DUTY OF A RAILROAD TO FURNISH SPECIAL EQUIPMENT

The question as to when, if ever, a railway can be made to furnish a shipper with special types of rolling stock, or respond in damages for its failure or refusal to do so, came recently before the District Court for the Western District of Pennsylvania in the case of *Pennsylvania R. Co. v. United States et al.*[1] This case resulted from an order made by the Interstate Commerce Commission requiring the railway to furnish certain refiners with tank cars. The railroad denied the authority of the Commission to make the order in question, while the Commission relied on certain provisions of the act as amended in 1906. The court held that the amendment did not add to the power of the Commission to require railroads to furnish cars, and suspended and annulled the order as in excess of the Commission's statutory power. As the effect of this decision is to make the opinion in *Scofield v. Lake Shore, etc., R. Co., 2 Interst. Com. Com'n R. 67,* the controlling law, and as this last case held that the sole duty of a carrier to furnish cars was that imposed by common law, and that the statute creating the Commission did not clothe it with the power to determine the instrumentalities of shipment to be employed by a carrier, or the power to require a carrier to use in its business the kind and number of cars which the Commission might deem necessary for a proper car service, it is apparent that the law on the subject under consideration is to be found in individual decisions of the state and federal courts. Decisions affected by the statutes[2] of the several states are, of course, beyond the scope of this note.

We are confronted at the outset with the necessity of placing a meaning on the words "common law" sufficiently broad to take into consideration the difference between railway carriers and all other carriers. At early common law the carrier was under no obligation to furnish the public with special facilities, or even additional facilities of the kind he already had; he must take what is offered

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[1]227 Fed. 911.

[2]Penalty for failure to supply cars: Bond v. Wabash, etc., R., 67 Iowa 712. Points on its own line only: Houston, etc., R. v. Buchanan, 94 S. W. 199. In Texas rush of business is no defense; this is beyond police power of state as it interferes with interstate commerce. Houston, etc., R. v. Mayers, 201 U. S. 321; Texas and P. R. Co. v. Allen, 98 S. W. 450.

him to carry, "if he has room for it in his carriage."[3] In Jackson v. Rogers,[4] an action on the case for refusal to carry, the reporter calls attention to the fact that it was "alleged and proved that he had the convenience to carry," and when Baron Parke had occasion to review the early law on the subject in Johnson v. The Midland Railway Co.[5] he regarded the rule that carriers were not bound to transport goods unless they had facilities for the purpose as well established. While the doctrine that the duty to carry is coextensive with the "holding out" may be found enunciated with more or less clearness in many of the early cases, it is not emphasized, so that it is difficult to derive any principle from the opinions other than this: that the carrier must make a reasonable effort to serve the public with what means he has at hand. Some such general principle seems to have guided the court in an American case decided in 1841.[6] A shipper sued a carter for the loss of a hogshead of molasses which the defendant's servant had received for carriage without the defendant's consent, and which was broken in loading because of the small size of the wagon. The defendant said that the servant's act was without the scope of his employment. The court ruled that to enable the plaintiff to recover he must prove "either a special contract and undertaking by the defendant to carry this hogshead of molasses, or a general usage; that is, that the defendant was a common carrier of goods, including goods of this description." So also in the case of Gordon v. Hutchinson (I Watts and S. 285), Chief Justice Gibson of Pennsylvania said: "In England the obligation to carry on request on the carrier's particular route, is the criterion of the profession; but it is certainly not so with us. In Pennsylvania, we had no carriers exclusively between particular places, before the establishment of our public lines of transportation, and according to the English principle we could have no carriers, for it was not pretended that a wagoner could be compelled to load for any part of the continent." It would appear that the law of carriers in America in 1840 was still in such a formative state that the often cited passage from New Jersey Steam Navigation Company v. Merchants Bank (1848) that the carrier "is bound to receive and carry all goods offered for transportation,—and is liable to an action in case of refusal"[6a] cannot be taken without qualification.

[3]Riley v. Horne, 5 Bing. 220.
[4]2 Shower 327.
[5]Decided 1852. 4 Exch. 367.
[6]Tunnell v. Pettijohn, 2 Har. (Del.) 48.
[6a]6 Howard 382.

The rule laid down by Story,[7] supported by citation of the usual cases[8] from the early reports, that "One of the duties of a common carrier is to receive and carry all goods offered for transportation by any person whatsoever upon receiving a suitable hire," is qualified by such important exceptions, immediately following, that it constitutes an accurate, if somewhat misleading, statement of the early common law. "If a carrier refuses to take charge of goods because his coach is full," he says, "—or because the goods are not of a sort which he is accustomed to carry; or because he has no convenient means of carrying such goods with security; these will furnish reasonable grounds for his refusal; and will, if true, be a sufficient legal defense to a suit for the non-carriage of the goods." The conclusion seems justified that the carrier was by early common law not bound to accept for transportation goods constituting the ordinary articles of commerce unless he had the facilities at hand for transporting them.

The business done by the early railways bore some resemblance to that done by the owners of toll roads, canals, and private rights of way, who provided primarily a right of passage, but the introduction of steam locomotives, the consequent complication in design of the carriages, and, lastly, the very important privileges granted the railroads by the people soon changed the relation of this class of carriers to the public. Perhaps the clearest statement of the attitude that the courts took toward the railroads when they came to fix their relation to the public is found in the leading case of Kansas Pacific Railway Co. v. Nichols[9]: "That railroads are *created* common carriers of some kind, we believe, is the universal doctrine of all the courts. The main question is always, whether they are common carriers of the particular thing then under consideration? The question in this case is whether they are common carriers of cattle? So far as our statute is concerned, no distinction is made between the carrying of cattle and that of any other kind of property. Under our statutes a railroad may as well be a common carrier of cattle as of goods, wares and merchandise or of any other kind of property. Now, as no distinction has been made by statute between the carrying of the different kinds of property, we would infer that railroads were created for the purpose of being common carriers of

[7]Sec. 508.

[8]Jackson v. Rogers, supra; Rex v. Kilderly, 1 Saund. 312; Lane v. Cotton, 1 Ld. Raym. 646; Balson v. Donovan, 4 Barn. and Ald. 32; Edwards v. Sheratt, 1 East. 604.

[9]9 Kas. 235.

all kinds of property which the wants and needs of the public require to be carried, and which can be carried by railroads." With the exception of Michigan,[10] the states seem to have adopted the attitude taken by the Kansas court toward railroads as the proper one, but in applying the rule that railroads were public purposes or public uses there was much variation.

It is apparent that as soon as it is held that a railroad must transport all kinds of goods, it must then carry these goods safely. Carrying the doctrine forward, if special cars are necessary to carry the goods, these must be provided. The only limitation on the doctrine would be that the goods must be such familiar articles of commerce as to raise the implication that the railroads were created to carry them, or, that the roads can be said to hold themselves out as carriers of them.

Accepting the general principle underlying the Kansas case as the proper one in dealing with railroads, the statement made by Hutchinson in his work on carriers appears as a clear statement of the law. "But still there may be cases in which it cannot be known from common experience nor from the character of the business in which the carrier is engaged whether the particular goods are such, that he as a common carrier, is under legal obligation to accept for carriage, and in such cases it would devolve upon the party who insisted upon his liability for the refusal, to show from the nature of the employment or from the usage of others similarly engaged, or from the previous practice or course of business of the particular carrier himself, that the duty to accept was incumbent upon him."[11]

The original practice in this country in transporting petroleum was to fill barrels and place these in cars. The losses and danger entailed in this method finally led to the much cheaper method (for the shipper) of transporting in bulk in tank cars.[12] The old method was, however, never abandoned and is still in use, in a somewhat changed form. With the introduction of this method, and other similar practices, tending to make alternative methods of shipment, one better than the other from the shippers' point of view, the question arose as to the right of the shipper to demand the better facilities from the carriers. Two cases decided by the Court of Appeals of Missouri[13] in 1882 and 1883 (before refrigerator cars,

[10]Mich. So. and North Ind. R. Co. v. Denough, 21 Mich. 165, 4 Am. R. 466.
[11]Sec. 112.
[12]Hist. of Penna. R.
[13]Wetzell v. Chicago, etc., R. Co., 12 Mo. App. 599; and Udell v. Ill. Cent. R. Co., 13 Mo. App. 254.

the type involved, had come into very general use), can be assigned to a middle stage in the development of the law as it stands at present. In the latter of these the court said: "While, as we held in the case just cited, and as the learned judge instructed the jury in this case, it cannot be said as a matter of law that in the absence of a special contract, the carrier is bound to furnish any particular kind of car,—as, for instance, a refrigerator car,—yet the circumstances may be such that it may be a fair question for the jury whether he acted reasonably in not furnishing such a car." It appeared in this case that the railroad had furnished cars previously on several occasions and that the injury complained of was the carrier's act in removing the produce from refrigerator cars already furnished, to other cars affording less protection from the weather. An earlier Massachusetts case[14] (1872) is cited herein which holds that one who ships in cold weather, unless protected by a special contract, does so at his own risk.

In Beard v. R. Co.[15] the railway accepted a shipment of butter which was to go south, and, owing to the warmer climate at the destination, the butter spoiled. The railway had no refrigerator cars, but the court held that the railway must keep the butter in condition. "Having accepted butter for transportation, defendant cannot escape liability for not safely transporting it on the ground that it did not have cars sufficient for the purpose." The court further held that the railroad should have iced the butter in the ordinary cars. The shipper is not required to pack the butter so that it will travel safely, but the railroad neglects this at its peril. It is submitted that under the circumstances here, the railroad could not refuse to accept the butter for shipment, so that the words "having accepted" in the opinion, do not qualify the liability. It further seems that a railroad, once having furnished special cars, must continue to furnish them.[16] A railroad that did not own refrigerator cars was held liable for a failure to supply them to shippers, when cars had previously been supplied by arrangement with a car company, on the ground of holding out, or practically, estoppel. As a limitation, however, on the general doctrine under discussion, the judge in this same case holds that without the holding out, there could have been no recovery: "That the finding of this fact was necessary to the plaintiff's right of action was very

[14]Swetland v. Boston and Albany R. Co., 102 Mass. 276.

[15]79 Iowa 518.

[16]Atlantic C. L. R. Co. v. Geraty, 166 Fed. 10; 20 L. R. A. N. S. 310.

plainly and clearly explained to the jury by the learned judge's instructions."

It would seem that under this case the railway cannot be made to furnish cars unless it holds itself out as supplying them, but it seems probable that cars must be supplied where there is any reasonable demand for them, or that very trivial circumstances will be regarded as sufficient to constitute a holding out. This case is flatly contradicted by a South Carolina case decided in 1902.[17] "The proposition that the plaintiffs cannot recover from the defendant unless he proves that the railroad company held itself out to the public as furnishing refrigerator cars for transporting fruits and vegetables is erroneous, inasmuch as it was only necessary for the plaintiff to show that the defendant was a common carrier of freight, and that the defendant refused to transport articles of freight, which resulted in damage to the plaintiff." This case seems to put the doctrine in the strongest form against the railway, and while the only authority for the case cited is an earlier South Carolina case,[18] which on examination appears to be nothing more than a restatement of the paragraph from Story's Bailments mentioned above, there is nothing illogical in the conclusion at which the court arrives. The general tendency of the courts seems to be to require the carrier to furnish the shipper with equipment, which is either cheaper, more convenient or necessary for the preservation in transit, as fast as such new equipment comes into general use. The law extends so as to make that equipment customary equipment.[19]

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[17]Mathis v. Southern R. Co., 65 S. C. 271; 61 L. R. A. 824.

[18]Porcher v. N. E. R. Co., 14 Rich., L. 181. See Npt. News, etc., R. v. Mercer, 96 Ky. 475.

[19]Johnson v. Toledo, etc., R., 133 Mich. 596.