on the part of consignees to render assistance, and so free them from the necessity of providing a larger staff of porters, they must take care that persons so assisting them to perform their contract with those persons are not injured through the negligence of servants in their employ."

At the defendants' station at C., it was the practice to unload coal waggons by shunting them, and tipping the coal into cells; it was also the practice for the consignees of the coal or their servants to assist in the unloading, and for that purpose to go along a

flagged path by the side of the waggons. The plaintiff was consignee of a coal waggon, which could not be unloaded in the usual way on account of all the cells being occupied. With the permission of the station-master he went to his waggon, which was shunted in the usual place, took some coal from the top of the waggon, and descended on to the flag-path. The flag he stepped on gave way, and he fell into one of the cells and was injured. It was held that, although not getting his coal in the usual mode, the plaintiff was not a mere licensee, but was engaged, with the consent of the defendants, in a transaction of common interest to both parties, and was therefore entitled to require that the defendants' premises should be in a reasonably secure condition. (*Holmes* v. *N. E. Ry. Co.*, L. R. 6 Ex. 123; 40 L. J. Ex. 121.)

It was held in *Indermaur* v. *Dames* (L. R. 2 C. P. 311; 36 L. J. C. P. (Ex. Ch.) 181) that where a person resorts to a building in the course of business, on the express or implied invitation of the occupier, such person, using reasonable care, is entitled to expect the occupier to use reasonable care to prevent damage from unusual danger which he knows or ought to know.

CHAPTER XIII.

THE RATES AND CHARGES PAYABLE FOR THE CONVEYANCE OF THE GOODS BY RAILWAY.

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I.—Tolls and Rates.

212. Railway companies are empowered by their special Acts to take certain specified tolls for the carriage of goods and persons on their railway, and for the use of such railway.

"It shall be lawful for the company to use and employ locomotive engines or other moving power, and carriages and waggons to be drawn or propelled thereby, and to carry and convey upon the railway all such passengers and goods as may be offered to them for that purpose, and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special Act authorised to be taken." (8 Vict. c. 20, s. 86.)

"It shall not be lawful for the company at any time to demand or take a greater amount of toll, or make a greater charge for the carriage of passengers or goods than they are by this and the special Act authorised to demand." (8 Vict. c. 20, s. 92.)

The third section enacts that the word "toll" shall include "any rate or charge or other payment payable under the special Act" for any passenger, animal, or goods conveyed on the railway.

The power to charge tolls is found in the provisions of the Railways Clauses Consolidation Act, 1845, which form this Article, as well as in each special Act, but the amount of the tolls is to be gathered from the special Acts only.

What determines whether a charge is a rate or a toll is not who

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provide the carriage or who provide the engine, but who are the carriers. (*Watkinson* v. *Wrexham, &c. Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 5.)

The toll clauses of a railway company's special Act are controlled by the general clause limiting maximum charges. (*Chatterley Iron Co.* v. *N. Staff. Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 238.)

"We do not consider that it would be expedient, even if it were practicable, to adopt any legislation which would abolish the freedom railway companies enjoy of charging what sum they deem expedient within their maximum rates when properly defined, limited as that freedom is by the conditions of the Traffic Act. (Report of Royal Commission on Railways, 1867.)

The charges which railway companies are entitled to make are of two kinds, those pertaining to them as owners of a railway, and those attaching to them as carriers.

"The charges of railway companies in their character of carriers consist mainly of remuneration for the mere conveyance of goods, and this remuneration includes tolls for the use of the railway, for the use of carriages and waggons, and for the supply of locomotive power. The amount of these tolls is fixed by statute, and a maximum rate comprising the several tolls is, with few exceptions, also fixed by statute, and is usually somewhat less in amount than the aggregate of the three separate tolls, probably because it was supposed that if the company provided both carriages and locomotive power they might make an easier profit than if either of these were supplied by the trader. . . . . When the earlier Railway Acts were passed it was supposed that the companies would be, like the canal companies, mere owners of the route, and their maximum tolls were fixed accordingly. But they subsequently became carriers, and as carriers provided stations, sidings, warehouses, cranes, and other fixed plant, which had in many cases previously been provided or leased by private firms. The evidence given before your Committee proves conclusively that large sums have been expended by railway companies in providing, from time to time, for this accommodation. In the second place they pro-

vided labour and appliances for loading, unloading, covering, collecting, and delivering traffic, which services varied in respect of different traffic. Some confusion has arisen from the use of the word 'terminals' for both these classes of service, and it would be well if distinct terms could be applied to them, such as 'station terminals' and 'handling terminals.' For these services they claim to be entitled by different Acts of Parliament to receive 'reasonable remuneration.'" Report of Select Committee on Railways, 1882. (See *post*, Arts. 224, 225.)

A railway company in carrying goods took them past C. junction to N.E. station and back, and then on by other lines, and charged a mileage rate, which included the mileage to and fro between these places; such route was reasonable and usual. It was held that they could so charge. (*L. & S. W. Ry. Co.* v. *Myers*, 39 L. J. C. P. 57.)

The S. D. Ry. Co. (as the working company under an agreement) in conveying goods from the B. Railway to a line leading from their own railway, were compelled, through not having any siding or other accommodation at the junction, to convey goods three miles beyond the junction to a station on their line, and then to send them back to the junction by another train, and it was held that in such they were entitled to credit themselves with the mileage one way—namely, the three miles—in estimating the mileage proportion between the two companies. (*Buckfastleigh, &c. Ry. Co.* v. *South Devon Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 321.)

In considering the question of the reasonableness of charges, the principle is not what profit it may be reasonable for a railway company to make, but what it is reasonable to charge to the person who is charged. (*International Bridge Company* v. *Canada Southern Ry. Co.*, 8 App. Cas. 723.) A provision in a railway company's special Act authorising them to fix such sum in respect of small parcels (not exceeding 500 pounds weight) as to them should seem fit repeals the maximum rate clause. (*Baxendale* v. *G. W. Ry. Co.*, 16 C. B. (N. S.) 137.) Such a provision does not extend to articles sent in large aggregate quantities, though made

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up of separate and distinct parcels, such as bags of sugar, coffee, &c.; but only to single parcels unconnected with parcels of a like nature which might be sent upon the railway at the same time. (*Edwards* v. *G. W. Ry. Co.*, 11 C. B. 588.)

One of the toll clauses of a railway company's special Act contained these words, "For all cotton and other wools, hides, drugs, manufactured goods, and all other wares, merchandize, articles, matters or things." Coleridge, J., in delivering the judgment of the Court (Lord Campbell, C. J., Coleridge J., Wightman, J., and Erle, J.), said: "It was suggested that 'manufactured goods' was, like 'dry goods,' a term of art, and denoted goods supplied from what are called the 'manufacturing districts,' and which may be seen in warehouses and the shops of drapers and haberdashers marked 'fabrics'; and some such notion may have been in the mind of the framers of these sections; but there are no clear indications of this, and it was certainly the duty of the defendants, if they had intended such a limitation of words, which in their natural meaning import a great deal more, to have taken care that such limitation should be expressed in unambiguous language. Forming the best judgment which we are able in so doubtful a matter, we think that the term 'manufactured goods' must be understood in a popular sense, and must mean not merely goods produced from the raw state by manual skill and labour, but such as are ordinarily produced in manufactories, and we should, therefore, exclude stationery, and include shoes, ironmongery, glass and drapery. It should be observed, however, that having given what we conceive to be the meaning of the term, the application of that meaning to particular articles is a question of fact, not of law. . . . We get no assistance from the context. 'Cotton,' 'wools,' and 'drugs' may all mean articles in the raw state—probably do." (*Parker* v. *G. W. Ry. Co.*, 25 L. J. Q. B. 209; 6 E. & B. 77.)

The Railway Commissioners have decided that the expression "all sorts of manure" includes artificial manures, as well as dung and cheap manures. (*Aberdeen Lime Co.* v. *Gt. North of Scotland Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 203.)

213. Railway companies have power to vary their rates as they may think proper, provided their charges are the same to all, and do not exceed the maximum sums they are authorized by their Acts to charge, and a reasonable amount for legal terminal services.

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties: it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit: Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway." (8 Vict. c. 20, s. 90.)

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As to the portion of this section relating to equality of tolls, see *post*, Art. 259, p. 330.

The word "tolls" applies to traffic generally, and is not limited to tolls strictly so called. (*Evershed* v. *L. & N. W. Ry. Co.*, 2 Q. B. D. 254; 46 L. J. Q. B. D. 289.)

214. "And whereas authority has been given by various Acts of Parliament to railway companies to demand tolls for the conveyance of passengers and goods, and for other services, over the fraction of a mile equal to the toll which they are authorized to demand for one mile; therefore, in cases in which any railway shall be amalgamated with any other adjoining railway or railways, such tolls shall be calculated and imposed at such rates as if such amalgamated railways had originally formed one line of railway." (8 Vict. c. 20, s. 91.)

One railway company, A., made an agreement with another railway company, B., to allow B. to carry passengers and goods over the A. line on certain terms. There was a station on the A. line towards the increased extent and accommodation of which the B. company was to contribute a limited sum. The A. company amalgamated with others, obtained several branch lines, and assumed a different name. The B. company did the same. It was held by the House of Lords that the agreement applied to all traffic coming from the B. line upon the A. line, however originating, whether only upon the original B. line, or in, from, or through any of its amalgamated lines. (*The Lancashire & Yorkshire Ry. Co.* v. *The East Lancashire Ry. Co.*, 25 L. J. Ex. (H. L.) 278.)

215. "Where two railways are worked by one company, then in the calculation of tolls and charges

for any distances in respect of traffic (whether passengers, animals, goods, carriages, or vehicles) conveyed on both railways, the distances traversed shall be reckoned continuously on such railways as if they were one railway." (31 & 32 Vict. c. 119, s. 18.)

The special Act of a railway company provided that where goods were carried on the company's railway, or partly on their railway and partly on some other railway of which they were joint owners, or which they had a right to use, for a less distance than six miles, the company should be entitled to take tolls as for six miles. The Act also provided that the tolls for goods carried over the company's line, and over portions of other lines of which they were part owners, or which they had a right to use, should be computed as if the company's line and the said portions of the said other lines formed one railway. Goods were passed over the line of which the company were sole owners for a distance of less than six miles; the same goods, on their transit to their ultimate destination, passed over another line, of which the company was part owner, for a distance of more than six miles. This latter line was under the sole management of another company. The goods were accompanied by two declaration notes, one made out in the name of the first company, and the other in the name of the other company, but the station of ultimate destination mentioned in both notes was the same. It was held by the House of Lords that the company was not entitled to split the contract; that the two lines must be treated as one; and that the six mile clause was not applicable. (*Lancashire & Yorkshire Railway Company* v. *Gidlow* (No. 1), 42 L. J. Ex. (H. L.) 129.)

The usual distance now authorized in a short distance clause is three miles.

216. "A list of all the tolls authorized by the special Act to be taken, and which shall be exacted by

the company, shall be published by the same being painted upon one toll-board or more in distinct black letters on a white ground, or white letters on a black ground, or by the same being printed in legible characters on paper affixed to such board, and by such board being exhibited in some conspicuous place on the stations or places where such tolls shall be made payable." (8 Vict. c. 20, s. 93.)

"The company shall cause the length of the railway to be measured, and milestones, posts or other conspicuous objects to be set up and maintained along the whole line thereof, at the distance of one quarter of a mile from each other, with numbers or marks inscribed thereon denoting such distances." (Sect. 94.)

"No tolls shall be demanded or taken by the company for the use of the railway during any time at which the boards hereinbefore directed to be exhibited shall not be so exhibited, or at which the milestones hereinbefore directed to be set up and maintained shall not be so set up and maintained; and if any person wilfully pull down, deface or destroy any such board or milestone he shall forfeit a sum not exceeding five pounds for every such offence." (Sect. 95.)

The word "tolls" in sect. 95 of the Railways Clauses Consolidation Act, 1845, relates to tolls properly so called, and not to charges for carrying passengers in the company's own carriages. (*Brown* v. *G. W. Ry. Co.*, 9 Q. B. D. (C. A.) 744; 51 L. J. Q. B. (App.) 529.)

217. "Every railway company and canal company shall keep at each of their stations and wharves a book

or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged.

"Every such book shall during all reasonable hours be open to the inspection of any person without the payment of any fee." (36 & 37 Vict. c. 48, s. 14.)

"Where a railway company intend to make any increase in the tolls, rates, or charges published in the books required to be kept by the company for public inspection, under section 14 of the Regulation of Railways Act, 1873, or this Act, they shall give by publication in such manner as the Board of Trade may prescribe at least fourteen days' notice of such intended increase, stating in such notice the date on which the altered rate or charge is to take effect; and no such increase in the published tolls, rates, or charges of the railway company shall have effect unless and until the fourteen days' notice required under this section has been given. Any company failing to comply with the provisions of this section shall, for each offence, and in the case of a continuing offence for every day during which the offence continues, be liable, on summary conviction, to a penalty not exceeding 5*l*." (51 & 52 Vict. c. 25, s. 33, *post*, APPENDIX.)

When traffic is received or delivered at any place on any railway other than a station within the meaning of sect. 14 of the Regulation of Railways Act, 1873, the railway company, on whose line

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such place is, shall keep at the station nearest such place a book or books showing every rate for the time being charged for the carriage of traffic other than passengers and their luggage, from such place to any place to which they book, including any rates charged under any special contract, and stating the distance from that place of every station, wharf, siding, or place to which such rate is charged. Every such book shall, during all reasonable hours, be open to the inspection of any person without the payment of a fee. (51 & 52 Vict. c. 25, s. 34.)

As to the penalty for contravening these sections, see next Art. (218).

The Commissioners have held that the statutory direction, that the books should be open to inspection, is equivalent to saying that there should be a publication of the rates, and gives a general right to inspect, and also to make copies or extracts. (*Perkins* v. *L. & N. W. Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 327.)

A company refusing to show their rate books at their stations will have to pay the costs of any proceedings which the parties, in the absence of information which the rate books would have afforded, had "reasonable and probable cause" for taking. (*Clonmel Traders, &c.* v. *Waterford & Limerick Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 92.)

The book of rates which a railway company are required by this section to keep at their station must show all rates, local as well as through, which are being charged from the station where the book is kept. Through rates need not be shown, in whole or in part, at any other station than the one from which the traffic carried at through rates is forwarded in the first instance. (*Oxlade* v. *N. E. Ry. Co.* (No. 3), 3 Ry. & Ca. Tr. Ca. 35.)

A classification table is to be open to the inspection of any person at every station without payment of any fee. (51 & 52 Vict. c. 25, s. 33, *post*, APPENDIX.)

218. "Where any charge shall have been made by a company in respect of the conveyance of goods over

their railway, on application in writing within one week after payment of the said charge made to the secretary of the company by the person by whom or on whose account the same has been paid, the company shall within fourteen days render an account to the person so applying for the same, distinguishing how much of the said charge is for the conveyance of the said goods on the railway, including therein tolls for the use of the railway, for the use of carriages, and for locomotive power, and how much of such charge is for loading and unloading, covering, collection, delivery, and for other expenses, but without particularizing the several items of which the last-mentioned portion of the charge may consist." (31 & 32 Vict. c. 119, s. 17.)

"The company shall within one week after application in writing made to the secretary of any railway company by any person interested in the carriage of any merchandise which has been or is intended to be carried over the railway of such company, render an account to the person so applying in which the charge made or claimed by the company for the carriage of such merchandise shall be divided, and the charge for conveyance over the railway shall be distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified." (51 & 52 Vict. c. 25, s. 33, *post*, APPENDIX.)

"The Railway Commissioners may from time to

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time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in the book mentioned in Article 217 how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses.

"Any company failing to comply with the provisions of this section shall for each offence, and in the case of a continuing offence, for every day during which the offence continues, be liable to a penalty not exceeding five pounds, and such penalty shall be recovered and applied in the same manner as penalties imposed by the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845 (as the case may require), are for the time being recoverable and applicable." (36 & 37 Vict. c. 48, s. 14.)

A railway company are not required, under sect. 14 of the Act of 1873, to show how the through rates quoted by it are divided between the railway companies receiving them (*Watkinson and others* v. *Wrexham, &c. Ry. Co.* (No. 3), 3 Ry. & Ca. Tr. Ca. 446); but where a railway company charge a through rate for merchandise carried partly by land and partly by sea, see 51 & 52 Vict. c. 25, s. 33, ss. 5, *post*, APPENDIX.

A railway company are bound to distinguish under this section, although the rate charged is a lump sum rate fixed by the company in order to compete with other lines. (*Bailey* v. *L. C. & D. Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 99.)

Where it was proved in evidence that nothing was included in a parcels rate except the carriage on the railway, the Commissioners refused to make an order under sect. 14. (*Robertson* v. *Midland Great Western*, 2 Ry. & Ca. Tr. Ca. 409.)

Where, to an application under this section, the railway company answered that the rates charged were mileage rates within their Parliamentary powers, and were not made up of separate sums, the Commissioners held that an order to distinguish such rates should be made, as it did not follow that the whole of each rate was for conveyance only, and that part was not for other expenses. (*Jones* v. *N. E. Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 208.)

An order under sect. 14 will be made only as to rates which are being charged by a railway company at the time of the application. (*Hall* v. *L. B. & S. C. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 398.)

The withdrawal of rates by a railway company, after an application has been made to the Railway Commissioners, will not disentitle an applicant to an order under sect. 14, calling on the company to distinguish how the rate is made up. (*Berry* v. *L. C. & D. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 310.)

It being the duty of a railway company to inform any person interested, and applying to it for information, how much of each local and through rate in its entirety is for conveyance, and how much is for other expenses, specifying the nature and detail of such other expenses, if the information is withheld, the Railway Commissioners will, on an application under sect. 14, order it to be given, and to be made public by proper entries in the rate book, and will order the railway company to pay the costs of the proceedings which became necessary for the purpose of obtaining such information. (*Cairns* v. *N. E. Ry. Co.*, and *Coxon* v. *N. E. Ry. Co.* (No. 1), 4 Ry. & Ca. Tr. Ca. 221; *Watkinson and others* v. *Wrexham, Mold, and Connah's Quay Ry. Co.* (No. 3), 3 Ry. & Ca. Tr. Ca. 446.)

The words "specifying the nature and detail of such other expenses" require a railway company to state in their rate book, to which the order made applies, what terminal services they

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undertake to perform with regard to the particular traffic, and how much they charge for each of such terminal services, and a railway company does not sufficiently comply with the section by giving a list of the various terminal services which they perform, and stating what their total charge is for the whole of these services. (*Colman* v. *G. E. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 108.)

The details to be given under sect. 14 must be such as to enable the person paying the rates and the Commissioners, should application under sect. 15 be made to them, to say whether an expense charged for in the rate is an expense for which the railway company can properly charge, and whether the amount charged for that expense is a reasonable amount or not. (*Birchgrove Steel Co.* v. *Midland Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 229.)

219. Every railway and canal company, at the request of any other such company or of any person interested in through traffic, shall afford all due and reasonable facilities for the receiving, forwarding, and delivering of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares. (51 & 52 Vict. c. 25, s. 25.)

As to the granting of such facilities, see *post*, Art. 253.

220. If a railway company charge for conveyance of goods the extreme sum sanctioned by their special Act, they cannot limit their liability as insurers. But if a railway company offer to carry at less than their maximum rates, in consideration of being relieved from loss by accidents, and give the customer an

alternative of carrying his goods at the maximum or insured rate, then such a condition, if accepted by the consignor, is reasonable and valid. (*Ante*, Art. 171.)

But even at the lower alternative rate the company cannot contract themselves out of liability for gross negligence.

See also Art. 168, as to a special contract for conveyance of goods.

221. Whenever any person receiving or sending or desiring to send goods by any railway is of opinion that the railway company is charging him an unfair or an unreasonable rate of charge, or is in any other respect treating him in an oppressive or unreasonable manner, such person may complain to the Board of Trade.

The Board of Trade, if they think that there is reasonable ground for the complaint, may thereupon call upon the railway company for an explanation, and endeavour to settle amicably the differences between the complainant and the railway company. (51 & 52 Vict. c. 25, s. 31.)

"For the purpose aforesaid, the Board of Trade may appoint either one of their own officers or any other competent person to communicate with the complainant and the railway company, and to receive and consider such explanations and communications as may be made in reference to the complaint; and the Board of Trade may pay to such last-mentioned person such remuneration as they may think fit, and as may be approved by the Treasury.

"A complaint under this section may be made to the Board of

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Trade by any of the authorities mentioned in sect. 7 of this Act (see *post*, APPENDIX) in any case in which, in the opinion of any of such authorities, they or any traders or persons in their district are being charged unfair or unreasonable rates by a railway company; and all the provisions of this section shall apply to a complaint so made as if the same had been made by a person entitled to make a complaint under this section." (51 & 52 Vict. c. 25, s. 31, *post*, APPENDIX.)

222. Where any question or dispute arises, involving the legality of any toll, rate, or charge, or portion of a toll, rate, or charge, charged or sought to be charged for merchandize traffic by a railway company or a canal company, the Railway and Canal Commissioners have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge, or so much thereof as the Commissioners decide to be legal. (51 & 52 Vict. c. 25, s. 10.)

Until the passing of this Act the Railway Commissioners had no jurisdiction in the matter of the charges made by railway companies, unless they were open to objection as being made in contravention of sect. 2 of the Railway and Canal Traffic Act, 1854, or unless they were in the nature of terminal charges.

As to the Commissioners' jurisdiction over rates which cause an undue preference or undue prejudice, see *post*, Art. 260.

223. If a person sending goods, in ignorance of the fact that the rates charged to him exceed those authorized by law, pays the amount demanded by the railway company, he can, upon discovering the truth, sue the company, and recover as damages

the difference between the sum paid and that which the company was by law entitled to demand. (*Evershed v. L. & N. W. Ry. Co.*, 3 App. Cas. 1029.)

In the above case the illegal charge was as to terminals; but it is equally true if the overcharge is in the mileage rate.

"Where the Railway and Canal Commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages is to be in complete satisfaction of any claim for damages, including repayment of overcharges, which but for this Act such party would have had by reason of the matter of complaint." (51 & 52 Vict. c. 25, s. 12.)

There is a proviso in that section that such damages are not to be awarded unless complaint has been made to the Commissioners within one year from the discovery by the party aggrieved of the matter complained of. (*Post*, APPENDIX.)

II.—TERMINAL SERVICES AND CHARGES.

224. The Railway Commissioners have power to hear and determine any question or dispute which may arise with respect to the terminal charges of any railway company, where such charges have not been fixed by any Act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, delivery,

and other services of a like nature; any decision of the Commissioners under this section being binding on all Courts and in all legal proceedings whatsoever. (36 & 37 Vict. c. 48, s. 15.)

This enactment gives the Railway Commissioners power, in case of dispute, to determine what is a reasonable sum to be charged for terminals.

No definition of "terminals" has hitherto been attempted in an Act of Parliament, but for the purpose of the Railway and Canal Traffic Act, 1888, "terminal charges" are to include "charges in respect of stations, sidings, wharves, depots, warehouses, cranes, and other similar matters, and of any services rendered thereat." (Sect. 55.)

In the report of the Select Committee on Railways (Rates and Fares), 1882, "terminals" are defined to be "accommodation and conveniences afforded, and services performed in respect to the goods at the receiving and delivering stations," and they recommended that "terminal" charges be recognised, but subject to publication by companies, and in case of challenge, to sanction by the Railway Commissioners.

As to the distinction between "station terminals" and "handling terminals," see *ante*, p. 227.

225. Where the special Act of a railway company enacts that "The maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways and waggons or trucks, and for locomotive power, and every other expense incidental to such conveyance (except a reasonable sum for loading, covering, and unloading the goods at any terminal station of such goods, and for delivery and collection, and any other

services incidental to the duty or business of a carrier, where such services, or any of them, are or is performed by the company), shall not exceed" certain sums prescribed; station accommodation, the use of sidings, weighing, checking, clerkage, watching, and labelling, provided and performed by the company in respect of goods traffic carried by them as carriers, may be, and *primâ facie* are, "services incidental to the duty or business of a carrier" within such enactment: whether they are so in any particular case is a question of fact for the Railway Commissioners to decide (under sect. 15 of the Regulation of Railways Act, 1873), and if found by them to be so, such services may be the subject of a separate reasonable charge in addition to the rates prescribed. (*Hall* v. *London, Brighton, &c. Ry. Co.*, 15 Q. B. D. 505; 5 Ry. & Ca. Tr. Ca. 28.)

As this work is intended only as a digest of the existing law, it will not be proper to discuss the vexed question of—whether the maximum rates for conveyance include station accommodation, &c. The views of the Railway Commissioners and of the Divisional Court are fully stated in the reports of *Hall's case*, and this Article states what the decision of a Divisional Court was on the subject.

226. The legal meaning in the special Acts of railway companies of the words "load" and "unload" is no other than the sense in which they are used in ordinary English, and the words are not applicable to things which have their own proper words to describe them. (*Kempson* v. *G. W. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 426.)

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The terms "loading" and "unloading" do not comprehend more than the labour of packing and unpacking a goods train or a goods truck, whether done by hand or by machinery. (*Berry* v. *L. C. & D. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 310.)

Upon an application to fix the sums to be paid to the railway company for performing the services of loading and unloading iron rods cut into lengths and rolled round a cylinder, two feet or so in diameter, into coils, which weighed about two hundredweight each, and of which fifty or sixty made a load for a truck, it was proved that the senders and receivers of the goods employed their own carts, and their carters put the carts by the side of the trucks and assisted in the work of loading and unloading, the company's porters performing the larger share of the work. The Commissioners found that the cost to the company at the sending station was $4\frac{1}{4}d.$ a ton, and at the receiving station $4d.$ a ton, and held, that taking this cost, with an addition for profit, a reasonable charge for such assistance in loading and unloading respectively was $5d.$ a ton; and that checking was a service not properly embraced in the term loading, and which should not be reckoned as part of the expense of loading. (*Kempson* v. *G. W. Ry. Co.*, *supra*.)

There can be no average rate for loading and unloading. Each case must depend on its own circumstances. If the terminal charges exceed the actual cost to the railway company, and a reasonable profit, then they are unreasonable.

As to rebates, see Undue Preference, *post*, Art. 276.

227. Where the special Act of a railway company enacts that in addition to the maximum mileage rates the company may charge a reasonable sum for covering of goods at any terminal station of such goods, the word "covering" includes not only the labour of un-

folding and making fast the sheets over a loaded waggon, but also the use of the sheets. (*Hall & Co.* v. *London, Brighton & South Coast Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 398.)

If the special Act contains the words "providing covers," this includes not only the supply of sheets, but also the labour of covering waggons with them. (*Coxon* v. *N. E. Ry. Co.* (No. 2), 4 Ry. & Ca. Tr. Ca. 284.)

In *Hall's case* it was held that, as regards the applicants' traffic, 6*d.* a sheet was a reasonable sum for the use of a sheet, it being proved that a sheet used in that traffic would make two journeys a week; that a reasonable charge for the labour of covering the loaded truck was 3*d.* if one sheet only was used, and 2*d.* each sheet if more than one.

In *Coxon's case*, the special Act of a railway company enacted that it should be lawful for them to demand, in addition to the maximum mileage rates, a "reasonable sum for loading, unloading, collecting, receiving, or delivering, and for providing covers for minerals, goods, articles, or animals." The Commissioners held, that the words "providing covers" included not only the supply of sheets, but also the labour of covering waggons with them.

Upon an application to the Commissioners to decide what were reasonable sums to be paid to the railway company for terminal services in respect of hay and straw traffic, it was proved that the railway company at the sending station provided a truck and two sheets for covering the load, which amounted to one and a-half tons, and that a railway porter assisted the consignor's servant in loading and drawing the sheets over the load and fastening them; that at the receiving station a porter untied the sheets, and then the consignee unloaded the truck and removed the hay or straw, and that if he detained the truck beyond three clear days he was charged demurrage.

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It was further proved that the railway porter covered the loaded waggon in twenty minutes, and that with the assistance of the consignor's servant he was able to load also in the same space of time; that the uncovering at the receiving station took ten minutes; but as the unloading was generally spread over two or three days, and the uncovering and re-covering the load had to be repeated, another ten minutes should be added on that account. It was held, that 9*d.* a sheet was a reasonable sum for providing covering, assuming that a sheet used in that traffic would not make more than one journey a week, that a reasonable charge for covering the loaded waggon was 2*d.* a ton; for assistance in loading, 2*d.* a ton; for uncovering and re-covering the load at the receiving station, 2*d.* per ton.

228. Weighing goods carried on a railway at a railway station for the convenience of the consignees is incidental to the statutory powers of the railway company, and not *ultra vires*, and an action may be maintained by the company to recover charges for weighing them. (*L. & N. W. Ry. Co. and G. W. Ry. Co.* v. *E. Price & Son*, 11 Q. B. D. 485; 52 L. J. Q. B. D. 754.)

In that case the railway company carried coals on their line for the defendants, who were coal merchants, and delivered them at the defendants' wharf, which adjoined a siding at one of the company's stations, and they allowed the defendants, in consideration of paying a specified reasonable charge, to weigh out the coals to customers by a machine belonging to the company, placed in the station yard. The company had no express statutory power to make charges for the use of their weighing-machines. It was held, that the charges were not *ultra vires*, and the company could maintain an action to recover them from the defendants.

As to whether when the special Act of a railway company com-

pels them to weigh coal at the point of discharge, such weighing is a facility for delivery under sect. 2 of the Railway and Canal Traffic Act, 1854, see *post*, p. 259.

III.—The Lien of a Railway Company.

229. Railway companies acting as carriers are entitled by the common law to a lien on the goods, and, unless they have entered into some special contract by which the right is waived, have a right to detain goods which they have received to be carried until the charges of carrying have been paid to them by the owner or employer. But railway companies have only the common law lien to rely upon. Section 97 of the Railways Clauses Consolidation Act, 1845, which gives a general power to detain and sell all goods in case of non-payment of tolls due in respect of any carriage or goods, applies only to tolls due for the use of the line by persons conveying goods in their own carriages, and not to tolls or charges due for goods carried by a railway company as carriers. (*Wallis* v. *L. & S. W. Ry. Co.*, L. R. 5 Ex. 62; 39 L. J. Ex. 57; *Scottish N. E. Ry. Co.* v. *Anderson*, 1 Sess. Ca. (3rd Ser.) 1056.)

A railway company, therefore, cannot sell goods which they have conveyed as carriers, and over which they have a lien. (See *ante*, Art. 119.)

"If, on demand, any person fails to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall have been removed from the premises of the com-

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pany, to detain and sell any other carriage or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the moneys arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto; or it shall be lawful for the company to recover any such tolls by action at law." (8 & 9 Vict. c. 20, s. 97.)

Notwithstanding the definition of toll in the interpretation clause as including "any rate or charge," &c. (see *ante*, Art. 212), this section has been held in the above cases to apply to tolls only, and not to the charges made by a company as carriers.

A sum claimed for sending back empty carriages is not a "toll" within the meaning of section 97 of the Railways Clauses Act, 1845. (*Field* v. *Newport, Abergavenny and Hereford Ry. Co.*, 27 L. J. Ex. 396; 3 H. & N. 409; and see *Grantham Canal Navigation* v. *Hall*, 14 M. & W. 880.)

A trader entered into an agreement with a railway company by which the company were to render a monthly account of their charges for freight of goods carried by them for the trader, and the company were to have a general lien for all moneys due to them on all goods belonging to him in their hands. He afterwards filed a liquidation petition, and a receiver and manager of his business was appointed, who, in order to carry on the business, bought goods with his own money and sent them by the company's railway. The company detained the goods under their lien, and only delivered them on payment of 50*l.*, which was due to them for freight. The receiver paid the 50*l.* under protest, and the Court of Bankruptcy ordered the company to repay it:—Held, that the Court of Bankruptcy had no jurisdiction to make the order. But, *semble*, that the company would have no defence to an action by the receiver for the 50*l.* (*Ex parte G. W. Ry. Co., In re Bushell*, 22 Ch. D. (C. A.) 470; 52 L. J. Ch. (App.) 734.)

The plaintiff consigned certain goods for carriage by the defendants to the consignee's address. The consignment note, which was signed by the plaintiff, contained a condition that "all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges." The Court held that the lien continued so long as the company held the goods, and was in no way affected by the refusal of the consignee to accept the goods after they had arrived at their destination. (*Westfield* v. *G. W. Ry. Co.*, 52 L. J. Q. B. 276.)

As to the effect of the consignee's bankruptcy upon a general lien constituted by agreement in favour of the company, see *Wiltshire Iron Co.* v. *Gt. Western Ry. Co.* (L. R. 6 Q. B. 101).

"If a carrier conveys goods under a particular notice, that notice and the acceptance of it by the customer may constitute a contract which will give him a general lien." Per Channell, B., in *Wallis's case*, *supra*.

Under the first part of sect. 97 of the Railways Clauses Consolidation Act, 1845, which provides that on failure "to pay the tolls due in respect of any carriage or goods," the company may detain and sell "such carriage, or all or any part of such goods," the company has no right to detain and sell a carriage for default in payment of tolls due only in respect of the goods carried on it.

By an Act with which the Railways Clauses Consolidation Act was incorporated, a railway company was authorized to charge a certain rate per ton per mile for coal carried on its line, with additional rates per ton per mile if the company supplied carriages and engines, but no mention was made of a toll for carriages conveyed on their line. The B. Company conveyed coals on the line in their own carriages, the railway company supplying power, and rendering accounts by which they charged the authorized rates per ton per mile for the coals and power, but did not charge any toll for the carriages. It was held by the Court of Appeal that the railway company could not detain and sell the carriages for the tolls due.

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Semble, that the latter part of the section, which enables the company to detain and sell for tolls due to them any carriages or goods on the premises of the company belonging to the persons owing the tolls, is not confined to carriages or goods to which the debtor is absolutely entitled; but if he has only a partial interest the company can only sell such interest as he has.

Whether under the latter part of the section carriages can be detained and sold for tolls due on goods, *quære*. (*North Central Wagon Co.* v. *M. S. & L. Ry. Co.*, 35 Ch. D. 191; 55 L. J. Ch. 780.)

CHAPTER XIV.

THE OBLIGATIONS OF A RAILWAY COMPANY TO AFFORD DUE AND REASONABLE FACILITIES FOR THE RECEIVING AND FORWARDING OF GOODS AND PASSENGER TRAFFIC.

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I.—Generally.

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230. Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic (which, by interpretation clause, includes passengers and their luggage, goods and animals) upon and from the several railways (which, by interpretation clause, includes station and siding) and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any

particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near (*i.e.*, by interpretation clause of the Act, within one mile) the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways (which includes stations and sidings) and canals of the several companies, be at all times afforded to the public in that behalf. (Railway & Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 2.)

See *Dickson* v. *Great Northern Ry. Co.*, *ante*, pp. 120, 121.

From 1854 to 1873 the remedy under this section was an application to the Court of Common Pleas. Since 1873 the jurisdiction has been transferred to the Railway Commissioners.

The Select Committee of 1872 stated in their Report that the applications to the Court of Common Pleas were almost all complaints of undue preference, and that the branch of the Act

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relating to traffic facilities had failed altogether to be applied, not because that branch did not need to be enforced as much as the other branch, but because of the difficulty of questions connected with traffic arrangements. Since the passing of the Act of 1873 many applications have been made to the Commissioners founded on complaints of companies not affording proper traffic facilities.

In 1845 an Act (8 & 9 Vict. c. 42) was passed enabling canal companies to become carriers of goods upon their canals.

Canal companies, as a rule, not being carriers on their own canals, and more than half the canals in England and Ireland being owned or controlled by railway companies, the subject of the carriage of goods by canal has ceased to be one of much practical importance. There are no independently-owned canals in Scotland. An exhaustive work on the "law relating to canals" was published in 1885 under that title, by Mr. R. G. Webster.

"Canals are able to compete with railways in the carriage of sundry classes of traffic, and railway companies have had recourse to various means to interfere with the independence of canals, and to obtain a control over them. Many railway companies are canal companies as well, and own canals which are portions of a continuous navigation, and it was quite necessary that their policy as railway companies to prevent by high tolls the carriage by water of competing or through traffic should be met by independent canal companies having a right to call upon them to agree to through tolls." (Fourth Annual Report of Railway Commissioners.)

Some of the provisions of the Railway and Canal Traffic Act, 1888 (*post*, Appendix), are intended to make canals more independent of railway companies, and better able to compete with them.

231. To induce the interference of the Railway Commissioners on a question of "reasonable facilities," apart from undue preference, it is generally necessary to prove a public inconvenience, and not

merely an individual grievance. (*Barret* v. *G. N. Ry. Co. and Midland Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 38; 26 L. J. C. P. 83; 1 C. B. (N. S.) 423, *post*, pp. 299, 346; *Beadell* v. *E. C. Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 56; 26 L. J. C. P. 250; *Painter* v. *L. B. & S. C. Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 58; 2 C. B. (N. S.) 702; *Ilfracombe Public Conveyance Co.* v. *L. & S. W. Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 61; Addison on Contracts, 8th ed., p. 575.)

These cases show that public convenience is probably the standard by which the absolute accommodation to be granted by railway companies to the public should be determined, when the question is unincumbered by any considerations of undue preference.

Barret's application was refused, as being that of a person seeking to have a complicated traffic arrangement re-arranged for his own peculiar benefit. In that case Williams, J., said: "If applicant had satisfied me that public convenience required what he asks, and the accommodation could reasonably be granted, I should have paused considerably before assenting to the rule being discharged." Cresswell, J., said: "In considering what was a reasonable amount of accommodation, regard must be had to the convenience of the general traffic of the company."

In *Beadell's case* and *Painter's*, and that of the *Ilfracombe Conveyance Co.*, the complainants were unsuccessful, because the Court was not satisfied that there was a substantial inconvenience to the public from the cab arrangements made for them by the company.

232. The Railway and Canal Traffic Act, 1854, s. 2, does not compel a railway company to find reasonable accommodation for the public further than as it is in the interests of railway traffic that it should be found. (*Holyhead Local Board* v. *London and North Western Ry. Co.*, 3 Ry. & Ca. Tr. Cas. 37.)

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In that case an application to the Commissioners under that section to order a railway company to construct a foot-bridge over their railway in their station at H. for the more convenient ingress and egress of foot-passengers from and to the town was refused, on the ground that such a bridge was not a due and reasonable facility under the circumstances.

The Commissioners in delivering judgment said :—"This is an application to us to require the London and North Western Railway Company to erect a foot-bridge in their station at Holyhead, with a view to shortening the distance between the town and their passenger station. . . .

"The Traffic Act, 1854, does not compel a railway company to find reasonable accommodation for the public further than as it is in the interests of railway traffic that it should be found; but it has been felt to be a grievance by the applicants that there was not also more endeavour made in designing the new station to connect the two sides, between which it was interposed, by cross roads, and that communication consequently between the town west of the station and the districts east of it, known as Black Bridge and Turkey Shore, has become less easy and direct than it was. . . . A station cannot be expected to have every possible facility, and it is enough if on the whole and with the particular facility here in question wanting Holyhead local passenger traffic is well off in respect of station accommodation. It is, in fact, more than usually so, for its size, for it has a station which is more than in proportion to its requirements, being adapted as well to a great through traffic, of which the railway company are carriers both at sea and by railway, and with a view to which it has been provided with the best appliances for facilitating the forwarding of traffic. By these local traffic also is benefited, and on the whole the claims of traffic of that character seem to us to be fairly met. We are of opinion, therefore, that a case has not been made out for an order against the company, and the application must be refused with costs."

233. Where any enactment in a special Act— (a) contains provisions relating to traffic facilities, undue preference, or other matters mentioned in sect. 2 of the Railway and Canal Traffic Act, 1854; or (b) requires a company to which this part of this Act applies to provide any station, road, or other similar work for public accommodation; or (c) otherwise imposes on a company to which this part of this Act applies any obligation in favour of the public or any individual, or where any Act contains provisions relating to private branch railways or private sidings, the Commissioners shall have the like jurisdiction to hear and determine a complaint of a contravention of the enactment as the Commissioners have to hear and determine a complaint of a contravention of sect. 2 of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts. (51 & 52 Vict. c. 25, s. 9.)

The Railway and Canal Traffic Act, 1854, s. 2, requires facilities to be given according to the powers of railway companies, and as special Railway Acts make the powers of some companies larger than those of others, so they also extend or limit the facilities they give to the public, and thus the general enactment as to affording facilities has to be read and considered with reference to the language of any special clauses regarding them. (*Tharsis Sulphur and Copper Co.* v. *L. and N. W. Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 455.)

In that case upon complaint by persons occupying works or manufactories adjacent to the railway that the railway company did not supply sufficient waggons for the traffic on the railway, it was held, that although the duty cast upon the railway company

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by the special Act was limited to cases where there was a request for waggons by members of a particular class, and where also only particular lines of railway were required to be used, yet where the duty did arise, it determined what was a reasonable facility within the meaning of sect. 2 of the Traffic Act, 1854, as effectively as if it were a duty of a more general kind or one which applied under any circumstances; and the railway company were enjoined to afford all reasonable facilities for the receiving, forwarding, and delivery of the applicants' ore passing exclusively over the lines transferred having regard to the above section.

The Commissioners, in delivering judgment, said:—"By the Act for transferring the undertaking of the St. Helen's Company to the London and North Western Company, the London and North Western Company, when requested so to do by any person occupying works or manufactories adjacent to and having sidings connected with the railways hereby transferred, is at all reasonable times and with all due diligence to provide waggons proper and sufficient for the conveyance of all traffic passing exclusively on the lines of railway hereby transferred, except coal, slack, and refuse material. The duty cast upon the respondents by this section is limited to cases where there is a request for waggons by members of a particular class, and where also only particular lines of railway are required to be used, but where the duty does arise, it determines what is a reasonable facility within the meaning of the Traffic Act as effectively as if it were a duty of a more general kind or one which applied under any circumstances. That Act requires facilities to be given according to the powers of railway companies, and as special Railway Acts make the powers of some companies larger than those of others, so they also extend or limit the facilities they give to the public, and thus the general enactment as to affording facilities has to be read and considered with reference to the language of any special clauses regarding them. In this case the special obligation is the more incumbent to be performed, because it is one of the terms on which the St. Helens railways were transferred to their present owners, and its being an obligation to

find waggons makes a company neglecting it answerable under the Traffic Act. This was the principle of our decision in *Watkinson and others* v. *Wrexham Mold and Connah Quay Ry. Co.* (No. 2), (3 Ry. & Ca. Tr. Ca. 164, 446)."

In this latter case it was held by the Common Pleas Division (affirming the judgment of the Commissioners), that the special Act imposed an obligation on the A. company to provide waggons proper and sufficient for the working and user of the B. railway, and that anyone interested in procuring that accommodation had a ground of complaint under sect. 2 of the Traffic Act, 1854, against the A. company if they refused to provide it.

Upon complaint by traders whose collieries and brickworks were connected by sidings with the respondents' railway that the respondents did not duly and properly work and manage their railway, and did not provide sufficient locomotive power for that purpose, and that they improperly and unnecessarily detained empty waggons destined for the collieries and works of the applicants, and failed to haul away with regularity and despatch from the sidings connecting the said works and collieries with the railway loaded waggons placed ready for removal. The Commissioners held that the respondents did not, according to their powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from their railway, and for the return of carriages and trucks; and the Commissioners ordered the respondents to work and manage their railway duly and properly, and to provide sufficient locomotive power and labour for that purpose, and to desist from unduly detaining empty or unloaded waggons destined for the collieries and works of the applicants, and to haul away with regularity and despatch from the sidings communicating with their railway loaded waggons properly placed ready for removal. (*Watkinson and others* v. *Wrexham, Mold, &c. Ry. Co.* (No. 3), 3 R. & Ca. Tr. Ca. 446.)

The Commissioners have doubted whether if a railway company is bound by their special Act to weigh coal at the point of discharge, such weighing is a facility for delivery under the Railway and

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Canal Traffic Act, 1854, s. 2. (*Watkinson and others* v. *Wrexham, Mold, &c. Rail. Co.* (No. 3), 3 Ry. & Ca. Tr. Ca. 446.)

As to compelling a company to work signals at a junction, as provided by their special Act, see *G. W. Ry. Co. & Midland Ry. Co.* v. *Bristol Port Ry. & Pier Co.*, *post*, p. 302.

As to the obligation on a railway company to afford facilities, having regard to what may be within their powers, and, at the same time, reasonable requirements, see *Thomas* v. *N. Staff. Ry. Co.*, *ante*, p. 116.

As to the provisions in a lease of a railway extending to works necessary to afford due facilities for traffic under sect. 2 of the Railway and Canal Traffic Act, 1854, see *L. & S. W. Ry. Co.* v. *Staines Ry. Co.*, 3 Ry. & Ca. Tr. Ca., p. 48.

II.—On a Railway Company's own Line.

234. Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic (which by interpretation clause includes passengers, with their luggage, goods, and animals) upon and from the several railways (which by interpretation clause includes station and siding) and canals belonging to and worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever. . . . . (Railway and Canal Traffic Act, 1854, s. 2, 17 & 18 Vict. c. 31.)

In America many cases have arisen involving the rights of express companies to compel railway companies to furnish them facilities

for carrying on their business. It has been almost uniformly held: 1, that railway companies are not authorized to carry on an express business; 2, that they must furnish facilities to persons engaged in carrying on that business; and, 3, that they must furnish equal facilities to all express companies that apply. The cases are collected in 22 A. & E. Ry. Ca. 275. (See now Inter-State Commerce Act, 1887, *post*, p. 339.)

235. The mere fact that railway companies make charges for the conveyance of passengers or goods in excess of those authorized by their special Acts, but without any undue preference, is not a breach of their obligation under sect. 2 of the Railway and Canal Traffic Act, 1854, to "afford according to their respective powers all reasonable facilities for the receiving and forwarding and delivering of traffic." (*Brown* v. *G. W. Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 523; 7 Q. B. D. 182; 50 L. J. Q. B. 483.)

If the overcharges are of such an amount and of such a nature that they have the effect, or it can be presumed that they are made with the intention, of preventing the use of particular trains and stations, or the traffic to those stations, the Commissioners may have jurisdiction to entertain a complaint in respect of them as being a refusal of "facilities." (*Semble, per* Brett, L. J., and Cotton, L. J.)

Charges which a railway company have no statutory power to make, and which are intended or calculated to prevent, and do in fact prevent, the conveyance of traffic on the railway, are a violation of sect. 2 of the Railway and Canal Traffic Act, 1854. (*Young* v. *Gwendraeth Valleys Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 247.)

A refusal to receive and carry traffic, except upon

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terms which the company are not warranted in exacting, is a denial of reasonable facilities within the meaning of the Act, and is also, when the sender of the traffic is thereby injured or inconvenienced in the conduct of his business, an undue prejudice and disadvantage to such sender. (*Distington Iron Co.* v. *L. & N. W. Ry. Co. and others*, 6 Ry. & Ca. Tr. Ca.)

Brown's case was a complaint that a railway company did not afford "all reasonable facilities" within the meaning of sect. 2 of the Railway and Canal Traffic Act, 1854, because they charged passenger fares in excess of the sums they were entitled to demand under the maximum clause of their special Act. It was held by the Court of Appeal (affirming the judgment of the Queen's Bench Division) that the Commissioners had no jurisdiction to entertain the complaint, because the mere fact that a railway company charged beyond the maximum sums contained in their special Act did not amount to a refusal to afford "reasonable facilities."

Bramwell, L. J., said that the words in sect. 2 of the Railway and Canal Traffic Act, 1854, "Every railway and canal company shall afford all due and reasonable facilities for the receiving and forwarding of traffic," had no reference to the prices a railway company charge for conveyance.

In the *Distington case* Mr. Commissioner Miller said:—

"The objection taken was, in effect, that inasmuch as the only grievance complained of consisted in an overcharge alleged to be in excess of the parliamentary maximum, and therefore illegal, and it was not alleged that any other traders or class of traffic were unduly preferred to the applicants, or that they were subjected to any prejudice or disadvantage other than the necessity of paying this overcharge, no violation of the second section of the Act of 1854 or of our Act was disclosed in the application; and the decision of the Court of Appeal in the case of *Brown* v. *The Great Western Railway Company* was relied upon as a conclusive authority for this proposition. If we thought that the decision in

Brown's case really governed the present one, it would, of course, be our duty simply to follow it without discussion or criticism; but a very slight examination of the facts discloses several and not unimportant points of distinction.

"The application in that case simply set forth the list of charges made or demanded by the respondent company for the carriage of passengers between Paddington Station and various places on their main line, and charged that such charges exceeded the authorized maxima by small amounts varying from 2*d.* to $\frac{3}{8}$*d.*, and prayed for an injunction restraining such excessive charges. There was no allegation that anyone had been prevented from travelling by the charge, or that anyone had tendered the legal amount and it had been refused, or that the company had attempted or threatened to prevent any one from travelling except on prepayment of the illegal amounts, and under those circumstances the Court of Appeal considered that the applicant did not allege any denial of reasonable facilities for the receipt, &c. of passenger traffic (which alone was in question) within the meaning of the Act, or any undue prejudice to the applicant, and they therefore decided that no violation of the Traffic Act was alleged, and that we had no jurisdiction to hear the case. The judges, however, not indistinctly intimated that their views would have been different if it had appeared that what the company had done had amounted to an obstruction of the traffic, or that any person had been prevented from travelling by reason of the excessive charges.

"In this case the presence of those elements, upon the absence of which the judges relied in that case, is sufficiently alleged. It appears that the applicants remonstrated against the charges not only as excessive in themselves, but as calculated to injure their business, that they formally announced in writing their intention not to pay more than the legal charges, and that thereupon the companies told them that unless that letter was withdrawn they would not receive or carry the traffic. This, in our opinion, amounted to a distinct tender by the applicants and refusal by the company of the sums alleged by the former to be the proper amounts. Of course, in considering the question of jurisdiction,

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we must assume the allegations to be true. Now we are clearly of opinion, and the observations of the judges in *Brown's case* seem to point to the same conclusion, that a refusal to receive and carry traffic except upon terms which the company are not warranted in exacting, is a denial of reasonable facilities within the meaning of the Act, and is also, when the sender of the traffic is thereby injured or inconvenienced in the conduct of his business, an undue prejudice and disadvantage to such sender. And from the character of this prejudice there is an obvious distinction between passenger and goods traffic; it may very well be that as to the former all that is required in the way of facilities is that proper carriages should be provided, and trains despatched at convenient times, and at reasonable rates of speed, because, as to all other matters, the passenger can help himself; but in the case of goods all that a sender can do is to deliver or offer the traffic to the company, and if they refuse to receive it, or, receiving, duly to forward it, he is as completely denied reasonable facilities for its transmission as if the company had wilfully neglected to provide the physical appliances necessary for its conveyance. Under these circumstances we came to the conclusion that the decision in *Brown's case* did not apply to the present case, and that we were competent, and bound, therefore, to hear the present application."

To justify interference by the Commissioners with rates and fares it is not sufficient merely that a distinction in the fares and rates of different lines, even of the same company, exist, unless it creates an undue preference or prejudice. (*Innes* v. *L. B. & S. C. Ry. Co. and L. & S. W. Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 155.)

Lord Blackburn, in delivering judgment in *Brown* v. *M. S. & L. Ry. Co.* (8 App. Cas. 712), said: "Now, I am not prepared to say that where there are maximum rates fixed, as no doubt there are on this railway, everything within these maximum rates must be a reasonable remuneration. I do not say whether that is so or not."

236. The Railway Commissioners have, under sect. 2 of the Railway and Canal Traffic Act, 1854,

jurisdiction to hear and determine a complaint against a railway company of not, according to their powers, affording all reasonable facilities for receiving, forwarding, and delivering passengers and other traffic at and from any of their stations which are used by the company for such passengers or other traffic; and although the Commissioners have no jurisdiction to order the company to make a new railway station, or to order any particular works, or otherwise to interfere with the discretion of the company in the mode of performing their obligation to afford such facilities, according to their powers, for the receiving, forwarding, and delivering of the traffic, yet they have jurisdiction to order such facilities, even if their doing so would necessitate the making by the company of some structural alterations of such station.

A railway company do not afford all due and reasonable facilities for receiving, forwarding, and delivering traffic if, having sufficient powers, they keep their platforms, booking offices, and other structures at any station in such a condition as to space and other arrangements as to cause dangerous or obstructive confusion, delay, or other impediment to the proper reception, transmission, or delivery of the ordinary traffic of that station, whether consisting of passengers or of goods. (*S. E. Ry. Co.* v. *Railway Commissioners and Corporation of Hastings*, 3 Ry. & Ca. Tr. Ca. 464; 6 Q. B. D. 586; 50 L. J. Q. B. 201.)

In that case a complaint was made to the Railway Commissioners, under sect. 2 of the Railway and Canal Traffic Act, 1854, by the Corporation of H. as to the condition of the stations of the South

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Eastern Railway Company at H. and L., and an application was made for an order requiring the railway company to enlarge the station at H., to provide a better booking-office, waiting-room, refreshment-room, and general accommodation therein; to alter the existing platforms, and to provide new ones; to improve the warehouse and cattle accommodation; and at L. to enlarge the platform, and to provide a new road of approach. The Commissioners delivered a judgment setting out the order which they proposed to make. This order required the railway company to extend the platform accommodation at H. according to a specified plan, to cover over the platforms and part of the carriage yard, to add four waiting-rooms of a specified size, to reserve a portion of the station for refreshments, to increase the accommodation for the delivery of tickets, and to increase and improve the accommodation for cattle.

With respect to the station at L., the order required the company to increase and improve the platform and waiting-room accommodation, to cover over the bridge, to make fresh openings into and to widen the road of approach to that station.

It was held by the Court of Appeal (reversing the judgment of the Queen's Bench Division) that the subject-matter of the complaint and application was not beyond the scope of the jurisdiction of the Commissioners, but that the Commissioners had no power peremptorily to order particular works to be executed according to a specified plan.

By Lord Selborne, L. C., and Lord Coleridge, C. J.: That the orders with respect to the platforms and goods yard at H., and the approach road at L., were in excess of jurisdiction; that the orders as to refreshment accommodation and the covering over of platforms, carriage yard and bridge, were not "facilities" within the statute; but that the orders as to booking-office, waiting-room, and cattle accommodation were such facilities.

By Brett, L. J.: That all the orders except those relating to the cattle accommodation and the delivery of tickets at the booking-office, were in excess of jurisdiction.

The Commissioners made no order as to goods, because what was wanted for that traffic was more ground; and it was a sufficient answer to the alleged contravention of the Act of 1854, with reference to facilities for that traffic, that the company had no power under its existing Acts to acquire more land.

The Lord Chancellor (Earl Selborne) in delivering judgment, said:—

"What, then, are the obligations imposed upon railway companies by this statute? They are contained in the second section, and are substantially three in number: First, a positive obligation to 'afford, according to their respective powers, all reasonable facilities for the receiving and forwarding and delivering of traffic, upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles.' 'Traffic,' according to the interpretation clause, sect. 1, includes 'passengers and their luggage and goods, animals, and other things conveyed by any railway company.' 'Railway' includes 'every station of or belonging to such railway company, and used for the purposes of such traffic.' The second obligation is to give no undue preferences; the third, to do whatever may be necessary to enable the company's own line, and any other line connected with or having a terminus near it, to be used by the public as continuous lines of communication.

"It is unnecessary to state more particularly the terms in which the second and third obligations are created, the first alone being material to the present question. I notice, only to set it aside, the argument of the respondents, that this has no reference to any traffic of which a company is itself the original carrier upon its own line. There is nothing either in the words or in the reason of the thing to warrant any such restricted construction. A company may carry, or not, upon its own line as it thinks fit, and, if if it does so, may undertake that business under various conditions and limitations. But, if and so far as it does undertake so to carry either passengers or goods traffic, it comes, in my opinion, under

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the obligation to afford for the purposes of that traffic the facilities required by the first branch of the second section of the Act.

"With respect to stations, there is no obligation to establish them at any particular places or place unless the company thinks fit to do so. The 'railway,' as interpreted by the Act, only includes existing stations 'used for the purposes of public traffic.' But when the company has, in fact, opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it for the purpose of being received or delivered as passengers to or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage or delivered there after carriage, it is, in my opinion, bound by the Act to afford at that station (to the extent of its powers) all reasonable facilities for 'receiving, forwarding, and delivering' such passengers and goods. It may not in all cases be a very easy thing to determine whether that obligation has been fulfilled or not. Nothing less than reasonable proof that it has not been fulfilled can authorise the Commissioners to interfere with the discretion of the company as to the arrangements or management of any of its stations; and, even then, the Act does not appear to contemplate an order for the execution of any particular works, if it can be obeyed without them. But I cannot assent to the argument that, according to the true construction of this second section, the obligation to 'afford all reasonable facilities,' &c., is circumscribed by the precise extent, capacity, and structural arrangements of the buildings, booking offices, and platforms, &c., *de facto*, provided at the time of complaint by the company, if these are insufficient for the ordinary traffic of the station, and if, by alterations or other improvements which the company has adequate power to make, all necessary facilities might be afforded. The words 'according to their respective powers,' as well as the general scope of the enactment, seem to me to be very much opposed to so limited a construction. I am, therefore, of opinion that a company does violate and contravene the Act if, having sufficient powers, it keeps its platforms, booking

offices, and other structures at any station, in such a condition as to space and other arrangements as to cause dangerous or obstructive confusion, delay, or other impediment, to the proper reception, transmission, or delivery of the ordinary traffic of that station, whether consisting of passengers or of goods.

"Being of that opinion, I am unable to hold, upon the terms of the complaint itself, that the matter of it (which I regard as summed up in the 7th and 14th paragraphs) was beyond the scope of the Commissioners' jurisdiction. . . .

"The reservation of part of the station buildings at Hastings for refreshment purposes, and the covering over of certain parts of the platform, &c., at both stations, on account of the exposure of the site, and the resort of invalids to St. Leonards and Hastings, seem to me to be clearly not necessary as 'facilities for the receiving, forwarding, or delivering traffic upon the railway,' however desirable they may be for the comfort or convenience of passengers.

"The enlargement in some reasonable way (whether by platform or by waiting room accommodation) of a space insufficient for the proper reception of ordinary passenger traffic, and some proper provision for the delivery of cattle from the company's waggons, without those risks which seem now to attend their passage through the station yard, are things which approach more nearly to my conception of facilities which the Commissioners, in the due exercise of their jurisdiction, might hold to be necessary and required by the Act. I am by no means prepared to say that there is no form of mandatory injunction which they can properly issue for these purposes. It does not, however, follow that they can order a certain number of waiting rooms to be provided, or dictate their classification, position, or dimensions, or enjoin the company to make cattle pens upon a particular piece of ground now used for other purposes. It may well be, that by the execution of such works as these, or some of them, the obligation imposed upon the company by the statute might be fulfilled, nor should I be disposed to impute any excess of their jurisdiction to the Commissioners if they were merely to indicate, for the consideration of the company,

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these or any other convenient means by which, in their opinion, that obligation may be fulfilled. But between any such reasonable suggestions, and a peremptory order for the execution of these particular works, there is a wide difference. I can find no warrant in the statute for the assumption by the Commissioners of a general control in matters of this kind over the discretion of the company as to the best means (when there is a choice of means) of fulfilling their statutory obligations.

"There remains the point as to booking office accommodation at both stations. The Commissioners proposed to order that this should be increased in a manner as to which I consider them to have had jurisdiction to make such an order as I conceive them to have intended.

"The result is that the Commissioners had, in my opinion, jurisdiction over the general matter of the complaint as summed up in paragraphs 7 and 14, and had also jurisdiction to order some, at least, of the things contemplated by their judgment, provided they did so in a proper manner and form, but that as to other things which they apparently intended to order they had no jurisdiction; partly because those things were beyond the company's powers, partly because they were not facilities reasonably necessary for the particular purposes mentioned in the Act, and partly because they would have required particular structural works to be executed which are not prescribed by the Act, and which cannot be supposed to be the only possible means of affording the facilities which the Act does require. * * * * * *

The Lord Chief Justice agrees in this view, and the judgment of the Court will therefore be to reverse the order of the Queen's Bench Division, and allow the demurrer of the Railway Commissioners."

Lord Justice Brett said: "The only question which the Commissioners have jurisdiction to entertain on any complaint is, whether what is complained of is something done or omitted to be done in violation or contravention of the Act; that any order which they may make can only properly be an order restraining

the Company from further continuing to do certain things which are in violation or contravention of the Act, or directing the Company to obey the Act as to certain matters omitted to be done by the Company in violation or contravention of the Act.

"Applying these propositions to the present dispute, it follows that the defendants had jurisdiction only to hear and determine and order in respect of facilities to be afforded upon or from the railway or the stations used by the Company for the purposes of public traffic. This description of the railway and stations, namely, that they are used by the Company, confines their jurisdiction to a dealing with the existing railway and the existing stations, and prevents them from ordering the making of any new railway or any new stations. Their jurisdiction was further confined to this, that they could only properly deal with matters which might facilitate or impede the receiving, forwarding, or delivering of passengers or goods upon or from the existing railways or stations; they had no jurisdiction to entertain or deal with matters otherwise affecting passengers or goods. The power to make an order being instituted by a statute which describes the kind of order it enables the tribunal to issue, the jurisdiction of the Commissioners is also confined to making such an order as is described in the statute and formulated in the rules. (See 15 C. B. p. 473.) The order, therefore, can only legally be made with regard to matters which the Commissioners may properly entertain, that is to say, with regard to matters which by their omission or commission may affect facility in receiving, forwarding, or delivering traffic. The order may direct the discontinuance of acts complained of, if they are done in violation or contravention of such facility, or may order that certain omissions complained of shall be supplied, if they are in violation or contravention of the same facility. To form an opinion whether omissions complained of are an omission of reasonable facilities, it may be right and even necessary that the Commissioners should receive and consider evidence of specified schemes or methods for supplying the alleged omission; but the order can only direct that the omission must be supplied either

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wholly or to a declared reasonable extent. If the omission can be supplied in more than one way, the Commissioners have no jurisdiction to declare which way is to be preferred. The discretion as to such a matter rests with the company. The Commissioners, therefore, in this case might properly receive evidence of specific methods of supplying the alleged omissions of reasonable facilities for the receiving, forwarding, and delivering of passengers or goods, and might properly consider whether the nature and expense of such specific methods of supplying facilities made the omission of such facilities reasonable or unreasonable; but the Commisssioners had no jurisdiction to order that the omissions, which they determined ought to be supplied, should be supplied by any specified works to be constructed in any specified form or any specified locality.

"The obligations dealt with by the statute which are material to be considered in the present judgment, are confined to facilities for the receiving, forwarding, and delivering of traffic upon and from the railway belonging to or worked by the company, or upon and from stations used by the company. This confines the jurisdiction to make any order to a power to make it with regard to the existing railway or the existing stations. It is necessary, however, to determine what is the legal limitation of the terms so used. It was urged that such terms prevented the Commissioners from making any order in any form which would necessitate the making by the company of any structural alteration or addition whatever. But the terms 'railway' and 'railway station' are not mere legal terms; they are the descriptions in ordinary phraseology of well-understood things of an ordinary kind. The terms as used in the statute are, therefore, to be construed as such descriptions. If there is an omission of some reasonable facility within the Act in the working of the railway, which omission can be reasonably supplied without altering the railway, using the term 'railway' as a description of that which is ordinarily understood by people of ordinary sense to be a 'railway,' there is nothing in the Act which says that it would be an answer on the part of the

company to an order to supply the omission that it could not be supplied without some structural alteration or addition. For instance, if additional points or sidings were required for safety at an existing junction, no ordinary person would say that the addition of a set of points or the laying of a siding rail would make a new railway; they would term it an adaptation or improvement of the existing railway, though an order to make a single-line railway from A. to B. into a double-line railway would be considered by all ordinary persons of intelligence to be an order to construct a substantially new line of railway or new railway. So as to a 'station;' the term is not in ordinary sense used as a description merely of the actual existing structures at a station, but as the description of a space actually set apart for and generally used as a resting-place for traffic, or a place for dealing with it in a particular way, although every part of the space is not covered with structures, or used for passing along, or for deposit. An order, therefore, to supply the omission of reasonable facilities at a given station would not be beyond jurisdiction because such omission could not be supplied without some structural alteration or addition made at such station, used as describing such spaces; but it would be beyond jurisdiction if it required and insisted upon the supplying of an alleged omission which could not be obeyed, and which it might be admitted could not be obeyed, without what every ordinary person would reasonably say was the making a new station or adding to the existing station so as to make it a different station, the distinction, as before, being between adaptations or improvements of existing works or an existing station, and the execution of substantially new works or the making of a substantially different station.

"Applying the above rules to the different matters included in the proposed order, the direction to extend the limits of the existing station is not an order which can be obeyed by improving or adapting the existing station, but only by substantially making a station different from the existing station, and is, therefore, beyond jurisdiction. An order in any form to do this would be beyond

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jurisdiction. So as to enlarging the bridge. The order to extend the platform accommodation is an order dealing with a matter within the jurisdiction of the Commissioners, if there was some legal evidence of a want of reasonable accommodation in that respect for receiving or forwarding the average number of passengers. If there was evidence before the Commissioners that the platform accommodation for getting into or out of or waiting for trains was not reasonably sufficient for the passenger traffic, and that further accommodation in that respect could be reasonably given within the limits of what might reasonably be treated, as above defined, as the existing station, the Commissioners might legally have declared that there was an omission of reasonable facilities in respect of platform accommodation, and might have enjoined the company to supply further platform accommodation to a specified extent, as to twice the existing extent, or so as to accommodate so many more passengers, and the Commissioners might properly have received evidence of specific schemes of improvement so as to determine what amount of further accommodation it would be reasonable to require; but the Commissioners exceeded their jurisdiction by ordering the platform to be extended according to the plan of the engineer, that is to say, in one way only. If they could make an order in such a form, their order would be disobeyed though an equal accommodation could be given in some other way. They have no power, under any circumstances, to make an order in any form to such effect. Therefore, the order so framed is an excess of jurisdiction.

"The order as to further protection from weather would have been within jurisdiction if it had been made with regard to passengers as such; but it exceeds because it is made in order to protect persons visiting Hastings as invalids, although it may protect with quite reasonably sufficient effect passengers as such.

"The order as to additional waiting-rooms would have been correct if, upon some legal evidence, the Commissioners had determined that there was a want of reasonable accommodation in that respect, which want could be supplied by reasonable alterations of or additions within the existing station, although such alterations

or additions involved structural alterations or additions, and had ordered further waiting-room accommodation to a specified extent to be given; but the order is in excess of jurisdiction because it directs absolutely certain specified works to be done.

"The order as to refreshment accommodation is further beyond jurisdiction because it does not come within the terms of facilities for receiving or forwarding passengers.

"The order as to the delivering of tickets is right in every respect.

"The order as to the goods shed and sidings would have been right if it had been confined to ordering an extension within the existing station; but the order to seek for powers to enlarge the goods station is in excess.

"The order as to cattle pens seems to be right, though the order to restore the raised platform to its original use is in excess.

"The order as to the approach to the station is in excess in every respect."

See further, as to providing station accommodation, *ante*, Arts. 193, 233.

The case of *Caterham Ry. Co.* v. *L. B. & S. C. Ry. Co. and S. E. Ry. Co.* (1 Ry. & Ca. Tr. Ca. 32; 26 L. J. C. P. 16; 1 C. B. (N. S.) 410), was the only one in which defective station arrangements were brought before the Court of Common Pleas under the Railway and Canal Traffic Act, 1854. It is important as showing that the Court were of opinion that interference with station arrangements was within their power. The Caterham Ry. Co., owning a branch line, complained that there was no convenient covered station at Caterham Junction. A rule *nisi* was granted, but the rule was not drawn up, the Brighton and the South Eastern Companies being willing to provide a covered station at the Caterham Junction, according to the intimation given by the Court that it was a reasonable accommodation. Cresswell, J., said: "I think the absence of such accommodation subjects passengers on the Caterham line to undue prejudice and inconvenience, and it appears that there are covered stations at all the other places on the line; as to

that, therefore, the rule may go." And Crowder, J., said: "With respect to the want of a covered station at the Caterham Junction, I think that is a reasonable accommodation to which the public are entitled, and that there ought to be a rule as to that." As to how far this case is an authority for the proposition that a covered station is a reasonable accommodation which a railway company are bound to provide for the public, see the conflicting judgments of the judges of the Queen's Bench Division in *S. E. Ry. Co.* v. *Ry. Commissioners and Corporation of Hastings* (*ante*, p. 265).

The case of *Dundee and others* v. *Belfast and Northern Counties Ry. Co.*, in the Commissioners' Court, raised the question of the power of a railway company to close a passenger station. Ballynure Road had been for many years a station on the Belfast and Ballymena Line, but in August, 1875, it was discontinued as a station for passengers. It was still kept open for goods, but for passenger traffic the company considered it sufficient that there was a station $2\frac{1}{2}$ miles distant—the Ballyclare and Doagh Station. The applicants were sufferers by the change, and they had represented to the company, though without effect, the public inconvenience of trains being no longer stopped at Ballynure Road, and their intention, if necessary, to have it determined whether they were not entitled to relief under the Traffic Act. The matter on either side was fully set out in the application and answer of the parties, but it underwent no discussion at the hearing, and the Commissioners made an order by consent "that the application should be dismissed, the defendants undertaking to re-open within one month for further trial Ballynure Road Station as a passenger station for two years, with two trains each way per day; at the end of that time both the parties to be in the same position they are in now."

In the *S. W. Ry. Co.* v. *Staines, &c. Ry. Co.* (3 Ry. & Ca. Tr. Ca. p. 48) the Commissioners thought that sect. 2 of the Railway and Canal Traffic Act, 1854, entitles the public, at stations where there are many passengers, to have the convenience of a sufficient waiting-room, and to have platforms which are not long enough

for the traffic extended, and to have also such siding accommodation as that goods can be received and delivered without delay.

A complaint that the platform accommodation of an existing station is not reasonably sufficient for the passenger traffic is a matter within the Railway Commissioners' jurisdiction, subject to the conditions laid down by the Court of Appeal in the *Hastings case*, *ante*, p. 262. (See *Tunbridge Wells Local Board* v. *S. E. Ry. Co.*, 5th Annual Report of Railway Commissioners, p. 4.)

In America the question whether a railway company can be compelled to put up a station has several times lately been before the Courts, and has been in each case affirmatively answered; it being held that the duty to establish stations upon a public railway was a public duty. (*People* v. *New York, &c. Ry. Co.*, 29 A. & E. Ry. Ca. 480; also Vols. 22 and 30.)

In *Northern Pacific Ry. Co.* v. *Territory* (29 A. & E. Ry. Ca. 82), it was held that a Court of equity will compel a railway company to construct a station and give other railway facilities at a proper and necessary place.

237. The Railway Commissioners will order additional trains to be run if a strong or clear case of its being reasonable to do so is made out. (*Innes* v. *L. B. & S. C. Ry. Co., and L. & S. W. Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 155.)

It is submitted that it would not be reasonable if such trains could only be run at a loss, or if they would interfere materially with superior traffic.

In giving judgment in the above case, the Commissioners said:

"As to the trains to Ludgate Hill and London Bridge, ten daily each way in the first case, and nine in the other, we are not of opinion that their number is insufficient, and as regards the times of arrival and departure in London, we feel the force of what was said on behalf of the companies as to the necessity of giving the trains by their principal lines their first consideration; but subject to this we trust they will endeavour so to fix the Tooting trains as to make their times to and from London harmonise as

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closely as possible with the hours most convenient for the generality of the passengers by them. We must go further with regard to the discontinuance of the trains between the joint line and Victoria. Looking, indeed, to the Brighton Company having carried on this service, which consisted of seven trains each way daily from 1869 to 1874, and to their having taken it off from the traffic not paying the expenses, we should be reluctant to order its re-establishment if the traffic could only be conveyed by running trains expressly to accommodate it. But the joint line or its prolongation, and the line from Sutton to Victoria, intersect on the same level, and to establish the communication with Victoria, nothing more, as it seems to us, is required than to allow an interchange of traffic at the point of intersection. This would not involve the running of any additional trains, but merely the providing of a transfer station at which the direct Victoria and Mitcham trains would stop to take up and set down the passengers by the joint line. We see no practical difficulty in this, nor do we understand Mr. Knight, the General Manager of the Brighton Company, to have suggested any, except the expense. A very small expense would be sufficient according to our view, but we have no preference for any particular mode of attaining the object aimed at, and any method that can be devised which, in the judgment of the companies concerned, would be the best to adopt, would meet with our approval."

In the *Dublin & Meath Ry. Co.* v. *Midland of Ireland Ry. Co.* (3 Ry. & Ca. Tr. Ca. 379) the Meath line was worked by the Midland Company under an agreement for a lease which provided that the Midland should work it in connexion with and in continuation of their own lines of railway, and should work it efficiently, and so as fairly to develop, protect, and maintain the traffic fairly belonging thereto. The Commissioners decided that it was the duty of the Midland Company to put on, in addition to the trains then running, a new down train and a new up train. They also ordered the branch train service, which was much complained of, particularly with regard to delays to which persons were subjected at the junction, to be increased and improved in various respects.

As to the correspondence of trains, see *post*, Art. 250.

In the *Caterham Junction case* (*ante*, p. 275) the Court of Common Pleas refused a rule on a complaint that a sufficient number of trains did not stop at the junction on the ground that as many trains stopped at the junction as at other stations of a similar character, and that there were no materials before the Court upon which to decide whether or not more trains were necessary for the convenience of the public.

In a case in the Court of Session in 1885 (*Great North of Scotland Ry. Co.* v. *Highland Ry. Co.*), Lord Trayner, in giving judgment, said: "It is the duty and privilege of a railway company to fix the times at which its trains shall run. They take into account the duty imposed upon them to give proper facilities and conveniences to the public. It is for the public advantage that they are incorporated. They must also take into account their own advantage in running such trains, in such directions, at such times, and under such conditions as shall, while being convenient to the public, afford a proper and reasonable return to the persons whose money is invested in the concern, and unless some limitation is put by statute upon the company's right to run trains at certain hours and under certain conditions, the common law certainly puts none."

By Arts. 2226 and 2227 of the Revised Statutes (U. S.), a duty is imposed on railway companies to furnish sufficient transportation to carry all property offered, though, when the carrier, from an unexpected and unprecedented press of business, is unable to do so, this, in general, will furnish a legal excuse for refusing to accept freight. (*Houston, &c. Ry. Co.* v. *Smith*, 22 A. & E. Ry. Ca. p. 421.)

Watts, C. J., in delivering judgment, said: "A general duty is here imposed upon the railroad company to furnish sufficient accommodation for the transportation of all property that may be offered. This is, however, but declaratory of the common law liability of carriers. Aside from these statutory provisions, it would be the duty of the carrier to provide all necessary facilities and means for transporting such property as might be offered, at least to the extent that would ordinarily be expected to seek

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transportation by the particular line. When an unexpected and unprecedented press of business occurs, the carrier is generally excusable for refusing to accept the property for transportation. Hutchinson on Carriers, sect. 292, and authorities cited."

A railway company having the control of two competing routes ought to afford equal facilities to the public by both routes. (*Londonderry Port, &c. Commissioners* v. *Great Northern of Ireland Ry. Co. and others*, 5 Ry. & Ca. Tr. Ca. 282.)

238. The making of a siding connexion or branch railway for the use of a particular individual or set of individuals, and not for the purpose of facilitating the ordinary receipt or delivery of traffic at a station, is not a facility within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854. (So held by Mr. Commissioner Price and Mr. Commissioner Miller; *contra*, by Sir Frederick Peel.)

If the siding connexion is legally in existence, the continuance of the connexion may be a reasonable facility within the meaning of the first clause of sect. 2 of the Railway and Canal Traffic Act, 1854, and the question whether the railway company ought reasonably to be required to render any and what facilities for the receipt and delivery of traffic at such a siding is a matter the Commissioners can determine under that section of the Act of 1854. (So held by Sir Frederick Peel and Mr. Commissioner Miller, *Girardot, Flinn & Co.* v. *Midland Ry. Co.*; *Beeston Brewery Co.* v. *Midland Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 53, 60.)

Where any Act contains provisions relating to private branch railways or private sidings, the Commissioners have the like jurisdiction to hear and determine a complaint of a contravention of the enactment as

the Commissioners have to hear and determine a complaint of a contravention of sect. 2 of the Railway and Canal Traffic Act, 1854. (51 & 52 Vict. c. 25, s. 9, *post*, APPENDIX.)

The question of granting facilities by means of siding accommodation is so important a one that the views of the Railway Commissioners are quoted somewhat at length.

The Beeston Brewery Company complained that the Midland Railway Company had recently, by taking up rails, severed the connexion between the applicants' private siding and the company's railway, and thereby prevented the traffic of the applicants from being received from or delivered to the railway company by means of the siding, whereby the railway company did not, according to their powers, give the applicants all reasonable facilities for the receiving, forwarding, and delivering of their traffic, and subjected them to undue and unreasonable prejudice and disadvantage.

On the preliminary question of law, the Commissioners' judgments were as follows:—

"Sir Frederick Peel: In this case the applicants complain that the railway company do not afford them reasonable facilities for their traffic, and that they subject their traffic to an undue prejudice, in respect that they do not allow them a siding at the Beeston station. It appears that when they came into possession of their premises near that station in 1882, there was a siding, and that that siding has only recently been taken up by the railway company in consequence of some difference about the charge for the conveyance of traffic. The applicants state in this application that the railway company wrongfully took up the siding; and that as regards an agreement to which they refer as their authority for taking up that siding, it is no justification for what they have done.

"The answer of the railway company is that we have no jurisdiction to hear this application. They say that the siding which they are said to have wrongfully taken up was laid down by them under an agreement with the predecessors to the brewery company in occupation of those premises, and that that agreement reserved

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to them expressly a power to take up the siding whenever they might think proper; and that any question as regards whether what they did was done rightly or wrongly, as far as that agreement is concerned, is a question which we have no authority to decide. In that view I concur, and so far as this application is in effect a reference to us of any difference or dispute with regard to things done under that agreement it is an application which, I think, we could not hear, seeing that the reference, if it be one, has been made to us by only one of the parties to the agreement.

"The company also say that what the Beeston Brewery Company want is a communication between the railway company's line and a branch railway on their own property, and that the subject of branch railways and their connexions is regulated by the 8th Victoria and another Act referred to in the section of that Act which regulates these matters, and that with neither of those Acts have we any jurisdiction to deal.

"It appears to me that that view also is a correct one, and so far as this application relies for making out its case upon any obligations imposed upon the railway company by the 8th Victoria, I think it is an application which we should have to decline to hear.

"At the same time, this is only part of the application, and the rest of the application seems to me to be free from objection. It appears to me that the applicants are not precluded from alleging that, quite independently of the 8th Victoria, they are entitled to have this connexion as a reasonable facility, within the meaning of the Traffic Act of 1854. It is a kind of facility, I think, which we have power to grant, and there are circumstances, I can easily imagine, where it would be reasonable that such a facility should be granted. But I think the applicants would have considerable difficulty in making out the reasonableness of such a thing in this particular case, because the connexion which they want is at a place which the company have appropriated to a station, and considering that a station—every part of it—may, for aught we know, be required for the accommodation of the traffic of the public at large, it is not clear by any means to me that it

could be reasonable that any part of that station should be set aside for a facility from which only one individual under any circumstances could derive any benefit.

"Then, again, I think that the applicants are not precluded from alleging, as they do allege, that the facility which they ask is one which has been granted by the company to other persons in other places, and that the circumstances under which such facility has been granted to others, notwithstanding that the place is not the same, are similar to the circumstances which constitute their own case. Of course it would be for them to get over the difficulty of the places not being the same. That would be a question of fact which would be for them to deal with.

"I think, therefore, the application, as regards the last two heads that I have mentioned, is one that we may allow as far as regards the question of jurisdiction."

"Mr. Commissioner Miller: In this case the applicants state that they have been for some time in possession of a branch railway which connects with the Midland Railway at a station; and that in consequence of disputes which are not stated here, and which I do not suppose would be material for this purpose, the railway company have taken up or threatened to take up the rails, so as to break the communication. They allege also that there are other persons, competitors in business, not at the same station, but at other stations, who have got the accommodation of branch railways in connection with the Midland Railway; and they assert that the breaking of their connexion with the railway will, amongst other things, subject them to an undue and unreasonable prejudice and disadvantage as between themselves and these other persons, their competitors in business. The defence of the railway company on the merits, is that the communication in question was made under an agreement, a clause in which agreement gave them an express right to terminate it at three months' notice, and that they have given the requisite notice, and that as a matter of law, whether they are right or not in that, we have no jurisdiction to determine the question, it not being within the powers given to us either by our Act or by reference in the Act of 1854.

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"Now, assuming, as for the purpose of testing this case we must assume, though of course I only assume it for that purpose, that the applicants are absolutely right, in other words, that we are trying this simply on demurrer to the application, it would appear to me that the applicants would have any one of three remedies, and that those remedies are not alternative, but cumulative. First of all they might apply for an injunction to restrain the company from taking up the rails in question, on the ground that they were wrongfully making a use of the agreement which was not contemplated by the parties at the time and was not warranted by its real meaning. That would be an application to the Chancery Division, with which of course we should have nothing to do. Or they might abandon the agreement altogether and apply to the Queen's Bench Division for a mandamus, relying simply on their right as adjoining owners to make a connexion between their branch railway and the railway of the Midland Company. That, again, is a matter over which we have no jurisdiction, and as to which no doubt they would have some difficulty in establishing their case, from the very fact that the connexion is made at a station. But beyond that they might, I think, come here, and, if their own view of the case were thoroughly well founded, come on either of two grounds: one, that the continuance of this connexion was a reasonable facility within the meaning of the first clause of the second section of the Traffic Act of 1854. I say 'the continuance' deliberately, because, notwithstanding the fact that the judgment of the Court of Appeal in the Hastings case does show that certain slight structural alterations at a station, which do not amount to a re-modelling of the station, are within the meaning of the word 'facilities,' I am unable, myself, to see that the making of a branch railway, not for the purpose of facilitating the ordinary receipt or delivery of traffic at the station, but for the use of a particular individual, or set of individuals, is a facility within the meaning of that Act. But although the making of it in the first instance might not be so, still, where it existed, the permitting the parties to whom it belonged to use it clearly would

be a facility within the meaning of the Act; and the question whether it was a reasonable facility or not, would, of course, depend upon two things; first, on the general merits; and secondly, on whether the existence of the agreement under which it was put down constituted a sufficient defence to the company for disregarding those general merits.

"But without determining that point, it appears to me that the applicants might further say this, and they do say it most distinctly in the ninth paragraph of their application. They say:—'Whether this branch railway was a facility to which we were originally entitled or not, whether we could have forced it under the Act of 1845 or not, we have got it, and certain competitors in trade of ours have got precisely similar facilities under precisely similar circumstances. The company now propose without reasonable cause to deprive us of the facility which they are continuing to our competitors'; and if the applicants are right on the merits, that clearly would be an undue prejudice within the second clause of the second section of the Act of 1854, leaving the question of facility under the first clause entirely on one side. That is a question which we have jurisdiction to hear and determine. I cannot help pointing out to the applicants, as the Chief Commissioner has already done, that the fact that the facilities given are at different stations, and therefore certainly more or less under different circumstances—and the onus of proving that the circumstances are for this purpose similar will fall entirely upon them—may be a very material difficulty in their way when we come to the merits of the case; but it does not, in my opinion, interfere with our jurisdiction to hear and determine the case, and to give them a remedy supposing the merits to turn out in their favour.

"It was suggested at the argument that under any circumstances the only thing we could do on this branch of the case would be to make a general order directing the company to desist from inflicting an undue prejudice on the applicants, and that such a general order, as it could not extend to making this particular structural alteration in the station, would practically be

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useless to the applicants. But although it is perfectly accurate to say that in the result of the Hastings judgment it would not be right for us specifically to dictate in our order in what way the prejudice was to be abated, if in our order we point out a way which certainly would abate it, and the company do not choose to accept that way, but try to abate it in some other way, they would do so at their own peril; and if, on an application to us alleging that the order had not been complied with, we thought that the course the company had taken did not amount to a compliance with the order, we should not hesitate to put in force the powers of the third section of the Act of 1854. If, on the other hand, the company, not accepting the course we suggested, did something else which we *did* think was a sufficient compliance with the order, of course there the matter would end. They are not in any way bound to accept our suggestion, but if they adopt any other course, they must take the risk of its being held eventually not to be a sufficient compliance with the order."

"Mr. Commissioner Price: My view of the case is simply this, that we really have no jurisdiction at all to inquire into it. The siding as to which the question arises was not constructed as a branch railway under the general Act, nor under any order of ours, as a reasonable facility. It is simply constructed under an agreement. It is a creature of that agreement, and into that agreement it does not appear to me we have any power whatever to inquire. It seems to me, therefore, the case falls to the ground from want of jurisdiction."

The case was subsequently heard on the merits, when Sir Frederick Peel said, in the course of his judgment:—

"The applicants now complain of their being refused a siding as an undue and unreasonable prejudice, and as denying them a reasonable facility for their traffic, a facility not only as dispensing with cartage, but as saving also time and expense in depositing the grain in their warehouse. They refer to the sidings given by the company to Messrs. Wheeldon at Derby, to Messrs. Meakin at Burton, and to many maltsters in Newark and other places, and

complain of it as imposing upon them an undue disadvantage that the railway company refuse to treat them in the same manner in respect of siding accommodation. The railway company, in answer to this application, contend that we have no jurisdiction to entertain the question raised by it, considered either as a question whether the applicants shall have a siding at which the railway company shall be bound to deliver traffic instead of at their goods station, or as a question whether the railway company exceeded their power in exercising the right reserved to them by the siding agreement of taking up the siding whenever they might think proper. They argue that a siding can only be laid down with the consent of the railway company, or under the provisions of the Railways Clauses Act, 1845, s. 76, and that in the latter case, though they are bound to let the siding be constructed, they are not bound to use or work it. But there can, I think, be no doubt that the Traffic Act of 1854, which enacts in such general terms that a railway company shall in no respect whatsoever give any undue preference or advantage, is as much applicable to a siding, both as to construction and user, as to any other means of affording facilities or conveniences to traffic; and though the company may have been within their right in cancelling the applicants' agreement, yet if the company have entered into and still have similar agreements with other maltsters with whom the applicants compete, the existence of these agreements may furnish a ground for a complaint of undue preference or prejudice, and may make it necessary for the company, if they continue to give sidings to others, to put down also a siding for the applicants, so that all may be treated alike. If there was here no question of partiality shown to others, and a siding was claimed merely on the ground of due facility, it seems to me the company would have a good defence to the claim in their statement that they give due facilities for all traffic at their general goods station at Derby, and that it rests with them to say at what points at that terminus they will receive or deliver traffic of which they are the carriers, and even if due facilities were not given, it would more likely be a case for

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an injunction in general terms to make proper arrangements, than for an order to execute any specific work, such as a private siding."

Mr. Commissioner Price said :—

"The applicants ask that under the circumstances we shall make—

"1st. An order enjoining the company to afford, according to their powers, all reasonable facilities for the receiving, forwarding, and delivering of the applicants' traffic, upon the company's railway at Derby ; and

"2nd. An order enjoining the company not to subject the applicants to the undue and unreasonable prejudice and disadvantage, and to desist from giving to others the undue and unreasonable preference and advantage above complained of.

"I am of the same opinion now as that expressed by me in a judgment given by this Court in the case of the Beeston Brewery Company, Limited, on January 20, of this year, that a siding constructed under an agreement with a railway company for the private use of a trader is the creature of an agreement into which we have no power to inquire, and which we have no jurisdiction to enforce. For the purpose of this judgment, therefore, I treat the siding or branch railway, the partial removal of which is complained of, as non-existent.

"With respect to the first order asked for, I am of opinion that a railway company affords all reasonable facility for the receiving, forwarding, and delivering of traffic, as provided for in the Railway and Canal Traffic Act, 1854, when it carries such traffic into its public station, and delivers it there to the consignee on sidings from which it can be conveniently unloaded and carried away by him. There has been no evidence to show that this reasonable facility has been denied to Messrs. Girardot, Flinn and Co., and I do not consider therefore that any case has been made out for the order as asked for.

"And with respect to the second order, I do not think that we have any power to require a railway company to lay down, or to

restore, a siding or branch railway for an adjoining landowner, even though he may be suffering prejudice or disadvantage by reason of the enjoyment of that accommodation by others. The rights of adjoining landowners are defined and protected by 8 Vict. c. 20, s. 76, and we have no jurisdiction under that statute.

"Nor do I think that we could order a branch line as a reasonable facility under section 2 of the Railway and Canal Traffic Act, 1854, and I consider that we are restrained from doing so by the judgment of the Court of Appeal in the case of the *South Eastern Ry. Co.* v. *The Railway Commissioners and the Corporation of Hastings*. In this judgment it was laid down by the Lord Chancellor that we had no jurisdiction to order certain things as facilities 'partly because those things were beyond the company's power, partly because they were not facilities reasonably necessary for the particular purposes mentioned in the Act, and partly because it would have required particular structural works to be executed which are not prescribed by the Act, and which cannot be supposed to be the only possible means of affording the facilities which the Act does require.'

"In the view which I have taken and expressed that the conveyance of traffic by a railway company into its public station, and its delivery in that station to a consignee upon a siding from which it may be conveniently unloaded and carried away, sufficiently satisfies the requirements of the Traffic Act of 1854, in the matter of reasonable facilities, it necessarily follows that the construction of a branch railway to the premises of a trader for his exclusive use cannot be 'reasonably necessary for the particular purpose mentioned in the Act,' and certainly it is a 'structural work' which is not 'prescribed by the Act.'

"And this ruling of the Lord Chancellor is confirmed and strengthened by that of the Master of the Rolls, then Lord Justice Brett, who in the same judgment lays it down that our jurisdiction under the Railway and Canal Traffic Act was confined to a 'dealing with the existing railway and the existing station,' and that we could not order 'the making of any new railway or any

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new station.' I do not concur, therefore, in granting either of the orders asked for."

Mr. Commissioner Miller said:—

"The present application alleges,—

"First, that the taking up of the siding was wrongful:

"Secondly, that the siding was a reasonable facility under section 2 of the Traffic Act:

"Thirdly, that other traders, whose names are given, have similar sidings under circumstances similar to those of the applicants' siding, and that the continuance of their siding, while taking up that of the applicants, was an undue preference of such other traders.

"The company rely upon the fact that the siding was constructed under an agreement which contained a clause giving them the right, which they have duly exercised, to terminate it at any time, on three months' notice, and at the expiry of such notice to take up the rails, &c., and they say that everything which they have done was done in accordance with the agreement.

"They then contest the jurisdiction of this commission to entertain the application:

"First, because the siding was the creature of an agreement, and it has been removed in accordance with that agreement, and they say that we have no jurisdiction to interpret the agreement, or to enforce or overrule its terms:

"Secondly, because the right, if any, to a siding ultra agreement could only arise under the Railways Clauses Act, s. 76; and they say that we have no jurisdiction to enforce the terms of that Act:

"Thirdly, because, as they contend, no order of ours could require them to work such a siding, and the existence of the siding unworked could not be a 'facility' to the applicants within the meaning of our Act. . . .

"In order rightly to consider the question, the circumstances must be looked at as they existed on the day after the expiration of the notice to determine the agreement, and before the siding had been actually destroyed. At that time, the rights of the

applicants under the agreement were wholly gone, and they had no right at all to call for any of the services stipulated for by the agreement, nor, so far as it depended on the agreement, had they any right to the continued existence of the siding. But if they had, on any ground independent of the agreement, a right to the siding, that right was not in my opinion prejudiced by the fact that the siding was originally laid down under an agreement, nor could the company, by determining the agreement, take advantage of the clause which gave them leave to take up the siding, if by so doing they infringed any such independent right.

"It is suggested that such right may exist on any of three grounds:

"First, under section 76 of the Railways Clauses Consolidation Act.

"Secondly, as a reasonable facility.

"Thirdly, to prevent an undue prejudice.

"The company admit the first ground, but they say that a right based upon that section is not enforcible under any order of ours, but only by way of mandamus; and so far as the right is to be regarded as one dependent solely on that section, I think that argument is sound. But it is obvious that, in a very large number of cases, the existence of such a siding affords great facilities for receiving and delivery of traffic, and in such cases, where the company are not required to do any work, or expend any money, but merely to permit a connexion to be made with their line by and at the expense of the siding owners, it may well be that this tribunal has jurisdiction to order the company to permit such a siding to be put in, although it would have no jurisdiction to order them to make it. And further, although we certainly could not order them to work such a siding themselves, it may be within our jurisdiction to direct them to give proper facilities for its working by the owners in such cases, and on such terms, as may be reasonable; and it appears to me that this jurisdiction may well be concurrent with and unaffected by the existence of a totally different remedy, depending upon quite different considerations,

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producing quite different results, and enforcible in a totally different manner.

"The circumstances of this case, however, do not really raise this question, but only a somewhat narrower one, namely, whether, when such a facility actually exists, and has been in working order for a time sufficient to test its operation, the company are at liberty arbitrarily to put an end to it, on the ground that it came into existence by virtue of an agreement which has been legitimately terminated, and which contained such a clause as the one now relied upon.

"For the purpose of considering this point I will assume that the siding in question is one, the construction of which could have been enforced under sect. 76. True, I have no jurisdiction to determine that question, but I must assume it one way or the other, and I cannot assume it against the applicants, for the following reason: The Act of Parliament gives every adjoining landowner an absolute right *ex debito justitiæ* to a branch railway, except in certain specified cases, one of which—the only one which can be suggested as applicable to the present case—is, that the company 'shall not be bound to make such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere.' This siding is no doubt at a place 'set apart for a specific purpose,' namely, a station; but where such a connexion has existed without question for a number of years, and where the company do not allege any physical change of circumstances, either in the construction of the station or the volume or character of the traffic, which would render that inconvenient now which had hitherto been convenient, it appears to me that it would be an insult to common sense to suggest that any Court could be found to believe that such a siding, under such circumstances, would 'interfere with' the purpose for which the particular place was set apart. Now assuming the siding to be legally in existence, whether by order under sect. 76, or otherwise, the question whether the company ought reasonably to be required to render any and what facilities for receipt and delivery

of traffic thereat, of course not thereon or thereover, would clearly be matter for our determination under sect. 2 of the Traffic Act; and it is at least not clear to me that this jurisdiction would not extend to a case where the siding was originally put in by agreement, which agreement had been legitimately terminated, and all rights dependent upon it extinguished, but where, nevertheless, an independent right to a facility existed which the company were unreasonably seeking to interfere with. But I do not think it necessary to determine this question either; because, assuming the jurisdiction to exist, I am of opinion that under the circumstances of this siding it would not be reasonable to require the company to afford the facilities desired, except upon the terms of being paid the Derby station to station rates for the time being without rebate or deduction, assuming these rates to be in themselves unobjectionable, and the company are willing and have offered to restore the siding upon these terms."

239. Where it is doubtful whether a junction which is sought by applicants as a reasonable facility would be allowed by the Board of Trade to be used, if ordered by the Commissioners and constructed by the railway company; and where the mode of working such junction would be unsatisfactory and obstructive to the other traffic on the main line, such a junction is not a due facility within the meaning of sect. 2 of the Railway and Canal Traffic Act, 1854.

An injunction to a company to work traffic will only be issued where there is a well-founded ground of complaint in respect of past working, and the question of proper facilities for the receipt, &c. of traffic at a junction does not arise until the junction exists.

If a junction could not be reasonably worked when constructed, a railway company could not be enjoined

to construct it as a reasonable facility. (*Dublin Whisky Distillery Co.* v. *Midland G. W. of Ireland Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 32. See *post*, Art. 246.)

The Railway Commissioners, in delivering judgment, said:—

"This case, as it was opened by counsel, was an application for an order directing the respondents to connect a siding of the applicants with their Liffey branch line, and to receive and deliver traffic at the junction. The siding has been constructed with reference to the provisions of the Railway Clauses Act, 1845, which enacts that any one who has land adjoining a railway, or the consent of the owner of such land, may lay down a siding upon it, and require such siding to be made by the railway company to communicate with their railway, except as to places where such communication would cause inconvenience or danger to their traffic. The respondents deny the right of the applicants to a junction under the Railway Clauses Act, 1845, and the applicants have taken no steps under that Act to enforce their claim. They have preferred to proceed under the Traffic Act, 1854, and they contend that what they ask to have done is a reasonable facility within the meaning of that Act. They intimated, however, in the course of the hearing that they did not at present seek an order to work traffic; and it is clear that as such an order could only be issued upon a well-founded ground of complaint in respect of past working, there is as yet no case for one, and that a siding must be joined to the railway, or a communication of some sort opened before the question can arise whether proper working facilities are afforded at the siding junction. . . .

"The applicants have now laid out a private siding adjoining the railway, but the company refuse to have a junction with it, and the question is whether a junction is, in the circumstances, one of those reasonable facilities for traffic which the Traffic Act, 1854, makes it the duty of railway companies to afford. The applicants assert that they have by the Railway Clauses Act, 1845, a right to a junction, and assuming the statutory obligation and proof of the

failure to comply with it, that alone might be sufficient for a mandamus to issue against the company in default. This, however, is not a proceeding for a breach of that Act, but of the Railway Traffic Act, 1854, and the objection is raised on behalf of the company, that no special or private right, such as this, is enforceable at all through the Traffic Act, 1854, which is not, it was argued by counsel, an Act that is concerned with any facilities but those of a public character. We will revert, if necessary, to that argument; but at any rate something more than the mere fact that such a right exists would in a complaint under the Traffic Act, where reasonableness is so material an element, be required to establish it, and if, for example, it would not be practicable to work a junction if made, the making of it could hardly be enjoined upon a company as a reasonable facility for traffic. . . . A siding junction as proposed by the applicants would be unusable for at least half the traffic which it has in view, and of course the sanction of the Board of Trade would be required before it could be used at all; and although the applicants only ask at present for an order directing the company to construct a junction, the propriety of granting an order even so limited depends upon the effect such a junction, when it comes to a question of using it, may be expected to have upon traffic. If it would have no effect at all, because it would not satisfy the conditions upon which the Board of Trade give their sanction to a junction being used, or if it would be an advantage to particular traffic, but an advantage that would be outweighed by its interference with the course of traffic in general, it would not be right to make the order. The test to be applied is the facility to traffic, and we feel it to be so uncertain whether the proposed junction carried out according to the plan of the applicants would be allowed to be used by those with whom the decision on that point would rest, and also the mode of working which the proposed junction would require, as explained in the evidence for the applicants, to be so unsatisfactory, that we do not think the junction would be a facility within the meaning of the Act, and we must therefore decline to make an order for it."

240. A railway company give only a reasonable facility in running over a portion of foreign line or siding to collect traffic, properly placed for that purpose, where such line has been conveniently planned for their having access to it, and where they have no reserve line of their own. (*Watkinson* v. *Wrexham, &c. Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 5.)

In that case a railway company worked a line for the carriage of minerals, which was connected with collieries by junctions to private sidings. The company had no power to make a terminal charge for services at the junctions of their line with the sidings. The company's trains called for trucks standing in the different sidings. At each junction the engine was detached and ran off the main line into the siding beyond the company's lands, from which it drew out any trucks ready to start and attached them to the train. The engine had, besides, frequently to perform shunting and marshalling, so as to pick out a number of trucks, full and empty, such as were to be added to the train. The railway company charged for the work done on the sidings a fixed sum of 3*d.* per ton, in addition to the mileage rate for conveyance on the railway company's own line. It was held that the company were not entitled to make such charge, and that, as the plan of each siding, as well as its junction, had received the approval of the engineer of the railway company, the owners of the sidings did all that was necessary to entitle them to have their traffic taken by the railway company at the mileage rate, and free of any charge for terminal services, if they placed their trucks as near to the junctions as they could be brought with safety to the main line, arranged in proper order, and clear of any obstacles to their being moved away.

241. A railway company is not bound to provide booking offices for traffic at places off their railway,

nor to arrange for the conveyance by road of goods between such places to the nearest station on their railway. (*Dublin & Meath Ry. Co.* v. *Midland, Gt. West of Ireland Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 379.)

The Commissioners, in delivering judgment, said:—"It is, no doubt, to the benefit of places that are situated some miles from a railway station that there should be persons to collect and deliver goods regularly as carriers. Bailieborough and Carrickmacross are six or seven miles from Kingscourt, and the complaint under this head is that the Midland do not do, as the Great Northern, have a booking office at those places, and arrange for the prompt and punctual transport of goods by road to and from their nearest railway station. We, however, do not think that a railway company is responsible for making carrying arrangements by road in addition to its proper business of carrying by railway; and the agreements between the two companies do not seem to us to impose on the Midland any such obligation, either directly or as a consequence of another railway company competing with it for traffic undertaking to collect and deliver goods in order to attract traffic to its own line."

242. A railway company is under the same obligations as a common carrier, undertaking to carry in accordance with the provisions of the Railway and Canal Traffic Act, 1854, therefore questions as to how far a sender of goods may require delivery at any station he may appoint is to be determined not with reference to what a railway company may choose to do, or may ordinarily do, but with reference to what may be within its powers, and at the same time a rea-

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sonable requirement. (*Thomas* v. *N. Staff. Ry. Co.*, *ante*, p. 116.)

In that case a railway company delivered minerals at T. station, but refused to deliver their damageable traffic consigned to the applicant, and delivered such traffic at L., one mile and a half from T., which was their general goods station for T.

The accommodation at T. station being insufficient to receive all the T. goods traffic, and the railway company having no power to enlarge it, it was held that the applicant was not entitled to have damageable goods delivered at that station.

It seemed that if the accommodation at T. station had been sufficient to receive all traffic similarly sent, the company would have been ordered to deliver damageable goods to the applicant at T. station.

III.—On through Traffic under Sect. 2 of the Railway and Canal Traffic Act, 1854.

243. Every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near (*i.e.*, by interpretation clause of the Act, within one mile) the terminus, station, or wharf of the other, shall afford all due and reasonable

facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways (which include stations and sidings) and canals of the several companies, be at all times afforded to the public in that behalf. (Railway and Canal Traffic Act, 1854, s. 2. 17 & 18 Vict. c. 31.)

"The Act of 1854 requires the interests of traffic coming to a line from other lines to be as much cared for as those of local traffic. It requires that it should be made as easy to go from any place on the railway of one company to any place on the railway, forming a through route, of another company, as if both railways belonged to the same company. Where, however, companies are competing, arrangements for working their lines in harmony are not unfrequently overlooked, and the provisions of the Act, and ready means of enforcing them, are very necessary to prevent through traffic being impeded." (4th Annual Report of the Railway Commissioners.)

Two railway companies ran trains to C., and each had a station there. The stations were 55 chains apart, but were connected by a line of railway belonging to one of such railway companies. Upon complaint by the inhabitants of the district that no passengers were conveyed on the railway between the two stations, although there was a continuous line of railway, the Commissioners made an order enjoining both the companies to afford a continuous communication for passengers by means of their continuous lines, and to afford due and reasonable facilities for forwarding through

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passenger traffic arriving by one of the lines at C. by the other. (*James and others* v. *Taff Vale and G. W. Ry. Cos.*, 3 Ry. & Ca. Tr. Ca. 540.)

Two railway companies ran trains to T. W., and each had a station there. The stations were a mile apart from each other, but were connected by a line of railway, which was used for the transit of goods only. The two railway systems were intended by the Legislature to join at T. W. Upon complaint by the inhabitants of the district that no passengers were conveyed on the railway between the two stations, although there was a continuous line of railway, the Commissioners held, that the case came within sect. 2 of the Railway and Canal Traffic Act, 1854, and accordingly an order was made enjoining both the companies to afford a continuous communication for passengers as well as for goods by means of their continuous lines. (*Uckfield Local Board* v. *L. B. and S. E. Ry. Cos.*, 3 Ry. & Ca. Tr. Ca. 214.)

The Commissioners in delivering judgment said :—

"This is a complaint by the Uckfield Local Board under sect. 13 of the Act of 1873, and as in such case required, it is accompanied by a certificate of the Board of Trade to the effect that they consider the local board to have proper grounds for submitting it. They come before us to complain that passengers are not conveyed by railway between the stations of the Brighton and the South Eastern Railway Companies at Tunbridge Wells. The transit at present has to be made by road, but a railway exists and is used for goods, and the application is that it may be used for passengers also. The Lewes and Tunbridge Wells Branch of the Brighton Company extends fifty-two chains beyond their station, and then terminates by a junction with the Hastings and Tunbridge Wells Branch of the South Eastern Company at a point on that branch which is twenty-two chains from the South Eastern station, so that the two stations are nearly one mile apart. The portion of the Brighton Company's railway between their station and the end of the line has been long completed, but it has never been opened

for passenger traffic, nor notice of an intention of opening it given to the Board of Trade.

"The accommodation which a through route for passenger traffic would afford to the public at Uckfield is evident. The communication between their part of East Sussex and places in Kent is necessarily by Tunbridge Wells, and from Uckfield by Tunbridge Wells, and thence by the South Eastern line to Cannon Street and Charing Cross, ought to be as good a route to London as that by Lewes and the Brighton line, and in any case as a second route would be a great convenience. The two railway systems were intended to be connected, and the Act under which the line from Uckfield to Tunbridge Wells was constructed provides for its terminating by a junction with the South Eastern Railway. The case therefore falls within the second section of the Traffic Act of 1854, which enacts that where there is a continuous line of railway, every company having railways which form part of it, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways by the other without delay, and so that no obstruction may be offered to the public, desirous of using such railways as a continuous line of communication. . . . . The order will be framed in general terms, following the words of the second section of the Traffic Act of 1854, and enjoining the two companies to afford a continuous communication by means of their continuous lines. Each company must, without loss of time, put itself in a position to perform its part of the joint business, and as to those mutual arrangements on which so much depends to execute the order properly, including what relates to the correspondence of trains, and to the selection of the most convenient place for delivering the traffic over, they, we think, will be better determined by agreement between the companies than by directions from us."

Where a railway company with running powers over the defendants' railway complained to the Commissioners that the defendants refused to work the signals which the applicants had reconstructed

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in such a manner as to enable the defendants' railway to be worked on the block system in pursuance of the power given by a special Act, the Commissioners held that the working of such signals was by sect. 2 of the Railway and Canal Traffic Act, 1854, a due and reasonable facility which the defendants should afford for the receiving, &c. of passenger traffic, and that the defendants, by refusing or omitting to work the signals, had offered obstructions to the public desirous of using the applicants' and defendants' railway as a continuous line of communication. (*G. W. Ry. Co. and Midland Ry. Co.* v. *Bristol Port Ry. and Pier Co.*, 5 Ry. & Ca. Tr. Ca. 94.)

244. In order to induce interference under the Railway and Canal Traffic Act, 1854, for the purpose of enjoining a railway company to run through trains on a continuous line of railways, it is not necessary to show a case of individual grievance, but it is necessary to show a case of public inconvenience. (*Barret* v. *Gt. N. and Midland Ry. Cos.*, 26 L. J. C. P. 83; 1 C. B. N. S. 423; 1 Ry. & Ca. Tr. Ca. 38.)

See Art. 247, p. 304.

245. Where railways owned by different companies are coterminous and form a continuous line, such companies are bound to use their utmost diligence in sending traffic over their respective routes. The obligation imposed upon every railway company to afford all due and reasonable facilities for receiving and forwarding by its railway traffic coming by another, which forms with it a continuous line of communication, is not limited to the cases in which

a railway company has accommodation to take over such traffic at the point of junction. (*Victoria Colliery Co.* v. *Midland and Neath and Brecon Ry. Cos.*, 3 Ry. & Ca. Tr. Ca. 37.)

This was a complaint by the lessees of a colliery, situated on the N. and B. Railway, at a short distance from its junction with the M. Railway to S., that they were prevented sending the traffic of their colliery to S. by the railways of the two companies, which formed a direct route, and in consequence had to send it by a circuitous route; it was proved that the two railways formed a continuous line of communication, and that, physically, there was no difficulty in the traffic of the colliery being carried to S. by the direct route.

It was held that the applicants were entitled, under sect. 2 of the Railway and Canal Traffic Act, 1854, to have their traffic conveyed by any route they pleased, and to use the two railways as if they were one continuous line.

See *Waterford and Limerick Ry. Co.* v. *Gt. S. and Western Ry. Co.*, 7th Annual Report of the Railway Commissioners.

246. Until works necessary for the exchange of traffic at the junction of connecting lines are completed and sanctioned by the Board of Trade, the route is not a "continuous line of railway communication." (*Hammans, Foster and others* v. *G. W. Ry. Co. and others*, 4 Ry. & Ca. Tr. Ca. 181; see *ante*, Art. 239.)

In that case it appeared that the S. and M. Company were the owners of a railway in two sections connected by lines belonging to two other companies which were worked by the Great Western Railway Company. The S. and M. Company did not book or work traffic between their two sections, and the Great Western

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Railway Company did not book from the stations on the lines worked by them to stations on either section of the S. and M. Company's Railway. To permit of the exchange of traffic required by the applicants, sidings and other accommodation at one of the junctions was necessary. It was held by the Commissioners that the failure to provide these between the 25th April and the 29th June, during which time the companies were considering the alterations which were necessary to enable the S. and M. Company to exercise their running powers over those connecting lines, was not a failure to provide facilities for the receiving, forwarding and delivery of traffic; and that the route, until so completed and sanctioned by the Board of Trade, was not a continuous line of railway communication.

247. It is no answer to the public, desirous of using railways as a continuous line, that there are disputes as to the rights of the companies *inter se.* (*Hammans, Foster and others* v. *G. W. Ry. Co. and others*, 4 Ry. & Ca. Tr. Ca. 181.)

In that case the junction between the northern section of the S. and M. Company's railway and that of the M. Company was at M., and it was physically complete, but was not opened because the S. and M. Company had not given the necessary notice. As the application asked for an order against the Great Western Company *only*, an injunction was refused.

See *Great Western Ry. Co. and Midland Ry. Co.* v. *Bristol Port Ry. and Pier Co.* (5 Ry. & Ca. Tr. Ca. 94), *ante*, p. 302.

The case of *Watson and others* v. *Swindon, &c. Ry. Co. and G. W. Ry. Co.* (9th Report of Railway Commissioners), was a complaint that the public were prevented using the Great Western Railway, and a railway which made a junction with it at Swindon, as a continuous line of communication. The railway from Swindon to Andover commences by a junction with the Great Western Railway near the

Swindon station, and the Act authorizing the railway provides for its traffic being accommodated in the Swindon station of the Great Western Company, and for the use of the station for that purpose, and the terms and conditions thereof being settled by agreement; and the two companies subsequently agreed that the Swindon and Andover Company should have all necessary facilities for the working of their traffic in the Great Western station, and full running powers between the station and the junction, and that the terms and conditions to which it should be subject should, if not agreed upon, be settled by an arbitrator. The Swindon railway was in due course completed and opened for traffic, but the two companies had not yet agreed upon the terms, and, pending their coming to a settlement, the Great Western Railway Company would not allow traffic to or from that railway to pass through the junction, or to be accommodated at their station. The only way, therefore, of transferring traffic from one railway to the other was to cart it by road between their nearest stations, and the object of the application was to put a stop to this, and to procure an order for the traffic being worked through by railway, and so to prevent further inconvenience to the public through differences between the companies. The Commissioners said that whatever might be the respective rights of the companies, they furnished no ground for an interference with the right of the public to have the railways available for use; that it must be understood that neither company was at liberty, by reason of any misconduct on the part of the other, to refuse to afford the facilities for through traffic required by the second section of the Act of 1854; that, whatever remedies for enforcing its claims might be open to either company, stoppage of the through communication was not one of those remedies, and that any attempt to bring the other company to reason by refusing, on this ground only, to receive or forward the traffic, would be treated by the Commissioners, if complained of, as a contravention of the Traffic Act; that it was clear that sect. 2 of the Traffic Act, which requires every railway company having a railway forming part of a continuous line of communication to afford all due and reasonable

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facilities for receiving and forwarding all the traffic arriving by one of such railways by the other without any unreasonable delay, was not being complied with, and that the applicants were entitled to have their grounds of complaint removed. There was indeed a difficulty about ordering an exchange at the point of junction, the junction not having been designed as a place of exchange, and having no suitable sidings for the purpose. It was, however, well laid out and properly signalled for running through, and not only was it in the power of the Great Western Company at once to permit the Swindon Company to use their line and station, but they had, besides, the alternative of themselves taking the traffic over the Swindon Company's line and delivering it to that company at one of their stations. They had no hesitation, therefore, in requiring traffic that had to pass from one of those railways to the other to be conveyed across by railway, and they directed that, unless the Great Western Company should elect to do the conveyance themselves, they should permit it to be done by the Swindon Company.

248. It is doubtful whether the facilities necessary to enable a company to work its traffic over the railway of another company, or, in other words, to exercise its running powers, are facilities an owning company are bound to provide under the Railway and Canal Traffic Act, 1854, unless the matters required are such as are necessary to keep their own line in a proper condition for the receipt, forwarding, and delivery of traffic. (*The Swindon, Marlborough, and Andover Railway Company* v. *The Great Western Railway Company and others*, 4 Ry. & Ca. Tr. Ca. 173.)

The Railway Commissioners cannot give running powers (except by consent) unless it is a reasonable facility for forwarding, &c.

traffic within the meaning of sect. 2 of the Railway and Canal Traffic Act, 1854. It is submitted it is not.

The exercise of running powers differs from through rates and traffic in this—that the running company use their own engines and carriages on the line of the owning company; whereas, in the case of through rates, the forwarding company carry on their own line, by their own engines and carriages, the goods, &c. sent on by the sending company.

In order to arrive at amount to be paid by running company to owning company—

(a) *For passengers*—let running company propose or fix fare or rate; deduct from it passenger duty, as that would have to be paid by company which issues the ticket; divide remainder according to mileage; deduct from mileage proportion of owning company the working expenses of the running company, so far as they relate to locomotive power, rolling stock, and servants with train (say 30 per cent).

(b) *For goods*—deduct terminals; then mileage proportion; then deduct, as above, working expenses (say 25 per cent.) from proportion of owning company.

For local traffic it is usual to allow the running company only 15 per cent. for working expenses.

The Commissioners have now jurisdiction to enforce the provisions in a railway company's special Act, *ante*, Art. 233.

249. Through booking is a facility under sect. 2 of the Railway and Canal Traffic Act, 1854. It is not necessary, in order to establish a claim to through booking, that the service should be continuous by the same trains, or by a connection between trains. (*Innes* v. *London, Brighton, and London and S. W. Ry. Cos.*, 2 Ry. & Ca. Tr. Ca. 155.)

The Railway and Canal Traffic Act, 1854, s. 2, gives

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a customer a right to require any number of railway companies in Great Britain to combine to form a continuous route by which his traffic may be sent at a single booking and for a single payment. (*G. W. Ry. Co.* v. *Severn & Wye Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 170.)

A railway company received goods for conveyance from places on their own railway to places on the railway of another company. There was through communication between such places by a continuous line of railway. The sending company refused to book such goods through to their destination, and only invoiced them locally to the end of their railway, where they were re-booked to the stations on the forwarding company's line, to which they were directed to be delivered.

It was held that the sending company must allow through booking from their stations to stations on the forwarding company's line; that through booking was a facility which railway companies may reasonably be required to afford, and, as exhibiting the total charge made for conveyance from end to end, was especially of use where doubts existed whether companies were making unequal or excessive charges. (*Uckfield Local Board* v. *London, Brighton, and South Eastern Ry. Cos.*, 2 Ry. & Ca. Tr. Ca. 214.)

In *Innes's case* the Commissioners said:—"On the subject of traffic between the joint line and Victoria, we observe that one route open to a passenger is that by Wimbledon and Clapham Junction. At present, however, a passenger by this route has to take a fresh ticket at Clapham Junction, the trains between Clapham Junction and Victoria being Brighton trains. Mr. Knight expressed the readiness of his company to concur in any proper arrangement which would dispense with this booking at Clapham, and it appears to us that passengers to and from the joint line, desirous of using the railways of the two companies as a continuous line of communication, are entitled to an order from us that the two companies shall afford them the facility of travelling by such railways between the joint line and Victoria

viâ Wimbledon and Clapham Junction without the delay and inconvenience of booking at the latter station."

250. If there were two competing companies having lines from A. to B., and one of them had a continuation from B. to C., and the company having such continuation arranged the departures from B. so as to interfere seriously with the other line, and put the public to inconvenience thereby, and forced the traffic to B. over a greater extent of line, at a sacrifice of time or cost, the Railway Commissioners would interfere upon an application made to them. (*Barret* v. *Gt. N. & Midland Ry. Companies*, *ante*, Art. 244, p. 302; Hodges on Railways, 6th ed. 525.)

Cockburn, C. J., said: "I can quite understand that two competing companies may so arrange the departures and arrivals of their respective trains as to operate injuriously to the shorter line, and inconveniently to the public. In such a case the Court would be justified in interposing under this Act. But it appears here that abundance of accommodation is provided on the Midland line; and, though the distance is somewhat longer, no additional cost is incurred, nor any materially greater loss of time sustained by the public."

It was provided by statute that the C. Railway Company should, for the accommodation of certain traffic, run and carry forward between L. and P. a train in conjunction with every train which should be run by the E. C. Companies, for the accommodation of that traffic, between L. and places on their lines; the speed and places of stoppage of such train to be regulated by the E. C. Companies.

It was held that the E. C. Companies could enforce an alteration in the service of trains run in conjunction by the C. Company without the consent of the latter, but were not entitled to fix the times of arrival and departure of such trains.

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The meaning of the expression "run in conjunction" considered. (*Caledonian Ry. Co.* v. *Great Northern, North Eastern & North British Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 377. See Art. 247.)

In cases where, having regard to the clauses in the special Acts, an exchange of passenger traffic between two companies, free to exchange at any junction between their lines, ought to be made at the junction which is most convenient for the public; the fact that one route is shorter than another, or one by reason of curves or gradients better adapted for fast traffic, or that at one junction there is a joint station, while at another there are two separate stations, are all matters affecting the public.

251. The Commissioners will not make an order on a complaint of diversion of traffic where the number of instances of diversion is so small, in proportion to the amount of traffic not diverted, as to show that the traffic was miscarried merely by inadvertence or mistake. (*Hammans, Foster & others* v. *Great Western Ry. Co. & others*, 4 Ry. & Ca. Tr. Ca. 181.)

The existence of through booking and through rates over one route which is 56 miles longer than another route, of which the applicant company's line (which is run over and used under an agreement by the L. & N. W. Railway Company) forms a part, is no ground for an application against the L. & N. W. Railway Company under sect. 2 of the Railway and Canal Traffic Act, 1854. (*Central Wales & Carmarthen Junction Ry. Co.* v. *London & North Western Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 101.)

There were two routes between C. and C. A., the N. W. route and G. W. route. The G. W. Company having in their own hands, at the outset, traffic consigned by the N. W. route to and from places beyond C. and C. A., sometimes diverted such traffic and carried it by their own route, and at other times caused undue delay in the delivery thereof at C.

Upon the application of a company owning a line terminating at C., which formed part of the N. W. route, the Commissioners granted an order enjoining the G. W. Company to afford to the applicants all the facilities to which they were entitled under the Railway and Canal Traffic Act, 1854. (*Central Wales & Carmarthen Junction Ry. Co.* v. *Great Western Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 191.)

252. "The Commissioners may order two or more companies to which this part of this Act applies to carry into effect an order of the Commissioners, and to make mutual arrangements for that purpose, and may further order the companies or, in case of difference, any of them, to submit to the Commissioners for approval a scheme for carrying into effect the order, and when the Commissioners have finally approved the scheme, they may order each of the companies to do all that is necessary on the part and within the power of such company to carry into effect the scheme, and may determine the proportions in which the respective companies are to defray the expense of so doing, and may for the above purposes make, if they think fit, separate orders on any one or more of such companies.

"Provided that nothing in this section shall authorise the Commissioners to require two companies to do anything which they would not have jurisdiction to require to be done if such two companies were a single company." (51 & 52 Vict. c. 25, s. 14.)

Until the passing of the above enactment the Railway Commissioners had no power to make an order on two railway companies to afford to the public facilities for conveyance by

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doing jointly acts which neither company could do separately. (*Toomer* v. *L. C. & D. Ry. Co. & S. E. Ry. Co.*, 2 Ex. D. 450; 47 L. J. Q. B. D. 276; 3 Ry. & Ca. Tr. Ca. 79.)

IV.—Through Rates under Sect. 25 of the Railway and Canal Traffic Act, 1888.

253. The facilities to be afforded under sect. 2 of the Railway and Canal Traffic Act, 1854, "include the due and reasonable receiving, forwarding, and delivering by every railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls or fares," and also at the request of any person interested in through traffic. (The Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, s. 25.)

This section is as follows:—

"Whereas by section two of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company and canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever;

and that every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf:

"And whereas it is expedient to explain and amend the said enactment: Be it therefore enacted, that—

"Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates); and also the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any person interested in through traffic, of such traffic at through rates: Provided that no application shall be made to the Commissioners by such person until he has made a complaint to the Board of Trade under the provisions of this Act as to complaints to the Board of Trade of unreasonable charges, and the Board of Trade have heard the complaint in the manner herein provided.

"Provided as follows:

"(1) The company or person requiring the traffic to be forwarded shall give written notice of the proposed through rate to

each forwarding company, stating both its amount and the route by which the traffic is proposed to be forwarded; and when a company gives such notice it shall also state the apportionment of the through rate. The proposed through rate may be per truck or per ton:

"(2) Each forwarding company shall, within ten days, or such longer period as the Commissioners may from time to time by general order prescribe, after the receipt of such notice, by written notice inform the company or persons requiring the traffic to be forwarded, whether they agree to the rate and route; and if they object to either, the grounds of the objection:

"(3) If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration:

"(4) If an objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the Commissioners for their decision:

"(5) If an objection be made to the granting of the rate or to the route, the Commissioners shall consider whether the granting of a rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly, or fix such other rate as may seem to the Commissioners just and reasonable:

"(6) Where, upon the application of a person requiring traffic to be forwarded, a through rate is agreed to by the forwarding companies, or is made by order of the Commissioners, the apportionment of such through rate, if not agreed upon between the forwarding companies, shall be determined by the Commissioners:

"(7) If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the Commis-

sioners, as to its apportionment, shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given:

"(8) The Commissioners, in apportioning the through rate, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof:

"(9) It shall not be lawful for the Commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route.

"Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby.

"When any company, upon written notice being given as aforesaid, refuses or neglects without reason to agree to the proposed through rates, or to the route, or to the apportionment, the Commissioners, if an order is made by them upon an application for through rates, may order the respondent company or companies to pay such costs to the applicants as they think fit."

And sect. 26 enacts that—

"Subject to the provisions in the last preceding section contained, the Commissioners shall have full power to decide that any proposed through rate is just and reasonable, notwithstanding that a less amount may be allotted to any forwarding company out of such through rate than the maximum rate such company is entitled

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to charge, and to allow and apportion such through rate accordingly."

It was not clear that either the public or a railway company could, under the Railway and Canal Traffic Act, 1854, require as a reasonable facility that through traffic should be forwarded at through rates, and that there should be only one booking and invoicing for the entire route. Sect. 11 of the Regulation of Railways Act, 1873, carried out the recommendations contained in the report of the Royal Commission on Railways in 1867, and the report of the Joint Select Committee on Railway Companies Amalgamation in 1872, that a railway company should be able, subject to conditions, to require that through traffic to or from places on the line of such company should be forwarded at through rates by other railway companies.

If the requisition gives rise to differences between the companies interested, either as to the route or as to the amount of the rate, or as to its apportionment, the differences are to be referred to and settled by the Railway Commissioners.

The Railway Rates Committee of 1882, in their report, said:—

"Your committee are of opinion that the existing law as to through rates is not sufficient in all cases to secure through communication, and they think that the Railway Commissioners should have power, on the application of a private trader, to order two or more railway companies to make a through rate over their respective systems, by a continuous line of communication, and by the shortest route available. Provided that such order shall not impose on any railway company a lower rate than the lowest rate on such railway for similar articles under similar circumstances."

This power to grant through rates at the instance of a trader is now given by the Railway and Canal Traffic Act, 1888, as set out in this article; and sect. 11 of the Regulation of Railways Act, 1873, is repealed.

In compelling a company to accept a through rate, the Commissioners compel them to carry traffic at less than their ordinary rates.

This is a new and exceptional power given to the Commissioners, affecting the property of companies and the security of those who have advanced money on the faith of the companies having a control over the rates up to the maxima allowed by Parliament.

It is a power, therefore, which has to be exercised with great care, and the Legislature have expressly required that before the Commissioners exercise it, they shall be satisfied that the granting of the rate is a due and reasonable facility in the interest of the public, and that, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly.

By sub-sect. 5 of sect. 11, it seems to have been intended that if the forwarding company object either to the rate or route, the Commissioners are to consider whether the rate will be in the public interest, and also whether the route is a reasonable route, and they then make the allowance or refusal of the rate dependent upon the Commissioners being satisfied as to both of these matters.

The Railway Commissioners, in their 4th annual report, said:—"Every company has a right to propose through rates over the lines of other companies, and, failing their consent to the rates proposed, to refer to us to allow and apportion them at our discretion. We have seen it stated here and there that this right is fraught with possible danger to railway property, but certainly as yet it has done no harm, nor developed any tendency to harm: rather it has been of excellent effect as an additional motive to harmony of arrangements, and an additional motive to connected companies to act as one concern in providing for the forwarding of through traffic."

It seems clear that the onus of proving the proposed rate to be a due and reasonable facility in the interest of the public, and the route to be a reasonable route, lies upon the applicants, because the making the through rate is "subject" to the 5th proviso, and also because the *onus probandi* lies on him who affirms, not upon him who denies.

By sub-sect. 5 of sect. 25 of the new Act, the Commissioners now

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have jurisdiction to allow a different rate to that proposed. The jurisdiction of the Commissioners under sect. 11 of the Regulation of Railways Act, 1873, was simply to decide whether the proposed through rate should be allowed or refused. (*Newry & Armagh Ry. Co.* v. *Gt. N. of Ireland Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 28.)

The Commissioners, in their fourth annual report, said:—"If it is referred to us to allow or refuse a through rate, and the amount of the rate is the point to which objection is taken, we have no alternative to simply granting or refusing the rate as proposed, and are without power to fix an amount for it different from that which has been proposed. We are authorized to make any division of a rate we please, but if we grant the rate at all we must grant it at the amount as a whole at which it has stood in the notice given of it by the applicant company to the other companies. We would suggest that we should have the same power over the amount of a through rate that we have over its apportionment."

The cases decided by the Commissioners as to through rates were, of course, decided on the 11th section of the Regulation of Railways Act, 1873. The provisions of that section are re-enacted in sect. 25 of the new Act. A "route" within the meaning of this section is a route from the station on the sending line where the traffic arises, to the station on the forwarding line where such traffic is delivered. (*E. & W. Junc. Ry. Co.* v. *G. W. Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 331.)

254. To entitle a railway company to apply for through rates, it is enough that they are a company with an interest in the through route, and it is not necessary to measure their interest, and to refuse them a *locus standi*, even though their proposals should be more of a detriment to other companies than a benefit to themselves. (*Severn & Wye & Severn Bridge Ry. Co.* v. *G. W. Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 156.)

The Commissioners in their judgment said:—"The length of

line belonging to the applicants which is used by traffic passing over the bridge is 4 miles 31 chains; and it is argued for the Great Western Company that it is not the intention of the Act of 1873 that a route which, as compared with the route in actual use, makes material changes as between the companies having the long distances should be sanctioned at the instance of a company whose quantum of interest in the proposed route is insignificant. But this does not seem to me to be the right construction to be put upon the Act. The subject is traffic passing over a continuous line made up of the railways of two or more companies. By the Act of 1854, each company is to afford to such traffic all reasonable facilities, and there is to be no obstruction to the public desirous of using the several railways as a continuous line; and any of the public may apply to enforce effect being given to the Act should any reasonable facilities be withheld. Then, in 1873, it is further enacted that the facilities given by the earlier Act shall include under certain conditions through rates, these conditions being that through rates are asked for by one of the railway companies concerned, that the granting of what is so asked is in the interest of the public, and that the route, to which the through rates are applicable, is a reasonable route. For the particular facility therefore of through rates, an application by a railway company is required; but within that limit the condition is general, and the smallest company stands on a footing of equality with the largest, and though the power of proposing a route ought not to be used for no better purpose than to take traffic from one company and give it to another, the means by which the Act intends that companies, large or small, shall not suffer in that way are to be found in the two other conditions, and ought not to be sought to be obtained by holding that companies have no *locus standi* given them to claim a through route when their interest in the route is relatively inconsiderable."

The power of proposing through rates is not limited to the railway companies which have the conveyance of the traffic, or the ownership of the lines on which it is either received or delivered;

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but any railway companies whose lines are part of a through route, and who, though not themselves working, have nevertheless a substantial interest in the traffic of their lines and the proceeds of it, are capable of proposing through rates. (Held by the Commissioners in *Greenock & Wemyss Bay Ry. Co.* v. *Caledonian Ry. Co.* (No. 3), 2 Ry. & Ca. Tr. Ca. 227; affirmed by the Court of Session, 5 Sess. Ca. (4th Ser.) 995; 3 Ry. & Ca. Tr. Ca. 145. Also held by the Commissioners in *Central Wales & Carmarthen Junction Ry. Co. and Mid Wales Ry. Co.* v. *G. W. Ry. Co., L. & N. W. Ry. Co., Mid. Ry. Co., and Pembroke & Tenby Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 110; affirmed by the Queen's Bench Division, 10 Q. B. D. 231; 52 L. J. Q. B. D. 211; 4 Ry. & Ca. Tr. Ca. 110.)

By a statutory agreement between the A. Railway Company and the B. Railway Company, whose railways formed a continuous line of railway, it was provided that the B. Company should work the line of the A. Company in perpetuity, and provide the necessary rolling stock; that the B. Company should appoint, pay and have the exclusive control over the staff required for working the A. Company's line, and that the A. company should appoint, pay and have exclusive control over the officials required to manage the directorial and financial departments of their undertaking, and the men required for the maintenance of the permanent way of their line; that the B. Company should receive for working the traffic 50 per cent. of the gross receipts, and that out of the remaining 50 per cent. the A. Company should pay, (1) The cost of maintaining the permanent way, public and parochial burdens, and government duties; (2) The "general charges" for the directorial and financial business of the company; and (3) Out of the balance should pay one-quarter to the B. Company in respect of a contribution of 30,000*l.* to the capital holders in the A. company; and lastly, that the traffic should be managed and the rates and fares fixed, by a joint committee, the B. Company being, however, the sole judges of the proper times for starting the trains:—

Held, by the Court of Session (affirming the judgment of the Railway Commissioners), that the A. Company was, within the

meaning of the Regulation of Railways Act, 1873, a forwarding company, and entitled, under sect. 11, to require that through rates should be fixed for traffic passing to and from stations on its line from and to stations on the B. Company's own line. (*Greenock & Wemyss Bay Ry. Co.* v. *Caledonian Ry. Co.*, *supra*.)

The C. W. Railway Company applied to the Commissioners for an order, under sect. 11 of the Regulation of Railways Act, 1873, allowing through rates in respect of the traffic in certain goods between Chester and Haverfordwest, the route proposed being from Chester over lines owned and worked by the L. & N. W. Railway Company, and over the applicants' own line, which was worked by the same company under an agreement with the applicants, and thence to Haverfordwest over G. W. Railway Company's line, which was worked and owned exclusively by that company, and *vice versâ* from Haverfordwest to Chester. The through route proposed consequently commenced and terminated off the line of the company proposing the through rate.

The applicants had no rolling stock, and did not work their railway, but maintained and managed their line, and collected, forwarded, and delivered their own traffic, the whole of the staff at their stations being employed and paid by them, and subject to their orders:—Held, by the Queen's Bench Division (affirming the judgment of the Railway Commissioners, and in accordance with the judgment of the Court of Session in *The Greenock and Wemyss Bay Ry. Co.* v. *The Caledonian Ry. Co.*), that the traffic required to be forwarded was "through traffic to or from" the applicants' railway, and that the applicants were a railway company entitled to apply for a through rate in respect of such traffic, within the meaning of sect. 11. (*Central Wales, &c. Ry. Co.* v. *G. W. Ry. Co.*, *supra*.)

Where a railway company took exception to the Commissioners' jurisdiction to entertain an application for through rates, on the ground that there was an agreement in existence which provided for through rates being fixed between the two companies, and for a reference to arbitration in the event of there being a difference

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as to the amounts at which those through rates should be fixed, the Commissioners held that the company who made the application was competent to do so.

Mr. Commissioner Miller said :—"I do not doubt for a moment the jurisdiction of this tribunal to hear and determine any question of through rates brought before it by any railway company having an interest in a route over which it is proposed that the goods should be carried. The Act giving the jurisdiction is perfectly general. It is a jurisdiction given in order to prevent railway companies, by agreement or want of agreement amongst themselves, imposing difficulties in the way of traffic being carried from point to point, and under any circumstances where you find a continuous line of railway belonging to two or more companies, and any one of the companies interested in the route has given the proper statutory notices so as to bring the case within the terms of the 11th section of the Act of 1873, and a difference has arisen between the companies as to whether the proposed rates should come into operation or not, it appears to me that the jurisdiction of this tribunal to hear and determine that question at once arises, and cannot be ousted in any way by any equities that may exist between the different companies themselves." (*Met. D. Ry. Co.* v. *Met. Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 126.)

See, as to the effect of an agreement as to the granting of through rates, *post*, Art. 258, p. 328.

The Commissioners refused to fix and apportion through rates, on the ground that the proposed rates were not in accordance with the terms of a statutory agreement made between the two railway companies over whose railways the rates were sought to be charged. (*North Monklands Ry. Co.* v. *North British Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 282.)

The W. B. Railway Company had entered into an agreement with the C. Company, whereby the latter company worked their line, and it was agreed that the rates and fares to be charged on the W. B. Railway should be fixed by a joint committee of the two companies.

It was held that this agreement did not relate to through rates, and that the W. B. Company were the proper parties to apply for such rates under that section. (*Greenock and Wemyss Bay Ry. Co.* v. *Caledonian Ry. Co.* (No. 3), 3 Ry. & Ca. Tr. Ca. 145.)

In a statute granting a gross toll to the Birmingham Canal Company, it was recited that it would be of public advantage for the canal from Warwick to Birmingham to be opened into the Digbeth branch; and that, in order to induce the Birmingham Company to agree to such junction taking place, it had been proposed and agreed that the Birmingham Company should have the rates or dues thereinafter mentioned. Both these statutes were repealed by others, substituting fresh tolls. The Court held, that the particular circumstances which led to the original establishment of the tolls did not prevent them coming under the jurisdiction of the commissioners in fixing through tolls under the Regulation of Railways Act, 1873, s. 11.

A canal company had a dividend guaranteed to them by a railway company under a statute, which provided that they should not reduce or vary their tolls without the consent of the railway company. It was held by the Exchequer Division that the consent of the railway company to the granting of a through toll reducing the tolls of the canal company was required before the commissioners could make an order under sect. 11. (*Warwick and Birmingham Canal Co.* v. *Birmingham Canal Co. and others*, 3 Ry. & Ca. Tr. Ca. 113, 324.)

255. To induce the Railway Commissioners to impose a through rate there must be evidence that it is required in the public interest. (*Belfast Central Ry. Co.* v. *Great Northern Ry. Co.* (*Ireland*, No. 3), *Great Northern Ry. Co.* (*Ireland*) v. *Belfast Central Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 159.)

The fact that the quantity of traffic to which the pro-

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posed rates could apply is small, and that no time will be saved if the traffic is carried by the proposed route, and the number of exchanges on the portion of the proposed through route worked by other companies is great,—are not reasons for refusing through rates, any more than they would be for withholding facilities under sect. 2 of the Railway and Canal Traffic Act, 1854. (*Central Wales, &c. Ry. Co.* v. *L. & N. W. Ry. Co. and G. W. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 211.)

This was an application by the C. W. Railway Company for through rates for traffic carried between Haverfordwest and Chester, Liverpool, Manchester, Leeds, Burton, Birmingham, and Wolverhampton, required to be forwarded *viâ* the C. W. route; it appeared that that route was shorter and more direct than the G. W. route, *viâ* Hereford (on which through rates were in force): the saving of distance by the C. W. route from Chester, Liverpool, Manchester, and Leeds being 57 miles; from Burton 32 miles; from Wolverhampton 22, and Birmingham 7. The G. W. Company contended that the proposed rates were not in the public interest, for the reasons stated in this article.

Upon an application for a through route and rate, it was proved that the proposed route was 56 miles shorter than the route over which the traffic was being carried, and was worked not less conveniently as regards the railway companies by whom the traffic was handled before it got to its destination; and that the proposed rate was of less amount, and presumably, therefore, more beneficial to the public, while, at the same time, being more in proportion to distance than the rate by the other route, it yielded a larger sum per mile to the companies carrying, and was, therefore, not obviously unreasonable as against them. The Commissioners inferred from those facts that the route was a reasonable one, and that the public were interested in the rate being granted; and held, that where a good *primâ facie* case of public interest existed on general

considerations, it was not necessary to bring evidence to prove a special case as well. (*Central Wales, &c. Ry. Co.* v. *G. W. Ry. Co. & others*, *ante*, p. 320.)

A coal rate will be a sufficiently paying rate to be allowed if the earnings per truck are not less than the earnings in other trucks of a goods train, and if the company's profit on coal is not less than their profit on their goods traffic generally.

The delay in unloading waggons at a particular station is not a cost which ought to make the through rate to that station higher.

In applications for through rates, there is no *primâ facie* case in favour of specially low charges, and the onus is upon the company applying to show reasons why the forwarding company should carry for less than it would be likely to receive out of agreed through rates. (*Belfast Central Case*, *supra.*)

On an application by the Belfast Central Railway Company to fix through rates for coal sent from Belfast quay over their railway to stations beyond Armagh on the Great Northern (Ireland) Company's railway, the Commissioners held, that having fixed the through rate to Armagh at 3*s.* 6*d.*, every member of the public had a vested right to have his coal carried to that point for that sum, and therefore in the case of places lying beyond Armagh, the question whether any proposed through rates were or were not reasonable in the interests of the public depended upon whether the difference between the proposed rate of 3*s.* 6*d.* afforded a reasonable remuneration for the haulage for the extra distance, it being proved that the extra distance involved no expense to the Great Northern Company other than haulage. (*Belfast Central Ry. Co.* v. *Great Northern Ry. Co.* (*Ireland*, No. 2), 3 Ry. & Ca. Tr. Ca. 419.)

The Commissioners will not grant through rates which will have the effect of raising a long-established rate and unsettling interests which have been founded on its continuing, unless the railway company asking for such through rates can show that an alteration is required to give them a fair return upon the traffic carried. (*Gt. N. of Ireland Ry. Co.* v. *Belfast Central Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 411.)

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256. The Commissioners must consider whether, having regard to the circumstances, the route proposed is a reasonable one. (51 & 52 Vict. c. 25, s. 25.)

That through rates exist by an alternative route, and that to maintain competition by the proposed route a similar facility is necessary, is a reason for granting through rates. That the distance between the points of arrival and departure of two through routes is the same, is too vague a ground for deciding that the rates charged in respect of these routes should be the same. (*Central Wales & Carmarthen Junction Ry. Co.* v. *London & North Western Ry. Co. and Great Western Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 211.)

A route, for which through rates are proposed, that would be a reasonable and serviceable route if worked throughout by one railway company, does not lose its serviceableness because two or more companies are concerned in working it; for the Railway and Canal Traffic Act, 1854, s. 2, is intended to secure that, in the case of a continuous line formed out of the railways of different companies, the companies should co-operate for the transit of through traffic, and send it forward to its destination as though it were their own proper traffic. (*Swindon, Marlborough & Andover Ry. Co.* v. *Great Western Ry. Co. and London & South Western Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 349.)

In this case the S. & M. Railway formed an alternative route between certain stations on the G. W. Railway and other stations on the S. W. Railway.

Upon an application by the S. & M. Railway Company for through rates between such stations *viâ* their railway, the rates to be the same as the existing rates between such stations by the alternative route, which were agreed through rates, it was proved that the route proposed by the S. & M. Railway would effect a great saving in time and distance, and that the transfers at junctions were the same by either route.

The Commissioners allowed the through rates and route as

proposed, on the ground that the interests of the public were, under the circumstances, in favour of the existence of an alternative railway route at equal rates.

The Commissioners held that rates that excluded traffic from the shorter of these two through routes, and confined it to the longer, could not but be at the expense of public policy; and though the quantity of traffic might be insignificant, and equal rates might not have much effect in developing through traffic by the route in question, it was a principle of importance to the public that a route between places offering the best opportunities for railway carriage, as far as distance was concerned, should not be placed at a disadvantage merely because portions of the route belonged to companies which had an alternative route and made lower charges in favour of the latter. It would be an undue preference if a company, as to traffic of the same description going between the same places, worked it at through rates if the traffic passed off their line at one point, and refused that facility if it passed off their line at another point.

The through rates and route proposed by the C. Company combined the more direct route of one company with the more convenient station of the other, and fixed as the rates for traffic sent that way the rates in force for through carriage by the alternative but less convenient route. (*Caledonian Ry. Co.* v. *North British Ry. Co.* (No. 4), 3 Ry. & Ca. Tr. Ca. 403.)

A sending company having two alternative routes for through traffic, one eight miles longer than the other, proposed, for the purpose of a through rate, to carry by the longer one, at a double cost and labour in working and maintaining the junction, with the object of making their own mileage more, and the mileage of the forwarding company less. It was held, that such longer route was not a reasonable route, within the meaning of section 11, subsection 5, of the Regulation of Railways Act, 1873. (*E. & W. Junc. Ry. Co.* v. *G. W. Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 331.)

The Commissioners held that a route was a reasonable one, within the meaning of section 11 of the Regulation of Railways

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Act, 1873, which was capable of maintaining a competition with quicker or cheaper routes, and efficient enough to be likely to be preferred for some portion of the traffic. (*G. W. Ry. Co.* v. *Severn & Wye, &c. Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 170.)

257. As a general rule, in apportioning through rates, it is reasonable that where a railway company has a very short distance it should have more in proportion than the company which has a long distance. (*Severn & Wye, &c. Ry. Co.* v. *G. W. Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 156.)

In dividing the total amount of a through rate between two forwarding companies where the traffic is carried on one of the railways a short distance, the charge which such a company may make for short distances under their special Act is to be taken into account in favour of such a company. (*Tal-y-llyn Ry. Co.* v. *Cambrian Rys. Co.*, 5 Ry. & Ca. Tr. Ca. 122.)

258. "Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby." (Railway & Canal Traffic Act, 1888, s. 25, *ante*, p. 315.)

The routes to which the obligations as to through rates and the power for applying for them have reference, consist generally of two or more railways forming together a continuous line, but they may also be a mixed route partly by land, partly by sea, provided the communication for the sea portion is by steam vessels, and the vessels are used, maintained, or worked by a railway company,

or under an arrangement to which a railway company is a party. Questions were raised as to this proviso in the following cases:—

An agreement between a steamboat company and a railway company that the steam vessels belonging to the former shall ply between two ports "for one year and thereafter until written notice to terminate the agreement six months from the date of such notice, . . . daily or at least upon alternate days of each week, the hours of departure of the boats to be determined by the steamboat company, regard being had, however, to the convenience of the railway company and to the times of the arrival and departure of their trains;" and containing also a clause that any dispute or difference as to the provisions of the agreement should be referred to the decision of an arbitrator to be appointed by the Board of Trade, whose decision was to be binding, is an arrangement for using, maintaining, or working steam vessels within the meaning of sect. 11 of the Regulation of Railways Act, 1873. (*The Belfast Central Ry. Co.* v. *The Gt. N. Ry. Co.* (*Ireland*, No. 4), 4 Ry. & Ca. Tr. Ca. 379.)

A railway company applying for through rates had agreed with C. for the carriage of passengers by steamers in connection with their lines. It was held that such steamers and the traffic carried thereby were within the provisions of the 11th section of Regulation of Railways Act, 1873. (*Greenock and Wemyss Bay Ry. Co.* v. *Caledonian Ry. Co.* (No. 3), 3 Ry. & Ca. Tr. Ca. 145.)

The existence of through bookings between A. and B. for the carrying of traffic by a certain steam vessel for the sea part of the through journey between these places is not such an arrangement for the "use" of these vessels as to make sect. 11 apply to them, and to enable the owners to require a through rate between A. and C. under that section.

Semble, a railway company cannot make a distinction in its rates for the same railway journey, according as the traffic is booked no further than it goes by railway, or is booked to a destination beyond the limits within which the Traffic Act is applicable, *e.g.*

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to places across the sea where section 2 of the Act has not been extended to the carriage by water. (*The Ayr Harbour Trustees and P. Barr & Co. (Ayr Steam Shipping Co.)* v. *The Glasgow and S. W. Ry. Co., The Caledonian Ry. Co., The North British Ry. Co., and The North Eastern Ry. Co.* (No. 1), 4 Ry. & Ca. Tr. Ca. 81.)

Where the arrangement as to the steam vessels was made by the company to whom the railway with which the steam vessels directly communicated belonged, it was held that such clause extended the whole provisions of sect. 11, and took effect whenever there was an arrangement with the proprietors of steam vessels for the conveyance of passengers or goods to and from any port or town with which there was railway communication, provided the railway company party to the arrangement owned or worked, or was otherwise immediately interested in, some portion or other of the line of railway communication. (*The Caledonian Ry. Co., Alexander Campbell and The Frith of Clyde Steam Packet Co., Limited* v. *The Greenock and Wemyss Bay Ry. Co. and The Joint Committee for managing the Traffic on the Greenock and Wemyss Bay Railway and Pier*, 4 Ry. & Ca. Tr. Ca. 135.)

An application by the D. Steam Packet Company for through rates for passengers between Kingstown and London, *viâ* the Company's steamers and N. W. Company's railway, was refused on the ground that the D. Steam Packet Company had agreed (under statutory powers) that the charges for the conveyance of passengers' traffic between London and Kingstown were to be fixed from time to time, as regards the through rates, by the railway company. (*City of Dublin Steam Packet Co.* v. *L. & N. W. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 10.)

To constitute an arrangement for "using" steam vessels within the meaning of sect. 11 of the Regulation of Railways Act, 1873, the agreement between the railway company and the owner of the steamboat must be definite, and contain an obligation on the part of the steamboat proprietor to ply between the specified ports. Where there was no such stipulation, and where stipulations as to the time of arrival and departure of the boat, and to

ensure that the railway and steamer should form together part of a continuous line of communication, were not contained in the agreement, the arrangement was held to be not such an one as was contemplated by the section.

Where there was an agreement for the season that a certain steamer should connect with one up and one down train of the railway company daily, the application being made within five weeks of the end of the season, the through rates were refused on the ground that they would be too transient to be proper to be allowed.

When the validity of an agreement is disputed upon grounds not obviously frivolous, the Commissioners will abstain from exercising their power of granting through rates, although the agreement, if valid, is such an one as would have entitled a railway company to require through rates under the section. (*Caledonian Ry. Co.* v. *Greenock & Wemyss Bay Ry. Co.* (No. 2), 4 Ry. & Ca. Tr. Ca. 70.)

CHAPTER XV.

THE OBLIGATIONS OF A RAILWAY COMPANY TO AVOID GIVING AN UNDUE PREFERENCE.

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I. Statutory Obligations.

259. A railway company may, subject to the provisions and limitations in the special Act contained, from time to time alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway. (8 Vict. c. 20, s. 90.)

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The word "tolls" in this section clearly includes a charge made by a company as carriers. (*Evershed* v. *L. & N. W. Ry. Co.*, 3 App. Cas. 1029; 48 L. J. Q. B. (H. L.) 22; and s. 3 of 8 Vict. c. 20.)

The words "goods of the same description" and "under the same circumstances," mean goods of the same description for the purposes of carriage, and they are used with reference to the conveyance of goods and not to the persons who send them. (*G. W. Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226; 38 L. J. Ex. (H. L.) 177.) By "the same circumstances" is meant the same circumstances as regards the railway company, *i.e.*, the same amount of labour and cost to them.

Willes, J., in delivering judgment in that case said: "The question, what is the meaning of the equality clause when it speaks of things of 'like description' conveyed 'under the like circumstances,' ought, I think, to be answered by saying that things are of a 'like description' when,—although their component parts are not 'identical,' which would be expressed by 'the same description,' not 'like description,'—they are similar in those qualities which affect the risk and expense of carriage, and that they are conveyed under like circumstances where the labour, risk, and expense are, in the opinion of the jury, the same—otherwise not. For instance, bags of red wheat and bags of white wheat are in the nature of things of like description. Bags of cotton and bags of jute, of like weight and value, are of the like description, if there is no other dissevering circumstance proved; but if it were superadded that one was more risky and troublesome to carry than the other, the jury would hold that the goods were of different descriptions; and bags of silk may be suggested as an instance in which a jury would be sure so to hold. Cattle, which would be more troublesome and exposed to risk than inanimate things, would be an instance of dissimilarity. So of horses, as less manageable than other cattle, and requiring special precautions. In each case the question ought, I think, to be, in fact, whether the sort of thing was like or different for the purposes of carriage, that being the subject dealt with. The railway company might also make a

distinction between the prices charged to all the world for articles not distinguished in this respect because of there being a great traffic in one and small in another: as, for instance, in the carriage of coals and the carriage of coke from a district in which the one was abundant and the other was not so, to such an extent that the former employed a greater number of waggons with a less expensive staff, the price of carriage being proved to depend more upon the wages of the staff than upon the wear and tear of the waggons. This would affect the expense, and make the articles, though in one respect like as minerals, in another unlike as to remuneration. I think 'like description' is exhausted upon the goods, and 'like circumstances' upon the carriage, and that neither can be extended to the personal qualities of the individual who sends the goods."

Lord Blackburn, in *Eversheď* v. *L. & N. W. Ry. Co.* (3 App. Cas. 1029), said: "What the legislature has clearly said is, that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all."

Equality clauses similar to this section were inserted in most of the special Acts before this general enactment.

The preamble of this section, viz., "Whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties," shows that the legislature intended to impose on railway companies, acting as carriers, an obligation beyond what is imposed at common law, so that an unequal charge to different persons under similar circumstances is by virtue of the statute extortionate. *Per* Blackburn, J., in *G. W. Ry. Co.* v. *Sutton*, *supra*, where the cases upon this section and upon the corresponding clause in the special Acts are reviewed.

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These cases arose out of disputes between railway companies and carriers in respect to "packed parcels," for which railway companies had charged carriers a higher rate than the public, "which it has been held over and over again they cannot do." (*Per* Willes, J., in *Piddington* v. *S. E. Ry. Co.*, 27 L. J. C. P. 295; 5 C. B. (N. S.) 111.)

This section does not apply to the case of a company charging lower passenger fares for long than for short distances for the purpose of excluding competition. (*Att.-Gen.* v. *Birmingham and Derby Junction Ry. Co.*, 2 Railw. Ca. 124.)

Sect. 90 does not prevent a railway company from making a special charge for goods carried over their railway in pursuance of a traffic agreement with another company under sect. 87 of the Act. (*Hull, Barnsley, &c. Ry. and Dock Co.* v. *Yorkshire and Derbyshire Coal and Iron Co.*, 18 Q. B. D. 761.)

If any railway company infringe the equality clause, and give an undue preference to particular customers, a customer paying the excess may recover it in an action against the company. (*G. W. Ry. Co.* v. *Sutton*, L. R. 4 H. L. Ca. 226; 38 L. J. Ex. 177; *Evershed* v. *L. & N. W. Ry. Co.*, 3 App. Cas. 1029; 48 L. J. Q. B. 22.)

The provision in sect. 90 requiring equality of rates for carriage of goods "passing only over the same portion of the line of railway under the same circumstances" applies only to goods passing between the same points of departure and arrival and passing over no other part of the line. And mere inequality in the rate of charge when unequal distances are traversed does not constitute a preference inconsistent with the concluding words of that section.

Therefore, where a railway company carried coals from a group of collieries situate at different points along their line, and charged all the collieries with one uniform set of rates in respect of such carriage, and the owners of the colliery lying nearest to the point of arrival brought an action for overcharges, it was held that the railway company had not infringed sect. 90. It was also held that in this case an action did not lie for breach of sect. 2 of

the Railway and Canal Traffic Act, 1854, undue or unreasonable preference or prejudice not having been made out.

It is doubtful whether under any circumstances an action lies for breach of that section.

Where goods are carried for different customers "over the same portion of the line of railway," and the only difference in the circumstances is that the goods carried for one customer are to be shipped to certain ports in order to develop a new trade, or open up new markets, and so to increase the tonnage carried, the railway company are not justified in making allowances to that customer, or in carrying for him at a lower rate than for the others.

A railway company which carried coals for the appellants, and also for B. and J., "over the same portion of their line of railway," and made allowances and a rebate to B. and J., and proved that they carried for B. and J. at a less cost to the company, but did not show that the allowances and rebate were adequately represented by the saving to the company. It was held that the difference in cost constituted a real difference in the circumstances; that there being nothing to show any want of good faith, the company were not bound to prove that the allowances and rebate were adequately represented by the saving; that there was no breach of sect. 90, and that the appellants could not maintain an action for overcharges under that section. (*Denaby Main Colliery Co.* v. *M. S. & L. Ry. Co.*, 11 App. Cas. 97; 55 L. J. Q. B. 181.)

260. No railway company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (17 & 18 Vict. c. 31, s. 2.)

Whenever it is shown that any railway company

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charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company. In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction in the matter, or the Commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: provided that no railway company shall make, nor shall the Court, or the Commissioners, sanction any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services. The Court or the Commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of mer-

chandise carried over a greater distance on the same line of railway. (51 & 52 Vict. c. 25, s. 27.)

The term "*undue preference*" includes an undue preference, or an undue or unreasonable prejudice or disadvantage, in any respect, in favour of or against any person or particular class of persons, or any particular description of traffic; the term "*merchandise*" includes goods, cattle, live stock, and animals of all descriptions; the term "*trader*" includes any person sending, receiving, or desiring to send merchandise by railway or canal. (51 & 52 Vict. c. 25, s. 55.)

The word "*traffic*" includes not only passengers and their luggage, and goods, animals, and other things conveyed by any railway company, or railway and canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company.

The word "*railway*" includes every station of or belonging to such railway, used for the purposes of public traffic. (17 & 18 Vict. c. 31, s. 1.)

The 2nd section of the Railway and Canal Traffic Act, 1854, is an extension of the 90th section ("equality clause") of the Railways Clauses Act, 1845 (*ante*, Art. 259), and adds the remedy by injunction to desist from an undue preference to the remedy by action to recover the amount of unequal charges.

The last provision in this Article, that no higher charge shall be made for short haulage than for long haulage, is taken from the Inter-State Commerce Act, 1887.

In the *United States*, until the passing of the Inter-State Commerce Act, 1887, cases involving questions of preference were decided for the most part upon common law principles.

The provisions of that Act relating to undue preference are the following:—

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any

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person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." (Sect. 2.)

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." (Sect. 3.)

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer dis-

tance: Provided, however, that upon application to the commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act." (Sect. 4.)

The commission has decided, in the case of *The Vermont State Grange* v. *Boston and Lowell Rail. Co.* (1 Interstate Commerce Commission Reports, p. 158), that where a carrier unites with one or more others in making a rate for long-haul traffic, the rate so made constitutes a measure for the rates on short-haul traffic upon its own lines as much as it would if the long-haul transportation was on its line exclusively.

Previous to the passage of the Act it was customary on many of the railways of America to give reduced rates to the class of persons known as "commercial travellers," but this was made illegal by the provisions in the Act against unjust discrimination (1 Interstate Commerce Reports, p. 8). It was also common in some quarters to give special rates to land lookers, explorers, or settlers, who were supposed to be looking for or establishing new homes in a section where their purchase, settlement, or improvement would benefit the carrier giving them, but this also is held to be now forbidden (1 Interstate Commerce Reports, p. 208). The opinion of the commission as declared in these cases is that, under the law, it is no longer competent for the carrier to discriminate among passengers enjoying the same accommodations, by means of any special classification dependent upon occupation or other condition or circumstance of a personal nature, except as the law itself, by the 22nd section, has in terms authorized it. That section is as follows:—"That nothing in this Act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger

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tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

The commission have lately decided that the provision of the Inter-State Commerce Act, requiring all rates to be reasonable, was intended for the protection of the public and not for the protection of railway companies from unreasonable competition, and that there was no intention of vesting in the commission any power of ordering an increase of rates, even if in its opinion they should be higher. (*Chicago, St. Paul, and Kansas City Ry. Co.* v. *Chicago, Burlington, and Northern Ry. Co.*) Incidentally, in discussing the case, the commissioners say that they do not understand on what ground the Chicago, Burlington, &c. Ry. Co., while insisting that its rates from Chicago to St. Paul are remunerative, can justify charging the same rates for one-third or two-thirds the distance. Upon its own showing these rates seem to be excessive.

261. Where any enactment in a special Act contains provisions relating to traffic, facilities, undue preference, or other matters mentioned in section 2 of the Railway and Canal Traffic Act, 1854, the Commissioners have the like jurisdiction to hear and determine a complaint of a contravention of the enactment, as the Commissioners have to hear and determine a complaint of a contravention of section 2 of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts. (51 & 52 Vict. c. 25, s. 9; *post*, APPENDIX, and *ante*, Art. 233.)

262. The provisions of section 2 of the Railway and Canal Traffic Act, 1854, and of section 14 of the

Regulation of Railways Act, 1873, and of any enactments amending and extending those enactments, shall apply to traffic by sea in any vessels belonging to or chartered or worked by any railway company, or in which any railway company procures merchandise to be carried, in the same manner and to the like extent as they apply to the land traffic of a railway company. (51 & 52 Vict. c. 25, s. 28.)

See note to Article 260.

263. Where a railway company is authorized to build, or buy, or hire, and to use, maintain and work, or to enter into arrangements for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of such steam vessels, then and in every such case tolls shall be at all times charged to all persons equally and after the same rate in respect of passengers conveyed in a like vessel passing between the same places under like circumstances; and no reduction or advance in the tolls shall be made in favour of or against any person using the railway in consequence of his having travelled or being about to travel on the whole or any part of the company's railway, or not having travelled or not being about to travel on any part thereof, or in favour of or against any person using the railway in consequence of his having used or been about to use, or his not having used or not being about to use, the steam vessels; and where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll

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charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway. (31 & 32 Vict. c. 119, s. 16.)

The intention of this section seems to be that a railway company that has *several* steamboats, and has power to take tolls in respect of them, shall charge such tolls equally and after the same rate in respect of passengers conveyed in a like vessel passing between the same places under like circumstances; and no reduction in the tolls shall be made in favour of any person using the steam vessels in consequence of his having travelled or being about to travel on the whole or any part of the company's railway, or in favour of any person using the railway in consequence of his having used or being about to use the steam vessels; or advance against any person in consequence of his not having travelled or not being about to travel on any part thereof; or against any person using the railway in consequence of his not having used or not being about to use the steam vessels.

See also 26 & 27 Vict. c. 92, s. 30, which is identical with this section except the words "authorized by a special Act hereafter passed and incorporating this part of the Act."

As to what will constitute an agreement for the use, maintenance, and working of steam vessels, see *Greenock and Wemyss Bay Ry. Co.* v. *Caledonian Ry. Co.* (No. 3), 2 Ry. & Ca. Tr. Ca. 232.

As to what circumstances will justify a preference by a railway company of steamers when in connection with its trains, see *Southsea & Isle of Wight Steam Ferry Co.* v. *L. B. and South W. Ry. Cos.*, 2 Ry. & Ca. Tr. Ca. 341.

As to the latter part of this section, which required the fare charged to be stated on the ticket, see *City of Dublin Steam Packet Co.* v. *L. & N. W. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 10, *post*, Art. 330.

264.—(1.) Notwithstanding any provision in any general or special Act, it shall be lawful for any railway company, for the purpose of fixing the rates to be charged for the carriage of merchandise to and from

any place on their railway, to group together any number of places in the same district, situated at various distances from any point of destination or departure of merchandise, and to charge an uniform rate or uniform rates of carriage for merchandise to and from all places comprised in the group from and to any point of destination or departure. (2.) Provided that the distances shall not be unreasonable, and that the group rates charged and the places grouped together shall not be such as to create an undue preference. (3.) Where any group rate exists or is proposed, and in any case where there is a doubt whether any rates charged or proposed to be charged by a railway company may not be a contravention of section 2 of the Railway and Canal Traffic Act, 1854, and any Acts amending the same, the railway company may, upon giving notice in the prescribed manner, apply to the Commissioners, and the Commissioners may, after hearing the parties interested and any of the authorities mentioned in section 7 of this Act, determine whether such group rate or any rate charged or proposed to be charged as aforesaid does or does not create an undue preference. Any persons aggrieved, and any of the authorities mentioned in section 7 of this Act (*post*, APPENDIX), may, at any time after the making of any order under this section, apply to the Commissioners to vary or rescind the order, and the Commissioners, after hearing all parties who are interested, may make an order accordingly. (51 & 52 Vict. c. 25, s. 29.)

This section is merely a statutory recognition of what has long been the law. For the convenience of their traffic, railway com-

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panies are obliged to divide their area into districts, with distinct rates and arrangements applicable to each; yet if such districts are arranged for the convenience of the company and not to give any preference or partiality, the Court of Common Pleas would not interfere. (*Ransome* v. *Eastern Counties Ry. Co.*, 4 C. B. (N. S.) 135; 27 L. J. C. P. 166; *Same* v. *Same*, 8 C. B. (N. S.) 709; 29 L. J. C. P. 329.)

If a railway company charge the same rates for the same traffic going to the same destination from places differing considerably in distance from that destination, this is *primâ facie* evidence of an undue preference. Where there is evidence of a preference, whether or not it is an unreasonable or undue preference within the meaning of sect. 2, is a question of fact.

As a general rule, charges on traffic using the same railway under the same circumstances ought to be after the same rate per ton per mile, but the rule is not so rigid that any scale that is not in conformity with it is illegal, nor are charges that are unequal, or that cause prejudice and disadvantage, prohibited by sect. 2 of the Railway and Canal Traffic Act, 1854, unless they act in that way unduly and unreasonably.

A railway company charged an uniform rate for traffic from an entire district or coalfield; the collieries were grouped because they all worked the same bed of coal, and the grouping applied compulsorily to a coalfield extending twenty miles, and covering an area in which some of the collieries were that distance apart. Collieries in one part of such district paid no higher rate than collieries in another for their coal traffic to any particular station, all alike paying one uniform rate, irrespective of any difference in their actual distances from such station. Upon complaint by a colliery company in the district that the effect of the uniform rate was to subject their coal to a higher charge per ton per mile than coal from other collieries, and to deprive them of the advantage of their greater proximity to places to which the coal was sent, it was proved that the applicants were charged the same rate for conveyance of their coal to a particular station as was charged for coal sent from other collieries in the same district,

although the additional distance to be run was ten or fifteen miles; that the grouping system, as it affected the applicants, subjected them to an undue and unreasonable prejudice and disadvantage, and that the railway company ought to carry the applicants' coal at a rate per ton per mile not exceeding that charged to other coal owners of the district; in ascertaining the mileage rate an allowance of 1*s.* per ton in all cases being first made for fixed expenses. (*Denaby Main Colliery Co.* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 426.)

Where a railway company have districts for through rates extending over long distances, they are not bound to vary the rates in respect of slight distances. (*Lloyd* v. *Northampton & Banbury Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 259.)

265. Any port or harbour authority or dock company which shall have reason to believe that any railway company is by its rates or otherwise placing their port, harbour, or dock, at an undue disadvantage as compared with any other port, harbour, or dock to or from which traffic is or may be carried by means of the lines of the said railway company, either alone or in conjunction with those of other railway companies, may make complaint thereof to the Commissioners, who shall have the like jurisdiction to hear and determine the subject-matter of such complaint as they have to hear and determine a complaint of a contravention of section 2 of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts. (51 & 52 Vict. c. 25, s. 29.)

By section 7 of this Act provision is made for complaints by public authority in certain cases. This section is set out, *post*, APPENDIX.

266. Where the Commissioners have jurisdiction to hear and determine any matter, they may, in addi-

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tion to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained. (51 & 52 Vict. c. 25, s. 12, *post*, APPENDIX, and *ante*, Art. 233.) In cases of complaint of undue preference no damages shall be awarded if the Commissioners shall find that the rates complained of have, for the period during which such rates have been in operation, been duly published in the rate books of the railway company kept at their stations in accordance with section 14 of the Regulation of Railways Act, 1873, as amended by this Act, unless and until the party complaining shall have given written notice to the railway company requiring them to abstain from or remedy the matter of complaint, and the railway company shall have failed, within a reasonable time, to comply with such requirements in such a manner as the Commissioners shall think reasonable. (51 & 52 Vict. c. 25, s. 13.)

It is no defence to an action by a railway company to recover charges for the carriage of goods that the charges sued for are unreasonable, so as to give an undue preference to other persons, or to subject the defendant to undue prejudice or disadvantage, within the meaning of section 2 of the Railway and Canal Traffic Act, 1854, nor can the defendant in such an action set-off or recover by counter-claim, over-payments in respect of previous charges which were unreasonable within that section. (*Lanc. and York. Ry. Co.* v. *Greenwood & Sons*, 21 Q. B. D. 215. See *ante*, Art. 115.)

II.—PRINCIPLES WHICH DECIDE WHETHER A PREFERENCE IS UNDUE OR NOT.

267. In determining, under the 2nd section of the Railway and Canal Traffic Act, 1854, whether a rail-

way company has given an undue and unreasonable preference to a particular person, company or traffic, or subjected a particular person, company or traffic to an undue or unreasonable prejudice or disadvantage, regard will be had to the convenience of the public, and the interest and convenience of the railway company with regard to its general traffic. (*Ransome* v. *Eastern Counties Ry. Co.* (No. 1), 1 C. B. (N. S.) 437; 26 L. J. C. P. 91; *Nicholson* v. *G. W. Ry. Co.* (No. 1), 5 C. B. (N. S.) 366; 28 L. J. C. P. 89; *West* v. *L. & N. W. Ry. Co.*, L. R. 5 C. P. 622; 39 L. J. C. P. 282; *Lees* v. *Lanc. & York Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 352.)

See *ante*, Arts. 231 and 232.

Cresswell, J., in delivering judgment in *Barret* v. *G. N. and Midland Ry. Cos.* (1 C. B. (N. S.) 423; 26 L. J. C. P. 83), said that, "in considering what was a reasonable amount of accommodation, regard must be had to the convenience of the general traffic of the company."

In *Ransome's Case* (*supra*), it was laid down that in determining whether a railway company has given any undue and unreasonable preference, the Court may take into consideration the fair interests of the railway itself, and entertain such questions as whether the company might not carry larger quantities, or for longer distances, at lower rates per ton per mile, than smaller quantities or for shorter distances, so as to derive equal profit to itself.

268. A preference to be undue must be of a person similarly circumstanced with the complainant.

This principle was imported into the Railway and Canal Traffic Act, 1854, from the "equality clause" of the Railway Clauses Consolidation Act, 1845.

See note to Art. 259, where the meaning of the words "the same circumstances" is fully considered.

269. A railway company pays no more than a due

regard to its own interests if it charges for its services in proportion to their necessary cost, and has only such a variation in its rates as there is in the circumstances of its customers affecting the cost and labour of conveyance. (*Bellsdyke Coal Co.* v. *North British Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 105.) Therefore a railway company is justified in carrying goods for one person at a less rate than that at which it carries the same description of goods for another, if there be circumstances which render the cost to the company of carrying for the former less than the cost of carrying for the latter. (*Ransome* v. *Eastern Counties Ry. Co.* (No. 1), 1 C. B. (N. S.) 437; 26 L. J. C. P. 91; *Oxlade* v. *North Eastern Ry. Co.* (No. 1), 1 C. B. (N. S.) 454; 26 L. J. C. P. 129.)

270. A railway company do not contravene section 2 of the Railway and Canal Traffic Act, 1854, by carrying at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee. (*Nicholson and another* v. *G. W. Ry. Co.* (No. 1), 5 C. B. (N. S.) 366; 28 L. J. C. P. 89; *Ransome* v. *Eastern Counties Ry. Co.* (No. 4), 8 C. B. (N. S.) 709; 29 L. J. C. P. 329.)

These cases decided that a guarantee of a fixed minimum is a ground for lowering the rate. It was assumed throughout in these cases that it was proved that the agreement had the effect of making it cheaper for the railway company to work, and therefore an agreement has only force so far as it affects the cost of working.

All the decisions are to the effect that motive has nothing to do with it.

In *Greenop* v. *S. E. Ry. Co.* (2 Ry. & Ca. Tr. Ca. 319), the Commissioners held a rebate of 15 per cent. and other allowances to customers who guaranteed "to send between Boulogne and London by the South Eastern Company's steamers and railway 850 tons each calendar month" was not unreasonable; but it should be noticed that the ground of defence on which the company "mainly relied" was that "for the conveyance of goods between Boulogne and London they had to compete with the General Steam Navigation Company." (See *post*, Art. 273; and *Holland* v. *Festiniog Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 278; *Rhymney Iron Co.* v. *Rhymney Ry. Co.*, 6 Ry. & Ca. Tr. Ca.)

271. When a railway company can carry a longer distance at less cost they may make a proportionately less charge per ton for goods carried a greater than for goods carried a less distance. (*Strick* v. *Swansea Canal Co.*, 16 C. B. (N. S.) 245; 33 L. J. C. P. 240; *Foreman* v. *Gt. Eastern Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 202.)

A difference in the distance the traffic is carried is not of itself a valid answer to a complaint of undue preference under section 2 of the Railway and Canal Traffic Act, 1854, and no conclusive inference is to be drawn either on the one hand from a railway company not carrying at an equal mileage rate, or not making an equal profit per mile; nor, on the other hand, from the rate for the longer distance, though less per mile, amounting to more for the whole distance or leaving a larger sum as profit after payment of expenses; and in determining the question whether the lower mileage rate is or is not an undue advantage, it is necessary to consider whether either traffic is able to be carried at

a less cost to the railway company than the other, or whether either traffic is under different conditions as regards competition of routes or other special circumstances. (*Broughton and Plas Power Coal Co.* v. *G. W. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 191.)

272. It is not a legitimate ground for giving a preference to one of the customers of a railway company, that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question.

Semble that this applies to other parts of the same line.

It is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ the company in other and totally distinct business. (*Baxendale and others* v. *G. W. Ry. Co.* (*Bristol Case*), 5 C. B. (N. S.) 309; 28 L. J. C. P. 69.)

This case proceeded on the ground that the consideration for the reduction of rates from A. to B. must be in respect of the same traffic and same route, and that it is not sufficient that the favoured customer undertakes to send all goods by the company's lines to justify a reduction in the rate for paper from A. to B., the traffic from A. to B. alone not being worth the difference in charge. (See also *Bellsdyke Coal Co.* v. *North British Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 105.)

273. A railway company cannot justify an inequality in rates made for considerations collateral to the pecuniary interests of the company. (*Harris* v. *Cockermouth and Workington Ry. Co.*, 3 C. B. (N. S.) 693; 27 L. J. C. P. 162; *Ransome* v. *Eastern Counties*

Ry. Co. (No. 1), 1 C. B. (N. S.) 437; 26 L. J. C. P. 91; *Oxlade* v. *North Eastern Ry. Co.* (No. 1), 1 C. B. (N. S.) 454; 26 L. J. C. P. 129.)

In these cases the judgments of the Court of Common Pleas appear to have proceeded upon the fact that the ground of the reduction in rates in favour of a particular person or class of persons was collateral to the fair interests of the railway company, and was too remote and speculative to afford a justification for making a difference between the persons so favoured and other members of the public.

In the above case of *Ransome* the decision was against the railway company, because their object was to enable rival coal owners to compete, a collateral object not sufficient to justify a reduction of rates.

In *Oxlade's Case* (*supra*), the railway company, from a desire to introduce northern coal and coke into Staffordshire, were induced to make special agreements with certain merchants for the carriage of coal and coke at a lower rate than their ordinary charge. The Court held that this was not a legitimate ground for making such agreements, and that lowering their rate for that purpose, there being nothing to show that the pecuniary interests of the company were affected, was giving an undue preference.

In the case of *Diphwys Casson Slate Co.* v. *Festiniog Ry. Co.* (2 Ry. & Ca. Tr. Ca. 73), the commissioners held that it was an undue preference where a railway company, with the object of discouraging the construction of a competing line, carried slate for certain quarry owners who agreed to send all their slate over the railway company's line for a fixed number of years at a less rate than they charged for the same service to the complainant quarry owners, who were offered, but refused to bind themselves by, such an agreement.

274. Competition alone, without any other circumstances, will not justify a preference in rates. (*Eversheds*

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v. *L. & N. W. Ry. Co.*, 3 App. Ca. 1029; 48 L. J. Q. B. 22; *Budd* v. *L. & N. W. Ry. Co.*, 36 L. T. (N. S.) 802; 25 W. R. 752.)

The Railway and Canal Traffic Act, 1854, does not prevent a railway company from having special rates of charge to a terminus to which traffic can be carried by other modes of carriage with which theirs is in competition. (*Foreman* v. *Great Eastern Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 202.)

In 1875 several brewers in Burton raised the question whether competition alone, without anything else, would justify an unequal charge. The Railway Commissioners issued an injunction against the London and North Western Railway Company, commanding them to charge all the brewers equally. (See *Thompson, Evershed, and others* v. *L. & N. W. Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 115.) Evershed then brought an action in the High Court to recover 1*s.* 9*d.* upon every ton that he had paid for six years past. The judgment of the Queen's Bench Division proceeded upon this principle: "We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favour of individual customers, unless, at all events, there is a sufficient consideration for such reduction, which shall lessen the cost to the company of the conveyance of their traffic." The case went to the House of Lords, and the Lord Chancellor (Lord Cairns), in delivering judgment, said: "It appears to me that the question in cases like the present must be simply this: Is the plaintiff obliged to pay one sort of remuneration for services which the railway company performs for him, while the company performs the same services for other traders, either for less remuneration or for no remuneration at all? In my opinion the railway company is—and that indeed is not disputed—in the collecting, loading, and delivering of goods, performing identically the same services for the plaintiff in this action as for the other two firms of brewers whose names have

been referred to. As a matter of policy and expediency it may well be that the appellants have good reason for treating those firms as they do. It may be, that if they do not so treat them, those other firms, from the natural advantages of the situation which they have been able to occupy, will send their goods by another railway, and not by the railway of the appellants. But with these considerations the plaintiff in the action has nothing to do. That is exactly one of those things which Parliament has not left open to railway companies to judge of, whether in that way they will equalize their capacity for competing with other lines or not. The one clear and undoubted right to my mind of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind, doing the same business and supplying the same traffic."

275. A railway company have no right to prefer themselves or their agents to the public and to carriers other than themselves. A railway company is bound to treat common carriers the same as other customers for all purposes, including the mode of charging in the aggregate. (*Baxendale* v. *North Devon Ry. Co.*, 3 C. B. (N. S.) 324; *Baxendale* v. *G. W. Ry. Co.* (*Reading Case*), 5 C. B. (N. S.) 336; 28 L. J. C. P. 81.)

The ground of the decision in this latter case was, that where a railway company carries on some other business, they must in respect of such business be taken to be *quoad* the railway in the position of third parties.

Many of the cases decided by the Court of Common Pleas under sect. 2 of the Railway and Canal Traffic Act, 1854, were applications for an injunction by carriers competing with railway companies, and complaining that in sending goods by railway and in carting them to and from railway stations, the companies subjected them to disadvantages, and gave themselves and their agents

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preferences which were undue. The same ground of decision as stated in this Article will be found in all the carriers' cases.

In *Cooper* v. *L. & S. W. Ry. Co.* (4 C. B. (N. S.) 738) the Court decided that the railway company were not bound to unload carriers' trucks, but intimated that if they unloaded some they should unload all, or that they could be compelled to treat all equally by unloading none or all.

In the case of *Goddard* v. *L. & S. W. Ry. Co.* (1 Ry. & Ca. Tr. Ca. 308), the treatment complained of as unequal was that the company showed a partiality to themselves to the prejudice of the complainant.

The fact that a package is composed of separate parcels, the aggregate amount of which, if carried separately, would be greater than would be chargeable for the entire package, and that the person who tenders the package is himself a carrier, and collects such parcels in the way of his business, is no legal ground for refusing to carry it on the same terms as similar packages for other persons. (*Crouch* v. *L. & N. W. Ry. Co.*, 14 C. B. 255; 9 Exch. 556.)

As to closing the doors of the station against the public or an individual, and not against the company's agent, see *Baxendale* v. *L. & S. W. Ry. Co.*, 12 C. B. (N. S.) 758; and *Palmer* v. *L. & S. W. Ry. Co.*, L. R. 1 C. P. 588; 35 L. J. C. P. 289.

276. A railway company cannot include in a charge for carrying a charge for collection and delivery, whether the customer requires the services to be performed for him or not. (*Baxendale* v. *Gt. W. Ry. Co.* (*Reading Case*), 5 C. B. (N. S.) 336; 28 L. J. C. P. 81.)

If goods are carried at a carted or collection and delivery rate, and the collection or delivery is not performed by the railway company because the sender or consignee of the traffic performs it himself, or by

any agent he chooses to employ, the railway company must make a deduction off such rates of such portion of them as is referable to the cost of collection or delivery. (*Fishbourne* v. *Gt. Southern and Western Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 224; *Menzies* v. *Caledonian Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 306.)

The collection and delivery rates, as they are called, of a railway company include their charge, not only for carriage by railway, but also for the service of carting to and from the termini. The public, however, is not obliged to employ the company as carriers to and from the railway; it may employ any hands it pleases to send or receive goods by, and if the goods are of the sort for which carted rates are charged, and the carting is not done by the company, a deduction may be claimed off the rate corresponding to the expense and trouble saved to the company.

The decision in *Baxendale's Case* was followed in subsequent cases at the suit of carriers against railway companies. (See *Garton* v. *G. W. Ry. Co.*, 5 C. B. (N. S.) 669; 28 L. J. C. P. 158; *Garton* v. *Bristol and Exeter Ry. Co.*, 6 C. B. (N. S.) 639; 28 L. J. C. P. 306.)

In the former of these two cases it was decided that the fact of the company's deriving no profit from the collection or delivery made no difference.

As to what rebate should be allowed for cartage, it is doubtful whether the company are not bound to allow the charge made by them to the public for the same service, or, in cases where that is not a satisfactory test, the actual cost to the company of the service and any profit which may accrue thereon to the company or be estimated by them in respect thereof. (*Goddard* v. *L. & S. W. Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 308.) It is submitted that the profit which the company is entitled to in such a case is a *reasonable* profit. The Railway Commissioners in their judgment in that case said: "Goods consigned by railway must, to complete their transport, be carted to and from the stations as well as conveyed

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upon the line. Conveyance on the railway is in practice a monopoly of the railway companies: but the service of collection and delivery is open to competition, and common carriers and the public can all engage in it. When the service is undertaken by the companies they have two ways of charging for it: they either make their goods rate a station to station rate only, and charge separately for cartage, or they make their goods rate a collected and delivered rate, which includes collection and delivery within a fixed distance or boundary from the stations of the two towns, from the one to the other of which the goods are carried on the railway. The companies seldom have both kinds of rates in operation at the same time between any two stations, and consequently, where the collected and delivered rate is in force, they are usually obliged to allow a rebate or deduction off it in respect of goods which they are employed to carry only, and not to collect and deliver as well. The goods rates of the railway companies in London north of the Thames are said to be nearly all collected and delivered rates; but the London and South Western Railway Company is the only company on the south side of the river which has adopted that form of goods rate, and even they have still eighty stations where the goods rates are station to station rates only."

A railway company carried traffic from A. station at collection and delivery rates, and appointed an agent to perform the service of carting to the station for them. The applicant, a carrier, also carted to the A. station goods for which the railway company charged collection and delivery rates. The company refused to pay applicant anything at all in respect of such cartage. The Railway Commissioners held, that if the railway company chose to protect themselves by charging only the rate, less the fair allowance for collection, they could do so; but if the goods were carried and charged for at a collection and delivery rate they were bound to pay a reasonable sum to the person who had performed the collecting service.

The Commissioners ordered the railway company to pay to the applicant the sum of 10*d.* per ton in respect of the service so per-

formed, this being the amount which they paid to their own agent for the service of actual cartage. (*Menzies* v. *Caledonian Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 306.)

A customer is not entitled to any allowance in respect of assistance in the loading, unloading, or weighing of goods given by his men to a railway company voluntarily, or for the customer's own convenience. (*Edwards* v. *G. W. Ry. Co.*, 11 C. B. 588.)

Upon complaint by a carrier, who collected and carted stamped and unstamped parcels to the railway company's terminus, that although the trouble and expense was the same to him whether parcels were stamped or unstamped, yet the railway company allowed him nothing in respect of the former: the Railway Commissioners held, that the railway company had not given an undue preference either to themselves or to the person they employed as their carting agent, because they charged the public nothing for collection, and the collection of stamped parcels cost them nothing, the carting agent consenting to carry stamped parcels gratis in consideration of being paid 1*d.* for every unstamped parcel.

Semble, such an arrangement would be an undue preference over a carrier who only carted stamped parcels. (*Robertson* v. *Midland G. W. Ry. Co.* (*Ireland*), 2 Ry. & Ca. Tr. Ca. 409.)

277. The Railway Commissioners have jurisdiction to inquire into a complaint of undue preference being shown by railway companies to one town or place over another town or place. (*Corporation of Dover* v. *S. E. Ry. Co. and L. C. & D. Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 349.)

To a complaint under section 2 of the Railway and Canal Traffic Act, 1854, of an inequality of charge, it is no answer that the traffic favoured and the traffic prejudiced are not in the same locality or district; and, assuming that there is a competition of interests,

and that circumstances in other respects are not dissimilar, the traffic of two localities, both on the same system of railways, although at a distance from each other, is as much within the Act as the traffic of two or more individuals in the same locality. (*Richardson and others* v. *Midland Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 1.)

That a preference of one town over another may be justified by the exigencies of the traffic, see *Hozier's Case*, 17 Sess. Ca. 302; *The Caterham Ry. Co.'s Case*, 1 C. B. (N. S.) 410; 26 L. J. C. P. 16; and *Jones' Case*, 3 C. B. (N. S.) 718; but that the Court will interfere to prevent such preference in the absence of sufficient justification, see the judgments of Lord President M'Neill in *Hozier's Case*, and of Cockburn, C. J., in *Baxendale* v. *G. W. Ry. Co.* (*Reading Case*), 5 C. B. (N. S.) 336; 28 L. J. C. P. 81.

As to uniform or group rates for a district, see *ante*, Article 264.

278. Any arrangement in favour of one class of vehicles entering their station yards over others of the same class, will be an undue preference on the part of the railway company, where it is shown to occasion public inconvenience, and there is no cause, such as want of space, for the preference. (*Marriott* v. *L. & S. W. Ry. Co.*, 1 C. B. (N. S.) 499; 26 L. J. C. P. 154.)

Where a railway company agreed with a cab proprietor, in consideration of his paying them 600*l.* per annum, to allow him the exclusive liberty of plying for hire within their station, the Court of Common Pleas refused to grant a writ of injunction against the railway company, at the instance of another cab proprietor, no inconvenience to the public being shown to have arisen from the arrangement. (*Beadell* v. *Eastern Counties Ry. Co.*, 2 C. B. (N. S.) 509; 26 L. J. C. P. 250.)

Marriott's Case was decided on the inconvenience inflicted on *the public*, not on the individual, and this was expressly stated to have been the ground of the decision. In *Beadell's Case*, and the cases of *Painter* v. *L. B. & S. C. Ry. Co.* (2 C. B. (N. S.) 702) and *Ilfracombe Conveyance Co.* v. *L. & S. W. Ry. Co.* (W. N. 1868, p. 269, 1 Ry. & Ca. Tr. Ca. 61), the complainants were unsuccessful, because the Court was not satisfied that there was a substantial inconvenience to the public from the cab arrangements made for them by the railway company.

The result of these cases appears to be that omnibus and cab proprietors, &c., as such, have no *locus standi* to apply for an injunction, but that an injunction may be granted to admit their vehicles, if it be proved to be for the benefit of the public that they should be admitted.

"*Jackman* v. *Isle of Wight Railway Company* was a case of vehicles plying for hire in competition, and of the railway company giving one of them an undue advantage, the vehicle of the complainants being excluded from the station yard at Ventnor, while that of another coach proprietor was admitted. There was no answer to the application, and the case was disposed of by agreement, the company paying costs." (3rd Report of Railway Commissioners.)

In *Barker* v. *Midland Ry. Co.* (18 C. B. 46; 25 L. J. C. P. 84), it was held that no action lies for excluding an omnibus from a railway station.

Jervis, C. J., in giving judgment in that case, said: "It is not pretended that the plaintiff himself uses the railway, but that he carries persons who do so, and he has no right to make a contract for the use of the defendant's private property. The railway is not a public highway for horses, carts, and omnibuses. What right has an omnibus to go upon the ground of the railway?"

Cresswell, J., said: "If the railway company refused a passenger by the railway leave to come on to the station, he perhaps might maintain an action. But this plaintiff does not desire, himself, to use the railway, but that his customers should do so."

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And Crowder, J., said: "This is not an action brought by anybody who wished to go by the railway or send his goods by it, but by a person who makes it his business to bring passengers and goods to the station; and I therefore think that he is not within the regulations made for persons who use the railway for themselves or their goods."

279. If a customer to whom credit has been allowed retains a balance due to a railway company as a set-off against a balance in dispute on another account, the company are justified in refusing such customer a further ledger account, without contravening sect. 2 of the Railway and Canal Traffic Act, 1854. (*Skinningrove Iron Co.* v. *North Eastern Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 244.)

It is no ground of complaint that the company give credit to or have a monthly ledger account with certain of their customers, and refuse the same to persons for whom goods are collected and delivered by carriers, unless it be shown that the difference was made for the purpose of preventing competition or of otherwise injuring the complainant. (*Goddard* v. *L. & S. W. Ry. Co.*, 1 Ry. & Ca. Tr. Ca. 308.)

In *Pickford* v. *Caledonian Ry. Co.* (4 Sess. Ca. (3rd Ser.) 755), one of the complaints was that certain preferred carriers were allowed a monthly credit, whereas the complainant was compelled to pay ready money, but the Court found that there was no evidence on the credit question. In the *Skinningrove Case*, Sir Frederick Peel, in delivering judgment, said: "The applicants also complain that the railway company do not allow them to pay upon monthly accounts, as they do other firms, but require all traffic to be paid on delivery, and each day's consignment of pig iron to be accompanied with a remittance. It appears that early in 1882 they

began to have a dispute with the railway company about the rate on ironstone from Brotton mines to the Skinningrove Works: and on the plea that there had been an excess charge of 2*d.* or 2½*d.* a ton on the ore, they in July, 1884, refused to pay in full the sums due by them on their pig iron carriage account, and deducted 1,500*l.* as a set-off for alleged overcharge on Brotton ironstone; and thereupon (on 14th August, 1884) the railway company informed them that their ledger account would be at once closed, and that the usual credit would no longer be continued to them. I think the company were almost forced into taking this step, and that it is not their fault either if credit is still refused. They give credit to accommodate their customers in paying their accounts with them, and if the accommodation is used by their customers to exercise a control over the company's rates of charge which they would not otherwise have, or as a means of postponing payment indefinitely, the company are in my opinion justified in withdrawing it altogether. The company, however, have long been willing, as their letter of August 6th, 1886, shows, to come to an arrangement with the applicants for re-opening their ledger account, their terms being that they should have an undertaking by the applicants that the accounts should in future be paid as rendered (without prejudice of course to the applicants' rights if there should be any overcharges), and that they should also have a personal guarantee of two of their directors for the payment of the accounts. The applicants, however, have declined to give the personal guarantee, contending that such assent might be construed to be a concurrence on their part in the existing rates charge, meaning the rates charged to them under the pig iron scale of April, 1884. Other firms therefore have a preference over them in this matter of credit, but the same facility for paying their railway dues would have been afforded to the applicants had they accepted the terms offered; and as I do not consider those terms unreasonable, I think they ought to bear the consequences of refusing them, and that they are not entitled to relief under the Traffic Act."

Part III.

CARRIERS OF ANIMALS BY RAILWAY.

CHAPTER XVI.

THE OBLIGATIONS OF A RAILWAY COMPANY WITH REGARD TO THE CONVEYANCE OF ANIMALS.

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I.—By Statute.

280. Section 2 of the Railway and Canal Traffic Act, 1854, imposes on a railway company the duty to afford reasonable facilities for carrying animals. (*Dickson* v. *G. N. Ry. Co.*, 18 Q. B. D. 176; 56 L. J. Q. B. 111; *ante*, Art. 147, and p. 120.) A railway company are not bound to be common carriers of animals, yet being bound by such section to afford facilities for the carriage of animals, they can only limit their liability in respect thereof by reasonable conditions within the meaning of section 7 of that Act. (*Ibid.*, see Art. 281.)

The carriage of live stock forms an important branch of railway traffic, and demands a separate chapter. Before the passing of the Railway and Canal Traffic Act, 1854, railway companies could lawfully refuse to carry animals except upon their own terms. They used to issue the following notice:—

"The ——— Railway Company give notice that they will not, under any circumstances, be answerable for injury to horses conveyed upon their railway; and they will not receive any horse for conveyance unless accompanied by a declaration, signed by the owner or his authorized agent, that the company are not to be liable for injury to such horse while in their custody, although every proper precaution will be taken to secure their safe conveyance."

It was held that a railway company might by special contract throw the risk of conveyance of horses on the owner. (See *Carr* v. *Lanc. & York. Ry. Co.*, 21 L. J. Ex. 263.) Parke, B., in delivering judgment, said:—

"Before railways were in use the articles conveyed were of a different description from what they are now. Sheep and other live animals are now carried upon railways, and horses which were used to draw vehicles are now themselves the objects of convey-

ance. Contracts, therefore, are now made with reference to the new state of things, and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks to which they are in modern times exposed. Horses are not conveyed on railways without much risk and danger: the rapid motion, the noise of the engine, and various other matters, are apt to alarm them, and to cause them to do injury to themselves. It is, therefore, very reasonable that carriers should protect themselves against loss by making special contracts."

In *Chippendale* v. *Lanc. & York. Ry. Co.* (21 L. J. Q. B. 22), Erle, J., said, "I think that a limitation, however wide in its terms, being in respect of live stock, is reasonable; for though domestic animals might be carried safely, it might be almost impossible to carry wild ones without injury."

In both these cases the railway company were held protected from liability to the plaintiff for damage to his cattle by the terms of a ticket which the plaintiff had received from the railway company and had signed. The terms were, that the "ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles."

In a case that was decided long after the passing of the Act of 1854, it was held that a railway company might exclude the carrying of animals from their public profession of carriers, and refuse to carry them except under a special contract. (*Richardson* v. *N. E. Ry. Co.*, L. R. 7 C. P. 75; 41 L. J. C. P. 60.) The facts in that case were these:—

A dog was delivered by its owner to a railway company for carriage on their railway. The company received it, not as common carriers, but as ordinary bailees. The dog was delivered with a collar on it and a strap attached thereto. During the journey there was a change of trains; for security during the interval of change a servant of the company fastened the dog up by means of the strap, and the dog slipped through the collar, got

on to the railway, and was killed. It was held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company, who were therefore not liable.

This case is sometimes cited as an authority that railway companies are not common carriers of animals, but it is not so; for it was found as a fact in the case stated, that the company were not common carriers of dogs, so as to have an absolute responsibility imposed on them to carry dogs. Consequently, the company were, with reference to the dog in question, in the position of ordinary bailees, and only liable for its loss in the event of negligence on their part, and would not be liable if its loss was by reason of the negligence of the person who delivered the dog to the company. Willes, J., in delivering the judgment of the Court, said: "What Lord Ellenborough said in *Stuart* v. *Crawley* (2 Stark. 323), is, we think, very applicable. That was an action for the loss of a greyhound which had been delivered to the defendant, a carrier. The dog had no collar, but was taken to the defendant's warehouse with a string round its neck; and the defendant's servants gave a receipt for it, which was not done here. The dog in that case was afterwards tied by this string to a watch-box, and it slipped from its noose and was lost. Lord Ellenborough held that the defendant in that case was responsible; and he said that it was not like the case of a delivery of goods imperfectly packed, since there the defect was not visible, but that here the defendant had the means of seeing that the dog was insufficiently secured. The defendant was therefore held liable, because he ought to have known better than to fasten a dog of that kind with only a string such as that which was round its neck. Obviously that case is a very different one from the present, because here the dog was delivered with a collar and a strap, which clearly indicated that the proper mode of securing the animal was by these. The present case differs from that of *Stuart* v. *Crawley* in two important particulars. In the first place the company are not common carriers

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of dogs, and in the next place the dog which was delivered in that case was evidently not intended to be secured by the string, and the defendant had the means of seeing how it ought to be secured . . . in so deciding we only follow the decision of this Court in *The Great Western Ry. Co.* v. *Talley*" (*post*, p. 412.)

The Court of Appeal has now decided, in *Dickson's Case* (*ante*, p. 120), that a railway company, under sect. 2 of the Railway and Canal Traffic Act, 1854, are as much bound to provide reasonable facilities for the carriage of animals as for the carriage of goods. The question has never been directly raised before the Commissioners, but they intimated the same opinion several times before the decision was given in *Dickson's Case*. See note to Art. 120.

As to what damages a railway company were liable for where they failed to provide horse-boxes, pursuant to contract, for the conveyance of horses, and the horses had to be sent by road, and were injured on the journey, see note to Art. 164.

In America a railway company that transports cattle and live stock for hire, for such persons as choose to employ them, are held to thereby assume and take upon themselves the relation of common carriers, and with the relation the duties and obligations which grow out of it; and they are none the less common carriers from the fact that the transportation of cattle is not their principal business or employment. (*Kimball* v. *Rutland Ry. Co.*, 26 Vt. 247.)

281. Every railway company is liable for loss of or for any injury done to any horses, cattle, or other animals, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; and every such notice, condition, or declaration is null and void.

A railway company may make a special contract

with the consignor respecting the receiving, forwarding, and delivering of any of the said animals, provided that:—

(1.) It is in writing.

(2.) It is signed by the consignor, or the person delivering such animals for carriage.

(3.) Its conditions are just and reasonable.

A railway company are not liable for the loss of or for injury done to any of the following animals beyond the sums hereinafter mentioned; viz.:

A horse - - - - - -	£50
Neat cattle (per head) - - -	15
Sheep (per head) - - - -	2
Pigs (per head) - - - -	2

Unless the person sending or delivering the same to the railway company, at the time of such delivery, declare them to be respectively of higher value than as above mentioned; in which case it is lawful for the railway company to demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge.

The proof of the value of such animals, and the amount of the injury done thereto, in all cases lies upon the person claiming compensation for such loss or injury. (The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 7.)

The section also enacts that "such percentage or increased rate of charge shall be notified in the manner prescribed in the

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11 Geo. 4 & 1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned." These requirements are stated *ante*, Art. 72, p. 63.

It is a question for a jury whether the percentage charged for the extra value declared is reasonable. (*Harrison* v. *L. B. & S. C. Ry. Co.*, 31 L. J. Q. B. 113.)

It appears that the "reasonable percentage" which the railway companies are authorized to demand by the 7th section of the Railway and Canal Traffic Act, 1854, for the carriage of certain animals of great value, may exceed the maximum fixed by the special Acts of the companies, so far as the animals specified in the section are concerned. With regard to animals not so specified, and with regard to goods, the section gives no power to exceed the maximum, and the higher "alternative rate" must in any case be within it. (*Per* Cockburn, C. J., in *Peek* v. *N. Staff. Ry. Co.*, 10 H. L. Ca. p. 561; Hodges on Railways.)

To entitle the company to demand the percentage under sect. 7, the sender must make a declaration of the value with the intention of paying the percentage. (*Robinson* v. *L. & S. W. Ry. Co.*, 34 L. J. C. P. 234.) In that case a special jury found 5 per cent. on additional value of horse above 50*l.*, for carriage above fifty miles reasonable. Some railway companies charge a small additional percentage per mile, while others charge an equal percentage whatever the distance may be.

If the sender declare the horse or other animal to be of less value than the sums mentioned in the Act, he cannot recover any greater damages for the loss of, or for any injury done to, such horse or other animal while in the hands of the railway company, than the amount of the declared value. (*McCance* v. *L. & N. W. Ry. Co.*, 3 H. & C. 343.)

Deterioration of cattle from want of food and water is an "injury" within the meaning of the Act. (*Allday* v. *G. W. Ry. Co.*, 34 L. J. Q. B. 5; 5 B. & S. 903.)

Dogs are comprehended in the words "other animals." (*Harrison* v. *L. B. & S. C. Ry. Co.*, 31 L. J. Q. B. 113.)

As to what conditions in contracts for the conveyance of live stock have been held to be reasonable or unreasonable, see note to Art. 171.

Where an agent who is employed to deliver cattle to be sent by a railway company signs the consignment note, he must be taken to have known the contents, and thereby binds his principal. (*Kirby* v. *G. W. Ry. Co.*, 18 L. T. 658.) Martin, J., in delivering judgment in that case, said: "It would be dangerous to hold that because the man who signed the note did not know its contents the contract would not be valid, when he was sent for the express purpose of making the contract under which the cattle were to be carried."

Where injury was done to a horse at a railway station by the negligence of the company before the declaration of value had been made, or ticket taken, or fare demanded, it was held that this was an injury in the *receiving*, and the owner could not recover more than 50*l.*, even though it was the usual practice to put horses into the horse-boxes before declaring their value or paying the fare. (*Hodgman* v. *W. Midland Ry. Co.*, 35 L. J. Q. B. (Ex. Ch.) 85; 6 B. & S. 560.) It may be useful to state the facts of that case. As the groom was leading the horse, by the direction of one of the railway porters, to a particular part of the yard, the horse was startled by another horse, and backed, in consequence, on some sharp iron girders which seriously injured it, so that it was necessary to kill it. The jury found that the railway company were guilty of negligence in leaving the girders where they were lying.

Mellor, J., said: "It appears to me the more reasonable construction is that so soon as the horse enters the company's premises for the purpose of being received, forwarded, and delivered, the act of delivery begins, and that if the person sending a horse to be carried on the railway desires to be in a position to recover against the company greater damages than the amount limited by the statute, he must *have made* the requisite declaration of value before the horse was taken to the premises of the company."

282. Where a railway company, under a contract for carrying animals by sea, procure the same to be carried in a vessel not belonging to them, their liability in respect of loss or damage to such animals is the same as though the vessel had belonged to them. (The Regulation of Railways Act, 1871, 34 & 35 Vict. c. 78, s. 12.)

By a proviso to section 12, this liability only attaches when the loss or damage to the animals happens during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company.

As to extension of enactments as to undue preference to cattle carried by sea by a railway company, see 51 & 52 Vict. c. 25, s. 28, *post*, APPENDIX.

283. Where a railway company by through booking contract to carry any animals from place to place partly by railway and partly by sea, they may, by publishing in their booking office, and printing on the back of their receipt or freight note, a notice to the effect that they will not be responsible for damage caused by accident or fire to animals carried by sea, limit their liability in that respect. (The Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 14.)

The section is set out in Art. 173.

284. The Privy Council, in exercise of the powers in them vested under the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), have made the follow-

ing Regulations as to trucks, horse-boxes, or other vehicles, and to prevent overcrowding:—

"*Trucks, Horse-Boxes, or other Vehicles.*

"Every railway truck, horse-box, or other railway vehicle, used for carrying animals, horses, asses, or mules on a railway, shall be provided at each end with two spring buffers, and the floor thereof shall, in order to prevent slipping, be strewn with a proper quantity of litter or sand or other proper substance, or be fitted with battens or other proper foot-holds." (The Animals Order of 1886, Part IV. Chap. 26, Art. 123.)

"*Overcrowding.*

"A railway company shall not allow any railway truck, horse-box, or other vehicle used for carrying animals, horses, asses, or mules on the railway to be overcrowded so as to cause unnecessary suffering to the animals, horses, asses, or mules therein." (*Ibid.*, Art. 124.)

"*Shorn Sheep.*

"Between each first day of November and the next following thirtieth day of April (both days inclusive) every railway truck or other railway vehicle carrying sheep shorn and unclothed shall be covered and inclosed so as to protect the sheep from the weather, without obstruction to ventilation; except that this Article shall not apply to sheep last shorn more than sixty days before being so carried." (*Ibid.*, Art. 125.)

"*Offences.*

Art. 126 of this Order provides that:—"If anything is done or omitted to be done in contravention of any of the foregoing provisions of this Part, ... the railway company carrying animals on

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or owning or working the railway on which,—and also, in case of the overcrowding of a railway truck, horse-box, or other vehicle on a railway, or of the carrying on a railway of sheep shorn and unclothed, the consignor of the animals in respect of which,—(as the case may be,) the same is done or omitted, shall, each according to and in respect of his or their own acts or omissions, be deemed guilty of an offence against the Act of 1878."

285. The Privy Council, in exercise of the powers in them vested under the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), have made the following Regulations as to the cleansing and disinfection of horse-boxes, cattle-trucks, and other vehicles used on railways :—

"*Horse-Boxes.*

"(1.) A horse-box used for horses, asses, or mules on a railway shall, on every occasion after a horse, ass, or mule is taken out of it, and before any other horse, ass, or mule, or any animal is placed therein, be cleansed as follows:

"(i.) The floor of the horse-box, and all other parts thereof with which the droppings of horses, asses, or mules have come in contact shall be scraped and swept, and the scrapings and sweepings, and all dung, sawdust, fodder, litter, and other matter shall be effectually removed therefrom; and

"(ii.) The sides of the horse-box and all other parts thereof with which the head or any discharge from the mouth or nostrils of a horse, ass, or mule has come in contact shall be thoroughly washed with water by means of a sponge, brush, or other instrument.

"(2.) The scrapings and sweepings of the horse-box, and all dung, sawdust, fodder, litter, and other matter removed therefrom,

shall forthwith be well mixed with quicklime." (The Animals Order, 1886, Part III., Chap. 18, Art. 103.)

"*Horse-Boxes, Guards' Vans, and other Vehicles.*

"(1.) A horse-box or a guard's van or other railway vehicle (not being a railway truck) if used for animals on a railway shall, on every occasion after an animal is taken out of it, and before any other animal, or any horse, ass, or mule is placed in it, be cleansed and disinfected as follows:

"(i.) If the animal is accompanied by a declaration in writing of the owner or consignee or his agent to the effect that it is intended for exhibition or other special purpose therein stated, and has not, to the best of his knowledge and belief, been exposed to the infection of disease, the vehicle shall be cleansed as follows:

"(*a*) The floor of the vehicle, and all other parts thereof with which the droppings of the animal have come in contact, shall be scraped and swept, and the scrapings and sweepings, and all dung, sawdust, fodder, litter, and other matter shall be effectually removed therefrom: and

"(*b*) The sides of the vehicle, and all other parts thereof with which the head or any discharge from the mouth or nostrils of the animal has come in contact shall be thoroughly washed with water by means of a sponge, brush, or other instrument; but

"(ii.) If the animal is not accompanied by such a declaration, the vehicle shall be cleansed and disinfected as follows:

"(*c*) The floor of the vehicle, and all other parts thereof with which the droppings of the animal have come in contact, shall be scraped and swept, and the scrapings and sweepings, and all dung, sawdust, fodder, litter, and other matter shall be effectually removed from the vehicle; then

"(*d*) The same parts of the vehicle shall be thoroughly washed or scrubbed or scoured with water; then

"(*e*) The same parts of the vehicle shall have applied to them a coating of lime-wash.

"(2.) The scrapings and sweepings of the vehicle, and all dung, sawdust, fodder, litter, and other matter removed therefrom, shall forthwith be well mixed with quicklime, and be effectually removed from contact with animals." (*Ibid.*, Art. 104.)

"*Trucks.*

"(1.) A railway truck, if used for animals on a railway, shall, on every occasion after an animal is taken out of it, and before any other animal, or any horse, ass, or mule, or any fodder or litter, or anything intended to be used for or about animals, is placed in it, be cleansed and disinfected as follows:

"(i.) The floor of the truck, and all other parts thereof with which animals or their droppings have come in contact shall be scraped and swept, and the scrapings and sweepings, and all dung, sawdust, litter, and other matter shall be effectually removed therefrom; then

"(ii.) The same parts of the truck shall be thoroughly washed or scrubbed or scoured with water; then

"(iii.) The same parts of the truck shall have applied to them a coating of lime-wash.

"2. The scrapings and sweepings of the truck, and all dung, sawdust, litter, and other matter removed therefrom shall forthwith be well mixed with quicklime, and be effectually removed from contact with animals." (*Ibid.*, Art. 105.)

"*Vans.*

"(1.) A van, if used for containing animals, horses, asses, or mules while carried on a railway, shall, on every occasion after a diseased or suspected animal, horse, ass, or mule is taken out of it, and as soon as practicable, and before any other animal, horse, ass, or mule is placed in it, be cleansed and disinfected as follows:

"(i.) The floor of the van, and all other parts thereof with which

animals, horses, asses, or mules, or their droppings have come in contact shall be scraped and swept, and the scrapings and sweepings, and all dung, sawdust, litter, and other matter shall be effectually removed therefrom; then

"(ii.) The same parts of the van shall be thoroughly washed or scrubbed or scoured with water; then

"(iii.) The same parts of the van shall have applied to them a coating of lime-wash.

"2. The scrapings and sweepings of the van, and all dung, sawdust, litter, and other matter removed therefrom shall forthwith be well mixed with quicklime, and be effectually removed from contact with animals." (The Animals Order, 1886, Part III. Chap. 18, Art. 106.)

"*Moveable Gangways and other Apparatus.*

"(1.) A moveable gangway or passage-way, cage, or other apparatus, used or intended for the loading or unloading of animals on or from a railway truck, or other railway vehicle, or otherwise used in connection with the transit of animals on a railway, shall, as soon as practicable after being so used, be cleansed as follows:

"(i.) The gangway or apparatus shall be scraped and swept, and all dung, litter, and other matter shall be effectually removed therefrom; then

"(ii.) The gangway or apparatus shall be thoroughly washed or scrubbed or scoured with water.

"(2.) The scrapings and sweepings of the gangway or apparatus, and all dung, litter, and other matter removed therefrom shall forthwith be well mixed with quicklime, and be effectually removed from contact with animals." (*Ibid.*, Art. 107.)

"*Pens.*

"(1.) Every pen or other place being in, about, near, or on a station, building, or land of a railway company, and used or intended to be used by or by permission of a railway company, or otherwise, for the reception or keeping of animals before, after, or

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in course of their transit by railway, shall be cleansed and disinfected, either on each day on which it is used and after it has been used, or at some time not later than twelve o'clock at noon of the next following day, unless the following day is Sunday, and then of the Monday following, and in either case before it is again used.

"(2.) Every such pen or other place shall be cleansed and disinfected as follows:

"(i.) All parts of the pen or other place with which animals or their droppings have come in contact shall be scraped and swept, and the scrapings and sweepings, and all dung, sawdust, litter, and other matter shall be effectually removed therefrom: then

"(ii.) The same parts of the pen or other place shall be thoroughly washed or scrubbed or scoured with water: then

"(iii.) The same parts of the pen or other place shall have applied to them a coating of lime-wash.

"(3.) The scrapings and sweepings of the pen or other place, and all dung, sawdust, litter, and other matter removed therefrom shall forthwith be well mixed with quicklime, and be effectually removed from contact with animals." (*Ibid.*, Art. 108.)

Where a "cattle plague order" directed that "every carriage truck required to be cleansed and disinfected should be cleansed and disinfected once in every twenty-four hours during the time when it is used for any animal;" and by a clause in their special Act, the railway company's maximum rate for the carriage of animals included every expense incidental to conveyance, "except for extraordinary services performed by the company, in respect of which they might make a reasonable extra charge," it was held that the railway company could not charge the owner of a cow which they had carried for him with the cost of cleansing the truck, as such cleansing was not a service performed for the owner within the meaning of the special Act. (*Cox* v. *Great Eastern Ry. Co.*, L. R. 4 C. P. 181; 38 L. J. C. P. 151.)

By an Order in Council made under the Contagious Diseases (Animals) Act, 1878, if an animal is moved in contravention of the regulations of any local authority, the person "causing, directing, or permitting," the movement shall be deemed guilty of an offence against the Act. The local authority of the county of Dorset having by regulations prohibited the movement of animals into their district except under specified conditions, animals were consigned to a place within the district, at through rates, and with through bills from Cork *viâ* Bristol, and a specified route. The Midland Railway Company were no parties to the contract with the consignor, but, in furtherance of the scheme of carriage, carried the animals on their railway over a portion of the route to a point outside the county of Dorset, whence they were subsequently carried into that county by another company. It was held that the Midland Railway Company were liable to be convicted of an offence against the Act, as persons "causing, directing, or permitting," the movement of the animals within the meaning of the Order in Council; and that the justices of the county of Dorset had jurisdiction to convict. (*Midland Ry. Co.* v. *Freeman*, 12 Q. B. D. 629; 53 L. J. M. C. 79.)

286. Every railway company must make a provision (to the satisfaction of the Privy Council) of water and food, or either of them, at such stations as the Privy Council from time to time, by general or specific description, direct, for animals carried, or about to be or having been carried, on the railway of the company. (The Contagious Diseases (Animals) Act, 1878, 41 & 42 Vict. c. 74, s. 33 (1).)

The rest of the section is as follows:—

"(2.) The water and food so provided, or either of them, shall be supplied to any such animal by the company carrying it, on the request of the consignor, or of any person in charge thereof.

"(3.) As regards water, if, in the case of any animal, such a request is not made, so that the animal remains without a supply of water for twenty-four consecutive hours, the consignor and the person in charge of the animal shall each be guilty of an offence against this Act; and it shall lie on the person charged to prove such a request and the time within which the animal had a supply of water.

"(4.) But the Privy Council may from time to time, if they think fit, by order prescribe any other period, not less than twelve hours, instead of the period of twenty-four hours aforesaid, generally, or in respect of any particular kind of animals.

"(5.) The company supplying water or food under this section may make, in respect thereof, such reasonable charges (if any) as the Privy Council by order approve, in addition to such charges as they are for the time being authorized to make in respect of the carriage of animals. The amount of those additional charges accrued due in respect of any animal shall be a debt from the consignor and from the consignee thereof to the company, and shall be recoverable by the company from either of them, with costs, by proceedings in any court of competent jurisdiction. The company shall have a lien for the amount thereof on the animal in respect whereof the same accrued due, and on any other animal at any time consigned by or to the same consignor or consignee to be carried by the company."

The Animals Order of 1886 provides (Part IV. Chap. 28, Art. 127) for the water supply on railways as follows:—

"The railway companies working the railways named in the Third Schedule shall make a provision of water, to the satisfaction of the Privy Council, at each of the stations therein named, for animals carried or about to be or having been carried on those railways." The Third Schedule sets out the names of a large number of stations in England, Wales, and Scotland. As to the offence of omitting to make such a provision of water, see *ante*, p. 370.

II.—Generally.

287. The liability of a railway company as common carriers of live animals is, in the absence of any negligence, subject not only to the exemption of the act of God or the Queen's enemies, but to the further exemption of any act wholly attributable to the development of a latent inherent vice in the animal itself, such as its violence or want of temper. (*Blower* v. *G. W. Ry. Co.*, L. R. 7 C. P. 655; 41 L. J. C. P. 268; *Kendall* v. *L. & S. W. Ry. Co.*, L. R. 7 Ex. 373; 41 L. J. Ex. 184.)

Where, however, the vice is brought out by the negligence or default of the railway company as carriers, the liability attaches. (*Wilson* v. *Lanc. Ry. Co.*, 30 L. J. C. P. 232; *Gill* v. *M. S. & L. Ry. Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89.)

The above cited case of *Blower* v. *G. W. Ry. Co.* decides that a railway company are not liable for the loss of an animal breaking loose from the ordinary restraints by its own special violence. It appeared that a bullock, one of a number of cattle delivered to a railway company, was properly loaded into a proper truck by the railway company. The truck was properly fastened and secured, but in the course of its journey the bullock escaped from the truck and was found lying dead on the railway. There was no negligence on the part of the railway company, and the fact was that the escape of the bullock was wholly attributable to the efforts and exertions of the animal itself, and it was held that the company were not liable for the loss of the animal.

In delivering judgment Willes, J., said: "The question appears to be whether the special liability of carriers as to goods does attach in the case of live animals. That question has been considered before, and the difficulty in determining it called forth the opinions against

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their liability of Martin, B., and of the other judges, to the contrary effect. The controversy may in reality be only one of words. The question may be determined on the facts and merits, on the distinction between the acts of animals of an extraordinary character, by reason of a vice inherent in them, or of a disposition producing frenzy or unruly conduct. There may be non-liability in such cases, and yet liability for accidents arising from ordinary inherent qualities. I adopt that distinction for the purposes of the decision in this case. It seems to me to be but one of words. It matters not whether we say that a person carrying goods subject to an exemption from liability for an accident arising from the extraordinary development of the proper vice of an animal, carries as a common carrier with an exemption beyond the act of God or the Queen's enemies, or does not carry as a common carrier at all. I should say the defendants are common carriers, and are liable for the safe delivery of live animals as well as with respect to all other goods; but that there is this exception, resting upon the common sense of mankind, viz., with regard to any accident which occurs by reason of the proper vice of the thing itself, that is to say, by reason of its nature which may lead to its destruction. That proper vice does not mean a moral vice of the thing itself or its owner. It is something naturally inherent in the thing which by its natural development leads to the destruction of the thing. If such exists in the thing, and leads to its destruction, it is not a liability involved in the contract. . . . It is obvious, therefore, that the key is given only to treat the carrier as an insurer, and not to refer his liability to the ground of negligence. Thus we find the insurer is not liable for damage arising from the proper vice of the thing, and that exemption has been extended to carriers."

In *Kendall* v. *L. & S. W. Ry. Co.* (*ante*, p. 381), a saddled horse was placed by the railway company's servants in a proper horse-box in the usual manner. The saddle was left on the horse according to the usual custom in such cases, with the stirrups hanging down. At the end of the journey the horse was found to be injured in the forearm and fetlock. The horse was proved to be free from vice,

and nothing unusual occurred to the train during the journey. Bramwell, B., said, "There is no doubt in this case that the horse was the immediate cause of its own injuries; that is to say, no person got into the box and injured it. It slipped or fell, or kicked or plunged, or in some way hurt itself. If it did so from no other cause than its inherent propensities—its 'proper vice,'—that is to say, from fright or temper, or struggling to keep its legs, the defendants are not liable. But if it so hurt itself from the defendants' negligence, or from any misfortune happening to the train, though not through any negligence of the defendants, as for instance, from the horse-box leaving the line owing to some obstruction maliciously put on it, then the defendants would as insurers be liable."

In that case, as in *Blowers* v. *G. W. Ry. Co.*, the animals were carried under a special contract, made in accordance with sect. 7 of the Railway and Canal Traffic Act, 1854, but no question arose as to the reasonableness of the contract.

As stated by Willes, J., in the above judgment in *Blower's Case* (*ante*, p. 381), it was formerly doubted whether the common law liability of railway companies as carriers extended to live stock conveyed by them. (See *York, &c. Ry. Co.* v. *Crisp and Thompson*, 23 L. J. C. P. 125; *Harrison* v. *L. B. & S. C. Ry. Co.*, 31 L. J. Q. B. 113; 2 B. & S. 122.)

In *McManus* v. *Lanc. & York. Ry. Co.* (27 L. J. Ex. 201), Martin, B., in delivering the judgment of the Court (Martin, Channell, and Bramwell, BB.), said: "We are able to decide this case without referring to the second point made by the defendants, namely, the alleged distinction between the liability of carriers as to the conveyance of horses and live stock, and ordinary goods; but should the question ever arise, we think the observation which fell from Baron Parke in *Carr* v. *Lanc. & York. Ry. Co.* (21 L. J. Ex. 263; 7 Ex. 707), is entitled to much consideration." The observation of Baron Parke will be found *ante*, p. 365.

In a case decided in the Court of Session in 1870, the Lord Justice Clerk (Moncreiff) said: "I do not think that in the carriage of live animals a railway company are insurers to the extent that, if the animal die in the course of the transit, the value

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or loss must fall on them. I think that, as a general proposition, cannot be maintained. There may be presumptions in a particular case, throwing the *onus* of proof of the cause of death on the one side or the other; but I do not think that the general proposition is well founded." (*Paxton* v. *North British Ry. Co.*, 9 Sess. Ca. (3rd Ser.) 50.)

A horse fastened in the usual way in a railway horse-box struggled through the feeding-window (about twenty-five inches square) into the adjoining compartment, and was thereby injured. The Court of Session held that the accident was not of a kind that the railway company were bound to have foreseen and to have provided against, and that they were not liable in damages. (*Ralston* v. *Caledonian Ry. Co.*, 5 Sess. Ca. (4th Ser.) 671.)

A shipowner has been held not liable for the loss of a horse caused partly by the excepted cause of a storm, and partly by the inherent fright of the animal excited by the storm. (*Nugent* v. *Smith*, *ante*, Art. 47.)

In an action against a railway company for injuries to cattle proved to have been safely placed in their truck, but found to be injured on arrival at their destination, the burden of proving negligence is on the plaintiff. (*Smith* v. *Midland Ry. Co.*, 57 L. T. 813.)

The following are decisions in the Courts of the United States as to the conveyance of animals by railway. A railway company, in the absence of special contract, assumes the same liability in transporting live stock as in transporting any other merchandise, except so far as the viciousness or unruliness of particular animals, or their liability to disease, &c., may interfere with the transportation of them; and a railway company may limit their liability for live stock transported by them, but may not exempt themselves from liability for their own negligence. (*McCoy* v. *K. & D. M. Ry. Co.*, 44 Iowa, 424.)

Railway companies are not liable as common carriers in regard to live stock, but only bound to use reasonable care and diligence. (*Baker* v. *Louisville, &c. Ry. Co.*, 10 Lea. (Tenn.) 304.)

If a horse, while being carried in a train, sustains an injury, not

from any fault of the servants of the railway company, but from its own viciousness or restlessness, the company as a common carrier is not responsible. (*Illinois Central Ry. Co.* v. *Brelsford*, 13 Ill. App. 251: and see cases in Angell, pp. 204—206.)

Failure to bed a car intended for the transportation of live stock is not *primâ facie* negligence on the part of the railway company.

Where the consignor of cattle contracts to supervise the loading of his cattle, and accepts a car not provided with bedding, he is precluded from asserting a liability on the part of the railway company for injuries caused by a failure to bed the car. (*East Tennessee, V. &c. Ry. Co.* v. *Johnston*, 75 Ala. 596; 22 A. & E. Ry. Ca. 437.)

288. In order to render the railway company liable, the animals must be duly delivered to them or to someone entrusted by them to receive them. (See *ante*, Art. 163.) Such delivery must be in conformity with the known course of the railway company's business, or it will not bind them. (*Slim* v. *Gt. N. Ry. Co.*, 14 C. B. 647.)

In that case the owner of cattle, in defiance of what he knew to be the course of business of a railway company, permitted the cattle to be delivered to a servant of the company at one of their stations, without getting an acknowledgment from the proper officer that the cattle had been received for the purpose of being carried, and it was held that the company were not responsible for the non-delivery of the cattle.

289. A railway company are bound to provide trucks that are reasonably sufficient for the conveyance of cattle under the ordinary incidents of a railway journey. (*Amies* v. *Stevens*, 1 Str. 128; *Blower* v. *G. W. Ry. Co.*, L. R. 7 C. P. 655; 41 L. J. C. P. 268.)

In the latter case Willes, J., said, "but their liability in this respect extends no further" than the obligation stated in this Article.

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In *Amies* v. *Stevens* it was said "No carrier is obliged to have a new carriage for every journey. It is sufficient if he provides one which without any extraordinary accident will probably perform the journey." As to the liability of a railway company for loss or damage happening from any defect in the vehicle, see *ante*, Art. 178.

See *Tattersal* v. *National Steamship Co.* (12 Q. B. D. 297; 53 L. J. Q. B. 332) as to the obligation to provide a reasonably fit ship.

In *Chippendale* v. *Lanc. & York. Ry. Co.* (21 L. J. Q. B. 22) the plaintiff saw his cattle put into a truck. During the journey some of the cattle got alarmed and broke out of the truck and were injured. The truck was so defectively constructed as to be unfit and unsafe for the conveyance of cattle. It was held that there was no implied stipulation that the truck should be fit for the conveyance of cattle. Erle, J., said, "I take it that the carriage was fit for the journey and fit for the weight, and that the damage has entirely arisen from the freight being living animals, who made an effort to escape and so injured themselves. This seems to me to be a risk for which the company peculiarly said that they would not be responsible."

In *Pratt* v. *Ogdensburg Ry. Co.* (102 Mass. 557), it was held that the fact that a person delivering horses to a railway company for transportation accepted a defective car, knowing it to be defective, did not exempt the railway company from liability for a loss occasioned by the defect, without proof of a contract on his part to assume the risk of such defect.

In *Hawkins* v. *G. W. Ry. Co.* (17 Mich. 57) the owner of animals assumed "all risks of loss, injury, damage, and other contingencies in loading, unloading, conveyance, and otherwise." It was held that this did not include an injury caused by the bottom of the car, in which the animals were, dropping out, and that the carrier was liable.

290. A railway company as carriers of cattle are

only bound to carry in a reasonable time under ordinary circumstances (*ante*, Arts. 195—198), and are not bound to use extraordinary efforts or incur extra expense in order to surmount obstructions caused by the act of God; as a fall of snow. (*Briddon* v. *G. N. Ry. Co.*, 28 L. J. Ex. 51. See *ante*, Chap. V., and Arts. 174, 176.)

Pollock, C. B., in delivering judgment in that case, said: "The question was substantially left to the jury whether, under all the circumstances, the detention of these cattle was the result of the snow, or was owing to the negligence or supineness of the company's servants. The jury have found upon that question in favour of the defendants, and rightly. There is a distinction between trains for passengers and for goods or cattle. The owners of goods or cattle have no right to complain that extraordinary efforts which are made to forward passengers are not used to forward cattle or goods. The rates of carriage are different, and the cattle or goods sent by goods trains pay at a lower rate than they would if sent by passenger trains. The contract entered into was to carry the cattle to Nottingham without delay, and in a reasonable time under ordinary circumstances. If a snow-storm occurs which makes it impossible to carry the cattle, except by extraordinary efforts, involving additional expense, the company are not bound to use such means and to incur such expense."

If the company only profess to run trains for a certain class of traffic at stated intervals, it will be within a reasonable time if they carry in due course according to their profession. Where a company received cattle for conveyance, and it did not appear that there were any ordinary cattle trains on the line, it was held to be properly left to the jury to say what was a reasonable time within which to convey the cattle, and therefore whether the company were bound to send them by a special train. (*Donohoe* v. *L. & N. W. Ry. Co.*, 15 W. R. 792.) As to the usual custom of

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a railway company to give a preference to the carriage of live stock when unable to take both goods and cattle, see note to Art. 156.

A falling off in condition of cattle in consequence of delay in delivery, and from want of food and water, amounts to an "injury" within the meaning of sect. 7 of the Railway and Canal Traffic Act, 1854. (*Allday* v. *G. W. Ry. Co.*, 34 L. J. Q. B. 5.)

291. The precise degree of care which it is the duty of a railway company, as carriers, to use in delivering animals entrusted to them, must depend upon and vary with the nature and condition of the animals carried, and the ever-varying circumstances under which the delivery takes place. Some animals require much more care and management than others, according to their nature, habits, and conditions. (*Per* Blackburn and Lush, JJ., in *Gill* v. *Man. Sheff. & Linc. Ry. Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89.)

"The line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier's place, and had to deal with the animals under the circumstances and subject to the condition in which the carrier is placed, and under which he is called on to act." (*Ibid.*)

The facts of that case are as follows:—The plaintiff, having bought a cow in the market, booked it at Doncaster to be carried by rail to Sheffield, where he resided, he and his man travelling as passengers by the same train. The train arrived at Sheffield between six and seven in the evening of the same day, and the cattle trucks were drawn up to their proper place, by the side of the cattle-yard. The plaintiff, who had to go to the office and sign a receipt for the cow before he was permitted to take her away, told the porter not to let the cow out of the truck till he came back. On

his return from the office he observed that the porter was unfastening the truck. He called out to him, "Don't let the cow out; if you do she'll go slap at you." The porter answered, "She'll be all right when she gets out; close the gate," and proceeded to unbolt the door. The plaintiff thereupon left the yard, saying, "If you do that I shall go outside." The cow, being let out, began to run about the yard, and towards a spot whence she might have got on to the line. Being driven back by some persons who were there, she ran up to a pig pen at the other end of the yard, and leaped over the rails of the pen on to the line, where she was run over and killed by a passing train.

Lush, J., in delivering the judgment of himself and Blackburn, J., said: "The fair inference from these facts is, we think, that the cow was, while in the truck, in so excited a state as to make it dangerous to let her out until preparations had been made for securing her, and taking her away in safety, which is what I infer the plaintiff intended to do; and that the warning given to the porter, though it intimated only danger to himself as the consequence of liberating the cow at that moment, must or ought to have conveyed to his mind that other mischief might happen if the animal were then set at large. It was contended for the defendants that there was no evidence of negligence, and that at all events the company were exonerated from liability by virtue of the conditions printed on the cattle ticket, and by which, no doubt, the plaintiff was bound. The condition relied on is in these terms:—'The Company give notice that they convey horses, cattle, sheep, pigs, and other live stock in waggons, subject to the following conditions:—

"'First. That they will not be responsible for any loss or injury to any horse, cattle, sheep, or other animal in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or restiveness of the animal.'

"It cannot, we think, be contended that this condition dispenses with the use of reasonable care on the part of the company in the receiving, carrying, and delivering cattle, any more than the excep-

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tion of perils of the sea in a bill of lading relieves a shipowner from the obligation to navigate with ordinary skill and care. The exception goes to limit the liability, not the duty. It is the duty of the carrier to do what he can by reasonable skill and care to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, he is released from liability; but if his negligence has brought on the peril, the damage is attributable to his breach of duty, and the exception does not aid him. See *Phillips* v. *Clark* (26 L. J. C. P. 167; 2 C. B. (N. S.) 156). . . . If it had appeared in this case that the exigencies of business required the porter to discharge the cattle trucks immediately, or that the plaintiff meant to put upon the company the charge of his cow, or to require the use of the truck for an unreasonable time, the case would have borne a different complexion; but we infer that all which the plaintiff wanted was time to enable him either to soothe and quiet the cow, so that he might drive her home, or to secure her, and so prevent her doing mischief either to herself or to persons who might come in her way, and that the porter could, without loss or inconvenience to the company or any other person, have kept the cow in the truck for that reasonable time. This, we think, he was therefore bound to do, and that as the mischief was attributable to his letting her at large, the defendants are liable to pay the statutory value of the cow, 15*l*."

292. It is the duty of a railway company to keep their station in a safe and proper state, and to deliver the cattle in a fit and proper place. (*Rooth* v. *N. E. Ry. Co.*, L. R. 2 Ex. 173; 36 L. J. Ex. 83.)

In that case it was held that a railway company cannot relieve themselves from this common law duty by inserting conditions in a special contract for the carriage of cattle. The conditions in that case are set out *ante*, p. 161.

In *Roberts* v. *G. W. Ry. Co.* (27 L. J. C. P. 266), it was held

that there is no specific obligation on a railway company carrying live stock to provide fences or guards at the station where the animals are unloaded, so as to ensure their not straying on the line.

The question whether such precautions are reasonable and proper is one for a jury upon the question of negligence. (*Rooth* v. *N. E. Ry. Co.*, *supra*.)

Cattle belonging to the plaintiff were driven at night along an occupation road, which crossed a branch line of the defendants' railway on a level. As they were passing over the crossing they became frightened owing to a number of trucks being shunted by the defendants in a negligent manner, and part of them escaped from the control of their drivers. These were, on the following morning, found dead or dying on the main line of the defendants' railway, which they reached owing to defects in the fence of an orchard and garden adjoining the railway. It was held that, as defendants had been guilty of negligence which caused the drovers to lose control over the cattle and caused the cattle to become infuriated, it was no answer that if the fence of the garden had not been defective the accident would not have happened; and that consequently the damages were not too remote. (*Sneesby* v. *Lanc. and York. Ry. Co.*, 1 Q. B. D. 42; 45 L. J. Q. B. (App.) 1.)

293. The responsibility of a railway company as carriers of cattle, does not terminate until the owner or consignee, by watchfulness, had, or might have had, an opportunity to remove his cattle. (Redfield on Railways; *Shepherd* v. *Bristol & Exeter Ry. Co.*, L. R. 3 Ex. 189; 37 L. J. Ex. 113.)

Many questions of great nicety have arisen as to whether a railway company have delivered the cattle either actually or constructively.

In the case of *Wise* v. *G. W. Ry. Co.* (25 L. J. Ex. 258; 1 H. & N. 63), it was assumed to be the duty of the sender or the

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consignee of the animals to provide for the reception of the cattle on their arrival at the station to which the railway company undertook to carry them, and that the railway company were therefore not liable for damage to cattle occasioned by there being no one to receive them on their arrival. It is submitted that this case is in conflict with the general principles applicable to carriers. (See Art. 206.)

In that case a horse was delivered to the Great Western Railway Company at N. to be conveyed to W. for the plaintiff. The person who delivered the horse signed the following document:—

"Great Western Railway. 9.45 train. March 31, 1885. Newbury to Windsor. Mr. Wise, of Eton, paid for one horse 12*s.* 6*d.* Notice.—The directors will not be answerable for damage done to any horses conveyed by this railway. I agree to abide by the above notice. W. T. Johnson."

The horse reached the station at W. safely, but the company's servants there either forgot or did not notice that the horse had arrived, and on the plaintiff calling for it the next day it was discovered in a horse-box on a siding, and found to have sustained serious injuries from cold and from remaining in a confined position all night. It was held that the railway company was protected from liability under the Railway and Canal Traffic Act, 1854, s. 7, by the signed contract.

It seems that independently of such contract the railway company would not have been responsible, the injury having been the result of the plaintiff not being ready to receive the horse on its arrival at W. The counsel for the plaintiff contended that the horse, not having been met at the station, ought to have been sent by the railway company to a livery stable. Whereupon Bramwell, B., said, "The duty to send the horse to a livery stable can hardly be put as a legal proposition. Suppose, instead of doing that, a porter was told to hold the horse for an hour or two, there would be no breach of duty. A more simple proposition for the plaintiff to urge is, that it was the duty of the company to take care that the horse was not injured; for instance, that they had no

right to turn it loose." Pollock, C. B., in delivering the judgment of the Court, said: "On referring to the facts of this case, there can be no doubt whatever that the person who had hired the horse was himself the real cause of all the mischief. The railway company, to a certain extent, have been blameable, but the real person who produced the mischief was the sender of the horse, who sent him without any letter intimating that he was coming, and without any groom or person to attend him during the journey; and one of the witnesses stated that it was the usual and proper course for an intimation to be given and for somebody to come and meet the horse at the end of the journey. If that had been done, the horse would have been taken care of; therefore, it appears to us to be an attempt to throw upon the railway company (who are certainly not free from blame in one sense) that which really was occasioned by the person who sent the horse. But we think that the mischief was within the notice, and that the horse being accepted under a special contract, the railway company was not liable for any damage that might be done to him while remaining at the station till somebody came for him or made an application for him. This must be considered as part of the risk of sending him from one place to another." See the following Article.

Where the plaintiff delivered cattle, carriage prepaid, to the defendant railway company for carriage on the terms of signed conditions, whereby, in consideration of an alternative reduced rate, it was agreed that the company were "not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury, arose from the wilful misconduct of the company or its servants"; the cattle were carried; but, on application made for them by the plaintiff, the defendants, in consequence of their clerk having negligently omitted to enter the cattle on the consignment note as "carriage paid," refused to deliver them, and alleged that the carriage was not paid. The cattle were kept exposed to the weather until the next day, when, the mistake having been ascertained, they were

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delivered. They were damaged by the exposure. In an action for damages by reason of wrongful detention and negligence, it was held that the withholding of the cattle, under a groundless claim to retain them, at the end of the transit, was not "detention" within the conditions, and the company were therefore liable. (*Gordon* v. *G. W. Ry. Co.*, 8 Q. B. D. 44; 51 L. J. Q. B. D. 58.)

Grove J., in delivering judgment, said: "It was not necessary to determine the question of 'wilful misconduct.' Mere honest forgetfulness could not, I think, be construed to be 'wilful misconduct.'" Lopes, J., said, "Upon the facts there appears to have been a refusal by the company's servants to deliver cattle to the consignee at a time when the latter had an absolute right to them. The refusal to deliver was unjustifiable. It was competent to the company to have at once made inquiry as to the payment of the carriage of the cattle. They did not do so, but kept the cattle; and this, I think, amounted to wilful misconduct."

In *Jarman* v. *G. W. Ry. Co.* (22 W. R. 73), which was an action for injury done to cattle by negligent detention, the contract was to carry at owner's risk, with the condition as to wilful misconduct on the part of the company's servants. Blackburn, J., said, "If the railway company, having had distinct notice that the running of their trains was very dangerous indeed, owing to the badness of the points, and they were to continue to run their trains without the slightest attempt to put the matter right, that, I should say, would be clearly wilful misconduct."

As to where the consignee of live stock, with the assent of the railway company, is engaged for the convenience of both parties in taking delivery in a particular way, and while so engaged is injured by the negligence of the company's servants, see Art. 211.

294. A railway company at the end of the journey may put a horse into a livery stable if no person come to fetch him from the station, and the railway company may recover the livery charges from the consignee.

(*G. N. Ry. Co.* v. *Swaffield*, L. R. 9 Ex. 132; 43 L. J. Ex. 89.)

In that case the defendant sent a horse by railway directed to himself at S. Station. On arrival of the horse at S. Station at night there was no one to meet it, and the railway company, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse; he was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges, which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station-master offered to pay the charges, and let the defendant take away the horse; but the defendant declined and went away without the horse, which remained at the livery stable. The railway company afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm and with payment of a sum of money for his expenses and loss of time. Some months after, the railway company paid the livery stable keeper his charges and sent the horse to the defendant, who received it. In an action brought to recover the amount of the charges, it was held that the railway company acted reasonably in putting the horse in the livery stable, and that the defendant, having refused to take the horse, was liable to the railway company for all the livery charges which they had paid.

Pollock, B., in delivering judgment, said: "I do not know of any decision of English law by which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or consignor; but in my opinion he is."

It has been held in America that a railway company, as a common carrier of cattle, performs its duty when it has unloaded the cattle at their place of destination, and that the company are bound neither to deliver them at the residence of the consignee nor to give him notice of their arrival. (*Chicago & Eastern Illinois Ry. Co.* v. *Pratt*, 13 Ill. 477.)

Part IV.

THE CARRIAGE OF PASSENGERS' LUGGAGE BY RAILWAY.

CHAPTER XVII.

THE OBLIGATIONS OF A RAILWAY COMPANY WITH REFERENCE TO THE CONVEYANCE OF THE LUGGAGE OF A PASSENGER.

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295. A railway company, in virtue of the private Act under which they are incorporated, are bound to carry free of charge, and at their own risk, a passenger's ordinary luggage within the prescribed weight properly packed. (*Munster* v. *S. E. Ry. Co.*, 27 L. J. C. P. 308; 4 C. B. (N. S.) 676.)

A railway company are not bound to carry merchandise delivered to them by a passenger as his personal luggage. (See *post*, Art. 298.)

In *Munster* v. *S. E. Ry. Co.* (*supra*), Cockburn, C. J., said: "The plaintiff having sufficiently tied together the articles in question desired that they should be labelled, and carried with the rest of the passenger's luggage. It seems that the railway porter, having communicated with the station master, declined to label the articles and put them in the luggage-van. The Act of Parliament renders it imperative on the company to carry a certain weight of passenger's luggage. It enables the company also to make regulations, and by one of these the company say, that they will not be responsible for any article of passengers' luggage that is not marked with their label and properly addressed. The plaintiff knowing this, and that responsibility would fall on the company if the articles were labelled, calls on them to label the articles. This they refuse to do. It is impossible not to see that the question was, whether the company by so refusing to label could divest themselves of the common law liability which attached to them as carriers. It appears that the company sought to relieve themselves from such liability, first, by requiring all luggage to be labelled, and then by giving directions to their servants not to label articles of this description. This is what occurred. The plaintiff desires the parcel to be labelled; the porter will not do so, nor will the station master; he says, if it is to go at all, it must go in the same carriage with the plaintiff; the plaintiff objects to this, on the ground that the company are thereby endeavouring to relieve themselves from their liability as common

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carriers. This being the struggle between the two parties, the porter threatens to take it to the lost luggage office, unless the plaintiff will consent to take it with him in the carriage. The plaintiff says, 'You may put it where you please, but I will not take charge of it;' upon which it is left on the platform, and the porter takes it to the lost luggage office. I think the porter was not justified in doing so, and that the company are responsible for his acts. The plaintiff did nothing to prevent the company from putting the parcel in the carriage in which he was, or in any other part of the train. All he said was that if they put it in the carriage with him, they were not to construe that as a consent on his part to their not being responsible for it. There was nothing, therefore, to relieve the company from their liability as common carriers, and, consequently, the act of their porter in taking the parcel to the lost luggage office was a wrongful act, for which they are liable, whether it be on the count in trover, or on the special count for refusing to carry. Supposing, however, the company were justified in refusing to carry, they were justified in taking the parcel to the lost luggage office."

The London and North Western Railway Company's Act of 1846 enacts as follows:—

"Every passenger travelling upon the railway in a first class carriage may take with him his ordinary luggage not exceeding 112 lbs. in weight, and every passenger travelling in a second class carriage may take with him his ordinary luggage not exceeding 60 lbs. in weight, and every passenger travelling in a third class carriage may take with him his ordinary luggage not exceeding 40 lbs. in weight, without any charge being made for the carriage."

There is a similar clause in the Great Western Railway Company's Act of 1847, and in the Great Northern Railway Company's Act of 1850.

The Great Eastern Railway Company's Act of 1862, and London, Brighton, and South Coast Railway Company's Act of 1863, both allow 120 lbs. to first class passengers, 100 lbs. to second, and 60 lbs. to third class.

Each passenger by a parliamentary train is entitled to take with him 56 lbs. weight of luggage, "not being merchandise or other articles carried for hire or profit" without extra charge. (The Cheap Trains Act, 1844, 7 & 8 Vict. c. 85, s. 6.) This enables a husband and wife to take 112 lbs. of luggage between them, though the personal effects of one of them may not exceed a few pounds. (*G. N. Ry. Co.* v. *Shepherd*, 21 L. J. Ex. 286.)

The Act 5 & 6 Vict. c. 55, first gave the Crown the right to transmit military stores and baggage by railway, but made no provision as to the price. This was amended by 7 & 8 Vict. c. 85. These Acts are now repealed by 46 & 47 Vict. c. 34.

An officer on duty is entitled to take with him 112 lbs. of "personal luggage" without extra charge, and a soldier, &c., on duty 56 lbs. (46 & 47 Vict. c. 34, s. 6; see *post*, p. 440.)

Although the special Acts of railway companies provide that without extra charge it shall be lawful for every passenger by railway to take with him ordinary luggage, yet a railway company may run excursion trains for passengers only, without luggage. (*Ramsey* v. *N. E. Ry. Co.*, 32 L. J. C. P. 244; *post*, Art. 301.)

It will be noticed the railway companies have taken care in their special Acts expressly to limit the right of the passenger to "ordinary" luggage, which must be taken to mean the "personal" luggage of the traveller. (*Post*, Arts. 296, 297.)

Where a railway company carried troops and their baggage, in India, under a written contract with the Government, which provided for the due supply of suitable goods waggons, and for special trains when required, and contained the following clause: "The baggage shall remain in charge of a guard provided by the troops, the company accepting no responsibility,"—it was held that this clause did not exempt the company from responsibility for damage caused by their own negligence. (*Martin* v. *Gt. Indian Pen. Ry. Co.*, 37 L. J. Ex. 27.)

In the recent special Acts of Tramway Companies the following section has been inserted as to the conveyance of passengers' luggage:—

"Every passenger travelling upon the tramways may take with

him his personal luggage not exceeding 28 lbs. in weight without any charge being made for the carriage thereof, provided that such luggage be carried by hand and at the responsibility of the passenger, and shall not occupy any part of the seat, nor be of a form or description to annoy or inconvenience other passengers."

Where a railway company are justified in refusing to carry a package, they may lawfully take it, if left on their premises, to the lost property office, and charge their regular fee upon redelivery. (*Munster* v. *S. E. Ry. Co.*, *ante*, p. 397.)

"From the usual course of business of common carriers, when they carry a passenger, a contract is implied to carry also his luggage. They are presumed to be compensated in the fare for his transportation, and I can very well believe, well compensated, because the amount of travel is greatly increased by the comfort and convenience of carrying luggage, and would be lessened, if, for his luggage, a passenger was required to pay freight. It is curious to remark that the law takes more care of a man's luggage than it does of his life and limbs; for the former, the carrier is liable as insurer against loss, except by the act of God and the public enemies; for the safety of the latter, he is bound only to extraordinary care and diligence." (*Per* Nisbett, J., in *Dibble* v. *Brown*, 12 Geo. 217.)

296. A railway company are common carriers of passengers' personal luggage, which, under the statute under which they are incorporated, they are bound to carry free of charge. (*Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 612; 40 L. J. Q. B. 300; *Cohen* v. *S. E. Ry. Co.*, 2 Ex. D. 253; 46 L. J. Ex. 417.) This absolute liability may be modified where the passenger himself takes charge of his luggage in such a manner as to raise an implied condition that he shall himself take reasonable care. (*Talley* v. *G. W. Ry. Co.*, L. R. 6 C. P. 44; 40 L. J. C. P. 9; *post*, Art. 304.) But unless such a condition

can be implied from the circumstances of the case, their general liability as insurers will continue. (*Richards* v. *L. B. & S. C. Ry. Co.*, 7 C. B. 839; *Le Couteur* v. *L. & S. W. Ry. Co.*, L. R. 1 Q. B. 54; 35 L. J. Q. B. 40.)

The warranty or promise of a railway company as common carriers of the safety of a passenger's personal luggage is qualified by the excepted risks incident to the contract of a common carrier. (As to what these risks are, see *ante*, Chapters V. and XI.)

A railway company are not responsible as common carriers for luggage other than the personal luggage of the passenger, and not packed so as to make its nature obvious. (*G. N. Ry. Co.* v. *Shepherd*, *post*, Art. 298.)

The propositions stated in this Article must now be taken to be the law, although there are some dicta to the effect that railway companies are not insurers of a passenger's personal luggage. (See *per* Pollock, C. B., in *Stewart* v. *L. & N. W. Ry. Co.*, 33 L. J. Ex. 199; and *per* Willes, J., in *Talley* v. *G. W. Ry. Co.*, L. R. 6 C. P. 51.)

"It was contended in argument that a contract to carry passengers' luggage was not a contract for the carriage of goods by a common carrier. Cases were cited in which that very learned Judge, Lord Holt, seemed to think that a coachman who carried some luggage for a passenger in a coach was a mere gratuitous bailee, and was not only not liable as a carrier, but not even to take that degree of care which a bailee for hire must take. That was attempted to be explained, and I think probably correctly, by the particular modes of carriage which prevailed in Lord Holt's time, and of which we have but little knowledge. However that may be, I cannot have the least doubt that, when a passenger pays

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a certain sum for the conveyance of himself and his luggage, his luggage is carried for reward just as much as if it had been sent by a goods train. When the passenger has paid his fare he is entitled to have his luggage conveyed as well as himself, and although you may not be able to say how much of that fare is for the conveyance of the passenger and how much for the luggage, it does seem absurd to say that the company are gratuitous bailees; and since they are not so, they are necessarily liable for the loss of the luggage by the carelessness of their servants. It is not necessary to determine whether they are liable as common carriers, though upon the authorities cited before us I think they are, but whether that is so or not they are liable for loss by negligence." (*Per* Mellish, L. J., in *Cohen* v. *S. E. Ry. Co.*, *ante*, p. 400.)

"The impossibility of travelling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveller has led from the earliest times to the practice on the part of carriers of passengers for hire of carrying as a matter of course a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger. Under the older system of travelling by stage coaches, canal boats, or other vessels, the amount of luggage to be thus carried free of charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various Acts of Parliament under which railways have been established. The provision fixing the amount of luggage which the traveller shall be entitled to take with him free of charge has a twofold object, first, that of insuring to the traveller the conveyance of a reasonable amount of luggage; secondly, that of protecting the carrier from all dispute as to the amount of luggage which the passenger may claim to have carried, as well as entitling the former to a proper remuneration for the carriage of luggage in excess of the quantity thus fixed by statute. Besides thus fixing the quantum of luggage which the passenger

shall be entitled to have carried free of charge, the Railway Acts have, in conformity with the practice of carriers under the old system, taken care expressly to limit the right of the passenger to ordinary luggage, which must be taken to mean the personal luggage of the traveller. The conveyance of the personal luggage of the traveller being obviously for his convenience, and therefore accessory, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of passengers' luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers, unless indeed where the passenger himself takes the personal charge of them, as in *Talley* v. *G. W. Ry. Co.* (40 L. J. C. P. 90), in which case other considerations occur." (*Per* Cockburn, C. J., in *Macrow* v. *G. W. Ry. Co.*, *ante*, p. 400.)

Where a railway company made a bye-law to the effect that they "would not be responsible for the care of luggage, unless booked and paid for," it was held that the bye-law was null and void. (*Williams* v. *G. W. Ry. Co.*, 10 Ex. 115; *Munster* v. *S. E. Ry. Co.*, 4 C. B. (N. S.) 698; *G. W. Ry. Co.* v. *Goodman*, 21 L. J. C. P. 197.)

The loss of the luggage will not entitle the passenger to rescind the contract and recover back the fare. (*Richards* v. *L. B. & S. C. Ry. Co.*, 7 C. B. 839.)

297. Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, is considered to be personal luggage. (*Macrow* v. *G. W.*

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Ry. Co., L. R. 6 Q. B. 618; 40 L. J. Q. B. 300.) Personal luggage does not extend to any articles carried for the purposes of hire or profit, even though such articles would otherwise fall within the term "ordinary" or "personal" luggage. (*Per* Lush, J., in *Hudston* v. *Midland Ry. Co.*, L. R. 4 Q. B. 366; 38 L. J. Q. B. 213; and *per* Parke, B., in *Shepherd* v. *G. N. Ry. Co.*, 21 L. J. Ex. 286.)

"Under the term 'luggage' may be comprised his clothing and everything required for his personal convenience, and perhaps even a small present, had he had such with him, or a book on the journey might also be included in that term; but they were certainly not bound to carry merchandize and materials intended for trade, and to be sold at a profit." (Parke, B., in *Shepherd* v. *G. N. Ry. Co.*, *supra*.)

Documents and bank notes for use in certain causes in which the solicitor was engaged as a solicitor, and which he took in his portmanteau when going by railway to attend the county court, were held not to be personal or ordinary luggage. (*Phelps* v. *L. & N. W. Ry. Co.*, 34 L. J. C. P. 259.) Byles, J., said: "I should doubt if a man's own title deeds and securities can be called 'ordinary luggage,' but when they belong to another person the case is still clearer."

Pencil sketches of an artist, placed in his portmanteau, do not form part of his ordinary luggage, so as to entitle them to be conveyed free of charge. (*Mytton* v. *Midland Ry. Co.*, 28 L. J. Ex. 385.)

A passenger cannot claim to have carried as ordinary personal luggage articles of such a size and shape as that they cannot be reasonably carried as luggage. (*Hudston* v. *Midland Ry. Co.*, L. R. 4 Q. B. 366; 38 L. J. Q. B. 213.) In that case the plaintiff claimed to have carried as luggage a child's toy called a spring horse, 78 lbs. in weight, and 44 inches in length, standing on a flat surface.

"In *Hudston* v. *The Midland Ry. Co.*, the plaintiff had tendered to the company a spring horse which he had purchased and was taking home to his children as part of his luggage. The company refused to receive it unless he paid for the carriage, whereupon he paid the charge, and afterwards brought an action to recover back the sum he had so paid. My brother Lush in that case observes: 'The only definition I can think of, and one which is sufficient for this case, is, that the words of the statute describe a class of articles which are ordinarily or usually carried by travellers as their luggage.' He then proceeds to hold that the dimensions and size of this spring horse took it out of this definition. Considering the way in which the point arose, namely, on the refusal of the company to accept and carry it gratis, it was certainly relevant to inquire whether the article was such as might be reasonably rejected by the company on account of its size and shape, though it did not exceed the statutable weight." (Cockburn, C. J., in *Macrow* v. *G. W. Ry. Co.*, *ante*, p. 400. And see *Bruty* v. *G. Trunk Ry. Co. of Canada*, 31 Upper Canada R. 66.)

"This would include, not only all articles of apparel, whether for use or ornament—leaving the carrier herein to the protection of the Carriers Act, to which, being held to be liable in respect of passenger's luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage,' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandize or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier. The articles as to which the question in the present case arises consisted of bedding. Now, though we are far from saying

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that a pair of sheets or the like, taken by a passenger for his use on a journey, might not fairly be considered as personal luggage, it appears to us that a quantity of articles of this description, intended not for the use of the traveller on the journey, but for the use of his household when permanently settled, cannot be held to be so." (Cockburn, C. J., in *Macrow* v. *G. W. Ry. Co.*, *ante*, p. 400.)

298. A railway company are not liable for the loss of merchandize delivered to them by a passenger as his personal luggage to be carried free, unless the company, having an opportunity to know the contents of the package, see fit to accept it as luggage. (*Cahill* v. *L. & N. W. Ry. Co.*, 31 L. J. C. P. 271; *Belfast and Ballymena Ry. Co.* v. *Keys*, 9 H. L. Ca. 556.)

In the former of these two cases it was held that the mere fact that a package looks like merchandize, and is marked "glass," is not enough to fix the company with responsibility. Cockburn, C. J., said, "It is true it had a semblance as of merchandize, and was marked 'glass.' But persons often take with them very curious packages, and mark them 'glass,' to protect them from injury. Probably the porter never thought about it at all."

In *Shepherd* v. *G. N. Ry. Co.* (21 L. J. Ex. 286), it was held that if the merchandize be so packed as to be obviously merchandize to the eye, the railway company will be responsible for the loss in the absence of any bargain to the contrary.

Parke, B., in delivering judgment, said: "Had the railway company, with full notice of what the passenger was carrying, chosen to treat it as luggage, they would have been responsible for the loss; but their duty as common carriers was only to carry luggage, and not merchandize or articles wholly disconnected with personal luggage. If they had had notice, they might have

refused to carry it without an additional payment, but they had no opportunity of acquiring this knowledge in this case. Whether this was done with any fraudulent intention it is not material to inquire, for if without any fraud the passenger has so conducted himself that the company were not apprised of the nature of what he was carrying, it is the same in effect as if a fraud had been intended." And see *Belfast and Ballymena Ry. Co.* v. *Keys* (9 H. L. Ca. 556), where it was held that it makes no difference that the passenger was ignorant of the rule that nothing but personal effects are carried free of charge.

The law as stated in this Article is the same in the United States. (See Redfield's Law of Railways (3rd ed.), pp. 150—152.)

The mere fact that the passenger pays for the carriage of a trunk because it weighs more than is allowed to go free, does not entitle the passenger to carry merchandize. (*Cincinnati Ry. Co.* v. *Marcus*, 38 Ill. 219.)

If a passenger, with the intent to avoid paying freight, takes merchandize into a passenger carriage on a railway, he cannot hold the railway company liable as a common carrier, although on the journey the merchandize, at the request of a servant of the company, is placed in the luggage van and is lost. (*Belfast, &c. Ry. Co.* v. *Keys*, *supra*.)

299. If a railway company or other carrier of passengers permit a passenger, either on payment, or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permit him to take, as personal luggage, articles that would not come under that denomination, they will be liable for their loss, though not arising from their negligence. (*Per* Cockburn, C. J., in *Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 612, 617. *Per* Parke,

B., in *G. N. Ry. Co.* v. *Shepherd*, 21 L. J. Ex. 286. And see *Cahill* v. *L. & N. W. Ry. Co.*, 31 L. J. C. P. 271.)

"If a railway company, who, by their Act of Parliament, are bound, or by their regulations profess, to carry personal luggage free, choose to take as ordinary luggage that which they know to be merchandize, I quite agree that it is not competent to them, in the event of a loss, to claim exemption from liability on the ground that the article consists of merchandize and not of ordinary luggage." (*Per* Cockburn, C. J., in *Cahill* v. *L. & N. W. Ry. Co.* (*supra*).)

300. A regulation of a railway company that they will not be responsible for any passenger's luggage unless fully and properly addressed with the name and destination of the owner, is not a just and reasonable condition within section 7 of the Railway and Canal Traffic Act, 1854. (*Cutler* v. *North London Ry. Co.*, 19 Q. B. D. 64; *post*, Art. 308.)

When luggage has been given into the custody of the railway company's servants for transit, the passenger is not bound to inquire after it till it reaches its destination; and though it would seem that the company may refuse to carry luggage which has no address upon it, yet, having once accepted it for conveyance, they cannot afterwards plead the want of the address as an excuse for its having gone astray. (*Campbell* v. *Caledonian Ry. Co.*, 14 Sess. Ca. (2nd Ser.), 806.)

In that case the plaintiff took a ticket at Glasgow for Edinburgh, and gave his portmanteau into the custody of a railway porter, informing him of its destination. The portmanteau was

put into the van at Glasgow, but no further trace of it was ever got. There was no address upon it, and the passenger did not inquire after it on changing carriages at Carstairs, where also the luggage is shifted from one train to another. The company were held liable for the loss, Lord Cockburn saying: "The company took the luggage along with the man, and the mere act of taking it implied an obligation to re-deliver. It was said that nothing was paid for the luggage, but this is a mistake. There was no separate payment for it, but the fare for the passenger included the conveyance of his luggage as well as himself. The fact of there being no address does not alter the company's responsibility. They might have refused to take it without an address; but, having taken it, they cannot now raise that objection. It makes no difference that there was carelessness on the part of the pursuer; and, in like manner, the assertion that he was intoxicated and asleep, if it had been proved, would have been nothing to the purpose. It was not unnatural that a man should be asleep at that hour of the evening; but it was not his duty, but that of the company, to look to the luggage."

301. Although a railway company are bound, by the terms of their special Act of incorporation, to permit passengers to take a certain amount of luggage free of charge, and as a general rule are not entitled to enforce any regulation at variance with such obligation, they are not, on that account, precluded from making special stipulations with regard to the carriage of luggage by cheap or excursion trains. (*Rumsey* v. *N. E. Ry. Co.*, 32 L. J. C. P. 244; 14 C. B. (N. S.) 641.)

In that case Williams, J., said: "The question is whether the terms on which these excursion tickets are issued by the company can be enforced, so far as relates to the condition that passengers

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travelling with such tickets shall not be allowed to take luggage. I see nothing whatever to prevent it in the section of the Act of Parliament which is relied on. The defendants say that the bargain was that the plaintiff should give up his ordinary right of taking luggage as a first class passenger on condition of getting a cheaper ticket. There is nothing illegal in that." The section of the Act referred to by the learned judge was in the usual form. (See *ante*, p. 398.)

In the bills or other advertisements regarding these trains, there is commonly inserted a notice, either that no luggage at all will be allowed, or that luggage will only be carried by the company upon payment; or, lastly, that a certain amount will be carried free of charge but only at the passenger's own risk.

The holder of a railway excursion ticket, expressed to be "issued subject to the conditions contained in the company's time and excursion bills," one of which conditions was, that "luggage under 60 lb." should be carried "free, at passenger's own risk," was held bound, in the case of *Stewart* v. *L. & N. W. Ry. Co.* (33 L. J. Ex. 199; 3 H. & C. 135) by the terms of this special contract.

This condition was not signed by the passenger but was nevertheless held binding upon him. This case is in effect overruled by *Cohen* v. *S. E. Ry. Co.*, *post*, Art. 308.

302. The owner of luggage who allows his servant to carry it by train as his own personal luggage, the servant taking and paying for his ticket, and the owner travelling by a later train, cannot maintain an action against the company for the loss of such luggage. (*Becher* v. *G. E. Ry. Co.*, L. R. 5 Q. B. 241; 39 L. J. Q. B. 122.)

Mellor, J., said, "There can be no doubt but that the portmanteau was received by the company as the luggage of the servant, and that he was regarded by them as an ordinary passenger. It is unnecessary to say that the case where a man

says 'this is not my luggage, but my master's,' may give rise to different considerations." And Lush, J., said, "The company are in this position: they are bound by law to receive a certain quantity of the luggage of each passenger by their railway. But if they had known that the luggage was not the luggage of the servant, they would have known that they were not bound to receive it, and they would probably have refused it. There is no evidence of any duty on the part of the company except that which is founded on their contract, and the only person with whom they contracted was the servant."

303. As the duty thrown upon the carrier by receiving the passenger and his luggage to be carried for reward, though arising out of contract, is independent of the question by whom the reward is paid, a railway company are liable for the loss of his luggage to a servant whose fare has been paid by his master. (*Marshall* v. *York, Newcastle, and Berwick Ry. Co.*, 11 C. B. 655; 21 L. J. C. P. 34.)

304. A railway company accepting passengers' luggage to be carried in a carriage with the passenger enter into a contract as common carriers, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory. (*Bunch* v. *G. W. Ry. Co.*, 13 App. Cas. 31; 57 L. J. Q. B. D. (H. L.) 361.)

Until this case was decided in the House of Lords the ruling authority upon this point was *Bergheim* v. *G. E. Ry. Co.* (3 C. P. D. 221; 47 L. J. Q. B. (App.) 318). In that case it was decided by the Court of Appeal that a railway company are not insurers of

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that portion of a passenger's luggage which is, at his request or with his consent, placed in the same carriage in which he travels or is about to travel; but they were liable for loss or injury to it caused by their negligence.

The Law Lords in *Bunch's Case*, however, preferred the principle which was adopted in *Richards* v. *L. B. & S. C. Ry. Co.* (7 C. B. 839); *Butcher* v. *L. & S. W. Ry. Co.* (16 C. B. 13); and *Talley* v. *G. W. Ry. Co.* (L. R. 6 C. P. 44; 40 L. J. C. P. 9); and the views expressed in those cases by Lord Truro, Jervis, C. J., Williams, J., Crowder, J., Willes, J., Keating, J., and Montague Smith, J.

In *Talley's Case* it was held that if the passenger retain his luggage under his own personal care and control he is bound himself to take reasonable care of it, and he cannot charge the carrier with a loss caused by his own negligence.

That was an action by a passenger for not safely carrying his portmanteau which formed his luggage, and the evidence was that the plaintiff had the portmanteau put into the same carriage with him, and that in the course of the journey he got out for refreshment at Swindon, where the train stopped ten minutes, and upon returning failed to find his carriage, and completed his journey to London in another carriage in the same train. He afterwards obtained his portmanteau, but cut open, and minus a portion of its contents, which had been stolen by some one in the carriage after the plaintiff had left it.

The jury negatived negligence on the part of the railway company's servants, and found that the plaintiff had by his negligence contributed to the loss. It was held that the general liability of the railway company was, under the circumstances, modified by the implied condition that the plaintiff should use reasonable care, and that as the loss was occasioned by his neglect to do so, and would not have happened without such neglect, the company were not liable.

Willes, J., in delivering the judgment of the Court, said: "The rule which binds common carriers absolutely to insure the safe

delivery of the goods, except against the act of God or the Queen's enemies, whatever may be the negligence of the passenger himself, has never, that we are aware of, been applied to articles which are not put in the usual luggage van, and of which the entire control is not given to the carrier, but which are placed in the carriage in which the passenger travels, so that he, and not the company's servants, has *de facto* the entire control of them whilst the carriage is moving. If a passenger packed up articles liable to ignition by friction, and by the shaking of the carriage they caught fire; if a passenger were to look on whilst his luggage was being taken away or rifled, when he might reasonably be expected to interfere; if he were to expose small articles of apparent great value in a conspicuous part of the carriage, and leave them there whilst he unreasonably absented himself, and they were in consequence purloined,—he would have no more just reason for complaint against the carrier, than if he had upon some false alarm thrown his property out of the carriage window. . . . In the present case we are of opinion that the jury were justified in inferring from the circumstance of the portmanteau being put with the passenger's assent, and of course for his convenience, into the carriage in which he was to travel, and so out of the immediate and active control of the company's servants, instead of in the ordinary luggage van, where it would have been under such control, that it was intended by both parties, and was an implied term of the contract of carriage, that in return for the convenience of having his luggage at hand, the passenger should, during the journey, take such reasonable care of his own property as might be expected from an ordinary prudent man, and should not by his negligence expose it to more than the ordinary risk of luggage carried in a passenger carriage, and that the finding of negligence in not using such reasonable care was sustained by the evidence."

If a railway company place luggage in the carriage with the passenger without having been requested so to do by the passenger, they will not be absolved from their liability as insurers of such luggage, and they have no right to compel the passenger to take it

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in the carriage with him at his own risk. (*Munster* v. *S. E. Ry. Co.*, 27 L. J. C. P. 308; 4 C. B. 676; *ante*, p. 397.)

"I am very far from saying that there may not be cases where a company is bound by its contract to convey goods safely, in which the conduct of the passenger in taking the goods into his own personal custody and charge may, to some extent, release the company from its obligation. But I think that the evidence must be strong to make out such a case; and it is not because an article is, by common consent, placed in a carriage along with a passenger that the company is released. If it were otherwise, it would follow that he would be able to take any luggage into a carriage along with him, without risk of losing it. I cannot therefore by inference come to a conclusion which would relieve the company from the obligation of keeping a general superintendence over articles placed in the carriages so as to prevent thieves from purloining them. I think, therefore, that a case must be proved, leading irresistibly to the conclusion that the passenger takes possession of his articles before we say that carriers are not liable for the loss of them." (*Per* Cockburn, C. J., in *Le Conteur* v. *L. & S. W. Ry. Co.*, 35 L. J. Q. B. 40.)

A sleeping-car company are liable for a loss of a passenger's property only on proof of negligence, and the mere fact of loss raises no presumption of negligence. (*Tracey* v. *Pullman Palace Car Co.*, 67 How. N. Y. Pr. 154.)

Where a passenger on a sleeping car, in which there were only curtains dividing the sections and separating them from the aisle, and no special watch was kept, lost personal effects which he had placed under his pillow, it was held that the car company were liable as for negligence, either in not furnishing apartments that could be securely closed, or in not supplying a watch. (*Woodruff Sleeping, &c. Coach Co.* v. *Diehl*, 84 Ind. 474; 43 Am. Rep. 108.)

305. The liability of a railway company as insurers of luggage commences from the moment when luggage

is placed under the control of one of their porters for the purpose of putting it in transit. (*Lovell* v. *L. C. & D. Ry. Co.*, 45 L. J. Q. B. 476; 34 L. T. 127; 24 W. R. 394.)

When a porter receives luggage at the entrance of a station for the purpose of labelling it and putting it in a train, he receives it as agent of the company, and the company is liable for its safety, although the passenger has not yet taken a ticket. (*Ibid.*)

The liability is the same when luggage is entrusted to a porter, a reasonable and proper time before the departure of the train, to place in the carriage with the passenger. (*Bunch* v. *G. W. Ry. Co.*, 13 App. Cas. 31; 57 L. J. Q. B. D. (H. L.) 361; *Leach* v. *S. E. Ry. Co.*, 34 L. T. 134.)

In *Lovell's Case* the passenger arrived at a station half an hour too early, and gave his luggage to a porter, who undertook to label it, and it was held that the luggage was thenceforward in the custody of the company as common carriers; and a notice by the company that "the company's servants are forbidden to take charge of any articles," and that "any article which a passenger wishes to leave at a station should be deposited in a cloak room," did not apply to such a case. To make the company liable it is not necessary that the intending passenger should have taken a ticket, or that the luggage should be labelled, but he must have given directions for it to be placed in transit. If an intending passenger, on arriving at a station, give his portmanteau to a porter, and say merely the name of the station he is going to (*e. g.*, "Hull"), and the porter answers "All right!" this would, it seems, attach to the company their liability as common carriers; but if the luggage is given to the porter and nothing said on either side, the company is not liable if, before directions are given to place the luggage in transit, it is lost. (*Agrell* v. *L. & N. W. Ry. Co.* 34, L. T. 134.) In that case the plaintiff, allowing his

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luggage to be taken from him by a porter, gave no instructions to the porter as to his destination; but the porter leaving, and no other porter coming forward, labelled his own luggage and then went off to the refreshment room, it was held that the plaintiff could not recover for the loss of his luggage. Pollock, B., said: "To hold that, where nothing is said on either side, because a porter takes a portmanteau from a cab, he becomes charged with it, so as to make his employers from that moment common carriers of it, and liable as such, although the owner of it has taken no ticket, declared no destination, promised no payment, neither given nor undertaken to give any lien, and may have come to the station only to deposit his luggage in the left luggage office whilst he is going round to customers, would seem to be not only making a contract which was never made, but imposing upon railway companies a burden beyond what has hitherto fallen to common carriers." (See also *Midland Ry. Co.* v. *Bromley*, 25 L. J. C. P. 94; and *Gilbart* v. *Dale*, 5 A. & E. 543.)

Lush, J., in delivering judgment in *Lovell's Case*, said: "I own that I think this is a very plain case. A passenger arrives at the station just before the time when she expects her train to start. She was, however, mistaken in the hour of the departure of the train. A porter comes up to the cab: 'Am I in time for the 2.50 train?' she asks. 'There is no such train,' he replies, 'but there is one at 3.13.' 'Can I get my ticket?' she inquires. 'Yes, in a few minutes,' is the answer, and then, while she goes to take her ticket, the porter takes the luggage away to label it. She therefore did not go for the purpose of leaving her luggage at the station, but intending to go by the train, and the luggage was delivered in the ordinary way to the servants of the company, not to be kept, but for the very purpose for which people go with luggage to railway stations, that is to say, to have it labelled and put in the train. Under these circumstances, I have no doubt the company are liable for its loss." And Blackburn, J., said: "I do not see how any railway company could carry on its business as a carrier of passengers if this is not to be considered as the beginning of the journey. If the porters had to leave the luggage brought to the

station by intending passengers loaded on the cab until the passenger should have got his ticket, the result would be such a crowding of vehicles and luggage that the business could hardly be carried on at the station. The railway company have said, as they were entitled to say, that luggage is not to be deposited at their risk, except in accordance with the conditions they impose, and on payment of a fee; but they do not refer to a case of this kind, and though luggage is not to be deposited, it must be kept by the company's servants while the passenger gets his ticket. . . . No company could carry on business if the porters were not to take the luggage out of the cabs and omnibuses till the owner has taken his ticket."

In *Bunch's Case* (*ante*, p. 411), the question actually decided in the House of Lords was that it is within the scope of the duty of a railway porter to carry hand-luggage to and from the cabs and other conveyances; but it met with a vigorous opposition and direct denial from Lord Bramwell.

The facts of that case were as follows:—The female plaintiff arrived at the Paddington Station of the defendants' railway at 4.20 P.M. on Christmas Eve with a bag and two other articles of luggage, in order to travel by the 5 P.M. train. A porter labelled the two articles and took all the luggage to the platform, the train not then being at the platform. The female plaintiff told the porter she wished the bag to be put into a carriage with her, and asked if it would be safe to leave it with him. He replied that it would be quite safe, and that he would take care of the luggage and put it into the train. She then went to meet her husband and get her ticket. Ten minutes after she had left the luggage she and her husband returned together to the platform and found that the two labelled articles had been put into the van of the train, but that the porter and the bag had disappeared. In an action in the county court against the railway company for the loss of the bag, the judge found that the time when the luggage was entrusted to the porter was a reasonable and proper time before the departure of the train,

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and that the porter was guilty of negligence in not being in readiness to put the bag into the carriage when the female plaintiff returned, and held the company liable.

It was held by Lord Halsbury, L. C., and Lords Watson, Herschell, and Macnaghten (Lord Bramwell dissenting), that there was evidence upon which the county court judge might reasonably find, first, that the bag was in the custody of the railway company for the purposes of present and not of future transit from the time when it was delivered to their porter until its disappearance; and secondly, that its loss was due to their negligence.

Lord Macnaghten said: "The services rendered by railway porters in receiving passengers' luggage, in taking it to the platform, and putting it into the train, are part of the ordinary facilities for passenger traffic which the public nowadays expects from railway companies, and which railway companies for the most part hold themselves out as ready and willing to afford. These services are covered by the fare which the passenger pays for his journey. They are offered in view of the contract which a person who presents himself with luggage at a railway station presumably either has made or is about to make. The contract, as the case may be, runs from, or relates back to, the commencement of the journey; and the journey must, I think, be taken to commence, as regards passengers' luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thenceforward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded under ordinary circumstances as the continuous operation to be performed under the contract. The contract is the ordinary contract of common carriers—a contract to carry securely."

306. If a passenger entrusts luggage to a porter for deposit and custody, as distinguished from the physical handing over for the purpose of transit, the railway company are not liable for the loss of such luggage. (*Bunch* v. *G. W. Ry. Co.*, 13 App. Cas. 31;

57 L. J. Q. B. (H. L.) 361; *Welch* v. *L. & N. W. Ry. Co.*, 34 W. R. 166.)

In the latter case the intending passenger, having missed his train, asked a porter to take charge of his luggage until the next train, and the porter having agreed to do so, the passenger left the station, and went to the billiard-room of an hotel, where he amused himself for an hour, returning to find his luggage missing. It was held that the porter was not the agent of the railway company to take charge of the luggage.

In *Hodkinson* v. *L. & N. W. Ry. Co.* (14 Q. B. D. 228), the plaintiff arrived at a station on the defendants' railway with her luggage contained in two boxes, which were taken from the luggage-van by a porter in the employ of the company. The porter asked the plaintiff if he should engage a cab for her. In reply, she said she would walk to her destination, and would leave her luggage at the station for a short time and send for it. The porter said, "All right; I'll put them on one side and take care of them," whereupon the plaintiff quitted the station, leaving her boxes in the custody of the porter. One of them was lost. It was held that the transaction amounted to a delivery of the luggage by the company to the plaintiff, and a re-delivery of it by her to the porter as her agent to take care of, and that consequently the company were not responsible for the loss. Lord Coleridge, in giving judgment, said: "Possibly the porter may be responsible for the loss; but the company clearly are not. *Patscheider* v. *G. W. Ry. Co.* (*post*, Art. 312) is clearly distinguishable; there the plaintiff had no opportunity of taking possession of her box."

307. A railway company when carrying passengers' luggage by land are entitled to the protection of the Carriers Act, 1830. (*Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 612; 40 L. J. Q. B. 300.)

See this Act set out in detail, *ante*, Chap. VI., p. 56, and Art. 167.

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308. Passengers' luggage is within section 7 of the Railway and Canal Traffic Act, 1854, and therefore a railway company are liable for loss of or injury to such luggage in the receiving, forwarding, or delivering thereof, occasioned by the neglect of such company or their servants, notwithstanding any notice or condition made and given by them in anywise limiting such liability. Any special contract or condition limiting the liability of the company in respect of the loss or injury of such luggage must be just and reasonable, and must be signed as required by that section in order to protect the company. (*Cohen* v. *S. E. Ry. Co.*, 2 Ex. D. 253; 46 L. J. Ex. 417.)

The facts in that case were these:—The plaintiff took a ticket at an office of the defendants in Boulogne for a through journey from Boulogne to London, by defendants' steamer to Folkestone, and thence by their railway to London. On the ticket was printed: "Each passenger is allowed 120 lbs. of luggage free of charge." "The company is in no case responsible for luggage of the passenger travelling by this through ticket of greater value than 6*l*." Plaintiff had a box with her, which was given in charge of defendants' servants, and in transferring it from the boat to the train it fell into the sea, owing to the negligence of defendants' servants. It was held by the Court of Appeal that, assuming the contract to be governed by English law, the condition on the ticket was void by reason of sect. 7 of the Railway and Canal Traffic Act, 1854, and sect. 16 of the Regulation of Railways Act, 1868. But see now note to Art. 173 and Art. 262.

The provisions of sect. 7 of the Railway and Canal Traffic Act, 1854, are set out *ante*, Art. 168. The section does not apply to goods received not in the capacity of carriers, as luggage left in the cloak-room after the completion of the railway

journey. (*Van Toll* v. *S. E. Ry. Co.*, 31 L. J. C. P. 241; *post*, Art. 313.)

The plaintiff was a season ticket holder on the defendants' line from B. to K. under a special contract, by which he undertook to abide by all the rules, regulations, and bye-laws of the defendants. One of such regulations was that the defendants would not be responsible for any passenger's luggage, unless fully and properly addressed with the name and destination of the owner. The plaintiff having with him a bag which was not so addressed saw it labelled for K. by one of the defendants' servants; he left the train at C., an intermediate station, and proceeded to K. by a subsequent train; on his arrival at K. his bag was missing. There was no evidence that the bag ever reached K. It was held that the regulation of the defendants was not a just and reasonable condition within sect. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and could not be enforced against the plaintiff:—*Quære*, whether the liability of the defendants in respect of the portion of the journey from C. to K. was that of common carriers or merely of gratuitous bailees. (*Cutler* v. *North London Ry. Co.*, 19 Q. B. D. 64; 56 L. T. 639.)

309. A railway company issuing a ticket for the conveyance of a passenger partly by land and partly by water are entitled to the benefit of the Carriers' Act, 1830 (*ante*, Chap. VI.), in respect of so much of the journey as is performed by land. (*Le Couteur* v. *L. & S. W. Ry. Co.*, L. R. 1 Q. B. 54; 35 L. J. Q. B. 40; *post*, p. 427.)

Where a railway company by through booking contract to carry any luggage from place to place partly by railway and partly by sea, a condition exempting the company from liability for any loss or

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damage which may arise during the carriage of such luggage by sea, from the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such luggage, be valid as part of the contract between the consignor of such luggage and the company in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. (The Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 14.)

"The legislature foresaw that injustice might be done to the company in respect of carriage by sea, as they are liable to accidents and losses by the dangers of the sea to which they are not liable by land, and if they were subject to a carrier-liability for the loss of luggage, which we assume they would be, it would be hard upon them; therefore the legislature has expressly provided for that by another clause: they can, by putting up a notice in the office, save and protect themselves against those extraordinary liabilities against which parties protect themselves by the ordinary bill of lading, that is, against losses by the dangers of the sea, &c. Therefore they can protect themselves from losses by dangers of the sea; but having so treated the liability by sea, the legislature says that they shall in other respects be subject to the same rule as when they carry by railway, and they cannot put unreasonable conditions upon a passenger which shall prevent him from recovering for the loss of his luggage." (*Per* Mellish, L. J., in *Cohen* v *S. E. Ry. Co.*, *ante*, p. 420.) See *ante*, Art. 173.

310. Where a railway company issues a through ticket by which the passenger is to be carried partly on their own line and partly on that of another company, their liability for the loss of such passenger's luggage is the same whether such loss occurs on their line or on that of the other company. (*Ante*, Art. 192.)

A railway company may, by special contract, exempt themselves from liability for loss of passengers' luggage occurring on a railway not belonging to or worked by themselves, the Railway and Canal Traffic Act, 1854 (s. 7), applying only to the traffic on a company's own line. (*Zunz* v. *S. E. Ry. Co.*, L. R. 4 Q. B. 539; 38 L. J. Q. B. 209.)

The facts in that case were these:—Z. took a through ticket from the Charing Cross station of the South Eastern Railway Company to Paris: the ticket was in three coupons—(1) from London to Dover; (2) from Dover to Calais; (3) from Calais to Paris. His luggage consisted of a portmanteau and a hat-box, which were registered through to Paris. Upon the ticket was printed the following condition:—"The company is not responsible for loss or detention of or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the company's trains or boats." The portmanteau was lost on the journey between Calais and Paris. In an action for the loss, it was held that the Railway and Canal Traffic Act, 1854, only applied to the traffic of the company on their own line, and therefore the company was at liberty to make the special contract contained in the ticket. (See *Baltimore, &c. Ry. Co.* v. *Campbell*, 38 Am. Rep. 617; and *Hadd* v. *U. S. &c. Co.*, 36 Am. Rep. 757.)

311. The railway company actually carrying the passenger and his luggage, so far as concerns their

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own line, and their own acts or omissions, are under the same obligations in reference to the safety of the passenger's luggage as they would have been if they had directly contracted with him. (*Hooper* v. *L. & N. W. Ry. Co.*, 50 L. J. C. P. D. 103.)

It appeared in that case that the Great Western Railway Company issue through tickets from Stourbridge on their line to Euston (*viâ* Birmingham) on the defendants' line. The journey from Stourbridge to Birmingham is by the Great Western Railway, and from Birmingham to Euston by the defendants' railway. The plaintiff travelled with one of these tickets, and his portmanteau was labelled and carried in the van of the Great Western Railway Company as far as Birmingham. At Birmingham he changed into the defendants' train, and his portmanteau was seen to be transferred into the van of the defendants' train; but at Euston it was not forthcoming, and was not recovered for three months afterwards, when its contents were found injured by the corruption of a brace of pheasants which the plaintiff had packed inside the portmanteau. The plaintiff having sued the defendant company for the delay and injury to his goods, it was held that the action was maintainable, for the defendants, having received the portmanteau to forward it, had committed a breach of duty in neglecting to do so, for which they were responsible, apart from any question of contract.

There was no evidence to show to what point the portmanteau was labelled, but it would seem it must have been labelled to Euston.

Lindley, J., in delivering judgment, said: "The plaintiff, no doubt, entered into an express contract with the Great Western Railway Company to carry him and his luggage to Euston; at Birmingham it was transferred into the van of the defendant company. Whether there would be an implied contract with the defendant company may be a question of difficulty, but, as a matter of fact, the portmanteau was lawfully in their charge, and

the fact of its not being forthcoming at Euston involves the default of some one of the defendants' servants. The defendant company, having received the portmanteau, are responsible for its loss, in accordance with the principle of *Foulkes* v. *Met. Ry. Co.* (*ante*, p. 186). I am unable to distinguish that case from the present." (See *ante*, Art. 193, and *Hawley* v. *Screven*, 35 Am. Rep. 126.)

Damages may be recovered against a railway company for unreasonable delay in forwarding a passenger's luggage. (*Hooper's Case*, *supra*.)

Where a railway company issued a through ticket which had on it the words, "This ticket is issued subject to the regulations and conditions stated in the company's time tables and bills"; and there were notices in the booking office, and also on the company's time tables, to this effect:—"The company does not hold itself responsible for any delay, detention, or other loss or injury whatsoever arising off its lines, or from the acts or default of other parties;" it was held that, upon the true construction of the condition, the luggage could not be said to be off the defendants' line until it was out of their custody, and in the custody of some person responsible for its loss. (*Kent* v. *Midland Ry. Co.*, 44 L. J. Q. B. 18.)

312. It is the duty of a railway company with regard to the luggage of a passenger which travels by the same train with him, but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it; and the liability of the company as carriers does not cease until a reasonable time has been allowed to the owner to claim it. (*Patscheider* v. *G. W. Ry. Co.*, 3 Ex. D. 153; *Firth* v. *N. E. Ry. Co.*, 36 W. R. 467.)

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Where a railway company employ porters at their stations to convey passengers' luggage from the train to the carriages or hired vehicles of the passengers, the liability of the company as carriers continues until the porters have discharged their duty. (*Richards* v. *L. B. & S. C. Ry. Co.*, 7 C. B. 839; 18 L. J. C. P. 251; *Butcher* v. *L. & S. W. Ry. Co.*, 24 L. J. C. P. 137.)

If such is the usual practice of the company, they are bound, upon a passenger's arrival at his destination, to place his luggage upon a cab, if he requires them to do so; and where such a practice prevails, the company's responsibility continues until the whole luggage has been delivered on to the cab.

In *Butcher's Case* (*supra*), a passenger on the arrival of the train got out of the railway carriage on to the platform with a part of his luggage, a small hand-bag, in his hand, which he gave to one of the company's porters to take to a cab, and the porter lost it, and the company were held liable as for a non-delivery of the bag; it not being found by the jury that the passenger, by taking the bag into his own possession on the platform, had accepted that as a performance of the company's contract to deliver, according to their usual practice, into a cab. Crowder, J., in delivering judgment, said: "There was evidence that the bag was given to the company to be conveyed and delivered, and it appeared that the usual mode of delivery adopted by them was, that when the luggage arrived at the terminus the company's porters, if required so to do, assisted in carrying it and placing it on cabs within the station; and that assistance, as it seems to me, was included in the company's contract, for no gratuity is given by the passengers to the porters for it, but it is included in the fare paid at the commencement of the journey, and it is, of course, an advantage to the company to have the luggage removed from the platform as speedily as possible. The only distinction between this case and *Richards* v. *L. B. & S. C. Ry. Co.* is, that the plaintiff here had

the bag in his hand on the platform after the arrival of the train; but as it is not found that he had elected to treat that as a complete delivery, and as he intended to have a cab and gave the bag to one of the company's porters to deliver to a cab, and, for anything that appears to the contrary, the porter did not deliver it, there was no delivery according to the contract. The case is much the same as if the plaintiff had got out of the carriage without the bag, and the porter had then handed it out."

In *Le Couteur* v. *L. & S. W. Ry. Co.* (L. R. 1 Q. B. 54; 35 L. J. Q. B. 40), the railway company were held responsible for the loss of a dressing case accompanying the person of the passenger and lost in the course of being put into a hackney carriage at the station. It should be remarked that in this case there was evidence of negligence on the part of the company's servants. (See judgment of Willes, J., in *Talley's Case*, L. R. 6 C. P. 44; 40 L. J. C. P. 9.)

"I think that if a traveller by a railway is dissatisfied with his mode of travelling, he may at any point stop and require that his luggage should be delivered up to him." (*Per* Martin, B., in *Scotthorn* v. *South Staffordshire Ry. Co.*, 22 L. J. Exch. 121; and see *Rumsey* v. *N. E. Ry. Co.*, 32 L. J. C. P. 244.)

The law in the United States is the same as stated in this Article. "If he does not so remove it, it is the company's duty to put it into their baggage room and keep it for him, being liable only as warehousemen. And the reasonable time within which the owner must remove it is directly upon its arrival, making reasonable allowance for delay caused by the crowded state of the station at that time; and the lateness of the hour makes no difference if the baggage be put upon the platform." (Redfield on Carriers, p. 61; *Chicago and Alton Ry. Co.* v. *Addizoat*, Ill. App. 632.)

When a passenger did not call for his trunk on arriving at the termination of his route, but left it overnight, without any arrangement, and it was destroyed before morning by the burning of the station, it was held the company were not responsible. (*Roth* v.

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Buffalo, &c., Ry. Co., 34 N. Y. 548.) Where a passenger's trunk was carried to its destination, and not being called for was placed overnight by the carrier in the ladies' waiting-room, it was held that the passenger could recover damages for articles stolen from it. (*Hardway* v. *St. Louis and Cairo Ry. Co.*, 17 Ill. App. 321.)

Articles found in a railway carriage belong to the finder in the absence of the rightful owner claiming them.

313. A railway company are only liable as ordinary warehousemen for luggage left at a "cloak-room" or "left luggage office." But a railway company are not bound to receive luggage into their warehouse upon the ordinary liability of warehousemen, and they usually further limit their liability by conditions printed on the ticket given to the depositor at the time. There is no rule or presumption of law that a person is bound by the conditions contained in a document thus delivered to him; but it is a question of fact in each case whether they have been brought to his notice. (*Henderson* v. *Stevenson*, L. R. 2 Sc. App. 470.)

If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions.

If he knew there was writing, and knew or believed that the writing contained conditions, he is bound by the conditions.

If he knew there was writing on the ticket, but did not know or believe that the ticket contained conditions, nevertheless he will be bound if the delivering of the ticket to him in such a manner that he can see that there was writing upon it is, in the opinion of

the jury, reasonable notice that the writing contained conditions. (*Parker* v. *S. E. Ry. Co.*, 2 C. P. D. 416; 46 L. J. C. P. (App.) 768; *Harris* v. *G. W. Ry. Co.*, 1 Q. B. D. 515; 45 L. J. Q. B. 729.)

If a cloak-room ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back, the person taking such ticket is bound by the conditions, whether he has made himself acquainted with them or not. (*Ibid.*)

In *Parker's Case* the plaintiff deposited his bag in the cloak-room of a station on the defendants' railway, and paid 2*d.* He received in return a printed ticket, bearing on the face of it a receipt for one article, and at the bottom the words "See back." At the back of the ticket were the words, "The company will not be responsible for any package exceeding the value of 10*l.*" The same conditions were also printed on a placard hung up in the cloak-room. In an action against the company for the loss of the bag while thus in their cloak-room, the plaintiff claimed more than 10*l.* for the value of the bag and its contents. The defendants resisted the claim on the ground that they were relieved from responsibility by the above conditions. The Court of Appeal held that the proper question for the jury was, whether the defendants had done what was reasonably sufficient to give the plaintiff notice of the condition; and that, if that question were answered in the affirmative, judgment should be given for the defendants. Mellish, L. J., said: "The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them. I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to

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inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance, stupidity, or carelessness; but if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability."

In *Henderson* v. *Stevenson* (*supra*), a passenger paying for and taking a ticket for an ordinary journey for himself and luggage was held not to be bound by a condition that the company were not liable for losses of any kind, which was printed on the back of the ticket, without any reference on the face, and which he did not in fact read, and which was not otherwise brought to his notice.

A passenger, on his arrival at a railway station in the evening, left a large and heavy trunk with the porter at the left-luggage office, and in return for it got a receipt, bearing on the face, "The company only receive the within-mentioned articles upon the conditions expressed on the back of this ticket." The third condition upon the back was that when any "article deposited in the company's cloak-room or warehouse" exceeding the value of 5*l.* was lost, the company would not be liable, unless at the time when the package was delivered its true value was declared, and a corresponding additional charge paid. A notice to the same effect was likewise posted inside the office. No verbal reference was made to the terms of the conditions. Owing to press of traffic the trunk was left by the company's officials upon the station platform, immediately outside the left-luggage office, and had disappeared next day. The value exceeded 5*l.* and had not been declared. The Court of Session held that the railway company were liable for the loss, as they were not in a position to enforce the condition above specified, the article not having been "deposited in the company's cloak-room or warehouse." (*Hamdon* v. *Caledonian Ry. Co.*, 7 Sess. Ca. (4th Ser.) 966.)

The facts in the English case of *Harris* v. *G. W. Ry. Co.* (*ante*, p. 429), differ from *Handon's Case*. In the English case, the goods were deposited in a vestibule in such a manner as to satisfy the condition of being kept with reasonable and proper care; in *Handon's Case*, it was proved that the trunk was taken by the railway company out of their cloak-room or warehouse, and left on the platform of the station outside the luggage office, and that without the consent of the owner.

In *Van Toll* v. *S. E. Ry. Co.* (31 L. J. C. P. 241), the plaintiff, after travelling by the line of a railway company, deposited her bag, containing wearing-apparel and jewellery of the value of 20*l.*, at the cloak-room of the railway station. On so depositing the bag the plaintiff paid the charge of 2*d.*, and received a ticket, on the back of which was printed: "The company will not be responsible for articles left by passengers at the station, unless the same be duly registered, for which a charge of 2*d.* per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket or satisfactory evidence of the ownership being produced. A charge of 1*d.* per diem, in addition, will be made on all articles left in the cloak room for a longer period than twenty-four hours. The company will not be responsible for any package exceeding the value of 10*l.*" It did not appear whether the plaintiff read this notice on the ticket, but she brought the ticket to the cloak room when she returned there for the bag. It was held that the Railway and Canal Traffic Act, 1854, s. 7, did not apply, as the company did not receive the bag in the capacity of carriers. It was also held that the inference from the above facts was that the plaintiff assented to the terms of the notice on the ticket, and that therefore, as the value of the articles exceeded 10*l.*, the company were not liable for their loss, although occasioned by the company's negligence. Willes, J., in delivering judgment, said: "With respect to the Railway and Canal Traffic Act, 1854, that deals with the receipt, forwarding, and delivery by carriers, not with such accommodation as was made the question in this case. The accommodation given at the cloak-

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room of a railway station to persons who wish to leave parcels and other things there, and have them again when they call for them, is not a thing at all essential, or necessarily connected with the business of a carrier; and I think the argument that the company could be compelled to give such a convenience to persons using the railway was not well founded."

Where there is no notice on the ticket as to the hours during which the cloak-room is open, the railway company are bound to deliver the articles on a reasonable request, and within reasonable time. (*Stallard* v. *G. W. Ry. Co.*, 31 L. J. Q. B. 137; 2 B. & S. 419.)

If the owner should lose his ticket of receipt, he may still claim his goods by giving proof of ownership, and the railway company, under such circumstances, will be obliged to return them, notwithstanding what may be printed on the ticket.

Part V.

CARRIERS OF PASSENGERS BY RAILWAY.

CHAPTER XVIII.

THE OBLIGATIONS OF A RAILWAY COMPANY TO PROVIDE TRAINS AND ACCOMMODATION FOR PASSENGERS.

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I.—By Statute.

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314. Every railway company shall, according to their powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic (which, by interpretation clause, includes passengers and their luggage) upon and from the railway (which, by interpretation clause, includes station) belonging to or worked by such company. (Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 52.)

"Railway companies are bound by that Act to provide reasonable facilities for carrying passengers; but they are not common carriers of passengers." (*Per* Lindley, L. J., in *Dickson* v. *G. N. Ry. Co.*, *ante*, pp. 120, 121.)

Under this statute, very few applications relating to passenger traffic were made to the Court of Common Pleas between 1854 and 1873, when the jurisdiction was transferred to the Railway Commissioners. The cases which were decided show that public convenience is probably the standard by which the absolute accommodation to be granted by railway companies should be determined

when the question is unincumbered by any consideration of undue preference. See *ante*, Art. 231.

The cases which have been decided under this section as to passenger traffic relate either to (1) fares and tickets; (2) train accommodation; or (3) station accommodation.

(1) *Passenger Fares and Tickets.*

It was doubted in the earlier cases in the Court of Common Pleas whether the regulation of passenger fares was within the provisions of the Act. (*Hozier* v. *Caledonian Ry. Co.*, 17 Sess. Ca. 302.)

The judgments of Williams and Willes, JJ., in the case of *Caterham Ry. Co.* v. *L. B. and S. E. Ry. Cos.* (1 C. B. (N. S.) 410; 26 L. J. C. P. 16), and the decision in *Jones* v. *Eastern Counties Ry. Co.* (3 C. B. (N. S.) 718), seemed to decide that it was only in cases of undue preference or prejudice thereby. In *Innes* v. *L. B. & S. C. Ry. Co. and L. & S. W. Ry. Co.* (2 Ry. & Ca. Tr. Ca. 155), the Railway Commissioners held that to justify their interference with fares, it was not sufficient merely that a distinction in the fares of different lines, even of the same company, existed, unless it created an undue preference or prejudice. And in *Brown* v. *G. W. Ry.* (7 Q. B. D. 182; 50 L. J. Q. B. (App.) 483; *ante*, Art. 235), Bramwell, L. J., said that the words in sect. 2 of the Railway and Canal Traffic Act, 1854, "every railway company shall afford all due and reasonable facilities for the receiving and forwarding of traffic," had no reference to the prices a railway company charged for conveyance.

In *S. E. Ry. Co.* v. *Railway Commissioners and Corporation of Hastings* (6 Q. B. D. 586; 50 L. J. Q. B. D. 201; *ante*, Art. 236), the Court of Appeal held that the Commissioners had power to make an order to increase the accommodation for the delivery of tickets at a railway station.

See *ante*, Chap. XIII. as to passenger fares.

(2) *Train Accommodation.*

The Railway Commissioners will order additional trains to be run if a strong or clear case of its being reasonable to do so is made out. (*Innes* v. *L. B. & S. C. Ry. Co. and L. & S. W. Ry. Co.*, 2 Ry. & Ca. Tr. Ca. 155.)

See *ante*, Art. 237.

(3) *Passenger Station Accommodation.*

The Railway Commissioners have, under sect. 2 of the Railway and Canal Traffic Act, 1854, jurisdiction to hear and determine a complaint against a railway company of not, according to their powers, affording all reasonable facilities for receiving, forwarding, and delivering passengers at and from any of their stations which are used by the company for such passengers. (*S. E. Ry. Co.* v. *Railway Commissioners and Corporation of Hastings*, 6 Q. B. D. 586; 50 L. J. Q. B. D. 201; *ante*, p. 265.)

As to what facilities at a station the Commissioners may order, see Art. 236.

As to the admission of public vehicles into a railway station, see Art. 278.

"It may well be that as to passenger traffic facilities under sect. 2 of the Railway and Canal Traffic Act, 1854, all that is required in the way of facilities is that proper carriages shall be provided, and trains despatched at convenient times, and at reasonable rates of speed, because, as to all other matters, the passenger can help himself." (*Per* Mr. Commissioner Miller in *Distington Iron Co.* v. *L. & N. W. Ry. Co. and others*, 6 Ry. & Ca. Tr. Ca.)

315. Every railway company having or working a railway which forms part of a continuous line of railway communication, or which have their terminus or station near (*i.e.* by interpretation clause of the Act, within one mile) the terminus or station of another railway company, shall afford all due and reasonable facilities

for receiving and forwarding all the passenger traffic arriving by one of such railways by the other, without any unreasonable delay . . . and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways (which include stations) of the several companies, be at all times afforded to the public in that behalf. (Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 2.)

The cases which have been decided under this section are set out in Chap. XIV., Arts. 243—252. As to through passenger booking, see Art. 249.

A passenger desiring to use an ordinary train for part of a journey, for which he has taken a through ticket entitling him to travel by express, is not entitled to any deduction from the through fare on account of the difference of the service. (*City of Dublin Steam Packet Co.* v. *L. & N. W. Ry. Co.*, 3 Ry. & Ca. Tr. Ca. 10.)

In cases where, having regard to the clauses in the special Acts, an exchange of passenger traffic between two companies free to exchange at any junction between their lines, ought to be made at the junction which is most convenient for the public, the fact that one route is shorter than another, or one, by reason of curves or gradients, better adapted for fast traffic, or that at one junction there is a joint station, while at another there are two separate stations, are all matters affecting the public convenience as to the place of interchange. (*G. N. of Scotland Ry. Co.* v. *Highland Ry. Co.*, 5 Ry. & Ca. Tr. Ca. 103.)

316. The facilities to be afforded under sect. 2 of the Railway and Canal Traffic Act, 1854, include the due and reasonable receiving, forwarding, and delivering by every railway company, at the request of

any other such company or of any person interested in through passenger traffic, of such traffic to and from the railway of any other such company at through fares. (The Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, s. 25.)

This section is set out in full in Art. 253, and in that and the following Articles (254—258) the subject of through passenger fares is dealt with.

317. No railway company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic (which by interpretation clause includes passengers and their luggage) in any respect whatsoever, nor shall any such company subject any particular person or company to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (17 & 18 Vict. c. 31, s. 2.)

See Chapter XV., *ante*, p. 332.

318. For the purpose of moving by railway on any occasion of the public service—

Any of the officers or men in or belonging to her Majesty's navy or royal naval volunteers, and any other officers or men under the command or government of the Admiralty; and

Any of the officers or soldiers in her Majesty's regular reserve or auxiliary forces (within the meaning of the Army Act, 1881, or any Act amending the same) for the time being subject to military law; and

Any officers or men of any police force;

(All and any of which officers, soldiers and men are in this Act called "the forces");

Every railway company shall, on the production of a route duly signed for the conveyance of the forces, provide conveyance for them and their personal luggage, and also for any public baggage, stores, arms, ammunition, and other necessaries and things, whether actually accompanying the forces or not, at all usual times at which passengers are conveyed by the company, on such terms as may be agreed on between the railway company and the Secretary of State, Admiralty, or police authority, and subject to or in default of agreement on the following terms:—

The passenger carriages provided shall be of such classes in use on the railway, and in such proportions, as specified in the route. All carriages being protected from the weather and having proper accommodation:

The fares shall not exceed the following proportions of the fares charged to private passengers for the single journey by ordinary train in the respective classes of carriages specified in the route, that is to say, if the number of persons conveyed is less than one hundred and fifty, three-fourths; and if the number is one hundred and fifty or more, then for the first one hundred and fifty, three-fourths, as for four officers and one hundred and forty-six soldiers or other persons; and for the numbers in excess of the said one hundred and fifty, one half:

This section shall apply to such wives, widows, and children of members of the forces as are entitled to

be conveyed at the public expense, in like manner as if they were part of the forces; but children less than three years old shall be conveyed free of charge, and the fare for a child more than three and less than twelve years old shall be half the fare payable under this section for an adult:

One hundredweight of personal luggage shall be conveyed by the railway company free of charge for every one conveyed under this section who is required by the route to be conveyed first-class, and half a hundredweight for every other person conveyed; and any excess of weight shall be conveyed at not more than two-thirds of the rate charged to the public for excess baggage:

The said public baggage, stores, arms, ammunition, necessaries, and things shall be carried at rates not exceeding twopence per ton per mile, the assistance of the forces to be given when available in loading and unloading the same:

Provided that the company shall not be bound under this section to carry gunpowder or other explosive or combustible matters, except on terms agreed upon between the company and the Admiralty, or one of Her Majesty's principal Secretaries of State, as the case may be.

For the purposes of this section a route duly signed shall be deemed to be a route issued and signed in accordance with section 103 of the Army Act, 1881, or an order signed by a person authorized in this behalf by one of Her Majesty's principal Secretaries of State, or a route or order signed by a person autho-

rized in this behalf by the Admiralty, or, as regards the police, a route or order signed by a person authorized in this behalf by the police authority.

Fares payable under this section shall be exempt from passenger duty. Where a company has by refusal or neglect to comply with an order of the Board of Trade or the Railway Commissioners lost the benefit of this Act, that company shall, until its compliance is certified as in this Act provided, be exempt from the provisions of this section, but shall be bound to convey all such persons and things as mentioned in this section on the same terms as if this Act had not been passed. (46 & 47 Vict. c. 34, s. 6. See *ante*, Art. 295.)

319. (1.) If at any time the Board of Trade have reason to believe—

(a) That upon any railway or part of a railway, or upon any line or system of railways, whether belonging to one company or to two or more companies, which forms a continuous means of communication, a due and sufficient proportion of the accommodation provided by such company or companies is not provided for passengers at fares not exceeding the rate of one penny a mile; or

(b) That upon any railway carrying passengers proper and sufficient workmen's trains are not provided for workmen going to and returning from their work at such fares and at such times between six o'clock in the evening and eight o'clock in the morning, as appear to the Board of Trade to be reasonable;

then and in either case the Board of Trade may make such inquiry as they think necessary, or may, if required by the company or any of the companies concerned, refer the matter for the decision of the Railway Commissioners, who shall have the same power therein as if it had been referred to their decision in pursuance of the Regulation of Railways Act, 1873.

(2.) If on an inquiry under this Act it is proved to the satisfaction of the Board of Trade or the Railway Commissioners, as the case may be, that such proper and sufficient accommodation, or workmen's trains, as aforesaid, are not provided by any railway company, the Board of Trade or the Railway Commissioners, as the case may be, may order the company to provide such accommodation or workmen's trains at such fares as, having regard to the circumstances, may appear to the said Board or the Commissioners to be reasonable.

(3.) If any company on whom an order is made under this Act to provide proper and sufficient accommodation or workmen's trains refuse, or, at any time after the expiration of one month from the making thereof, neglect to comply with the order, the Board of Trade shall issue a certificate to that effect to the Commissioners of Inland Revenue, and after the date of such certificate the company shall lose the benefit of this Act and be liable to pay in respect of the fares received after such date the same amount of passenger duty as would be payable if the passenger duty had not been varied as provided by this Act, and shall continue so liable in respect of all fares received up to the date at which the Board of Trade certify that the

company has complied with the said order. Where two or more companies are concerned, the certificate shall state whether both or all, or one or more, and which of them is in default.

(4.) A company on whom an order is made by the Board of Trade under this section may, within six months after the making of the order, appeal to the Railway Commissioners, who shall have the same power in the matter as if it had been originally referred to their decision.

(5.) The Board of Trade or the Railway Commissioners, as the case may be, may rescind or vary any order made by them under this section. (46 & 47 Vict. c. 34, s. 3.)

Under sects. 2, 4, and 5 of that Act, all fares of 1*d.* a mile are exempt from passenger duty, and the limitations which under the previous Acts were attached to the exemption of cheap trains are consequently repealed.

Under sect. 2, fares exceeding 1*d.* a mile are rendered liable to a duty of 2 per cent. in lieu of the existing duty of 5 per cent. within areas containing not less than 100,000 inhabitants, and certified by the Board of Trade as urban districts. The Board of Trade have certified certain districts.

To these reductions of taxation is attached the condition (sect. 3) that if a due proportion of the accommodation afforded by each company is not afforded to passengers at fares not exceeding 1*d.* a mile, or if proper workmen's trains are not provided between 6 in the evening and 8 in the morning at such fares and hours as the Board of Trade think reasonable, inquiry may be made, and if the company prove to be in default, the above-mentioned reductions of taxation shall be withdrawn from that company.

The above reductions of taxation were made by Parliament in the belief and trust, justified in most cases by the growth of third

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class traffic, and by the increase of workmen's trains, that the true policy of the companies in the matter of accommodation to the poorer classes of society is consistent with the interests of those classes, and that the future would see a continual increase in the accommodation given to those classes. (See Board of Trade Circular, 12th October, 1883.)

The Railway Commissioners have decided one case as to providing proper and sufficient workmen's trains within the meaning of the Act. (See *North London Ry. Co. and London & North Western Ry. Co.*, 6 Ry. & Ca. Tr. Ca.)

Since the year 1864, a clause has been inserted in the special Acts of most of the railway companies having a terminus in London, compelling such companies to run cheap trains for *bonâ fide* artizans, mechanics, and labourers who have daily business in London. The Acts protect the railway company in case of accidents happening to such passengers, by their liability being limited to 100*l.* The amount of compensation to be received by such passengers, if injured, is to be determined by an arbitrator appointed by the Board of Trade, and not otherwise.

320. Any railway company that knowingly lets for hire or otherwise provides any special train for the purpose of conveying parties to or to be present at any prize fight, or who shall stop any ordinary train to convenience or accommodate any parties attending a prize fight at any place not an ordinary station on their line, are liable to a penalty, to be recovered in a summary way before two justices of the county in which such prize fight is held or attempted to be held, of such sum not exceeding 500*l.*, and not less than 200*l.*, as such justices determine. (31 & 32 Vict. c. 119, s. 21.)

One-half of the penalty is to be paid to the party at whose suit

the summons is issued, and the other half to be paid to the treasurer of the county in which the prize fight is held or attempted to be held, in aid of the county rate. (*Ibid.*) Service of the summons on the secretary of the company at his office ten days before the hearing is sufficient to give the justices jurisdiction to hear and determine the case.

321. Every railway company must provide, and maintain in good working order, in every train worked by it which carries passengers, and travels more than twenty miles without stopping, such efficient means of communication between the passengers and the servants of the company in charge of the train as the Board of Trade may approve.

If a railway company makes default in complying with this requirement it is liable to a penalty not exceeding 10*l.* for each case of default.

Any passenger who makes use of the said means of communication without reasonable and sufficient cause is liable for each offence to a penalty not exceeding 5*l.* (31 & 32 Vict. c. 119, s. 22.)

A train is or is not within this section according to the actual instructions as to stopping given to the company's servants in charge of the train. And, therefore, where the primary cause of an accident to a train, not provided with such communication, was the breaking of a wheel-tire (without any negligence on the part of the company or their servants), and several minutes elapsed between the first shock felt by the passengers and the actual disaster resulting in the mischief complained of, it was properly left to the jury to say—First, what was the effect of the company's time-tables, taken together with the special instructions given to their servants with regard to the train in question; and, second, whether the absence of the statutory precaution was conducive to

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the accident which occurred. (*Blamires* v. *Lanc. & York. Ry. Co.*, L. R. 8 Ex. 283; 42 L. J. Ex. 182.) In that case Blackburn, J., said: "I wish to leave altogether open what may be the duty of railway companies with regard to trains running for shorter distances than twenty miles."

322. All railway companies, except the Metropolitan Railway Company, are bound, in every passenger train where there are more carriages than one of each class, to provide smoking compartments for each class of passengers, unless exempted by the Board of Trade. (31 & 32 Vict. c. 119, s. 20.)

Any railway company (including in such term any person or persons who is or are proprietor or proprietors of a railway or of carriages used for the conveyance of passengers upon a railway) may make application to the Commissioners of Inland Revenue for the grant of a licence or licences for the dealing in and sale of tobacco and snuff by any means, personal, mechanical, or otherwise in any railway carriage of which such company are the proprietors.

Such application shall be made upon a form to be provided by the Commissioners, and containing such particulars as they may prescribe.

The licence shall be granted by the Commissioners upon payment in respect of each carriage of the excise duty of five shillings and threepence, and shall expire on the fifth day of July after the date thereof. All the enactments relating to the dealing in and sale of tobacco and snuff and excise licences shall be applicable to such carriages and licences, and every carriage in respect of which a licence is granted shall be deemed to be "premises" of a dealer in and seller of tobacco within the meaning of the enactments relating to the dealing in and sale of tobacco or snuff.

If any railway company shall deal in or sell tobacco or snuff, or suffer tobacco or snuff to be dealt in or sold in any railway

carriage, without having in force a licence authorizing the company so to do, such company shall incur a fine of fifty pounds; and if in any proceedings for the recovery of such fine any question shall arise as to the proprietorship of any railway carriage, the proof of proprietorship shall lie upon the defendant. (47 & 48 Vict. c. 62, s. 12.)

See byelaw as to smoking, *post*, p. 479.

II.—Generally.

323. It is the duty of a carrier of passengers [who holds himself out to the public generally without exception to carry passengers who offer themselves to be carried] to receive all persons as passengers who offer themselves in a fit and proper state to be carried, provided the carrier has sufficient room in his conveyance, and the passengers are ready and willing to pay the proper and reasonable fare, and to conform to reasonable regulations as to carriage. (*Lovett* v. *Hobbs*, 2 Show. 127.)

Part of the above article is placed in a bracket because it has never been expressly decided in England, and has always been doubted (independently of the obligation of railway companies under the Railway and Canal Traffic Act, 1854, *ante*, Art. 314), whether carriers of passengers are bound to receive and carry all persons who offer themselves to be carried, in the same manner as common carriers of goods. (See *Bretherton* v. *Wood*, 3 Bro. & B. 54; *Benett* v. *P. & O. Steamboat Co.*, 18 L. J. C. P. 85.) In America it has been decided that passenger carriers are bound to carry passengers whenever they offer themselves and are ready to pay for their transportation. (See Story on Bailments, 1870, s. 591; Angell on Carriers, s. 525.) In *Jencks* v. *Coleman*, 2

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Sumners R. 221, Story, J., said: "There is no doubt this steamboat is a common carrier of passengers for hire, and therefore the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodation, and there was no reasonable objection to the character or conduct of the plaintiff."

It is submitted that in England a carrier of passengers is not a common carrier according to the custom of the realm and the common law. In support of this view, the very material difference between the liability of a carrier of goods and a carrier of passengers must be remembered; also the fact that at the times when the custom and the common law had their origin there existed no carrying of passengers. The first case in which the liability of carriers of passengers came into question was tried before Lord Kenyon in 1791. That related to a mail coach.

The cases of *Aston* v. *Heaven*, 2 Esp. 533; *Christie* v. *Griggs*, 2 Camp. 79; *Sharpe* v. *Grey*, 9 Bing. 457, are authorities to show that a person who conveys passengers *only* is not a common carrier.

The question whether carriers of passengers are common carriers is not now of practical importance, as sect. 2 of the Railway and Canal Traffic Act, 1854, makes it obligatory on railway companies, who have constituted themselves carriers of passengers, to run trains for the convenience of the public, if necessary. (See *ante*, Art. 314.)

It would seem that a common carrier for the carriage of passengers may, under certain circumstances, be indicted for refusing to carry one. (*Per* Patteson, J., in *Pozzi* v. *Shipton*, 1 P. & D. 12.)

324. A passenger is entitled to accommodation according to his contract. In the absence of express stipulation, a passenger is entitled to all reasonable and usual accommodation. (Story on Bailm.)

The Railway and Canal Traffic Act, 1854, s. 2, com-

pels a railway company to grant all due and reasonable facilities to passenger traffic. (*Ante*, Art. 314.)

Upon an unconditional contract to carry, it seems that a railway company are bound to find room for all. (*Hawcroft* v. *Gt. N. Ry.*, 21 L. J. Q. B. 178.) A railway company are bound to find room in every train for every person holding a ticket who presents himself at a starting station, but at intermediate stations they are allowed to issue tickets conditionally on there being room (see bye-law on the subject, *post*, p. 479).

If there is no room in the first train, the railway company are bound to send on the passenger by the next one. (See Art. 156.)

In *Hawcroft* v. *Gt. N. Ry. Co.* (*supra*), the plaintiff, intending to go to London and back by the defendants' railway, paid for and received from them the following ticket at Barnsley and went to London with it:—"B. to L. and back. Excursion ticket. To return by the trains advertised for that purpose on any day not beyond 14 days after date hereof." A morning and evening return excursion trains were advertised on the Saturdays, but they were not advertised to go to B. On a Saturday morning within the fourteen days, the plaintiff presented himself at the L. station in time for the morning return train. It became full, so that the plaintiff could not find room in it, and it would have been dangerous to have added other carriages to it. The company refused to let him go by an ordinary train, but kept him waiting until the evening return train, in which he found a place. That train took him only to D., where he arrived on Sunday morning. No trains ran from D. to B. on Sundays. The line from D. to B. belonged, not to the defendants, but to another company. The plaintiff hired a carriage to take him from D. to B., and brought an action to recover the expense from the defendants. It was held that by the terms of the excursion ticket and advertisements, the defendants contracted to carry the plaintiff back to B. on any day within the fourteen days that he might choose, and by any of the advertised trains that he might select; that not sending him by

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the morning train was a breach of contract, and that taking him only to D., instead of to B., without previous notice, was a second breach. Patteson, J., said: "If it had been brought to the knowledge of the plaintiff that if, of his own pleasure, he chose to stay for the evening train on the Saturday, he would have to wait at Doncaster the whole of Sunday, I cannot say that he would have had any right to damages. But it was not the plaintiff who chose to wait for the evening train, the company refused to take him by the morning train. In that, indeed, they were right, because the train was too full to allow him to be carried with safety. But if they put him off, and kept him until the evening, they should have made some special provision for carrying him on to Barnsley at once. I do not think that they had any right to keep him in London until the 9 h. 45 m. evening train. They should have sent another train. The case finds that they might have done so without danger."

The evil of overcrowding of railway carriages is one which there is no efficient procedure at present to prevent. The duty to receive passengers upon a tender of the fare, if there be sufficient room, involves that he shall not be overcrowded after he has paid his fare and taken his seat, and be thereby, as it were, expelled. (Cases in Angell, p. 470.) The railway companies have a bye-law which enacts that "any passenger persisting in entering a carriage or compartment of a carriage containing the full number of persons which it is constructed to convey, when any such person objects to his so entering the carriage or compartment," is subjected to a penalty; and by another bye-law, if a passenger, in consequence of there being no room in the train, or in the class of carriage for which he has taken a ticket, "travel in a class of carriage inferior to that for which he has a ticket, the fare or difference of fare shall be immediately returned on application to any passenger for whom there is not room as aforesaid, if the application be made before the departure of the train." (See these bye-laws, *post*, pp. 479, 481.)

In the case of *Jackson* v. *Met. Ry. Co.* (3 App. Cas. 193; 47 L. J. Q. B. (H. L.) 303), the plaintiff was a passenger in a railway carriage, when three persons got in beyond the number it

was constructed to carry, and remained standing in it until the train arrived at the next station, where, the platform being crowded, a rush was made for places, and, notwithstanding that there were these three extra persons in the carriage, the door was opened, and others tried to get in. The plaintiff rose from his seat and raised his hand to prevent them, when the train moved on, and the plaintiff fell forward with his hand on the hinge of the door. At that moment a porter pushed away the people who were trying to get in, and slammed the door, crushing the plaintiff's thumb. There was no evidence that a complaint of the overcrowding had been made to the railway officials, or that they knew of the fact. It was held by the House of Lords that there was no evidence of negligence proper to be left to a jury.

Bramwell, L. J., said: "No doubt by doubling the number of carriages, by letting passengers on to the platform one by one, by stopping at each station five minutes, by having a porter for every carriage or two, or perhaps ten, it would be possible to prevent persons getting into carriages where there was no seat for them. But with the precautions to ensure this, to make it absolutely certain, the traffic must stop. It would not pay the defendants to carry it on, nor be worth while for the public to make use of it. All that the public has a right to expect, all that the defendants undertake for, is that which is consistent with practically working the railway. Does the intrusion of three men in a carriage already full afford any evidence that there is any failure of what is practically possible in the management of the railway? I say no. I do not believe that anyone in his conscience would say that he would censure or reprimand either the directors or manager of the company, or the porters at a particular station, on its being proved that three persons at that station had got into a carriage already full. How is it to be avoided? How can the porters see that a carriage into which the people are getting is full?"

In Chitty and Temple on Carriers, p. 252, it is said that "a passenger is entitled to sufficient room and accommodation; and

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if more than the legal number are taken on a coach, he may refuse to occupy his seat, and may recover all expenses incurred in performing his journey by other conveyances."

325. The contract with a railway company is made by payment of money by the passenger in exchange for a ticket which operates as a receipt for the money, and specifies to some extent the particulars of the contract undertaken.

The contract into which a railway company enters with a passenger by giving him a ticket between two places is the same whether the journey be entirely over their own line or partly over the line of another company. (*G. W. Ry. Co.* v. *Blake*, 31 L. J. Ex. 346; *Thomas* v. *Rhymney Ry. Co.*, L. R., 6 Q. B. 266; 39 L. J. Q. B. 141; *post*, p. 486.)

A railway company which grants a ticket to an intended passenger impliedly undertakes to provide a train to forward him within reasonable time, and with reasonable speed.

When a passenger ticket is expressed to be "issued subject to regulations in the time-table," such regulation or conditions become part of the contract between the passenger and the company. (*McCartan* v. *N. E. Ry. Co.*, 54 L. J. Q. B. 441; *Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. (C. A.) 286; 45 L. J. C. P. D. (App.) 521; *Woodgate* v. *G. W. Ry. Co.*, 51 L. T. 826; 33 W. R. 428.)

It was decided, in the case of *Hurst* v. *G. W. Ry. Co.* (34 L. J. C. P. 265), that the mere granting of a ticket does not impose on a railway company the obligation to have a train ready to start at

a definite time. In that case the plaintiff was non-suited because he did not put in evidence the time-tables of the company. The facts were these:—

The plaintiff took a ticket from the defendants from C. to N.; the plaintiff, after waiting a long time, was told by a porter that the train was late in consequence of an accident, and the train eventually arrived an hour and a half late. The consequence was that the plaintiff was too late for the train at G., which would have carried him on to N. The time-table was not put in, but only some correspondence, in which the defendants repudiated their liability on the ground that, by the time-tables, they gave notice they would not be liable for the trains not keeping time. It was held that there was no evidence of a cause of action.

Erle, C. J., said: "No special contract arises from mere talk with officials—casual talk with an official, whose duty may merely be to open or shut the doors of the carriages; and indeed all that the porter says is that the train is late."

326. The publication of time-tables amounts to a promise by the railway company that the trains will run as therein advertised, and subject to the terms and conditions therein stated, for the conveyance of any person who regularly applies for a ticket and tenders the proper fare.

The publication of time-tables amounts to a contract by the publishing company that not only their own trains but the trains of other companies will run in conformity therewith. (*Denton* v. *G. N. Ry. Co.*, 25 L. J. Q. B. 129; *Hurst* v. *G. W. Ry. Co.*, 34 L. J. C. P. 264; 19 C. B. (N. S.) 310.)

In *Denton's Case*, in the printed and published time-tables of the defendants for the month of March, 1855, which were kept in circulation throughout the month, a passenger train was advertised to

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leave the defendants' station in London at 5 p.m., and to arrive at Peterborough at about 7.20 the same evening, and about the same time to proceed on to Hull, arriving at Hull about midnight. The time-tables contained the following notice:—"The companies make every exertion that the trains shall be punctual, but their arrival or departure at the time stated will not be guaranteed, nor will the companies hold themselves responsible for delay or any consequences arising therefrom." The defendants' line of railway extended as far as A. beyond Peterborough, but they had running powers over the L. & Y. Railway to M., where the N. E. Railway Company's line joined; and under the Railway Clearing Act, 1850, the defendants had for some time been issuing tickets with which passengers were conveyed, as advertised, from Peterborough to Hull. But, on the 1st of March, the N. E. Railway Company discontinued to run their train, having given previous notice to the defendants, but not until after their time-tables had been printed and published, and in consequence the defendants were no longer able to issue tickets by the train as advertised. Relying on the time-tables, the plaintiff left London on the 25th of March for Peterborough, on business, intending to go on to Hull the same evening. He accordingly applied to the clerk at the Peterborough station in proper time for a ticket by the train advertised to leave for Hull about 7.20 p.m., and offered to pay the fare; the clerk, however, refused to grant the ticket, stating as a reason the N. E. Railway Company having discontinued their train as before. The plaintiff then took a ticket and proceeded as far as the M. Junction, where he was obliged to remain that night, and, it was admitted, had in consequence sustained a pecuniary loss. It was held by Campbell, C. J., Wightman, J., and Crompton, J., first, that for the reasons stated in this article, the defendants were liable to the plaintiff for a breach of contract. Secondly, that by continuing the publication of the time-tables throughout the month of March, the defendants were also liable for the loss to the plaintiff, caused by a false representation knowingly made. And, *per* Crompton, J., that an action would lie against the defendants for a breach of duty

in refusing to take the plaintiff to Hull as advertised. Lord Campbell, C. J., said, "It seems to me that railways would not be that benefit and accommodation to the public which we find them to be, if the representations made in their time-tables are to be treated as so much waste paper, and not considered as the foundation for a contract." And Wightman, J., "It is said that the company would be made liable, though prevented by some inevitable accident from running the train; but it seems to me such a liability is prevented, and that the case would then come within the limitation in the time-tables, that the company would not be responsible for delay, or any consequences arising therefrom." Crompton, J., in the course of his judgment said, "I think the statement was made at any moment during the time the time-tables were continued, and the defendants therefore held out a false representation to the public, by which the plaintiff sustained damage. I also think they would be liable for a breach of their duty in not carrying the plaintiff as a passenger, as they have held themselves out to do. They could not properly refuse to carry a person offering himself as a passenger, and ready to pay his fare; and it would be a serious inconvenience if, holding themselves out as common carriers, the company were not bound to carry passengers. I entertain some doubt as to how far the liability of the defendants can be rested upon contract. I prefer resting my judgment on the duty and obligation of the defendants as common carriers by which they were bound to carry the plaintiff."

327. The promise of a railway company, as expressed in their time-tables, amounts to no more than an undertaking to use reasonable diligence to ensure punctuality.

The words "every attention will be paid to ensure punctuality as far as practicable" in the time-tables of a railway company import a contract to use due attention to keep the times specified in the time bills as far

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as practicable, having regard to the necessary exigencies of the traffic and circumstances over which the company have no control. (*Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. (C. A.) 286; 45 L. J. C. P. D. (App.) 521.)

In that case the plaintiff had taken a ticket at defendants' station in Liverpool for Scarborough, *viâ* Leeds. In consequence of delay on the journey plaintiff arrived at Leeds after the ordinary train had left, and, though travelling for pleasure only, he took a special train thence to Scarborough. In an action to recover the cost of the special train, the Court of Appeal held, (1) that the facts and documents which formed the contract were the taking and granting of the ticket, the ticket, the time-table, and the conditions. The conditions referred to were, amongst others, these:—"Time Bills. The published train bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to ensure punctuality as far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public, but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company." The Court further held, (2) that the defendants thereby contracted to make every reasonable effort to ensure punctuality; (3) that although a delay

of a few minutes would not be evidence of a want of reasonable effort, yet a long or unusual delay was evidence calling upon the company to show that it arose in spite of such reasonable effort, and that there was evidence that such delay was the cause of the plaintiff's missing the corresponding train at Leeds; (4) that the cost of the special train was not recoverable as damages.

Lord Justice James in giving judgment observed:—

"I am of opinion that the company are not entitled to strike out from the contract the words, 'but every attention will be given to ensure punctuality, so far as is practicable,' and to treat this as a mere vague assurance, having no legal operation, involving no legal responsibility, but only a responsibility to public opinion, to be enforced by letters to the 'Times' or a local journal. I agree, however, that is to be read in connection with the very clear stipulations that the company are not to be accountable for any loss, inconvenience, or injury which may arise from delays or detention. . . . If we consider the immense extent and complication of a modern railway system and net work in England, it would be most unreasonable to put a construction on such a document as the one before us, which would enable any passenger delayed anywhere to put the whole traffic arrangements, the conduct of the whole railway staff, on its trial before a judge and jury."

Cleasby, B., in that case said:—

"Without saying that in no case whatever could the traveller charge the expenses of a special train as part of his damages, I feel justified in expressing my opinion that every person disappointed through some default of the company in catching a particular train would not be entitled, as a matter of law, to reinstate himself, as nearly as he could, by means of a special train."

A railway company are not bound to forward by special train a passenger failing to catch a train on their own line by reason of the ordinary train being delayed by no fault of the company. (*Fitzgerald* v. *Midland Ry. Co.*, 34 L. T. 771.) In that case the plaintiff took a ticket from B. to L., by a train which was advertised to arrive at L. at 10.10 p.m. Between B. and D. the train

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was delayed by the floods, and consequently failed to catch the corresponding train from D. to L. On arriving at D. the plaintiff found that no other train would go to L. that night. The plaintiff claimed to recover damages from the railway company for breach of an absolute contract to carry from B. to L. on the day when the ticket was taken. The Court held that the railway company had only contracted to use due diligence to reach D. in time to catch the corresponding train to L., and that as they had failed to do so from unavoidable causes they were not bound to forward the plaintiff by special train.

A passenger took a tourist ticket from a railway company on the faith of their programme of tourist ticket arrangements. On the back was printed, "This ticket is subject to the regulations and conditions stated in the company's time tables and bills." The monthly time bill stated that the company did not "hold itself responsible for any delay, detention, &c., arising off its lines, or from the acts or defaults of other parties, nor for the correctness of the times over other lines or companies." The passenger was detained by the lateness of another company's train. It was held that he was bound by the monthly time-table, and could not recover the expenses incurred through such detention. (*Thompson* v. *Midland Ry. Co.*, 34 L. T. 34.)

In the common stipulation on railway tickets, that the company shall not be liable for any delay in the starting or arrival of trains arising from accident or other cause, the words "other cause" mean "other cause in the nature of accident," and not "any cause whatever." (*Buckmaster* v. *G. E. Ry. Co.*, 23 L. T. 471.)

A railway company cannot absolve itself from the results of negligence in not starting a train by stating on the time-tables that the company will not "hold itself responsible for delay or any consequences arising therefrom." (*Ibid.*)

In that case the plaintiff recovered the cost of a special train and damages for loss of market. He was a miller, the holder of a season ticket between Framlingham in Suffolk, and London, and was in the habit of going to London twice a week to the Mark Lane Corn

Market, by a train which was advertised to depart at 6.45 a.m., and to reach London at 10.40 a.m. The corn market opened at 11 o'clock. On the occasion in question, although the train and engine were at the platform, steam was not up, and the train could not proceed. He obtained a special train, but did not reach London until after 12 o'clock, and was too late for the market. The company relied upon the notice in the time-tables (*ante*, p. 454), and upon the following statement upon the season ticket:—"This ticket is issued subject to the provisions of the company's bye-laws, rules, and regulations in force during its term. It is also issued on the condition that the company shall not be liable in respect of any alteration of trains, or any delay in the starting or arrival of trains arising from accident or other cause during its term." The Court held that "other cause" meant "other cause of accidental kind."

In consequence of the decision in *Le Blanche* v. *L. & N. W. Ry. Co.* (*ante*, p. 456), the Great Western Railway made a condition that they would not be liable for loss or inconvenience or delay unless due to wilful misconduct of their servants, and the Court held that such a condition was not unreasonable. When a through train arrives at a junction too late to enable a passenger to catch the train running in connection, it is not wilful misconduct of the company's servants to refuse to send the passenger on by a special train if, having regard to the condition of the line and the safety of other passengers, they consider it their duty to refuse. (*Woodgate* v. *G. W. Ry. Co.*, 51 L. T. 826; 33 W. R. 428.)

It would appear from that case that if a company, knowing that their line was blocked, issued a ticket to a passenger for a through train, he might hold them liable for misrepresentation, and that personal inconvenience without pecuniary loss might be a ground for damages if the company's liability was established.

The fact that a railway company has paid the demand of another passenger for inconvenience from delay cannot be used against them as an admission of liability. (*Ibid.*) Unpunctuality

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will not entitle the passenger to rescind the contract and recover back his fare.

In *McCartan* v. *N. E. Ry. Co.* (54 L. J. Q. B. D. 441), the Court held that the true construction of the conditions in that railway company's time-tables was that they refused to guarantee the punctuality of their trains according to the times mentioned in the tables, from whatever cause the irregularity or want of punctuality might arise.

328. If a railway company fail to carry a passenger to the station for which he has duly taken a ticket, according to their contract, he may incur the reasonable expense of travelling there, and claim from the company as damages for their breach of contract the expense of getting there by other means, if there be any, or compensation for the trouble and inconvenience of walking there, if there be no other means of getting there; but he is not entitled to claim compensation for an accidental injury or illness occasioned to him in the course of reaching his destination by such means, for such consequences are neither the proximate consequence of the breach of contract nor within the contemplation of the parties at the time of contracting. (*Hamlin* v. *Gt. Northern Ry. Co.*, 26 L. J. Ex. 20; 1 H. & N. 408; *Hobbs* v. *L. & S. W. Ry. Co.*, L. R. 10 Q. B. 111; 44 L. J. Q. B. 49; *Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. 286; 45 L. J. C. P. 521.)

Damages for delay of a passenger are recoverable on the principle that if the party bound to perform a contract do not perform it, the other party may supply the performance as nearly as he can, and charge as damages the reasonable expense incurred in so doing. (See Leake on Contracts, p. 1050.)

In *Le Blanche* v. *L. & N. W. Ry. Co.* (*ante*, p. 456), Lord Justice Mellish said: "I think that any expenditure which, according to the ordinary habits of society, a person who is delayed on his journey would naturally incur at his own cost, if he had no company to look to, he ought to be allowed to incur at the cost of the company, if he has been delayed through a breach of contract on the part of the company; but that it is unreasonable to allow a passenger to put the company to an expense to which he could not think of putting himself if he had no company to look to."

Whether a passenger is justified in taking a special train to remedy a delay caused by the unpunctuality of the railway company, depends upon the circumstances of each particular case. (See note to Art. 327.)

Loss occasioned to a passenger prevented from attending business engagements by unreasonable delay in carrying him to his destination cannot be recovered against a railway company, as such damage is too remote. (*Hamlin* v. *Gt. N. Ry. Co.*, *supra*; *Hobbs* v. *L. & S. W. Ry. Co.*, *supra*.)

In *Hobbs's case* the plaintiff, with his wife and two children of five and seven years old respectively, took tickets on the defendants' railway from Wimbledon to Hampton Court by the midnight train. They got into the train, but it did not go to Hampton Court, but went along the other branch to Esher, where the party were compelled to get out. It being so late at night the plaintiff was unable to get a conveyance or accommodation at an inn, and the party walked to the plaintiff's house, a distance of between four and five miles, where they arrived at about three in the morning. It was a drizzling night, and the wife caught cold, and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance. In an action to recover damages for the breach of contract, the jury gave 28*l.* damages, viz., 8*l.* for the inconvenience suffered by having to walk home, and 20*l.* for the wife's illness and its consequences. It was held, as to the 8*l.*, that the plaintiff

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was entitled to damages for the inconvenience suffered in consequence of being obliged to walk home; but as to the 20*l.*, that the illness and its consequences were too remote from the breach of contract for it to be given as damages naturally resulting from it. Cockburn, C. J., said: "It must be in the contemplation of the parties that passengers put down at a wrong place will have to get home. If there are means of doing so they must avail themselves of them, and the company are responsible for the cost incurred; if there are no such means, the company are responsible, and must compensate for the inconvenience which the absence of means causes."

CHAPTER XIX.

THE OBLIGATIONS OF A RAILWAY COMPANY AS TO PASSENGER FARES AND BYE-LAWS.

I. Railway Fares.

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I. Railway Fares.

329. A railway company may use and employ locomotive engines and carriages to be drawn thereby to carry and convey upon the railway all such passengers as shall be offered to them for that purpose, and make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the fares by the special Act authorized to be taken by them. (8 Vict. c. 20, s. 86.)

See Art. 212.

A railway company have power to vary their passenger fares,

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provided they charge the same to all, and do not exceed the maximum sums authorized by their special Acts. (8 Vict. c. 20, s. 90.)

See Art. 213.

Where two railways are worked by one company, then, in the calculation of tolls and charges for any distances in respect of passenger traffic conveyed on both railways, the distances traversed shall be reckoned continuously on such railways as if they were one railway. (31 & 32 Vict. c. 119, s. 18.)

As to the jurisdiction of the Railway Commissioners over passenger fares, see Chapters XIII., XIV., and XV.

330. "Every company shall cause to be exhibited in a conspicuous place in the booking office of each station on their line a list or lists, painted, printed, or written in legible characters, containing the fares of passengers by the trains included in the time-tables of the company from that station to every place for which passenger tickets are there issued." (The Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 15.)

Where an aggregate sum is charged by the railway company for conveyance of a passenger by a steam vessel and on the railway, the ticket is to have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway. (31 & 32 Vict. c. 119, s. 16. *Ante*, Art. 263.)

Upon complaint by the D. Steam Packet Company that the N. W. Railway Company had not complied with sect. 16 of the Regulation of Railways Act, 1868, which enacts (*inter alia*) that "where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway," it was admitted by N. W. Railway Com-

pany to be so, but as the D. Steam Packet Company did not show that such non-compliance had caused any damage to themselves, the Commissioners made no order. (*City of Dublin Steam Packet Co.* v. *L. & N. W. Ry. Co.*, 4 Ry. & Ca. Tr. Ca. 10.)

331. "If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding 40*s*." (8 Vict. c. 20, s. 103.)

The offence under this section is a criminal offence, and the penalty recoverable under the section is not a "civil debt" within the terms of sect. 6 of the Summary Jurisdiction Act, 1879; nor do the provisions of sect. 35 of that Act apply in such a case. The magistrate may, on conviction and non-payment, issue a distress warrant under sect. 146 of the Railways Clauses Consolidation Act, 1845, and if sufficient distress is not found, shall imprison the defendant under sect. 147. (*R.* v. *Paget*, 8 Q. B. D. (C. A.) 151; 51 L. J. M. C. 9.)

A long series of decisions has cut down the application of this section to cases of fraud strictly so called. (*Dearden* v. *Townshend*, L. R. 1 Q. B. 10.) In that case, the passenger took a return ticket from E. to S. and back. He travelled to S.; but, on the

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return journey, instead of getting out at E., he proceeded as far as N., without obtaining a fresh ticket. On getting out at N., he delivered up the ticket, explained the circumstances to the guard, and tendered the difference of the fare. It was held that he could not be convicted of the statutory offence, there having been no intent to defraud.

In *R.* v. *Frere* (24 L. J. M. C. 68; 4 E. & B. 598), it was held that a passenger who takes a ticket for the longer distance and gets out at an intermediate station is not thereby guilty of an offence within sect. 96 of the Railways Clauses Act, even though his object in so acting was to avoid payment of the larger fare. Railway companies, by printing on their tickets or otherwise that tickets are available only for the stations marked upon them, can make a special contract to that effect. See *Stewart* v. *L. & N. W. Ry. Co.* (33 L. J. Ex. 199; 3 H. & C. 135).

"Without having paid his fare" means the fare for the class by which the passenger travels. A passenger who, with a second or third class ticket, travels in a superior class with intent to defraud, is liable to be convicted under this section. (*Gillingham* v. *Walker*, 44 L. T. 715; 29 W. R. 896.)

A., who was travelling on the G. W. Railway in a train going to N., produced the "forward half" of a tourist return ticket from L. to N. and back. This ticket had been originally issued to another person, and was stated on the back thereof to be non-transferable. The original taker had used the ticket as far as H. on the way from L. to N., but then proceeded on a different route, and consequently, not having given up the forward half of the ticket, sold it to A., who was travelling with it between H. and N. The Court held that A. was liable to be convicted under 8 & 9 Vict. c. 20, s. 103, for travelling without having previously paid his fare with intent to avoid payment thereof. (*Langdon* v. *Howells*, 4 Q. B. D. 337; 48 L. J. M. C. 133.)

II.—Railway Bye-laws.

332. By the Railways Clauses Act, 1845, railway companies are empowered from time to time, subject to the provisions of that and the special Act of the company, to make regulations for the following purposes:—

For regulating the mode by which, and the speed at which, carriages using the railway are to be moved or propelled;

For regulating the times of the arrival and departure of any such carriages;

For regulating the loading or unloading of such carriages, and the weights which they are respectively to carry;

For regulating the receipt and delivery of goods and other things which are to be conveyed upon such carriages;

For preventing the smoking of tobacco, and the commission of any other nuisance in or upon such carriages, or in any of the stations or premises occupied by the company;

And, generally, for regulating the travelling upon, or using and working of the railway. But no such regulation shall authorize the closing of the railway, or prevent the passage of engines or carriages on the railway at reasonable times, except at any time when, in consequence of any of the works being out of repair, or from any other sufficient cause, it shall be necessary to close the railway, or any part thereof. (8 Vict. c. 20, s. 108.)

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And for the better enforcing the observance of such regulations, the companies are empowered, subject to the provisions of 3 & 4 Vict. c. 97, to make bye-laws, and from time to time to repeal or alter such bye-laws, and make others, provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of that Act or the special Act; and such bye-laws must be reduced into writing, and have affixed thereto the common seal of the company; and any person offending against any such bye-law is liable to a penalty not exceeding 5*l.* for every offence; and if the infraction or non-observance of any such bye-law, or other such regulation, be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, the company may summarily interfere to obviate or remove such danger, annoyance or hindrance, and that without prejudice to any penalty incurred by the infraction of any such bye-law. (Sect. 109.)

No bye-laws made under sect. 109 of the Railways Clauses Act, 1845 (8 Vict. c. 20) are valid unless confirmed and allowed by the Board of Trade. (3 & 4 Vict. c. 97.)

The approval of the Board of Trade does not prevent an inquiry as to the validity of bye-laws. (*R.* v. *Wood*, 5 E. & B. 49.)

The bye-laws of a railway company made pursuant to these sections are documents of a public nature, and proveable as such.

Upon an information charging a passenger with an infraction of a bye-law, it was proved that a copy of the bye-laws was affixed in the manner directed by the Act at the two stations respectively at

which the passenger entered and quitted the carriage, and it was held sufficient proof of publication; and that it was not necessary to prove further that copies were affixed at every other station on the line. (*Motteram* v. *Eastern Counties Ry. Co.*, 29 L. J. M. C. 57.)

Where a bye-law of a railway company imposes certain duties on passengers and lays correlative duties on the company, the company must have strictly complied with the bye-law on their part to entitle them to enforce it against the passenger. (*Jennings* v. *Gt. N. Ry. Co.*, L. R. 1 Q. B. 7; 35 L. J. Q. B. 15.)

333. The following code of bye-laws has been issued by the Board of Trade, and has been universally adopted by the railway companies. Any variation from this form must have the sanction of the Board of Trade:—

"Bye-laws and Regulations

"Made by the —— Railway Company, with the approval of the Board of Trade, for regulating the travelling upon and using of all railways belonging to, or leased to, the said company, and with respect to which that company have power to make bye-laws.

"*Obtaining Ticket and delivering up the same.*

"No. 1. No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly authorized servant of the company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey."

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In the very recent case of *Butler* v. *M. S. & L. Ry. Co.* (21 Q. B. D. 207; 57 L. J. Q. B. D. 564), the Court of Appeal decided that where a railway passenger has taken and paid for his ticket, but has afterwards lost it, and has declined to pay the fare again, the company cannot eject him from the railway carriage, but, assuming the condition to be reasonable (see p. 471), can only take his name and address and sue him for the fare.

In that case, the ticket issued to the plaintiff incorporated by reference this bye-law. The plaintiff, having lost the ticket, was unable to produce it when required to do so during the journey by one of the defendants' servants. The plaintiff was thereupon required to pay the fare from the station whence the train had started, and, on his declining to do so, was forcibly removed by the defendants' servants from the carriage in which he was travelling, no more force, however, being used than was necessary for his removal. He thereupon sued the defendants for assault. The Court of Appeal held that the contract between the plaintiff and the defendants did not by implication authorize the defendants to remove the plaintiff from the carriage on his failing to produce a ticket and refusing to pay the fare as provided by the condition; that the defendants were not justified in so removing him; and that the action was therefore maintainable.

A railway company are not liable in an action for assault and false imprisonment, by reason of one of their servants giving a passenger into custody, if the act is done in contravention of instructions and beyond the scope of the employment. (*Walker* v. *S. E. Ry. Co.*, L. R. 5 C. P. 640; 39 L. J. C. P. 346.)

A foreman porter, who, in the absence of the station-master, is in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and, if he gives in charge on such suspicion an innocent person, the company are not liable. (*Edwards* v. *L. & N. W. Ry. Co.*, L. R. 5 C. P. 445; 39 L. J. C. P. 241.) See *ante*, Art. 187, as to the authority of a railway company's servants.

A passenger by a railway carriage was ordered to leave it by

the company's servants under circumstances which did not justify them in what they were doing; and it appeared that upon leaving the carriage he left a pair of race-glasses upon the seat, which, as the train proceeded without him, were lost. The Court held that the loss of these glasses was not the natural result of the wrongful act, and that the plaintiff could not recover their value. (*Glover* v. *L. & S. W. Ry. Co.*, L. R. 3 Q. B. 25; 37 L. J. Q. B. 57.)

It has been held in America that passengers on a railway are bound to conform to a regulation of the company requiring passengers to exhibit their tickets when requested by the conductor; and if they do not so conform, they may legally be ejected from the train, no unnecessary violence being used. (*Hibbard* v. *N. Y. & Erie Ry. Co.*, 15 N. Y. R. 455.)

Lord Esher, M. R., in delivering judgment in *Butler's Case* (*ante*, p. 470), said: "One of such bye-laws and regulations provides that, 'every passenger shall show and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose; and any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey.' I do not think it necessary for the purposes of this case to discuss the question whether that is a valid or reasonable regulation, or how far the plaintiff would be bound by it if unreasonable. It would seem, if the decision in *Saunders* v. *S. E. Ry. Co.* (5 Q. B. D. 456) be correct, not to be reasonable. Whenever it becomes necessary we must deal with that question, but I think we may for the present purpose assume that the condition is reasonable. The effect of it is that the passenger is under an obligation to show his ticket, when asked to do so, and, if he fails to do so, a certain consequence is to follow, viz., that he must pay the fare from the station whence the train started. But suppose that he refuses to do so, he no doubt breaks his contract; but does it result that the company's servants may lay hands on him and remove him from the carriage? I do not think that it does. The remedy is by proceeding against him for

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the amount of the fare he refuses to pay. Where is there any contract by which he has agreed that, if he fails to show a ticket or to pay the fare mentioned in the regulation, the company may lay hands on him and put him out of the carriage by force? No one has any right to lay hands forcibly on a man in the absence of some legal authority to do so or some agreement to that effect."

The case of *Saunders* v. *S. E. Ry. Co.* (5 Q. B. D. 456; 49 L. J. Q. B. 761), referred to in the Master of the Rolls' judgment, was as follows:—

A bye-law of the defendant company provided "that a passenger should show and deliver up his ticket to any duly authorized servant of the company whenever required to do so for any purpose; and that any person travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, should be required to pay the fare from the station where the train originally started to the end of his journey." The plaintiff had a ticket entitling him to travel on the lines of the defendants and the London and South Western Railway Company from Charing Cross or Cannon Street to Windsor and back. Having come to the Waterloo Junction Station on the defendants' line, where he had to change trains, he had for this purpose to go from the defendants' station to that of the London and South Western Railway Company. On passing out of the defendants' station he was asked to show his ticket, but refused to do so. There was no intention to defraud on the plaintiff's part. The defendants summoned him under the above bye-law, and he was convicted in the amount of the fare from the station whence the defendants' train by which he travelled had started. The Court held that the conviction must be quashed.

Cockburn, C. J., said: "Assuming that the powers given by the 108th section of the Railways Clauses Consolidation Act, to make bye-laws for 'regulating the travelling upon or using and working the railway,' applied to persons travelling in the company's carriages, which he was inclined to think it did not, it was not competent to the company by their bye-law to make the

refusal to show the ticket an offence in the absence of a fraudulent intention; secondly, the bye-law was void for unreasonableness, because the penalties thereunder for offences of equal criminality would vary with the distance from which the train might originally have started; and thirdly, the bye-law was inapplicable to the case, as the power to make bye-laws was confined to the case of persons travelling on the railway, which the plaintiff was not doing when required to show his ticket."

And Lush, J.: "The bye-law was void for unreasonableness, because the penalty for not showing the ticket varied according to the distance the train had travelled, and also because the passenger was required not only to show, but to deliver up his ticket whenever required for any purpose."

It seems that, as against a passenger who has, in good faith, travelled a short distance upon the line without having procured a ticket, this bye-law is unreasonable and void—inasmuch as it is in substance an attempt to inflict a penalty for doing without fraud that which, by the joint operation of sects. 103 and 109 of 8 Vict. c. 20, can be punished only if done fraudulently. (*L. and B. Ry. Co.* v. *Watson*, 4 C. P. D. (App.) 118; 48 L. J. Q. B. D. (App.) 316.)

A bye-law was made by a railway company, under the powers of their special Act and of 8 Vict. c. 20, in the terms following:—"Any person travelling, without the special permission of some duly authorized servant of the company, in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40*s.*, and shall in addition be liable to pay his fare, according to the class of carriage in which he is travelling, from the station where the train originally started, unless he shows that he had no intention to defraud:"—Held, first, that the bye-law taken as a whole was void, on the ground that the penalty imposed by the latter part was unreasonable. Secondly, that the bye-law was divisible, and that the first part of the bye-law omitted the intention to defraud required by 8 Vict. c. 20, s. 103, to constitute the offence. It was therefore repugnant to the statute and invalid. (*Dyson* v. *L. & N. W. Ry. Co.*, 7 Q. B. D. 32; 50 L. J. M. C. 78.)

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A passenger was convicted in a penalty of 10*s.* under this bye-law for travelling in a first-class carriage with only a second-class ticket; but it was found as a fact that he had no intention to defraud the company. The Court held, that the conviction must be quashed, for without deciding whether the bye-law did or did not make proof of the absence of fraudulent intention an exemption from the penalty as well as from the extra fare, it was, if it made the fraudulent intention immaterial in the case of the penalty, repugnant to 8 Vict. c. 20, s. 103, and *ultrà vires* the company. (*Bentham* v. *Hoyle*, 3 Q. B. D. 289; 47 L. J. M. C. 51; and see *Barry* v. *Mid. Ry. Co.*, Ir. L. R. 1 C. L. 130.)

A bye-law was made by a railway company, under the powers of their special Act and of 8 & 9 Vict. c. 20, in the terms following:—"No passenger will be allowed to enter any carriage on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket, specifying the class of carriage and the stations for conveyance between which such ticket is issued. . . . Any person travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of the journey":—Held, that in order to entitle the railway company to take proceedings before justices under this bye-law, a demand of the specific sum payable in respect of such fare must have been first made to the passenger who refused, or was unable to produce his ticket. (*Brown* v. *G. E. Ry. Co.*, 2 Q. B. D. 406; 46 L. J. M. C. 231.)

A bye-law of a railway company ran thus: "Each passenger booking his place will be furnished with a ticket, which he is to show and deliver up when required to the guard, &c.," and "each passenger not producing or delivering up his ticket when required is hereby subjected to a penalty not exceeding 40*s.*;" and it was held that under this bye-law holders of annual tickets for travelling on the line are bound to produce their tickets to the railway officers as much as ordinary passengers. (*Woodard* v. *Eastern Counties Ry. Co.*, 30 L. J. M. C. 196.)

In *Jennings* v. *Gt. N. Ry. Co.* (L. R. 1 Q. B. 7; 35 L. J. Q. B.

15), the bye-law was as follows:—"No passenger shall be allowed to enter any carriage without having first paid his fare and obtained a ticket. Each passenger on payment of his fare will be furnished with a ticket, which such passenger is to show when required, and to deliver up, before leaving the company's premises, upon demand." The plaintiff took tickets for himself, his servants, and horses, by a particular train, on the defendants' railway. The train was afterwards divided into two. The plaintiff travelled in the first train, taking all the tickets with him. When the second train with the servants and the horses was about to start, the plaintiff's servants were required to produce their tickets, and on their being unable to do so, the defendants refused to carry them. The Court held, in an action by the plaintiff for not carrying his servants, that as the defendants contracted with the plaintiff, and delivered the tickets to him, and not to the servants, the defendants could not under the bye-law justify their refusal to carry.

A railway company's regulations sometimes provide that the ticket office shall be closed a certain time before the starting of each train. Such regulations are reasonable as tending to obviate confusion.

Lords Ardmillan and Neaves held, in the case of *Scottish N. E. Ry. Co.* v. *Matthews* (5 Irvine, 237; Deas. p. 499), that if a person who has arrived at the station too late to take a ticket seat himself in the train while it is standing at the station, the company are justified in refusing to allow him to remain, although he tenders payment of the fare.

"*Using Ticket for any other Day.*

"No. 2. Any passenger using or attempting to use a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding 40*s*."

The High Court of Justiciary in Scotland have lately held, in the case of *Thom* v. *Caledonian Ry. Co.* (14 Sess. Ca. (4th Ser.) 5),

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that this bye-law was only applicable to cases where an attempt was made to cheat the company, and that it was oppressive to prosecute for the penalty where there was no such attempt. The facts in that case were these: B. and C. left Aberdeen by train for Edinburgh on Sunday. B. had an unused half of a return ticket which was still available for some months. C. took a single ticket only available for the day of issue and not transferable. On their arrival at Perth they alighted from the train and missed it, apparently accidentally, on its leaving for Edinburgh. There was no other train to Edinburgh on that day. They resumed their journey on the evening of the next day. On arriving at Larbert Station, where tickets are checked, B. showed C.'s ticket as his own. The ticket inspector objected to C.'s ticket as being only available for the previous day, and required payment of the fare from Stirling (the last station) to Larbert. B. refused to pay or to give his name and address, and was handed to the police, and convicted of an offence against the bye-law. The conviction was quashed, on the ground that this was a case of oppressive application of the bye-law.

Lord Young in delivering judgment said:—

"Two friends start from Aberdeen to Edinburgh, the one with a return ticket, which was available not only for that day, but which had still to run some months, so that that ticket was all right. The other takes a single ticket from Aberdeen to Edinburgh. They missed, accidentally, the train from Perth to Edinburgh, which was the last train on Sunday night; therefore they were obliged to break their journey. It was stated to us, but it was a mere incidental detail, that, having no friends to stay with in Perth, they went on to Dundee, for which place they could catch a train, remaining there overnight. They return to Perth the following day. The one ticket is all right, but the single ticket is said not to be available, and probably that may be so in the sense that it was in the power of the railway officials to refuse to receive it. I should think the ticket collectors would be instructed and authorized to pass the ticket in such circumstances.

I should be surprised if it were not so. I cannot commend, as at all likely to command the approbation of the public, the demand for a second fare, the railway company having already received the fare in full. When a passenger presents his ticket at Perth the ticket examiner takes it, presumably examines it, and passes it by checking it off. The appellant could not have got to Larbert without some official examining the ticket in ordinary circumstances. But when he comes to Larbert the tickets are examined again. The ticket collector objects to the single ticket, and says, 'This was issued in Aberdeen yesterday, and is not available for to-day. I will thank you for 8*d*.' The appellant says, 'It was passed at Perth. I believe it to be a perfectly good ticket.' His name and address are demanded, but he will not submit to what he considers an imposition, and being a little haughty on the subject, and refusing to give his name and address, he is handed over to the police. I am surprised, and almost distressed, that the officials at Larbert should have acted so, and still more that the superior officers of the company should have given countenance to such conduct. He gives his name and address after he is handed over to the police, and nevertheless for the matter of 8*d*., and without a suspicion of roguery in the matter, he is detained for fourteen hours. I cannot think that any bye-law would sanction such a proceeding—that is, any bye-law if properly read and construed. The bye-law in question may be very proper if read and applied only to rogues—to people trying to cheat—but this was not a case of that kind at all. It had no aspect of a case of that sort. I am therefore of opinion that upon these facts, and on a proper construction of the bye-law, which is applicable only to persons who intend to cheat, and to evade payment of their fare in a tricky and dishonest manner, this conviction is not well founded."

The Lord Justice-Clerk and Lord Craighill concurred.

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"*Using Ticket for any other Station.*

"No. 3. Any passenger using or attempting to use a ticket for any other station than that for which it is available will be required to pay the difference between the sum actually paid and the fare between the stations from and to which the passenger has travelled, or, at the option of the company, the fare from the station to which he was booked to the end of his journey."

See *R.* v. *Frere* (24 L. J. M. C. 72; 4 E. & B. 598).

The effect of the decisions on the three first bye-laws seems to be that a passenger *fraudulently* infringing them may be apprehended and compelled by a magistrate to pay the fare as provided in the bye-laws; but that a passenger innocently infringing the bye-laws cannot be proceeded against under them.

A passenger with a return ticket between any two stations on a line of railway cannot travel on, upon that ticket, to a station beyond the terminal station mentioned therein, and from and to which the ticket was taken, without paying the extra fare for the farther distance so travelled, notwithstanding that the charge for a return ticket for the entire distance is the same as that paid by him for the ticket which he had taken. (*G. W. Ry. Co.* v. *Pocock*, 41 L. T. 415.)

"*Defacing Tickets.*

"No. 4. Any passenger wilfully altering or defacing his ticket so as to render the date, number, or any material portion thereof illegible is hereby subjected to a penalty not exceeding 40*s*.

"*Sale and Purchase of Return Tickets.*

"No. 5. A return ticket is granted solely for the purpose of enabling the person for whom the same is issued to travel therewith to and from the stations marked thereon, and is not transferable. Any person who sells, or attempts to sell, or parts or attempts to

part with the possession of the return half of any return ticket in order to enable any other person to travel therewith, is hereby subjected to a penalty not exceeding 40*s.*, and any person purchasing such half of a return ticket, or travelling or attempting to travel therewith, shall be liable to pay the fare which he would have been liable to pay for the single journey, and shall, in addition thereto, be subjected to a penalty not exceeding 40*s.*

"*Tickets issued when there is room.*

"No. 6. At the intermediate stations the fares will only be accepted, and the tickets issued, conditionally; that is to say, in case there shall be room in the train for which the tickets are issued. In case there shall not be room for all the passengers to whom tickets have been issued, those to whom tickets have been issued for the longest distance shall (if reasonably practicable) have the preference, and those to whom tickets have been issued for the same distance shall (if reasonably practicable) have priority according to the order in which tickets have been issued, as denoted by the consecutive numbers stamped upon them. The company will not, however, hold itself responsible for such order of preference or priority being adhered to, but the fare or difference of fare, if the passenger travel by an ordinary train in a class of carriage inferior to that for which he has a ticket, shall be immediately returned, on application, to any passenger for whom there is not room as aforesaid, if the application be made before the departure of the train.

"*Smoking.*

"No. 7. Every person smoking in any shed or covered platform of a station, or in any building of the company, or in any carriage or compartment of a carriage not specially provided for that purpose, is hereby subjected to a penalty not exceeding 40*s.* The

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company's officers and servants are required to take the necessary steps to enforce obedience to this bye-law; and any person offending against it is liable in addition to incurring the penalty above mentioned to be summarily removed, at the first opportunity, from the carriage, or from the company's premises.

"*Using Ticket for Superior Class.*

"No. 8. Any person travelling without the special permission of some duly authorized servant of the company in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subjected to a penalty not exceeding 40*s.*; and shall in addition be liable to pay the fare, according to the class of carriage in which he is travelling, from the station whence the train originally started, unless he shows that he had no intent to defraud."

This bye-law is invalid and void. See *Dyson* v. *L. & N. W. Ry. Co.* (*ante*, p. 473); and also *Bentham* v. *Hoyle* (*ante*, p. 474).

"*Being Intoxicated or using Obscene or Abusive Language, &c.*

"No. 9. Any person found in a carriage, or elsewhere upon the company's premises, in a state of intoxication, or using obscene or abusive language, or writing obscene or offensive words on any part of the company's stations or carriages, or committing any nuisance, or otherwise wilfully interfering with the comfort of other passengers, is hereby subjected to a penalty not exceeding 40*s.*, and shall immediately, or, if a passenger, at the first opportunity, be removed from the company's premises.

"*Damaging Property.*

"No. 10. Any person who wilfully cuts or tears any lining or window strap, or curtain, removes or defaces any number plate, or

breaks or scratches any window of a carriage used on the railway, or who otherwise, except by unavoidable accident, damages, defaces, or injures any such carriage, or any station, or other property of the company, is hereby subjected to a penalty not exceeding 5*l.*, in addition to the amount of any damage for which he may be liable.

"*Travelling on Roof, Steps, &c.*

"No. 11. No passenger shall be permitted to travel on the roof, steps, or footboard of any carriage, or on the engine, or in the guard's van, or any portion of the carriage not intended for the conveyance of passengers; and any passenger persisting in doing so, after being warned to desist by the guard in charge of the train, or any duly authorized servant of the company, is hereby subjected to a penalty not exceeding 40*s.*, and shall be liable to be summarily removed from the company's premises.

"*Entering or leaving Carriage when in motion.*

"No. 12. Any passenger entering or leaving, or attempting to enter or leave, any carriage while the train is in motion, or elsewhere than at the side of the carriage adjoining the platform, or other place appointed by the company for passengers to enter or leave the carriages, is hereby subjected to a penalty not exceeding 40*s.*

"*Entering full Carriage.*

"No. 13. Any passenger persisting in entering a carriage or compartment of a carriage containing the full number of persons which it is constructed to convey, when any such person objects to his so entering the carriage or compartment, is hereby subjected to a penalty not exceeding 40*s.*

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"*Conveyance of Dogs in Carriages.*

"No. 14. Dogs and other animals will not be suffered to accompany passengers in the carriages, but will be conveyed separately and charged for, and any person taking a dog or other animal with him into any passenger carriage used on the railway is hereby subjected to a penalty not exceeding 40*s*.

"*Taking Loaded Fire Arms.*

"No. 15. Loaded fire arms are on no account to be taken into or placed upon any carriage, waggon, truck, or other vehicle forming or intended to form a train or any portion of a train on the railway, or to be brought to the station or on to the premises of the company, and every person so offending is hereby subjected to a penalty not exceeding 5*l*.

"*Travelling with Infectious Disorder.*

"No. 16. The company may refuse to carry any person who has any infectious disorder. If any person who has any such disorder is found upon the premises of the company, or travels or attempts to travel on the railway of the company, without the special permission of the company, he shall be liable to a penalty not exceeding 40*s*. in addition to the forfeiture of any fare which he may have paid, and may be removed at the first opportunity from the company's premises. Any person who has charge of any person suffering from an infectious disorder while upon the premises of the company, or travelling or attempting to travel on the railway, or who aids or assists any person suffering from such disorder in being upon the premises of the company, or travelling or attempting to travel on the railway, shall be liable to a penalty not exceeding 40*s*., unless the person suffering from such disorder be travelling with the special permission of the company.

"*Omnibuses, &c., Drivers obeying Servants of Company.*

"No. 17. Every driver or conductor of an omnibus, cab, carriage, or other vehicle shall, while in or upon any station yard or other

premises of the company, obey the reasonable directions of the company's officers and servants duly authorized in that behalf; and every person offending against this regulation is hereby subjected to a penalty not exceeding 40*s*.

"Given under the common seal of the —— Railway Company the day of , 18 .

"Secretary of the company.

"The Board of Trade hereby signify their allowance and approval of the above bye-laws and regulations.

"Signed by order of the Board of Trade
the day of , 18 .
"Assistant secretary to the Board of Trade."

It is not a libel for a railway company to publish a strictly accurate account of the conviction of persons for offences against these bye-laws, &c., even if they add the name and address. (*Alexander* v. *N. E. Ry. Co.*, 34 L. J. Q. B. 152; *Biggs* v. *G. E. Ry. Co.*, 16 W. R. 908.)

CHAPTER XX.

THE OBLIGATIONS OF A RAILWAY COMPANY AS TO THE DEGREE OF CARE REQUIRED IN THE CONVEYANCE OF PASSENGERS.

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I.—Generally.

334. Railway companies as carriers of passengers are not insurers, but are bound to exercise the greatest care and forethought for securing the safety of their passengers, and are answerable for the smallest negligence on the part of their servants and agents; but not for unforeseen accidents which care and vigilance could not have provided against or prevented. (*Christie* v. *Griggs*, 2 Camp. 79; *Jackson* v. *Tollett*, 2 Stark. 37; *Dudley* v. *Smith*, 1 Camp. 169.)

A railway company do not warrant that everything they necessarily use in the conveyance of passengers is absolutely free from defects likely to cause peril, and therefore they will not be responsible to a passenger for a defect in the carriage which is such that it could neither be guarded against in the process of construction, nor discovered by subsequent examination. (*Readhead* v. *Midland Ry. Co.*, L. R. 4 Q. B. 379; 38 L. J. Q. B. 169.)

Carriers of passengers by railway contract that all persons connected with the carrying and with the means and appliances of the carrying, such as the carriages, the railroad, or signalling, shall use care and diligence; but they do not contract that other railway companies who may be entitled to use the railway shall not be guilty of negligence in the management of their trains. (*Wright* v. *Midland Ry. Co.*, L. R. 8 Ex. 137; 41 L. J. Ex. 89.)

The contract into which a railway company enters with a passenger on giving him a ticket between two

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places is the same (in the absence of any stipulation), whether the journey be entirely over their own line or partly over the line of another company, and whether the passage over the other line be under an agreement to share profits, or simply under running powers: viz., that due care (including in that term the use of skill and foresight) shall be used in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management. (*Thomas* v. *Rhymney Ry. Co.*, L. R. 6 Q. B. 266; 40 L. J. Q. B. 89.)

The liability of the company is independent of any contract between the passenger and the company, the law implying a duty on the part of the company to carry him safely. (*Foulkes* v. *Met. D. Ry. Co.*, 5 C. P. D. 157; 49 L. J. C. P. D. 361.)

The facts in this latter case were these:—

The defendants had running powers between H., a station upon their own line, and R., a station of the S. company, over the line of that company. The defendants and the S. company divided the profits of the traffic between H. and R. The plaintiff took a return ticket from R. to H., which was issued to him by a clerk of the S. company. Upon the return journey from H. to R. he travelled in a train belonging to the defendants, and driven by their servants. Owing to the carriage being unsuited to the platform at R., which belonged to the S. company, the plaintiff sustained bodily injury. At the trial the jury found that the defendants had been guilty of negligence, and the Court of Appeal held that an action lay against the defendants, for they, having permitted the plaintiff to travel by their train, were bound to make provision for his safety. And see *Self* v. *L. B. & S. C. Ry. Co.*, 42 L. T. 173.

The obligation of a railway company extends, it seems, to everything except latent defects which could not by any reasonable diligence or skill be discovered.

The case of *Richardson* v. *G. E. Ry. Co.* (1 C. P. D. 342) may be cited as an instance of alleged negligence in allowing an unsound truck to travel on the line without due examination. The facts in that case were these:—A foreign truck, loaded with coal, belonging to the B. Waggon Company, came on to the defendants' line at Peterborough, and there underwent the usual examination, when a defect in one of the springs and a crack in the woodwork were discovered. The truck was shunted, upon the discovery of the defects, in order that it might be repaired by the waggon company to whom it belonged. The defect in the spring, which was the only pressing defect, was repaired, and the truck was handed over to the defendants, and sent on by them to its destination. On the way an accident, by which the plaintiff was injured, happened through the existence of a crack in one of the axles of the truck. It was stated in evidence that by a minute examination of the truck the crack in the axle might have been discovered. The defect in the axle was entirely unconnected with the defects previously discovered. The Court of Appeal held that the defendants were not bound to do more in the way of examining the foreign truck on its arrival at Peterborough than they had done, and inasmuch as the defects discovered on such examination were entirely unconnected with the defect that caused the accident, they were not responsible by reason of their failing upon the discovery of such defects to enter upon a more minute examination of the truck.

In *McCawley* v. *Furness Ry. Co.* (L. R. 8 Q. B. 57; 42 L. J. Q. B. 4) Blackburn, J., said: "The duty of the defendants, as carriers of passengers, is to take reasonable care that such passengers shall not be exposed to danger during the journey. If, through the want of due care, the passenger is killed or injured, the carrier is liable to make compensation, and may even be made criminally responsible."

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335. If a railway company, through wrongful act, neglect, or default, cause the death of a person, they are liable to an action for damages notwithstanding the death of the person injured, provided the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof. (9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95.)

The first of these Acts is called Lord Campbell's Act, and, although it is not in terms directed against railway companies, it has affected them more than any class of passenger carriers.

"Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." (8 & 9 Vict. c. 93, s. 2.)

"Not more than one action shall lie for and in respect of the same subject-matter of complaint; and every such action shall be commenced within twelve calendar months after the death of such deceased person." (Sect. 3.)

"In every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered." (Sect. 4.)

"The following words and expressions are intended to have the

meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say, words denoting the singular number are to be understood to apply also to plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word 'person' shall apply to bodies politic and corporate; and the word 'parent' shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word 'child' shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter." (Sect. 5.)

"If there shall be no executor or administrator of the person deceased, or, there being such executor or administrator, no such action as in the said Act mentioned shall within six calendar months after the death of such deceased person as therein mentioned have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator." (27 & 28 Vict. c. 95, s. 1.)

"It shall be sufficient, if the defendant is advised to pay money into Court, that he pay it as a compensation in one sum to all persons entitled under the said Act for his wrongful act, neglect, or default, without specifying the shares into which it is to be divided by the jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue." (Sect. 2.)

These Acts do not apply to Scotland.

The personal representatives of a deceased man cannot maintain

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an action under Lord Campbell's Act where the deceased, if he had survived, would not have been entitled to recover. (*Haigh* v. *Royal Mail S. Co.*, 52 L. J. Q. B. D. 640.)

The plaintiff, as administrator, sued the defendants under the provisions of Lord Campbell's Act to recover damages for the death of his son, who had been killed by their negligence. At the trial the plaintiff gave evidence to the effect that he was nearly blind, and was injured in his leg and hands, and that the deceased was always very kind to him, and used to contribute to his support five or six years ago when he required it. The Court held, upon the above facts, that there was some evidence for the jury of a reasonable expectation of benefit from the continuance of the son's life, entitling the plaintiff to sue under 9 & 10 Vict. c. 93. (*Hetherington* v. *N. E. Ry. Co.*, 9 Q. B. D. 160; 51 L. J. Q. B. D. 495.)

The numerous cases which have been decided under this Act are to be found in Roscoe's Nisi Prius Evidence, Hodges on Railways, and Browne and Theobald on Railways.

A sum of money was received from a railway company by way of compensation by the executors of a person whose death had resulted from injuries received in an accident on the railway, no action having been brought under Lord Campbell's Act (9 & 10 Vict. c. 93). The executors brought an action in the Chancery Division, to which all the relatives of the deceased referred to in sect. 2 of 9 & 10 Vict. c. 23, were parties, asking for a declaration as to the persons entitled to the money. It was held that the Court could distribute the fund amongst such of the relatives of the deceased as suffered damage by reason of the death in the same manner as a jury could have done in an action under the Act. (*Bulmer* v. *Bulmer*, 25 Ch. D. 409.)

336. In all actions against railway companies for personal injuries, if any evidence whatever of negligence is offered, the question whether there was negli-

gence on the part of the company or not is for the jury, and not for the Court. (*Bridges* v. *North London Ry. Co.*, L. R. 7 H. L. 213; 43 L. J. Q. B. (H. L.) 151; *Robson* v. *N. E. Ry. Co.*, 2 Q. B. D. 85; 46 L. J. Q. B. D. 50; *Slattery* v. *Dublin, &c. Ry. Co.*, 3 App. Cas. 1155.)

Lord Coleridge, C. J., in delivering judgment in the Court of Appeal in the latter case, said: "It may be that the judgment of the House of Lords (*i.e.*, in *Bridges' case, supra*), which has been so much referred to, has set the matter at rest; for though their actual judgment was confined strictly to the facts of the case, yet if we take into consideration the opinions of the judges which were given on that occasion, and regard the judgment of the Lords as having been given in accordance with those opinions, it will be seen that the general view of the law adopted by their Lordships was, that if any evidence at all is given for the plaintiffs, it is for the jury to determine whether there was negligence on the part of the defendants or not."

"Every judge on the bench has exhausted himself in endeavouring to enunciate some proposition with regard to these cases, founded on principle; but, after all, we must decide the case on its own facts." (*Per* Brett, L. J., in *Rose* v. *N. E. Ry. Co.*, *post*, p. 498.)

Kelly, C. B., and Bramwell, L. J., in *Jackson* v. *Met. Ry. Co.* (3 App. Cas. 193) held that no principle of law whatever was laid down in the case of *Bridges* v. *N. L. Ry. Co.*

Lord Cairns, L. C., in *Jackson* v. *Met. Ry. Co.* (*supra*) said: "The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether on these facts, when submitted to them, negligence ought to be inferred."

337. The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of

ordinary care which contributed to the cause of the accident.

Though a plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident which is the subject of the action, yet, if the defendants could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse them. (*Radley* v. *L. & N. W. Ry. Co.*, 1 App. Cas. 754; 46 L. J. Ex. (H. L.) 573, and the authorities there cited.)

When, in an action of negligence, the defendants rely on the doctrine *volenti non fit injuria*, they must obtain a finding at the trial that the plaintiff voluntarily took the risk upon himself, and had a full knowledge of the nature and extent of the danger. Otherwise the Court will not give judgment for the defendants on the ground that such a finding is the only inference which can properly be drawn from the facts. (*Osborne* v. *L. & N. W. Ry. Co.*, 21 Q. B. D. 220; 36 W. R. 809; *post*, p. 591.)

338. A railway company, as carriers of passengers, being liable only for negligence and not as insurers of their absolute safety, in stipulating that the passenger shall travel "at his own risk," except their liability for negligence. (*McCawley* v. *Furness Ry. Co.*, L. R. 8 Q. B. 57; 42 L. J. Q. B. 4; *Hall* v. *N. E. Ry. Co.*, L. R. 10 Q. B. 437; 44 L. J. Q. B. 164.)

Outside the cover of a paper book of coupons forming a railway ticket, issued to the plaintiffs by the defendants, was printed the name of their railway, the words "Cheap return ticket, London to Paris and back, second class," and a statement of the period and journey for which the ticket was available, but no reference to the

inside of the cover. On the inside, and apparent on turning the leaf, was a condition limiting the responsibility of the defendants to their own trains. The plaintiff, having been injured while travelling by virtue of the ticket in a French train, sued the defendants. They set up the condition. The plaintiff had not read and did not know of it. The Court held that the whole book was the contract accepted by the plaintiff, and that he, therefore, could not reject the condition, which was one of its terms, and that judgment should be entered for the defendants. (*Burke* v. *S. E. Ry. Co.*, 5 C. P. D. 1; 49 L. J. C. P. D. 107.)

In that case Lord Coleridge distinguished it from *Henderson* v. *Stevenson* (L. R. 2 H. L. Sc. 476) in the House of Lords, where on the back of the ticket was printed, "The company incurs no liability in respect of loss, injury, or delay to the passenger or to his luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise." In the office there was hung up a notice that "the passengers, and the owners of the passengers' luggage, &c., should undertake all risks whatsoever." It was not shown that the plaintiff's attention was called either to the notice in the office, or on the back of the ticket, or that he knew either of the one or the other.

A railway passenger took a ticket containing a printed condition which stated that, inasmuch as the holder was permitted to travel (as he did) by a passenger carriage attached to a goods train, the railway company should be relieved from responsibility for any personal injury to plaintiff, consequent upon, or in any way arising from, such passenger carriage being attached to a goods train. In an action by the passenger for personal injuries, sustained by him while alighting from a carriage attached to a goods train, which, after certain goods waggons had been shunted, stopped short of the platform of the station to which he was travelling, the Court held that the plaintiff was bound by the condition, although in fact unaware of its terms, and that the railway company were exempted from liability if the injuries complained of arose from an accident within the scope of the condition. (*Johnson* v. *Great Southern and Western Ry. Co.*, 9 Ir. R. C. L. 108.)

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A drover in charge of his cattle signed a contract with a railway company, which stated that the cattle were to be conveyed upon the conditions mentioned upon the back of the invoice handed to him, and on the back of the invoice there was printed, amongst other conditions, the following:—"That, as a drover is allowed to attend the cattle during transit, they will allow such drover to travel free of charge, upon condition that he so travel at his own risk." On the face of the invoice there was nothing referring to passengers except the words "Drover in charge free," and at the foot of it were the words "For conditions of carriage, see back hereof." The drover did travel free, and, in consequence of a collision occurring on the journey, he received personal injuries, for which he brought an action against the railway company. The Court held that the condition, allowing a drover in charge of his cattle to travel free, provided he did so at his own risk, was part of the written contract signed by the drover; and that as he had elected to travel free he was bound by the conditions, and could not recover damages for the personal injuries sustained. (*Duff* v. *Gt. N. Ry. Co.*, 4 L. R. Ir. C. L. 178.)

339. Where a passenger travels on a railway at his own risk, the exemption from liability on the part of the railway company extends, not only to the actual transit, but to risks incurred on the premises of the company in coming to and going from the points to which the contract to carry applies. (*Gallin* v. *L. & N. W. Ry. Co.*, L. R. 10 Q. B. 212; 44 L. J. Q. B. 89.)

In that case, a cattle drover so travelling, who had to alight at a siding, and in necessarily going to the station passed a dangerous place, at which he met with an accident, was held not entitled to recover, although the jury found that there had been negligence on the defendant company's part.

See *Hall* v. *N. E. Ry. Co.* (L. R. 10 Q. B. 437; 44 L. J. Q. B.

164), as to free passes over lines in connection, and the non-liability of a railway company where a person travels "at his own risk" over their line under a contract with another railway company. In that case it was held that the ticket under which the plaintiff travelled meant that he should be at his own risk during the whole of the journey.

Cockburn, L. C. J., in delivering judgment in *McCawley* v. *Furness Ry. Co.* (L. R. 8 Q. B. 57), said: "The plaintiff had a free pass, and was carried under an agreement, in which it was provided that he should travel at his own risk, and I think that such an agreement must have been intended to exclude everything to which the company would ordinarily be liable as carriers of passengers. Now, I cannot think of anything for which the company would be liable with regard to the plaintiff, except negligence. There would, under ordinary circumstances, be an obligation to use due care in carrying the plaintiff. This obligation is excluded by the express terms of the bargain, and consequently there is a good defence to the action."

"An agreement that the passenger should be carried at his own risk would not take away the carrier's liability to a criminal prosecution. No such agreement could be set up as a defence to an indictment, but there is nothing to prevent it from being pleaded in a civil action." *Per* Blackburn J., *ibid.*

340. An injury to a servant while a passenger upon a railway upon a ticket taken by himself is not such a wrong done to the servant as to enable a master to maintain an action for loss of service. (*Alton* v. *Midland Ry. Co.*, 34 L. J. C. P. 292; 19 C. B. (N. S.) 213.)

And see *Baylis* v. *Lintott* (L. R. 8 C. P. 345; 42 L. J. C. P. 119.)

In *Berringer* v. *G. E. Ry. Co.* (4 C. P. D. 163), Lopes, J., held that an action could be maintained by the father against another

company, whose train came into collision with the train in which his son, an infant, was travelling, and thereby injured him, for loss of his services; on the ground that, though there was no contract of carriage, there was a pure tort by the company.

Where a master takes a ticket for his servant, the contract is with the master. (*Jennings* v. *Gt. N. Ry. Co.*, *ante*, p. 475.) Where the servant takes a ticket for a journey by himself, although on his master's service, the contract is with the servant.

341. Unless there be an intention in the passenger to defraud, the mere non-payment of fare will not exempt the railway company from liability for negligence. (*Austin* v. *G. W. Ry. Co.*, L. R. 2 Q. B. 442; 36 L. J. Q. B. 201.)

By 7 & 8 Vict. c. 85, s. 6, railway companies were bound to carry by certain trains children under three years of age without charge, and were entitled to half the fare charged for an adult in respect of all children between three and twelve years of age. The plaintiff's mother, carrying in her arms the plaintiff, a child of three years and two months old, took a ticket for herself by one of these trains on the defendants' railway, but did not take a ticket for the plaintiff; in the course of the journey an accident occurred through the negligence of the defendants, and the plaintiff was injured. At the time the plaintiff's mother took her ticket, no question was asked by the defendants' servants as to the age of the child; and there was no intention on the part of the mother to defraud the company. It was held that the plaintiff was entitled to recover against the defendants for the injury he had received. (*Austin* v. *G. W. Ry. Co.*, *supra*).

Cockburn, C. J., Shee, J., and Lush, J., held that there was a contract to carry both mother and child, and that the mistake as to the age of the child was no answer to an action for breach of this

contract. And Blackburn, J., held that, apart from any contract, the company were liable for breach of a duty, arising from the fact that the child was lawfully in one of their carriages. Blackburn, J., said: "In *Marshall* v. *York, Newc. & Ber. Ry. Co.* (21 L. J. C. P. 34; 11 C. B. 655), the Court held that the contract to carry safely does not depend upon whether or not the passenger has himself entered into a contract with the carrier, but that the fact of his being lawfully within the carriage creates a duty to carry him safely. If there be fraud on the part of the passenger, no such duty would arise. Whether fraud on the part of the mother would be the same as fraud by the child, so as to bring it within the principle of *Waite* v. *N. E. Ry. Co.* (28 L. J. Q. B. 258), we need not inquire, for actual fraud is not proved."

342. The duty of a railway company towards those who, in practice, they allow to accompany passengers in order to see them off by the train without asking special permission, is not lower than towards those whom they accompany. (*Per* Denman, J., in *Watkins* v. *G. W. Ry. Co.*, 46 L. J. C. P. D. 817.)

Denman, J., in his judgment, said: "I am of opinion that a railway company, keeping open a bridge over their line for the use of their passengers, is bound to keep that bridge reasonably safe, and that if, in practice, the friends of passengers are allowed by the company's servants to see passengers off by the trains, and to cross the bridge without asking special permission, the duty of the company in that respect cannot be put lower towards them than towards those whom they accompany for such not unreasonable purpose. I think that this view is consistent with the case of *Corby* v. *Hill* (27 L. J. C. P. 318; 4 C. B. (N. S.) 556) and *Smith* v. *London, &c. Docks Co.* (L. R. 3 C. P. 330; 37 L. J. C. P. 217). I regard the passenger's friend so permitted to go along the bridge by constant acquiescence on the part of the railway, as not being in

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the nature of a person barely licensed to be *there*, but as being invited to go to the same extent as the passenger whom he accompanies, and who is there on lawful business, in which the passenger and the company have both an interest. I consider also that the case of *Indermaur* v. *Dames* (L. R. 2 C. P. 311; 36 L. J. C. P. 181) is in favour of this view."

II.—Evidence of Negligence.

343. A collision between two trains of the same company is *primâ facie* evidence of negligence. (*Skinner* v. *L. B. & S. C. Ry. Co.*, 5 Ex. 787.)

Running off the line seems also to be *primâ facie* evidence of negligence. (*Bird* v. *Gt. N. Ry. Co.*, 28 L. J. Ex. 3; *Dawson* v. *M. S. & L. Ry. Co.*, 5 L. T. 682.)

In the absence of evidence to the contrary, trains running over a particular line of railway are to be presumed to be the property of, or at any rate under the control of, the company to whom the line belongs, although other companies may have running powers over the part of the line in question. (*Ayles* v. *S. E. Ry. Co.*, L. R. 3 Ex. 146; 37 L. J. Ex. 104.)

344. An invitation to passengers to alight on the stopping of the train, without any warning of danger to the passenger, who is so circumstanced as to be unable to alight without danger, such danger not being visible and apparent, amounts to negligence on the part of the railway company; and the bringing up a train to a final standstill for the purpose of the passengers alighting amounts to an invitation to alight; at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he purposes to alight at the

particular station. (*Cockle* v. *S. E. Ry. Co.*, L. R. 7 C. P. 321; 41 L. J. C. P. 140.)

In *Bridges* v. *North London Ry. Co.* (L. R. 7 H. L. 213) it was doubted whether the calling out the name of a station is an invitation to the passengers, going to that station, to alight there. It was held that the evidence of the calling out the name in that case, coupled with the stopping of the train, and the interval of time which elapsed before it again moved, was evidence to go to a jury. In delivering judgment in *Cockle's case*, Cockburn, C. J., said: "It is not necessary here to say what would be the effect if a passenger should alight where the danger was visible and apparent, as where a passenger gets out in broad day, trusting to his ability to overcome the difficulty. . . . In the present case the evidence of the conduct of the company's servants was such as to warrant the jury in finding that the train had really come to the final standstill, and that the company's servants meant the passengers to get out there or be carried on."

In the case of *Lewis* v. *L. C. & D. Ry. Co.* (L. R. 9 Q. B. 66; 43 L. J. Q. B. 8), it was held that the mere stopping of a train, and calling out the name of a station, is no evidence of an invitation to alight.

In that case Blackburn, J., said, "We must have evidence of a negligent invitation to alight, given after the stopping. When a train overshoots the platform it must of necessity stop some little time before it can back." And Archibald, J., said, "There may indeed be conduct on the part of a company's servants, without the opening of a door, or requesting to alight, which amounts to an invitation to alight. For instance, if a train should stop a considerable time, that might be an invitation."

In *Robson* v. *N. E. Ry. Co.* (2 Q. B. D. 85; 46 L. J. Q. B. D. (App.) 50), Lord Justice Mellish said, "Here the plaintiff was invited to alight, and on accepting the invitation was injured; and the fact that the train had gone beyond the platform was in itself, I think, *some* evidence of negligence. Then the question arises,

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was the defendant justified in alighting when she did so? . . . A railway company are bound to find, at every station, reasonable means for passengers to alight."

A railway train, consisting of six carriages, drew up at a small station with the last carriage beyond the platform. The platform was adapted for five carriages only; but on market days the train usually consisted of six carriages. The plaintiff, who frequently travelled by the train, was in the last carriage. The train was drawn up as far as possible, the engine being against a dead end, and the porters called out "All change here." The plaintiff's son got out and took her parcels across to a train waiting on the other side of the platform. The plaintiff knew her carriage was not at the platform. She, however, did not call for assistance, but proceeded to get out as quickly as she could. She put one foot on the iron step, and as she was about to put the other on the wooden step the first slipped, and she fell. It was held that the above circumstances did not constitute any evidence of negligence for the jury. (*Owen* v. *G. W. Ry. Co.*, 46 L. J. Q. B. D. 486.)

As a general rule, a party who attempts to get into or out of a railway carriage while the train is in motion is guilty of such rashness as to bar all action at his instance for any injury that may result.

The train in which the plaintiff was carried as a passenger overshot the platform at the station at which the plaintiff intended to alight, drawing the carriage in which the plaintiff was seated beyond the platform. The porters called out, "Keep your seats," but not so as to be heard by the plaintiff, and the train was not put back. After waiting a reasonable time, the plaintiff got out, and in doing so sustained personal injuries. It was held that there was evidence of negligence on the part of the company to go to the jury. (*Rose* v. *N. E. Ry. Co.*, 2 Ex. D. 248; 46 L. J. Ex. D. (App.) 374.)

345. A railway company are bound to provide for the public whom they invite to travel by their line means of access to, and egress from, their carriages and

stations, which can be used without danger. (*Bridges* v. *N. L. Ry. Co.*, L. R. 7 H. L. 213; 43 Q. B. (H. L.) 151.)

Their duty is to take reasonable care to keep their premises in such a state as that those whom they invite to come there shall not be unduly exposed to danger. (*Welfare* v. *L. & B. Ry. Co.*, L. R. 4 Q. B. 693; 38 L. J. Q. B. 241.)

In cases as to accidents to passengers at stations, it is always a question whether the mischief could reasonably have been foreseen, and whether precautions ought not to have been taken to guard against it.

In *Crafter* v. *Met. Ry. Co.* (35 L. J. C. P. 132), the railway company had a staircase at a station for the use of passengers, leading from the arrival platform to the street: it was about 6 feet wide, with walls on each side and wooden steps nosed with brass, worn smooth. The plaintiff slipped in going down the stairs and hurt himself. It was held that there was no evidence to go to the jury, there being nothing unusual in the staircase, and its nature being obvious to everyone.

The plaintiff was injured by falling on steps leading to the defendants' railway station, which the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he might have used, and he admitted that he knew that the steps were dangerous, and went down carefully holding the handrail. The Court held that the defendants had not shown that the plaintiff with a full knowledge of the nature and extent of the danger had voluntarily agreed to incur it, so as to make the maxim *Volenti non fit injuria* applicable; and therefore he was entitled to recover. (*Osborne* v. *L. & N. W. Ry. Co.*, 21 Q. B. D. 220.)

In *Cornman* v. *Eastern Counties Ry. Co.* (29 L. J. Ex. 94) the plaintiff, who, with a crowd of others, was waiting on the platform

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for the arrival of a train, caught his foot on the edge of a weighing machine, was tripped over, and hurt. The machine was such as is commonly employed for weighing luggage, and was standing in the usual place. It was held that there was no evidence of negligence of the company to go to the jury. Bramwell, B., said: "Nothing is so easy as to be wise after the event. No human being ever suggested that any mischief was likely to arise from a weighing machine placed as this was; and how, therefore, could the company anticipate any? On the contrary, they might fairly expect there would be none, when year after year company after company had weighing machines placed in similar positions, and no harm ever resulted."

In an action under Lord Campbell's Act to recover damages for death through the alleged negligence of a railway company, it appeared that on the occasion of the accident the deceased had taken a ticket for a special train at a cheap rate for harvest men. There being no room in the special train, the deceased remained on the platform until the arrival of the next ordinary train, together with a crowd composed of harvest men, who had also taken tickets for the special train, and of other persons, a large number of whom had entered the station without permission. The company had an extra number of porters at the station, but in consequence of great disorderliness of the persons so assembled on the platform, and by a sudden and violent rush of the crowd, the deceased was pushed on the line, and was killed by the engine of the ordinary train as it approached. At the trial the jury found that the deceased was not entitled to proceed by the ordinary train; that the accident was caused by the rush of the crowd; that the company had not taken due precautions to prevent injuries from the crowding on the platform; and that, by using due precautions, they might have prevented the rush of the crowd:—The Court held, that even assuming the deceased to have been lawfully on the platform, the company were not liable for the accident. (*Cannon* v. *Midland Great Western Ry. Co.*, 6 L. R., Ir. C. L. 199.) A railway company is not bound to provide at a station (even when

an unusually large number of passengers by a special train is expected) a staff of servants sufficient, not merely for the guidance and assistance of passengers and the preservation of order amongst them, but adequate to control the violence of an assemblage of persons entering the station without permission and overcrowding the platform. (*Ibid.*)

In *Shepperd* v. *Midland Ry. Co.* (25 L. T. 879; 20 W. R. 705), an intending passenger fell upon a piece of ice nearly half an inch thick, extending half-way across the platform. The presence of the ice being unexplained, it was held that there was evidence of negligence on the part of the company.

Although a railway company are not bound to erect a foot bridge over their line to give passengers access from one platform to the other, and the want of such a bridge will not, *per se*, make them liable for injuries received by the public on that account, still the absence of such a precaution throws a greater onus on the company to provide for the safety of the public. (*Girdwood* v. *North British Ry. Co.*, 4 Sess. Ca. (4th Series) 115.)

Where notices have been put up by a railway company forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in the case of an injury occurring to anyone crossing the line at that point, set up the existence of the notices by way of answer to an action for damages for such injury. (*Slattery* v. *Dublin, Wicklow & Wexford Ry. Co.*, 3 App. Cas. 1155.)

The case of *Vaughan* v. *Taff Vale Ry. Co.* (29 L. J. Ex. 247) shows that a railway company are not liable for an accident resulting from the use of that which they are expressly permitted by the legislature to use, unless there be evidence of some negligence in fact.

Bilbee v. *L. B. & S. C. Ry. Co.* (34 L. J. C. P. 182; 18 C. B. (N. S.) 584) shows that there may be a state of circumstances which would cast on a railway company the duty of doing something more than the statute requires.

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III.—Compensation for Injuries.

346. In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice. (*Phillips* v. *L. & S. W. Ry. Co.*, 5 C. P. D. 280; 49 L. J. Q. B. 233.)

In that case it was held that the right direction to a jury, who have to assess damages in an action for personal injuries sustained in a railway accident by a professional man making a large income, is that, in respect to the plaintiff's money loss, they should not attempt to arrive at an absolute or mathematically accurate compensation, but should give a fair and reasonable compensation, taking into consideration the amount of his income when the injuries were sustained, the length of time he has been deprived of that income, the probability of his having continued to earn it if he had not been injured, the prospect of his being able to earn anything in the future, and all the other circumstances of the case.

Bramwell, L. J., said: "I have tried as a judge more than a hundred actions of this kind, and the direction which I, in common with other judges, have been accustomed to give to the jury has been to the following effect:—'You must give the plaintiff a compensation for his pecuniary loss; you must give him compensation for his pain and bodily suffering. Of course, it is almost impossible for you to give to an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all the circumstances what is a fair amount to be awarded to him.' I have never known a direction in that form to be questioned."

347. Where the passenger has, under a policy of insurance against accidents, received a sum of money in respect of the accident in question, it cannot be taken into account in reduction of the damages to be awarded to such passenger. (*Bradburn* v. *G. W. Ry. Co.*, L. R. 10 Ex. 1; 44 L. J. Ex. 9.)

"The Railway Passengers Assurance Company's Act, 1864" (27 & 28 Vict. c. cxxv, s. 35), enacts, that no contract of that company, nor any compensation received or recoverable by virtue of any such contract, either under that Act or otherwise, shall prejudice or affect any right or action, claim or demand, which any person or his executors or administrators may have against any other company or any person, either at common law or by virtue of 9 & 10 Vict. c. 93, or of any other Act of Parliament, for the injury, whether fatal or otherwise, in respect of which the compensation is received or recoverable.

348. Where a person has been injured or killed by an accident on a railway, the Board of Trade, upon application in writing made jointly by the company from whom compensation is claimed and the person if he is injured, or his representatives if he is killed, may, if they think fit, appoint an arbitrator, who shall determine the compensation (if any) to be paid by the company. (31 & 32 Vict. c. 119, s. 25.)

349. Whenever any person injured by an accident on a railway claims compensation on account of the injury, any judge of the Court in which proceedings to recover such compensation are taken, or any person

who by the consent of the parties or otherwise has power to fix the amount of compensation, may order that the person injured be examined by some duly qualified medical practitioner named in the order, and not being a witness on either side, and may make such order with respect to the costs of such examination as he may think fit. (31 & 32 Vict. c. 119, s. 26.)

Part VI.

CARRIERS OF PASSENGERS BY ROAD.

CHAPTER XXI.

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I.—Generally.

350. Passenger carriers on land are bound to convey persons whenever they offer themselves in a fit and proper state to be carried, and are ready to pay for their transportation, and there is room in the carrier's conveyance. (See *ante*, Art. 323.)

The passenger must be in a fit state as to sobriety, health, and conduct to associate with other passengers. (Story on Bailm.)

Passengers are bound to submit to such reasonable regulations as the carriers may adopt for the convenience and comfort of the other passengers, as well as for their own proper interests. (Story on Bailm.; Angell on Carriers.)

Passenger carriers have a right to demand and to receive their fare at the time when the passenger engages his seat; and if he refuses to pay it, they may fill up the place with other passengers who are ready to make the proper deposit. (*Ker* v. *Mountain*, 1 Esp. 27.)

351. The carrier is bound to carry the passenger from the usual place of taking up to the usual place of setting down, and he cannot at any intermediate place refuse to proceed, the undertaking to carry to the journey's end being absolute. (*Dudley* v. *Smith*, 1 Camp. 167; Story on Bailm.; Angell on Carriers.)

If the usual place of alighting from a stage coach is at an inn-yard, it has been decided that passengers cannot be compelled to get out even at the inn-gate. (*Dudley* v. *Smith*, *supra*.)

352. Carriers of passengers impliedly undertake to carry passengers within reasonable time and with reasonable speed.

In an action by a passenger against a carrier for breach of the contract to deliver him at his destination, he may claim as damages

the expense of getting there by other means, if there be any, or compensation for the trouble and inconvenience of walking there, if there be no other means of getting there, because it is the direct object contemplated in the contract that he should reach his destination; but he is not entitled to claim compensation for an accidental injury or illness occasioned to him in the course of reaching his destination by such means, for such consequences are neither the proximate consequence of the breach of contract nor within the contemplation of the parties at the time of contracting. (*Hobbs* v. *L. & S. W. Ry. Co.*, L. R. 10 Q. B. 111; 44 L. J. Q. B. 49; *ante*, Art. 328.)

353. Passenger carriers, not being insurers, are not responsible for accidents where all reasonable skill and diligence have been employed. Passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go, and are responsible for any, even the slightest, neglect. (*Aston* v. *Heaven*, 2 Esp. 533; *Christie* v. *Griggs*, 2 Camp. 79.)

In all cases of negligent and improvident driving by a servant employed to drive, the master will be responsible if the servant was driving about the master's business, or using the master's horses and carriage for the master's benefit; and the master cannot exonerate himself from liability by showing that the servant was acting in disobedience of his orders. Where, therefore, an omnibus company gave written instructions to their drivers "to drive at a steady pace, and not on any account to race with or obstruct other omnibuses," and a driver disobeyed these instructions, and wilfully drew across the road to obstruct another omnibus, and ran against it and upset it, it was held that the instructions given by the omnibus company to their servants could not exonerate the company from responsibility for the careless, wilful, and malicious acts

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of such servants while carrying passengers for the benefit of the company. (*Limpus* v. *L. G. Omnibus Co.*, 1 H. & C. 526; 32 L. J. Ex. 34.)

A cabdriver, employed on the usual terms of paying so much a day for his cab and horse and keeping the rest himself, is, as between the cab proprietor and the public, by virtue of the Acts relating to the subject, the servant of the proprietor, who is therefore liable for the cabdriver's negligence while acting within the scope of the purposes for which the cab is intrusted to him. (*Powles* v. *Hider*, 6 E. & B. 207; 25 L. J. Q. B. 331; *Venables* v. *Smith*, 2 Q. B. D. 279; 46 L. J. Q. B. 470.) But where the cabdriver hires the cab only, and he himself provides a horse, he is not the servant of the proprietor of the cab so as to make the latter liable for his negligence. (*King* v. *Spurr*, 8 Q. B. D. 104; 51 L. J. Q. B. 105. See Addison on Torts, p. 102.)

Where an injury is sustained by a passenger, from an inevitable accident, the owner of the conveyance is not liable, provided there was no negligence in the driver. (*Aston* v. *Heaven*, 2 Esp. 533.)

As to contributory negligence by passenger, see *ante*, Art. 337.

As to liability to the representatives of a passenger killed by an accident, see *ante*, Art. 335.

The whole subject was thoroughly examined by the Supreme Court of the United States, in the case of *Stokes* v. *Saltonstall*. (13 Peters, 181—193.)

"When everything has been done which human prudence, care, and foresight can suggest, accidents may happen. The lights may in a dark night be obscured by fog; the horses may be frightened; the coachman may be deceived by the sudden alteration of objects on the road; the coach may be upset accidentally by striking another vehicle, or by meeting with an unexpected obstruction; or from the intense severity of the cold the coachman, although possessed of all proper skill, and taking all due and reasonable care, may at the time become physically incapable of managing his horses, or of otherwise doing his duty (*Stokes* v. *Saltonstall*, *supra*): in all these, and the like cases, if there is no

negligence whatsoever, the coach proprietors are exonerated." (Story on Bailm.; *Crofts* v. *Waterhouse*, 3 Bing. 319; *Christie* v. *Griggs*, 2 Camp. 79.)

354. Carriers of passengers are bound to provide conveyances reasonably strong and sufficient for the journey, with suitable harness, trappings, and equipments; and to make a proper examination thereof previous to each journey. (*Bremner* v. *Williams*, 1 Car. & P. 414; *Christie* v. *Griggs*, 2 Camp. 80; *Camden & Amboy Ry. Co.* v. *Burke*, 13 Wend. 611, 628.)

This and the following article only state what amounts to negligence within the meaning of Article 353.

Carriers of passengers are bound not to overload the coach either with passengers or with luggage; and they are to take care that the weight is suitably adjusted so that the coach is not top-heavy and made liable to overset. (*Long* v. *Horne*, 1 Car. & P. 612; *Israel* v. *Clark*, 4 Esp. 259.)

A custom and usage of so overloading their coaches with goods, luggage, or passengers, is no excuse for the act. (*Dewort* v. *Loomer*, 21 Conn. 246.)

355. Carriers of passengers are bound to provide careful drivers, of reasonable skill and good habits, for the journey; and to employ horses which are steady, and not vicious, or likely to endanger the safety of the passenger. (*Christie* v. *Griggs*, 2 Camp. 79; *Crofts* v. *Waterhouse*, 3 Bing. 321; *Hall* v. *Connecticut R. Steamboat Co.*, 13 Conn. 319; *Fuller* v. *Talbot*, 23 Ill. 357.)

"The coachman must have competent skill; he must be well acquainted with the road he undertakes to drive; he must be pro-

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vided with steady horses, a coach and harness of sufficient strength, and properly made, and also with lights by night. If there is the least failure in any of these things, the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage that happens." (*Per* Best, C. J., in *Crofts* v. *Waterhouse*, 3 Bing. 321.)

If the driver overloads the carriage, or drives with immoderate speed, or with defective reins, or with reins so loose that he cannot readily command his horses, or if he passes unnecessarily along unsafe parts of the road, or through narrow gateways, &c., and a collision occurs, the proprietor of the carriage will be answerable for injuries sustained by the passenger. (*Aston* v. *Heaven*, 2 Esp. 535; *Bremner* v. *Williams*, 1 Car. & P. 414; see Addison on Contracts, 8th ed., p. 520.)

There may be occasions upon which it becomes the duty of the driver to deviate, to a reasonable extent, from the proper side of the road. (*Wayde* v. *Carr*, 2 Dow. & R. 255.) In that case the Court said, "Whatever might be the law of the road, it was not to be considered as inflexible and imperatively governing a case of this description. In the crowded streets of a metropolis, where this accident happened, situations and circumstances might frequently arise where a deviation from what is called 'the law of the road' would not only be justifiable but absolutely necessary. Of this the jury were the best judges."

In an action against an omnibus proprietor for injury to a passenger, it was proved, on behalf of the latter, that he was sitting inside the omnibus and was injured by one of the horses kicking the front panel, constituting the back of his seat, and that on a subsequent examination marks of other kicks were seen. It was held that there was evidence of negligence of the defendants to go to the jury. (*Simson* v. *L. G. Omnibus Co.*, L. R. 8 C. P. 390; 42 L. J. C. P. 112.)

Bovill, C. J., said, "It is quite true that the defendants did not absolutely warrant the plaintiff's safety or the sufficiency of the carriage and horses, and that they were only bound to use due and

reasonable care for the safety of passengers, and it is true that the mere fact of an accident is not generally *primâ facie* evidence of negligence; but if the cause of the accident be shown, this may or may not be *primâ facie* evidence according to its nature. In the case of a public carriage, the *owner* is bound to use due and reasonable care that there are proper *horses* which are not dangerous to the passengers; and as respects his liability, it is not necessary to show that he was aware that they were improper or dangerous."

356. Persons driving carriages are bound to exercise all possible diligence to avoid driving against foot passengers, who have a right to cross the highway, and if they do not exercise such diligence, and any accident happens to the foot-passenger, they will be responsible therefor. (*Cotterill* v. *Starkey*, 8 Car. & P. 691.)

If a person driving on the road cannot pull up, because his reins break, that is no ground of defence for an injury done to a foot-passenger; because he is bound to have proper harness. (*Ibid.*)

357. Carriers of passengers are bound to receive and to take care of the usual luggage which it is customary to allow every passenger to carry for the journey although they receive no specific compensation therefor, but simply receive their fare for the conveyance of the passenger. (*Robinson* v. *Dunmore*, 2 Bos. & Pul. 416. See *ante*, pp. 15, 16.)

It has been held that a cab proprietor is not a common carrier of luggage taken with the passenger. (*Ross* v. *Hill*, 2 C. B. 877; *Powles* v. *Hider*, 6 E. & B. 207.)

A passenger carrier has a lien upon the luggage of the passenger

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for his fare; but not a lien on the person of the passenger, or the clothes he has on. (*Wolf* v. *Summers*, 2 Camp. 631.)

II.—In the Metropolis.

358. Every hackney carriage standing in any street or place, and having thereon any of the numbered plates required by law to be affixed, is, unless actually hired, deemed to be plying for hire, although such hackney carriage is not on any standing or place usually appropriated for the purpose of hackney carriages standing or plying for hire; and the driver of every such hackney carriage which is not actually hired is obliged and compellable to go with any person desirous of hiring such hackney carriage. (1 & 2 Will. 4, c. 22, s. 35.)

The driver of every such hackney carriage must, if required by the hirer thereof, carry in and by such carriage the number of persons painted or marked thereon, or any less number of persons. (16 & 17 Vict. c. 33, s. 9.)

The "cabs" and "omnibuses" of London are called in the statutes relating to them "metropolitan hackney carriages" and "metropolitan stage carriages." A hackney carriage whilst on the premises of a railway company by their leave for the accommodation of passengers by their trains is not "plying for hire" in any "street or place" within the meaning of the Hackney Carriage Acts, and the driver of such carriage cannot under those Acts be compelled to convey any person desirous of hiring it. *Semble* (*per* Bramwell, B.), if the driver consent to be hired, the regulations of the Hackney Carriage Acts as to the amount of fare payable will attach. (*Case* v. *Storey*, L. R. 4 Ex. 319; 38 L. J. M. C. 113.)

Drivers of cabs may stand and ply for hire with such carriages on Sunday, and if they do so are liable and compellable to do the like work on Sunday as they are on other days. (1 & 2 Will. 4, c. 22, s. 37. See *ante*, p. 55.)

359. The driver of every hackney carriage which plies for hire must (unless such driver have a reasonable excuse, to be allowed by the magistrate before whom the matter shall be brought in question) drive such hackney carriage to any place to which he shall be required by the hirer thereof to drive the same, not exceeding six miles from the place of hiring, or for any time not exceeding one hour from the time when hired. When hired by distance the driver must drive at a reasonable and proper speed, not less than six miles an hour, except in cases of unavoidable delay, or when required by the hirer thereof to drive at any slower place. When hired by time the driver may be required to drive at any rate not exceeding four miles an hour, but if required to drive more than four miles an hour the driver is entitled to demand, in addition to the fare regulated by time, for every mile or part of a mile exceeding four miles the fare regulated by distance. (16 & 17 Vict. c. 33, s. 7.)

That the horse is tired has been held by magistrates to be a reasonable excuse.

360. The driver of every hackney carriage is bound to carry in or upon it a reasonable quantity of luggage for every person hiring it. (16 & 17 Vict. c. 33, s. 10. See *ante*, p. 19.)

If any luggage is carried outside the hackney car-

riage the driver is entitled to an extra payment of 2*d.* for every package carried outside, whatever may be the number of passengers carried. (Order made under powers contained in 32 & 33 Vict. c. 115.)

361. Cab fares may be according to distance or time, at the option of the hirer, expressed at the commencement of the hiring. If not otherwise expressed, the fare is to be paid according to distance. (Order made under 32 & 33 Vict. c. 115.)

Whether the hiring be by distance or by time, the driver is entitled to charge, in addition to what is due to him for distance or time, as the case may be, an extra payment of 6*d.* if at any time during the hiring more than two persons are carried together for every person above two persons so carried. Provided that two children under the age of ten years must count for one person, and for any one such child when carried together with two or more persons, the extra payment must be 3*d.*, and no more. (Order made under 32 & 33 Vict. c. 115.)

When a hackney carriage is hired by distance, and the hirer requires the driver to stop such carriage for fifteen minutes, or for any longer time, the driver may demand and receive from the hirer so requiring him to stop a further sum (above the fare to which he shall be entitled, calculated according to the distance) of 6*d.* for every fifteen minutes completed that he shall have been so stopped. No driver is to demand or receive over and above the fare any sum by way of back fare from the place at which the carriage is discharged.

362. Every driver or conductor of an omnibus who refuses to admit and carry at the lawful fare any passenger for whom there is room, and to whose

admission no reasonable objection is made, or who demands more than the legal fare for any passenger, is liable to a fine of 20*s*. (6 & 7 Vict. c. 86, s. 33.)

363. There must be kept distinctly painted, in a conspicuous manner, on the inside of every metropolitan stage carriage, a table of the fares to be demanded of the passengers. The fares specified in this table are to be deemed to be the only lawful fares; and may be recovered by the driver or conductor, as in the case of hackney carriages, before a magistrate. (6 & 7 Vict. c. 86, s. 7.)

The legislature has fixed the tariff for the hire of cabs (*ante*, p. 516), but has permitted omnibus proprietors to fix their own scale of charges.

Luggage must be paid for extra. See *ante*, p. 16.

The driver or conductor of an omnibus who receives a parcel to carry, even without any reward or gratuity, is personally responsible for its loss through gross negligence on his part. (*Beauchamp* v. *Powley*, 1 Moo. & R. 38, *ante*, p. 31.)

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(17 & 18 VICT. c. 31.)

An Act for the better Regulation of the Traffic on Railways and Canals. [10th July, 1854.]

WHEREAS it is expedient to make better provision for regulating the traffic on railways and canals: Be it enacted (&c., &c.), as follows:

1. In the construction of this Act—

The word "traffic" shall include not only passengers, and their luggage, and goods, animals and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, boats and vehicles of every description adapted for running or passing on the railway or canal of any such company: "Traffic."

The word "railway" shall include every station of or belonging to such railway used for the purposes of public traffic; and "Railway."

The word "canal" shall include any navigation whereon tolls are levied by authority of Parliament, and also the wharves and landing places of and belonging to such canal or navigation, and used for the purposes of public traffic: "Canal."

The expression "railway company," "canal company," or "railway and canal company" shall include any person being the owner or lessee of or any contractor working any railway or canal, or navigation constructed or carried on under the powers of any Act of Parliament: "Company."

A station, terminus or wharf shall be deemed to be near another station, terminus or wharf when the distance between such stations, termini or wharves shall not exceed one mile, such stations not being situate within five miles from St. Paul's Church, in London. "Stations."

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Duty of railway companies to make arrangements for receiving and forwarding traffic, without unreasonable delay, and without partiality.

2. Every railway company, canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station or wharf of the one near the terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf (*a*).

(36 & 37 Vict. c. 48.)

An Act to make better provision for carrying into effect the Railway and Canal Traffic Act, 1854, *and for other purposes connected therewith.* [21st July, 1873.]

Be it enacted (&c., &c.), as follows:—

* * * * *

Definitions.

3. In this Act—

The term "railway company" includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament:

The term "canal company" includes any person being the owner or lessee of, or working, or entitled to charge tolls for the use

(*a*) As to the part of this section which deals with the granting of due and reasonable facilities, *see ante*, Chap. XIV., p. 251; and as to giving an undue preference, *ante*, Chap. XV., p. 332.

of any canal in the United Kingdom constructed or carried on under the powers of any Act of Parliament:

The term "person" includes a body of persons corporate or unincorporate:

The term "railway" includes every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic:

The term "canal" includes any navigation which has been made under or upon which tolls may be levied by authority of Parliament, and also the wharves and landing-places of and belonging to such canal or navigation, and used for the purposes of public traffic:

The term "traffic" includes not only passengers and their luggage, goods, animals, and other things conveyed by any railway company or canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company:

The term "mails" includes mail bags and post-letter bags:

The term "special Act" means a local or local and personal Act, or an Act of a local and personal nature, and includes a Provisional Order of the Board of Trade confirmed by Act of Parliament, and a certificate granted by the Board of Trade under the Railways Construction Facilities Act, 1864:

The term "the Treasury" means the Commissioners of her Majesty's Treasury for the time being.

* * * * *

Commissioners not to be interested in railway or canal stock.

5. Any person appointed a Commissioner under this Act shall within three calendar months after his appointment absolutely sell and dispose of any stock, share, debenture stock, debenture bond, or other security of any railway or canal company in the United Kingdom which he shall at the time of his appointment own or be interested in for his own benefit; and it shall not be lawful for any person appointed a Commissioner under this Act, so long as he shall hold office as such Commissioner, to purchase, take, or become interested in for his own benefit any such stock, share, debenture stock, debenture bond, or other security; and if any such stock, share, debenture stock, debenture bond, or other security, or any interest therein, shall come to or vest in such Commissioner by will or succession, for his own benefit, he shall, within three calendar months after the same shall so come to or vest in him absolutely, sell and dispose of the same or his interest therein.

It shall not be lawful for the Commissioners, except by consent of the parties to the proceedings, to exercise any jurisdiction by this Act conferred upon them in any case in which they shall be directly or indirectly interested in the matter in question.

The Commissioners shall devote the whole of their time to the performance of their duties under this Act, and shall not accept or hold any office or employment inconsistent with this provision.

Sect. 6.

Transfer to Commissioners of jurisdiction under 17 & 18 Vict. c. 31, s. 3.

6. Any person complaining of anything done or of any omission made in violation or contravention of section two of the Railway and Canal Traffic Act, 1854, or of section sixteen of the Regulation of Railways Act, 1868 (*a*), or of this Act, or of any enactment amending or applying the said enactments respectively, may apply to the Commissioners, and upon the certificate of the Board of Trade alleging any such violation or contravention any person appointed by the Board of Trade in that behalf may in like manner apply to the Commissioners; and for the purpose of enabling the Commissioners to hear and determine the matter of any such complaint, they shall have and may exercise all the jurisdiction conferred by section three of the Railway and Canal Traffic Act, 1854, on the several courts and judges empowered to hear and determine complaints under that Act; and may make orders of like nature with the writs and orders authorised to be issued and made by the said courts and judges; and the said courts and judges shall, except for the purpose of enforcing any decision or order of the Commissioners, cease to exercise the jurisdiction conferred on them by that section.

Power for Commissioners to enable companies to explain alleged violation of law.

7. Where the Commissioners have received any complaint alleging the infringement by a railway company or canal company of the provisions of any enactment in respect of which the Commissioners have jurisdiction, they may, if they think fit, before requiring or permitting any formal proceedings to be taken on such complaint, communicate the same to the company against whom it is made, so as to afford them an opportunity of making such observations thereon as they may think fit.

Differences between railway and canal companies to be referred to Commissioners.

8. Where any difference between railway companies or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorised to be referred to arbitration, such difference shall at the instance of any company party to the difference and with the consent of the Commissioners be referred to the Commissioners for their decision in lieu of being referred to arbitration: Provided that the power of compelling a reference to the Commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special Act, the Commissioners are of opinion that the difference in question may more conveniently be referred to him (*b*).

Power to refer differences to Commissioners.

9. Any difference to which a railway company or canal company is a party, may, on the application of the parties to the difference, and with the assent of the Commissioners, be referred to them for their decision.

(*a*) *Ante*, p. 313.
(*b*) This section is amended by sect. 15 of 51 & 52 Vict. c. 25, *post*, p. 532.

Sect. 10.

Transfer to Commissioners of certain powers and duties of the Board of Trade.

26 & 27 Vict. c. 92.

10. The following powers and duties of the Board of Trade shall be transferred to the Commissioners; namely,

(1.) The powers of the Board of Trade under Part III. of the Railway Clauses Act, 1863, or under any special Act, with respect to the approval of working agreements between railway companies; and,

(2.) The powers and duties of the Board of Trade under section thirty-five of the Railway Clauses Act, 1863, with respect to the exercise by railway companies of their powers in relation to steam vessels:

And the provisions of the said Acts conferring such powers or imposing such duties, or otherwise referring to such powers or duties, shall, so far as is consistent with the tenor thereof, be read as if the Commissioners were therein named instead of the Board of Trade.

* * * * *

Publication of rates.

14. Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged.

Every such book shall during all reasonable hours be open to the inspection of any person without the payment of any fee (*c*).

The Commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses (*d*).

Any company failing to comply with the provisions of this section shall for each offence, and in the case of a continuing offence, for every day during which the offence continues, be liable to a penalty not exceeding five pounds, and such penalty shall be recovered and applied in the same manner as penalties imposed by the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845, (as the case may require,) are for the time being recoverable and applicable.

Power to Commis-

15. The Commissioners shall have power to hear and determine any question or dispute which may arise with respect to the terminal

(*c*) See sects. 28, 33, and 34 of 51 & 52 Vict. c. 25, *post*, pp. 540, 543, and *ante*, Article 217, p. 232.

(*d*) See *ante*, Article 218, p. 236.

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sioners to fix terminal charges.

charges of any railway company, where such charges have not been fixed by any Act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, delivery, and other services of a like nature; any decision of the Commissioners under this section shall be binding on all courts and in all legal proceedings whatsoever (*e*).

Arrangements between railway companies and canal companies.

16. No railway company or canal company, unless expressly authorised thereto by any Act passed before the passing of this Act, shall, without the sanction of the Commissioners, to be signified in such manner as they may by general order or otherwise direct, enter into any agreement whereby any control over or right to interfere in or concerning the traffic carried or rates or tolls levied on any part of a canal is given to the railway company, or any persons managing or connected with the management of any railway; and any such agreement made after the commencement of this Act without such sanction shall be void.

The Commissioners shall withhold their sanction from any such agreement which is in their opinion prejudicial to the interests of the public.

Not less than one month before any such agreement is so sanctioned, copies of the intended agreement certified under the hand of the secretary of the railway company or one of the railway companies party or parties thereto, shall be deposited for public inspection at the office of the Commissioners, and also at the office of the clerk of the peace of the county, riding, or division in England or Ireland in which the head office of any canal company party to the agreement is situate, and at the office of the principal sheriff clerk of every such county in Scotland, and notice of the intended agreement, setting forth the parties between whom or on whose behalf the same is intended to be made, and such further particulars with respect thereto as the Commissioners may require, shall be given by advertisement in the London, Edinburgh, or Dublin Gazette, according as the head office of any canal company party to the agreement is situate in England, Scotland, or Ireland, and shall be sent to the secretary or principal officer of every canal company any of whose canals communicates with the canal of any company party to the agreement; and shall be published in such other way, if any, as the Commissioners for the purpose of giving notice to all parties interested therein by order direct (*f*).

Maintenance of canals by railway companies.

17. Every railway company owning or having the management of any canal or part of a canal shall at all times keep and maintain such canal or part, and all the reservoirs, works, and conveniences thereto belonging, thoroughly repaired and dredged and in good working condition, and shall preserve the supplies of water to the same, so that the whole of such canal or part may be at all times

(*e*) See sect. 10 of 51 & 52 Vict. c. 25, *post*, p. 530, and sect. 37, p. 544. As to what "terminal charges" includes, see sect. 55 of 51 & 52 Vict. c. 25, *post*, p. 552.

(*f*) See Part III. of 51 & 52 Vict. c. 25, *post*, p. 544.

kept open and navigable for the use of all persons desirous to use and navigate the same without any unnecessary hindrance, interruption, or delay. Sect. 17.

Conveyance of Mails.

18. Every railway company shall convey by any train all such mails as may be tendered for conveyance by such train, whether such mails be under the charge of a guard appointed by the Postmaster General or not, and notwithstanding that no notice in writing requiring mails to be conveyed by such train has been given to the company by the Postmaster General. Conveyance of mails.

Every railway company shall afford all reasonable facilities for the receipt and delivery of mails at any of their stations without requiring them to be booked or interposing any other delay.

Where the mails are in charge of a guard appointed by the Postmaster General, every railway company shall permit such guard, if he think fit, to receive and deliver them at any station by himself or his assistants, rendering him nevertheless such aid as he may require.

19. Every railway company shall be entitled to reasonable remuneration for any services performed by them in pursuance of this Act with respect to the conveyance of mails, and such remuneration shall be paid by the Postmaster General. Remuneration for conveyance of mails.

Any difference between the Postmaster General and any railway company as to the amount of such remuneration, or as to any other question arising under this Act, shall be decided by arbitration, in manner provided by the Act of the session of the first and second years of the reign of her present Majesty, chapter ninety-eight, or, at the option of such railway company, by the Commissioners.

20. Where a railway company use, maintain, or work, or are party to any arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, all provisions contained in any Act with respect to the conveyance of mails by railways shall, so far as they are applicable to the conveyance of mails by steam vessels, extend to the steam vessels so used, maintained or worked. Conveyance of mails on steam vessels.

Regulations as to Commissioners.

* * * * *

26. Any decision or any order made by the Commissioners for the purpose of carrying into effect any of the provisions of this Act may be made a rule or order of any superior court, and shall be enforced either in the manner directed by section three of the Railway and Canal Traffic Act, 1854, as to the writs and orders therein mentioned, or in like manner as any rule or order of such court. Orders of Commissioners.

For the purpose of carrying into effect this section, general rules and orders may be made by any superior court in the same manner

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as general rules and orders may be made with respect to any other proceedings in such court.

* * * * *

Sittings of Commissioners.

27. The Commissioners shall sit at such times and in such places and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business; they may, subject as in this Act mentioned, sit either together or separately, and either in private or in open court, but any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court (*g*).

* * * * *

Evidence of documents.

30. Every document purporting to be signed by the Commissioners, or any one of them, shall be received in evidence without proof of such signature, and until the contrary is proved shall be deemed to have been so signed and to have been duly executed or issued by the Commissioners.

Commissioners to make annual reports.

31. The Commissioners shall, once in every year, make a report to her Majesty of their proceedings under this Act during the past year, and such report shall be laid before both Houses of Parliament within fourteen days after the making thereof if Parliament is then sitting, and if not, then within fourteen days after the next meeting of Parliament.

Miscellaneous.

Determination of fees.

32. The Commissioners may, at any time after the passing of this Act, by general order, with the concurrence of the Treasury, appoint the fees to be taken in relation to proceedings before them, and may from time to time, by general order, with the like concurrence, increase, reduce, or abolish all or any of such fees, and appoint new fees to be taken in relation to such proceedings.

Collection of fees.

33. The Public Offices Fees Act, 1866, shall apply to all fees taken in relation to any proceedings before the Commissioners (*h*).

Any fee or payment in the nature or lieu of a fee paid in respect of any proceedings before the Commissioners and collected otherwise than by means of stamps shall be paid into the receipt of her Majesty's Exchequer in such manner as the Treasury from time to time direct, and carried to the Consolidated Fund.

* * * * *

Notices how to be given.

35. Any notice required or authorised to be given under this Act may be in writing or in print, or partly in writing and partly in print, and may be sent by post, and if sent by post shall be deemed to have been received at the time when the letter containing the same would have been delivered in the ordinary course of the post; and in proving such sending it shall be sufficient to prove that the letter containing the notice was prepaid and properly addressed and put into a post office.

(*g*) See sect. 5 of 51 & 52 Vict. c. 25, *post*, p. 528.

(*h*) The Public Offices Fees Act, 1866, is repealed by the Public Offices Fees Act, 1879 (42 & 43 Vict. c. 58), which is substituted for it.

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Application of Act to Scotland.

36. In the application of this Act to Scotland—

(1.) The term "attending on subpœna before a Court of Record" means attending on citation the Court of Justiciary:

(2.) The Queen's and Lord Treasurer's Remembrancer shall perform the duties of a master of one of the superior courts under this Act.

(51 & 52 Vict. c. 25.)

An Act for the better Regulation of Railway and Canal Traffic, and for other purposes. [10th August, 1888.]

Be it enacted (&c., &c.), as follows:

Short title and construction.

1. This Act may be cited as the Railway and Canal Traffic Act, 1888.

This Act shall be construed as one with the Regulation of Railways Act, 1873, and the Acts amending it; and those Acts and this Act may be cited together as the Railway and Canal Traffic Acts, 1873 and 1888.

36 & 37 Vict. c. 48.

Part I.—Court and Procedure of Railway and Canal Commissioners.

Establishment of Railway and Canal Commission.

Establishment of new Railway and Canal Commission

2. On the expiration of the provisions of the Regulation of Railways Act, 1873, with respect to the Commissioners therein mentioned, there shall be established a new Commission, styled the Railway and Canal Commission (in this Act referred to as the Commissioners), and consisting of two appointed and three *ex officio* Commissioners; and such Commission shall be a court of record, and have an official seal, which shall be judicially noticed. The Commissioners may act notwithstanding any vacancy in their body.

Appointment and tenure of office of appointed Commissioners.

3.—(1.) The two appointed Commissioners may be appointed by her Majesty at any time after the passing of this Act, and from time to time as vacancies occur.

(2.) They shall be appointed on the recommendation of the President of the Board of Trade, and one of them shall be of experience in railway business.

(3.) Section five of the Regulation of Railways Act, 1873, shall apply to each appointed Commissioner (*a*).

(4.) There shall be paid to each appointed Commissioner such salary not exceeding three thousand pounds a year as the President of the Board of Trade may, with the concurrence of the Treasury, determine.

(*a*) *Ante*, p. 521.

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(5.) It shall be lawful for the Lord Chancellor, if he think fit, to remove for inability or misbehaviour any appointed Commissioner.

Appointment and attendance of ex officio Commissioners.

4.—(1.) Of the three ex officio Commissioners of the Railway and Canal Commission one shall be nominated for England, one for Scotland, and one for Ireland; and an ex officio Commissioner shall not be required to attend out of the part of the United Kingdom for which he is nominated.

(2.) The ex officio Commissioner in each case shall be such judge of a superior court as—

(a.) in England the Lord Chancellor; and

(b.) in Scotland the Lord President of the Court of Session; and

(c.) in Ireland the Lord Chancellor of Ireland;

may from time to time by writing under his hand assign, and such assignment shall be made for a period of not less than five years.

(3.) For the purpose of the attendance of the ex officio Commissioners, regulations shall be made from time to time by the Lord Chancellor, the Lord President of the Court of Session, and the Lord Chancellor of Ireland respectively, in communication with the ex officio Commissioners for England, Scotland, or Ireland, as the case may be, as to the arrangements for securing their attendance, as to the times and place of sitting in each case, and otherwise for the convenient and speedy hearing thereof.

Sittings of Commissioners.

5.—(1.) Subject to the provisions of this Act, and to general rules under this Act, the Commissioners may hold sittings in any part of the United Kingdom, in such place or places as may be most convenient for the determination of proceedings before them.

(2.) The central office of the Commissioners shall be in London, and the Commissioners when holding a public sitting in London shall hold the same at the Royal Courts of Justice, or at such other place as the Lord Chancellor may from time to time appoint.

(3.) Not less than three Commissioners shall attend at the hearing of any case, and the *ex officio* Commissioner shall preside, and his opinion upon any question which in the opinion of the Commissioners is a question of law shall prevail.

36 & 37 Vict. c. 48.

(4.) Save as aforesaid, section twenty-seven of the Regulation of Railways Act, 1873, shall apply, and any act may be done by any two Commissioners (*b*).

(5.) Every judge who may with his consent be assigned to hold the office of ex officio Commissioner shall attend to hear any cases before the Commission, which as ex officio Commissioner he is required to hear, when and as soon as the cases are ready to be heard, or as soon thereafter as reasonably may be; and any such judge shall be required to perform any of the other duties of a judge of a superior court only when his attendance on the Commission is not required.

(6.) If and when any judge who may be assigned to hold the

(*b*) *Ante*, p. 526.

office of ex officio Commissioner is temporarily unable to attend, the Lord Chancellor in England, the Lord President of the Court of Session in Scotland, and the Lord Chancellor in Ireland, may respectively nominate any judge of a superior court to sit as ex officio Commissioner in place of the judge who is so temporarily unable to attend as aforesaid, and the judge so nominated shall for the purpose of any case which he may hear be an ex officio Commissioner.

(7.) If the President of the Board of Trade is satisfied either of the inability of an appointed Commissioner to attend at the hearing of any case, or of there being a vacancy in the office, and in either case of the necessity of a speedy hearing of the case, he may appoint a temporary Commissioner to hear such case, and such Commissioner, for all purposes connected with such case, shall, until the final determination thereof, have the same jurisdiction and powers as if he were an appointed Commissioner. A temporary Commissioner shall be paid such sum by the Commissioner so unable to sit, or, if the office is vacant, out of the salary of the office, as the President of the Board of Trade may assign.

Appointment of additional judge.

6. On an address from both Houses of Parliament representing that, regard being had to the duties imposed by this Act on the ex officio Commissioners, the state of business of the High Court in England requires the appointment of an additional judge of that court, it shall be lawful for Her Majesty to appoint an additional judge of such court, and from time to time, on a like address but not otherwise, to fill any vacancy in such judgeship, and the law relating to the appointment and qualification of the judges of such superior court, to their duties and tenure of office, to their precedence, salary and pension, and otherwise, shall apply to any judge so appointed under this section, and a judge so appointed under this section shall be attached to such division or branch of the court as Her Majesty may direct, subject to such power of transfer as may exist in the case of any other judge of such division or branch.

Provision for complaints by public authority in certain cases.

7.—(1.) Any of the following authorities, that is to say—

(a) any of the following local authorities, namely, any harbour board, or conservancy authority, the Common Council of the City of London, any council of a city or borough, any representative county body which may be created by an Act passed in the present or any future session of Parliament, any justices in quarter sessions assembled, the Commissioners of Supply of any county in Scotland, the Metropolitan Board of Works, or any urban sanitary authority, not being a council as aforesaid, or any rural sanitary authority; or

(b) any such association of traders or freighters, or chamber of commerce or agriculture as may obtain a certificate from the Board of Trade that it is, in the opinion of the Board of Trade, a proper body to make such complaint,

may make to the Commissioners any complaint which the Commis-

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sioners have jurisdiction to determine, and may do so without proof that such authority is aggrieved by the matter complained of, and any of such authorities may appear in opposition to any complaint which the Commissioners have jurisdiction to determine in any case where such authority, or the persons represented by them, appear to the Commissioners to be likely to be affected by any determination of the Commissioners upon such complaint.

(2.) The Board of Trade may, if they think fit, require, as a condition of giving a certificate under this section, that security be given in such manner and to such amount as they think necessary, for any costs which the complainants may be ordered to pay or bear.

(3.) Any certificate granted under this section shall, unless withdrawn, be in force for twelve months from the date on which it was given.

Jurisdiction.

Jurisdiction of Railway Commissioners transferred to the Commission.

8. There shall be transferred to and vested in the Commissioners all the jurisdiction and powers which at the commencement of this Act were vested in, or capable of being exercised by the Railway Commissioners, whether under the Regulation of Railways Act, 1873, or any other Act, or otherwise, and any reference to the Railway Commissioners in the Regulation of Railways Act, 1873, or in any other Act, or in any document, shall, from and after the commencement of this Act, be construed to refer to the Railway and Canal Commission established by this Act.

Jurisdiction of Commissioners under special Acts. 17 & 18 Vict. c. 31.

9. Where any enactment in a special Act—

(a.) contains provisions relating to traffic facilities, undue preference, or other matters mentioned in section two of the Railway and Canal Traffic Act, 1854, or (*c*)

(b.) requires a company to which this part of this Act applies to provide any station, road, or other similar work for public accommodation, or (*d*)

(c.) otherwise imposes on a company to which this part of this Act applies any obligation in favour of the public or any individual,

or where any Act contains provisions relating to private branch railways or private sidings, the Commissioners shall have the like jurisdiction to hear and determine a complaint of a contravention of the enactment as the Commissioners have to hear and determine a complaint of a contravention of section two of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts (*e*).

Jurisdiction over tolls and rates.

10. Where any question or dispute arises, involving the legality of any toll, rate, or charge, or portion of a toll, rate, or charge, charged or sought to be charged for merchandize traffic by a company to which this part of this Act applies, the Commissioners

(*c*) See Article 233, *ante*, p. 257.
(*d*) See Article 236, *ante*, p. 264.
(*e*) See Article 238, *ante*, p. 280.

shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge, or so much thereof as the Commissioners decide to be legal (*f*).

Jurisdiction to order traffic facilities, notwithstanding agreements.

11. Nothing in any agreement, whether made before or after the passing of this Act, which has not been confirmed by Act or by the Board of Trade, or by the Commissioners under the Regulation of Railways Act, 1873, or this Act, shall render a company to which this part of this Act applies unable to afford, or shall authorise such company to refuse, such reasonable facilities for traffic as may in the opinion of the Commissioners be required in the interests of the public, or shall prevent the Commissioners from making or enforcing any order with respect to such facilities.

Power to award damages.

12. Where the Commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which, but for this Act, such party would have had by reason of the matter of complaint (*g*).

Provided that such damages shall not be awarded unless complaint has been made to the Commissioners within one year from the discovery by the party aggrieved of the matter complained of.

The Commissioners may ascertain the amount of such damages either by trial before themselves, or by directing an inquiry to be taken before one or more of themselves or before some officer of their court.

No damages where rates published under certain conditions.

13. In cases of complaint of undue preference no damages shall be awarded if the Commissioners shall find that the rates complained of have, for the period during which such rates have been in operation, been duly published in the rate books of the railway company kept at their stations in accordance with section fourteen of the Regulation of Railways Act, 1873, as amended by this Act, unless and until the party complaining shall have given written notice to the railway company requiring them to abstain from or remedy the matter of complaint, and the railway company shall have failed, within a reasonable time, to comply with such requirements in such a manner as the Commissioners shall think reasonable (*h*).

Orders on two or more companies.

14. The Commissioners may order two or more companies to which this part of this Act applies to carry into effect an order of

(*f*) See Article 222, *ante*, p. 240.
(*g*) See Article 223, *ante*, p. 240.
(*h*) See Article 266, *ante*, p. 348.

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the Commissioners, and to make mutual arrangements for that purpose, and may further order the companies or, in case of difference, any of them, to submit to the Commissioners for approval a scheme for carrying into effect the order, and when the Commissioners have finally approved the scheme, they may order each of the companies to do all that is necessary on the part and within the power of such company to carry into effect the scheme, and may determine the proportions in which the respective companies are to defray the expense of so doing, and may for the above purposes make, if they think fit, separate orders on any one or more of such companies.

Provided that nothing in this section shall authorise the Commissioners to require two companies to do anything which they would not have jurisdiction to require to be done if such two companies were a single company.

Amendment of 36 & 37 Vict. c. 48, s. 8, as to references to arbitration.

15. For the purposes of section eight of the Regulation of Railways Act, 1873, and any other enactment relating to the reference to the Railway Commission of any difference between companies which under the provisions of any general or special Act is required or authorised to be referred to arbitration, the provisions of any agreement confirmed or authorised by any such act shall be deemed to be provisions of such Act (*i*).

Power to apportion expenses between railway company and applicants for works.

16.—(1.) Where the Board of Trade or the Commissioners, in the exercise of any power given by any general or special Act, on application order a company to which this part of this Act applies, to provide a bridge, subway, or approach, or any work of a similar character, the Board of Trade or the Commissioners, as the case may be, may require as a condition of making the order that an agreement to pay the whole or a portion of the expenses of complying with the order shall be entered into by the applicants or some of them, or such other persons as the Board of Trade or Commissioners think fit, and any of the following local authorities, namely, any sanitary authority, highway board, surveyor of highways acting with the consent of the vestry of his parish, or any other authority having power to levy rates, shall have power, if such authority think fit, to enter into any such agreement as is sanctioned by the Board of Trade or Commissioners for the purpose of the order.

(2.) In such case any question respecting the persons by whom or the proportions in which the expenses of complying with the order are to be defrayed may, on the application of any party to the application, or on a certificate of the Board of Trade, be determined by the Commissioners.

(3.) In this section the expression "parish" shall have the same meaning as the same expression has in the Acts relating to highways; and the expression "the consent of the vestry of his parish"

(*i*) *Ante*, p. 522.

shall, in any place where there is no vestry meeting, mean the consent of a meeting of inhabitants contributing to the highway rates, provided that the same notice shall have been given of such a meeting as would be required by law for the assembling of a meeting in vestry.

Appeals.

Appeals on certain questions to superior court of appeal.

17.—(1.) No appeal shall lie from the Commissioners upon a question of fact, or upon any question regarding the locus standi of a complainant.

(2.) Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal.

(3.) An appeal shall not be brought except in conformity with such rules of court as may from time to time be made in relation to such appeals by the authority having power to make rules of court for the superior court of appeal.

(4.) On the hearing of an appeal the court of appeal may draw all such inferences as are not inconsistent with the facts expressly found, and are necessary for determining the question of law, and shall have all such powers for that purpose as if the appeal were an appeal from a judgment of a superior court, and may make any order which the Commisioners could have made, and also any such further or other order as may be just, and the costs of and incidental to an appeal shall be in the discretion of the court of appeal, but no Commissioner shall be liable to any costs by reason or in respect of any appeal.

(5.) The decision of the superior court of appeal shall be final: Provided that where there has been a difference of opinion between any two of such superior courts of appeal, any superior court of appeal in which a matter affected by such difference of opinion is pending may give leave to appeal to the House of Lords, on such terms as to costs as such court shall determine.

(6.) Save as provided by this Act, an order or proceeding of the Commissioners shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari, or otherwise, either at the instance of the Crown or otherwise.

Supplemental.

General powers and enforcement of orders.

18.—(1.) For the purposes of this Act the Commissioners shall have full jurisdiction to hear and determine all matters whether of law or of fact, and shall as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of their orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of their jurisdiction under this Act, or otherwise for carrying this Act into effect, have all such powers, rights, and privileges as are vested in a superior court: Provided that no person shall be punished for contempt of court, except with the consent of an ex officio Commissioner.

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(2.) The Commissioners may review and rescind or vary any order made by them; but, save as is by this Act provided, every decision or order of the Commissioners shall be final.

Costs.

19. The costs of and incidental to every proceeding before the Commissioners shall be in the discretion of the Commissioners, who may order by whom and to whom the same are to be paid, and by whom the same are to be taxed and allowed.

Power to make rules.

20.—(1.) The Commissioners may from time to time, with the approval of the Lord Chancellor and the President of the Board of Trade, make, rescind, and vary general rules for their procedure and practice under this Act, and generally for carrying into effect this part of this Act.

(2.) All rules made under this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting, and if Parliament is not then sitting within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if they were enacted by this Act.

Appointment of officers, clerks, &c.

21.—(1.) There shall be attached to the Railway and Canal Commission such officers, clerks, and messengers as the Lord Chancellor, with the consent of the Treasury as to number, from time to time appoints.

(2.) There shall be paid to each of such officers, clerks, and messengers, such salaries as the Treasury from time to time determine.

Salaries, expenses, &c.

22. The salaries of the appointed Commissioners, and of all officers, clerks, and messengers attached to the Railway and Canal Commission, and all the expenses of the said Commission of and incidental to the carrying out of this Act, shall be paid out of moneys to be provided by Parliament.

Company to which Part I. applies.

23. This part of this Act shall apply to any railway company and to any canal company, and to any railway and canal company.

Part II.—Traffic.

Revised classification of traffic and schedule of rates.

24.—(1.) Notwithstanding any provision in any general or special act, every railway company shall submit to the Board of Trade a revised classification of merchandise traffic, and a revised schedule of maximum rates and charges applicable thereto, proposed to be charged by such railway company, and shall fully state in such classification and schedule the nature and amounts of all terminal charges proposed to be authorised in respect of each class of traffic, and the circumstances under which such terminal charges are proposed to be made. In the determination of the terminal

charges of any railway company regard shall be had only to the expenditure reasonably necessary to provide the accommodation in respect of which such charges are made, irrespective of the outlay which may have been actually incurred by the railway company in providing that accommodation.

(2.) The classification and schedule shall be submitted within six months from the passing of this Act, or such further time as the Board of Trade may, in any particular case, permit, and shall be published in such manner as the Board of Trade may direct (*k*).

(3.) The Board of Trade shall consider the classification and schedule, and any objections thereto, which may be lodged with them on or before the prescribed time and in the prescribed manner, and shall communicate with the railway company and the persons (if any) who have lodged objections, for the purpose of arranging the differences which may have arisen.

(4.) If, after hearing all parties whom the Board of Trade consider to be entitled to be heard before them respecting the classification and schedule, the Board of Trade come to an agreement with the railway company as to the classification and schedule, they shall embody the agreed classification and schedule in a Provisional Order, and shall make a report thereon, to be submitted to Parliament, containing such observations as they think fit in relation to the agreed classification and schedule.

(5.) When any agreed classification and schedule have been embodied in a Provisional Order, the Board of Trade, as soon as they conveniently can after the making of the Provisional Order (of which the railway company shall be deemed to be the promoters), shall procure a Bill to be introduced into either House of Parliament for an Act to confirm the Provisional Order, which shall be set out at length in the schedule to the Bill.

(6.) In any case in which a railway company fails within the time mentioned in this section to submit a classification and schedule to the Board of Trade, and also in every case in which a railway company has submitted to the Board of Trade a classification and schedule, and after hearing all parties whom the Board of Trade consider to be entitled to be heard before them, the Board of Trade are unable to come to an agreement with the railway company as to the railway company's classification and schedule, the Board of Trade shall determine the classification of traffic which, in the opinion of the Board of Trade, ought to be adopted by the railway company, and the schedule of maximum rates and charges, including all terminal charges proposed to be authorised applicable to such classification which would, in the opinion of the Board of Trade, be just and reasonable, and shall make a report, to be submitted to Parliament, containing such observations as they may think fit in relation to the said classification and schedule, and calling attention to the points therein on which differences which have arisen have not been arranged.

(*k*) See *post*, sect. 35.

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(7.) After the commencement of the session of Parliament next after that in which the said report of the Board of Trade has been submitted to Parliament, the railway company may apply to the Board of Trade to submit to Parliament the question of the classification and schedule which ought to be adopted by the railway company, and the Board of Trade shall on such application, and in any case may, embody in a Provisional Order such classification and schedule as in the opinion of the Board of Trade ought to be adopted by the railway company, and procure a Bill to be introduced into either House of Parliament for an Act to confirm the Provisional Order, which shall be set out at length in the schedule to the Bill.

(8.) If, while any Bill to confirm a Provisional Order made by the Board of Trade under this section is pending in either House of Parliament, a petition is presented against the Bill or any classification and schedule comprised therein, the Bill, so far as it relates to the matter petitioned against, shall be referred to a Select Committee, or if the two Houses of Parliament think fit so to order, to a joint Committee of such Houses, and the petitioner shall be allowed to appear and oppose as in the case of a private Bill.

(9.) In preparing, revising, and settling the classifications and schedules of rates and charges, the Board of Trade may consult and employ such skilled persons as they may deem necessary or desirable; and they may pay to such persons such remuneration as they may think fit and as the Treasury may approve.

(10.) The Act of Parliament confirming any Provisional Order made under this section shall be a public general Act, and the rates and charges mentioned in a Provisional Order as confirmed by such Act shall, from and after the Act coming into operation, be the rates and charges which the railway company shall be entitled to charge and make.

(11.) At any time after the confirmation of any Provisional Order under this section any railway company may, and any person, upon giving not less than twenty-one days notice to the railway company may, apply in the prescribed manner to the Board of Trade to amend any classification and schedule by adding thereto any articles, matters, or things, and the Board of Trade may hear and determine such application, and classify and deal with the articles, matters, or things referred to therein in such manner as the Board of Trade shall think right. Every determination of the Board of Trade under this sub-section shall forthwith be published in the "London Gazette," and shall take effect as from the date of the publication thereof.

(12.) Nothing in this section shall apply to any remuneration payable by the Postmaster-General to any railway company for the conveyance of mails, letter bags, or parcels under any general or special Act relating to the conveyance of mails, or under the Post Office (Parcels) Act, 1882.

45 & 46 Vict. c. 74.

(13.) Nothing in this section shall apply to any remuneration payable by the Secretary of State for War to any railway company

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for the conveyance of War Office stores under the powers conferred by the Cheap Trains Act, 1883.

46 & 47 Vict. c. 34.

Provisions as to through traffic (*l*).

25. Whereas by section two of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company and canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf:

And whereas it is expedient to explain and amend the said enactment:

Be it therefore enacted, that—

Subject as herein-after mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates); and also the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any person interested in through traffic, of such traffic at through rates: Provided that no application shall be made to the Commissioners by such person until he has made a complaint to the Board of Trade under the provisions of this Act as to complaints to the Board of Trade of unreasonable charges (*m*),

(*l*) See Article 253, *ante*, p. 312.

(*m*) *Post*, sect. 31, p. 541.

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and the Board of Trade have heard the complaint in the manner herein provided.

Provided as follows:

(1.) The company or person requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and the route by which the traffic is proposed to be forwarded; and when a company gives such notice it shall also state the apportionment of the through rate. The proposed through rate may be per truck or per ton:

(2.) Each forwarding company shall, within ten days, or such longer period as the Commissioners may from time to time by general order prescribe, after the receipt of such notice, by written notice inform the company or persons requiring the traffic to be forwarded, whether they agree to the rate and route; and if they object to either, the grounds of the objection:

(3.) If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation on such expiration:

(4.) If an objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the Commissioners for their decision:

(5.) If an objection be made to the granting of the rate or to the route, the Commissioners shall consider whether the granting of a rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly, or fix such other rate as may seem to the Commissioners just and reasonable:

(6.) Where, upon the application of a person requiring traffic to be forwarded, a through rate is agreed to by the forwarding companies, or is made by order of the Commissioners, the apportionment of such through rate, if not agreed upon between the forwarding companies, shall be determined by the Commissioners:

(7.) If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the Commissioners, as to its apportionment, shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given:

(8.) The Commissioners, in apportioning the through rate, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof:

(9.) It shall not be lawful for the Commissioners in any case to

compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route.

Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby.

When any company, upon written notice being given as aforesaid, refuses or neglects without reason to agree to the proposed through rates, or to the route, or to the apportionment, the Commissioners, if an order is made by them upon an application for through rates, may order the respondent company or companies to pay such costs to the applicants as they think fit.

Powers of Commissioners as to through rates.

26. Subject to the provisions in the last preceding section contained, the Commissioners shall have full power to decide that any proposed through rate is just and reasonable, notwithstanding that a less amount may be allotted to any forwarding company out of such through rate than the maximum rate such company is entitled to charge, and to allow and apportion such through rate accordingly.

Undue preference in case of unequal tolls, rates, and charges, and unequal services performed.

27.—(1.) Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

(2.) In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction in the matter, or the Commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the Court, or the Commissioners, sanction any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.

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(3.) The Court or the Commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other persons for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway (*n*).

Extension of enactments as to undue preference to goods carried by sea.

28. The provisions of section two of the Railway and Canal Traffic Act, 1854, and of section fourteen of the Regulation of Railways Act, 1873, and of any enactments amending and extending those enactments, shall apply to traffic by sea in any vessels belonging to or chartered or worked by any railway company, or in which any railway company procures merchandise to be carried, in the same manner and to the like extent as they apply to the land traffic of a railway company.

Group rates to be chargeable by railway companies.

29.—(1.) Notwithstanding any provision in any general or special Act, it shall be lawful for any railway company, for the purpose of fixing the rates to be charged for the carriage of merchandise to and from any place on their railway, to group together any number of places in the same district, situated at various distances from any point of destination or departure of merchandise, and to charge a uniform rate or uniform rates of carriage for merchandise to and from all places comprised in the group from and to any point of destination or departure.

(2.) Provided that the distances shall not be unreasonable, and that the group rates charged and the places grouped together shall not be such as to create an undue preference.

(3.) Where any group rate exists or is proposed, and in any case where there is a doubt whether any rates charged or proposed to be charged by a railway company may not be a contravention of section two of the Railway and Canal Traffic Act, 1854, and any Acts amending the same, the railway company may, upon giving notice in the prescribed manner, apply to the Commissioners, and the Commissioners may, after hearing the parties interested and any of the authorities mentioned in section seven of this Act, determine whether such group rate or any rate charged or proposed to be charged as aforesaid does or does not create an undue preference. Any persons aggrieved, and any of the authorities mentioned in section seven of this Act, may, at any time after the making of any order under this section, apply to the Commissioners to vary or rescind the order, and the Commissioners, after hearing all parties who are interested, may make an order accordingly (*o*).

Power to dock com-

30. Any port or harbour authority or dock company which shall have reason to believe that any railway company is by its rates or

(*n*) See Article 260, *ante*, p. 339.
(*o*) See Article 264, *ante*, p. 345.

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otherwise placing their port, harbour, or dock, at an undue disadvantage as compared with any other port, harbour, or dock to or from which traffic is or may be carried by means of the lines of the said railway company, either alone or in conjunction with those of other railway companies, may make complaint thereof to the Commissioners, who shall have the like jurisdiction to hear and determine the subject-matter of such complaint as they have to hear and determine a complaint of a contravention of section two of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts.

Companies and harbour boards to complain of undue preference.

31.—(1.) Whenever any person receiving or sending or desiring to send goods by any railway is of opinion that the railway company is charging him an unfair or an unreasonable rate of charge, or is in any other respect treating him in an oppressive or unreasonable manner, such person may complain to the Board of Trade.

Complaints to Board of Trade of unreasonable charges by railway companies.

(2.) The Board of Trade, if they think that there is reasonable ground for the complaint, may thereupon call upon the railway company for an explanation, and endeavour to settle amicably the differences between the complainant and the railway company.

(3.) For the purpose aforesaid, the Board of Trade may appoint either one of their own officers or any other competent person to communicate with the complainant and the railway company, and to receive and consider such explanations and communications as may be made in reference to the complaint; and the Board of Trade may pay to such last-mentioned person such remuneration as they may think fit, and as may be approved by the Treasury.

(4.) The Board of Trade shall from time to time submit to Parliament reports of the complaints made to them under the provisions of this section, and the results of the proceedings taken in relation to such complaints, together with such observations thereon as the Board of Trade shall think fit.

(5.) A complaint under this section may be made to the Board of Trade by any of the authorities mentioned in section seven of this Act, in any case in which, in the opinion of any of such authorities, they or any traders or persons in their district are being charged unfair or unreasonable rates by a railway company; and all the provisions of this section shall apply to a complaint so made as if the same had been made by a person entitled to make a complaint under this section.

32.—(1.) The returns required of a railway company under section nine of the Railways Regulation Act, 1871, shall include such statements as the Board of Trade may from time to time prescribe, and the forms referred to in that section may from time to time be altered by the Board of Trade in such manner as they think expedient for giving effect to this section, and the said section nine of the Railways Regulation Act, 1871, shall apply accordingly.

Annual returns by railway companies to contain such statistics as the Board of Trade shall require.

34 & 35 Vict. c. 78, s. 9.

(2.) The Board of Trade may from time to time alter the times

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fixed by the said Act or by the Railways Regulation Act (Returns of Signal Arrangements, Workings, &c.), 1873, for the forwarding of any of the returns required by the said Act or this Act.

36 & 37 Vict. c. 76.

Classification table to be open for inspection. Copies to be sold.

33.—(1.) The book, tables, or other document in use for the time being containing the general classification of merchandise carried on the railway of any company, shall, during all reasonable hours, be open to the inspection of any person without the payment of any fee at every station at which merchandise is received for conveyance, or where merchandise is received at some other place than a station then at the station nearest such place, and the said book, tables, or other document as revised from time to time shall be kept on sale at the principal office of the company at a price not exceeding one shilling.

(2.) Printed copies of the classification of merchandise traffic, and schedule of maximum tolls, rates, and charges of every railway company authorised, as provided by this Act, shall be kept for sale by the railway company at such places and at such reasonable price as the Board of Trade may by any general or special order prescribe.

(3.) The company shall within one week after application in writing made to the secretary of any railway company by any person interested in the carriage of any merchandise which has been or is intended to be carried over the railway of such company, render an account to the person so applying in which the charge made or claimed by the company for the carriage of such merchandise shall be divided, and the charge for conveyance over the railway shall be distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified.

(4.) Every railway company shall publish at every station at which merchandise is received for conveyance, or where merchandise is received at some other place than a station then at the station nearest to such place, a notice, in such form as may be from time to time prescribed by the Board of Trade, to the effect that such book, tables, and document touching the classification of merchandise and the rates as they are required by this section and section fourteen of the Regulation of Railways Act, 1873, to keep at that station, are open to public inspection, and that information as to any charge can be obtained by application to the secretary or other officer at the address stated in such notice.

36 & 37 Vict. c. 48 (*ante*, p. 523).

(5.) Where a railway company carries merchandize partly by land and partly by sea, all the books, tables, and documents touching the rates of charge of the railway company, which are kept by the railway company at any port in the United Kingdom used by the vessels which carry the sea traffic of the railway company, shall, besides containing all the rates charged for the sea traffic, state what proportion of any through rate is appropriated

to conveyance by sea, distinguishing such proportion from that which is appropriated to the conveyance by land on either side of the sea.

(6.) Where a railway company intend to make any increase in the tolls, rates, or charges published in the books required to be kept by the company for public inspection, under section fourteen of the Regulation of Railways Act, 1873, or this Act, they shall give by publication in such manner as the Board of Trade may prescribe at least fourteen days notice of such intended increase, stating in such notice the date on which the altered rate or charge is to take effect; and no such increase in the published tolls, rates, or charges of the railway company shall have effect unless and until the fourteen days notice required under this section has been given.

(7.) Any company failing to comply with the provisions of this section shall, for each offence, and in the case of a continuing offence for every day during which the offence continues, be liable, on summary conviction, to a penalty not exceeding five pounds.

Place of publication of rates in respect of traffic at places other than stations.

34. When traffic is received or delivered at any place on any railway other than a station within the meaning of section fourteen of the Regulation of Railways Act, 1873, the railway company on whose line such place is, shall keep at the station nearest such place a book or books showing every rate for the time being charged for the carriage of traffic other than passengers and their luggage, from such place to any place to which they book, including any rates charged under any special contract, and stating the distance from that place of every station, wharf, siding, or place to which such rate is charged.

Every such book shall, during all reasonable hours, be open to the inspection of any person without the payment of a fee.

Power to make rules for purposes of Part II. of Act.

35.—(1.) The Board of Trade may from time to time make, rescind, and vary rules with respect to the following matters:—

(a) The form and manner in which classifications and schedules under this part of this Act are to be prepared and submitted to the Board of Trade and to Parliament, and the publication, advertisement, and settlement (by the Board of Trade) of such classifications and schedules, and of Provisional Orders (*p*);

(b) All proceedings before the Board of Trade under this part of this Act;

(c) The fees to be paid in respect of such proceedings; and

(d) Any matter authorized by this Act to be prescribed.

(2.) Any rules made by the Board of Trade in pursuance of this section shall be laid before Parliament within three weeks after they are made, if Parliament be then sitting, and if Parliament be not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if they were enacted by this Act.

(*p*) The Board of Trade have issued rules on the subject.

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Part III.—Canals (q).

Part II. to extend to canal companies.

36. All the provisions of Part II. of this Act relating to any railway company shall, so far as applicable, apply to every canal company, and to every railway and canal company; and in Part II. of this Act, unless the context otherwise requires, the expression "railway company" shall include a canal company and railway and canal company, and the expression "railway" shall include a canal, and the expression "rate" shall include tolls and dues of every description chargeable for the use of any canal or by any canal company.

Application of 36 & 37 Vict c. 48, to canals.

37.—(1.) Section fifteen of the Regulation of Railways Act, 1873, shall apply to the terminal charges of a canal company.

(2.) The Railway and Canal Traffic Act, 1854, as amended by the Regulation of Railways Act, 1873, shall extend to any person whose consent is required to any variation of the rates, tolls, or dues charged for the use of any canal, or by any canal company, in like manner as if such person were a canal company, and the expressions "canal company" and "railway and canal company" in the said Acts and this Act shall be construed accordingly to include such person.

(3.) The provisions of the Railway and Canal Traffic Act, 1854, and the Regulation of Railways Act, 1873, with respect to rates, shall apply to tolls and dues of every description chargeable for the use of any canal or by any canal company. And nothing in any agreement, whether made before or after the passing of this Act, and whether confirmed by Act of Parliament or not, and nothing in this Act shall prevent the Commissioners from making or enforcing any order for a through rate or toll which may in their opinion be required in the interest of the public.

(4.) Any company allowing traffic to pass from a canal on to any other canal or any railway, or from a railway on to a canal, shall be deemed to be a forwarding company, and the allowing of traffic so to pass shall be deemed to be the forwarding of traffic within the meaning of the above-mentioned Acts.

(5.) The provisions of the Railway and Canal Traffic Act, 1854, and of the Regulation of Railways Act, 1873, and of this Act, with respect to through rates, shall extend to any canals which, in connexion with any river or other waterway, form part of a continuous line of water communication, notwithstanding that tolls may not be leviable by authority of Parliament upon such river or other waterway.

Powers of Commissioners over canal tolls, rates, and

38. Where a railway company, or the directors or officers of a railway company, or any of them or any persons on their behalf, have the control over, or the right to interfere in or concerning the traffic conveyed, or the tolls, rates, or charges levied on the traffic

(q) See note to Article 230, *ante*, p. 252.

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charges where a railway company or its officers own or control the traffic of a canal.

of or for the conveyance of merchandise on a canal, or any part of a canal, and it is proved to the satisfaction of the Commissioners that the tolls, rates, or charges levied on the traffic of or for the conveyance of merchandise on the canal are such as are calculated to divert the traffic from the canal to the railway, to the detriment of the canal or persons sending traffic over the canal or other canals adjacent to it—

(1.) The Commissioners may, on the application of any person interested in the traffic of the canal, make an order requiring the tolls, rates, and charges levied on the traffic of or for the conveyance of merchandise on the canal, to be altered and adjusted in such a manner that the same shall be reasonable as compared with the rates and charges for the conveyance of merchandise on the railway:

(2.) If within such time as may be prescribed by the order of the Commissioners, the tolls, rates, and charges levied on the traffic of or for the conveyance of merchandise on the canal are not altered and adjusted as required by such order, the Commissioners may themselves by an order make such alterations in and adjustment of the tolls, rates, and charges levied on the traffic of or for the conveyance of merchandise on the canal as they shall think just and reasonable, and the tolls, rates, and charges as altered and adjusted by the order of the Commissioners shall be binding on the company or persons owning or having the control over the traffic of, or the tolls, rates, and charges levied on the traffic of, or for the conveyance of merchandise on the canal:

(3.) No application shall be made to the Commissioners under this section until the Board of Trade have certified that the applicant is a fit person to make the application, and that the application is a proper one to be submitted for the adjudication of the Commissioners; and no order shall be made by the Commissioners under this section unless notice of the application has been served upon such company and persons, and in such manner as the Board of Trade may direct:

(4.) The Commissioners may at any time, upon the application of any company or person affected by any order made under this section, and after notice to and hearing such companies and persons as the Commissioners may by any general rules or special order prescribe, rescind or vary any order made under this section.

Returns by canal companies.

39.—(1.) Every canal company shall, on or before the first day of January in every year, beginning on the first day of January next after the passing of this Act, send to the registrar of joint stock companies a return stating the name of the company, a short description of their canal, the name of their principal officer, and the place of their office, or, if they have more than one office, of their principal office.

(2.) Every canal company shall within such time as may be pre-

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scribed by the Board of Trade, and afterwards from time to time whenever required by the Board of Trade, not being oftener than once in every year, forward to the Board of Trade in such form and manner as the Board may from time to time prescribe, such returns as the Board of Trade may require for the purpose of showing the capacity of such canal for traffic, and the capital, revenue, expenditure, and profits of the canal company.

(3.) When the canal of a canal company, or any part thereof, is intended to be stopped for more than two days, the company shall report to the Board of Trade, stating the time during which such stoppage is intended to last, and when the same is re-opened the company shall so report to the Board of Trade.

(4.) A company failing to comply with this section, shall be liable, on summary conviction, to a fine not exceeding five pounds for every day during which their default continues, and any director, manager, and officer of the company who knowingly and wilfully authorizes or permits the default shall be liable, on summary conviction, to the like fine.

Byelaws of canal companies.

40.—(1.) Every canal company shall, before such date as the Board of Trade may prescribe, forward to the Board of Trade true copies, certified in such manner as the Board of Trade direct, of any byelaws or regulations of such company which are in force at the commencement of this Act; and the byelaws of any canal company, copies of which are not forwarded to the Board of Trade as provided by this section, shall from and after the said day cease to have any operation, save in so far as any penalty may have been already incurred under the same.

(2.) A byelaw or regulation of any canal company hereafter to be made under any power which has before or at the time of the passing of this Act been, or which may hereafter be, conferred on any canal company, shall not have any force or effect until two months after a true copy of such byelaw or regulation, certified in such manner as the Board of Trade direct, has been forwarded to the Board of Trade, unless the Board of Trade before the expiration of such period have signified their approbation thereof.

(3.) The Board of Trade may, at any time after any existing or future byelaws or regulations of a canal company have been forwarded to them, notify to the company their disallowance thereof, or of any of them, and in case such byelaws or regulations are in force at the time of the disallowance, the time at which the said byelaws or regulations shall cease to be in force. A byelaw or regulation disallowed by the Board of Trade shall not after such disallowance have any force or effect whatever, save (as regards any byelaw or regulation which may be in force at the time of the disallowance thereof) in so far as any penalty may have been then already incurred under the same.

(4.) The Board of Trade may from time to time make, rescind, and vary such regulations as they think fit with respect to the publication by canal companies of their byelaws and regulations,

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and with respect to the publication by canal companies of their intention to apply to the Board of Trade for the allowance of any intended byelaws and regulations. Any regulations so made which are for the time being in force, shall have effect as if they had been enacted in this Act.

Inspection of canals.

41. Whenever the Board of Trade are, through their officers or otherwise, informed that the works of any canal are in such a condition as to be dangerous to the public, or to cause serious inconvenience or hindrance to traffic, the Board of Trade may direct such officer or other person as they appoint for the purpose to inspect the said canal and report thereon to the Board of Trade, and for the purpose of making any inspection under this section the officer or person appointed for the purpose shall, in relation to the canal or works to be inspected, have all the powers of an inspector appointed under the Regulation of Railways Act, 1871. 34 & 35 Vict. c. 78.

Misapplication of a railway company's funds for acquisition of unauthorized interest in canal.

42.—(1.) No railway company, or director, or officer of a railway company shall, without express statutory authority, apply or use or authorise or permit the application or use of any part of the company's funds for the purpose of acquiring either in the name of the railway company, or of any director or officer of the railway company, or other person, any canal interest, or of enabling any director or officer of the railway company, or other person, to purchase or acquire any canal interest, or of guaranteeing or repaying to any director or officer of the railway company or other person who has purchased or acquired any canal interest the sums of money expended or liability incurred by such director, officer, or person, in the purchase or acquisition of such canal interest, or any part of such money or liability.

(2.) In the event of any contravention of the provisions of this section, the canal interest purchased in such contravention shall be forfeited to the Crown, and the directors or officers of the company who so applied or used, or authorised or permitted such application or use of the company's funds, shall be liable to repay to the company the sums so applied or used and the value of the canal interest so forfeited; and proceedings to compel such repayment may be taken by any shareholder in the company.

(3.) In this section the expression "company's funds" means the corporate funds of any railway company, and includes any funds which are under the control of or administered by a railway company; the expression "officer" includes any person having any control over a company's funds or any part thereof; and the expression "canal interest" means shares in the capital of a canal company, and includes any interest of any kind in a canal company or canal.

Canal companies may agree for through tolls, &c.

43.—(1.) Any canal company may make and enter into contracts and arrangements with any other canal company or canal companies for the passage over and along their respective canals, or

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any of them, of boats, barges, vessels, and other through traffic, and for the use, by such traffic, of the wharves, landing places, and other works of any such canal, upon payment of such through tolls, rates, and charges, and subject to such conditions and restrictions as may be agreed upon between such companies; and for the collection and recovery by any one of the companies on behalf of themselves and the other companies interested of the tolls, rates, and charges payable in respect of such through traffic; and for the division and apportionment of the tolls, rates, and charges; and any such contract may contain provisions for the erection and maintenance of or otherwise for providing warehouses, offices, and other buildings and conveniences, and any other provisions for the purpose of carrying into effect any such arrangement, and any company may apply their funds or moneys for the same purpose.

(2.) Notwithstanding any enactments providing for the charge of equal tolls, rates, and charges, such through tolls, rates, and charges as above mentioned may respectively be computed at a lower toll or rate per mile than the tolls, rates, or charges charged for the passage over and along the same canals of like traffic, not being through traffic, without necessitating or occasioning any reduction of the last-mentioned tolls, rates, or charges.

(3.) Any like contracts and arrangements existing at the passing of this Act shall be, and from the respective dates of the making thereof shall be deemed to have been, as valid as if the same had been made after the commencement of this Act.

Canal companies may establish clearing system.

44. For the purpose of facilitating through traffic upon canals, any canal companies upon whose canals through tolls, rates, or charges may be in operation, may establish a canal clearing system, on such principles, in such manner, and subject to such regulations as to the admission of other companies to such system, the retirement of members, the appointment of a committee to conduct the business of the system, and of a secretary or other necessary officers, the mode of conducting business, and such other regulations for carrying into effect such system as may from time to time be approved by the Board of Trade in writing under the hand of the secretary or one of the assistant secretaries of that Board; and any company may apply any funds or money belonging to them, for the purpose of establishing or carrying into effect any such system, and the provisions of sections eleven to twenty-six inclusive of the Railway Clearing Act, 1850, shall, mutatis mutandis, apply to any canal clearing system when so established.

13 & 14 Vict. c. xxxiii.

Abandonment of canal.

45.—(1.) Where, on the application of a canal company, it appears to the Board of Trade that any canal or part of a canal belonging to the applicants (hereinafter referred to as an unnecessary canal) is at the time of making the application unnecessary for the purposes of public navigation, or where, on the application of any local authority, or of three or more owners of lands adjoining or near to any canal or part of a canal, it appears to the Board

of Trade that that canal or part of a canal (hereinafter referred to as a derelict canal) has for at least three years previously to the making of the application been disused for navigation, or, by reason of the default of the proprietors thereof, has become unfit for navigation, or that the lands adjoining or near thereto have suffered injury by water that has escaped from the derelict canal, and that the proprietors of the derelict canal decline or are unable to effect the repairs necessary to prevent further injury, the Board of Trade may by warrant signed by their secretary authorise the abandonment by the existing proprietors of such unnecessary canal or such derelict canal, and after the granting of the warrant, and the due publication as required by the Board of Trade of a notice of the granting thereof, the Board of Trade may make an order releasing the canal company or other the proprietors of the unnecessary or derelict canal from all liability to maintain the same canal, and from all statutory and other obligations in respect thereof, or of or consequent on the abandonment thereof.

(2.) In the case of an unnecessary canal no warrant of abandonment shall be granted unless the Board of Trade are satisfied—

(a) That it is unnecessary for the purposes of public navigation;

(b) That the application has been expressly authorised by a resolution of a majority of the shareholders of the canal company owning the canal present and voting at an extraordinary or special general meeting of that company;

(c) That such public and other notices of the application have been given as the Board of Trade may require;

(d) That compensation (the amount thereof to be determined in case of difference as the Board of Trade may prescribe) has been made to all persons entitled to compensation by reason of the proposed abandonment of the canal.

(3.) In the case of a derelict canal the warrant may be granted on the condition that the canal or any part thereof, with all or any of the powers relating thereto, be transferred to any person, body of persons, or local authority, and where any such condition is imposed the Board of Trade may, if they think fit, frame and embody in a Provisional Order a scheme for the management of the canal or any part thereof.

(4.) The Provisional Order may provide for the constitution of a body to manage the canal or any part thereof, for the transfer to that body or any local authority of the canal or any part thereof, and of all or any of the powers relating thereto, for the limitation or discharge of any liabilities affecting the canal or the owners thereof for the time being, and for any other matters which may appear to the Board of Trade to be necessary or proper for carrying this section into effect.

(5.) The Board of Trade may submit to Parliament for confirmation any Provisional Order made by it in pursuance of this section, but any such order shall be of no force unless and until it is confirmed by Act of Parliament.

(6.) If while the bill confirming any such order is pending in

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either House of Parliament, a petition is presented against any order comprised therein, the bill, so far as it relates to the order, may be referred to a select committee, and the petitioner shall be allowed to appear and oppose as in the case of private bills.

(7.) In this section the expression "local authority" means any one of the local authorities mentioned in section seven of this Act.

(8.) For the purpose of giving effect to the provisions of this section, the Board of Trade may require the applicants to furnish any evidence in their possession or under their control relative to the application, and may at the expense of the applicants appoint and send an officer to inspect the canal referred to in the application, and to obtain information and evidence in the neighbourhood thereof relative to the proposed abandonment, and may from time to time make regulations as to the mode of making applications, and the nature and mode of publication of notices, and generally as to the conduct of proceedings.

Definition of "canal company."

46. In this part of this Act the expression "canal company" shall include a "railway and canal company," so far as relating to any canal of any such last-mentioned company.

Part IV.—Miscellaneous.

Perpetuation of 36 & 37 Vict. c. 48.

47. So much of the Regulation of Railways Act, 1873, as limits the time during which that Act shall continue in force shall, save so far as it relates to the appointment of the Commission, be repealed, and the said Act, save as aforesaid, shall be perpetual.

Evidence on rating appeals.

48. On any rating appeal, and before any Court, where it may be material to show the receipts or profits of a railway company or canal company, or railway and canal company, it shall be lawful for the company to prove the same by written statements or returns verified by the affidavit or statutory declaration of the manager or other responsible officer, and any such statements or returns shall be primâ facie evidence of the facts therein stated with respect to such receipts or profits: Provided that the person by whom any such affidavit or statutory declaration is made shall in every case, if required, attend to be cross-examined thereon.

Recovery and application of penalties.

49. Every penalty recoverable on summary conviction under this Act may be prosecuted and recovered in the manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction.

Parties may appear in person or by counsel or solicitor.

50. In any proceedings under this Act any party may appear before the Commissioners either by himself in person or by counsel or solicitor.

Parliamentary agents entitled to practise

51. Any person who shall be certified by the chairman of committees of the House of Lords or the Speaker of the House of Commons to have practised for two years before the passing of this Act

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in promoting or opposing bills in parliament shall be entitled to practise in any proceedings under this Act as an attorney or agent before the Commissioners: Provided that every such person so practising as aforesaid shall, in respect of such practice and everything relating thereto, be subject to the jurisdiction and orders of the Commissioners, and further provided that no such person shall practise as aforesaid until his name shall have been entered in a roll to be made and kept, and which is hereby authorized to be made and kept, by the Commissioners.

before Commissioners.

52. The powers and jurisdiction conferred by this Act on the Commissioners or Board of Trade shall be in addition to and not in substitution for any powers and jurisdiction vested in the Commissioners or Board of Trade by any statute.

Saving of powers conferred on Commissioners and Board of Trade.

53.—(1.) All documents purporting to be rules, orders, or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorized in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders, rules, or certificates without further proof, unless the contrary is shown.

Proceedings of Board of Trade.

(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified.

54.—(1.) Where any local authority having power under this Act to make or oppose any complaint to the Commissioners, or the Board of Trade, or to enter into any agreement to pay the whole or a portion of the expenses of complying with an order of the Commissioners or the Board of Trade, or to make any application for the abandonment or acquisition of a canal under this Act, incur any expenses in or incidental to such complaint, opposition, agreement, or application, such expenses may be defrayed out of the rates or funds out of which the expenses incurred by such authority in the execution of their ordinary duties are defrayed, and if such authority is a rural sanitary authority in England, shall be defrayed as general expenses, unless the Local Government Board direct that they shall be defrayed as special expenses.

Expenses of local authorities.

(2.) A local authority may enter into any contract involving the payment by themselves and their successors of any expenses authorized by this section to be defrayed.

(3.) Where any such local authority have no power to borrow money for the purpose of defraying any expenses authorized by this section, such authority, if other than a surveyor of highways, may, with the consent of the Board of Trade in the case of any harbour board or conservancy authority, and with the consent of the Local Government Board in the case of any other authority, borrow money in manner provided by the Local Loans Act, 1875,

38 & 39 Vict. c. 83.

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on the security of the rates or funds out of which the expenses are authorized to be defrayed, and the prescribed period for the loan shall be such period as the Board giving such consent may approve.

(4.) On the request of any board whose consent is required for such loan, the Board of Trade or Commissioners shall certify such particulars respecting the amount of the said expenses and the propriety of incurring the same and of borrowing for the payment thereof as may be requested by such board.

41 & 42 Vict. c. 52.

(5.) In Ireland, any authority borrowing in pursuance of this section may borrow in manner provided by the Public Health (Ireland) Act, 1878, in like manner as if the provisions of that Act with respect to borrowing were re-enacted in this section, and in terms made applicable thereto.

Definitions.

55. In this Act, unless the context otherwise requires,—

Terms defined by the Regulation of Railways Act, 1873, have the meanings thereby assigned to them:

The term "conservancy authority" means any persons who are otherwise than for private profit intrusted with the duty or invested with the power of conserving, maintaining, or improving the navigation of any tidal or inland water or navigation:

The term "harbour board" means any persons who are otherwise than for private profit intrusted with the duty or invested with the power of constructing, improving, managing, regulating, and maintaining a harbour, whether natural or artificial, or any dock:

The term "Lord Chancellor" means the Lord High Chancellor of Great Britain:

The term "undue preference" includes an undue preference, or an undue or unreasonable prejudice or disadvantage, in any respect, in favour of or against any person or particular class of persons or any particular description of traffic:

The term "terminal charges" includes charges in respect of stations, sidings, wharves, depôts, warehouses, cranes, and other similar matters, and of any services rendered thereat:

The term "merchandise" includes goods, cattle, live stock, and animals of all descriptions:

The term "trader" includes any person sending, receiving, or desiring to send merchandise by railway or canal:

The term "home," in relation to merchandise, includes the United Kingdom, the Channel Islands, and the Isle of Man:

The term "rating appeal" means an appeal against any valuation list or against any poor rate or any other local rate:

27 & 28 Vict. c. 53. 44 & 45 Vict. c. 24.

The term "Summary Jurisdiction Acts" in Scotland means the Summary Procedure Act, 1864, the Summary Jurisdiction (Process) Act, 1881, and any Act or Acts amending the same; and in Ireland, within the police district of Dublin metropolis the Acts regulating the powers and duties of justices of the peace for such district, or of the police of such district, and

elsewhere, the Petty Sessions (Ireland) Act, 1851, and any Act amending the same:

The term "superior Court" means, as regards England, the High Court of Justice, as regards Scotland, the Court of Session, and as regards Ireland, the High Court of Justice: 14 & 15 Vict. c. 93.

The term "superior court of appeal" means, as regards England, her Majesty's Court of Appeal; as regards Scotland, the Court of Session in either division of the Inner House; and as regards Ireland, her Majesty's Court of Appeal:

The term "rules of court" means, as regards Scotland, acts of sederunt.

In the application of this Act to Ireland, the expression "council of a borough" includes town or township commissioners, and any reference to justices in quarter sessions shall be construed to refer to a grand jury; and any reference to the Local Government Board or to an urban or rural sanitary authority, shall be construed to refer to the Local Government Board for Ireland, and to an urban or rural sanitary authority in Ireland.

Commencement of Act.

56. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-nine, which day is in this Act referred to as the commencement of this Act: Provided that at any time after the passing of this Act any appointment and rules may be made, and other things done for the purpose of bringing this Act into operation at such commencement.

Pending business. 36 & 37 Vict. c. 48.

57. Subject to general rules to be made under this Act, all proceedings which, at the commencement of this Act, under the Regulation of Railways Act, 1873, and Acts amending it, or under any other Acts, are pending before the Railway Commissioners, shall be transferred to the Railway and Canal Commission under this Act, and may thereupon be continued and concluded in all respects as if such proceedings had been originally instituted before that Commission.

Transfer of pending business from superior courts.

58. Every action or proceeding which might have been brought before the Railway Commissioners if this Act had been in force at the time when such action or proceeding was begun, and is at the commencement of this Act pending before any superior Court, may, upon the application of either party, be transferred by any judge of such superior Court to the Railway and Canal Commissioners under this Act, and may thereupon be continued and concluded in all respects as if such action or proceeding had been originally instituted before that Commission: Provided that no such transfer, nor anything herein contained, shall vary or affect the rights or liabilities of any party to such action or proceeding.

Repeal.

59.—(1.) The enactments mentioned in the schedule to this Act are hereby repealed to the extent therein specified.

(2.) The repeal effected by this Act shall not affect—

(a) Anything done or suffered before the commencement of this

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Act under any enactment repealed by this Act, or the expiration of any office which would otherwise have expired by virtue of any enactment repealed by this Act; nor

(b) Any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed; nor

(c) Any fine, forfeiture, or other punishment incurred or to be incurred in respect of any offence, committed or to be committed against any enactment so repealed; nor

(d) The institution or continuance of any proceeding or other remedy, whether under any enactment so repealed, or otherwise, for ascertaining or enforcing any such liability or disqualification, or enforcing or recovering any such fine, forfeiture, or punishment as aforesaid.

SCHEDULE.

Acts Repealed.

Section 59.

Note.—A description or citation in this schedule of a portion of an Act is inclusive of the words, section, or other part first and last mentioned, or otherwise referred to as forming the beginning or as forming the end of the portion described in the description or citation.

Session and Chapter of Act.	Short Title.	Extent of Repeal.
17 & 18 Vict. c. 31 ..	The Railway and Canal Traffic Act, 1854.	Section four and section five.
31 & 32 Vict. c. 119 ..	The Regulation of Railways Act, 1868.	Section sixteen, paragraph two, from "The provisions of" to the end of the section.
36 & 37 Vict. c. 48 ..	The Regulation of Railways Act, 1873.	Section three, from "The term 'superior court'" to the end of the section, section four, section eleven, section twelve, section thirteen, section twenty-one, section twenty-two, section twenty-three, section twenty-four, section twenty-five, section twenty-six from the words "The Commissioners may review" to the end of the section, section twenty-eight, section twenty-nine, section thirty-four, and section thirty-seven.
37 & 38 Vict. c. 40 ..	The Board of Trade Arbitrations, &c. Act, 1874.	Section eight, from "and shall continue in force" to "expiration."

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PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C.

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"RHODRONS, LONDON."

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