1865

The Carriers Act, 1865

Common Carrier

The Carriers Act, 1865, was passed at a time when the profession of carrying goods or passengers was growing and the carriers had an open opportunity to contract out of liability even for negligence or misconduct with the result that the consignors were left wholly at their mercy. Now the Carriers Act does not permit exclusion of liability in such cases.

The purpose of the [English] Carriers Act, 1830 is thus explained in Halsbury:[1] "The Carriers Act, 1830 was passed with the primary object of protecting common carriers from the great risk which they ran under the common law in carrying parcels containing articles of great value in a small campass. With regard to such property, the carrier attempted to protect himself by putting up notices limiting his liability; but there was great difficulty in fixing consignors with knowledge of notices of this kind."[2]

An Act relating to the rights and liabilities of common carriers

WHEREAS it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents ; it is enacted as follows :—

1. *Short title.*—This Act may be cited as the Carriers Act, 1865.

2. *Interpretation-clause.*—In this Act, unless there be something repugnant in the subject or context,—

"common carrier" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately ;

"person" includes any association or body of persons, whether incorporated or not.

Definition of 'common carrier'

The liability stated under the Act and its provisions are attracted only when a carrier comes within the description of "common carrier" as given in Section 2 of the Act. This section is the "interpretation clause" and the first concept defined is that of common carrier. The definition is in these words :

> 'Common carrier' denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately.

1. LAWS OF ENGLAND, 184-85 (Vol 5, 4th ed 1974).
2. Quoting the title and preamble of the Act.

Based upon English Common Law

The definition is based upon the English common law. "The common law in England developed from quite early times to make the profession of common carriers a kind of public service, or as stated by Lord HOLT in an early case "a public trust".[3] It is where such a public trust has been undertaken as distinct from a private contract that a carrier ceases to be a private carrier and becomes a public carrier or as English law calls him "a common carrier". Explaining the distinction between a mere carrier and a common carrier, ALDERSON B said in *Ingate* v *Christie*:[4]

> Everybody who undertakes to carry for anyone who asks him, is a common carrier. The criterion is, whether he carries for a particular person only, or whether he carries for every one. If a man holds himself out to do it for everyone who asks him, he is a common carrier ; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract.[5]

The definition given by Story in his book on BAILMENT is more or less to the same effect :

> A common carrier is one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place.[6]

If the reserves to himself the right to reject goods of any kind or from any person, he is not a common carrier.[7] An illustration in point is *Belfast Ropework Co.* v *Bushell*.[8]

The defendant described his business as that of an automobile engineer and haulage contractor. He owned two lorries intended for sale. With these

3. *Lane* v *Cotton*, (1701) 1 Com 100 : 1 Ld Raym 646 : 12 Mod Rep 472 : 92 ER 981 : Empire Digest, Vol. 8, p. 14, 17.
4. (1850) 3 Car Kir 61, NP : 8 Digest (Repl) 10.
5. The quotation is collected from the judgment of DAS GUPTA J in *River Steam Navigation Co. Ltd.* v *Shyam Sunder Tea Co. Ltd.*, [1962] 2 SCR 802 at p. 807 : AIR 1962 SC 1276. See also FARWELL LJ in *Clarks* v *West Ham Corpn.*, [1909] 2 KB 258 at 879 CA where his Lordship observed that the test for determining whether a person is a common carrier or not would in each case appear to be the same. *Tamvaco & Co.* v *Temothy and Green*, (1882) Cab & El 1 : 8 Digest (Repl) 5, it is a question of fact in each case. Thus the court can register a finding of fact in each case that a particular carrier is a common carrier. *Brind* v *Dale*, (1837) 8 C & P 207 : 8 Digest (Repl) 6.
6. This definition was adopted in *Bennet* v *Peninsular and Oriental Steam Boat Co.*, (1848) 6 CB 775, 787, per WILDE CJ. The question was elaborately considered by POTI J of the Kerala High Court in *R.R.N. Ramlinga* v *Narayana*, AIR 1971 Ker 197 at p. 199. He quoted Chitty on CONTRACTS as saying that a "common carrier is a person who publicly professes to undertake for reward to transport the goods of all such persons as desire to employ him". [page 481, Vol. 2, 23rd edn.] The learned judge also quoted from Otto Kahn Freund, THE LAW OF CARRIAGE BY INLAND TRANSPORT and from Macnamara's LAW OF CARRIERS. A person may be a common carrier although one of the places which he touches may be out of the jurisdiction or overseas. *Crouch London & N. W. Ry. Co.*, (1854) 14 CB 255 : 25 LJ Exch 134 ; *Pianciani* v *London and Smith Ry Co.*, (1856) 18 CB 226 : 8 Digest (Repl) 50.
7. The right to reject may form part of standard conditions. *Hunt and Winterbotham Ltd.* v *B R S (Parcels) Ltd.*, [1962] 1 QB 617 : [1962] 1 All ER 111 CA.
8. [1918] 1 KB 210 : 87 LJ KB 740 : 118 LT 310 : 34 TLR 156. To the same effect, *Rosenlethal* v *LCC*, (1924) 131 LT 563, carrying selected goods.

and others which he hired when necessary he carried sugar from Liverpool to Manchester. At Manchester he invited offers of goods of all kinds except machinery for carriage to Liverpool and other places. These offers he accepted or rejected according as the rate, route and class of goods were or were not satisfactory. He accepted the plaintiff's hemp for carriage to Liverpool. In the course of the transit the hemp was damaged by fire without negligence of the defendant.

It was held that inasmuch as he reserved to himself the right of rejecting or accepting offers of goods for carriage he was not a common carrier and, therefore, was not absolutely liable for the loss of goods.[9]

Charges for services not relevant to concept of "common carrier"

The concept was considered by the Supreme Court in *River Steam Navigation Co. Ltd.* v *Shyam Sunder Tea Co.*[10]

The defendant company was providing steamer service in the river Brahmputra between Dibrugarh and Calcutta, and was engaged mostly for carriage of tea chests. In this respect the company admitted that it was a common carrier. In order, however, to facilitate the transportation of tea from the interiors to the main Ghats on the river, the company provided boats on request to the tea gardeners on the tributaries of the river and nothing was charged for this service. The plaintiff delivered certain tea chests on board the company's boat on a tributary point for transportation to the main Ghat and onward to Calcutta. The boat sank owing to negligence. The company was accordingly sued and it contended that it was not a common carrier on feeder lines and should, therefore, not be held liable.

But the court held that the company had become a common carrier even on the feeder routes. One of the agents of the company told the court that they always tried to give facility to the interior tea gardens and to all customers wherever they required any help. It, therefore, became obvious that they accepted goods wherever they were available indiscriminately from all customers and brought them to the main routes. This was a sufficient public profession of their being regarded as common carriers for that purpose. It was immaterial that there were no fixed rates for feeder services. The court cited BLACKBURN J in *G.W. Ry. Co.* v *Sutton*[11] as saying that "there was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or

9. The matter depends upon the substance of the situation rather than the carrier's own description of himself. *Upston* v *Slark*, (1827) 2 C & P 598 ; *Chattack & Co.* v *Bellamy & Co.*, (1895) 64 LJ QB 250. (Wharfingers) Persons who undertake carriage as ancillary to their own business are not common carriers. *Consolidated Tea and Lands Co.* v *Oliver's Wharf*, [1910] 2 KB 395 (Warehouseman), disapproving *Maving* v *Todd*, (1815) 1 Stark 72 ; *Armour & Co. Ltd.* v *Tarbard Ltd.*, (1920) 37 TLR 208 (Warehouseman) ; *Lynch Bros Ltd.* v *Edwards & Fase*, (1921) 90 LJ KB 506 (contractor) ; *Scruttons Ltd.* v *Midland Silicones*, [1962] AC 446 : [1962] 1 All ER 1 HL, (stevedores).

10. [1962] 2 SCR 802 : AIR 1962 SC 1276. *See also* the Privy Council decision in *India General Navigation and Ry. Co. Ltd.* v *Dekhari Tea Co.*, (1923) 51 IA 28.

11. (1869) LR 4 HL 226 at p. 237 : 38 LJ Ex 177 : 22 LT 43.

even gratis. All that the law required was that he should not charge any more than was reasonable."[12]

Goods or routes of choice also no consideration

It also makes no difference that he carries only for a part of the route or only certain kinds of goods.

> A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods, or he may limit his obligations to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places.[13]

Similarly, it has been observed that "at common law no person is bound to carry as a common carrier any goods of a kind which he does not profess to carry.[14]

Special contract not inconsistent with profession

A common carrier may limit his liability by a special contract and he does not thereby cease to be a common carrier, though, of course, the contract would be valid only if does not offend the provisions of the Act.[15] He remains a common carrier and liable as such even where he has forwarded the goods to another carrier outside his own system.[16]

Licence under Motor Vehicles Act

Thus the legal requirement is the public profession to carry goods for persons indiscriminately and not as a casual operation or for providing the transport service to a particular individual or some individuals. It is on this basis that a licence is issued under the Motor Vehicles Act for the profession of public carrier.[17]

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12. The court also found support in the statements of Professor Otto Kahn Freund in THE LAW OF CARRIAGE BY INLAND TRANSPORT, 190 (3rd ed.).
13. *Johnson* v *Midland Rail Co.*, (1849) 4 Ex 367, per PARKE B at p. 373.
14. PER LINDLEY LJ in *Dickson* v *Great Northern Rail Co.*, (1886) 18 QBD 176 at p. 183, CA, per LINDLEY LJ. See also *Oxlade* v *North Eastern Ry Co.*, (1857) 1 CBNS 454, 498 ; *India General Navigation and Ry Co.* v *Dekhari Tea Co.*, (1923) 93 LJPC 108.
15. *See* the judgment of DRAKE BROCHMAN J C in *Ali Mohamad* v *G.P.P. Ry. Co.*, AIR 1915 Nag 6 at p. 7 : 11 Nag LR 174.
16. *Tugun Ram* v *Dominion of India*, AIR 1966 Nag 260 : ILR (1965) 2 All 150 DB. See also *Madura Co. Ltd.* v *P.C. Xavier*, AIR 1931 Mad 115, goods transmitted by a canal company to a railway company, the canal company was held liable as a common carrier and *India General Navigation and Rly. Co.* v *Dekhari Tea Co.*, ILR 51 Cal 304 : 51 IA 28 : AIR 1924 PC 40. The Act applies to cases of surface transport and only to the extent of surface transport. If the further transport involves carriage by other modes, the Carriers Act would apply to the land part only. *Le Conteur* v *London and S.W. Ry. Co.*, (1865) LR 1 QB 54. The person claiming the application of the Act has to prove that fact and his case would fail if he cannot show that loss or injury was caused to his goods during the course of the surface transport. See *London and N.W. Ry. Co.* v *J.P. Asthon & Co.*, [1920] AC 84 HL ; *Pianciani* v *London and S.W. Ry. Co.*, (1856) 18 CB 226 ; *Baxendale* v *Great Eastern Ry Co.*, (1860) LR 4 QB 244.
17. *Hussainbhai* v *Motilal*, AIR 1963 Bom 208 : 65 Bom LR 152 DB : 1963 Mah LJ 312 : ILR 1963 Bom 822.

Consequences of rejection

Once a person qualifies as a common carrier within the meaning of this definition, he becomes bound to accept the type of goods which he professes to carry on his routes. Any refusal by him is an offence for which a civil as well as a criminal action lies. As explained by Lord HOLT in an early case :[18]

> Wherever a subject takes upon himself a public trust for the benefit of the rest of his fellow subjects, he is *co ipso* bound to serve the subjects in all the things that are within the reach and comprehension of such an office, under pain of an action against him. If on the road a shoe falls off my horse, and I come to a smith to have one put on, and the smith refused to do it, an action will be taken against him, because he has made profession of a trade which is for the public goods.... If an inkeeper refuses to entertain a guest when his house is not full, an action will lie against him ; and so against a carrier, if his horses be not loaded, and he refuses to take a packet proper to be sent by a carrier.

This statement has been cited with approval by PATEL J of the Bombay High Court in *Husainbhai* v *Motilal*[19], but the learned judge added :

> Though for improper refusal he is liable to indictment, there does not appear to be a single case of conviction.[20] In this country there can be no prosecution for a refusal, since it is not made an offence. Obligation to carry may, however, be enforced in different ways such as, for example, a suit for damages for refusal.

Refusal when justified

He can, however, justly refuse to carry if there is no room in his vehicle, or the goods are not of the type which he professes to carry ;[21] or the destination is not on his routes or if the goods are unlawful, dangerous or improperly packed.[22] He may also refuse where the full and proper price for carriage has not been paid.[23] A consignment can also be refused if it is offered too much before the time of departure[24] or where the destination can be reached [only] through areas of disturbance.[25]

18. *Lane* v *Cotton*, 92 ER 981.
19. AIR 1963 Bom 208 at p. 211. The learned judge also cited PARKE B in *Johnson* v *Midland Ry. Co.*, (1849) 18 LJ Ex 366.
20. *See* note (*a*) in Halsbury's LAWS OF ENGLAND, 137 (Vol. 4, 3rd ed.).
21. *Macklin* v *Waterhouse*, (1828) 5 Bing 212 : 7 LJ (OS) CP 12 ; *Johnson* v *Midland Ry. Co.*, (1849) 4 Exch 367.
22. *Jackson* v *Rogers* , (1683) 2 Show 327 : 8 Digest (Repl) 12 ; *Baston* v *Denovan*, (1820) 4 B & Ald 21 : 8 Digest (Repl) 84 ; *Spillers and Bakers Ltd.* v *Great Western Ry. Co.*, [1911] 1 KB 386 ; *Munster* v *S.E. Ry. Co.*, (1858) 4 CBNS 676 : 27 LJPC 308 ; *London and North Western Ry. Co.* v *Richard Hudson & Sons Ltd.*, [1920] AC 324 HL, defective packing.
23. *Wyld* v *Pickford*, (1841) 8 M & W 443 : 10 LJ Exch 382.
24. *Lane* v *Cotton*, (1701) 1 Ld Raym 646 ; *Garton* v *Bristol & Exeter Ry. Co.*, (1861) 30 LJQB 273.
25. *Edwards* v *Sherratt*, (1801) 1 East 604.

Where no exception of this kind was available a carrier was held liable for his refusal to accept goods even though the person offering the goods was himself a carrier and was undercutting the defendants' freight rates.[26]

Common carriers are now rare

Common carriers carried goods at their own risk.[27] They were bound by the principle of absolute liability. They also had no right of refusal. Therefore, most carriers now state in their contracts that they are not common carriers. It has been observed that "[C]ommon carriers are now rare. The courts do not nowadays regularly infer that a carrier is a common carrier.[28] Nevertheless common carriers are not extinct."[29] The learned authors cite by way of example the case of *Siohn (A) & Co. and Academy Garments (Wigan)* v *Hagland etc. Transport*[30]:

> A carrier of hanging garments advertised himself as being ready to carry for all and sundry at standard rates irrespective of the attractiveness of the load. He was held to be a common carrier and, therefore, absolutely liable for loss of goods whether negligent or not.

It is observed in HALSBURY'S LAWS OF ENGLAND :[31]

> "Moreover, in the case of international carriage the status of a common carrier is something in the nature of anachronism since much of the English law relating to such carriage, whether by road, rail, sea or air, is directly or indirectly derived from international conventions.
>
> From the nature of their occupations, hoymen, lightermen, masters of general ships and common bargemen have been held to be common carriers."[32]

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26. *Crouch* v *London & North Western Ry. Co.*, (1854) 9 Ex 556.
27. A common carriers is an insurer of the safety of the goods. A simple carrier occupies the position of bailee and as such bound by the duty of reasonable care, whether the bailment arose under a contract or otherwise. *Great Northern Ry. Co.* v *L.E.P. Transport and Depository Ltd.*, [1922] 2 KB 742 CA ; *Morris* v *C.W. Martins & Sons Ltd.*, [1966]1 QB 716 : [1965] 2 All ER 725.
28. Citing *Webster* v *Dickson Transport*, [1969] 1 Lloyd's Rep. 89.
29. Charlesworth's MERCANTILE LAW 541-542 (14th ed by Schmitthoff and Sarre, 1984), where the learned editors add that : "the law relating to them is of importance as a basis to the understanding of current law and conditions of carriage." See also HALSBURY'S LAWS OF ENGLAND, 133, Vol. 5 (4th ed. 1974) where it is observed : "as at the present time practically all carriage is regulated by contract, it might be difficult to discover any one operating purely as a common carrier who does not limit, by a special contract, the heavy liabilities. Thus furniture carriers are not common carriers because they generally make a special contract." *Electric Supply Stores* v *Caywood*, (1909) 100 LT 855 ; *Scaffe* v *Farrant*, (1875) LR 10 Exch 358 ; *Turner* v *Civil Service Supply Assn. Ltd.*, [1926] 1 KB 50 ; *Fagan* v *Green and Edwards*, [1926] 1 KB 102. It is necessary to charge the carrier that the goods should have come into his custody as a carrier, otherwise he would be liable only as a bailee. *East India Co.* v *Pullen*, (1726) 2 Stra 690 ; *Walker* v *Jackson*, (1842) 10 M & W 161 ; *Willoughby* v *Horridge*, (1852) 12 CB 742 : 22 LJ CP 90.
30. [1976] 2 Lloyd's Rep 428.
31. 133, Vol. 5 (4th ed 1974).
32. *Ibid.*, citing *Dale* v *Hall*, (1750) 1 Wils 281 (hoymen, small boatsmen) ; *Rich* v *Kneeland*, (1613) Cro Jac 330 (bargemen) ; *Watkins* v *Cottell*, [1916] 1 KB 10 ; *Aslam* v *Imperial Airways Ltd.*, (1933) 149 LT 276, 278.

Government carriers are generally excluded by the governing statute itself from the category of common carriers. But a carrier of passengers, whether Government or private, is likely to be regarded as a common carrier. The very nature of the job is such that they have to offer public services and they cannot pick and choose. But liabilitywise the position is different. Passengers are on self-care, but of goods, the carrier is a trustee. [See under Chapter 5 on Carriage of Passengers].

A public carrier under the Motor Vehicles Act is a common carrier.[33]

Private Carrier

Characteristics

The characteristics of a private carrier are thus stated in Halsbury's Laws of England :[34]

> "A private carrier is a person who, in the course of business or occasionally, undertakes the carriage of passengers or of other people's goods, but who does not hold himself out as exercising the public employment of a common carrier. A carrier, who, while inviting all and sundry to employ him, reserves to himself the right of accepting or rejecting their offers of goods for carriage, whether his vehicles are full or empty, being guided in his decision by the attractiveness or otherwise of a particular offer, and not by his ability or inability to carry having regard to his other engagements, is a private carrier."[35]

The position, therefore, seems to be that if a person does not qualify as a common carrier, as explained in the foregoing pages, he is to be regarded as a private carrier. Carriers of passengers are more readily regarded as common carriers and those carrying goods by road under road[36] licences are regarded as common carriers. Indian Railways are common carriers to the extent to which they occupy that position under the provisions of the Railways Act.[37]

Obligations of private carrier

A private carrier occupies the position of a bailee and, therefore, his duty and liability are regulated by Sections 151 and 152 of the Contract Act, 1872. These two provisions of the Contract Act are as follows :

> **151.** ***Care to be taken by bailee.***—**In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.**

33. *R.R.N. Ramlinga* v *V.N. Chettiar*, AIR 1971 Ker 197. Forwarding agents are not carriers. They act as agents for arranging transport. Stevedores are also not carriers. See *Scrutton Ltd.* v *Midland Silicones Ltd.*, [1962] AC 446 : [1962] 1 All ER 1 HL and Halsbury's Laws of England, 133 Vol. 5 (4th ed 1974).
34. 138, Vol 5 (4th ed 1974).
35. Citing, *Belfast Ropework Co. Ltd.* v *Bushell*, [1918] 1 KB 210, 215, per Bailhache J and *Nugent* v *Smith*, (1875) 1 CPD 19, 27 per Brett J : reversed, (1876) 1 CPD 423 CA.
36. The award of a licence under the Motor Vehicles Act, 1988 converts the carrier into an undertaking of a public nature. See *Clarke* v *West Ham Corpn.*, [1909] 2 KB 858, 878, Farwell LJ.
37. See under Chapter 3 on Railways.

152. *Bailee when not liable for loss, etc., of thing bailed.*—The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151.

The duty of a bailee under Section 151 is to exercise reasonable care. So is the duty of a private carrier.[38] He becomes liable when loss or damage is due to his negligence.[39] Since burden lies on him to account for the goods, any loss or damage is prima facie evidence of negligence. The onus of proving that the loss occured without negligence is on the private carrier as a bailee.[40]

The burden of proof is on the bailee to show that he was exercising reasonable care and if he can prove this he will not be liable.[41] Thus, where the railway administration was not able to explain how the barge carrying the plaintiff's goods sank and was lost, negligence was presumed making the railway liable.[42]

Where the loss has been due to the act of the bailee's servant, he would be liable if the servant's act is within the scope of his employment. Explaining the principle in *Cheshire* v *Bailey*[43] COLLINS MR said :

"The bailee is bound to bring reasonable care to the execution of every part of the duty accepted. He may perform that duty by servant or personally,

38. See, for example, *Houghland* v *R.R. Low (Luxury Coaches) Ltd.*, [1962] 1 QB 694 : [1962] 2 All ER 159 CA where it was pointed out that the test of liability in all cases is whether a sufficient degree of care had been exercised in the circumstances of the case. It is the same in all cases whether the carrier is a paid or a gratuitous bailee. The duty depends upon the nature any quality of the goods. English rulings also do not see any wisdom in maintaining the classification. See *Morris* v *C.W. Martin & Sons Ltd.*, [1966] 1 QB 716 : [1965] 3 All ER 725.

39. *John Carter (Fine Worsteads) Ltd.* v *Hanson Haulage (Leeds) Ltd.*, [1965] 2 QB 495 : [1965] 1 All ER 113, CA ; *Richardson* v *North Eastern Ry. Co.*, (1872) LR 7 CP 75, 81. Their liability cannot be the same as that of carriers by sea. *Steel* v *State Line S.S. Co.*, (1877) 3 App Cas 72 HL ; *Tattersalt* v *National S.S. Co. Ltd.*, (1844) 12 QBD 297 DC ; *Atlantic Shipping and Trading Co. Ltd.* v *Louis Dreyfits & Co.*, [1922] 2 AC 250 HL.

40. See Lord DENNING MR in *Morris* v *C.W. Martin & Sons Ltd.*, [1966] 1 QB 716, 726 : [1965] 2 All ER 725 CA. See also *Reeve* v *Palmer*, (1858) 5 CBNS 84 : 28 LJCP 168 ; *Joseph Travers & Sons Ltd.* v *Cooper*, [1915] 1 KB 73, CA ; *Coldman* v *Hill*, [1919] 1 KB 443, 449, CA ; *Brook's Wharf and Ball Wharf Ltd.* v *Goodman Bros*, [1937] 1 KB 534 : [1936] 3 All ER 696 CA.

41. *Joseph Travers & Sons Ltd.* v *Cooper*, [1913] 1 KB 73 CA.

42. *Union of India* v *Sugauli Sugar Works*, [1976] 3 SCC 32. See also *Orient Paper Mills Ltd.* v *Union of India*, AIR 1984 Ori 157 for responsibility of railways as bailees and the questions of burden of proof. Loading was done in the private siding of the plaintiff and so burden upon him to prove the fact of loading ; *Cochin Port Trust* v *Associated Cotton Traders*, AIR 1983 Ker 154, port trust not able to explain how fire commenced and destroyed bailor's goods, held, presumption of negligence. *State Bank of India* v *Quality Bread Factory*, AIR 1983 P & H 244, goods lost from hypothecated godown on account of the negligence of bank officials, held, borrower's liability reduced to that extent. *Raman & Co.* v *Union of India*, AIR 1985 Bom 37, since the liability of the railways is that of bailee under Sections 151-152 burden was on them to show how loss occurred and that it occurred after the first 7 days after the completion of the transit.

43. [1905] 1 KB 237. For other cases on the subject see, *John Carter (Fine Worsteds) Ltd.* v *Hanson Haulage (Leeds) Ltd.*, [1965] 2 QB 495 : [1965] 1 All ER 117 CA ; *Morris* v *C.W. Martin & Sons Ltd.*, [1966] 1 QB 716 : [1965] 2 All ER 725 CA ; *James Bachman & Co. Ltd.* v *Hay's Transport Services Ltd.*, [1972] 2 Lloyd's Rep 535 ; *United Africa Co. Ltd.* v *Saka Owoade*, [1955] AC 130 : [1957] 3 All ER 216 PC ; *Atchison* v *Page Motors Ltd.*, (1933) 154 LT 128.

and if he employs servants he is as much responsible for all acts done by them within the scope of their employment."

Contract to the Contrary

It is still debatable whether a bailee can contract himself out of the duty prescribed by Section 151, or whether a contract of bailment can exempt the bailee from his liability for negligence? The argument is built chiefly on the ground that Section 152 opens with the remark: "in the absence of any special contract". This may show that the legislative intent was to permit him to reduce the scope of his liability. Judicial thinking on this line is in evidence in a Punjab and Haryana decision.[44] The court said that the words "in the absence of special contract" as used in Section 152 show that a bailee can contract himself out of the obligation under Section 151.[45] The court cited the following observation from a Bombay decision :

> This court in *Bombay Steam Navigation Co.* v *Vasudev Baburao*[46], held that it was open to a bailee to contract himself out of the obligation imposed by Section 151. The Act does not expressly prohibit contracting out of Section 151 and it could be a starling thing to say that persons *sui juris* are not at liberty to enter into such a contract of bailment as they may think fit. Contracts of bailment are very common although they are not always called by their technical name. There is no reason why a man should not be at liberty to agree to keep property belonging to a friend on the terms that such property is to be entirely at the risk of the consumer and that the man who keeps it is to be under no liability for the negligence of his servants in failing to look after it."[47]

It is submitted with respect that this seems to be an unnatural reading of the two sections. Section 151 prescribes the minimum standard of care expected of a bailee and Section 152 has the effect of saying that unless the standard of care is enhanced by special contract, the bailee will be liable only when he fails to observe the requirement of Section 151. The words in Section 152 "in the absence of the special contract" would permit the standard of duty to be revised upwards and not to be diluted. Apart from this, it has always been held that it is unfair and unreasonable for any person to say that he would not be liable for negligence. No one can get a licence to be negligent. Thus in a Gujarat case bales of cloth were lost from bank custody under circumstances showing negligence. The banker was held liable irrespective of a clause which absolved him of all liability.[48]

Delivery of goods to railways for purpose of carriage is under a special contract because in addition to it being an ordinary contract of bailment, the

44. *State Bank of India* v *Quality Bread Factory*, AIR 1983 P & H 244.
45. The court cited the observations of Beaumont CJ in *Lakhaji Dadaji & Co.* v *B.M. Rajanna*, 41 Bom LR 6 : AIR 1939 Bom 101.
46. (1928) ILR 52 Bom 37 : AIR 1928 Bom 5.
47. This case was *followed* by a Division Bench of Gujarat High Court in *Chittarmal Anandi Lal* v *PNB*, ILR (1969) 10 Guj 480.
48. *Mahendra Kumar Chandulal* v *C.B.I.*, AIR 1984 Guj (NOC) 53.

provisions of the Railways Act[49] also apply. The Bombay High Court faced a problem on this point in a case[50] involving consignment of certain bales of cloth to be carried in brake van and on arrival at the destination one of the bales being tampered with resulting in a short delivery to the extent of 33 kgs. The railways escaped liability because the value of the goods was not declared as required by the relevant section of the Railways Act.[51]

As ordinary bailees railways too are bound by the duty imposed by S. 151. The railways were held liable where, instead of keeping the goods in the their own godown, they left them at the jetty or a port and they were destroyed by fire.[52]

Private carrier's insurable interest

A person who is in possession of the goods of another person as a bailee has an insurable interest in those goods because he is under an obligation to return the goods to the person entitled to them and is liable for any loss of or damage to the goods. He is entitled to insure them for his own interest as well as for that of the owner. If the insurance becomes a claim because of loss of or damage to the goods, the carrier who receives the insurance money can keep the amount which represents his interest and is a constructive trustee of the consignor for the rest of the amount.[53]

Liability of Carrier

Certain preliminary points made out by the Carriers Act about the liability of a carrier may be noted first.

Liability for goods mentioned in the Schedule [Section 3]

The Carriers Act mentions in its schedule certain types of property. The schedule is reproduced below:

SCHEDULE

Gold and silver coin.	Jewellery.
Gold and silver in a manufactured or unmanufactured state.	Time-pieces of any description.[54]
Precious stones and pearls.	Trinkets.[55]

49. No. 1 of 1890, Section 77 B(1) (repealed by the Act of 1989) in this case.
50. *Jugalkishore* v *Union of India*, AIR 1988 Bom 377.
51. Section 77 B(1) (repealed by the Act of 1989).
52. *Union of India* v *Hafiz Bashir Ad*, 1987 Supp SCC 174. The liability of a carrier is now regulated by the Carriers Act, 1865 and that of the railways by the Railways Act, 1989. There are similar provisions in these Acts and, therefore barring a few exceptions stated therein, the liability is absolute, see *Shah Jugaldas Amritlal* v *Shah Hira Lal*, AIR 1986 Guj 88.
53. *Hepburn* v *A. Tomlinson (Hulliers) Ltd.*, [1966] AC 451 : [1966] 1 All ER 418 HL.
54. This has been held to include a ship's chronometer. *Le Conteur* v *London & S.W. Ry. Co.*, (1865) LR 1 QB 54.
55. This item is thus explained in Halsbury's Laws of England, 166, Vol. 5 (4th ed 1974) : Trinkets are things which are primarily ornamental, though they may also be useful, e.g. bracelets, shirt pins, rings and brooches (which do not come within the meaning of jewellery), tortoise shell purses and ornamental smelling bottles; but plain German silver pocket matchboxes are not trinkets. *Bernstein* v *Baxendale*, (1859) 6 CBNS 251. An eyeglass with a gold chain attached is not a trinket : *Davey* v *Mason*, (1841) Car & M 45 ; this case was overruled in *Bernstein* v

Bills and hundies.[56]

Currency-notes of the Central Government or notes of any Banks, or securities for payment of money, English or foreign.

Stamps and stamped paper.

Maps,[57] prints and works of art.

Writings

Title-deeds.

Gold or silver plate or plated articles.

Glass.[58]

China.

Silk in a manufactured or unmanufactured state, and whether wrought up or not or wrought up with other materials.[59]

Shawls and lace.

Clothes and tissues embroidered with the precious metals or of which such metals form part.

Articles of ivory, ebony or sandalwood.

Art pottery and all articles made of marble.

Furs.[60]

Government securities.

Opium.

Coral.

Musk, Itr, Sandalwood oil, and other essential oils used in the preparation of itr or other perfumes.

Musical and scientific instruments.

Feathers.

Narcotic preparations of hemp.

Crude India-rubber.

Jade, Jade-stone and amber.

Gooroochand or Gooroochandan.

Cinematograph films and apparatus.

Zahir Mohra Khatai.

Platinum.

Iridium.

Palladium.

Radium and its preparations.

Tantalum.

Osmium.

Ruthenium.

Rhodium.

Agarwood.[61]

Baxendale, supra, but not upon this point. See also *Levi Jones & Co. Ltd.* v *Cheshire Lines Committee*, (1901) 17 TLR 443 (opera glasses and photographic apparatus : not trinkets).

56. A bill bearing the acceptor's signature and sent to the drawer for his signature is not a completed bill for this purpose. *Shoessiger* v *S.E. Ry. Co.*, (1854) 3 EB 549.

57. A case containing a set of maps has been held to be within the meaning of the term 'maps'. *Wyld* v *Pickford*, (1841) 8 M & W 443 : 10 LJ Ex 382.

58. *Owen* v *Burnett*, (1834) 4 Tyr 133 : 3 LJ Ex 76, looking glass or mirror included ; *Burnstein* v *Baxendale*, (1859) 6 CBNS 251, smelling bottles ; see also *Levi Jones & Co. Ltd.* v *Cheshire Lines Committee*, (1901) 17 TLR 443, but not opera glasses and photographic equipment.

59. *Flowers* v *S.E. Ry. Co.*, (1867) 16 LT 320, silk dresses included ; *Davey* v *Mason*, 1841 Car & M 45 which was to the contrary was overruled in *Wood* v *Metropolitan Ry. Co.*, (1867) 16 LT 330 ; *Hart* v *Baxendale*, (1852) 6 Exch 769, silk hose and lights included ; *Bernstein* v *Baxendale*, (1859) 6 CBNS 251, silk watch guards included ; *Brunt* v *Midland Ry. Co.*, (1864) 2 H & C 889 : 9 LT 690 : 33 LJ Ex 187, elastic silk webbing has been held to be silk wrought up with other articles.

60. *Mayhew* v *Nelson*, (1833) 6 C & P 58, articles made of felt composed of rabbit's fur and sheep's wool, not included.

61. Whether any particular item is covered by the Schedule is a question of fact and not a question law. *Brunt* v *Midland Ry. Co.*, (1864) 2 H & C 889 ; *Woodheard* v *London and N.W. Ry. Co.*,

Section 3 deals with liability for such property. Because the properties mentioned are of special value, for example, gold and silver, the section requires the value or description to be given and provides that the carrier would not be liable beyond one hundred rupees unless the value was declared or description given. The section is as follows :

> **3. *Carriers not to be liable for loss of certain goods above one hundred rupees in value unless delivered as such.*—No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof.**

Declaration as to scheduled goods

In a case before the Calcutta High Court,[62] the consignor declared the goods as stationery. The consignment contained other goods besides stationary and included silk handkerchiefs of the value in excess of Rs. 100 and other gold and silver articles which fell within the schedule. Each class of such article was of the value of less than Rs. 100. Two boxes of such goods were lost. The ruling of the court appears from the following passage in the judgment of MITTER J.[63]

> The next point taken is that the consignor is guilty of fraud as it did not give the declaration in respect of the scheduled articles...and that therefore the consignor is not entitled to get the price of the non-scheduled articles also as the court should refuse all relief where the transaction is vitiated by the fraud of the party seeking relief. There is no foundation for this contention under the English Law. When a package containing both scheduled and non-scheduled articles is lost, the value of the non-scheduled articles may be recovered though the value of the scheduled articles exceeding the statutory limit cannot be recovered.[64] This is also the law in India in the case of carriers who are governed by the Carriers Act.

In this case certain classes of articles were less than Rs. 100 in value, but the aggregated value of all such classes exceeded Rs. 100. Whether in such cases the claim should be allowed or not was not considered by the court as this point was not raised at the appropriate stage.

(1878) 3 Ex D 121 ; *Levi Jones & Co.* v *Cheshire Lines Committee*, (1901) 17 TLR 443. Things which are accessory to the scheduled goods and are with them in their packages are included in the same category. *Henderson* v *London and N.W. Ry. Co.*, (1870) LR 5 Exch 90 ; *Treadwin* v *G.E. Ry. Co.*, (1868) LR 3 CP 308. Where mixed articles are contained in a packing, this system of liability would apply to only that portion of the articles which are within the Schedule. *Wyld* v *Pickford*, (1841) 8 M & W 443 : 10 LT Ex 382 ; *Treadwin* v *G.E. Ry. Co.*, (1868) LR 3 CP 308 ; *Flowers* v *S.E. Ry. Co.*, (1867) 16 LT 329.

62. *River Steam Navigation Co. Ltd.* v *Jamunadas Ram Kumar*, AIR 1932 Cal 344 : ILR 59 Cal 472. A provision of this kind is contained in the [English] Carriers Act, 1830 about which it has been observed that the Act is now of little practical importance, but it can "lead to injustice and is in need of repeal." See CHARLESWORTH'S MERCANTILE LAW, 546 (14th ed by Schmitthof and Sarre, 1984) and *Caswell* v *Cheshire Lines Committee*, [1907] 2 KB 499.

63. At p. 346.

64. The Court cited : *Flowers* v *S.E. Ry. Co.*, (1867) 16 LT 329 ; *Treadwin* v *G.E. Ry. Co.*, (1868) 3 CP 308 : 37 LJ 83 : 17 LT 1 : 16 WR 365.

In another case before the Calcutta High Court:[65]

> Six packages of *matka* silk thread were made over to the carrier as undeclared luggage. The steamer had gone only about two and a half miles that it caught fire and the goods were lost. The company resisted the claim on the ground that the nature and value of the goods, being scheduled articles, were concealed from the company, and also higher charges were not paid on them.

The court held that Section 3 is subject to the declaration in Section 9 which holds the carrier liable where the loss is due to his negligence. The loss in this case being due to the carrier's negligence he was liable.

> Had the *matka* silk thread been lost otherwise than through the negligence of the company, they would not have been liable for the loss, as the value and description of the property had not been declared as provided by Section 3 and as there was no payment of a special rate as provided by Section 4. But as the property was lost owing to the negligence of the company, we are of opinion that they are liable for the loss, although the value and description of the property were not declared and a higher charge was not paid for them and that in such a case Sections 3 and 4 of Act III of 1865 do not afford any protection to the carrier.[66]

The court also rejected the contention that because the goods were booked as luggage and not as general merchandise there should be no liability for the loss of general merchandise. Section 8 speaks of liability for "property delivered" which words would include "luggage as well as goods".[67]

The value of the goods is to be taken according to the invoice price to the consignee and not according to the price paid by the consignor.[68] The declaration has to be made by the consignor for the purposes of the Act. A declaration made for any other purpose, e.g., for customs purposes, may not serve the purposes of the Act, even if the carrier comes to know such a declaration.[69]

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65. *Indian General Navigation & Rly. Co. Ltd.* v *Gopal Chundra Guin*, (1914) 41 ILR Cal 80 : AIR 1914 Cal 150.
66. CHATTERJEA and WALMSLAY JJ at pp. 84-85. Another case of the same kind is *Narang Rai Agarwalla* v *River Steam Navigation Co. Ltd.*, (1907) ILR 34 Cal 419. The case of *Shaik Raheemullah* v *Palmar*, (1864) Croyton is Rep. 133, which is contrary to this case, was decided before the Carriers Act, 1865.
67. See at pp. 85-86. The court considered : *Cahill* v *London and N.E. Ry. Co.*, (1862) 13 CB NS 818 ; *Great Northern Ry. Co.* v *Shephard*, (1852) 8 LX 30 ; *David Keays* v *Belfast Ry. Co.*, (1861) 9 HL Cas 556 and *Velayat Hossein* v *Bengal and N.W. Ry. Co.*, (1909) ILR 36 Cal 819.
68. *Blankensee* v *London and N.W. Ry. Co.*, (1881) 45 LT 761.
69. *Hirschel and Meyer* v *G.E. Ry. Co.*, (1906) 12 Com Cas 11 : (1906) 96 LT 147 : 20 TLR 661 ; *Robinson* v *London and S.W. Ry. Co.*, (1865) 19 CBNS 51 : 34 LJ CP 234 : 12 LT 347, on the basis of which it is suggested in Halsbury that it would probably not justify making the additional charge, Para 349, note 11 (4th ed 1974), where it is also noted that "a statement that the consignor wished the goods to be insured will not suffice without a declaration of their value if it exceeds £ 10 ; *Doey* v *London & N.W. Ry. Co.*, [1919] 1 KB 623.

Right to payment of charges

The carrier is entitled to insist upon full payment of his charges along with the acceptance by him of the consignment.[70] But if he accepts the goods without demanding payment of freight in advance, he cannot afterwards claim payment until he has carried the goods to their destination.[71] The charge should be reasonable and should be accepted from whatever source its payment is arranged.[72] He is also entitled to customer as well as price preference provided that his conduct in the circumstances is reasonable.[73] Where his demand of freight is exorbitant and it is paid under protest, he would have to refund the extra portion of the charge.[74]

Extra charges [*Section* 4]

Section 4 is supplementary of the provision in Section 3. It enables the carrier to charge extra for the risk in respect of the scheduled articles. Such extra charges must be exhibited at the place of booking in English as well as the language of the place. The section runs as follows :

> 4. ***For carrying such property payment may be required at rates fixed by carrier.***—Every such carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid at such rate of charge as he may fix.

Sections 3 and 4 would not be attracted where the goods in question do not come within the schedule. In a case before the Andhra Pradesh High Court,[75] the question was whether "Leno" was within the schedule. The only clause to which it came near states : "clothes and tissues embroidered with the precious metals or of which such metals form part." The court held that "Leno" which according to the CONCISE OXFORD DICTIONARY means "kind of cotton gauge for caps, veils, curtains etc." could not "by any stretch of imagination be brought within the ambit of this term."[76]

If the goods have been declared by the consignor, he has done his duty and the failure of the carrier to charge extra on the basis of the declaration will not make any difference as to the carrier's liability.[77]

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70. *Wyld* v *Pickford*, (1841) 8 M & W 443.
71. *Barnes* v *Marshall*, (1852) 18 QB 785.
72. *Pickford* v *Grant Junction Ry. Co.*, (1841) 8 M & W 372 ; *Harris* v *Packwood*, (1810) 3 Taunt 264 ; *Crouch* v *Great Northern Ry. Co.*, (1856) 11 Exch 742.
73. *Branley* v *S.E. Ry. Co.*, (1862) 12 CBNS 63 ; *Great Western Ry Co.* v *Sutton*, (1860) LR 4 HL 226.
74. *Baxendale* v *London & S.W. Ry. Co.*, (1866) LR 1 Exch 137.
75. *Alopati Suryanaraynan* v *Puvvada Pullayya*, (1968) 1 Andh LT 317.
76. *See* at p. 320.
77. (1892) 19 Cal 538. *Behrens* v *Great Northern Ry. Co.*, (1861) 3 LT 863. The carrier remains entitled to his usual defences under the Act. *Hinton* v *Dibbin*, (1842) 2 QB 646 ; *Great Western Ry. Co.* v *Rimell*, (1865) 18 CB 575 : 27 LJ CP 201, injury caused by negligence, the carrier remained entitled to the protection of the Act. *Moriu* v *N.E. Ry. Co.*, (1876) 1 QBD 302 ; *Millen* v *Brasch*, (1882) 10 QBD 142 CA ; *Wyld* v *Pickford*, (1841) 8 M & W 443, liability for wilful misfeasance and acts inconsistent with the contract.

Right to recover back charges [Section 5]

If the value and nature of the goods have been declared as required by Section 3 and the carrier has levied special charges, the consignor will be entitled to recover in case of loss of such goods, not merely the value of the goods, but also the charges paid by him in respect of the special risk. Section 5 provides for this right in the following words :

> ***5. The person entitled to recover in respect of property lost or damaged may also recover money paid for its carriage.***—**In case of the loss or damage to property exceeding in value one hundred rupees and of the description aforesaid delivered to such carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid.**

Recovery under this section is allowed to the person on whose behalf the goods were booked and not to the agent or the forwarding carrier unless he booked on his own account.[78]

Liability for Non-scheduled Goods [Section 6]

> *6. In respect of what property liability of carrier not limited or affected by public notice.*—The liability of any common carrier for the loss or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice.

Limitation of Liability by Special Contract

The liability for the loss of goods not falling within the schedule cannot be limited by public notice but can be limited by special contract made with each consignor. The clauses of the contract by which liability is limited must be brought to the notice of the other party.[79] In a case before the Madras High Court,[80] the party's agent signed the consignment note which carried conditions overleaf limiting liability for loss to Rs. 500 only. The goods having been lost, the consignor claimed that neither he nor his agent had knwledge of the clause. RAMACHANDRA IYER J reminded him as follows :[81]

> It is comparatively rare to find any common carrier to convey goods under such liability, (absolute liability) as it is invariably the practice with common carriers to enter into a contract, defining and limiting their liability. That practice is so universal that in the normal course of things one would expect any consignor of goods to look into such conditions which are found

78. *D.P. Narasa Reddy* v *Ellisetti*, AIR 1964 AP 71 : (1963) 2 Andh WR 190.
79. It cannot be done by a general public notice given by the carrier. It would have to be done by a special contract though that special contract may be based upon the general notice. Where the document containing special contract is delivered to the consignor and is received from him under his signature without any objection, special contract arises. *Great Northern Ry. Co.* v *Morville*, (1852) 7 Ry & Cass Cas 830 : 21 LJ QB 310. Even after signature the carrier would have to show that care was taken to bring the conditions to the notice of the consignor. *Orient Road Lines* v *M.B. Mohd Hassan Sahib & Co.*, [1988] 2 KLT 619 : [1990] 2 ATC 706, printed terms in the absence of signature, not amounting to contract.
80. *Indian Air Lines Corpn.* v *Jothaji*, AIR 1959 Mad 285 : ILR 1959 Mad 439 : [1959] 2 MLJ 373.
81. At p. 286.

in consignment notes. To say that in every case the carrier should prove that he drew the attention of the consignor to the clause ... is extending the rule beyond its limits.[82]

Limiting clauses are strictly construed and against the party who inserted them. One of the protections is contained in the section itself which requires that the contract containing such clauses should be signed by the owner of the property or by his duly authorised agent. Oral stipulations will not be sufficient. Thus where, in a case before the Rajasthan High Court[83], the carrier pointed out to one of those attending loading of cotton on a gas plant truck that it was exceptionally risky and he agreed to take it, the carrier was nevertheless held liable when the gas plant materialised the risk by putting the truck with its load of cotton on fire.

In a similar case before the Kerala High Court[84] on the reverse side of the consignment note there was a condition to the effect that "the company shall not be liable for any loss or damage due to pilferage, theft, weather conditions, strikes, riot, disturbances, fire, explosion or accident." The Court did not permit the carrier to escape liability under this clause unless there was signature showing an agreement to that effect. A statement in the consignment note that the goods are being carried at owner's risk does not constitute a special contract.[85]

If the special contract is not destructive of his position as a common carrier, the Act applies to the carriage for the good or bad of both parties. If the special contract takes the carrier out of the concept of a common carrier, then the Act does not apply. Neither party can take the advantage of the Act. The carriage becomes a purely contract carriage.[86]

The carrier may exclude his liability even for the criminal acts of his servants.[87]

Discharge from liability

The liability of the carrier comes to an end not on actual unloading of the goods but when the entire cargo in good condition is handed over to the person

82. The court considered the following cases in which the limiting clauses were held to be binding : *Luddit* v *Guiger Cootte Airways*, [1947] AC 233 ; AIR 1947 PC 151 ; *Assam Roadways* v *National Ins. Co.*, AIR 1979 Cal 178 ; *Moothora Kant Shaw* v *India General Steam Navigation Co.*, (1884) ILR 10 Cal 166.

83. *Vidya Ratan* v *Kota Transport Co. Ltd.*, AIR 1965 Raj 200 : (1965) Raj LW 247 DB.

84. *Orient Road Lines* v *M.B. Mohd. Hassan Sahib & Co.*, [1988] 2 Ker LT 619, the goods were consigned on the owner's risk but even so the carrier was not able to draw any benefit from clauses excluding his liability unless the document containing those conditions was signed by the consignor or agent. To the same effect, *United India Assurance Co. Ltd.* v *Associate Corpn. Ltd.*, [1987] 1 KLT (Short Note) 46, where mere printing of the words "subject to Bombay jurisdiction" was held not to amount to a special contract.

85. *Indian Roadways Corpn.* v *Unnecrikutty*, [1990] 1 KLT 292 : 1991 ACJ 15, relying on *United India Ins. Co. Ltd.* v *Associate Corpn. Ltd.*, [1987] 1 KLT 46 (Short Notes).

86. *Baxendale* v *Great Eastern Ry. Co.*, (1869) LR 4 QB 244 ; *Hirschel and Myer* v *Great Eastern Ry. Co.*, (1906) 96 LT 147 ; *Great Northern Ry. Co.* v *L.E.P. Transport and Depository Ltd.*, [1922] 2 KB 742 CA.

87. *Shaw* v *Great Western Ry. Co.*, [1894] 1 QB 373 ; *Butt* v *Great Western Ry. Co.*, (1851) 11 CB 140 : 20 LJCP 141 ; *John Carter (Fine Worsteds) Ltd.* v *Hanson Haulage (Leeds) Ltd.*, [1965] 2 QB 495 : [1965] 1 All ER 113 CA.

producing documents at the port of destination. Mere unloading of the goods and handing them over to the port authority does not amount to an effective discharge. In a case of this kind, the shipowner handed over the goods to the port authority at the destination and the consignee while removing them in stages found that the last lot was in damaged state. The carrier contended that the goods were discharged at the port in good condition and the damage might have happened at the port. The carrier was held liable.[88] As to the meaning of effective discharge the court said :

> As held by a Full Bench of this Court in the decision in *General Traders Limited* v *Pierce Leslie (India) Ltd.*[89], discharge means effective and actual discharge in such a reasonable manner as to enable the consignee to take delivery of the goods. But the question is whether the discharge of the goods to the Port authorities itself will automatically exonerate the carrier from liability.

The position as to this was thus explained :

> "If the cargo was discharged to the Port authorities in proper order and condition, the position of the carrier will be safe. Thereafter, if the damage or shortage occurs, the Port authorities alone could be held responsible. According to Regulation 85 of the Cochin Port Dock Regulations, issued under the authority of the Major Port Trusts Act, broken or damaged condition of the cargo will have to be noted by the Port authorities. Claim against the Port Trust will not lie unless notice of loss or damage has been given within seven clear working days from the date of taking charge."

Thus it is the responsibility and burden of the carrier to prove how and where the goods were lost or damaged. Explaining the extent and scope of this burden the court said :

> "But the carrier, as custodian of the cargo entrusted for shipment and delivery, is having heavy responsibilities in relation to it. The carrier is bound to exercise due diligence to make all parts of the ship, in which the goods are carried, fit and safe for reception, carriage and preservation. He must properly and carefully load, handle, store, carry, keep, care and discharge the goods carried. Exceptions to these liabilities provided in the rights and immunities in Art. IV are subject to the above duties and liabilities. Neither the carrier nor the ship shall be responsible for the loss or damage arising or resulting from any cause without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier. But, in such cases also, the initial burden is on the carrier, who claims the benefits of the exception, to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.
>
> "The contention by the first respondent is that the entire goods were discharged without any damage or shortage and damage or shortage, if any,

88. *National Textile Corpn.* v *Pakistan National Shipping Corpn.*, [1990] 2 KLT 911 Ker.
89. 1986 KLT 1192.

might have happened at the Port. Such an allegation of possibility will not absolve the carrier. The carrier will have to establish initially that the entire goods were discharged in proper condition without any fault or privity of the carrier or fault or neglect of the agents or servants. Unless that burden is discharged, the liability of the carrier and their agents will continue until actual delivery is given to the person who produces the bill of lading. Primary burden of proving that the loss or damage occurred on account of an unexpected cause falls squarely upon the carrier who seeks to exempt himself from liability. Once he has discharged that burden, the onus then would shift to the cargo owner to show that the carrier is not entitled to the benefit of the exception."[90]

Liability as Common Carrier [Sections 7, 8 and 9]

The provisions relating to the liability of the common carrier for the loss of or damage to the goods entrusted to him for carriage are to be found in Sections 7, 8 and 9. The main provision is in Section 8. Section 7 extends the liability stated under Section 8 to the operators of railroads or tram roads under Act XXII of 1863. Section 8 renders the carrier liable for loss or damage when it is due to negligence or criminal act on his part or on the part of those working for him, and Section 9 says that it shall not be the responsibility of the consignor to prove negligence or criminal act on the part of the carrier. All that he has to prove is loss or non-delivery. These provisions may now be reproduced.

7. *Liability of owner of railroad or tramroad constructed under Act XXII of 1863, not limited by special contract. In what case owner of railroad or tramroad answerable for loss or damages.*—The liability of the owner of any railroad or tramroad constructed under the provisions of the said Act XXII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any special contract; but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.

8. *Common carrier for loss or damage caused by neglect or fraud of himself or his agent.*—Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property other than property to which the provision of Section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants.

9. *Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.*—In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants, or agents.

90. See *C.D. Johar and Sons (P) Limited* v *Peirce Leslie and Co.*, 1970 KLJ 260 and *Collis Line Private Limited* v *New India Assurance Co. Limited.*, 1981 KLT 784.

Duties of a Common Carrier

Duty to accept and carry

Liability arises out of breach of duty. The carrier owes two duties. He owes the duty to accept and carry the goods according to his public profession[1] and, secondly, he owes the duty to deliver the goods safely at the destination. A wrongful refusal may arise from the fact that he was demanding an unreasonable charge or was trying to impose unreasonable conditions.[2] A learned author has presented the following list of cases in which refusal is justifiable :[3]

The common carrier cannot refuse to accept goods except where

(*a*) they fall outside the categories specified by him as usual in the course of his business and so unreasonable ;

(*b*) they are dangerous[4] or exceptional in character[5] *e.g.* too large exposing the carrier to undue risk[6] or too valuable disproportionate to the safety measures he usually commands;[7]

(*c*) that the goods were tendered at an unreasonable time before the carrier was ready for his journey ;[8]

(*d*) the goods were inadequately packed ;[9]

(*e*) there was no room for the particular goods in his vehicle ;[10]

(*f*) the consignor refused to pay the freight in advance when so requested.[11]

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1. This duty was the point of emphasis in *Clarke* v *West Ham Corpn.*, [1909] 2 KB 858, 877 CA per FARWELL LJ and by PARKE B in *Johnson* v *Midland Ry. Co.*, (1849) 4 Exch 367, 372. *Macklin* v *Waterhouse*, (1828) 5 Bing 212 : 7 LJ (OS) CP 32, which is like the duty of an innkeeper to receive guests into his inn. His liability to compensate arises if he unjustifiably refuses to take a load. *Crouch* v *London and North-Western Ry. Co.*, (1854) 14 CB 255 ; For an action for damages for refusal to carry a passenger's luggage, see *Munster* v *S.E. Ry. Co.*, (1858) 4 CBNS 476 : 27 LJPC 308. Only nominal damages are allowed where no loss or damage has been caused. *Flaherty* v *Midland Great Western Ry. Co.*, (1914) 48 ILT 216. The criminal charge which was possible at one time for such a refusal is now obsolete. See HALSBURY LAWS OF ENGLAND, 154 Vol 5 (4th ed 1974) citing BAILHACHE J in *Belfast Ropework Co. Ltd.* v *Bushell*, [1918] 1 KB 210, 212. A carrier may, however, accept goods on his terms which should, of course, be reasonable. *Smith & Sons* v *London and N.W. Rly. Co.*, (1918) 88 LJKB 742 and *Sutcliffe* v *Great Western Ry. Co.*, (1910) 1 KB 478, 479 per BUCKLEY LJ.
2. *Garton* v *Bristol and Exeter Ry. Co.*, (1861) 1 B & S 112 : 30 LJQB 173 ; *Allday* v *Great Western Ry. Co.*, (1864) 5 B & S 903 : 11 LT 267 : 34 LJQB 5. Unreasonableness of the charge is a question of fact in each case. *Baxendale* v *Eastern Counties Ry. Co.*, (1858) 4 CBNS 63 : 27 LJCP 137.
3. V.G. Ramachandran, LAW OF CONTRACT IN INDIA, 2221 (2nd ed 1983).
4. *Bomfield* v *Goole and Sheffield Transport Co. Ltd.*, (1910) 2 KB 94, 115.
5. *Date* v *Sheldon*, (1921) 7 LILR 53, 54.
6. *Edwards* v *Sherrat*, (1801) 1 East 604.
7. *Batson* v *Donovan*, (1820) 4 B and Ald 21.
8. *Lane* v *Cotton*, (1701) 12 Mad 472, 481.
9. *Munster* v *S.E. Railway*, (1858) 4 CB (NS) 676, 701.
10. *Jackson* v *Rogers*, (1683) 2 Show 327.
11. *Wyld* v *Pickford*, (1841) 8 M and W 443.

Duty in emergency

A carrier is justified in disposing of the cargo, indeed he is under a duty to do so, if that is the only way of saving the cargo from total loss. The law bestows upon the carrier the agency of necessity for that purpose.[12] A railway company was held justified in disposing of the consignment of butter because delay was being caused by workers' strike and the butter was rapidly deteriorating.[13]

Duty to follow instructions of consignor

A carrier is under a duty to carry out the instructions of his consignor, for example, the duty to stop goods in transit on receiving notice from the consignor. This is his statutory duty also. Any other instructions which have been accepted by the carrier would also make him duty-bound to obey them.[14]

Duty to deliver within reasonable time

A carrier is under duty to carry the goods and to deliver them at the appointed destination either within the stipulated time or, if no time was agreed upon, within a reasonable period of time.[15] "Reasonable time" would mean the time which would be necessary to cover the distance involved if the carrier works with due diligence. The time which is necessary in the ordinary way of his business is available to him to complete the carriage and after that time unreasonable delay begins. Delays caused by extraordinary events which are beyond his control do not make him liable because he is not bound to fight with such events at extraordinary expense or effort.[16]

Warranty of roadworthiness

A carrier by land, as opposed to that by sea, does not give a warranty of roadworthiness of his vehicle.[17] Road vehicles have to obtain certificate of fitness under the Motor Vehicles Act. But the fact that the vehicle was not roadworthy would be a material evidence of negligence.

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12. *Great Northern Ry. Co.* v *Swafield*, (1874) LR 9 Exch 132 ; *Notara* v *Henderson*, (1874) LR 7 QB 225 ; *Coldman* v *Hill*, [1919] 1 KB 443 CA.
13. *Sims & Co.* v *Midland Ry.*, [1913] 1 KB 103 and *Great Northern Ry. Co.* v *Swafield*, 1874 Ex 132 where the company had to keep the horse at a stable, nobody having come to receive it. *Springer* v *G.W. Ry. Co.*, [1921] 1 KB 257, CA.
14. *Streeter* v *Horlock*, (1822) 1 Bing 34 ; *Hastings* v *Pepper*, 11 Pickering 41 (1831), liable for disregarding the instruction to carry the parcel "this side up," though he could have refused to accept goods on that basis.
15. *Raphael* v *Pickford*, (1843) 5 Man & G 551 ; *Taylor* v *Great Northern Ry. Co.*, (1866) LR 1 CP 385 ; *Hales* v *London and N.W. Ry. Co.*, (1863) 4 B & S 66 : 32 LJQB 292 : 8 LT 421. Loss itself may be cause of delay. See *Hearn* v *London & S.W. Ry. Co.*, (1855) 10 Exch 793 ; *Pianciani* v *London & S.W. Ry. Co.*, (1856) 10 CB 266.
16. *Hawes & Son* v *S.E. Ry. Co.*, (1884) 14 LJQB 174 ; *Nicholls* v *N.E. Ry. Co.*, (1888) 59 LT 137. The fact of strike has to be taken into account while considering whether there was reasonable delay ; *Sims & Co.* v *Midland Ry. Co.*, [1913] 1 KB 103 ; *Mallet* v *G.E. Ry. Co.*, (1899) 1 QB 309.
17. In contrast to this carriers by sea are bound by an absolute warranty of fitness. See *John Carter Ltd.* v *Hanson Haulage (Leeds) Ltd.*, [1965] 2 QB 495.

Duty not to deviate

A carrier is under a duty not to deviate from the agreed route. Any such deviation, being a breach of contract, the carrier will not be heard to say that there was no negligence on his part, nor he can claim the protection of contract clauses. A deviation means departure from normal commercial practices or routes. A carrier who was carrying a customer's cameras loaded certain other goods on the lorry and went to deliver them first, thus deviating from the direct route. The court found that what was done was a normal commercial practice. It was not a breach of the contract. The carrier was held not liable for a theft occurring without his negligence.[18]

Duty to deliver against documents only

The carrier is under a duty not to deliver goods except on production of original documents. He will not be liable where goods have been delivered as against original documents though they were produced by an unauthorised person and there is nothing in the circumstances to show lack of authority.[19]

Principle of absolute liability

The liability for loss or damage arises in respect of the failure to deliver the goods intact at the destination. The carrier may fail to deliver the goods because they might have been lost *en route* or he may deliver them in a damaged condition. In either case he is liable.[20]

The principle of English law is that the carrier is absolutely liable for any loss or destruction of the goods. He undertakes the liability of an insurer.[21] He should either deliver the goods or pay compensation for their loss or destruction. "By the custom of the realm a common carrier of goods was at common law bound to answer for the goods at all events. The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the King."[22] It is observed in HALSBURY'S LAWS OF ENGLAND that "he is liable even when overwhelmed and robbed,"[23] or when he had no control over persons causing loss or damage.[24] Thus the only exceptions to liability were

18. *Mayfair Photogenic Ltd.* v *Baxter Hoare Ltd.*, [1972] 1 Lloyd's Rep. 410. See also cases cited under the duty to deliver within reasonable time.
19. *Amin & Co.* v *Southern Roadways Ltd.*, AIR 1985 Mad 287 ; (1984) 97 Mad LW 656 : [1985] 1 MLJ 78.
20. *Metro Freight Carriers P Ltd.* v *National Ins Co*, [1989] 2 TAC 186, loss of oil caused by the truck on account of accident. Liability followed. The Court was of the view that it was open to the consignee or consignor to sue for the loss.
21. *Dhar* v *Ahmed*, 37 CWN 550 ; *I.G.S.N. Co.* v *Gopal*, 41 Cal 80 ; *Chapman* v *G.W. Ry.*, 5 QB 278 ; *Hales* v *L.N.W. Ry.*, (1863) 4 B & S 66.
22. Lord WRIGHT in *A.W. Ludditt* v *G.C. Airways Ltd.*, AIR 1947 PC 151 at 152. The inquote is from *Redhead* v *Midland Ry. Co.*, (1860) 4 QB 379 : 38 LJ QB 169 : [1861-73] All ER Rep 30. To the same effect COTTON LJ in *Bergheim* v *G.E. Ry. Co.*, (1878) LR 3 CPD 221. The duty in reference to goods is more stringent than the duty owed in relation to the carriage of passengers. *Macrow* v *Great Western Ry. Co.*, (1871) LR 6 QB 612, 618. That there can be a common carrier of passengers is shown by cases like *Baker* v *Ellison*, [1914] 2 KB 762 DC.
23. 156, Vol 5 (4th ed 1974) citing *Coggs* v *Bernard*, (1703) 3 Ld Raym 909 ; *Forward* v *Pittard*, (1785) 1 Term Rep 27, 34.
24. *Ibid.*

where the loss was due to king's enemies, an act of God, inevitable accident, defective packing or inherent vice of the goods.

Liability not contractual

The liability that arises under the Carriers Act is not contractual.[25] The provisions of the Contract Act relating to the liability of a bailee are not applicable, for a carrier is not a mere bailee. This was categorically so stated by the Privy Council in *Irrawaddy Flotilla Co. Ltd.* v *Bugwandas*.[26]

> The obligation imposed by law on common carriers has nothing to do with contracts in its origin. It is a duty cast upon common carriers by reason of their exercising a public profession for reward. 'A breach of this duty[27] is a breach of the law, and for this breach an action lies founded on the common law which action wants not the aid of a contract to support it'.[28]

Thus the liability of the carrier arises by virtue of the law and not by virtue of the contract which he has made with the consignor. And what is the legal obligation ? The carrier is liable to account for the goods in any case and at all events just like an insurer of goods. He must either deliver up the goods or stand to be liable for their loss or destruction. There have been many an instance of absolute liability. Thus, a shipowner was held liable for loss when his barge ran into an anchor wrongfully left in the water by a stranger and to which no buoy appeared to be fastened ;[29] where the goods were destroyed by an accidental fire, the court saying that "a carrier is in the nature of insurer ;[30] where the goods were damaged by rats, notwithstanding that he had kept cats on board, that being the only protection available against rats at the time ;[31] where the goods were stolen by a forcible robbery while the ship was lying in the river Thames,[32] the court saying : "a common carrier must make good a loss though even robbed";[33] where the goods were taken away from the ship by means of a trick.[34]

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25. It is a breach of duty independent of any contract. *Foward* v *Pittard*, (1785) 1 Term Rep 27 ; *Bretherton* v *Wood*, (1821) B Brod & Bing 54 : 9 More CP 141 ; *London & North Western Ry. Co.* v *Richard Hudson & Sons Ltd.*, [1920] AC 324 HL. Special obligations may be under a special contract and yet the underlying concept of common carrier may survive. *Kilners Ltd.* v *John Dawson Investment Trust Ltd.*, (1935) 35 SR (NSW) 274, 279.
26. (1891) 18 IA 121, PC : 18 Cal 620.
27. Says DALLAS CJ in *Bretherton* v *Wood*, (1821) 3 B & B 54 at p. 62 : 147 ER 134, Exch.
28. Cited by the Bombay High Court in *Hussainbhai* v *Motilal*, AIR 1963 Bom 208 at p. 209, where PATEL J added that if "the respondents were common carriers, they were liable as insurers for the goods burnt by fire."
29. *Trent and Mersey Navigation* v *Wood*, (1785) 4 Dough KB 286 ; 99 ER 884 ; 3 Esp. 127. *Covington* v *Willan*, (1819) Gow 115 ; *Brooke* v *Pickwick*, (1837) 4 Bing 218 ; *Riley* v *Home*, (1828) 5 Bing 217 ; *Brind* v *Dale*, (1839) 8 C & P 207.
30. *Forward* v *Pittard*, (1785) 1 Term Rep 27 : 99 ER 953.
31. *Laveroni* v *Drury*, (1852) 8 Exch 166 ; 22 LJ Ex 2 ; 155 ER 1304.
32. *Barclay* v *Cuculla and Gana*, (1784) 3 Dough KB 389 : 99 ER 711.
33. *Gibbon* v *Paynton*, (1769) 4 Bur 2298 : 98 ER 199.
34. *Morse* v *Slue*, (1672) 2 Keb 866 : 84 ER 548.

Position in India same except as modified by statute

The position of the carrier in India is the same except as modified by the Carriers Act. "Since the great case of *Irrawaddy Flotilla Co. Ltd.* v *Bugwan Das*,[35] it is well settled that the duties and obligations of a common carrier are governed by the English common law as modified by the provisions of the Indian Carriers Act."[36] In the above cited Privy Council case :

> Certain bales of cotton were delivered to a carrier for carriage to Rangoon by a ship. A fire broke out suddenly, and was not due to any negligence on the part of the servants ; all precautions were taken on the night of the fire ; when the fire was once detected, everything possible was done to stop it, but its progress was so exceedingly rapid that nothing could be saved. That is how the goods were destroyed.

The carrier pleaded that he had accepted the goods on the terms and conditions that he would be bound to take only such care of the goods as is defined in Section 151 of the Contract Act, namely, the bailee's duty of reasonable care and he, having taken that degree of care, should not be held liable. Thus the question was whether the liability of the common carrier in India was to be governed by the Carriers Act or by Section 151 of the Contract Act. The question had already excited controversy between the High Courts in India, for the Bombay High Court had taken the view in *Kaverji Tulsidas* v *Great Indian Peninsular Ry Co*[37] that Section 151 being applicable to "all cases of bailment" and a delivery of goods for carriage being also a bailment, the section would apply to carriers, and the Calcutta High Court in *Moothoora Kant Shaw* v *Indian General Steam Navigation Co*[38] had held that this was not so and Section 8 of the Carriers Act must govern the question of the carrier's liability. After considering these cases, Lord MACNAGHTEN, who delivered the opinion of the Board, concluded :

> These considerations lead their Lordships to the conclusion that the Act of 1872 [the Contract Act] was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that the common carriers are not within the Act. They are therefore compelled to decide in favour of the view of the High Court of Calcutta, and against that of the High Court of Bombay.[39]

The reason why their Lordships so held was that the Carriers Act was in force at the time when the Contract Act was passed and there is nothing in it to show that it intended to repeal the Carriers Act.

Thus the position of the common carrier in India is that he is liable for the loss or damage of the goods just like an insurer except where the loss falls

35. 18 Ind App 121, PC : (1891) 18 Cal 620.
36. As noted by PN MOOKERJEE J of the Calcutta HC in *Sukul Bros* v *Kavrana*, AIR 1958 Cal 730 at p. 732.
37. ILR 3 Bom 109.
38. ILR 10 Cal 166.
39. At p. 131.

within any of the admitted exceptions. His liability is absolute except as modified by the Carriers Act. And what is the modification ? The modification is that he is permitted by making a special contract with each consignor and not by a general public notice, to limit his absolute liability in any way he likes except that he cannot exclude his liability for negligence or criminal act. Ordinarily he is absolutely liable ; he may limit his liability by a special contract, but he will always be liable for his own or his servant's negligence or criminal act. Accordingly in *Transport Corpn. of India Ltd* v *Indian Rayon Corpn, Veraval*[40], where there was no such special contract, it was no defence to show that there was no negligence on the part of the carrier. For example, in *G.M. Roadways Co* v *PG Industries*[41], copper wires were handed over to a transport company at Calcutta to be conveyed to Tatanagar. The contract provided that the goods were received wholly at the risk of the owner. A part of the consignment was stolen enroute probably with the connivance of the drivers. This being a criminal act on the part of the carrier's servants, the carrier was held liable notwithstanding that he had agreed to carry the goods only at the owner's risk.[42] Similarly, the Madras High Court held the carrier liable when certain bales of cotton being carried by him by his lorry were lost in an accidental fire.[43] Rajasthan High Court faced a similar problem in *Vidya Ratan* v *Kota Transport Co.*[44] A truck-load of cotton was booked with a transporter over a long distance route. The truck was operated by gas plant. The carrier told the consignor that it was risky to carry cotton by a gas plant truck, but even so he said that he would run the risk. The risk materialised. The gas plant set the cotton on fire and only a nominal part of it could be salvaged and delivered. For the rest the carrier was held liable. KAN SINGH J cited from Halsbury's LAWS OF ENGLAND statements under the heading "construction of special contracts."[45]

The liability of a common carrier for loss, injury or delay in respect to the goods carried may be varied by contract. If the contract is such as to obliterate or destroy his character of a common carrier, he must be regarded for the purpose of that particular contract as a private carrier, but if the contract does not so obliterate or destroy that character, and merely limits

40. [1992] 1 Guj Law Hearld 277 Guj.
41. AIR 1971 Cal 494.
42. *See* the judgment of SAILL KUMAR DATTA J at p. 502. Thus theft or forgery by servants is no defence, whether or not the same was facilitated by an act, omission or negligence of the owner. *Great Western Ry. Co.* v *Rimell*, (1856) 18 CB 575 : 27 LJ CP 201 ; *Metcalfe* v *London, Brighton & South Coast Ry. Co.*, (1858) 4 CBNS 307 : 27 LJCP 205, though the carrier can exclude such liability by special contract. *Shaw* v *Great Western Ry. Co.*, (1894) 1 QB 373 at 383. Goods pilfered by servants at an authorised receiving house would make the carrier liable, but not for receipt of goods by a pretended agent. *Stephens* v *London & S.W. Ry. Co.*, (1886) 18 QBD 121 CA ; *Machu* v *London & S.W. Ry. Co.*, (1848) 2 Exch 415 ; *Devlan* v *Midland Ry. Co.*, (1877) 2 App Cas 792 HL ; *Way Great Eastern Ry. Co.*, (1876) 1 QBD 692 ; *Harrisons and Crossfield Ltd.* v *London & N.W. Ry. Co.*, [1917] 2 KB 755.
43. *P.K. Kalasami* v *K. Ponnuswami*, AIR 1962 Mad 44. For another illustration see *River Steam Navigation Co. Ltd.* v *Shyam Sunder Tea Co.*, AIR 1955 Ass 65.
44. AIR 1965 Raj 200.
45. 3rd Ed., Vol. 4, para 407.

his liability in some respects, in all other respects he remains under a common carrier's liability.[46]

No such written special contract having been proved in this case, the learned judge quite naturally came to the conclusion that the carrier was a common carrier and, therefore, responsible for the loss.

To the same effect is the decision of the Calcutta High Court in *River Steam Navigation Co Ltd* v *Jumunadas Ram Kumar*.[47] The consignment note in this case excluded the liability of the carrier for negligence of the their servants. Referring to this MITTER J observed :[48]

> Even in England it has been held that where a carrier made a contract with their customers that they would not be liable for any loss however occasioned such a contract was bad and unreasonable and could not be enforced in any part of it.[49] The portion of the contract which exonerates the Steam Navigation companies from the negligence of their servants or agents is bad both as being unreasonable and as being in contravention of Section 8.

Holding the carrier liable for his failure to deliver goods at the destination, TAKRU J of the Allahabad High Court observed :[50]

> The opening words of this section [Section 8] make it perfectly clear that its provisions override those of Section 6. In other words, that whatever kinds of liability the carrier may be able to limit by special contract... he cannot limit his liability for the criminal act or negligence of himself or any of his agents or servants. The prohibition is a statutory prohibition, with the result that if a special contract contains a stipulation in derogation of it, it would be void to that extent as offending Section 8.[51]

The Calcutta High Court allowed an unregistered partnership firm to file a case on a carrier for loss of goods because carriage is not merely a contract but an independent legal obligation. The Court said :

> The obligation is not founded upon contract but on the exercise of public employment for reward. The duty arises irrespective of the contract. The owner of goods may sue common carrier in an action on tort.[52]

Railways as common carriers

The liability of railways is also akin to that of common carriers. An example is the decision of the Gujarat High Court in *Jugaldas* v *Harilal*[53].

46. *See* at p. 203.
47. AIR 1932 Cal 344.
48. At p. 345.
49. See *Ashendon* v *London & Brighton South Coast Ry. Co.*, (1880) 5 Ex D 190 : 42 LT 586.
50. *Tugun Ram* v *Dominion of India*, AIR 1966 All 200 at p. 204.
51. See further *Madura Co. Ltd.* v *P.C. Xavier*, AIR 1931 Mad 115, where also the liability was held to be not dependent upon risk notes, but upon Section 8.
52. *Umrani Sen* v *Sudhir Kumar*, AIR 1984 Cal 230, accordingly Section 69 of the Partnership Act was not applicable.
53. AIR 1986 Guj 88.

The contract was for carriage of certain bags of cotton waste by road transport. The original carrier assigned the work to a sub-carrier. A small part of the route passing through a town came parallel to the railway line for about a kilometer with a gap of only 3-4 feet. Sparks of burning coal from an engine carrying a passenger train set the goods on fire. Wind was blowing fast and within no time the cotton and the truck caught fire reducing the goods to ashes.

Both the transporter and railways were held liable. There was no special contract within the meaning of Section 6 reducing liability and nor there was any plea of the defence of act of God or of King's enemies. There was no escape from the conclusion that *prima facie* the carrier was liable. The court cited *His Highness, the Gaekwar Sircar of Baroda* v *Gandhi Katcharabhai Kastuurchand*[54], where it was held that if statutory permitted acts are done negligently, the railways will be responsible. There was clear evidence that the railway administration had acted very negligently because in spite of clear knowledge that much of the traffic that was passing through that narrow passage carried highly inflammable articles, it employed the locomotive which was manufactured in 1925, 47 years ago, on a line which passed at a distance of 3-4 feet at the same level and parallel with the highway.

Carriage of animals

In fulfilment of his duty as a common carrier, a carrier may have to make special arrangements if he professes to carry special type of goods. So is true of a carrier of animals. He has to make his vehicles reasonably suitable for the type of animals he professes to carry. He has to take all other reasonable steps to assure their safety and to provide fit and proper means and places for loading and unloading[55]. Where the consignor takes the risk of sending his special cargo in vehicles not meant for that purpose, the above-stated duty of providing a fit vehicle does not arise.[56] But statutory requirements for carriage of animals, *e.g.*, the provisions of the Railways Act in reference to animals, would have to be observed.[57]

No liability is incurred for restive conduct of animals,[58] but liability does arise for other casualties.[59] Injury caused through not feeding the animals when

54. (1900) 2 Bom LR 357. The court relied upon CHARLESWORTH ON NEGLIGENCE, 500 (5th ed.) where it is observed that liability follows if statutory authority is used negligently.
55. *Blower* v *Great Western Ry. Co.*, (1872) LR 7 CP 655 ; *M'Manus* v *Lancashire and Yorkshire Ry. Co.*, (1859) 4 H & N 327 : [1843-60] All ER Rep 725 ; *Combe* v *London and S.W. Ry. Co.*, (1874) 31 LT 613 ; *Rooth* v *N.E. Ry. Co.*, 1867 LR 2 Exch 173.
56. *Nevin* v *Great Southern and Western Ry.*, (1891) 30 LR Ir 125.
57. See under Railways, Chapter 3. Such provisions deal with feeding and watering of animals during transit, ventilation, cleanliness, medical attendance etc.
58. Or causes like "acts of God" or other general defences, *e.g.*, where injury was caused by snow storm which was considered to be an act of God, no liability arose. *Briddon* v *Great Northern Ry. Co.*, (1858) 28 LJ Ex 51.
59. *Blower* v *Great Western Ry. Co.*, (1872) LR 7 CP 655.

there is delay, or statutory or customary duty to that effect, would make the carrier liable.[60]

It is the duty of the consignee to receive the animals at the destination, failing which he may become liable for the carrier's expenses in taking care of the livestock. Thus, in *Great Northern Railway Co.* v *Swafield* :[61]

> A horse, having been consigned with the defendant company, was not received by any one at the destination. The company had no arrangement of its own to keep animals and, therefore, placed the horse with a livery stable-keeper.

The company's action was held to be reasonably necessary in the circumstances and, therefore, the company was allowed to recover the charges of the stable-keeper.

After the consignee has taken possession of the animals at the end of the destination, the carrier is no longer liable as carrier even if the consignee has not removed them from the carrier's premises.[62]

Where the carrier has exempted himself from the consequences of the animals' own restiveness, such as injury to horses and cattle by kicking or plunging from fear and restiveness, he would still be liable if any of these things happen on account of or is induced by the carrier's own negligence.[63] Where the carrier undertakes to be liable only for negligence, the burden of proving negligence would be upon the complainant.[64] But this burden is of a very light nature because, although the carrier in such a case becomes a private carrier he is nevertheless a bailee and the bailor may have to show only a *prima facie* case of negligence. For example, where it was shown that the animal was in fact injured and that the mode of transport was not proper, that becomes a sufficient proof of negligence.[65] Where the means of securing the animal provided by the consignor failed to hold the animal, the carrier may not be liable except where it can be shown that it was obvious to the carrier when the animal was delivered that those means would be inadequate.[66]

Liability during transit

The carrier is liable for things happening to goods during the period of "transit". The term "transit" is defined in Section 51 of the Sale of Goods Act, 1930 for the purposes of the duty of the carrier to stop goods in transit on the instructions of the unpaid seller. For this purpose as well as for the purposes of the liability of the carrier for loss of or damage to goods, transit begins when

60. *Allday* v *Great Western Ry. Co.*, (1864) 5 B & S 903 : 11 LT 267 : 34 LJQB 5 ; *Curran* v *Midland Great Western Ry. Co.*, [1896] 2 IR 183.
61. (1874) LR 9 Ex 132.
62. *Shepherd* v *Bristol and Exeter Ry. Co.*, (1868) LR 3 Exch 189.
63. *Gill* v *Manchester Ry. Co.*, (1873) LR 8 QB 186 : 28 LT 587 ; *Moore* v *Great Northern Ry. Co.*, (1882) WLR Jr 95.
64. *Harris* v *Midland Ry. Co.*, (1876) 25 WR 63 ; *Smith* v *Midland Ry. Co.*, (1887) 57 LT 813.
65. *Pickering* v *N.E. Ry. Co.*, (1889) 4 TLR 7 CA ; *Russel* v *London and S.W. Ry. Co.*, (1908) 24 TLR 548 CA.
66. *Richardson* v *N.E. Ry. Co.*, (1872) LR 7 CP 75 ; *Stuart* v *Crawley*, (1818) 2 Stark 323 : 2 Digest (Repl) 364.

goods are handed over to a carrier or his agent and he has accepted them and continues till the goods are delivered to the consignee or his agent or tendered to him. It is not necessary that the goods should be actually moving.[67] Since it is the function of the consignee to collect the goods, he cannot prolong the transit by his omission to take away the goods. The transit can remain prolonged only for a reasonable time after the arrival of the goods at the appointed destination. That would convert the carrier into an ordinary bailee to be liable only if he was negligent with the consignment. He is in the category of a paid bailee because he charges demurrage for keeping the goods.

Exceptions

That being the general principle of liability, exceptions have been admitted. Just as the principle of absolute liability is a tradition, the exceptions are also a part of the same tradition. These exceptions do not have the statutory force in India because they are not stated in any section of the Carriers Act. But they have become a part of our law by virtue of the frequent declarations by the courts, including the Supreme Court,[68] that English common law applies to common carriers in India with all its exceptions except as modified by the Carriers Act. The exceptions are as follows :

1. Act of God

A carrier is not liable for any loss or destruction of the goods where such loss or destruction is due an "act of God" occurring without the intervention of human forces. The exception was elaborately considered in *Nugent* v *Smith*[69]:

> A loss is a loss by the act of God if it is occasioned by the elementary forces of nature unconnected with the agency of man or other cause ; and a common carrier is entitled to immunity in respect of loss so occasioned if he can show that it could not have been prevented by any amount of foresight, pains and care reasonably to be expected of him.

In that case :

> The defendant, a common carrier by sea from London to Aberdeen, received from the plaintiff a mare to be carried to Aberdeen on hire. In the course of the voyage the ship encountered rough weather and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by conduct of the mare herself by reason of fright and consequent struggling.

It was held that the defendant was not liable for the death of the mare. "The carrier does not insure against the irresistible act of nature, nor against defects

67. *Schotsmans* v *Lancs and Yorks Ry.*, (1867) 2 Ch App 332 and *William Soanes Ltd.* v *F.E. Walker Ltd.*, (1946) 79 Lloyd's Rep 646 where it is observed that for the purposes of the liability of the carrier "transit" does not mean movement. Custody for purposes of carriage is transit whether it be at the end point, midway or at commencement.

68. *River Steam Navigation Co.* v *Shyam Sunder Tea Co.*, (1962) 2 SCR 802.

69. (1876) 1 CPD 423 : 45 LJQB 697 : 34 LT 827 CA. See also *Briddon* v *Great-Northern Ry. Co.*, (1858) 28 LJ Ex 51 ; *Lloyd* v *Guibert*, (1865) LR 1 QB 115 ; *River Wear Comrs.* v *Adamson*, (1877) 2 App Cas 743 HL.

in the thing carried itself ; if he can show that either the act of nature or the defect of the thing itself, or both taken together, formed the sole, direct and irresistible cause of the loss, he is discharged. In order to show that the cause of the loss was irresistible it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances it could have been prevented."

Similarly, where the goods were thrown overboard from a barge in a storm to lighten the barge[70] and where the goods were lost by tempest,[71] the carrier was held not liable. Thus, "however stringent the law is as to liability of a carrier, it does not put upon him the obligation to insure goods at all hazards against such superior forces as the agencies of nature—a force against which his skill and care cannot possibly provide."[72]

The Kerala High Court faced a problem of this kind in *R.R.N. Ramalinga* v *Narayana*.[73]

> The plaintiff booked 18 bags of green gram with the defendant for transportation from Kanyakumari to Quilon in one of his lorries. The lorry was waylaid by a *jatha* while it was just only 1 1/2 miles from Quilon and the unruly mob which formed the *jatha* robbed the goods. The *jatha* was being taken out as a part of the food agitation. The agitators needed food and they jumped upon the lorry which carried it. The carrier stood as a silent spectator to see the irresistible happening.

The defendant being common carrier by road, he could be protected from liability only if the exception relating to act of God applied. Holding the carrier liable, POTI J refused to agree that "all inevitable accidents must be taken as acts of God."[74] He said : "Some of the well known instances of acts of God are the storms, the tides and the volcanic erruptions . . . . Accidents may happen by reason of the play of natural forces or by intervention of human agency or by both . . . . But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be acts of God."[75] The learned judge concluded :

> The criminal activities of unruly mob which robbed the goods cannot certainly be an act of God so as to absolve the defendant from the rule of absolute liability as a common carrier. Hence the defendant will be answerable for the loss of the goods.[76]

70. *Mouse's Case*, (1608) 12 Co Rep 68 : 77 ER 1341.
71. *Amies* v *Stevens*, (1718) 1 Stra 127 : 93 ER 428.
72. COCKBURN CJ in *Cohen* v *Gaudet*, (1863) 3 F & F 455, NP.
73. AIR 1971 Ker 197 : 1971 Ker LJ 332 : 1971 Ker LJ 240 : 1971 ACJ 298.
74. Supra at p. 202.
75. The learned Judge cited passage as to the meaning of the expression "act of God" from COCKBURN CJ's judgment in *Nugent* v *Smith* (note 69 above) and from Halsbury's LAWS OF ENGLAND, Vol. 8, 3rd ed., p. 183. He also considered *Chidambakrishna* v *South Indian Ry. Co.*, 21 Trav LJ 1.
76. At p. 202.

The case is a pictorial monument in its facts, though not in its result, to Mahatma Gandhi's observation that to a hungry man God appears in the form of food.

In the subsequent case of *Orient Road Lines* v *Mohammed Hassan Sahib & Co.*[77], SHAMSUDDIN J of the same High Court relied heavily upon this case to hold that a road accident is generally out of the category of things happening on account of natural forces. Accordingly, its was no act of God that a speeding bus coming from the opposite direction dashed against the lorry head on. The court cited the following collection of authorities in that decision :

> Act of God is one arising from natural causes. Some of the well-known instances of acts of God are the storms, the tides and the volcanic eruptions. They are, in a sense, inevitable accidents beyond the control of man. What is urged in this case is that all inevitable accidents must be taken as acts of God. Matters which are not within the power of any party to prevent, is, according to learned counsel, inevitable accidents so far as he is concerned and consequently it is to be considered as acts of God. I cannot agree. Accidents may happen by reason of the play of natural forces or by intervention of human agency or by both. It may be that in either of these cases accidents may be inevitable. But it is only these acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be acts of God.[78]
>
> "It is at once obvious, as was pointed out by Lord MANSFIELD in *Forward* v *Pittard*[79], that all causes of inevitable accident—" 'fortuitus'—may be divided into two classes—those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of non-feasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term 'act of God' to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term 'act of God' is properly applicable."
>
> In HALSBURY'S LAWS OF ENGLAND,[80] this question is dealt with as under :
>
> "An act of God in the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against ; or, more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person

77. [1988] 2 KLT 619 : [1990] 2 TAC 706 Ker.
78. COCKBURN CJ in *Nugent* v *Smith*, (1876) 1 CPD 423.
79. (1785) 1 Term Rep 27 : 8 Digest (Repl) 18.
80. 183, Vol 8 (3rd ed).

sought to be made liable for it, or who seeks to excuse himself on the ground of it. The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of an occurrence (when in other words, it does not imply any law form which its recurrence can be inferred) does not prevent that phenomenon from being an act of God. It must, however, be something overwhelming and not merely an ordinary accidental circumstance, and it must not come from the act of man."

There is nothing in the decision in *Chidambara Krishna Iyer Nataraja Iyer* v *South Ry. Co.*[81] to warrant the view that even when the accidents are purely the result of human agency, it should be taken to be "acts of God".

In *General Traders Ltd.* v *Pierce Leslie (India) Ltd.*[82], a Full Bench had occasion to consider the plea of the defence of act of God, in a suit for damages due to shortage of property carried by ship. A defence of act of God was raised on the ground that goods had to be jettisoned due to sudden deterioration of weather. It was not made out that the tempest or gale in the sea was so heavy or so unprecedented that sailors could not have taken precautionary measures with reasonable forsight and in those circumstances the court held that it was not established that loss was caused as a result of 'act of God'.

In *Kerala Transport Co* v *Kunath Textiles*,[83] the Division Bench again considered the extent of liability of the carrier in respect of goods lost. The court finally held that the absolute liability of the carrier is subject to only two exceptions, one of them is any special contract that the carrier may choose to enter into with the customer and the other is act of God. It was further held that act of God does not take in any and every inevitable accident. It is only those acts which can be traced to natural causes as opposed to human agency that can be said to be acts of God.

Relying upon the decision in *R.R.N. Ramalinga* v *Narayana*[84], the Kerala High Court in *Kerala Transport Co.* v *Kunnath Textiles*[85] held that the fire that occurred in the godown of the carrier could not be said to be an act of God. The Court had to meet the formidable exemption clause running like this :

> "The company shall not be liable for any loss or damage due to pilferage, theft, weather conditions, strike, riots, disturbances, fire, explosion or accident provided, however, all reasonable precautions are taken to provide against such contingencies."

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81. 21 Trav LJ 1.
82. AIR 1987 Ker 62.
83. 1983 KLT 480.
84. AIR 1971 Ker 197.
85. 1983 KLT 480.

SUBRAMONIAM POTI J said in reply:[86]

> The exclusion clause is no doubt very wide in scope and certainly takes in fire as in this case. But that is subject to the condition that the defendant takes all reasonable precautions to provide against such contingency. Naturally therefore if defendant is trying to answer the liability on the basis of the term of special contract he would have to show what reasonable precaution he took against fire. The evidence in this case discloses not only absence of reasonable precaution but absence of any precaution whatsoever which normally a person engaged in transport business would be expected to take. It is agreed that in the premises where the goods were stocked there were no fire extinguishers, there were no buckets with sand and there was not even a watchman. It is the watchman in the neighbouring premises who was good enough to notify about the fire long after the fire started. That was responsible for inviting the fire fighting force to the place. The officers of the defendant company reached the place long thereafter. That shows that no precaution had been attempted against the possibility of a fire. In this view the above said clause cannot be invoked by the defendant and the defendant would be liable to answer the plaint claim. We therefore hold in agreement with the court below that the plaintiff is entitled to the decree sought.

Where damage was done to a cargo by water escaping through the pipe of a steam boiler, in consequence of the pipe having been cracked by frost, it was held that this was not an act of God, but negligence on the part of the captain in filling his boiler before the time for heating it, although it was the practice to fill overnight when the vessel started in the morning.[87] Where the goods were put in a boat which was towed by a steam vessel to a pier to take in passengers and had to be twice stopped for another vessel to leave the pier and in the second stoppage, the tide overturned it, it was held that the damage was not caused by the act of God and the carrier was liable. "The act of God means something overwhelming, and not merely an accidental circumstance."[88]

A contract of carriage provided[89] that "the carrier shall, however, be relieved of liability if the loss, damage or delay was caused through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent."[90] The defendant was carrying a consignment of shoes. The vehicle was loaded and was parked some thirty yards away from a restaurant where the owner and the driver went for a meal. The time of meal was prescribed by the

86. At p. 483.
87. *Stordet* v *Hall*, (1828) 4 Bing 607 ; 130 ER 902.
88. *Oakley* v *Portsmouth and Ryds Steam Packet Co.*, (1856) 11 Exch 618 : 156 ER 977.
89. *Michael Galley Footwear Ltd.* v *Iaboni*, [1982] 2 All ER 200. The provision was under Article 17(2) of the C.M.R. Convention implemented by the Carriage of Goods by Road Act, 1965 (English), noted 1983 JBL 344.
90. An earlier case decided under this article was *Thermo Engineers* v *Ferry Masters*, [1981] Lloyd's Rep. 200.

Drivers Hours Regulations. That time would have been lost if the vehicle was taken to a more safe place. They however took all reasonable precautions one of which, for example, was switching on the alarm system. When they came back, the vehicle along with its contents was stolen. The judge found that there was no negligence on the part of the carrier but even so he was held liable. The article in question relieves the carrier from strict liability but in this case the circumstances of loss were not such as the carrier could not have avoided.[91] To the same effect is *Silber Ltd.* v *Islander Trucking Co.*[92], about which it has been said that the courts have given a rational and coherent interpretation to Article 17(2) of the CMR convention. This Article states that 'the carrier shall, however, be relieved of liability, if loss, damage or delay was caused. . . through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent." In the previous cases[93] this provision was interpreted as incorporating the defence of *force majeure*" with emphasis upon the words "could not avoid." But the emphasis changed in this case because there is nothing which could not have been avoided by some means or the other.

> The driver parked his cab in a well lit area 50 yards short of a motor way tollgate to take a rest. Shortly afterwards a lorry pulled up on his left and thieves smashed into his cab through the right hand window and captured the driver and the lorry thus enabling them to steel its contents.

The defendants were held liable. MUSTILL J was of the view that the clause was not intended to incorporate the defence of "act of God" (*force majeure*) but that the carrier would not be liable if he could not avoid the loss even with the utmost care. "The idea is to exclude the precaution which is wholly unreasonable ; not to set a standard which could be equated with the common law duty of care. The court must ask itself whether there were precautions which could have been taken and which were not beyond the bounds of common sense." The learned judge found on facts that the loss could have been avoided if the driver had taken his rest at a nearby secure lorry park. He said : "I find myself unable to hold that a person exercising the utmost care could properly have ignored the park as a means of reducing the risk to the goods."

In a Scottish case,[94] a contract for carriage of furniture by road provided that the contractors shall not be responsible for loss or damage to furniture and effects caused by or incidental to fire on aircraft. The loss was occasioned by carriers' breach of duty under the contract and the court held that the clause could have protected the carrier from the statutory liability even for an accidental fire and not from the consequences of breach of contract. The provision was construed *contra proferentum.*

91. For criticism see 1983 JBL 344-345.
92. [1985] 2 Lloyd's Rep 243.
93. *Thermo Engineers* v *Ferry Masters*, [1981] Lloyd's Rep 200, noted in 1981 JBL 209 and *Michael Galley*, cited above.
94. *Graham* v *The Shore Porters Society*, 1979 SLT 119, noted 1979 JBL 119.

2. National Enemies

The second defence available to a carrier is the act of the hostile foreign enemies. A carrier is not liable for loss or damage caused by alien enemies, whether they be persons belonging to an enemy country or the enemy state itself. This kind of risk usually materialises during times of war. If, for example, a ship or a lorry on its way is torpedoed or bombarded the carrier will not be liable for the consequences. But if the war intervenes on account of something wrong on the part of the carrier himself, he will not be allowed this defence. For example, in *James Morrison & Co. Ltd.* v *Shaw, Savill and Albion Co. Ltd.*[1], a ship touched a port which was not on its customary route so that the deviation increased the voyage by about fifty miles and when it was just only seven miles away from its destination it was torpedoed by a German submarine and sank with her cargo. The carrier was not permitted to plead the defence of King's enemies. SWINFEN EADY LJ said : "The question is whether the defendants are protected from liability as carriers by the fact that the loss occurred through the King's enemies. If they, as carriers, were duly performing their contract of carriage, they would not be liable for loss occasioned by the King's enemies. But they were breaking their contract. They are quite unable to show that the loss must have occurred in any event, whether they had deviated or not."[2]

3. Inherent Vice or Defects

A common carrier is not liable for an injury to goods caused by an inherent defect or vice in the goods themselves. Thus where a bullock was consigned with a railway company and it escaped by its own exertions and not due to any negligence and was killed, the railway company was held not liable.[3] The position of a carrier of animals is thus stated in HALSBURY'S LAWS OF ENGLAND :[4] "Thus, although bound to makes all reasonable provision against the ordinary and natural unruliness of animals carried, he (the carrier) is not liable if injury occurs through what may be called "inherent vice" or "proper vice" in the animal or restiveness on the part of the animal of an extraordinary kind."[5] Similarly, in Lister v Lancashire and Yorkshire Ry. Co. :[6]

> A railway company contracted with the plaintiffs to carry for him an engine from his yard to a neighbouring town on their railways. The engine was on wheels and fitted with shafts to allow of its being drawn by horses.

1. [1916] 2 KB 783 : 86 LJ KB 97 : 115 LJ 508, CA.
2. See also *Morse* v *Slue*, (1672) 1 Vent 190. The expression "national enemies" would include rebels. *Secretary of State for War* v *Midland Great Ry Co. of Ireland*, [1923] 2 Irish Rep 125 and also enemies of a foreign Government, *Russel* v *Niemann*, (1864) 17 CBNS 163 ; 34 LJCP 10 : 10LT 786. Protection against consequences of war is generally had through exemption clauses.
3. *Blower* v *Great Western Ry.*, (1872) LR 7 CP 655.
4. 160, 5th vol. (4th ed. 1974).
5. *Kendal* v *London and South Western Ry. Co.*, (1872) LR 7 Exch. 317 ; See also *Gill* v *Manchester, Sheffield* and *Lincolnshire Ry Co. Ltd.*, (1873) LR 8 QB 386.
6. [1903] 1 KB 878 : 72 LJ KB 385 : 88 LT 5619.

> While the defendants were drawing the engine with their horses to the railway station one of the shafts, owing to its being rotten, broke, the horses took fright and upset the engine, which was damaged. The defective condition of the shaft was not known to either party, and could not have been discovered by any ordinary examination.

It was held that as the engine was not in fact fit to be carried in the way in which it was intended to be carried, and the damage resulted in consequence of that unfitness, the defendants were excused.

For the same reason, a carrier was held not liable when he was carrying wine in pipes and one of them burst owing to the wine being already on the ferment, this being an inherent development in the goods themselves.[7] Similarly, in a consignment of a cask of gin, the carrier was held not liable when the cask leaked in transit without his fault.[8]

If the goods suffer loss of weight during transit, it can be due to their wasting nature as much as due to the carrier's negligence. But in either case burden lies upon the carrier to explain it.[9]

4. Improper or Bad Packing

If the goods are lost or damaged on account of improper, insufficient or defective packing, the carrier is not liable.[10] Where goods are delivered to a common carrier for carriage insufficiently packed and are damaged in the course of the transit, the carrier's knowledge of their condition at the time of their receipt will not preclude him from setting up as a defence that the damage was due to the insufficient packing. This was pointed out in *Gould* v *South Eastern and Catham Ry. Co.*[11]

> A glass show case was consigned with a railway company. The case was not packed in a manner that the brittle nature of the goods demanded, and though the company knew this, it was not held liable when the case was damaged soiely on account of its insufficient packing.

Similarly, where unpacked furniture was sent, the railways were held not liable for damage due to that condition.[12]

7. *Farrar* v *Adams*, (1711) Bull NP 69.
8. *Hudson* v *Baxendale*, (1857) 2 H & N 575.
9. *Hawkes* v *Smith*, (1842) Car & M 72 NP. For other examples see, *Cox* v *London and NW Ry Co.*, (1862) 3 F & F 77 : 8 Digest (Repl) 23 ; *Barbour* v *SE Ry Co.*, (1876) 34 LT 67 ; *Baldwin* v *London Catham & Dover Co.*, (1882) 9 QBD 582 ; *Stuart* v *Crawley*, (1818) 2 Stark 323. Contra : *London and NW Ry Co. Richard Hudson & Sons Ltd.*, [1920] 2 KB 186. For other cases on the point see, *Silver* v *Ocean SS Co. Ltd.*, [1930] 1 KB 416 CA ; *Richardson* v *NE Ry Co.*, (1872) LR 7 CP 75.
10. *Hart* v *Baxendale*, (1867) 16 LT 390 ; *Smith, Bushell & Great Western Ry Co.*, [1919] 2 KB 162, CA. The carrier may refuse to carry improperly packed goods. *Sutcliffe* v *Great Western Ry Co.*, [1910] 1 KB 478, CA.
11. [1920] 2 KB 186 : 89 LJ KB 700 : 123 LT 256.
12. *Barbour* v *South Eastern Ry Co.*, (1876) 34 LT 67.

The carrier is not liable for any damage to the extent to which it is exclusively due to defective packing, even if there is some delay on the part of the carrier.[13]

5. Justified Delay

A common carrier of goods is not, in the absence of a special contract, bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case, and he is not responsible for the consequences of delay arising from causes beyond his control. For example, in *Sims & Co.* v *Midland Ry. Co*:[14]

> Perishable goods were consigned, no time for delivery being fixed. During the transit, a general strike of railway workers, including the defendants' workers, broke out and the defendants were unable to forward the goods to their destination. The goods becoming deteriorated, the defendants sold them.

The carrier was held not liable. The delay was caused by factors beyond their control and the delay caused the deterioration.

In another case,[15] delay was caused by an obstruction caused by the conduct of another company which carried power lines over the railway line, the railway company was held not liable.

6. Misconduct or Default of Consignor

It is the duty of the consignor to disclose to the carrier the true nature, quality and value of the goods so that he may take precautions accordingly. The consignor is under a duty to disclose the dangerous or unsafe nature of the goods. A formal disclosure may not be needed where the goods are showing their nature by themselves or if the carrier is already aware of that fact. A consignor who does not perform this duty may become liable to the carrier for damage to him or to others whose goods are lost along with those of the negligent consignor.[16] Where the consignor's address given by the consignor in the documents is wrong or defective and delay is causing in advising him of the arrival, the carrier incurs no liability for such delay.[17] A carrier is relieved of his responsibility to take care of the cargo if the consignor undertakes to protect his goods himself. Such an undertaking does not arise from the mere fact that the cargo owner is himself accompanying the goods.[18] Where a defect in packing

13. *Hingginbotham* v *Great Northern Ry Co.*, (1861) 2 F & F 796 : 8 Digest (Repl) 18 ; *Baldwin* v *London, Catham & Dover Co.*, (1882) 9 QBD 582.
14. [1913] 1 KB 103 : 82 LJ KB 67 : 107 LT 700 : 18 Com Cas 44.
15. *Taylor* v *Great Northern Ry. Co.*, (1866) LR 1 CP 385.
16. *Brass* v *Maitland*, (1856) 6 E & B 470 ; *Mitchell Cotts & Co.* v *Steel Bros & Co. Ltd.*, [1916] 2 KB 610, where the charterers caused delay by not obtaining unloading order from Government within time and the carrier was not made aware of the need of unloading permission ; *Great Northern Ry Co.* v *LEP Transport and Depository Ltd.*, [1923] 2 KB 742 CA.
17. *Caledonian Ry Co.* v *W Hunter & Co.*, (1858) 20 Dunl (ct of Seas) 1097 ; *Pointin* v *Porrier*, (1885) 49 JP 109.
18. *East India Co.* v *Pullen*, (1726) 2 Stra 690 : 8 Digest (Repl) 25 ; *Brind* v *Dale*, (1837) 8 C&P 207 ; *Robinson* v *Dunmore*, (1801) 2 Bos & P 416 : 8 Digest (Repl) 5.

is discovered en route, it becomes the carrier's duty to rectify the defect so as to prevent further damage to the goods and if the goods were meant for forwarding they should not be forwarded is that condition.[19] Any loss or damage due to the consignor's failure in this respect will not render the carrier liable.[20] It is, however, not the duty of the consignor in every case to disclose the contents of his goods, particularly where the goods are not dangerous or are not within the Schedule.

> If a box with money be delivered to a carrier, he is bound to answer for it, if he be robbed, though it was not told him what was in it. It is immaterial that the sender told the carrier of some things in the box and not all, for he need not tell the carrier all the particulars in the box.[21]

The consignor should not commit any fraud upon the carrier. A consignor concealed money in a consignment of tea. The money was stolen. The carrier was held not liable. The loss was due to the consignor's fraudulent practice.[22]

A carrier of passengers is generally not liable unless there is fault in him.[23]

Goods of dangerous nature

Where the goods are of dangerous nature, that fact ought to be disclosed. For example, where carboys of corrosive fluid were consigned without disclosure and they leaked causing damage to other goods, the sender was held liable.[24] Carriers do not profess to carry goods which are dangerous to persons or property.[25] The consignor warrants that the goods are safe to be carried in the ordinary way. The duty of disclosure is owed by him unless the carrier is already aware of the fact. The liability of the consignor to compensate the carrier for loss caused by dangerous goods would be there whether or not the consignor himself was aware of the dangerous propensity of the goods.[26] The expression

19. *Beck* v *Evans*, (1812) 16 East 244 ; *Notara* v *Henderson*, 1872 LR 7 QB 225 ; *Cox* v *London and NW Ry Co.*, (1862) 3 F & F 77. This is so because where damage is caused by an excepted peril, the carrier may still become liable in respect of the subsequent aggravation of such damage due to his negligence. *Notora* v *Henderson*, (1872) LR 7 QB 225, carriage by sea.
20. *Butterworth* v *Brownlow*, (1865) CBNS 409 ; 34 LJ CP 226. Like others, this defence cannot also be resorted to where the carrier has been guilty of negligence. *Talley* v *Great Western Ry Co.*, (1870) LR 6 CP 44 ; *Barbour* v *SE Ry Co.*, (1876) 34 LT 67 ; *Bradley* v *Waterhouse*, (1828) 3 C & P 318.
21. *Kenrig* v *Eggleston*, (1648) 82 ER 932.
22. *Bradley* v *Waterhouse*, (1823) 3 COP 318.
23. *Readhead* v *Midland Ry. Co.*, (1869) 4 KB 379 where a railway company was held not liable for an accident occurring without fault. See also to the same effect *Clarke* v *Westham Corpn.*, [1909] 2 KB 858, 879 CA, citing STORY ON BAILMENT, Section 591 (9th ed)
24. *Great Northern Ry Co.* v *L E P Transport*, [1922] 2 KB 742. See also *Bamfield* v *Goole and Sheffield Transport Co. Ltd.*, [1910] 2 KB 94, where it was pointed out that it was not material that the sender himself did not know.
25. *Bamfield* v *Goole and Sheffield Transport Co. Ltd.*, [1910] 2 KB 94 at 115 CA.
26. *C Burley Ltd.* v *Stepney Corpn.*, [1947] 1 All ER 507 ; *Farrant* v *Barnes*, (1862) 11 CBNS 553 ; *Williams* v *East India Co.*, (1802) 3 East 192 ; *Brass* v *Maitland*, (1856) 6 E & B 470 : 26 LJ QB 49 ; *Great Northern Ry Co.* v *L E P Transport and Depository Ltd.*, [1922] 2 KB 742 CA, injury to felt goods by escape of corrosive fluid from carboys.

'dangerous goods' would include goods which are dangerous to the carrier's vehicle or to other goods in the vehicle.[27]

A carrier would, however, be liable for any loss or damage to the extent to which it is due to his negligence. For the rest the defence of the consignor's misconduct may apply.[28]

If the carrier asks the consignor to disclose the value of the goods and he makes a false declaration, just, for example, to minimise the freight, he can recover only the declared value. Where the value is not required to be disclosed, nor any value has been declared, the full real value of the goods is recoverable.[29] Under the Carriers Act, however, the value of the scheduled goods has to be declared by the consignor.

Commencement of liability

The liability as a common carrier commences from the moment of acceptance of goods either by him or through his authorised agent or employee.[30] An implied acceptance takes place when he permits the goods to be placed at the usual place for carriage. Thus, where with the consent of the station master goods were stored on a railway company's platform, wagons being not available, the company was held liable when they were damaged by fire caused by a spark emitted by a passing engine.[31]

Where the carrier's agent receives the goods without authority or in excess of authority or in breach of instructions, the carrier is not bound by such receipt unless it can be shown that he was holding out that person for that purpose.[32] Thus, where a lorry driver took a note from the carrier which enabled him to

27. *C Burley Ltd.* v *Stepney Corpn.*, [1947] 1 All ER 507, damage to the carrier's barge ; *Ministry of Food* v *Lamport and Holt Line Ltd*, [1952] 2 Lloyd's Rep 371, damage to cargo of maize from leakage of tallow. Apart from this there are statutory regulations as to the storage and movement of explosive substances and other kinds of dangerous goods, e.g., regulations under the Fire Arms Act. Violation of such Acts entails criminal prosecution. It may also create civil liability, because non-observance is an evidence of negligence. See *Cutler* v *Wandsworth Stadium Ltd.*, [1949] AC 398 : [1949] 1 All ER 544 ; *Blamires* v *Lancashire and Yorkshire Ry Co.*, (1873) LR 8 Exch 283 ; *Lochgilly Iron and Coal Co.* v *M'Mullan*, [1934] AC 1 HL.

28. *Higginbatham* v *Great Northern Ry Co.*, (1861) 2 F & F 796 ; *London and NW Ry Co.* v *Richard Hudson & Sons Ltd.*, [1920] AC 324, HL, where the loss resulted from the consignor's conduct in helping the carrier with his duty and the carrier became liable.

29. *Long* v *District Messenger and Theatre Ticket Co. Ltd.*, 32 TLR 596 ; *Gibbon* v *Paynion*, (1769) 4 Burr 2298 ; *Walker* v *Jackson*, (1842) 10 M & W 161 ; *Titchburne* v *White*, (1719) 1 Stra 145 ; *M' Cance* v *London and NW Ry Co.*, (1864) 3 H & C 343 : 34 LJ Ex 39.

30. *Lovett* v *Hobbs*, (1680) 2 Show 127 : 8 Digest (Repl) 6 ; *Cobban* v *Downe*, (1803) 5 Esp 41 : 41 Digest (Repl) 353 ; *Boehm* v *Combe*, (1813) 2 M & S 172 ; *Buckman* v *Levi*, (1813) 3 Camp 414 : 39 Digest (Repl) 682.

31. *G. G. of India in Council* v *Jubilee Mills Ltd.*, AIR 1953 Bom 46. See also *Jenkyns* v *Southampton etc Steam Packet Co.*, [1919] 2 KB 135, CA ; *Colepepper* v *Good*, (1832) 5 C & P 380, goods delivered at his usual receiving place ; *Westminister Bank Ltd.* v *Imperial Airways Ltd.*, [1936] 2 All ER 890 ; *Burrel* v *North*, (1847) 2 Car & Kir 680 : 8 Digest (Repl) 31, goods delivered to the person allowed by the carrier to receive them.

32. *Slim* v *Great Northern Ry Co.*, (1854) 14 CB 647 : 23 LJ CP 166 ; *Soanes* v *London and S W Ry Co.*, (1919) 88 LJKB 524 CA.

collect the goods from the consignor, the carrier became liable when the lorry driver disappeared with the goods.[33]

Duration of Liability

On the acceptance of the goods for carriage, the carrier becomes charged with the responsibility of carrying them in safety to the destination and of discharging them at that place also in safety.[34] He has to fulfil this responsibility even if the route has become expensive and unprofitable to him on account of an alteration in circumstances over which he might have had no control.[35] The responsibility begins with the receipt of the goods and not on commencement of carriage and continues up to the delivery to the consignee, actual or constructive, and not merely up to arrival at the destination.[36] Unless the carrier has undertaken to deliver the goods at the consignee's place, his responsibility ends by carrying the goods to their place of destination and giving the consignee a reasonable time for taking away his goods. What is reasonable time is, of course, a question of fact is each case, but the consignee cannot prolong the transit by not taking away the goods within reasonable time after becoming aware of their arrival.[37]

Delivery

Whether the carrier's responsibility is to deliver the goods by taking them to the consignee's place or to carry them only up to his own station or a designated port, depends upon the terms of the contract and the goods would have to be delivered accordingly. The place of delivery may also depend upon the usual course of the carrier's business.[38] If the goods are deliverable at the consignee's house, a delivery at that place is good whoever might receive them.[39] Where the goods are accepted by the carrier with knowledge that he can carry them only a part of the way and for the rest he would have to handover to another carrier and if he does not limit his liability only to the part to be performed by him, the whole route would be his responsibility.[40]

33. *John Rigby (Haulage) Ltd.* v *Reliance Marine Ins. Co. Ltd.*, [1956] 2 QB 468 ; [1956] 3 All ER 1, CA. It is otherwise where somebody obtains possession of the goods from the consignor by false pretences in which the carrier had no role to play. *Harrisons and Crossfield's Ltd.* v *London and North Western Ry Co.*, [1917] 2 KB 755 : 86 LJKB 524.
34. *Duff* v *Budd*, (1822) 3 Brod & Bing 177 : 8 Digest (Repl) 45 ; *Chapman* v *Great Western Ry Co.*, (1880) 5 QBD 278.
35. Thus, carriers were not excused from their responsibility under existing contracts of carriage by reason of the fact that the usual route via the suez was suddenly closed. See *Tsakiorglou & Co. Ltd.* v *Noblee & Thorl Gmbh*, [1962] AC 93 : [1961] 2 All ER 179 : [1961] 2 WLR 633 ; *Mangaldai Tea Co.* v *Ellerman Lines Ltd.*, [1920] WN 152.
36. *Chapman* v *Great Western Ry Co.*, (1880) 5 QBD 278 ; *Shepherd* v *Bristol and Exeter Ry Co.*, (1868) LR 3 Exch 189 ; *Patscheider* v *Great Western Ry Co.*, (1878) 3 Ex D 153 ; *Bourne* v *Cadliffe*, (1841) 3 Man & G 643.
37. *Mitchell* v *Lancashire and Yorkshire Ry Co.*, (1875) LR 10 QB 256 ; *Bradshaw* v *Irish NW Ry Co.*, (1875) LR 7 CL 252.
38. *Essex Counties Farmers' Cooperative Assn Ltd.* v *Newhouse & Co. Ltd.*, (1916) 86 LJKB 172.
39. *McKean* v *McIver*, (1870) LR 6 Exch 36 ; *Galbraith and Grant Ltd.* v *Block*, [1922] 2 KB 155; *British Traders Ltd.* v *Ubique Transport Ltd.*, [1952] 2 Lloyd's Rep 236. Delivery at any other place would not be good delivery. *Hoare* v *Great Western Ry Co.*, (1877) 37 LT 186.
40. *Reader* v *South Eastern and Catham Ry Co.*, (1921) 38 TLR 14. The position of such a carrier

Where the goods are deliverable at the carrier's station, whether he has to give notice to the consignee of the arrival or whether it is the consignee's function to ascertain depends upon the contract. Where no such notice is required by the contract, it becomes the consignee's duty to find out at arrival and any delay on his part in this respect would involve him into liability for demurrage.[41]

Misdelivery

Misdelivery means delivery to a person not authorised to receive them. This would obviously make the carrier liable.[42] A refusal to deliver the goods to the person entitled to them would make the carrier liable for conversion even if the refusal is on the ground that the goods belong to a third person.[43] Delivery to the consignee in the ordinary course of things and without notice that the consignee is not entitled to possession discharges the carrier from his liability.[44] He would also be discharged if delivery is effected to a person on his demand out of the ordinary course, but who was entitled to possession.[45] The carrier may in such cases retain possession till he is able to ascertain the true position and in case of doubt may wait for a court order in an interpleader suit.[46]

Refusal by consignee to receive

If the consignee either refuses to receive the goods or if the consignee is not traceable at the address provided by the consignor, the absolute liability of the carrier comes to an end. He would then be converted into an ordinary bailee to be liable only for negligence.[47] On refusal by the consignee, the carrier should inform the consignor. This is necessary for mutual convenience though there is no such obligation. Nor is the carrier bound to return the goods at once to the consignor. He should wait for a reasonable period for instructions of the consignor.[48]

Position of carrier at end of transit

At the end of the transit when the goods are waiting for consignee to take them away and reasonable period has expired since their arrival, the carrier ceases to be liable as carrier and becomes converted into an ordinary custodian.

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has to be distinguished from that of a forwarding agent who incurs the liability only that of a bailee. *Jones* v *European and General Express Co.*, (1920) 90 LJ KB 159 ; *Marston Exclesior Ltd.* v *Arbuckle Smith & Co. Ltd.*, [1971] 2 Lloyd's Rep 306 CA.

41. *Chapman* v *Great Western Ry Co.*, (1880) 5 QBD 278.
42. *Stephenson* v *Hart*, (1828) 4 Bing 476 ; [1824-34] All ER Rep 409 ; *Heugh* v *London and NW Ry Co.*, (1870) 5 Exch 51, misdelivery after the end of the transit period, liability arises only if it is negligent. *Verschures Creameries Ltd.* v *Hull and Netherlands SS Co. Ltd.*, [1921] 2 KB 608, CA, *Sanquer* v *London and SW Ry Co.*, (1855) 16 CB 163 : 3 CLR 811, such liability may cease to exist if the consignees sue the person to whom the goods were misdelivered.
43. *Greenway* v *Fisher*, (1824) 1 C & P 190 ; *Hollins* v *Fowler*, (1875) LR 7 HL 757.
44. *McKean* v *McIvar*, (1870) LR 6 Exch 36.
45. *Sheridan* v *New Quay & Co.*, (1958) 4 CBNS 618 : 28 LJCP 58.
46. *Clayton* v *Le Roy*, [1911] 2 KB 1031, CA ; *De Rothschild Freres* v *Morrison Kekewich & Co.*, (1890) 24 QBD 570, CA.
47. *Stephenson* v *Hart*, (1828) 4 Bing 476 ; *Heugh* v *London and NW Ry Co.*, (1870) LR 5 Exch 51 ; *Great Western Ry Co.* v *Crouch*, (1858) 3 H & N 183.
48. *Hudson* v *Baxendale*, (1857) 2 H & N 575 : 27 LJ Ex 93 and the cases cited in the preceding note.

His position is then akin to a warehousekeeper,[49] who is a bailee and as such, not absolutely liable, but under a duty to assure safety of the goods to the extent to which reasonable care and caution can do so.[50] The burden of proving that there was no negligence on his part rests upon the carrier.[51] The carrier may recover by way of demurrage his charges for keeping, but not so if he is exercising his right of lien for unpaid freight.[52]

Burden of Proof [Section 9]

***9. Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.*—In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants, or agents.**

When the goods are not delivered at the destination, there is a presumption that they must have been lost due to the negligence or some other fault of the carrier. The consignor has to prove nothing except this that the goods have not been delivered at the destination. The burden lies upon the carrier to prove that there was no negligence or fault on his or his servants' part. The loss of goods is an evidence of negligence which the carrier will have to disprove.[53] The presumption is not displaced merely by showing that there was a storm. Thus in *Niranjanlal* v *B.S. Navigation Co*,[54] the carrier proved a newspaper report of the storm during the night that the goods were lost and he also proved that the godown in which the goods were stored at the time of loss was sufficiently safe, yet this was held to be not sufficient to displace the presumption of negligence. No witness was produced to depose form his personal knowledge how the storm affected the building and in what manner the goods were damaged. MEHROTRA CJ said : "The defendants will not be liable to pay damages only if they succeed in proving that the damage was the direct and exclusive result of the storm."[55]

To the same effect is the decision of the Calcutta High Court in *C. Doogur* v *River Steam Navigation Co.*[56] The goods were lost by fire while they were on board the defendant's flat for carriage to Calcutta. The defendant gave evidence showing the state of things before the fire occurred, the circumstances leading to the discovery of the fire (but not the cause or origin of it), and the measures taken to extinguish the fire. It was held that the occurrence of a fire disclosed

49. *Heugh* v *London and NW Ry Co.*, (1870) LR 5 Exch 51 ; *Chapman* v *Great Western Ry Co.*, (1880) 5 QBD 278.

50. *Mitchell* v *Lancashire and Yorkshire Ry Co.*, (1875) LR 10 QB 255 ; *Brook's Wharf and Bull Wharf Ltd.* v *Goodman Bros*, [1937] 1 KB 534 : [1936] 3 All ER 696, CA ; *British Traders Ltd.* v *Ubique Transport Ltd.*, [1952] 2 Lloyd's Rep 236.

51. *Joseph Travers & Sons Ltd.* v *Cooper*, [1915] 1 KB 73, CA ; *Caldman* v *Hill*, [1919] 1 KB 443, CA ; *WLR Traders Ltd.* v *Br & Northern Shipping Agency Ltd.*, [1955] 1 Lloyd's Rep 554.

52. *London and NW Ry Co.* v *Crooke & Co.*, (1904) 20 TLR 506 ; *Somes* v *British Empire Shipping Co.*, (1860) 8 HL 338.

53. See *Irrawaddy Flotilla* v *Bugwandas*, 18 ILR Cal 620.

54. AIR 1967 A & N 74.

55. *Ibid.*, at p. 77. The Court noted that the law on this point has been very clearly stated in *River Steam Navigation Co.* v *Shyam Sunder Tea Co.*, AIR 1955 Ass 65 and *River Steam Navigation Co.* v *Milapchand*, AIR 1958 Ass 115.

56. ILR (1897) 24 Cal 787.

in the case, without any explanation as to the origin of it was, of itself, evidence of negligence and the defendant had not discharged the onus cast upon them by law, of showing that there was no negligence.[57]

The Madras High Court also held a carrier liable for the loss of bales of cotton by fire while he was carrying the goods by his lorry, and it was not sufficient for him to show that there was no negligence on his part.[58] In a similar case before the Bombay High Court,[59] the carrier was not allowed to escape liability merely by alleging and even showing that short delivery of iron rods was due to theft because he has also to show the circumstances of theft so as to enable the court to judge whether negligence or misconduct was not involved. Explaining the state of law, BHONSALE J said:[60]

> The provisions of Section 9 are too unambiguous to be emphasised and under these provisions the plaintiff is absolutely free from the burden of proving that short delivery or non-delivery were owing to any negligence or criminal act on the part of the defendant. All that the plaintiff has to prove is the factum of loss by way of short delivery or non-delivery. The presumption of negligence on the part of the defendants being rebuttable presumption, it is for the common carriers to rebut such a presumption and if that is not done satisfactorily, the suit has to be decreed. The liability of common carriers is not that of a mere bailee.

The court emphasised the fact that any terms and conditions printed on the way bill which had the effect of reducing the liability prescribed by the Act would be of no avail.[61]

Where the parties have placed before the court all the evidence on which they rely, it is for the court to say upon that evidence whether or not the loss was caused by negligence. Pointing this out in *Central Coacher Tea Co.* v *River Steam Navigation Co.*[62], where chests of tea were damaged in river navigation, PETHERAM CJ said that the evidence showed that while negotiating a bend, the flotilla came opposite the shoal, the captain stopped and then reversed the engine and that in consequence of this action the flotilla drifted with the current down and across the stream until it struck the left bank and that is how the goods

57. See further *Tugun Ram* v *Dominion of India*, AIR 1966 all 260 at p. 265 and *Inter-State Transports* v *Pfizer Ltd.*, [1988] 1 TAC 89, Karnataka, where the truck capsized after skidding and the driver was not examined, he being the only person in the know of things, presumption of negligence, and nothing more had to be proved by the claimant.

58. *Kalasami* v *Ponnuswami*, AIR 1962 Mad 44.

59. *Road Transport Corpn.* v *Kirloskar Bros. Ltd.*, AIR 1981 Bom 299 : [1981] 83 Bom LR 173 : 1981 Mah LJ 855 DB.

60. At p. 304.

61. The position as to burden of proof is well settled. See *Indian Drugs and Pharmaceuticals* v *Savant Transport*, AIR 1979 AP. 41 ; *P.K. Kalaswami Nadar* v *K. Ponnuswami Mudaliar*, AIR 1962 Mad 44 ; *Vidya Ratan* v *Kota Transport Co.*, AIR 1965 Raj 200 ; *Tegun Ram* v *Dominion of India*, AIR 1966 All 260 ; *Commrs for Port of Calcutta* v *General Trading Corpn Ltd.*, AIR 1964 Cal 290 and *R.K. Abdulla Yelinje Mammi* v *K. Chenna Keshava*, AIR 1963 Ker 198.

62. Unreported. Explained in (1897) 24 Cal 788, foot note 5 ; *Assam Roadways* v *National Ins. Co.*, AIR 1979 Cal 178 : 83 CWN 560 : 1979 ACJ 287 ; *Moothora Kant Shaw* v *India Gen. Steam Navigation Co.*, ILR (1884) 10 Cal 166.

were damaged. The court, therefore, held that nothing appears to have been done which was inconsistent with due care and caution and the presumption of negligence was rebutted.

The following statement appears in American Jurisprudence as to the sound public policy on which this principle is based:[63]

> "The immense increase of business, the inestimable value of the commodities now entrusted to the charge of common carries, and the vast distances to which they are transported have multiplied the difficulties of the owner who seeks to recover for the loss of his goods, and have added greatly to the opportunities and temptations of the carrier who might be disposed to neglect or violate its trust. Furthermore, it is apparent that while the dangers of embezzlement and collusion with thieves, generally given as the cause, might be sufficient when the property is lost, such a reason has no application when it is delivered at its place of destination in a damaged condition. The carrier's exclusive possession of evidence, the difficulties under which the shipper might labour in discovering and proving the carrier's fault, his inability to contradict the carrier's witnesses, the necessity of avoiding the investigation of circumstances impossible to be unraveled, the importance of stimulating the care and fidelity of the carrier, and the convenience of a simple, intelligible, and uniform rule in so extensive a business—in other words, commercial necessity plus public policy and convenience—constitute much broader grounds and are the basis for the acceptance of the rule at the present time."[64]

This statement was cited by the Karnataka High Court in a matter is which the burden of proof became reversed by reason of the state of pleadings.[65] The plaintiff in this case specifically pleaded as to the negligence of the carrier showing full knowledge as to how damage was caused to goods. This amounted to inviting the burden to one's self and, therefore, he had to prove those alleged facts. The court referred to a Division Bench decision[66] in which on the basis of the following statement from the pages of American Jurisprudence it was held that, in case "the plaintiff alleges specific acts of negligence, he then has the burden of proving such negligence". It was observed by the Division Bench:

> "It was not incumbent on the plaintiffs to plead that the damage was caused on account of negligence; but having alleged that the damage was caused on account of specific acts of negligence, it was not necessary for the defendant to plead that the damage was on account of inevitable accident; it was sufficient for him if he denied that there was any negligence."

In this case the defendant company called the particulars of the negligence alleged to have been committed by it and in response to that the plaintiff attributed the accident to a specific act of overloading and a rash and negligent

63. *Oriental Fire and General Ins. Co. Ltd.* v *Sathyanarayana Transport*, [1989] 2 Kar LJ 129 : [1989] 2 TAC 552.
64. Vide AMERICAN JURISPRUDENCE—2d. Volume 14 - second edition - para 509.
65. *Hercules Ins. Co.* v *Sri Ganesh Transport Co.*, [1969] 1 Mys LJ 316.
66. Para 618, Vol 14, 2nd ed.

driving. That was held to be not sufficient proof of negligence. As against this in *Interstate Transport* v *Pfizer Ltd.*[67] the plaintiffs had not alleged any specific acts of negligence. They had only pleaded that the defendant was a common carrier and he had not acted in a prudent manner and the damage and loss of goods in question was caused by rash and negligent acts of the defendant. The defendant having admitted that the vehicle met with an accident, it was incumbent on him to prove that the accident was due to reasons beyond his control.

Notice of Loss [Section 10]

Notice of loss or injury to be given within six months.—No suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.

Notice of loss should be given to the carrier[68] before the action is brought and the notice should be given within six months from the date on which the plaintiff first learned of the loss.[69] Notice has to be given even where the carrier knows of the loss,[70] but if the carrier does not raise any objection on that ground, that is a waiver.[71] A notice given to the local agent is sufficient.[72] The Kerala High Court has held that an omission to mention the fact of service of notice in the plaint does not render the suit for damages as incompetent.[73]

It is not necessary that actual proceedings should be commenced within six months. The section prescribes only the notice period. A suit may then be filed within the period permitted by Article 10 of the Limitation Act, 1963.[74] This Article says that the period of limitation against a carrier for compensation is three years and it runs from the date when the loss or injury occurs.[75]

It has been laid down by the Supreme Court that the period of six months as prescribed by the section cannot be reduced.[76] The clause in question provided :

67. ILR 1987 Ker 2870. See further, *Manager, Doars Transport (P) Ltd.* v *Canara Bank*, [1992] 1 Mad LJ 453, where the carrier was held liable without proof of negligence or misconduct.
68. See *Murari Lal* v *DCM Ltd.*, (1980) 18 DLT 67, where it was pointed out that no particular form of notice is prescribed.
69. Notice sent to the joint claims departments of the two companies against whom the action was brought has been held to be sufficient. *River Steam Navigation Co.* v *State of Assam*, AIR 1962 Ass 110.
70. *Br. b Foreign Marine Ins. Co.* v *India etc. Rly. Co.*, AIR 1918 Cal 896 : 38 Cal 50.
71. *U Be Tin* v *U Tun On*, AIR 1938 Rang 437.
72. *India General Navigation & Ry. Co. Ltd.* v *Girdharilal*, AIR 1927 Cal 394.
73. *Kerala Transport Co.* v *Apollo Cables P. Ltd.*, AIR 1986 Ker 219.
74. *Indian Drugs and Pharmaceuticals* v *Savant Transport P. Ltd.*, AIR 1979 AP 41. Notice given by the party will ensure for the benefit of the insurer also who is subrogated to the position of the party, AIR 1978 P & H 336 : ILR [1978] 2 P & H 175 : (1978) 80 Punj LR 465.
75. According to a decision of the Kerala High Court the time begins to run when the plaintiff gets knowledge of the loss or injury and not from the date when loss occurs. *Associated Transport Corpn. P. Ltd.* v *National Ins. Co. Ltd.*, [1989] 2 TAC 33 Ker.
76. *M. G. Bros. Lorry Service* v *Prasad Textiles*, [1983] 3 SCC 61 : AIR 1984 SC 15 : 1983 ACJ 507 : [1983] 2 SCR 1027.

> No suit shall lie against the firm is respect of any consignment without a claim made in writing in that behalf and preferred within 30 days from the date of booking or from the date of arrival at the destination by the party concerned.

The clause was held to be violative of Section 10 and, therefore, void by virtue of Section 23 of the Contract Act. Fixing the period of notice from the date of booking or from the date of arrival was regarded as unnatural because the whole of such period may be lost when the goods are still in transit or before the consignor comes to know of the arrival of the goods at the destination. Hence if the period of notice is to be delimited, it must run from the date when the consignor gets knowledge of the loss. And the period must not be less than six months. The court also distinguished the clause in question from those clauses which do not limit the time but which extinguish the right to enforce the contract itself and, therefore, have been held valid under Section 28 of the Contract Act. The clause in question did not at all talk about the right to sue. It was only reducing the period of notice.[77]

The court also pointed out that Section 6 of the Carriers Act, which permits the carrier to limit his liability would also be of no help because in this case what was sought to be limited was not the extent of liability but the period within which the liability may be enforced. Explaining the purpose of the Carriers Act in general terms, the court said :[78]

> The Carriers Act, 1865, as the preamble states, was enacted because it was thought expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability. Therefore, it is important to keep [in mind] the fact that the Act was passed for both the purposes : to limit the liability of the carriers [and also to declare their liability.]

Non-delivery

N H BHATT J of the Gujarat High Court considered the matter of non-delivery and whether notice under Section 10 is necessary where the goods have not been delivered at all and came to the conclusion that such notice was not necessary in cases of non-delivery.[79] The section requires notice to be given of "loss or damage". It does not talk of non-delivery and the learned judge felt that loss caused by non-delivery was a separate category and that, therefore, such loss need not be notified. An action would be competent whether notice under Section 10 was given or not. He drew support from his own earlier decision in *Union of India* v *K. Mansukhram & Sons*[80]. A similar question under Section 77-B of

77. The court distinguished *Home Ins. Co. of New York* v *Victoria-Montreal Fire Ins. Co.*, [1907] AC 59 : 76 LJ PC 1 : 95 LT 627 : 23 TLR 29, and *Haji Shakoor Gany* v *H.E. Hinde & Co. Ltd.*, AIR 1932 Bom 330 : 138 IC 793 : 34 Bom LR 634, because in these cases the clause forfeited the right to sue itself.

78. At p. 65. Gujarat High Court has held in *Melepurath Sankunni Ezhuthassan* v *Thekittil G. Nair*, [1986] ACJ 440 that Section 10 is confined only to cases of loss or damage. Hence no notice under Section 10 is necessary in cases of non-delivery of goods.

79. *Patel Traders* v *Patel Ambaram Thakashi*, [1986] 2 TAC 221 Guj.

80. 20 GLR 333.

the Railways Act, 1890 was there before him. That section also does not use the word 'non-delivery', whereas other sections use that expression. He, therefore, held that the protection of the section was not available to the railways in cases of "non-delivery".

The Bombay High Court is of the view that notice of loss is necessary even in cases of non-delivery. The case before the court was *Sharma Goods Transport Wardha* v *Vidarbha Weavers Central Coop Society Ltd.*[81]

> The plaintiff entrusted goods for carriage to a carrier but as the goods were never delivered a suit for compensation was filed. No notice under Section 10 of the Carriers Act was given. The courts below found that the carrier did not deliver the goods to the plaintiff and having negatived the contention of requirement regarding notice granted decree. In second appeal challenging the judgment by the Goods Transport Carrier, it was held that the courts below were not right in treating the case of non-delivery of goods as falling in a class apart from cases of loss or injury to goods entrusted to the carrier and holding that no notice as required by Section 10 of the Carriers Act was necessary. What is mentioned in Section 9 can have very little relevance while considering the ambit of Section 10. The notice not having been given as required by Section 10 the decrees passed by the courts below were liable to be set aside.

Notice not needed where compensation deducted from freight

According to a decision of the Andhra Pradesh High Court, notice under Section 10 is necessary only when the consignor wants to recover his compensation from the defaulting carrier through the aegis of the court. If the consignor has still to pay the freight, he may deduct the amount due to him in respect of the loss and this irrespective of the fact whether or not notice under Section 10 was given.[82]

Measure of Damages

The field of measure of damages is being growingly occupied by statutory provisions. Such enactments generally provide for the minimum amount of compensation. Legislation dealing with motor vehicles, railways, air carriage and fatal accidents are common examples. They generally provide for minimum compensation. Compensation beyond statutory limits can be recovered either under the terms of the contract or in accordance with the general principles of the law of contract dealing with breach of contract. Where the value of the goods is declared as part of the contract, only the declared value is recoverable.

In a case before the High Court of Delhi where the value of the goods was declared, A B ROHATGI J discovered the law form the authorities to this effect :[83]

> "As the law compels carriers to undertake the responsibility of an insurer, it would be most unjust if it did not afford them the means of knowing the extent of their risk. Other insurers always have the amount of

81. 1987 Mh LJ 1002. Relying on AIR 1954 Bom 297 and AIR 1961 SC 725.
82. *Transport Corpn. of India* v *National Seeds Corpn. Ltd.*, 1985 ACJ 651 : [1985] 1 ART 506.
83. *Murari Lal* v *DCM Ltd.*, (1980) 18 Delhi Law Times 67 at 73.

what they are to answer for specified in the policy of insurance: How will the carrier protect himself against risks, the extent of which he cannot know ? His reward for carriage must be in proportion to the risk. "Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey more expensive, in proportion to the value of his load". He can say to the owner : 'I will not undertake the safe conveyance of goods unless you state their value and pay me a premium proportionate to their value'. The carrier will be liable only for what he is fairly told of. He is not obliged to take a package the owner of which will not inform him what are its contents, and of what value they are. He is entitled to be apprized of the value of the property entrusted to him for safe conveyance."

As long ago as 1828 the principle was established that :

"A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them, but if he does take charge of them, he waives his right to know their contents and value. It is the interest of the owner of goods to give a true account of their value to a carrier, as in the event of a loss he cannot recover more than the amount of what he has told the carrier they were worth ; and he cannot recover more than their real worth, whatever value he may have put on them when he delivered them to the carrier."[84]

Applying this principle to the instant case it is clear that the Mills made a declaration of the value of the goods in the challans and this declaration formed the basis of the contract which the parties intended to make, and by which it was to be regulated and governed. The contract was made upon the footing and understanding that the value of the goods to be transported was that given in the challans. Here it appears in evidence that the contract was to be regulated and governed by a state of facts understood by the parties, viz., that the goods were of the value indicated in the challans. Having agreed to regard the truth of the assumption as the basis of their contract the parties cannot subsequently be allowed to recede from that position. The governing principle is that stated in Balckburn's Contract of Sale—viz. that "when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts and not on truth"[85] The principle has again been stated as "that the parties agree for the purposes of a particular transaction to state certain facts as true ; and that so far as regards *that transaction*, there shall be no question about them."[86] Applying this rule to the present case, the court said that both parties were bound by the conventional state of facts agreed upon between them.

In HALSBURY'S LAWS OF ENGLAND[87] it is said :

84. *Ritey* v *Horne*, 130 ER 1044 at 1046 per BEST CJ.
85. *Mc Cance* v *London and NW Rail Co.*, 159 ER 563 at 564.
86. See *Dabbs* v *Sen Men*, (1925) 36 CLR 538 at 548-552 per ISSACS J ; Spencer Bower and Turner, ESTOPPEL BY REPRESENTATION, 147, 2nd ed.
87. Para 458, Vol 5, 4th ed.

"Where goods are entirely destroyed or lost by a common carrier, the measure of the damages recoverable from him is prima facie the value of the property lost. The owner is entitled to the value of goods dealt in by way of trade at the place to which they were consigned. If there is a market for that description of goods at that place, the damages are the market value of the goods there at the time when they ought to have been delivered ; but if there is no market, then the damages are the cost price of the goods, together with the expenses of carriage, and such profits as might reasonably be expected to have been made in the ordinary course of business, provided the carrier had notice that the goods were brought for resale. *If the consignor has declared the value of the goods before the carriage, he is bound by the declaration and is estopped from giving evidence that the goods have any higher value.*"

If there is no such declaration, much depends upon the purpose for which the goods are needed at the destination. If they are meant for resale, the carrier may have to pay an amount equivalent to the profits lost.[88] Where the goods are meant for consumption and they have been delayed, the loss of earnings caused by the delay, and if they have been lost, their value at the destination is generally the measure of damages.[89]

Where the value of scheduled goods has been declared and the carrier has also recovered extra charge, he would be liable for the declared value, of course ; he would have to refund the amount of the extra charge also. Since the carrier is not bound by the value declared by the sender, the latter, in case the carrier disputes the genuineness of the value declared, would have to offer a very strict proof of the real value.[90]

It is for the plaintiff to prove the quantum of damage whether in respect of short delivery or otherwise. The carrier is bound to compensate the plaintiff on the basis of the invoice value.[91]

Jurisdiction

Ordinarily a suit lies under the Civil Procedure Code at the place where the contract was made, or where it was to be performed or where the defendant resides or carries on business. Section 28 of the Contract Act provides that any provision in a contract "absolutely" taking away the right to enforce the contract is void. The use of the word "absolutely" has been taken by the courts as a

88. *See*, for example, the decision of the House of Lords in *Heron II, Koufos* v *C Czarnikoev Ltd.*, [1967] 3 All ER 686 ; [1969] 1 AC 350 ; [1976] 3 WLR 1491.

89. *Ibid.* See also *James Bachanan & Co. Ltd.* v *Babco Forwarding & Shipping (U.K.)*, [1977] 2 WLR 107, where excise duty on goods meant for export was allowed to be recovered as damages. The carrier had damaged the goods en route ; *Murari Lal* v *DCM Ltd.*, (1980) 18 DLT 67, where ROHATGI J said that the general rule is that the value of the property lost is the measure of damages. Where marketable goods are lost it is almost axiomatic that the market price measures the damage. But if the consignor declares the goods to be of certain value, he cannot allege subsequently that the goods were in fact of a higher value. (See Halsbury Para 337, Vol 5, 4th ed).

90. *M' Cance* v *London and NW Ry Co.*, (1864) 3 H & C 343 : 34 LJ Ex 39.

91. *Transport Corpn of India Ltd.* v *New India Assurance Co. Ltd.*, [1984] 1 TAC 41 Ker.

clue to the legislative intention that a partial restriction can be imposed. If out of the available jurisdictions, one is left open and others are closed, the agreement is binding. An agreement providing that an action would lie only at one place, and at no others, would be binding. So is true of a contract of carriage. It can also provide that an action would lie at one place and at no others. The consensus of authority now is that though the liability created by the Carriers Act is not contractual but even so the underlying relationship is contractual. The latitude given by Section 28 of the Contract Act can be availed of by the carriers also.[92] This consensus has been discovered in a judgement of the Gauhati High Court.[93] In this case :

> A consignment note carried the stipulation that the court at Matta alone would have jurisdiction to entertain suits in respect of all claims and matters arising under the consignment or of goods entrusted for transport. The consignments were lost giving rise to two small claims. The claim was filed at Newgong on the ground that Matta was too far away for a small claim and the carrier had his office at Newgong. The question was at to the maintainability of the suit at that place.

The court held that in spite of the contract clause as to jurisdiction, the balance of convenience suggested that the suit should be allowed at Newgong. There was no chance of miscarriage of justice at that place. The court cited instances as to when it could be said that jurisdiction has been ousted.[94]

> In *Manganlal* v *Satyanarain*[95], a note at the foot of the letter pad of the defendant that all offers etc. were subject to Hamburg jurisdiction was not held sufficient to hold that there was stipulation between the parties that the agreement would be subject to what has been printed at the foot of the letter pad. *Surajmall* v *Kalinga Iron Works*[96], is a case where at the top of the purchase order it was stated that "All subject to Calcutta jurisdiction." It was stated that because of this recital it could not be held that the other side had agreed to confine the disputes to the jurisdiction of Calcutta courts only. It was pointed out that the ouster of a court's jurisdiction cannot be assumed easily, and the same must be proved by express words or by necessary

92. For further details *see* comments on Section 28 in Avatar Singh, LAW OF CONTRACT, 217 (5th ed 1989).

93. *All Bengal Transport Agency* v *Hare Krishna Banik*, AIR 1985 Gau 7 ; [1984] 1 Gau LR 405. The court considered *Dwarka Rubber Works* v *Chhotelal*, AIR 1956 MB 120 where the view taken was that such a stipulation being against the Civil Procedure Code would be void under Section 23 of the Contract Act. *National Car Products* v *H.P. State Electricity Board*, AIR 1979 Del 255 ; *Savani Transport* v *Mudaliar & Co.*, AIR 1980 AP 30 ; *Patel Roadways* v *Bata India Ltd.*, AIR 1982 Cal 575 ; *C. K. Prasad* v *Mohd. Munir Alam*, AIR 1983 NOC 33 Pat : 1982 East LR 384 and *Globe Transport Corpn.* v *Triveni Eng. Works*, (1983) 4 SCC 707, where it was held that an action should lie only at the place specified in the contract.

94. AIR 1985 Gau 7 at p. 10.

95. AIR 1978 All 455.

96. AIR 1979 Ori 126. Also to the same effect *Prakash Road Lines* v *United India Ass.*, 1983 ACJ 688 (Mad) ; *Hakam Singh* v *Gammon (India) Ltd.*, AIR 1971 SC 740 ; *Rao & Sons* v *Trikamji*, (1975) 16 Guj LR 31 and *R. G. Transport Co.* v *United India Ins. Co.*, AIR 1980 Guj 184.

implication. The same stand has been taken in *Salem Chemical Industries* v *Bird & Co.*[1] In *Jaishri Luxury House* v *Kathotia Som*[2], the objection relating to jurisdiction of the court at Jaipur was negatived as the bill on the other side said "subject to Delhi jurisdiction" without the word "only". The court also said that it must be shown that the party who is to be bound down by the term had knowledge of the same.[3] Thus where the party was aware of the fact that the contract of carriage envisaging transport from Baroda to Naini in Allahabad provided for jurisdiction at Jaipur only, though no cause of action could have arisen there, the Supreme Court regarded the clause as valid. The Jaipur courts had jurisdiction because of the carrier's head office there.[4]

The Kerala High Court highlighted the same truth is its decision in *Economic Transport Organisation* v *United India Insurance Co.*[5] BHAT J said:[6]

> Where there is choice of forum, it is certainly open to the parties to agree on an exclusive forum for settlement of disputes. But such an agreement must be clearly spelled out either by express words or by necessary implication. Ouster of jurisdiction of courts cannot be lightly assumed or presumed. If there is such a concluded agreement, it will certainly operate as estoppel against the parties to the contract. If it is merely a unilateral affirmation or statement made by one of the parties, as long as it is not shown that the statement has been accepted by the other party as a term or condition of the agreement, it cannot be held that there is an agreement to confer exclusive jurisdiction on any court. Particular caution is necessary in regard to such a clause contained in a printed form, as in this case. Where the printed form is signed by both the parties or where a term printed by one party is singed by the other party and forwarded by the latter to the former and the printed form contains clear words conferring exclusive jurisdiction on a court at any particular place or ousting the jurisdiction of the court at any other place, it may not be difficult to hold that the parties have agreed to such a term. Even in such cases courts must remember that people often sign order forms containing a good deal of printed matter without caring to read what is printed. It cannot be said that everything which is printed may be deemed to form part of the contract. Where a form printed by one party is signed only by that party and delivered to the other party, without anything more, it will be difficult for the court to hold that there has been *consenseus ad idem* in regard to the particular clause. Of course, if there is some other material to indicate acceptance or

1. AIR 1979 Mad 16.
2. AIR 1980 Raj 42.
3. *Hindustan Tiles Corpn.* v *Kisanlal*, AIR 1979 Bom 69.
4. *Globe Transport Corpn.* v *Triveni Eng. Works*, 1984 ACJ 465 SC. Another matter on jurisdiction to the same effect, *ABC Laminart P Ltd.* v *AP Agencies, Salem*, AIR 1989 SC 1239.
5. (1986) KLT 220.
6. As reproduced by P K SHAMSUDDIN in *South Eastern Roadways* v *United India Ins. Co. Ltd.*, AIR 1991 Ker 41 at 43.

consent of the other party who received the printed form, then the court is free to infer that the clause formed part of the agreement.[7]

The Madras High Court also allowed an action at the place of consignment where the carrier had an office though the documents stated that disputes between the parties were subject to Bangalore courts' jurisdiction only.[8]

Jurisdiction cannot be conferred on courts where it does not exist

Though the parties can restrict the choice of jurisdiction out of the available places, they cannot confer jurisdiction where it otherwise does not exist. Certain goods were booked from Bangalore to Hyderabad. The contract provided for exclusive Bombay jurisdiction. The court said that no cause of action arose in Bombay jurisdiction. The Bombay courts having had no jurisdiction otherwise, it could not been conferred on them by agreement.[9] The court cited the following passage from its own earlier decision :[10]

> The parties by a concluded and binding agreement can choose to have the jurisdiction of one of the courts where part of the cause of action arose, and exclude the other court. The contract can be express or implied but it should be unequivocal, and should be precise and definite. Such a contract cannot be fastened on third parties unless it is satisfactorily shown that the third party is privy to the contract or acted upon the contract consciously knowing the fact and implication of the agreement.

Clauses as to jurisdiction and third parties

It has been held by the Andhra Pradesh High Court that restrictions contained in the contract of carriage as to jurisdiction are not binding on third parties, like an insurer, unless he was made aware of them. He was accordingly allowed to sue the carrier at Hyderabad for his reimbursement though the contract allowed only Calcutta jurisdiction.[11] The matter came before the Full Bench of the Court under a reference because two earlier decisions of the court were divergent.[12]

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7. To the same effect : *Prakash Road Lines P Ltd.* v *United India Insurance Co Ltd.*, 1983 ACJ 688, printed clauses conferring exclusive jurisdiction on a particular court not allowed to overide Section 20 of the Civil Procedure Code, relying upon *Hakam Singh* v *Gammon (India) Ltd*, (1971) 1 SCC 286 : AIR 1971 SC 740 ; *Indian Roadways Corpn*, [1990] 1 KLT 292 : 1991 ACJ 15, a printed condition on the back side of the consignment note subject to "Bombay jurisdiction alone," is not sufficient in itself to constitute a special contract signed by the owner or an agent duly authorised within the meaning of Section 6 so as to confer exclusive jurisdiction on Bombay Courts.
8. *Prakash Roadlines P. Ltd.* v *R. M. Gounder*, AIR 1985 Mad 84 : (1985) 98 Mad LW 543. See *Prakash Roadlines Ltd.* v *United India Ins. Co.*, (1984) 1 Mad LJ 167 : 96 Mad LW 440. See also *Road Transport Corpn.* v *Kirloskar Bros.*, AIR 1981 Bom 229 at 306 where the court held the restriction as to the choice of forum to be binding but that the objection must be raised at the earliest stage and not at the appeal stage.
9. *Patel Roadways P. Ltd.* v *Republic Forge Co. Ltd.*, [1986] 1 ACJ 390 AP. There was no clear evidence whether the term as to jurisdiction had been accepted by the party.
10. *B.A. Transport Co.* v *Bankatlal*, [1982] 1 APLJ 284. See also *MBT Co.* v *A. Narainsinha Rao*, [1968] 2 An WR 424 ; per RAMA RAO J.
11. *East India Transport Agency* v *National Insurance Co. Ltd.*, [1992] 1 TAC 151 AP (FB) ; another matter of the same kind, *B.A. Transport Co.* v *Bankatlal*, [1982] 1 APLJ 284 AP.
12. Those decisions were : *Raja Rao* v *A.P.T. Co.*, [1969] 2 APLJ 151 transferee of booking

Delivery [Sections 8 and 9]

A carrier has to deliver goods only on production of the relevant documents, otherwise he does so at his own risk. In a case before the Madras High Court[13] goods were delivered to the indorsees of the way bills. The original way bill produced contained a rubber stamp similar to that used by the plaintiff and it did not show any suspicious circumstances to doubt its genuineness. Having regard to the large number of parcels that the plaintiffs have been receiving and through different persons, the carrier did not entertain any doubt about genuineness of the indorsement. Nor there was any doubt as to personation. The delivery was held to be a good discharge. The court distinguished the case from an earlier case in which goods were delivered without the documents of title being produced.[14]

Notice of Terms

According to the ordinary principles of the law of contract whenever a contract is made by delivery of printed documents, notice of the crucial terms of the document must be given to the other party. This applies as well to documents prepared for effectuating a contract of carriage. In a case before the Allahabad High Court:[15]

> The contract was made in this case by delivering goods receipts and consignment notes. Both provided for arbitration. The documents were simply delivered but not signed. The court entertained no doubt that an arbitration agreement can be made in this way because the Arbitration Act does not require signature. It only requires written agreement. The only other question was whether the consignor had knowledge of the terms as to arbitration.

The court extensively surveyed the cases in the law of contract as to notice of printed terms and said:[16]

> The ratio of the decisions discussed above is that if the terms and conditions printed overleaf the consignment note are to be binding on the parties they must be brought to the notice of the consignor before the contract of carriage is completed. In other words, the terms and conditions must categorically and specifically be brought to the notice of the consignor before he agrees to book the consignment. Since it is not practical or feasible that such terms could be read out to the individual consignor, it is expected that

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documents, lorry receipt, held bound by the clause as to jurisdiction ; *Special Secy., Govt. of Rajasthan* v *Venkataramana Seshaiyer*, AIR 1984 AP 5 ; *E.I.D. Parry (India) Ltd.* v *Savant Transports*, AIR 1980 AP 30 and *Savant Transports* v *United India Fire & Gen. Ins. Ltd.*, [1980] 2 ALT 167.

13. *Amin & Co.* v *Southern Roadways Ltd.*, AIR 1985 Mad 287 : (1984) 97 Mad LW 656 : (1985) 1 MLJ 78.
14. *Eswara Iyer & Sons* v *M.B. Transport Co.*, AIR 1964 Mad 516.
15. *Oriental Fire & General Ins. Co.* v *New Suraj Transport Co.*, AIR 1985 All 136 : [1986] 1 ACJ 259.
16. *See* the judgment of I.P. SINGH J at pp. 140-142.

such steps be taken by the transporter to exhibit those terms and conditions outside or inside their office premises in sufficiently legible and bold letters so as to attract the attention of the incoming customer and afford him sufficient warning before-hand that the transaction of booking will be subject to the said terms and conditions.

Applying this to the facts of the case the court said that there was nothing to show that anything was done to draw the attention of the customer to those terms. On the contrary, it appeared that an oral contract was made first and afterwards, the documents were prepared and simply delivered.

The Kerala High Court has also insisted that in order to bind the consignor to the conditions printed on the consignment note, the signature of the consignor or that of his agent is necessary. The note contained a condition as to jurisdiction for filing of claims. Disregarding the condition the court gave the ruling that a suit was maintainable at the place where the contract of carriage was made.[17] Printings on the note, the court said, do not by themselves constitute any agreement or estoppel.[18]

The liability as a common carrier cannot be varied or limited by a general public notice to that effect. Whatever be that notice, it would have to be incorporated into each individual contract so as to bind the consignor.[19] Where the terms incorporated into a contract are such as destroy the character of the carrier as a common carrier, the effect would be that for the purposes of such a contract, the carrier would stand converted into a private carrier. Where the contract does not have such a devastating effect and operates only to limit liability in one respect or the other, for the rest his liability as a common carrier would remain alive.[20]

17. *South Eastern Roadways* v *United India Ins. Co. Ltd.*, AIR 1991 Ker 41. Citing the Supreme Court judgment in *A.B.C. Laminart P. Ltd.* v *A.P. Agencies, Salem*, (1989) 2 SCC 163 : AIR 1989 SC 1239 where at p. 1243 the meaning of the expression "cause of action" is explained.

18. Citing to the same effect, *Orient Road Lines* v *M.B. Mohammad Hassan Sahib & Co.*, (1988) 2 KLJ 619. Another decision of the same court in *United India Ins. Co. Ltd.* v *Associated Transport Corpn. Ltd.*, [1987] 1 Ker LT 46 was to the effect that since the consignor or any person duly authorised by him had not signed the consignment note, it could not be assumed that there was an agreement which would constitute an estoppel creating a bar to maintaining a suit in any other court than the court mentioned in the consignment note; *Road Transport Corpn.* v *Kirloskar Bros. Ltd.*, [1982] ACJ 7 Bom, emphasising the requirement of proper notice; *Patel Roadways P. Ltd.* v *Republic Forge Co. Ltd.*, 1986 ACJ 390 AP, another matter on notice of terms; *United India Ins. Co. Ltd.* v *Associated Transport Corpn. P. Ltd.*, 1987 ACJ 801 Ker, highlighting the importance of signature; *AVS Perumal* v *Vadivehi Asar*, AIR 1986 Mad 341, remarking that parties consented to, not enough, *M.P. Highway Organisation* v *New India Assurance Co. Ltd.*, [1991] 1 TAC 723 MP, considering the need for signature and the fact that the lorry receipt is an acceptance by the carrier of the goods for carriage.

19. *Drayson* v *Horne*, (1875) 32 LT 691; *Joshua Buckton & Co. Ltd.* v *London and N.W. Ry. Co.*, (1917) 87 LJKB 234.

20. *Great Northern Ry. Co.* v *L.E.P. Transport and Depository Ltd.*, [1992] 2 KB 742, CA; *Scalfe* v *Farrant*, 1875 LR 10 Exch 358; *Joseph Travers and Sons Ltd.* v *Cooper*, [1915] 1 KB 73, CA; *Sulton & Co.* v *Ciceri & Co.*, (1890) 15 App Cas 144, HL; *Price & Co.* v *Union Lighterage Co.*, [1904] 1 KB 412, CA; *India General Navigation and Ry. Co.* v *Dekhari Tea Co.*, (1923) 93 LJPC 108.

Right to Sue

Since there is nothing in the Act as to who can sue the carrier for loss of goods, the remedies of the Act become available to any person who can show an interest in the goods. Section 8 says that the carrier shall be liable to the owner. The position of law on the point has been examined by PA CHOUDHARY J of the Andhra Pradesh High Court.[21] The case arose out of transfer of consignment by one carrier to another. The latter carrier damaged a part of the goods for which the first carrier was held liable. He then sued the second carrier for his indemnity. He being not the owner of the goods his right to sue was questioned. The court surveyed the provisions of the Act and found that there was nothing in the Act as to the status of the person who can sue. The court accordingly allowed the claim. "The question who should sue is not the subject matter of the Carriers Act. Particularly that question has not at all been dealt with by Section 8 of the Act..." It is clear that the question of right to sue the carrier has to be considered and answered by the general provisions of law and not by reference to the Carriers Act. Under the general law the right to sue belongs to a person whose civil rights are injured. The person aggrieved can bring a suit. In conceivable cases a person other than an owner can also be aggrieved.

The court cited an observation from its own earlier decision:[22]

> One need not be the owner of the goods to claim damages if there be a special contract ; the carrier would be liable under the contract. In this case the defendant would be liable because he had obtained possession of the goods as a result of the entrustment by the plaintiff and also because of the special contract.

Authoritative writers are also of the same opinion. Otto Kahn Freund on the LAW OF CARRIAGE BY INLAND TRANSPORT[23] observes :

> Who is in a position to sue 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.

The statement of law in CHITTY ON CONTRACTS[24] is to the same effect. After emphasising the owner's right to sue, he adds :

> But a bailee may also do so at any rate if he is responsible to his bailor for the safety of the goods. And the general principle that the owner is the

21. *V. Venkat Rao* v *Commercial Goods Transport Firm*, AIR 1982 AP 203 ; [1982] 1 APLJ (HC) 60 : (1982) 1 Andh WR 118. Where the carrier was not able to prove that the property in the goods had passed to the consignee, the consignor was allowed to sue, AIR 1983 Cal 408 : AIR 1983 Cal 237.
22. *Savani Transport P. Ltd.* v *C.Ad. Sharif Saheb*, (1980) 1 Andh WR 308, following *Davis* v *James*, (1770) 5 Burr 2680 : 8 Digest (Repl) 167 and *St. Joseph Union Title Works* v *Rappai*, (1978) Ker LJ 117.
23. 209, 4th ed.
24. Para 519 (23rd ed.).

proper plaintiff may be varied by special agreement between the consignor and consignee.

The observation in HALSBURY'S LAWS OF ENGLAND is also to the same effect:[25]

> Nevertheless where the goods are at the consignor's risk until delivery to the consignee, the consignor may have special property in the goods, as bailee, sufficient to entitle him to sue.[26]

The Andhra Pradesh High Court has again emphasised that the provisions of the Sale of Goods Act, 1930 relating to passing of property or transfer of title are not applicable to the the question of the right to sue under the Carriers Act. The word 'owner', the court said, must be construed as referring not to the person who has acquired title to the property but the person who has obtained the right to demand delivery of the goods from the carrier. The test of the right to sue is the right to demand delivery from the carrier.[27] The goods under transport in this case were handed over to the person who had purchased the goods and had thus become owner through transfer of way bills. A short delivery certificate was given to him. The insurance company indemnified him for the shortage and sued the carrier for reimbursement. The right of the insurer to do so was vindicated because he sues in the right of the person who was entitled to the goods.[28]

Meaning of term "owner"

The court conducted the following extensive survey of authorities to come to this conclusion.

'It is true that Section 8 uses the expression 'owner' and the carrier is made liable to the owner for the loss or damage of any property delivered to the carrier. This Court (A P High Court) had occasion to examine this question on several occasions. The earliest judgment is *D.P. Narasa Reddy* v *Ellisetti China Venkata Subbayya*[29] that of a plaintiff who being himself a public carrier entrusted the goods in his turn to the other public carrier. The question arose whether the suit by such plaintiff-public carrier is maintainable. Construing Section 8 the learned judge held that the suit was not maintainable. However,

25. Para 452 (Vol. 5, 4th ed.).
26. The court cited G.W. PATON ON BAILMENT, p. 239 where it is pointed out that the carrier cannot set up *jus tertii* against the person who delivered the goods to him.
27. *Globe Transport Corpn.* v *National Insurance Co. Ltd.*, [1989] 1 ALT 373 : [1990] 1 TAC 617 : 1990 ACJ 310.
28. The court considered: *Nency Kasi Viswanathan Gadigay Sonna Lingappa Dakaappal*, AIR 1952 Mad 185, railway receipt sent through bank to be delivered on payment; *L.G. Lakshmana Iyer* v *S. Pachiappa Mudaliar*, AIR 1961 Mad 343, railway receipt drawn to self but indorsed and despatched to the purchaser; *State of Madras* v *Vuppala Peda Venkataramanaiah & Sons*, AIR 1959 AP 23 where the court held that when the railway receipt which is a document of title is taken out in the name of the seller, he manifests his intention to remain the owner and to retain control over the goods till the buyer makes payment through the bank. Another example of subrogation is *Oriental Insurance Co. Ltd.* v *Prakash Roadlines P. Ltd.*, [1988] 1 TAC 515; *Karnataka Electric Board* v *Halappa*, [1987] 1 TAC 451 Karnataka, liability for fire accident, interest on damages, liability of carrier discussed.
29. AIR 1964 AP 71.

it was held by the learned judge the claim was based on the ground that the plaintiff was the owner as per the provisions of the Contract Act but not on any special contract. A similar question arose in *Suvani Transport Pvt. Ltd.* v *C. Ahmed Shariff Saheb*[30] where MADHAVA REDDY J (as he then was) held that the provisions of the Carriers Act do not prohibit the parties from entering into a special contract, nor do they it absolve a common carrier from the liability undertaken by him under such contract, if any. He observed :

> "In fact the Carriers Act makes the carrier liable to the owner for loss or damage even if there be no specific contract between them and even if the goods were not entrusted to the carrier by the owner. In fact this is an exception to the general rule relating to contracts that unless there is privity of contract, no claim for damages for loss lies."

The court cited the following statement from HALSBURY:[31]

> "The liability of a common carrier for loss, injury or delay in respect to the goods carried may be varied by contract."

It is further stated in that work that the terms and conditions of any particular contract of carriage are to be ascertained by the application of the general law of contract.

Applying this to the facts of the case the court said :[32]

"Hence merely because the defendant is a common carrier the general law of contract is not abrogated. In condition No. 3 of the invoice which forms the contract between the plaintiff and the defendant it is clearly stipulated that the defendant would be liable to make good the loss occasioned to the plaintiff-company. If there were no agreement, then under the Carriers Act perhaps the defendant would have been liable only to the owner but in view of the stipulation contained in the invoice, the defendant is liable to make good the damage at the instance of the plaintiff as well."

The court drew support from the following further authorities:

In MCGREGOR ON DAMAGES[33] referring to the case of *Geouch* v *L.N.W. Rly.*[34] it is stated that the person who contracts for the carriage of goods which are not his own property is nevertheless entitled to their full value in an action for breach of contract arising out of their loss or destruction. The plaintiff was himself a carrier of parcels and had sub-contracted certain carriage to the defendant. He was held entitled to the full value of the goods upon their loss.

In *Freeman* v *Birch*,[35] where a laundress sent linen, which she had washed, to the owner by the carrier whom she paid and the carrier having lost, it was held that the laundress was entitled to sue the carrier for the loss. It would be

30. 1980 (1) AnWR 306 : 1980 (1) ALT 225 : 1981 ACJ 98 : 1980 (1) APLJ 139.
31. Paras 3-5, and 393 Vol. 5, 4th ed.
32. 1981 ACJ 98 at 103.
33. Para 142, p. 844, 13th ed.
34. (1849) 2 C & K 789.
35. 114 ER 596.

seen that although the laundress was not owner of the linen, she was held entitled to sue the carrier for the loss, for she had entrusted the linen to the carrier.

In *Dunlop* v *Lambert*[36] it was held that a person other than the owner may employ the carrier on his own account; in such a case he may sue the carrier on such contract. The special contract supersedes the necessity of showing the ownership of the goods.

The court concluded :

It would thus be seen that a person who is in possession of the goods or entitled to the possession of the goods, may entrust the said goods on his own account to the carrier and if any loss is occasioned to such goods by any act or omission of the carrier or the negligence of the carrier, the person who has entrusted the goods is entitled to claim damages for the loss. One need not be the owner of the goods to claim damages if there be a special contract; the carrier would be liable under the contract. In this case, the defendant would be liable because he had obtained possession of the goods as a result of the entrustment by the plaintiff and also because of the special contract.[37]

Right to sue is part of general law

In *K. Venkata Rao* v *Commercial Goods Firm, Vizianagaran*[38] P.A. CHOUDHRAY J emphasised the importance of general law :

> "The question of right to sue the carrier has to be considered and answered by the general provisions of law and not by reference to the Carriers Act which in my opinion has nothing to say upon that question. Now under the general law the right to sue belongs only to a person whose civil rights are injured. In the now familiar legal parlance it is believed that it is only the person aggrieved that can bring a suit. In conceivable cases a person other than an owner can also be aggrieved."

This was also a suit by a carrier against another carrier and the same was held to be maintainable. The learned judge cited the following propositions from GW Paton on BAILMENT[39]. Normally the owner of the goods is the person who makes the contract with the carrier and in such a case he alone can sue in contract or in tort, subject, however, to the following propositions :

(*a*) So far as the carrier is concerned, he must treat the person in possession as the owner, at least in the absence of a claim by the real owner. The carrier is bound to receive the goods for carriage and can make no inquiry as to title. *Jus tertii* cannot be raised by the carrier

36. (1839) Cl & Fn 600 : 8 Digest (Repl) 167.

37. Some other authorities are : *Cork Distilleries Co.* v *Great S. & W. Ry. Co.*, (1874) 7 HL 269 ; *Mullinson* v *Carver*, (1943) 1 LJ (OS) 59 ; *Dekhari Tea Co. Ltd.* v *Assam-Bengal Ry. Co. Ltd.*, where RANKIN J observed that the law presumes that the consignor is the owner ; *Murphy* v *Midland Great Western Ry. Co.*, [1903] 2 JR 5 ; *Dunlop* v *Lambert*, (1839) 6 Cl and Fin 600 the presumption is one of fact ; distinguishing *Narasa Reddy* v *Chinna Venkatsubbaiah*, [1963] 2 An WB 190 where it was emphasised that benefit of Section 8 goes in favour of the owner.

38. 1982 (1) An WR 118 : 1982 (1) ALT 273.

39. P. 239.

of his own volition, for it is the general rule of bailment that the bailee is estopped from denying the bailor's title....

(*b*) If the goods are consigned by a bailee, he alone can sue in contract, though the true owner may also sue in tort.

(*c*) * * * * *

(*d*) The consignor may make a special contract with the carrier which will retain the consignor's right of action, although property has passed to the bailee. Apart from such a case, if the goods are lost, the carrier will pay the consignor at his peril."

Thus it is seen in all the three cases that the plaintiff was a transport company without being the owner and its claim was sustained in the two later cases. Now, it can be seen that the person who entrusted the goods can maintain the suit even though he is not the owner of the property and that the consignor can sue but not the consignee who has not become the owner of the property when the goods are in transit. In this context, it is necessary to bear in mind that the function of a public carrier is that of a public employment. In fact, as observed by Otto Kahn-Freund in his book THE LAW OF CARRIAGE BY INLAND TRANSPORT:[40]

"This duty of the carrier to deliver the goods safely is mainly for historical reasons, at common law considered to exist quite apart from any contract. It is imposed upon him by the law not only because he has contracted to carry and deliver the goods but because he has been put in possession of another person's goods. In legal language this is expressed by saying that the carrier is a bailee, who is liable to the bailor if the fails to deliver the goods in tact. As a matter of history, the law of bailment, was, in this country, developed long before the law of contract."

The earlier judgment of the Madras High Court in *Kariadan Kumber* v *British India Steam Navigation Co* states:[41]

"The duties and liabilities of a common carrier are governed in India by the principles of the English Common Law on that subject (except where they have been departed from, in the cases of some classes of common carriers by the Carriers Act of 1865 or by the Railway Act of 1878 and 1890), (Now Act of 1989) and that notwithstanding some general expressions in the chapter on Bailments, a common carrier's responsibility is not within the Indian Contract Act of 1872."

That is why the judgment in *British India Steam Navigation Co. Ltd.* v *T.P. Sokkallal Ram Sait*[42] also states that in respect of the cases governed by the Carriage of Goods by Sea Act, the law applicable in India before the Act, was common law of England as applicable to common carriers and not the provisions of the Contract Act relating to bailment. The reason is that the duties of a public carrier based on public employment are greater than those contemplated under

40. 194 (4th ed).
41. ILR 38 Mad 941.
42. ILR 18 Cal 620.

Sections 151 and 152 of the Contract Act under a bailee will be absolved from liability for loss or destruction of goods if he takes reasonable care of the goods bailed. No doubt if a statutory provision is found, the common law is abrogated. The Carriers Act has two-fold purposes : one is, restricting the liability of the common carrier and other, disabling the common carrier absolving itself from negligence or misconduct by entering into a contract. The Carriers Act (3 of 1865) is framed on the lines of English Carriers Act, 1830 and as held by Lord MACNAGHTEN in *Irravaddy Flotilla Co.* v *Bhagwan Das*[43] the Contract Act of 1872 is not intended to deal with the law relating to common carriers. The Act enables a common carrier to limit his liability under special contract in the case of certain goods but he cannot get rid of the liability for negligence by entering into contract. The Supreme Court in *M.G. Brothers Lorry Service* v *Prasad Textiles*[44] upheld the view that a contract restricting the liability of a common carrier in contravention of Section 10 of the Act is void being opposed to public policy under Section 23 of the Contract Act.

Hence the question to be examined is what meaning is to be ascribed to the word 'owner' occurring in Section 8. Even though the word 'owner' is used in Section 8 we cannot bring consignor in its purview simply because there is contract between him and the carrier.

There are several occasions where a party has to enter into contract and entrust the goods to the carrier without being the owner of the property. For instance, an agent on behalf of the principal may deliver goods for transport even though he is not the owner of the goods. Sometimes, the consignor may send the goods through a carrier without transferring the title in the property. If the consignee or a person becomes the owner of the property after purchasing the goods when they are in transit, he can demand delivery and the carrier cannot investigate the title of the consignee as he is bound to deliver the goods.

Intervention of carrier's lien

Similarly, can a carrier refuse to deliver the goods to the seller who has got a right of lien on the goods for the unpaid purchase money notwithstanding the fact that the property in the goods has passed to the buyer?

A question arose before the House of Lords in *United States Steel Products Co* v *Great Western Railway Company*[45]. Here the vendor claimed lien on the goods for the unpaid price and demanded delivery from the carrier. The carrier claimed general lien on the goods in respect of the amounts due to him as per condition No. 7 in the consignment note which enabled the carrier to claim general lien for any money due to him from the *owners* of such goods. In view of the fact that due to endorsement of the bill of lading the buyers became owners of the goods and the carrier refused to deliver the goods to the vendor and claimed lien on the ground that the purchaser had to pay certain amounts

43. AIR 1953 Mad 3.
44. (1983) 3 SCC 61 : AIR 1984 SC 15.
45. 1916 AC 189.

to him though unconnected with the consignments. The trial court held such claim of the carrier was untenable. The Appellate Court reversed it. The House of Lords in an unanimous judgment restored the judgment of the trial court and reversed that of the Appellate Court. The whole things rested upon the meaning of the word 'owner' occurring in condition No. 7 which enabled the carrier to withhold the goods. Lord BUCKMASTER LC observed:

> "... the pharse 'the owners of such goods' seems to me plain, but they are not the only people who answer to the description, I entirely agree with PICKFORD J that the phrase covers all persons who under the contract and the bill of lading were entitled to go to the railway company and receive the goods."

"Owner" not to be given ordinary meaning

Lord ATKINSON also held that the word 'owners' cannot be given its ordinary meaning. Lord PARKER OF WADDINGTON took the view that "the expression 'owners' in the clause may well be used to denote the person entitled to the delivery of the goods, whoever such person may be, and does not necessarily refer to the person who at the date of the contract or at any other time may have the legal property in the goods."

This dicta of the House of Lords though occurring while construing the words of a contract furnishes a good guidance in construing the word 'owner' occurring in Section 8.

It is pertinent to refer to a passage in CHITTY ON CONTRACTS.[46]

> "*Who can sue the carrier.*—If goods are lost or damaged during transit, the question arises who can sue the carrier for breach of the contract of carriage. The general rule is that the owner of the goods is the proper person to sue, because the goods are at his risk. But a bailee may be able to do so at any rate if he is responsible to his bailor for the safety of the goods. And the general principle that the owner is the proper plaintiff may be varied by special agreement between the consignor and consignee (*e.g.* that risk is to remain with the former) or between the consignor and the carrier."

It is also useful to refer to a passage in HALSBURY'S LAWS OF ENGLAND[47],

> "*Special agreements.*—The general principle that the owner is the proper person to sue may be varied by special agreement between the parties. Thus by agreement between the consignor and the consignee the risk of the goods may remain with the consignor until delivery, and, by agreement between the consignor and the carrier, the carrier may be liable to the consignor.
>
> Further, if the consignor has made a special contract with the carrier for the carriage of goods, or if the consignor has delivered them to the

46. 519, Vol. II, 23rd ed.
47. Para 454 (4th ed, 1974).

carrier as agent for the consignee, the consignee is the person to sue, *even though the property in the goods has not passed to him....*"[48]

When the goods are transferred during transit, the purchaser becomes the owner of the property and the carrier is bound to deliver the goods to the purchaser on production of the documents of title be it a railway receipt or a way bill. It is indisputable that the contract of carriage comes to an end when the delivery takes place.

If the title is transferred before delivery takes place, the purchaser is entitled to demand delivery and hence the word 'owner' occurring in Section 8 must be construed as referring not to the persons who are in law having title to the property but those who are entitled to demand delivery of the goods from the carrier. The test in this case is not the passing of ownership and the rules relating to passing of title in the goods under the Sale of Goods Act are not relevant. The criterion is whether a person can demand delivery from the carrier. If so, he is entitled to sue the carrier in respect of his breach of public employment for loss of goods or non-delivery.

In this case, the second plaintiff paid the invoice price and took delivery of the way bill and obtained delivery of the goods from the carrier. Thus it is seen that his right to sue the carrier can be based on two grounds. Firstly he has become the owner of the goods by transfer before the contract of carriage came to an end. Secondly, once it is recognised that the liability of the carrier is not contractual but that of public employment, he is liable to the person who obtained right to take delivery of the goods.

Post Office

The Post Office is not a common carrier or even an ordinary carrier. It is an authority constituted under the Post Office Act and charged with the responsibility to meet the social, industrial and commercial needs of the people. Its liability in respect of things delivered to it for carrying to the addressee is not in tort. Its employees are also protected by the Act in respect of liability for carrying mail. The relationship of the Post Office with the sender of articles is also not typically contractual. Its functioning is statutory. So are its liabilities. Since a bailment can arise without contract the Post Office has been regarded by the Supreme Court to be a bailee of the articles of the sender.[49] The liability for articles lost or damaged in the course of post is regulated by tariff adopted under the Post Office Act.

48. (Emphasis supplied)

49. *I.T.C.* v *P.M. Rathod*, [1960] 1 SCR 401 ; AIR 1959 SC 1394, the position of the Post Office in reference to VPP articles. The position of the Post Office was also considered by the Supreme Court in *Union of India* v *Mohd. Nazim*, [1980] 1 SCC 284 : AIR 1980 SC 431. In England the position was considered in *Treifus & Co. Ltd.* v *Post Office*, [1957] 2 QB 352 : [1957] 2 All ER 387, CA, not an agent of the Crown.

LIABILITY FOR CRIMINAL BREACH OF TRUST

Where goods are lost or damaged either due to negligence or pilferage by employees or due to natural causes, the liability of the carrier is that of civil nature. But where the goods have been converted to the carrier's own use or have been intentionally prevented from going into the hands of the consignee, liability for criminal breach of trust is thereby created.[50] The consignee alleged that the accused jointly and dishonestly misappropriated or converted to their own use the goods in the 13 consignments. The following portion of the judgment of UL BHAT J explains the liability for such conduct :

> A careful reading of Section 405 IPC will show that it takes in within its fold acts amounting to breach of contract or violation of law. Such an act may be an offence if it is done with the requisite *mens rea*. Such an act will not be an offence if the requisite *mens rea* is absent. The duty of the carrier as per contract between the parties was to deliver the goods to the consignee on presentation by the consignee copy of the lorry receipt, or in the alternative, return the goods to the consignor. It is alleged in the complaint that the accused have done neither of these acts. Section 8 of the Carriers Act lays down that the common carrier will be liable for the criminal acts of its servants. That is not sufficient to show that the act alleged to have been committed by the accused cannot fall within the definition of criminal breach of trust under Section 405 IPC.

Till the Carriers Act of 1865 was passed, the law governing common carriers was the same as the Common Law of England. The Act was enacted with the intention of enabling the common carriers to limit their liability for loss or damage to the property delivered to them to be carried and also to declare their liability for loss or damage to such property occasioned by the neglect or criminal act of themselves, their servants or agents. Under the provisions of the Act, in particular of Section 8 of the Act, a common carrier cannot be permitted to limit his liability for loss occasioned by the criminal acts of the carrier, his servant or agent. This is the only effect of the provisions of the Act regarding criminal acts. It only means that the Carriers Act recognises the liability of the carrier for loss occasioned to the consignor on account of the criminal act of the carrier or his servant or agent. That does not mean that the criminal act cannot be punished under the provisions of the Indian Penal Code if the necessary ingredients are brought out or established. Just as an act in breach of contract could also be an offence under Section 405 IPC, an act which would attract the provisions of Section 8 of the Carriers Act could also come within the scope of Section 405 IPC, if the other ingredients exist. It is not correct to say that merely because the Carriers Act, 1865, declares the liability of a carrier for loss occasioned by criminal acts of himself or servant or agent, the criminal act cannot be dealt with under the provisions of the Indian Penal Code.

50. *Kanhayalal Baid* v *Raj Kumar Agarwal*, 1981 KLT 427 : 1981 Cri LJ 824.

The learned counsel for the petitioner placed reliance on the decision reported in *Yusuff* v *Theyyu*,[51] in support of his contention that the act complained of is a mere breach of contract or breach of condition of an agreement and therefore does not amount to criminal breach of trust. It may be noted that in that decision, this Court had to consider the correctness of a conviction entered for the offence of breach of trust. On the evidence on record, this Court came to the conclusion that the act was merely one of breach of contract and did not amount to criminal breach of trust. It may be that a similar conclusion may be arrived at in the light of evidence which may be placed before the court. But at this stage, it cannot be said that the act complained of is merely an act in breach of contract or breach of a statutory obligation and does not involve criminal breach of trust.

51. (1969) KLT 667.