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THE LAW OF CARRIAGE BY INLAND TRANSPORT

THE LAW OF
CARRIAGE
BY
INLAND TRANSPORT

BY

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PREFACE

NINE years have passed since the publication of the previous edition of this work. These nine years have been amongst the most eventful in the history of the British transport system and of the law of inland transport in particular. The nationalisation of the railways and canals and the formulation of a scheme for the nationalisation and co-ordination of major parts of road transport have given additional importance to the administrative side of transport law. They have had or are going to have significant repercussions in the law governing the relationship between the carrier of goods and passengers and his customer.

These developments have made it necessary to revise and to rearrange the text very thoroughly. The emphasis had to be shifted from what one may call the private law aspect of transport law to the public law aspect. It has become impossible to understand the mutual rights and liabilities of the carrier and his customer without a firm grounding in the law governing the organisation of the transport industry. The first part of the book has therefore been devoted to an analysis of the structure of the industry and of those principles of administrative law which underlie the statutory control of transport by railway, canal and road vehicle. The second part which deals with the contract for the carriage of goods has been brought up-to-date, but no major changes were called for in this part of the book. The law governing the carriage of passengers, on the other hand, which is the topic of the last part, has been profoundly influenced by a number of recent cases and statutes, and the third part had to be largely rewritten.

In order to keep the book within reasonable limits the writer was compelled very reluctantly to omit some of the detailed case summaries contained in Disney's original text. It is regrettable but inevitable that with the passing of time the proportion of the work taken from Disney should diminish.

It is hoped that in its new form the book may prove useful not only to the student for whom it is primarily written but also to the practitioner, and, especially in its first part, to the layman interested in the legal aspect of public enterprise in the field of inland transport.

I wish to express my grateful thanks to my wife who has spent many hours reading the proofs and preparing the Table of Statutes and the Index.

LONDON, O.K.-F.
September 1948

PREFACE TO THE FIRST EDITION

THE eighth edition of Disney's *Law of Carriage by Railway* appeared in 1929. Since that time the law of road transport of passengers, as well as of goods, has grown in importance for those who are engaged in the road transport industry itself, as well as those concerned with the management and operation of the railways, and for the public in general.

The syllabus of the course of lectures, delivered every year at the London School of Economics and Political Science, which was the basis of Disney's work, and for which the present writer is now responsible, had to be changed accordingly. It now covers the Law of Inland Transport, including carriage by road.

These changes have made it necessary substantially to rewrite this work. In its present form it contains a synopsis of some of the leading principles of road transport law, such as the rules governing the road carrier's liability for the safety of goods and passengers and the licensing system for passengers and goods vehicles introduced by the Road Traffic Legislation.

It was possible, on the other hand, to cut out considerable parts of Disney's original text. In view of the dominating position which Standard Terms and Conditions now occupy in relation to railway goods traffic, most of the passages dealing with the interpretation of the Railway and Canal Traffic Act, 1854, could be omitted. The law of facilities and undue preference has also somewhat decreased in importance of late and the relevant chapters could, therefore, be shortened.

In the interest of conciseness it was thought advisable not to include a chapter on canals, and to leave out the appendix of statutes and statutory conditions contained in the last edition of 'Disney'.

The object of the book remains what it has always been: to serve as an elementary introduction for law students, as well as students of commerce and those railway students who receive a special course of theoretical training under the existing educational schemes of the railway companies. It was felt, however, that practitioners might welcome a more thoroughgoing analysis of the recent development of the law relating to statutory supervision of railway charges, since none of the works dealing with this topic have been re-edited for a number of years. The cases decided since 1928 on matters of railway charges and the like have, therefore, been more fully analysed than decisions concerning other subject-matters, so as to give the practising lawyer a guide to the present

state of this branch of railway law. This seemed all the more appropriate in view of the present public discussion in this field, and it is hoped that the layman who wishes to form an opinion of his own on the 'square deal' dispute may also turn to the pages of this book. The non-legal student, as well as the layman, will find all that he wants in the text itself. The footnotes are mainly written for the benefit of the lawyer.

The present scheme of the book, like Disney's original scheme, is based on notes made in preparation of the course of lectures delivered at the London School of Economics. It is sincerely hoped that the book in its present form will be able to maintain the tradition founded by Mr. Disney's admirable work.

O. K.-F.

LONDON,
January 1939

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PART ONE

THE ORGANISATION OF THE TRANSPORT INDUSTRY

CHAPTER 1

INTRODUCTION

THIS book is concerned with the law which governs the relation between a carrier by rail or road and his customers, *i.e.* the owners of goods carried by railway or road vehicle and the passengers travelling in railway trains or public service vehicles. Transport of goods and of passengers is in this country divided between public and private enterprise. The carriage by rail of merchandise as well as of passengers and their luggage has been nationalised. This does not meant that the State itself, or as lawyers put it, the Crown acts as a carrier. The services are provided by public corporations known as the Transport Commission and as the Executives which act as the Commission's agents. Similarly, certain branches of carriage by road, notably the long distance carriage of goods, will be transferred from private to public enterprise, while private firms will continue to carry goods on the roads over short distances. Public corporations such as the Transport Commission and some of the Executives, local authorities, and private operators, participate in the carriage of passengers by road, and may for a long time continue to do so. In other branches of the industry which are outside our scope we find a similar mixture of public and private undertakings. Thus, transport by inland waterway and coastal shipping are mainly in the hands of private entrepreneurs, while transport by air is controlled by public corporations.

The basis of the legal relationship between a carrier and his customer is the same whether the carrier is a public corporation, a local authority, or a private firm or company. The law of contract governs the rights and duties of the owner of goods carried by rail or road, no matter whether the carrier is the Railway Executive or a road-hauling firm organised as a company or partnership. A passenger by railway has certain rights and liabilities. They were not fundamentally changed when, on January 1, 1948, a public corporation succeeded to the property, the rights and duties of the former railway companies. It does not matter, from the point of view of the law of carriage proper, whether the owner and operator

of a lorry is the Road Transport Executive or whether it is a private firm of road haulers, nor has a passenger in a bus or in a coach any greater or smaller rights according as to whether it is run by a private firm, a local authority, or the London Transport Executive.

Nevertheless one cannot understand the law of carriage unless one knows something about the organisation of the industry. The principles which determine that organisation are bound up with the general problem of monopoly and competition, and from time immemorial the rights and particularly the duties and liabilities of a carrier have been influenced by the question to what extent he enjoyed a monopoly. Moreover, in the most important instances, statutes define the services which a customer can demand, and determine the amount of remuneration which a carrier can exact. These statutes are incomprehensible to any one unfamiliar with the legal structure of the transport industry. Finally, it should not be forgotten that there is no clear cut separation between unregulated private enterprise and organised public operation. There are intermediate stages, and in particular there is a licensing system by which, in a variety of ways, private and sometimes public operators are subject to supervision and control. The legal position as between carrier and customer is not unaffected by this licensing law which forms an important part of the norms by which the industry is organised. In short: no one can hope to grasp the law governing the mutual rights and duties of a carrier on one side and a consignment owner or passenger on the other unless he has learned a great deal about the carrier's statutory monopoly, about his duties under a licence, and about his supervision by the licensing authorities, by the Transport Tribunal, by the Minister of Transport, and ultimately, by Parliament.

CHAPTER 2

THE TRANSPORT COMMISSION AND THE EXECUTIVES

THE COMMISSION

THE Transport Commission which was created by the Transport Act, 1947, is by far the most important carrier of goods and passengers in this country. It is a public corporation, *i.e.* while it is a 'public authority'[1] and administers its undertaking in the public interest, it is not part of the organisation of the State. Nationalisation is a comprehensive term which, from a legal point of view, has many different meanings. The postal services of Britain have been nationalised for many years, but they were nationalised by incorporation in the State itself. The Postmaster-General is a Minister of the Crown. The members of the Transport Commission, however, though appointed by the Minister of Transport, are not servants of the State. The Commission consists of a full time chairman and between four and eight other members, at least four of whom render whole-time services, but none of them, whether salaried or honorary members, are either civil servants or members of the Government. They are responsible to the Commission, whose members they are, and not to the Minister who has appointed them. Nor are they, of course, in any sense representatives of outside interests, although the Minister must appoint persons who have had wide experience and shown capacity in transport, or in industrial, commercial or financial matters, or in administration, or in the organisation of workers.[2] The law seeks to secure their complete independence from both political and economic influences which might interfere with their work. Hence it provides that they must not be members of the House of Commons,[3] and, on the other hand, that they must not have any financial or other interests likely to prejudice the discharge of their functions.[4] What is true of the status of the members themselves is in many ways true of all other servants of the Commission and of the other public corporations which act as its agents: while every postman is a servant of the Crown, a railway-

[1] Transport Act, 1947, Sect. 1 (1). For the implications of this principle from the point of view of the limitation of actions see Sect. 11 of the Act, and below p. 234.
[2] Sect. 1 (2). The Ministers also appoints the auditors. Sect. 94 (3).
[3] Sect. 1 (4).
[4] Sect. 1 (5) and (6).

man or a London bus driver is no more a servant of the State today than he was in the days before nationalisation.

The fact that the Transport Commission is an independent public corporation [5] is of importance in many respects. It has its own rights and its own liabilities, it can sue and be sued in a court of law, its property is not Crown property, its debts are not the debts of the State.[6] It is subject to all taxes, rates and other public charges, general and local.[7] It is, exceptions apart, autonomous in the conduct of its day to day affairs and in the regulation of its own procedure.[8] The Minister of Transport can only give directions of a general character to the Commission with regard to the exercise and performance of its functions in relation to matters which appear to him to affect the national interest.[9] There are, however, important exceptions to the principle that the Minister cannot give detailed instructions to the Commission. Thus, programmes of reorganisation or development which involve a substantial outlay on capital account must be framed on lines settled with the approval of the Minister.[10] The same applies to the training and education of personnel and to research.[11] In all questions touching finance the autonomy of the Commission is much more restricted than in matters of management. They cannot borrow money, whether short term or long term, without the consent of the Minister, and long term loans are only permitted for a number of defined purposes and with the approval of the Treasury. Short term credits need not be submitted to the Minister in every single case provided a general authority has been obtained.[12] In their investment policy

[5] Sect. 1 (9), Schedule I, No. 1.

[6] But many of its liabilities, notably British Transport Stock created and issued for compensation purposes, are guaranteed by the Treasury. Sect. 90.

[7] Sect. 10. Note, too, that the Commission has power, with the consent of the Minister, to promote and oppose Bills in Parliament, and that it has inherited from its predecessors whatever powers they had to make and oppose applications for orders. Sect. 9. This would be unthinkable if the Commission was part of the administration of the State.

[8] Schedule I, No. 3.

[9] Sect. 4 (1). The Minister must consult the Commission before issuing directions.

[10] Sect. 4 (2).

[11] Sect. 4 (3).

[12] Sect. 88. The total of short term loans must not at any time exceed £25 million, and long term loans, effectuated by the issue of British Transport Stock, must not exceed £250 million, which does not, however, include loans raised for the redemption of existing Stock or for the provision of cash payable by way of compensation for the transfer of undertakings under the Act or under a scheme. The creation of Transport Stock for the purpose of satisfying statutory compensation claims which, under the Act or a scheme, have to be satisfied by the issue of Stock is

the Commission are free to act at their discretion,[13] but they must comply with the Minister's directions (to be given with the approval of the Treasury) in all matters concerning the establishment and management of the general reserve which it is their duty to create and maintain and in all matters concerning its application.[14] The salaries, fees and allowances of the members of the Commission and any pensions payable on their retirement or death are settled by the Minister with the approval of the Treasury,[15] and the Minister also determines the other terms of their appointment.[16] There are many other matters on which the Minister may give directions to the Commission [17] or in which they cannot act without his approval or authorisation.[18]

There are obviously great advantages in separating the nationalised transport services from the general machinery of the State. On the other hand, however, the autonomy of a body like the Transport Commission raises the fundamental issue of parliamentary control. If the Minister of Transport is not responsible for running the railways and the nationalised road services, how can he be taken to account by Parliament for any shortcomings of those services? But how can an autonomous public corporation like the Transport Commission be responsible in the political sense? This problem, the most fundamental political problem of nationalisation, has been solved, as was to be expected, by a compromise. The Commission must make an annual report to the Minister on the exercise and performance of their functions during the year and on

also outside the £25 million limitation. Sect. 89. The Minister prescribes by Regulations with Treasury approval and subject to Parliamentary control (Sect. 120) how Stock is to be issued, transferred, dealt with, and redeemed. Sect. 89 (3).

13 Sect. 91.

14 Sect. 92 (2) (b).

15 Sect. 1 (7).

16 Sect. 1 (3).

17 *E.g.* Directions to discontinue any of their activities, dispose of any part of their undertakings or securities, call in loans, and revoke guarantees. Sect. 4 (5). Directions on returns, accounts and other information to be furnished to the Minister (Sect. 4 (6)), on the form, particulars and manner of the Commission's annual statement of accounts (Sect. 94 (1) (b)), on the scheme of audit and cognate matters (Sect. 94 (3)), on the periodical statistics and returns to be rendered to the Minister (Sect. 94 (5) and (6)).

18 *E.g.*, the acquisition by agreement of railway, harbour, inland water way, tramcar and trolley vehicle undertakings not transferred by the Act, Sect. 4 (4), the determination of the conditions of appointment, including remuneration and pensions, of the members of the Executives (Schedule II, No. 2), schemes for the delegation of functions to the Executives (Sect. 5 (4)), the compulsory acquisition of land (Sect. 8), the promoting and opposing of Bills in Parliament (Sect. 9).

their policy and programme. This report must include a statement of the Commission's audited accounts with the auditors' report. A copy of every such report must be laid by the Minister before each House of Parliament. This report must also set out all directions which the Minister has given to the Commission as well as a statement of the salaries or fees and emoluments of the members of the Commission. There is only one exception to this: if the Minister notifies to the Commission his opinion that it is against the interests of national security to mention any direction in the report, it will be omitted.[19] Moreover, Parliament receives copies of the periodical statistics and returns relating to each of their principal activities which the Commission must render to the Minister.[20] It is regularly informed of the guarantees which the Treasury gives for securities issued by the Commission.[21] What is, however, particularly important is the duty of the Minister to lay before Parliament a copy of the annual report of the Central Transport Consultative Committee, to be discussed below. This means that, in debating the work done by the Transport Commission, either House of Parliament will have before it not only the Commission's own views, but also the opinion of those most concerned, the customers of the nationalised services.[22] In effect, therefore, the Transport Commission is indirectly subjected to parliamentary control with regard to its general policy and finance, but not with regard to its routine management. One might perhaps say that, in relation to the public corporation, the control by the Minister, and through the Minister by Parliament, is intended to fulfil functions similar to those which the shareholders' meeting is supposed to perform in relation to a commercial company.

POWERS AND DUTIES

Like all corporations created by Parliament the Transport Commission is not free to engage in any activities it pleases. A railway company was not entitled to apply its funds to unauthorised objects, nor engage in any business not expressly or implicitly permitted. Similarly, the Transport Commission has only those powers which are expressly enumerated in the Transport Act of 1947. What is

[19] Sect. 4 (7), Sect. 94 (4). After the first appointment of a member of the Commission the Minister must lay before each House a statement of his salary or fees and allowances. Sect. 1, subs. 8.

[20] Sect. 94, subs. 5.

[21] Sect. 90, subs. 3.

[22] Sect. 6 (9). In addition, the annual report of the Transport Tribunal of all their proceedings must be laid before Parliament. All existing enactments on annual reports by the Tribunal are superseded by this provision. Schedule 10, No. 3.

not permitted by the Act must be considered as forbidden, but this is a principle which must be liberally interpreted. A railway company was never restrained from engaging in any business which might have been fairly or reasonably considered as ancillary to the main purpose for which it was created. One can expect that the same principle of interpretation will be brought to bear upon those parts of the Transport Act which define the powers of the Transport Commission.

This definition embodies four main principles: 1. The Commission may do everything which is covered by the terms 'carriage' and 'warehousing' in the widest sense of the words, *i.e.* the carriage of goods and passengers, by rail, road and inland waterway, the provision of port facilities and facilities for traffic by inland waterway in Great Britain, and in certain limits the storage and consignment of goods.[23] The provision of hotels, hostels, etc., and of other amenities and facilities for passengers are also mentioned.[24] On the other hand, the Commission has no power to engage in coastal shipping (except under the principle to be mentioned below), or in the carriage of passengers or goods by air, coastal shipping being still a matter of private enterprise, and air transport being entrusted to other public corporations under a different statute.

2. The Commission may do everything which its predecessors might have done. In addition to the powers expressly conferred upon it by the Act, it has inherited and will continue to inherit from the undertakings acquired by agreement or compulsory transfer all the powers which they had had under the statutes governing their activities. It does not matter whether they had actually used these powers, provided they might have done so. This makes it possible for the Commission to do a number of things not covered by the express provisions of the Transport Act, *e.g.* to continue the passenger steamship services of the former railway companies. In practice this provision may make it necessary to delve into the depths of legal history by analysing the powers of the amalgamated railway companies which they in turn had frequently inherited from the special acts of companies created many years ago.[25]

3. The Commission may do everything which is incidental to the fulfilment of its principal objects, or, as the Act puts it, 'all other

[23] Sect. 2 (1), (a) to (d).
[24] Sect. 2 (1), (e) and (f).
[25] Sect. 2, subs. 3. This principle is, however, subject to certain limitations, particularly with reference to the manufacture of anything which is not required by the Commission itself, and even with reference to the production of and trading in vehicles, spare parts, etc., for the Commission's own use. For details of this matter which is of great complexity see Sect. 2, subs. 3 proviso and subss. 4 and 5.

things which in the opinion of the Commission are necessary to facilitate the proper carrying on of (its) business. . . '.[26] A large number of things which come under this heading are enumerated in the statute, and, no doubt, on established principles of interpretation, the general clause quoted above will have to be interpreted as covering only such activities as are similar to those expressly mentioned. Among them are the construction, manufacture, purchase, maintenance and repair of articles required for the purposes of the principal objectives of the Commission, furthering the training and education of its staff, promoting research, buying and leasing land, providing accommodation for the staff etc. Moreover, there are other ancillary powers referring to the acquisition of undertakings, agreements with other carriers inside and outside Britain etc.[27]

4. A number of activities are expressly prohibited on the ground that it was intended to reserve them to private enterprise. Thus the Commission may not carry passengers in hackney carriages,[28] it is not entitled to build ships larger than 175 tons, and it is subject to restrictions with regard to the manufacture of, and trade in, vehicles and their parts, even in so far as it requires them itself.[29]

From the point of view of the law of carriage it is important to know precisely not only what are the statutory powers of the Commission, but also what are its duties. We are here concerned with the public duties of the public corporation, not with its duties and liabilities towards individuals under the law of contract and under the law of tort. Public duties of the kind here under discussion cannot be enforced by any proceedings before any court or tribunal.[30] Nevertheless their definition is of interest not only as an expression of the economic and financial policy which Parliament sought to pursue, but also from the point of view of the Commission's prospective customers. The public duties of the Commission affect the fundamental issue of the customer's right to choose between the various services provided by the Commission, and as will be pointed out hereafter may affect the legal problem whether and to what extent the Commission is a common carrier.

The public duty of the Commission is defined in very general terms. It must 'provide, or secure or promote the provision of, an efficient, adequate, economical and properly integrated system of public inland transport and port facilities with Great Britain for

[26] Sect. 2 (2) (e).
[27] Sect. 2, subs. 2. For the financial powers of the Commission see Sects. 88 to 91, for the power to acquire land compulsorily see Sect. 8.
[28] Sect. 2, subs. 1 proviso.
[29] Sect. 2, subs. 2 proviso, subss. 4 and 5.
[30] Sect. 3, subs. 5.

passengers and goods with due regard to safety of operation'. For this purpose it is incumbent on the Commission 'to take such steps as they consider necessary for extending and improving the transport and port facilities within Great Britain in such manner as to provide most efficiently and conveniently for the needs of the public, agriculture, commerce and industry'.[31]

At first sight it may not be clear to the reader how a rather vague pronouncement of this kind can be of practical importance in the everyday application of the law. It is, however, not very difficult to think of situations in which this may be the case. Thus, as will be explained in greater detail in a later chapter, the Commission in its capacity as a carrier by railway is under a statutory duty to provide reasonable facilities for the carriage of goods and passengers, a duty enforceable by proceedings before the Transport Tribunal. It is, to say the least, possible that, in determining what are 'reasonable' facilities the Tribunal will in future have regard to the question whether the provision of the facilities demanded is compatible with the fulfilment of the public duties of the Commission as formulated in the Transport Act.[32] Again, the Commission must not unduly prefer, in its railway services, one of its customers to another. Whether or not a preference or discrimination is 'undue' may in future have to be decided in the light of the duties imposed upon the Commission in its capacity as a public corporation.

In one respect the Act itself gives some guidance on the practical aspect of the statutory duties incumbent on the Commission. One of these duties, as we have seen, is to provide a properly integrated system of transport. Does this mean that the Commission is free to guide goods transport into the channels of rail or road traffic in accordance with its integration programme? Can it answer a customer's request for the carriage of goods in a particular manner by a reference to its integration policy? In view of the need for a proper measure of co-ordination between rail and road transport this is obviously a matter of first-rate importance. Which should be paramount: the customer's freedom to choose rail or road transport or the performance of the Commission's duty to integrate the transport services? As a matter of principle it is the customer who decides which of the services provided by the Commission he wishes to use. However, this freedom of consumer's choice presupposes

[31] Sect. 3, subs. 1.

[32] Sect. 3, subs. 5 is not contrary to this view. It merely says that the duties as such cannot be directly or indirectly enforced. It does not say that the public duties cannot be used by the Commission as a defence where its private duties are sought to be enforced.

that for the time being regular goods transport services of various kinds, *e.g.* rail and road, are in fact provided between the same points by the Commission. It does not mean that the Commission is under any obligation to provide or to continue to provide any particular type of goods transport service between any particular points.[33] Nor does it prevent the Commission from making differential charges for various types of goods transport services between the same points.[34] It will be necessary to revert to these matters in a different context.

The power of the Commission to discontinue any of its services or to dispose of any part of its undertaking [35] is not restricted by its duty to respect the freedom of consumers' choice. There is only one limitation: If the Commission intends to discontinue permanently a regular goods transport service by road between any particular points, it must give at least one month's notice in a suitable manner to those whose interests are affected. This is the only counterpart in the law of transport by road to the law of reasonable facilities which has played so prominent a part in the development of British railway law.[36]

One word should be said about the financial duties of the Commission. The whole of the business of the Commission 'shall form one undertaking'. It must be conducted so as to secure that the revenue of the Commission is sufficient for meeting the charges properly chargeable to revenue, 'taking one year with another', and rates, fares, etc. must be levied accordingly. The Act does not say that the budget of any of the services taken by itself must be made to balance, and it appears to be permissible to use the surplus of one service to balance the deficit of another.[37] On the other hand, the Act imposes specific duties upon the Commission as to what must be charged to revenue. This includes proper allocations to the general reserve which, apart from any special reserves for replacements, etc., it is the Commission's duty to establish and maintain.[38] It also includes proper provision for depreciation or

[33] Sect. 3, subs. 2. The Commission may, however, be under a duty of this kind under other statutory provisions, e.g. under the facilities clause in Sect. 2 of the Railway and Canal Traffic Act, 1854.

[34] Sect. 3, subs. 2 (b). Would it be right for the Commission to charge differential rates amounting to an 'insuperable barrier' against the use, say, of the road transport services for a given type of goods?

[35] Sect. 2, subs. 7. The Minister may direct the Commission to do so. Sect. 4, subs. 5.

[36] Sect. 3, subs. 3.

[37] Sect. 3, subs. 4.

[38] Sect. 92. One of the purposes of the general reserve which must be managed in accordance with directions given by the Minister is to prevent frequent fluctuation of charges.

renewal of assets and for redemption of capital, and also certain compensation payments.[39]

THE EXECUTIVES

The Transport Act is a compromise between the needs for co-ordination and for decentralisation. The Transport Commission itself is the supreme organ of co-ordination and the policy-making body for the whole of the nationalised transport system of Great Britain. In the interest of decentralisation, however, it is provided that the Transport Commission does not itself run the services for which it lays down the programmes and policy. Management, as distinguished from policy-making, is entrusted to public authorities, known as the Executives, whose task it is 'to assist the Commission in the discharge of their functions'.[40] There are to be five of these bodies—the Railway Executive, the Docks and Inland Waterways Executive, the Road Transport Executive, the London Transport Executive, and the Hotels Executive. The Minister has the power to create further Executives and to determine their names and also to abolish existing Executives.[41] Each Executive is itself a public corporation with its own rights and liabilities and with power to sue and be sued in court.[42] The constitution of the Executives resembles that of the Commission itself. Each of them has a chairman and between four and eight members appointed by the Minister after consultation with the Commission from persons with qualifications identical with those required for members of the Commission[43]. Like the members of the Commission they must be neither Members of Parliament nor have any financial interests incompatible with the discharge of their functions. Their terms of appointment, including remuneration, are settled by the Commission with the approval of the Minister, and the remuneration is paid by the Commission.[44]

In all their activities the Executives act as agents of the Commission.[45] They can do only those things which the Commission has delegated to them under a scheme which requires the approval of

[39] Sect. 93. These financial duties are in future to be observed by the Commission and the Transport Tribunal in fixing the charges, Sect. 85, and thus these provisions fill the gap left by the repeal of the provisions of the Railways Act, 1921, on the standard revenue. For the duties of the Commission with regard to accounts, statistics and returns see Sect. 94.

[40] Sect. 5, subs. 1.

[41] Sect. 5, subs. 3. See also Sect. 5, subs. 11.

[42] Sect. 5, subs. 2, Schedule 2, No. 3.

[43] Schedule 2, No. 1.

[44] Schedule 2, No. 2.

[45] Sect. 5, subs. 4.

the Minister and which must be published.[46] In order to appreciate the relationship between the Commission and the Executives one must bear in mind that, according to the general principles of English law, an agent who enters into a contract or holds property for a principal need not disclose to the world that he is acting for somebody else's account. It is compatible with the idea of agency that, in relation to third persons, the agent should appear as the owner of property, the creditor of debts, and, on the other hand, the person liable, under transactions for which he is accountable to, or can claim indemnity from, his principal. There is therefore no contradiction in those provisions of the statute which say that the Executives act as agents for the Commission, but that, as respects matters falling within the scope of any delegation, 'any rights, powers and liabilities of the Commission shall be treated as rights, powers and liabilities of the Executive and of the Executive only'.[47] As a corollary to this the Executive and not the Commission is to be treated as the employer of the officers and servants of the Commission so long as they are by virtue of the delegation under the control of the Executive.[48] A passenger by rail or the owner of goods consigned for carriage by railway makes his contract with the Railway Executive and not with the Transport Commission. In the daily lives of passengers or of traders this may not be a matter of great significance, but if it comes to a dispute the lawyer who advises the carrier's customer must know whom he has to sue in court. It is clear that a passenger who claims damages for an accident suffered in the course of a railway journey must make the Railway Executive responsible, and an action for damages will have to be brought against that body and not against the Commission, and the same is true if an owner of goods wishes to claim compensation for the loss of those goods in railway transit. Similarly, a pedestrian injured in a road accident in London owing to the negligence of a bus driver will seek to obtain damages from the London Transport Executive. It is true that by a special provision of the Act[49] the Transport Commission is liable to satisfy any judgment or order which requires the Executive to pay a sum of money, if that sum has not been paid within fourteen days from the date on

[46] Sect. 5, subss. 4 and 5. The manner of publication is specified in the latter subsection. Schemes of delegation may be revoked or varied by the Commission with the approval of the Minister. This is assumed rather than expressed in the Act.

[47] Sect. 5, subs. 4 and subs. 9 (a).

[48] Sect. 5, subs. 9 (b), a provision inserted to cover the question of vicarious liability in tort.

[49] Sect. 5, subs. 9 proviso.

which the judgment or order becomes enforceable, and the judgment will become automatically enforceable against the Commission. This provision, however, which is not likely to be of very great practical importance, must not obscure the fact that a lawsuit has to be conducted against the Executive and not against the superior body. Similarly, claims for freight, for passengers' fares, or for damages against customers, as well as the carrier's lien on goods, vest in the Executive.

The Executives are under a duty to comply with the terms of the delegation expressed in the published scheme. They are bound by any conditions or limitations which may be attached to the delegation, and also by any directions which the Commission may give to them from time to time.[50] Even without express delegation they have the power, at the request of the Commission or of any other Executive, to act as their agents. This provision [51] has the great advantage that outsiders dealing with the Executive need not in every single case inquire whether a transaction entered into by the Executive is covered by the express terms of its delegation. According to the general principles of the law of agency, an agent has not, in the absence of express permission on the part of the principal, the power to subdelegate his authority. The Executives are bound by this principle, but the Commission may empower them to delegate any of their functions to agents.[52]

There is only one restriction imposed by the express provisions of the Act upon the Commission's right to delegate its functions to the Executives: The Executives cannot be empowered to borrow money except temporarily for the purpose of carrying on current business. This is in accordance with the general financial scheme of the statute which submits the financial side of the nationalised transport industry to the control of the Minister.[53]

CONSULTATIVE COMMITTEES

In order to preserve a measure of contact between the Transport Commission and the public who are dependent on its services, Consultative Committees are to be established, composed of an independent chairman and persons nominated by the Commission on one side and representatives of agriculture, commerce, industry, shipping, labour and local authorities on the other.[54] All these are appointed by the Minister, who also determines the number of

[50] Sect. 5, subs. 6.
[51] Sect. 5, subs. 10.
[52] Sect. 5, subs. 7.
[53] Sect. 5, subs. 8.
[54] Sect. 6, subss. 1 and 4.

members.[55] The idea is to create an organised opportunity for consultation between the providers and users of transport. In view of the wide extension of the Commission's undertaking this purpose could not have been achieved if the representatives of the Commission and those of the users had only been able to meet at the seat of the Commission in London. On the other hand, it was plainly necessary to establish machinery for consultation at the centre where the major decisions on policy are made. Hence the law provides for a two tier system of Consultative Committees; there is to be a Central Transport Consultative Committee for Great Britain, and there are to be Transport Users Consultative Committees for areas to be defined by the Minister. In the organisation of these area committees the Minister has a wide measure of discretion. It is for him to decide whether, in any given area, there are to be separate committees for passenger and for goods traffic or whether one committee shall combine both functions, and he may, in appointing the representatives of the transport users on a committee, disregard any interests, which, in his opinion, need not be represented. It is also for him to define the areas, but here his discretion is circumscribed: the whole of Great Britain must always be covered by all the areas taken together and whatever other committees there may be for Scotland and for Wales, there must always be one for passengers' and goods traffic combined for each of these two countries as a whole.[56] The Minister need not define the areas once and for all; he may, after consultation with the Commission abolish a committee and draw new area boundaries.[57]

He may also replace in a given area a combined committee by separate passenger and goods' committees or *vice versa*. In the appointment of members he is free to select from those nominated by the Commission as representatives of its interests. With the exception of at least one member of the Central Committee they need not (although they may be) members of the Commission itself. In appointing the users' representatives, all the Minister is required to do is to consult the relevant representative bodies. He may also appoint no more than two additional members to each committee.[58] The Act, without saying so in express terms, obviously does not contemplate that either the chairmen or the other members of the committees should hold full time salaried appointments. The Commission may pay them allowances for loss of remunerative time in

[55] Sect. 6, subs. 4.
[56] Sect. 6, subss. 1, 3 and 4.
[57] Subs. 2.
[58] Subs. 4.

accordance with a scale approved by the Minister and the Treasury, and in addition travelling allowances and out of pocket expenses. Otherwise, they hold their appointments in accordance with the terms fixed by the Minister who is therefore free to determine their tenures of office.[59] They may be members of the House of Commons.[60]

Meetings of each committee must be held at least twice a year. but the chairmen may call a meeting whenever they think fit, and they must do so upon a request by three members.[61]

The functions of the committees are to deliberate and to report but not to make decisions. They must consider, and if they think fit, report on anything (including charges) affecting the Commission's services and the facilities it provides and on which representations have been made to the committee by transport users, unless indeed such representations are frivolous. But they need not confine their attention to representations coming from outside. Whatever they themselves think is in need of consideration, and whatever the Minister or the Commission refers to them belongs to their sphere of action.[62]

A report made by a committee is not a decision of the issues involved, but it should have great persuasive power. It is therefore important to know what happens to those reports. A report made by a committee established in one of the areas is sent (together with the minutes of the committee meetings) to the Central Committee and to the Commission. A report coming from the Central Committee (again together with the minutes) also goes to the Commission, but also to the Minister who may, but need not, decide to give to the Commission directions with respect to the subject matter of the report.[63]

Furthermore, and this may well turn out to be the most important aspect of this whole scheme of Consultative Committees, the Central Committee must make an annual report to the Minister, and a copy of this report must be laid before each House of Parliament. In debating the work done by the Commission either House of Parliament will thus have before it not only the Commission's own views expressed in its annual report and the Minister's directions, but also the opinion of those most intimately concerned, those working for and those making use of, the nationalised service.[64]

[59] Subss. 6 and 10.
[60] Subs. 5.
[61] Subs. 7.
[62] Subs. 7.
[63] Subs. 8.
[64] Subs. 9.

The Consultative Committees are thus intended to play the role of a sort of transport parliament, and, as such will take the place of the panels set up under the Ministry of Transport Act, 1919, and of the Transport Advisory Council established by the Road and Rail Traffic Act, 1933, both of which have ceased to exist.

Chapter 3

THE ORGANISATION OF RAILWAYS AND CANALS

When the Transport Act, 1947, came into force, the British railways had already for a number of years been under unified management and control. The Railway Control Order, 1939, made by the Minister of Transport by virtue of Defence Regulation 69, had vested the control of all railways in the Government who exercised it through a Railway Executive Committee composed of representatives of the principal companies. Moreover, as will be pointed out in greater detail later, the revenues and expenditures of the main line railway companies had been pooled, and the net revenue of all the amalgamated railway companies taken together was paid over to the Government, in so far as it exceeded the standard revenue.[0] Control over the charges was partly vested in the Minister under Defence Regulation 56. Most of the privately owned railway wagons had been requisitioned by Orders made under Defence Regulation 53. The railways had remained in the private ownership of the companies, but that ownership had already lost much of its importance from the point of view of management, and the transition from private to public enterprise which took pace on the 'date of transfer', *i.e.* on Jan. 1, 1948, was to a considerable extent a financial operation.

Even so, from the legal point of view the public monopoly of the transportation of passengers and goods by railway dates from that day. Any one looking at the Transport Act, 1947, would expect to find a provision formulating this monopoly. He would look in vain. As has been said before, nationalisation is not a legal term of art. The object of transferring a given type of economic activity from private to public enterprise can be achieved in a variety of ways, of which the express formulation of a legal monopoly is only one. In the case of the railways a provision for a legal monopoly was unnecessary. It was sufficient to say that on the date of transfer the whole of the existing railway undertakings were to vest in the Commission.[1] There was no need for saying that in future no person other than the Commission was to have the power or right

[0] For an explanation of the meaning of 'standard revenue', see below, p. 72.

[1] Sect. 12. The 'Railway Undertakers' whose undertakings are transferred to the Commission are enumerated in the Third Schedule, Part 1.

to act as a carrier of passengers or goods by railway. It is true that in theory this remains possible, but this is a statement without any practical importance. In practice the monopoly of carriage by railway is vested in the Commission owing not only to the comprehensiveness of the transfer of existing undertakings, but also to the peculiar characteristics of the railway business which make it impossible for any one to enter it without the consent of Parliament. Nobody has ever been able to construct a railway or to establish a railway company without the intervention of Parliament. Whenever a railway company started its business, it had to obtain a special statute conferring upon it the necessary powers to acquire land by way of compulsory purchase. If any one tried to enter into competition with the Commission in the field of railway transport, he would have to obtain the consent of Parliament so that the factual monopoly of the Commission could not be broken except by the legislature itself.

The whole of the undertakings enumerated in the Third Schedule to the Transport Act have vested in the Transport Commission since Jan. 1, 1948. These undertakings comprise not only the four amalgamated railway companies and the London Passenger Transport Board, but also a number of minor companies which used to carry on railways placed under the control of the Minister under Defence Regulation 69. They also include a number of undertakings which own or used to own railways, while leaving the management to others.[2] The transfer to the Commission extends to those parts of the undertakings which are carried on outside Great Britain or which were devoted to activities not falling within the scope of the Commission's normal statutory powers such as the cross-Channel steamer services of the Southern Railway.[3]

When the Commission took over these undertakings it inherited all their property and succeeded to all their rights and liabilities. It became party to the agreements which these bodies had concluded,

[2] Sect. 13 of the Act sets out in detail the policy which underlines the selection of those undertakings that were to be transferred. By virtue of this section, bodies whose undertakings are carried on as a whole or to a preponderant extent outside the United Kingdom or which for other reasons were not comprised in the Orders made under Defence Regulation 69, are not included. Neither are those non-operating owners the major part of whose revenues is derived from sources other than railways and canals. From a legal point of view it is not quite easy to understand the interrelation between Sect. 12 and Sect. 13. It appears that Sect. 12 and the Third Schedule are the operative enactments and that Sect. 13 is merely explanatory.

[3] Sect. 12, subs. 2. As we have seen, these activities may be continued by the Commission. Sect. 2, subs. 3.

and any reference in statutes to those bodies are now to be read as references to the Commission.[4]

When we come to the problem of canals we find a much more complicated picture. The reason for this is not far to seek. Though to our modern eyes it may appear as a commonplace it is still worth noting that in the case of railway transport (as distinguished from all other forms of transport) the ownership of the 'road' is necessarily combined with the operation of the service itself. In the very early days of railway traffic in this country people had not yet fully realised this. They still thought that the rail 'road' or rail 'way' would just be a road or a way like any other and that those who had constructed and owned the permanent way would allow any one desirous of running his engines and vehicles to use it for the payment of a 'toll'. This explains the use of the strange word 'toll' for railway charges; they were originally thought of much in the same way as one thought of turnpike tolls or canal tolls. We need not waste a word on the obvious fact that the technical exigencies of railway transportation make it utterly impossible to divorce ownership from use. But we must bear in mind that in the case of the canals the situation is different. Here we must distinguish between the company or body of persons that owns the canal and any undertaking which carries on a business of carriage by canal barge. The first type of undertaking is called in the Transport Act, 1947, a 'canal or inland navigation undertaking',[5] the latter is called a 'canal carrier undertaking'. A canal or inland navigation undertaking then is any undertaking which operates or owns, or formerly owned, a canal or canals, while a canal carrier undertaking 'means an undertaking consisting wholly or partly of the carriage of goods by canal or inland navigation'.[6] This distinction is fundamental for an understanding of the legislative technique employed in the nationalisation of the British canals. Canal and inland navigation undertakings have been transferred to the Transport Commission in the same way as railway undertakings.[7] As in the case of the railways no formal monopoly of ownership or

[4] The very complex details are outside the scope of this book. See for them Sect. 14, for the Commission's right of disclaimer with regard to certain agreements, Sect. 15, and for the law governing compensation Sects. 16 and 17, and Schedules 4 and 5.

[5] Sect. 13, subs. 1 (a).

[6] Transport Act, 1947, Sect. 125.

[7] Sects. 12 and 13. They are enumerated in Part 2 of the Third Schedule, and they are comprised in the 'class' defined in Sect. 13. The Canal Control Orders made by the Minister of Transport during the War had already vested the control of these undertakings in the Minister. The development was here much the same as in the case of the railways.

operation of canals has been established, but here again, owing to the nature of the business, the control rests entirely in the hands of Parliament. It is as impossible to build a new canal without parliamentary sanction as it is to construct a new railway. Hence, without enjoying a legal monopoly the Commission is in fact the only owner and operator of British canals.[8]

While thus the ownership and management of the canals has been transferred to public enterprise, this is not, or not yet, the case with regard to carriage by canal or other inland waterway.[9] Canal carrier undertakings have not been transferred to the Commission, and private firms are now carrying goods on the public canals. Nevertheless, the Commission fulfills important functions in connection with carriage by canal. Though it is under no duty to act as a canal carrier, it has power to do so,[10] *i.e.* existing private canal carriers remain in being, but the Commission may enter into competition with them. Moreover, and this may be more important, the Commission has the power of regulating the private canal carrying business through a licensing system,[11] and if it makes use of that power it may, in certain circumstances, be under a duty to acquire existing canal carrier undertakings.[12] The licensing system may be introduced by the Commission for the whole or for any specified part of their waterways. They are free to proceed by stages.[13] They may attach conditions to the licences, and this will enable them to do what so far has not been done in the field of carriage by road, *viz.*, to establish a public control of charges.[14] There is nothing to restrict the Commission's power to introduce such a system, except that it must be done by a published notice in writing which must be given at least three months in advance.[15] The Commission will, however, be restricted in applying a system

[8] It will, in this capacity, be subject to all the laws that have hitherto governed the use and the abandonment of canals by canal owning railway companies, although certain modifications have been introduced by Sect. 37 of the Act.

[9] Sect. 13, subs. 3.

[10] Sect. 2, subs. 1 (a).

[11] Sect. 35.

[12] Sect. 36.

[13] Sect. 35, subs. 1. Licences can only be imposed for the carriage of goods for hire or reward, not for the carriage by a firm of its own goods or those of its holding or subsidiary companies, or for the delivery or collection of goods sold or used or subjected or to be subjected to a process of treatment in the firm's own business. In other words, the licences must be analogous to the A and B licences required by public and limited carriers by road, and there will be nothing to correspond to the C licences required by the ancillary users of road vehicles. Sect. 35, subs. 5.

[14] Sect. 35 (2).

[15] Sect. 35 (1).

of licensing once it has been established. Licences must not be refused, or revoked, or granted for less than seven years (without the applicant's consent), or be granted subject to conditions, except for the purposes of securing the better use of the waterway in the national interest or its economical development, maintenance, or management.[16] All disputes arising between an applicant for, or a holder of, a licence and the Commission will be decided by the Transport Tribunal.[17]

Here, then, we have a system of public control very different from that used in the case of the railways. For the canals themselves public control is carried into effect by means of full ownership, with regard to the carrying business the public corporation fulfils its function of furthering the national interest through the mechanism of a licensing system.

Wherever existing private firms are subjected to fundamentally new conditions governing their business activities, it may be a demand of justice that they should be able to divest themselves of their undertakings which, as a result of public control, may completely change their character. This may well be the case with some or perhaps many of the canal carrying undertakings. To establish a system of public control such as a licensing system may (and often does) involve as a corollary a duty imposed upon a public authority to acquire against compensation those private undertakings which it is about to subject to control. The transfer from private to public enterprise, therefore, is in these cases not a liability imposed, but a privilege conferred upon the entrepreneur. He has the choice either to continue as private entrepreneur under conditions of public regulation or to compel the public authority to acquire his business. This privilege is conferred upon any canal carrier who carried on business in this field on Nov. 28, 1946. If his appeal to the Transport Tribunal against the conditions of a licence or its refusal or revocation is rejected, the Tribunal may, on his application, declare that the whole or part of his undertaking is to be transferred to the Commission. If then no agreement is reached between him and the Commission within six months, the Minister of Transport may make a transfer order and, in doing so, apply *mutatis mutandis* those provisions about road transport undertakings which will be discussed below.[18]

A final word must be said about the important subject of railway wagons. Since Jan. 1, 1948 the use of privately owned wagons on

[16] Sect. 35 (2) proviso.
[17] Sect. 35 (3). For the Transport Tribunal see below, p. 69.
[18] Sect. 36.

the Commission's railway lines has come to an end, and the state of affairs which was the result of the Requisitioning Notices issued under Defence Regulation 53 has thus been made permanent.[19] This is an absolute legal prohibition, a legally established monopoly of operation, coupled with a transfer of ownership, inasmuch as all privately owned wagons have vested in the Commission free from encumbrances since the date of transfer.[20] The disappearance of the use of privately owned wagons on the British railways, apart from the exceptions mentioned below, has repercussions in many fields of transport law, notably in the law of 'reasonable facilities', and will be further discussed below.

The ownership and operation of a number of categories of wagons[21] will remain in private hands. Tank wagons are among them and also wagons set apart for the conveyance of deleterious substances like cement, salt, etc., as well as specially constructed vehicles of a number of types. The Minister and the Commission may, in certain circumstances, grant further exceptions from the principle of public ownership.

[19] Sect. 32, subs. 1.

[20] Sect. 29. Owners and encumbrancers of wagons are being compensated in accordance with Sects. 30 to 32, and Schedule 6.

[21] Sect. 33, subs. 1 provisos, and Schedule 7. These categories are identical with those exempted in the requisitioning orders during the War.

CHAPTER 4

THE LICENSING OF GOODS MOTOR VEHICLES

BEFORE the Second World War the problem of competition between rail-borne and road-borne goods transport was one of the major economic issues in this as in other countries. It was urged by the railway companies that the most remunerative traffic was rapidly being taken away from them by their competitors on the road who did not provide out of their own pockets to the same extent as the railways the means for the construction and upkeep of the channels of communication which were used by their vehicles. In 1932 a Conference on Rail and Road Transport was held under the auspices of the Ministry of Transport. This Conference, which consisted of an independent chairman and of an equal number of railway and road transport representatives, drafted a report which was published by the Ministry of Transport and is known as the Salter Report. Any one who wishes to understand the legal principles underlying the licensing system applied to goods vehicles should refer to this important document. It forms the background of the enactment which, for the first time in this country, laid down a system of goods vehicles licences. This enactment is the Road and Rail Traffic Act, 1933.[1]

The Conference recommended the introduction of a system of goods vehicle licences. This was done for a variety of purposes. The main object of the Conference was to establish 'a fair basis of competition and division of function between rail and road transport of goods',[2] and the system of licences recommended by the Conference and introduced by the 1933 Act serves this purpose. On the other hand, the Conference recognised that the overcrowding of the roads also presented an acute problem and it was the desire to cope with the 'actual or prospective congestion or overloading of the roads'[3] which the Conference also had in mind when recommending the licensing system.

[1] During the Second World War the licensing system under the Act of 1933 was suspended by a system of 'defence permits' introduced by a series of Emergency Powers (Defence) Road Vehicles and Drivers Orders (see, *e.g.*, the Order of 1943, S.R. and O., No. 1055) made by the Minister of Transport by virtue of Defence Regulation 72. For the problems arising from the return to the application of the 1933 Act see the decision of the Road and Rail Traffic Appeal Tribunal in *L.N.E.R.* v. *Walker* (1947), 28 T.C. 58.

[2] See the terms of reference.

[3] Salter Report, No. 111, D, 2.

There are two different kinds of carriers of goods on the roads who present different economic problems and who are dealt with by the law differently. One is termed by the Report a 'road haulier'[4] and defined in the Act as a carrier of goods for hire or reward, or a carrier of goods for or in connection with his business as a carrier of goods.[5] The road haulier is the carrier who by profession or occupation carries goods for others and receives a remuneration for it. On the other hand, there are what the Salter Report calls the 'ancillary users', who own goods motor vehicles as ancillary to their commercial undertakings.[4] As far as competition between road and rail is concerned, the road haulier presents a more formidable problem to the legislator than the ancillary user. Though the habit of business men to employ their own lorries and vans for the transport of goods sold, bought or manufactured by them, has undoubtedly contributed considerably to what is known as the 'diversion of traffic' from the railways, the railway companies' complaint was principally directed against the road hauliers proper. But the railway companies were concerned with the ancillary users as well. Very stringent provisions concerning the facilities to be granted to the public and the conditions of employment of their servants are imposed upon carriers by railway, and their interest no less than that of the employees themselves and the public demanded that certain standards regarding the fitness of vehicles, hours of work, and conditions of employment should be observed by the ancillary users.

The reader will now appreciate why the Road and Rail Traffic Act, 1933, did not introduce one type of licence only, but three types, known as the 'A' or Public Carrier's Licence, the 'B' or Limited Carrier's Licence, and the 'C' or Private Carrier's Licence.[6] The A licence must be obtained by the road haulier, the C licence is that granted to the ancillary user, while the B licence may in certain cases be obtained by those who use a vehicle or vehicles as road hauliers and as ancillary users as well.

Before 1933 there was practically no statutory regulation of goods traffic by road. There neither was nor is anything analogous to the rules of undue preference in railway law. Nor is there as yet any regulation of road charges as far as goods traffic is concerned. Whilst, as we shall see hereafter, the Licensing Authority for Public Service Vehicles can regulate the fares to be taken by the operators of buses and coaches, there is no authority which has any power to

[4] Salter Report, No. 102.
[5] See Sect. 2 (2).
[6] Sect. 2 (1).

impose conditions upon carriers of goods by road concerning the rates which they must or may take.[7] The Act of 1933 did not introduce anything even remotely resembling the elaborate system of rate control contained in the Railways Act, 1921. All that was done was to regulate the conditions of entry into the business of road hauliers, and the conditions under which a person may use a vehicle for the transport of his own goods. The basic principle is that no person must use a goods vehicle on a road for the carriage of goods except under a licence.[8] Every vehicle to be so used must be specified in the licence, though in certain cases, particularly in the case of trailers, it is sufficient to specify the maximum number of vehicles which may be used under the licence.[9]

1. 'A' LICENCE

The public carrier's or A licence entitles its holder 'to use the authorised vehicles for the carriage of goods for hire or reward, or for the carriage of goods' otherwise than for hire or reward if they are carried 'for or in connection with his business as a carrier of goods, whether by road transport or any other kind of transport'. A licence is required for every vehicle and also for every trailer, though it is permissible to apply for a licence for a maximum number of trailers instead of specifying them, as must be done in the case of the motor vehicles.[10] The licence is given to a particular person for a particular vehicle and it cannot be transferred.[11] It is a condition of every A licence that no vehicle authorised under it may be 'used for the carriage of goods for or in connection with any other trade or business carried on' by the licence holder 'except such storing or warehousing of goods as may be incidental to his business as a carrier'.[12] A furniture remover, for instance, who is at the same time a dealer in furniture and who has obtained an A licence for a van which he uses for removal purposes must not use

[7] As we shall see, the licensing authority may attach conditions to a B licence, but even here it is expressly provided that no conditions with respect to the rates to be charged must be attached: Sect. 8 (3) (d). However, an applicant for A and B licences, who has already carried on business as a carrier of goods for hire or reward, must, if so required, submit to the licensing authority particulars of the rates charged by him in the past: Sect. 5 (2) (a).

[8] Sect. 1 (1). To use the vehicle without a licence is a criminal offence (Sect. 1 (8)), the penalty being up to £20 in the case of a first offence, and up to £50 in the case of a second or subsequent conviction: Sect. 35 (2).

[9] See Sects 2 (5)–(7) and 10 (4).

[10] Sects. 2 (2), 1 (2) and 2 (6) (c).

[11] Sect. 21; and see for its interpretation the decision of the Court of Appeal in *Nash* v. *Stevenson Transport Ltd.*, [1936] 2 K.B. 128.

[12] Sect. 2 (2).

that same van for the carriage of furniture which he has bought in order to resell. He cannot take out an A licence and a C licence for the same vehicle.[13] What he has to do if he wishes to use the vehicle for both purposes is to try to obtain a B licence.

Whether goods are carried for hire or reward is far from easy to determine in all cases.[14] The Act contains certain provisions which give some guidance. For example, it is expressly said that an A licence must be obtained for a 'chartered' vehicle, *i.e.*, if a vehicle is let on hire by X. to Y., X. must obtain an A licence; otherwise he commits an offence if he allows Y. to carry goods in that vehicle.[15] On the other hand, if a man delivers or collects goods which he has sold, or let on hire or hire-purchase in the course of his trade or business, he need not take out an A licence, even though he may make an extra charge for delivery. The baker who supplies us with bread in the morning may make an extra charge for early delivery in his van, yet he does not want an A licence. He is still an 'ancillary user' and not a 'road haulier', although he has received a reward for the carriage of goods.[16] The same is true of a laundry which undertakes to wash the linen of its customers for a charge, which includes a remuneration for the carriage back to the customer's house. For it is enacted[17] that 'the delivery or collection by a person of goods which have been, or are to be subjected to a process or treatment in the course of a trade or business carried on by him', does not constitute a carrying of goods for hire or reward. A special privilege is granted to farmers. A farmer does not want an A licence, if he carries a neighbouring farmer's goods for a remuneration in a vehicle licensed for use in connection with his own agricultural business, providing the goods are carried for the other farmer's business of agriculture. Thus, one farmer's lorry may be made available for other farmers in the neighbourhood on a market day without an A licence having been taken out.[18] A local authority is deemed to carry on a business with regard to those functions which it has to fulfil. Thus, it does not require an A licence for most of its activities. But as we shall see, for most of its

[13] Sect. 2 (8); in default of this provision the B licence would be practically non-existent, since the necessity for obtaining it could be circumvented by taking out an A licence and a C licence for the same vehicle.

[14] See, *e.g.*, *Spittle* v. *Thames Grit and Aggregates Ltd.*, [1937] 4 All E.R. 101, and *Nugent* v. *Phillips*, [1939] 4 All E.R. 577.

[15] This would seem to be the meaning of the somewhat cryptic enactment in Sect. 1 (4).

[16] Sect. 1 (5) (a).

[17] Sect. 1 (5) (b).

[18] Sect. 1 (5) (c). See on this the decision of the Divisional Court in *Bruce* v. *Odell* (1939), 27 T.C. 135. Other privileges are given to dealers, manufacturers and repairers of motor vehicles under subs. (5) (d) and (e).

activities the local authority does not even require a C licence.[19] The Transport Commission does not require licences for any of its services.[20]

The A licence, which is granted as a rule for five years,[21] is in the ordinary case a 'discretionary licence', and not a licence 'as of right'. The C licence, on the other hand, is a licence as of right; this is so, at least, as a rule. The road haulier, however conscientiously he may comply with the conditions regarding fitness of vehicles, hours of work and treatment of his employees, cannot go before the licensing authority and say: 'I have fulfilled all the conditions imposed by law; now grant me a licence'. He has to satisfy the licensing authority that in view of the general circumstances of the area the granting of the licence is commercially desirable, the licensing authority having 'full power in his discretion either to grant or refuse the application',[22] or to grant the licence in respect of other or fewer vehicles than those asked for. No such thing can happen in the case of a C licence. The 'ancillary user' has a right to have his licence granted once he has fulfilled the conditions to be mentioned.

It is of the utmost importance to know what considerations a licensing authority takes into account when approached for the granting of an A licence, since it is on this question that the regulation of the competition between road and rail, as contemplated by the Salter Report and by the Act, very largely depends.[23] The licensing authority has regard primarily to the interests of the public as a whole—an expression which includes not only those persons who require facilities for transport, but also those who provide them. In other words, the interests of other carriers by railway, road, inland waterway, or coastal shipping have to be considered as well as those of the traders who are supposed to avail themselves of the applicant's services.[24] Moreover, there is an important difference between an applicant who has already used vehicles for hire or reward, and an applicant who claims 'new tonnage'. The

[19] Sects. 1 (6) and (7) (g).

[20] Transport Act, 1947, Sect. 59; see below, p. 37.

[21] Originally the period was two years (Sect. 3 (1) (a)). By virtue of powers conferred upon him by Sect. 2 of the Road Traffic Act, 1937, the Minister has, by the Goods Vehicles (Duration of Carriers Licences) Provisional Regulations, 1938, extended this period to five years.

[22] Sect. 6 (1) (a).

[23] There is a large number of cases decided on this point. The reader who is interested in this matter should refer to the excellent account given by Mr. Maxwell in his book, *The Law relating to Carriers' Licences under the Road and Rail Traffic Act, 1933,* and should also refer to the series of Traffic Cases, which contain all the reports.

[24] Sect. 6 (2).

licensing authority has to take into account the extent to which an applicant is already authorised to use goods vehicles for carriage for hire or reward under an existing licence. Also he has to consider the extent to which the vehicles to be authorised will be in substitution for horse-drawn vehicles, and in addition, in determining the number of vehicles to be authorised, the need for providing for occasions when vehicles are withdrawn from service for overhaul or repair. Since the reliability of road carriers is a matter of the utmost concern, the applicant's previous conduct in his capacity as a carrier of goods must also be considered.[25]

In certain exceptional cases even an A licence can be claimed 'as of right'. The most important of these is the case of what one may call 'contract carriage'. If, for a continuous period of at least one year, the user of the vehicle puts it at the disposal of one of his customers exclusively, under a contract to this effect, the carrier may claim his A licence as of right. The case contemplated by this provision [26] is that in which a firm of road hauliers places at the disposal of a trading firm a vehicle and driver for the exclusive use of the firm, but under control of the carrier.[27] The customer must not himself be a carrier. Of course, even in this case the road haulier must satisfy the licensing authority that he is a person fit to receive the licence, but the commercial considerations usually connected with the granting of A licences are not taken into account.[28]

2. 'B' LICENCE

The policy suggested by the Salter Report,[29] and carried out by the Road and Rail Traffic Act, 1933, is to draw a clear dividing line between road hauliers and ancillary users. There should be no overlapping and the two kinds of use of commercial vehicles should be clearly separated. Yet when the Act was drafted, it was found to be necessary to introduce a third form of licence which is a sort of a half-way house between the road haulier's A licence and the ancillary user's C licence. This is the so-called Limited Carrier's Licence or B licence, which is made possible but clearly looked upon with disfavour by the Act. There must be some way of permitting

[25] See about all this: Sect. 6 (2).
[26] Sect. 7 (1).
[27] This is a distinction between this case and that of the 'chartered vehicle'.
[28] There was also another exception where A licences were granted as of right, namely, in the case of applications made before April 1, 1934, but this need not be dealt with now: Sect. 7 (2).
[29] See Report No. 106.

a coal merchant, who carries coal to his customers' houses in the winter, to use his vehicle for the carriage of other people's goods in the summer. It must also be possible for the furniture remover, who wants an A licence for his business as a carrier of other people's furniture, to use his van or vans for the carriage of furniture bought by himself for resale, if he happens to be a dealer in furniture at the same time.

It is one of the invariable conditions of the A licence [30] that the vehicle must not be used for the carriage of goods in connection with any trade or business carried on by the licensee which is not the business of carrying, storing or warehousing of goods. On the other hand, as we shall see,[31] the C licence is issued under the condition that the vehicle must not be used for the carriage of goods for hire or reward. Finally, let us remember that two licences cannot be issued for the same vehicle,[32] and it will be clear why the Act introduced the B licence.

This B licence or Limited Carrier's Licence entitles its holder [33]

' to use the authorised vehicles, as he thinks fit from time to time, *either* for the carriage of goods for or in connection with any trade or business carried on by him, *or, subject to any condition which the licensing authority, in the exercise of his discretion to attach conditions to a B licence, may attach to the licence,* for the carriage of goods for hire or reward '.

The B licence, then, gives its holder a possibility of using a vehicle as a road haulier and as an ancillary user as well, and it would seem to be odd, at a first glance, that this apparently unlimited licence should be styled by the Act as a ' Limited ' Carrier's Licence.

Yet, if one looks at the provisions more closely it will be seen that this is an apt terminology, for, the holder of a licence of this type is restricted in many ways. To begin with, the licence is issued for two years only.[34] But, what is even more important, the granting of the B licence is subject to a dual discretion. Far from being a licence as of right, as is the C licence, it is a discretionary licence in two different respects. Not only does the licensing authority decide in his discretion whether he will grant the licence at all.[35] If he decides to grant it, he can, unlike the case of the A

[30] Sect. 2 (2).
[31] Sect. 2 (4).
[32] Sect. 2 (8).
[33] Sect. 2 (3).
[34] Sect. 3 (1) (b) as amended by the Road Traffic Act, 1937, and Goods Vehicles (Duration of Carriers Licences) Provisional Regulations, 1938.
[35] Sect. 6 (1) (a) and (2). The decision will partly depend on the extent to which the applicant intends that the vehicles shall be used for the carriage of goods for hire or reward.

licence, attach conditions to it apart from the general conditions contained in the Act itself. In this way he can, for example, limit the use of the authorised vehicle to specified districts or to specified routes, to the carriage of certain classes or descriptions of goods, or to the carriage only for specified persons, and he can, furthermore, impose other conditions 'in the public interest and with a view to preventing uneconomic competition'. But, not even in the case of the B licence can the licensing authority impose any condition as to the rates to be charged. All these conditions refer to the use of the vehicle for the carriage of goods for hire or reward. The use for the licensee's own business (not being that of a carrier) cannot be so restricted.[36] Conditions once imposed may subsequently be cancelled or varied on the application of the licence holder.[37] There is not now any case in which a B licence must be granted as of right.[38]

3. THE 'C' LICENCE

The C licence, as we have mentioned before, is the one granted to the ancillary user. It entitles the holder[39] to use the authorised vehicles (except in cases of emergency) 'for the carriage of goods for or in connection with any trade or business carried on by him, subject to the condition that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward'. It is granted for five years[40] and it is, as a rule, granted as of right.[41]

One important difference between the C and the A and B licences is, that if a C licence holder acquires new vehicles after the grant of the licence he need not take out a new licence for these vehicles. After having given due notice to the licensing authority he can have the existing licence extended to the new vehicles.[42]

[36] Sect. 8 (3).
[37] Sect. 8 (4).
[38] There was one case when applications were made before April 1, 1934; see Sect. 7 (3).
[39] Sect. 2 (4).
[40] Sect. 3 (1) (c), as amended by the Road Traffic Act, 1937, and Goods Vehicles (Duration of Carriers Licences) Provisional Regulations, 1938.
[41] Sect. 6 (1) (b). In two cases even the C licence is discretionary, namely, where the applicant is the holder of a licence which is suspended, or where a licence previously held by him has been revoked. This means: where the reliability of the applicant as a carrier of goods is doubtful, the licensing authority shall exercise a discretion. The reader will notice that this is obviously a discretion far different from that exercised in the case of A and B licences. It does not seem to be concerned with the commercial desirability of the use of the vehicle, but rather with the personal desirability of the applicant as a user of commercial vehicles.
[42] Sects. 2 (7) and 10 (4).

There are certain kinds of vehicles which do not even require a C licence. Tractors and other agricultural engines need not be licensed, even if they are partly used for the carriage of agricultural produce or equipment.[43] Moreover, any goods vehicle registered in the name of a farmer and used by him for agricultural purposes, is exempted. So is the 'caravan' or other goods vehicle attached to a car constructed for carrying not more than seven passengers exclusive of the driver.[44] There are other exceptions, the more important of which refer to tram cars, trolleys, public service vehicles [0] (even if they carry passengers' luggage), to the use by local authorities of vehicles for such purposes as road cleansing and collecting refuse, to vehicles used by the police, fire brigades or ambulances, and finally to vehicles used for any purpose specified in Minister's Regulations.[45]

The reader may well ask why it was deemed necessary to introduce the C licence at all. If the applicant has a right to obtain the licence, what is the object of having a licensing system for ancillary users? The answer can be found in the Salter Report as well as in the Act. The Act, following the Report, intends to regulate competition between road and rail not only by restricting the number of commercial vehicles, but also by imposing upon all commercial road users certain conditions with regard to the fitness of their vehicles, the payment of their employees, the hours during which their employees are permitted to work, the keeping of records and the loading of vehicles. These conditions tend to remove what used to be widely regarded as an unfair advantage enjoyed by road carriers over the railways. This part of the policy of the Salter Report and the Act concerns the ancillary user as well as the road haulier, and the object of the C licence is to make the fulfilment of certain requirements [46] a condition of the licensee's right to use the vehicle. The conditions are contained in the Act and need not be specially imposed by the licensing authority, and they attach to A and B licences as well as to C licences. A breach of one of these conditions is not only a criminal offence,[47] it may also lead to the suspension or revocation of the licence. This will not happen, however, unless there were frequent breaches of conditions, or unless the breach was wilful, or involved danger to the public. A

[43] Sect. 1 (7) (a).
[44] Sect. 1 (7) (b).
[0] For explanation of this term, see below, p. 47.
[45] See, for details, Sect. 1 (7).
[46] They are enumerated in Sect. 8 (1).
[47] Sect. 9 (1). The penalty may be £20 in the case of a first offence, and £50 in the case of a second or subsequent conviction: Sect. 35 (2).

public inquiry by the licensing authority must be held if the licence holder so demands.[48]

In order to make sure that the authorised vehicles are maintained in a fit and serviceable condition the Act introduces an elaborate machinery for the constant supervision of goods vehicles. Examiners are appointed by the Minister of Transport [49] who have the right to inspect the vehicle at any reasonable time and may even prohibit the use of the vehicle.[50] But in such a case the person aggrieved may apply to the licensing authority to have the matter submitted to a certifying officer, appointed under the Road Traffic Act, 1930, and against the decision of that official he may even appeal to the Minister of Transport.[51]

The most important of the general conditions imposed on all licence holders is the one referring to the time for which drivers may remain continuously on duty and the hours which they are to have for rest. The rules applicable and referred to in the Road and Rail Traffic Act [52] are contained in the Road Traffic Act, 1930, s. 19.[53] Nobody must be employed as a driver for a continuous period of more than five hours and a half, or for continuous periods amounting in the aggregate to more than eleven hours in any period of twenty-four hours, commencing at 2 a.m.; the driver must have, at least, ten consecutive hours of rest in any period of twenty-four hours.

Licence holders must pay their road haulage workers, *i.e.* mainly drivers and attendants, no less than the 'statutory remuneration'. For A and B licencees this is fixed by the Minister of Labour in 'Road haulage wages orders' based on proposals made by the Road Haulage Central Wages Board. For C licencees it may be fixed by the Industrial Court.[54]

Finally, the law contains a series of rules referring to the keeping of records by the holder of any type of goods vehicle licence, setting out working hours of drivers, particulars of journeys, etc.[55]

[48] Sect. 13 (1). This provision also applies when one of the special conditions attached to a B licence is broken.
[49] Sect. 17 (1).
[50] Sect. 17 (2)–(6).
[51] Sect. 17 (7) and (8). For other powers of the examiners, see Sect. 18; and for powers of certifying officers, see Sect. 19.
[52] Sect. 8 (1) (c).
[53] As amended by the Road and Rail Traffic Act, s. 31, and the Road Traffic Act, 1934, s. 7. Note that these rules also apply to the drivers of public service vehicles.
[54] Road Haulage Wages Act, 1938.
[55] For details see Sect. 16, and, for its interpretation, see *Beer* v. *W. H. Clench* (1930) *Ltd.*, [1936] 1 All E.R. 449; *Flatman* v. *Poole*, [1937] 1 All E.R. 495.

The authority entrusted in each Traffic Area [0] with the granting of licences under the Road and Rail Traffic Act, 1933, is the Chairman of the Traffic Commissioners appointed under the Road Traffic Act, 1930, and in the Metropolitan Traffic Area the Traffic Commissioner. These authorities are now known as the Licensing Authorities for Goods Vehicles.[56] They act under the general directions of the Minister of Transport.[57] A person desirous of obtaining an A or B licence must apply to the Licensing Authority for the area in which the permanent base or centre is situated from which it is intended that the authorised vehicles will normally be used for the business of carrying goods for hire or reward. The road haulier must obtain as many licences as there are such centres of business, *e.g.*, if he has one centre of business in London and one in Manchester, any one of his vehicles which is to be used from both places must be licensed by the Authority for the North-Western Area as well as by that for the Metropolitan Area.[58]

The applicant for a C licence must approach the licensing authority who has jurisdiction for his principal place of business or the one that is competent for the area in which his head office is situated.[59]

When refusing the grant of a licence or when granting a licence differing from that applied for, or when imposing conditions to which the applicant does not agree, the licensing authority must, on the request of the applicant, state the reasons for his decision in writing.[60]

In order to enable the licensing authority to arrive at his decision he must be supplied with very full particulars. These differ according to whether the licence applied for is an A or B or C licence. The particulars to be submitted by applicants for all licences refer to the vehicles to be used under the licence.[61] The details to be set out by the prospective road haulier, include such matters as the facilities to be provided, the districts in which the vehicles will normally be used, as well as any information, reason-

[0] For explanation, see below, p. 47.

[56] Road and Rail Traffic Act, 1933, Sect. 4; Transport Act, 1947, Sect. 117.

[57] Transport Act, 1947, Sect. 57 (1); this subsection is of general application, although it appears in a context where one would hardly expect to find a provision changing the general status of the licensing authorities. Sect. 56 and Sect. 57 (2) refer to very special matters in connection with long distance permits.

[58] Sect. 5 (3).

[59] Sect. 5 (4).

[60] Sect. 6 (3).

[61] Sect. 5 (1) (a) and (b).

ably required by the licensing authority. This last point covers especially statements on any previous business carried on by the applicant as a road haulier, on arrangements and agreements entered into by the applicant and affecting facilities for transport of goods in the area, and on the financial interests of other road hauliers in his business. Thus, the question of competition and monopoly with regard to commercial transport is kept under constant supervision by the licensing authorities.[62]

It is one of the most important principles of the Act that those who already provide facilities for commercial transport should be entitled to raise objections to the granting of road hauliers', *i.e.*, A and B licences. When an application for such a licence [63] is made, the licensing authority publishes a notice of the application and then existing road carriers, and above all, the Transport Commission in its capacity as carrier by railway, may raise objections to the granting of the licence. These objections may be based on the fact that suitable transport facilities in the particular district are already in excess of requirements, or would exceed requirements if the licence were granted, or on the ground that the applicant has not complied with a condition of a licence previously held by him.[64] Such objections may be raised, not only when a new licence is applied for, but also when the licensing authority is approached for the variation of an existing licence.[65]

The licensing authority may hold any inquiries necessary in order to arrive at a decision.

Any person aggrieved by a decision of a licensing authority, whether he be an applicant or an objector, has a right of appeal which goes to the Transport Tribunal.[66] Here we see one of the important differences between the statutory control of goods transport and that of passenger transport where the ultimate authority is the Minister of Transport himself.[0]

When a road haulier or ancillary user of a goods vehicle has obtained the licence or licences required by the Road and Rail

[62] Sect. 5 (1) (c) and (2).

[63] Sect. 11 (1). There are exceptions, particularly in those cases where the licence is as of right, Sect. 11 (3) and (4).

[64] Sect. 11 (2). Note that B licence holders as such may not raise objections to the granting or varying of an A licence.

[65] Sect. 11 (3). See for an elucidation of some of the practical difficulties which have arisen under this subsection, *Ex-Army Transport Ltd.* v. *Diamond and Co. Ltd.* (1936), 24 T.C. 303; and *Application by R. and D. Transport*, [1937] 4 All E.R. 656.

[66] Road and Rail Traffic, Act, 1933, Sect. 15; Transport Act, 1947, Sect. 73.

[0] See below, p. 53.

Traffic Act, 1933, he has still to make sure that his driver or drivers obtain the Heavy Goods Vehicle Driver's Licence from the Licensing Authority of the area in which the prospective driver resides.[67] If the prospective driver is already licensed as a driver of all types of single deck public services vehicles the licence is unnecessary. Where it is required the applicant may be subjected to a special test. The licence is granted for three years. On refusal an appeal lies to a Court of summary jurisdiction.

[67] This was introduced by the Road Traffic Act, 1934, s. 31, which should be compared for details.

Chapter 5

THE NATIONALISATION OF LONG DISTANCE TRANSPORT OF GOODS BY ROAD

When Parliament decided to transfer to public enterprise the long distance carriage of goods by road, it had to make provisions of two different kinds: it had to establish a monopoly of operation and it had to lay down rules for the compulsory acquisition of existing undertakings. This is a scheme of nationalisation far more complicated than that referring to the railways and canals. There, as we have seen, it was sufficient to provide for the transfer of existing undertakings, and a legal monopoly was not required. The nationalisation of a portion of the road transport industry is also more involved than the scheme for the transfer of railway wagons, where all that was necessary was the setting up of an operating monopoly, coupled with a few provisions for the transfer of physical assets. Railway wagons in private hands will in future be useless because they cannot be operated on the lines of the Commission, but lorries and vans are capable of being used both for those purposes which will in future by the preserve of the public corporation and for the short distance carriage of goods which will remain a matter for private enterprise. If therefore the Act had simply prohibited the use of these vehicles for long distance haulage and compelled their owners to transfer them to the Commission, it would have defeated its own end. Some method had to be devised to ensure that goods vehicles would not in future be used for that type of activity which the public corporation alone was intended to carry on. On the other hand, compulsory acquisition not only of vehicles but of undertakings had to be provided for, in order to create a basis for calculating the compensation due to those who, as a result of nationalisation, would have to give up not only the vehicles themselves, but also the goodwill of their undertakings. Hence the need for conferring upon firms hitherto predominantly engaged on long distance carriage the right to be bought out by the Commission. It will be useful to separate in what follows the principles governing the Commission's long distance hauling monopoly from those applicable to the acquisition of existing undertakings.

THE LONG DISTANCE HAULAGE MONOPOLY

It will no doubt take a considerable time to carry into effect the scheme for the nationalisation of long distance haulage. When

this has been done the Transport Commission, acting through the Road Transport Executive as its agent, will have the sole right of carrying goods for hire or reward in motor vehicles or trailers constructed or adapted for that purpose if the vehicle at any time while the goods are being so carried is more than 25 miles away from its operating centre.[1]

It is clear that the borderline between public and private enterprise will be defined by the meaning of the crucial words: 'if the vehicle, at any time while the goods are being so carried, is more than 25 miles from its operating centre'. The operating centre is the base from which the vehicles are normally used for the carriage of goods for hire or reward, a definition which is subject to a number of exceptions.[2] The distance of 25 miles is measured as the crow flies, and not along the route taken by the vehicle.[3] What matters is not the distance between the operating centre and the destination of the vehicle, but that between the centre and the point on the vehicle's journey which is farthest from it in the course of any given journey. The circumference of a circle with a radius of 25 miles around the operating centre marks the outer limit beyond which goods vehicles operated by road hauliers must not move. Inside that line, however, they may cover any distance they please as long as they do not cross the line at any moment of their journey.

The operating monopoly vested in the Commission will be enforced through the mechanism of the licensing system for goods vehicles under the Road and Rail Traffic Act, 1933.

The Transport Commission and its agents, the Executive, do not require licences under the Act of 1933.[4] The general power to carry goods by road conferred upon them by Sect. 2 of the 1947 Act takes the place of the licensing system. They are, however, under the Act subject to obligations similar to those imposed by many of the statutory conditions binding upon licence holders. They must maintain their vehicles in a fit and serviceable condition, comply with the existing provisions regarding speed, weight, and load limits, observe the rules as to drivers' and attendants' maximum hours of work, and, like any other road haulier keep records as to journeys, loads, hours of work, etc.[5]

[1] Transport Act, 1947, Sect. 52, subs. 1, together with Road and Rail Traffic Act, 1933, Sect. 1, subs. 2.

[2] For the definition as well as for the exceptions see Sects. 58 and 62 of the 1947 Act. The operating centre must be named in every application for an A or B licence under the Road and Rail Traffic Act, 1933.

[3] Sect. 34 of the Interpretation Act, 1889. Sect. 9, subs. 3 of the Transport Act, 1947, does not apply to the measurement of this line.

[4] Transport Act, 1947, Sect. 59.

[5] For details see Sect. 59 of the Transport Act, 1947. There are certain

Private haulage firms, however, will continue to be subject to the licensing system after the transfer of the long distance business to the Commission is completed. From that moment all existing and future A and B licences will be subject to the statutory condition not to carry any goods beyond the 25 miles limit. This condition will take its place automatically alongside the other conditions enumerated in Sect. 8 of the Act of 1933, and it will not be necessary for the Licensing Authority when granting the licence expressly to impose it on the licence holder.[6]

All this, however, is subject to a number of very far reaching exceptions. To begin with, important branches of long distance haulage are not to be nationalised at all. Thus the carriage of liquids in bulk in a tank fixed to the vehicle is exempt, and so is the carriage of liquids in tanks of a capacity of no less than 500 gallons even if it is not fixed to the vehicle. The whole business of furniture removal for any distance will remain in private hands. The carriage of meat and livestock will not be nationalised, and certain other types of carriage are also excluded.[7]

Even within the orbit of the nationalisation provisions the Transport Commission can waive its monopoly right. It will do so by granting permits to the licence holders. These permits will enable private hauling firms to carry goods beyond the 25 mile limit. Whether or not it wants to grant or withhold a permit, to attach conditions to it, or to revoke it, is entirely a matter within the discretion of the Commission. Apart from the very important exceptions to be mentioned presently, the Commission is entirely free at any time to suspend, vary, or withdraw a permit it has given. The conditions which the Commission attaches to a permit are enforced as if they were conditions attached to the licence itself, and, in the case of A licences they are in fact the only conditions that can be imposed upon the licence holder beyond those contained in the Act of 1933 itself. There is a general clause which makes it incumbent upon the Commission to take into consideration the needs of, and any special circumstances affecting, the

differences in detail between these provisions and the conditions of licences held by private firms. Thus the power to dispense with the requirements as to records which normally vests in the Licensing Authority is exercised by the Minister as far as the Commission is concerned. The Road Haulage Wages Act, 1938, which contains the statutory minimum wage system for drivers and attendants of goods vehicles, does not apply to the Commission or its agents. This is clear from Sect. 1, subs. 2 of that Act.

[6] Transport Act, 1947, Sect. 52.

[7] For details Sect. 52, subs. 1 provisos.

locality in which the operating centre is situated, but an applicant cannot enforce this provision.[8]

These rules apply to 'new-comers', *i.e.* to firms other than those that were carrying on the haulage of goods for hire or reward under A or B licences on Nov. 28, 1946, which was the day after the First Reading of the Transport Bill in the House of Commons. Any person whose undertaking included long distance haulage on that day has a number of privileges which mitigate the rigidity of the provisions outlined above. The main object of those provisions is to prevent the setting up of new undertakings. Established undertakings which apply for a permit and do so within a period to be prescribed by the Minister may continue to use their vehicles for long distance carriage until the Commission refuses to grant their application. For them, therefore, it is not the granting of the permit which operates as a precondition to their right to carry goods over long distances, but it is the refusal of the permit which operates as a destruction of that right. Much more important, however: though the Commission need not grant a long distance permit to an established entrepreneur, any permit which he does obtain is quite different in its nature from that given to a new-comer. The established firm obtains its permit for all its vehicles used under A or B licences which have the same operating centre, so that the permit does not attach to an individual vehicle but to the whole existing fleet of vehicles (not including, however, any lorries or vans newly acquired). Still more important: permits given to estab-

[8] For details see Sect. 52 and Sect. 60 of the 1947 Act. Permits may be granted with respect to several licences at the same time, and more than one permit may be granted to one person (Sect. 52 (5)). The provisions by which holding and subsidiary companies are treated as one unit for the purpose of licensing law (Sect. 12 of the Act of 1933), apply to the permits granted by the Commission (Sect. 60, subs. 3 of the 1947 Act). The definition of a 'holding company' and of a 'subsidiary company' in Sect. 12 of the Act of 1933, which is unaffected by the new definition in Sect. 18 of the Companies Act, 1947, continues to apply in this connection, and the definition of control (in Sect. 125 (4) of the Transport Act, 1947, and in the 13th Schedule to that Act) has nothing to do with this matter. The whole body of law referring to the enforcement of licences and to their transfer and assignment will also apply to the permits. The Commission may, instead of revoking, suspending or varying the licence, apply to the licensing authority for that purpose (Sect. 60 (6) of the Transport Act, 1947). It must, however, be understood that the power of the Commission serves its economic policy and its exercise must be determined by the tempo of the nationalisation of road transport in the light of the considerations mentioned in Sect. 52, subs. 2 proviso. The power of the Licensing Authority is a sanction for the enforcement of the conditions, whether they are statutory or specially imposed. A suspension or revocation of a permit by the Licensing Authority on the ground that a condition has been violated is subject to an appeal to the Transport Tribunal.

lished undertakings are not liable to be withdrawn, suspended, or revoked by the Commission at will, nor can conditions be attached to them, except by agreement. In fact they give to their holders a considerable measure of security of tenure. An 'original' permit granted by the Commission to a firm esablished in the business on Nov. 28, 1946, can only be revoked or suspended by the Licensing Authority on proof of a serious breach of a condition of the permit or of any of the licences. The permit survives the licence for which it was originally granted, and attaches to a new licence granted to the holder for the same vehicles or even to a new holder who acquires the whole or a part of the undertaking. The Commission can revoke it only at certain stated intervals. In the first place it remains in force for one year and can then be withdrawn only at one month's notice. If the Commission does not use this right, then, in the second place it can only be revoked after the lapse of further three years at six months' notice and so on from three years to three years. The tenure is therefore granted for one year and thereafter from triennium to triennium. When revoking an original permit, the Commission may grant another one instead, and to such a 'substituted' permit different terms may be attached. Nevertheless, as regards the length of tenure the substituted permit is governed by rules quite similar to those which apply to the original permit. Finally, these established entrepreneurs may, in certain circumstances, and especially on refusal of a permit, compel the Commission to acquire their undertakings or specified vehicles which are being subjected to the prohibition of long distance carriage. These provisions, then, define the rights of those road hauliers which are caught by the prohibition of long distance carriage. Within that group, however, there is the still more privileged group of those whose undertakings are predominantly devoted to the long distance business, and who have much more far reaching rights to be described below.

All that has been said is subject to agreement between the Commission and the firm affected. The whole body of law designed to protect established entrepreneurs can be contracted out either by a contract for the sale of the undertaking to the Commission or by other methods.[9]

THE TRANSFER OF EXISTING HAULAGE UNDERTAKINGS

We have seen that in certain cases established firms can require the Commission to buy out their undertakings or vehicles. This right

[9] The above is an attempt to summarise in outline the very complicated provisions in Sects. 53 to 55 of the Transport Act, 1947.

is, in general, a conditional one. It is available only on proof that the Commission has refused to grant an original permit or imposed conditions and that, as a result of this, the existing business of the applicant is suffering substantial interference.[10] If, however, the business of a firm was, at any time during the year 1946, predominantly devoted to long distance carriage for hire or reward in the special sense to be explained below, then its right to be bought out is not conditional, but absolute. The owners of such a firm need not submit to the tenure of their long distance carriage business under permits granted by the Commission. They can insist on transferring the undertaking on payment of the statutory compensation, even if the Commission is willing to grant them a permit, and in order to exercise this right they need not prove substantial interference. It may still be possible for the Commission and the firm to come to an agreement. Under such an agreement the Commission may grant long distance permits, but they cannot compel the firm to accept them. It is entirely within the discretion of the undertaking as well as of the Commission itself whether such an agreement is to be concluded, and, while the Commission is under no duty to enter into such contracts, it may in a given case be obliged not to do so because otherwise it might act contrary to its general statutory duties.[11] An agreement of this kind may be made subject to conditions, and if the firm violates any of them the right of the Commission to acquire the undertaking revives.

The acquisition of existing undertakings thus appears under the scheme of nationalisation as a right given to its owners and at the same time as a right given to the Commission. The provisions of the Act are designed to lay down a procedure by which the Commission can force private firms to transfer their undertakings, and private firms in turn can compel the Commission to acquire them.

An undertaking enjoys this absolute right if it exhibits the following characteristics: (1) Its activities must wholly or partly consist of the operation of vehicles authorised to be used under an A or B licence. (2) It must have been carried on either by its present owner or by his predecessor at any time during the year 1946. (3) Its relevant activities in 1946 must have consisted to a

[10] Sect. 54, subs. 1.

[11] Sect. 39, subs. 1. For the agreements mentioned in the text see the proviso. The duty in question is particularly that to provide an integrated transport service. The Commission must satisfy itself that in view of the special character of the undertaking, or the nature of the goods it carries, or the locality it serves, its continued existence as a private long distance haulage undertaking is expedient in the public interest.

predominant extent of ordinary long distance carriage for hire or reward.[12]

The activities which are taken into account are all those consisting of the carriage of goods in goods vehicles under any kind of licence, whether A, B, or C. All these are 'relevant' activities in this sense. Thus, a department store with a large fleet of road vehicles, some used under C licences for goods bought by customers, and some used under A and B licences for the carriage of customers' goods from one place to another, will qualify for the right of transfer of its haulage undertaking to the Commission if the whole of that fleet of vehicles was predominantly devoted to long distance carriage. If short distance carriage prevailed, taking into account the activities of all these vehicles, then the owners of the department store may still have a conditional right to transfer that part of their undertaking which was devoted to long distance haulage if the Commission refuses an original permit.

One of the most difficult points about the nationalisation of road transport is, that the term 'ordinary long distance carriage' as used in connection with the absolute right of transfer has a meaning different from that which it bears in connection with the definition of the monopoly. It is not enough for the owners of a firm claiming to be bought out to prove that their undertaking was predominantly dedicated to the carriage of goods for hire or reward outside the 25 mile limit. In order to bring themselves within the orbit of the provisions about compulsory transfer they must prove in addition that the goods were carried for a distance of 40 miles or more, measured along the route taken and not as the crow flies, either in one vehicle or in a succession of vehicles. Carriage inside the 25 mile circle is not ordinary long distance carriage, however long the journey may be. On the other hand, for the purposes now under discussion, carriage is not necessarily long distance carriage, even if the vehicle enters the area outside the 25 mile circle at any point of its journey. This is the case only if the total length of the journey is 40 miles, measured between the starting point (which is not, of course, necessarily the operating centre) and its end which may or may not be inside the 25 mile circle.[13]

[12] Sect. 39, subs. 1.

[13] Assume that X, a road haulier, has his operating centre at A which is 50 miles from B, and assume further that he is in the habit of carrying goods from a point C, situated 15 miles from A on the road to B, as far as B. Carriage from C to B would certainly be prohibited under the monopoly provision of Sect. 52, because it is outside the 25 mile circle. Yet, even if X could show that carriage from C to B and back was his predominant activity, he would not qualify for compulsory acquisition as an absolute right under Sect. 39 because the journey is less than 40

Those branches of the long distance carriage business which are exempted from the provisions about the monopoly are also excluded from the right of compulsory acquisition.[14]

There still remains the question whether the undertaking was 'predominantly' devoted to this type of business. In order to decide this question the statute has laid down three alternative tests: (1) The weight test: long distance carriage predominates if, in 1946, the total weight of the goods subject to long distance carriage for hire or reward under A or B licences exceeded one half of the weight of all the goods carried by that undertaking in vehicles used under A, B, or C licences.[15] (2) The receipt test: long distance carriage predominates if, in 1946, the total receipts of the undertaking from long distance carriage for hire or reward under A or B licences exceeded one half of the total value to the undertaking of the services of all its vehicles used under A, B, or C licences.[16] (3) The subsidiary test: the information available may not permit the conclusion that either or neither of the two foregoing tests has been satisfied. If so, the Arbitration Tribunal which ultimately determines these matters will act on whatever information it has and will decide according to its discretion in the light of all the circumstances.[17]

The proceedings may take two different forms. Either the Commission serves on the firm a written notice of acquisition, and the firm, if it contests the Commission's right to do so, serves a counter notice requiring the withdrawal of the original notice. Or else the owner of the firm takes the initiative and serves on the Commission a notice in writing requesting it to serve a notice on him.[18]

miles. He could, however, claim the protection of the special provisions on original permits, and exercise the conditional right of being bought out under Sect. 54, at any rate with regard to the vehicles used for the business between C and B. Further similar examples to illustrate the practical implications of the difference between the two meanings of long distance carriage will easily suggest themselves to the reader.

[14] Sect. 39, subs. 2 proviso.

[15] Sect. 41 (1) (a). For the calculation of the weight see the details in subss. 2, 3 and 4, mainly with reference to cases in which for charging purposes weight is calculated by volume, or freight is charged by volume.

[16] Sect. 41, subs. 1 (b) and subs. 5. The total value is found by adding together the actual receipts in respect of road haulage and the notional revenue from ancillary usage, *i.e.* the revenue which would have been reasonably obtainable, if the vehicles under C licences had been used under A licences.

[17] Sect. 41, subs. 1 proviso. For special privileges with regard to the determination of predominance in the case of vehicles hired by the Minister of Transport see Sect. 42 (2) and (3).

[18] Contrast Sect. 40 (1) and (2) with Sect. 40 (4). The manner of service, the time within which it must take place and further particulars will be prescribed by the Minister by regulations which must be laid before both Houses of Parliament. Sect. 40 (5), Sect. 119 (a), Sect. 121 (2).

Whichever way the proceedings start, any dispute in the matter goes before the Transport Arbitration Tribunal.[19] It must go there if the Commission fails to withdraw its notice and the firm maintains its counter notice or if the Commission fails to serve a notice and the firm maintains its original notice.[20]

From the 'date of transfer'[21] all relevant property owned by the transferor for the purposes of the undertaking and all relevant contracts to which he is a party and which were made for these purposes vest in the Commission free from encumbrances. The transferor receives compensation.[22] He must carry on the undertaking in the ordinary course of business until the date of transfer and maintain it in an efficient condition. If he does not, he is liable for damages which will be deducted from the compensation.

Normally the variation of an A or B licence, which merely consists in the substitution of one vehicle for another of the same or smaller weight is a matter which can be claimed as a right,[23] but this is not so where the applicant seeks to substitute a new vehicle for one which has been transferred to the Commission. In this case it is within the discretion of the Licensing Authority to permit or not to permit the variation of the licence.[24] This is important. It expresses the policy of the Transport Act not to allow an automatic expansion of short distance business in substitution for long distance business transferred to public enterprise.

[19] Sect. 105.

[20] Sect. 40 (3)and (4). For a case in which the Commission has the duty to acquire without a corresponding right see Sect. 42 (1) and (2).

[21] For its definition see Sect. 44. It is normally the date specified in the notice of acquisition, or, in the case of dispute, a date one month after its determination, or an agreed date in substitution of either.

[22] Details are outside the scope of this book. Sect. 46 to 51.

[23] Road and Rail Traffic Act, 1933, Sect. 10 (2). See Maxwell, *Law of Carriers Licences,* pp. 88, 217.

[24] Transport Act, 1947, Sect. 6 (2).

Chapter 6

THE LICENSING OF PASSENGER VEHICLES

Motor buses and coaches belong to that class of vehicles known as 'public service vehicles'.

This, as we shall see, is the expression used for all motor vehicles which carry passengers at separate fares, and also for vehicles with a carrying capacity of eight passengers or more when they are hired out at a lump sum.

Let us put ourselves into the position of a man (or company) who wishes to open a line of motor coaches or motor buses, and let us ask ourselves what he must do before he can start his business.

For every vehicle which he intends to use he wants, like any other owner of a motor vehicle, a revenue licence [2] which is issued by the competent County Council.[3]

Furthermore, every driver to be employed in the service of the prospective motor coach operator wants a driver's licence, for, if the operator employs an unlicensed person as driver he, as well as the driver, may incur heavy penalties.[4] The driver's licence is issued for one year [5] by the County Council or the County Borough Council for the area in which the prospective driver resides.[6] The future public service vehicle operator should be careful in the selection of the persons whose services he wishes to engage. For unless they are already in the possession of driver's licences, they will only be able to obtain a licence if they comply with certain legal requirements. One of these is physical fitness,[7] another one is that the driver must not have been disqualified by a Court on the ground of a previous offence.[8] Again, the persons to be employed must have a certain age. The general rule is that the driver of a

[2] The relevant enactment is Sect. 13 of the Finance Act, 1920, and the Second Schedule to that Act, which has been frequently amended.

[3] Roads Act, 1920, Sects. 1 and 5.

[4] Road Traffic Act, 1930, Sect. 4 (1).

[5] *Ibid.*, Sect. 4 (4).

[6] *Ibid.*, Sect. 4 (8).

[7] *Ibid.*, Sect. 5. A person suffering from certain disabilities is disqualified entirely; in the case of other disabilities he may claim to be subjected to a special test.

[8] *Ibid.*, Sects. 6, 7, 10, 11, 12. Road Traffic Act, 1934, Sect. 2. A person may be disqualified by a conviction or by a special order of the Court. In either case he cannot obtain a licence while the disqualification lasts. In some cases the Court must, in others it may, and in a third group of cases it may not disqualify a driver in connection with an offence.

motor car must be at least 17 years old,[9] but the driver of a public service vehicle, such as a motor coach or a motor bus, must be at least 21 and the conductor must be at least 18.[10] Finally, every prospective driver must, of course, have passed the driving test, or, as the law calls it, the 'test of competence to drive', which was introduced in 1934 and has been reintroduced after having been suspended during the Second World War.[11]

So far the duties imposed upon a person intending to operate a public service vehicle do not differ from those with which every motor car owner or driver has to comply. But in the case of motor vehicles used for the carriage of passengers for hire or reward the law takes a special interest in the admission of the vehicle to the road. The general provisions dealing with the licensing of motor vehicles and their drivers have the object of protecting the public from dangers and of forcing the users of the vehicles to contribute to the maintenance of the roads by way of special taxes. In the case of motor coaches and motor buses the law is also concerned with the protection of the passengers. It was, therefore, necessary to introduce special licences for this type of vehicle, known as Public Service Vehicle Licences, which are only granted if the applicant as well as the vehicle comply with the conditions deemed to be necessary for the protection and safety of the public travelling on the road. Moreover, the opening of a regular line of passenger vehicles is a matter of great commercial importance, and may be detrimental to the interests of competitors as well as of other road users. In order to cope with the difficulties created by increasing competition for the carriage of passengers and to enable the Minister of Transport to keep a check on the opening of new lines, a second type of licence was introduced by the Road Traffic Act, known as the Road Service Licence, which must be carefully distinguished from the Public Service Vehicle Licence.

A prospective motor coach operator, then, will have to obtain two further licences, the Public Service Vehicle Licence and the Road Service Licence. While the granting of Revenue Licences and ordinary Driver's Licences is entrusted to the local authorities, the issuing of Public Service Vehicle Licences, as well as of Road Service Licences, falls within the jurisdiction of a special authority known as the Licensing Authority for Public Service Vehicles, whose office was created by the Road Traffic Act, 1930, and who

[9] Road Traffic Act, 1930, Sect. 9 (2). There are special rules for motor cycles, heavy locomotives, light locomotives, motor tractors and heavy motor cars.

[10] *Ibid.*, Sect. 77 (2).

[11] Road Traffic Act, 1934, Sect. 6 (1).

act under the general directions of the Minister of Transport.[12]

The whole of England and Scotland has been divided into Traffic Areas,[13] for each of which three Traffic Commissioners have been appointed by the Minister of Transport.[14] Two are taken from panels of persons nominated by the County Councils and the Borough and Urban District Councils concerned and hold office for three years, while the third, who acts as chairman, holds a full-time appointment during His Majesty's pleasure.[15] These Traffic Commissioners are the Licensing Authority for Public Service Vehicles. They issue all the licences which we are now discussing, Public Service Vehicle Licences and Road Service Licences, as well as those Driver's and Conductor's Licences which are specially required for public service vehicles. The prospective motor coach operator, therefore, will have to deal with two entirely different sets of authorities, the local authorities on one hand and the Licensing Authority on the other. The function of the Licensing Authority has, to some extent, a judicial character. They may, but they need not, hold a public sitting before they arrive at a decision, except in the case of Road Service Licences, where a public sitting is obligatory.[16] They may delegate certain of their functions to one of their number, but at the hearing of an application two at least of the Commissioners must always be present.

1. PUBLIC SERVICE VEHICLE LICENCES

In order to obtain a Public Service Vehicle Licence the motor coach proprietor must apply to the Licensing Authority of that traffic area within or from which the vehicle is intended to be ordinarily operated,[17] but, once he has obtained the licence, it is valid everywhere, inside as well as outside the traffic area of the Authority who have granted it.[18] He wants a Public Service Vehicle Licence for each public service vehicle.

There are two criteria distinguishing public service vehicles from other motor vehicles: (1) A motor vehicle, however small, is a

[12] Road Traffic Act, 1930, Sect. 63 (1). Transport Act, 1947, Sect. 117.
[13] *Ibid.*, Sect. 62 (1).
[14] There is one Traffic Commissioner only in the Metropolitan Traffic Area, who is appointed by the Minister of Transport and holds office during His Majesty's pleasure. See Road Traffic Act, 1930, Sect. 98, as amended by the Chairmen of Traffic Commissioners (Tenure of Office) Act, 1937, Sect. 1 (2) (b).
[15] Road Traffic Act, 1930, Sect. 63 (3) and (5), as amended by the Chairmen of Traffic Commissioners (Tenure of Office) Act, 1937.
[16] Road Traffic Act, 1930, Sect. 64 (1); but see the relaxation of this rule in Sect. 27 of Road Traffic Act, 1934.
[17] Road Traffic Act, 1930, Sect. 78 (1).
[18] *Ibid.*, Sect. 73 (3).

public service vehicle, if it carries persons for hire or reward at separate fares. (2) A motor vehicle carrying passengers for hire or reward not at separate fares, but under a contract for the use of the vehicle as a whole at a fixed sum, *i.e.*, a contract carriage, is a public service vehicle, provided it is adapted to carriage eight persons or more.[19]

The law [20] divides public service vehicles into three categories: stage carriages, express carriages and contract carriages. The stage carriage is the ordinary motor bus in which passengers may travel for a short journey at low prices. The express carriage, as its name implies, is quicker than the stage carriage, but this is not its criterion. What distinguishes the express carriage from the stage carriage in law is not its speed, but the amount of the minimum fare. An express carriage is a public service vehicle for the use of which a minimum fare of 1*s.* is charged. This is the only legal test for the distinction between the two types of coaches, but in practice the higher fare involves, of course, fewer stopping points and greater speed. And finally, as mentioned before, the contract carriage is the motor coach which is hired by a person or group of persons as a whole, but a contract carriage is not a public service vehicle unless it is adapted to carry more than seven passengers.

When applying for Public Service Vehicle Licences for the various coaches or buses he means to use, the future operator must make up his mind for what purposes he intends to use them. Will he confine his business to letting out coaches at fixed or agreed rates or sums for weddings and the like? In that case his coaches will be contract carriages, and it will be sufficient for him to apply for Contract Carriage Licences. But he must beware, for a Contract Carriage Licence does not enable him to use the coach for which it is granted as anything but a contract carriage.[21] On the other hand, he may contemplate using his vehicles as express carriages, that is, he does not intend to charge fares of less than 1*s.* In this case he will apply for Express Carriage Licences, and this gives him the advantage of being allowed to use the vehicles not only as express carriages, but also as contract carriages, though he may not use them as stage carriages.[22] Even if he holds an Express Carriage Licence only, this will not prevent him from charging less than 1*s.* to children, workmen, or students, provided the ordinary fare is 1*s.* or more. And he may issue return or other composite tickets at a price of more than 1*s.*, even if the single tickets composing it are

[19] Road Traffic Act, 1930, Sects. 121 (1) and 61.
[20] *Ibid.*, Sect. 61 (1), as amended by the Road Traffic Act, 1934, Sect. 24.
[21] *Ibid.*, Sect. 67.
[22] *Ibid.*, Sect. 67 (1), proviso (a); for an exception, see proviso (b).

issued at less than this amount.[23] But he may be well advised to take out a Stage Carriage Licence which entitles him to use his vehicle for the carriage of passengers for hire or reward at separate fares, however small they be. The Stage Carriage Licence includes the permission to use the vehicle as a contract carriage or as an express carriage, provided of course the operator complies with the conditions attached to his Road Service Licence, which will be discussed below.[24]

What will he have to do or to prove in order to obtain permission to use the vehicles as Public Service Vehicles? The object of the Public Service Vehicle Licence is to protect the public against dangers involved in the operating of motor coaches and buses by unreliable persons and in the use of vehicles which are not fit for such particular use. Therefore, the Licensing Authority must be satisfied that, according to his previous conduct, the applicant is a person fit to hold a Public Service Vehicle Licence,[25] and they must further be satisfied that the vehicle itself is fit. If it is a vehicle adapted to carry eight or more passengers the examination of its fitness is entrusted to a certifying officer, specially appointed for the purpose of exercising this function by the Minister of Transport. Once the certifying officer has found that the vehicle complies with the prescribed conditions as to fitness which are laid down in the regulations made by the Minister he issues a certificate of fitness and this certificate binds the Licensing Authority and continues in force as a rule for five years. The Minister of Transport may also approve types of vehicles, and in that case all the certifying officer has to do is to certify the conformity of the vehicle with one of the types approved by the Minister.[26]

If there is no personal objection against the prospective operator and if his vehicles comply either with the types approved by the Minister or with the Minister's regulations as to fitness, the Licensing Authority must grant him the licence. They have no further discretion in this matter, and no considerations other than those mentioned must be taken into account. Commercial questions of any description have nothing to do with the granting of the Public Service Vehicle Licence. The operator wants a Public Service

[23] *Ibid.*, Sect. 61 (1) (b).
[24] *Ibid.*, Sect. 67 (1), proviso (a).
[25] *Ibid.*, Sect. 67 (2).
[26] See, for further details, Road Traffic Act, 1930, Sect. 68. The Minister also appoints Public Service Vehicle Examiners, who have the task of inspecting public service vehicles and have the right to stop them on the road: see Sect. 69

Vehicle Licence for each vehicle and the licence is not transferable to another person or vehicle. The licence expires one year after it has taken effect.[27] If it is refused by the Authority there is an appeal to the Minister of Transport.[28] It should be noted that the Public Service Vehicle Licence must also be obtained by the Transport Commission and its Executives and by local authorities desirous of running public service vehicles.

2. ROAD SERVICE LICENCES [29]

If the motor coach owner intends to provide a road service he must apply for a Road Service Licence and he must not use any vehicle as a stage carriage or as an express carriage except under such a licence.[30] It is the essential difference between stage and express carriage and contract carriage that in the first case passengers are carried for hire or reward at separate fares, while there are no separate fares in the case of a contract carriage.

The procedure leading up to the granting of a Road Service Licence is much more complicated than that connected with the obtaining of a Public Service Vehicle Licence, and it takes more time. It is, therefore, of the utmost importance for those providing vehicles for the use of the public to know whether in a given case a Road Service Licence must be obtained. This depends on the question whether passengers are to be carried at separate fares, and the question what are 'separate fares' has been the object of a large number of decisions. The Acts themselves give us some guidance as to what are and what are not 'separate fares'. For example, it does not matter whether the separate payments are to be made to the owner of the vehicle himself or to another person.[31]

In *Osborne* v. *Richards*,[32] the owner of a coach agreed with the secretary of a football club to put at the disposal of the public a motor coach travelling to the football ground. The consideration for the carriage was payable by the individual passengers to the football club. Here a road service licence was required, because it was a case of stage carriage, and not one of contract carriage.

Moreover, it is quite immaterial whether or not the payments made are solely for the journey,[33] *e.g.*, if a carrier of goods on the road permits the owners of the goods to travel on the goods vehicle, the consideration for the transport of the goods to include that for

[27] Road Traffic Act, 1930, Sect. 80 (1) (a).
[28] Sect. 81.
[29] For the suspension of the licensing system during the Second World War see above, p. 23, note 1.
[30] Sect. 72 (1) and (10).
[31] Road Traffic Act, 1930, Sect. 61 (2).
[32] [1933] 1 K.B. 283.
[33] *Ibid.*, Sect. 61 (2).

the transport of the owners, a Road Service Licence is also required.[34] If a person is carried on a motor coach without payment of a fare on the strength of his membership in a club or a society which provides such services for its members, a Road Service Licence is required, though technically if the society is not incorporated the members may be said to be the co-owners of the vehicle.[35]

It is only if a vehicle is used on a special occasion and for the conveyance of a private party that it is not deemed to be a vehicle carrying passengers for hire or reward at separate fares, though the members may have made separate payments.[36] The owner of a vehicle who puts it at the disposal of a party for an excursion need not take out a Road Service Licence, though the person who made the arrangements with him and paid him a lump sum in fact recovers from the individual members of the party something in the nature of fares or separate payments. The words 'special occasion' and 'private party' were, however, so narrowly interpreted by the Courts[37] that by a special enactment[38] Parliament laid down the meaning of these words. If the arrangements for the bringing together of the passengers have been made by a person other than the holder of the Public Service Vehicle Licence or his agent, and if there have been no public advertisements, and if several other conditions are fulfilled including the taking of a work ticket[39] by the driver, which has to be produced to a police constable on demand, then the Road Service Licence can be dispensed with.[40]

[34] *Drew* v. *Dingle*, [1934] 1 K.B. 187. Another case in point is *Westminster Coaching Services* v. *Piddlesden* (1933), 149 L.T. 449.

[35] Road Traffic Act, 1934, Sect. 26.

[36] Sect. 61 (2), proviso.

[37] See, in particular, the decision in *Miller* v. *Pill*, [1933] 2 K.B. 308; and see also, for the meaning of 'private party', *Birmingham and Midland Omnibus Co., Ltd.* v. *Nelson*, [1933] 1 K.B. 188. See also *Nelson* v. *Blackford*, [1936] 2 All E.R. 109: the illuminations at Blackpool upon the occasion of King George V's Jubilee were not a 'special occasion'. 'A special occasion must be a particular and individual occasion analogous to a race meeting. An attraction at a seaside resort which lasts 49 days cannot, in my opinion, come within those words' (*per* Lord Hewart, L.C.J.).

[38] Road Traffic Act, 1934, Sect. 25; see this provision explained by Lord Hewart, L.C.J., in *Evans* v. *Dell* (1937), 53 T.L.R. 310, at pp. 312, 313.

[39] The holder of the public service vehicle licence must make a record containing particulars as to the journey, which has to be produced on demand during six months following the journey to any person authorised by any Traffic Commissioner, and the object of the work ticket is to enable the record of the journey to be traced and identified.

[40] For an illustration see *Evans* v. *Hassan*, [1936] 2 All E.R. 107, and for an example of the elaborate—but unavailing—attempts made to evade the Act: *Sidery* v. *Evans and Peters*, [1938] 4 All E.R. 137.

Even where the passengers to be carried do not constitute a private party, a certain relaxation is introduced for those vehicles which are adapted to carry less than eight passengers. If such a small carriage is used on such occasions as race meetings, public gatherings and other special occasions to carry passengers at separate fares, it is not deemed to be a stage carriage or an express carriage and no Road Service Licence need be obtained.[41] Special provision has been made for those cases in which passengers in a taxi cab agree to share their fares.[42] Until 1937 this meant that the cab was used as a stage or express carriage, for it was not let out as a whole, but at separate fares. A Road Service Licence was, therefore, required, and, in the absence of such a licence the passengers as well as the driver and the owner were guilty of an offence, in paying or receiving the separate fares. The Road Traffic Act, 1937, has taken this case out of the scope of the rules applicable to stage and express carriages.

Once the motor coach owner knows whether or not he has to apply for a Road Service Licence, the next thing he is concerned with is, where he has to make his application. A Road Service Licence has to be obtained from the Licensing Authority of any area through which the proposed route runs,[43] and a Road Service Licence granted by the Authority of one area has no validity in another area.[44] In order to mitigate the hardship which would ensue through the necessity for applying to the Authority of every area through which the coaches are intended to run, the law provides that a Road Service Licence granted by the Authority of one area may be backed by those of the others,[45] and that even such backing is unnecessary if the area is merely a ' corridor area ' where

[41] Road Traffic Act, 1930, Sect. 61 (1), proviso.

[42] See *Newell* v. *Cross,* [1936] 2 All E.R. 203, and *East Midland Traffic Area Traffic Commissioners* v. *Tyler,* [1938] 3 All E.R. 39.

[43] Road Traffic Act, 1930, s. 78 (2).

[44] Sect. 73 (1). Note the difference in this respect between public service vehicle licences and road service licences.

[45] Road Traffic Act, 1930, Sect. 73 (1) and (2). A Road Service Licence backed by the Licensing Authority of a given area takes effect as if it had been granted by them, and they may ' as respects their area ' impose any conditions which they might have imposed on granting the licence or varying its conditions. Conditions thus imposed by the ' backing ' Authority may ' have an influence upon the scope of the licence, not only in the area in which it is backed, but also in the area in which it was originally granted ' (per Lord Hewart, L.C.J., in *R.* v. *Minister of Transport,* [1937] 1 All E.R. 264, at p. 271). In this case the Divisional Court, following an unreported decision of the Court of Appeal in *R.* v. *Yorkshire Traffic Commissioners* (April 1933) held that the ' backing ' Authority in one area had jurisdiction to prohibit the issuing of tickets in another.

passengers are neither taken up nor set down, nor permitted to alight for more than fifteen minutes, provided the use of the vehicle in the corridor area is included in the main Road Service Licence.[46]

The position of an applicant for a Road Service Licence is entirely different from that prevailing with respect to Public Service Vehicle Licences. For, the Road Service Licence is a 'discretionary licence', *i.e.*, it is only granted if, in the exercise of their jurisdiction, the Licensing Authority regard it as suitable to grant it. If the licence is refused the applicant may appeal to the Minister of Transport, but again, the decision is discretionary.[47] The discretion exercised by the Licensing Authority or, on appeal, by the Minister of Transport is twofold. Not only may the Authority in their discretion grant or refuse the licence, but they may also, when granting the licence, attach conditions of various types to the licence. It is necessary that the Road Service Licence should have this discretionary character since the Authority have to take in account the complicated question of competition and monopoly in regard to road passenger services, a question which cannot be tied down to strict legal rules.

When applying for a Road Service Licence the applicant has to submit certain particulars to the Licensing Authority. These refer to the type or types of vehicles to be used, in the case of a proposed regular service, to the time tables and fare tables, and where no regular service is intended to the frequency and the times to be taken on the journeys.[48] Moreover, very detailed statements must be made of the financial position of the applicant, of all arrangements and agreements entered into by him with regard to the provision of transport facilities and of any financial interest other persons providing passenger transport facilities may have in the applicant's firm. Even after having obtained the licence the holder must furnish the Licensing Authority with such particulars if there is any change.[49]

What considerations will the Licensing Authority take into account when approached for the granting of a Road Service Licence? First of all, they will see to it that the road service is not provided under such conditions that the transgression of any speed

[46] Road Traffic Act, 1934, Sect. 28.

[47] Road Traffic Act, 1930, Sects. 72 (3) and 81. Note that this appeal jurisdiction has not been transferred to the Transport Tribunal by the Transport Act, 1947. For the interpretation of these provisions, see the decision of the Divisional Court quoted in the note last but one, and *R.* v. *Minister of Transport. Ex parte Upminster Services Ltd.*, [1934] 1 K.B. 277.

[48] Sect. 72 (5).

[49] Sect. 76.

limit can ensue. They will then consider the suitability of the routes proposed, the extent to which the proposed routes are already adequately served, and whether the proposed service is necessary or desirable in the public interest. They will also take into account the needs of the area as a whole in relation to traffic and the co-ordination of all forms of passenger transport, including passenger transport by rail. In this latter connection it is of the greatest importance that representations may be made before the Authority by any persons who already provide transport facilities along or near the routes proposed as well as by local authorities interested. The Railway Executive, for example, have a right to be heard by the Licensing Authority before a Road Service Licence is granted and to defend their interests, and they can also appeal to the Minister of Transport against the granting of a Road Service Licence.[50]

When granting a Road Service Licence the Licensing Authority may, as we have seen, attach conditions. Such conditions may refer to anything to be taken into account in the granting or refusing of a Road Service Licence. They may, in particular, include a complete regulation of the fares, for it may not only be a condition of a Road Service Licence that fares shall not be unreasonable,[51] but it is also provided that the Licensing Authority may fix minimum or maximum fares,[52] and where it is desirable in the public interest, they may impose the condition that fares shall be so fixed as to prevent wasteful competition with other forms of transport.[53] Other conditions may refer to the publicity to be given to time tables and fare tables, and to stopping points and non-stop routes.[54]

The duration of a Road Service Licence, once it is granted, is a complicated matter. Generally speaking, Road Service Licences expire approximately one year after they have been granted, on particular dates during the year which are fixed by the Minister of Transport.[55]

To use a vehicle without having obtained the necessary Road Service Licence is a criminal offence, and so is the non-compliance

[50] Road Traffic Act, 1930, Sects. 72 (3) and 81 (1) (b).
[51] Sect. 72 (4) (a).
[52] Sect. 72 (6). Other carriers will frequently urge the fixing of minimum fares, and local authorities of maximum fares.
[53] Sect. 72 (4) (b).
[54] Sect. 72 (4) (c) and (d). The holder of the licence must also comply with the Fair Wages Clause. Sect. 93, and see Road and Rail Traffic Act, 1933, Sect. 32 (1).
[55] This is roughly the effect of Road Traffic Act, 1930, Sect. 80 (2), as amended by the Road Traffic Act, 1934, Schedule 3, in conjunction with the Public Service Vehicles (Duration of Road Services Licences) Regulations, 1938.

with any of the conditions imposed by the Road Service Licence.[56] Besides, the Road Service Licence may be revoked or suspended by the Licensing Authority if the licensee breaks the conditions wilfully, or frequently, or in such a manner that danger to the public is involved in the breach.[57]

Even a local authority desirous of running a public service vehicle must obtain a Road Service Licence. If the local authority intends to run a public service vehicle outside its own district, it wants, in addition to the Road Service Licence, the special consent of the Licensing Authority of the area in which the vehicle is to run.[58]

The Transport Commission and its Executives do not require Road Service Licences.[59]

3. DRIVERS' AND CONDUCTORS' LICENCES

After having obtained the necessary Public Service Vehicle Licences and Road Service Licences the motor coach owner must also see to it that special licences are issued by the Licensing Authority for his drivers and conductors. These licences do not dispense with the necessity for an ordinary Driver's Licence.[60] The applications must be made by the prospective drivers and conductors themselves and in each case to the Authority of the area in which the applicant resides.[61] Once it has been issued it is valid everywhere for one year. Against a refusal it is possible to appeal to a Court of Summary Jurisdiction.[62]

[56] Road Traffic Act, 1930, Sect. 72 (10); an injunction may also be issued against a person thus acting.
[57] *Ibid.*, Sect. 74, as amended by Road Traffic Act, 1934.
[58] Sects. 72 (8) and 101; and for details, see Sect. 102.
[59] Transport Act, 1947, Sect. 65, and see below, p. 57.
[60] Road Traffic Act, 1930, Sect. 77.
[61] In the Metropolitan Traffic Area these licences are issued by the Commissioner of Police: Road Traffic Act, 1930, Sect. 99 (4) (b), as amended by the London Passenger Transport Act, 1933, Sect. 51, and the Metropolitan Traffic Area (Drivers' and Conductors' Licences) Regulations, 1934.
[62] Road Traffic Act, 1930, Sects. 77, 78 (3), 80 (1a) and 82.

Chapter 7

THE CO-ORDINATION OF PASSENGER ROAD TRANSPORT

The Transport Act, 1947, does not envisage the immediate or entire nationalisation of road passenger transport. In this sphere, the Commission will not acquire a monopoly. It will not be its main function to provide the bus and coach services, but to regulate and to co-ordinate the services provided by others. It has the power of operating public service vehicles, but, outside London, its function as an operator is subservient to its primary duty to regulate the services area by area. From the undertakings transferred to the Commission, *e.g.* from the railway companies, it may have inherited passenger road services. Whether it will continue them or transfer them to other bodies, whether, on the other hand, it will acquire additional road passenger undertakings, these are all questions to be decided in the light of local conditions and of the corporation's permanent duty to regulate and co-ordinate. In the matter of passenger transport outside London the public interest is protected in the form of 'administrative control', and not as in railway and long distance road goods transport by 'administrative service'. Outside the Metropolis the Commission appears in passenger transport as one entrepreneur among others. It has the power to acquire such undertakings, but since it has no monopoly rights it has no duty to acquire them.

The only immediate effect of the Transport Act on passenger road transport outside London is to make it incumbent upon the Commission, 'as soon as may be (to) review the passenger road transport services operating in Great Britain with a view to determining the areas with respect to which schemes shall be prepared and submitted' to the Minister.[1] The initiative in preparing schemes for co-ordination will thus usually emanate from the Commission, but the Minister may specify an area and direct the Commission to prepare and submit a scheme for that area.[2]

Changes in the sphere of road passenger transport will be brought about by Orders made by the Minister and embodying schemes prepared by the Commission.[3] The Act does not lay down

[1] Sect. 63 (1).
[2] Sect. 63 (4).
[3] Sect. 63 (3).

any time limits for the making of such Orders. The process of organisation and reorganisation may be continuous. It is quite different from the nationalisation of the railways which happened at one moment as one event, with the result that all the legal provisions governing it are of a transitory nature and will exhaust their importance after a while. Nor is it comparable with the changes impending in long distance road goods transport, where the public interest asserts itself in a series of measures of which the only one to be permanent in character is the provision about the monopoly. The provisions on passenger transport are permanent. The process of regional organisation may never be completed.[4]

As we have seen, no one may normally operate a bus or coach service without having obtained a Road Service Licence from the Licensing Authority for Public Service Vehicles. The only exception before Jan. 1, 1948 was that of the London Passenger Transport Board, which had a monopoly of passenger transport by road in the London Traffic Area and did not within that area require Road Service Licences. Since Jan. 1, 1948 the Commission, acting through the London Transport Executive, has inherited this privilege of its predecessor, the Board. But more than that: wherever the Commission or any of its agents, *e.g.* the Road Transport Executive or the London Transport Executive outside the London Traffic Area, act as carriers of passengers by road, they do not require Road Service Licences.[5] They are, however, placed under certain restrictions with regard to the use of public service vehicles for hire or reward at separate fares. Although they need not take out a licence they must obtain the approval of the Licensing Authority for the routes of their vehicles, for stopping points, and for the class and description of the vehicles they use, but not for their fares or time tables. They must give publicity to their time tables and fare tables, but this is enforced by regulations to be made by the Minister and not by the Licensing Authority.[6]

The schemes which the Commission may, and, if so directed, must prepare and submit to the Minister have the twofold objective, (a) to co-ordinate *all* passenger transport services serving the area specified in the scheme, *i.e.* road as well as rail services, and (b) to provide adequate, suitable, and efficient road services to meet the needs of the area.

The ownership and operation of rail services as such is thus outside the scheme. Nevertheless, they can in other respects be

[4] Note the importance of the words 'at any time' in Sect. 63 (1).
[5] Sect. 65 (1).
[6] Sect. 65 (3).

drawn within its orbit, *e.g.* by providing for the pooling of receipts or expenses as between the road and rail services in a given area.[7]

Each scheme is a piece of delegated legislation which takes effect in the form of an Order made by the Minister and is as such subject to parliamentary control. This takes the form of the 'special parliamentary precedure' laid down in the Statutory Orders (Special Procedure) Act, 1945, which means in practice that it is surrounded with special safeguards and exercised in the form of semi-judicial proceedings in order to protect the interest of the persons affected.[8]

The Act allows for the greatest possible flexibility in the formulation of these schemes. They can maintain or even create conditions of competition, while on the other hand they may confer monopoly powers upon existing entrepreneurs, authorities, public corporations or other bodies, or even upon bodies created for this special purpose. New operating bodies may be established without giving them any monopoly powers, thus making them enter the field as competitors. Undertakings may be transferred from the private to the public or from the public to the private sphere or within either sphere. In all this the Commission plays a twofold role: It is the originator or, at any rate, the architect of the scheme, and it may at the same time be one of those participating, or even the only body participating, in its application. The scheme may thus (but need not) do any of the following things:

1. It may specify those participating in its operation, and this may include individuals, commercial companies, local authorities, the Commission itself, or any of its Executives.[9] These 'bodies' may be specified for the operation of the services and also for administering, or taking part in the administration of, the scheme which may thus nominate not only the carriers, but also the permanent co-ordinators of the services. Frequently the Commission may act in this latter capacity, but it need not. It may leave this function to a local authority or to a body created *ad hoc,* such as a mixed undertaking in which both public and private interests participate.[10]

[7] This follows from Sect. 64 (1) (c) which presupposes that rail passenger transport services are provided 'under the scheme' and which envisages that the interrelation between carriers by road and by rail can be regulated. Rail services can therefore be regulated in a scheme only for the purpose of co-ordinating them with the road services, and not for their own sake.

[8] Sect. 63 (3).

[9] Sect. 64 (1) (a).

[10] Sect. 64 (3) seeks to secure that if an *ad hoc* body acts as administrator and co-ordinator, a person of experience in local government in the area is a member of the body.

2. It may define the relationship between the various persons or bodies which provide passenger services under the scheme, whether by road or by rail. Thus the Commission may divest itself of its property in any of the road services which it provides in order to carry into effect the provisions of a scheme.[11] As a result the passenger services in large towns and 'conurbations' can at last be co-ordinated, *e.g.* in London what have in the past been the L.P.T.B. Services with the suburban lines of the former railway companies. Similar results may be produced in areas such as South Lancashire, South Wales, and Clydeside.

3. It may impose statutory obligations to provide road passenger transport services, and may, on the other hand, prohibit or restrict such services.[12] The legal effect of a statutory obligation of this kind will be comparable to that of the facilities clause in the Railway and Canal Traffic Act, 1854. Like the latter it will leave in existence, but push into the background, the common law obligation of the common carrier to accept passengers.[13] Schemes which prohibit or restrict the provision of road passenger services by persons other than those expressly specified as operators will establish a transport monopoly. Outside London this has so far been unknown in road passenger transport law. Now monopolies may be created everywhere, but need not be created anywhere. Any type of road passenger transport may thus be organised. There is no limitation as in goods transport where the monopoly is confined to long distance carriage, nor is there any need for an 'all or nothing': A scheme may provide that in a given area a multitude of carriers may continue to exist, but that certain activities, *e.g.* carriage over a minimum distance are monopolised. To this there is only one exception: Contract carriage cannot thus be regulated. As in air transport, charter carriage is outside the nationalisation or co-ordination scheme.[14]

4. Hitherto all restrictions imposed upon road passenger services appeared incidentally as a result of the system of road service licences under the Road Traffic Act, 1930. The schemes will take over the main functions of this licensing system, and may therefore exempt any of the services provided under them from the need for obtaining these licences.[15] In practice this enabling clause will pre-

[11] Sect. 65 (1) (c).
[12] Sect. 64 (1) (d).
[13] See *Clarke* v. *West Ham Corporation*, [1909] 2 K.B. 858, and *Ludditt* v. *Ginger Coote Airways Ltd.*, [1947] A.C. 233. How will the statutory obligation be enforced? It is arguable that mandamus will lie.
[14] This follows from the definition of 'passenger road transport service' in Sect. 125.
[15] Sect. 64 (1) (f) (III).

sumably be widely used. Otherwise all operators under the scheme with the exception of the Commission itself will continue to require Road Service Licences, and a bewildering mass of legal provisions will apply, giving rise to almost insoluble questions, if the Licensing Authorities impose conditions at variance with the scheme.

5. Much of what the Licensing Authorities do in the form of imposing conditions of Road Service Licences will in future be done by the schemes, such as the regulation of fares, of conditions of liability, through charges, etc.[16] Bus and coach fares and the conditions of liability to passengers can thus be subjected to regulation by the Transport Tribunal. Alternatively an existing regulation already made by the Tribunal for any branch of the services of the Commission can, with suitable modifications, be extended to all or to some of the bodies carrying passengers by road under a scheme. In theory there may be a scheme whereby some of the road passenger carriers have their fares regulated by the Licensing Authority and others by the Tribunal. The Act is so flexible that, on paper, it creates a confusion of jurisdictions of the Licensing Authorities, of the Tribunal, and of the Commission. Moreover, any of the provisions relating to charges or terms and conditions may be extended to services under a scheme, *e.g.* the rules in the Railways Act, 1921, on exceptional fares, the legislation on workmen's tickets, the legislation (but not the common law principles) on passengers' luggage.[17] The scheme may also make it incumbent upon operators to obtain the approval of the Licensing Authority for the routes

[16] This is expressed in an indirect fashion in Sect. 64 (1) (f) (I) and (II).

[17] It is submitted that no scheme could abrogate Sect. 97 of the Road Traffic Act, 1930, because this would not mean to replace one statutory provision by another, but to substitute a common law principle for an existing statutory provision. The common law principle that the carrier is free to contract out his liability to passengers as made inapplicable to public service vehicles by Sect. 97. To reintroduce it could not by any stretch of language be called an incorporation of a statutory provision relating to the terms and conditions applicable to the Commission. Nor could the facilities clause of the Railway and Canal Traffic Act, 1854, be extended to road passenger transport, except perhaps with regard to such things as through charges, because it refers neither to charges nor to terms and conditions. It may be different with regard to the law of undue preference because it is statutory and refers, in parts at least, to charges. On the other hand, Sect. 64 (1) (f) (II) is wide enough to cover such matters as periods for claims under Standard Terms and Conditions, Bye-laws on the conduct of passengers and the payment of fares, the carriage of dangerous substances, penal provisions like Sect. 5 of the Regulation of Railways Act, 1889, etc. It may even cover such matters as the system of agreed charges under Sect. 37 of the Road and Rail Traffic Act, 1933, *e.g.* by authorising contracts with firms for the carriage of their employees at agreed fares, as long as they remain separate fares, the latter restriction being necessary in view of the definition of road passenger transport services in Sect. 125 of the Act of 1947.

and to comply with restrictions imposed by that Authority on types of vehicles and on stopping points, and also with regulations made by the Minister for the publication of fares and time tables. One may perhaps say that where a scheme operates there is no scope for the licensing system in its economic aspect (the regulation of competition and monopoly), but that in its technical aspect (protecting the road surface, preventing overcrowding, etc.) the licensing system will have to be replaced by clauses in the schemes submitting the operators to regulation by the Licensing Authorities. The four regulating agencies, *i.e.* the Licensing Authorities, the Minister, the Commission, and the Tribunal will have to co-operate, but the Act does not define the distribution of regulating functions among them.[18] The schemes may also determine the financial affairs of those constituted or specified as a body providing road passenger transport. This can be done by incorporating in the scheme, with or without modification, some or all of the provisions of the Transport Act which relate to borrowing by the Commission, the issue of stock, and even Treasury guarantees.[19]

6. Finally, under a scheme any undertaking or part of an undertaking may be transferred to the bodies specified or constituted by the scheme, in so far as these undertakings operate passenger road services within the area. This may, but need not be done. A scheme may be confined to regulation and co-ordination and refrain from changing the property in undertakings. What may be thus transferred may be public as well as private undertakings, and a scheme may lead to measures of denationalisation as well as of nationalisation. There is only one limitation: A compulsory transfer of a part of an undertaking must comprise the whole of its passenger road transport services, inside and outside the area. Existing undertakings may not be split up.[20] In all the more important cases of compulsory transfer compensation must be paid,[21] but the statutory provisions on compensation may be varied by the scheme, especially where the transferor is a local authority.[22]

[18] The legal provisions on public service vehicle licences are unaffected by the Act of 1947, but they are insufficient to cater for the need for technical supervision, because, when granting a public service vehicle licence (which is a licence as of right) the Licensing Authority looks at the vehicle in isolation and not at the technical aspect of the use of this particular vehicle on this or that particular road.

[19] Sect. 64 (1) (e).

[20] Sect. 64 (1) proviso, which qualifies the enabling clause in Sect. 64 (1) (b).

[21] Sect. 64 (1) (g) and Schedule 8.

[22] See the reference in Sect. 64 (1) (g) to Part 2 of Schedule 8, and compare Schedule 8, Part 1, Sect. 1 (1) proviso (b) with provisos (a) and (c). Schedule 8, Part 2, including its reference to Schedule 9 and to Sect. 47 of the Act does not apply to local authorities. A local authority also receives additional compensation under Sect. 114 of the Act.

Even where the scheme imposes a monopoly, the monopolist is not under any statutory duty to acquire existing undertakings. This, however, need not produce any injustice, because operators affected by restrictions or prohibitions contained in schemes have a right to compensation, subject to the ultimate decision of the Arbitration Tribunal.[23]

The schemes are intended to be flexible. They may be repealed or amended by subsequent schemes, and area boundaries may be changed.[24] One of the most far-reaching provisions is that which enables the schemes to alter existing statutory provisions.[25]

A few words must be added about the procedure to be observed in preparing, submitting and confirming schemes. When considering a scheme the Commission must take account of representations by relevant local authorities.[26] The Minister must examine whether the scheme makes satisfactory provision with respect to the matters it purports to regulate. It is at this stage that the question of compensation must be dealt with.[27] If it appears to the Minister that the scheme is satisfactory, he must prepare a draft Order which embodies the scheme and he must give notice that he proposes to proceed with the making of the Order. This notice must be published in the press,[28] and forty days must be allowed for objections. If such objections are made in proper time and manner and state in writing the specific grounds on which they are based, they must be considered by the Minister. If no relevant objections have been made or all have been withdrawn, the Minister may make the Order, but otherwise there must be a public local inquiry, and the Minister must consider the report made by the person who has presided over it.[29] Finally, as mentioned above, the Order is subject to special parliamentary procedure in order to protect the interests of those affected by the scheme.

[23] Sect. 64 (4).
[24] Sect. 64 (1) (h).
[25] Sect. 64 (1) (i).
[26] Sect. 63 (2).
[27] Schedule 8 (1) and Sect. 64 (4).
[28] Schedule 8, No. 2 (1).
[29] Schedule 8, No. 3 (1) to (3).

CHAPTER 8

THE LAW OF RATES AND FARES THE TRANSPORT TRIBUNAL

GENERAL AND HISTORICAL

THE amount of the freight is, on principle, a matter of contract between the carrier and the consignor who is generally considered to be acting as the consignee's agent. The parties to the contract of carriage are, however, not always free to settle the amount of freight as they please. Even at common law there is one restriction limiting the parties' freedom of contract in that respect. For, if a common carrier attempts to demand an unreasonable rate, that is equivalent to a refusal to carry, which lays him open to an action for damages, or, if the consignor has paid more than a reasonable rate of carriage, to an action for the recovery of the excess.[1] If there are any carriers by road who are common carriers, the ancient rules prohibiting a carrier from demanding unreasonable rates would still seem to be applicable to them. Otherwise road traffic rates are entirely a matter of contract. There is not, as yet, any statutory provision dealing with road traffic rates in general, though a regulation of the Transport Commission's road charges under a confirmed charges scheme is contemplated by the Transport Act.[2] The Licensing Authority, admitting goods vehicles for road traffic, has no power to impose any conditions as to the amount of rates which may be claimed, not even in the case of B licences.[3]

It is entirely different in the case of railway traffic. In order to understand this important branch of the law of inland transport it is necessary to know something of the historical development of the administrative supervision of railway rates.

From the earliest times of railway traffic the legislature found it necessary to exercise a statutory control over the revenue of railway undertakings which had hardly an equivalent in the case of

[1] See the cases collected in Chitty, On Contracts, 19th ed., pp. 668 and 669, notes (e), (g) and (h).

[2] Sects. 76 and 77. The prohibition of charge increases beyond a certain maximum, introduced by the Road Haulage and Hire (Charges) Order, 1942, S.R. and O. 1942, 251, made by the Minister under powers conferred upon him by Defence Regulation 55, continued under the Supply and Services (Transitional Powers) Act, 1945, and amended by S.R. and O. 1946, 1890, is not a regulation of charges in the sense here contemplated.

[3] Sect. 8 (3) (d) of the Road and Rail Traffic Act, 1933.

undertakings of any other kind. Ever since they became important as carriers of goods, railway companies were regarded as monopolists and it was, therefore, felt that the law had to step in, in order to make sure that the railways' services would be available to the public at a reasonable price.

This was only inadequately achieved by the common law and at a very early stage of the development the introduction of statutory maximum rates became necessary. Many years later the desire to safeguard an adequate revenue to the railway undertakings themselves led to the fixing of rates which had the character of minimum rates as well.

The law of rates has gone through a series of stages which can be clearly distinguished.

1. The railways of Britain have all been made by companies with money subscribed or lent by private persons. It is obvious that no ordinary trading company could make a railway, except perhaps for a very short distance, for it would have no power of acquiring the necessary land. A railway company needed special and peculiar powers to enable it to acquire land compulsorily from unwilling owners, to cross highways and otherwise to interfere with various public and private rights. Therefore every railway company was created by a special Act of Parliament conferring the necessary powers. The large railway companies which were in existence on the eve of nationalisation had all been formed by the union of a number of smaller companies, so that each of them traced its origin to several sources and derived its powers from a number of different special Acts. The Transport Commission has inherited these powers so that the old special Acts will not entirely lose their importance under the new system of public enterprise.

It is obvious that Parliament did not confer these wide powers on a company except for the purpose of benefiting the nation, and that in return for such powers railway companies were invariably required to give full value to the public. The legislature attempted to secure this return by controlling the railway companies in the interests of the nation, especially by compelling them to give reasonable facilities for the conveyance of traffic, by forbidding unfair or oppressive contracts and by imposing limits to the charges for carriage by railway.

During the first stage of this development these objects were achieved by the special Acts controlling the individual companies, but even in those early days of railway traffic, it was necessary to regulate some matters by general Acts applicable to all railway companies.

One of the earliest Acts of Parliament, aimed at controlling the railway companies in the interests of the public was an Act of 1838,[4] which obliged companies to make reasonable arrangements at reasonable charges for the conveyance of mails. This was followed by the Railways Regulations Acts, 1840 to 1844, which made various provisions for the safety and for the orderly working of railways, and gave the Board of Trade powers of supervising railways and enforcing the laws. These general Acts, which applied to all railway companies side by side with the special Acts governing the individual railway company and now apply to the Transport Commission and the Railway Executive, contained the rules as to statutory supervision and rates control until 1845.

2. It was soon found that it would facilitate matters if one could avoid the necessity of repeating in each special Act a great mass of provisions relating to the taking of land, the formation and management of companies, etc. With this object, certain general Acts were passed, known as Railways Clauses Acts and Land Clauses Acts, which are only applicable if incorporated in a special Act, while the general Acts mentioned before are applicable without being so incorporated.

The most important of these Acts from our point of view was the Railways Clauses Consolidation Act, 1845, which contains a great number of important regulations relating to the construction and working of railways and the conduct of their business including certain rules as to rates.

The Act of 1845 gave a railway company power, if it chose, to use locomotives on its railway to carry passengers and goods and to make reasonable charges for its services not exceeding the charges authorised by its special Acts. These maximum charges, however, were usually so high that the companies did not attempt to go up to the maximum in fixing their rates. There is no scale of charges in the Act of 1845 and no classification of merchandise, and it was also left to the special Acts to determine for which services the maximum rate was recoverable and for which the companies were allowed to make extra charges. As a rule the maximum charge was to cover the conveyance of animals and goods, including the tolls for the use of the railway, of wagons and trucks, and for locomotive power, and for every other expense incidental to such conveyance, but it was left to the companies to demand an extra reasonable sum for the covering, loading and unloading of goods at a terminal station, for delivery and collection, and for other services incidental to the duties or business of the carrier, but not to the conveyance itself. Thus

[4] Railways (Conveyance of Mails) Act, 1838.

in the very early days a distinction was introduced between the rate for conveyance, that is, the remuneration for the haulage itself, and station and service terminals, that is, the remuneration for services performed by the company in connection with the carriage of goods, but not incidental to their conveyance. The system of the Act of 1845 and the special Acts was one of a fixed maximum conveyance rate coupled with unfixed and reasonable charges for terminal services.[5]

This second stage of the development lasted from 1845 till 1888. Down to that year a special Act for each company fixed the maximum rates which such company might charge for the carriage of almost every description of goods. As every great railway company was formed by the union of a number of smaller railways, each of which was made under a special Act which controlled the power of charging, by the year 1888 there were more than 900 of such Acts of Parliament in force, and it was often almost impossible for a trader to discover what the legal charges were. The position was somewhat alleviated by the Regulation of the Railways Act, 1873, which imposed upon railway companies the obligation to keep at each station rate books open for inspection by the public. They were also compelled to distinguish in the rate book how much of each rate represented the remuneration for the conveyance of the traffic and how much was for other expenses. Thus it became necessary to disintegrate a rate showing the particulars of services and how much money was claimed for each particular service, and traders were enabled to claim a rebate if they did not require all the services but only part of them.

3. A simplification and unification of rate making became urgently necessary. Under the Railway and Canal Traffic Act, 1888, the Board of Trade settled for each company a new classification of goods and a revised schedule of the maximum rates chargeable in respect of each class, together with the terminal charges to be made. The Orders thus made by the Board became binding upon the companies by being embodied in thirty-five Acts of Parliament, known as the Railway Rates and Charges Order Confirmation Acts, passed in the years 1891 and 1892, the general provisions of which were almost identical and which were substituted for those of the older and special Acts. They adopted a uniform classification of merchandise and fixed maximum rates for almost every kind of goods. For certain services which were not terminal charges, but yet incidental to the duty or business of a

[5] See the lucid explanation of this historical development in Leslie, *Law of Carriage by Railway*, 2nd ed., p. 315.

carrier, no regulation as to remuneration was made, except that the charge had to be reasonable, and with regard to some of these services this has remained the law to the present day and applies under public as well as under private enterprise. The system of the Act of 1888 and of the Confirmation Acts of 1891 and 1892 was much too rigid in that it did not permit any alteration of the maxima or of the classification except by Act of Parliament. On the other hand, it was much too flexible because the companies had the unrestricted power of making exceptional rates below the maximum, provided they gave no undue preference. This flexible system, however, was soon destroyed by subsequent legislation.

The traders frequently objected when a company desired to raise a charge which was below the maximum, although the increased rate was still within legal limits. A a result of this opposition the Railway and Canal Traffic Act, 1894, was passed. This Act made it incumbent upon a company to prove, if it was contested, that any increase in rates or charges made after Dec. 31, 1892, was reasonable. The former presumption, that a rate which did not exceed the legal maximum was reasonable, thus disappeared. A company could only raise a rate in force at the end of 1892 if it could prove that altered circumstances justified the proposed increase, even if it had reduced an exceptional rate experimentally and then intended to raise it to its former level. The whole system of rate making was petrified.[6]

Theoretically the charges fixed under the Act of 1888 and the Order Confirmation Acts continued in force with little material alteration till the year 1914.

4. When the First World War broke out in 1914, the Government immediately put in force their powers of controlling and taking possession of the railways conferred by the Regulation of the Forces Act, 1871, and most of the railways remained under the control of the Government throughout the War and afterwards, under the Railways Act, 1921, until Aug. 15, 1921. Until 1919 this control was exercised by the Board of Trade which since the early days had been the Government Department in charge of railway affairs, but after the passing of the Ministry of Transport Act, 1919, the newly-created Ministry of Transport took over most of the powers in relation to railways hitherto exercised by other departments. It was clear that owing to the fall in the purchasing power of money

[6] For a full explanation of this system see the judgment of Fletcher Moulton, L.J., in *North Staffordshire Colliery Association* v. *North Staffs Ry. Co.*, [1907] 2 K.B. 191, at p. 203. The decision whether or not an increase was reasonable was entrusted to the Railway and Canal Commission. See below, p. 68.

and owing to the need for avoiding wasteful competition a return to the pre-war system was out of the question and that an entirely new organisation of the railways, involving an increase in State control had to be established. This was done by the Railways Act, 1921, until 1947 much the most important Act relating to railways ever passed. In order to achieve a more efficient and economical working of the railways, nearly all existing companies were formed into four groups and the Minister of Transport was given wide powers, including the power to make new orders relating to the working of the railways and to the acquisition of land by the companies.

The new organisation involved a revolutionary change in the charging system. During a transitional period the Minister was empowered to control all rates, fares and other charges, *i.e.* to increase existing charges and to fix new ones. The charges so fixed by the Minister were 'deemed to be reasonable'. It was thus that for the first time the system of maximum charges was superseded by a system of fixed charges which formed a maximum and a minimum at the same time. The principle of fixed or 'standard' charges, freely alterable by an impartial tribunal and subject to wide but regulated powers of granting exceptional rates, became the dominant feature of the permanent regime introduced by the Railways Act, 1921.

5. In order to give effect to the new ideas embodied in the Act, it was necessary to bring about a fundamental change in the constitution of the various Courts and Tribunals entrusted by Parliament with the supervision of railway traffic and charges. Until 1873 the statutory obligations of the railway companies, such as the duty to grant reasonable facilities to the public and to refrain from undue preference, were enforced by proceedings in the ordinary courts. In 1873 a new Court, the Railway and Canal Commission, was established for this purpose.[7] It was remodelled and its jurisdiction was enlarged in 1888,[8] and it continued under the Act of 1921 and until the coming into force of the Transport Act, 1947, to exercise important functions in connection with the duties of the railway companies towards the public. The Act of 1921 deprived it, however, of its jurisdiction over rates and charges. Control over the remuneration which may be legally demanded for railway services was vested in a newly-established Court, called by the Railways Act the 'Railway Rates Tribunal', and now[9] known as

[7] Regulation of Railways Act, 1873.
[8] Railway and Canal Traffic Act, 1888.
[9] Transport Act, 1947, Sect. 72.

the 'Transport Tribunal'. Its composition is different from that of the Commission. The latter has two specially appointed members and is presided over by one of the judges of the High Court in England and of the Court of Session in Scotland. The Tribunal, however, consists of three permanent members, one of whom must be a person of experience in commercial affairs, one a person of experience in transport [10] business, and the third, who is the President, an experienced lawyer. In particular cases two additional persons may be selected—one from each of two panels—[11] to serve on the Tribunal in order to strengthen the Court in dealing with the technicalities of the case.

The decisions of the Tribunal are by a majority of the members present at the hearing of a matter, the additional members having the same voting power as the permanent members.[12] The Tribunal may sit in any part of Great Britain convenient for dealing with the particular business.[13] In certain cases or classes of cases the President may delegate the powers of the Tribunal to one or more persons selected from a special panel.[14] There is a right of appeal from the decisions of the Tribunal to the Court of Appeal on questions of law, but there is no appeal on questions of fact.[15] The Tribunal may, by its own rules, provide that it may itself review its previous decisions.[16]

[10] According to the Railways Act, 1921, Sect. 20 (4) he had to have experience 'in railway business'. This was amended by Sect. 72 (2) (a) of the Transport Act, 1947.

[11] Railways Act, 1921, Sect. 24, under which there are two panels, a 'general panel' representing users of transport facilities and labour, and a 'transport panel' representing those who provide them. Until 1947 the latter was a 'railway panel'. The law was amended by Sect. 72 (2), (c), (d), and (e) of the Transport Act, 1947. By Sect. 39 (6) of the Road and Rail Traffic Act, 1933, a special 'shipping panel' was created from which additional members are selected to sit upon the Tribunal when dealing with investigations concerning the effect of exceptional rates and agreed charges upon the competition of the railways with persons engaged in the coastwise shipping business. When exercising its functions under the London Passenger Transport Act, 1933, the Tribunal must sit with two additional members appointed in accordance with the Ninth Schedule to that Act.

[12] Railways Act, 1921, Sects. 24 (5) and 25.

[13] *Ibid.*, Sect. 23.

[14] Transport Act, 1947, Tenth Schedule, No. 6. Only the procedure under subpara. (5) can be applied to railway charges.

[15] Railways Act, 1921, Sect. 26. This is a bad case of legislation by reference. Appeals from the Transport Tribunal are regulated by reference to the law governing those from the Railway and Canal Commission which has ceased to have anything to do with transport matters.

[16] Railways Act, 1921, Sect. 22, and Transport Act, 1947, Tenth Schedule, No. 4. This is an innovation introduced by the Act of 1947, by which a type of procedure hitherto applicable to the Railway and Canal Commission has been made available to the Tribunal which has taken over

Under the Railways Act, 1921, the Tribunal obtained complete jurisdiction over the charges to be made for the carriage of passengers and goods by railway and for ancillary services, including the fixing and regular reviewing of standard charges,[17] the control of exceptional charges,[18] the power to alter the classification of merchandise by changing the class of any article or by adding in its appropriate class any article not classified. It also obtained the power of instituting new group rates or to continue, modify or cancel existing ones, of varying any tolls, of determining the amount to be allowed by way of rebate for terminal services not performed, and the reasonableness of any charges for which no authorised charge is applicable. It was entrusted with the right to determine the reasonableness of conditions as to the packing of goods especially liable to damage in transit, or liable to injure other goods. The Tribunal was also charged with the duty of deciding what articles and things may be conveyed as passengers' luggage.[19]

Subsequent legislation has greatly augmented these powers. Thus, under the Road and Rail Traffic Act, 1933, the control of agreed charges was vested in the Tribunal, and further powers over fares in the London Area were added by the London Passenger Transport Act, 1933. Important functions were added in connection with the Railway Freights Rebate Scheme established by the Local Government Act, 1929.[20]

Nevertheless, it was not until the Transport Act, 1947, came into force that the Tribunal was given complete jurisdiction in transport matters. Some of the obligations imposed upon the railway companies by early legislation, notably the equality clause of the Rail-

all the latter's functions in regard to transport. The new provision is retrospective as from the commencement of the Act of 1921. Before the Commission there were two types of proceedings for the review of its decision by the Commission itself, one applicable by reason of accidental error, subject to a time limit (Rules of Procedure, No. 69, analogous to R.S.C. Order 28, Rule 11), the other one by reason of changed circumstances (Railway and Canal Traffic Act, 1888, Sect. 18). See *per* Mackinnon, J., in *Railways (Valuation for Rating) Act, 1930,* [1936] 2 All E.R. 316. Both types can now be made applicable to the Tribunal. This shows that the principle of *res judicata* cannot be applied to administrative tribunals and to their policy making decisions in the same way in which it is applied to litigation before civil courts.

17 Railways Act, 1921, Sect. 35.

18 *Ibid.,* Sects. 36 to 39.

19 Railways Act, 1921, Sect. 28.

20 This scheme, now governed by the Eleventh Schedule to the Local Government Act, 1929, and by the Railway Freights Rebates Acts, 1936 and 1943, is now to be liquidated by virtue of the provisions of Sect. 87 of the Transport Act, 1947, and no further reference to it will be made in this book.

ways Clauses Consolation Act, 1845, continued to be enforceable in the ordinary courts, and the Railway and Canal Commission retained much of its jurisdiction in matters of transport, especially with regard to undue preference and, certain exceptions apart, to facilities. The creation of the Tribunal by the Act of 1921 had thus produced a very complex system of jurisdictions, giving rise to legal problems of great difficulty. In this respect the Transport Act, 1947, has brought about a great deal of simplification. The Tribunal has completely absorbed the statutory jurisdictions of the courts and of the Commission, and, though the latter will continue to exist, it will no longer be concerned with matters relating to the law of inland transport.[21]

The Tribunal is a court of record.[22] Within the framework of its jurisdiction it hears and determines all matters whether of law or of fact. It has all the powers of the High Court in England and of the Court of Session in Scotland as regards witnesses, documents, the enforcement of its own orders, etc. Its final orders are in England enforced as if they were orders of the High Court.[23] Thus the Tribunal can make an order for damages, *e.g.* in cases of undue preference, but it has no power to give judgment for the payment of charges due.[24] A charge approved by the Tribunal, if unpaid, can only be recovered in the ordinary courts of law. A Court is not likely to disregard the Tribunal's decision as to the reasonableness of a given charge, but whether the Court is legally bound by the decision of the Tribunal is an open question.

6. The most important effect of the Railways Act, 1921,[25] was the introduction of a new system of charges which replaced the former system of unalterable maxima. The charges fixed by the

[21] Transport Act, 1947, Sects. 74 and 75, and Eleventh Schedule which contains a complete enumeration of the statutes under which the Commission has hitherto exercised jurisdiction in matters of transport law. The Tribunal has also taken over the functions of the Appeal Tribunal established as the ultimate court in all questions concerning licences for goods vehicles under the Road and Rail Traffic Act, 1933, and the Appeal Tribunal has ceased to exist (Transport Act, 1947, Sect. 73). The Minister of Transport, however, remains the ultimate court in all questions concerning licences for passenger vehicles under the Road Traffic Acts.

[22] Railways Act, 1921, Sect. 20 (1). It seems that neither *mandamus* nor *certiorari* lies against decisions of the Tribunal, though prohibition might.

[23] Transport Act, 1947, Tenth Schedule, No. 1.

[24] See Railways Act, 1921, Fifth Schedule, 11 (3).

[25] Other important matters dealt with in the Act are outside the scope of this book. This applies, *e.g.*, to the provisions relating to wages, conditions of employment, and settlement of disputes, and to Part 5 which deals with light railways, amending the Light Railways Acts, 1896 and 1912.

Tribunal are 'standard charges', and as a matter of principle, no variation is allowed upwards or downwards from the charges so fixed. Under the Railways Act a charge lower than the standard charge is only possible in the form of an exceptional rate which the companies (now the Executive) can grant or the Tribunal can fix for particular types of traffic passing over certain routes, and not by agreement with an individual trader. An exceptional rate, once made, is available to everybody who delivers goods of a particular type to the carrier for conveyance on a particular route.

The main principle to which the Act sought to give effect was that of the 'standard revenue'. It was the duty of the Tribunal to fix the charges in such a manner that, 'with efficient and economical working and management', they would together with other sources of revenue yield to each railway company an amount equivalent to the income obtained in the 'standard year' 1913, plus certain additions. At the same time the Tribunal had to bear in mind the interest of the public in the maximum development and extension of goods and passenger traffic by railway, *i.e.* the Tribunal was not intended to allow increases in the charges which, while tending to secure the standard revenue to the companies, would have led to an appreciable contraction of traffic. In order to achieve these aims, the Tribunal had to review all railway charges once a year, and provision was made in the Act to guide the Tribunal as to the steps it ought to take if in any year the companies had earned less, or if they had earned more, than the standard revenue. So as to be able to keep all charges under control and to prevent the companies from jeopardising the standard revenue, the Minister had to be informed of all exceptional charges granted by a company, and he had the power of referring any such charges to the Tribunal for review. All this did not mean that the State guaranteed a certain income to the railway companies. What it did mean was that an effort was made to fix the amount of the charges in such a way as to enable the companies to attain a certain fixed level of revenue. The theory underlying the Act did not, however, work in practice. At no time before the outbreak of the Second World War were the companies able to earn the standard revenue, one of the reasons being the steady increase in competition on the part of road transport. The remedy envisaged by the Act of 1921 for an actual revenue falling short of standard was an increase in the charges. This remedy might have been of assistance if the companies had retained the position of monopolists which they had held in bygone days. As it was, the economic development went in a direction contrary to the expectations of those who had framed the scheme

underlying the Act, and only on one occasion [26] did the Tribunal make an attempt to help the companies by ordering a general increase of charges. The real remedy had to be found in a wide-spread application of the powers to grant exceptional rates with the result that carriage under exceptional rates soon began to prevail over the application of the standard charges. The legal principles governing the standard revenue had largely remained a dead letter.

7. We have seen that the Railways Act, 1921, was based upon the notion that railway companies were to be regarded as monopolists. The law, as laid down in the Act, hampered the railway companies in many respects and made it difficult for them to meet the new and formidable competition on the part of carriers of goods and passengers by motor vehicles, *i.e.* to offer to prospective customers terms favourable enough to compete with those offered by road carriers. The railway companies resented what they regarded as the excessive amount of publicity forced upon them by the institution of the rate book. They were also seriously affected by the impossibility of making special agreements with individual traders of great importance, by which all the goods carried for such traders could be subjected to a uniform freight, without the necessity of calculating the rate of freight on the basis of the ton-mile system of standard and exceptional charges contained in the Act of 1921. The companies wanted to be able to agree with an individual trader for a flat rate calculated on the basis of weight or tonnage or the price of the goods without regard to the classification of the individual consignments. In 1933 the Court of Appeal decided that such a flat rate agreement was illegal under the Act of 1921.[27] However, the Road and Rail Traffic Act, 1933, introduced the possibility of a flat rate to be known as an ' agreed charge '.[28] Thus, up to a point the railway companies' freedom of contract was restored so as to enable them to compete with their rivals on the roads, though even the agreed charges made under the Act of 1933 require the approval of the Transport Tribunal and must be given full publicity.

It need therefore cause little surprise that the companies were

[26] *Standard Charges—Ninth Annual Review* (1937), 26 T.C. 1. The principles discussed in the text were laid down in Sects. 58 and 59 and in a number of other provisions of the Railways Act, 1921, now repealed by the Transport Act, 1947. For a more detailed analysis and for the case law on these matters, now obsolete, reference is made to the previous edition of this book.

[27] *In re The Railways Act, 1921; In re an Application by the Great Western Ry. Co.*, [1933] 2 K.B. 391, commonly referred to as *Robinson's Case*.

[28] Sect. 37.

agitating for a thoroughgoing reform of the law, culminating in a removal of most of the restrictions on their freedom to contract and in a limitation of the publicity which the law enforced upon railway rates, but not on the freight charged for consignments carried by road. This agitation was in full swing and a report by the Transport Advisory Council [29] had just been made with a view to preparing legislation when the War broke out and, for the time being, all these problems lost their practical significance.

8. The history of the British Railways during the Second World War differed in many respects from the events which had taken place between 1914 and 1919. It is true that the Minister of Transport, this time acting under Defence Regulations,[30] again took control of the railways, but he exercised this control through a Railway Executive Committee who, acting as his agents, were empowered to give directions to the companies. This Committee consisted of the general managers of the companies themselves. The Minister also acquired [31] and used [32] the power of regulating the charges. This power was exercised mainly with a view to permitting additional charges so as to adjust the price the railway companies were entitled to demand for their services to the general fall in the purchasing power of money. The Minister availed himself of the advice of a Consultative Committee before making orders permitting such additions. The Tribunal retained its general jurisdiction over rates and fares, but its power and duty to review all charges annually was suspended.[33]

The financial position of the railway companies changed almost overnight. Road competition lost most of its vigour and, owing largely to the tremendous demand which the Government made on the railway companies' goods and passenger services, they were now, for the first time since the passing of the Railways Act, 1921, in a position to earn the standard revenue and more than that. Since it was clear that the vast and sudden increase in the revenue of the companies was the direct result of the national emergency, it was generally considered as right that the companies should not be allowed to earn the full financial benefit of the changed situation.

[29] This Council was established under Sect. 46 of the Road and Rail Traffic Act, 1933, but has now been abolished by Sect. 6 (11) of the Transport Act, 1947, its place having been taken by the Central Transport Consultative Committee set up under that Act. See above, p. 16.

[30] Defence Regulation 69, by virtue of which the Minister made the Railway Control Order, 1939, Statutory Rules and Orders, 1939, 1197.

[31] By virtue of Defence Regulation 56.

[32] See, *e.g.*, S.R. and O. 1939, 1637 and 1822. S.R. and O. 1940, 586 and 2037.

[33] See S.R. and O. 1940, 563.

A Financial Agreement [34] was concluded between the Government and the companies, and subsequently amended by the Railway Control Agreement.[35] Under the revised agreement the revenue receipts and expenses of the controlled companies were pooled. The net revenue of the pool was paid to the Government who in turn paid to the controlled undertakings a fixed sum and, in addition, one half of the surplus of the total net revenue over this sum until the total standard revenue of the controlled companies was reached. In effect this meant that the companies earned the standard revenue and that the surplus enured for the benefit of the community.

The Minister also took control of the canals [36] and requisitioned all private, *i.e.* not railway-owned wagons with the exception of certain stated categories.[37]

Under the Supplies and Services (Transitional Powers) Act, 1945, the relevant Defence Regulations were kept in force after the end of hostilities. The unified administration of the railways which had been the effect of the war emergency was thus continued under peace time conditions, and so was the power of the Minister to make Orders for increases in charges, the pooling of revenues and the requisitioning of wagons. In all these respects the arrangements made by and under the Transport Act, 1947, are, to some extent, a continuation of a system of railway law and administration which had been put into operation either at the beginning or in the course of the War.

9. The present organisation of the British transport industry and the legal aspect of the nationalisation of the railways have been described above, but a few words must here be said about the general development of the law of railway charges under the Act of 1947. The idea of the standard revenue has been definitely abandoned, and with it the annual review of charges by the Transport Tribunal and the need for reporting exceptional charges to the Minister.[38] But, apart from this, the general scheme of standard,

[34] Cmd. 6168.

[35] Statutory Rules and Orders, 1941, p. 896. In order to enable the companies to carry out these agreements the Railway Agreement (Powers) Act, 1940, was passed, and under this Act the Railway Agreement (Powers) Order, S.R. and O. 1941, 2074, was made which embodied the Railway Control Agreement.

[36] By virtue of Defence Regulation 56, as amended by the Amendment Regulations S.R. and O. 1942, No. 1279. See the Canal Control Orders, *e.g.* S.R. and O. 1942, Nos. 1372, 1658, 2053.

[37] By virtue of Defence Regulation 53. The Requisition Notice of Sept. 3, 1939, S.R. and O. 1939, 1085, was followed by numerous similar notices issued in the course of the War.

[38] Sect. 83 (3) and (4), Sect. 86 and Schedule 15, Part 1.

exceptional and agreed charges under the Acts of 1921 and 1933 remains, for the time being, much as it was before the War. In order to cope with the decrease in the purchasing power of money the war time powers of the Minister to authorise additions to the statutory charges have been renewed,[39] and, as during the War, it is only exercised after the advice of a consultative committee has been obtained which consists of the permanent members of the Transport Tribunal. Under the Act, however, this power can only be exercised by regulations which must be laid before both Houses of Parliament and are subject to annulment by either House within forty days.[40] Moreover, the Transport Commission have received additional powers of increasing exceptional rates in a simplified form, subject to the ultimate decision of the Tribunal.[41] The Tribunal and the Commission are enjoined to do nothing which in their opinion will prevent the Commission from earning a revenue sufficient to meet the charges properly chargeable to revenue taking one year with another or from giving effect to the directions of the Minister.[42] This broad and flexible principle has taken the place of the elaborate casuistry of the former law governing the standard revenue.

Nevertheless, the existing system remains much too rigid. It does not constitute a solution of the problem of rail and road charges which agitated public opinion before the War, and which is no less urgent under public than it was under private enterprise. Nor is it meant to be a permanent solution. The Act regards it as 'transitional'. It will cease to be law, and the relevant provisions of the Act of 1921 will lose their importance, with the gradual introduction of the new system of charges schemes which is discussed below.

THE STATUTORY CONTROL OF RAILWAY RATES: THE PRESENT (TRANSITIONAL) SYSTEM

All charges which the Railway Executive may make for its services are under the control of the Transport Tribunal. They are either 'standard charges' or 'exceptional charges' (both of them with or without additional charges authorised by the Minister), or 'agreed charges'. The amount of freight which a consignor or a consignee has to pay to the Railway Executive is either the standard rate fixed by the Tribunal, or an exceptional rate which may be either granted

[39] Sect. 82.
[40] Sect. 120.
[41] Sect. 83 (2).
[42] Sect. 85. This includes, *inter alia*, the matters enumerated in Sect. 93.

by the Executive (or by one of its predecessors, the former railway companies) in certain limits, or fixed by the Tribunal, or an additional charge authorised by the Minister, or an agreed charge approved or fixed by the Tribunal. 'Charge' in this connection is a comprehensive term which includes the Transport Commission's remuneration for the carriage of goods known as a 'rate', as well as that for the conveyance of passengers and their luggage, known as a 'fare'.[43]

(1) *Standard Rates*

The principle upon which charges for the carriage of goods have been estimated for many years is that a sum of money depending upon the description of the goods should be payable per ton of the weight of the consignment per mile of the distance carried, and that the rate per mile should decrease as the distance increases. In addition, charges may be made for services rendered in respect of the handling of, and dealing with, the goods at stations and sidings before departure and after arrival and for accommodation provided at stations, or, where traffic is dealt with at a private siding for services rendered or accommodation provided thereat. This principle was adhered to by the Railways Act, 1921, and, at any rate for the time being, by the Transport Act, 1947.

As there are many thousands of different kinds of goods, and as the expense of carrying different descriptions of goods varies very greatly, it seems obvious that the first step in preparing schedules of charges is to classify all goods. The present classification of merchandise was made by an Advisory Committee, appointed under the Ministry of Transport Act, 1919, under powers conferred by the Railways Act, 1921.[44] In determining the class into which any

[43] Railways Act, 1921, Sect. 57. The word 'toll' includes 'any rate or charge or other payment payable under the special Act, or fixed by the . . . Tribunal under the provisions of the Railways Act, 1921, for any passenger, animal, carriage, goods, merchandise, articles, matters or things conveyed on the railway'. Railways Clauses Consolidation Act, 1845, Sect. 3, as amended by the Railways Act, 1921, Sect. 56 and Schedule 5. This definition must be understood as a relic from the earliest days of railway transport. In the oldest Acts companies were given powers of demanding 'tolls'. A toll was originally a payment to be made by any person passing along the railway with his own vehicle for the privilege of so passing. It was thought in the early days that this would be the normal case, and though this anticipation was never realised, and it was soon found that the owner of the permanent way must invariably be the carrier, the word 'toll' was retained in the early Acts and given extended meanings, so that it was not always clear what was included. The above definition was intended to clarify this question.

[44] Sect. 29.

particular merchandise[45] should be placed, regard was had to all relevant circumstances, especially to value, to bulk in comparison to weight, to risk of damage, to cost of handling, and to the saving of cost which might result when goods were forwarded in large quantities. This classification was taken under the Act of 1921 as the initial classification.[46]

The Tribunal then settled schedules of standard charges on the basis of drafts submitted by the railway companies,[47] and after having heard interested parties. Each schedule is made according to the classification, showing rates for conveyance, terminal charges and fares for passengers. They are divided into eight parts.[48] Part 1 covers the charges in respect of the great majority of descriptions of goods and minerals, divided into a large number of classes. The other Parts relate—2 to animals, 3 to carriages, 4 to perishable merchandise by passenger train, 5 to small parcels,[49] 6 to merchandise of an exceptional character, 7 to fares and charges for passengers and their luggage and other things carried by passenger train, and 8 to any toll payable by a trader. All kinds of goods in the same class are liable to the same charges, and, in theory, every kind of merchandise is to be found in the classification in its appropriate class.

Since Jan. 1st, 1928, the day when these charges came into operation, it has not been permissible for the companies and for their successor, the Railway Executive, to make any variation from the charges either upwards or downwards[50] unless by way of an exceptional rate, or by way of an agreed charge,[51] or as an addition authorised by the Minister.[52]

Any of the standard rates is liable to be modified by way of increase or decrease at any time by the Tribunal on the application of the Transport Commission, any representative body of traders, or any person certified by the Board of Trade to be a proper person to

[45] Merchandise includes goods, minerals, livestock and animals of all descriptions. Railways Act, 1921, Sect. 57.

[46] It has been modified by the Tribunal which is also empowered to reclassify goods and other articles. The onus of proof is upon the person who asks for a reclassification. See *Woolworth a. Co.* v. *Amalgamat. Ry. Cos.* (1930), 20 Ry. & Can. T.C. 149.

[47] Railways Act, 1921, Sects. 30 and 31.

[48] Fourth Schedule.

[49] A large consignment of goods which is made up of a number of separate parcels (such as bags of sugar or coffee) cannot be treated as a number of small parcels for purposes of charges. Fifth Schedule, 17.

[50] Railways Act, 1921, Sect. 32.

[51] Under Road and Rail Traffic Act, 1933, Sect. 37.

[52] Either under Defence Regulation 69 or under the Transport Act, 1947, Sect. 82.

make such application.[53] Such application may also be made by certain local authorities, and by chambers of commerce or associations of traders similarly certified by the Board of Trade.[54]

When dealing with such applications the Tribunal must bear in mind the need for not doing anything which might prevent the Commission from discharging its general duty to secure that its revenue covers its outgoings or from giving effect to the directions of the Minister.[55] This is the only guidance given to the Tribunal by statute during the transitional period.

Printed copies of the general classification of merchandise and schedules of standard charge in force must be kept for sale by the Railway Executive at such places and at such reasonable prices as the Minister directs.[56]

The Executive must also keep for public inspection at every station at which merchandise is received for conveyance books showing the chargeable distance from such station to every place to which they book, and the charges applicable for the conveyance of each class of merchandise to such place. The books must also show all exceptional rates in operation from that station and any charges in force there for collection and delivery. The general classification and books must be open to inspection by any person free of charge at all reasonable hours.[57]

In so far as the Executive carries by land and sea at through rates, a rate book, showing the amount of the rate attributable to the sea portion of the route, must be kept at every port of dispatch.[58]

(2) *Exceptional Rates*

It is obvious that the Railway Executive must have some power of carrying merchandise at less than the standard rates, or they may entirely lose much valuable traffic. In former days one of the principal inducements to grant exceptional rates was the mutual competition of the various railway companies. What is decisive nowadays is the necessity for meeting the formidable competition by road and sea transport, and for adapting the uniform standard charges to the conditions and needs of the various localities which are served by

[53] Railways Act, 1921, Sect. 35 which must be read in the light of Transport Act, 1947, Sect. 86.
[54] Railways Act, 1921, Sect. 78.
[55] Transport Act, 1947, Sect. 85.
[56] Railways Act, 1921, Sect. 54 (2). For an application and interpretation of this provision, see *Amalgamated Ry. Cos.* v. *London Chamber of Commerce* (1930), 20 Ry. & Can. T.C. 157.
[57] Railways Act, 1921, Sect. 54 (3).
[58] *Ibid.*, Sect. 54 (5).

the railways. There are many cases too, in which it is right and proper towards the trader and advantageous to the Executive to give the trader reduced terms; for example, when he supplies goods in full train loads or in full truck loads, or packed in such a manner as substantially to facilitate handling.

A rate, lower than the standard rate, is known as an exceptional rate, but it should be observed that it always bears a definite proportion to the corresponding standard rate, and that it applies to all the traffic of a particular class passing along a particular route. It is, therefore, available to every trader who delivers goods of this class to be carried along this route.

The Railways Act, 1921, provides for three kinds of exceptional rates: old exceptional rates existing before the appointed day[59] which the companies were allowed to continue, new exceptional rates granted by the carrier, and new exceptional rates fixed by the Tribunal.

(a) *Old continued exceptional rates.* As from the appointed day, all exceptional rates previously in operation ceased[60] except such rates not less than 5 per cent below the corresponding standard rate as were continued by agreement in writing between the company and the trader concerned, or, failing agreement, were notified in writing to the secretary of the railway company by the trader with the request to refer them to the Tribunal for determination. It was for the company to prove to the Tribunal that such rates should be altered or discontinued and for the Tribunal to decide whether it wished to disintegrate the rate into its component parts at once or upon special application.[61] If the exceptional rate was more than 40 per cent below the standard rate the matter had to be referred to the Tribunal even if the company and the trader came to an agreement.[62]

(b) *Granted exceptional rates.* The Executive may grant[63] to traders new exceptional rates without the concurrence of the

[59] Jan. 1, 1928.
[60] Sect. 36.
[61] *Railways Act: Disintegration of Continued Exceptional Rates* (1928), 20 Ry. & Can. T.C. 1. For disintegration in general, see below, p. 85.
[62] For further details, see Sect. 36.
[63] To grant an exceptional rate means to put it into operation, and it is put into operation by being inserted in the rate book. See Romer, L.J., delivering the judgment of the Court of Appeal in *Great Western Ry. Co.* v. *James and Hodder* (1936), 24 T.C. 241, at pp. 244–246. Therefore, if the Tribunal gives its consent to a rate more than 40 per cent below standard that rate does not come into operation before it has been inserted into the rate book. This is one of the differences between an exceptional rate approved by the Tribunal under Sect. 37 (1) and an exceptional rate fixed by the Tribunal under Sect. 37 (3).

Tribunal; but such rates must not be more than 40 per cent below the standard rate chargeable, unless the consent of the Tribunal be obtained.[64]

An exceptional rate granted by a railway company before the nationalisation of the railways or by the Executive after Jan. 1, 1948, may be increased or cancelled by the Executive, provided thirty days' notice be given. But if any interested trader objects, the matter must be referred to the Tribunal, and then the increase or cancellation does not take effect, unless and until the Tribunal, after hearing the Executive, so determines.[65] These principles are subject to three exceptions: (i) If in the opinion of the Transport Commission an exceptional rate in force on Jan. 1, 1948, is unduly low by reason of road, canal or coastal shipping competition, it may increase the rate up to 60 per cent of the standard rate without giving the thirty days' notice, and, although an aggrieved trader may appeal against this to the Tribunal, the increase of the rate takes effect immediately on having been ordered by the Commission. The Tribunal may order the lower rate to be restored from a date to be determined by the Tribunal, but until that date the increased rate remains in operation. Moreover, the Tribunal can restore the lower rate only on the ground that the increase was not justified in view of the competitive character of the lower rate.[66] (ii) No trader is entitled to object to an increase where the rate has been reduced since Jan. 1, 1928, unless such increase would raise the rate above what it was before the reduction.[67] (iii) No trader is entitled to object to the cancellation of an exceptional rate granted since Jan. 1928 and not fixed by the Tribunal, unless the effect of the cancellation would be to make the rate higher than it was when the exceptional rate was granted.[68]

The Executive may reduce an exceptional rate granted by itself

[64] Sect. 37, as amended by Sect. 40 of the Road and Rail Traffic Act, 1933, and by the Schedule to that Act, and by Sect. 83 (3) (a) of the Transport Act, 1947. The effect of the Act of 1933 is to enable the Executive to grant an exceptional rate less than 5 per cent below standard without obtaining the consent of the Tribunal. The Act of 1947 abolished, as far as the Transport Commission is concerned, the duty to report the granting of exceptional rates to the Minister and the power of the Minister to refer such matters to the Tribunal.

[65] Sect. 38 (3), as amended by Sect. 40 of the Road and Rail Traffic Act, 1933, and the Schedule to the Act, and Sect. 38 (4).

[66] Transport Act, 1947, Sect. 83 (2).

[67] Railways Act, 1921, Sect. 38 (3) proviso.

[68] Railways Act, Sect. 38 (4) proviso. These provisions enable the Executive to reduce exceptional rates experimentally, freed from such a disadvantage as they were under in consequence of the construction placed upon Sect. 1 (1) of the Railway and Canal Traffic Act, 1894, in the *North Staffordshire Colliery Owners Case*, above p. 67.

or by its predecessors, the companies, provided it is not reduced so as to be more than 40 per cent below the standard rate, in which case the consent of the Tribunal must be obtained.[69] An exceptional rate thus granted may also be cancelled or varied at any time by the Tribunal upon application by a trader or representative body of traders interested in the rate or upon application by the Executive.[70] If it has not been applied for two years it may always be cancelled by the Executive.[71] The only ground on which the Tribunal will refuse its consent to a rate more than 40 per cent below the standard will be the fiscal effect of the new rate on the revenue of the Transport Commission. The public interest enters into the matter only in so far as it is concerned with the development of the railway service itself and with the ability of the Commission to discharge its statutory duties. Objections based on the detrimental effect which the new rate may have on the interests of the traders competing with those favoured by the exceptional rate will not be taken into account by the Tribunal.[72]

When the Tribunal gives its consent to an exceptional rate more than 40 per cent below the standard it does not sanction a minimum, but the particular percentage of the standard rate to which it gives its approval. In other words, in such a case the Executive is not free to grant an exceptional rate higher than the one to which the Tribunal has given its consent. If the Tribunal sanctions a rate 60 per cent below the standard, the granting of a rate 50 per cent below the standard is invalid.[73]

[69] The duty to report such reductions to the Minister has been abolished as far as the Transport Commission is concerned. Transport Act, 1947, Sect. 83 (3) (b).

[70] Railways Act, Sect. 38 (6).

[71] Railways Act, 1921, Sect. 38 (7).

[72] Sect. 38 (2), as interpreted in *Great Western Railway Co. and Others* v. *Corporation of Bristol and Others* (1928), 20 Ry. & Can. T.C. 22, and, in particular, the decision of the Court of Appeal in *G.W.R. Co.* v. *Chamber of Shipping of the United Kingdom* (1937), 25 T.C. 223; [1937] 2 K.B. 30. This important principle, which must now be read in the light of Sect. 85 of the Transport Act, 1947, also applies to applications under Sect. 37 (2) of the Railways Act, 1921; see *L.N.E. Ry. Co.* v. *Northern Brick Federation* (1939), 27 T.C. 145. It would seem that it also applies to the fixing of exceptional rates under Sect. 37 (3) of the Act of 1921 and to the approval of agreed charges under the Act of 1933. The expression 'trader' in Sect. 37 (5), (6) and (7) of the 1933 Act would not seem to include a rival carrier. This construction is in accordance with Sect. 39 of the Act, and much in the line or reasoning contained in the judgment of Lord Wright, M.R., and Romer, L.J., in the *Chamber of Shipping Case* seems to be applicable to fixed exceptional rates and to agreed charges as well as to granted exceptional rates, sanctioned by the Tribunal.

[73] *G.W. Rly.* v. *James and Hodder* (1935), 23 T.C. 93, and (1936), 24 T.C. 241.

(c) *Fixed exceptional rates.* The Tribunal may at any time fix an exceptional rate upon application by a trader,[74] but it will not do so merely on the ground 'that without a reduction of rate a trader cannot carry on a particular branch of his business'. 'The reasonableness of a rate is not to be tried by its effect upon the trade of the persons who have to pay it'.[75] An exceptional rate fixed by the Tribunal will not, as a rule, be able to be raised or cancelled by the Executive. This, however, is subject to the important exception that competitive exceptional rates fixed by the Tribunal and in operation on Jan. 1, 1948, may be increased up to 60 per cent of standard by the Executive itself, subject to an appeal by aggrieved traders to the Tribunal.[76] Otherwise an exceptional rate fixed by the Tribunal can only be cancelled or increased by the Tribunal unless it has ceased to operate for more than two years. In all other respects it is subject to the same rules as a granted exceptional rate,[77] and it may in particular be reduced by the Executive, as long as it remains less than 40 per cent below the standard rate.

Where there is competition with the railways by inland waterways, it is clear that rates might be lowered so as to injure or destroy canal services, to the detriment of the public. Where complaint is made to the Minister of such detrimental rates by persons who, in the opinion of the Board of Trade, are proper representatives of the canal interests affected, the Minister has the power to refer the matter to the Tribunal, who, after hearing the parties, have the power to vary or cancel the rates complained of.[78]

Even more extensive protection against competition by the railways is given to persons engaged in the coastwise shipping business ('coastal carriers'). Where exceptional rates or agreed charges are made in competition with coastal carriers, a body which, in the

[74] In *James Dole and Co.* v. *The Four Amalgamated Ry. Cos.* (1937), 25 T.C. 87, at p. 96, the President of the Tribunal explained the principles governing the fixing of exceptional rates under Sect. 37 (3). The Tribunal is not prepared to impose an exceptional rate on the ground that diversion of traffic to the roads is threatened, nor is it prepared to give a preference by way of lower charges to traders sending large consignments or tonnages, thus putting the small trader at a disadvantage. The Tribunal will bear in mind the necessity for avoiding undue preferences and violations of the equality clause of the Act of 1845.

[75] *Pirelli* v. *Four Amalgamated Ry. Cos.* (1944), 28 T.C. 98, at p. 103, and cases quoted there.

[76] Transport Act, 1947, Sect. 82 (2).

[77] Railways Act, 1921, Sect. 38 (1).

[78] Railways Act, 1921, Sect. 39, as amended by Road and Rail Traffic Act, 1933, Sect. 39 (8). It must be remembered that, while the canals themselves belong to the Transport Commission, the 'canal carrier undertakings' remain private, although they are subject to licensing and other regulations.

opinion of the Board of Trade, is properly representative of the coastwise shipping business, may apply to the Tribunal on the ground that coastal carriers are placed at an undue or unfair disadvantage, or that the railway rates are inadequate in view of the cost of the services. The Tribunal, which sits with an additional member taken from a 'shipping panel' constituted for this purpose, then enters upon a complete investigation of the railway rates concerned. If it comes to the conclusion that the complaint is justified and that the action of the Railway Executive is by reason of its prejudicial effect upon the coastwise shipping business undesirable in the national interest, it may modify or cancel the exceptional rates or agreed charges complained of.[79]

Canal interests and coastal carriers are thus protected against the effect of exceptional rates and agreed charges after they have come into operation. But they are not permitted to object in advance to the sanctioning by the Tribunal of an exceptional rate more than 40 per cent below the standard on the ground that so low a railway rate would divert traffic from canal or coastwise shipping to the railways. 'Unless the shoe has been found pinching by being worn, no representation shall be heard to say that there is anything the matter with its design'.[80]

It can be expected that these matters will in future lose some of the practical importance they have had in the past. Conflicts of interest between the Transport Commission and canal carrier undertakings may find their solution by the exercise of the licensing and regulating power conferred upon the Commission by the Transport Act.[81] The Act also expressly enables the Commission to enter into and carry out agreements with coastal carriers for co-ordinating their activities with those of the Commission, and in particular, for facilitating the through carriage of goods, for the quoting of through rates, and for the pooling of receipts or expenses. The Minister will establish a Coastal Shipping Advisory Committee in order to consider and report to the Minister on matters affecting the interests of the Commission and of coastal carriers. The Commission will have to give effect to any directions given by the Minister with the object of securing that efficient coastal shipping services are maintained to the extent which he considers is required in the national interest, provided that these directions must be based upon a report made by the Advisory Committee. The application

[79] Road and Rail Traffic Act, 1933, Sect. 39, as amended by Transport Act, 1947, Sect. 83 (5).

[80] *Per* Scott, L.J., in *G.W.R. Co. v. Chamber of Shipping of U.K.* (1937), 25 T.C. 223, at p. 228.

[81] Sect. 35.

of these provisions may prevent those conflicts of interests which it is the intention of the earlier legislation to cure.[82]

(3) *Additional Charges*

It must be remembered that the charging system we are considering has a transitional character. Broadly speaking, it is the system inaugurated by the Railways Act, 1921, as modified by War legislation. The Transport Act, 1947, continues these provisions, including the threefold structure of standard charges, exceptional charges and agreed charges until the time when charges schemes will have been prepared and come into force in accordance with the provisions to be discussed below. The rigidities from which the law of railway freights has suffered in the past will then disappear, but during the transitional period care had to be taken to preserve those advantages which the greater flexibility of the war time provisions had involved. One of the most important of these provisions was, that, by virtue of Defence Regulation 56, the Minister was in a position to adapt the level of railway charges to the changing purchasing power of money without being compelled to resort to proceedings before the Tribunal. This power has been continued by the Transport Act.[83] The Minister may at any time, if he thinks it expedient so to do with a view to ensuring a sufficient revenue to the Commission, authorise it to make charges additional to those in operation under any statutory provision. This clearly refers to percentage additions to standard and exceptional charges, but would not seem to refer to agreed charges. The power must be exercised by regulations which, as pointed out above, are subject to parliamentary control. The services or facilities to which the charges, subject to the authorisation, refer, must be specified in the regulation. The Transport Tribunal as such is not concerned with this matter at all, but its permanent members are constituted as a consultative committee whose advice the Minister must consider before he makes the regulations. All this is intended as a temporary measure. The power of the Minister does not extend to any services or facilities in respect to which a charges scheme is in force. As the statutory system of standard and exceptional rates is gradually superseded by the new system of charges schemes, the power of the Minister to authorise additional charges by virtue of this provision will lose its practical importance.

(4) *Disintegration of Rates*

In order to find out what amount of freight or other remunera-

[82] Transport Act, 1947, Sects. 70, 71. [83] Sect. 82.

tion is payable to the Railway Executive in a given case, it is not enough to know the sum chargeable as a standard rate or as an exceptional rate. It must also be ascertained what services are covered by these charges, for it may be either that the trader does not intend to make use of all the services offered by the Executive for the charge, and then he must know what rebate from the rate he can claim on this account, or else, it may be that he requires additional services, and then it must be clear whether he can be asked to pay an additional sum for these, and how that sum is fixed. The law must, in the case of each rate, afford a machinery, by which the rate can be apportioned to particular services. This process of allocating specified proportions of the rate to specified services is known as disintegration.

All the services rendered to a trader by the Railway Executive,[84] in the ordinary course of the business of carrying goods, may be considered under three heads: (1) the actual conveyance of the goods, including haulage, the use of the line with all the necessary signalling, etc., and generally the use of wagons or trucks;[85] (2) other services incidental to the business of the Executive as carriers, such as loading and unloading, covering and uncovering the goods, including the provision of labour, machinery, plant, stores and sheets used in their performance;[86] (3) the use of the accommodation provided and duties undertaken by the Executive at terminal stations, including services in respect of traffic thereat, such as sorting, checking, weighing, etc., and a considerable amount of clerical work.[87]

A station to station rate determined by the Tribunal shows these three elements, known as (1) the standard rate for conveyance, (2) the standard service terminals, and (3) the standard station terminal. The Tribunal, when fixing a standard rate, splits it up at once into its three constituent elements, so that any charge so fixed can be readily disintegrated,[88] so as to show how much of the charge is for conveyance and how much is for other services. If a trader has not required all the services covered by the standard rate, it is easy to find out to what rebate from the full rate he is entitled in respect of the services he has not received. Thus, where a trader's goods

[84] See above, p. 66.
[85] Fifth Schedule, 12.
[86] Fifth Schedule, 14.
[87] Fifth Schedule, 13; and see for an explanation of all that is included in the so-called 'station terminal', *Hall* v. *London, Brighton and South Coast Ry. Co.* (1885), 15 Q.B.D. 505; and see, in particular, Wills, J., at pp.536–537.
[88] Sect. 30, and Fourth Schedule.

are carried in a separate truck and the truck is loaded or unloaded elsewhere than in a shed or building of the Executive, the Executive may not charge a service terminal for any such services. The trader can in such a case even claim a rebate if he has requested the Executive to allow him to perform the service himself, and the Executive has unreasonably refused to allow him to do so.[89]

The rate for conveyance of goods is calculated per ton per mile, while the service terminals and station terminal, though varying with the class and weight of the goods, are naturally not affected by the distance the goods are carried. But even the rate for conveyance does not always reflect the exact mileage. Thus, quarters of a mile may be charged for, and a fraction less than a quarter of a mile may be reckoned as a quarter of a mile,[90] and, to meet the case of very short journeys or very small consignments, the Tribunal may allow the Executive to charge as for a minimum distance or a minimum sum.[91] The minimum distance must never vary according to whether charges for station terminals are or are not made, for this would deprive a trader who does not make use of the station of the full benefit of his rebate, and, on the same ground, the Executive must never, in calculating distance, include any portion of the railway which is the subject of a charge for a station terminal.[92]

For the purpose of fixing charges for conveyance, a number of places in the same district may be grouped together, and these places may be treated as if they were all the same distance from any point of destination or departure of goods, although in fact they are situated at various distances from that point. Such distances must not be unreasonable, and the group rates charged and the places grouped together must not be such as to constitute any undue preference.[93] A group rate cannot be ordered as a facility. On the other hand, it does not in itself constitute an undue preference, though it is bound to give an advantage to one trader over another,[94] but, in a given case, it may amount to undue preference. In such a case, as in other cases of undue preference, it is for the Tribunal to make an order for the abatement of the preference. The Railways Act provides that the Tribunal may continue or

[89] Fifth Schedule, 3 (2).
[90] Fifth Schedule, 16.
[91] Sect. 48. The Tribunal has fixed the minimum distance of six miles.
[92] Fifth Schedule, 1.
[93] Ry. & Can. T.A., 1888, Sect. 29.
[94] See *John Good & Sons, Ltd.* v. *L. & N.E. Ry. Co.* (1927), 19 Ry. & Can. T.C. 191, where the essence of a group rate is fully explained by the President of the Tribunal at pp. 200–201.

modify existing group rates, and also cancel such rates or institute new ones.[95]

The weight upon which standard charges are calculated is subject to special provisions.[96] Thus, in cases of consignments over three hundredweights a fraction of a quarter of a hundredweight may be charged for a quarter,[97] and, where the Executive receives or delivers a quantity of goods less than a truckload in one truck at a private siding or in circumstances requiring such goods to be carried in one truck, it may charge as for a reasonable minimum truckload.[98]

The standard station to station rate does not cover all the services which the Executive may provide within the scope of its undertaking. For services outside the standard rate no rates are fixed, and the only rule contained in the Act is that the Executive may charge for them a reasonable sum, to be determined, in case of dispute, by the Tribunal.[99] Such services include the weighing of goods and the use of coal drops, the warehousing of goods before and after conveyance, and accommodation supplied to goods consigned to an address other than a station on a railway, which are not removed within a reasonable time after written notice of arrival has been given at the address.[100]

The Executive may charge for such services only when they are rendered to a trader at his request or for his convenience, and, if a trader gives notice in writing before any service is rendered that he

[95] Sect. 28 (1) (c). Does this mean that the Executive must always apply to the Tribunal in order to make a group rate? Has Sect. 28 (1) (c) of the Act of 1921 implicitly abrogated Sect. 29 (3) of the Act of 1888 which gave the companies the power, but did not put them under a duty, to apply to the Commission—now the Tribunal—before making a group rate in order to make sure beforehand that a contemplated group rate would not create an undue preference? For a discussion of this question, see Porter, J., in *G.W. Ry. Co.* v. *James and Hodder* (1935), 23 T.C. 93, at p. 105.

[96] Charges are calculated, as a rule, on the gross weight of a consignment, unless otherwise agreed; but the Tribunal may specify articles on which the charges are calculated on cubic capacity: Fifth Schedule, 2. Fuel that loses weight during transit through drainage, evaporation or any cause beyond the carrier's control is (unless otherwise agreed in writing) charged on the weight of the contents of the truck when received by the Executive. Standard Terms and Conditions F (12).

[97] Fifth Schedule, 15.

[98] Fifth Schedule, 18.

[99] Fifth Schedule, 11.

[100] The end of transit, as discussed below, p. 190, does not coincide with the moment from which warehousing charges may be made. See Fifth Schedule, 11 (4). The criterion in the case of the charges is still the old common law criterion of 'reasonable time' which has been abandoned under Standard Terms and Conditions with regard to the question of liability.

does not require it, the service is not to be deemed to have been rendered at the trader's request or for his convenience.[101] The giving of such notice, however, will not relieve the trader of liability to pay for services or accommodation which by his own action the Executive has been compelled to provide for him, and a request may be implied from the trader's own conduct.[102]

Special rules are made for collection and delivery of goods by the Executive outside railway stations. These rules have nothing to do with road services carried on by the Transport Commission which do not directly serve the purpose of collecting and delivering goods carried or to be carried by railway. As regards collection and delivery, it is necessary to distinguish between collection and delivery by road to and from a station where the Executive has held itself out to collect and deliver that particular description of goods, and other collection and delivery services. Where the Executive holds itself out to collect and deliver any description of goods by road, it is bound to do so on request by any person ready to pay the proper charges. But the Executive may refuse to deliver to any person who is unwilling to agree for the delivery to him of the whole of his traffic or the whole of his perishable traffic. The charges for these services must be reasonable, and they must be published in the rate book. The Executive is never under any duty to deliver to a person who has not entered into the agreement just mentioned, but if he fails to take delivery within a reasonable time the Executive may deliver the goods and may recover a reasonable charge for so doing.[103] For collection and delivery services otherwise than by road, or from stations where the Executive has not held itself out as prepared to undertake these duties, no charge is entered in the rate book, and the general rule applies that a reasonable remuneration may be received by the Executive for this service, if it was done at the request or for the convenience of a trader.[104]

The standard rate for conveyance generally includes the use of wagons and trucks.[105] On Sept. 3, 1939, all privately owned wagons were requisitioned by the Government, and since Jan. 1, 1948, they have vested in the Railway Executive. The use of privately owned wagons on the railways of the Commission is forbidden,[106] and, consequently, whatever may have been the law before 1939, the

[101] Fifth Schedule, 11.
[102] *L. & N.W. Ry. Co.* v. *Duerden* (1916), 85 L.J.K.B. 885; and see also *Midland Ry. Co.* v. *Myers, Rose & Co., Ltd.*, [1909] A.C. 13.
[103] Sect. 49.
[104] Fifth Schedule, 11 (2).
[105] Fifth Schedule, 12.
[106] Transport Act, 1947, Sect. 33 (1).

Executive is not now under any duty to haul privately owned wagons. The railway companies have always been, and the Executive is now, bound to supply sufficient wagons to deal expeditiously with the traffic offered. The Transport Act, 1947,[107] provides expressly that the Commission must afford the use of suitable railway wagons to any class of traders whose property in wagons has vested in the Commission under the Act, and that this can be ordered as a 'reasonable facility'. The provision of the wagons will normally be covered by the rate for conveyance, but, where this is not the case, the Executive may make an extra charge for providing them.[108] An extra demurrage charge may be made where wagons are detained or any accommodation is occupied, before or after carriage, for longer than the time reasonably necessary for dealing with the traffic.[109]

Certain types of privately owned wagons will continue to be in use, among them some special categories exempted from nationalisation, such as tank wagons, wagons specially set apart for a number of specific traffics, *i.e.* for the conveyance of cement, lime, salt, and other enumerated deleterious substances, and others.[110] Other categories may be excluded from nationalisation by the Minister or temporarily admitted by the Commission in special cases.[111] In so far as, in accordance with these provisions, traders are still allowed to use non-railway owned trucks, the law in force before nationalisation will presumably continue to apply. Traders will be able to claim a reasonable rebate if they use their own wagons, and the supply of wagons is included in the rate for conveyance.[112] The Executive must give facilities for hauling such wagons, return them when empty, free of charge, and pay demurrage if they are detained beyond a reasonable time.[113]

In connection with private sidings, it is necessary to distinguish between two kinds of charges. In many cases private sidings and other accommodation have been constructed or provided by agreement with traders. The Executive is at liberty to charge such rent for this accommodation as may be agreed in writing, or in default of agreement, determined by the Tribunal.[114] If the amount of siding rent which can be charged is in dispute, the Executive cannot

[107] Sect. 33 (2).
[108] Railways Act, 1921, Fifth Schedule, 6 (1).
[109] Railways Act, 1921, Fifth Schedule, 11.
[110] Transport Act, 1947, Sect. 33 (1) proviso (a), and Seventh Schedule.
[111] *Ibid.*, provisos (b) and (c).
[112] Railways Act, 1921, Fifth Schedule, 6 (2).
[113] *Ibid.*, Fifth Schedule, 7 and 3 (1).
[114] Railways Act, 1921, Fifth Schedule, 4.

bring an action in the Courts for the rent, unless it has previously obtained a decision of the Tribunal as to the amount.[115] The other type of charges is for services at private sidings and wharves.[116] These may, in a given case, be included in the standard station terminal,[117] in which case the Tribunal cannot be asked to fix an extra charge for these services, but, if no other charge is provided, the Tribunal will fix a reasonable charge.

An exceptional rate is a miniature standard rate and should show, as a rule, the constituent elements in the same proportion as the corresponding standard rate. This principle is sometimes referred to as the Pidcock principle, because it was laid down in the important decision of *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Pidcock.*[118]

Under the Railways Act the Tribunal, when fixing an exceptional rate or sanctioning an exceptional rate more than 40 per cent below the standard may disintegrate the rate at once so as to show the terminal charges.[119] Where a station to station exceptional rate is granted by the Executive without reference to the Tribunal, and the Executive does not show in its quotation how the rate is built up, the rate is deemed to be composed of conveyance rate and terminal charges in accordance with the Pidcock principle in proportion to the amounts shown in the corresponding standard rate for the same service and accommodation.[120]

In the case of any exceptional rate which is not a station to station rate the Executive must, within fourteen days after application in writing by any person interested in the disintegration of the rate, afford that person information of the amounts included in the rate for the various services rendered. Any dispute as to the dis-

[115] See Branson, J., in *G.W. Ry. Co.* v. *Boon* (1928), 20 R. & Can. T.C. 63.

[116] *Ibid.*, Fifth Schedule, 11 (1).

[117] As in *Nestle and Anglo-Swiss Condensed Milk Co.* v. *L.M.S. Ry. Co.* (1934), 22 T.C. 61.

[118] 9 Ry. & Can. T.C. 45; for a more recent statement of the principle, see Sankey, J., in *Prentice Bros., Ltd.* v. *L. & N.E. Ry. Co.* (1925), 18 Ry. & Can. T.C. 177.

[119] In the case of old continued exceptional rates brought before the Tribunal under Sect. 36, the Tribunal also disintegrates the rate, though it may postpone the performance of this duty at its discretion until some party interested in the rate applies for its disintegration: *Railways Act: Disintegration of Continued Exceptional Rates* (1928), 20 Ry. & Can. T.C. 1.

[120] If traffic has been reclassified the disintegration is to be made by reference to the standard rate to which the exceptional rate is for the time being exceptional, not by reference to the standard rate out of which the exceptional rate was originally carved: *Nestle and Anglo-Swiss Condensed Milk Co.* v. *L.M.S. Ry. Co.* (1934), 22 T.C. 61.

integration of an exceptional rate will be determined by the Tribunal.[121]

(5) *Agreed Charges*

The essence of an agreed charge under the Road and Rail Traffic Act, 1933,[122] is that it is a flat rate. It is available only to the trader who has agreed upon it with the Executive, and it does not, as an exceptional rate does, refer to a particular type of traffic over a particular route. It may be calculated by gross weight or tonnage of the whole of a trader's traffic [123] or in proportion to the purchase price of all the goods delivered by the trader for carriage.[124]

Though an agreement is necessary for an agreed charge, it is not sufficient. In order to be valid, every agreed charge must be approved by the Tribunal.[125] The Tribunal is enjoined by the Act of 1933 not to give its consent to any agreed charge, if it is of the opinion that the object to be attained by the making of the charge could have been adequately secured by the grant of an appropriate exceptional rate. This shows that the law regards the agreed charge as something out of the ordinary, to be used only where it is unavoidably necessary for the protection of the Railway Executive against diversion of traffic.

Within seven days after an agreement has been made between a trader and the Executive for an agreed charge, particulars must be lodged with the Tribunal, and notice of the application to the Tribunal must be published in a way directed by the Tribunal. For, though the agreed charge itself does not require the same publicity which is necessary in the cases of standard and exceptional rates, the public must be given an opportunity of intervening in the proceedings for the approval of the charge by the Tribunal. The main object of this publicity is the protection of traders competing with the trader who has made the agreed charge with the Executive.

It is expressly said in the Road and Rail Traffic Act [126] that an

[121] Sect. 40. In the case of additional charges authorised by the Minister under Sect. 82 of the Transport Act, 1947, the services and facilities for which the additional charges can be claimed are to be specified in the regulations.

[122] Sect. 37.

[123] As in *Chiswick Products Agreed Charge* (1934), 22 T.C. 53.

[124] As in *Woolworth's Agreed Charge* (1934), 22 T.C. 90, where Messrs. Woolworth agreed to pay to the railway companies by way of remuneration for the carriage of their goods 4·25 per cent of the sum total of the purchase-price of all the goods carried during the particular year.

[125] Road and Rail Traffic Act, 1933, Sect. 37 (1), proviso.

[126] Sect. 37 (9).

agreed charge cannot be complained of as an undue preference or undue discrimination, nor can it be regarded as an inequality forbidden by the Railway Clauses Act, 1845.[127] The protection of rival traders is given in a different manner. It is, in fact, threefold :—

(a) A trader who considers that his business will be detrimentally affected if the agreed charge is approved may oppose the approval of the charge, and this opposition may be brought before the Tribunal through a representative body of traders.

(b) Instead of opposing the approval of the charge, a rival trader may apply to the Tribunal for the fixing of a similar charge for the carriage of his own merchandise.

(c) At any time after the expiration of one year from the approval of an agreed charge a trader who considers that his business has been detrimentally affected may apply to the Tribunal for the withdrawal of the approval or for modification of the charge.[128]

When approached for the approval of an agreed charge, the Tribunal has to consider the effect of the agreed charge upon the net revenue of the Commission and upon its ability to discharge its statutory duties, and also upon the business of rival traders. The Tribunal is not faced with the alternative of either approving or refusing to approve. It may express its willingness to approve the charge in a modified form, and it may also restrict its approval as regards time, *i.e.* sanction the charge for a limited period.

Unlike an exceptional rate, an agreed charge need not be published in the rate book,[129] but it must be recorded and laid open to inspection in the manner directed by the Tribunal.[130]

[127] See below, p. 108.

[128] See Road and Rail Traffic Act, 1933, Sect. 37 (5), (6) and (7), and for the 'representative body of traders', see Sect. 38.

[129] Road and Rail Traffic Act, 1933, Sect. 37 (11).

[130] The Tribunal has laid down the principles which it applies when approached for the approval of agreed charges in the two cases, *Chiswick Products Agreed Charge* and *Woolworth Agreed Charge*, quoted above, p. 92. These cases, together with the decision in *Robinson's Case*, [1933] 2 K.B. 391, illustrate the commercial situation which gave rise to the legislation introducing the power of making flat rates by agreement. It would appear from a remark in *James Dole & Co.* v. *The Four Amalgamated Ry. Cos.* (1937), 25 T.C. 87, at p. 89, that the Tribunal, before the coming into force of the Act of 1933, gave their consent to flat rate agreements of the type subsequently held to be illegal in *Robinson's Case*.—The provisions about reporting charges to the Minister, and the Minister's power to refer them to the Tribunal have been abolished. Transport Act, 1947, Sect. 83 (4), and Schedule 15. Individual charges may still be reviewed by the Tribunal on applica-

THE STATUTORY CONTROL OF RAILWAY RATES: THE SYSTEM OF CHARGES SCHEMES

The existing statutory system governing railway charges is destined to be superseded, within the next few years, by charges schemes which the Transport Commission is under a duty to prepare and to submit to the Tribunal for confirmation. The great issues of economic policy in regard to transport which were debated before the outbreak of the War still await to be settled. Among them is the problem of making the method of calculating railway charges more flexible. On the other hand, the question as to whether the charges for the carriage of goods by road should be subject to statutory regulation has not yet been answered. The interrelation between rail and road transport remains a matter of major economic significance under public as well as under private enterprise. The Transport Act, 1947, has not made an attempt to solve these problems by what might have been the premature enactment of fixed rules. All the Act does is to provide the procedure by which a new regime can be introduced. The framework laid down in the Act is so elastic that, without any further Act of Parliament, most, if not all, of the relevant legislation can be repealed by administrative action and be supplanted by new provisions of the utmost flexibility.

The main objects, then, which the provisions of the Transport Act, 1947,[181] now under discussion, seek to attain are twofold. They can be summarised in the two words: elasticity and comprehensiveness. In future all services and facilities provided by the Transport Commission for the carriage of goods and passengers by rail, road, and inland waterway within Great Britain, all port facilities, and facilities for traffic by inland waterway, and for the storage of goods in Great Britain, must be covered by charges schemes which it is the duty of the Commission to prepare. Other services, *e.g.* hotels, may also, but need not be included. The terms and conditions other than charges, under which the Commission supply their services, such as those referring to liability for the safety of goods and passengers may, but need not be, covered by charges schemes. The first scheme or series of schemes covering charges for all the

tion (1933 Act, Sect. 37 (12)).—The subject of Through Rates, discussed in the previous edition of this book has been omitted, because it has lost most of its practical importance. It should however be mentioned that, while Sect. 75 of the Railways Act, 1921, has been repealed by the Transport Act, 1947, Schedule 15, Sect. 47 of the Act of 1921 is still nominally in force.

[181] Sects. 76 to 81.

services which must be included are to be submitted before Aug. 7, 1949, unless this period is extended by the Minister.[132]

The schemes take effect if and when they are confirmed and in the form in which they are confirmed by the Transport Tribunal. Once a scheme is in operation, it overrides 'any statutory provision relating to the subject matter of the scheme'.[133] In view of the almost unlimited possibilities of creating different types of charges by the schemes and of authorising differential treatment of various classes of goods and categories of customers, the whole body of legislation on charges, discussed in the previous pages, but also the law of undue preference still to be discussed will perhaps soon be a matter of legal history.

There is nothing final about the regulation of charges in any scheme which has been put into operation. One of the lessons we have learnt from the experience made with the Railways Act, 1921, is that it is wrong to allow a momentary economic situation to be reflected in an Act of Parliament which will fail to achieve its purpose as soon as the economic facts undergo a transformation. The Transport Act, 1947, recognises this. The law of transport charges must be elastic not only in the sense that a large number of different types of charges may have to be applied at the same time, but it must also be dynamic rather than static in the sense that an adaptation even of the most fundamental principles of transport law to new economic situations must be facilitated. Hence the rule that the Transport Commission is under a duty to prepare and submit to the Tribunal such schemes 'from time to time',[134] that a charges schemes may revoke or amend any previous charges scheme,[135] that schemes may be altered by the Tribunal on application,[136] or reviewed by the Tribunal upon a request made by the Minister.[137]

The Commission and the Tribunal are at liberty to adopt, as respects any of the services and facilities to which a scheme relates, 'such system for the determination of the charges . . . as may appear desirable'. The Act enumerates some of the possibilities which are involved in this wide and sweeping formula, but it is careful to say that this enumeration shall be 'without prejudice to the generality of the foregoing words'.[138] Among the examples of

[132] Transport Act, 1947, Sect. 76.
[133] *Ibid.*, Sect. 78, subs. 5.
[134] Sect. 76.
[135] Sect. 77, subs. 2.
[136] Sect. 79.
[137] Sect. 80.
[138] Sect. 77, subs. 1.

types of charges which may be introduced are: fixed charges, maximum charges, minimum charges, standard charges, exceptional charges, special charges and agreed charges. All these may be introduced simultaneously for different kinds of services or facilities. More than that: A scheme may enable the Tribunal to make orders authorising or requiring the Commission to give differential treatment as regards charges or terms and conditions in specified classes of cases. The determination of the charges and of the terms and conditions may even be left to the Commission itself, and there is not even a compulsion to allow an ultimate appeal to the Tribunal in such cases. The problem of publicity, one of the most hotly contested issues in transport law before the War, may also be solved by charges schemes which can regulate the publication or non-publication of charges and of terms and conditions. All or any of these powers may be exercised in relation to the transport of goods and passengers by road, or by rail, or both. In other words, the legislation about the rate book, about disintegration of rates, and also about certain kinds of facilities may be put out of action by the schemes.

The procedure for the confirmation, the alteration and the review of charges schemes is regulated in great detail. When a draft scheme has been submitted by the Commission to the Tribunal for confirmation it must be published in the manner directed by the Tribunal together with a notice specifying the time and the manner in which objections and other representations may be lodged, and a similar procedure must be observed with regard to an application to alter, or a request by the Minister to review, a scheme.[139] Bodies representative of any class of persons using the services or facilities to which the scheme will relate and bodies representing nationalised industries or undertakings using these services or facilities may lodge objections to a draft scheme, apply for an alteration, or make representations concerning an intended review of a scheme.[140] On the submission of a draft scheme the Tribunal may, but need not, agree to hear bodies representative of competing entrepreneurs, *e.g.* road hauliers, who wish to make representations on the ground that the charges provided for in the draft scheme are unduly low, and such bodies may also be heard when the Tribunal deals with an intended alteration of a scheme or a review of a scheme.[141] A public

[139] Sect. 78, subs. 1; Sect. 79, subs. 2; Sect. 80, subs. 2.

[140] Sect. 78, subs. 2; Sect. 79, subs. 1 (b) and (c); Sect. 80, subs. 3.

[141] Sect. 78, subs. 3; Sect. 79, subs. 3; Sect. 80, subs. 4 (a). In the case of a review a body of users of facilities or services provided by the Commission may also make representations on the ground that the services or facilities used by them would become unduly expensive if those covered by the intended alteration of the scheme are made too cheap. Sect. 80, subs. 4 (b).

inquiry must be held whenever a scheme is to be confirmed, altered or reviewed, and objectors must (or in certain cases may) be heard.[142] The Commission must give the Tribunal all the assistance which is required.[143]

When a draft scheme is submitted the Tribunal may either confirm it, or reject it, or amend it. It has a similar freedom of action with regard to applications for alteration and requests for a review.[144] It should be noted that an alteration can, of course, also be applied for by the Commission itself, but neither the Commission nor any one else can succeed with such an application within twelve months since the coming into force of the scheme or if the point submitted to the Tribunal has already been considered within the last twelve months, or if it involves a matter of such magnitude that it should be dealt with in the form of a review.[145]

A scheme which has been confirmed by the Tribunal as well as the particulars of an alteration or of a review decided upon by the Tribunal must be published, except that publication can be omitted in the case of minor alterations if the Tribunal so determines. The Tribunal settles the time when any of its decisions are to come into force.[146]

THE LAW OF FARES

There is no elaborate body of provisions regarding the fixing of fares for road passenger transport. But road vehicle fares are not subject to the same amount of freedom of contract which exists in connection with rates for the carriage of goods by road. The Licensing Authority for Public Service Vehicles[147] may attach conditions to the Road Service Licence. One of these conditions is that the fares shall not be unreasonable, and, in certain circumstances, the Licensing Authority may fix maximum or minimum fares.[148] Thus, the fares to be taken by those providing road services can be regulated by public authority, while there is no corresponding provision in connection with rates.

Local authorities running Public Service Vericles are entirely free to demand and take such fares as they think fit,[149] and no

[142] Sect. 78, subs. 4; Sect. 79, subs. 4; Sect. 80 subs. 5.
[143] Sect. 78, subs. 6; Sect. 79, subs. 6; Sect. 80, subs. 6.
[144] Sect. 78, subs. 4; Sect. 79, subs. 4; Sect. 80, subs. 5.
[145] Sect. 79, subs. 1.
[146] Sect. 78, subs. 5; Sect. 79, subs. 5; Sect. 80, subs. 5. Where a scheme relates to passenger transport any local authority within whose area persons using these transport services reside is entitled to raise objections. Sect. 81.
[147] Road Traffic Act, 1930, Sect. 72 (4); Transport Act, 1947, Sect. 117.
[148] Road Traffic Act, 1930, Sect. 72 (6).
[149] Road Traffic Act, 1930, Sect. 104 (1).

conditions as to fares can be attached to their Road Service Licences.[150]

The Transport Commission and its agents, in particular the London Transport Executive, do not require Road Service Licences, and the fares they charge for their bus and coach services are not subject to the control of the Licensing Authority.[151] But, in so far as the London Transport Executive is concerned, the law tries to protect the public in certain respects, for example by providing for publicity to be given to the fares chargeable. Schedules containing particulars of the fares must be deposited at the Ministry of Transport, and they must be open for inspection at all reasonable times.[152] Before making any alteration in fares the Executive must give public notice.[153] There is vested in the Transport Tribunal a power to revise the fares chargeable by the London Transport Executive, and either to reduce them or increase them, or some of them, generally or in respect of particular hours of traffic.[154]

In future the control of the Licensing Authorities over road fares is likely to diminish in importance. Those road passenger services which are regulated by area road transport schemes may—and perhaps will—be gradually either included in charges schemes prepared by the Commission and withdrawn from the regulating power of the Licensing Authorities by these schemes,[155] or they will be exempted from the law of Road Service Licences by the road transport schemes themselves.[156]

[150] It is not quite clear whether this provision applies to all public service vehicles run by local authorities, or only to those vehicles operating within the area of the local authority itself. For this question, which is of considerable legal difficulty, see Mahaffy and Dodson, Road Traffic Acts, p. 168.

[151] Transport Act, 1947, Sect. 65. London Passenger Transport Act, 1933, Sect. 26 (2). The provisions of the Railways Act referring to fares, explained below, are no longer applicable to the Metropolitan Railway, which was taken over by the London Passenger Transport Board and from the Board by the Transport Commission. However, except in so far as the Tribunal, acting under Sect. 29 of the London Passenger Transport Act, 1933, increases the fares chargeable on the Metropolitan Railway, the fares must not exceed the standard fares which were chargeable when this part of the London Passenger Transport Act came into force; Sect. 25 (2). The Board inherited the charging powers of the undertakings transferred to them (*ibid.*, Sect. 25 (1)), and the London Transport Executive inherited them from the Board.

[152] *Ibid.*, Sect. 27.

[153] *Ibid.*, Sect. 28.

[154] *Ibid.*, Sect. 29. The principles governing the revision of these fares are similar to those applicable to the fares chargeable by the Railway Executive for suburban traffic in London for which see Sect. 34 of the Act and below p.

[155] Transport Act, 1947, Sect. 64 (1) (f) (I) and Sect. 77.

[156] *Ibid.*, Sect. 64 (1) (f) (III) and Sect. 65.

As may be expected, there is a much more comprehensive code for railway fares. Broadly speaking, the more important provisions dealing with the statutory control of rates apply to fares as well, and the reader can be referred to what has been said about this subject. Thus the Transport Tribunal has the same power over standard fares payable for the conveyance of passengers and their luggage as it has over other charges.[157] Standard fares are fixed by the Tribunal in accordance with the Act; they may be modified upon application, either by the Transport Commission or by a representative body of users. The Minister may, by regulations, authorise additions to fares as he may authorise additions to rates.[158]

The law of exceptional fares, however, is different from that of exceptional rates. The Executive may charge exceptional fares below the standard in such circumstances as it thinks fit, and there is no lower limit, as there is in the case of exceptional rates.[159] There is nothing to prevent the Executive from charging such low fares as it thinks fit in special circumstances. Thus, it can convey excursionists and tourists on easy terms, and issue cheap tickets for holiday resorts. It cannot, however, go above the maximum third class standard fares imposed by the Railways Act.

Railway fares, like rates, will in future be regulated by charges schemes.

In order that passengers should be fully informed as to the fares they may be required to pay, lists containing the fares of passengers travelling by the trains included in the time tables must be conspicuously exhibited in the booking office of each station.[160] Every passenger ticket must bear upon its face, printed or written in legible characters, the fare chargeable for the journey for which it is issued, but this does not apply to certain categories of tickets such as excursion and tourist tickets which need not as a rule bear on their faces the fares payable.[161]

Children under three years of age, who are accompanying passengers, are carried without any charge, and children of three years and upwards but under fourteen years of age at a reduced fare.

Powers are conferred on the Tribunal with respect to the

[157] Railways Act, 1921, Sects. 30, 31, 32 and 35.

[158] Transport Act, 1947, Sect. 82.

[159] Railways Act, 1921, Sect. 41 (1).—Nor has the Executive the right to increase fares up to 60 per cent of standard under Sect. 83 (2) of the Transport Act, 1947, which does not apply to fares. The duty to report exceptional fares to the Minister and his power to refer them to the Tribunal have been abolished: Transport Act, 1947, Sect. 83 (3) (c).

[160] Regulation of Railways Act, 1868, Sect. 15.

[161] Regulation of Railways Act, 1889, Sect. 6, and Order made by the Board of Trade under the powers of the Act.

through fares of passengers conveyed partly by land and partly by sea. In so far as it operates seagoing vessels, the Railway Executive may charge such reasonable fares as it thinks fit for the conveyance of passengers and their luggage on ships, but the Tribunal has power to determine any question as to the reasonableness of such fares.[162]

Special rules govern the fares chargeable by the Railway Executive on the system of their London suburban railway lines.[163] The Executive is entitled to fix for its suburban services any fares it thinks fit, provided that they do not exceed the standard fares chargeable when the London Passenger Transport Act came into force, *i.e.* on June 30, 1933. Under this maximum the Executive is free to increase or reduce fares. The Tribunal acting on the application of a local authority may also vary these fares, and in any case where the Executive has not itself power to make a desired alteration, the Tribunal may do so on the application of the Executive. Thus the Tribunal may do what the Executive cannot do, that is, raise the fares on the suburban lines above the standard fares on June 30, 1933. An order by which the Tribunal increases or reduces fares may be either general or in relation to particular hours of traffic.[164] No new application for a change can be made within twelve months after such an order has been made unless a special certificate has been obtained from the Minister of Transport.[165] An order made by the Tribunal overrides any special rules contained, for example, in the special Act of a railway company which is otherwise binding on its successor, the Transport Commission.[166] The only statutory provision to guide the Tribunal in its decision is, that no order must be made which is likely to prevent the Transport Commission from discharging its statutory duties.[167] When dealing with matters under the London Passenger Transport Act, the Tribunal sits with two additional members, one of whom must be a person having experience in matters relating to local government in London and one must be a person having experience in financial matters. Both are appointed by the Minister of Transport. There is no appeal from any decision of the Tribunal made under this Act, not even on a point of law.[168]

[162] Railways Act, 1921, Sect. 53.
[163] London Passenger Transport Act, 1933, Sects. 32 to 36, and Schedule 9.
[164] Sect. 34 (1).
[165] Subs. 3.
[166] Subs. 2.
[167] Transport Act, 1947, Sect. 85.
[168] See London Passenger Transport Act, 1933, Sect. 36 (2) and Schedule 9; the decision of the Railway Rates Tribunal in *Four Amalgamated Ry. Cos. and the L.P.T.B.* v. *L.C.C. and Others* (1939), 27 T.C. 167, gave a full survey of the legal position before the War, but has now lost its significance.

CHAPTER 9

RAILWAY FACILITIES AND UNDUE PREFERENCE

FACILITIES

DURING the second half of the nineteenth and the first decade of the twentieth century the railway companies held a monopoly of the more important forms of inland transport. Where the inducement of competition is missing, the law often steps in to make sure that the public is provided with the facilities which it requires. Accordingly, we find that Parliament passed a series of enactments with a view to compelling the railway companies to provide certain facilities for the public. With the advent of road competition this subject has lost much of its practical importance.

In the view of the law, no monopoly of road transport has as yet developed which calls for the interference of the legislature. Consequently we do not find in the law of transport by road anything analogous to the law of railway facilities. There is, however, one exception to this. The London Passenger Transport Act, 1933,[1] has constituted a monopoly of road passenger transport in London and its suburbs in favour of the London Transport Executive. It was, therefore, necessary to introduce provisions as to the supply of passenger transport facilities by the London Transport Executive.[2] On the application of a local authority the Transport Tribunal can require the Executive to provide new or improved services or facili-

[1] Sect. 16. This applies within the 'special area', *i.e.* such portion of the London Passenger Transport Area as lies within the London Traffic Area. This definition is contained in Sect. 15 (3) of the London Passenger Transport Act, 1933. Sect. 15 was repealed by the Transport Act, 1947, Fifteenth Schedule, Part 2. It was apparently overlooked that the definition of the 'special area' in the repealed section applied to the whole of the Act, including, *e.g.* the unrepealed Sect. 16. It is submitted that, for the purposes of interpreting Sect. 16, the definition of the 'special area' in the repealed Sect. 15 (3) must be regarded as still being in force. It must, however, be admitted that this raises a difficult point of statutory interpretation and the matter is not beyond doubt. The London Passenger Transport Area, which is substantially identical with the Metropolitan Traffic Area, is defined in the Seventh Schedule to the London Passenger Transport Act, 1933. The London Traffic Area is defined in the First Schedule to the London Traffic Act, 1924. Within the 'special area' nobody must use a vehicle as a stage carriage or an express carriage without the written consent of the Transport Commission. For exceptions see Sect. 16 of the London Passenger Transport Act, 1933.

[2] Sect. 30.

ties for passenger traffic, or prohibit their withdrawal or reduction.[3] The order must not be such as to necessitate the raising of additional capital (save with the consent of the Transport Commission) or an application by the Commission to Parliament for additional powers. An order made may be amended, altered or revoked on the application of the Executive, but not as a rule before twelve months after it has been made.

The Transport Commission and its Executives can be compelled by law to work the railways so as to afford reasonable facilities to the public. The principal provision is contained in Sect. 2 of the Railway and Canal Traffic Act, 1854, which enacted that every railway company must, according to its powers, afford all reasonable facilities for receiving, forwarding, and delivering traffic upon its railways. 'Traffic' means passengers and their luggage, and all kinds of goods, animals and other things carried by railway and also wagons and trucks suitable for running on the railway. The Railways Act, 1921, has left this principle untouched. It contains an important provision as to facilities,[4] but the governing provision remains that of the Act of 1854.[5]

This power of compulsion is exercised by the Transport Tribunal.[6]

The general principle is that the Executives can only be called upon to afford facilities 'according to their powers'. It is clear that they could not be required to carry things which it was not reasonably possible for them to carry, such as things too large to pass under bridges, articles of immense weight, and such like. But the powers that have usually to be considered are legal and financial, not physical powers.

For example, one of the chief duties of the Railway Executive is to provide platforms, offices, sidings, etc., sufficient to afford to the public every reasonable convenience in relation to both passenger and goods traffic, so as to avoid all danger, confusion, or delay. If the Executive does not reasonably perform this duty, it may be compelled by the Tribunal to perform it and to supply proper accommodation. Thus, if a station or any other building is too small for the purpose, the Tribunal may order an enlargement to be

[3] When acting under the provisions of the London Passenger Transport Act, the Tribunal sits with additional members. No appeal lies from its decision. See the Ninth Schedule to the Act.

[4] Sect. 16.

[5] As to the mutual relationship of these two provisions, see Finlay, J., in *Luton, Dunstable and District Coal Merchants Association* v. *L.M.S. Ry. Co.* (1937), 26 T.C. 98. The alterations in the law introduced by Sect. 16 are mentioned in the subsequent text.

[6] Transport Act, 1947, Sect. 75.

effected. In doing so, however, the Tribunal cannot enjoin the Transport Commission to do anything outside its powers, and an order for the enlargement of a station cannot be made, unless the Commission is the owner of land sufficient for the enlargement, for if it does not own such land it might be unable to acquire it unless it was authorised by the Ministers to do so by way of compulsory purchase.[7] Neither can the Tribunal order the Transport Commission or any of its Executives to do anything which they are by law forbidden to do except with the consent of some person or public body,[8] but they cannot refuse to carry out an order on the ground that by so doing they would break an agreement, such as a restrictive covenant, which has not been sanctioned by an Act of Parliament.[9]

It is the duty of the Transport Commission to afford reasonable facilities for the receiving, forwarding and delivery of traffic. A member of the public can ask for a facilities order only in his capacity as a person interested in railway traffic, not in any other capacity. In one case,[10] for example, the owner of a road which was crossed by a railway line and interrupted by level crossing gates, which were kept shut, tried in vain to obtain an order against the railway company to keep open the road at the level crossing, except at such times as the trains were actually passing. The application had to be dismissed because it had nothing to do with the receiving, forwarding and delivery of traffic.

The duty of the Transport Commission to afford facilities is only a duty in respect of existing lines and stations. It cannot be called upon to lay down a new line or to build a station where no station is.

In one case a company had a station on a branch line which it first closed to passenger traffic and subsequently removed altogether on the ground that the company was losing on the traffic. Five years afterwards, on the application of a local authority, the Commissioners made an order directing the company to give facilities for passenger traffic on this branch. These facilities could not be given without rebuilding the station. The company appealed against this order, and the Court of Appeal held that the Commissioners had no jurisdiction to make it, as they could only order

[7] Transport Act, 1947, Sect. 8, and Acquisition of Land (Authorisation Procedure) Act, 1946. For the former law, see *Thomas* v. *North Staffs. Ry. Co.* (1876), 3 R. & C.T.C. 1. For an example referring to sidings, see *Joseph Stokes* v. *L.M.S. Ry. Co.* (1932), 21 R. & C.T.C. 30.

[8] *Corporation of Arbroath* v. *Caledonian Ry. Co.* (1898), 10 R. & C.T.C. 252.

[9] See Railway and Canal Traffic Act, 1888, Sect. 11.

[10] *Sandilands* v. *L.M.S. Ry. Co.* (1927), 20 R. & C.T.C. 136.

facilities with respect to an existing thing and could not compel the company to build a station where no station was.[11]

Under the Railways Act, 1921,[12] the facilities ordered may include the provision of such minor alterations and extensions and improvements of existing works as will not involve an expenditure exceeding £100,000.[13]

The Transport Commission must afford reasonable facilities. What can be reasonably required has in the past been one of the main points of contest between railway companies on the one side and local authorities and other applicants for facilities orders on the other. It is clear that as a matter of principle charges have nothing to do with the question of reasonable facilities. Even to make charges in excess of what it is authorised to charge, either for goods or passengers, is not of itself a failure by the Executive to afford reasonable facilities; but, in extreme cases, excessive charges demanded in order to prevent persons from using particular stations or particular trains, may be regarded as an 'insuperable barrier' and treated as a refusal of facilities.[14]

Whether facilities demanded are reasonable depends above all on the interest of the public, which includes the safety of the public, the interests of trade and the interests of any particular locality.[15] Unless, however, there is a serious breach of those duties which the Transport Commission owes to the public, a mere inconvenience caused to the public does not justify an order for facilities.[16] For example, a certain inconvenience was caused to season ticket holders by the closing of a side door of a station through which they were in the habit of reaching their train. Yet the reopening of the door was not ordered as a reasonable facility.[17] It is on the same ground

[11] *Darlaston Local Board* v. *L. & N.W. Ry. Co.*, [1894] 2 Q.B. 694. In *Winsford U.D.C.* v. *Cheshire Lines Committee* (1931), 21 R. & C.T.C. 10, the Commissioners rescinded an order made forty years before by which a company had been enjoined to reopen a branch line for passenger traffic, since, according to the *Darlaston* principle, the old order had been made in excess of the Commissioners' jurisdiction. This decision is an important contribution to the doctrine of *res judicata* in its application to administrative Courts.

[12] Sect. 16.

[13] See *Corporation of Nottingham* v. *Midland Ry. Co.* (1922), 17 R. & C.T.C. 72.

[14] *G.W. Ry. Co.* v. *The Railway Commissioners and Brown* (1881), 7 Q.B.D. 182.

[15] Railways Act, 1921, Sect. 16.

[16] This is so in spite of the wording of Sect. 16, which speaks of 'railway services, facilities and conveniences' for the question of the reasonableness of facilities continues to be governed by the principles evolved under the Act of 1854.

[17] *Corporation of Nottingham* v. *Midland Ry. Co.*, above, note 13.

that the Tribunal will seldom interfere with the number of trains which the Executive chooses to run, though, where a strong case is made out, they will sometimes order the running of more trains.[18] Again, an order may be made to lengthen platforms too short for conveniently dealing with passenger traffic, to provide a roof over a platform to protect passengers from the weather, suitable booking offices and waiting rooms, suitable urinals and water closets.[19] But facilities which are merely for the comfort of passengers, such as refreshment rooms, are not ordered.

As a general rule no order for facilities will be made which, while in the interests of the public, are likely to disorganise the system or method according to which the traffic is worked, or the costs of which are unreasonably high.[20] One of the questions to be considered is what proportion the traffic benefited by the facility demanded bears to railway traffic as a whole.

If the Executive wishes to discontinue an existing facility, it must be able to show either that the general circumstances have changed or that a reasonable alternative facility is offered to the public.

In one case [21] a railway company proposed to transfer a coal depot which had existed at a certain place for fifty years to another station one and a half miles distant. This project was part of a comprehensive scheme for reorganising a goods station which had become necessary owing to a great increase in traffic there. It caused great inconvenience to certain coal merchants who had been in the habit of storing coal at the depot. Nevertheless the removal of the depot was not prohibited. Since the proposed scheme was in the interests of the public, there had been a change of circumstances, and new facilities were afforded which were equal in value to those withdrawn.

The particular measures to be taken are not, as a rule, prescribed by the order, which merely says that proper accommodation must be provided or proper arrangements made.

With regard to goods traffic, the Executive may be ordered to provide siding accommodation sufficient for the convenient, safe and speedy receipt and delivery of goods. It may also be ordered to provide for the junction of private sidings and private branch

[18] *Innes* v. *London, Brighton and South Coast Ry. Co.* (1875), 2 R. & C.T.C. 155.

[19] *Metropolitan Water Board* v. *London, Brighton & South Coast Ry. Co.*, [1910] 2 K.B. 890, 899.

[20] *Sussex County Council* v. *London, Brighton and South Coast Ry. Co.* (1892), 8 R. & C.T.C. 17.

[21] *Luton, Dunstable and District Coal Merchants Association* v. *L.M.S. Ry. Co.*, above p. 102. The question, whether facilities for storing coal at a station are facilities for the receiving, forwarding and delivering of traffic, remained undecided.

railways with its lines[22]; but no such order will be made where a proposed junction cannot be made without serious inconvenience to the general traffic of the railway.[23] Where delay or unreasonable detention of trucks is caused by want of sufficient locomotive power, the Executive may be ordered to supply it.[24]

The Executive is bound to give reasonable facilities for the speedy carriage of perishable merchandise, either by passenger train or by other similar service. But it need not carry any goods other than perishables or passengers' luggage by passenger train; nor need it carry perishables by any particular train. Such facilities must be subject to the convenient and punctual working of the passenger train service.[25]

A complaint or an application for a facilities order may be made by a local authority or by any such association of traders or chamber of commerce as may obtain a certificate from the Board of Trade that it is a proper body to make such complaint. As a condition of giving such a certificate, the Board may require the party applying therefor to give security for the costs which may be incurred.[26] No other person who is not directly interested in the subject-matter of the case, is entitled to be heard by the Tribunal.[27]

Where a dispute arises between the Transport Commission and a local authority with regard to facilities to be provided in connection with the London suburban passenger services, the local authority may obtain from the Tribunal an order requiring the Transport Commission to provide new services or facilities, to restore such as have been withdrawn or reduced, or to prohibit their withdrawal or reduction. The local authority cannot successfully make such an application unless the facilities and services concerned affect its own area. The Tribunal may not make the order prayed for, if it forces the Commission to raise new capital (unless the Commission consents) or to apply to Parliament for additional powers. Upon application by the Commission but, as a rule, not within twelve months after making the order, the Tribunal may amend, alter, or revoke its order, if there was a material change of circumstances.

The Commission is bound to carry on their trains and public service vehicles the mails, and post office servants in charge of them,

[22] Railways (Private Sidings) Act, 1904.
[23] *Greenwood* v. *Cheshire Lines Committee* (1909), 13 R. & C.T.C. 169.
[24] *Watkinson* v. *Wrexham etc. Ry. Co.* (1880), 3 R. & C.T.C. 446.
[25] Railways Act, 1921, Schedule 5, No. 10.
[26] Railway and Canal Traffic Act, 1888, Sect. 7, and Railways Act, 1921, Sect. 78.
[27] Railways Act, 1921, Sect. 78 (3).

so as to satisfy the requirements of the Postmaster-General. The remuneration for this service must be fixed by arbitration, or by the Tribunal where the Commission fails to agree on terms with the Postmaster-General.[28] The Minister also has power to call upon the Commission to provide sufficient workmen's trains at reasonable rates between the hours of 6 o'clock p.m. and 8 o'clock a.m. where sufficient workmen of a class requiring such accommodation reside in any district served by the Commission.[29]

An entirely new type of facilities order was introduced by Sect. 16 of the Railways Act, 1921. According to this provision the Commission itself may obtain such an order from the Minister of Transport with the object of being authorised to afford services, facilities and conveniences in connection with its undertaking and with a view to securing and promoting the public safety, or the interests of the public or of trade, or of any particular locality. Such an order may authorise the Commission to provide minor alterations, extensions and improvements of existing works, not involving an expenditure of more than £100,000. This new provision has the object of enabling the Commission to obtain, in limits, an enlargement of their powers without resorting to the costly machinery of an Act of Parliament.

PREFERENCE

Ever since the middle of the nineteenth century it has been regarded as necessary to prevent railway companies from unduly interfering with the conditions under which their customers compete. The rules enacted with this object form part of that body of law which deals with carriers by railway in their capacity as monopolists. There is nothing in the common law to forbid a carrier to treat one customer more favourably than another, or to charge one less than the other for similar services, providing the higher charge is not an unreasonable one.[30] Parliament, however, has restrained carriers by railway in the exercise of their discretion in dealing with their customers.

There are two main provisions with this object. By Sect. 90 of

[28] Conveyance of Mails Act, 1893; Transport Act, 1947, Sect. 65 (3).

[29] Cheap Trains Act, 1883, Sect. 3. There is some doubt as to how far, if at all, this section is still in force. The Railways Act, 1921, Sect. 34, repeals all statutory provisions with respect to charges for or in connection with the carriage of passengers by railway. But in *In re Railways Act*, 1921 (1923), 17 R. & C.T.C. 147, at pp. 163–164, the Tribunal pointed out that Sect. 3 of the Cheap Trains Act is not primarily such a provision but rather a section by which the Minister of Transport has power to enforce a facility.

[30] See below, p. 118.

the Railways Clauses Act, 1845, the Railway Executive is forbidden to prejudice or favour particular parties and is required to charge all persons equally for the carriage of either passengers or goods of the same description over the same portion of any line under the same circumstances. This only applies to traffic between the same points of departure and arrival, and has no application to charges on different portions of a railway. It applies to goods which are carried under the same circumstances as regards the services rendered by the Executive, and which are of the same description so far as carriage is concerned, irrespective of the actual nature of the goods.[31] A person who is charged more than another for goods of the same description carried between the same points under the same circumstances may recover the excess and also claim damages or an injunction.[32] The Tribunal has jurisdiction in all these matters.[33]

This provision is obviously inadequate to deal with the problem of discrimination between customers, since its application is limited to traffic passing on the same line. A much more comprehensive provision is contained in Sect. 2 of the Railway and Canal Traffic Act, 1854. The Railway Executive may not give undue or unreasonable preference to any particular person or company or to any particular description of traffic, nor may it subject any particular person or company or description of traffic to any undue or unreasonable prejudice. It is not preference that is forbidden, but *undue* preference, *i.e.*, preference which is unfair or made without good cause. Similar charges should be made for similar services. Whenever it is proved that one trader, or class of traders, is charged less for the same kinds of goods and for similar services than another trader or class of traders (difference in charges) or that better facilities are offered to one trader or class of traders than to another (difference in treatment), a presumption arises that the former is being unduly preferred, and the burden of proving that such difference in charges or treatment does not amount to an undue preference lies upon the Executive.[34] Thus the mere fact that one trader is given better terms than another is no conclusive proof that the preference is undue, though in that case the Executive may be called upon to explain the position and show that the preference given is fair and justifiable.

The complaining trader must prove that there was a preference,

[31] *G.W. Ry. Co.* v. *Sutton* (1869), L.R. 4 H.L. 226.
[32] See *Denaby Main Colliery Co.* v. *M.S. & L. Ry. Co.* (1885), 11 App. Cas. 97.
[33] Transport Act, 1947, Sect. 74.
[34] Railway and Canal Traffic Act, 1888, Sect. 27 (1).

and, in order to do this, he must show that the preferred traffic is in competition with his own. For example, it is not undue preference to carry goods to a seaport town for shipment from that place at lower rates than the Executive charges for goods of the same description intended for consumption in the place, for in such a case the goods intended for shipment do not compete with the goods intended for consumption.[35] But, once the trader has established that there is preference, it is for the Executive to show that the preference is not undue.[36]

Questions whether there is preference and whether it is undue are determined by the Transport Tribunal.[37]

There are various grounds on which the Executive may prove that it is fair and reasonable, and therefore lawful, to prefer one customer to another. Thus, it may be able to show that it performs services in favour of the complaining trader which offset the difference in charges, as, for example, where he receives services at a siding justifying a charge equal to that made to a rival trader who uses a station.[38]

Where there are circumstances which make the cost of carrying for one less than the cost of carrying for another, the Executive is justified in charging the former a less sum in proportion to the difference in the cost of carriage. For example, if A.'s goods were carried on a stretch of level line, while B.'s goods of the same description were carried up a steep gradient, it would be reasonable to charge A. less than it charged B.[39]

Again, although as a rule a trader has a right to equal treatment with all other traders of the same kind supplying the same traffic, it may be justifiable to give one better terms than another on the ground that he supplies traffic in much larger quantities than the other, or packed in such a way as to make handling easier and therefore less costly to the Executive, or because the traffic is supplied at irregular intervals by one, and not by the other. In all such cases the circumstances are different, and where that is so the Executive may fairly prefer the trader whose arrangements are such as to effect a saving of expense to the Executive.[40] For example, where a trader agrees to supply his traffic to the Executive only in

[35] *Lancashire Patent Fuel Co.* v. *L. & N.W. Ry. Co.* (1904), 12 R. & C.T.C. 77.

[36] See MacKinnon, J., in *Association of Master Lightermen and Barge Owners v. S. Ry. Co.* (1933), 21 R. & C.T.C. 126, at p. 136.

[37] Transport Act, 1947, Sect. 75.

[38] *Prentice Brothers, Ltd.* v. *L.N.E. Ry. Co.* (1925), 18 R. & C.T.C. 177.

[39] *Newry Commissioners* v. *G.N. Ry. Co.* (1891), 7 R. & C.T.C. 184.

[40] *L. & N.W. Ry. Co.* v. *Evershed* (1878), 3 App.Cas. 1029, 1037.

full truck loads or full train loads, it is not undue preference to make lower charges to him than to other traders of the same kind who do not supply their traffic in the same way, provided the Executive is ready to give similar advantages to all traders who are ready to deal with the Executive in a similar manner, and provided the reduction of charge is in the circumstances reasonable in amount.[41] Rebates are justified, of course, if granted to a trader on consideration that he himself performs certain services which the Executive has to perform for his rival.

The preferential treatment, however, may in certain circumstances be justifiable, though the Executive is unable to grant it to any other trader. This is the case if the preference constitutes the consideration for something obtained by the Executive or its predecessors in the past from the trader preferred, as, for instance, for a conveyance of land by the trader.[42]

The Executive may also justify a preference by showing that it is in the public interest, for, in deciding whether a preference is, or is not, undue, greater weight is given to considerations affecting the interests and welfare of the public than to any other consideration, provided the interests of the public can be favoured without laying unfair burdens on either the Transport Commission or a particular class of traders. Hence, though it might be unreasonable to carry goods of a certain description to a certain station for one trader and to refuse to carry similar goods to that station for another trader in the same town, it might be quite reasonable to carry such goods to that station for the Corporation of the town, while refusing to do so for any private trader; such an exception in favour of the Corporation might be for the benefit of the inhabitants of the town at large, while the giving of the same facilities to all might disorganise the traffic of the Executive.[43]

Thus it is a rule that no place should, without very good reason, be deprived of the advantage given to it by its geographical position.[44] If X be 80 miles and Y 130 miles distant from some large centre of population upon the same line, it would *prima facie* be undue preference to Y to make the same charges for the carriage of similar goods to the large place from the two towns, for this is depriving X of the natural advantage it enjoys of

[41] *Mansion House Association* v. *L. & S.W. Ry. Co.*, [1895] 1 Q.B. 927; see also the *Lightermen's Case*, quoted above, note 1, p.

[42] *Holwell Iron Co.* v. *Midland Ry. Co.*, [1910] 1 K.B. 296.

[43] *Lees* v. *L. & Y. Ry. Co.* (1874), 1 R. & C.T.C. 352. In the *Lightermen's* Case, quoted above, one of the points taken into account, with the approval of the Court of Appeal, was that the system of charging attacked by the applicants had been enforced for forty years by all the railway companies owning wharves on the Thames.

[44] *Timm* v. *N.E. Ry. Co.* (1901), 11 R. & C.T.C. 214.

being fifty miles nearer the great place than the other. There may, however, be circumstances which make a preference of Y reasonable as being for the public benefit; and if that can be shown, the preference is not undue.[45] Thus, where a great city is supplied with some commodity by both X and Y, it is clear that the larger the supply the lower the price of the commodity is likely to be to the inhabitants. But possibly it may not pay the traders of Y to send their goods and sell them in competition with goods of the same description sent by the traders of X, unless the charges to them are considerably lower in proportion than the charges made to the traders of X. If, in the interests of the inhabitants of the city a supply of the commodity in question is required from both X and Y, and this supply can only be obtained by a certain preference of Y, such preference will probably be held to be justifiable.[46]

In the modern conditions of competition between road and rail it may be a matter of public interest that traffic should not be diverted from the railways to road vehicles, and this may justify a preference which otherwise might have been undue.[47] Less may be charged for railway traffic which is subject to competition by road, sea or otherwise, than for traffic between two points equally distant from another where there is no competition.[48] It is a justification for a preference that there is already in existence competitive transport in regard to the traffic preferred, and that the traffic would be lost to the railway but for the preferential treatment. It is, however, no justification of a preference to say that it is necessary in order to discourage possible competition which does not exist as yet.[49]

It it a well-established principle that rates for a long transit are less in proportion than for a short transit. This is expressed in the saying, 'long lead, low rate'. But where goods have come oversea from a foreign country and are forwarded from the port of arrival by a railway to any place in the United Kingdom, the home part of the transit must not be considered as part of a through route for the purposes of fixing charges. Foreign goods must not be favoured over home goods with respect to similar services.[50] But foreign goods are in fact often carried by railway from ports to inland towns at rates which apparently favour the foreign over the home produce. If goods are preferred merely because they have come oversea, such

[45] See Railway and Canal Traffic Act, 1888, Sect. 27 (2).

[46] See *Liverpool Corn Traders' Association* v. *G.W. Ry. Co.* (1892), 8 R. & C.T.C. 114; *Castle Steam Trawlers, Ltd.* v. *G.W. Ry. Co.* (1908), 24 T.L.R. 317.

[47] See the *Lightermen's Case,* quoted above, note 1, and, in particular, Scrutton, L.J., at pp. 151–152.

[48] *Foreman* v. *G.E. Ry. Co.* (1875), 2 R. & C.T.C. 202; *Muntz's Metal Co.* v. *L. & N.W. Ry. Co.* (1911), 14 R. & C.T.C. 284.

[49] Compare *Diphwys Co.* v. *Festiniog Ry. Co.* (1874), 2 R. & C.T.C. 73, with *Phipps* v. *L. & N.W. Ry. Co.,* [1892] 2 Q.B. 229.

[50] Railway and Canal Traffic Act, 1888, Sect. 27 (2).

preference is illegal; but it may be quite justifiable to prefer them because of the quantity in which they are delivered to the carrier, or of the mode in which they are packed.[51]

In so far as its collection and delivery services are concerned, the Railway Executive in its capacity as road carrier is equally bound not to give undue preference, and it must not even prefer itself unfairly to other carriers performing similar services.[52] Thus, where it charges its customers a rate for carriage which includes collection and delivery, it is undue preference of itself to refuse to make a reasonable rebate to other carriers who collect and deliver themselves.[53] Similarly, it may be an undue preference to grant to the Executive's agents better terms than to independent carriers, as, for example, if it makes higher wharfage charges at a waterside station to independent lightermen than to those lightermen who are its accredited agents.[54]

In dealing with passengers, all persons in a like position towards the Executive must receive the same treatment. But there is nothing illegal in preferring certain persons to the general public because of their business relationship to the Executive. For example, it may be reasonable for the Executive to grant cheap season tickets to traders with whom it does a large business.[55] Generally speaking, the law of undue preference has never been of great importance in connection with passenger traffic.

Where any person has been unduly prejudiced within the meaning of the Railway and Canal Traffic Act, 1854, by being charged a higher rate than some other person, he cannot recover the excess of charge by action.[56] He may, however, make a complaint to the Tribunal against the undue preference of the other; and if he makes his complaint after a written notice to the Executive requiring it to remedy the matter which has been disregarded, and within a year of the discovery by him of the excessive charge, the Tribunal may award him damages.[57]

As has been mentioned above, the law of undue preference is

[51] See the decision of the Court of Appeal in *Mansion House Association* v. *L.S.W. Ry. Co.*, [1895] 1 Q.B. 927.

[52] *Palmer* v. *L.B. & S.C. Ry. Co.* (1871), L.R. 6 C.P. 194.

[53] *Menzie* v. *Caledonian Ry. Co.* (1887), 5 R. & C.T.C. 306.

[54] See the *Lightermen's Case,* above, note 1, where, however, it was held on the facts that the preference was not undue. On the same principle, Sect. 116 of the Transport Act, 1947, prohibits discrimination as between travel agencies controlled by the Transport Commission and other travel agencies established at the time of the passing of the Act.

[55] *Inverness* v. *Highland Ry. Co.* (1901), 11 R. & C.T.C. 218.

[56] *L. & Y. Ry. Co.* v. *Greenwood* (1888), 21 Q.B.D. 215.

[57] Railway and Canal Traffic Act, 1888, Sects. 12 and 13.

bound up with the character of the railways as monopolistic undertakings. Naturally, with the increased importance of competition by road, this branch of the law has tended to become of smaller influence though, as shown by the *Lightermen's Case*, the very fact that there is road competition may give a new importance to certain aspects of the law of undue preference. The Railways Act, 1921, and the new system of rate making which it introduced, is mainly responsible for the eclipse of the law of undue preference. As long as the law of rates merely laid down maxima within which the companies were free to make rates at their discretion, it was within the bounds of possibility to grant preferential charges to one trader in comparison with another. Under a system of fixed or standard charges this possibility is much diminished. It is true, that in granting an exceptional rate, the Executive can still create an undue preference. The trader, however, whose rival has thus been preferred, has a more stringent remedy than a complaint of undue preference. He can approach the Tribunal with an application under Sect. 37 (3) of the Railways Act, 1921, to fix an exceptional rate for his own traffic equal to that granted to the goods with which he is competing. It was held by the Tribunal in *James Dole & Co.* v. *The Four Amalgamated Railway Companies and the London Passenger Transport Board*[58] that, when fixing an exceptional rate, the Tribunal has regard to the obligations of the carrier and the rights of the traders under the Acts of 1854 and 1888 and under the equality clause of the Act of 1845. The machinery provided by the Railways Act, 1921, is thus made available for the prevention of undue discriminations between railway customers, with the result that cases of undue preference are not likely to arise frequently in future.

It might, however, have been thought that the introduction of agreed charges by the Road and Rail Traffic Act, 1933,[59] would have given new importance to the law of undue preference, for discrimination is quite conceivable in connection with agreements for flat rates conceded in favour of one trader, but not in that of another. Here, however, the Act expressly excludes[60] the operation of the Equality Clause in the 1845 Act, as well as of the Preference Clauses of the Acts of 1854 and 1888, to an agreed charge approved by the Tribunal. The remedies available to a rival trader are exclusively those dealt with above, that is to say, either to oppose the approval of the charge, or to ask the Tribunal to fix a charge

[58] (1937), 25 T.C. 87.
[59] Sect. 37; see above, p. 92.
[60] Sect. 37 (9).

in his own favour, or to ask for the withdrawal of the charge after twelve months.

It must not be thought, however, that the Railways Act, 1921, and the subsequent legislation, which have so greatly contributed to the diminution in importance of the law of undue preference, had in any way legalised undue discrimination. Difference in treatment, as defined above, and as distinguished from difference in charges, is not materially affected by legislation on charges, and, even with reference to difference in charges, undue preference is still possible. Exceptional rates granted by the Executive may still be complained of as an undue preference.

PART TWO

THE CARRIAGE OF GOODS

CHAPTER 10

COMMON CARRIERS AND PRIVATE CARRIERS

THE second part of this book deals with the law which governs the relation between a carrier by railway and the owner of a motor vehicle on the one side and a consignor or consignee of goods on the other, but it is necessary to go back to a time when neither railways nor motor cars were in existence. Mechanical locomotion is a thing of yesterday; but there have been carriers of goods for many centuries, and long before the first railway was made there was a well-defined system of law relating to carriers by land. The first railway company was, in the eye of the law, merely a new sort of carrier; it had to take the law as it found it, and was subject to the same rules as governed carriers whose only instrument of locomotion was the horse. And although Parliament has passed many Acts relating to inland transport, the law is theoretically still the old carriers' law, as modified by those Acts. Any one employed to carry an article from one place to another is in a sense a carrier, but he is not necessarily what is known in law as a common carrier. The law makes a careful distinction between a common carrier and a private carrier. A common or public carrier is one who makes carrying his business, who holds himself out to the world as prepared for hire to transport from place to place the goods of any person wishing to employ him, while a man who undertakes to carry goods only for certain persons is not a common, but a 'private' carrier.

'Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract'.[1]

The essential part of the definition of a common carrier, then, is that he professes to the public his readiness to carry for any one who wishes to engage his services and is prepared to pay his charges. This 'profession' of the common carrier, however, may be limited

[1] Alderson, B., in *Ingate* v. *Christie* (1850), 3 Car. & K. 61.

in two respects. It is not essential that he should hold himself out as ready to carry goods of all sorts. He may limit his profession to goods of a certain type, *e.g.*, he may profess to carry only small parcels, and then he could not be required to carry large and bulky things. He may profess to carry only one description of goods, as, for example, corn, in which case he would be a common carrier of corn, and could not be required to carry anything else.[2] Again, the profession to carry need not extend to all routes and areas. The carrier is a common carrier though he professes to carry goods only to certain places, or, perhaps, even only between two particular places. If this were the case, he would be entitled to refuse goods offered to him for carriage to places to which he did not profess to extend his operations. But the common carrier cannot, once he has established himself as a common carrier, either exclude from the effect of his profession certain types of prospective customers or impose on individual consignors of goods conditions under which alone he will be prepared to carry. In other words: he may restrict the profession with regard to goods which and areas in which he is prepared to carry, but not with regard to persons for whom and conditions, especially as to liability, under which he is ready to do so. If he intends to restrict his liability he can do so by way of contract with the consignor only, not by unilateral limitation of his profession.[3]

The law does not force a person who has held himself out as a common carrier to retain that capacity for all times to come. There is no such principle as 'once a common carrier—always a common carrier'. A carrier who has held himself out as common carrier of certain goods is at liberty publicly to withdraw his profession and to announce that henceforward he will either cease to carry altogether, or, while continuing to carry, not assume a common carrier's liability.[4] As long as he is a common carrier, he is liable as such, and, in the absence of a special contract, no unilateral declaration will relieve him of his common law liability. If, however, he makes it clear to the world that he will no longer be a common carrier for anybody, he will cease to be a common carrier. But, in order to achieve this result, he must leave no possible doubt that he will not be regarded as a common carrier in future. It is not sufficient that he is known to be in the habit of limiting his

[2] See Parke, B., in *Johnson* v. *Midland Ry. Co.* (1849), 4 Ex. 367, where the railway company which had not professed to be a common carrier of coal along a particular route was held to be entitled to refuse such carriage.

[3] See Leslie, *Law of Transport by Railway*, 2nd ed., p. 14.

[4] For examples of such cases, see *Sutcliffe* v. *G.W. Ry. Co.* [1910] 1 K.B. 478, and *W. R. Smith* v. *L.N.W. Ry. Co.* (1918), 120 L.T. 273.

liability by contract. Though he may make such a contract in ninety-nine out of a hundred cases, if, by forgetfulness or otherwise, he omits to enter into a special contract in the hundredth case, he will bear the common carrier's liability in that case, and he will always be entitled to rely upon those rules of the common law or of a statute which give special rights and protections to common carriers.[5]

Two important legal consequences follow from the fact that a man is a common carrier.

1. Once he has held himself out as a common carrier he is no longer free to decide as he pleases, whether he is to enter into contracts of carriage or not, while the private carrier is at liberty to do so. The common carrier must not pick and choose between would-be customers, and he may not without lawful excuse refuse to carry goods offered to him by any person who is ready to pay his reasonable charges, provided, of course, the goods are such as he professes to carry, and provided his business extends to the place to which he is required to carry them. The law imposes upon him a duty to accept all those offers to conclude contracts of carriage which are covered by his profession. So important is this rule that the law considers a common carrier guilty of a wrongful act who without lawful excuse refuses to accept goods offered to him, and it used to be said that he was even indictable therefor as for a criminal offence. Though this criminal liability, if it ever existed, may now be said to be obsolete, a common carrier is still civilly liable for damages if he wrongfully refuses to carry goods, and actions to enforce this liability in tort are occasionally brought. A carrier may have a lawful excuse for refusing, and, therefore, a good defence to such an action. Thus, in an old case, it was held that a carrier is justified in refusing to carry if his vehicle is full,[6] and it is well established that the carrier need not accept the goods unless they are tendered to him at a reasonable time. The carrier can also decline the consignor's offer if the person offering the goods is not at the same time ready and willing to pay the full price for their carriage. The carrier need not give credit to the consignor or to

[5] *Baxendale* v. *G.E. Ry. Co.* (1869), L.R. 4 Q.B. 244, and *G.N. Ry. Co.* v. *L. E. P. Transport Co.*, [1922] 2 K.B. 742. In both cases the carrier himself relied on his capacity as a common carrier. It is rightly pointed out in Macnamara, *Law of Carriers by Land*, 3rd ed., 1925, p. 14, that the decision in *Smith* v. *L.N.W. Ry. Co.*, above, is overruled by the decision of the Court of Appeal in the *L. E. P. Case*, if and in so far as it decides that railway companies are not common carriers in cases where they carry under special contract.

[6] See Cozens-Hardy, M.R., in *Spillers and Bakers, Ltd.* v. *G.W. Ry. Co.*, [1911] 1 K.B. 386, 392.

the consignee, he is entitled to payment in advance, and, unless the money is tendered he can refuse to carry. The charges demanded by the carrier must, however, be reasonable and, as a rule, a charge according to the usual scale of that carrier's charges will be regarded as reasonable. If the carrier demand an unreasonable sum, such demand is equivalent to a refusal to carry; and if the unreasonable sum so demanded be paid under protest, the excess may be recovered from the carrier. There is no rule, at common law, that the common carrier must 'treat all customers equally'. 'There was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable'.[7] The requirement of equality of charges, in so far as it exists, is entirely the creation of statute, while the common law regards inequality as nothing more than possible evidence of unreasonableness.

2. The other difference between the private and the common carrier, and, indeed, the most remarkable feature of the law relating to common carriers, is the rule which makes the common carrier an insurer of the safe carriage of the goods he undertakes to carry. The general principle of the common law is usually stated in this way: a common carrier is an insurer of the goods which he contracts to carry, and is liable for all loss of, or injury to, those goods while they are in course of transit, unless such loss or injury is caused by the act of God, or by the King's enemies, or is the consequence of inherent vice in the thing carried, or is attributable to the consignor's own fault.

The law makes a distinction between absolute or strict liability and liability for negligence. Where A. is liable to compensate B. for a loss, irrespective of A.'s conduct, and whether or not he was at fault, he is said to be absolutely liable. Where, however, A. is liable to B. only for the consequences of his or his servant's neglect of duty or lack of care, he is said to be liable for negligence.

In most cases a bailee (or person entrusted with the goods of another) is not liable for loss of or injury to the goods while in his charge, unless the loss or injury were due to his wilful act or negligence. 'Negligence' means the omission to do something which in the circumstances a reasonable and careful man would do, or the doing of something which in the circumstances a reasonable and careful man would not do. It is the omission to take that amount of care which it is the legal duty of a person to take. The ordinary bailee is only bound to take reasonable care of the other

[7] Blackburn, J., in *G.W. Ry. Co.* v. *Sutton* (1869), L.R. 4 H.L. 226, 237.

person's goods. If the goods are lost or destroyed without any negligence on his part, he is under no liability; but the burden is on him to prove that the damage was not due to his negligence, and if he fail in such proof he is held responsible. A private carrier is not liable to compensate the owner of goods which are lost or damaged while in his custody, unless he is guilty of negligence. But it is his duty to take reasonable and proper care of the goods, and if the goods are lost or damaged the burden is on him to show that he performed that duty and that the loss or damage was not caused by his negligence.

The liability of a common carrier, however, is an absolute one. He may be liable for loss or damage even in cases where he has taken every reasonable care and precaution. For example, he is liable where the goods are stolen from his possession without any fault on his part, even where he is robbed with violence; he is liable where they are destroyed by fire not caused by his negligence or that of any person over whom he has control; he is liable where they are lost or injured by the negligence or wrongful act of some stranger, or by an inevitable accident.

Since, then, the common carrier is liable even where no negligence can be proved against him or his servant, it is clear that his responsibility for the safety of the goods is a heavy one. It is his duty to carry the goods safely, and, if he fail in his duty he must make pecuniary compensation for the loss caused to the owner, even when he is in no way to blame for such failure. It is also his duty to deliver the goods in safety to the person to whom they are consigned.

As has been mentioned, there are four cases in which the common carrier is not liable for loss or injury; but when the question of liability is raised, the burden of proof is upon the carrier to show that the facts bring him within one of the exceptions. The significance of these four 'excepted perils': act of God, act of the King's enemies, inherent vice of the goods, and consignor's own fault, will be explained later, but it should be mentioned here that even if the carrier proves that the facts of the case come within one of these four caetgories, he is not free from liability. He must further show that neither he nor his servants contributed to the loss or injury by their own negligence. In other words: in the case of the four 'excepted perils' the carrier is free from absolute liability, but not free from liability for negligence. With regard to loss or injury due to one of these four exceptional circumstances the common carrier's liability is reduced to that of a private carrier.[8]

[8] Below, p. 146.

The above is a sketch of the liability of the common carrier according to the ancient custom or common law of England, and the question which remains is: To what extent are carriers by rail and road hauliers common carriers?

It has never been doubted that railway companies came under the definition of a common carrier in so far as they publicly professed to carry goods.[9] At common law, therefore, if a railway company accepted goods for carriage without entering into a special contract with the consignor, its liability was that of a common carrier outlined above. It was, however, a fact well known to the public from the earliest days of railway traffic, that railway companies were in a habit of insisting on special conditions of liability being agreed between themselves and consignors. That being so, a prospective consignor could hardly at any period compel a railway company to carry goods under the common law liability if it was unwilling to do so, but the railway company made itself liable for damages if it refused to carry altogether.[10] The law referring to common carriers was applicable to railways in so far as the common carrier's liability in the absence of a special contract was involved. But there was no common law duty imposed on railway companies to accept goods for carriage under the common law liability, and no Act of Parliament compelled a railway company to carry any goods as common carriers except in so far as they publicly professed to do so.[11] The Railways Clauses Act, 1845, provides in Sect. 86, that it shall be lawful for railway companies to use and employ railway engines or other moving power and carriages and wagons to be propelled thereby and to carry and convey upon the railway all goods offered to them for that purpose. This enactment gave the railway companies the right to carry goods as common carriers, but it did not compel them to accept the common carrier's liability unless they chose to do so by omitting to insist on special conditions. And the even more important enactment in Sect. 2 of the Railway and Canal Traffic Act, 1854, though it imposed on the companies the duty to afford reasonable facilities for the receiving and the

[9] 'There can be no doubt that in this country railway companies are in respect of most goods common carriers': per Atkin, L.J., in *G.N. Ry. Co.* v. *L.E.P., &c. Co.*, [1922] 2 K.B. 742, 769.

[10] Thus in *Crouch* v. *L.N.W. Ry. Co.* (1854), 14 C.B. 255, a railway company was successfully sued for refusing to carry for another carrier 'packed parcels', *i.e.* parcels containing a number of smaller parcels collected from various persons by the consigning carrier, and forwarded for distribution by his agent to the persons to whom addressed.

[11] See Parke, B., in *Johnson* v. *Midland Ry. Co.* (1849), 4 Ex. 367, and Roche, J., in *Smith* v. *L.N.W. Ry. Co.* (1918), 120 L.T. 273.

forwarding and delivering of traffic, did not make them liable to carry under the common carrier's liability either.[12]

When, on Jan. 1, 1948, the railway companies ceased to operate as carriers and their undertakings vested in the Transport Commission,[13] it inherited from the companies their existing rights and liabilities and succeeded to the legal position which they had occupied.[14] Both the principles of the common law and the provisions of statutes[15] which had hitherto been applicable to the railway companies in their capacity as carriers by rail must now be applied to the Commission and to the Executives which act as its agents. The Executives are therefore common carriers of goods by rail to the same extent as the railway companies had been before Jan. 1st, 1948. The transfer of the railways from private to public enterprise has not affected the legal position of the carrier by rail towards his actual and potential customers.

The question to what extent carriers by rail can be called common carriers is one of great difficulty and of little practical importance now, since in both relevant respects—liability as well as duty to carry—the common law was largely superseded by statute even before the nationalisation of the railway system. The duty which has now been imposed upon the Commission to allow would-be consignors to choose among existing rail and road transport services available between the same points should in practice prove to be a more powerful protection of the public than the common law duty not to 'pick and choose' between potential customers.[16]

The position of the road carrier depends entirely on the way in which he carries on his business.[17] In bygone days there was a strong tendency to attach a common carrier's liability to as many road carriers as possible, and the conception of a common carrier was developed in connection with road carriers and not in connection with carriers by sea. The Carriers Act, 1830, which mentions

12 There have always been certain descriptions of goods of which the railway companies were not even common carriers in the sense that a refusal of carriage under any terms would have made them liable; such were, for instance, dangerous goods and animals. See Lindley, L.J., in *Dickson* v. *G.N. Ry. Co.* (1886), 18 Q.B.D. 176, at p. 182.

13 Transport Act, 1947, Sect. 12.

14 Transport Act, 1947, Sect. 14 (2).

15 Transport Act, 1947, Sect. 14 (4).

16 Transport Act, 1947, Sect. 3 (2).

17 That a road haulier is the holder of a 'public carrier's licence' ('A' licence) under the provisions of the Road and Rail Traffic Act, 1933, is not by any means conclusive proof for his being a common carrier. A furniture remover, for instance, who reserves to himself the right of accepting or rejecting offers of employment at his own discretion, is not a common carrier.

'mail contractors, stage coach proprietors and other common carriers', seems to indicate that, about the year 1830, mail contractors and stage coach proprietors were regarded as common carriers as a matter of course. The case of *Hellaby* v. *Weaver and Others*[18] points in the same direction. The defendants were forwarding agents. Their business was to collect goods at Worcester and to send them to their destination by railway, sometimes receiving the whole cost of carriage, including the railway charges, at other times receiving only the charge for conveyance to the station. In the case before the Court the goods were sent to Exeter and the defendants received the whole charge for the conveyance from their customers. The goods were lost on the road and the defendants were held to be liable as common carriers.

The more recent cases, however, show a very different trend of development.[19] We can see from a decision of Lord Abinger, C.B., delivered as early as 1837, in *Brind* v. *Dale*,[20] that even at that time the law was beginning to develop in another direction. The defendant was a town carman whose carts plied for hire near the wharves and the defendant let his vehicles by the hour, by the day or for a particular job. Lord Abinger indicated that he did not regard this defendant as a common carrier, but left the ultimate determination of the question to the jury as a question of fact. In more recent times the Courts have been generally disinclined to attach a common carrier's liability to road carriers. Three cases may illustrate the eclipse of the common carrier's liability in connection with carriage by road. The most important of these cases is *Belfast Rope Work Co.* v. *Bushell*.[21]

An automobile engineer and haulage contractor used several lorries, partly belonging to himself and partly hired for the purpose, for the carriage of goods from Liverpool to Manchester and back. From Liverpool to Manchester he carried only one commodity, namely, sugar. At Manchester, however, he invited offers of all kinds of goods, except machinery, for carriage to Liverpool, at varying charges, without applying any regular tariff. He sometimes accepted and sometimes rejected these offers, according as the rate, route, or class of goods suited him in the circumstances or not. Bailhache, J., found as a fact that the defendant was not a common carrier and, therefore, not liable for the destruction of a consignment of hemp which occurred during transit without his negligence. The learned judge considered what criterion he was to apply in order to find the line of

[18] (1851), 17 L.T. (O.S.) 271. The effect of this case seems to be wrongly stated in Macnamara, *loc. cit.* at p. 21.

[19] See Bailhache, J., in *Belfast Rope Work Co.* v. *Bushell*, [1918] 1 K.B. 210, 214.

[20] (1837), 8 Car. & P. 207.

[21] [1918] 1 K.B. 210.

demarcation between the common and private carrier. He rejected the test whether the carrier was prepared to carry for everybody who offered him goods, for every carrier who is anxious to have a flourishing business naturally tries to get as many orders as he possibly can. What the judge regarded as decisive was the ground on which the carrier makes his decision to reject or to accept. If he only refuses to carry when his carriage is full or when the consignor does not pay him his charges, then he may be a common carrier, but if, as in the present case, the carrier reserves to himself the right to accept or reject 'being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements', then he cannot possibly be a common carrier.

This case would seem to take all furniture removers and road hauliers out of the category of common carriers (though the case of forwarding agents may still stand on a different footing), a view which is strengthened by the decision in *Watkins* v. *Cottell*.[22]

There it was admitted by the plaintiff that the defendant, a furniture remover, was not a common carrier, and this seemed to be beyond doubt in view of the fact that the defendant never carried furniture for a customer without first giving an estimate. What the plaintiff asserted in this case, however, was that the defendant, though not a common carrier, was subject to the common carrier's liability. The notion that a carrier who is not under the common carrier's duty to carry for all and sundry can nevertheless be made absolutely liable was derived by the plaintiff in this case from certain decisions rendered by the Courts in connection with sea carriage.[23] The importance of the decision of the Court was that the application of these rules of the law of carriage by sea to the law of carriage by road was rejected. Once you have failed to establish that a road carrier is a common carrier, you cannot make him liable as a common carrier, though you might perhaps do so if it was a case of a shipowner or lighterman.

The third case, *Electric Supply Stores* v. *Gaywood*,[24] shows not only that a furniture remover and carman will not be regarded as a common carrier, but that he himself cannot rely on those provisions of the law which are made for common, but not for private carriers. Pickford, J., pointed out that the defendant, a carman and furniture remover, was not a common carrier and the Judge did not give him those rights of lien which are vested in the common carrier.[25]

The reader should, however, remember that the mere habit of a road carrier of entering into special contracts does not necessarily

[22] [1916] 1 K.B. 10.

[23] See in particular the leading case of *Liver Alkali Co.* v. *Johnson* (1874), L.R. 9 Ex. 338, followed in *Hill* v. *Scott*, [1895] 2 Q.B. 371, 713. For a very clear explanation of this rule in connection with a case of lighterage, see Hamilton, J., in *Consolidated Tea and Lands Co.* v. *Olivers Wharf*, [1910] 2 K.B. 395, at pp. 398, 399.

[24] (1909), 100 L.T. 855.

[25] For the importance of this decision as regards liens, see below, p. 245.

make him a private carrier. If the decision in *Hellaby* v. *Weaver* [26] is still good law, the fact that a forwarding agent who collects and delivers goods to and from railway stations habitually makes special contracts with his customers does not make him a private carrier.[27] No more than these general indications can be derived from the material available. The result would seem to be that, with the possible exception of forwarding agents, all carriers of goods by road must be regarded as private carriers. It should be noted, however, that the development of the law briefly sketched in the foregoing pages took place within the framework of a legal system of free competition. Whatever factual monopolies may have existed or continue to exist in the field of road transport, there has not so far been anything in the law to exclude the possibility of a choice by the potential customer between the services of any number of carriers by road. That this number was kept down, and competition was restricted by the licensing system established under the Road and Rail Traffic Act, 1933, is true, but irrelevant in the present context. Entry into the trade was made more difficult by that system, but, once he had succeeded in obtaining his licence and established himself, the entrepreneur was, after the Act of 1933 as before, potentially a competitor with others. Hence, if he reserved to himself the right of accepting or rejecting consignments in accordance with 'the attractiveness or otherwise of the particular offer', it was, as a matter of law (though not of course necessarily as a matter of fact), open to the would-be consignor to engage the services of another carrier. This will be different when the nationalisation of long distance carriage is completed. After the 'appointed day' the Transport Commission will have a legal monopoly of carriage by road outside a circle of twenty-five miles around the operating centre of the vehicle. The right of the Commission or of its agent, the Road Transport Executive, to reject consignments, to 'pick and choose' between potential customers, and hence their legal status as private carriers is not incompatible with the existence of the legal monopoly. As a matter of legal history it may be true that the common carrier's duty to carry and

[26] Above, p. 122.

[27] The case of *Scaife* v. *Farrant* (1875), L.R. 10 Ex. 358, is somewhat misleading. The majority of the Exchequer Chamber held that the special contract made between the parties showed that the defendant was not a common carrier. This is not in line with the decisions in *Baxendale* v. *G.E. Ry. Co.*, above, and in *G.N. Ry. Co.* v. *L.E.P. Transport Co.* The correct line of reasoning seems to be contained in the judgment of Denman, J., at p. 364, where he points out that, but for the contract in this particular case, the defendant would have been under the common carrier's absolute liability.

his absolute liability were developed by the courts, consciously or subconsciously, as an attempt to counteract the economic effects of factual monopolies. It does not follow that a carrier who is a monopolist, whether merely in fact or, as in the case of the Transport Commission after the appointed day, by operation of law, is therefore a common carrier. If in fact the Road Transport Executive acts in practice like the defendant in *Belfast Rope Work Co.* v. *Bushell,* above, it is a private carrier in the eyes of the law, despite the fact that the rejection of the consignment would deprive the trader of any opportunity of having his goods carried by road. In the case of the railway companies the view that they were common carriers was largely based on the fact not that they were monopolists, but that they were under a statutory duty to carry. Now it is true that the Transport Act, 1947,[28] imposes a similar duty upon the Commission and its agents. Where, for the time being, they provide 'regular goods transport services of different kinds available between the same points, it shall be their duty to allow any person desiring transport for his goods between those points freedom to choose such of the services so provided as he considers most suitable to his needs'. At first sight this might seem to be conclusive, and it would be tempting to draw the inference that, as a result of this provision, the Transport Commission and its agent, the Road Transport Executive, will, after the appointed day, be common carriers of goods outside the 25 mile circle. Nevertheless, it is submitted that this inference would be erroneous. Section 3, subsect. 5 provides that 'nothing in this section shall be construed as imposing on the Commission, either directly or indirectly, any form of duty or liability enforceable by proceedings before any court or tribunal to which they would not otherwise be subject'. This makes it clear beyond any doubt that the duty not to compel the potential customer to send his goods by rail instead of by road (which is the essence of the provision in Sect. 3, subsect. 1) does not subject the Commission to the liabilities of a common carrier. It is, however, necessary to observe the legal implications of the words 'nothing in this section' and 'not otherwise be subject'. No court will be able to say that the Commission is a common carrier because of the operation of the section as such, but the careful wording of subsect. 5 leaves it open to the court to say that the Commission has become a common carrier as a result of the practice developed under the section. In other words: if in future the Road Transport Executive finds itself compelled to forego the right to 'pick and choose' between consignments offered for long distance carriage,

[28] Sect. 3, subsect. 2.

then a court may well say that it has become a common carrier because in fact it has begun to hold itself out as a long distance carrier for all and sundry. The problem here discussed may fascinate the jurist and may, in years to come, be keenly discussed among economists and lawyers. Its practical importance is likely to be small. By virtue of Sect. 76 of the Transport Act, 1947, the charges schemes which the Transport Commission will have to submit for confirmation to the Transport Tribunal must cover the charges of its road services and may cover the terms and conditions (including those as to liability for loss or damage) under which it carries. It is more than possible that, when the appointed day arrives, statutory schemes will be put in operation which will completely regulate the charges for long distance carriage by road and the conditions under which the Road Transport Executive can be made liable either absolutely or for negligence. The common carrier's liability, if any, of the Road Transport Executive is therefore likely to be superseded by a statutory liability in a way similar to that in which the railway companies' common law liability was, after Jan. 1, 1928, superseded by their liability under Standard Terms and Conditions.[29]

At the present moment the old common carrier's liability is of very little importance indeed. The Railway Executive carries under statutory conditions and road hauliers are, as a rule, private carriers. We do not know what the future may have in store, but, as things are today, the common carrier's absolute liability, established for the protection of the public in the seventeenth and eighteenth centuries, has largely ceased to be a matter of the living law and become a historical relic and a textbook affair.[30]

[29] It has long since been held that the Postmaster-General is not a common carrier, and this is also embodied in statutory provisions relating to the Post Office: see Post Office Act, 1908, Sect. 13. In *Rosenthal* v. *L.C.C.* (1924), 131 L.T. 563, it was held that the L.C.C. was not a common carrier of goods transported in its tramways. Nothing in the text affects the position of personal luggage transported for passengers in public service vehicles. This matter will be dealt with below.

[30] Strangely enough, the common carrier's liability survives in the law of sea carriage under the rule in the *Liver Alkali Case,* though carriage by sea without a special contract either by way of charterparty or by way of bill of lading is a rare exception.

Chapter 11

THE CONTRACT OF CARRIAGE

The relationship between the consignor and the carrier, from which the wide liability of the latter arises, depends on contract, but not upon any express contract. It depends merely on the fact of the carrier in the ordinary course of his business accepting the goods for carriage. Who, then, are the parties to the contract? Who is in a position to proceed against the carrier for default in the carriage of goods? The answer is that the owner of the goods is regarded as the person with whom the contract of carriage is made, and that he, therefore, is the proper person to sue the carrier. In most cases the object of carrying goods from one place to another is to transfer possession from a seller of goods to a buyer. In such cases the consignor, when delivering the goods to the carrier, is still the owner of the property, but the very act of delivery to the carrier usually makes the consignee the owner of the property, under Sect. 32 of the Sale of Goods Act, 1893. Though the contract in such a case has the appearance of having been made by the consignor, it is in fact made by him on behalf of, and as agent for, the consignee as owner, and it does not matter what arrangements have been made between seller and buyer with regard to the payment of the freight, *i.e.*, whether it is included in the price and has to be borne by the seller, or whether the buyer has undertaken to pay it out of his own pocket. Therefore, if goods are sold and delivered to the Railway Executive or to a road haulier for carriage to the buyer, and they are lost or injured during transit in circumstances involving liability on the part of the carrier, damages must be paid to the consignee, not to the consignor. The law regards this as the normal case, and gives the carrier a right to assume that if goods are entrusted to him for carriage this is done in performance of a contract of sale. It is not the carrier's duty to inquire into the internal relationship between consignor and consignee. Unless he has been made familiar with circumstances justifying the conclusion that the case has not the normal features of a contract of sale, he is safe if he pays damages to the consignee, while he pays the consignor at the risk of having to compensate the consignee all over again. Since the consignor is deemed to act as agent for the consignee, the latter is bound by all the conditions of the contract, but is not bound by any private arrangement between the consignor

and the carrier which is not incorporated in a printed or written contract. If the consignor makes a special contract with the carrier by which the carrier expressly undertakes to compensate him in cases of loss or injury whether he be the owner or not, the consignor has the right to claim damages without proving his ownership. Such contracts are extremely rare.

There are, of course, many cases in which delivery to the carrier does not, in fact, affect ownership of the goods. The consignor may be and remain the owner up to the end of the transit and longer, for instance, if he sends the goods to a buyer on approval, or where it has been agreed between seller (consignor) and buyer (consignee) that ownership shall not pass before the goods have reached the buyer's premises, or where the consignor had not sold the goods at all, but sent them to his agent, or to another town in connection with a removal of his business. In such cases, if the circumstances are known to the carrier, damages should be paid to the consignor.

On the other hand, the consignee may be the owner even before transit begins. It would seem as if in such cases the consignee should always be regarded as the party to the contract with the carrier. In fact, this is not always so. If the consignor was entrusted by the consignee with the possession of the goods, that is, if the consignor is the consignee's bailee, the contract is deemed to be made between the consignor (bailee) and the carrier. This is well illustrated by an old case. A laundress was under contract to fetch, wash and return her customer's linen. She used to return it by carrier, paying carriage. In an action against this carrier for the loss of some linen belonging to a customer it was held that, as she was a bailee responsible for the safe return of the linen, she was entitled to sue the carrier.[1] Though, however, in these cases the bailee-consignor alone is a party to the contract with the carrier, there are cases in which nevertheless the consignee may sue the carrier as well. But his right to receive damages cannot be based on a contract with the carrier, it can only arise from the carrier's general duty not to be negligent in his handling of other people's goods. In other words, it is not based on a contractual claim, but an action arising from tort, and subject to principles altogether different from those governing the carrier's ordinary contractual liability.

Again, it is possible that neither the consignor nor the consignee is the owner of the goods. The contract with the carrier would, in such a case, be deemed to have been made by the consignor on behalf of the owner. If, however, the consignor acted as the

[1] *Freeman* v. *Birch* (1843), 3 Q.B. 492.

owner's bailee, he and not the owner would be the proper person to sue the carrier. If, for instance, an agent sends goods belonging to his principal to another agent, the consignor-agent in his capacity as bailee would be the person to claim contractual damages from the carrier in cases of loss or injury.

These principles determine the question who is, in cases of loss or injury, the person entitled to claim damages from the carrier. The question of liability for freight is altogether different. It will be dealt with later.

Chapter 12

LIMITATION OF LIABILITY BY CONTRACT

INTERPRETATION OF CONTRACTS LIMITING LIABILITY

We have seen that a carrier cannot limit his liability by a unilateral act. There is, however, nothing in the common law to prevent a consignor and a carrier from making a special contract, and, if such a contract is made, the relationship between them will be controlled by the special contract. The common law liability is often varied by such contract; but except in so far as it is so varied the carrier continues to be under that liability; and a common carrier, as we have seen, does not by limiting his liability assume the position of a bailee, who is only liable where he is negligent. Thus, where the contract exempts the carrier from liability for loss from certain causes only, he remains liable for loss from other causes. There is generally a presumption that a carrier remains liable for loss of, or injury to, the goods owing to the negligence of himself or his servants; and in order that a contract may free the carrier from liability for negligence, it must do so in explicit terms.

'The common law imposes upon the carrier of goods definite and well-known liabilities for the protection of owners. These liabilities are frequently modified by the terms of express contracts, but except to the extent to which plain language affects alteration, they still remain and cannot be removed by subtle implications or ambiguous words'.[1]

Since there is no statutory limitation to the road carrier's liability for loss of or injury to goods during transit or for misdelivery and delay, it is important for him to restrict his liability by contract. For, though most road carriers are private carriers, this liability is a very heavy one, since it is incumbent upon them to prove that they and their servants have not been guilty of any negligence with respect to the goods.

It is, therefore, of vital importance that words should be chosen which clearly and unambiguously limit the carrier's liability. Great care must be applied to this task, since words which at first sight might seem to indicate to the layman that liability is restricted or

[1] Lord Buckmaster in *L. & N.W. Ry. Co.* v. *Neilson*, [1922] 2 A.C. 263, at p. 266.

even removed cannot always be held by the Courts to be able to achieve the result desired.[2]

The interpretation of clauses in contracts purporting to restrict a carrier's liability varies according as to whether the carrier is a common carrier or a private carrier. Suppose, for instance, a contract between the owner of goods and a road carrier contains the words that 'the carrier is not to be responsible for loss or damage caused by fire'. If the carrier is a common carrier this clause may mean one of two things: it may imply that he will not be liable for fire unless caused by his or his servants' negligence, in which case he removes his absolute common carrier's liability and reduces it to that of a private carrier or bailee. But it may also mean that he excludes all liability whatsoever, even that for his own and his servants' negligence. If he is a common carrier, the Courts take the view that a general clause of this kind does not relieve him of liability for negligence, but has the more restricted effect only of reducing his liability to that of a private carrier.[3] There is almost a presumption that general words used in a contract regulating the common carrier's liability will not affect his liability for negligence.

The private carrier, however, is in an altogether different position. His only liability is that for his own and his servants' negligence. General words of the kind quoted would have no meaning at all unless they took away or restricted his liability for negligence. The same words which, used by a common carrier, will only relieve him of absolute liability and leave him saddled with liability for negligence, will take away all liability if used by a private carrier.

'A common carrier is liable for the acts of his servants whether they are negligent or not; an ordinary bailee is not liable for the acts of his servants unless they are negligent. If a common carrier would protect himself from responsibility for all acts of his servants he must use words which will include those acts which are negligent; because words which would suffice to protect him from liability for acts properly done by his servants in the course of their services may fall short of protecting him from their negligent acts. But if an ordinary bailee used words applicable to the acts of his servants, inasmuch as he is not liable for their acts unless negligent,

[2] See, in particular, the important judgment of Walton, J., in *Price & Co.* v. *Union Lighterage Co.*, [1903] 1 K.B. 750, at p. 752. The judgment was affirmed by the Court of Appeal: see [1904] 1 K.B. 412.

[3] It is believed that this rule was originally developed in the law of carriage by sea, particularly in connection with liability for unseaworthiness, and then applied to the law of inland transport. See *The Pearlmoor*, [1904] P. 286, and *Price & Co.* v. *Union Lighterage Co.*, quoted above; and see *Beaumont-Thomas* v. *Blue Star Line, Ltd.*, [1939] 3 All E.R. 127, and in particular the judgment of Scott, L.J., quoted below, p. 330.

the words will generally cover negligent acts, although such acts are not specially mentioned, because otherwise the words would have no effect'.[4]

This rule is well illustrated by the decision in *Turner* v. *Civil Service Supply Association Ltd.*[5]

The defendants, furniture removers and warehousemen, entered into a contract to remove by van the plaintiff's furniture from London to Hailsham. One of the conditions of the contract was that the defendants were not responsible for loss or damage caused by fire. In the course of the transit a fire caused by the negligence of the lorry driver destroyed the bulk of the plaintiff's goods and damaged the remainder. The plaintiff sued for damages and the defendants relied on the exemption clause. Sankey, J., was compelled to decide in favour of the defendants. Since the defendants were admittedly private carriers the general clause relieved them from liability for negligence.

It must not be assumed, however, that a private carrier need not make his intention to limit his liability quite clear. This was expressly emphasised by Sankey, J., in the case just quoted. It is not the rule that clear words must be used, but the other rule that general words do not affect liability for negligence which, though applicable to the common carrier, is inapplicable to the private carrier.[6]

Examples of words which have been held to be sufficient to restrict a carrier's liability are that the carriers 'will not be responsible for any damages however caused',[7] or that the carriers will not be liable 'in any case' for loss or damage to the goods,[8] or that the carrier was relieved 'from all liability for loss or damage by delay in transit or from whatever other cause arising';[9] or that a bailee was not to be liable 'whatever may be the nature of such accident or damage or howsoever arising'.[10] On the other hand it would be insufficient, in order to exclude a common carrier's liability

[4] Per Bankes, L.J., in *Rutter v. Palmer,* [1922] 2 K.B. 87, at p. 90.

[5] [1926] 1 K.B. 50, followed in *Fagan* v. *Green and Edwards, Ltd.,* [1926] 1 K.B. 102. See also *Bontex Knitting Works Ltd.* v. *St. John's Garage,* [1943] 2 All E.R. 690, [1944] 1 All E.R. 387, and *Alderslade* v. *Hendon Laundry Ltd.,* [1945] 1 All E.R. 244.

[6] In *Pyman Steamship Co.* v. *Hull and Barnsley Ry. Co.,* [1914] 2 K.B. 788, Bailhache, J., drew the same distinction in a case of owners of a graving dock who were liable as bailees to the owners of a ship who had used the dock under a contract. See in particular the language used by the learned judge at pp. 793–795.

[7] *Austin* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1852), 10 C.B. 454.

[8] *Ashendon* v. *London, Brighton and South Coast Ry. Co.* (1880), 5 Ex. D. 190.

[9] *Brown* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1883), 8 App. Cas. 703.

[10] *Pyman Steamship Co.* v. *Hull and Barnsley Ry. Co.,* above.

to use the words that he shall not be liable 'for any loss of or damage to goods which can be covered by insurance'.[11] In the case of a private carrier, however, the words excluding liability 'for any damage to goods however caused which can be covered by insurance', were held to have the effect of relieving the carrier of liability for negligence,[12] and the words 'passengers take upon themselves all risk whatsoever of the passage' had the same effect in the case of a carrier of passengers.[0]

RESTRICTIONS ON THE CARRIER'S POWER TO LIMIT HIS LIABILITY

These, then, are the rules governing the interpretation of contracts restricting or excluding the carrier's liability. There are, however, other rules of law which make it impossible for the carrier to restrict his liability altogether or at least in certain respects. The carrier's freedom of contract is not in all cases unlimited.

A private carrier of goods is free to make a contract with the consignor by which he removes his liability for the safety of the goods during or after transit. The contract need not even be given any particular form. Though it will be advisable, even in the case of a private carrier, to make the contract in writing, in order to facilitate proof, it will be legally valid although made by word of mouth.

The case of a common carrier is different. The responsibility laid on his shoulders is clearly a very heavy one. Naturally, therefore, carriers were eager, whenever they possibly could, to enter into agreements with their customers, so as to limit and cut down their responsibility as far as possible. The risk is particularly great and the responsibility especially heavy where small parcels containing articles of great value are entrusted to carriers; and it was with regard to such parcels that carriers were most anxious to avoid their common law liabilities. Hence, in the earlier part of the nineteenth century, a custom grew up amongst carriers of posting up notices at their receiving offices altogether excluding the carrier's liability for all classes of goods, or limiting it to certain causes of loss or injury. If it could be proved that a notice of this kind came to the knowledge of the consignor at the time he handed over the

[11] *Price & Co.* v. *Union Lighterage Co.*, quoted above. See also *Sutton & Co.* v. *Ciceri & Co.* (1890), 15 App.Cas. 144; and see, to the same effect, Creswell, J., in *Austin* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1852), 10 C.B. 454, at 473, 474.

[12] *Travers* v. *Cooper*, below, p. 159. See also *Mitchell* v. *L. & Y. Ry. Co.*, below, p. 195.

[0] *Beaumont-Thomas* v. *Blue Star Line Ltd.*, above.

goods to the carrier, the Courts presumed that he had consented to the terms and the conditions of the notice; and the carrier would be able to escape the whole of his liability, or part of it, unless, perhaps, gross negligence could be proved against him. If such a notice were posted up in a conspicuous position in the receiving office, and if the consignor had actually been in the office so that he had an opportunity of reading the notice, the Courts would generally decide that he must have seen the notice, and, therefore, that it had come to his knowledge. If, having seen it, he did not choose to read it and so ascertain the conditions upon which he was sending the goods, that was his own fault. On this principle, no doubt, the Courts often held that such notices were binding upon persons, who had never in fact seen them, and who knew nothing of their contents, so that in practice they operated like unilateral binding declarations on the part of the carrier, while in legal theory they remained contractual conditions. These notices naturally gave rise to many disputes and to much litigation. Difficult questions frequently arose as to their meaning, and as to whether they had been brought to the knowledge of the consignors. To remedy this state of things the Carriers Act of 1830 was passed.

The circumstances in which it was passed are stated in a preamble to the Act. It says that bankers and other persons often sent parcels containing money, notes, jewellery and other property of great value in small compass, by public conveyances, so that the property was very liable to depredation and the responsibility of the carrier greatly increased, also that the senders very often omitted to notify the value and the nature of such parcels so as to give the carrier the opportunity of taking special care to protect himself from this heavy responsibility; and that it was difficult to prove that parties had knowledge of notices published by carriers limiting their responsibility, so that carriers were exposed to great and unavoidable risks and had sustained heavy losses.

It was, then, a very real grievance on the part of the carriers which gave rise to the Act, but it would be a mistake to regard the Act as a statute enacted for the sole purpose of giving relief to the carriers. In fact, the public had a grievance as well, for the practice of posting up notices deprived owners of goods not only of the advantages accruing from the heavy common carrier's liability, but often of any right against the carrier altogether. These notices had become usual as a measure of self-protection by the carriers against their liability for goods 'of great value in small compass' and for goods of a brittle or breakable nature. By legalising the carriers' practice with regard to these goods, the Act made its general use

unnecessary, and in affording a remedy to the carriers' special grievances referring to valuables, the Act opened a way of dealing, for the benefit of the public, with the general grievance of the unilateral notices.

The effect of the Act is that all goods are divided into two groups, valuables, that is certain enumerated types of property of great value in small compass and of a brittle nature, and others. With the special rules introduced for the carriage of valuables we are not yet concerned.[13] As regards general goods, that is, non-valuables, Sect. 4 of the Act provides that no public notice shall in any way limit or affect the common law liability of the common carrier for loss or injury. Hence, no notice stuck up in a carrier's receiving office purporting to limit the carrier's liability for goods not within the Act is of any effect, even though the sender of the goods is fully aware of the notice and makes no objection.

But, while the carrier is thus deprived of one way of imposing conditions of carriage on consignors, his general freedom to contract out of his common law liability is not impaired by the Act. Section 6 provides that nothing in the Act shall in any way affect any special contract between common carriers and other parties for the conveyance of merchandise. A special contract means an agreement expressly made between the carrier and the other party with respect to a particular consignment of goods. If any such contract is made, the relationship between the parties is governed by the contract, and not necessarily by the common law. Neither the extent to which the carrier may restrict his liability nor the form of the contract is affected by the Act, with this exception that the contract must not have the form of a public notice stuck up in the receiving house. As far as common carriers by road are concerned no further statute has been passed to regulate special contracts restricting or excluding the common carrier's liability, and to this day a road haulier who is a common carrier is free entirely to remove his liability by contract.

THE RAILWAY AND CANAL TRAFFIC ACT, 1854

It is, however, altogether different in the case of carriage by railway. When the Carriers Act became law, the earliest railways had just been opened, and no one knew with certainty whether this new mode of transport would be a success or not. Probably the Act was passed with little thought of railways. Mail coaches, stage coaches, wagons and vans are mentioned in the Act itself; but railways are never expressly referred to. Railways and carriers by railway are

[13] See below, p. 201.

only brought within the Act by the use of the terms 'other public conveyances by land for hire' and 'other common carriers'. These words were, of course, quite wide enough to include the railway companies (as today they cover the Railway Executive). Within a few years after the passing of the Act everything was changed. The whole face of the country became covered with railways: railways ran to every town of any importance; and carriage by railway became almost the only mode of carriage by land except for very short distances. This new order of things had the effect of creating huge monopolies. If a person wished to send goods from one place to another, he found he could only do so by employing a railway company, and very likely he had no choice of railway. He had to send his goods by one certain railway, or not at all. In such circumstances the companies became exceedingly powerful, and it is not surprising to find that they made great efforts in every possible way to use the full power (expressly preserved by the Carriers Act) of making special contracts with consignors in order to cut down and limit the great responsibility attaching to them as common carriers. They were often in such a position as to be able, practically, to insist on such contracts; and so they managed to do a very great part of their most risky business under special agreements with their customers, which to a large extent deprived the customer of his right under the general law relating to carriers. This was effected in a way somewhat reminiscent of the old practice of sticking up notices in receiving offices (now barred by the Carriers Act), but the place of the printed and posted up notices was now taken by the conditions printed on a receipt and handed to the consignor. When a person brought goods to a railway station to be forwarded, he was handed a paper or ticket which acknowledged the receipt of the goods and of the money charged for the carriage, and contained also in print a set of *conditions* on which the goods were carried. If those conditions were brought to his notice and if he did not dissent, the Courts held that the conditions constituted a special contract between him and the carrier and that the liability of the carrier was determined by the contract. If the conditions were not brought to his notice, the consignor was not bound by them; but it was almost impossible for him to prove that they did not come to his notice if they were printed and put into his hand, since the Courts usually presumed that the consignor had notice of the conditions when they were placed in his hand. If the goods were lost or damaged and the owner tried to get compensation, he was referred to the conditions of his contract, and then, for the first time probably, he read them, and ascertained that the railway com-

pany had accepted his goods upon terms which protected the company from almost every kind of liability. There are a great many cases reported illustrating this state of things, the most important example of which was *Carr* v. *Lancashire and Yorkshire Ry. Co.*,[14] a particularly hard case in which the railway company was held to be protected from the consequences of the gross negligence of its servants by a clause printed at the foot of a weighbill. Cases of this sort attracted a good deal of attention. Complaints from the public were loud and there was a demand for the interference of Parliament. It seems that the case just mentioned, which was heard in 1852, was a good deal commented upon, and probably helped to bring matters to a crisis.

Accordingly, in 1854, Parliament did interfere; and the result of this interference was that Act of such extreme importance to carriers by railway—the Railway and Canal Traffic Act, 1854.

As we have seen, the Act provided, in Sect. 2, that all railway companies shall, according to their powers, afford all reasonable facilities for receiving and forwarding and delivering of traffic, including passengers and their luggage, goods, animals, and other goods carried by any railway company.[15] This provision is still in force, although we must, of course, read it, as if the words 'Transport Commission' were substituted for 'railway companies'.[16]

There was thus imposed on carriers by railway a statutory duty to carry for any one who desires to contract with them all sorts of goods which they have facilities for carrying, including animals. They cannot refuse to carry any such goods; but neither this Act nor any other Act prevents a carrier by railway from contracting out his common carrier's liability.[17]

Section 7, however, provides that carriers by railway are liable for the loss of or injury to any goods carried by them, occasioned by the neglect or default of themselves or their servants, notwithstanding any notice, condition or declaration by the carrier limiting such liability. Every such notice, condition or declaration is declared to be null and void, but nothing in the Act is to prevent the carrier from making such conditions with respect to the receiving, forwarding and delivering of goods as are just and reasonable. No special contract, however, with any other party respecting the receiving, forwarding or delivering of goods is to be binding upon such party unless the contract is signed by him or by the person

[14] (1852), 7 Ex. 707.
[15] See above, p. 102.
[16] Transport Act, 1947, Sect. 14 (4).
[17] *Dickson* v. *G.N. Ry. Co.*, above; *Smith & Sons* v. *L.N.W. Ry. Co.*, above.

delivering the goods to the carrier. The consignor, therefore, may be bound not only by the signature of himself or his agent, but also by the signature of the person who delivers the goods to the Railway Executive, whether in fact that person had authority to sign or not.

It is further provided that nothing in the Act is to alter or affect the rights, privileges, or liabilities of any carriers by railway under the Carriers Act with respect to goods within that Act.

The section restricts the Railway Executive's power to enter into contracts limiting their liability for the neglect or default of their servants. 'Default' in the section means default in the nature of neglect or wilful misconduct and within the scope of the servant's authority. Goods may be lost or injured by causes which have nothing to do with a servant's wilful misconduct or neglect, and there may even be a default of a servant which is neither in the nature of negligence nor within the scope of the servant's authority. As regards such events, the railway company's, and now the Railway Executive's, power to exclude or restrict its liability is unimpaired by the Act. The Act leaves it free to reduce its common carrier's liability to that of a bailee in whatever form it likes, and whether the conditions under which it is done are just and reasonable or not. But as soon as that part of the carrier's liability is concerned which he would have to bear even if he were a private carrier, the contract restricting the liability must comply with the Act in order to be valid. Thus goods may be stolen by a servant without any neglect on the part of the carrier. This is an event for which a common carrier, but not a private carrier is liable. It is certainly lost by the default of a servant; but this defence is not within the section. Therefore, liability for such theft may be excluded otherwise than by a signed contract which is just and reasonable.[18] If, however, the theft was facilitated by neglect on the part of the Executive, the section applies, and from liability for such loss the Executive would be relieved only if the contract was made in accordance with the section.

The section only applies to matters connected with the 'receiving, forwarding, and delivering' of the goods, that is, with the Executive's liability as a carrier. Therefore, conditions relating to matters after transit is at an end are not with the section. Conditions relating to the warehousing of goods after the transit is complete and conditions relating to lien come under this principle.[19]

[18] *Shaw* v. *G.W. Ry. Co.*, [1894] 1 Q.B. 373; see, in particular, Wright, J., at pp. 382, 383.

[19] See below, pp. 196, 244.

The Act applies to loss or injury, not to delay. If the Executive wishes to protect itself against liability caused by unreasonable delay, it may still do so without making a signed contract and though the conditions of the contract are not reasonable.

It must not be assumed, because the restriction upon the carrier's power to contract out of his liability is contained in the same Act which imposes the duty to grant facilities for carriage, that the effect of Sect. 7 is confined to those cases in which the carrier is under a duty to carry. Even though the Executive would have had a right to refuse the goods at common law as well as under the statute (for instance, in the case of dangerous goods), the section would apply.[20]

The Act requires a contract restricting the carrier's liability for loss or injury caused by the neglect or default of its servants which is, firstly, signed by the consignor or his agent, and, secondly, just and reasonable.

It was for some time doubtful whether, on the proper construction of this section, just and reasonable conditions were binding whether contained in a signed contract or not, and also whether conditions in a signed contract were binding whether they were just and reasonable or not, *i.e.*, whether both requirements had to be fulfilled or whether they were to be considered as requirements in the alternative. From a practical point of view, this question was decisive. For, if a company, by inducing the consignor to sign a written document, could obtain conditions which were not just and reasonable, then the Act had failed to achieve its purpose, namely, to prevent the companies from imposing unjust conditions on the public. There was a good deal of fluctuation of opinion amongst the judges, but it was finally settled that the two requirements were cumulative and not alternative. Conditions exonerating the carrier from liability for neglect, although perfectly just and reasonable, are not binding upon the consignor unless contained in a writing signed by him or on his behalf; and, what is more important, conditions although contained in a contract signed by the consignor, are not binding upon him unless they are just and reasonable.

These important principles were finally settled in the famous case of *Peek* v. *N. Staffordshire Ry. Co.*[21]

The plaintiff was the owner of three marble mantelpieces which he

[20] See, as to this point, Hughes, L.Q.R., 1931, p. 234, where it is rightly pointed out that some of the dicta of Lindley, L.J., in *Dickson* v. *G.N. Ry. Co.*, above, cannot be upheld in view of later decisions. For the present position of dangerous goods, see below, p. 232.

[21] (1863), 10 H.L. 473.

wished to send to London by railway. A printed notice was delivered to him, intimating that the company would only receive, forward and deliver goods subject to certain conditions stated in the notice, one of which was that all liability for loss of or injury to this type of article was excluded unless declared and insured according to its value. A long discussion then took place, both verbal and written, between the parties, and at last the company informed the plaintiff that the charge would be at the rate of £2 : 15*s.* per ton and, if insured, the charge would be 10 per cent on the declared value in addition. Then the plaintiff wrote: 'Please forward the three cases of marbles, not insured', and signed this. The goods, which were thus invoiced at the uninsured rate were injured in transit from being exposed to wet, and the plaintiff sued the company for damages. The company relied on the document signed by the plaintiff, but the House of Lords held that the condition was unreasonable, and being unreasonable, was invalid under the Act even if it had been embodied in a written and signed document.[22]

This decision also establishes the criteria to be applied in testing a contract as to its reasonableness under the Act. The House of Lords found that a carrier by railway is bound to carry for a reasonable remuneration. If he offers to do so, but at the same time offers in the alternative to carry on the terms that he shall have no liability at all, and holds forth as an inducement a reduction of the price below a reasonable remuneration, or offers some other advantage which he is not bound to give, such condition must be reasonable within the meaning of the Act. The carrier must offer to the consignor a 'fair alternative' to carriage at owner's risk. No contract for carriage at owner's risk can be valid unless, at the same time, the carrier declares his readiness to carry at his own risk and at a reasonable rate. And this alternative is only fair if the offer to carry at owner's risk is coupled with a reduction of rates fairly equivalent to the additional risk imposed upon the owner.

The consignor, then, must have a real alternative and the power, if he pleases, to send his goods at the carrier's risk for a reasonable sum. In *Peek's Case* the high rate of insurance was a deterring rate, and the condition was unreasonable, as the consignor had no bona fide choice offered to him; but if there is a fair alternative, there is also a presumption that the arrangement is just and reasonable. Though it is prima facie unreasonable for the carrier to require a consignor to pay a sum by way of insurance, estimated at a percentage of the value of the goods, as a condition of undertaking

[22] It was also decided that the documents referred to did not constitute a contract in writing containing the conditions signed by the plaintiff; and that the Act requires that not only must the condition be just and reasonable, but also that it must be embodied in a special contract in writing, signed by the owner of the goods or person delivering the goods to the carrier.

full responsibility for their safety, yet even such a condition may, in a given case, be reasonable.[23] The onus of showing that the contract is just and reasonable rests upon the carrier.[24]

These principles were laid down in *Peek's Case* and in various other cases turning on the construction of Sect. 7.[25] They governed the carriage of all ordinary goods by railway until Jan. 1, 1928.[26] Even now they apply to passengers' luggage and to merchandise carried under a written contract specially made between the parties in accordance with Sect. 44 (3) of the Railways Act, 1921.

THE ORIGIN OF STANDARD TERMS AND CONDITIONS

Railway companies were—and the Railway Executive are now—common carriers of all goods which they profess to carry as such; and before Jan. 1, 1928, the companies, unless they took the precaution of making a special agreement, were subject to the liabilities of a common carrier at common law in respect of all goods carried by them with the exception of certain valuable and breakable goods and of certain animals.[27] A special agreement gave no protection to a company from liability for loss or injury caused by negligence or default, unless it was in writing signed by the person sending or delivering the goods and unless the conditions limiting the liability were just and reasonable.

No carrier by railway, however, was (except by special agreement) under any greater liability than that of the common carrier, for by Sect. 89 of the Railway Clauses Act, 1845, it is provided that nothing in that Act or any company's special Act shall make a company liable in any case except where the common carrier would be liable, nor deprive a company of any protection or privilege to which common carriers are entitled.

From the earliest days of railways the companies have used many forms of contract applying to various conditions and classes of traffic. Out of the doctrine of the fair alternative established by

[23] *G.W. Ry. Co.* v. *McCarthy* (1887), 12 A.C. 218. In the case of valuables and animals special rules apply which will be considered below. Whether a contract is just and reasonable must be determined by the Court or judge alone. It is not a question proper to be left to the jury, even though questions of fact are necessarily involved in its determination. See Lord Herschell in *G.W. Ry. Co.* v. *McCarthy*, at p. 229.

[24] *Brown* v. *Manchester, &c. Ry. Co.* (1883), 8 App.Cas. 703, at p. 716, *per* Lord Watson.

[25] The more important of these cases are *Glenister* v. *G.W. Ry. Co.* (1873), 29 L.T. 423; *Lewis* v. *G.W. Ry. Co.* (1877), 3 Q.B.D. 195; *Dickson* v. *G.N. Ry. Co.* (1886), 18 Q.B.D. 176; and *Williams* v. *Midland Ry. Co.*, [1908] 1 K.B. 252.

[26] See below.

[27] See below, pp. 201 and 217.

Peek's Case and the decisions following it, there grew alternative forms of consignment notes appropriate to carriage at carrier's risk [28] and to carriage at owner's risk.

The owner's risk conditions were those by which the companies restricted their liability, but, as a rule, accepted responsibility for wilful misconduct. In order to be valid these conditions had to be embodied in a contract signed by the consignor or his agent.

The Courts have always looked with extreme disfavour upon conditions, aimed at relieving carriers from *all* responsibility even for wilful misconduct on their servants' part. Judges were reluctant to hold that conditions were reasonable, if they went so far as to exclude the company's liability for wilful misconduct, though even such conditions were sometimes held to be valid when the consignor was given some fair and substantial advantage as consideration for his agreement.[29] Yet, though even a condition removing the carrier's liability for wilful misconduct might occasionally be saved under the doctrine of the 'fair alternative', an attempt by the companies to contract out of this particular liability always involved the risk that the conditions were not upheld by the Courts. Thus it came about that even in their owner's risk consignment notes the companies usually took upon themselves the liability for the wilful misconduct of their servants.

The carrier's risk conditions represented the fair alternative which the company had to offer to the consignor, that is, they were the common law rules as to common carriers' liability with slight alterations. Furthermore, there were special conditions applicable to goods peculiarly liable to damage in transit, and others applying to livestock, fuel, milk, perishable goods, etc. Every company had its own forms; but these forms constantly underwent modification in the light of legal decisions and constantly approached uniformity as the companies more and more closely combined in common action for their mutual advantage. Hence, by the year 1921 the forms in use by the various companies were nearly identical.

The interpretation and application of these forms of consignment notes have been a fruitful source of litigation. The Railways Act, 1921, aimed at bringing about a complete uniformity in the terms of contracts for the carriage of goods and at giving the conditions previously printed on the backs of the forms statutory

[28] Throughout this book the words 'carrier's risk' have been substituted for 'company's risk', although the latter expression is still used in the Standard Terms and Conditions which continue to be in force.

[29] The leading case is *Brown* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1883), 8 App.Cas. 703. Lord Bramwell's speech is particularly important.

authority, making it unnecessary in the future to express them.

The Act [30] required the railway companies to prepare and submit to the Transport Tribunal (then the Railway Rates Tribunal) the terms and conditions for carriage at carrier's risk of merchandise other than livestock and of livestock, the corresponding owner's risk conditions, and also the terms and conditions for the carriage of damageable goods not properly protected by packing. The Tribunal was required to consider these terms and conditions, and, after hearing parties interested, to settle them and fix the date for them to come into operation.

The terms and conditions having in due course, and after much consideration and public discussion with the aid of experienced counsel, been duly settled, the Tribunal at length appointed Jan. 1, 1928, as the date upon which those terms and conditions were to come into force. From that date to Jan. 1st, 1948, they were the standard terms and conditions of carriage for all railway companies, and they are now the standard terms and conditions of carriage for the Railway Executive. They are deemed to be reasonable, and no one can be heard to maintain the contrary and to challenge their validity.[31]

If goods are carried under Standard Terms and Conditions it is not possible for the owner to rely on Sect. 7 of the Railway and Canal Traffic Act, 1854, and to contend that any limitation of the carrier's liability, contained in Standard Terms and Conditions, is invalid, but this does not mean that Sect. 7 is repealed. Nothing in the Railways Act, 1921, precludes the Executive and a trader from agreeing in writing to any terms and conditions they think fit for the carriage of goods, subject to the provisions of the Act of 1854. Hence, liberty is reserved to traders and to the Executive to make contracts outside the standard conditions, provided such contracts are in writing.[32] To such special contracts Sect. 7 of the 1854 Act applies today just as it applied to all contracts of railway carriage before Jan. 1st, 1928. It is only in the absence of a special contract that Standard Terms and Conditions apply.

Since the appointed day all merchandise carried by railway without any special contract has been carried at the carrier's risk conditions. In order to bring the owner's risk conditions into operation a request in writing to carry at that rate is necessary, and the request is only effective if an owner's risk rate is in operation for the particular goods.[33] Further, although the Executive is not obliged to carry damageable goods not properly protected by packing, if it does

[30] Sect. 42.
[31] Sect. 43 (2).
[32] Sect. 44 (3).
[33] Sect. 44 (1); and see below, p. 154.

carry such goods, it carries them on the terms and conditions settled by the Tribunal for such traffic.[34]

The Tribunal settled fourteen sets of conditions. Conditions A, C, E, G, K, L and O are conditions for the carriage at carrier's risk of several types of goods; A, C and E apply to goods carried by merchandise train, A to ordinary merchandise for which no special terms and conditions are provided, C to livestock (other than wild animals), E to damageable goods not properly protected by packing. G, K, L and O govern the carriage of goods by passenger train or other similar service, L applying to merchandise in general, G to perishable merchandise, K to milk in cans, churns and butts and returned empty cans, churns or butts, and O to damageable goods not properly protected by packing.

To each of these sets of conditions, with the exception of E and O, there corresponds a form of conditions at owner's risk (Standard Terms and Conditions B, D, H, J and M), while N embodies the conditions for the carriage at carrier's and at owner's risk of livestock by passenger train or other similar service.

F contains special conditions for the carriage of coke, coal or patent fuel.

By far the most important of these are Standard Terms and Conditions A and B. If there is no special contract or request and ordinary merchandise is carried by merchandise train, it is no longer the common law which applies but Standard Terms and Conditions A.

The Tribunal may, on application, alter, add to or amend the terms and conditions and fix a date from which the alterations, conditions or amendments are to come into operation.[35] This power has been repeatedly exercised in the past and may continue to be exercised in future. Under the provisions of the Transport Act, 1947, however, more far reaching changes may be made. The 'charges schemes' which the Transport Commission must prepare and submit to the Tribunal for confirmation are, in the first place, intended to determine the charges which the Commission and its agents are entitled and liable to make for their services. But, 'where it is necessary or expedient so to do', they may be extended to the other terms and conditions applicable to the Commission's services and to the facilities it offers. In particular, they may regulate the liability of the Commission for loss or damage. The first of these schemes will have to be submitted before Aug. 6, 1949, unless the Minister of Transport extends this period.[36] It is possible that

[34] Sect. 44 (2).
[35] Railways Act, 1921, Sect. 45.
[36] Transport Act, 1947, Sect. 76.

these schemes will gradually supersede the existing Standard Terms and Conditions and that they will become the principal source of law with regard to the contractual rights and duties of consignors and consignees of goods carried by rail. Even more far reaching, however, may be the transformation which the schemes are likely to bring about in the law of transport of goods by road. The schemes will cover all the services and facilities provided by the Commission, and they may therefore settle the terms and conditions of the contracts between the Road Transport Executive and the owners, consignors and consignees of goods carried by road. The draft scheme or schemes which the Commission will have to submit before Aug. 6, 1949, will have to relate to the carriage of goods and passengers by rail, road and inland waterway within Great Britain, to port facilities, and to the storage of goods within Great Britain.[37] There is no need for the Commission to include in the draft schemes the terms and conditions (other than charges) for all these services and facilities, but it may do so. It is, therefore, possible that in the near future a considerable proportion of all the contracts made in this country for the transportation of goods by road and also for the warehousing of goods will, for the first time in the history of English law, be governed by statutory regulation. The inadequacy of the common law for the regulation of the contract of carriage by road has long been apparent. It may well be that we shall see the eclipse of the common law in the fields of road transport and of warehousing as we have seen it in the field of railway law. For the time being however the rights and liabilities of road carriers of goods in relation to their customers remain unaffected by statute.

Once a scheme has been confirmed by the Tribunal, it takes effect 'notwithstanding anything in any statutory provision relating to the subject matter of the scheme'.[38] Hence Sect. 7 of the Railway and Canal Traffic Act, 1854, will not be applicable to terms and conditions thus settled any more than it is to the Standard Terms and Conditions settled by virtue of the Railways Act, 1921. Alternative sets of terms and conditions may be provided,[39] and the determination of terms and conditions may be left to the unilateral decision of the Commission, subject to the approval of the Tribunal or even without such approval.[40]

The schemes are subject to alteration by the Tribunal and their operation must be reviewed by the Tribunal upon the request of the Minister.[41]

[37] Transport Act, 1947, Sects. 76 and 2 (1).
[38] Transport Act, 1947, Sect. 78, subs. 5.
[39] Transport Act, 1947, Sect. 77 (1) (c).
[40] *Ibid.*, Sect. 77 (1) (e).
[41] Sects. 79 and 80.

Chapter 13

LOSS AND INJURY DURING TRANSIT

THE RAILWAY EXECUTIVE'S LIABILITY AT CARRIER'S RISK

Standard Terms and Conditions, Form A, is a codification of the railway carrier's liability at common law with certain important changes. At carrier's risk the Railway Executive undertakes the common carrier's absolute liability. The owner whose goods have been carried at carrier's risk and are either lost or damaged during transit need not prove anything but that they were so lost or damaged, and that he, in consequence, suffered pecuniary loss. He need not prove that the loss or damage was due to any particular event.[1] His right to recover compensation is quite independent from the question whether any negligence on the part of the Executive's servants contributed to the loss or damage. Only in the case of the excepted perils will the Executive be free from liability, and even then it is for the Executive to prove that all reasonable foresight and care in the carriage of the merchandise was used. The insurer's liability is toned down to a liability for negligence in the case of the excepted perils, negligence to be disproved by the Executive. (Standard Terms and Conditions A (3).)

The scope of the four excepted perils [2] is wider under Standard Terms and Conditions A than at common law, and new exceptions have been added.

1. The first exception is, where the loss or injury is caused by the act of God. This old-fashioned but expressive phrase in its legal signification means some elemental force of nature which was directly the cause of the injury, and which could not have been foreseen, or, if foreseen, could not have been guarded against by any ordinary or reasonable precaution. The Railway Executive is not liable for any accident as to which it can show that it is due to natural causes directly and exclusively, without human intervention,

[1] A special form of conditions (F) is provided for coal, coke, and patent fuel. The carrier is only liable for loss of, or damage to, fuel in transit, if the owner can prove neglect or default on the part of the carrier or his servants (F (3)). There is no absolute liability.

[2] See above, p. 119. They can now be found in Standard Terms and Conditions A (3) (a) (act of God), (b) (act of the King's enemies), (c) (act or omission of the trader, his servants or agents), and (f) (inherent liability to wastage in bulk or weight, latent defect or inherent defect, vice or natural deterioration of the merchandise).

and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from the carrier.[3] Loss or damage is seldom caused to goods in transit on land by the act of God, as thus defined; for care must be taken to protect the goods from all the ordinary forces of nature. Thus, rain and frost are forces of nature which may do much harm to certain classes of goods, but they constantly occur and must be foreseen and guarded against by the carrier. If the goods are injured by such ordinary forces the carrier is liable, for it is a carrier's duty to protect the goods from such injury.[4] It is only against the extraordinary that he is not bound to take precautions. A horse has been killed by lightning while being carried in an ordinary horse-box. Such an accident may some day happen again, but it is something quite out of the ordinary, something against which the carrier is not bound to guard. It is probably within the bounds of possibility to protect horse-boxes from lightning, but it would be ridiculous to expect carriers to do so.

In the words of Chief Justice Cockburn: 'All that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and, if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God. I do not think that because someone may have discovered some more efficient method of securing the goods which has not become generally known, or because it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject something more efficient might not be produced, that the carrier can be made liable'.[5]

In *Briddon* v. *The Great Northern Ry. Co.*[6] part of a railway line became blocked by an extraordinary fall of snow. A goods train, to which trucks containing cattle were attached, was shunted at an intermediate station, and the engine was used as additional power to take on a passenger train through the snow. Great and successful efforts were made to keep the passenger trains running, but no extraordinary efforts were made to forward the goods traffic. As a result, the train containing the cattle was detained at the station where it had been shunted for thirty hours, and the beasts suffered greatly from cold and want of food. The company, when sued for damages for the injury caused to the cattle and for loss of market, pleaded that the damage was caused by the act of God, that is, by an extraordinary fall of snow. The jury found that the delay was not owing to any fault on the part of the company, but was the unavoidable result of the state of the line, and that under the circumstances the company had done

[3] *Nugent* v. *Smith* (1876), 1 C.P.D. 423.
[4] See per Lord Buckmaster in *L. & N.W. Ry. Co.* v. *Richard Hudson & Sons, Ltd.*, [1920] A.C. 324, at p. 343.
[5] *Nugent* v. *Smith*, above, at p. 437.
[6] (1858), 28 L.J. Ex. 51.

all that they were bound to do. The Court held that the company were not bound in respect of goods to make the extraordinary efforts and incur the additional expense which the forwarding of the passenger trains had cost them; and judgment was given for the company.

In *Ryan v. Youngs*,[7] the driver of a motor lorry who was suffering from a heart disease was seized by a fit of unconsciousness while driving the vehicle. He died soon afterwards. He had never shown any symptoms of the disease and had appeared to be in perfect good health. Even if he had been medically examined immediately before the accident there would have been nothing to show the likelihood of an imminent collapse. In these circumstances the Court of Appeal came to the conclusion not only that the man's employers had not been negligent in allowing him to drive the vehicle, but that this accident had to be regarded as 'what has often been referred to as an act of God'.

A fire or explosion due to an accident did not relieve the carrier of his insurer's liability at common law, though the railway servants might have been quite free from blame. As soon as there was any 'human intervention' contributing to the causation of the loss or injury, 'act of God' could not be invoked as an exception. This is different under Standard Terms and Conditions at carrier's risk, since condition 3 (g) adds 'casualty (including fire and explosion)' to the list of excepted perils. The word 'casualty' does not seem to have been judicially construed. So much seems to be certain: casualty cannot simply mean accident, for, as Professor Hughes points out,[8] if one gave it this meaning one would knock the bottom out of the carrier's risk liability. 'To interpret casualty as meaning 'accident' is to make A (3) declare that a company as carrier are liable for accident except where the cause of a damage is an accident'. Apparently A (3) contemplates two types of accidents, those which can be classified as casualty and those which cannot, but it is a matter of speculation to find the border line.

2. The second exception is, where loss or injury is caused by the King's enemies. The expression 'the King's enemies' does not include rebels or robbers or rioters; it means the armed forces of a foreign power with which this country is at war.[9] If goods are taken from a carrier by such forces, or injured or destroyed by them, the carrier is not responsible to the owner for the loss. For example, during the two World Wars, where goods in transit on a

[7] [1938] 1 All E.R. 522.

[8] *Law Quarterly Review*, 1931, pp. 241, 242.

[9] In *H.M. Secretary of State for War* v. *Midland Great Western Ry. Co. of Ireland, Ltd.*, [1923] 2 I.R. 102, Dodd, J., held that the Irish Republican Army were 'the King's enemies' within the meaning of the exception. His judgment is based on the fact that every judge on the Irish Bench had decided in reported cases that there was war at the time of the consignment.

railway were destroyed by bombs dropped from German aircraft, and where goods were sent to the bottom of the sea on a railway company's steamship being torpedoed by a German submarine, in neither case were the company liable under the common law for the value of the goods. The carrier, however, is only protected where he could not by the use of proper care have avoided the goods falling into the enemy's power and when he has duly performed his contract of carriage, and not, for example, in so far as he failed to minimise air raid damage by taking ordinary precautionary measures, such as the provision and use of extinguishing apparatus to counteract the effect of incendiaries.

This common law exception 'act of the King's enemies' has been extended so as to cover 'acts of war or of the King's enemies'. Thus the exception can now be invoked if the act was one of the British Government or one of its allies, done in the conduct of a war. In other words: it covers now not only the damage done by hostile bombs but also that done by British anti-aircraft shells. It also embraces acts committed, not by foreign enemies, but by internal forces hostile to the Crown. The type of case to which this exception now extends is also illustrated by the decision in *Curtis* v. *Mathews*,[10] which referred to an act committed at Dublin by the 'Provisional Government' during Easter Week, 1916.

A great many other types of interference by Governments and their agents in peace as well as in war time and of disturbances caused by outsiders have also been made excepted perils. Arrest or restraint of princes and rulers, or seizure under legal process have become excepted perils under A (3) (c), and, while it is not very likely that arrest or restraint of princes or rulers of a foreign nation will ever be pleaded as an excepted peril as far as land transport is concerned, seizure under legal process may very well be of importance. The addition of these words makes the exception wide enough to cover all seizures by some friendly Government whether by executive or by judicial act. A case in point would be where a bailiff in purported execution of the judgment of a Court seizes goods delivered to the Railway Executive for carriage in the mistaken belief that they belong to the judgment debtor.

Furthermore, A (3) (d) provides that orders or restrictions imposed by the Government or any department thereof are also an excepted peril. This comprises every interference on the part of a Government authority with the carriage of the goods such as may happen in case of a prohibition to consign goods of a particular description from an area infested by a contagious or epidemical

[10] [1919] 1 K.B. 425.

disease. At common law the common carrier was liable for damage done by rioters. We find in A (17) c. II., that the carrier 'shall not in any case be liable for riots, civil commotions, strikes, lock-outs, stoppage or restraint of labour from whatever cause, whether partial or general'. It is, perhaps, surprising that riots and civil commotions should have been grouped with ordinary labour disputes, but this is usual in many types of contracts. This clause is not comprised in A (3), and it may at first sight seem as if this was a case in which the Executive was not even liable for its own or its servants' negligence, since the proviso to A (3), which imposes on the Executive the burden of proving that they used all reasonable foresight and care, is not expressly made applicable to the case of riots and labour disputes. It would be against the scheme of carrier's risk conditions and a violation of their common law basis to hold that in this isolated case there was not even liability for negligence. On the other hand, it is extremely doubtful whether the Executive would have to prove that, *e.g.*, a railway strike might have been avoided by the Executive.

3. The third common law exception is, where loss or injury is caused by 'inherent vice' in the thing carried. This means some default or defect latent in the thing itself which by its development tends to the injury or destruction of the thing carried. It would be contrary to reason for a carrier to be deemed an insurer against loss from such a cause. Thus, he is not liable for injury to fruit or other perishable goods from heating or natural decay during transit, provided he has taken all reasonable care of the goods according to their nature, as, for instance, seeing that they have proper ventilation. Again, the carrier is not responsible for diminution of liquids caused by evaporation or leakage, which no ordinary and reasonable care on his part could prevent; nor is he responsible for destruction by spontaneous combustion. A defect in a thing may be harmless as long as the thing is not moved, but it may cause injury as soon as the thing is carried from place to place, even though the carrier uses all reasonable care; for injury caused by such a defect the carrier is not liable.

The best examples, however, of inherent vice are supplied by animals. Animals cannot be carried except under conditions which tend to produce fright and panic in them. Carriers must take all reasonable precautions to guard against the consequences of such fright, but they are not bound to do more; and if an animal takes fright in an unusual degree, and so becomes unmanageable, and is injured without any want of reasonable care on the part of the carrier, the carrier is not liable.

In *Blower* v. *Great Western Ry. Co.*,[11] a bullock was loaded to the satisfaction of the consignor in the usual and proper way, in a truck of the description ordinarily used by the company for such animals. In the course of the journey, however, it was discovered that the bullock had escaped from the truck, and its carcase was afterwards found on the side of the railway. When the company was sued for the value of the animal, it was found as facts that its escape was wholly attributable to its own efforts and exertions; that neither its death nor its escape was due to any negligence on the part of the company; and that the truck was in every respect proper and reasonably sufficient for the purpose for which it was used. On these facts it was decided that the company was not liable. The Court held that the company was bound to provide trucks sufficient to retain cattle under the ordinary incidents of a railway journey, but its liability did not extend further. Here the escape of the bullock arose from no other cause than its own inherent vice, or restiveness, or frenzy, and for injury from such a cause the company was not liable.

In *Kendall* v. *London and South-Western Ry. Co.*,[12] a horse was found to have sustained severe injuries during a short journey. No accident had happened to the train, nor anything likely to alarm the horse, which was a quiet animal accustomed to travel by rail. Baron Bramwell 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 cause other 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 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. If perishable articles, say, soft fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other foods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable'. And as the Court came to the conclusion that the horse was injured entirely by its own acts, without any fault on the part of the company, the action failed.

In *Lister* v. *Lancashire and Yorkshire Ry. Co.*[13] the plaintiff employed the defendants as common carriers to carry an engine from his yard to a neighbouring town on their line. The engine was on wheels with shafts to draw it, and had been purchased by the plaintiff secondhand a few months before. The defendants sent two men, two boys and two horses for the purpose; and the men and boys were competent, and the horses proper for the purpose. The horses were harnessed to the engine, which was drawn out of the yard. Whilst they were proceeding along the road one of the shafts broke, the horses took fright, became unmanageable and upset the engine, which was damaged in consequence. The shaft was rotten at the point where it broke, but this was not known either to the plaintiff or the defendants, and could not have been discovered by any ordinary examination. The plaintiff sued the railway company for damages for injury to the engine.

[11] (1872), L.R. 7 C.P. 655.
[12] (1872), L.R. 7 Ex. 373.
[13] [1903] 1 K.B. 878.

The Court held that the company was not liable, for the thing was being carried in the ordinary way, and the company had taken all reasonable precautions, but the accident had happened from the unfitness of the thing for that mode of carriage. The unfitness for carriage, although not known to either party, was inherent vice within the meaning of the established rule.

From these cases it will be seen that if the cause of destruction or injury comes from something in the goods themselves which the carrier cannot be reasonably expected to foresee or to guard against, or from the ordinary wear and tear and chafing of the goods, which cannot be avoided if the goods are carried in the ordinary way, and which is in no way due to negligence on the carrier's part, the carrier is not responsible for the injury.

This excepted peril is defined in Standard Terms and Conditions A (3) (f), quoted above.

4. The fourth excepted peril at common law is, where goods are lost or injured through the fault of the consignor himself. It would be unreasonable if a consignor could make an innocent carrier pay where loss was caused entirely by his own fault. For example, where goods are liable to injury in transit unless they are protected by packing, it is the duty of the consignor to pack them properly. Damage arising from neglect of this duty without any fault on the carrier's part is not damage for which the carrier is liable.[14] Again, if the real nature of the goods is concealed from the carrier, so that he has no opportunity of exercising unusual care where the peculiar nature of the goods so requires, he is only bound to use such ordinary care as the goods seem to require, and if he does so he is not liable for damage due to his not using extraordinary care.

This common law exception is set out in detail in Standard Terms and Conditions. The carrier is not liable for the consequences of insufficient or improper packing (A (17), c. I), addressing, labelling and filling in of the consignment note (A (23), A (1), A (2)), though it is doubtful whether the carrier would be responsible for his own negligence contributing to loss or damage resulting from improper packing or addressing.[15] Moreover, the carrier is not liable for the consequences of any act or omission of the trader (= owner) whether he be the consignor or the consignee, and whether the act or omission be negligent or not, provided there has been no negligence on the part of the carrier or his servants (A (3) (e)). Nor is the carrier answerable for any loss or damage caused by the consignee's unwillingness or inability to take delivery within a reasonable time. (A (17), c. III.) In the latter case there is no

[14] See Chap. 19.

[15] The first proviso to A (3) is not repeated in either A (17) or A (23).

positive legal obligation upon the carrier to give notice to the consignor of the consignee's refusal to accept the consignment. But the carrier should do what is reasonable in the circumstances.[16] Where the consignee refuses to pay carriage, and the carrier on that account refuses to deliver, the goods should be retained for a reasonable time at the station of destination.[17]

The Executive disclaim all liability for loss or damage to merchandise where the loading or covering is performed by the sender, but it is for the carrier to prove that the loss or damage would not have arisen had the loading or covering not been faulty or improper. Naturally, this does not apply if the manner of loading or covering was directed by the Executive or its own servants, and the wording of condition A (19) seems to imply that it is for the Executive to prove that there was either no direction as to the manner of loading or covering or that such a direction, if given, was not followed.

If loss or damage arises from a defect in a truck or sheet not belonging to, or provided by, the Executive, we must distinguish two cases: (1) If the goods were carried in the truck or were covered by the sheet, which was defective, the Executive is not liable, whether the goods damaged or lost did or did not belong to the owner of the truck or sheet. (2) If the goods lost or damaged were not carried in, or covered by, the defective truck or sheet, the liability of the Executive is only excluded if the trader who claims compensation had himself provided the truck or sheet, the defect of which was the cause of the mishap. (A (18).) It is always for the carrier to prove that the defect of the truck or sheet was the cause of the damage and that there was no negligence on the part of his servants.

The trader is debarred from recovering any compensation in respect of merchandise where there has been fraud on his part, even if there was negligence on the part of the carrier's servants.[18] This might arise in cases in which the contents of parcels and packages are wrongly declared in order to evade the payment of the proper freight.

It will be observed that, wherever goods carried upon carrier's risk conditions are lost or damaged during transit, the onus of avoiding liability is generally on the company. In other words, the Executive is liable unless it proves that it is not.

[16] *Hudson* v. *Baxendale* (1857), 2 H. & N. 575.
[17] *Crouch* v. *G.W. Ry. Co.* (1858), 27 L.J. Ex. 345.
[18] A (3), proviso II.

THE RAILWAY EXECUTIVE'S LIABILITY AT OWNER'S RISK

Standard Terms and Conditions, Form B, contains in a standardised form those conditions which used to be agreed upon between consignors and railway companies when the latter were to be relieved of their heavy insurers' liability at common law, in return for the substantial reduction in rates required by Sect. 7 of the 1854 Act as interpreted by the Courts. These conditions apply[19] when the Executive has been requested in writing to carry at owner's risk rates, and the consignment note must state that the merchandise is to be carried at owner's risk.[20] But the Executive need not carry at owner's risk unless an owner's risk rate is in operation.[19] The standard rates settled by the Transport Tribunal are carrier's risk rates, and no duty was imposed on the Tribunal by the Act to settle standard owner's risk rates for all classes of merchandise. For certain types of goods described as 'damageable',[21] however, the Tribunal had to and did fix owner's risk rates, which are between 2½ and 12 per cent below the corresponding carrier's risk rates, and with regard to these goods an owner's risk rate is always 'in operation', so that the consignor has a right to demand carriage at owner's risk. When goods are carried at exceptional rates, the trader has the option between carrier's and owner's risk conditions, whatever the nature of the goods, for the Executive is always liable to quote upon request an exceptional owner's risk rate if a corresponding exceptional carrier's risk rate is in operation, and vice versa,[22] and the difference in rate must be fairly equivalent to the difference in risk under the two sets of conditions.[23] Thus a trader has a right to carriage at owner's risk if the rate applicable is an exceptional rate,[24] but not if it is the standard rate, unless the goods are damageable.[25]

At owner's risk the Executive undertakes to compensate the

[19] Railways Act, 1921, Sect. 44 (1).

[20] Standard Terms and Conditions B (1) (a).

[21] Sect. 46 (1).

[22] Railways Act, 1921, Sect. 46 (2). If the Executive does not comply with this request within twenty-eight days, the corresponding rate will be fixed by the Transport Tribunal.

[23] Sect. 46 (3).

[24] In two cases carriage at owner's risk cannot even be demanded when the rates are exceptional rates: (1) if the difference in risk is insignificant (Sect. 46 (2)), *e.g.*, in the case of merchandise carried by passenger train (see Gorst, *A Guide to the Railway Rates Tribunal*, 1927, p. 151); (2) in the case of livestock, unless it was usual at the time of the passing of the Act, to carry the particular kind of livestock concerned at reduced rates under owner's risk conditions. (Sect. 46 (4).)

[25] Leslie, *Law of Transport by Railway*, 2nd ed., p. 376, note (c). It is difficult to accept the view expressed in note (a).

owner for the consequences of the wilful misconduct of its own servants, if the owner can prove it. And in certain cases in which the outward appearance of the facts points to a wrongful act committed by the Executive's servants the owner can claim damages unless the Executive disproves negligence. Thus, 'owner's risk' does not mean that the carrier is never liable for loss or injury, but, exceptions apart, it is for the trader to prove that the carrier is responsible and not, as at carrier's risk, for the carrier to disprove his liability.

The essence of the matter is to be found in Standard Terms and Conditions B (3), according to which the carrier shall not be liable for loss or damage, except upon proof that the same arose from the wilful misconduct of the carrier or his servants.

Wilful misconduct must be carefully distinguished from negligence. It means the doing of something, or the omitting to do something, which it is wrong to do or to omit, and which the person answerable does or omits intentionally, knowing that his act or omission is wrong. This includes the doing of an act with reckless indifference, not caring what the result of that indifference might be. This attitude is something beyond negligence even of a gross kind. The person who acts negligently may be blamed for his lack of foresight. He does not, though he ought to do so, foresee the harmful consequences of his conduct. He trusts his luck and is confident that they will not occur. At its worst negligence may be defined as an 'it will be all right' attitude. Wilful misconduct, however, is the 'I don't care' attitude. At its best it means that the wrongdoer foresees the injurious results of his act and takes up an attitude of indifference towards their occurrence, though wilful misconduct also includes those cases of the most serious character in which the wrongdoer actually intends the harmful consequences of his behaviour.[26]

A few examples may illustrate wilful misconduct.

[26] The definition of 'wilful misconduct' given many years ago in the Irish case of *Graham* v. *Belfast and Northern Counties Ry. Co.*, [1901] 21 R. 13, has been approved in many other cases and was used by Hallett, J., in the recent case of *Hartstoke Fruiterers* v. *L.M.S.*, [1942] 2 All E.R. 488, at p. 490, for the interpretation of S.T. and C.B. (3). (This decision was affirmed by the Court of Appeal: [1943] 1 All E.R. 470.) The definition is as follows: 'Wilful misconduct . . . means misconduct to which the will of the party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail, or omit to do (as the case may be) a particular thing, and yet intentionally does, or fails, or omits to do it, or persists in the act, failure or omission regardless of consequences'.

Suppose a consignment of Cheshire cheese is sent from Cheshire to London and packed in Cheshire by the railway's servants who are perfectly familiar with this sort of work. Suppose further, the servants entrusted with the packing set aside the method usually applied and pack the cheese in a faulty manner though they know perfectly well that this must probably lead to a deterioration of the merchandise. This is a case of wilful misconduct, though there is no actual intention to damage the cheese.

If, however, as in *Lewis* v. *G.W. Rly.*,[27] the cheese is sent from London to Shrewsbury and if an improper mode of packing is applied by servants who are not used to this work, this is, at its worst negligence. If there is no evidence that the railway servants know that the mode of packing which they adopt is likely to cause injury, they may be blamed for not having made the proper inquiries as to an adequate method of packing. This omission, however, will only be evidence of carelessness, it does not amount to recklessness.

Again, compare the two cases of *Forder* v. *G.W. Ry. Co.*[28] and *Bastable* v. *North British Ry. Co.*[29] In the first of these cases a fellmonger delivered a parcel of sheepskins to be carried by the company from London to Winchester at owner's risk, relieving the company from liability except on proof of wilful misconduct on the part of its servants. The skins were injured in transit through being carried in a truck upon a bedding of wood chips which became entangled in the wool. The owner complained to the stationmaster at Winchester of this injurious mode of carrying skins and was informed that the officials at Paddington had been asked not to use the objectionable kind of litter again. Two months later he sent a similar lot of skins under a similar contract from London to Winchester. This second lot was injured in exactly the same way from the same mode of carriage. The owner claimed damages for the injury to both parcels of skins, but failed, even with respect to the second parcel. There was no evidence that the servants of the company who actually loaded the second parcel in the trucks, or who superintended the loading, were informed or knew that the mode of packing was likely to be injurious. The mere fact that some other official of the company knew was not sufficient. It was, therefore, decided that no wilful misconduct had been proved, and that the company was protected by its contract.

In the second case a travelling showman sent a switchback plant by railway, having signed a contract which provided that the company should not be liable for damage unless it arose from wilful misconduct on the part of its servants. The regulations of the company required that a load should be gauged whenever there was any reason to doubt whether it was within proper dimensions. The goods were loaded, but although there was clearly good reason to judge whether the load would pass under the gauge, the responsible servant was content to judge of the dimensions by his eye alone and dispatched the load without gauging it. On the journey the goods were injured by coming in contact with part of a bridge. Here the company was liable, as the omission to pass the load under the gauge amounted in the circumstances to wilful misconduct.

[27] (1877), 3 Q.B.D. 195; see in particular the language of Bramwell, L.J., at p. 206.
[28] [1905] 2 K.B. 532.
[29] [1912] S.C. 555.

Another good illustration is afforded by a very recent case: Two trucks of bananas were consigned at owner's risk to the plaintiffs who were fruit merchants. The first truck arrived at the defendants' station—400 yards from the plaintiffs' office—on Sept. 6, 1940, at 1.50 p.m., and some twenty minutes later was ready for unloading. One of the defendants' clerks rang the consignees on the telephone at 2.28 p.m. and again at 2.35 p.m. without on either occasion getting a reply. He left a note for the checker to telephone the plaintiffs first thing next morning, but the note was on a telegraph form and the checker thought it was no business of his. The second truck arrived on Sept. 7 before 7.30 a.m. On that day the clerk, intending to give notice of arrival to the plaintiffs, by mistake rang up another firm of banana merchants. He had confused the telephone numbers. The plaintiffs received no notice until the morning of Sept. 10. By that time the bananas had become overripe and the plaintiffs had suffered financial loss for which they claimed damages from the railway company. They failed because neither the clerk's failure to give proper instructions to the checker nor his mixing up of the telephone numbers on the following day nor even his subsequent inaction was capable of being classified as wilful misconduct. The decision might have been very different if the company had been liable for negligence. In reading the decision it is difficult not to remember what happened in London during the days and nights when these events took place, but it is improbable that even the confusion caused by the first heavy air attacks could have served as an excuse if the plaintiffs had been able to rely on the negligence of the defendants' servants.[30]

The burden of proving wilful misconduct is a very heavy one, as obviously in most cases the owner of damaged or lost goods is quite unable to say, or to find out, how his goods were damaged or what was the cause of the loss. The explanation is usually exclusively within the knowledge of the carrier, and the carrier is legally entitled to take up the position of refusing to assist the owner in solving the mystery. The fact that the carrier gives no explanation is not sufficient of itself to raise any presumption of misconduct.[31]

Where, however, misconduct, such as larceny, on the part of some person unknown is proved, and the owner can show that no member of the outside public, but only servants of the carrier, had effective access to the goods while in transit, it is proper to infer that the misconduct in question was committed by some one or more of the carrier's servants.[32]

There are, however, two cases in which the carrier will be liable though the trader is unable to prove wilful misconduct.

If the whole of a consignment, which was properly packed and addressed in accordance with the rules contained in the conditions,

[30] *Hartstoke Fruiterers Ltd.* v. *L.M.S. Ry. Co.*, [1942] 2 All E.R. 488, [1943] 1 All E.R. 470.
[31] *H. C. Smith, Ltd.* v. *G.W. Ry. Co.*, [1922] 1 A.C. 178.
[32] *H. C. Smith, Ltd.* v. *Midland Ry. Co.* (1919), 88 L.J.K.B. 868.

does not arrive at all, the Executive undertakes liability for the loss thus arising even at owner's risk.[33] It is, however, open to the Executive to show that the cause of the non-delivery was accident or fire, in which cases it will only be liable if the trader can prove that the accident or fire was due to the wilful misconduct of the carrier's servants. Even if the disappearance of the consignment was not due to an accident or to fire, the Executive does not undertake to be absolutely liable, for it can exonerate itself by showing that the non-delivery has not been caused by the negligence or misconduct of its servants. The Railway Executive undertake this exceptional liability at owner's risk because the total disappearance of a consignment not due to accident or fire strongly points to misconduct of some sort on the part of the Executive or its servants.

It is the same when a separate package forming part of a consignment disappears, though the rest of the consignment is properly delivered.[34] The Executive is liable for this kind of short-delivery unless it can prove that it was due to fire or accident, or that there was no negligence on the part of the Executive's servants.

The Executive is also liable without proof of wilful misconduct in the case of pilferage from packages[35] which were protected otherwise than by paper or other packing readily removable by hand. For, if such a package is opened and goods are stolen from it, the facts themselves speak for a serious default on the part of the carrier's own men, provided the pilferage occurred while the package was still under the control of the carrier. In order to establish this beyond doubt, the trader must prove that the pilferage was pointed out to a servant of the Executive on or before delivery; if he cannot show that this was done, he must prove wilful misduct in order to claim compensation. In no case, however, is the Executive responsible as an insurer. If it can show that its servants were not negligent, it is not liable.

There is no room for a system of 'excepted perils' under owner's risk conditions, under which the Executive is never liable as an

[33] Standard Terms and Conditions B (3), proviso (a). The corresponding provision for the carriage of milk at owner's risk (J (9)) mentions 'loss of milk through non-arrival of any can, churn or butt at the station to which it was consigned'. In the case of carriage by passenger train or by similar service this liability is limited to 75 per cent of the net invoice value. (M (2).)

[34] The words 'or of any separate package forming part of a consignment' were added to the proviso in order to avoid the serious inconveniences illustrated by *G.W. Ry. Co.* v. *Wills*, [1917] A.C. 148.

[35] Standard Terms and Conditions B (3), proviso (b). If the goods are carried by passenger train or other similar service this liability does not extend beyond 75 per cent of the net invoice value. (M (2), proviso.)

insurer. This explains why we do not find in Form B a special clause dealing with loss or damage caused by defective trucks or sheets not provided by the Executive.[36] At owner's risk the Executive is never liable for loss or damage proved to be the consequence of faulty or improper loading and covering performed by the sender, though it was done in the manner directed by the Executive and, apparently, though the railway servants directing the loading or covering were guilty of wilful misconduct.[37]

The Executive will not, in any case, be liable for loss or damage to the extent to which this is caused by insufficient or improper packing (Standard Terms and Conditions B (16), c. I), addressing, labelling, or filling in of a consignment note (B (21)). The clauses dealing with riots, civil commotions and labour disputes, and with loss or damage owing to the consignee's delay in accepting delivery (B (16), c. II, III) are identical with the corresponding conditions at carrier's risk. In all these cases it would seem that the Executive is not liable even if its own servants contributed to the loss or damage by their own wilful misconduct.

THE ROAD CARRIER'S LIABILITY

Enough has been said about the common carrier's liability for loss of, or injury to, goods during transit. Most road carriers are, however, private carriers, and are, therefore, in a different legal position.

A private carrier is a bailee, and being a bailee of the goods, he is, by virtue of the bailment, under an obligation to apply to the custody and carriage of the goods the utmost care. He is fully liable for any act of carelessness committed by his servants in the course of their employment, but not for the interference by strangers over whom he has no control. The private carrier, like any other bailee, must prove that he and his servants were as careful as they had to be with regard to the bailor's property. For example, if a furniture remover is sued for damages because goods were lost or damaged in transit, all the owner has to do is to show that he delivered his goods for carriage to the carrier, and that they did not arrive or arrived in a damaged condition. Once this is established, it is for the carrier to explain how the damage arose or how the goods were lost. This was finally laid down in a case referring to carriage by barge on the Thames. (*Joseph Travers & Sons, Ltd.* v. *Cooper.*[38])

[36] A (18) has no parallel in B.

[37] Compare A (19) and B (17).

[38] [1915] 1 K.B. 73. This is nothing but a special application of the doctrine *res ipsa loquitur* for which see below, p. 269, see Goddard, L.J., (as he then was) in *Easson* v. *L.N.E.R.*, [1944] 1 K.B. 421.

Goods were loaded into a barge from a ship for delivery at the barge-owner's wharf. The barge while lying alongside the wharf with the goods aboard was left unattended at night and, after taking the ground at low tide, became submerged as the tide rose, and the goods were damaged. There was a contract exempting the barge-owner from liability for negligence. He was, therefore, not liable, but the Court of Appeal unanimously held that it was for him to explain what had happened to the barge that night and to show that there was no negligence in the way in which his servants had dealt with the barge. Had he not been protected by his exemption clause, he would have been liable for damages, since he could not disprove negligence.[39]

The question whether there is or is not negligence on the part of a carrier's servants is very largely a question of fact. It is impossible to lay down general rules showing what does and what does not amount to negligence. It is, however, possible to state that the carrier's duty with regard to the fitness of his vehicle for carriage is a heavy one. There is not in the law of inland transport an absolute warranty of road worthiness, corresponding to the absolute warranty of seaworthiness imposed upon a shipowner at common law. Even for the fitness of his van or other vehicle the carrier is only liable within the framework of the law of negligence. Yet, whenever the carrier violates any of the statutory provisions in the Road Traffic Act, 1930, and the Acts amending this statute, and in the Road and Rail Traffic Act, 1933, referring to the fitness of vehicles for carriage, this violation of the law raises a strong presumption of negligence. Thus, for instance, if his lorry were not fitted with proper brakes and a collision ensued, causing destruction of the goods by fire, this would be held sufficient to establish a case of negligence against the carrier. It would not help him, in such a case, to show that the owner of the goods or the consignor was aware of the defective state of the vehicle.[40] This is not the place to set out the various rules applicable to the fitness of vehicles and

[39] This is the line of reasoning followed by Kennedy, L.J., and Phillimore, L.J., while Buckley, L.J., was of the opinion that the contract did not exempt the defendant from liability for negligence. The three Lords Justices agreed that the burden of proof was on the defendant. Counsel in the case quoted an unreported decision of the House of Lords in *Morison Pollexfen and Blair* v. *Walton,* of May 10, 1909, also quoted by Bankes, L.J., in *Coldman* v. *Hill,* [1919] 1 K.B. at p. 447. In this case Lord Loreburn, L.C., and Lord Halsbury accepted the view that it is for the bailee to disprove negligence. See also the judgment of the Court of Appeal in *Coldman* v. *Hill,* [1919] 1 K.B. 443, referring to the liability of an agister of cattle where the principles set out in the text are fully explained by Bankes, L.J., on p. 450. And see *Brook's Wharf and Bull Wharf, Ltd.* v. *Goodman Brothers,* [1937] 1 K.B. 534.

[40] See Cresswell, J., in *Austin* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1852), 10 C.B. 454, at pp. 473, 474. And see also Lord Watson in *Brabant & Co.* v. *King,* [1895] A.C. 632, at p. 640.

the duties imposed upon road carriers. They include not only the proper equipment of lorries, trailers, and vans, but also the provision of the proper personnel. As we have seen, the law imposes very strict limitations upon the working time of lorry drivers and van drivers. These rules are not only made for the protection of the men themselves, but for the protection of the public, and if damage occurs to goods loaded upon a lorry because the driver working overtime against the law did not pay proper attention, then the carrier would be liable to the owner of the goods for the damage done.

While it is quite clear that the road carrier is liable for negligence caused by his servants, as long as they act within the scope of their employment, it is not by any means easy to say when they do so act, and in particular whether any intentional wrong done by a servant can ever be regarded as lying within the scope of his employment. So much is clear: if the servant, when doing intentional harm to the goods, acts for the benefit or the intended benefit of his master, then the master will be liable. So, for instance, in the case in which the master himself induces his servant to do away with goods or even where the servant, without any instigation on the part of his master, steals goods in order to secure them for the master.[41] But what of the case in which the servant acts for his own benefit only and not for that of his master? Can it be said that a lorry driver who steals during transit goods entrusted to the lorry owner for carriage acts 'within the scope of his employment'? It would seem [42] that in such a case the owner would not be liable, while if the servant negligently, and without evil intention, made it possible for a third person to steal the goods, the carrier would be liable.[43] However, this seems to be somewhat unsatisfactory, and it is not quite clear in the present state of the law whether, in certain cases at least, a lorry or van owner could not be made liable even for the intentional misdeeds of his servants whom he has held out as his representatives to the public.[44]

The duty imposed upon the carrier to look after the goods entrusted to him for transport is not merely a negative duty. Apart from the question of complying with the statutory rules as to speed, fitness of vehicle, proper personnel and working hours, it involves certain positive acts which a bailee must perform in order to safe-

[41] *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259.
[42] *Cheshire* v. *Bailey*, [1905] 1 K.B. 237.
[43] *Abraham* v. *Bullock* (1902), 86 L.T. 796.
[44] It is very difficult to determine the exact relationship between the decision of the House of Lords in *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716, and the case of *Cheshire* v. *Bailey*, just quoted.

guard the interests of the bailor. Thus, in the case of a fire, the duty of the carrier and his servants is to see to it that the goods are saved, as far as that is possible, and it does not matter whether the cause of the fire is or is not attributable to the carrier's or his servant's negligence. Though the law of bailment protects the private carrier from liability for a fire of which he can show that it was not caused by his or his servants' negligence, he will have to pay damages to the owner of the goods if he does not do his utmost to mitigate the damage.[45] If goods disappear during transit, for instance, because they are stolen by a third party, the carrier is under a duty to make all proper efforts to preserve the bailor's rights, and he must try to recover the property if that is at all possible.[46] It is impossible to say how far he has to go in this direction in a particular case. The main principle is that, whether the cause of the loss be fire or breakage or theft, the carrier is not entitled to shield himself behind the fact that he and his servants were not at fault if it would have been within his powers to minimise the damage by taking proper steps.

DAMAGES

Where a carrier is responsible for loss or injury, he must pay such damages as will compensate the owner of the goods, and are the natural result of the carrier's default. If the goods are entirely lost or destroyed, the measure of the damage is, as a general rule, the market value of the goods at the time and place at which they ought to have been delivered. If there is no market for the goods at the place of destination, then the damages may be ascertained by taking the price of the goods where delivered to the carrier, and adding to that the cost of carriage and any profit which the consignee might fairly be expected to have made by resale of the goods where intended to be resold. If the market value is ascertainable, and the carriage has not been paid, the cost of the carriage must be deducted from the market value. Where the goods are delivered to the consignee in an injured condition, the damages will be measured by the depreciation in the value of the goods which was the natural result of the injury. A carrier is not liable for indirect or consequential damages.[47]

[45] See the leading judgment of Willes, J., in *Notara* v. *Henderson* (1872), L.R. 7 Q.B. 225, the principle of which was applied to inland transport in the case of *G.N. Ry. Co.* v. *Swaffield* (1874), L.R. 9 Ex. 132.

[46] See *Coldman* v. *Hill*, above, and as to the general duty to take active steps to defend the bailor's property, *Ranson* v. *Platt*, [1911] 2 K.B. 291.

[47] This general principle is also embodied in Standard Terms and Conditions. See, for example, A (17) (b) and B (16) (b).

Chapter 14

DELAY, DEVIATION AND DETENTION

DELAY

EVEN a common carrier of goods has never been absolutely liable for delay. 'Safety first' has always been one of the guiding principles of the law of carriage. All the carrier has to do is to apply reasonable care to make sure that the goods arrive within a reasonable time. He is not responsible for loss caused by delay which is not due to his own or his servants' negligence. He is bound to carry safely, and he must consider safety before speed. If the safety of the goods demands it, he is justified in delaying delivery, but he must not be dilatory or negligent in performing his duties. These common law rules apply to all road carriers, common and private, and they are embodied in Standard Terms and Conditions A (4) according to which at carrier's risk the Railway Executive is liable for negligent delay only. A trader who claims damages must prove that his pecuniary loss was due to delay in transport, *i.e.*, that more than a reasonable time elapsed between the delivery of the goods to the carrier and their arrival. It is impossible to lay down any hard and fast rules as to what is a reasonable time; that must depend on the circumstances of each individual case. If the delay appears to be unreasonable, then the carrier must explain how it arose and must show that neither he nor his servants were to blame for it. If it was his fault, he is responsible unless protected by contract. If it was the fault of some other person over whom he had no control, or the consequence of unavoidable circumstances, he is not liable.

Thus a carrier is not liable for delay caused by sudden, unusual and unexpected pressure of business if he has used all reasonable diligence. The Railway Executive, for example, is bound to give reasonable facilities for forwarding goods, but even at the largest station there is a limit to the powers of the Executive. And if from such cause which the carrier had no reason to foresee, or which he could not avoid, he is overwhelmed with an extraordinary amount of traffic, delay is probably unavoidable. If the servants of the carrier do their best, as far as can reasonably be expected, the carrier will not be liable for delay so caused. If called to account, however, for delay from such a cause, the carrier will probably have to prove that the sudden pressure was such as could not have reason-

ably been foreseen, or that it was so great that he did not possess the machinery necessary to deal with it.

If, in the midst of such a block of traffic, goods are offered for transport which the carrier's servants know must in the circumstances be delayed, they should inform the consignor of the likelihood of delay. If they do not so inform him, the carrier will probably be held liable. The same applies in other cases where in consequence of an accident, or otherwise, goods are received which the carrier knows must be delayed. Where there is such a block of traffic, goods should as far as reasonably possible be forwarded in the order in which the carrier received them. If he forwards goods otherwise than in the order of their delivery to him that again may amount to negligence.[1]

The carrier is excused if the delay was caused by the act of a stranger.

Thus in *Taylor* v. *G.N. Ry. Co.*[2] three hampers of poultry were sent from a place in Lincolnshire to London for the early market by the defendant's railway, no special contract being made. The Midland Ry. Co. had running powers of a portion of the defendant's line. A Midland Ry. Co.'s train, whilst running on the defendant's line, met with an accident owing to the negligence of the Midland Co.'s servants. The obstruction of the line, thus caused, led to the result that the defendant's train in which the poultry were being carried was seriously delayed and the owner suffered pecuniary loss, as his poultry did not reach the market in time. As the delay was entirely due to the negligence of the servants of the Midland Co. over whom the defendants had no control, and as the defendants had used all reasonable exertions to deliver the goods in time they were not responsible. The decision would have been the same under Standard Terms and Conditions A.

The case of *Briddon* v. *Great Northern Ry. Co.*, the facts of which are given above,[3] shows that the safeguarding of higher interests may serve as excuse for what otherwise might have been regarded as unreasonable delay. The measures which were taken by the railway company to maintain the passenger traffic, in spite of the snowstorm, prevented it from carrying the cattle to their destination within the usual time. The delay caused loss of market, but it was excused in view of the fact that the fulfilment of the carrier's duty in regard to the passenger traffic was more important than the securing of the due arrival of the goods.

The Railway Executive is never liable for delay caused by a defect in a truck or sheet not belonging to, or provided for by, the Executive, if the goods delayed were either contained in, or covered

[1] See the Irish case of *Page* v. *G.N. Ry. Co.* (1868), 2 Ir.R. 228.
[2] (1866), L.R. 1 C.P. 385.
[3] P. 147.

by, the defective truck or sheet or if they belonged to the trader who had provided the defective equipment. But it is for the Executive to show even in this case that there was no negligence on its own part or that of its servants.[4] Again, the exception to liability for loss or injury in cases of loading or covering, performed by the sender, applies to liability for delay as well.[5]

The Railway Executive is not responsible for delay caused by the consignor's failure properly to address parcels, to label trucks, or to fill in the consignment note.[6]

The case of *Caledonian Ry. Co.* v. *Hunter*[7] would certainly be decided under Standard Terms and Conditions, as it was decided under Scottish law in 1858. A parcel of goods was delivered to the railway company at Glasgow, labelled, 'Wm. Rae, draper, Sudbury'. There are, in fact, several places called Sudbury, one in Derbyshire, another in Suffolk, and another in Middlesex. The company sent the parcel to Sudbury in Derbyshire, which was the nearest, but on arrival the consignee could not be found. Considerable time was then spent in finding the consignor and ascertaining his wishes with regard to the goods. It was at last discovered that the goods were intended for Sudbury in Suffolk, and in rather over a month from the time of starting on its journey the parcel was tendered to the consignee. He, in consequence of the delay, refused to accept the goods, and they were thrown back on the consignor's hands, who sued the railway company for damages for the delay. He did not succeed, however, for the delay was primarily his own fault for addressing the parcel so ambiguously; in the circumstances the company had acted reasonably in sending the goods to the nearest place of the name; and carriers are not responsible for delay when caused by the address on the goods not being full, distinct and ample.

The exceptions dealing with pecuniary loss caused by insufficient or improper packing, riots, civil commotions, and labour disputes, as well as the exceptions concerning the consignee's refusal to take or accept delivery within reasonable time, also apply to liability for delay.[8] In the absence of a special contract, the Executive will not even at carrier's risk be liable for loss of a particular market, nor for indirect or consequential damages.[9]

Under the owner's risk conditions the Railway Executive is never liable for delay, except upon proof that the same arose from the wilful misconduct of the Executive or its servants.[10] Thus in

[4] Standard Terms and Conditions A (18).
[5] A (19) and above, p. 153.
[6] This is so, though Standard Terms and Conditions A (23), rather surprisingly, does not mention delay.
[7] (1858), 20 Sess. Ca. 2nd Ser. 1097.
[8] Standard Terms and Conditions A (17).
[9] Standard Terms and Conditions A (17) (a) and (b).
[10] Standard Terms and Conditions B (3). The provisions in Standard Terms and Conditions B (16), that the carrier will not be liable for delay to the extent to which it is caused by, or arises from, insufficient or

case of a sudden pressure of traffic, the trader would have to show that the delay might have been avoided had it not been for an act of wilful misconduct on the part of the railway servants. The omission to inform the trader of the likelihood of delay in such a case may amount to recklessness, and so may the forwarding of goods in an order other than that of their delivery to the carrier.

If the merchandise is to be carried by passenger train or other similar service and not put at the consignee's disposal within twenty-eight days after receipt by the carrier, the latter is liable for the delay up to 75 per cent of the invoice value of the merchandise, unless the carrier can disprove negligence.[11]

So far, we have assumed that there was no special agreement between the consignor and the carrier that the goods should be delivered at a particular time or by a particular road vehicle or train. It is possible to enlarge the carrier's liability for negligence to an absolute liability, but this must be done by a special contract, and, being a somewhat unusual type of agreement, it would have to be expressed in very clear language. An undertaking to be absolutely responsible for the arrival of the goods at the place of destination at a particular time can perhaps be inferred from the mentioning of such a time in the contract of carriage. It is not by any means clear what are the consequences of such an agreement, and to what extent, if any, the carrier can rely on any excepted perils if he fails to deliver at the time stipulated. A contract to carry goods by a certain train, or in the case of a road carrier, by a certain vehicle, does not amount to a contract that the goods shall arrive at the time at which the train or vehicle is due to arrive according to time table. The mere fact, however, of a train arriving several hours late would be sufficient to call for some explanation from the Executive and to throw upon it the burden of proof that such delay was not due to negligence on its part.[12]

The question of the measure of the damages is very difficult in the case of delay. Where there has been delay, for which the carrier is responsible, the damages payable are such as have arisen naturally from the delay in the ordinary course of things. It is clear that, owing to extraordinary circumstances, very heavy loss, often far in excess of the value of the goods may be caused by delay. Thus, the

improper packing, riots, labour disputes, or consignee's not taking or accepting delivery within a reasonable time, appears to be redundant, and the same is true of the provision in B (17) dealing with delay caused by faulty or improper loading or covering.

[11] M (2). For the even more stringent liability undertaken by the Executive in the case of milk and perishables, see H (2) and J (9).

[12] *Roberts* v. *Mid. Ry. Co.* (1877), 25 W.R. 323.

delay of an article sent as a sample may cause the sender to lose a very large order. The sample may be worth a mere trifle, but the financial loss caused by the delay may be enormous. In such a case the loss is not recoverable from the carrier as damages, unless the peculiar circumstances were brought to his notice so that he may fairly be considered as having accepted the responsibility. If he was informed of the peculiar facts, the damages may be recovered. Where a carrier is informed of facts which are likely to lead to heavy loss in case of delay, he may insist on special conditions; but where such circumstances are clearly brought to his notice, and he accepts the goods without conditions, he will be responsible for any financial loss occurring owing to these facts.[13] Damages which are not recoverable because they arise from circumstances out of the ordinary course, and not known to the carrier, are said to be 'too remote'. For such indirect or consequential damage the carrier is not liable, and, in so far as railway traffic is concerned, this is expressly laid down in Standard Terms and Conditions.[14]

In *Hadley v. Baxendale* [15] the plaintiffs were the owners of a mill at Gloucester. Owing to the fracture of the crank-shaft of the engine, which set their machinery in motion, the mill was stopped. It was necessary in order to get a new shaft from the makers of the engine to send the broken shaft to Greenwich as a pattern. The plaintiffs sent to the defendants (the well-known firm of carriers known as Pickford & Co.) a servant, who told them that the shaft must be sent to Greenwich immediately, and inquired how soon it could be delivered. The answer was, that if it was sent to the defendants any day before noon it would be delivered at Greenwich the next day. The shaft was accordingly sent to defendants before 12 o'clock the next morning, £21 : 4*s.* was paid for its carriage, and the defendants' clerk was asked to hasten its delivery. By the negligence of the defendants, however, there was great delay in the delivery, and, in consequence, the making of the new shaft was postponed several days. The mill was accordingly kept idle for just that number of days more than it would have been if there had been no negligence, and the owners lost their profits for that number of days. They, therefore, sued the defendants, and sought to recover as damages this loss of profits. They did not succeed, however, as the Court held the damages to be too remote. The carriers did not know that the work of the mill was stopped for want of the shaft, and this was a very extraordinary result of the delay. If, however, the carriers had known the whole circumstances, and that every day's delay meant the loss of a day's profits, then they would have been liable for the whole loss. The Court laid down the following rules: 'Where two parties have made a contract which one of them has broken, the damages, which the other party ought to receive in respect of such breach of contract should be such as may

[13] *Gee* v. *Lancashire and Yorks. Ry. Co.* (1860), 6 H. & N. 211; *Horne* v. *Midland Ry. Co.* (1873), L.R. 8 C.P. 131.
[14] See, for example, A (17) (b) and B (16) (b).
[15] (1854), 9 Exch. 341.

fairly and reasonably be considered, either arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive him'.

In *Simpson* v. *London and North Western Ry. Co.*[16] the plaintiff, who was a manufacturer of cattle-food, used to attend cattle shows, where he exhibited samples of his goods in a show tent, and obtained orders for various kinds of food. He had a tent for this purpose at a cattle show at Bedford, and the defendant railway company had an agent and an office on the show ground for the purpose of receiving and delivering goods. A few days after the close of the Bedford Show there was to be a similar show at Newcastle, at which the plaintiff wished to show his samples. The samples were accordingly packed in boxes and delivered to the defendants' agent on the ground to be carried to the show ground at Newcastle. The agent knew the day on which the goods were required at Newcastle, and the purpose for which they were sent. There was, however, an unreasonable delay in the delivery of the goods, which caused them to miss the show altogether. The plaintiff sued the company for damages for loss of the profits he would probably have made by obtaining orders at Newcastle. The Court held that he was entitled to such damages, as the company knew the object with which the goods were being forwarded; and it is the law that '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'.

But where loss has arisen not only from delay, but also from some cause which the carrier knew nothing about and had no reason to suspect, the carrier will not be responsible. *Baldwin* v. *London, Chatham and Dover Ry. Co.*[17] is an example of this. There rags were delayed in transit, but the delay alone would have caused no appreciable damage if the rags had been packed dry, as they ought to have been. The defendant company had no notice that the rags

[16] (1876), 1 Q.B.D. 274.
[17] (1882), 9 Q.B.D. 582.

were wet, and therefore it was not liable for the damage from this cause.

If delay in transit leads to the loss of a particular market, such damage is generally regarded as too remote, and, in the absence of a special contract no compensation can be recovered either by the consignor or by the consignee for loss of profit on the ground that the goods could not have been sold on a particular day. This is expressly embodied in Standard Terms and Conditions.[18]

DEVIATION

When a carrier undertakes to carry goods, he undertakes to carry them by the ordinary route. He is not obliged to carry them by the shortest route; he may carry them by a longer route if that is in the ordinary course of business. If he unnecessarily [19] deviates from the usual route, and delivery is delayed in consequence, he is responsible at common law; but the goods may be carried by as long and circuitous a route as he pleases, provided no delay or injury is caused thereby, unless he has agreed to carry by a certain route. For there may, of course, be a special agreement between the carrier and the consignor according to which the carrier undertakes to carry by a specified route.[20]

In so far, then, as deviation leads to delay, the carrier is liable to compensate the owner for the financial loss caused to him by such delay. Standard Terms and Conditions A (4) and B (3) deal with this aspect of the matter and provide that at carrier's risk the Railway Executive is liable to compensate the trader for financial loss proved to have been caused by unreasonable deviation, unless the Executive proves that the deviation has arisen without negligence on its part or on that of its servants, while at owner's risk it is for the trader to prove that the deviation arose from the wilful misconduct of the Executive or its servants. The road carrier who is a private carrier is liable for negligence in the absence of a special contract, and even if the road carrier happens to be a common carrier his liability for delay caused by deviation cannot be pitched higher than that existing in other cases of delay, that is, he is liable for negligence and no more.

[18] A (17) (a), B (16) (a). The decision in *Collard* v. *South Eastern Ry. Co.* (1861), 7 H. & N. 79, is no longer applicable under Standard Terms and Conditions. It would seem to be doubtful whether the principle contained in the decision could be applied to road carriers.

[19] Reasonable deviation must be permissible, *e.g.*, deviation with the object of safeguarding a consignment, on the analogy of the law of carriage by sea. See Scrutton on Charterparties, Art. 99, *Kish* v. *Taylor,* [1912] A.C. 604.

[20] *Hales* v. *L. and N.W. Ry. Co.* (1863), B. & S. 66.

Deviation has, however, another and more important aspect. While the goods are being carried along a route other than the ordinary one, or, in case of an agreement to carry by a specified route, other than the agreed one, the carrier is no longer deemed to possess the goods as carrier. By deviating from the ordinary or agreed route, he becomes a wrongful possessor whose liability is stricter even than that of the common carrier. When injury to, or loss of, goods occurs during deviation, the carrier has to compensate the owner without being able to rely on the excepted perils or any other defence derived either from the common law or an agreement or Standard Terms and Conditions.

Moreover, a carrier who deviates from the ordinary or agreed route, or uses a type of vehicle other than that agreed upon, breaks a condition of a contract which goes to the root of the agreement.[21] A breach of such a condition is different from that of a less fundamental contractual term; it entails not only liability for damages, but it entitles the other party to avoid the contract altogether. The terms of the contract are no longer applicable to the relationship between the parties and no defences derived from these terms will avail the party who has broken a condition. In this respect the case of deviation is just like that of a carrier whose servant leaves the consignment to its fate, unprotected against theft. He too breaks a fundamental condition, the condition 'to deliver forthwith' and this prevents him from relying on any exceptions clause that may be in the contract.[22] It is very important to keep clear the difference between a 'complete departure from the contract of carriage', *i.e.* a breach of a fundamental condition which makes it impossible for the carrier to rely on any of the exceptions from his liability stipulated in the contract, and a violation of a merely 'ancillary' provision of the contract, such as the condition in Standard Terms and Conditions which imposes upon a carrier by rail the duty of notifying the consignee of the arrival of the goods at the destination station. In a case of the latter type the owner of the goods who seeks to obtain damages cannot against the carrier's reliance on an exceptions clause invoke the principles laid down by the courts in deviation cases.[23]

[21] See for a full explanation of the law the judgments of Lord Atkin and Lord Wright in *Hain Steamship Co. Ltd.* v. *Tate and Lyle Ltd.*, [1936] 2 All E.R. 597.

[22] *Bontex Knitting Works Ltd.* v. *St. John's Garage*, [1943] 2 All E.R. 690; [1944] 1 All E.R. 381. See also *Davies* v. *Collins*, [1945] 1 All E.R. 247. Note that arbitration clauses continue to operate, despite the repudiation of the contract by a deviation or similar fundamental breach: *Woolfe* v. *Collis Removal Service*, [1947] 2 All E.R. 260.

[23] This is what the plaintiffs attempted to do in the Court of Appeal in

No case in connection with land transport has arisen in which a carrier tried to rely upon the common law exceptions as a defence against claims for loss or damage during deviation. It is, however, well established in the law of carriage by sea that the carrier cannot even claim the protection of common law excepted perils if loss or injury occurred during deviation.

It is not very likely that a case like *James Morrison & Co., Ltd.* v. *Shaw, Savill & Albion, Ltd.*[24] will ever arise in connection with land transport, but it illustrates the effect of deviation on the position of the carrier at common law. Wool was shipped in the defendants' steamship for carriage from New Zealand to London during the First World War. Instead of proceeding along the usual route the ship went into Havre, which in the circumstances constituted an act of deviation. Eight miles from Havre the ship was torpedoed by a German submarine, and the cargo was lost. The carriers were held by the Court of Appeal to be liable for damages. It was true that the same accident might have happened had the ship gone straight into London, and in that case the carriers could have relied not only on an exceptions clause in the bill of lading, but also on 'act of the King's enemies' as a common law exception. However, by leaving the ordinary route the carrier had broken an essential condition of the contract, and the owner of the goods was free to treat the contract as rescinded. During the deviation the carriers did no longer possess the goods as carriers. They were wrongful possessors and liable for every damage which happened to the goods while the wrongful possession lasted. The proof that the damage might have happened, even if there had been no deviation, could not help them. Had they been able to prove that the damage would have necessarily happened had there been deviation or not, it might have been possible for them to avoid liability.[25]

Cases decided in connection with railways show that the carrier is unable to rely on the terms of his contract in such a case. These decisions refer to the 'owner's risk' contracts which were in use before 1928.

In *Mallett* v. *Great Eastern Ry. Co.*[26] the plaintiff delivered a consignment of fish to the defendant company at Lowestoft, to be carried to Jersey via the Great Western Railway and Weymouth, and signed an owner's risk contract by which he relieved the company from liability, except upon proof of wilful misconduct. The defendants, by mistake, sent the fish by London and South Western Ry. Co. and Southampton, which was the longer route. The weather was very stormy, and although the steamers by each route were timed to arrive at the same time, the one by the longer route was more likely to be delayed, and the plaintiff had therefore expressly chosen the other

Hartstoke Fruiterers' Ltd. v. *L.M.S.*, [1943] 1 All E.R. 470. The words in the text are based on the judgment of Lord Greene, M.R. Goddard, L.J. (as he then was) characterised this argument of the plaintiffs as an attempt 'to have their cake and eat it'.

[24] [1916] 2 K.B. 783.

[25] See, as to this point, Tindal, C.J., in *Davis* v. *Garrett* (1830), 6 Bing. 716.

[26] [1899] 1 Q.B. 309. For a recent explanation of the case see the judgment of the Master of the Rolls in the *Hartstoke Case*, above, note 23.

route. The result was, that the fish arrived in Jersey too late for the market for which it was intended, and this action was brought for damages for the loss suffered. The High Court held that the company was liable, and that the consignment note afforded it no protection, as it had sent the goods by a different route from that agreed upon. The delay referred to in the consignment note was a delay in performance of the contract, but the delay which occurred was due to the defendants doing something wholly at variance with the contract. In the similar case of *Foster* v. *Great Western Ry. Co.*[27] the decision was in favour of the company. It was found almost impossible to reconcile these two cases.

Finally, in *London and North Western Ry. Co.* v. *Neilson*[28] the House of Lords decided in favour of the principle laid down in *Mallet's Case*. The manager of a touring theatrical company made an agreement with the defendant railway company to carry the properties and baggage of his company at owner's risk from Llandudno to Bolton via Manchester. The consignment consisted of fifteen packages, and a van was appropriated to the traffic and labelled 'through to Bolton'. No package was labelled to Bolton, but while some had no labels at all, others bore old labels. Through a blunder or misunderstanding on the part of the company's servants the van was not sent through to Bolton, but was unloaded at Manchester. Then the unlabelled packages were placed in the cloakroom, and the others were sent in accordance with their old labels to Bath, Scarborough, Newcastle, etc. The result was, that the goods were delivered two days late at Bolton, and that in consequence theatrical performances could not be given as arranged, to the serious loss of the manager. He accordingly brought an action for damages for delay in delivery, and it was held by the House of Lords that when the goods were dispersed at Manchester the agreed transit was departed from and that when the agreed route was abandoned the privileges and protection which the company enjoyed by virtue of the owner's risk contract ceased. As soon as the carrier deliberately deviated from the agreed route he carried the goods where the consignor never consented that they should be carried and where the carrier by his special contract never agreed that he would carry them, and from that time the goods ceased to be covered by the contract and by the exceptions therein contained.

In *Gunyon* v. *South Eastern and Chatham Ry. Co.*[29] the plaintiff sent a consignment of fruit from Sittingbourne to Glasgow by passenger train under a consignment note 'for perishable and other merchandise carried by passenger train or other similar service to be carried at reduced rates at owner's risk'. The goods were sent from Sittingbourne to London by a passenger train, but from London to Glasgow they were sent by ordinary goods train, and in consequence were greatly delayed in delivery at Glasgow, and suffered much in value through deterioration. The company was not protected by its contract, for it was of the essence of that contract that the fruit should be carried by passenger train; by forwarding the fruit by goods train, the company departed from the agreement into which it had entered, and the goods, therefore, were not being carried at owner's risk.

[27] [1904] 2 K.B. 306.
[28] [1922] 2 A.C. 263. See also *Buerger* v. *Cunard S.S. Co.*, [1925] 2 K.B. 646; [1927] A.C. 1.
[29] [1915] 2 K.B. 370.

There is no reason why these decisions should not be applicable to Standard Terms and Conditions as they were to the agreed consignment notes which were in existence before Standard Terms and Conditions came into force. Standard Terms and Conditions operate as a contract deemed to have been concluded between the consignor and the carrier,[30] and cannot be pleaded as a defence to an action for loss or damage occurring while goods were carried along a route other than that agreed upon. The fact that the liability for the financial loss caused by the deviation itself is expressly dealt with in A (4) and in B (3) cannot, apparently, make any difference, but the matter is not free from doubt.[31]

DETENTION

Standard Terms and Conditions speak of detention as another cause of financial loss for which the carrier may be liable. At carrier's risk it is for the trader to prove that his loss was due to the detention while the carrier must prove that the detention has arisen without any negligence on his own or his servants' part. (A (4).) At owner's risk it is for the trader to show that the carrier or his servants were guilty of wilful misconduct which caused the detention.

In fact, detention would appear to be nothing but a particular form of delay, *i.e.*, a delay occurring not after but before the dispatch of the goods, or else, after the end of transit. If the carrier omits to forward the goods in proper time from the station of dispatch or keeps them at the destination station for more than a reasonable time, the delay so caused entails the same legal consequences [32] as if it had occurred while the goods were being transported. This and nothing else would seem to be the legal importance of the word 'detention' in Standard Terms and Conditions.

It would also be an act of detention if a carrier omitted to dispatch by a particular train or road vehicle goods which he had accepted to be forwarded by that particular train or vehicle. A carrier is not bound to undertake dispatch by a particular vehicle, unless the goods are delivered a reasonable time before the time of

[30] This emerges from Sect. 43 (2) of the Railways Act, 1921. See Hughes, *Law Quarterly Review*, 1931, p. 250. For this reason Standard Terms and Conditions B (23) by which the conditions shall apply by whatever route the merchandise is carried, cannot affect this issue. It is interesting to note that this condition was apparently not pleaded when the plaintiff relied on *L.N.W. Ry. Co.* v. *Neilson*, [1922] 2 A.C. 263, in *Hartstoke Fruiterers Ltd.* v. *L.M.S.*, [1943] 1 All E.R. 470.

[31] Hughes, *ibid.*, p. 248.

[32] See above, p. 162.

the departure of the train or lorry.[33] The consignor must allow the carrier reasonable time in which to weigh, book and otherwise deal with goods; and, if the carrier has a staff sufficient to deal with the ordinary traffic without undue delay, he will not be bound to receive goods for a certain train or vehicle, if such time is not allowed, nor will he be responsible for delay from such cause.

[33] See *Nicholls* v. *N.E. Ry. Co.* (1888), 59 L.T. 137. For a judicial discussion of the term 'detention', see *Jordan* v. *G.W. Ry. Co.* (1881), 8 Q.B.D. 44.

Chapter 15

DELIVERY TO THE CONSIGNEE

At common law the common carrier is not only an insurer against loss of, or injury to, goods during transit; he is also absolutely liable for the safe delivery of the goods to the proper consignee. This absolute liability for any damage arising from misdelivery of the goods, however, is not a peculiar feature of the law of common carriers, but the outcome of a general principle of the common law. If A is in possession of B's goods, whether under a contract or otherwise, he is liable in damages for what is known as conversion if he hands them over to C without A's authorisation, though he may be free from blame. A will have to compensate B for his 'act of conversion' though he was under the honest misapprehension that C was the owner or that he was authorised to deal with the goods as he did. Since a carrier's liability for misdelivery does not depend on any special rules imposing an insurer's liability on the common carrier, but on the general principles of the law of torts, it is absolute whether he is a common or a private carrier, and even after he has ceased to be a carrier altogether and has become a warehouseman. All this is subject to any contract restricting or excluding the carrier's liability which he may have concluded with the consignor.

Strictly speaking, there cannot be liability for misdelivery as such. The owner of goods which have been delivered to a carrier can suffer pecuniary loss with regard to these goods in three ways: either because they do not arrive at all at their destination, or because they arrive in a damaged condition, or because they arrive too late. If goods are delivered to the wrong person the owner may suffer damage, because he is unable to obtain the goods from the person who thus got hold of them. This would be a case in which there is a claim for compensation on the ground of misdelivery leading to a total loss, *i.e.*, non-delivery. Again, though the goods were in the first place handed to the wrong person they may have eventually reached the proper consignee, but the owner may have suffered damage through, say, loss of market, in which case there would be a claim for compensation, because misdelivery involved delay. Finally, cases are thinkable in which the goods are damaged through the misdelivery, for instance, because they were not properly handled by the person to whom they had been wrongly delivered. The claim in this case would be for injury to the goods

arising from the misdelivery. It is not sufficient in any case for the owner to show that there has been misdelivery. He must prove that it has either led to total loss or to delay or to injury, but, as soon as he can establish that any of these events occurred in consequence of delivery to the wrong person, he can rely on the carrier's absolute liability for conversion. On the other hand the courts have sometimes to be on their guard against attempts made by plaintiffs to make every conceivable kind of mishap appear as a 'misdelivery' and thus to plead in their favour the more stringent liability imposed by the law on a carrier if financial loss is suffered by the owner of a consignment owing to delivery to a wrong person.[1] 'Misdelivery means a delivery to the wrong person, and if you keep the goods yourself you do not deliver them at all'.[2] It is thus clearly distinguished not only from delay and detention but also from a mere failure to tender the consignment at the proper time or in the proper manner, *e.g.* from a failure to give timely notice of arrival. Failure to tender or to place the goods at the consignee's disposal is not in itself misdelivery.

The person claiming damages for misdelivery is the owner of the goods misdelivered, that is, either the consignor or the consignee of the goods which were handed to the wrong person. Sometimes a claim for damages may arise in favour of the person to whom the goods were handed by mistake.

In *Macdonald* v. *David Macbrayne, Ltd.*[3] carriers by mistake delivered to A, a consignee of two barrels of paraffin, a third barrel of similar appearance, but containing motor spirit, which was, in fact, intended for B, another consignee. A's servant accepted the three barrels, not knowing how many his employer had ordered, and believing all of them to contain paraffin. Accordingly, they were put in A's store as paraffin. Three weeks later one of A's servants went to the store with a naked light to draw paraffin. He tapped the barrel, which in fact contained motor spirit, and the consequence was an explosion, which caused very serious damage. The carriers were liable to A for this consequence of their misdelivery. In a case of this sort the ground for the carrier's liability is not conversion, but either negligence or breach of the contract with the person to whom the goods were improperly delivered.

From these general remarks it should be clear that the position of a road carrier in connection with misdelivery is most peculiar. In his case more than any other it is necessary to secure protection

[1] E.g. Standard Terms and Conditions B (3), proviso (c). This was one of the arguments used by the plaintiffs in *Hartstoke Fruiterers Ltd.* v. *L.M.S.*, above, p. 171.

[2] *Per* Scrutton, L.J., in *London and North Western Ry. Co.* v. *Neilson*, [1922] 1 K.B. 192, at p. 202.

[3] [1915] S.C. 716.

by contract against the heavy responsibilities imposed upon him by the rigid rules of the common law. It has been pointed out above that many road carriers, if not most of them, are private carriers, and liable only for their own or their servants' negligence even in cases of total loss or injury during transit. But as soon as the owner of the goods can prove that loss, injury or delay are due to misdelivery, the road haulier is absolutely liable for conversion and the fact that he is only a private carrier does not help him. In this respect, even private carriers are dependent on special contracts in order to avoid the consequences of absolute liability.[0]

The position of a carrier by railway is altogether different. At common law he was liable for misdelivery as an act of conversion like every other carrier, subject to special contract.[4]

Under Standard Terms and Conditions at carrier's risk misdelivery is governed by the same rule as loss or injury during transit (A (3)), *i.e.*, the carrier is absolutely liable for misdelivery subject to the excepted perils and subject to all that has been said above about the effect of conditions A (17) and A (23). Naturally, if the misdelivery is due to the negligence of the consignor (as, for example, if the goods are not properly addressed), then the carrier is not responsible. Here, as in the case of loss and injury carrier's risk conditions are a restatement of the common law (with the insertion of excepted perils of which, in this case, the common law knows nothing at all), though the common law rule embodied in A (3) with regard to misdelivery has its origin not in the special duties imposed on the common carrier, but in the general principles of the law of conversion.[5]

At owner's risk a trader claiming compensation on account of misdelivery has to prove that it was due to the wilful misconduct of the carrier or his servants. Here, as in other cases of loss, it is not the intention of the Railway Executive to evade liability when the outward appearance of the facts speaks for a default on the part of its own men.[6] If the merchandise is tendered to or placed

[0] For the wording of conditions adequate to protect a bailee against liability for misdelivery see *Ashby* v. *Tolhurst*, [1937] 2 All E.R. 837.

[4] To what extent Sect. 7 of the Railway and Canal Traffic Act, 1854, affected the power of a carrier by railway to limit his liability for misdelivery is not quite clear; in view of the words 'liable for the loss of or for any injury done to . . . any articles, goods or things in the receiving, forwarding *or delivery* thereof', the Act probably applies to those cases of misdelivery which lead to a total loss or to injury, but not to delay caused by misdelivery. The point may be of some importance in connection with special contracts made under Sect. 44 (3) of the Railways Act, 1921.

[5] See Hughes, *Law Quarterly Review*, 1931, pp. 238, 239.

[6] Standard Terms and Conditions B (3), proviso (c). For an explanation see the concluding part of the judgment of the Master of the Rolls in the *Hartstoke Case*, above, p. 171.

at the disposal of the consignee within twenty-eight days[7] after receipt of the consignment by the carrier to whom it was handed by the sender, the carrier will only be liable if wilful misconduct is proved, since it cannot be said that such delay points to a default on the part of the railway servants. But if the consignment is not tendered to or placed at the disposal of the consignee within this period, then the carrier will be liable unless he can prove that the misdelivery has not been caused by his own negligence or that of his servants. This enlarged liability of the Railway Executive at owner's risk applies whether the goods do or do not finally reach the proper consignee, provided that he was not put into possession within twenty-eight days.[8]

What constitutes wilful misconduct in connection with misdelivery will emerge from a comparison of two cases.

In *Hoare* v. *G.W. Ry. Co.*[9] sixty cases of pollard were sent at owner's risk by railway to Mr. Jeeves at Pewsey. The address was, in fact, given by mistake, and as Jeeves was not expecting any such goods he refused to accept them. A few days afterwards a man named Jarvis applied to the stationmaster for a similar quantity of pollard, which he said he expected from quite another quarter. The stationmaster, thereupon, without making any inquiries whatever delivered the pollard to Jarvis, and in consequence the consignor lost his property and sued the railway company for damages. The company contended that they were protected by the contract, as the stationmaster had been guilty of negligence, not of wilful misconduct. The Court, however, held that there was here wilful misconduct, and that the company was liable. The servant of the company was guilty of more than negligence; he did not inadvertently misread the written address, but deliberately delivered the goods to a man with another name. This was a wilful act, which he must have known was wrong.

In *Stevens* v. *G.W. Ry. Co.*[10] certain goods were handed to the defendant company on Oct. 27 to be carried at owner's risk, and to be delivered to a certain firm. By mistake the goods were delivered to another firm, and the company lost sight of them and did not find them till Dec. 9. They were then tendered to the consignees and refused. The company then seems to have done nothing till the end of January following, when it acquainted the consignor with the facts. Here the company was not liable for damages to the consignor. Misdelivery and delay had been proved against it, but these might have been caused by mere negligence, as well as by wilful misconduct. No proof was given of wilful misconduct, and he who alleges wilful misconduct must prove it. In *Hoare's Case* the consignor had been in a position to explain why the pollard had been misdelivered, but here only misdelivery and delay were proved without any explanation of the cause. Nowadays this case would have been decided in favour of

[7] In the case of perishable merchandise within a reasonable time, which shall not be less than seventy-two hours.
[8] Otherwise in the case of carriage by passenger train. See M (2).
[9] (1877), 37 L.T. 186.
[10] (1885), 52 L.T. 324.

the consignor if the goods had been carried under Standard Terms and Conditions B, since they were not tendered to the consignee within twenty-eight days after receipt by the carrier, and it would hardly be possible for the carrier to disprove negligence in a case like this.

It will be seen from these two cases that delivery to the wrong person will not be presumed to be misconduct. Something else must be proved besides negligence to constitute wilful misconduct, and that something must be of a serious or gross nature, though, of course, it need neither amount to a criminal act nor to moral misconduct.

It is not always easy to say what actually constitutes misdelivery, in other words, what the carrier has to do in order to fulfil his duty to deliver at the proper place.

A carrier is bound to deliver the goods to the right person. This is generally the consignee, or his agent, or some person nominated by him. The carrier is always safe in delivering to the consignee unless he has notice that some other person has a right to the possession of the goods. He is also safe if he delivers the goods to someone whom he can, according to the usual course of business, regard as a person authorised by the consignee to accept delivery. If a carrier delivers goods at the place to which they are addressed he has usually done what he is bound to do. It is often impossible for him to know whether the person who receives the goods at the place is really the consignee or whether he has really authority to receive them. If, however, goods are taken to the address to which they are consigned, and there are circumstances sufficient to raise suspicion in the mind of a reasonable man as to the right of a person there to receive the goods, the carrier may be liable if he hands them over to such person without proper inquiry. For instance, if a parcel addressed to a house were handed to a man who happened to be standing on the doorstep when the carrier's servant arrived there, the carrier might be liable if it turned out that the man was a stranger and that he misappropriated the goods. Though the carrier's liability for misdelivery, being an act of conversion, is an absolute one, the question, whether a given person to whom goods have been handed can be regarded as the proper consignee, largely depends on the 'usual course of business'.

Again, we may contrast two decided cases in order to see how this principle works in practice.

In *Stephenson* v. *Hart* [11] a man, calling himself West, induced the plaintiff to forward a parcel to the address of I. West, 27 Great Winchester Street, London. The plaintiff sent the parcel through the defendant to this

[11] (1828), 4 Bing. 476.

address, but the defendant, when offering to deliver it there, found not only that no such person as West was known there, but that the house had been uninhabited for a year. About a week or ten days afterwards the defendant received a letter from St. Albans, signed I. West, and informing him that a box for West had been addressed by mistake to Great Winchester Street, and requesting him to forward it to a public-house at St. Albans. This the defendant did, and when the box arrived at St. Albans a person, calling himself West, said: 'that is the box I expected; it contains money', opened it, took out the money, and shortly afterwards disappeared. In this case the defendant carrier was held to be liable to the plaintiff. The circumstances of the case should have aroused suspicion in his mind. He could not regard delivery at St. Albans as being within the usual course of the business. The swindler was not the proper consignee, that is the person to whom the consignor, in fact, intended to consign the goods, nor were the goods delivered at the address indicated by the consignor. The carrier had clearly overstepped the bounds of his authority.

In *M'Kean* v. *M'Ivor*,[12] on the other hand, the plaintiffs, merchants in Manchester, had a traveller in Glasgow whose business it was to obtain orders for them for their goods. This person represented to his principals that he had obtained an order for a quantity of goods from 'C. Tate & Co., of 71 George Street'. There was, in fact, no such firm as C. Tate & Co., but the traveller had made arrangements at the address given to receive letters and parcels addressed to C. Tate & Co. The plaintiffs, on getting the order, sent the goods by a firm of carriers to C. Tate & Co., 71 George Street, and wrote to the traveller to his own address, notifying the dispatch of the goods. On arrival of the goods at Glasgow the defendants, following the usual course of business, sent a notice to C. Tate & Co. at the address given, stating that the goods had arrived, asking the consignees to send for them, and informing them that the notice must be produced, indorsed as a delivery order. The traveller received the notice, indorsed it with the name C. Tate & Co., thus got possession of the goods and fraudulently misappropriated them. The consignors sued the carrier for damages for the loss of their goods, but failed. The consignors themselves, by giving directions that the goods were to be delivered to C. Tate & Co., at 71 George Street, represented to the defendants that there was such a firm at that place, and the carrier had a right to assume that such was the fact. The carrier had acted according to his usual custom in giving notice, and the delivery of the notice at the address was equivalent to delivery of the goods there. He had obeyed the senders' directions and the mere fact that the goods had been delivered to a person who had committed a fraud on the sender could not be regarded as misdelivery on the part of the carrier.

While, in the first case, there were circumstances which should have told the carrier that the person claiming the goods was neither the consignee nor a person acting with the proper consignee's authority, there were no such circumstances in the second case. Or, to put it another way, in the second case the swindler deceived the consignor only, and his subsequent conduct towards the carrier was 'mere machinery', while in the first case there was a second inde-

[12] (1870), L.R. 6 Ex. 36.

pendent fraud when the carrier was induced to send the box to St. Albans. The carrier cannot help acting as a conduit pipe in the course of a fraud on the consignor, and it is not misdelivery on his part if he delivers goods to a swindler who has managed to induce the consignor to send him goods. But if the carrier allows himself to be deceived, that may amount to misdelivery, as it did in *Stephenson* v. *Hart*.

When the carrier has taken the goods to the address indicated and tried to deliver them without success, he becomes not a warehouseman, but an 'involuntary bailee', who would seem to be liable for negligence only, even in the case of misdelivery.[13] Even then it may happen that the goods ultimately reach a person for whom they are not intended, but the act of handing them to such a person after they have once been tendered at the proper place of delivery does not entail absolute liability. But there must have been a proper tender. What the defendant in *Stephenson* v. *Hart* did at Great Winchester Street was no tender in the proper sense of the word. The principle is, however, well illustrated by the case of *Heugh* v. *London and North Western Ry. Co.*,[14] which, incidentally, affords another illustration that the carrier does not become liable merely by the fact that he is the unconscious tool of a swindler.

The plaintiffs, who were Manchester merchants, had had dealings with a certain firm in London. A man who had been in the employment of the firm wrote, in the name of the firm, ordering a quantity of goods. These were consigned by the defendant's railway to the firm's place of business in London. The goods, on arrival in London, were sent by the defendants to the address indicated, but it was found that there was a board up that the premises were to let, and the caretaker refused to take in the goods. The company had, in fact, ceased to carry on business altogether, but the defendants knew nothing of that. The goods were then taken back to the defendant's station, and, following usual practice, the company posted an advice note to the consignees to the address on the goods, stating that the goods had been consigned to them, and remained at the station at their risk, and would be delivered to them on production of the note. The man, who had written the order, by some means got possession of this note, and when he produced it at the station, together with the delivery order, signed by himself in the name of the consignees, the goods were delivered to him. The goods were never heard of again, and the consignors sued the railway company for the amount of their loss. It was held that the defendants were not liable, on the ground that, as carriers, they had done all they had contracted to do, the goods were left in their hands against their will, they had followed their ordinary and reasonable course of business in subsequently dealing with them, and were guilty of no negligence.

[13] See also Standard Terms and Conditions A (12).
[14] (1870), L.R. 5 Ex. 51.

We have seen that a carrier can never be regarded as having committed misdelivery if he has delivered the goods at the address indicated by the consignor, and, in the particular case of a carrier by railway, on the consignment note. There is, however, no general rule that a carrier is bound to deliver goods at the house of the consignee. Whether a carrier is so bound depends on his general usage or, else, on special contract. He is bound to deliver at the consignee's address, if he expressly agrees to do so, and also if such delivery is his usual custom, because the contract with the consignor implies a promise by the carrier to deal with the goods in the ordinary course of his business. In the case of a road haulier, such a custom is likely to be implied, and in a town even the Railway Executive will probably deliver within a certain radius all parcels arriving at its station except parcels of great bulk. From a small country station, on the other hand, the Executive probably does not deliver at the consignee's house at all.[15]

Where a carrier has contracted to deliver at the address of the consignee, he is (it is submitted) under no legal obligation to convey the goods farther than the consignee's door, or entrance, or usual place of unloading. For carriage by rail this is expressly provided in Standard Terms and Conditions A (9), which recurs in all the other forms of Standard Terms and Conditions, except those dealing with the carriage of fuel, livestock and milk. It is to the effect, that when the Executive performs the cartage, the place of collection or delivery at the trader's premises shall be the usual place of loading or unloading the merchandise into or from road vehicles. By undertaking the cartage the Executive does not incur any obligation to provide any power, plant or labour except its own carmen.

Where the Railway Executive does not deliver at the consignee's house, it should, if his address is on the goods, or is otherwise known to the Executive, give him notice in writing that the goods have arrived at the station. This is expressly provided in Standard Terms

[15] The Railway Executive do not undertake the collection or delivery of milk outside their stations, and it is expressly provided that the sender and the consignee or their agents shall assist in the loading and unloading of the cans, churns or butts into or from the rail vehicles. The particular usage prevailing in regard to the carriage of milk in cans, churns or butts and of returned empty cans, churns or butts are reflected in the special rule that, unless otherwise determined, transit shall be deemed to be at an end when the milk cans, churns or butts are placed in the usual position for delivery and the consignee has had a reasonable opportunity to take delivery thereof. (See Standard Terms and Conditions J (6), (7), (13), K (6), (7), (14).) It is clear from this provision that the duty to deliver milk cans, churns or butts is fulfilled as soon as the milk is put on the platform or whatever the place may be where consignees are in a habit of collecting these objects.

and Conditions A (10) and B (9) for ordinary merchandise, and the rule applies whether the goods are to be called for at a station or at a public siding, but not if the goods are delivered to a private siding, or by the carrier's barge, or truck alongside ship. Notice may be by telephone if this is agreed in writing.[16] Where the consignee's address is unknown and where he refuses to take delivery, notice should be given to the sender where it is reasonable and practicable so to do. This notice should also be in writing, and by telephone only if there was a written agreement permitting this form of notice.

If the carrier fails to comply with these provisions, he commits a breach of contract for which the owner of the goods can claim damages. The extent of this liability for failure to give proper and timely notice of arrival is determined by the general principles which govern his obligations as a carrier, *i.e.* at carrier's risk by Standard Terms and Conditions A (3) and at owner's risk by B (3). At carrier's risk he is protected by the excepted perils, but in the absence of any excepted peril, liable like an insurer. At owner's risk the Executive need not pay damages unless it is proved that the failure to give proper notice of arrival was due to the wilful misconduct of the railway servants.[17]

These rules as to notice do not apply to fuel, milk and livestock,

[16] Even in the absence of a written agreement notice may be given by telephone if this is 'by mutual consent agreed to be the proper method of giving notice having regard to the course of business between the parties'; *per* Lord Greene, M.R., in *Hartstoke Fruiterers Ltd.* v. *L.M.S.*, [1943] 1 All E.R. 470.

[17] In *Hartstoke Fruiterers Ltd.* v. *L.M.S.*, above, the Court of Appeal rejected the plaintiffs' argument that Standard Terms and Conditions B (3) did not apply after the end of the transit. The rejection was based on the ground that the argument 'would have this remarkable result, that until the goods arrived at the station the company would be protected by condition 3, and that, at the expiration of one clear day after the notice of arrival was given, the company would be protected by the special warehousing conditions in condition 11, whereas in the interval of time between these two points of time condition 3 would have no application at all, and would not protect the company'. While it is clearly right that the duty imposed upon the carrier by A (10) and B (9) is governed by the overriding provisions in condition 3, it is not easy to follow the line of reasoning by which the Court arrived at this result. The duty to give notice of arrival is owed by the carrier as a carrier. Transit does not and cannot come to an end until notice of arrival has been given: see A (11) and B (10). Arrival at the station as such does not terminate transit. Thus there can be no interval of time between the end of transit and the moment when the warehousing rule begins to operate in favour of the carrier. The answer to the plaintiff's argument in the *Hartstoke Case* is to be found in the provisions of Standard Terms and Conditions about the termination of transit. These provisions make it quite clear that notice of arrival is an obligation covered by the law of carriage itself.

and they apply in a different form to goods carried by passenger train or other similar service. There is no duty to give notice of arrival of such goods before twelve hours have elapsed since the arrival at the station, and the carrier is not liable to pay any compensation for loss or damage arising from the failure to give such notice except upon proof by the trader (1) that the consignee had no reason to anticipate that the merchandise had been forwarded or (2) that the failure to remove the merchandise was not due to the neglect of the consignee or his servant or agent. This applies whether the goods carried by passenger train or other similar service are perishable merchandise or ordinary goods, but not to milk, cans, churns or butts.[18]

The carrier's duty is to deliver at the place to which the goods are consigned, but if the owner changes the carrier's instructions while the goods are in transit, the carrier must comply with this order, provided he has satisfied himself that the person designating a new place of delivery is, in fact, the owner of the goods at the moment when the order is given.[19] Since, as a rule, the consignee and not the consignor is the owner of the goods while they are in transit, it is the consignee who has in the ordinary course of things the right to change the place of destination, and in the absence of any notice to the contrary, the carrier is justified in assuming that the consignee is the owner and in obeying his directions.[20] If the consignor has remained the owner of the goods, the carrier must comply with his orders. That may be so even though the object of the carriage is to forward the goods from the seller to the buyer, for by Sect. 32 of the Sale of Goods Act, 1893, the rule that delivery to the carrier is deemed to be delivery to the buyer, is subject to any agreement to the contrary which the parties to the contract of sale may have made.[21] The owner must give his new directions to the

[18] Standard Terms and Conditions G (9), H (8), L (10), M (9), O (10).

[19] *Scothorn* v. *South Staffordshire Ry. Co.* (1853), 8 Ex. 341.

[20] *Cork Distilleries Co.* v. *G.S. & W. Ry. Co.* (1874), L.R. 7 H.L. 269.

[21] See also Sect. 19 of the Sale of Goods Act, by which the seller may reserve the right of disposal of the goods until certain conditions are fulfilled. In such cases, notwithstanding the delivery of the goods to the carrier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. A seller-consignor who changes the destination of goods in transit on the ground that he has reserved his right of disposal under the contract of sale, would probably be required to give strong evidence of this fact to the carrier. See also the express provision in Sect. 39 (2) giving the seller who has retained the property a right to withhold delivery co-extensive with the right of stoppage *in transitu* given by Sect. 44 to the unpaid seller who has already passed on the property to the buyer by delivery to a carrier.

carrier before the goods have reached the destination originally indicated, and so as to allow the carrier reasonable time to take the necessary steps. If required to deliver at a new place by the owner, the carrier is bound to deliver at that place, provided the place is one which he serves; and he may be liable in damages if he disregards the owner's directions.

There is one case of very great importance in which a person, other than the owner, can change the original place of destination of the goods before they reach it, or before they are handed to the consignee. It is the case when the seller of goods exercises that right which is known as the right of stoppage *in transitu*. This right is given by the Sale of Goods Act [22] to the unpaid seller of goods, who has already transferred the property in the goods to the buyer, by transmitting them to a carrier. When the buyer becomes insolvent, the unpaid seller need not sit still while the goods are carried towards their destination, perhaps, soon to form part of a bankrupt's estate and to be sold by a trustee in bankruptcy or by the liquidator of a company. Instead of going through the ordeal of watching the goods reaching their destination, and of waiting for the dividend to be distributed in the buyer's bankruptcy, the seller, though no longer the owner, can stop the goods while they are still in transit and request the carrier to redeliver them to himself. This right can be exercised under the following conditions: (1) The seller must be unpaid, either wholly or in part, and he is also deemed to be unpaid if he has drawn a bill of exchange for the price upon the buyer which the buyer has accepted but not yet paid. (2)The buyer must be insolvent, that is to say, unable to pay his debts. It is not necessary that actual bankruptcy proceedings should have been taken against him. (3) The goods must still be 'in transit'. The meaning of the term 'transit' in this context [23] does not coincide with that applied in connection with the carrier's own liability.[24] Transit for the purpose of the exercise of the right of stoppage *in transitu* begins at the moment when the goods are delivered to the carrier and ends with delivery to the buyer or his agent, whether at the original place of destination or at a place subsequently indicated as place of destination by the buyer.[0] It also ends when the carrier at any moment agrees to hold the goods as the buyer's bailee. If the carrier wrongfully refuses to hand over the goods to the buyer, transit is deemed

[22] Sects. 44 to 46.
[23] Sect. 45.
[24] See p. 190.
[0] For a comparatively recent illustration see *Plischke* v. *Allison Bros. Ltd.*, [1936] 2 All E.R. 1009.

to be at an end for the purpose of the exercise of the right of stoppage in transit, while it continues in so far as the carrier's own liability is concerned. On the other hand, if the goods are rejected by the buyer and the carrier continues in possession of them, transit continues for the purpose of the exercise of the right of stoppage *in transitu,* even if the seller has refused to receive the goods back, but it is at an end with regard to the carrier's own liability. Thus if the consignee-buyer refuses to pay the carrier's charges because he is unable to do so on account of his insolvency, the goods cease to be in transit from the point of view of the carrier's liability, and, if the goods are subsequently lost or damaged, the carrier's liability is only that of a warehouseman. But if the seller wishes to exercise his right of stoppage in transit, he may still do so. (4) The seller must either take actual possession of the goods, which he is not likely to be able to do without the carrier's concurrence, or he must give notice of his claim to the carrier. He need not give the carrier notice to stop in any particular form; *e.g.,* a request by telegraph may be sufficient. The notice may be given to the servant of the carrier, who has at the time actual control over the goods, or to the carrier himself. For example, it may be given either to the stationmaster of the station where the goods happen to be, or to the district or regional head office of the Railway Executive. In the latter case the notice must be given so as to allow the carrier time, with reasonable diligence, to give the necessary directions.

When the seller has given notice of stoppage *in transitu,* the carrier is bound to redeliver the goods to the seller at the seller's expense, and he will be liable to an action for damages by the seller if he fails or refuses to deliver the goods so demanded. If the goods reach the consignee in spite of a valid exercise of the consignor's right of stoppage *in transitu,* and the consignee is declared a bankrupt, the goods will become part of the property to be realised for the benefit of the creditors, and the unpaid seller will only get a dividend of so much in the pound along with the other creditors. If, therefore, the carrier has wrongfully refused to redeliver the goods, the carrier may have to pay as damages to the seller the balance of the price of the goods after deduction of the dividend.

Apart from this important, but solitary case of determination of the place of destination by a person other than the owner, the only person to give orders as regards delivery is the owner of the goods.

What is the carrier to do when he finds that no one is prepared to accept the goods, or that circumstances outside his control prevent him from delivering perishable goods in time to protect them from deterioration? The question whether in such cases the carrier

is justified in selling the goods, acting as the owner's 'agent of necessity', has given rise to considerable difficulties.

At common law, the rules of which are still fully applicable in the absence of a special contract to carriers by road, the carrier may sell perishable goods and pay over the proceeds of the sale to the owner after deducting his own charges and expenses. However, he must not exercise this power unless there is 'a real business necessity', and 'it must be practically impossible to get the owner's instructions in time as to what shall be done'.[25]

Thus, in *Sims & Co.* v. *Midland Ry. Co.*, a consignment of butter was accepted by the defendant company for delivery to the plaintiff. Very soon after they had accepted the goods a general strike of railway servants broke out. The defendant's servants joined in the strike and in consequence the defendant was unable to forward the goods. The weather being hot, the butter began to deteriorate rapidly, and to avoid heavy loss the company sold the butter. The plaintiff then brought an action for damages for failure to deliver the goods, but the defendant company was not liable, as it was right in selling.

In *Springer* v. *Great Western Ry. Co.*,[26] on the other hand, tomatoes were delivered to the defendant at St. Heliers, Jersey, for carriage to Covent Garden. The ship carrying the tomatoes from St. Helier to Weymouth was delayed by bad weather, and when she arrived at Weymouth a strike of the defendant's men broke out suddenly at Weymouth. When finally the tomatoes were unloaded after great delay the defendant's traffic agent found that they were in a very bad condition, and he decided to sell them, the strike preventing the tomatoes being forwarded to London. The owner succeeded in an action for damages against the railway company, because the traffic agent at Weymouth, before selling the vegetables, ought to have communicated with him. Otherwise than in *Sims' Case*, this would have been possible here before a complete deterioration of the merchandise. In order to justify a sale, it would have been necessary to show that it was 'commercially impossible to communicate with the owner and receive instructions from him'.[27]

These restrictions imposed by the common law on the carrier's right to sell make it utterly necessary to regulate this matter by special contract in the case of transport by road.

In the case of railway traffic Standard Terms and Conditions have considerably enlarged the carrier's right to sell. The 'real necessity' of the common law has been extended so as to include all cases in which perishable merchandise is either refused by the consignee, or, if 'wait order' traffic, not taken away from the destination station within a reasonable time after arrival, or not addressed or labelled in accordance with regulations. The right also

[25] Scrutton, J., in *Sims & Co.* v. *Midland Ry. Co.*, [1913] 1 K.B. 103, at p. 112.

[26] [1921] 1 K.B. 257.

[27] *Per* Scrutton, L.J., at p. 267.

exists if perishable goods are not delivered in consequence of riots, civil commotions, and any kind of labour dispute, or in consequence of damage or obstruction to the railway, caused by flood or landslip when no reasonable alternative route is available. Communication with the owner is only necessary where it is reasonably practicable by wire or telephone. Notice must be given to the consignee when the goods are not taken away from the destination station, and when they cannot be delivered in time on the ground of flood or landslip. Similar notice to the sender is to be given when the goods are refused by the consignee and when they are not properly addressed or labelled. No notice at all need be given in cases like those of *Sims* and *Springer,* in which the delay is caused by labour disputes or civil disturbances. The carrier, after having done what is reasonable to obtain the value of the merchandise, tenders to the consignee the proceeds after deduction of all proper charges and expenses, the charges being those in operation for the journey actually completed, but not in excess of those chargeable for the full transit.[28]

In order to get rid of unclaimed non-perishable goods, such as 'wait order' traffic not removed within a reasonable time, and merchandise which neither the consignee nor the sender wishes to dispose of, the Railway Executive may sell them separately or by inclusion in a sale of unclaimed goods. The sender or consignee must be notified within fourteen days before the sale, and, if both are unknown, it must be advertised in the press.[29]

[28] A (15), B (14), E (15), G (13), H (12), J (15), K (16), L (14), M (13), O (14). These rules apply to milk, carried by passenger train or other similar service. They are applicable, with slight modifications, to live-stock, which may also be sold if it is so injured in transit that, having regard to all circumstances, it is reasonable to slaughter, or which has died in transit from any cause whatsoever, in which case notice is to be given to the consignee: C (12), D (12), N (13).

[29] For details, see Standard Terms and Conditions A (16), B (15), E (16), F (10), L (15), M (14), O (15). The Minister may by Regulations which must be laid before both Houses of Parliament make provision for the safe custody and redelivery or disposal of any property found on or in any premises, vessels or vehicles belonging to the Transport Commission. He may also fix the charges to be made by the Commission for these services. Transport Act, 1947, Sect. 119 (c) and Sect. 120.

Chapter 16

BEGINNING AND END OF TRANSIT: THROUGH TRAFFIC

BEGINNING OF TRANSIT

Since the carrier's liability as a carrier is co-extensive in time with transit, it is of the greatest importance precisely to determine the moment when transit begins and when it ends. Whether carriage be by road or by rail,[1] transit begins at the moment when the goods are delivered to the carrier. They are already in transit while they await dispatch. The reader must clear his mind of the notion that goods are in transit only when they are moving. Since the carrier is under a duty to dispatch the goods delivered to him for carriage within a reasonable time, transit begins as soon as he has accepted them. If any person seeks to make a carrier responsible for the loss of goods entrusted to him, the first thing he must prove unless the carrier admits it is that he did, in fact, deliver the goods to the carrier and that the carrier did, in fact, accept the goods. Delivery to a carrier is effected by delivery to a servant or agent of the carrier who has authority to accept delivery.

If a person were to put an addressed parcel into a van, as the train stood at a station platform, or into a lorry due to depart, without communicating with any servant of the Executive or the owner of the lorry, the Executive or lorry owner would not be responsible for that parcel. It has, in a sense, been delivered to him, but he certainly has not accepted it. Personal luggage, however, put into a train or motor coach by the passenger or his servant without objection by the Executive's servants or the coach owner would probably be held to have been accepted by the carrier.[2]

Again, if a parcel be handed to a servant of the carrier, who has no authority to receive such parcels, the carrier is not responsible.[3] If, however, in the circumstances a person is justified in supposing that a servant of the carrier to whom he entrusts goods has authority to receive them, the carrier may be held liable for the

[1] Or—apparently—by air. In *Westminster Bank Ltd.* v. *Imperial Airways Ltd.*, [1936] 2 All E.R. 890, three bars of gold, consigned for carriage by air to Paris, were stolen from the defendants' strong room at Croydon Airport. It was held that the loss occurred 'during carriage by air'.

[2] *Jenkyns* v. *Southampton Steam Packet Co.*, [1919] 2 K.B. 135.

[3] *Slim* v. *G.N. Ry. Co.* (1854), 14 C.B. 647; *Harrison and Crosfield, Ltd.* v. *L.N.W. Ry. Co.*, [1917] 2 K.B. 755.

goods and may not be allowed to prove that in fact the servant had no such authority.[4]

In all cases where a servant or an agent has authority to receive goods, delivery to and acceptance by that servant is a good delivery to and acceptance by the carrier, and the carrier immediately becomes responsible.

If goods are delivered at any office of a carrier which is used for receiving such goods, and there accepted by any person who appears to be a servant of the carrier, the delivery and acceptance are complete. Also where a road carrier or the Railway Executive recognise any place (such as a village shop, for example) as a receiving office for goods, they are responsible for goods delivered at that place from the time they are so delivered. And if a carrier allows any person to receive goods for him, he is responsible as carrier for the goods from the time they are delivered to that person, even though he is not paid for receiving them. The same would probably be true of the Railway Executive collecting goods at the consignor's premises.

At the beginning of transit the Railway Executive must give a receipt for the goods. This receipt which is provided for in Standard Terms and Conditions [5] must not be mixed up with the special receipt to be given under the Carriers Act, 1830, Sect. 3, for goods coming within the scope of the Act. It need be given only, if required by the consignor, who must also prepare it for signature by the company's servant.

It is evidence of the act of delivery, but not of the condition or of the correctness of the declared nature, quantity or weight of the consignment. In this respect, as in others, the Railway Executive's receipt is altogether different from a bill of lading issued by the master of a ship as agent of the shipowner.

END OF TRANSIT

The end of transit is not coincident with the end of the actual journey. This is quite clear in those cases in which, for instance, a carrier by railway undertakes to cart the merchandise. Though transit is always at an end when the goods are actually delivered, the contrary is not the case, and transit may end though there has been no delivery; for instance, if the carrier tenders the goods to the consignee and acceptance is refused. Transit may even be at

[4] *Soanes* v. *L. & S.W. Ry. Co.* (1919), 120 L.T. 598.

[5] A (1), B (1), E (1), G (1), H (1), J (1), K (1), L (1), M (1), O (1); no receipt need be given in the case of carriage of livestock and fuel: C (1), D (1), F (1), and N (1).

an end where the carrier refuses to deliver, for instance, because the consignee declines to pay the carriage, for this is equivalent to a refusal by the consignee to accept.

In the law of road transport the common law rules still prevail. Transit ends when the goods have been tendered to the consignee, whether he has accepted them or not, and where the goods are not to be delivered at the consignee's premises, a reasonable time after their arrival at the station or place of destination. The decision in *Chapman* v. *Great Western Ry. Co.* and *Chapman* v. *London and North Western Ry. Co.*,[6] though no longer applicable to goods carried by railway under Standard Terms and Conditions, still affords the guiding principle governing the end of transit in the case of road transport.

Two packages of goods, one carried by the Great Western Ry., the other by the London and North Western Ry., arrived at the Great Western Ry. station at Wimborne, one on the 24th, the other on the 25th of March, both addressed to the plaintiff 'to be left till called for', and they were placed in the station warehouse. The railway company did not know the plaintiff's address, who travelled about the country with drapery goods. The goods had not been called for when, on the morning of the 27th, a fire broke out by accident, the warehouse was burnt down, and the two parcels were destroyed. On the same day the plaintiff called for the goods, and on hearing that they were burnt, claimed damages from the two companies. He failed, because at the moment when the goods were destroyed a reasonable time had elapsed since the arrival of the goods, transit was at an end, and the Great Western Ry. Co. held the goods no longer as a common carrier, but as a warehouseman, and as such the company was not liable for the consequences of an accidental fire in the absence of negligence.

The principle of this decision is applicable to goods to be called for at a road haulier's yard, to those rail-borne goods which do not come under Standard Terms and Conditions (such as dangerous goods) and to those carried under special contracts made under Sect. 44 (3) of the Railways Act, 1921, by which the application of Standard Terms and Conditions is excluded, but it has no application to passengers' luggage, where entirely different rules prevail.[7]

Under Standard Terms and Conditions applicable to ordinary merchandise carried by merchandise train four cases must be distinguished.[8]

1. If the merchandise is to be carted by the Executive, transit ends when the goods are tendered at the usual place of delivery, *i.e.*, the place where the merchandise is usually unloaded from the road

[6] (1880), 5 Q.B.D. 278.

[7] See below, p. 253.

[8] A (11) and (7); B (10) and (6); and with regard to damageable goods not properly protected by packing, E (11) and (7).

vehicles. The Executive is under no obligation to provide any power, plant or labour which, in addition to their carmen, may be required for the unloading of road vehicles at the consignee's premises.[9] As soon as the Executive's road vehicle has reached the consignee's goods yard and has been unloaded there, transit is at an end. Whatever assistance may be given afterwards to the consignee's servants by the railwaymen, the Executive will no longer be liable as a carrier for damage to the goods. The position is similar in the case of a delivery to the address of a private person. As soon as the parcel is taken to the consignee's doorstep, transit is over, and, if the railwaymen consent to take the parcel up the stairs, they do so as private individuals and not as the Executive's servants. Tender at the consignee's premises effects the end of transit only if it is done within the customary cartage hours of the delivery district, or at another time, if there was an agreement to this effect.

When the goods have been tendered in accordance with these rules transit ends. Goods which the consignee has refused are no longer in transit while carried back to the station, and the Executive is only liable as a warehouseman for whatever happens while they are returning to the railway station. Here the conception of transit applicable in connection with the carrier's liability is different from that applied to the seller's right of stoppage *in transitu*.[10]

2. If merchandise is not to be carted by the Executive, or if it is to be retained by the Executive awaiting order, transit ends at the expiration of one clear day after notice of arrival is given to, or at the address of, the consignee.[11] Standard Terms and Conditions abolish the 'reasonable time' principle embodied in *Chapman's Case*,[12] and replace it by this less ambiguous rule.

3. Merchandise carried to a private siding is subject to special rules. When it is arranged that the consignee should take delivery upon the siding, delivery there terminates transit. If the consignee refuses to take delivery, transit ends at the expiration of one clear day after the receipt by the consignee of notice in writing (or by telephone if so agreed in writing) that the carrier is ready and willing to deliver. If the consignee is prevented from taking delivery and if his inability to accept the goods is not due to the fault of the carrier, transit ends one clear day after the consignee has received notice of arrival. If, owing to the carrier's fault, the consignee

[9] A (9), B (8), E (9).
[10] See above, p. 185.
[11] See above, p. 182.
[12] See above, p. 191. If the consignee's address is unknown, transit ends one clear day after notice of arrival is given to the sender. Where the sender's address is also unknown, transit ends one clear day after arrival.

cannot take delivery, transit does not end before the cause which has prevented him from taking delivery has been removed and the merchandise is either delivered upon the siding by arrangement, or one clear day has expired after the receipt by the consignee of notice that the carrier is now ready and willing to deliver.

If delivery to the place of destination entails transfer to an independent carrier [13] transit ends when the merchandise is tendered or transferred to the carrier. The Executive's liability ceases altogether once the goods are entrusted to the carrier, and the Executive ceases to be a carrier and becomes a warehouseman if the carrier refuses to take them over. It sometimes happens that, though the ultimate destination is within the railway system of Great Britain, there is an intermediate portion of the journey where the goods have to be carried by an independent carrier. In such a case transit is suspended when the goods have been tendered to the carrier and whilst they are in his possession.

The rules of the law of inland transport cease to be applicable to exported goods as soon as they are taken on board ship, and, at least under the Railways Act, 1921, it does not make any difference whether that ship belongs to the Transport Commission or not.[14]

No provisions are made for the cartage of livestock, nor is there any general duty imposed upon the Executive to notify the consignee of the arrival of livestock at the destination station. As soon as the Executive has given a reasonable opportunity to the consignee to take delivery at the place to which the livestock is consigned, transit ends, but in no case does it extend beyond twenty-four hours after arrival of the livestock at the destination station. The consignee is notified only if either he or the sender has made a special request in writing to this effect. The notice is given by wire or telephone message at the expense of the party making the request and only when it is reasonable and practicable.[15]

Again, in the case of fuel there is, of course, no reference to cartage and no reference to notice to the consignee either. Special provisions are made concerning the end of transit in the case of fuel for shipment and for the suspense of transit if fuel arrives at reception sidings when the fuel is held there for the convenience of the trader, or the carrier is unable to effect delivery through the default of the trader.[16]

[13] *I.e.* a carrier other than a contractor employed by the Railway Executive to deliver merchandise within the usual delivery area of a terminal station. Such 'terminal contractors' are the agents of the Executive and not those of the traders.

[14] See below, p. 198; but see below, p. 215, for an exception to this rule.

[15] Standard Terms and Conditions C (8), D (8) and N (9).

[16] Standard Terms and Conditions F (6).

The position of the Executive is different when goods are carried by passenger train or other similar service. Though the carrier has to give notice of arrival in these cases,[17] the consignee can be assumed to be prepared for the arrival of such traffic and the notice has, therefore, nothing to do with the termination of transit. Transit ends at the expiration of one clear day after the arrival of the consignment at the destination station, whether the goods are perishable or not.[18]

Special provisions apply if such goods are to be carried to a private siding.[19]

The Executive never undertakes the delivery outside its stations of milk in cans, churns or butts and returned empty cans, etc., which have been carried by passenger train or other similar service.[20] No provisions are made for the end of transit in the case of cartage, or for notification of the consignee. Transit ends when the milk cans, etc., are placed in the usual position for delivery and the consignee has had a reasonable opportunity to take delivery.[21]

Whatever be the type of goods carried, transit ends when the Executive agrees to warehouse the goods. We may sum up by saying that transit lasts from the time the carrier accepts the goods for transit until the transit is ended, which may take place either by (1) actual delivery; or (2) tender and refusal to accept or refusal to pay charges; or (3) attempt to deliver and failure through no fault of the carrier; or (4) failure by the consignee to remove the goods one clear day after arrival or notice of arrival; or (5) by the carrier agreeing to warehouse the goods.

LIABILITY AFTER TRANSIT

As soon as the transit is at an end the carrier's liability as such ceases. The whole liability of the carrier, however, does not come to an end with the end of transit, unless the goods have been safely delivered. If they remain in the hands of the carrier after the termination of the transit, he is liable for the safety not as a carrier, but as a warehouseman. This is a rule of the common law which applies to carriers by road as well as by railway, though in the case of the latter the common law is modified in certain respects by Standard Terms and Conditions.

A warehouseman is one who, as part of his business, has the care and custody of another man's goods. At common law he is not

[17] See above, p. 182.
[18] L (9) (b), M (8) (b), G (8) (b), H (7) (b).
[19] L (9), M (8), G (8), H (7).
[20] K (7), J (7).
[21] K (14), J (13).

an insurer, but, as a bailee,[22] is bound to take all reasonable care of the goods and is answerable for injury or loss, caused by his own negligence or that of his servants. He is not answerable for loss or injury if the goods are lost, injured or destroyed through no negligence of himself or his servants. Hence, if goods are in the hands of a carrier after the transit is at an end, and they are stolen from his warehouse or destroyed by fire without any negligence on the part of the carrier or his servants, the carrier is not liable. It is for the warehouseman, as it is for a private carrier,[23] to show that the loss or damage to the goods are not due to his or his servants' negligence. The owner of the goods and the warehouseman are free to enter into an agreement by which the warehouseman's liability is either enlarged to that of an insurer or restricted, though it would seem to be doubtful whether a contract can go so far as to exclude the warehouseman's liability for intentional wrongs.

These general principles, which are still fully applicable to the road carrier who warehouses goods after transit, are well illustrated by decisions referring to the position of railway companies before Standard Terms and Conditions came into force. One of these cases, *Chapman* v. *Great Western Ry. Co.*, has been quoted above. Another case to the same effect is *Mitchell* v. *Lancs. and Yorks Ry. Co.*[24]

Sixty bales of flax arrived at a small station, where there was then no proper warehouse. The day after arrival the company sent the consignees a written notice stating that the goods had arrived and requesting them to remove them as soon as possible, 'as they remain here to your order, and are now held by the company, not as carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges'. Some of the bales were left on the company's hands for over two months, and the company, not having any accommodation to store this large quantity of flax indoors, merely stacked it on the bare ground and covered with tarpaulins. These were not sufficient to protect it properly, and the rain got through and completely spoilt the flax. When sued for damages by the consignees, the company had to admit that it had not taken reasonable care of the goods, and could not deny that it would have been bound to take that care in its capacity as warehouseman. It tried, however, to rely on the words 'at owner's sole risk' in its notice, but, since it had agreed to hold as warehouseman, which involved the duty to take care, the words 'at owner's sole risk' were construed by the Court as meaning in this case that the company no longer held the goods as insurers. The carrier had by his notice, which was assented to by the consignees, contracted to hold the goods as a ware-

[22] For an excellent summary of the law of bailment, see Chitty, *On Contracts*, 19th ed., pp. 630–663; as to the warehousing contract in particular, see *ibid.*, pp. 646–647.

[23] See above, p. 159; for liability of warehousemen, see *Brook's Wharf and Bull Wharf, Ltd.* v. *Goodman Bros.*, [1937] 1 K.B. 534.

[24] (1875), L.R. 10 Q.B. 256.

houseman, though, in fact, he had no proper accommodation for storing the goods.

In a situation of this kind the carrier becomes a bailee for reward, who is bound to take good care, and, on the other hand, is entitled to charge a reasonable sum for taking care of them. It must not be assumed, however, that the carrier is bound to take any responsibility at all when he has no proper facilities for storage. If, for instance, a road carrier informed the consignee that the goods had arrived and that he had no proper accommodation, and that he could not be responsible for damage arising from lack of proper storage, then, provided no warehouse rent was charged, the Court would probably hold that the carrier was not a warehouseman, but an involuntary bailee, whose liability is not as extensive as that of a bailee for reward.[25]

Section 7 of the Railway and Canal Traffic Act, 1854, does not apply to contracts regulating the liability of the Railway Executive in its capacity as warehouseman. This is the reason why, in *Mitchell's* case, the notice sent to the consignee and the consignee's tacit acceptance of that notice constituted a valid contract, though it was not signed by the consignor or his agent, and though there was no question of a fair alternative. Section 44 (3) of the Railways Act, 1921, has no application to such contracts either, since it deals with 'terms and conditions for the carriage of merchandise' only. Standard Terms and Conditions, however, provide that contracts regulating the Railway Executive's liability after the end of transit must be in writing.[26] In the absence of such special contract the Executive holds the merchandise as a warehouseman subject to the usual charges. But it will not be liable even under ordinary carrier's risk conditions in three cases: (1) if merchandise not properly protected by packing is lost, misdelivered, detained or damaged after the end of transit, unless the owner proves that the Executive or its servants were negligent and that proper packing would not have prevented the loss, etc.; (2) if the goods are of a description coming within the scope of the Carriers Act, 1830, as amended by subsequent Acts;[27] (3) if the Executive gives notice that it has no suitable accommodation. Thus the Railway Executive is entirely protected from any liability which it might at common law have incurred as an involuntary bailee of goods for which it has no

[25] He would seem to be liable only for gross neglect to be proved by the owner of the goods. The question is doubtful. See Chitty, p. 634.

[26] A (12), B (11), C (9), D (9), E (12), G (10), H (9), L (11), M (10), N (10), O (11).

[27] See p. 203.

proper storage accommodation.[28] Livestock left in charge of the Railway Executive after the end of transit is held at the sole risk of the owner, though he has to pay reasonable charges for lairage or other accommodation or services.[29] There is no liability after the end of transit for milk in cans, churns or butts and returned empty cans, etc. carried by passenger train or other similar service.[30] The liability for fuel which remains in the Executive's hands after the end of transit is the usual warehouseman's liability, but the burden of proving negligence is upon the trader claiming damages.[31]

THROUGH TRAFFIC

Not all the rules governing carriage by rail and road are necessarily applicable to the whole of the period between the beginning and the end of transit. Transit may extend beyond the journey actually under the control of the carrier who first received the goods for carriage. Through traffic, *i.e.* the carriage of goods to a destination not served by the carrier who originally received the consignment or along a route entailing carriage by another carrier for part of the journey, is today a comparatively insignificant branch of the law of inland transport, since the whole railway system of Britain is owned by the Railway Executive. The principles formerly laid down by the courts for carriage of goods received and carried part of the way by one railway company and then handed on to another have lost their importance. They cannot be applied where either during an intermediate portion of the journey or at its end the goods have to be handled by a road carrier, nor can they apply where several road carriers successively participate in the transportation of a consignment. If a road carrier is a 'terminal contractor', *i.e.* 'a contractor employed by' the Railway Executive 'to deliver merchandise within the usual delivering area of a terminal station',[32] any loss or damage which occurs while the goods are in his possession is treated as if it had happened while the goods were in the hands of the Executive itself. Where, however, the carriage to the destination entails transfer to an independent carrier, *i.e.* a carrier who is neither the Executive nor a terminal contractor, different principles apply. As soon as the goods are handed to such a carrier, the liability of the Executive is at an end, but it is implicitly authorised as agent for the

[28] A (12), B (11), E (12). In the case of goods carried by passenger train it need not even give notice if it has no accommodation: G (10), H (9), L (11), M (10), O (11).

[29] C (9), D (9), N (10).

[30] There are no conditions dealing with liability after the end of transit in Standard Terms and Conditions J and K.

[31] F (7).

[32] Standard Terms and Conditions A (7), B (6).

sender or owner to enter into a contract of carriage with the independent carrier'.[33] Here there is an important difference between carriage at carrier's risk and carriage at owner's risk. Under owner's risk conditions it is always for the trader to show that loss, injury, etc. occurred on the British railway system or while the goods were carried by a terminal contractor. At carrier's risk, however, the burden of proof depends on the situation of the place of destination. If it is outside Great Britain, the burden of proof is on the trader, but, if it is within Great Britain, there is a presumption in favour of the trader that the loss, etc. occurred on the British railway system or while the goods were carried by a terminal contractor, and the Executive when sued must prove that this was not the case.[34]

There is little in Standard Terms and Conditions to elucidate the position of the Executive carrying goods on land and then across the sea in its own vessel. On principle, the liability of the Executive for loss, injury, etc. occurring while goods are carried in its sea-going vessels is a matter governed by the law of carriage by sea. However, certain rules of the law of inland transport, such as the Carriers Act, 1830, have been made applicable by express provisions to carriage in vessels owned by the Railway Executive.[35]

The Executive has inherited from the former railway companies their statutory powers to own and work sea-going ships, and in so far the Railway Executive carries on business partly by land and party by sea, principally in relation to traffic with the Continent and with Ireland. It would be a serious matter for the Executive if it was restricted in its power to limit its liability for loss or injury during transit by sea to a greater extent than competing sea carriers. Before Jan. 1, 1928, it depended on the date of the special Act empowering the railway company to work its own vessels whether Sect. 7 of the Act of 1854 applied to such traffic, for Sect. 31 of the Railways Clauses Act, 1863, extended the provisions of Sect. 7 to all such traffic as was authorised by any special Act passed after the Act of 1863. But since Jan. 1, 1928, Sect. 31 of the Act of 1863 is repealed, and, therefore, Sect. 7 of the Act of 1854 has no application to traffic by sea.[36] Thus, the Railways Act, 1921, has removed

[33] Standard Terms and Conditions A (7), B (6).

[34] Compare A (7), E (7), G (5), L (6) and O (6) with B (6), H (4) and M (5), and note that in the case of livestock (C (6), D (6) and N (6)) the burden of proof is on the trader, even at carrier's risk, and the liability does not extend to the carriage by a terminal contractor. The position is similar in the case of fuel (F (4)) and milk (K (12) and J (11)).

[35] Carriers Act, 1830, Sect. 11, as added to the Act by the Sixth Schedule to the Railways Act, 1921. See below, p. 215.

[36] Railways Act, 1921, Sect. 56, and Sixth Schedule.

a serious discrimination working to the detriment of the railway carriers in their capacity as sea carriers.

There are many dangers incident to carriage by sea, which have nothing corresponding in carriage by land, and loss or injury at sea is much more likely to happen from causes quite outside the control of the Executive. The law provides certain ways in which the Executive can protect itself against liability for these particular dangers. Every consignment of merchandise to be carried by the Executive partly by land and partly by water, or wholly by water, must be accompanied by a consignment note signed by the sender containing such terms and conditions applicable to carriage by water as the Executive is entitled to impose.[37] Moreover, it is provided by Sect. 14 of the Regulation of Railways Act, 1868, that where a carrier by through booking contracts to carry goods from place to place partly by railway and partly by sea, a condition exempting the carrier from liability for loss or damage arising 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 be valid as part of the contract between the consignor and the carrier, provided that the condition is published in a conspicuous manner in the railway receiving office, and also legibly printed on the receipt or note given to the consignor, but conditions of this kind obviously can have nothing to do with the land part of the transit.[38]

Where a road carrier enters into a contract with a consignor, by which he undertakes to carry goods to a destination which involves carriage by rail, it is a question of fact whether the road carrier does or does not act as the owner's agent when delivering the goods to the Railway Executive. If he acts as forwarding agent, he cannot be made liable for any loss, etc. occurring during rail transit, and he establishes by his transaction with the Railway Executive a direct contractual relationship between the consignor and the Railway Executive. If, however, he does not act as the consignor's forwarding agent, but as carrier throughout the journey, then he is liable to the owner for any occurrence happening before the goods reach their destination. The extent of his liability for what happens on the railway lines would, in the absence of a special contract, depend on the question whether he is a common or a private carrier. If he

[37] Standard Terms and Conditions A (6), B (5), C (5), D (5), E (6), G (4), H (3), J (10), K (11), L (5), M (4), N (5), O (5). There is no similar condition in the case of fuel.

[38] See the discussion of *The Stella*, [1900] P. 161, in Lipsett and Atkinson, p. 71. To what extent Sect. 14 of the Act of 1868 is compatible with the Carriage of Goods by Sea Act, 1924, is an open question.

is a private carrier, he can hardly be made liable for the negligence or even the wilful misconduct of the railway servants, for the Railway Executive cannot be said to be the road carrier's servant for whose negligence he is responsible. If he is a common carrier,[39] he may bear a heavier responsibility for the safety of the goods towards his consignor than the Railway Executive has towards himself as consignor of the goods on the railway part of the journey. For the Executive will be protected by the special limitations of liability contained in Standard Terms and Conditions, while the road carrier who has entrusted the consignment to the Executive in carrying out his contract for carriage of the goods can only rely on the common law exceptions. The position of road carriers who are charged with the duty of handing goods to the Railway Executive is, however, far from being clear.

[39] Like the forwarding agent in *Hellaby* v. *Weaver*, above, p. 122.

Chapter 17

THE CARRIAGE OF VALUABLE AND BREAKABLE GOODS

I

At common law a carrier had no right to open a parcel entrusted to his care. He was, therefore, unable to ascertain the amount of risk he undertook by accepting a parcel for carriage and delivery. The consignor was under no duty to inform the carrier about the contents of a package, even if it consisted of goods of great value in a small compass, such as gold, jewellery, or documents, the loss of which might mean ruin to the carrier, or of breakable articles, like glass and china requiring special care. Yet, as a common carrier he had to accept the parcel and could not make disclosure of its contents a condition of his preparedness to carry. It was this dilemma which forced carriers into the habit of posting up notices in their receiving offices, and thus to limit their liability. When the Carriers Act, 1830, checked this practice, and thus afforded a remedy to the well-founded grievances of the public, justice demanded that special rules should be enacted compelling consignors of parcels to disclose to a common carrier their contents if consisting of valuable or breakable articles of a certain minimum value, and to pay him an increased charge over and above the ordinary rate of carriage, as a compensation for the greater risk and care required.

The Carriers Act gives the common carrier a twofold protection :—

(a) Whenever a parcel or package contains articles of certain descriptions mentioned in the Act, the total value of which exceeds £10, or, in the case of railway traffic, £25,[1] the consignor or other person delivering the parcel to the carrier must make a special declaration [2] of the nature and value of the articles contained in it. This must be done at the time when the parcel is delivered to the carrier, provided it contains one or more of the articles mentioned in the Act, if the total value of these articles exceeds the minimum

[1] The minimum value fixed by the Carriers Act is £10, and this is still the figure applicable to common carriers by road. This figure has been raised to £25, as far as railway carriage is concerned, by the amendment to the Carriers Act, contained in the Railways Act, 1921, Sect. 56 and Schedule 6.

[2] Sect. 1 of the Act.

figure, though each of them may be worth less. It does not matter whether the parcel also contains goods outside the Act, and the value of such goods is left out of account when the value of the parcel is calculated; *e.g.*, if a parcel containing five golden bracelets of a value of £6 each is delivered to the Railway Executive for carriage, a declaration must be made, but no declaration would be necessary if the value of each bracelet was only £4, though the parcel also contained clothing or other articles outside the Act of a value of £5 or more.

If no declaration is made the carrier is relieved from all liability for loss of, or injury to, goods coming under the Act.[3] Not even the minimum amount can be claimed if the declaration is omitted.[4] The carrier is entitled to an express declaration of the nature and value of the goods, whether they are delivered to him at a receiving office or elsewhere. For example, where the servant of the carrier calls by request at the house of the sender, and the goods are delivered there, the carrier will be entitled to the full protection of the Act, if no express declaration has been made.[5] No particular form of declaration as to the nature and value of the contents of a parcel is necessary; it is quite sufficient if the particulars are brought to the knowledge of the carrier with the intention of making a declaration, and with sufficient clearness to enable him to fix the increased rate which he is entitled to charge. But to deprive the carrier of the protection of the Act, the declaration must be an express declaration, both as to value and as to nature, intended to be a declaration; and it is quite irrelevant that the contents of a parcel are obvious on examination.[6]

(b) Section 2 of the Act empowers the carrier to affix 'in legible characters in some public and conspicuous part of the office, warehouse or other receiving house where such parcels or packages are received' a notice by which he demands an increase rate of carriage over and above the ordinary rate of carriage as a compensation for his greater risk and care. If the carrier makes use of this provision and demands the 'insurance rate' for goods within the Act in this manner, the notice is binding upon all those who deliver to the carrier for carriage parcels or packages containing goods coming under the Act, and, what is more, unless they pay this additional

[3] But see the exception below, p. 208.

[4] Note the difference in this respect between the Carriers Act and the law of carriage of animals. See below, p. 218.

[5] This, it is submitted, is all that was decided in *Hart* v. *Baxendale* (1851), 6 Ex. 769.

[6] See *Doey* v. *L. & N.W. Ry.*, [1919] 1 K.B. 623.

charge or undertake to pay it the carrier is not liable for any loss or injury occurring during transit.

In order to claim the insurance money the carrier must demand it by proper notice, but he need not draw the consignor's attention to the necessity for declaring the contents and value of a parcel containing goods within the Carriers Act. If, however, the carrier omits to put up a notice by which he demands the insurance money he cannot rely on the consignor's omission to make the declaration. The carrier's protection depends on his having put up a notice, but this notice need not mention the duty to declare.[7]

II

In order to avoid unnecessary litigation the Act does not leave it to the Courts to say which articles are 'valuable' or 'breakable'. It contains an enumeration of those articles for which a declaration

[7] Sect. 3 of the Act. A certain amount of confusion prevails with regard to the effect of the important decision of the Court of Exchequer Chamber in *Hart* v. *Baxendale* (above, p. 202). The facts of the case were simple. The plaintiff delivered to the carriers, Messrs. Pickford & Co., at his house in Regent Street, silk goods to be carried to the Camden Town Station of the London and North Western Ry. Co. At their receiving offices Messrs. Pickford & Co. had posted up notices by which they demanded the insurance money in accordance with the Carriers Act. When Messrs. Pickford's carmen collected the goods at the plaintiff's house, the plaintiff did not make a declaration as to their nature and value. The goods were lost, and the plaintiff claimed damages from the carriers who pleaded the Carriers Act. All the Court had to decide was, whether the carrier could claim the protection of the Act only if goods were delivered at a receiving office where a notice was posted. This question was answered in the negative by the Court, and it was held that, once notices are posted in the carrier's receiving offices (*quære*, Must he put them up in all his receiving offices?), he can rely on the Carriers Act whether the goods are delivered to him at the receiving office or on the road or on the consignor's premises or anywhere. Whatever else Patteson, J., who delivered the judgment of the Court, said was clearly *obiter dictum*. It is important to be quite clear about this, since it has been frequently said that *Hart* v. *Baxendale* deals with another matter as well, namely, with the question whether the carrier can claim the protection of the Act if no declaration has been made, and if he has omitted to post up a notice in his receiving office. This question is answered by Sect. 3, which says, *inter alia*, if 'such notice as aforesaid shall not have been affixed the . . . common carrier . . . shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law . . . '. From this it follows that the carrier, though he need not demand the declaration, must have demanded the insurance money by proper notice in order to take advantage of the consignor's omission to make a declaration. It is submitted that a careful reading of the judgment of Patteson, J., in *Hart* v. *Baxendale* shows that this was also the view of that learned judge, though he did not expressly refer to Sect. 3. Bailhache, J., in *Rosenthal* v. *L.C.C.* (1924), 131 L.T. 563, expressed a similar view with regard to *Hart* v. *Baxendale*, though he rightly pointed out that the concluding sentence of the judgment of Patteson, J., is somewhat misleading.

must be made and insurance money be paid if demanded by notice. These fall into two groups, those included because of their value, and those included because of their breakable nature. The first group consists of the following: British or foreign gold or silver coin, gold or silver whether manufactured or not, precious stones, jewellery, watches, clocks or timepieces of any description, trinkets, bills, British or Irish bank-notes, English or foreign orders, notes or securities for the payment of money, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, furs ,lace (other than machinery made),[8] and in the case of road carriers silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials.[9] The second group includes glass and china. The reader will, no doubt, be surprised at this somewhat old-fashioned enumeration. Valuable stone sculptures or old books are not included, nor are delicate instruments, which deserve special protection to a higher degree than some of the articles mentioned in the Act. The Courts have done their best to give a sensible interpretation to this odd assortment. It is true, that in a case before a jury it is not a question of law for the judge, but one of fact for the jury to decide whether or not the thing in question comes under the description of anything in the list, but this is subject to the control which the Court exercises over verdicts if they are manifestly wrong.[10] It was, for instance, not easy to interpet the word 'trinkets'. It has been defined to include things which are mainly and chiefly intended for ornament, though they may also be useful. A case containing a large number of miscellaneous fancy articles had been sent by the defendants, who were the well-known firm of Pickford & Co., as common carriers, and had been lost by them. The defendants did not dispute their liability to pay for some of the things, but denied their liability for others, claiming the protection of the Act, as there had been no declaration, and the things were worth far more than £10. The Court decided that bracelets, shirt pins, gilt rings, brooches and tortoise shell and pearl portemonnaies were all trinkets, but that German silver match boxes were not included in that term, being in no sense ornamental.[11] This is undoubtedly a reasonable inter-

[8] Machine-made lace was taken out of the scope of the Act by 28 & 29 Vict. c. 94, an Act to amend the Carriers Act, 1865.

[9] This last item was taken out of the scope of the Carriers Act, as far as railway traffic is concerned, by the Sixth Schedule of the Railways Act, 1921, in conjunction with Sect. 56 (1) of the Act itself.

[10] See *Woodward* v. *L.N.W. Ry. Co.* (1878), 3 Ex. D. 121, at 126, per Hawkins, J.

[11] *Bernstein* v. *Baxendale* (1859), 6 C.B. (N.S.) 251.

pretation of the Act, though it cannot be said that everything chiefly intended for ornament comes under the description of an article of great value within a small compass.

That glass includes looking glasses [12] and that timepieces include chronometers [13] is fairly obvious, but the meaning of 'paintings, engravings, pictures' is not so easily determined. Should the artistic purpose of the painting or design enter into consideration, or should every bit of design or painting be protected, whatever its object? In *Woodward* v. *London and North Western Ry. Co.*,[14] it was held that designs for manufactured carpets were not paintings in the ordinary sense as works of art, but merely models to work by in a manufacturing process.

The duty to declare, as well as the duty to pay insurance money, applies only in the case of those valuables, which are contained in a parcel or package. If any of the things were sent by a carrier loose, without any packing, the Act would have no application, and the carrier no protection. The carrier, however, whether by road or by rail, would be justified in refusing to accept any goods which are not properly packed, if packing is reasonably necessary for their safety in transit.[15] The result of the cases seems to be that 'parcel or package' is wide enough to include anything of any size in which the owner chooses to pack his goods, *e.g.*, an ordinary furniture removal van, or a wagon.[16]

We have already seen that the carrier is protected by the Act if a parcel contains a variety of articles, some of which are within the Act, and some not. This is especially important in the case of passengers' luggage carried by the Railway Executive, or by a road carrier, together with the passenger. The Act applies to such luggage in the same way as to other goods.[17] If, then, a parcel of this sort, which has not been declared as to its value and contents is lost, the value of the things not mentioned in the Act may be recovered from the carrier, although the value of the articles within the Act cannot be recovered. Thus, where a lady's portmanteau was lost on a railway (before Jan. 1, 1928), and it was proved that it contained, amongst other things, a silk dress, whose value brought it within the Act, it was held that the company was not liable for the value of the silk dress, although they were liable for the other things.[18]

[12] *Owen* v. *Bennett* (1834), 2 C. & M. 353.
[13] *Le Conteur* v. *S.W. Ry. Co.* (1865), L.R. 1 Q.B. 54.
[14] (1878), 3 Ex. D. 121.
[15] See below, p. 229.
[16] *Whaite* v. *Lancs. and Yorks. Ry. Co.* (1874), L.R. 9 Ex. 67.
[17] See below, p. 249.
[18] *Flowers* v. *S.E. Ry. Co.* (1867), 16 L.T. 329.

If a parcel is lost which contained undeclared goods within the Act, and also other goods not within the Act, then the carrier is liable for the box, portmanteau or case in which the goods were packed. If, however, a box or case is lost, which contained only undeclared goods within the Act, then the carrier is not even liable for the case in which they were packed.

It is not always easy to distinguish between a separate article not coming within the Act and an accessory of an article covered by the Act. The buttons of a fur coat, the morocco case containing a ring, or a case containing valuable maps[19] are not separate articles, but merely accessories, and so is the frame of a picture, as in ordinary circumstances a picture requires a frame, and is not seen without it.[20] On the other hand, where a 'lace corporal', that is an article intended to cover the altar during the celebration of Holy Communion, had been put in a gilt frame only for the purpose of being shown at an art exhibition, the frame was held to be a separate article and not covered by the Act, since the lace corporal did not require a frame in ordinary circumstances.[21]

III

The Carriers Act protects the carrier only with regard to compensation payable for total loss or injury, not against liability for damages on the ground of delay. If a parcel containing goods within the Carriers Act is culpably delayed in transit, whether through deviation or otherwise, the carrier must compensate the owner, though no declaration has been made, but mere delay must be distinguished from temporary loss. For loss may be temporary as well as permanent. If the carrier is unable to trace the whereabouts of an article or package, he has 'lost' it, though at some later time he may have the good fortune of rediscovering it, and if the package contained undeclared goods within the Act, the carrier need not compensate the owner for their temporary disappearance. Whenever an article is lost to the carrier—whether temporarily or permanently—it is lost within the meaning of the Act, but where there has been unreasonable delay in the delivery of the goods without loss, *i.e.*, where the goods have never been lost sight of, but have negligently been detained, the Act affords no protection.[22] And if goods are temporarily lost and found again by the carrier, it becomes the duty of the carrier to deliver them within a reason-

[19] *Wyld* v. *Pickford* (1841), 8 M. & W. 443.
[20] *Henderson* v. *L. & N.W. Ry. Co.* (1870), L.R. 5 Ex. 90.
[21] *Treadwin* v. *G.E. Ry. Co.* (1868), L.R. 3 C.P. 308.
[22] *Hearn* v. *L. & S.W. Ry. Co.* (1855), 10 Ex. 793.

able time after recovering them; and if after having recovered them the carrier fails in this duty, the Act affords him no protection for such detention.

The difference between temporary loss and mere delay is well illustrated by the decision in *Millen* v. *Brasch & Co.*[23]

A lady who was travelling from London to Rome sent a trunk by rail from London to Liverpool, from which port it was to be shipped by steamer to Italy. The trunk never arrived in Rome. It contained silk dresses and a sealskin jacket, articles within the Act and over £10 in value, but no declaration was made. For about four months the carriers were quite unable to say what had happened to the trunk. But after this period it appeared that, by the carelessness of the carrier's servants, the trunk had been put on board a ship bound for New York. It was eventually recovered, but in the meantime the lady had been put to much inconvenience and had to buy other articles in Rome at an increase of price. The articles also were injured through being carelessly handled in the New York customs house. When sued for damages the carrier pleaded the Carriers Act, and judgment was given for the carrier on this ground. The goods were 'lost' within the meaning of the Act, although the loss was only temporary, and the Act protected the carriers.

If goods within the Act, which have not been declared, are injured or lost during a state of deviation, the Carriers Act can be pleaded as a defence, though no other defences are available to the carrier in such a case. This would appear to be the effect of *Morritt* v. *North Eastern Ry. Co.*[24]

A man travelling from York to Darlington handed two water colour drawings to the guard, asking him to take care of them, after having made sure that the pictures (which were tied together in a way which made it obvious that they were pictures) were labelled for Darlington. Though the pictures were above the value of £10, he omitted to make a declaration of the value. When the train arrived at Darlington he took a fresh ticket for Barnard Castle and told the porter to see that the drawings were taken out and put in the train by which he was starting. They were, however, not taken out, but were carried on to Durham, and when they were recovered by the owner they had sustained considerable injury which they had suffered while being carried beyond their destination. When the owner claimed damages the company was held to be entitled to plead the Carriers Act.

This would seem to show that deviation does not deprive the carrier of the protection of the Carriers Act, but it is not quite clear whether this case was one of deviation in the proper sense of the word.

IV

In one case the Act affords the carrier no protection for the loss

[23] (1882), 10 Q.B.D. 142.
[24] (1876), 1 Q.B.D. 302.

of, or injury to, undeclared goods. That is, where the loss or injury arises from the felonious act of any servant of the carrier.[25] Thus, if the servant of a common carrier by road were, out of spite, to set fire to a shed and so destroy a valuable parcel of furs which had not been declared, the carrier would be liable, because the loss arose from the felonious act of a servant. The felonious act, however, for which the carrier is most often held liable is larceny by his servant. Thus, if the conductor of a motor coach were to open a lady's trunk while unobserved and to steal therefrom a diamond necklace, the owner of the motor coach would be liable in the absence of a special contract, though the lady had made no special declaration of the contents of her trunk. If, however, a person who has lost undeclared goods wishes to take advantage of these exceptions to the general provisions of the Act, it is not sufficient for him to show that somebody must have stolen his goods while they were in transit and that that somebody was very likely a servant of the carrier. For instance, in a case in which a parcel was last seen in the custody of a railway porter (before Jan. 1, 1928) against whom no charge was made, and by whom it had been placed in the locked box of a luggage van from which it had disappeared, the carrier was held not to be liable.[26] On the other hand, it is not necessary for him to give evidence sufficient to convict one particular servant of the crime of larceny or to name the thief. It will be sufficient to make the carrier liable if he can convince a judge or jury by proper evidence that the goods were in fact stolen and that the loss must have been due to somebody in the carrier's employ.

This falls very short of what is necessary to convict an individual of the crime. If in a prosecution it can only be proved that one of two persons must have stolen a thing, neither of these persons can be convicted. But, if the owner of lost goods is able to prove that one of two servants of the carrier must have stolen them, the carrier is certainly liable.

Thus, in *Vaughton* v. *The London and North Western Ry. Co.*,[27] the plaintiff delivered a parcel of jewellery, whose value brought it within the Act, to the defendant company to be carried from Birmingham to Liverpool. No declaration of value was made. The parcel never reached its destination; but a few days after it ought to have been delivered some of the missing articles were found in a pawnbroker's shop in Liverpool, and later on, some parts of the box in which the jewellery had been packed, and a pin which had been contained in it, were found upon a siding belonging to the company. Two railway men were arrested, but afterwards discharged.

[25] Sect. 8.
[26] *G.W. Ry. Co.* v. *Rimell* (1856), 18 C.B. 575.
[27] (1874), L.R. 9 Ex. 93.

The plaintiff sued for the value of the lost jewellery, and the company pleaded they were protected by the Act. The jury found that the goods had been lost through the felony of the company's servants, and the Court refused to interfere with the verdict, since it was sufficient to show that some servant of the company was guilty and not necessary to bring the offence home to any servant in particular.

The case of *McQueen* v. *The Great Western Ry. Co.*[28] shows the limits of this rule. The plaintiff delivered to the defendant railway company at Cardiff a large case of drawings of greater value than £10 to be carried to London. No declaration was made as to the nature and the value of its contents. The company's servant put this case into a truck which was shunted to a siding about one mile in length and easily accessible to any person from almost any direction. The case disappeared and was not heard of again. The company, when sued for the value of the drawings, admitted that the case must have been stolen whilst in the truck upon the siding, but no explanation was given as to how it was stolen and the company succeeded in claiming the protection of the Act. The Court held that it is not enough to show that the carriers' servants had a greater opportunity of committing the theft than another person. Evidence must be given establishing a prima facie case against the servants of the company. In the words of Cockburn, C.J., any other decision would 'fritter away the effect of the Act'.

But where goods were stolen from a parcel in circumstances which showed that the thief must have spent a considerable time in opening and repacking the parcel, and the company was unable to prove that any person other than the servants of the company had any effective access to the parcel, the Court of Appeal held that there was evidence that the goods were stolen by a servant of the company.[29]

The Courts have given a wide interpretation to the word 'servant' in this connection.

In the case of *Stephens v. London and South Western Ry. Co.*,[30] a parcel of silk was delivered at a receiving office for transmission to a station on the defendant's railway, and no declaration of the contents and value of the parcel was made. The company had stated in its published time tables that the place where the goods were to be delivered was to be a receiving office for parcels and goods intended for carriage by the defendants. The parcel was collected in due course by the defendants and taken to one of their stations. While there, a person in the employ of the proprietor of the receiving office managed to get hold of it by means of a forged order and to get away with it. The Court of Appeal held that the defendants were not protected by the Carriers Act, since the loss had arisen from the felonious act of a person who was to be regarded as one of the defendants' servants.

Once a carrier recognises any place as a receiving office and

[28] (1875), L.R. 10 Q.B. 569.
[29] *H. C. Smith, Ltd.* v. *Midland Ry. Co.*, above, p. 157.
[30] (1886), 18 Q.B.D. 121.

authorises some person to receive goods there as his agent, the carrier will be liable for goods stolen by a servant of that agent just as if he were his own servant.

In *Morritt* v. *North Eastern Ry. Co.*,[31] Blackburn, J., suggested that the Act affords no protection to the carrier where he or his servant wilfully does some act which leads to loss or injury. Thus the carrier would be liable for undeclared goods which were wilfully damaged or knowingly handed over to a wrong person, or which the carrier converted to his own use. Whether this dictum would be followed if the question ever came up for decision is somewhat doubtful in view of the fact that the Act itself restricts the liability to cases of felony, and thus implicitly extends the protection to those cases of wilful damage which cannot be stigmatised as felonies.

V

If a declaration is made in accordance with the Act, and if the insurance money, if required, has been paid, the carrier has to sign a special receipt for the package by which he acknowledges that the packet or parcel has been insured. This receipt is never liable to stamp duty. If the carrier refuses to give it he cannot claim the exemption from liability under the Act, and must refund an increased rate of charge paid.[32]

Where the nature and value of the contents of a parcel have been duly declared and the increased charge has been paid and the goods thus insured are lost or injured, the carrier is liable, in the absence of a special contract, as at common law. The owner has the right to compensation for the loss or damage, but he is also entitled to recover back from the carrier the increased charge.[33]

The owner can in no case recover more than the value declared. He is bound by the consignor's declaration. On the other hand, the carrier is not so bound. He is free to contest the value as declared, and in such a case the owner must prove the value of the lost goods by ordinary legal evidence.[34] Where the goods are sent by a seller to a buyer, the value is the invoice price to the buyer, not the price paid for the goods by the seller.[35]

According to Sect. 6 of the Act, the parties are free to make a special contract. That contract may or may not be inconsistent with the terms of the Act. In so far as it is, the application of the

[redacted] above, p. 207.
[32] Sect. 3.
[33] Sect. 7.
[34] Sect. 9.
[35] *Blankensee* v. *London and North Western Ry. Co.* (1882), 45 L.T. 761.

Act is excluded. Thus, the carrier may, by contract, disclaim liability even for theft by his own servants. Or, on the other hand, he may renounce his right to have the contents of a package or parcel set out in detail.

In *Shaw* v. *Great Western Ry. Co.*,[36] the plaintiff sent a portmanteau by the defendant railway company, which contained, amongst other things, jewellery to the value of £250. She did not declare the contents of the portmanteau, but she signed a consignment note, which contained a condition that the company were *entirely* relieved from liability for loss of things within the Carriers Act, unless declared. The jewellery was stolen from the portmanteau by a servant of the company without any negligence on the part of the company, and the plaintiff sued for its value. It was held, however, that she could not recover, for by her contract contained in the consignment note she had agreed to relieve the company of *all liability*, and that included even theft by one of its servants.

A contract of this sort, if made by the Railway Executive, is governed by Sect. 7 of the Railway and Canal Traffic Act, 1854, provided the contract removes or restricts the carrier's liability for his own neglect or default.[37]

VI

The Act applies to 'mail contractors, stage coach proprietors, or other common carriers by land for hire'. It is not applicable to private carriers. Here for once the common carrier is in a better position than the private carrier. If no declaration is made, the common carrier is not even liable for the negligence or wilful misconduct of his servants, unless the latter amounts to a felony. (Sect. 8.) The private carrier, however, who carries valuables of any sort is liable for his and his servants' negligence, though no declaration has been made. This explains the somewhat curious fact, that there are cases in the books in which carriers tried hard to persuade the Courts that they were common carriers.[38]

In modern road transport by goods vehicle the Act is not likely to be of very great importance. A furniture remover entrusted with the carriage of valuables would probably be in the position of the carrier in *Belfast Rope Works* v. *Bushell*,[39] and would be a private carrier. This shows how necessary it is for road carriers to protect themselves by special contract against liability for loss of, or injury to, valuables and breakable goods. If they do not take this precaution they are liable for their servants' negligence causing

[36] [1894] 1 Q.B. 373.
[37] See above, p. 137.
[38] *E.g.*, *Baxendale* v. *Great Eastern Ry. Co.* (1869), L.R. 4 Q.B. 244, and *Rosenthal* v. *L.C.C.*, above, p. 203.
[39] See above, p. 122.

loss of, or injury to, valuables in the same way as they are liable for any other goods.

The Carriers Act is more important in regard to passengers' luggage of which the owner of a motor coach or other public service vehicle is a common carrier [40] if he publicly announces his readiness to transport a certain amount of luggage accompanying passengers either 'free of charge' or for a consideration. The fact that the Carriers Act confines its own scope to carriers 'for hire' does not exclude its application to passengers' luggage carried 'free of charge' since the luggage is not, legally speaking, carried free, the fare paid by the passenger including the consideration for the transport of the luggage. This has been decided with respect to passengers' luggage on railways,[41] and there is no reason why this principle should not also apply to passengers' luggage on the road.

Before Jan. 1, 1928, there was no doubt that the Carriers Act was applicable to railway companies, for they were regarded as common carriers. Since that day, however, it has been doubtful whether the Act still applies to railway traffic. Standard Terms and Conditions A (5) [42] provides as follows:—

'The (carrier) shall not, whether the carriage be by land or water, or partly by land and partly by water, be liable for loss or injury (from whatever cause arising) of or to any articles or property described in the Carriers Act, 1830, as amended by subsequent Acts, contained in any parcel or package when the value of such articles or property exceeds £25, unless the nature and value thereof be declared on delivery to the (carrier) for carriage and an increased charge over and above the charge for carriage at (carrier's) risk rates be paid as compensation for the greater risk incurred, or an undertaking to pay such increased charge be accepted'.

The Courts have not so far had an opportunity of elucidating this condition. It may be meant to take the place of the Carriers Act and to exclude its application if the goods are carried under Standard Terms and Conditions. On the other hand, it may be meant to operate by way of a supplement to the Carriers Act. The former interpretation seems to be correct in view of the words 'from whatever cause arising', which imply that the carrier disclaims liability in the absence of a declaration even where he would be liable under the Carriers Act. Thus the Executive would escape liability even though no notice was posted up demanding insurance money in accordance with the terms of the Carriers Act, and

[40] See below, p. 249.
[41] *Casswell* v. *Cheshire Lines Committee*, [1907] 2 K.B. 499.
[42] The same condition applies if merchandise is carried by passenger train or other similar service at carrier's risk. See Standard Terms and Conditions L (4).

though no receipt was given in accordance with Sect. 3. Again, Sect. 8 would no longer be applicable to the Railway Executive, in so far as it carries under these conditions, and it would not be liable in the absence of a declaration even if the goods could be proved to have been stolen by one of its servants. The wording of the condition lends strength to this interpretation, though one would have expected that the conditions, when attempting to override an Act of Parliament, would do so in plain terms, particularly in view of Standard Terms and Conditions A (24), according to which the rights and liabilities of the trader and the carrier respectively, whether at common law or under any statute shall remain unaffected subject, of course, to the Conditions.

It is not even quite clear that the authors of Standard Terms and Conditions had the power of excluding the application of the Carriers Act to goods carried under Standard Terms and Conditions, even if they intended to do so. Whether the Tribunal were empowered to make conditions at variance with an Act of Parliament, or acted beyond their powers (*ultra vires*) when attempting to do so, depends on the legal nature of Standard Terms and Conditions. If they are to be regarded as a contract made between the consignor and the carrier the contents of which have been fixed beforehand by the Tribunal, then there is no reason why a condition of this sort should not be valid even in derogation of the Carriers Act, as the parties to the contract of carriage have always been free to exclude the operation of the Carriers Act.[43] If, however, the Tribunal, when settling Standard Terms and Conditions under Sect. 43, acted in a legislative capacity, that is as a body entrusted with delegated legislative authority, then it might be argued that, in the absence of an express authorisation, they could not override existing statutes. The former view is probably correct, so that the Carriers Act would seem to be inapplicable to goods carried under Standard Terms and Conditions A, its place being taken by Condition 5. It can only be hoped that the Courts will be given an opportunity of deciding this intricate point.

Under owner's risk conditions there is a similar clause. Standard Terms and Conditions B (4) is almost identical with Standard Terms and Conditions A (5),[44] but it contains the proviso that when the declaration is made and the increased charge is paid or an under-

[43] See *Baxendale* v. *G.E. Ry. Co.*, above, p. 117; *Shaw* v. *G.W. Ry. Co.*, [1894] 1 Q.B. 373.

[44] The same condition applies if merchandise is carried by passenger train or other similar service at owner's risk rates and if merchandise is accepted for carriage by passenger train or other similar service at owner's risk only. See Standard Terms and Conditions M (3).

taking to pay it is accepted, then the liability of the carrier shall extend to the full value declared. This would seem to exclude Sect. 9 of the Carriers Act. If a declaration is made of the contents and value of a parcel containing valuables and carried at owner's risk, then the owner who proves wilful misconduct [45] can recover the full value declared (but, of course, no more) and the Executive cannot deny that the goods had the value asserted in the declaration. Why the Railway Executive should assume a liability (to the full value declared) at owner's risk which it is not prepared to undertake at carrier's risk is very difficult to see.

When damageable goods coming within the Carriers Act are not properly protected by packing,[46] the Executive does not undertake any liability whatsoever even though a declaration be made, for nobody should send goods of this sort otherwise than in their proper packings.

All that has been said applies to the liability of a carrier for loss of, or injury to, goods within the Carriers Act, provided that loss or injury occurs while the goods are still in transit. As soon as transit is over, the carrier becomes a warehouseman, who is only liable for his and his servants' negligence,[47] but the Railway Executive is in no case liable for any loss, misdelivery or detention of, or damage to, goods within the Act, if the mishap occurs after the end of transit, unless there has been an agreement in writing by which the Executive specially undertakes this liability,[48] whether the goods have been carried at carrier's risk or at owner's risk. In the absence of a special contract nobody should use the Executive's accommodations as a storehouse for precious or breakable articles. If anybody chooses to do so he cannot claim damages even though the articles were stolen by the Executive's own servants or destroyed in consequence of an act of utter recklessness.

To contracts of carriage governed by special agreements concluded under Sect. 44 (3) of the Railways Act, 1921, and to the carriage of passengers' luggage, which are outside Standard Terms and Conditions, the Carriers Act still applies. Special contracts made under Sect. 44 (3) must comply with Sect. 7 of the Railway and Canal Traffic Act, 1854. But if the conditions of this section

[45] Or non-delivery or pilferage, unless the carrier disproves negligence.

[46] Standard Terms and Conditions E (5). The same condition applies to the carriage of damageable goods not properly protected by packing when carried by passenger train or other similar service at carrier's risk. See Standard Terms and Conditions O (4).

[47] See above, p. 194.

[48] A (12) (b) I; B (11) (b) I; E (12) (a); L (11) (b) I; M (10) (b) I; O (11) (a).

is complied with, the contract is valid, and if it is meant to displace Standard Terms and Conditions entirely, then the Carriers Act will be fully applicable, including the felonies clause in Sect. 9. It is not at all unlikely that a consignor of precious stones, gold watches or plate should enter into a special agreement with the Railway Executive, in which case the Carriers Act would be applicable. But of even greater practical importance is the effect of the Carriers Act on passengers' luggage. It is in connection with the personal luggage accompanying a passenger that the duty to declare the contents and value of parcels and packages containing Carriers Act goods is most likely to remain unfulfilled. If a railway servant were to steal jewellery out of a lady's bag, carried as passengers luggage, the Executive would be liable under Sect. 9 of the Carriers Act, though no declaration was made by the owner of the bag since Standard Terms and Conditions are not applicable to passengers' luggage while the Carriers Act is.[49]

The Carriers Act applies to 'common carriers by land for hire', and before 1928 the Act was inapplicable to carriage by sea though the vessel in which the goods were carried across the sea belonged to a British railway company. In cases of mixed carriage by sea and land, the railway company could not plead the Carriers Act, unless it was able to show that the loss or injury complained of had actually occurred during the land part of the journey.[50]

In this respect the law was completely changed by the Railways Act, 1921,[51] which added a new section (11) to the Carriers Act in its application to railway traffic. The new section is as follows:—

'In this Act the expression 'common carrier by land' shall include a common carrier by land who is also a carrier by water, and as regards every such common carrier this Act shall apply to carriage by water in the same manner as it applies to carriage by land'.

Thus the Carriers Act can now be pleaded by the Railway Executive if loss of or injury to valuables occurs during a mixed journey, and it is no longer necessary for the carrier to show that the goods were lost or injured while on land. Even if it is clear that loss or injury occurred during the sea part of the journey the Act will be applicable. And, what is more, the Act is now applicable even to carriage by water only, if the vessel is owned by the Railway Executive. If, for instance, passengers' luggage containing

[49] *Casswell* v. *Cheshire Lines Committee*, see above, p. 212.

[50] This was decided in many cases and as late as 1920 by the House of Lords in *L. & N.W. Ry. Co.* v. *Ashton*, [1920] A.C. 84. For a case in which the carrier was able to prove that the loss had occurred on the land part of the journey, see *Le Conteur* v. *L. & S.W. Ry. Co.* (1865), L.R. 1 Q.B. 54.

[51] Sect. 56 (1) and Schedule VI.

valuables is sent from Dover to Calais in a steamer belonging to the Railway Executive, and these goods are lost or injured, the Carriers Act is applicable.

The provisions in Standard Terms and Conditions protecting the Railway Executive against liability for loss or injury to valuable and breakable goods also apply to carriage by water as well as to carriage partly by land and partly by water.[52]

The amendment of the Carriers Act, brought about by the Railways Act, 1921, has reference to railways only. As regards carriage by road, the law remains what it was before 1928. Thus, if a common carrier by road were to undertake the transport of glass or china from London to Belfast, and if the glass or china were broken during transit, the carrier could plead the Carriers Act, *i.e.*, the absence of a declaration, only if he could prove that the damage occurred either in England or in Northern Ireland. If he is unable to prove where it happened, it will be assumed against him that it did occur while the goods crossed the Irish Channel, where the Act is inapplicable.[53]

[52] Standard Terms and Conditions A (5), B (4), E (5), L (4), M (3), O (4).

[53] Although a carrier may be protected from liability by the Act in respect of undeclared goods, still, if the goods are lost or injured by the negligence or misconduct of a servant of the carrier, that servant may himself be personally liable to pay damages, and he is not protected by the Act. (Sect. 8.)

Chapter 18

THE CARRIAGE OF ANIMALS

I

The carriage of living animals raises legal problems of a special nature. This is due to the fact that transport of animals differs in several respects from the transport of ordinary goods.

1. Before the days of railways there were probably no carriers by land of the larger animals. When it was necessary to transport animals from one place to another they were usually driven on the roads. A thing which moved by itself did not seem to require carriage. Thus, a common carrier of such animals seems to have been unknown. And in the earlier days of railways, as the companies did not profess to be common carriers of animals,[1] they could not be compelled to carry them, and, as a rule, only consented to carry them on being relieved of almost all responsibility for their safety. Section 2 of the Railway and Canal Traffic Act, 1854, obliged every railway company according to its powers, to afford all reasonable facilities for the receiving and forwarding of traffic; and traffic was expressly defined to include animals. Therefore, after the Act had come into force, a railway company could no longer refuse to carry animals, or refuse to carry them except on their own terms. For, by Sect. 7 of the Act, no conditions relieving the carrier of liability for neglect or default are binding on the consignor unless they are just and reasonable; and a contract, containing such conditions, is void unless in writing signed by the consignor or his representative. But, while the companies were thus restricted in their power to contract out of their liability for wilful misconduct and negligence, nothing in the Act compelled them to become common carriers of animals and to take upon themselves the insurer's liability with respect to these particular goods. There-

[1] Whether or not railway companies were common carriers of animals used to be controverted. But, as Willes, J., pointed out in *Blower* v. *Great Western Ry. Co.* (1872), L.R. 7 C.P. 655, this question was, perhaps, to a large extent a controversy of words. For, even if they were regarded as common carriers of animals, the exception 'inherent vice' deprived the insurer's liability of most of its practical importance in the case of animals. The theory seems to have been that the companies did not carry animals as common carriers, nevertheless, the excepted peril 'inherent vice' was evolved by the Courts in cases concerning animals on the assumption that the companies were common carriers, and later, this exception was extended to the carriage of goods other than animals.

fore, a company might always refuse to carry them except upon conditions relieving it of responsibility for loss or injury which was not caused by the neglect or default of the company or its servants.

2. In yet another respect does carriage of livestock differ from that of ordinary merchandise.

The living animal more than any other kind of merchandise, is liable to suffer injuries during transit through its own nature. The common law recognised this by grafting upon the common carrier's absolute liability the exception of 'inherent vice', which, though not confined to cases of animals,[2] was largely developed in connection with cases concerning horses and cattle suffering injuries during transit through their own exertions.[3]

3. Lastly, there is one feature which animals share with some of the goods specially dealt with in the Carriers Act. It is just as difficult for the layman to distinguish a good imitation of a pearl from the genuine jewel as it is for the uninitiated to estimate the value of an animal and to distinguish the Derby winner from an ordinary horse, or a prize bull from one of his humble brethren. The carrier's servants cannot be expected to be experts on race-horses or cattle breeding, and, from the carrier's point of view, it is urgently necessary that he should not be exposed to the risk involved in carrying an extremely valuable animal without being informed of its value if this exceeds the normal. The Railway and Canal Traffic Act,[4] 1854, protects the Railway Executive from liability beyond a certain sum. In the absence of a declaration of value made by the consignor, the Executive is not liable for more than a certain maximum amount for each animal.[5] In addition to making a declaration, the consignor has to pay an insurance money by way of 'a reasonable percentage upon the excess of the value' over the maximum figures contained in the Act, provided the insurance money is demanded by the Executive in the way prescribed for valuable and breakable goods in the Carriers Act, 1830. But while under the Carriers Act nothing can be claimed by the owner of valuable or breakable goods not duly declared, the omission to declare the value of an animal deprives the owner only of his right to claim more than the maximum figure mentioned in the Act. The Act laid down maximum amounts for certain types of animals

[2] See *Lister* v. *Lancs and Yorks Ry. Co.*, above, p. 151.

[3] See, for instance, *Kendall* v. *London and S.W. Ry. Co.* and *Blower* v. *G.W. Ry. Co.*, both above, p. 151. The logical contradiction involved in this line of reasoning has never been solved. See above, p. 217.

[4] Sect. 7, second proviso.

[5] £50 in case of a horse, £15 per head of neat cattle, £2 per head for sheep and pigs.

only; not, for example, for dogs, and, since a mongrel dog seems to be almost as inferior in value to the winner of a greyhound race as a cart-horse is to a thoroughbred, some of the most hotly contested disputes about the application of the 'just and reasonable clause' in the 1854 Act arose in connection with the carriage of dogs.[6]

II

The Tribunal, as directed by the Railways Act,[7] settled Standard Terms and Conditions for the carriage of livestock at carrier's risk, other than wild animals (Standard Terms and Conditions C), and at owner's risk (Standard Terms and Conditions D), and for the carriage of livestock by passenger train or other similar service (Standard Terms and Conditions N), and they came into operation on Jan. 1, 1928. Since that date all livestock (other than wild animals) carried by railway without any special contract has been carried upon Standard Terms and Conditions C, unless the carrier has been requested in writing to carry at the owner's risk rate, in which case the livestock is carried upon Standard Terms and Conditions D, though the carrier is not obliged to carry at owner's risk rates unless an owner's risk rate was in operation at the date of the passing of the Railways Act.[8]

The difference between these sets of Standard Terms and Conditions and those applicable to ordinary merchandise reflects the three special features of the carriage of animals.

1. There is no absolute liability imposed upon the Executive even if it carries livestock under Standard Terms and Conditions C (carrier's risk). At carrier's risk (Form C) the Executive is liable for loss or injury caused by its own neglect or that of its servants. At owner's risk (Form D) it is responsible for loss or injury upon proof of wilful misconduct, and there is nothing to correspond to the exceptional cases of liability for negligence (non-delivery and misdelivery) under owner's risk conditions applicable to ordinary merchandise.[9] Even at carrier's risk it is always for the trader to prove that loss, injury, deviation, misdelivery, delay or detention arose on the railway system of Great Britain even when the place

[6] See *Dickson* v. *G.N. Ry. Co.* (1886), 18 Q.B.D. 176, and *Williams* v. *Midland Ry. Co.*, [1908] 1 K.B. 252.

[7] Sects. 42 and 43. The limitation of the company's liability in the absence of a declaration of value under the Act of 1854 seems to have made it unusual for the companies to provide owner's risk consignment notes for livestock.

[8] Sect. 46 (4).

[9] Compare C (3) with A (3) and D (3) with B (3).

of destination is within Great Britain.[10] The rules as to end of transit differ from those prevailing in the case of ordinary merchandise,[11] and, as in the case of valuables, the Railway Executive disclaims any liability whatever for the safety of animals after the end of transit, thus excluding even the restricted liability of a warehouseman.[12]

2. The special risks created by the propensity of animals to take fright during transit and to injure themselves and each other has led to a modification of the ordinary distribution of the burden of proof. Standard Terms and Conditions C (3) makes a distinction between injury (including fatal injury) [13] on the one side, and loss, deviation, delay or detention on the other. In the former case the onus of proof is on the trader, in the latter it is on the carrier. Thus, if a horse is injured during transit, whether fatally or not, the owner must prove, even at carrier's risk, that there was neglect or default on the part of the carrier's servants, such as improper coupling or violent shunting. If, however, the horse has disappeared and cannot be found, all that the owner has to do is to show that it was lost during transit, and then it is for the carrier to prove that there was no negligence or default on the part of his servants. Even in cases of loss and delay, the burden of proving negligence is imposed on the owner, if the carrier can show that the loss and delay was due to the consignor's failure to protect or secure the livestock, to the insufficiency or unsuitability of any article supplied by him for this purpose,[14] or to incorrect selection or misdelivery occasioned by loading or unloading performed by the owner or his agents at any point of the transit.[15] At owner's risk the carrier will never be liable in these cases.[16]

A comparison of two cases decided at common law will illustrate the rule that it is for the owner to prove the cause of an injury to livestock during transit.

[10] See above, p. 198, and compare A (7) (c), (d) with C (6) (c).
[11] See above, p. 191, and compare C (8) with A (11) and D (8) with B (10).
[12] Compare C (9) and D (9) with A (12) and B (11).
[13] C (23).
[14] This embodies in effect a rule laid down in *Richardson* v. *N.E. Ry. Co.* (1872), L.R. 7 C.P. 75. There it was held that where the owner of an animal delivered for carriage himself provides means for securing the animal, the carrier is not liable for negligence if the animal escapes because of such means being insufficient.
[15] Compare Standard Terms and Conditions C (13) (c), IV, V, VI, and proviso with A (17) (c).
[16] D (13).

In *Smith* v. *Midland Ry. Co.*,[17] the plaintiff sent eight cows by the defendant company's railway from Derby to Bedford. The consignment note was drafted so as to impose the burden of proof in effect on the owner. The cows were safely put into a truck at Derby, but on arrival of the train at Bedford one had a broken leg, another was lame and two others were bruised and had suffered other slight injuries. The plaintiff who claimed damages from the company was unable to prove any definite negligence, and could only say that from his experience and from the nature of the injuries they were caused by negligent shunting and violent jerking of the train. He lost his case, for the injuries were quite as consistent with the cattle having become restive and one of them having fallen down and got her leg broken, as with the unreasonable jolting of the train, and it was for the plaintiff to give proof of the negligence he alleged.

In *Pickering* v. *North Eastern Ry. Co.*,[18] a horse was put into a box which was attached to a mineral train. The horse was found at the end of the journey to have received serious injuries, and the owner successfully sued the company for damages. It was proved at the trial that the train had been subjected to a great deal of violent shunting, and that the trucks of which it was for the most part composed were not fitted with proper couplings. In this case the circumstances were such as to raise a clear inference that the injuries were caused by negligence. Here the plaintiff was able to prove that there was something improper in the mode by which the animals were carried, and this was sufficient evidence of negligence on the part of the company. It would have been for the company to show that in spite of the prima facie case made out by the plaintiff the improper mode of carriage had not, in fact, caused the injuries.

The Executive also has at its disposal the special common law defence of inherent vice which, one may assume, still subsists,[19] though it is not likely to be of great practical importance in view of the more stringent protection given by Standard Terms and Conditions.[20] Moreover, this defence cannot be expected to succeed very often, for the carrier must provide against all ordinary cases of unruliness or fright. In order to take advantage of this exception the carrier must show that the animal was injured through its own act, and also that the act was one so far out of the common that the carrier could not be expected to have foreseen it or to have taken steps to guard against it. Thus, the vehicle in which the animal is carried must be reasonably strong. If the owner can prove that a horse kicked and broke the side of the horse-box in which he was carried and so injured himself, the Executive will probably find itself obliged to pay damages, for the horse-box must be strong enough to resist all kicks that can be reasonably expected, and all

[17] (1887), 57 L.T. 813. See also *Russell* v. *L.S.W. Ry. Co.* (1908), 24 T.L.R. 548.

[18] (1887), 4 T.L.R. 7.

[19] C (20).

[20] For examples of this defence, see *Blower* v. *G.W. Ry. Co.* and *Kendall* v. *L.S.W. Ry. Co.*, both above, p. 151.

ordinary unruliness of horses. If, however, it could be proved by the Executive that a horse injured in this way was vicious and unruly in an abnormal degree, the Executive might escape liability on proof that the vehicle was strong enough to satisfy all ordinary reasonable requirements.

In *Blower* v. *Great Western Ry. Co.*[21] it was said to be the duty of a railway company to provide vehicles for the carriage of cattle sufficient to secure the cattle from injury from the ordinary incidents of a railway journey, including fright caused by their novel position and passing objects. It is obviously of the greatest importance for the Executive to see that all horse-boxes and cattle-trucks are in a thoroughly sound condition and strong enough to stand all ordinary strain and all such violence as should reasonably be expected from the animals carried.

Questions of difficulty often arise as to when delivery of cattle is complete. The unloading is often carried out by the servants of the consignee and of the carrier working together, and the carrier is not responsible for any act of the former. It is, however, for the Executive to prove that it was the negligence of the consignee's servants which caused the damage, and nothing relieves the Executive of the large measure of responsibility which must continue to rest on it as long as cattle are being unloaded and still on its premises and still being dealt with by its servants.

The Executive protects itself against risk arising from faulty loading or covering of animals by the sender. C (14) and D (14) provide in effect that the carrier cannot be liable at all in cases of injury caused by the overloading of a truck performed by the owner or his agents where the charge for carriage is per truck or according to space occupied in the truck. Besides, if loss or delay is caused by penning, stabling, or loading animals together of different classes or sexes, the trader must prove negligence or default[22] if the live-stock is carried at carrier's risk, and wilful misconduct under owner's risk conditions.[23]

The Executive is, however, bound to provide fit and proper places and appliances for the loading and unloading of animals, and to guard against injury to them by escaping on to the line, or otherwise, in the course of loading and unloading.

3. The Railways Act, 1921, and Standard Terms and Conditions have left untouched the principle contained in the Act of

[21] Above, p. 151.

[22] This would seem to be the meaning of the somewhat cryptic provision in C (14) (b) and D (14) (b).

[23] The wording of N (15) (b) favours this interpretation of the intended distribution of the burden of proof.

1854 that a declaration of value must have been made and special insurance money paid by the consignor, if more than the statutory maximum is to be recovered as compensation for loss of, or injury to, animals in transit. The figures in the 1854 Act, however, which had become inadequate, were raised so as to adapt them to modern conditions,[24] and, while the compulsory declaration of value and payment of insurance money was confined to horses, cattle, sheep and pigs in the 1854 Act, it was extended to all animals by the Act of 1921. Standard Terms and Conditions have again lowered the maximum provided in the Railways Act for smaller animals.[25]

The declaration of value must be in the nature of a distinct intimation to the carrier that he is to be held responsible for such sum. If no such declaration is made, the trader cannot recover more than the statutory maximum, but the carrier cannot demand a percentage beyond the usual charge where he has obtained knowledge of the value of an animal from some other source than such declaration.[26] Where a higher value is declared and the percentage paid, no greater sum can be recovered than that declared; but the carrier is not bound by the declaration, and, in case of loss or injury, the owner must prove the value of the animal lost or the amount of the injury sustained. The limitation of liability protects the Executive in all cases where no declaration is made and where there is no special contract.

The percentage which the Executive may demand upon declaration being made is not a charge for carriage; by the express words of the Act it is a 'compensation for the increased risk and care'. Large sums by way of insurance are often paid for very valuable animals, such as racehorses and prize bulls, and it is obvious that it would not be reasonable to fix any maximum premium for insurance. Under Standard Terms and Conditions, which in this respect differ from the Act of 1854, the carrier would seem to be entitled to claim the percentage even without having notified the scale of insurance charges by notice affixed in the receiving offices.

Section 7 of the Act of 1854 limits the liability of the carrier for

[24] Railways Act, Schedule VI: £100 instead of £50 for a horse; £50 instead of £15 for any head of cattle of the ox species; £5 for any other animal (instead of £2 per head for sheep and pigs).

[25] C (4), D (4), N (4): £2 for any dog, deer or goat; 7*s.* 6*d.* for any rabbit or other small quadruped or any head of poultry or other bird. The further decline in the purchasing power of money requires another revision of these figures in the near future.

[26] *Robinson* v. *London and S.W. Ry. Co.* (1865), 19 C.B. (N.S.) 51.

the loss of, or for any injury done to, the classes of animals mentioned, in cases of neglect or default in 'the receiving, forwarding or delivering of such animals'. From the wording of Standard Terms and Conditions C (4), D (4) and N (4), it would seem that the limitation of liability is now extended to delay, misdelivery, detention and deviation. The words 'receiving, forwarding and delivering' do not occur in Standard Terms and Conditions either, so that the limitation extends to all possible liabilities arising in connection with the transport of animals. Even under the Act of 1854 the Courts gave a wide interpretation to these words. Thus, if an animal was injured by negligence when brought on to the carrier's premises for the purpose of being carried, before any declaration or contract was made, the carrier was only liable up to the limit, because the negligence was negligence in the receiving.[27]

Standard Terms and Conditions do not apply to wild animals, but the Railways Act, 1921, limits the liability for 'any other animal' to £5, and this would seem to comprise wild animals. It is doubtful whether the Railway Executive can be required to carry wild beasts or any large animal such as a giraffe. If such animal is conveyed by merchandise train, it is at the owner's sole risk and responsibility, and the charge is not less than 1*s.* 2*d.* per mile.

III

On principle,[28] a carrier is under no duty to provide for the feeding and watering of livestock, unless an obligation to do so is imposed by statute, statutory order or regulation, special request or agreement. Such a statutory obligation is contained in Sect. 23 of the Diseases of Animals Act, 1894, whereby the Executive must, on the request of the consignor or of any person in charge of animals, supply water and food for the use of animals carried or about to be carried, at such stations as the Minister of Agriculture shall direct. If no request is made so that any animal remains without water for twenty-four consecutive hours (or a shorter period if the Minister so directs), the consignor and the person in charge are each guilty of an offence. For food and water supplied under this provision the Executive may make a reasonable charge, the amount of which is

[27] See *Hodgman* v. *West Midland Ry. Co.* (1865), 35 L.J.Q.B. 85, where a valuable racehorse was injured through the negligence of the company's servants, when it was just being led through the yard on the railway company's premises and before the person delivering the horse for carriage had had time to take a ticket or to make a declaration. The company was entitled to rely on the limitation of its liability.

[28] C (15), D (15), N (16). Provisions are also made regulating the carrier's liability for the safety of cattle drovers and other persons in charge of livestock. See C (2), D (2), N (2), and below, p. 337.

subject to approval by the Minister. On a long journey the circumstances may be such that a request to supply food or water will be implied. The charges constitute a debt to the Executive from both the consignor and the consignee, and may be recovered from either of them.[29] The Executive also has a lien for these charges upon any animal to which the food or water has been supplied, and also upon any other animal consigned by or to the same consignor or consignee.[30]

Under the same Act orders have been made regulating the transport of animals so as to protect them from unnecessary suffering, to ensure the proper cleansing and disinfecting of trucks and pens, and for many other purposes. Orders may also, as occasion requires, be made prohibiting or regulating the movements of animals, within or out of a district in which cattle plague or other contagious disease is prevalent. Disobedience to such orders makes the Executive liable to a penalty.

If animals are delayed in transit the Executive must supply them with food and water at its own expense. Delay is a much more serious thing in the case of animals than in the case of most inanimate goods, for it may cause deterioration or even death from want of food.

In *Allday* v. *Great Western Ry. Co.*[31] cattle were carried beyond their destination by the negligence of the company, and great delay was caused in delivery. The result was that, as the cattle were given no food and water, they were depreciated in value from loss of condition, and the company had to compensate the owner for his loss through this depreciation.

Even where the Executive is under no duty to supply food and water, it is always entitled to do so,[32] even in the absence of a request by the owner or of an agreement with him. It is for the Executive to decide whether it is reasonable or not to supply the food and water. The owner must pay these expenses and, even at carrier's risk, the Executive is not liable for the consequences of faulty watering and feeding, unless wilful misconduct can be proved.

The law must also see to it that the animals are looked after when transit is over. It is the duty of the consignee to provide for the reception of the animals at the end of transit. If he does not do so, the Executive is not, in general, liable in damages for the consequences.[33] But it may be liable to a penalty if any regulation of the Minister of Agriculture for the care of animals during

[29] See C (10), D (10), N (11).
[30] See C (11), D (11), N (12).
[31] (1864), 5 B. & S. 903.
[32] C (15), D (15), N (16).
[33] C (13) c. III, D(13), c. III, N (14), d. I.

detention is disregarded. If animals are not received by the consignee the carrier must take reasonable care of them. Since the carrier is not justified in turning them into the road or letting them starve, he may recover from the owner any expenses properly incurred in taking such care of them, though the owner has not entered into an agreement with the carrier to this effect, and even though he may have expressly asked the carrier not to incur these expenses. In fact, this is one of the few cases in which English law recognises such a thing as 'agency of necessity' and the right given to one person to recover the expenses incurred in managing the affairs of another though without any order to do so.

In *Great Northern Ry. Co.* v. *Swaffield*[34] a horse arrived at a country station at 10 o'clock p.m. There was no one to meet it, the station-master did not know the consignee's address, there was no accommodation for the horse at the station, and so the station-master sent it to the nearest livery stable. Afterwards the consignee asked for the horse, but, before delivering it, the company had to pay the stable keeper. This amount the company was entitled to recover from the owner of the horse, as the course taken was the only one reasonably open to the company to secure the safety of the horse. It is the carrier's duty to act reasonably according to the circumstances of the case in providing for the safety of animals which are left on his hands at the end of transit. Failure to perform this duty is negligence for which the carrier is responsible, unless protected by some contract. On the other hand, he is entitled to recover any expenses reasonably incurred in carrying out this duty.

Most of what has been said with regard to the carriage of animals by railways is made applicable by Standard Terms and Conditions N to carriage of livestock (other than wild animals) when carried by passenger train or other similar service. It is doubtful whether living animals can, in any circumstances, be regarded as 'passengers' luggage' in the technical meaning of that term.[35] This question need, however, not be discussed. For Condition N (18) provides that any livestock which, by the Executive's regulations, passengers are permitted to take with them shall be subject to the limitations of liability contained in Standard Terms and Conditions N. If a lady's pet dog is injured in the compartment, it is for her to prove that the injury was due to the carrier's negligence and she cannot recover more than £2 damages, unless she has made a declaration of value and paid the necessary insurance money. Standard Terms and Conditions N apply to carriage at carrier's risk rates as well as to carriage at owner's risk rates and there are certain small differences from the ordinary Conditions C and D, which it is not necessary to discuss in detail.

[34] (1874), L.R. 9 Ex. 132.
[35] See below, p. 256.

IV

Road carriers can in no case be regarded as common carriers of animals. They are only responsible for the negligence of their servants, but this liability is not restricted to a maximum. Here again, the road carrier must make a special contract in order to achieve for himself exceptions from liability similar to those which the Railway Executive enjoys under Standard Terms and Conditions. There is no reason why the burden of proof should be different in this case from what it is in other cases of private carriers. The bailee must disprove his or his servants' negligence,[36] but if injuries are obviously self-inflicted there may be a prima facie case against negligence which shifts the burden of proof on to the trader, a result corresponding to the principle underlying Standard Terms and Conditions C (3). The principles laid down in *Allday's* and *Swaffield's* cases as to feeding and watering and the care to be taken for animals after the end of transit[37] are not based on any special considerations of railway law, but on the general rules of the law of carriage, and they are applicable to road carriers as well. The road carrier is entitled to feed and water animals and to look after them if the consignee omits to take delivery, and to charge the expense to the owner in both cases. He must also provide food and water at his own expense in cases of delay due to his or his servants' negligence. Elaborate provisions are given for the cleansing of road vehicles carrying animals, which it is not necessary to discuss here in detail.[38]

[36] See above, p. 159.
[37] See above, p. 225 and p. 226.
[38] See Transit of Animals (Amendment) Order, 1930; and for its application, *Nethaway* v. *Brewer*, [1931] 2 K.B. 459.

Chapter 19

DAMAGEABLE GOODS AND DANGEROUS GOODS

I

A CARRIER does not become responsible to the full extent unless the goods, if they are of a nature to require packing, are properly and securely packed. It is incorrect to call this a duty or obligation imposed on the consignor. The carrier has no claim against the consignor arising from his neglect to provide proper packing.[1] It is only a precaution to be taken by the consignor in order to enable the owner to claim damages in cases of loss, injury or delay.[2]

If goods are injured in transit entirely because they have not been properly packed, not even the common carrier is liable at common law, since the fault of the consignor is an excepted peril, provided, of course, that the carrier has taken all proper care himself. A common carrier is an insurer, but he does not insure against the negligence of the consignor. There are many classes of goods which cannot be sent either by railway or by road vehicle with safety unless they are properly protected by packing from the ordinary and inevitable incidents of the journey. Furniture of many kinds is, perhaps, the most obvious example. It is for the consignor to see that such goods are so securely packed as to be protected from incidents, and if the goods are injured because of his failure to do so the carrier is not liable, and the consignor may be responsible to the consignee or other owner.[3]

A common carrier of certain brittle articles such as glass and china in packages is specially protected by the Carriers Act, 1830.[4] But the Carriers Act does not cover all breakable goods. Earthenware pottery, for instance, when sent in boxes or cases, requires very careful packing, otherwise it will probably be injured by almost any movement. Boxes containing such articles are sometimes delivered for carriage without anything at all to show the nature of their contents. The carrier is only bound to take care of such a consignment to the extent which is ordinarily necessary with boxes of similar appearance. If this is done, but nevertheless the brittle articles

[1] Except in the case of dangerous goods; see below, p. 238.
[2] See above, p. 152 and p. 163.
[3] *L.N.W. Ry.* v. *Richard Hudson & Sons, Ltd.*, [1920] A.C. 324, per Lord Dunedin, at pp. 333 and 335.
[4] See above, p. 200.

inside are broken through not being properly packed, the carrier cannot be compelled to make good the damage. If he is informed of the contents, he has generally an opportunity of observing the packing, and may, perhaps, require some improvement before accepting the goods. But even if he knows the contents, he may have no opportunity of inspecting the packing; and then he is not liable for injury, if he takes reasonable care of the goods considering their nature, and the injury is caused by the goods not having been packed with that care which the consignor is bound to use and the carrier has the right to expect. Even if the faulty packing is manifest to the carrier, he can still rely on it as a defence.[5]

The common carrier's duty not to discriminate between his would-be customers does not involve an obligation to accept for carriage goods which are improperly packed, provided the articles are of a nature to require better packing for safe transit.[6] This rule is embodied in the Railways Act, 1921,[7] which provides that the carrier 'shall not be under any obligation to carry damageable goods not properly protected by packing'. Section 7 of the Railway and Canal Traffic Act, 1854, did not prevent railway companies from imposing upon the public proper packing as a condition of liability for neglect and default without offering any alternative liability for goods improperly packed. The requirement of proper packing was just and reasonable in itself, so that the doctrine of the fair alternative suffered an exception in this case.[8] Whether a condition as to

[5] This very doubtful point was finally settled in *Gould* v. *South Eastern and Chatham Ry. Co.*, [1920] 2 K.B. 186. The judgment of Atkin, L.J., contains a full discussion of the various aspects of this somewhat complicated problem. The principle laid down in *Gould's Case* was, in fact, covered by the authority of *Barbour* v. *S.E. Ry. Co.* (1876), 34 L.T. 67, the facts of which were similar to those of *Gould's Case*. A difficulty was raised by the decision of Lord Ellenborough in *Stuart* v. *Crawley* (1818), 2 Stark. 323, which, as Atkin, L.J., points out in *Gould's Case*, is either overruled by *Barbour's Case*, or else must be read as being only an application of the principle that the carrier must take ordinary reasonable care even in the case of improperly packed articles. If they are damaged owing to lack of ordinary care, the carrier cannot even at common law use the improper packing as a defence. The difference between *Stuart* v. *Crawley* and *Richardson* v. *N.E. Ry. Co.* (1872), L.R. 7 C.P. 75, illustrated this very point. In *Stuart's Case* the carrier did not take that care which would have been necessary even if the dog had been properly fastened; in *Richardson's Case* he did.

[6] See Williams, J., in *Munster* v. *South Eastern Ry. Co.* (1858), 4 C.B. (N.S.) 676, at p. 701.

[7] Sect. 44 (2).

[8] *Sutcliffe* v. *Great Western Ry. Co.*, [1910] 1 K.B. 478. A limitation of liability for loss of, in contradistinction to injury to, damageable goods improperly packed was, however, held to be unreasonable in *Simons* v. *G.W. Ry. Co.* (1856), 18 C.B. 805.

packing of damageable articles is reasonable or not, is now decided by the Transport Tribunal.[9]

A carrier by road to whom goods are tendered for carriage, the packing of which is obviously improper, has thus a threefold alternative. He may either refuse to carry them, or he may accept them for carriage in which case he would not, even as a common carrier, be liable for damage occurring during transit which was caused by the improper packing, provided the care required for the handling of properly packed goods was applied, or, finally, he may carry them and undertake, expressly or impliedly, the liability even for injury arising from the faulty packing and charge a higher rate. Instead of choosing the third alternative, the carrier may, himself, make the goods fit for carriage and charge the consignor a reasonable sum for his services in so doing.[10]

The carriage by railway of damageable goods not properly protected by packing is now governed by Standard Terms and Conditions. At owner's risk the Executive is adequately safeguarded by the general rules that the owner must prove wilful misconduct in order to recover damages, and that the carrier is not liable even for pilferage from packages if they are only covered by packing readily removable by hand.[11] At carrier's risk the general principle is that the carrier escapes liability if he can prove that loss or injury was occasioned by improper packing.[12] This may be a sufficient protection against claims arising from the carriage of merchandise which does not require special package. In the case of damageable goods, however, which are not properly packed, it should be for the owner to prove that the lack of adequate packing was *not* the cause of the loss or injury. It is for this reason that the Transport Tribunal, then known as the Railway Rates Tribunal, acting under the express provision of Sect. 42 (c) of the Railways Act, 1921, settled special terms and conditions for the carriage of damageable goods not properly protected by packing.

If such goods are tendered to the carrier for carriage by merchandise train and there is no express agreement to the contrary, Standard Terms and Conditions E are applicable. Standard Terms and Conditions O apply if the goods are to be carried by passenger train or other similar service.

If damageable goods not properly protected by packing are lost or damaged during transit, the trader can make the carrier liable in

[9] Railways Act, 1921, s. 28 (1) (g); Transport Act, 1947, Sect. 72.
[10] *Littleton Collieries* v. *L.N.W. Ry. Co.* (1916), 115 L.T. 840.
[11] B (3).
[12] A (3) (c) and A (17), c. (1).

two cases: (1) If he can prove wilful misconduct, the carrier is liable though the wilful misconduct of his servants may have been facilitated by the improper packing. By putting himself into the position in which he would have been, if the goods had been carried at owner's risk, the trader can preclude the Executive from relying on the improper packing as a defence. (2) If he cannot prove wilful misconduct, he must show that the loss or damage would have been suffered if the goods had been properly protected by packing and that the Executive would have been liable if the goods had been carried under the standard conditions applicable to ordinary merchandise at carrier's risk rates. If, for example, furniture improperly protected by packing is broken during transit by rail, the owner can obtain damages if he can prove that the way in which the porters or carters loaded or unloaded the furniture showed reckless indifference towards the consequences of rough handling. It would be in vain for the carrier to say that even the rough treatment could not have damaged the goods if they had been properly packed, since the proof of recklessness, that is, wilful misconduct, overrides this defence. If, however, the owner is able to prove no more than carelessness on the part of the railway servants, then he would have to prove that the way in which the furniture was loaded or unloaded would have led to breakage, even if the furniture had been properly protected. If the furniture was destroyed by fire during transit, the trader would first of all have to prove that proper packing would not have protected the furniture from being burned. After he had succeeded in this proof it would be for the Executive to show that reasonable foresight and care was applied, because this would be a case of casualty under Standard Terms and Condition A (3) (g).[13]

The carrier is liable for delay, deviation and detention as in the case of ordinary goods, since the improper packing does not affect the choice of the ordinary route or the speed of dispatch. The trader must prove that his financial loss was caused by delay, detention or unreasonable deviation, and the Executive must prove that such delay, detention or deviation has arisen without negligence on its part or on the part of its servants.[14]

[13] Standard Terms and Conditions E (3) and O (2).

[14] E (4) and O (3). Misdelivery as a cause of liability ranges in the case of damageable goods not properly protected by packing with delay, detention and deviation. It is mentioned in E (4) and O (3), not in E (3) and O (2). The Executive disclaims all liability for Carriers Act goods which, though damageable, are improperly protected by packing. See p. 214, and Standard Terms and Conditions E (5) and O (4), a curious anomaly, since the carrier would be liable for wilful misconduct at owner's risk, while no liability, even for wilful misconduct, is undertaken at company's risk.

II

Goods are called dangerous if they are likely to damage other merchandise, the carrier's own vehicles and equipment or to inflict bodily harm upon the carrier's servants or passengers. The owner's and the consignor's responsibility for damage or injury done by dangerous goods will be discussed below.[15] Here we are solely concerned with the carrier's own responsibility for the safe carriage of such goods.

There has never been a common carrier of goods which by their own nature are liable to damage other goods and are, therefore, to be judged as dangerous. Every carrier, even though he profess to be a common carrier of other types of goods has always been free to refuse to accept such goods for carriage. By express statutory provision,[16] the Railway Executive is under no obligation to carry dangerous goods, but its liability to carry ammunition, etc. intended for the use of His Majesty's forces upon terms to be agreed with the Government is not affected by these enactments.[17]

The Railways Clauses Act of 1845 left it to the discretion of the company to decide which goods are dangerous and which are not, and it further provided that the carrier is entitled to refuse to take any parcel that he may suspect to contain goods of a dangerous nature, or to require the same to be opened to ascertain the fact. Here, the Railways Act, 1921, has introduced a change. The classification of a particular article as dangerous is no longer left to the carrier, though, once he has declared an article to be dangerous, it is prima facie deemed to be so. The trader, however, who is interested in the carriage of such goods, may apply to the Transport Tribunal, which is to determine the question of the dangerous character of the particular article, but it is for the trader to prove to the Tribunal that the article is not dangerous. Thus, the ultimate decision of this important question is entrusted to an independent body.[18]

Since there is no common carrier of dangerous goods, there has never been an absolute liability for the safety of such goods during transit. A road carrier to whom dangerous goods have been delivered for transit would, so it seems, have to be regarded in all circumstances as a private carrier of these goods as far as his liability

[15] See below, p. 238.
[16] Railways Clauses Act, 1845, Sect. 105; Railways Act, 1921, Sect. 50 (1).
[17] Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6.
[18] Railways Act, 1921, Sect. 50 (3). It is also for the Tribunal to pronounce upon the reasonableness or otherwise of any conditions as to packing of articles liable to cause damage to other merchandise. Railways Act, 1921, Sect. 28 (1) (g).

is concerned. In the absence of a special contract, his duty would only be to take proper care for the safety of the goods.

Dangerous goods are the only type of merchandise for which there are no Standard Terms and Conditions [19] regulating the Railway Executive's liability. The Executive is free to make its own terms upon which it is prepared to accept such goods for carriage. This is to be inferred from Sect. 50 (2) of the Railways Act, 1921, which says that the goods shall be conveyed 'subject to such bye-laws, regulations and conditions as the company may think fit to make in regard to the conveyance or storage thereof'. Whatever may have been the position before Jan. 1, 1928, there can hardly be any doubt that this provision now excludes the applicability of Sect. 7 of the Railway and Canal Traffic Act, 1854, to special contracts made between the consignor of dangerous goods and the carrier, restricting or removing the carrier's liability even for loss or injury caused by the neglect or default of the railway servants. Thus the Executive is free to regulate its own liability by a unilateral declaration, and the conditions so imposed upon the public need not be just and reasonable within the meaning of the Act of 1854, nor is it necessary that they should be embodied in a signed contract.

[19] The concluding words of Sect. 50 (2) of the Railways Act, 1921, have nothing to do with the terms as to liability upon which such goods are carried. They refer exclusively to the question of rates.

Chapter 20

PERIODS FOR CLAIMS

THERE is no statutory provision protecting the carrier against claims made a considerable time after the goods have reached their destination. Under the general law applicable to all contracts an action to recover damages must be brought within six years after the cause of action accrued, that is, after the contract was broken.[1] If the person to be sued is a public authority or someone acting on its behalf the period of limitation is one year.[2] The Transport Commission and the Executives are 'public authorities'.[3] Hence, an express provision was needed in order to remove the very great disadvantage which would have been caused to the public, if the short period of limitation had applied to the whole of the nationalised transport services by rail and road. This provision is contained in Sect. 11 of the Transport Act, 1947. There it is laid down that the special privileges as to limitation of actions otherwise applicable to public authorities are not to be enjoyed by the Transport Commission and the Executives. The period within which actions must be brought against them is, however, cut down from six to three years.[4] The length of the period of limitation, whether it be six years as in the case of a firm of road hauliers or three as in the case of the Railway Executive, is liable to work hardship on the carrier who in a great number of cases must prove the facts which establish a defence to an action for damages, and when he is sued after a considerable time it may no longer be possible for him to produce the necessary evidence. It is, therefore, of importance for

[1] Limitation Act, 1939, Sect. 2.
[2] Limitation Act, 1939, Sect. 21.
[3] Transport Act, 1947, Sects. 1 (1) and 5 (1).
[4] Had it not been for this provision, the nationalisation of the railways would have led to a serious deterioration of the legal position of all those having claims against the Railway Executive. In *Swain* v. *S. Ry. Co.*, [1939] 2 All E. R. 794, the Court of Appeal held that a railway company was not a 'public authority' within the meaning of the Limitation Act, even when it was acting in the performance of statutory duties. On the other hand, the Transport Act, 1947, has brought about an improvement in the position of people who have claims against the London Transport Executive which, before the coming into force of the Act, would have lain against the London Passenger Transport Board. The Board was a 'public authority' within the meaning of the Limitation Act and actions against it had to be brought within one year. (*Marshall* v. *L.P.T.B.*, [1936] 3 All E.R. 83, and *Batting* v. *L.P.T.B.*, [1941] 1 All E.R. 228, both decisions of the Court of Appeal.)

the carrier by road as well as by rail to shorten the time limit by special contract. The road carrier is entirely dependent on such special contract in order to remove the risk involved in a belated action. There is, on the other hand, no legal provision to prevent a road carrier from shortening the statutory period of six years by embodying a clause to this effect in his consignment note. The Railway Executive, however, enjoys a special protection under Standard Terms and Conditions.

If a trader intends to claim damages against the Railway Executive on the ground of loss from a packed or unpacked consignment, or on the ground of damage, deviation, misdelivery, delay or detention, he must fulfil two conditions: (1) He must give notice to the Executive of the occurrence in writing (otherwise than upon any of the Executive's own documents) within three days after the termination of the transit of the consignment, or of the part of the consignment in respect of which the claim arises. (2) He must make his claim in writing within seven days after the termination of the transit. The provisional advice and the final claim may be handed in at the forwarding station or at the delivery station, or, at the trader's option, at the district or head office of the Executive.[5] In the case of livestock, where it is more difficult to ascertain the exact nature of the claim to be made, this second period is extended to ten days.[6]

If the consignment does not arrive at all or if the claim is for the non-delivery of a separate package forming part of a consignment, the end of transit cannot be the event to set in motion the period for claims as the very complaint is that transit did not reach its end. In such cases the Executive must be advised of the non-delivery in writing (otherwise than on its own documents) within fourteen days after the receipt of the consignment, and the claim itself must be made within twenty-eight days after the same event. This applies to livestock only where the whole of a consignment fails to be delivered.[7]

[5] It is impossible to say what should now be the proper adaptation of the 'district or head office of the . . . company' in Standard Terms and Conditions A (8) (a) etc. Presumably the head office of the Region should be substituted for the 'head office of the company', but this is not free from doubt.

[6] Standard Terms and Conditions A (8) (a), B (7) (a), C (7) (a), D (7) (a), E (8) (a), F (5) (a), G (6) (a), H (5) (a), J (12) (a), K (13) (a), L (7) (a), M (6) (a), N (7) (a), O (7) (a).

[7] A (8) (b), B (7) (b), C (7) (b), D (7) (b), E (8) (b), F (5) (b) (in the case of fuel it applies to the non-delivery of the whole of a consignment or of a truck forming part of it), G (6) (b), H (5) (b), J (12) (b), K (13) (b), L (7) (b), M (6) (b), N (7) (b), O (7) (b).

Many traders will feel that these periods are rather short, and there may be cases in which it is difficult for a trader to substantiate his claim within these comparatively brief periods. When Standard Terms and Conditions were discussed before what was then the Railway Rates Tribunal, the question of the time limits was one of the most hotly contested points,[8] and the solution found is in the nature of a compromise between the interests of the traders and those of the carriers. All the forms of Standard Terms and Conditions contain an identical proviso that a trader is at liberty, before action brought, to prove to the satisfaction of the carrier that it was not reasonably possible for him to advise the carrier in writing, or to make his claim in writing within the prescribed times, and that he sent in his advice or claim within a reasonable time. If the carrier consents the trader may bring his action in spite of the fact that he had not complied with the time limit provisions of Standard Terms and Conditions. If the carrier does not consent, the trader is entitled to take the case before the Transport Tribunal. If the Tribunal, having regard to all the circumstances, considers it equitable, it may declare that the non-compliance with any of the time limits shall not be a bar to the maintenance of proceedings against the Executive,[9] but he must approach the Executive or the Tribunal before he brings an action in the Courts. He cannot rely on the proviso of Standard Terms and Conditions as a reply against the carrier's defence based upon the time limits, unless he has obtained the previous consent to his doing so either from the Executive itself or from the Transport Tribunal. He will not obtain this consent if he has made it impossible for himself by his own course of business to raise his complaint in time. Hence, the Tribunal will refuse to exercise its discretion in favour of a consignor who as a result of his own inadequate arrangements remains ignorant of the non-arrival of a consignment dispatched to an agent [10] or to a purchaser.[11] Sellers of goods should make it a term of their contracts with their customers that they are advised in time if the goods do not arrive. If they fail to take this precaution, they cannot claim that it was not reasonably possible for them to raise their claim against the carrier within the specified period on the ground that they themselves had been informed too late. It is

[8] See Proceedings of the Railway Rates Tribunal, Standard Terms and Conditions, pp. 46–86.

[9] A (8) proviso, and the proviso to the other conditions quoted in note 6, p. 235.

[10] *Wapnah* v. *L.M.S. Ry. Co.* (1933), 22 R. and C.T.C. 87.

[11] *H. B. Barnard and Sons Ltd.* v. *L.M.S. Ry. Co.* (1943), 28 T.C. 93; *Fryden Brothers and Co. Ltd.* v. *L.N.E. Ry. Co.* (1946), 28 T.C. 113.

equally necessary that the seller should advise his customer of the dispatch of the goods and send his invoice within a period which allows the provisions in Standard Terms and Conditions to be observed if the consignment fails to reach the purchaser.

Where, on the other hand, the station staff at the arrival station know that the consignment has been lost sight of and fail to inform the consignee, the carrier acts inequitably if he relies on the consignee's inevitable failure to make his claim in time, and the Tribunal will exercise its discretion in favour of the trader. 'The main object of Condition 8 (b) is that the carrier should be given notice of a fact of which frequently he would be unaware'. Hence where the carrier is aware of the material facts and the trader is not, and where a bare notice of non-arrival given within the prescribed time would not have afforded the carrier any knowledge which he did not already possess to assist him in tracing the consignment the Tribunal will help the trader.[12]

[12] *Sully* v. *Southern Ry. Co.* (1942), 28 T.C. 108.

Chapter 21

RIGHTS OF THE CARRIER

A CONSIGNOR of goods to be carried by rail or by road impliedly warrants to the carrier that they are fit to be transported, and, if necessary, to be stored in the condition in which they are handed to him. If the goods are of a dangerous character, the consignor must give notice of this fact to the carrier, and if goods which are apparently harmless turn out to be dangerous, the consignor is responsible to the carrier for any damage which the carrier had no reason to anticipate.[1] In the case of railway traffic the notice to be given by the consignor must be given in writing, and there is the additional warranty that the merchandise is not included in the dangerous goods classification or unclassified merchandise of a kindred nature.[2] Unless such notice in writing is given by the consignor at the time when the goods are delivered to the carrier, the goods must be distinctly marked as dangerous on the outside of the package containing them, otherwise a penalty of £20 must be paid to the Executive by the consignor.[3]

A person delivering to the Railway Executive dangerous goods for conveyance must also comply with all the Executive's bye-laws, regulations and conditions referring to the conveyance or storage of explosives and other dangerous articles.[4] If the consignor omits to comply with these rules, he as well as the owner must indemnify the Executive for all loss or damage which it may suffer in consequence, and the Executive can at its option sue either the consignor or the owner of the goods. It is for the carrier to prove that the damage was caused by the consignor's non-compliance with the bye-laws, etc., and the only defence against such a claim will be to show that

[1] *Bamfield* v. *Goole and Sheffield Transport Co.*, [1910] 2 K.B. 94; *G.N. Ry. Co.* v. *L.E.P. Transport, Ltd.*, above; see also *Brass* v. *Maitland* (1856), 6 E. & B. 470, and *Farrant* v. *Barnes* (1862), 11 C.B. (N.S.) 553.

[2] This condition recurs in all forms of Standard Terms and Conditions, *e.g.*, A (20), B (18). The second branch of the warranty does not apply to goods, perishable or otherwise, sent by passenger train or other similar service, nor, of course, to fuel. In the case of livestock, the wording of the warranty is somewhat different, and in the case of damageable goods carried under Standard Terms and Conditions E, it does not, of course, cover the want of proper protection by packing: C (16), D (16), E (20), F (13), G (17), H (16), L (19), M (18), N (17), O (19).

[3] Railways Clauses Consolidation Act, 1845, Sect. 105 (2).

[4] Railways Act, 1921, Sect. 50 (2).

the injury or damage was due to the wilful misconduct of the carrier's own servants.

A claim for compensation is also given to the carrier's servants who suffer harm through breach of the consignor's warranty of fitness or through the consignor's or owner's failure to comply with the regulations as to dangerous goods. The carrier himself will be able to recover damages for injury thus done to his own property and also to goods belonging to third parties who have entrusted him with their possession for carriage or storage, and it is immaterial whether the carrier himself is liable to the third party.[5] A bailee can recover compensation for damage to goods in his possession, no matter whether he is liable over to his bailor or not. Example: A consigns explosives or corrosive fluids by railway and omits to comply with regulations or to inform the carrier about the dangerous nature of the consignment, and damage is done to goods belonging to B which are carried in the same van or truck. B has no claim against the carrier, because if the goods are carried at owner's risk the carrier is not liable for the default of third parties, and at carrier's risk the case is likely to be one of casualty for which the Executive is not responsible in the absence of negligence of its own servants. The Executive can, nevertheless, claim damages from A for B's loss, and, once the money is recovered by the Executive it must be paid over to B.

If goods turn out to be dangerous, the consignor is liable for damages whether or not he was aware of the fact that the consignment was unfit to be carried or of a dangerous description. This principle was originally developed as a corollary to the carrier's duty not to refuse a consignment, *i.e.* it operated in favour of common carriers and of those who, like the railway companies, were under a statutory duty to carry.[6] Nevertheless, although the matter is not free from doubt, it is probably the better view that all carriers, including private carriers who are under no obligation to carry, can enforce the warranty against the consignor, and can enforce it even in circumstances in which the consignor was not negligent in failing to ascertain the true nature of the merchandise.[7] An absolute

[5] *The Winkfield,* [1902] P. 42, and *G.N. Ry. Co.* v. *L.E.P. Transport &c. Co.,* [1922] 2 K.B. 742.

[6] Railway and Canal Traffic Act, 1854, Sect. 2.

[7] In *Burley* v. *Stepney Corporation,* [1947] 1 All E.R. 507, the most recent case on the subject, Hallett, J., examined the authorities on this controversial topic and came to the conclusion 'that the balance of authority is in favour of the view that there is an implied warranty that goods delivered for carriage are safe to be carried, and that is so irrespective of whether the person delivering the goods to be carried knows of the danger, and irrespective of whether the person to whom they are delivered is under

liability to the carrier and his servants is thus imposed upon the consignor of goods. This is of great importance to forwarding agents who act as consignors of packages the contents of which they may have no opportunity of examining. The case of *Great Northern Ry. Co.* v. *L.E.P. Transport Co., Ltd.*[8] shows that the forwarding agent, though perfectly innocent, becomes liable as consignor to the carrier for damage done by goods delivered up by him for transport.[9]

It is of great importance to the carrier that the consignor should give him a proper description of the consignment as well as an exact indication of the consignee's person and address. The calculation of the rate of freight may depend on the nature and weight of the goods and on the number of parcels or articles handed to the carrier for conveyance. A full account of all these points and of the consignee's name and address must be given by the owner or possessor of goods passing on a railway,[10] in so far as the account is necessary to enable the carrier to calculate the charges. If this provision is not complied with the carrier may refuse to convey the merchandise or else may examine, weigh or count the goods at the owner's expense. The carrier should always give the consignor an opportunity of having the goods weighed or counted on payment of a reasonable charge before declining to carry them at all. If the owner or other person in charge of the goods, such as the consignor, omits to give this account though it is demanded by the Executive, he makes himself liable to a penalty set out in detail in Sect. 99 of the Railways Clauses Consolidation Act, 1845. The demand may be express or implied.[11]

If the consignor fraudulently conceals or misstates the contents of a package or its weight or the number of articles forming a consignment, the owner does not acquire any rights against the carrier in the case of loss, damage or delay.[12] Moreover, in a case of

a common law duty or a statutory duty to carry them'. It is submitted that this conclusion is correct and that, contrary to the view indicated in Salmond on *Torts,* 10th ed., p. 567, the absolute warranty is not confined to contracts 'for the carriage of goods by a person under statutory duty to carry'.

[8] See above, p. 117.

[9] The controversy whether there is such an absolute liability cannot be regarded as fully settled. For a survey of the authorities see Salmond on *Torts,* 10th ed., p. 567, Note (h) and the decision in *Burley* v. *Stepney Corporation,* above. There is no doubt that the warranty, whatever its extent, can be contracted out.

[10] Railways Clauses Act, 1845, Sect. 98, as amended by the Sixth Schedule to the Railways Act, 1921.

[11] *Barr, Moering & Co.* v. *L. & N.W. Ry. Co.,* [1905] 2 K.B. 113.

[12] See above, p. 153.

carriage by rail the giving of a false account with the intent to avoid the payment of charges makes the owner liable to heavy penalties.[13] But neither a carrier by rail nor a carrier by road has the power to open any parcel delivered to him for carriage,[14] except that the Railway Executive may require the opening of the parcel, if there is a reasonable suspicion that it contains dangerous goods.

The consignor's so-called duty properly to address and to label the consignment is not a duty in the proper sense of the word. It is only one of the conditions which the consignor must fulfil in order to enable the owner to recover damages in the case of loss, injury or delay. If he omits to address the goods plainly and legibly and with so full an address that the consignee may be easily found, the carrier will not be responsible if the goods are lost or delayed in consequence of the address being insufficient. This principle is well illustrated by the case of *Caledonian Ry. Co.* v. *Hunter*.[15]

Standard Terms and Conditions contain elaborate provisions with regard to the addressing of goods in accordance with regulations settled by the Transport Tribunal,[16] also with regard to the filling in of the consignment note, and in the case of merchandise carried by merchandise train with regard to the labelling of the trucks.[17]

If the consignor omits to comply with any of the three distinct

[13] Railways Clauses Consolidation Act, 1845, Sect. 99. At one time it was doubted whether this section was applicable if goods were carried in the carriers own wagons and trucks. It is true that the section says 'with intent to avoid the payment of any tolls payable in respect thereof', but tolls, according to the definition in Sect. 3, includes rates and charges, and this was so held in *Barr, Moering & Co.* v. *L. & N.W. Ry. Co.*, above. It was held in *L. & N.W. Ry. Co.* v. *Rickerby, Ltd.*, [1921] 1 K.B. 231, that an offence under Sect. 99 is committed when a false account is given as to the weight of the goods. In *Mousell Brothers, Ltd.* v. *L. & N.W. Ry. Co.*, [1917] 2 K.B. 836, it was held that the principal of a servant or agent who gives a fraudulent account to the carrier is liable, though the principal himself was no party to the fraud and even though he may be himself a limited company.

[14] See *Crouch* v. *L. & N.W. Ry. Co.* (1849), 2 Car. & K. 789.

[15] See above, p. 165.

[16] See these regulations printed in the Appendix of the official edition of Standard Terms and Conditions. There are separate regulations for the addressing of merchandise carried by merchandise trains and others for merchandise, when carried by passenger train or other similar service.

[17] Standard Terms and Conditions A (1) and (2), B (1) and (2), C (1), D (1), E (1) and (2), F (1) and (2), G (1), H (1), J (1), K (1), L (1), M (1), N (1), O (1). See also the special provision referring to the stamping, etc. of cans, churns or butts containing milk in J (2) and K (2), and observe that the carrier may open, and, if necessary, detain for a reasonable time, any can, churn or butt for the purpose of ascertaining the quantity of milk contained therein: J (8), K (8).

requirements, addressing, filling in of the consignment note, and labelling of trucks, the Executive is exempted from liability even at carrier's risk if it can prove that there was no negligence on the part of its servants.

The owner of the goods, that is, as a rule, the consignee, is deemed to be the party with whom the carrier makes his contract. He is, therefore, always liable to the carrier to pay the freight, and the carrier may sue him for his charges as soon as transit is over.[18] But the consignee is not necessarily the only party so liable. The consignor, though usually no party to the contract and merely acting as the consignee's agent, may expressly or even implicitly promise the carrier to cover his charges, if the consignee refuses to pay or if for some other reason the carrier chooses to demand the charges from him. In *Great Western Ry. Co.* v. *Bagge*[19] the consignment note said in so many words that the consignee would pay the charges. Yet the Court held that there was a 'resulting contract' and implied undertaking by the consignor to pay the freight, and we may, perhaps, be entitled to infer from this case that the Courts will be very ready to imply an undertaking by the consignor to take upon himself at least a subsidiary liability for the carrier's charges. This is, however, far from being certain, and road carriers should, therefore, insert in their consignment note a clause by which the consignor undertakes to pay the freight if the consignee fails to do so.

With regard to railway traffic the question is regulated by Standard Terms and Conditions.[20] The sender of the goods is primarily liable for the carrier's charges, but without prejudice to the carrier's rights against the consignee or any other person. If the consignment note is silent about the duty to pay the charges, the

[18] Even if, as between consignor and consignee, the latter is an agent 'to sell and to account': *World Transport Co.* v. *Tealing and Co.*, [1936] 2 All E.R. 573.

[19] (1885), 15 Q.B.D. 625.

[20] A (13), B (12), E (13), G (11), H (10), L (12), M (11), O (12). The slightly different wording of the conditions referring to carriage by passenger train or other similar service shows that prepayment of the charges by the consignor is the normal procedure in these cases. In the case of milk (J (5) and K (5)) all that is said is that the carrier is entitled to prepayment of the charges. In the case of livestock (C (10), D (10), N (11)) the carrier's right to obtain payment from the sender includes expenses for the custody, care and maintenance of the livestock or for any other service performed, accommodation provided, or expenses incurred, while the livestock remains in the possession of the carrier or his agents. In the case of fuel (F (8)), the carrier's charges are primarily payable by the owners of the sending colliery or works, except where the carrier has notified the owners of the sending colliery or works of his willingness to debit the charges to the account of some other person.

Executive has the option whether it will debit or sue the consignee (or other owner) or the consignor. When, however, it is stated on the consignment note that charges are payable by the consignee ('carriage forward'), the Executive must first make a reasonable demand for payment of the consignee, and only after the consignee has failed to comply with this demand may it approach the consignor for its charges.

A carrier has no right to sue for his charges before he has performed his services, that is before transit has come to an end. He may refuse to carry, however, even if he is a common carrier, unless the person desiring to send the goods is ready to pay the charges at the time of the delivery of the goods for carriage. Though no right to the money has accrued to the carrier at that moment, he is, not even as a common carrier, under a duty to carry unless he receives his freight, or at least an undertaking to pay the freight, from the consignor.

In practice it is extremely common for carriers to carry goods without being prepaid. When goods are sold and sent by railway, probably in the greater number of cases the carriage is paid by the buyer on delivery; or, perhaps, in the case of large customers, there may be an arrangement with the carrier to pay periodically. It is, of course, immaterial from the carrier's point of view whether his charges are included in the price payable by the consignee to the consignor for the goods, or whether, as between the consignor and the consignee, the consignee has undertaken to cover the carrier's account.[21]

The common law gives every carrier the right to retain possession of the goods until he is paid. This power is known in England as 'lien', and in Scotland as 'right of retention'.

At common law which is still fully applicable to carriage by road, the lien is merely a 'passive lien', that is, a right to retain the goods and to refuse to give them up till the money is received, but not to sell them. It is a 'particular lien' only, *i.e.*, the carrier may retain a consignment of goods only for the charges in respect of that particular consignment, not in order to enforce the payment of

[21] Can the carrier demand freight if he has deviated in the course of the journey, but afterwards safely carried the goods to their destination? This difficult question, discussed but not decided by Lord Wright in *Hain Steamship Co.* v. *Tate and Lyle, Ltd.*, [1936] 2 All E.R. 597, at p. 612, does not seem to have arisen in connection with inland transport. A logical development of the theory of the 'breach of fundamental condition' (above, p. 170) would lead to what Lord Wright called 'startling consequences', viz. to depriving the carrier of remuneration in circumstances in which, despite a technical breach, he has in substance discharged his obligations.

charges for the carriage of other goods or for other services rendered, and he cannot retain goods in respect of a general account due to him by the owner. If the consignee is prepared to pay the carriage of a parcel, the carrier must deliver it although the consignee remains in debt for other goods. By agreement which may be either express or implied from the general course of dealing between the parties,[22] or from a trade custom tacitly embodied in the contract, the carrier may acquire an 'active lien', that is, the right to sell the goods after a reasonable time, and also a 'general lien' enabling him to retain the goods for charges other than those incurred in respect of the goods retained. Again we see how important it is for the road carrier carefully to provide for an extension of his common law rights by contract.

It is different in the case of the Railway Executive,[23] for Standard Terms and Conditions extend the common law lien so as to make it 'active' and 'general'.

If it is not satisfied within a reasonable time from the date upon which the carrier first gave notice of the exercise of his lien to the owner of the merchandise, the merchandise may be sold and the proceeds of sale applied in, or towards, the satisfaction of the lien, the carrier accounting to the owner of the merchandise for any surplus. It may be exercised for all charges due from the owner of the merchandise for any services rendered or accommodation provided in relation to the carriage or custody of other merchandise, though not for other claims, such as rent for premises, etc. In view of the wording of Section 5 (9) of the Transport Act, 1947, it seems that the Railway Executive cannot exercise the lien for moneys and charges due to, *e.g.*, the Road Transport Executive. On the general principles of the common law this would be different: the agent who acts for a disclosed principal can, for the latter's account, exercise a lien for claims arising from transactions entered into through another agent, provided, of course, that there is a right to a general lien.

[22] *Aspinall* v. *Pickford* (1800), 3 Bos. & P. 44, n.

[23] In view of the express conditions contained in Standard Terms and Conditions, the question of the interpretation of Sect. 97 of the Railways Clauses Consolidation Act, 1845, does not seem to be of very great practical importance at the present moment. This section which is still in force, gives the Railway Executive a right of sale as well as a general lien. It was, however, held in *Wallis* v. *L.S.W. Ry. Co.* (1870), L.R. 5 Ex. 62, that this section gave a lien only for tolls in the strict sense of the word, that is to say, for the remuneration for the carriage in vehicles not belonging to the carrier, not for rates or charges. The correctness of this decision has been doubted. See Leslie, *Law of Carriage by Railway*, p. 449.

In so far as the lien is particular it is stronger than the seller's right of stoppage *in transitu*, but in so far as it is general it is postponed to this right of the seller. This is of importance, since the cases in which a carrier exercises his lien are usually those in which a consignee and buyer of goods is unable to meet his debts. A conflict of interests may arise between the seller (consignor) and the Executive, each of them wishing to get hold of the goods in order to satisfy claims against the consignee.[24] In such cases the Executive need not redeliver the goods stopped *in transitu* to the consignor before he has paid all the charges incurred in connection with these particular goods, but once he has done so the goods can no longer be retained, though money may be owing to the Executive by the consignee for other goods carried or stored. Before selling the Executive must keep the goods for a reasonable time, and it will be liable to an action for damages if it sells too soon.[25]

To a common carrier who must not refuse a consignment, and who cannot inquire into the consignor's title to the goods, the law gives a lien as against the true owner, though the goods were delivered to the carrier by a thief or other person having no right to deal with them. It would seem from the decision in *Electric Supply Stores* v. *Gaywood*[26] that the private carrier's lien is not so extensive.

Furniture was let out on hire to a person who undertook not to remove it from a certain place. Nevertheless he instructed a private carrier to take the furniture to another town. Not being able to deliver it there, the carrier stored it, and when the owners claimed the furniture from him, he refused to hand it over unless they paid his charges, but it was held that he was not entitled to do so, and he had to restore their property to the owners without having received the money.

Thus we see that the common carrier enjoys certain privileges which the law withholds from the private carrier and the warehouseman.[27] In these days of hire-purchase agreements this difference in the position of common and private carriers may be a matter of considerable importance particularly in relation to road transport. As long as the hirer under a hire-purchase agreement is entitled, as against the owner, to remain in possession, he can, with

[24] See, for instance, a case like *U.S. Steel Products Co.* v. *G.W. Ry. Co.*, [1916] 1 A.C. 189.

[25] Standard Terms and Conditions A (14), B (13), C (11), D (11), E (14), F (9), G (12), H (11), J (14), K (15), L (13), M (12), N (12), O (13).

[26] (1909), 100 L.T. 855.

[27] As regards the position of the warehouseman, see the case of *Singer Manufacturing Co.* v. *L.S.W. Ry. Co.*, [1894] 1 Q.B. 833, discussed on p. 264.

effect against the owner, create a lien in favour of a private carrier or warehouseman. This is so, even though the hire-purchase agreement may restrict his right to create a lien. But once the owner has terminated the agreement, *e.g.* because the hirer is in arrear, the hirer's authority to bind the owner comes to an end.[28]

A carrier cannot investigate the consignee's title either, and, therefore, the word 'owner' in the Standard Terms and Conditions quoted, and in any contract providing for a general lien for claims against the owner, must be interpreted as referring not to the persons who are in law the owners at the time, but those who are entitled to demand delivery of the goods by the carrier, whether they are the owners or not.[29]

A lien does not come into existence before the goods have been carried to the place of destination. Transit must be over when the carrier exercises his lien. He is not justified in detaining goods at the beginning of the transit and refusing to part with them till the general account is satisfied.[30]

A carrier is bound to take proper care of goods which he retains under this right, and he should keep them for a reasonable time at a place reasonably convenient for the consignor or the consignee, as the case may be, to obtain possession of them if he is prepared to pay the debts for which the lien is exercised. The carrier's duty to take proper care of the goods may make it necessary for him to incur expense in preserving the goods (*e.g.*, in feeding an animal retained). He is entitled to recover such expense from the owner,[31] but he has no right to charge for warehousing the goods while he detains them in exercise of his lien, as he detains them not for the owner, but for his own interest and benefit.[32] No one has any right to remove goods or take possession of them against the will of the carrier, until the carriage is paid.

There is nothing to prevent a carrier from exercising his lien and simultaneously suing the proper person for the money due. If he gets judgment for the amount due he must hand over the goods when the judgment is satisfied. He need not do so sooner.

[28] *Bowmaker Ltd.* v. *Wycombe Motors Ltd.*, [1946] 2 All E.R. 113.
[29] *U.S. Steel Products* v. *G.W. Ry. Co.*, above.
[30] *Wiltshire Iron Co.* v. *G.W. Ry. Co.* (1871), L.R. 6 Q.B. 776.
[31] See *G.N. Ry. Co.* v. *Swaffield*, above, p. 226.
[32] *Somes* v. *British Empire Shipping Co.* (1860), 8 H.L. Cas. 338.

Chapter 22

PASSENGERS' LUGGAGE AND CLOAK ROOM CONTRACTS

THE DUTY TO CARRY PASSENGERS' LUGGAGE

From the earliest days of public coaches it seems to have been the custom for carriers of passengers to carry a certain amount of personal luggage for their passengers without additional charge. They do not, however, carry this luggage gratuitously, for the fare paid by the person carried is understood to include the remuneration to the carrier for the carriage of a reasonable quantity of such goods as a person travelling usually takes with him for his personal use and comfort.[1]

By their private Acts all railway companies were bound to carry free of extra charge the ordinary personal luggage of their passengers up to a certain weight. Since Jan. 1, 1928, when the Standard Charges settled by the Tribunal [2] came into force, every first-class passenger carried at the standard fares may take with him, without extra charge, 150 lbs., every second-class passenger 120 lbs., and every third-class passenger 100 lbs. of ordinary luggage, not being merchandise or other articles carried for hire or profit.

There is no enactment imposing on owners of omnibuses, motor coaches and other public service vehicles the duty to carry passengers' luggage free of extra charge. But the Licensing Authority for Public Service Vehicles, when granting a road service licence under Sect. 72 (4) of the Road Traffic Act, 1930,[3] may attach to the licence the condition that the payment of the fare should include the right to carry a certain amount of passengers' luggage without extra payment. Such a condition would be permissible under the Act, as it would secure that the fare is not unreasonable in view of the consideration offered for it, and generally contributes to the convenience of the public.[4]

[1] See Mellish, L.J., in *Cohen* v. *S.E. Ry. Co.* (1877), 2 Ex. D. 253, at pp. 258–259, and Darling, J., in *Casswell* v. *Cheshire Lines Committee*, [1907] 2 K.B. 499; and see the wording of the Road Traffic Act, 1930, Sect. 104 (1), proviso, where the so-called 'free carriage' of passengers' luggage is referred to as carriage 'without *extra* charge'.

[2] Part 7: Scale of Charges for the Conveyance of Passengers.

[3] See above, p. 50.

[4] The Transport Commission and its agents, e.g. the London Transport Executive, do not require road service licences for the passenger services

If a local authority run a public service vehicle outside their own district, having received the necessary consent from the Licensing Authority under Sect. 101 of the Road Traffic Act, 1930, they must allow their passenger to take with him personal luggage not exceeding 28 lbs. in weight, without extra charge.[5]

There is nothing to prevent a carrier agreeing with a passenger that he shall not exercise his right to take luggage, provided a consideration is offered to the passenger for his willingness to forgo his right. Where the Railway Executive runs cheap excursion trains or gives cheap return tickets to holiday resorts, it is not unusual for the Executive to issue tickets on condition that no luggage shall be taken, or not more than the passenger can carry in his hand. As these tickets are issued at rates generally far below what the Executive has the right to charge, the passenger taking one on such a condition agrees with the Executive to give up his right to take luggage in consideration of being carried at the cheap rate. Such an agreement is perfectly legal, and if a passenger in spite of the agreement manages surreptitiously to put luggage into the train he will have to pay a sum for the carriage of the luggage on being found out, and the Executive may retain the luggage until this sum is paid.[6]

While there is no statutory upper limit to the amount of luggage which passengers by railway may be allowed to take with them, the owner of a public service vehicle may be restricted by his road service licence as to the maximum amount and weight and shape of luggage which he may carry. The purpose of an omnibus or a motor coach is to carry passengers, and the carriage of luggage is only an ancillary service. The law does not require the owner of such a vehicle to take out a goods vehicle licence under the Road

which they provide (Transport Act, 1947, Sect. 65 (1)), and the Licensing Authority has no power over the fares they may charge or over the conditions of the contracts of carriage. Hence, as the law stands at the moment, the Transport Commission and the Executives are not under any legal duty to carry passengers' luggage by road. This, however, may not always remain so. The charges schemes which are subject to confirmation by the Transport Tribunal may impose the duty to carry passengers' luggage by road upon the Commission and the Executives. Moreover, any body constituted or specified by an area road transport scheme for the purpose of providing road passenger transport services may be subjected to the duty of carrying passengers' luggage, either by extending to it the provisions of a charges scheme applicable to the Transport Commission, or by incorporating in the area scheme *mutatis mutandis* the statutory provisions on carriage of passengers' luggage by rail. (Sect. 64 (1) (f).)

[5] Road Traffic Act, 1930, Sect. 104 (1).

[6] *Rumsey* v. *N.E. Ry. Co.* (1863), 14 C.B. (N.S.) 641.

and Rail Traffic Act, 1933,[7] if he wants to carry passengers' luggage, and it is all the more important that conditions attached to the road service licence should prevent him from using his vehicle for the purpose of evading the Act of 1933.[8]

THE CARRIER'S LIABILITY FOR PASSENGERS' LUGGAGE

With regard to passengers' luggage a carrier by railway is, as a rule, subject to all the heavy responsibilities of a common carrier, for the rules applicable to the carriage of passengers' luggage are those of the carriage of goods, not those of the carriage of passengers. The Railway Executive is, therefore, an insurer of the safety of such luggage. On the other hand, it is entitled to all the protection given to common carriers by the Carriers Act, 1830, and the passenger cannot recover damages for any money, jewellery or other article coming under the Act, unless he has declared it in accordance with the provisions of the Act.[9] But for other articles the Executive is absolutely liable unless it has restricted its liability in the manner to be explained.

The owner of a public service vehicle who permits his passengers to take luggage with them would also appear to be a common carrier of passengers' luggage.[10] It can hardly make any difference whether he does so of his own free choice, or because of the conditions of his road service licence, or of an area road transport scheme, or because, as in the case of a local authority running a public service vehicle outside their district, a statute compels him to do so. The Carriers Act, 1830, which speaks of the 'stage coach proprietor' as a common carrier, may be quoted in support of this view. Moreover, the principle underlying *Clarke* v. *West Ham Corporation*[11] may be regarded as being applicable to public service vehicles as it

[7] Road and Rail Traffic Act, 1933, Sect. 1 (7) (d).

[8] In the case of local authorities running public service vehicles outside their their district, the Licensing Authority may also attach an upper limit to the carriage of passengers' luggage as a condition to their consent under Sect. 101 (1) of the Act. It would seem that Sect. 104 (2) forbids them to carry passengers' luggage of more than 56 lbs. in weight outside their district, though the law speaks of 'small parcels' in this connection and not of passengers' luggage. They may make a charge for the excess over 28 lbs., and they may also carry dogs (but no other animals) in the care of passengers for a charge not exceeding the passenger's fare. See also the similar provisions applicable to the London Transport Executive under the London Passenger Transport Act, 1933, Sect. 26 (1). In future it will be possible to impose maxima by area road transport schemes.

[9] *Casswell* v. *Cheshire Lines Committee*, above, p. 212.

[10] See, in the same sense, *Story on Bailments*, 9th ed., p. 471, and Mahaffy and Dodson, *Road Traffic Acts and Orders*, p. 154.

[11] [1909] 2 K.B. 858. This aspect of *Clarke's Case* is unaffected by *Luddit* v. *Ginger Coote Airways Ltd.*, [1947] A.C. 233.

is to railways, and the owner of a public service vehicle would not seem to be allowed to discriminate between his customers and arbitrarily to refuse to would-be passengers the use of his coach. If the carrier cannot discriminate between passengers as regards their persons, he cannot do so with regard to their luggage either, because to admit the passenger but to reject his luggage would, in practice, mean to reject the passenger himself. The criterion for refusing passengers and their luggage is not whether they offer attractive terms, but whether there is room in the coach and whether the passenger is prepared to pay his fare.[12] Therefore, the coach owner is a carrier of passengers' luggage for 'all and sundry', a common carrier of passengers' luggage and, accordingly, absolutely liable for loss or injury during transit, but protected with regard to valuable and breakable goods under the Act of 1830.

Hence, if there were a collision, and luggage carried in the train or motor coach were destroyed, the carrier would be liable for the loss of the luggage, even though no negligence could be proved against him or his servants; whereas in the case of the passenger himself, it would be necessary to prove negligence in order to make the carrier liable.[13]

In this, as in all other cases of common carrier's liability, the carrier does not insure against the four excepted perils: act of God, act of the King's enemies, inherent vice and consignor's fault, to which, in this case, must be added the passenger's own fault. Of these the last is by far the most important. If luggage is carried by railway in the van of the train by which the passenger is travelling, or in a motor coach on the roof or in the dickey, the carrier is liable for the luggage in the ordinary way. With regard, however, to luggage taken by the passenger in the compartment or in the coach along with him, it may be that full control over such luggage is not given to the carrier. If the passenger himself takes charge of the luggage, the position of the carrier is modified; if a passenger has assumed in whole or in part the custody and control of his own luggage, the carrier is not liable for any loss or injury occurring during its transit which has been caused by the act or default of the passenger. Even in respect to luggage carried in the compartment or coach with the passenger, the carrier remains liable as a common carrier,[14] but there is this modification, that if the

[12] See *Belfast Rope Work* v. *Bushell*, above, p. 122.

[13] See p. 265.

[14] This rule does not extend to articles of clothing, jewellery, etc. worn by the passenger, and to whatever he may carry in his pockets, nor probably to a lady's handbag. These articles are not luggage and the liability for their safety would seem to be governed by the rules governing liability for injuries to the passenger himself. The position of the umbrella and the raincoat put in the rack is doubtful. See *Chitty on Contracts*, p. 717.

passenger has interfered with the carrier's control, the carrier is not liable for loss or injury due to that interference.

In *Talley* v. *G.W. Ry. Co.*,[15] the passenger got out of his compartment at an intermediate station and went into the refreshment room, leaving his portmanteau in the train. On his return to the train, which had been moved to another platform in the meantime, he could not find his carriage and got into another for the rest of the journey. When the train, which was rather crowded, arrived at its destination, the portmanteau was found, but it had been cut open and some of its contents stolen. Here the company was not responsible, as the passenger had himself assumed control of his luggage, and was therefore bound to take such care of it as might be expected from an ordinary prudent man, and the loss would not have happened but for his failure to take such care. It was a case of 'passenger's own fault', for which the carrier (in the absence of negligence on his own part) is not responsible.

This, however, does not mean that the passenger is bound to keep a watchful eye on his luggage during the whole of the journey.

In *Vosper* v. *G.W. Ry. Co.*,[16] the passenger spent practically the whole of the journey either in the restaurant car or in another compartment where he had found some friends, and when, shortly before the arrival of the train, he returned to his own compartment, his suitcase could not be found. It was held that the railway company was liable for the loss, since there had been no contributory negligence on the passenger's part. It was not his duty to remain in the compartment all the time, having regard to the fact that he was invited by the company itself to be absent for a time in order to have a meal in the restaurant car. It is also an ordinary incident of carriage that a passenger who has chosen a compartment might change his mind *en route* and wish to travel in another compartment for the purpose of joining friends, or because, being originally in a non-smoking compartment, he desires to smoke and therefore has to choose another one.[17]

Similarly, if a passenger absents himself in order to go to the telephone and leaves the luggage in the care of a porter at a station,[18] or if he goes to buy a book or newspaper at the book stall,[19] his act is not deemed to be negligent.

The carrier of passengers' luggage, like any other carrier, cannot set up the act of a third party as a defence when sued for damages on the ground of loss or injury during transit.[20]

[15] (1870), L.R. 6 C.P. 44.
[16] [1928] 1 K.B. 340.
[17] See Atkin, L.J., at pp. 347, 348. Although *Talley's Case* was not overruled, it is not easy to distinguish the two cases.
[18] *Henderson* v. *L.M.S. Ry. Co.*, [1930] S.C. 822.
[19] *Carr* v. *L.M.S. Ry. Co.*, [1931] K.B.N.I. 94.
[20] *Ehinger* v. *S.E. & Chatham Ry. Co. and Pullman Car Co.* (1922), 38 T.L.R. 678, where a railway company was held to have contracted as an insurer for the whole journey of luggage belonging to a passenger travelling in a car provided by the Pullman Car Company from whom

Even with respect to luggage carried in a van or on the top or in the dickey of a motor coach there may be consignor's fault. For instance, if luggage is wrongly labelled or addressed or badly packed and loss or injury occurs in consequence, the carrier is not liable. It is probably lawful for a carrier to refuse luggage unless it is properly labelled and packed, and the mere fact that luggage which has been accepted is unlabelled or that its packing is faulty will of itself be no defence in an action for damages, unless it can be shown that the lack of a label or faulty packing was the cause of the loss. The Railway Executive, when imposing conditions as to the addressing of passengers' luggage, must face the risk that such conditions are held unreasonable and void,[21] a risk which does not exist in the case of road carriers.

This is due to a difference between the position of carriers by rail and carriers by road, with respect to passengers' luggage. As has been seen, the Transport Commission and its Executives are obliged, by Sect. 2 of the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for receiving, forwarding and delivering traffic upon their railways. 'Traffic' is defined in Sect. 1 to include, not only passengers, but also their luggage. Then Sect. 7 makes the carrier liable for loss or injury to any 'articles, goods or things' by negligence, unless his liability is limited by contract signed by the person delivering the goods, which contract, however, is only binding when its conditions are just and reasonable. Passengers' luggage is included in the words 'articles, goods or things'.[22] Therefore, the provisions of Sect. 7 apply to passengers' luggage as well as to other kinds of goods.[23] The Executives are not at liberty to limit their liability for loss of, or injury to passengers' luggage caused by negligence or default of their servants, unless this is done by contract in writing signed in the manner prescribed and unless the conditions are just and reasonable.[24] It is, however, hard to see how a 'fair

the passenger had taken an additional ticket entitling him to the use of their car. Though placed in the vestibule of the Pullman car, the luggage was still in the custody of the railway company. The Pullman Car Company had not made a contract for the carriage of the luggage and could only have been made liable in tort on proof of negligence.

[21] See cases below. This would hardly be possible in the case of a condition referring to packing, see *Sutcliffe* v. *G.W. Ry. Co.*, [1910] 1 K.B. 478.

[22] *Cohen* v. *S.E. Ry. Co.*, above.

[23] *Wilkinson* v. *Lancashire and Yorkshire Ry. Co.*, [1907] 2 K.B. 222; and see *Cutler* v. *N. London Ry. Co.* (1887), 19 Q.B.D. 64, where a signed condition that a company shall not be responsible for luggage 'unless fully and properly addressed with the name and destination of the owner' was held to be unreasonable and void.

[24] *Page* v. *L.M.S.*, [1943] 1 All E.R. 455.

alternative' can be offered to a passenger whose luggage must be carried at the full common carrier's liability without any extra charge. In practice, therefore, it is well-nigh impossible for a carrier by rail to contract out of his liability as an insurer of passengers' luggage. There are no Standard Terms and Conditions governing the carriage of passengers' luggage, so that this is one of the cases where the pre-1928 law is still fully applicable.[25] The owner of a public service vehicle, on the other hand, may limit or negative his liability for passengers' luggage, but since the Carriers' Act applies, an announcement posted up in the receiving office would be ineffective. His position in this respect is similar to that of the railway companies between 1830 and 1854.[26]

As in the case of carriage of merchandise it is necessary clearly to determine the beginning and end of transit, as the common carrier's liability only attaches to loss or injury occurring during that period. The rules laid down by the Courts in this respect have been developed in connection with railway traffic, but they would appear to be capable of extension to the carriage of passengers' luggage in public service vehicles, with those modifications which are made necessary by the particular characteristics of motor transport.

Transit begins when the luggage is handed to a servant of the Executive for the purpose of being placed in the train, even though the train may not be due to start for some considerable time. But it ends once the luggage is placed from the van or compartment on to the platform, though the passenger may engage the services of one of the railway servants for the custody or carriage of his luggage. In other words, as a rule (though there are exceptions), the porter at the departure station is deemed to be the servant of the Executive and acting as its agent when handling the passenger's luggage, but the porter at the arrival station is not. It is part of

[25] It is different, however, with regard to merchandise which a traveller has been allowed to take with him. See below, p. 258. Certain types of passengers' luggage are governed by Standard Terms and Conditions, *e.g.*, animals which a passenger is allowed to take with him as passengers' luggage (for instance, a pet dog). Here the carrier's liability is governed by Standard Terms and Conditions N, for it is provided in N (18) that 'any livestock which, by the company's regulations, passengers are permitted to take with them, shall be subject to the limitations of liability contained in these conditions'. It would also seem that Standard Terms and Conditions O govern the liability for passengers' luggage which is damageable, but not properly protected by packing. See the wording of O (20). In future, charges schemes under Sect. 76 of the Transport Act, 1947, may provide terms and conditions for the carriage of passengers' luggage.

[26] See above, p. 135.

the ordinary duty of a porter to take charge of a passenger's luggage on his arrival at a station of departure while the passenger goes to the booking office to take his ticket, and the Executive is responsible for this luggage,[27] but porters have no authority to take charge of luggage after the journey is ended, and if a porter does take charge of it, he is acting outside the scope of his employment, and the Executive is not responsible for negligence or misconduct. The Executive is only bound to deliver passengers' luggage on to the platform and must allow the passenger a reasonable time within which to claim it and take it away. It is for him to be ready to receive it within that reasonable time, and if he does not, the Executive ceases to be responsible.[28] It has performed its contract, and if the passenger is not prepared to take away the luggage he should make a fresh contract by placing the luggage in the cloak room. Even at the departure station, however, the luggage must not be left in the charge of a porter for an unreasonable time before the train starts, and should be deposited in a cloak room if a prolonged wait at a station is necessary.

In *G.W. Ry. Co.* v. *Bunch*,[29] a lady arrived at Paddington at 4.20 p.m. on Christmas Eve, with a bag and two other cases of luggage, in order to travel to Bath by a train advertised to start at 5 p.m. A porter took charge of the three cases, put them on a barrow and wheeled them out on to the platform. The lady then told the porter she wished to take the bag in the carriage with her, and asked him if it would be safe to leave it with him while she went to the front of the station to meet her husband. The porter replied that it would be quite safe. The lady accordingly went away, leaving the porter standing by the luggage, the train not having then been drawn up to the platform. The bag had not been labelled; the other two articles had been. Ten minutes after the lady had left her luggage with the porter, she returned with her husband to the place where it had been left. They found that the train had come up, and that the two articles which had been labelled had been put in the van, but they could not find any trace of either the bag or the porter. The bag was never seen again, and the railway company was held to be liable for its value and the value of its contents. The time when the luggage was entrusted to the porter was a reasonable time before the departure of the train, as it was Christmas Eve, when a great many persons were travelling, and the company was receiving luggage for the train without objection, and was issuing tickets for the train within a very short time of the lady's arrival. As soon as the luggage had been delivered to the porter it was in the custody of the company for the purpose of the journey and the company received it as a common carrier.

An even more striking case is *Steers* v. *Midland Ry. Co.*,[30] where luggage was taken to a sleeping compartment more than one hour before

[27] *Lovell* v. *London, Chatham and Dover Ry. Co.* (1876), 34 L.T. 127.
[28] *Patscheider* v. *G.W. Ry. Co.* (1878), 3 Ex. D. 153.
[29] (1888), 13 A.C. 31.
[30] (1920), 36 T.L.R. 703.

the departure of the train, the passenger having been assured by one of the company's inspectors that it would be perfectly safe. While the passenger was having a meal outside the station, the luggage was stolen from the train, and the company was held to be liable.

On the other hand, in *Hodkinson* v. *L.N.W. Ry. Co.*[31] a passenger refused a porter's offer at the arrival station to put her luggage into a cab. Thereupon the porter undertook to put it aside and take care of it till it should be fetched. When the lady returned to the station an hour and a half afterwards one of her bags had disappeared and the porter's explanation was that he had allowed a woman to take it away believing that she was the owner. The passenger failed to recover the value of her bag and its contents from the company, since the company's responsibility had come to an end when the luggage was taken from the van and placed at the owner's disposal on the platform, and the porter was not acting within his authority as the company's agent in taking charge of the luggage.

And in *Firth* v. *N.E. Ry. Co.*[32] a passenger who carried off another person's portmanteau from the arrival platform by mistake and brought it back to the station after having taken it to his house about a mile distant, was unable to recover damages from the company for his own portmanteau which had disappeared in the meantime. He had not been ready to take possession of his own luggage within a reasonable time of the train's arrival, and at the expiration of that time the company's liability as a carrier had come to an end.

Where, however, the Railway Executive provides porters (as is the ordinary custom) to carry luggage from the train to the taxi-cab or other vehicle which is to take it away, transit does not end before, and the Executive's liability as a carrier continues until, the porters have performed their duty. Therefore, the Executive is responsible if a porter, in carrying a box from the train to a cab, loses it, or has it stolen from him, or injures the box or its contents.[33]

.Though it seems never to have been decided, it must be assumed that when the Railway Executive collects and delivers passengers' luggage from and to the premises of a passenger, transit begins at the moment when the luggage is handed to the Executive's carman, and ends when the luggage is delivered or tendered during the usual cartage hours and at the ordinary place of delivery, *i.e.*, the door-step of the house.

These principles governing the duration of transit in the case of passengers' luggage carried by railway may be applied with caution to public service vehicles. It is probably not very usual to put luggage into a motor coach a long time before it is due to start, and what was held to be a 'reasonable time' in cases like *G.W. Ry. Co.* v. *Bunch* and *Steers* v. *Midland Ry. Co.* might not be held to be so

[31] (1884), 14 Q.B.D. 228.
[32] (1888), 36 W.R. 467.
[33] *Butcher* v. *L.S.W. Ry. Co.* (1855), 16 C.B. 13. See also the cases quoted above.

in the case of a motor coach. The rule that on arrival, delivery on the road (taking the place here of the platform) is the end of transit, and that the carrier is no longer responsible as such after that crucial moment, would seem to be applicable here as in the case of railway traffic.[34]

WHAT IS AND WHAT IS NOT PASSENGERS' LUGGAGE

It is of the greatest importance to carriers to have some trustworthy rules as to what is and what is not passengers' luggage. In the first place they are not obliged to carry any other goods without extra charge. In the second place, if goods are carried which appear to be passengers' luggage but which in fact are not, the carrier may avoid all liability for loss or injury on the ground that he never contracted to carry such goods.[35] Thus, questions as to whether particular articles are passengers' luggage generally arise either where a carrier refuses to carry goods without extra payment on the ground that they are not passengers' luggage, or where goods are lost or destroyed, and the carrier resists a claim for damages on the ground that he did not contract to carry goods which do not come within that category.

Neither the Railways Act, 1921, nor the Road Traffic Act, 1930, gives any guidance as to what is passengers' luggage. It is true that the latter Act, in Sect. 94 (i) empowers the Minister of Transport to make regulations with respect to 'the carriage of luggage and goods on public service vehicles', but the only regulation made under this enactment [36] concerns the carriage of explosive, highly inflammable

[34] The principles governing through carriage of passengers' luggage which were discussed in the previous edition have ceased to be of practical importance with the transfer of all railway undertakings to the Transport Commission.

[35] The difference between 'passengers' effects' and 'goods' is also of importance in connection with the law governing speed limits of road vehicles. The First Schedule to the Road Traffic Act, 1934, defines a 'passenger' vehicle as one 'constructed solely for the carriage of passengers and their effects' and a 'goods' vehicle as one 'constructed or adapted for use for the conveyance of goods or burden of any description'. The borderline is not always easy to find. See *Hubbard* v. *Messenger*, [1937] 4 All E.R. 48.

[36] The Public Service Vehicle (Equipment and Use) Provisional Regulations (No. 2), 1931, r. 11. See also the Public Service Vehicle (Conduct of Drivers, Conductors and Passengers) Regulations, 1936, Sect. 10 (b) and (c), which forbid the carriage as passengers' luggage in Public Service Vehicles of certain types of articles, *e.g.*, loaded firearms or any dangerous or offensive article. Bulky and cumbersome articles and animals may not be brought into or on the vehicle except with the consent of an authorised person, *i.e.* (see Rule 2), an employee of the licensee (including the conductor) on duty upon or in connection with the vehicle. Any passenger contravening these regulations may be removed by the

or otherwise dangerous substances which must be packed in a certain manner prescribed. The Railways Act, 1921, provides that the Transport Tribunal shall have power to determine questions as to the articles or things which may be conveyed as passengers' luggage.[37] From the decisions of the Tribunal there is a right of appeal to the Court of Appeal on questions of law, but there is no appeal on questions of fact.[38] In disputes as to what is passengers' luggage, it will often be very difficult to distinguish between questions of law and of fact. It may be assumed, however, that the Tribunal will have regard to the existing law; therefore the decisions of the past are still important, and, as it does not seem as if, so far, the Tribunal had ever had an opportunity of exercising this jurisdiction, the cases determined by the ordinary Courts of Justice are our only guide towards the solution of this important and difficult problem.[39] There is no reason why the principles developed by the Courts in connection with railway traffic should not be applicable to road traffic as well.

It is possible to extract from the great number of decisions four rules which go a long way towards determining what is and what is not passengers' luggage.

1. Ordinary and personal luggage alone can be regarded as passengers' luggage, and must, therefore, be carried without extra charge. This includes what a passenger takes with him for his personal use and convenience, according to the habits of the class to which he belongs. Thus, his clothing, toilet requisites, and such like clearly come under the description, whilst, on the other hand, a commercial traveller's case of samples is just as clearly not personal luggage. As usual in such cases, the difficulty is to draw the line. The same article may be personal luggage or not, according to the purpose for which it is being carried. Thus, whether a sewing machine is passengers' luggage may depend on whether it is carried by a lady for personal use or by a professional seamstress for her business,[40] and similar considerations might apply to the much-discussed question of the typewriter. 'All articles of apparel,

driver or conductor, or on request of either of them by a police constable (Rule 12 (a)), and may also be liable to pay a fine not exceeding five pounds. (Road Traffic Act, 1930, Sect. 84 (2).) These regulations were made by the Minister of Transport by virtue of the Road Traffic Act, 1930, Sect. 84.

[37] Railways Act, 1921, Sect. 28 (1) (h), and Transport Act, 1947, Sect. 72.

[38] Sect. 26.

[39] See the judgment of McCardie, J., in *Buckland* v. *R.*, [1933] 1 K.B. 329, a customs case. In the course of his judgment, the learned judge made some very important observations on our problem.

[40] *Shannon* v. *Midland G.W. Ry. Co.* (1898), 33 Ir. L.T. Rep. 32, quoted by McCardie, J., in *Buckland* v. *R.*, above.

whether for use or ornament . . ., but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour,[41] 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',[42] would be passengers' luggage, but documents carried in a portmanteau by a solicitor travelling to attend a Court,[43] or theatrical clothing and properties taken as luggage by an actor[44] are not. A musical instrument carried by an amateur would perhaps be passengers' luggage, but a violoncello carried by a musician for his own livelihood was held not to come within that category.[45] Workmen's tools are certainly not passengers' luggage, but here the Transport Tribunal[46] has stepped in on social grounds and enjoined the Railway Executive to carry them up to 60 lbs. in weight in each particular case without extra charge. They are, however, carried only at the owner's risk.

Goods which are carried as merchandise for purposes of trade and business, and not for personal use, are never personal luggage,[47] but if a carrier chooses to accept as passengers' luggage things which he knows do not come under that description, he is responsible for their safety; he has acted 'with his eyes open' and thus waived the legal rules about passengers' luggage, and, in the event of loss, he cannot claim exemption from liability by reason of the nature of the goods.[48]

The Executive issues tickets to commercial travellers, theatrical companies and others on favourable terms, and allow them to take a certain quantity of their business effects without extra charge by

[41] *Quære*, the amateur only, or also the professional artist? See the criticism of the cases in the judgment of McCardie, J., in *Buckland* v. *R.*, above.

[42] *Per* Cockburn, C.J., in *Macrow* v. *G. W. Ry. Co.* (1871), L.R. 6 Q.B. 612, 622.

[43] *Phelps* v. *L.N.W. Ry. Co.* (1865), 19 C.B. (N.S.) 321.

[44] *Gilbey* v. *G.N. Ry. Co.* (1920), 36 T.L.R. 562.

[45] *G.W. Ry. Co.* v. *Evans* (1921), 38 T.L.R. 166. See the point of distinction made by McCardie, J., in *Buckland* v. *R.*, above, between 'the artist who only amuses himself and the artist who hopes to sell his work'. In *Jenkyns* v. *Southampton Steam Packet Co.*, [1919] 2 K.B. 135, it was held that a revolver, ear-defenders, a pair of binocular glasses and a flashlamp carried in a suit-case by an army officer during the war were passengers' luggage.

[46] Part 7 of the Schedule of Standard Charges.

[47] *Belfast and Ballymena Ry. Co.* v. *Keys* (1861), 9 H.L. Cas. 556.

[48] *Per* Cockburn, C.J., in *Macrow's Case*, above, at p. 617; *Cahill* v. *London N.W. Ry. Co.* (1863), 13 C.B. (N.S.) 818; *Page* v. *L.M.S. Ry. Co.*, [1943] 1 All E.R. 458. Similar principles apply where the carrier has accepted for carriage as passengers' luggage goods exceeding the maximum weight admitted for passenggers' luggage.

the train in which they travel, as if such goods were personal luggage. Sometimes a traveller is permitted by the Executive's Regulations to put into the compartment or into the van things which are not luggage, but has to pay for this privilege. Such traffic comes under Sect. 7 of the Railway and Canal Traffic Act, 1854, and the Executive cannot limit its liability with respect to such goods, unless the contract complies with that section. Thus, a notice in the time tables purporting to negative or limit the Executive's liability for commercial travellers' samples allowed to be carried as passengers' luggage is quite ineffective.[49] If there is no contract complying with Sect. 7, such goods are carried under those Standard Terms and Conditions which are applicable to the carriage of merchandise by passenger train or other similar service.[50] The Conditions themselves are substantially identical with those governing carriage by merchandise train, though there are one or two special conditions with regard to the end of transit, and other matters.[51] In practice, however, these Conditions must be read in conjunction with the Railway Executive's 'Book of Regulations' relating to traffic by passenger train or other similar service. These Regulations which have been settled by the Transport Tribunal are incorporated in the relevant Standard Terms and Conditions.[52] They provide, *inter alia,* that the Executive will only be liable for merchandise (as distinguished from luggage) accompanying a passenger if either its carriage by passenger train is permitted by Regulations or if the passenger has declared its nature at the for-

[49] *Wilkinson* v. *Lancashire and Yorkshire Ry. Co.,* above.

[50] Standard Terms and Conditions L (20).

[51] See, for instance, Standard Terms and Conditions L (9) (b) and L (10), above, p. 194. If an owner's risk rate should ever be in operation for such goods, they might be carried under Standard Terms and Conditions M (see M (19)). If the merchandise a passenger is allowed to have with him is perishable, Standard Terms and Conditions G (at carrier's risk, see G (18)) and H (at owner's risk, see H (17)) are applicable. And see as to the application of Standard Terms and Conditions N and O which extend to passengers' luggage in the proper sense of the word, above p. 253.

[52] Standard Terms and Conditions L (21). Since these Regulations are incorporated in Standard Terms and Conditions, they must be 'deemed to be reasonable' in accordance with Sect. 43 (2) of the Railways Act, 1921, and their validity cannot therefore be challenged under the provisions of Sect. 7 of the Railway and Canal Traffic Act, 1854, on the ground that they are unreasonable. It may, however, as suggested, though not decided, by Atkinson, J., in *Page* v. *L.M.S.,* [1943] 1 All E.R. 455 at p. 461, be possible to deny their applicability on the ground that they are not signed by the consignor or his agent in accordance with the Act of 1854. This would only be possible, of course, in so far as the Executive purports to exempt itself from liability for the neglect or default of its servants.

warding station and paid the proper charge. In *Page* v. *L.M.S. Ry. Co.*,[53] it was held that, under these Regulations, the carrier was liable for the loss of merchandise accompanying a passenger which was permitted to be carried by the Regulations, irrespective of whether any charge had been demanded and paid, and irrespective of any declaration. Moreover, and this seems to be the most interesting aspect of this case, the learned judge applied the principle, discussed above, that general words of exemption do not exclude a common carrier's liability for negligence. It was thus implicitly laid down that the Railway Executive is a common carrier of merchandise by passenger train.

2. Not all luggage carried for the passenger's personal use is personal luggage. It must be 'for his personal use or convenience, according to the habits and wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey'.[54] Anything carried for a personal though 'larger or ulterior' purpose, 'such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier'.[55] A rocking horse, 78 lbs. in weight and 44 in. in length, bought by a man as a present for his children, was held not to be personal luggage,[56] nor was a trunk containing six pairs of sheets, six pairs of blankets and six quilts, intended for the use of his household by a passenger who was on his way from Canada via Liverpool to London, where he was about to settle down.[57] One pair of sheets, etc., intended for use on the journey might have been considered as passengers' luggage (in 1871). The article need not be for use on the actual journey, but it must be at least 'for use during the time he is away from home'.[58]

3. But not even everything taken for personal use in connection with the journey is personal luggage. 'In the word "luggage" there is involved the idea of a package or something of that sort. . . . An article which is taken, as it were, loose, as a bicycle is taken, is subject to rather different considerations. . . . There is, in addition to the requirement that they are for some personal use, the requirement that they are for some personal use, the requirement that they must be of the kind of goods that are usually denominated as luggage. . . . It conveys the idea that they are carried about in

[53] [1943] 1 All E.R. 455.
[54] Cockburn, C.J., in *Macrow* v. *G.W. Ry. Co.*, above, p. 258.
[55] Cockburn, C.J., in *Macrow* v. *G.W. Ry. Co.*, above.
[56] *Hudston* v. *Midland Ry. Co.* (1869), L.R. 4 Q.B. 366.
[57] *Macrow* v. *G.W. Ry. Co.*, above.
[58] Channel, J., in *Britten* v. *G.N. Ry. Co.*, [1899] 1 Q.B. 243.

a box or a bag or something of that kind. That is the popular idea conveyed by the word " luggage " '.[59] It was, therefore, held that a bicycle taken by train by a passenger who hopes to mount and ride it as soon as he alights from the train, is not personal luggage,[60] nor is an invalid chair,[61] or a wireless set,[62] and this was also one of the reasons why the rocking horse was not held to be passengers' luggage, for it was said that a smaller toy might have come under that description.

4. The use for which a passenger takes the luggage with him must be his own personal use. If he is taking luggage by train or motor coach for the use of some other person, the carrier is not under the liability of a common carrier if the goods are lost. Thus, where a servant travelled by railway and took with him his own personal luggage, and also a portmanteau belonging to his master, and this portmanteau was lost, it was held that the company was not liable, as it had not contracted to carry the master's luggage, the master not being a passenger on the train.[63]

This does not mean that a passenger can only recover damages for loss of, or injury to luggage which is his own property. If another person's property was lent or otherwise bailed to him for his own personal use in connection with the journey, he may recover for it in his capacity as bailee,[64] and even a servant may recover for goods carried as passengers' luggage, though they belong to the master, as long as they are for the servant's personal use, such as a livery. The decisive point is always the purpose for which the luggage is carried, not the ownership of the luggage.

Moreover, the rule that the carrier is primarily responsible to the owner of the goods carried[65] applies to passengers' luggage as it applies to other articles. If goods belonging to one person are carried as another's personal luggage, either of them may sue the carrier on the ground of loss or injury. Thus an employer was held to be entitled to sue a railway company for the negligent destruction of a livery carried by his servant in his portmanteau for his use, but belonging to the employer. Although there was no contract with the employer, still the company was bound to treat the luggage with reasonable care, and there was a duty upon it not to do any

[59] Channel, J., in *Britten* v. *G.N. Ry. Co.*, above.
[60] *Britten* v. *G.N. Ry. Co.*, above.
[61] *Cusack* v. *L.N.W. Ry. Co.* (1891), 7 T.L.R. 452.
[62] *Per* Atkinson, J., in *Page* v. *L.M.S.*, [1943] 1 All E.R. 455.
[63] *Becher* v. *G.E. Ry. Co.* (1870), L.R. 5 Q.B. 241.
[64] *The Winkfield*, above, p. 239. In *Jenkyns* v. *Southampton Steam Packet Co., Ltd.*, above, part of the articles lost by the army officer had been lent to him by another person; nevertheless he recovered damages.
[65] Above, p. 127.

act to injure another person; therefore the company was liable to the owner of the goods for negligence, although there was no contract with the owner.[66] The servant, of course, might have sued as well.

CLOAK ROOM CONTRACTS

Strictly speaking, the cloak room contract is outside the scope of this book. It has nothing to do with the law of carriage, and is purely and simply a warehousing agreement, though the warehouseman happens to be a carrier at the same time. If carriers by railway and road carriers provide cloak rooms, they do not receive articles deposited there as carriers, but as warehousemen, and subject to any conditions of which the depositor has notice. Such conditions are particularly necessary since the Carriers Act, 1830, does not apply to cloak room agreements, and a special contract is always necessary in order to protect the owner of the cloak room against liability for valuable and breakable goods. Even if the Railway Executive provides the cloak room, the Railway and Canal Traffic Act, 1854, does not apply to articles deposited there. Therefore conditions need not be signed or reasonable to be binding on the depositor.[67] Though it is usual for the Railway Executive to give notice, in its published regulations, that it will not be responsible for luggage left at its stations unless the luggage is formally put under its charge by being deposited in a cloak room, the Railway Executive cannot be ordered by the Transport Tribunal to provide a cloak room as a reasonable facility.[68]

The liability of a carrier by rail or road providing a cloak room is that of a warehouseman at common law. Therefore he is liable for loss, injury or unreasonable delay in redelivery caused by negligence, but not for loss or injury not referable to any negligence on his own part or on the part of his servants. There is, however, probably an exception to this in the case of misdelivery. Misdelivery being an act of conversion,[69] warehousemen appear to be liable if they deliver the goods to the wrong person, whether they are negligent or not. And, since even an innocent mistake does not relieve a cloak room keeper of liability for misdelivery, it would seem that even delivery to a person producing the cloak room ticket is no defence to an action brought by the true owner. If not protected by any condition, a cloak room keeper is probably responsible

[66] *Meux* v. *G.E. Ry. Co.*, [1895] 2 Q.B. 387.
[67] *Van Toll* v. *S.E. Ry. Co.* (1862), 12 C.B. (N.S.) 75.
[68] In spite of the dicta in *Singer Manufacturing Co.* v. *L.S.W. Ry. Co.*, [1894] 1 Q.B. 833, see Leslie, *Law of Transport by Railway*, p. 684.
[69] Above, p. 174.

for the delivery of an article to the wrong person even though the person produced the ticket, and there was no negligence on the part of the cloak room keeper. The Railway Executive has a condition on most of its cloak room tickets that it shall not be responsible for any article which is delivered to the person producing the ticket.

The cloak room keeper's duty is to keep the article in safety, not necessarily to keep it in the cloak room (unless there is a special agreement to that effect), and then any special conditions limiting or excluding the cloak room keeper's liability continue to operate while the deposited article is kept outside the cloak room.

This is well illustrated by the case of *Gibaud* v. *G.E. Ry. Co.*,[70] where a bicycle was deposited in a railway cloak room and for want of a convenient space inside the cloak room was left for a considerable time outside on the platform, and, while standing there, was stolen. The cloakroom ticket bore a condition that the company would not be 'in any way' responsible for the loss of any article of value over £5, unless a higher value were declared at the time of delivery and a higher amount paid. The bicycle was alleged to be worth £15 15*s.* 0*d.*, but no declaration had been made, and the company was held to be protected by this condition even if the loss were due to negligence occurring while the bicycle was on the platform.

The liability for articles kept in a cloak room chiefly depends on the conditions of the deposit, at least in the case of railway cloak rooms. When an article is put into a cloak room, it is the custom for the railway servants to hand the depositor a printed ticket containing the conditions of the contract. If reasonable notice is given to the depositor of these conditions,[71] and this will be the case as a rule, the depositor will be bound by them. The conditions invariably limit the cloak room keeper's liability for parcels of over a certain value, unless a sum beyond the usual small fee is paid. Such conditions are valid,[72] and are usually widely interpreted by the Courts.

Thus, it was held in *Pratt* v. *S.E. Ry. Co.*[73] that a condition relieving the company from responsibility 'for any package exceeding the value of £10' was a protection against a claim for damages on the ground that a gun worth more than £10 was injured while in the cloak room by the negligence of the company's servants. And in *Skipwith* v. *G.W. Ry. Co.*,[74] where, according to the condition on the cloak room ticket, the company was 'not to be answerable for loss or detention of, or injury to, any article or property exceeding the value of £5' unless a special declaration was

[70] [1921] 2 K.B. 426.
[71] As to what is reasonable notice, see p. 332.
[72] Possibly with the exception of conditions protecting the Executive from liability for wilful default.
[73] [1897] 1 Q.B. 718.
[74] (1888), 59 L.T. 520. See *Lyons & Co.* v. *Caledonian Ry. Co.*, [1909] S.C. 1185.

made and insurance money paid, it was held that loss included misdelivery and that the company was not liable for the value of a bag worth fifty guineas which had been handed by mistake to the wrong person.

The cloakroom contract printed on the ticket usually provides for the payment of certain charges in case an article deposited is left in the care of the cloak room keeper for longer than a certain time. The cloak room keeper has his warehouseman's lien upon the article deposited for such charges; this, however, in the absence of a special agreement, does not give him a right of sale, nor a right to retain the article for any charges except those due for this particular article. No charges can be made for the time after a demand for redelivery has been made, and while the article is kept back by the cloak room keeper in the exercise of his lien, *i.e.*, in his own interest.

Unlike the common carrier and in the same way as the private carrier[75] the cloak room keeper can only exercise his lien if the person who handed him the goods had at that time a right to deal with the article. If a thief deposits a stolen article, the cloak room keeper cannot assert his lien against the rightful owner. But it is sufficient if the person depositing the goods was entitled to deal with them at the time when they were deposited, and it is not necessary that the depositor should still be entitled to the article when it is redeemed by the owner.

In *Singer Manufacturing Co.* v. *L.S.W. Ry. Co.*,[76] a man was in possession of a sewing machine belonging to the Singer Manufacturing Co. under a hire-purchase agreement at a weekly rent. He deposited the article in a railway cloak room at a moment when he owed no rent, but afterwards he made default in the weekly payments so that the owners were entitled to have it back, yet it was still left in the cloak room and remained there for many months. When the owners found out where the sewing machine was and demanded it from the railway company, it was held that the railway company was entitled to the lien against the owners for their charges, since the depositor had been entitled to deal with the machine when it was deposited. Thus the railway company could retain the machine till its charges were paid, but it would have been otherwise if the depositor had already been in arrear with his rent when he handed the machine to the railway company, and if the owners had terminated the hire-purchase agreement.[77]

[75] Above, p. 245.
[76] [1894] 1 Q.B. 833.
[77] *Bowmaker Ltd.* v. *Wycombe Motors Ltd.*, [1946] 2 All E.R. 113.

PART THREE

THE CARRIAGE OF PERSONS

CHAPTER 23

THE LAW OF NEGLIGENCE

GENERAL

AFTER having dealt with goods traffic by rail and road, we must now summarise the rights and duties of those who make it their business to carry passengers for hire or reward by railway, by motor bus and by motor coach. We shall concentrate our attention on the carriage of passengers at single fares and leave out of account what is known in road traffic law as 'contract carriage', *i.e.* the letting out of the vehicle as a whole or at a lump sum. We are thus not going to deal either with taxicabs or with those larger vehicles (adapted to carry eight passengers or more) for the use of which on occasions like funerals, football matches, etc. the operator receives one single payment and which, because of their size, are classified together with buses and coaches as 'public service vehicles'.

We have seen that a distinction is made in the law of carriage of goods between common carriers and private carriers. The former, but not the latter, are under a duty to accept consignments and absolutely liable for the safety of the goods in transit. This distinction has its counterpart in the law of carriage of persons, but it leads to very different consequences. A common carrier of passengers, *i.e.* a carrier who holds himself out as being prepared to carry all and sundry from one place to another in his vehicles, must not refuse to carry a particular person unless he has reasonable grounds for doing so. In so far there is a close parallel between the duties of the common carrier of passengers and those of the common carrier of goods. 'Both classes of carriers . . . are subject to the obligations which arise from their exercising a public profession which requires them to carry for all and sundry subject to the obvious limiting conditions'.[1] But while there is a great deal of similarity between the duty not to refuse passengers and the duty

[1] *Per* Lord Wright, delivering the judgment of the Privy Council in *Ludditt* v. *Ginger Coote Airways Ltd.*, [1947] A.C. 233. That it is legitimate to speak of a 'common carrier of passengers' was laid down by the Court of Appeal in *Clarke* v. *West Ham Corporation*, [1909] 2 K.B. 858. *Ludditt's Case* throws a great deal of doubt upon the correctness of the decision in *Clarke's Case*, but it expressly confirms the correctness of the premiss of

not to refuse consignments, there is nothing in the law of carriage of persons to correspond to the insurer's liability which the common law imposes upon the common carrier of goods. The use of the term 'a common carrier of passengers' must not mislead the reader. It refers to the duty to carry, but in no way to the measurement of the carrier's liability towards his passengers. The common carrier of passengers resembles the common carrier of goods in the conditions under which he must enter into contracts of carriage, but not in the type of liability implied in the terms of those contracts. Stage coach proprietors and other carriers of persons were never considered in law to be insurers of their passengers, and neither the Railway Executive nor a road vehicle owner are ever absolutely liable for the safety of their passengers.[2] They are, however, bound to use the greatest amount of care and forethought which is reasonably necessary to secure the safety of the persons whom they undertake to convey. The failure to use such care and forethought amounts to negligence, and carriers of passengers by rail or by road are liable in damages if injury is caused through negligence on their part or on the part of any of their servants while acting within the scope of his employment.

The law of negligence is the basis on which the liability of carriers of passengers rests. Negligence is a tort, *i.e.*, it is wrongful conduct which gives rise to liability for damages but which does not necessarily consist in a breach of contract. We shall see that it is not necessary to have made a contract with the carrier in order to claim the rights of a passenger. The carrier is under an obligation to maintain the requisite standard of care and he owes this duty to all those who are lawfully using his vehicle, no matter whether they have been admitted on the basis of a contract of carriage as fare paying passengers or whether the carrier has chosen to allow them to travel with a 'free pass' or otherwise as 'licensees' without payment. All these persons are 'passengers' in the eyes of the law, and to each passenger the carrier is liable to maintain a standard of

the earlier decision. In other words: the Privy Council has reaffirmed the principle that a common carrier of passengers is under a duty to carry, but it has rejected the consequence (drawn in *Clarke's Case*) that this duty to carry restricts the carrier's power to limit his liability. For older cases see Story on *Bailments*, 9th ed., p. 580.

[2] In one exceptional case a public service vehicle owner is liable for the consequences of injuries to his passengers, whether or not he or his driver is at fault. By virtue of Sect. 16 of the Road Traffic Act, 1934, he is liable to pay to a registered medical practitioner or to a hospital certain specified sums for emergency treatment of passengers injured on the road, but he can recover sums so paid from any person whose wrongful act was a cause of the accident, e.g. from the driver of another car who was at fault. For details see Sects. 16 and 17 of the Act.

care. It is said that this standard of care consists in doing what a reasonable man would do and in not doing what a reasonable man would not do in the circumstances. This is a rather vague formula which derives its meaning from the interpretation it has been given by the Courts in connection with the duties of a carrier. Examples will be given in due course, but it should be clear from the outset that this liability for negligence is something very different from the absolute liability of an insurer who must pay damages irrespective of any fault on his part or on that of his servants. The difference may be illustrated by two cases, one taken from railway law and the other one from the law of road transport.

In the leading case of *Readhead* v. *Midland Ry. Co.*[3] a passenger was injured in an accident caused by the breaking of the tyre of a carriage wheel. The company was in a position to prove that the breaking was due to a latent defect in the tyre which was not attributable to any fault on the part of the manufacturer and which could not have been detected before the breaking. It was held that the company was not liable.

In *Mottram* v. *South Lancashire Transport Co.*[4] a passenger on a trolley bus was on the point of alighting at a request stop when the bus started to proceed and the passenger was thrown and injured. The starting signal had been given by another passenger who was leaving the bus and had failed to notice the plaintiff. The conductress was on the upper deck collecting fares. It was held that she was under no duty to go down to the platform and see that the passengers alighted in safety. The action was dismissed.

The point in these (and in many other) cases was that the carrier and his servants had done all that the 'reasonable' man would have done. 'It is sufficient that the carrier should adopt the best apparatus, kept in perfect order and worked without negligence by the men employed. If he does that, he ought not to be responsible for the consequences of an extremly rare and obscure accident which cannot, in a business sense, be prevented by any known means'.[5]

Negligence may consist of an act as well as an omission. To drive at an excessive speed or on the wrong side of the road may be negligence, and to omit to keep a proper look-out or to light a motor vehicle may be negligence as well. For a signalman it may be as negligent to give the 'go' sign as it would be not to give the 'stop' sign. A bus conductor may be equally negligent in starting

[3] (1869), L.R. 4 Q.B. 379. For a recent analysis of the importance of this case see the comments of Lord Wright in *Ludditt* v. *Ginger Coote Airways Ltd.*, above.

[4] [1942] 2 All E.R. 452. Cf. the criminal case of *Askew* v. *Bowtell*, [1947] 1 All E.R. 883, which elucidates the duties of the driver and of the conductor of a tramcar with regard to compulsory stopping points.

[5] *Newberry* v. *Bristol Tramways Co.* (1912), 107 L.T. 801.

the vehicle while an intending passenger is on the point of entering as he may be in omitting to stop it at a compulsory stopping point. The reasonable man does not drive at a dangerous speed but neither does he fail to look about when he arrives at a cross-roads.

Any person to whom the carrier owes a duty of care—and this is true of every passenger—and who is injured by his negligence can claim damages. This means that he can claim compensation in money for any damage he has suffered which is a natural result of the carrier's negligence. It must not be too remote, *i.e.*, it must be capable of being regarded as a normal consequence of the negligent conduct. For example, if the driver of a bus drives down a busy road at a furious speed, it is a natural consequence of his act that the bus collides with another vehicle and that one of his passengers is injured. The owner of the bus would be responsible for this negligent act of his driver and would have to compensate the passenger for his medical expenses and for other costs incurred in restoring him to health. But if, in consequence of his injuries, the passenger misses an appointment and loses a valuable contract which he would have obtained had he kept the appointment, then the owner of the public service vehicle could not be made liable for the profit the passenger loses, because these damages would be held to be too 'remote'. The driver's act would be as negligent in the one case as in the other. But the consequences for which carriers can be made responsible must be limited, otherwise grave injustice would ensue.

Very definite duties are imposed upon road carriers with regard to the construction, equipment, weight, loading, etc. of their vehicles, and the Railway Executive is subject to similar obligations with regard to its rolling stock, its engines, the permanent way, the signals and anything else used in the carrying on of traffic. Yet, as the case of *Readhead* v. *Midland Ry. Co.*, above, shows, a carrier does not warrant to his passengers that his rolling stock is sound. He undertakes to take due care and to use a high degree of skill and foresight in carrying his passengers safely. The utmost a carrier by land is expected to do is to apply all possible skill in the testing of his material and in the equipment and handling of his vehicle. If an accident occurs owing to a latent defect which human skill could neither have prevented nor detected in spite of all due care having been applied, then the carrier cannot be made liable. Nor can he be made responsible for the consequences of an accident due to the interference of a mischievous or officious outsider which his own servants were not in a position to discover.[6]

[6] Before the coming into force of the Transport Act, 1947, it was held that

This state of the law, however, raises in practice a formidable problem.' The rule is that a carrier cannot be made responsible for personal injuries suffered by his passengers, unless negligence can be asserted and proved. If this rule was strictly applied it would make the position of the injured passenger (or of his relatives if the accident was fatal) very difficulty indeed. How can an ordinary man be expected to disentangle the technical intricacies of the railway system, how can a passenger in a motor coach or bus find out precisely what mistake made by the driver or conductor was the cause of the accident? A law which would saddle the plaintiff in these cases with the full burden of proof would defeat its own purpose, since very few plaintiffs could ever succeed in proving their case. Hence, in order to cope with this difficulty, judges have laid down the principle that 'where a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care'.[7] This principle is usually quoted as the maxim 'the thing speaks for itself', or more frequently, in Latin: *res ipsa loquitur.* Accidents are said to 'speak for themselves' if, at first sight, they look as if they had been caused by some negligence on the part of the carrier's servants, so that it is for the carrier to exonerate himself and not for the passenger or his relatives to prove negligence.[8]

In railway law this doctrine is of the utmost importance. If two trains collide,[9] or if an axle or a wheel breaks, or if a train is

the carrier's liability with regard to the fitness of the vehicles he used was less extensive when they did not belong to himself. With the transfer of most 'privately owned' wagons this point has lost much of its importance. Cases in point were *Caledonian Ry. Co.* v. *Warwick,* [1898] A.C. 216,—a case which must be read in the light of the explanatory remarks made in the House of Lords in *Oliver* v. *Saddler and Co.,* [1929] A.C. 584,—and *Richardson* v. *G.E. Ry. Co.* (1876), 1 C.P.D. 342.

[7] *Per* du Parcq, L.J., in *Easson* v. *L.N.E. Ry. Co.,* [1944] 1 K.B. 421; this definition must now be preferred to that given by Brett, J., in *Gee* v. *Met. Ry. Co.* (1873), L.R. 8 Q.B. 161, at p. 175, quoted in the previous edition.

[8] '*Res ipsa loquitur*', as was pointed out by du Parcq, L.J., in *Easson's Case,* above, may have two different meanings: 'Sometimes what is meant by this figure of speech is that certain facts are so inconsistent with any view except that the defendant has been negligent that any jury which, on proof of these facts, found that negligence was not proved would be giving a perverse verdict. Sometimes the proposition does not go as far as that but is this, that on proof of certain facts an inference of negligence may be drawn by a reasonable jury although the precise circumstances are not fully known'. We are mainly concerned with the second type of case and less with the first type.

[9] *Skinner* v. *L.B. and S.C. Ry. Co.* (1850), 5 Ex. 787.

derailed,[10] all the plaintiff has to do is to prove this fact, and it will be presumed that there was negligence. The burden will then be on the Railway Executive to disprove negligence, if possible. 'When an accident happens on the railway, as the railway system and the trains thereon are entirely under the control of the railway company, it is for them to explain, if they can, how the accident happened without fault on their part'.[11]

This distribution of the burden of proof should not be mixed up with the absolute liability of a common carrier of goods: Even in the most unlikely circumstances it remains open to a carrier of passengers to explain the cause of the accident and to show that he and his men were not to blame for it.

In *Hart* v. *Lancashire and Yorkshire Ry. Co.*[12] a collision between an engine and a train belonging to the same company was indirectly caused by the fact that an engine driver was seized with a sudden fit and fell across the footboard of the engine in a state of insensibility. The defendants were not liable for the consequences of the accident. The decision of the Court of Appeal in *Ryan* v. *Youngs*[13] shows a very similar situation in connection with road traffic and an application of the same principles.

Great difficulties have arisen in the application of the principle *res ipsa loquitur* to accidents caused by the door of a compartment or of a railway coach flying open. There is no doubt that it is one of the duties of a carrier by rail towards his passengers to see to it that the doors of a train are properly shut when it leaves a station.

In a recent case[14] a passenger on the District Line of the London Underground system (on which there are trains without automatic doors) recovered damages for injuries received when he fell out of the open door near which he was standing. He held on to the rails provided for the purpose, but lost his balance when the train swayed and jerked between two stations. It was no answer to his allegation of negligence that during rush hours trains could not be allowed to stop at stations for more than thirty-five seconds and that consequently the Board's servants had no time to make sure that the doors were closed.

It is equally clear that the carrier is liable if a door which has been shut flies open in the course of the journey owing to faulty construction or want of repair of the fastening. He would not,

[10] *Dawson* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1862), 5 L.T. 682.

[11] *Per* Goddard, L.J., in *Easson* v. *L.N.E.R.*, above. In *Readhead* v. *Midland Ry. Co.*, above, it was, of course, for the railway company to show that there was a hidden flaw in the material and not for the plaintiff to show that there was no such hidden flaw.

[12] (1869), 21 L.T. 261.

[13] [1938] 1 All E.R. 522.

[14] *Brookes* v. *L.P.T.B.*, [1947] 1 All E.R. 506.

however, be liable if the door was opened by a stranger over whom he had no control. If the door of a carriage flies open while the train is in motion, does this fact 'speak for itself'? Is it by itself evidence of negligence in the fastening of the door?

In *Gee* v. *Metropolitan Ry. Co.* (1873)[15] this question was answered in the affirmative. A passenger stood up to look out, and got hold of a bar across the window. The door immediately flew open, and the passenger fell out and was injured. It was held that 'any passenger in a railway carriages who rises for the purpose either of looking out of the window or of dealing with, and touching, and bringing his body in contact with the door for any lawful purpose whatever, has a right to assume and is justified in assuming that the door is properly fastened; and if by reason of its not being properly fastened his lawful act causes the door to fly open, the accident is caused by the defendants' negligence'.[16]

Again, in *Inglis* v. *L. M. and S. Ry. Co.*[17] a passenger fell out of the open door of a compartment and all his fellow-passengers in the compartment swore that no one in the compartment had interfered with the lock since the beginning of the journey. The Court drew the inference that the door had not been properly fastened when the train left the station.

Modern technical developments, however, may enable a carrier of passengers to do what in former days would have been almost impossible: to show that the flying open of a door does not permit an inference of negligence on the part of his men, although the cause of the mishap cannot be fully explained.

This was shown by the important decision of the Court of Appeal in *Easson* v. *L.N.E.R.*, above. A five-year-old boy fell out of the Scottish Express from Edinburgh to London. The accident happened a few miles south of Grantham. It was impossible to explain how the door of the corridor coach had come to be open. In the normal course of things it was out of the question for any one to use this particular door at either of the two stopping points through which the train had passed immediately before the accident because at both stations, York and Grantham, the platform was on the other side, and at York examiners had walked along the side of the train at which the door was. The door was one of those modern doors which cannot be opened from inside and it was fitted with a safety catch which would have caught the door, on the assumption—the worst from the defendants' point of view—that the door was not fully shut when the train left Grantham. The Court was satisfied by expert evidence that it was impossible for the door, if caught by the safety catch, to come open owing to the vibration of the train. On the other hand any of the many people walking up and down the train might have opened the door (although the little boy himself could not have done so). The door was not therefore in the full sense under the company's control after the train had left Edinburgh. The cause of the accident remained a mystery, but the Court

[15] L.R. 8 Q.B. 161.

[16] See also *Richards* v. *G.E. Ry. Co.* (1873), 28 L.T. 711. Contributory negligence may be important in this context. See below, p. 279.

[17] [1941] S.C. 551.

refused to apply the doctrine *res ipsa loquitur*, on the ground that the company had discharged its duty to provide proper inspection and safety measures. This duty remains what it always was, but modern technical appliances throw a new light on accidents of this kind. Where they are used, the balance of probability is no longer necessarily in favour of negligence on the part of the carrier. The action for damages was dismissed.

In most of the major railway accidents the rule *res ipsa loquitur* will continue to operate in favour of the passenger, but it is by no means the same with regard to road traffic. There is no presumption that a collision between a public service vehicle and another car, motor cycle or bicycle is due to the bus or coach driver's fault, and if a passenger in a bus or coach is injured in a collision, he cannot recover damages from the owner of the public service vehicle unless he proves that its driver had been negligent. On the other hand, if a passenger suffers injuries owing to the conductor prematurely giving the starting signal or owing to his failure to stop the bus at a compulsory stopping point, there will clearly be a *prima facie* case against the conductor's employer. It has also been held that the unexpected turning over of a car on the road was in itself evidence of negligence on the part of the driver, and the same applied in a case in which a vehicle struck or mounted the pavement. If a passenger was injured in an accident in which any of these things had happened to the vehicle in which he was riding, the rule that the 'thing speaks for itself' would be on his side.[18] Again, if the accident occurred at a moment when the vehicle was on the 'wrong' side of the road, it would be for the owner of the public service vehicle to prove that, in spite of appearances, his driver had not been negligent. The situation would be the same if a passenger was injured owing to the bus or coach running into an obstacle, because in that event the inference will be drawn that the driver failed to live up to one of his most fundamental duties, *viz.*, always to keep a proper look-out on the road so as to be able to see what in normal circumstances can come across his way. This applies to obstacles overhead as much as it applies to those on the ground.

At least two cases have come before the Courts in recent years in which a passenger riding on the top of a bus was injured by glass splinters from a window broken by the branches of a tree overhanging the road. It was held on both occasions that the driver had been negligent and that his employer was liable to pay damages to the injured passenger. The first case [19] happened in broad daylight, and the L.P.T.B.'s servant had clearly

[18] See on these points *Halliwell* v. *Venables* (1930), 143 L.T. 215; *Hunter* v. *Wright*, [1938] 2 All E.R. 621; *Laurie* v. *Raglan Building Society Ltd.*, [1942] 1 K.B. 452.

[19] *Radley* v. *L.P.T.B.*, [1942] 1 All E.R. 433, 166 L.T. 285.

neglected that reasonable care which a carrier owes to his passengers, the more so, since the same sort of thing had happened before on the same spot though without any breaking of windows. Had the Board been able to point to special circumstances, *e.g.* a high gale, the decision might have been the other way. The facts of the second case [20] touched the fringe of those 'special circumstances' which might have exonerated the driver. It was a borderline case. The overhanging of the tree was slight, the branches which caused the accident protruded over the kerb of the road only by a few inches. The accident happened at night and a brilliant street lamp made it very difficult for the driver to see the obstacle. The Master of the Rolls saw no 'ground for holding that a driver who chooses to drive close to the kerb is making an unreasonable use of the highway'. In view of his duty to observe the road he could not 'be blamed for not casting his eye up to the upper part of this tree and forming a sufficiently accurate estimate on the question of the slight overhang'. Yet, since he *knew* of this potential source of danger, it was his duty to give the tree a wide berth. These decisions confirm the view taken in earlier cases that the driver need not reckon with quite abnormal things. Many years ago it happened, for instance, that a passenger travelling on the uncovered top of a bus was struck by an iron projection from a street lamp. This was held to be something quite out of the ordinary which the driver was under no duty to anticipate, and the passenger's action against the bus company failed.[21]

There is, then, a *prima facie* case against the owner of a public service vehicle if the driver has had the misfortune of hitting an obstacle, but that case can be rebutted. It is not conclusive against him, whether the accident happened in daylight or at night, and whatever was the nature of the object with which the bus or coach collided. At one time it used to be thought that the employer of a driver who at night ran into a stationary vehicle could not possibly have any defence at all. He could not, it was said, escape the charge of negligence, because his servant was to blame either for not keeping a proper look-out or for having driven so fast as to make it impossible for himself to stop his vehicle in time. But this theory of the 'inevitable dilemma' must now be regarded as obsolete. Each case must be decided on its own facts. They may be such as to exonerate the driver.[22]

[20] *Hale* v. *Hants and Dorset Motor Services Ltd.*, [1947] 2 All E.R. 628, a decision of the Court of Appeal.

[21] *Hase* v. *L.G.O.C.* (1907), 23 T.L.R. 616. See also *Simon* v. *L.G.O.C.* (1907), 23 T.L.R. 463, and *Trinder* v. *L.G.O.C.* (1919), 35 T.L.R. 291.

[22] The 'dilemma' theory was based upon dicta of Swift, J., in *Tart* v. *G. W. Chitty and Co. Ltd.*, [1933] 2 K.B. 453, and of Scrutton, L.J., in *Baker* v. *E. Longhurst and Sons, Ltd.*, [1933] 2 K.B. 461. It received a first blow in the subsequent decision of the Court of Appeal in *Tidy* v. *Battman*, [1934] 1 K.B. 319, and was rejected by the Privy Council in the common law case of *Stewart* v. *Hancock*, [1940] 2 All E.R. 427. Finally, the Court of Appeal gave it the *coup de grace* in *Morris* v. *Luton Corporation*, [1946] 1 K.B. 114, and the Master of the Rolls, discussing the alleged 'principle' 'that a person riding in the dark must be

It often happens that a person claiming damages for alleged negligence is in a position to show that the defendant has broken a duty imposed upon him by statute. This is of great importance in connection with road traffic, and sometimes also with respect to claims of railway passengers. Where it can be proved that a carrier has violated one of those numerous statutory rules with which he and his servants must comply, the plaintiff has usually made a *prima facie* case of negligence. This is, in effect, a rule closely connected with the principle *res ipsa loquitur*, but, in view of its special significance in the present context, it is useful to discuss it separately.

BREACH OF STATUTORY DUTIES

The Transport Commission and the Executives which act as its agents are subject to numerous statutory duties. So are all operators of public service vehicles, whether they are local authorities or commercial companies or public corporations. It is only necessary to remind the reader of a few examples taken from road traffic law. The carrier is under definite obligations with regard to the selection of his staff: the driver must have passed a test and have obtained a driving licence,[23] and the driver of a public service vehicle must have acquired a special licence [24] and he must not be under twenty-one.[25] He must not have been disqualified for a previous offence,[26] and, of course, he must not be allowed to drive when under the influence of drink or drugs.[27] There are stringent provisions with regard to the construction and equipment of the vehicles [28] and with regard to their use, the speed at which [29] and to the places where [30] vehicles may be driven. These examples might be multiplied. The violation of any of the duties imposed by these and other provisions upon the carrier and his servants may usually lead to criminal proceedings and to punishment. But this

able to pull up within the limits of his vision', expressed the hope that it 'may rest peacefully in its grave'. See also *Clark* v. *Brims*, [1947] 1 All E.R. 242.

[23] Road Traffic Act, 1930, Sect. 4; Road Traffic Act, 1934, Sect. 6.

[24] Road Traffic Act, 1930, Sect. 77; Transport Act, 1947, Sect. 117. This licence is granted by the Licensing Authority for Public Service Vehicles and in the Metropolitan Traffic Area by the Commissioner of Police.

[25] Minimum age provisions in Road Traffic Act, 1930, Sect. 9 and Sect. 77 (2).

[26] Road Traffic Act, Sect. 6 and 7; Road Traffic Act, 1934, Sect. 5.

[27] Road Traffic Act, 1930, Sect. 15.

[28] Road Traffic Act, 1930, Sects. 30 and 94, and Regulations made thereunder.

[29] Road Traffic Act, 1930, Sect. 10; Road Traffic Act, 1934, Sects. 1 and 2, and First Schedule.

[30] Road Traffic Act, 1930, Sect. 14.

does not necessarily mean that the carrier is civilly liable to the passenger if he or his men have failed to comply with one of the statutory regulations enacted with a view to protecting the public interest. They do not impose upon the carrier an absolute liability towards his passengers. The importance of the statutory regulation of rail and road transport for claims made by passengers injured in accidents is that their violation constitutes *prima facie* evidence of negligence, no more. Whatever may be the position in criminal proceedings, in an action for damages it is open to the carried to show that he and his men have done all they could do to fulfil their statutory duties. If he can satisfy the Court that, despite his efforts, adverse circumstances prevented him from doing what the statute required him to do, he will not be liable to pay damages. A passenger cannot rely upon the statute as a foundation for his claim, but, by proving its violation, he can make a case of negligence which the carrier must answer. In other words: in civil proceedings for damages on the ground of negligence a breach of statutory duties gives rise to an application of the rule *res ipsa loquitur*. If, *e.g.*, a passenger in a motor coach was injured in an accident and it is admitted or proved that the accident was caused by the faulty condition of the brakes, the carrier will have a case to answer. He may still be able to satisfy the Court that he had done all in his power to maintain the brakes of the vehicle in the condition required by statute, *e.g.* that the coach had recently been overhauled by a reputable firm of repairers, but the burden of proof rests on him, and if he cannot discharge it, he will be liable in damages for negligence. Thus, the provisions of the statute and of the statutory regulations 'can be used as a guide to see whether there ought to be a finding of negligence or no negligence'.[31] In the law of inland transport breach of statutory duties is not, as a rule, as such the basis for a claim for damages, but only a *prima facie* case of negligence.[32]

[31] *Per* Greer, L.J., in *Croston* v. *Vaughan*, [1938] 1 K.B. 540, at p. 551.

[32] There is thus an essential difference between the operation of statutes such as the Road Traffic Acts and statutes regulating the relation between employers and employed such as the Factories Acts. A breach of the latter gives rise to a claim for damages on the ground of violation of statutory duty. The principal authority for the statement in the text is the decision of the Court of Appeal in *Phillips* v. *Britannia Hygienic Laundry*, [1923] 2 K.B. 832, which has been followed on numerous occasions. See, *e.g.*, *Stennett* v. *Hancock*, [1939] 2 All E.R. 578, where the action against the lorry owner was dismissed, but the repairers were held liable on the principle of *Donoghue* v. *Stevenson*, [1932] A.C. 562. A recent and instructive example is provided by the decision in *Badham* v. *Lambs, Ltd.*, [1946] 1 K.B. 45, which refers to the statutory prohibition directed against the sale of a car the brakes of which do not comply with regulations. The view submitted as correct in the text is shared by Leslie, pp. 483–484, and by Mahaffy and Dodson, p. 647.

These principles are of importance in many cases in which passengers are injured in accidents caused by the non-compliance with regulations. Most of these regulations are, for the purposes of civil liability, only standards of conduct. Their observance does not neccessarily exclude, nor does the non-observance necessarily involve, liability in damages. For example, there are elaborate provisions concerning the lighting of vehicles.[33] If a vehicle is equipped with lights in accordance with these provisions, that does not preclude a passenger injured in an accident from relying on the insufficiency of the lighting, though he would have to prove it. On the other hand, if the lights were not up to the statutory standard the operator of the vehicle might still try to convince the Court that in the circumstances the use of those lights did not constitute negligence.

Every railway train carrying passengers and travelling more than twenty miles without stopping must be equipped with means of communication between the passengers and the personnel in charge of the train.[34] If a passenger is injured in a railway accident and can show that it would have been prevented if there had been a communication cord, he has established a strong *prima facie* case of negligence against the Railway Executive, but not a conclusive case.[35]

The Road Traffic Acts, 1930 and 1934, provide for speed limits varying with the type of vehicle and the locality where it is driven. To an action for damages brought by a passenger of a public service vehicle against its owner on the ground of injuries suffered in an accident it is no defence at all that the driver had not overstepped the speed limit. On the other hand, even if he has done so (and therefore committed a criminal offence), his employer may still escape civil liability for the consequences of an accident. He may,

[33] Road Transport Lighting Act, 1927. The principle of *Phillips* v. *Britannia Hygienic Laundry*, above, was applied to this statute in *Clark* v. *Brims*, [1947] 1 All E.R. 242. See also *Wintle* v. *Bristol Tramways and Carriage Co., Ltd.* (1917), 117 L.T. 238.

[34] Regulations of Railways Act, 1868, Sect. 22.

[35] This, it is submitted, is the effect of *Blamires* v. *Lancashire and Yorkshire Ry. Co.* (1873), L.R. 8 Ex. 283, although the case is somewhat inconclusive. Brett and Grove, JJ., emphasised that the non-compliance with the statutory provisions was only evidence of negligence and that the jury were only entitled to find for the plaintiff because it was shown that railway companies were in the habit of applying the regulations. Blackburn, J., however, dealt with these regulations much in the same way in which the House of Lords deals with industrial legislation in cases such as *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152, that is he regarded the breach of the statutory duty as a cause of action in itself.

perhaps, be able to show that his vehicle collided with another car coming around a corner at great speed and that the speed of his own vehicle was not such as to prevent the driver from pulling up in time to avoid obstacles with which it was his duty to reckon. It would be for him to allege and prove all the facts relevant to this defence, but the violation of the statutory obligation, though imposing upon him the burden of exonerating himself, would not as such make him liable. The standards set up for the protection of the public in general differ from those governing the question of negligence in a case between passenger and carrier. The first standard applies to criminal responsibility, but in relation to civil liability the compliance or non-compliance with the statutory speed limit is only a rebuttable indication whether or not the driver has done his duty, and no more.

There is, however, one exceptional case in which the Courts have taken a different view of road traffic legislation. This is the breach of the statutory obligation imposed upon owners of motor vehicles to take out an insurance policy covering third party risks.[36] They must not permit any person to use the vehicle unless a third party risk policy is in force with regard to that person. The subject is of very great importance in practice, though not primarily in connection with public service vehicles. It is nevertheless relevant in the present context, because the statutory obligation to insure extends to the operator's liability to his passengers. The Courts have held that the owner of a motor vehicle who allows an uninsured person to drive makes himself absolutely liable to all those suffering injury or damage as a result of the uninsured driver's negligence. This was laid down by the Court of Appeal in *Monk* v. *Warbey*[37] and approved by the House of Lords in the Scottish case of *McLeod* v. *Buchanan*.[38] A violation of the duty to insure is not merely evidence of negligence. Negligence or no negligence, he who permits someone else to drive his car is liable to third persons if the driver was not insured. He may have every reason to believe that the person in charge of the car was an experienced and careful driver, he may even be under the mistaken impression that his own or the driver's own policy covers him while in charge of the owner's car, and he may have every reason to believe that this is the case. He will nevertheless be liable to third persons injured as a result of

[36] Road Traffic Act, 1930, Sect. 35. See below, p. 319.

[37] [1935] 1 K.B. 75.

[38] [1940] 2 All E.R. 179. The speech of Lord Wright which may now be regarded as the leading authority on the subject contains an analysis of what is meant by 'permitting' the use of a vehicle.

the driver's negligence. This is a case of liability for breach of statutory duties in the strict sense of the word.

It is possible that there may be some other examples of statutory provisions affecting passenger transport which give rise to this type of civil liability. But they do not concern the rights of passengers against carriers. Thus, the rules concerning pedestrian crossings made under Sect. 18 of the Road Traffic Act, 1934, give rise to a civil liability enforceable by pedestrians who suffer injury as a result of their violation.[39] But a passenger injured in an accident could not simply invoke these rules as a basis for a claim to damages even if he was in a position to show that the accident was caused by the driver having set them aside. He could only use this breach of a statutory obligation as evidence of negligence. Again, in *Buxton* v. *North Eastern Ry. Co.*,[40] a passenger was injured through the collision of a train with a bullock which strayed on the line from an adjoining field by breaking through a fence. The fence was defective, but the defect was undiscoverable, in fact the fence had been lately repaired and was apparently in good condition. It was argued that something like an absolute liability to keep the fence in order was imposed by a statutory provision [41] on the company (now the Executive) owning the permanent way. It was, however, said by the Court that though there might perhaps be such an absolute liability towards adjoining landowners, for whose protection this statutory rule was made, there was certainly no such absolute liability in favour of the passenger who could only rely on a violation of this rule as evidence of negligence rebuttable by the carrier.

It should, finally, be noted that the Highway Code [42] was published by the Minister of Transport under the Act only in order to give instructions for the guidance of road users of all kinds. It is not a body of rules of law at all, but failure to observe any of its provisions may be relied upon in civil as well as criminal proceedings with a view to establishing (or, as the case may be, negativing) liability.[43] Thus the Highway Code (No. 21) says that the driver of a vehicle should keep well to the left unless about to

[39] *Sparks* v. *Edward Ash Ltd.*, [1943] 1 K.B. 223; *Upson* v. *L.P.T.B.*, [1947] 2 All E.R. 509. See also *Bailey* v. *Geddes*, [1938] 1 K.B. 156; *Chisholm* v. *L.P.T.B.*, [1939] 1 K.B. 426; *Knight* v. *Sampson* [1938] 3 All E.R. 309; *Wilkinson* v. *Chetham-Strode*, [1940] 2 K.B. 330; *Joseph Eva* v. *Reeves*, [1938] 2 K.B. 393.

[40] (1868), L.R. 3 Q.B. 549; see in particular the judgment of Blackburn, J., at p. 553.

[41] Railways Clauses Consolidation Act, 1845, Sect. 68.

[42] See Road Traffic Act, 1930, Sect. 45.

[43] Road Traffic Act, 1930, Sect. 45 (4).

overtake or turn right. This is known as the rule of the road. If the driver of a bus does not comply with it, that may be evidence of negligence, but there is no strict duty, and it is always open to the driver or his employer to show that the driver was justified in setting aside the Highway Code which needs to be understood as a 'set of common sense provisions', no more and no less.

CONTRIBUTORY NEGLIGENCE

It happens not infrequently that an accident occurs for which both the carrier's servants and the passenger himself are to blame. Take, *e.g.*, the case of a railway passenger who is thrown down when the train gives a sudden jerk as he is in the act of entering or alighting. It is negligent for the railway servants to allow the train to stop or start too abruptly, but it is also negligent for the passenger to attempt to enter or leave the train while it is in motion. If a person 'suffers damage as the result partly of his own fault and partly of the fault of any other person',[44] we say that he has been guilty of 'contributory negligence'. Until July 15, 1945, a passenger was not entitled to succeed in an action for damages if the carrier was in a position to prove that the plaintiff was guilty of contributory negligence, however negligent the carrier's own men might have been. This unsatisfactory rule of the common law has now been replaced by a more equitable solution of the problem. By Section 1 of the Law Reform (Contributory Negligence) Act, 1945, claims are no longer defeated by reason of the contributory negligence of the claimant. But the damages recoverable are 'reduced to such an extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'. Parliament has thus extended to the whole of English (and also of Scottish) law a rule which had hitherto applied only in connection with collisions at sea. The rule is that where an accident is caused by the combined negligence of both parties concerned, the burden is apportioned between the two. This is the most significant change in the law of carriage of passengers by inland transport to have occurred in recent years. In the past the passenger thrown on to the platform owing to a 'jerk' lost his case completely if it was negligent for him to leave or enter at the moment when he did. In future the Court will have to assess his 'share in the responsibility'. The meaning of these words is not free from doubt, but, in the absence, so far, of judicial authority on their interpretation, one may surmise that what will be most important will be the degree to which the conduct of the parties concerned is regarded as blame-

[44] Law Reform (Contributory Negligence) Act, 1945, Sect. 1 (1).

worthy.[45] A passenger jumping off the train while it was still going at some speed might find his damages reduced by 90 per cent, while another passenger, alighting while the train was almost at a standstill, might get two thirds or more of the damages.[46] It is a matter for the exercise of the discretion of the Court, and, as time passes and more and more cases under the Act come before the Courts, they will no doubt work out the principles on which this discretion is exercised.

The question of contributory negligence on the plaintiff's part cannot properly arise, unless either the defendant admits his own negligence or the plaintiff can prove that the defendant was negligent. There must have been negligence on both sides. It will be even more important in future than it was in the past, carefully to distinguish those cases in which no blame attached to the conduct of the carrier's servants from the different type of case where both they and the passenger brought about the injury by want of ordinary care.

In the past it has been a frequent cause of complaint against railway companies that a passenger's fingers have been squeezed in a carriage door by a porter slamming the door without warning. Here no question of contributory negligence arises. Either the porter was negligent or he was not. If he was, it is difficult to see how the passenger can be blamed at all. If the porter slammed the door while the passenger was in the act of entering or leaving, he was plainly negligent and the Railway Executive will have to pay damages.[47] If, however, the door was closed after the passenger had completely entered the carriage, he had only his own negligence to thank in that he had put his hand in a dangerous place. In raising this defence, the Railway Executive would not be pleading contributory negligence, but absence of negligence on the part of its own servant, on the ground that 'no railway servant should be supposed to assume that a passenger's finger may be placed in a dangerous position unless the passenger was in the act of getting in

[45] It seems that this line of approach is indicated by the judgment of Tucker, L.J., in *Cakebread* v. *Hopping Bros. Ltd.*, [1947] 1 All E.R. 389, one of the few cases so far decided under the Act, a case which, however, has nothing to do with the law of carriage. It is submitted that it is not only just, but also logical to construe the words 'share in the responsibility' as referring to guilt and not as referring to causation. There are degrees of guilt, there can be no degrees of causation. Distribution of the burden according to causation leads of necessity to a rigid 'fifty-fifty' rule, a rule fortunately rejected by Parliament.

[46] The Court must always find and record the total damages which would have been recoverable if the claimant had not been at fault. Sect. 1, subs. 2.

[47] *Fordham* v. *L.B. and S.C. Ry. Co.* (1869), L.R. 4 C.P. 619.

or out of the carriage'.[48] To shut the door of a railway compartment is not, in itself, an act of negligence.

Contrast with this situation cases like those of the sudden 'jerk', mentioned above. If the passenger can satisfy the Court that the train started or stopped with unusual abruptness, he has made out a case of negligence, and all the Railway Executive can do is to try to have the damages reduced on the ground of contributory negligence on the part of the passenger. The circumstances may be such as to negative any such contributory negligence, as in *L. and N.W. Ry. Co.* v. *Hellawell*,[49] where the railway servants had opened the door and actually invited the passenger to step out, while on the other hand the passenger's contributory negligence may be aggravated where the trains are electric and everybody can therefore be expected to reckon with the possibility of more rapid pulling up and stopping of the trains.[50]

A very important type of case in which the question of contributory negligence arises is that of the 'overshooting train' and the 'invitation to alight'. Trains overshoot, or stop short of, the platform of a station. Sometimes, too, a train is longer than the platform. In any of these cases when the train stops, a passenger may find that there is no platform alongside his carriage. Now, it is clearly not negligence on the part of the railway servants to stop

[48] *Per* Lord Alverstone, C.J., in *Drury* v. *N.E. Ry. Co.*, [1901] 2 K.B. 322. In that case the plaintiff's finger was crushed after he had put his hand in the hinge of the door which another passenger had left open. He tried to put the blame on the railway servant for not having warned him before shutting the door, but the action was dismissed. The case followed the earlier authority of *Metropolitan Ry. Co.* v. *Jackson* (1877), 3 App.Cas. 193. There the passenger rose from his seat to prevent a number of persons from getting into the compartment, and while he was thus standing with his arms extended, the train started, a porter slammed the door, and the passenger's thumb was caught and crushed. His action failed on the ground that the porter had not been negligent.

[49] (1872), 26 L.T. 557.

[50] In a number of cases the Courts have decided against the railway company, although a finding of contributory negligence might have been justified. In future it will be no longer a question of 'all or nothing', and the Courts will perhaps be more inclined towards a finding of negligence on both sides. Cases in point are are *Metropolitan Ry. Co.* v. *Delaney* (1921), 125 L.T. 472, which deals with the sliding doors of the London Underground, and *Angus* v. *London, Tilbury and Southend Ry. Co.* (1906), 22 T.L.R. 222, where the train was stopped abruptly because the engine driver wanted to save the life of a man who was on the railway line, though there was no explanation how he got there. See also, in this connection, *Brookes* v. *L.P.T.B.*, [1947] 1 All E.R. 506, where it was held not to be contributory negligence for a passenger on the London District Line to stand with his back toward the open door while holding on to the rails. Here, however, the operative negligence was found not in the jerk, but in failing to shut the door.

a train in a place where there is no platform.[51] The exigencies of traffic often make it necessary. But if a train is stopped where there is no platform, in such circumstances that passengers may reasonably suppose that there is one, or that they are invited to get out, the Executive is bound to take precautions to warn passengers of the real state of things, and omission to give such warning is negligence.[52] It is, of course, especially necessary to take precautions at night, and this need was further aggravated during the black-out. But, at any rate in peacetime, in most of such cases it is perfectly obvious, to any passenger using his eyes, that there is no platform alongside; and if he, seeing the risk, chooses to get out without asking for assistance or demanding that the carriage should be taken to the platform, he is clearly guilty of contributory negligence and the amount of damages he can recover will be correspondingly reduced.

The mere calling out of the name of the station has never been held to be an invitation to alight; in fact, there have been many judicial opinions to the contrary. It would be dangerous to lay down any rule of universal application as to what amounts to an implied invitation to alight, for it must depend on the particular circumstances of each case.[53] Decisions on questions of this sort should always be used with caution, since they are frequently made on the facts of the case and do not involve any legal principle.[54]

[51] This is clearly brought out by *Harrold* v. *G.W. Ry. Co.* (1866), 14 L.T. 440, where a passenger on a dark evening stepped off a train, knowing that there was no platform and not having been invited by the company to do so, but where he had seen other passengers alighting. See also *Anthony* v. *Midland Ry. Co.* (1908), 25 T.L.R. 98, and *Siner* v. *G.W. Ry. Co.* (1869), L.R. 4 Ex. 117, where the accident happened in broad daylight.

[52] Such a case was *Rose* v. *N.E. Ry. Co.* (1876), 2 Ex. D. 248, where the train overshot the platform and the company's servants called out to the passengers to keep their seats, but not loudly enough to be heard by a passenger in the overshooting train. Even the mere verbal warning, however, would not have been sufficient, unless the train was subsequently backed or otherwise brought into a position where the passengers could alight, since they could not be expected to sit still and be carried on to the next station. For a very full explanation of the law see the judgment of Cockburn, C.J.

[53] This remark, however, should be read in the light of the decision of the House of Lords in *Bridges* v. *N.L. Ry. Co.* (1874), L.R. 7 H.L. 213, where the combined fact of stopping at a station with the calling out of the name of the station seems to have been regarded as at least evidence to be submitted to a jury on the question whether the company's servants had not by their conduct induced the passenger to get out of the carriage.

[54] This seems to be true, *e.g.*, of the decision of the House of Lords in *London, Tilbury and Southend Ry. Co.* v. *Glasscock* (1903), 19 T.L.R. 305, which was decribed by Atkin, L.J., in *Sharpe* v. *S. Ry. Co.*, [1925] 2 K.B. 311, as being of no value as a legal authority. In *Glasscock's*

We have seen that, in certain cases the Railway Executive can be made liable for the sudden opening of the door of a compartment. The importance of contributory negligence in this connection is well illustrated by the case of *Adams* v. *Lancashire and Yorkshire Ry. Co.*,[55] where a passenger on a very short journey, sitting next to the door, made several attempts to shut a door which constantly flew open. He was thrown out of the carriage when standing up on one of these occasions. It had been unnecessarily careless on his part to try to shut the door at all, and thus, though the company had been negligent in allowing the fastening of the door to be out of repair, the passenger failed with his action by reason of contributory negligence. Nowadays, under the Contributory Negligence Act, his action would not have been dismissed, but one may surmise that, in a case of this kind, the Court would regard 'the claimant's share in the responsibility for the damage' as considerable and that the damages would be correspondingly reduced.

Cases of contributory negligence are less likely to occur in connection with road passenger transport than in connection with the railways. It is possible but not very probable that a passenger in a bus or coach suffers injuries owing to the combined negligence of himself and of the operator's servants. If he steps off a vehicle while it is still in motion, mounts it before it has stopped, or stands up in a place where only sitting passengers are allowed, there can usually be no question of negligence on the part of the carrier at all if the passenger is injured. On the other hand, the Scottish decision of the House of Lords in *Western Scottish Motor Traction Co.* v. *Allam*[56] shows how difficult it is for a carrier of passengers in a public service vehicle to succeed with a plea of contributory negligence.

The accident resulted from the relaxation of the rules about standing passengers during the War. A standing passenger was precipitated into the

Case (see the judgment of the Court of Appeal in (1902), 18 T.L.R. 295) the company was held to be negligent on the ground that the train had always stopped opposite a portion of the platform where passengers could step from the carriage to the platform on the same level, and that the plaintiff was familiar with the station and therefore entitled to expect that the usual practice would be followed. Moreover, the appearance of the platform was misleading. In *Sharpe's Case* the passenger went to sleep in his compartment and woke up to find the carriage door open and his fellow-passengers gone. He got out without looking and therefore without seeing that the carriage was short of the platform. He lost his case against the company. The judgment of Bankes, L.J., in this case repays careful study.

[55] (1869), L.R. 4 C.P. 739.

[56] [1943] 2 All E.R. 742; 60 T.L.R. 24.

road out of the open door of a bus and killed, when the vehicle was driven round a curve at an improperly rapid speed. The Scottish Courts, whose judgment was affirmed by the House of Lords, held that the bus company had been negligent. It was the duty of the driver to bear in mind that there might be standing passengers who were not at the moment holding on to something. Nor was it contributory negligence for a passenger not to do so despite the fact that he was standing close to an open door.[57]

If a passenger's own carelessness contributes to an accident, caused by the negligence of the carrier or his servants, the Court will reduce the damages in accordance with the provisions of the Contributory Negligence Act. Every carrier, however, whether by rail or by road, must reckon with the possibility of a certain amount of negligence on the part of his passengers. If he does not adjust his conduct to the possibility of careless behaviour on the part of the passengers themselves, then he may have to pay full damages though the passenger too was at fault. 'Allow for other people doing something silly at any moment' is not only a piece of sound advice, tendered by the Highway Code, but an imperative which a carrier disobeys at his peril. It is submitted that contributory negligence on the part of the passenger is irrelevant if the carrier could and should have avoided its consequences. If a crowd of passengers is pressing towards the exit of a bus after the vehicle has started to move again, should it not be regarded as negligence in the conductor to omit to stop the bus and to allow the passengers to get out in safety? Should not their contributory negligence become irrelevant in view of the conductor's failure to allow for their 'silliness'? This is not the place to discuss the highly controversial doctrine of the 'last opportunity', but it may well be that the precept of the Highway Code summarises in a terse and popular form the true and legitimate meaning of this doctrine in the law of carriage.

In the previous edition of this book a number of cases concerning accidents at level crossings were epitomised in order to illustrate the meaning of contributory negligence. For the law of carriage these cases are only of direct relevance in so far as they affected passengers or intending passengers using railway stations. Such, *e.g.* was the case of *Coburn* v. *G.N. Ry. Co.* (1891),[58] where a woman was killed when traversing a level crossing which was the only way from one platform to another at a station. The approaching train was invisible and gave no warning. The company was held to be liable to pay damages to the woman's dependants. The duty to take precautionary measures at level crossings which is incumbent now on the Railway and London Transport Executives as it used to be on the railway

[57] A similar view was taken with regard to traffic on the London Underground in *Brookes* v. *L.P.T.B.*, above, p. 270.

[58] 8 T.L.R. 31.

companies may in this case have been augmented by the fact that users of the station had been implicitly invited to use the crossing. Such an invitation deprives the Executive of the plea of contributory negligence, and it may be implied even where a notice is posted, forbidding passengers to use the crossing at a station, if the crossing is constantly used by the public without any attempt on the part of the railway staff to enforce the prohibition.[59]

It is to be noticed that what may amount to contributory negligence in an adult, need not amount to contributory negligence on the part of a child. Every one is bound to use due care, and if he brings injury upon himself through not using an ordinary and reasonable degree of care, he must, as a rule, suffer a reduction of the compensation he is entitled to claim from others. But the same amount of care cannot be expected from a young child as from a grown-up person. Hence, where children have a right to go upon or are admitted on railway premises, the Executive is bound to take any reasonable precautions to ensure their safety. Thus, where a railway company erected a footbridge over their line, the sides of which were fenced with open ornamental iron work, and a child of five years, lawfully on the bridge, fell through the fencing, the openings being too large, it was held in an action for damages by the child that the company was liable.[60] Similarly, special precautions may be required where children travel by train or by public service vehicle.

If a child is under the care of an adult and the child is injured in such circumstances that the negligence of the adult contributed to the injury, the carrier is nevertheless fully liable. In *Oliver* v. *Birmingham and Midland Omnibus Co.*,[61] an infant was crossing a road in the care of his grandfather. When they had reached the middle of the road the grandfather was startled by the approach of an omnibus and released the infant's hand. The infant was struck by the omnibus and was injured. The infant brought an action against the omnibus company and the jury found that the driver was negligent, and that the grandfather was guilty of contributory negligence. In spite of this contributory negligence the infant was entitled to recover. From this important decision we may conclude that if a person travels in a train, bus, or coach with an infant in his charge and if he does something amounting to negligence, the infant's right to damages payable by the carrier for his servants' negligence will not be affected thereby.[62]

[59] *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (1878), 3 A.C. 1155.
[60] *Lay* v. *Midland Ry. Co.* (1876), 34 L.T. 30.
[61] [1933] 1 K.B. 35.
[62] This case overrules the previous decision in *Waite* v. *N.E. Ry. Co.* (1859), E.B. and E. Note that in *Easson* v. *L.N.E.R.*, above, p. 269, the

Road accidents are frequently caused by the combined negligence of the drivers of two vehicles, and a word must be said about the legal position of a passenger in a public service vehicle who has suffered injuries in circumstances in which both the driver of his own bus or coach and another driver have been at fault. He may have rights against the driver of the other car. If he can make out a case of negligence against that driver, the damages to which he is entitled will not be reduced by reason of the fact that the bus or coach driver was partly to blame for the accident. The contributory negligence of the carrier or his servants is not imputed to the passenger, he is not 'identified' with the carrier. If the driver of the other vehicle or his employer is sued by the owner of the public service vehicle for damage done to the vehicle itself or, for personal injuries suffered in the accident, by the bus driver, he may plead contributory negligence, but he cannot do so as against the passenger's claim.

The doctrine, according to which a passenger in a sea-going vessel or in a vehicle was identified with the person responsible for its management, driving or navigation, was done away with by the House of Lords in the famous case of *The Bernina*,[63] a decision on carriage by sea laying down the principle of non-identification with equally important consequences for inland transport.[64]

The passenger is, of course, at liberty to claim damages from the owner of the vehicle in which he was riding. The two rights stand side by side. Damages cannot be recovered twice over, but the passenger is entirely free to decide from which of the two vehicle owners he wishes to demand damages. The owner of the public service vehicle cannot be heard to say that the driver of the other car was negligent, any more than the owner of the other car can rely on the bus driver's carelessness. Different principles prevail as regards the distribution of the burden between the two vehicle owners, but these do not affect the passenger, and are beyond the scope of this book.[65]

railway company was unable and made no attempt to rely on the negligence of the plaintiff's mother who had allowed her five-year-old child to go alone out into the corridor of the train.

[63] (1888), 13 App.Cas. 1.

[64] See *Matthews* v. *London Street Tramways Co.* (1888), 58 L.J.Q.B. 12, a case of a collision between a tramcar and a bus, in which the bus driver's negligence was held to be immaterial in an action brought by a passenger in the bus against the owner of the tram. See also the decision of the Court of Appeal in *Sharp* v. *Avery*, [1938] 4 All E.R. 85, where the rights of a pillion-rider against a third party were held to be unaffected by the contributory negligence of the driver of the motor cycle.

[65] For a good illustration see *Croston* v. *Vaughan*, [1938] 1 K.B. 540.

Chapter 24

LIABILITY FOR THE NEGLIGENCE OF SERVANTS AND OTHERS

The carrier of passengers like the carrier of goods is responsible not only for his own negligence, but for that of his servants as well.

In order to make a carrier liable for the negligence of his servants, it is necessary to show that the person whose negligence is complained of is the carrier's servant in the legal sense of the word, that while being negligent he was acting in his capacity as a servant, and finally, that he was, in fact, the servant of the person to be made responsible and not somebody else's servants.

1. It is quite clear that, for instance, a signalman or an engine-driver is the servant of the Railway Executive, or that the driver or conductor of a motor coach is the servant of the owner of the public service vehicle. Not all cases, however, are as clear. If, for instance, the owner of a motor coach engages the services of a firm of repairers for the carrying out of necessary repairs to his vehicle, can that firm be called the servant of the coach owner? Can he, therefore, be made responsible for any act of negligence which they commit in repairing the coach and, for instance, for a violation of one of those many rules laid down by law with regard to the construction and equipment of motor cars and public service vehicles in particular—the object of which is to safeguard the public against accidents? [1] The question as to who is a servant and in what circumstances a person can be said to be in the service of another so that this other person becomes his master or employer and is responsible for any injury or damage caused in the course of his employment, has been solved by the Courts by applying a simple-looking test: is the person who is doing the service to be told not only what he has to do, but also how he has to do it? To take our case: is the owner of the motor coach in a position not only to say what he wants done, but also to say how the services are to be carried out? If he is, then the person employed is his servant. If he is not, then the person employed is known as an independent contractor. Clearly

[1] See Road Traffic Act, 1930, Sects. 3 (1) and 30 (1), and the regulations made by the Minister of Transport under the latter section. See Motor Vehicles (Construction and Use) Regulations, 1947, S.R. and O., No. 670; Public Service Vehicles (Equipment and Use) Regulations, 1941, S.R. and O., No. 643, amended by S.R. and O., 1943, No. 1220.

the firm of repairers would not be servants, for the motor coach owner leaves it to them to decide how they should carry out the work, and all that he tells them is what he wants done. It is quite different in the case of the driver and conductor who are subject to the rules of service laid down by the master. The conclusion which the law draws from this distinction is that, while the master is fully responsible for all acts done by a servant in the course of his employment, he is not so responsible for acts done by an independent contractor. If the independent contractor does harm to third persons, the only remedy which these third persons can claim is an action against the independent contractor himself, and whether or not there is such an action is not a question to be discussed here. However, this rule does not relieve a carrier of all responsibility for the construction and equipment of his vehicle if he has entrusted a firm with its manufacture or repair. The law imposes upon him certain duties. It is for him to see that the vehicle which he operates conforms to the standards set up by railway legislation, or, as the case may be, the Road Traffic Acts, and by the regulations made under those Acts. In the ordinary course of things he will have to delegate the performance of these duties to others. The law does not expect him to be the manufacturer and repairer of his own coaches. However, he does not get rid of his duties by delegating them to others, and if the vehicle is not up to standard and if an injury to a passenger results from the fault, then the owner of the vehicle cannot be heard to say that he relied on the skill of the manufacture or repairer. To put it in wider terms: in so far as the law imposes specific duties upon a person he is responsible for these duties.[2]

2. As a rule no question of this sort will arise when a carrier of passengers is made liable for the negligence of his servants, for in most cases the person whose negligence is complained of is clearly a servant. However, a question may and will more frequently arise as to whether he was actually acting as a servant when causing the injury. When can a servant be said to be acting in his capacity as a servant or, as it is usually put, within the scope of his employment? Here, again, the law gives an answer which, at first sight, appears to be simple, but the application of which is difficult in border-line cases. It is said that the servant is acting within the scope of his employment when he is acting for his master's business.[3] The test is: Was he acting for his master, not: Was he complying with his master's orders? If the latter was the test, then a master

[2] *Robinson* v. *Beaconsfield Rural District Council*, [1911] 2 Ch. 188.
[3] See, for example, Charlesworth on Negligence, p. 49.

could hardly ever be made liable for his servant's negligence, for it will always be part of the servant's orders to fulfil those rules of conduct and statutory regulations the object of which is to safeguard the bodily integrity of the passengers. Thus, whenever a motor coach driver exceeds the speed limit, drives on the wrong side of the road, or does anything else by which he violates his duties, he is acting against orders, yet, since he is acting in the course of his master's business, the master is liable for the consequences. The reader can do no better than refer to the somewhat extreme case of *Limpus* v. *London General Omnibus Co.*[4] In that case the employers, the omnibus company, had given strict orders to their bus drivers not to enter upon one of those racing competitions on the road which seem to have been usual in those days between the buses belonging to competing companies. In defiance of his orders, the driver deliberately obstructed the plaintiff's bus, and thus damaged the plaintiff's property. The defendant company, when made liable for damages, pleaded that the bus driver could not be said to be acting within the scope of his employment when he was intentionally setting aside the rules of conduct imposed upon him by the master, but this plea was overruled, and ever since it has been held that the master cannot rely as a defence upon any orders which he may have given to his servant. A similar line of reasoning was followed in the instructive Canadian case of *Canadian Pacific Railway Company* v. *Lockhart.*[5] An employee who—contrary to orders—used his own uninsured car on his employer's business was held both by the Supreme Court of Canada and by the Judicial Committee of the Privy Council to have acted within the scope of his employment.

Yet the rule that the servant must have been acting within the scope of his employment if the owner is to be made liable for any negligence committed by the servant is of the greatest practical importance. Supposing, for instance, the conductor of a motor coach took it upon himself to drive the vehicle and, while doing so, caused injury to passengers by negligent driving. Would it be just to make the owner or operator of the coach liable for damages? Obviously not, and so it was held in *Beard* v. *London General Omnibus Co.*[6] In that case the conductor wanted to turn the vehicle round in order to make it ready for departure while the driver was temporarily away. Here, clearly, he overstepped his

[4] (1862), 1 H. & C. 526.

[5] [1942] A.C. 591. For a recent English case on the same principle see the decision of Hilbery, J., in *McKean* v. *Raynor Bros. Ltd.*, [1942] 2 All E.R. 650.

[6] [1900] 2 Q.B. 530.

duties in doing so, and, unfortunately, caused an accident. It was held that the company could not be made responsible for this act of its over-zealous servant. He was a conductor and not a driver. The scope of his employment was that of a conductor, and therefore, whenever he did anything outside the duties of a conductor, he was not legally acting in his capacity as a servant. If in this case the driver had asked the conductor to do what he did, the company would undoubtedly have been liable, not for the negligence of the conductor, but for the negligence of the driver in delegating his duties to another, and apparently inexperienced person.[7] One question which it is, perhaps, not yet possible fully to decide in view of the existing authorities is this: supposing the driver falls ill and the conductor assumes the driver's duties in a state of emergency, and while doing so causes damage, can the owner be made liable? It is submitted that he ought to be made liable in a case like this, but the question cannot be decided with certainty.[8]

The test, whether the servant was acting in his master's business, may afford a solution to some of the problems which have been discussed by the Courts in the past. Thus, the question of an accident happening while a vehicle is driven in a roundabout way and on a route other than that prescribed by its owner may perhaps be solved in this way: if the driver deviated for a purpose of his own, *e.g.*, in order to pick up a friend of his, whom he wanted to take along in the vehicle, then the master could hardly be made liable for an accident happening while the vehicle was being used for this purpose.[9] If, however, he was deviating in what he thought to be his master's interest then the decision would have to be the other way. It is quite certain that the chauffeur of an ordinary car who uses it for a joy-ride cannot make his master liable for any accident which may be the consequence of his negligence while he is thus using the vehicle; nor would the owner be liable for anything happening while the servant was using the vehicle for his own purposes with the owner's permission.[10]

It is a fallacy to argue that a servant cannot be said to be acting within the scope of his employment if, while employed in his master's service, he causes injury by doing something for which he was not employed. If the driver of a motor coach approaches the filled petrol tank with a lighted cigarette and causes an explosion, the owner is liable. True enough, smoking was no part of the

[7] See *Rickett* v. *Thomas Tilling, Ltd.*, [1915] 1 K.B. 644.
[8] See *Poland* v. *John Parr & Sons*, [1927] 1 K.B. 236; and see the view expressed by Salmond on Torts, 10th ed., p. 92.
[9] *Mitchell* v. *Crasweller* (1853), 13 C.B. 237.
[10] *Britt* v. *Galmoye* (1928), 44 T.L.R. 294.

driver's duty, but whatever a servant does while being employed may impinge upon the performance of his duties. For the driver to smoke at the time and in the manner in which he did was negligence not only during but also in his employment and therefore an act which made his employer liable.[11]

3. Though a person is clearly a servant and though he clearly acts in the course of his employment, it may be difficult to decide in some cases in whose employment he was when performing his duties. Supposing there are two motor coach companies, A and B, and for some reason or other A 'lend' their servant, a driver, to B to drive one of their coaches for a time. If he causes an accident by his negligence, who is to be liable, the coach company which paid him and with which he was under a contract of employment, or the coach company for whose benefit he was acting when the accident occurred? This question would be difficult to decide on principle. The test is: Who exercises actual control over the servant? Actual control is exercised by the person who controls 'the way in which the act involving negligence was done'. There is a strong presumption that the regular, the habitual employer, *i.e.* in our case A will be liable and the burden of proving that liability rests on the 'borrower', the temporary employer, 'is a heavy one and can only be discharged in quite exceptional circumstances'.[12] Only if A could show that B controlled not only the 'what', but also the 'how' of the driver's work, not only the subject-matter, but also the method of his performance, would they escape liability. It would not be sufficient that they determined the starting points and destinations of his journeys, if he continued to obey his regular employer's instructions in technical matters such as the maintenance and repair of the vehicle. If the vehicle was lent with the driver it would even more unlikely that responsibility was transferred.[13]

[11] This obvious principle had to be mentioned here, because there was an earlier case, *Williams* v. *Jones* (1865), 3 H. and C. 602, which contradicted it. Much doubt was thrown on that case by the decision of the Court of Appeal in *Jefferson* v. *Derbyshire Farmers Ltd.*, [1921] 2 K.B. 281. Now, since the decision of the House of Lords in *Century Insurance Ltd.* v. *N.I. Road Transport Board*, [1942] A.C. 509, it can be regarded as overruled.

[12] *Per* Viscount Simon in *Mersey Docks and Harbour Board* v. *Coggins and Griffiths Ltd.*, [1946] 2 All E.R. 345.

[13] The writer is unable to maintain the views expressed in the previous edition. The decisions of the House of Lords in *Century Insurance Co. Ltd.* v. *Northern Ireland Road Transport Board*, [1942] A.C. 509, and in the *Mersey Docks Case*, above, make it impossible to assert that in the situation envisaged in the text the Courts are likely to affirm the existence of a 'transmutation of service' (see Salmond on Torts, 10th ed., p. 87). The disinclination of the Courts to do so is demonstrated by a number of recent cases, *e.g. Clelland* v. *Lloyd*, [1938] 1 K.B. 272, *Bontex Knitting*

We have referred to cases of motor coaches rather than of railways in order to explain the rule that the master is liable for the negligence of which his servant is guilty in the course of his employment. Cases concerning the railways are less likely to give rise to difficulties in connection with this rule. For example, if a signalman by mistake signals 'line clear' when a train is on the line; or if an engine driver, in a moment of thoughtlessness, runs past a signal at 'danger', and thus causes a collision, it does not want a great deal of explanation to show that the Executive must be liable for the negligence of the signalman or of the engine-driver, and must compensate the injured persons. The Executive, *i.e.* either the Railway Executive or the London Transport Executive, is so liable, not the Transport Commission. It is enacted that 'the Executive shall, to the exclusion of the Commission, be treated as the employer of any officers or servants of the Commission so long as they are by virtue of the delegation under the control of the Executive'.[14] The Executive and not the Commission is, therefore, the 'master' responsible for the negligence of the railway 'servants' within the meaning of the common law rule.[15]

We have seen that as a rule the carrier cannot be made liable for the fault of an independent contractor, except where he has used the independent contractor for the performance of specific duties imposed upon him by law. Whenever a third person who is not the carrier's servant has caused by his negligence an injury to passengers, the carrier will escape liability. A few examples will illustrate this rule:

In *Daniel* v. *Metropolitan Ry. Co.*[16] several passengers in one of the company's trains were killed and injured by an iron girder which was placed

Works, Ltd. v. *St. John's Garage,* [1943] 2 All E.R. 690 (affirmed [1944] 1 All E.R. 381), and, most important in the present context, the decision of the Court of Appeal in *Willard* v. *Whiteley Ltd.,* [1938] 3 All E.R. 779. It was there held that a firm of furniture removers who were in the habit of hiring from the owner of a number of lorries vehicles together with their drivers and removal men, did not become the 'masters' of the drivers. The lorry owner continued to pay the wages and received from the furniture removers a lump sum. Moreover, and this was decisive, the power of dismissal remained vested in the lorry owner, and he remained the proper addressee for any complaints made against the conduct of the drivers. See also *Chowdhary* v. *Gillot,* [1947] 2 All E.R. 541, decided on the same principles. The writer has been unable to find a recent case in which the 'borrower' of a driver was held to be his 'master'.

[14] Transport Act, 1947, Sect. 5, subs. 9 (b).

[15] Note, however, that payment by the Commission can be claimed if the Executive fails to satisfy a judgment or order within fourteen days after it has become enforceable. *Ibid.,* Sect. 5, subs. 9, proviso.

[16] (1871), L.R. 5 H.L. 45.

in position across the railway, over balanced and fell upon the passing train. The girder had been placed there by contractors of great eminence engaged by the Corporation of London for the carrying out of certain works. It was argued that the railway company was negligent in not having a man to stop dangerous work while the train was passing, but it was held that the company could not be made answerable for the negligence of persons over whom it had no control, and, furthermore, that it was not its duty to take precautions against possible negligence of persons whose skill and carefulness it had no reason to doubt.

While this may be an exceptional case, the case of *Wright* v. *Midland Ry. Co.*[17] illustrates a rule, once very important in railway traffic, and still of the greatest importance in road traffic, namely, that one carrier cannot be made liable for the negligence of another. In that case the L. & N.W. Ry. Co. had the right to run over a small portion of the Midland Ry. Co.'s railway. At the junction there was a signal box under the control of the Midland Ry. Co. Upon the occasion of the accident for which this action was brought, the signalman had set the signals in favour of a train of the Midland Ry. Co.'s and against any train of the L. & N.W. Ry. Co.'s. The plaintiff was a passenger in a Midland train which, in obedience to the signals, proceeded along the portion of the line over which both companies had power to run. Being on this portion of the line, it was run into by the L. & N.W. train, the driver of which had disregarded the signals and run past the junction. The plaintiff was injured in the collision, but he could not recover damages from the Midland Ry. Co., since the collision was only due to the negligence of the other company. Had this been a case of injury to goods at common law, the Midland Ry. Co. would have been liable in the absence of a special contract,[18] but for the injuries suffered by the passenger they could not be made liable in the absence of their own and their servants' negligence. The injured person might have recovered damages from the L. & N.W. Ry. Co., on the ground of that company's negligence.

An accident may happen to a railway train, and, even more easily, to a motor coach by the negligence of one of the passengers. It is hardly necessary to point out that a carrier cannot be held responsible for the misconduct of his passengers, and if one passenger suffers harm by the negligence of another he must try to get his compensation from that passenger. Certain definite duties are imposed upon the passengers in railway trains as well as in public service vehicles.[19] The object of these various rules is to safeguard the carrier and his vehicle as well as the co-passengers. If a passenger violates these rules, for instance by giving a 'signal which might be interpreted by the driver as a signal from the conductor to start' and another passenger who is on the point of leaving the

[17] (1873), L.R. 8 Ex. 137.
[18] See Bramwell, B., at p. 140.
[19] See below, p. 347; and cf. the Railway By-laws, discussed below, Chapter 30, and the Public Service Vehicles (Conduct of Drivers, Conductors and Passengers) Regulations, 1936, Part 3.

vehicle suffers injuries as a result,[20] the carrier is not liable. Similarly if a passenger smokes or carries a lighted pipe, cigar or cigarette, in a part of the vehicle in which a notice is exhibited that smoking is prohibited [21] and, by doing so, causes an explosion, the passengers will be without a remedy against the coach owner, unless the conductor might have noticed it and was negligent in not preventing the mischief. If a passenger were to take a parcel of explosives into the compartment of a train or into a motor coach and other passengers were injured in an explosion, the carrier could not be made liable unless the appearance of the parcel was such as to cause the carrier's servants to suspect that it contains something dangerous.[22]

A carrier is not even bound to guard against wilful disorder on the part of his passengers, nor to protect passengers from one another.

Thus, in *Pounder* v. *N.E. Ry. Co.*,[23] a man who had been engaged on evicting miners on strike from their houses belonging to their employers was repeatedly assaulted by pit-men while travelling in a local train. The railway company's servants refused to allow him to travel in the guard's van, which would have been against the rules, but a seat was found for him in a carriage with several other unexceptionable passengers. It was not regarded as the company's fault that six or seven of the miners managed to push their way into that carriage, which was already full, nor were the company's servants under any duty to turn the miners out, or to find the plaintiff another seat. Even when at the next stop this party of miners got out and another relay got in, in order to express their feelings towards the plaintiff, and when this procedure was repeated at each following station, the guard, though the plaintiff called out to him, was under no duty to interfere. The company had not broken any obligation it owed to the plaintiff, and he failed with his action.[24]

A similar decision was given in *Cobb* v. *G.W. Ry. Co.*,[25] where a gang of sixteen men entered the plaintiff's compartment at a station, robbed him of about £90, and left the carriage before the train started. The station-master refused to comply with the plaintiff's request to detain the train and have the men arrested and searched, so that the men escaped; but the House of Lords held that the company was under no duty towards the plaintiff to detain the train in order to give him an opportunity of recovering his property. Such a duty, if it existed, was at its best a duty to public justice, and not a duty owing to the plaintiff.

In the last mentioned case the plaintiff also tried to make out

[20] Public Service Vehicle Regulations, No. 9 viii. See *Mottram* v. *South Lancashire Traction Co.*, [1942] 2 All E.R. 452.
[21] Public Service Vehicle Regulations, No. 9, xvi.
[22] See the decision of the Privy Council in the Indian case *East Indian Ry. Co.* v. *Kalidas Mukerjee*, [1901] A.C. 396.
[23] (1892) 1 Q.B. 385.
[24] Cf. *Machen* v. *Lancashire and Yorkshire Ry. Co.* (1918), 120 L.T. 356.
[25] [1894] A.C. 419.

that it was actionable negligence to permit a carriage to be overcrowded, but it will hardly ever be possible to make a carrier liable merely on the ground of overcrowding. A man may be robbed if there are six persons in the compartment, or if there are sixteen, and robbery cannot be said to be the natural result of a carriage being over-full. It may be negligent on the part of a carrier to admit too many passengers to his vehicle, especially where any passenger, already in the carriage before it became overcrowded, raises an objection, but it will seldom be possible to prove any damage resulting from the crowding, as mere discomfort would probably not be sufficient. The over-fastidious first-class railway passenger who, during the First World War, sought to recover the difference between the first and third-class fares because his compartment was overcrowded with third-class passengers had his action dismissed, since it was unreasonable, at least in wartime, to expect the company to refuse passengers when the third-class compartments were full.[26]

Operators of public service vehicles are under very definite duties with regard to the maximum number of passengers they are allowed to take, but it is hardly conceivable that a passenger can ever bring an action against the owner of a motor coach on the ground that, for example, he has admitted standing passengers in a case in which it is forbidden.[27]

[26] *Jones* v. *G.N. Ry. Co.* (1918), 34 T.L.R. 467.

[27] The regulations dealing with this subject were made by the Minister of Transport under the Road Traffic Act, 1930, Sect. 94 (h).

Chapter 25

PERSONS ENTITLED TO RECOVER DAMAGES

As a rule a passenger in a railway train or in a public service vehicle is carried under a contract made with the carrier. By taking his ticket he enters into a contract of carriage, the consideration for the carrier's undertaking to transport the passenger being the passenger's payment of the fare. If the ticket is issued at a booking office, as is normally the case on the railways and sometimes on motor bus and coach lines, the contract begins to operate when the passenger receives his ticket. But if, as is normally the practice on buses, the ticket is taken in the course of the journey, it is far from easy to say at what precise moment the contract is concluded. It is possible to argue that there is no contract until the conductor has issued the ticket, but the better view seems to be that the passenger accepts the offer of carriage when he enters the vehicle. So much is certain : the mere act of putting one's foot on the running board does not constitute an acceptance of the carrier's offer.

In *Wilkie* v. *L.P.T.B.*,[1] the Master of the Rolls expressed the view that the contract is not made until 'the passenger puts his foot on the bus. It is made when he, by conduct, accepts the offer of carriage, and . . . this does not take place until he puts himself either on the platform or inside the bus'. This dictum merely determines the earliest possible moment at which the contract can be said to have been made. It does not say that it is right to regard the earliest possible moment as the actual moment of contracting. This question is not a mere legal subtlety. It is true that it is deprived of much of its practical importance owing to the principle which bases the carrier's liability for the safety of his passengers on the law of negligence and not on the law of contract. Nevertheless it may be of importance to fix the moment when the contract is concluded in connection with the application of Sect. 97 of the Road Traffic Act, 1930, and also in order to disentangle the very involved legal situation which arises when a passenger takes a bus going to a destination different from the one to which he intended to travel.

It must not be thought, however, that the duties of the carrier which have been described in the previous chapters can only be based on that contract. In the law of carriage of goods it is usual to regard the carrier's duties as being of a contractual nature, though for historical and other reasons there is much to be said for the view that a carrier of goods is liable in tort for the safety of a

[1] [1947] 1 All E.R. 258.

consignment entrusted to his care. In the law of carriage of persons, however, it is quite clear that the violation of the carrier's duties is a tort, and entails the obligation to compensate not only those who were carried under a valid contract, but everybody who happened to be inside, or on the point of entering or leaving, the vehicle when the accident took place, unless he was a trespasser. It does not matter for the standard of care to be applied by the carrier, whether he has received any consideration from the person claiming damages on the ground of negligence. This shows quite clearly that the liability is in tort and not in contract, for if it was in contract it could only be enforced in the presence of valuable consideration. More than that: the carrier's liability for the safety of his passengers is the same no matter whether their presence in the vehicle was or was not in the carrier's own interest. He owes the same duty to a paying passenger that he owes to the man with a 'free pass' who has been admitted to the vehicle as a personal favour and to the pedestrian or 'hitch-hiker' to whom he has 'given a lift'. This is not only important in practice, but also very remarkable from a legal point of view. As we shall see hereafter, the occupier of premises owes a far higher standard of care to those who are there under a contract or in his own interest than to 'bare licensees', *i.e.* to persons merely permitted to enter, or to pass through, the premises. No such distinction is made in the law of carriage. Those present on a vehicle are, for the purposes of the carrier's liability, divided into two categories: passengers and trespassers.[2]

Motor law provides many illustrations that gratuitous passengers have the same right to safety as passengers who have paid a fare. In *Miller* v. *Liverpool Co-operative Society Ltd.*,[3] an employee who rode on his employer's lorry with the latter's tacit acquiescence, but without his express permission, recovered damages for injuries suffered through the driver's negligence. In *Lewys* v. *Burnett* [4] the driver of a lorry gave a lift to a soldier, but neither the driver nor the mate warned him that the vehicle was going to pass under a bridge with a very low headroom. The soldier was fatally injured when his head came into contact with the bridge, and his widow obtained a judgment for damages against the driver and the mate. It should be observed, however, that a person may be a 'passenger' in relation to the driver and a 'trespasser' in relation to the driver's

[2] See *per* Henn-Collins, M.R., in *Harris* v. *Perry and Co.*, [1903] 2 K.B. 219, at p. 225, and *per* Croom-Johnson, J., in *Lewys* v. *Burnett*, [1945] 2 All E.R. 555, at p. 559.

[3] [1940] 4 All E.R. 367.

[4] [1945] 2 All E.R. 555.

employer. This happened in *Twine* v. *Bean's Express Ltd.*,[5] where the driver of a van gave a lift to a pedestrian in defiance of express instructions given to him by his employer. These are cases of lorries and vans, but the principles underlying these decisions are equally applicable to coaches and buses. In connection with these public service vehicles, however, the difference between a fare paying passenger and a person riding on the vehicle with a 'free pass' or otherwise as a mere licensee is of legal importance. The standard of care owing to both types of passengers is the same, but while the carrier is unable to contract out of his liability to the fare paying passenger,[6] there is nothing in the law to prevent him from making it a valid condition of mere licence that he should not be liable for accidents howsoever caused.

This was the gist of the important decision of the Court of Appeal in *Wilkie* v. *L.P.T.B.*[7] The plaintiff was an employee of the London Passenger Transport Board. His contract of employment was embodied in a written document which specified his salary but made no mention of a free pass. He was, however, given a free pass which was available on the Board's buses, trams and trolley buses. One of the printed conditions on the pass was to the effect that the Board had the right to cancel, suspend or withdraw the pass at any time they might think fit. Another condition provided that neither the Board nor their servants were to be liable to the holder for any injury howsoever caused, except in the case of an employee using the pass in the course of his employment and for the purposes of the business of the Board. On a day when he was off duty the plaintiff intended to use the pass and was on the point of entering a bus when he was thrown into the roadway and suffered injuries owing to the negligence of the conductress who prematurely started the bus by ringing the bell. His action against the Board failed. Had it not been for the condition on the pass he would have been entitled to be compensated for his injuries, but that condition was valid and it negatived the Board's liability. The pass was not a 'contract for the conveyance of a passenger'. It was neither a part of the contract of employment nor was it a separate contract because, quite apart from the absence of consideration, there was 'no contractual animus to be found in relation to it'. It was a revocable licence and the plaintiff a mere licensee unable to invoke the Act of 1930 which operates only so as to invalidate exemptions clauses in contracts. The plaintiff had availed himself of the benefit of the pass as soon as he made use of the permission to use the bus, *i.e.* as soon as he placed his foot on the bus. The argument that he had not yet become a passenger when the accident occurred and that therefore the condition in the pass was irrelevant was rejected.

The principle that a person may be a passenger who has not made a contract with the carrier is equally important in railway

[5] [1946] 1 All E.R. 202.
[6] Road Traffic Act, 1930, Sect. 97.
[7] [1947] 1 All E.R. 258, affirming a decision of Lord Goddard, C.J., [1946] 1 All E.R. 650.

law. There are many cases in which passengers are carried by train without making any payment at all. It has always been held that, in the absence of a special contract by which a carrier by rail limits or excludes his liability, he is liable for negligence to such a passenger precisely in the same way as he is to paying passengers. The Railway Executive is in the habit of excluding its liability to railway servants to whom free tickets are issued, so that this case can rarely be used as an example for the rule. There are, however, other cases. Sometimes newspaper reporters receive free tickets, and in one case [8] the representative of a sporting newspaper travelling to a race meeting with a free ticket issued in the name of another reporter of the same paper was injured in the course of the journey and recovered damages, since he could not be regarded as a trespasser, the company having frequently permitted reporters to use the tickets of their colleagues. In another case [9] it was held that a Post Office servant travelling free with the mails was entitled to recover damages from a railway company for personal injuries suffered by him through the negligence of the company. The most interesting of these cases, however, is *Austin* v. *G.W. Ry. Co.*[10]

The injured passenger in this case was a child of three years and two months. The mother had omitted to take a ticket for the child, though according to the regulations of the company only children up to three were carried free. Yet the child was held not to be a trespasser and to be able to recover damages. This was so because there was no evidence that the mother had had any intention of defrauding the company, since no question as to the age of the child had been asked by the servants of the company.[11]

It appears, therefore, that every person who is travelling upon a railway or in a public service vehicle without any intent to defraud, even if he has not actually taken a ticket is a 'passenger' and the carrier is responsible to him for injuries caused by his negligence. It is a very common thing for a person who arrives late at a station to enter a train without taking a ticket, because he has no time to take one, but with the intention of paying at the other end of the journey; such a person is undoubtedly a passenger.[12]

[8] *G.N. Ry. Co.* v. *Harrison* (1854), 10 Exch. 376.

[9] *Collett* v. *L. and N.W. Ry. Co.* (1851), 16 Q.B. 984. The Railway Executive is under a duty to carry Post Office servants free of charge under the Railway (Conveyance of Mails) Act, 1838, Sect. 1.

[10] (1867), L.R. 2 Q.B. 442.

[11] See the important judgment of Blackburn, J.

[12] Formerly one of the most important applications of the principle under discussion was the case of 'through journeys', *i.e.* of journeys extending over the network of several railway companies. With the transfer of the entire railway system to the Transport Commission this has lost its practical importance. The leading case was *Foulkes* v. *Metropolitan District Ry. Co.* (1880), 5 C.P.D. 157.

There are only two exceptions to the rule that every person carried in a railway or public service vehicle can claim damages if injured through the negligence of the carrier or his servants: one of these exceptions is the limitation or exclusion of the carrier's liability by contract, with which we shall deal in one of the following chapters, and the other one is where the person carried must be regarded as a trespasser. If a person is wrongfully on a railway train or in a public service vehicle, the only duty which the carrier owes him is not to injure him intentionally. But the carrier need not take any care as far as the person of the trespasser is concerned, and need not even warn him of concealed dangers.

In a Canadian case [13] a person who was neither a passenger nor a servant of the railway company got on to an empty train which was being shunted in order to get a lift on his way home, and the train was in collision through the negligence of the defendant company's servants and the trespasser was injured.

Here the carrier was not liable, and the same would be true if a person were in a railway train or in a motor coach with the fraudulent intention of travelling without paying.[14] However, the mere fact that a person who has taken a third-class ticket is found in a first-class compartment, does not make him a trespasser.[15]

Not only passengers are entitled to be treated with the utmost care by the carrier. Many persons come on to the carrier's premises, for example, to railway stations, without any intention of travelling. Here the matter is not quite as simple as it is with persons who are actually carried. In that case there are only two categories, passengers and trespassers, and it does not make any difference whether the passenger had a contractual right to travel in the vehicle or whether he was permitted to travel without payment. It is different with regard to persons who use the carrier's premises, without being transported in his vehicles. English law does not impose a general duty on a landowner to keep his premises safe for all those who use them. He has certain duties in this respect, but they vary and depend on the relationship in which he stands towards the person using his premises.

A man is walking along a station platform on a cold and frosty day, and suddenly slips over a strip of ice, falls and is seriously injured.[16] The question whether the Railway Executive is liable to

[13] *Grand Trunk Ry. Co.* v. *Barnett*, [1911] A.C. 361.
[14] *Per* Blackburn, J., in *Austin* v. *G.W. Ry. Co.* (1867), L.R. 2 Q.B. 442.
[15] See Atkin, L.J., in *Vosper* v. *G.W. Ry. Co.*, [1928] 1 K.B. 340, at p. 349: 'A third-class passenger is not an outlaw when he travels in a first-class carriage'.
[16] As in *Shepherd* v. *Midland Ry. Co.* (1872), 25 L.T. 879.

this man cannot be answered without having previously ascertained why the man was on the platform. Was he waiting for his train? Was he, perchance, a policeman on duty? Was he seeing off one of his friends, or was the sole object of his presence in the station to buy a newspaper at the bookstall? Or was he, perhaps, a pickpocket waiting for a victim? Whether the Executive was under a duty to safeguard this particular person from the injury he suffered will depend on the purpose of his presence in the station. The classification of persons entering another man's premises and the exact determination of the duties owing to the various categories of such persons, are matters of great legal difficulty,[17] but for practical purposes we shall not be far of the mark if we divide those who use the carrier's premises other than his vehicle into four categories :—[18] (1) The highest duty is owing to those who enter the premises because they are entitled to do so—either on the ground of a contract, or otherwise—as for instance, the man who, having bought his ticket, is waiting for his train, but also the policeman on duty. (2) The next category consists of those who come without being entitled to do so, but who enter the premises 'by the permission of the occupier granted in a matter in which the occupier has himself some pecuniary or material interest',[19] *e.g.*, the man who sees off his friends at a station or who sends off a parcel or inquires as to trains with a view to travelling on a future occasion. These people are invited by the carrier to enter the premises. He welcomes them because their presence directly or indirectly furthers his business, and because they are so invited, they are called 'invitees'. (3) It is not always easy to distinguish from these invitees those belonging to the third category which is known as that of the 'bare licensees', that is, those who come on to the premises, *e.g.*, of the Railway Executive, with the express or implied consent of the Executive, but entirely for a purpose of their own, and not in any sense in connection with the business of the Executive. It is well known that persons constantly enter railway stations in order to use the lavatories, or to buy a paper at the bookstall, or for some other purpose in which the Executive has no interest whatever. These persons are on the Executive's premises only because the Executive does not

[17] The reader is referred to Salmond on Torts, 10th ed., pp. 469–504, and to Winfield, *Law of Tort*, pp. 580–607.

[18] See MacKinnon, L.J., in *Ellis* v. *Fulham Borough Council*, [1938] 1 K.B. 212: 'Those who suffer physical injuries upon the premises of others have to be divided into three categories'. There is, however, the fourth category of those who come under a contractual or other right and with whom the case from which this quotation is taken was not concerned.

[19] See Salmond, p. 476; see also *Hyett* v. *G.W.R.*, [1947] 2 All E.R. 264 and *Weigall* v. *Westminster Hospital*, [1936] 1 All E.R. 232.

choose to warn them off. (4) Finally, there are trespassers, like the pickpocket, whose presence is unlawful.

Roughly speaking, one may say that the division is into those entitled, those invited, those permitted and those forbidden to come.[20]

As regards the first category a carrier is under the same duty which he owes to passengers: to use all reasonable skill and care to make the premises safe. But to establish responsibility, it is necessary to prove the absence of reasonable care on the part of the carrier or his servants; and therefore he is not liable where injuries are caused on his premises by the negligence of a stranger or person over whom he has no control, including that of the servant of an independent contractor employed to repair a station.[21] In one case a stray dog bit a woman in a station, and the railway company was held not to be liable, since there was no evidence that the presence of the dog was due to negligence on the part of the company's servants.[22] On the other hand, the rule that the 'thing speaks for itself' frequently works against the occupier of the premises. If the man who slipped on the platform was there because he was waiting for his train, he may recover damages though it cannot be explained how the ice came to be there, as the Executive's servants in such weather ought to have seen that there was no ice on the platform. There is no rule that a ticket holder tacitly submits to the risk of a station's being dangerous, and if, for instance, a season ticket holder slips on a flight of stone steps which have become worn and hollowed and are dangerous because covered with frozen snow, it is not an answer to his claim for damages that he was familiar with the dangerous character of this particular staircase and that he might have chosen another which he knew.[23] Exactly the same would be true of an intending passenger falling on a line from an

[20] In *Ellis* v. *Fulham Borough Council*, quoted above, MacKinnon, L.J., pointed out that' 'the names or nicknames that have been customarily applied to describe those three categories are a little unfortunate. We all know what trespassers are, and that category is clear; but the names of the other two categories, "invitees" and "licensees", are, I think, unfortunate for the reason, that the most obvious use of the word "invitation" in common language is that of a request by a host to another person to attend a social function. A person who accepts that request and goes to his host's house, none the less ought to go into the category of licensees and not into that of invitees'. See also *Sutton* v. *Bootle Corporation*, [1947] 1 All E.R. 92.

[21] *Welfare* v. *L.B. & S.C. Ry. Co.* (1867), L.R. 4 Q.B. 693.

[22] *Smith* v. *G.E. Ry. Co.* (1866), L.R. 2 C.P. 4.

[23] See the decision in *Osborne* v. *L. & N.W. Ry. Co.* (1888), 21 Q.B.D. 220; and see also the decision of the Privy Council in *Letang* v. *Ottawa Electric Ry. Co.*, [1926] A.C. 725.

insufficiently lighted platform on a foggy night,[24] or of a passenger arriving by an excursion train and pushed by the crowd against an obstruction on the platform which the railwaymen ought to have removed in order to protect passengers against such dangers.[25] To such actions for damages on the ground of negligence the Executive cannot successfully plead that the user of the station had to take it as he found it. This goes so far that a very definite duty is imposed on carriers by rail and, presumably, by road, to take reasonable steps for the control of large numbers of persons coming to their stations. They must so regulate crowds that people do not unwittingly injure one another when there is a rush.[26]

It is not quite so easy to say what amount of care is owing to an invitee. In *Brackley* v. *Midland Ry. Co.*,[27] the Court of Appeal took the view that the only duty owing to an invitee was to warn him of the existence of dangers. In *Norman* v. *G.W. Ry. Co.*[28] on the other hand, the duty was pitched higher, so high indeed, that it is not easy to see the difference between the position of a person coming to the premises because he is entitled to do so and the invitee. If the former decision is right, the person who slipped on the ice and who was on the platform, for instance, in order to wait for a train by which a friend was arriving, could not recover if there had been a poster warning the public to take care because the platform was slippery.[29] In practice it seems that in the case of railway stations at least, invitees have been held to be entitled to almost the same degree of care as passengers. In theory, perhaps, there is some difference in the degree of liability, but in practice it cannot be said that the difference is of any importance to the Executive.

In *Thatcher* v. *G.W. Ry. Co.* a railway company was held to be liable to a man who had gone to a station in order to see off two ladies and who,

[24] See the decision of the House of Lords in *London, Tilbury & Southend Ry. Co.* v. *Paterson* (1913), 29 T.L.R. 413, and the more recent case of *Schlarb* v. *L.N.E. Ry. Co.* (1936), 1 All E.R. 71, where the facts were very similar.

[25] See *Sturges* v. *G.W. Ry. Co.* (1892), 8 T.L.R. 231; and cf. this case with *Cornman* v. *Eastern Counties Ry. Co.* (1859), 4 H. & N. 781, where the obstructing object was clearly visible and the company was not found to be negligent.

[26] See *Hogan* v. *S.E. Ry. Co.* (1873), 28 L.T. 271, where a woman with a child in her arms was swept off her feet on to the line and injured when a crowd rushed into an excursion train. She recovered damages. See also *Fraser* v. *Caledonian Ry. Co.* (1903), 5 F. 41; and cf. *McCallum* v. *N. British Ry. Co.*, [1908] S.C. 415.

[27] (1916), 85 L.J.K.B. 1596.

[28] [1915] 1 K.B. 584; see also *Weigall* v. *Westminster Hospital*, [1936] 1 All E.R. 232, at p. 236.

[29] See as to the controversy with regard to the duty owing to an invitee, Salmond, p. 479, and Winfield, p. 593.

when the train began to move, was struck by the door of the guard's van, which had not been properly shut. The Court found that the defendants owed the plaintiff a duty to take reasonable care not to do anything to endanger his personal safety.[30]

On the other hand, where the danger is perfectly obvious and it is mere carelessness on the part of the person using the station to run into it, the Executive cannot be made liable.

Thus held in *Watkins* v. *G.W. Ry. Co.*[31] where plaintiff, while accompanying her daughter to the station and crossing a foot bridge giving access to the platform, ran into a plank placed by a porter across the bridge in order to clean a lamp. In *Atherton* v. *L. & N.W. Ry. Co.*,[32] on the other hand, a man who was injured by a spark from an engine when going along a path running parallel and close to the line, recovered damages from the company, who had negligently omitted to screen the path.

The position of the licensee is altogether different. The duty owing to him is only to warn him of dangers known to the Executive [33] which are not obvious, in other words, the only right he has is not to be led into a 'trap'. If the man slipping on the ice had been on the platform in order to buy a newspaper he could hardly have recovered damages in any circumstances, for the danger was obvious. And if he had been injured by a spark from the engine, that is to say, by a hidden danger, it might well have been open to the Executive to say that it did not know anything about this particular source of danger. The mere fact that the occupier of the premises ought to have known of the danger is not sufficient to make him liable to a bare licensee. If the Executive permitted a person to use a footbridge for his own purposes unconnected with railway traffic and the footbridge was unsafe to the knowledge of the Executive, though there was nothing to show an ordinary observer that it was unsafe, the Executive would probably be liable in

[30] (1893), 10 T.L.R. 13; see the judgment of Lord Esher, M.R. See also a similar dictum by A. L. Smith, L.J., in *Taylor* v. *M.S. & L. Ry. Co.*, [1895] 1 Q.B. 134, where that learned Lord Justice seemed to be of the opinion that there was no difference at all between the invitee and the passenger as regards their rights.

[31] (1877), 37 L.T. 193.

[32] (1905), 93 L.T. 464.

[33] There is some doubt about the extent of the duty owing to a licensee. Is the occupier liable to him not only for dangers about which he knew but also for those about which he ought to have known? This latter view—more satisfactory perhaps from the point of view of justice, but difficult to reconcile with precedent—is based on the speech of Lord Hailsham, L.C., in *Addie* v. *Dumbreck*, [1929] A.C. 358, at p. 365, but it has been suggested that the Lord Chancellor used the relevant words owing to a slip of the tongue. See for a possible compromise solution of this problem the judgment of the Master of the Rolls in *Baker* v. *Borough of Bethnal Green*, [1945] 1 All E.R. 135, at p. 140.

damages if the person using the bridge fell and was hurt. If, however, the Executive did not know that the bridge was unsafe, it probably would not be liable to such person. It is not bound to see that persons not invited to, but only permitted on the Executive's premises do not go into dangerous places, or to warn them against dangers which are not concealed.

In *Batchelor* v. *Fortescue* [34] a contractor whose men were engaged in excavating earth was held not to be liable when an onlooker was killed by the falling down of a tub full of earth caused by the breaking of a chain hoisting up a steam crane.

It seems that the theory behind this astonishing rule is that a licensee receives the right to use the premises as a sort of gift,[35] and that, therefore, he must take the place as he finds it. A carrier is not under any duty to exercise care to have the premises in a safe condition for the use of such persons. Still, if he chooses to allow such persons to come on to the premises he must warn them of any concealed source of danger which is known to him but not apparent to a person who exercises ordinary care.[36] It should also be noted that even a passenger or other person coming as of right, or an invitee, becomes a bare licensee when he goes to a part of the premises to which he is not either expressly or impliedly invited to go and to which the carrier has no reason to expect him to go. If he is injured by defective machinery in such a place the carrier cannot be made liable.[37] Even to a bare licensee, however, the carrier would be liable for injuries caused by active negligence, as, for example, where a porter injured such a person by negligently wheeling a truck.[38]

As regards the trespasser there is no duty at all. He may even be 'led into a trap' with impunity as long as this is not done deliberately. Even a trespasser must not be harmed intentionally, but this seems to be the only claim he can raise against the occupier of the premises on which he trespasses.

In the practice of the Courts difficulties arise mainly in connection with children. There are cases in which a child must be regarded as a licensee in circumstances in which an adult might have been a trespasser. This is so in particular where the owner or

[34] (1883), 11 Q.B.D. 474.

[35] See Willes, J., in *Gautret* v. *Egerton* (1866), L.R. 2 C.P. 371, at p. 375. The decision of the House of Lords in *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74, now the leading case on this subject, is probably the high-water mark of the application of this theory.

[36] See *Wilson, Sons & Co., Ltd.* v. *Barry Ry. Co.* (1917), 86 L.J.K.B. 432.

[37] *Griffiths* v. *L.N.W. Ry. Co.* (1866), 14 L.T. 797.

[38] *Tebbutt* v. *Bristol and Exeter Ry. Co.* (1870), L.R. 6 Q.B. 73.

occupier of the premises raises no objection to children using his land or buildings as a playground. This, of course, could never be regarded as an implied permission to enter if the person concerned was an adult, but in the case of a child it might be regarded as a permission to be there if no objection were raised.

Thus, in *Cooke* v. *Midland G.W. Ry. of Ireland*[39] the defendant company had a turntable close to a public road. It was not used and was left unlocked and practically unfenced. It thus became the common plaything of the children of the neighbourhood, and the company took no steps to keep them off the premises. A child of four years of age while playing with others on the turntable was seriously injured, and brought an action for damages against the company. The House of Lords held that there was evidence of negligence to support a verdict against the company. In this case the failure of the company to warn the children off the premises was regarded as an implied license or permission to be there. Such a view, however, would probably not be held in similar circumstances where adults were concerned.

Again, what may be an effective warning in the case of adults may not be so in the case of children. For example, if a carrier by rail or road were content merely to post a notice forbidding persons to go on to a certain part of a station or garage, such a warning might well be sufficient to negative any implication of license to adults, but it would hardly be a sufficient warning to children. But even children may be trespassers if they go where they know they are forbidden to go in defiance of a warning.

Thus, in *Hardy* v. *Central London Ry. Co.*[40] there was an escalator giving access to the electric trains at the Liverpool Street Tube Station of the defendant company. The escalator was reached through a booking hall, which was open to the street, and was a powerful attraction to the children of the neighbourhood. Not only did the booking clerks drive them out, but a policeman went through the hall every half hour and cleared it of children. However, as soon as ever the coast was clear they used to return, prepared to run any risk to win a ride down and up the wonderful moving staircase. While playing this game a very young child, in the charge of an older child, was seriously injured and subsequently brought an action against the company for damages. It was held, however, that the injured child was a trespasser and that the company was not liable.

A careful distinction must be made between those parts of the premises where children can still be regarded as licensees and those where they are mere trespassers.

[39] [1909] A.C. 229.

[40] [1920] 3 K.B. 459. See also *Breslin* v. *L.N.E. Ry. Co.*, [1936] S.C. 816; *Adams* v. *Naylor*, [1944] K.B. 750, [1944] 2 All E.R. 21 (minefield), and *Walder* v. *Hammersmith Borough Council*, [1944] 1 All E.R. 490 (child playing in air-raid shelter).

Thus in *Jenkins* v. *G.W. Ry. Co.*[41] children were in the habit of playing on a pile of sleepers, where they were clearly licensees under the rule laid down by the House of Lords in *Cooke's Case*. On one occasion, however, a child two and a half years old went on to the railway line itself and was run down by a train. Here the child was a trespasser, and the action against the company was dismissed.

Another difference between children and adults in this respect is that a danger which may be apparent to an adult may not be apparent to a child, and what may be a trap to a child may not be a trap to an adult. This is not only so because adults can be expected to appreciate the dangerous character of a particular part of the station, garage or building better than children, but also because there is, in the case of a child, what has been called a 'moral or psychological' trap such as the turntable in *Cooke's Case*.[42]

Finally, there is this difference between children and adults, that what may be contributory negligence in the case of an adult need not be so in the case of a child. The Courts will not be very ready to assume contributory negligence in a child, and thus the carrier's liability to a child whether passenger, invitee or licensee is in practice higher than that to an adult.

[41] [1912] 1 K.B. 525. See also the Scottish case of *Edwards* v. *L.M.S. Ry. Co.*, [1928] S.L.T. 331.

[42] See the 'trap' and the 'moral trap' explained by Hamilton, L.J., in *Latham* v. *Johnson*, [1913] 1 K.B. 398. There have been very many cases dealing with this aspect of the matter during the last twenty years, but they are not concerned with carrier's premises. The most important are the two decisions of the House of Lords in *Addie* v. *Dumbreck*, [1929] A.C. 358, and *Excelsior Wire Rope Co.* v. *Callan*, [1930] A.C. 404. See also *Mourton* v. *Poulter*, [1930] 2 K.B. 183, and *Culkin* v. *McFie and Sons Ltd.*, [1939] 3 All E.R. 613.

Chapter 26

WHAT CAN BE RECOVERED

NON-FATAL ACCIDENTS

WHERE a carrier's negligence is the cause of non-fatal injuries such damages can be recovered as represent a compensation for loss directly traceable as a result of the negligence.[1] In a case of injury to property during transit, damages are, as a rule, easily measured; but where the injury is to the person, it is a matter of much greater difficulty to assess the damages. Some of the elements of damage are comparatively easy to calculate; for instance, medical expenses and loss of wages, board and lodging.[2] But it is impossible by any rule of valuation or arithmetic, to assess the worth of a lost eye or a lost leg, or the compensation properly payable for pain and suffering.[3] Yet all these items may have to be included, and so, above all, may the loss of earning capacity which is the result of an accident.[4]

One item in the calculation of damages for personal injuries may be the loss of expectation of happiness suffered by the victim. This must not be confused with damages for pain and suffering. The Courts do not regard damages for loss of expectation of happiness as a compensation for the mental anguish suffered by the victim owing to the consciousness that his life will be shortened. They consider 'a positive measure of happiness' as an objective asset the value of which can be assessed in currency. Hence this item may have to be included even though the victim is a child, incapable of appreciating this loss. On the other hand, it is expectation of happiness, and not what insurance mathematicians call expectation of life that has to be measured. The number of years

[1] It is impossible to deal in this context with the complicated question of remoteness of damage. The test mentioned in the text is the one adopted by the Court of Appeal in *Re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560; see, in particular, Scrutton, L.J., at p. 577. Whether this test will eventually be approved by the House of Lords cannot be predicted. See in particular the doubts expressed in *Bourhill* v. *Young*, [1943] A.C. 92.

[2] That board and lodging are to be included has now been laid down in *Liffen* v. *Watson*, [1940] 1 K.B. 556.

[3] The difficulty is enhanced by the fact that damages for pain and suffering can be recovered whether the cause of the pain be organic or neurotic. See *Liffen* v. *Watson*, above.

[4] The decision in *Phillips* v. *L.S.W. Ry. Co.* (1879), 5 Q.B.D. 78, 280, is still the leading authority on this matter.

lost is not, therefore, necessarily decisive in calculating the damages. No positive guidance can be derived for the assessment of the value of this item from the decisions of the Courts, except that judges and juries are constantly admonished not to award excessive amounts under this heading.[5]

Damages for personal injuries are recoverable even where an accident happens which does not cause any physical injury to a person, but nervous and mental injury from fright. Such nervous shock is a very real injury, the natural result of the accident, and a proper element, therefore, to be considered in assessing damages. It can now be regarded as definitely established [6] that where nervous shock is caused to a person by an act of negligence which gives rise to a reasonable fear of immediate personal injury, damages may be recovered although no actual impact occurred. This is of considerable importance in motor traffic, but perhaps the best illustration is afforded by the Irish railway case of *Bell* v. *G.N. Ry. Co. of Ireland,* mentioned above.

There a passenger in an excursion train suffered shock when a train ran down an incline backwards with great velocity, because it was too heavy for the engine. The train was pulled up suddenly with a jerk and physical injury was thus avoided, but medical evidence was given to the effect that this particular passenger was suffering from fright and nervous shock to such an extent that her condition might result in paralysis, and she recovered damages on this account.

Generally speaking, the assessment of damages in cases of per-

[5] The above is an attempt to summarise the main effect of the numerous decisions rendered in this matter of which the most important are *Rose* v. *Ford,* [1937] A.C. 826, and *Benham* v. *Gambling,* [1941] A.C. 157. The present writer has attempted a more exhaustive analysis in 5 *Modern Law Review,* p. 81.

[6] It is true that, in *Victoria Railway Commissioners* v. *Coultass* (1888), 13 App.Cas. 222, the Privy Council dismissed the claim for damages of a woman who had suffered serious illness on account of sudden terror at a train approaching a level crossing which had been negligently opened by a railway servant. But, first the Irish and subsequently the English courts refused to follow the decision of the Privy Council. See *Bell* v. *G.N. Ry. Co. of Ireland* (1890), 26 L.R. Ir. 428; *Dulieu* v. *White,* [1901] 2 K.B. 669, and *Hambrook* v. *Stokes Bros.,* [1925] 1 K.B. 141. It is still doubtful whether this principle is confined to cases in which the shock is caused by fear for human life or safety. The Court of Appeal, in *Owens* v. *Liverpool Corp.,* [1939] 1 K.B. 394, extended it to a case in which the relatives of a deceased person who attended the funeral suffered shock when the hearse collided with a tramcar. In *Bourhill* v. *Young,* [1943] A.C. 92, the correctness of the decision of the Court of Appeal in *Owens' Case* was doubted by four members of the House of Lords. The main principle, however, that damages can be recovered for shock caused by fear for one's own or another person's safety was approved by the House of Lords, although the decision itself went against the victim of the accident on other grounds.

sonal injuries is a matter for which very few strict rules can be laid down, and, hence, juries and judges of fact where they sit without a jury have a very free hand and award such damages as they think will tend to console the injured person for his suffering and cover his loss of expectation of happiness. The Court of Appeal will not interfere with a verdict on the ground that the damages are too much or too small, except in very extreme cases where the damages are so grossly excessive or so absurdly small as to show either that the jury did not understand the question or that they were influenced by improper motives, such as a desire to punish the defendant or by a misapprehension of the law.

The fact that the injured person was insured against accidents, and therefore entitled to receive a sum of money from an insurance company in respect of his injuries, must not be taken into account in assessing the damages payable by the carrier.[7]

FATAL ACCIDENTS

Two different questions arise in connection with fatal accident. (1) Can those who suffer damage through the death of another person recover compensation from a person, in our case a carrier, who is guilty of negligence causing this death? For example, can the wife and family of a man killed in a motor accident or railway collision sue the guilty motorist or Railway Executive for the loss which they have suffered because they have been deprived of the breadwinner of the family? (2) When a person dies, is he survived by those rights which accrued to him during his lifetime, and can these rights be claimed by his estate, *i.e.*, the person representing his estate, his executor or administrator? This second question arises whether the deceased was killed by the fault of another or not. He may have been libelled before his death, or he may have entered into a contract and, at the moment of his death, there may have been vested in him a right of action for damages on the ground of libel or on the ground of breach of contract, and the law has to answer the question whether such rights form part of a man's estate.

If a passenger is killed in a railway or motor coach accident both these questions have to be asked and answered. In many cases the deceased's widow is at the same time the representative of his estate, though this is not universally so. If she is, then she may perhaps be entitled to damages against the Executive, or the public service vehicle operator, under two different headings. She may claim damages for herself (and her children) on the ground of her own loss and the loss of the children. In so far she complains of the

[7] *Bradburn* v. *G.W. Ry. Co.* (1874), L.R. 10 Ex. 1.

damage suffered by herself, not of the damage suffered by the deceased. She says: I am so much the poorer because my husband died as a consequence of this accident, and I want to be compensated for this loss which I have suffered. But on the other hand, she may also say: I am the representative of my husband's estate, and my husband when he was still alive had vested in him certain rights of action against this carrier on the ground of this accident. For example, he had to pay so much for medical expenses; he lost so much by way of wages during his illness; he should have recovered so much for his pain and suffering, and so much for his loss of expectation of happiness. Under this second heading she is no longer referring to her own losses, but to those of her late husband, for which she claims compensation, not because she has become poorer, but because she represents the estate of her husband, and enforces the rights belonging to that estate.

The reader who distinguishes between these two questions will also understand the meaning of the two ancient common law rules which are now dwindling away, but which have given shape to this branch of the law, *viz.*, (a) that the death of a human being could not be complained of in a civil Court, and (b) that a personal action died with the person. The first of these rules referred to the loss suffered by A through the death of B, the second referred to B's own rights, which died with B.[8]

(1) *Loss suffered by a third person through the death of another*

The rule that the death of a human being cannot be complained of in a civil Court is of obscure origin, but, though subject to the most important exceptions, it is still part of English law. It was laid down in *Baker* v. *Bolton* in 1808,[9] and it was confirmed by the House of Lords in 1917.[10] The rule leads to astonishing consequences. For example, it is accepted law that a man may recover damages for injuries to his wife caused by negligence, and also for the loss of the services of a servant who was injured in an accident due to the negligence of another person, and that a son or daughter may be a servant if he or she renders services to a parent. Here, then, we have a case in which a third person, the master or husband,

[8] The decision of the Court of Appeal in *Marginson* v. *Blackburn Borough Council,* [1939] 2 K.B. 426, illustrates the need for a careful distinction between claims made by a person in his own right and claims made in a representative capacity. In so far as he represents another person's estate he cannot be met by a plea of *res judicata* based upon a judgment rendered in a previous action to which he was a party in his own right.

[9] 1 Camp. 493.

[10] *Admiralty Commissioners* v. *S.S. Amerika,* [1917] A.C. 38.

is one who can claim damages on the ground of an accident suffered not by himself, and this right is quite independent from that of the injured person. But, where a servant is killed, a master has no right of action for the loss of services which was the consequence of the death, though he may recover for the loss of services between the accident and the death.[11] If, then, a son or daughter be a servant by contract with a parent, the parent has no right of action for damages for the loss of their services by death. In 1934 the Law Revision Committee appointed by the Lord Chancellor reported that this rule in *Baker* v. *Bolton* should be abolished,[12] but this recommendation has not been carried into effect so far.

However, there has always been one important exception to this rule: If the death of A results from a breach of a contract made by B with C, the wrongdoer, then B is allowed to claim damages from C by reason of A's death.[13]

But all depends on whether B, the person claiming damages, has made the contract with C, the person who has caused the death of A. Only if the claimant himself is the contracting party, is he in a position to recover damages by reason of the death of another.

'Thus, a woman travelling in a motor coach is so injured as the result of negligence on the part of the driver that she dies; her husband is put to great expense for her medical treatment and nursing and for her funeral expenses. Before her injury the woman had managed the house and done the housework, the husband has been and will be forced to employ and pay for help. In such a case if the woman bought the ticket for the journey herself, her husband has no claim . . . because it is merely a claim in tort, and hence falls within the maxim. If, however, the husband bought the ticket for his wife so that he can claim in contract, the law . . . says that he may claim against the wrongdoers for all these expenses and for loss of his wife's services'.[14]

The rule in *Baker* v. *Bolton* brought the law into a lamentable state from the point of view of the widow and orphans and the other relatives of a man killed in an accident. Therefore, Parliament intervened in 1846 and passed the Fatal Accidents Act, 1846, which is known as Lord Campbell's Act,[15] and which is a very important exception to the rule in *Baker* v. *Bolton*, wiping out its most evil effects. The object of the Act is to give the dependants, *i.e.*, the family of a person killed through the default of another, the

[11] *Osborn* v. *Gillett* (1873), L.R. 8 Ex. 88, and *Clark* v. *L.G.O.C.*, [1906] 2 K.B. 648.

[12] Law Revision Committee Interim Report, 1934, Cmd. 4540.

[13] *Jackson* v. *Watson*, [1909] 2 K.B. 193.

[14] Law Revision Committee Interim Report, above, p. 4. He may sometimes claim under the Fatal Accidents Act. See below.

[15] 9 & 10 Vict. c. 93.

possibility of recovering compensation for their own loss, that is, for the loss of the family breadwinner.

'Whensoever the death of a person shall be caused by wrongful act, neglect, or default,[16] and 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, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony'.[17]

Only certain relatives of the deceased can claim compensation under this Act. The action is for the benefit of the wife, the husband, a parent or a child of the deceased person. The word 'parent' includes grandparents, and a step-parent, and the word 'child' includes a grandchild and a step-child, and also a child not born at the time of the fatal accident to its father.[18] Parents and children can also recover under this Act though they are only related to the deceased illegitimately or as a consequence of adoption.[19] If the deceased left no such relations as those mentioned, no action can, as a rule, be brought. Hence, brothers and sisters derive no advantage from the Act, even though they may have been absolutely dependent upon the deceased.

The jury may give such damages as they may think proportionate to the injury inflicted by the death on the parties affected, and it is their duty to decide how the damages shall be divided amongst those persons. But it is important to note that the persons for whose benefit the action is brought must have suffered some pecuniary loss through the death, and that they cannot recover for pain and anguish suffered as a result of the deceased's illness and death. Pecuniary loss includes the loss of a reasonable probability of pecuniary benefit from the deceased if the deceased had lived[20] though there may have been no legal right on the part of the person claiming compensation to be supported by the deceased.

Thus not only may a parent recover under the Act for services rendered by reason of relationship,[21] but it was held that a father could recover damages in respect of the death of his son who was killed in a railway accident, and who was in the habit of assisting his father when the father

[16] This includes breach of contract. See *Grein* v. *Imperial Airways*, [1937] 1 K.B. 50, a principle of importance in the law of carriage when liability in tort is excluded, but liability for breach of contract is not.
[17] Fatal Accidents Act, 1846, Sect. 1.
[18] *The George and Richard* (1871), L.R. 3 A. & E. 466.
[19] Law Reform (Miscellaneous Provisions) Act, 1934, Sect. 2.
[20] *Pym* v. *G.N. Ry. Co.* (1861), 4 B. & S. 396.
[21] *Dalton* v. *S.E. Ry. Co.* (1859), 4 C.B. (N.S.) 296.

was out of work. It was true that the father had not been actually assisted by the son for over five years, but as he was nearly blind, and had also suffered injuries to his legs and hands, there was a reasonable probability that he would again become dependent on his son's support and this was held to be sufficient evidence of pecuniary loss.[22]

A reasonable expectation of pecuniary benefit to be derived from the deceased is sufficient, but injury to feelings and mental suffering are rigidly excluded as grounds of liability.[23] In most cases the damages which are claimed are for the loss of actual support by a widow and children through the death of the family breadwinner, and now, under recent legislation, damages may also be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought.[24]

Where an action is brought under the Act on behalf of the relations of a deceased person, the fact that the deceased was insured and that insurance money has been paid or become payable on his death must not be taken into account in assessing damages,[25] nor must any benefit payable under the National Insurance Act, 1946, or under the National Insurance (Industrial Injuries Act), 1946, be deducted.[26]

An action under the Act must be commenced within twelve months after the death. Though this right is not vested in the estate as such, but belongs to the relatives mentioned in the Act, the action is brought in the name of the executor or administrator of the deceased who, in this case, does not act on behalf of the estate but for the benefit of those entitled to compensation under the Act. If there is no executor or administrator or if there is an executor or administrator but no action is brought within six months of the death, then the action may be brought by the persons themselves who are entitled to benefit.[27]

One of the most important points to remember about Lord Campbell's Act is that the relatives can get compensation only if the deceased, had he lived, could have recovered damages for his injuries. The right of the relatives is different in scope from that

[22] *Hetherington* v. *N.E. Ry. Co.* (1882), 9 Q.B.D. 160.
[23] *Royal Trust Co.* v. *Canadian Pacific Ry. Co.* (1922), 38 T.L.R. 899. This is different in Scottish law.
[24] Law Reform (Miscellaneous Provisions) Act, 1934, Sect. 2 (3).
[25] The Fatal Accidents (Damages) Act, 1908 (8 Edw. 7, c. 7).
[26] Law Reform (Personal Injuries) Act, 1948, Sect. 2 (5), but a reasonable prospect of receiving a pension otherwise than under National Insurance Legislation, e.g. under a Royal Warrant, must be taken into account: *Johnson* v. *Hill*, [1945] 2 All E.R. 272.
[27] The Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95).

which the deceased might have exercised had he been only injured but not killed; the damages which they recover are for their own loss, not for that of the deceased. But they cannot recover for such loss, unless the deceased might have recovered for his own. For example, if the deceased was guilty of contributory negligence, the person sued under the Act, *i.e.* in our case the carrier, is entitled to use this as a defence, and the damages recoverable for the benefit of the dependants will be reduced in the same proportion in which those recoverable by the deceased would have been reduced if he had survived.[28] In this respect as in others the relatives are said to stand in the shoes of the deceased. Thus, if after having suffered injuries, the injured man accepts compensation in full settlement of his claim, and afterwards dies, the relatives can bring no action under Lord Campbell's Act.[29] Also, if the carrier has validly excluded his liability either by the contract with the passenger or by the terms of the 'free pass' or other licence under which he was carried, the relations of this person cannot recover damages if he is killed in an accident.[30] However, if the contract or licence did not entirely exclude, but only limited, the carrier's liability, such limitation is held not to bind the relatives, for it is said to refer only to the loss suffered by the passenger himself and not to the loss suffered by his relations.[31]

In conclusion, it must again be mentioned that damages recovered under the Act are obtained by the dependants in their own right. They do not form part of the deceased's estate, are not assets available to his creditors for execution and are not assessable to death duties.

(2) *Loss suffered by the deceased himself*

At common law a person's rights of action in tort died with him. So that, if a man was seriously injured by the negligence of a carrier in whose vehicle he was travelling, and died before he could bring an action, the carrier escaped liability, at least for the injured man's pain and suffering and for his loss of expectation of happiness; though if he had lived long enough to sue, the carrier might have had to pay very heavy damages. Even at common law, however,

[28] Law Reform (Contributory Negligence) Act, 1945, Sect. 1, subs. 4.

[29] *Read* v. *G.E. Ry.* (1868), L.R. 3 Q.B. 555; and see, in particular, the judgment of Blackburn, J., at p. 558.

[30] *Haigh* v. *R.M.S.P. Co.* (1883), 49 L.T. 802; *The Stella,* [1900] P. 161. For such contracts and licences see below, p. 327.

[31] *Nunan* v. *S. Ry. Co.,* [1924] 1 K.B. 223; *Grein* v. *Imperial Airways,* [1937] 1 K.B. 50. The somewhat surprising result is that, in the words of the learned editor of the 10th ed. of *Salmond on Torts* (p. 352), 'the deceased can bar his dependants entirely of their remedy, but he cannot bar them in part'.

contractual rights survived the death of the person entitled, though rights in tort did not. As a consequence of this principle a passenger who had taken a ticket for himself and was killed in an accident due to the negligence of the carrier, was survived by his right to recover for medical expenses incurred before his death and for actual loss of wages during the period between the accident and the death, and these sums could be claimed by the estate.[32]

The principle that a personal action dies with the person [33] was abolished in 1934 by the Law Reform (Miscellaneous Provisions) Act [34] which provides that, subject to certain exceptions, 'on the death of any person after the commencement of this Act all causes of action . . . vested in him shall survive . . . for the benefit of his estate'.[35] Therefore, the representative of the estate of a passenger killed in an accident due to the negligence of a carrier, can claim against the carrier the same rights, which the deceased could have claimed, had he survived. What these rights are, we have explained when dealing with non-fatal accidents. They do not only include loss suffered through medical expenses and loss of wages between the accident and death, but also damages for the deceased's pain and suffering and for the loss of his expectation of happiness. At first sight this may seem to be startling. It looks as if those likely to benefit from the deceased's premature death, whether they be relatives taking under an intestacy, beneficiaries under his will, or, perhaps, his creditors, were enabled to claim damages for the very event which caused the benefit to accrue to them, namely, the cutting down of the deceased's life. The law, however, regards this question from the moment immediately preceding the death. At that moment it was already certain that the injured person's expectation of happiness was diminished as a result of the accident. At that moment, then, the deceased might have claimed damages by reason of the probability that death would occur sooner and consequently his expectation of happiness be reduced. Under the Act of 1934 this right survives for the benefit of his estate, even if death was instantaneous.[36] The case of instantaneous death illustrates the difference between damages for pain and suffering and damages for loss of expectation of happiness. If the deceased was not at any moment conscious of the accident, he cannot be said to have suffered any pain, and consequently the estate cannot recover

[32] *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (1875), L.R. 10 C.P. 189.
[33] Usually quoted in Latin: '*Actio personalis moritur cum persona*'.
[34] 24 & 25 Geo. 5, c. 41, s. 1.
[35] The Act also provides that causes of action subsisting against a person shall survive against his estate, but this is of no importance for our present purposes.
[36] *Morgan* v. *Scoulding*, [1938] 1 K.B. 786.

any damages under this heading, but loss of expectation of happiness does not depend on the feelings of the person concerned and thus damages on that ground may be recovered even in a case of instantaneous death.

The Act of 1934[37] says that neither a loss nor a gain to the estate itself which has been caused by the death must be taken into account. The loss or gain to the estate which was caused by the death cannot possibly have been that of the deceased, and the rights which are enforced under the Act are the rights of the deceased himself which had accrued to him before his death. Thus, the fact that a business carried on by the deceased suffers because he is no longer alive, or that an annuity which he enjoyed during lifetime lapses with his death, must be left out of account when calculating damages. On the other hand, insurance money payable under a life policy at the moment of death may not be deducted. By way of exception funeral expenses which, of course, are expenses of the estate and not expenses of the deceased, may be included.

The persons deriving benefit from the operation of the Act of 1934 will often be quite different from those benefiting under the Act of 1846. Whenever the dependants are excluded by will from the enjoyment of the estate, or whenever the estate is overburdened with debts, the damages recoverable under the 1934 Act will ultimately go either to the beneficiaries outside the family or to the creditors. As a rule, however, a man leaves his property to his family, and when that is so the members of the family will often be benefited in their capacity as dependants under the Act of 1846 (since they recover for the loss of their breadwinner) and at the same time as beneficiaries of the deceased's estate under the Act of 1934. That Act says, in Sect. 1 (5), that the rights conferred by it for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred by the Fatal Accidents Acts. This, however, means no more than that actions under both statutes can be maintained simultaneously and are not mutually exclusive. It does not prevents the Courts from avoiding a duplication of damages. The Fatal Accidents Acts establish the principle that, exceptions apart, any pecuniary benefit derived by a dependant from the death of the deceased must be deducted from his claim for damages under the Acts. The Courts apply this principle so as to reduce the amount recoverable under these Acts by the sum obtained under the Act of 1934.[38]

[37] Sect. 1, subs. 2.

[38] The controversy relating to this topic was settled by the House of Lords in *Davies* v. *Powell Duffryn Collieries,* [1942] A.C. 601.

Chapter 27

INSURANCE

The reader will have gathered from the preceding chapters that the law is anxious to give ample protection to passengers in railway trains and public service vehicles, and to impose a heavy liability on carriers of passengers for injuries suffered by persons transported in their vehicles. However, even the most stringent provisions of the law cannot protect an injured passenger or the family of a passenger killed in an accident against the carrier's inability to pay. The most favourable judgment will not be of much assistance to the person injured or his dependants if the judgment recovered cannot be satisfied. With public corporations, such as the Transport Commission and the Executives acting as its agents, this problem does not arise. In the case of public service vehicle owners, however, the law takes the view that a special safeguard is necessary in order to ensure that claims raised by those using the vehicles or their families on the ground of accidents attributable to the carrier's fault, are met in cash. The law tries to achieve this result by the institution of compulsory third party risk insurance.[1]

Whenever a person anticipates that he may become liable to a third party, he may enter into a contract of insurance with an insurer by which the insurer undertakes to satisfy the claims raised by a third party or to indemnify the insured if he has met a claim himself. Such contracts have always been very usual in connection with mechanised road transport. The motorist was always well advised to take out a third party risk insurance policy in order to avoid the danger of having to pay large sums out of his own pocket should he be unfortunate enough to injure a person on the road. However, it was only in 1930 that third party risk insurance by motorists became compulsory in this country. The main object of those provisions in the Road Traffic Act, 1930, which compel

[1] The subject of third party risk insurance cannot be dealt with here. This chapter has the sole object of explaining to the non-legal reader what compulsory insurance means. The reader is referred to the introductory work by Picard, *Elements of Insurance Law*, 1935, and, for more detailed information, to the exhaustive treatise by Shawcross, *The Law of Motor Insurance*, 1935. The statutory provisions are contained in Sects 35–44 of the Road Traffic Act, 1930, in Sects. 10–17 of the Road Traffic Act, 1934, and in the Third Parties (Rights against Insurers) Act, 1930. See also the Motor Vehicles (Third Party Risks) Regulations, 1941, S.R. and O., No. 926.

motorists to take out and keep in force third party policies,[2] is to protect other road users, such as pedestrians, cyclists, drivers of, and passengers in, other motor vehicles, who suffer injuries through the fault of the motorist insured. With this aspect of compulsory third party insurance, which is by far the most important one in practice, we are not concerned in this book.

What is important from our point of view is that, under the Road Traffic Act, 1930, the owner of a public service vehicle, and, indeed, of any other vehicle in which passengers are carried for hire or reward,[3] is compelled by law to be insured against third party risk. And the policy must cover his own liability and that of any other person whom he permits to use the vehicle in respect of death of, or injury to, persons carried in or upon the vehicle, entering it or alighting from it.[4] This means that the owner of a motor coach, for example, is under a statutory duty to be insured against third party risk arising from fatal or non-fatal injuries suffered by his passengers at any time from the moment when they begin to enter the vehicle until the moment when they have ceased alighting from it. The policy must not only cover the owner's own negligence, but also that of his driver and of anybody who, with his permission, uses the vehicle on the road.

The law recognises that with certain owners of public service vehicles such precautions are unnecessary. Local authorities, for example, are generally exempted from this compulsion to insure against liability to passengers in their public service vehicles.[5] Moreover, the owner of a public service vehicle, instead of taking out an insurance policy, can deposit with the Accountant-General of the Supreme Court the sum of £15,000, which is a security in the hands of the Court for possible claims made by passengers or their dependants, and in this case he need not take out a third party policy.[6]

The insurance policy must be issued by an authorised insurer, that is to say, by insurance companies or underwriters who comply

[2] See, in particular, Sect. 35 (1). Instead of obtaining a third party policy, he may also obtain a security given by an authorised insurer and consisting of an undertaking to make good any failure by the vehicle owner to discharge his liability arising from accidents. In the case of public service vehicles, the maximum limit of this undertaking must be no less than 25,000*l*. See Sect. 37.

[3] For the meaning of this phrase in this context see *Wyatt* v. *Guildhall Insurance Co. Ltd.*, [1937] 1 K.B. 653.

[4] See Sect. 35 (1) and Sect. 36 (1) (b) (ii).

[5] Sect. 35 (4).

[6] The provision about deposits was made to cover the case of public service vehicle owners who are in a habit of acting as self-insurers.

with certain legal requirements made in order to safeguard their solvency.[7]

The insurer issues to the owner of the vehicle a certificate of insurance, which he must produce to a police officer whenever required to do so. He will not get his revenue licence unless he produces evidence that the insurance policy is in force.[8]

A moment's reflection will make it clear that if the law confined itself to introducing the principle of compulsory insurance it could not achieve its object of protecting road users and passengers in public service vehicles against the vehicle owner's inability to pay. It must be remembered that the contract of insurance is a contract between the owner and the insurer, and that, for example, a passenger in a public service vehicle is not a party to that contract. The mere principle of compulsory insurance does not give the passenger or his dependants any right against the insurer. Their rights are rights against the carrier only. What happens if the carrier is made bankrupt, or if a company is wound up? Without other legal provisions, a claim against the insurer would be part of his general assets and the money paid to him by the insurer and destined to cover his liability to passengers, etc., would be distributed among his general creditors in the case of his bankruptcy. Moreover, an insured carrier's right against the insurer is not even a debt which can be attached by way of execution on behalf of an injured passenger or his relations.[9]

It is for these reasons that, in 1930, the possibility of direct proceedings on the part of the third party against the insurer was, for the first time, introduced into English law. This was done by a special Act, the Third Parties (Rights against Insurers) Act, 1930.[10] By this Act it is provided that in the case of the person insured against third party risks becoming bankrupt, or in the case of other events equivalent to bankruptcy, such as composition with creditors and winding up in the case of companies, the rights against the insurers vest in the third party whether the liability of the insured person to the third party arose before or after the bankruptcy. Thus, for instance, if a passenger in a motor coach is injured in an accident owing to the fault of the coach driver, and afterwards the owner of the coach is made bankrupt, the coach owner's right against the insurance company to be indemnified against claims on the part of

[7] As to the meaning of 'authorised insurer', see Sect. 36 (3) of the Road Traffic Act, 1930, and see also Sect. 42.

[8] See Sects. 36 (5), 40 and 39 of the Road Traffic Act, 1930.

[9] See, as to this point, the decision of the Court of Appeal in *Israelson* v. *Dawson*, [1933] 1 K.B. 301.

[10] 20 & 21 Geo. 5, c. 25.

the passenger would not become part of the assets to be distributed among the creditors. The passenger himself would be enabled to proceed against the insurance company.[11] The Third Parties Act, 1930, is not confined in its scope to third party risk insurance in connection with road traffic, though probably it was liability arising from road accidents which was uppermost in the minds of those drafting the Act. On the other hand, the application of the Act is restricted to cases of bankruptcy and similar events and in other cases this Act gives no direct claim which the passenger can enforce against the insurer.

The principle of direct action (in certain cases), as embodied in the Third Parties Act, combined with the principle of compulsory insurance as contained in the Road Traffic Act, 1930, goes a long way to removing the danger that passengers in public service vehicles or their dependants will be unable to obtain those damages from the carrier which are due to them in law. Since the carrier must always be insured or have obtained security covering his liability towards the passenger, and since in a case of bankruptcy, etc. the passenger can proceed directly against the insurer, the law has done its utmost to enable a passenger or his dependants to recover their damages from the insurer if they cannot recover them from a solvent carrier.

Still, even these provisions would be insufficient to protect the public, and passengers in particular. So far we have not said anything about any agreements which the carrier may have made with his insurer. We must remember that insurance, including third party insurance, is a contract, and it is the essence of a contract that the parties to it are free to enter into any agreement within the limits of public policy and the imperative provisions of statutes. So far as insurance policies taken out by road carriers are concerned, the law must restrict this freedom of contract, otherwise there might be a danger that, for example, passengers in public service vehicles lose their rights, not because there is no insurance policy, but because something has happened which invalidates the policy according to the contract made between the carrier and the insurer, or because something has not happened which was made by the insurer a condition of his liability.[12]

For example, it might have been agreed between the carrier and

[11] However, he might also obtain judgment against the carrier himself instead of proceeding against the insurer, and then make the insurance company liable under the provisions to be mentioned. See Sect. 11 of the Road Traffic Act, 1934.

[12] Any reader familiar with insurance law will notice that we are using certain terms in an untechnical way in order to explain the effect of the provisions.

the insurer that the insurer was not to become liable unless the carrier informed him of the accident within twenty-four hours. In such a case, if the carrier omitted to comply with this clause of his contract the insurer would not be liable to the carrier, nor, even in the case of compulsory third party insurance, to a third party proceeding under the Third Party Act in the case of a carrier's insolvency. The Road Traffic Act, 1930,[13] tries to cope with this difficulty and enacts that any condition in a policy (or security) which provides that liability shall not arise unless some specified thing is done after the accident, shall be of no effect in connection with any claim made under a compulsory policy. The same applies if the policy provides that something shall not be done after the event, for example, that the vehicle shall not be moved without the insurer's consent. It is quite true that this provision protects the public, including passengers in motor coaches and the like, from the detrimental effect of any clause in policies dealing with something to be done or not to be done *after* the accident, but it was soon realised after the Act had come into force that there was a gap. The Act did not deal with those cases in which the insurer's liability depended on something to be done or left undone, or some disclosure being made by the insured owner, *before* the accident which gave rise to the liability. And even under the Act of 1930 a third party remained fully exposed to a defence raised by the insurer which was based on some restriction in the policy. Let us select three examples: If the carrier in his proposal form gives incorrect or insufficient answers to the questions asked by the insurer, for instance, if the carrier untruthfully states that he has never had an accident before, this may entitle the insurer to avoid the policy. If, in such a case, the insurer avoided the policy after the accident, the purpose of the law would be defeated. Or, again, if the carrier agreed to take all reasonable steps to maintain the vehicle in an efficient state, and before the accident did something to the brake which was contrary to this undertaking, again the insurer could avoid liability.[14] And, finally, if the policy said that the insurer was not to be liable if the vehicle was driven by a person less than twenty-five years old, and the driver at the time of the accident was twenty-three, the insurer could again avoid liability.

It was one of the objects[15] of the Road Traffic Act, 1934, to enable third parties to recover the amount of their damages from

[13] Sect. 38.

[14] See *Jones* v. *Provincial Insurance Co.* (1929), 46 T.L.R. 71.

[15] For an explanation see the judgment of Goddard, L.J., (as he then was) in the Court of Appeal in *Zurich General Accident and Liability Insurance Co. Ltd.* v. *Morrison,* [1942] 1 All E.R. 529, at p. 540.

the insurer, although, at common law, the insurer would not have been liable to indemnify the carrier. It is not possible here to deal with these very complicated provisions. It must be sufficient to say that once a certificate of insurance has been delivered to the owner of a public service vehicle, any restriction of the policy referring to such matters as the age of the driver, the condition of the vehicle, the number of persons carried in the vehicle, etc. are of no effect in so far as the insurance is compulsory. Such clauses are not entirely void, and the insurer may try to recover from the carrier the money paid to third parties, but in relation to third parties he cannot rely upon such clauses.

Moreover, though the insurer may have a right of avoiding or cancelling the policy, *e.g.*, because the vehicle owner—wittingly or unwittingly—made a wrong statement when filling in his proposal form, he is not relieved of his liability to pay the insurance money to third parties to whom the carrier is liable. That is so even if the insurer has already intimated to the carrier that he avoids or cancels the policy, when he has allowed the carrier to remain in possession of the certificate of insurance. There are certain ways in which an insurer can get out of this stringent liability, which cannot be discussed here. The main effect of these provisions is to make the third party's position fairly independent of what happens between the insurer and the carrier.[16]

In spite of all these provisions the law is still incomplete and there are far too many loopholes enabling the insurer to escape liability. Thus, as soon as a vehicle is used for any purpose other than those described in the policy, the insurer is not liable and there is nothing, even in the Act of 1934, to protect third parties in such cases.[17] This is a serious shortcoming in motor insurance law, but since it concerns private vehicles more than public vehicles, we cannot deal with it here in any detail.

The Road Traffic Acts of 1930 and 1934 also contain provisions to protect hospitals which give treatment to persons injured in road accidents. Certain hospitals can in certain cases claim from the insurer expenses incurred in connection with the treatment.[18]

[16] See Sects. 12 and 10 of the Road Traffic Act, 1934.

[17] See the remarks made by Goddard, J., in *Jones* v. *Welsh Insurance Corporation, Ltd.* (1937), 157 L.T. 483, and see, for a striking and recent illustration: *Bonham* v. *Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] 1 All E.R. 427.

[18] Sect. 36 (2) of the Road Traffic Act, 1930, as amended by Sect. 33 of the Road and Rail Traffic Act, 1933; and see also Road Traffic Act, 1934, Sects. 16 and 17.

Chapter 28

DELAY

In practice the liability of a carrier of passengers for delay is of infinitely smaller importance than that for safe carriage. As yet there does not seem to be any decision which lays down the law governing a public service vehicle owner's liability for delay. It would appear, however, that the principles evolved by the Courts in railway law might also be applicable in the case of motor coaches. These principles are as follows :—

The mere issuing of a ticket to a passenger does not imply a promise to carry the passenger to his destination by a particular train or at a particular time.

In *Hurst* v. *G.N. Ry. Co.*[1] a passenger complained of having been delayed at Gloucester, where he had to change on his way from Cardiff to Newcastle. Willes, J., said: 'As to the ticket, all that it indicates is that the plaintiff shall be carried from Cardiff to Newcastle by the next train starting from Cardiff to Gloucester (where the defendants' line ends) and thence on by the next train starting from Gloucester for Newcastle at such time as it was possible to overtake it. It is simply a ticket for the plaintiff's conveyance from Cardiff to Newcastle'.

Of course, if there is no train at all the contract of carriage has been broken by the carrier.

In *Hobbs* v. *L.S.W. Ry. Co.*[2] a husband and wife took tickets for themselves and their children from Wimbledon to Hampton Court. They were landed at Esher instead, and were unable to obtain a train from there. They recovered damages for breach of contract on the ground that they were forced to walk all the way from Esher to Hampton Court on a stormy night. 'The contract', said Blackburn, J., 'was to supply a conveyance to Hampton Court, and it was not supplied'.

So much concerning the effect of the ticket as such. The matter is different, however, when we consider the effect of the time-table on the contract between the parties. In a number of decisions the correctness of which is open to doubt,[3] the public time-table has

[1] (1865), 19 C.B. (N.S.) 310.
[2] (1875), L.R. 10 Q.B. 111.
[3] The doubt refers to the assumption made in these cases that the unqualified advertisement of a time-table is an offer. The cases on auctioneers, company prospectuses, price lists, etc. suggest that the time-table is only an invitation to make an offer. See the remarks of Lord Hanworth, M.R., in *Thompson* v. *L.M.S.*, [1930] 1 K.B. at p. 47, and Cheshire and Fifoot, *Law of Contracts*, p. 22.

been held to be an implied part of the agreement between the passenger and the carrier. Unless the carrier safeguards himself by special contractual provisions, he undertakes to provide the trains or vehicles at the times mentioned in the time-table. Thus, the Railway Executive may be bound by the publication of a time-table to run a particular train at a particular time to a particular place.

In *Denton* v. *G.N. Ry. Co.*,[4] the railway company had discontinued running a certain train without changing the time-table, and an intending passenger recovered damages for the loss of an appointment. In *Cooke* v. *Midland Ry. Co.*,[5] a miner, who was the holder of a ticket for a workmen's train due to start at 5.18 a.m. according to a time-table issued for the information of the miners of his colliery, recovered damages for the loss of one day's earnings when the train was too late to allow him to reach the colliery in time for the day's work.

In view of this effect of time-tables on its liability the Railway Executive is very careful to protect itself, either by contractual restrictions of its liability for delay, or by those general rules issued under statutory powers which are binding upon itself as well as upon its passengers. The relevant 'Conditions of Issue of Passenger Tickets' now provide that the carrier does not undertake that the train shall start or arrive at the time specified in the time-tables. The Executive also refuses to be responsible for any loss, inconvenience or injury which may arise from delay or detention, unless upon proof that such loss, inconvenience, injury, delay or detention arose as a consequence of wilful misconduct on the part of its servants. It also reserves the right to alter the time-tables at any time without notice. These conditions appear to afford the carrier very efficient protection, as it is not easy to imagine a case of delay which can be proved to be due to the wilful misconduct of the railwaymen.[6]

Should such misconduct ever be established, the passenger would be entitled to compensation for damage ensuing directly from the breach of contract and not for any inconvenience or loss caused by the delay, but not within the contemplation of the parties when making the contract. Thus, in *Hobbs* v. *L.S.W. Ry. Co.*,[7] the

[4] (1856), 5 E. and B. 860.

[5] (1892), 57 J.P. 388.

[6] The development of the law leading up to the formulation of these conditions was explained in the previous edition. It is now only of historical interest. In several cases it was held that they afforded full protection; see, *e.g.*, *Woodgate* v. *G.W. Ry. Co.* (1884), 51 L.T. 826; *M'Cartan* v. *N.E. Ry. Co.* (1885), 54 L.J.Q.B. 441; and *Duckworth* v. *Lancashire and Yorkshire Ry. Co.* (1901), 84 L.T. 774.

[7] Above, p. 324. The propriety of the decision was doubted in the subsequent case of *M'Mahon* v. *Field* (1881), 7 Q.B.D. 591.

husband obtained damages for the inconvenience suffered by himself, but not for his wife's medical expenses or for the loss incurred by himself owing to her inability to assist him in his business while she was laid up with a cold contracted during the forced march across the Thames bridge. A passenger who claims damages for delay must, moreover, do his best to mitigate the damages by trying to get a bus, or if need be, a taxi, and must on the whole behave exactly as he would have behaved if the delay had been due to his own fault. He will then be able to recover from the carrier expenditure thus reasonably incurred, but he must not indulge in extravagances he would never resort to when acting for his own account, like the passenger in *Le Blanche* v. *L.N.W. Ry. Co.*,[8] who actually attempted to saddle the railway company with expenses to the order of £11 10*s.* for a special train he had ordered for no other purpose than to arrive at a seaside resort in time for his dinner.

[8] (1876), 1 C.P.D. 286. Contrast *Hamlin* v. *G.N. Ry. Co.* (1856), 26 L.J. Ex. 20 where a man failed to recover damages for loss of an appointment on the ground that he might have kept it if he had taken a road vehicle.

Chapter 29

CONTRACTUAL LIMITATION OF LIABILITY

We have seen that a common carrier of passengers is not absolutely liable like a common carrier of goods, but that he must not unreasonably refuse to carry an intending passenger, provided the contract of carriage is within the terms of his profession. We have also seen that the common carrier of goods, although under a duty to carry, is free to limit his liability for the safety of the goods entrusted to his care and even to exclude it altogether. It is true that such restriction or exclusion of liability requires a contract, but the common law does not in any way impair the carrier's freedom of contract in this respect. Whatever limitations had to be placed on the common carrier's power to contract out of his liabilities, had to be imposed by statutes, such as the Carriers Act, 1830, and the Railway and Canal Traffic Act, 1854, because the common law was silent. Exactly the same is true of the common carrier of passengers. He too is free to contract out of his liabilities, unless a statute prevents him from doing so. His liability, while much less heavy than that of the common carrier of goods, can like the latter be limited or removed by contract, and 'such a contract cannot be pronounced unreasonable by a court of justice'.[1]

Hence the carrier may attach conditions to his preparedness to carry. He may say: 'I am prepared to carry you, but only if you relieve me of the whole or of part of my liability for your safety during transit'. He may do so whether he carries at the ordinary or at a reduced fare, although, in practice, it seems to be unusual for the carrier's liability to be limited in the nowadays less frequent cases in which passengers are carried at ordinary single fares.[2] All

[1] *Per* Viscount Haldane in *Grand Trunk Railway of Canada* v. *Robinson*, [1915] A.C. 740, at p. 747. The text follows the reasoning developed by Lord Wright in *Ludditt* v. *Ginger Coote Airways Ltd.*, [1947] A.C. 233. It is submitted that, in so far as it is at variance with this reasoning, the decision of the Court of Appeal in *Clarke* v. *West Ham Corporation*, [1909] 2 K.B. 858, cannot be regarded as correct. The discussion in the previous edition of this book was largely based on that decision.

[2] This practice of making no attempt to limit liability under ordinary single fare contracts may account for the fact that the validity of the so-called rule in *Clarke* v. *West Ham Corporation*, above, has never been tested in an English railway case. This alleged rule is to the effect that something like the doctrine of the fair alternative has to be read into the common law, *i.e.* that a common carrier of passengers may limit his liability to a

this applies to railway traffic, but in the case of public service vehicles a statutory provision, Sect. 97 of the Road Traffic Act, 1930, completely prohibits any exclusion or even restriction by contract of the carrier's liability for the safety of his passengers. The section provides as follows :—

'Any contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or restrict the liability of any person in respect of any claim which may be made against that person in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of such liability, be void'.

In view of the particular risk connected with motor transport, it is a matter of public policy that passengers should be able to enforce their claims against the public service vehicle owner, or, as the case may be, his insurer, and it is for this reason that the law imposes this imperative provision. But the section applies only to *contracts* with passengers. The public service vehicle owner is free to restrict or even exclude his liability for the safety of such passengers as are not carried by virtue of a contract, but as bare licensees, *e.g.* as holders of a 'free pass'.[3]

Carriers by rail, however, are free to restrict their liability, provided it is done by contract (or by the condition of a licence to travel free of charge).

We have seen that the carrier's liability for injuries to passengers, fatal or non-fatal, is quite independent from the existence of any contract. But, when a passenger suffers injuries through the negligence of the Executive or its servants, the Executive has not only committed a tort, but also, in the case of a paying passenger, a breach of the contract made with him to carry him

passenger carried at a reduced fare, but that no such limitation is valid without a countervailing concession, leaving it open to the passenger to insist on full liability while foregoing the concession in fares. It should be remembered that, in the law of carriage of goods, the doctrine of the fair alternative was developed by the House of Lords in *Peek* v. *N. Staffordshire Ry. Co.*, above, by way of interpreting Sect. 7 of the Act of 1854, and not as a doctrine of the common law. What the so-called rule in *Clarke's Case* postulates is that Sect. 7 of the Act of 1854 is redundant, for, if the doctrine was inherent in the common law there would have been no need for the restrictions on the carrier's freedom of contract imposed by Sect. 7. The facilities clause in Sect. 2 of the Act of 1854 which applies to passenger traffic (in contradistinction to Sect. 7 which does not) has nothing to do with the question. Like the similar Canadian enactment discussed by Lord Wright in *Ludditt* v. *Ginger Coote Airways Ltd.*, above, it does not 'relate to the particular terms of any special contract or their reasonableness but simply to external physical and mechanical facilities'.

[3] *Wilkie* v. *L.P.T.B.*, [1947] 1 All E.R. 258.

with due care, and, in regard to other matters between the carrier and the passenger, such as the question of delay, and the duties of the passenger himself, the contract is the ruling factor, and the relationship between carrier and passenger depends on its terms. If the Executive and a passenger enter into a special contract, by which the Executive's contractual liability for injuries is restricted, the passenger cannot enforce a claim in tort which goes beyond the restricted liability of the carrier as imposed by contract.[4]

In the absence of such a special contract the carrier is liable for negligence. He is not absolutely liable. This is important for the interpretation of contractual clauses by which a carrier of passengers attempts to exclude or to restrict his liability for the consequences of accidents. The Courts deal with such clauses by applying the same canons of construction which they have developed for exceptions clauses in contracts for the carriage of goods.[5] A carrier of passengers 'is under a duty to use skill and care and no more. The absolute duty of the goods carrier to keep and deliver safely does not apply'.[6] Hence exceptions clauses contained in contracts for the carriage of passengers must be interpreted like those agreed upon between private carriers of goods and their customers. The special rules of construction applicable to common carriers of goods and their contracts cannot be invoked by a passenger seeking to obtain damages for the consequences of an accident. In particular, a general clause negativing liability, *i.e.* words like 'howsoever caused' etc. are sufficient to remove liability for negligence, and no express negligence clause is required for that purpose.

This was well illustrated by a case concerning the carriage of passengers by sea, the principle of which is, however, equally applicable to inland transport. In *Beaumont-Thomas* v. *Blue Star Line Ltd.*, above, the plaintiff, a passenger in the defendants' steamship, slipped on the floor outside his cabin and suffered serious injuries. He claimed damages on the ground that the steward had been negligent in washing the floor of the corridor at a time when many passengers would go to their cabins. The defendants denied that there had been any negligence on the part of their servant and —this is the decisive point—relied on two clauses in the written contract. By the first of these the passengers took upon themselves 'all risks whatsoever of the passage to themselves their baggage and effects', while by the second, 'without restricting the generality' of the previous condition, the defendant

[4] See the leading case of *Elder Dempster and Co.* v. *Paterson, Zochonis and Co. Ltd.*, [1924] A.C. 522; and see *Grand Trunk Ry. Co. of Canada* v. *Robinson*, [1915] A.C. 740.

[5] See above, p. 130.

[6] *Per* Scott, L.J., in *Beaumont-Thomas* v. *Blue Star Line Ltd.*, [1939] 3 All E.R. 127, at p. 130.

company was not to 'be held liable for . . . injury . . . to any passenger arising or resulting directly or indirectly from any act, neglect or default of pilot, master, officers, mariners, or of any other persons whatsoever whether in any way acting for or under contract with or in the employ of the company or not in the navigation or management of the ship . . . or from any other cause whatsoever'. The Court of Appeal, reversing the decision of Lord Hewart, C.J.,[7] held that these clauses excluded the defendants' liability to the plaintiff on the assumption that the steward had been negligent (an assumption, incidentally, held to be unfounded). Scott, L.J., pointed out that it was 'essential first to ascertain what the contractual duty would be if there were no exception. In the contract of a common carrier by land or of a shipowner for the carriage of goods by sea, broadly speaking, the carrier is an insurer for the safe delivery of the goods. If they are damaged on the way, he is liable. That is his primary duty. There is also a secondary duty, however, namely the duty to use skill and care. That duty comes into play in case of the carrier invoking some term of an exception clause as a protection against liability. In such a case, if the excepted peril has been occasioned by the negligence of the carrier's servants, the failure to perform the secondary duty debars him from reliance upon the exception. In the case of a carrier of passengers no such double duty attaches. . . . This fundamental difference in the basic contract caused the common law courts of England during the last 100 years to make a difference in the interpretation of general words of exception from liability according as the contract to be construed was one imposing the double duty or only the one duty. . . . In the case of double duty, the Courts have treated the exception as *prima facie* directed to the absolute undertaking of safe delivery, but as not applying to the duty of skill and care. On the other hand, in a contract where there was no duty except the duty of skill and care, the Courts have construed the same words of exception in the opposite sense—namely, as directed to the duty of skill and care —for the two simple reasons (1) that some meaning must be given, and (2) that no other meaning than an exception of liability for negligence was left'. On these grounds the Court came to the conclusion that the first of the two exceptions clauses excluded the defendants' liability for negligence and that the opening and the concluding words of the second clause prevented it from cutting down the effect of the first.

What is true of contractual clauses applies with equal force to the conditions of a 'free pass' or other licence by which a carrier of passengers permits persons who have not entered into a contract of carriage to use a vehicle.[8]

Section 7 of the Railway and Canal Traffic Act, 1854, does not apply to passengers. It is not necessary, therefore, for a contract to carry a person to be in writing or signed by the person in order to be binding upon him, provided that the conditions of the contract are brought to his notice.

The contract for the carriage of a passenger by railway is

[7] [1939] 1 All E.R. 174.

[8] See the reference to the principle under discussion by the Lord Chief Justice in *Wilkie* v. *L.P.T.B.*, [1946] 1 All E.R. 649.

usually made by the purchase of a ticket. The ticket is a receipt for the fare that has been paid, and also an agreement by the carrier to carry the passenger, with due care for his safety, from the station of issue to the station of destination named.[9] The ticket always implies this, but it usually implies a good deal more, such as, for example, those obligations imposed on the passenger which will be considered in the following chapter. There is very little on the face of the ticket to indicate that it may constitute a contract containing many conditions; but there is frequently on the ticket some reference to conditions to be found elsewhere, such as: 'This ticket is issued subject to the Regulations and Conditions stated in the . . . Time Tables and Bills'. Or the words: 'For conditions see back' may appear on the face of the ticket, and on the back there may be a reference to regulations, bills, time-tables, etc. In each of these cases the carrier intends to incorporate in the contract made by issuing the ticket certain conditions published elsewhere as applying to the contract. If the passenger has notice of such conditions he is bound by them whether in fact he chooses to read them or not, and this would be so even though he were blind or illiterate.[10] The general principle has been thus expressed:—

'A great number of contracts are, in the present state of society, made by the delivery by one of the contracting parties to the other of a document in common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not'.[11]

It is clear, however, that a person cannot be said to have accepted any condition unless he has notice of it. How far a passenger has notice of the conditions referred to in a ticket is sometimes a difficult question. If he knows of the conditions, there can

[9] The principles here discussed do not apply to all documents commonly known as 'tickets'. Where, as in *Chapelton* v. *Barry U.D.C.*, [1940] 1 K.B. 532, the 'ticket' is merely a receipt for money paid under a contract which was already concluded when the ticket was issued, conditions printed on the ticket are not terms of the contract. This case concerned a ticket issued for the use of a deckchair. *Quære:* Could its principle be applied to tickets issued in public service vehicles? The question is unlikely to arise in practice because of Sect. 97 of the Road Traffic Act, 1930.

[10] *Thompson* v. *L.M.S. Ry. Co.*, [1930] 1 K.B. 41. This may now be regarded as the leading case. It was followed in Scotland: *Gray* v. *L.N.E. Ry. Co.*, [1930] S.C. 989.

[11] *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178, at p. 188.

be no doubt that he is always bound by them. But it frequently happens that a passenger never looks at his ticket from the time he buys it until he gives it up, or, if he does look at it, he only notices that it is to the station to which he wishes to travel, and does not read further. Such a person may say with perfect truth that he did not know anything at all about conditions. He may be bound by them nevertheless. But if the Executive contends that a passenger was carried under a condition exonerating it from liability in case of injury, it is necessary for the Executive to prove that it was brought to the notice of the passenger. This the Executive may do by showing one of two things: either that the passenger knew that there was writing or printing on the ticket, and that he knew that the printing on the ticket contained conditions relating to the terms of the contract of carriage; or else that the Executive had done what was reasonably sufficient to give the passenger notice of the conditions.[12] Whether a carrier has done what was reasonably sufficient to bring the conditions to the passenger's notice is a question of fact, and only some indications can be given as to how this question may be solved.

In the first place, it seems to be established that where a condition is actually printed on the face of the ticket, it is brought to the passenger's notice and binding whether he has read it or not;[13] but even in this case it may be a question of fact whether the condition is sufficiently brought to the notice of the passenger.[14] Secondly, if there is on the face of the ticket a reference to 'conditions' which are to be seen either on the back of the ticket or elsewhere, the passenger is bound by the conditions whether he reads them or not.[15] In both these cases a document is put into the hands of the passenger with printing upon it. That seems to be equivalent to the railway servant saying to the passenger, 'Read that!' If not (it may be asked), why is the printing there? If, then, the passenger accepts a document without objection, he must be considered to have consented to its terms. Where, however, there are only the words, 'See back' on the face of the ticket, without any reference to conditions, the question is more difficult. No doubt the passenger would be bound by the conditions if he knew or believed they were referred to on the back. But it is well known that advertisements

[12] See the three questions to the jury as laid down in *Parker* v. *S.E. Ry. Co.* (1877), 2 C.P.D. 416, and approved by the House of Lords in *Richardson* v. *Rowntree*, [1894] A.C. 217.

[13] See *Zunz* v. *S.E. Ry. Co.* (1869), L.R. 4 Q.B. 539.

[14] See *Hooper* v. *Furness Ry. Co.* (1907), 23 T.L.R. 451.

[15] *Harris* v. *G.W. Ry. Co.* (1876), 1 Q.B.D. 515.

are sometimes printed on the back of tickets, and a person may reasonably believe that the back does not contain anything which concerns him.

If the question as to whether the carrier has done what was reasonably sufficient to give the passenger notice of the conditions, is decided against the carrier, and it is decided also that the passenger did not know or believe there was anything on the back of the ticket which concerned him, then the passenger will probably be held not to be bound by the conditions. Where a ticket is complete on the face of it, and contains no reference on the face to the back, or to any conditions, then, unless it can be shown that the passenger was aware of conditions on the back, the passenger cannot be said to have assented to such conditions, nor is he bound by them.[16] The conditions of an ordinary ticket (which have nothing to do with the Executive's liability for injuries) are generally placarded in various parts of the railway stations, and also contained in the published time-tables. In the case of season tickets, traders' season tickets and workmen's tickets, which concern us here, there are special conditions. These may be notified in a similar manner, or in some other manner or may be printed on the ticket itself. In any case, if a question is raised as to whether such a condition is binding on the passenger, it will be answered by showing that he knew of it, or that he must in law be considered as knowing of it from having it brought to his notice. The Executive is deemed to have done what was sufficient to bring the conditions to the passenger's notice if it has made it apparent to the ordinary average passenger that there are special conditions. The passenger is only bound by these conditions if they—or the reference to them—were plainly visible on the face of the ticket, and not, for example, if the words 'for conditions see back' are obliterated by a stamp.[17] On the other hand, the Railway Executive need not take into account any inability on the part of the passenger to inform himself of the conditions, caused by abnormal features, such as blindness or illiteracy.[18] Also if one passenger takes a ticket for another, whether that other passenger be his guest or not, the question to be decided is whether the passenger who took the ticket had been given reasonable notice of the conditions. The person to whom he has handed the ticket, for example, a relative or friend whom he had invited to

[16] *Henderson* v. *Stevenson* (1875), L.R. 2 H.L. Sc. 470.

[17] *Sugar* v. *L.M.S. Ry. Co.*, [1941] 1 All E.R. 172. Note the comments made by Viscount Caldecott, L.C.J., on the 'unreal atmosphere' in which these cases are decided.

[18] See *Thompson* v. *L.M.S.*, above.

travel on the railway at his expense will be bound by the conditions if reasonable notice was given to the host.[19]

It would be quite wrong, however, to conclude from the foregoing remarks that a passenger is always and necessarily affected by a notice of conditions printed or referred to on the face of the ticket, even though the reference may be perfectly legible. The Courts are not in all circumstances inclined to look favourably upon what is, after all, an attempt to remove a person's common law rights by a mechanism which can be called 'contractual' only with the help of an extremely artificial process of legal reasoning. These 'conditions', whatever the lawyer may say about their contractual nature, are being dictated by the carrier, and the passenger's alleged freedom of choice exists exclusively on paper. Hence it is not very surprising to find that in a recent case which concerned a condition printed on a 'walking pass' by a railway company and issued to a workman employed by a firm of wagon repairers, the decision of the Court of Appeal went against the company. It was held that the company had failed to give reasonable notice to the workman. It is true that this was not a case of a contract of carriage nor, for that matter, a case of contract at all, but much of what was said about the need for bringing 'that astonishing surrender of his elementary rights home to (the) mind' of the person affected can, by parity of reasoning, be applied to the case of a passenger. It is submitted that in his case too one may talk about 'a misuse of contract which makes the legislature tend to substitute status'.[20]

[19] *Fosbroke-Hobbs* v. *Airwork Ltd. and another* (1936), 53 T.L.R. 254. This decision refers to air transport, but its principle can be applied to other forms of carriage.

[20] *Henson* v. *L.N.E.R.*, [1946] 1 All E.R. 653. The words quoted in the text are taken from the judgment of Scott, L.J. The facts of the case are instructive. The plaintiff was a workman in the service of a firm of wagon repairers. His employers were under contract with the owners of privately, *i.e.* non railway-owned wagons, and, since the requisitioning of practically all privately-owned wagons in 1939, under contract with the Government for whom the railway company acted as agents. For many years the railway company had granted to the repairing firms the 'privilege' of carrying out their work on railway-owned sidings. In order to make this possible the workmen who were attending to these jobs had to pass the railway company's property, and, so as to enable them to do this without being stopped as trespassers they were handed walking passes. A reference to 'conditions on the back hereof' was printed on the face of each of these documents, and on the back there was a condition purporting to remove the company's liability to the passholder for accidents. The plaintiff was injured in an accident due to the negligence of the railway company's servants. He sued the company for damages, and the company relied on the printed conditions on the pass

As was pointed out above, it is probable that the Railway Executive, if they so chose, could remove their liability even where they issue ordinary tickets at single fares. In practice this is unusual. The cases in which the question of giving notice of conditions to passengers arises are invariably cases of workmen's tickets, excursion tickets, cheap day return tickets, etc.[21] Among these workmen's tickets are of particular importance. Workmen are carried at extremely low rates, and the law considers it to be reasonable that when a man is carried at such a rate the carrier should in some degree limit his liability in case of accident. This may be done by making it a condition of the contract that in case of a claim for injuries being substantiated against the carrier, the liability shall not exceed a certain sum. The theory of the law, logical, but as some may think very remote from reality, is this: no workman who objects to accepting such a condition is under any necessity of accepting it; he has only to pay for an ordinary ticket and the Executive will carry him with full liability. If the condition was sufficiently brought to the knowledge of the passenger, he cannot recover more than the sum named, whatever may be the nature of his injuries, though, as we have seen, his dependants are not bound by this condition in case of fatal injuries when they proceed under Lord Campbell's Act.[22]

Again, in granting 'through tickets' to places abroad, it is usual for the Executive, by the conditions on which such tickets are issued, to limit their liability for negligence to the acts and omissions of their own servants. Such a condition will be valid provided the

which had been originally issued to him in 1940 and been subsequently renewed from year to year. When asked in Court whether he had ever read the document, he replied: 'I cannot remember whether I read it when I first got it, but I have not read it since'. The three members of the Court of Appeal came to the unanimous conclusion that he had not received reasonable notice. The ticket cases were distinguished on the ground that there was no contract between the plaintiff and the defendant company and that the walking pass was in the nature of a licence. The case is not, therefore, an authority for the law of carriage. Nevertheless it deserves the closest attention in the present context in view of the dicta of Scott and Tucker, L.JJ.

[21] *Penton* v. *S. Ry. Co.*, [1931] 2 K.B. 103 was a case of a suburban cheap day ticket. The Court, assuming the correctness of the rule in *Clarke* v. *West Ham Corp.*, emphasised that the ticket had been granted at a much reduced fare. Swift, J., at p. 111, expressed the view that, assuming the existence and correctness of that rule, the liability could also be excluded on the issue of a monthly return ticket. Since most passengers travel nowadays with monthly return tickets, the controversy about *Clarke's Case* is largely academic.

[22] See *Hearn* v. *S. Ry. Co.* (1925), 41 T.L.R. 305, and *Nunan* v. *S. Ry. Co.*, above, p. 315.

conditions were sufficiently brought to the notice of a passenger.[23]

Whether contained in a workmen's, excursion, cheap day return, or through ticket, the limitation of liability is only valid if the passenger is free to accept or reject the contract and capable of entering into contractual obligations. An infant, that is a person under the age of twenty-one years, cannot bind himself by contract, at least not by a contract which is not for his benefit. Therefore, if the passenger is an infant, any conditions limiting the carrier's liability for his safety are void. This is particularly important in connection with workmen's tickets issued to workmen under age.

In *Flower* v. *L.N.W. Ry. Co.*[24] a boy about fourteen years old was employed by a colliery and had a free pass on the railway by arrangement between the colliery and the railway company. He signed an agreement with the railway company, according to which he renounced all claims on the ground of accidents or injuries occasioned by the negligence of the company or its servants. In spite of this agreement he was held to be entitled to recover damages against the company for injuries suffered on the railway.

There are one or two cases in which the law itself limits or negatives the liability of the Railway Executive so that no special contract is necessary. In connection with workmen's trains etc. there is often some difficulty in proving that the condition was brought to the knowledge of the injured man. That is why most railway companies had, by their private Acts of Parliament, acquired statutory protection limiting their liability in these cases, thus avoiding any possible difficulty as to knowledge. For example, by Sect. 12 of the Metropolitan District Railway Act, 1893, it is provided, in respect of any passenger travelling with a ticket marked 'workman's ticket' at the lower rates mentioned, that—

'the liability of the company under any claim for compensation for injury to person or otherwise shall be limited to a sum not exceeding £100, and this whether the ticket be issued by the company or by any company having arrangements for booking over the company's railways, and whether the claim for compensation arose on the railway of the company or of such other company'.

The Railway Executive and the London Transport Executive have inherited these privileges from their predecessors.

Another example where the law makes special provision for

[23] An example is *Burke* v. *S.E. Ry. Co.* (1879), 5 C.P.D. 1, where a passenger had taken a cheap return ticket from London to Paris containing a condition limiting the defendant company's liability to what arose in connection with its own trains and boats. He was injured through the negligence of the servants of a French company while travelling in France, and failed to recover against the English company.

[24] [1894] 2 Q.B. 65.

relieving a carrier by rail from liability is the case of cattle drovers and other persons in charge of a consignment of livestock who are permitted to travel by a train carrying the livestock. By S.T. & C., C. 2 and D. 2, where livestock is carried by merchandise train, whether at carrier's or at owner's risk, the sender must state the name of the person accompanying the livestock in the place provided on the consignment note, and the person in charge must himself sign a declaration and agreement printed thereon that he is the person in charge and that he relieves the carrier from all liability to himself or to his representatives for loss of life, personal injury or delay, and for loss of or damage or delay to his property however caused.[25] It is obvious that such persons run a much greater risk than do the ordinary passengers. It is most important, therefore, for the Executive when carrying drovers with cattle, to protect themselves from liability, and to secure that no question shall be raised as to whether or not the conditions were brought to the knowledge of an injured drover.[26]

[25] The condition is slightly different where the livestock is carried by passenger train or other similar service, though the effect is much the same. See Standard Terms and Conditions N (2) (b).

[26] For cases in which this question was raised in connection with drovers, see *Gallin* v. *L.N.W. Ry. Co.* (1875), L.R. 10 Q.B. 212, and the Canadian case of *Grand Trunk Ry. Co. of Canada* v. *Robinson*, [1915] A.C. 740, a very instructive case.

Chapter 30

RIGHTS OF THE CARRIER

The contract for the carriage of passengers, like the contract for the carriage of goods, implies obligations on both sides. It imposes obligations not only on the carrier, but also on the passenger, the most important of these being the duty to pay the fare. The passenger must also comply with certain rules regulating his general conduct during the journey.

THE RIGHT TO RECEIVE THE PROPER FARE

The law makes special provision to protect carriers of passengers from the innumerable frauds which are constantly practised upon them, and in various ways tries to ensure that carriers receive the fares they can properly demand.

A ticket, such as an excursion or tourist ticket, which is sold at a reduced fare, must only be used for the purpose for which it was issued, *i.e.* for travelling to the destination named on the ticket. It is not permissible to use it for an intermediate station (for which a higher fare may be chargeable),[1] or for a journey to a station beyond the stated destination by paying the full fare for the remaining distance.[2] If any such tricks are discovered, the carrier will be able to claim the difference between what ought to have been paid and what has been paid.

In the two cases in which this was laid down the conditions printed on the ticket said that, if the ticket were used for any other train or station than those named, the ticket would be forfeited and the full fare chargeable. There is a certain doubt whether the Executive could recover the full price of the ticket to the station to which the passenger actually travelled without giving credit for the price of the ticket taken. English Courts are not favourable to the recovery of penalties, and it is all the more interesting to note that, in the second case mentioned, the Court, beyond permitting the company to recover the difference in price between the two tickets, gave judgment for the full fare to the station to which the passenger actually travelled without deducting the lower fare paid. One of the railway bye-laws and regulations expressly provides that in cases

[1] *G.N. Ry. Co.* v. *Winder*, [1892] 2 Q.B. 595.
[2] *G.N. Ry. Co.* v. *Palmer*, [1895] 1 Q.B. 862.

of this kind, if there is intent to avoid payment of the additional fare, there shall not only be a penalty recoverable but the ticket taken shall be forfeited.[3] This bye-law may possibly make it unnecessary to embody a clause of this sort in the contract with the passenger by giving him reasonable notice of its existence.[4] In the two cases mentioned the decision of the Court depended on the conditions which had been 'embodied in the contract', though in the latter case it was far from clear that the words 'see back' printed on the face of the ticket in very small type would have been held sufficiently reasonable notice, if the defendant had appeared before the Court and raised the point.[5]

It may also be noted in this connection that, unless the carrier expressly grants the right to break a journey, the passenger may not do so.

In *Ashton* v. *Lancs. and Yorks. Ry. Co.*,[6] a passenger, who tried to break the journey when using the return half of a ticket, was compelled to pay the full single fare from the point where she interrupted the journey to the destination. This was decided upon the general legal principles governing the contract between the passenger and the carrier, and no special conditions were referred to, so that there could be no question of a forfeiture.[7]

So great is the risk that carriers of passengers run of being defrauded of their fares that a number of penal provisions have been enacted dealing with offences in connection with tickets and fares. The relevant provisions with regard to railway traffic are contained partly in Acts of Parliament and partly in bye-laws made by the former railway companies under powers delegated to them by Parliament. Operators of public service vehicles are protected by Statutory Regulations made by the Minister of Transport under powers contained in the Road Traffic Act, 1930.

The most important enactments relating to ticket offences by passengers on railways are contained in Sect. 5 of the Regulation of Railways Act, 1889. It is provided there that—

[3] About this bye-law, see below, p. 345.

[4] See above, p. 331.

[5] See also *L.N.W. Ry. Co.* v. *Hinchcliffe*, [1903] 2 K.B. 32, a case similar to *G.N. Ry. Co.* v. *Palmer*, above, where, on conditions embodied in the contract, the full fare was held to be payable, and the ticket the passenger had taken was forfeited.

[6] [1904] 2 K.B. 313.

[7] See also *Bastaple* v. *Metcalfe*, [1906] 2 K.B. 288, where it was decided in connection with a tramcar that a passenger who leaves the vehicle before it reaches the stopping place to which he has taken the ticket, terminates the contract by his own act, and if he wants to travel by another vehicle of the same company to the destination originally contemplated, he must take a new ticket. This decision would seem to yield a principle applicable to public service vehicles as well as to tramcars.

'every passenger by a railway shall, on request by an officer or servant of (the Executive), either produce, and if so requested deliver up, a ticket showing that his fare is paid, or pay his fare from the place whence he started, or give the officer or servant his name and address; and in case of default shall be liable on summary conviction to a fine not exceeding 40*s.*'.[8]

It is to be noticed that no offence is committed under this provision unless the passenger fails in all three of the courses open to him. Thus, if he cannot or will not deliver up or produce his ticket, he may pay the fare from the place where he started, and then he has committed no offence against this provision; or he may refuse either to produce his ticket or to pay, but may be willing to give his name and address, in which case also he has committed no offence. If he refuses to take any of these three alternatives, any officer of the Executive, or any constable may detain him until he can be charged before a magistrate.[9] Where a person who will not produce a ticket or pay, clearly refuses his name and address, the Executive is within its rights in detaining him. If, however, he gives a name and address which the servants of the Executive believe to be false, they are in a position of some difficulty. To give a false name or address is equivalent to refusing to give his name and address. So, if the name or address given is, in fact, false, the detention of the person is justifiable; but the Executive detains the person at its risk, for if the name and address turn out to be correct the Executive has acted illegally, and is liable to an action for false imprisonment.[10] Hence the Executive has no authority to detain a passenger while inquiries are being made into the correctness of a name or address. The provision applies to season ticket holders as well as to others.[11] It sometimes happens that a man has really got a ticket, but cannot find it when he is asked for it, and he refuses to pay or give his name and address. In such cases he should be given plenty of time and every opportunity of finding the ticket. If the Executive detains him too soon, and without giving him every reasonable opportunity, it may find itself obliged to pay damages for false imprisonment; for it has been held that in such cases it is a question for the jury, whether or not the passenger did, in fact, fail to produce his ticket;[12] and probably the jury will take that

[8] Sub-sect. (1).
[9] Sub-sect. (2).
[10] *Knights* v. *L.C. & D. Ry. Co.* (1893), 62 L.J.Q.B. 378. See also *Ormiston* v. *G.W. Ry. Co.*, [1917] 1 K.B. 598.
[11] See *Woodward* v. *Eastern Counties Ry. Co.* (1861), 30 L.J.M.C. 196.
[12] *Brotherton* v. *Metropolitan and District Joint Committee* (1893), 9 T.L.R. 645.

view of the facts which is most favourable to a man who has been arrested although, in fact, he had got a ticket. Where a person is asked to produce his ticket while he is actually in a train and does not produce it or pay, but does give his name and address, another difficult question arises, namely, whether he can be ejected from the train. If he has never had a ticket, he has no right to be in the train, and it may be that he can be put out, provided no more force is used than necessary.[13] But if he has had a ticket and lost it, then he is lawfully in the train by virtue of his contract with the carrier. If the railway servants turn him out, they assault him, and probably the Executive will be liable in an action for damages for assault.[14]

It is to be noticed that the deliberate refusal, either to produce a ticket, or to pay, or to give name and address, is an offence of itself, even though the passenger has, in fact, got a ticket. But where a ticket is not produced it may well be that the passenger is attempting to avoid paying the fare, and then other charges may be preferred against him. Sub-sect. (3) of the same section provides as follows :—

'If any person (a) travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof; or (b) having paid his fare for a certain distance, knowingly and wilfully proceeds by train beyond that distance without previously paying the additional fare for the addition distance, and with intent to avoid payment thereof; or (c) having failed to pay his fare, gives, in reply to a request by an officer of (the Executive), a false name or address', he shall be liable to a fine not exceeding 40*s.* for a first offence, or, if he offends again, to a fine not exceeding £20, or to imprisonment for a time not exceeding one month.

In a charge under any of these provisions, the important point is the intent to avoid payment. It is no offence for a passenger to travel without a ticket, or beyond his destination, if there is no intention to withhold payment, though possibly he may be liable to be sued on his contract for some breach of the conditions. If, however, there is the intent to travel and to avoid payment, an offence is committed.

Thus, in *Browning* v. *Floyd*,[15] a married woman bought a return ticket from London Bridge to Paddock Wood, but, having got a lift in a car on the outward journey, did not use the forward half. She gave it to her husband who used it on a subsequent occasion. He was found guilty of an offence under the Regulation of Railways Act, 1889, Sect. 5 (3) (a), and his wife was guilty of 'aiding and abetting' him. There was no 'intent to defraud', but there was the requisite 'intent to avoid payment of the fare', and that was all that mattered.

[13] *McCarthy* v. *Dublin, W. & W. Ry. Co.* (1870), I.R. 5 C.L. 244.
[14] *Butler* v. *M.S. & L. Ry. Co.* (1888), 21 Q.B.D. 207.
[15] [1946] 2 All E.R. 367.

The expression 'paid his fare' in the Act means *paid his fare to the Executive.* Therefore, the offence is committed if a passenger has in fact paid something for his ticket, but to an unauthorised person who sold the ticket though it was not transferable.

This was decided under the similar provisions of the Railways Clauses Act, 1845, which preceded the Act of 1889, in *Langdon* v. *Howells,*[16] where a man who had taken a tourist return ticket sold the outward part of it after having proceeded on a different route from an intermediate station. The buyer of the ticket which was marked 'not transferable' was convicted for travelling without having previously paid his fare with intent to avoid payment thereof. A similar decision was arrived at in the case of a workman's ticket marked 'not transferable', under the Act of 1889 in *Reynolds* v. *Beasley.*[17]

To pay one's fare within the meaning of the Act means to pay the fare for the class of compartment in which one intends to travel, and a passenger who, having taken a third class ticket, travels in a first class compartment is punishable under the Act if it can be proved that he has acted fraudulently and with intent to avoid payment of the higher fare.[18]

Where a person travels without a ticket the fare may be recovered from him by the Executive quite irrespective of his liability to punishment for fraud.[19]

In many respects the Railway Executive may also rely on the bye-laws made by its predecessors, the railway companies. Bye-laws can only be made under powers expressly given by Act of Parliament. When made within such powers, and with the observance of all conditions precribed by Parliament, bye-laws are real laws, and are enforced, like other laws which create offences, by proceedings before magistrates for fine or imprisonment. A bye-law cannot be valid which is outside the powers given by Parliament, or which is contrary to the general law of the land, or which is unreasonable. If a railway company professed to make a bye-law which it had no power to make, the bye-law is said to be *ultra vires;* and if proceedings are taken with the object of punishing a breach of such bye-law, the Courts will refuse to act upon it and will pronounce it invalid.

Railway companies were given powers to make bye-laws by the Railways Clauses Act, 1845,[20] and this power can now be exercised

[16] (1879), 4 Q.B.D. 337.
[17] [1919] 1 K.B. 215; see also *Haynes* v. *Davey* (1937), 25 T.C. 294, where a passenger used the return half of a non-transferable return ticket issued to another person, and was convicted under the Act.
[18] *Gillingham* v. *Walker* (1881), 44 L.T. 715.
[19] Regulation of Railways Act, 1889, Sect. 5 (4).
[20] Sects. 108–111.

by the Executive. As far as passengers are concerned, the powers are 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'. Bye-laws may also be made for maintaining order in, and regulating the use of, railway stations and the approaches thereto.[21]

The bye-laws must not be repugnant to the laws of that part of the United Kingdom where they are to have effect, or to the Act creating the power, to the special Act of the company which made them, or, if made by the Executive, to the Transport Act. A maximum fine of £5 may be prescribed as the penalty for an offence against a bye-law. The bye-laws must be exhibited in a conspicuous place in every station, or else no penalty can be recovered. They must also, before they can become operative, be approved by the Minister of Transport.[22] When a bye-law satisfies all the regulations as to its validity, it is binding upon all persons without any further notice to them.

All the big railway companies made bye-laws in the same terms. These have been approved and are still in force.[23] They may be read in the published time-tables or at any railway station. It is to be noticed that the approval of the Minister of Transport does not necessarily make a bye-law valid. It is only a Court of Justice that can decide the question of validity, and the Courts pay no regard to the opinion of a Government Department on such question. Many of the bye-laws made by the railway companies of England before the year 1905 were disapproved of by the Courts, and were practically worthless. In that year, however, all the companies made fresh bye-laws, which were in force till 1926. None of them was ever disapproved. New bye-laws, an example of which can be found in any station, were made in 1926, and these are probably valid. The great principle upon which the Courts held some of the old bye-laws to be invalid is that an act which the law has declared to be criminal only when committed with a fraudulent intention cannot be made into a criminal act by a railway bye-law irrespective of any fraudulent intention. 'A bye-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful.

[21] Regulation of Railways Act, 1889, Sect. 7.
[22] Railway Regulation Act, 1840, Sects. 8, 9. The powers conferred on the Board of Trade by this Act have been transferred to the Minister of Transport under the Ministry of Transport Act, 1919.
[23] Transport Act, 1947, Sect. 14.

It is repugnant if it makes unlawful that which the general law says is lawful, . . . if it . . . professes to alter the general law of the land '.[24]

These principles were applied in the case of *L.M.S. Ry. Co.* v. *Greaver.*[25] The bye-law considered in that case was Bye-law No. 6 of the L.M.S. Ry. Co. which forms part of the code of 1926.[26] A passenger travelled from Manchester to Euston, having purchased a non-transferable excursion return ticket at 10*s.*, while the ordinary single fare was 25*s.* On arrival at Euston he handed the return half of his ticket to another passenger, but before that passenger had a chance even to attempt to use it for a journey from Euston to Manchester, the two offenders were caught by a railway official. The company prosecuted both of them under the above mentioned bye-law.[27] It was alleged that the bye-law was void because it did not expressly say that fraudulent intent was a necessary ingredient of criminal liability and that it was, therefore, repugnant to the Regulation of Railways Act, 1889, according to which non-payment of the fare entails criminal liability only where there is fraud. The High Court, however, arrived at the conclusion that there was no such repugnancy in this case. Applying the test laid down in *Gentel* v. *Rapps,* the Court found that there was nothing in the Act of 1889 to make lawful what had been done by the accused. Moreover, and this was decisive, payment of the fare to an unauthorised person was equivalent to non-payment according to the decision in *Reynolds* v. *Beasley,* and if a person buys a non-transferable ticket at a lower fare than he would have had to pay, had he bought a ticket from the company, the fraudulent intent is obvious. It would seem that acts coming under Bye-law 6 are always fraudulent and that for this reason Bye-law 6 is compatible with the Act of 1889.

Other bye-laws dealing with ticket, and similar, offences say that no person must alter, deface, mutilate or destroy any ticket whilst it is available for use, with intent to enable the carrier to be defrauded or prejudiced, or knowingly and wilfully use or attempt to use any such ticket which has been in any respect materially altered, defaced or mutilated.[28]

It is forbidden to use a ticket to a more distant station for

[24] Channel, J., in *Gentel* v. *Rapps,* [1902] 1 K.B. 160. It should be noted that whether or not a bye-law is valid as a bye-law, it may be binding upon a passenger as part of his contract with the carrier if it is incorporated in the contract by being referred to on the ticket. See *Butler* v. *M.S. & L. Ry. Co.* (1888), 21 Q.B.D. 207.

[25] [1937] 1 K.B. 367.

[26] In effect this bye-law forbids the selling and buying of tickets which are not transferable and the use of tickets or parts of tickets, sold, bought, transferred, or received, unless the sale was made by a duly authorised servant or agent of the company.

[27] The company could not have prosecuted them under the Act of 1889, because there was no 'attempt to travel'. The writer is indebted to the Chief Legal Adviser's Office of the L.M.S. Co. for drawing his attention to an error in the previous edition of this book which was induced by a remark made by the Lord Chief Justice in the course of his judgment.

[28] Bye-law 5.

travelling to an intermediate station if the fare to the intermediate station would have been higher,[29a] and nobody is permitted to enter any carriage or vehicle upon the railway for the purpose of travelling, unless and until a ticket has been obtained.[30] There is no penalty attached to this latter offence, but anybody who enters a carriage without a ticket and fails to leave the carriage immediately on the request of one of the Executive's servants or agents, may be removed from the carriage. This latter provision has no counterpart in the law of public service vehicles where it is often the practice to buy the ticket in the vehicle from the conductor. An offence punishable by a fine of 40*s.* is committed by any person who knowingly and wilfully refuses or neglects on arriving at the point to which he has paid his fare, to quit a railway carriage,[31] and a similar provision has been made by the Minister of Transport for public service vehicles.[32]

As regards public service vehicles the Minister of Transport has made rules in order to safeguard the payment of the proper fare and to prevent improper dealings with tickets.[33] These rules are substantially similar to those applying to railway traffic, but in some respects the law is more stringent in enforcing the public service vehicle owner's right to the proper fare. Thus, while a railway passenger who fails on request 'to produce a ticket, or to pay the fare, or to give his name and address' is liable, in the case of a first offence, to a fine of 40*s.*, or to removal from the carriage, the fine payable for any contravention of the Public Service Vehicle Regulations, or for any failure to comply with them, may be as high as £5, even in the case of a first offence.[34] If a passenger is reasonably suspected by the driver or conductor of contravening any of the Regulations he must give his name and address to a police constable, or to a driver or conductor on demand,[35] and if he has actually infringed the Regulations, he may be removed from the vehicle by any driver or conductor, or upon their request by any police constable.[36]

[29] Bye-law 4; and see above, p. 339.
[30] Bye-law 2.
[31] Railways Clauses Act, 1845, Sect. 103.
[32] Public Service Vehicles (Conduct of Drivers, Conductors and Passengers) Regulations, 1936 (S.R. & O., 1936, No. 619), Regulation 11 (b) (ii).
[33] Public Service Vehicles, etc. Regulations, 1936, and Public Service Vehicles (Conduct of Drivers, Conductors and Passengers) Amendment Regulations, 1946.
[34] Road Traffic Act, 1930, Sect. 84 (2).
[35] Regulation 12 (b), covered by the enabling provision in Road Traffic Act, 1930, Sect. 84 (1) (b).
[36] Regulation 12 (a), covered by the enabling provision in Road Traffic Act, 1930, Sect. 84 (1) (a). Proceedings for a breach of the Regulations may be instituted by anybody, and by the owner of the vehicle in particular,

As with railway passengers, it is an offence to use or attempt to use, with intent to avoid payment of the fare, a ticket which has been altered or defaced, or a period or season ticket which has expired. It is also an offence to use or attempt to use a ticket issued to another person, if it bears an indication that it is not transferable.[37] The most important provision is that every passenger on a stage or express coach must be either the holder of a ticket for that journey, or immediately on demand declare the journey he intends to take or has taken and pay the conductor the fare for the whole of such journey, and accept the ticket provided therefor. If no demand has been made upon him, and if he leaves or attempts to leave the coach without paying the fare for the journey which he has taken he is guilty of an offence, providing he acts with the intent of avoiding payment.[38] The offence is only committed if he fails to pay on demand, or if he leaves or attempts to leave the carriage with intent to defraud the coach proprietor of his fare. The mere act of leaving the carriage without having paid the fare is not an offence, if no demand has been made.[39]

The reader will notice the difference between this rule and that contained in sub-sect. (1) of the Regulation of Railways Act, 1889, Sect. 5. It is not enough for a passenger in a motor coach to give his name and address. He must produce his ticket or pay the fare, and there is no third alternative.[40]

while other offences under Part 4 of the Road Traffic Act, 1930 (which deals with public service vehicles), must not be instituted, except by or on behalf of certain officials or public authorities: Sect. 95. Offences are prosecuted under the Summary Jurisdiction Acts: Sect. 113 (1).

[37] Regulation 11 (a), as amended by the Amendment Regulations of 1946 which added the provision about period and season tickets. A comparison of this Regulation with Bye-laws 5 and 6 shows certain differences. For example, the offence of using a railway ticket bought from an unauthorised person is committed whenever the ticket does not purport to be transferable, while in the case of the motor-coach ticket the offence is only committed if the ticket expressly indicates that it is not transferable. There are other differences which need not be analysed in detail.

[38] Regulation 11 (b) (i) and Regulation 11 (c).

[39] Under the Minister's Regulations of 1933 (S.R. & O. 1933, No. 235) the mere act of leaving the carriage without having paid the fare was a criminal offence. However, in *L.P.T.B.* v. *Sumner,* [1935] W.N. 196, the High Court declared a similar tramway bye-law to be void, and, in consequence of this decision, which in itself did not apply to public service vehicles coming under the Road Traffic Act, the Minister of Transport amended the Regulations. See the Public Service Vehicles (Conduct of Drivers, Conductors and Passengers) (Amendment) Provisional Regulation, 1935. The conductor's exclamation 'any more fares, please', has become an act of the greatest legal relevance, since it is a demand for the fare, the non-compliance with which is a criminal offence.

[40] As to the duty either to show the ticket when required to do so by any authorised person or to pay the fare for the journey taken or to be taken,

RULES AS TO CONDUCT OF PASSENGERS

A number of penal provisions, partly contained in Acts of Parliament, and partly in Railway Bye-laws and Public Service Vehicle Regulations, aim at protecting the carrier's property from wanton destruction by passengers. Others try to prevent passengers from endangering themselves or from annoying or endangering their fellow passengers. Some rules have also been made with the object of safeguarding the free flow of traffic.

Thus, under the Railway Bye-laws, the most serious offences are taking a loaded gun or an inflammable, explosive or corrosive substance into a train or a station, or wilfully injuring any property belonging to the carrier.[41] The penalties may be up to £5 for a first offence.[42]

Similarly, it is an offence for a passenger or intending passenger [43] in a public service vehicle wilfully to remove, displace, deface or alter number plates, notice boards, etc., and, in general, wilfully to damage, soil or defile any part of the vehicle.[44] For the protection of the carrier's property and for that of the health of the other passengers the railway bye-laws,[45] as well as the Public Service Vehicle Regulations [46] forbid spitting. Intoxicated persons may not enter a railway carriage, nor may persons travel by passenger train who are in an unfit and improper condition. Persons whose dress or clothing is in a condition liable to soil or injure the linings or cushions of any carriage or the dress or clothing of any passenger may not enter or remain in a railway carriage, and there is a similar provision concerning public service vehicles. The special proviso concerning workmen's trains should be noted.[47]

see Regulation 11 (b) (III). At the end of the journey the ticket must be surrender on request: (IV). A period or season ticket must be surrendered at the expiry of the period for which it was issued (V), and any ticket must at any time during the journey be surrendered in exchange for a new ticket covering the journey or journeys the passenger is still entitled to take: (VI).

41 Bye-laws 16 and 18.

42 Bye-law 1.

43 The Public Service Vehicles (Conduct of Drivers, Conductors and Passengers) Regulations, 1936, purport to regulate the conduct not only of actual but also of intending passengers on public service vehicles. It is, however, very doubtful whether the Regulations are in so far covered by the enabling Sect. 84 of the Road Traffic Act, 1930, under which they were made. For a full discussion of this problem, see Mahaffy and Dodson, p. 445, note (g).

44 Regulation 9 (XI) and (IX).

45 23.

46 9 (IX).

47 Railway Bye-law 13; Public Service Vehicle Regulation 10 (a).

For the safety of passengers in emergency it is provided that every train which travels more than twenty miles without stopping must be equipped with efficient means of communication between the passengers and the railway servants who have charge of the train. Any passenger who uses such means of communication without reasonable or sufficient cause is liable to a fine of £5.[48] This is an offence irrespective of the distance which the train travels without stopping.[49] With this provision we may compare the Regulations making it a criminal offence for a passenger in a public service vehicle to distract the driver's attention without reasonable cause, or to speak to him unless it is necessary to do so, or to give any signal which might be interpreted by the driver as a signal from the conductor to start.[50]

A passenger is liable to a penalty if he remains in an overcrowded carriage or vehicle which he has been requested to leave [51] and it is a criminal offence for passengers in motor coaches when entering or attempting to enter the vehicle wilfully and unreasonably to impede passengers seeking to enter the vehicle or to alight. Any passenger may be removed and fined who does with respect to any part of the vehicle or its equipment anything calculated to obstruct or interfere with the working.[52]

A penalty is incurred by any person who trespasses on any railway after having once been warned by the Executive or any of its servants not to do so.[53] Further, if any person wilfully trespasses upon any railway or upon any station, works or premises connected with any railway, and refuses to quit on being requested so to do by any railway servant, he may be arrested and is liable to a fine of £5.[54]

Many provisions aim at preventing passengers or intending passengers from becoming a nuisance or danger to others. Thus, persons suffering from infectious or contagious diseases or disorders may not, in general, travel in a railway carriage,[55] nor may dangerous luggage be carried either in a railway compartment or in

[48] Regulation of Railways Act, 1868, Sect. 22.
[49] *Jones* v. *Bithell*, [1919] 1 K.B. 219.
[50] Regulation 9 (VII), (VIII). The case of *Mottram* v. *South Lancashire Transport Co.*, [1942] 2 All E.R. 452, illustrates the need for this rule. See the remarks of Du Parcq, L.J. (as he then was).
[51] Railway Bye-law 7; Public Service Vehicle Regulation 9 (IV).
[52] 9 (III), (VI).
[53] Regulation of Railways Act, 1868, Sect. 23, as amended by the Regulation of Railways Act, 1871, Sect. 14.
[54] Railways Regulation Act, 1840, Sect. 16.
[55] Railway Bye-law 12.

a motor coach,[56] and this is extended to bulky or cumbersome articles in the case of motor coaches. Special provisions restrict the carriage of animals,[57] and of other things which are calculated to annoy fellow passengers.

Certain things may not be done in railway compartments and motor coaches. Smoking is restricted,[58] selling and advertising goods is generally prohibited.[59] Obscene or offensive language must not be used in railways or motor coaches,[60] and a beneficial rule forbids the use of any noisy instruments and the making of excessive noise by singing in motor coaches.[61]

Passengers must not travel in places which are not provided for them, such as in guard-vans or on the engine of a railway, or on the upper deck of a public service vehicle, unless they have a seat there.[62] It is an offence to enter or leave a railway carriage whilst the train is in motion and to enter or alight from a motor coach otherwise than by the doors or openings provided for the purpose.[63]

Under the Railways Clauses Act, 1845, bye-laws may not only impose penalties up to £5 for each offence, but, if the infraction of any bye-law is attended with danger or annoyance to the public or hindrance to the Executive in the use of the railway, the Executive may take summary means to obviate or remove such danger, annoyance or hindrance, without prejudice to the penalty incurred, and, thus, in many cases the offender may be removed from the Executive's train or premises. This is also generally the case with regard to offending passengers in motor coaches.[64] However, there is an even more stringent remedy, at least in the case of the railways. A person may be arrested by an officer of the Executive, if his name and address are unknown, who commits any offence against the provisions of the Railways Clauses Act, 1845.[65] Of course, under

[56] Railway Bye-law 15; Public Service Vehicle Regulation 10 (b).
[57] Railway Bye-law 15; Public Service Vehicle Regulation 10 (c).
[58] Railway Bye-law 17; Public Service Vehicle Regulation 9 (XVI). Note the exception in case of contract carriages.
[59] Railway Bye-law 19; Public Service Vehicle Regulation 9 (XVII) and (X). Note also the provisions against betting, bookmaking, playing for money, etc. in Railway Bye-law 20.
[60] See the comprehensive provision in Railway Bye-law 14 and Public Service Vehicle Regulation 9 (I).
[61] Public Service Vehicle Regulation 9 (XII).
[62] Railway Bye-law 9; Public Service Vehicle Regulation 9 (V).
[63] Railway Bye-law 11; Public Service Vehicle Regulation 9 (II).
[64] See above, p. 348.
[65] *Ibid.*, Sect. 154. The power of arrest extends to offences against the special Act of the railway companies. This, it is submitted, must now be read as an authorisation given to the Executive's servants to arrest for offences against the special Act of that company on whose former lines and premises the offence was committed.

the general law of the land, persons may also be arrested who are found committing any felony or assault upon the trains or premises of the Transport Commission. There does not, however, seem to be power to arrest for breach of bye-laws. The greatest caution should be exercised by railway servants in arresting a person, for if they are under a mistake as to the facts the Executive may have to pay heavy damages in an action for false imprisonment.

The Executive will not be liable if a servant acts without any authority, but if he acts within his authority his employers must suffer for his mistake. A person found committing a felony or dangerous wounding may be arrested by any one. A constable may arrest any person whom he reasonably suspects of having committed a felony. A special constable employed by the Executive is the servant of the company, and if he arrests a person for felony without having reasonable grounds to suspect that person of felony the Executive is liable.[66] Where power is given to officers of the Executive to arrest, servants of inferior rank should not act except by way of assisting their superiors.

The general principle of the liability of the Executive for a wrongful arrest made by a servant seems to be: that, if upon the facts which the servant believed to exist the Executive might have properly arrested, they are answerable for the act of their servant; but if the Executive would have had no power to arrest, even if the facts had been as the servant believed, or if the servant was not a proper person to act in any case, then they are not responsible.[67] Thus, where a porter took hold of a passenger and wrongfully accused him of travelling in a first-class compartment with a third-class ticket, it was held that the railway company was not liable in an action by the passenger for assault and false imprisonment, for the company had no power to arrest for the offence which was alleged and, therefore, they could not authorise the porter to arrest.[68]

What has been said about powers to arrest on the ground that a felony has been committed applies to public service vehicles with the same force as to railways. There are, however, in the case of public service vehicles, no special powers of arrest like those contained in the Railways Clauses Act.

[66] *Lambert* v. *G.E. Ry. Co.*, [1909] 2 K.B. 776; but see the doubts raised as to this decision by McCardie, J., in *Fisher* v. *Oldham Corporation*, [1930] 2 K.B. 364.

[67] See *Poulton* v. *L. & S.W. Ry. Co.* (1867), L.R. 2 Q.B. 534.

[68] *Ormiston* v. *G.W. Ry. Co.*, [1917] 1 K.B. 598.

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