[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER FOR RAILWAYS (NEW SOUTH WALES) . . . . . } APPELLANT;
DEFENDANT,

AND

QUINN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *March* 26, 27.

MELBOURNE, *May* 29.

Rich, Starke, Dixon, McTiernan and Williams JJ.

Railways—Negligence—Carriage of goods—Non-delivery of goods—By-law—Incorporation by reference to handbook with conditions of carriage—Condition limiting time for making claim—Validity—"Just and reasonable"—Failure to observe condition—Liability of Commissioner—Common carrier—Bailee—Failure to exhibit by-law—Effect—Government Railways Act 1912-1943 (*N.S.W.*) (*No.* 30 *of* 1912—*No.* 43 *of* 1943), *ss.* 33, 64, 65, 66, 67, 136—*By-law No.* 1,002, *Condition No.* 27—*Common Carriers Act* 1902 (N.S.W.) (*No.* 48 *of* 1902), *s.* 9 (*a*), (*c*).

A contract made between the Commissioner for Railways (N.S.W.) and the owner for the carriage of certain goods was expressed to be subject to the provisions of the *Government Railways Act* 1912, as amended, the by-laws, regulations and conditions published thereunder, and to the terms and conditions of the consignment note signed by the owner. A by-law so incorporated contained (*inter alia*) two conditions: (1) that a claim for loss or damage to goods tendered for conveyance by rail would not be allowed unless lodged in writing with the Commissioner within fourteen days after the date when delivery was or should have been given; (2) that the Commissioner did not guarantee the arrival or delivery of any goods at any particular time and that he did not undertake to advise the consignor of the arrival of the goods or that delivery had not been taken. The goods were consigned at "Commissioner's risk" rates.

Held by the whole Court that the by-law containing the condition requiring claims for loss or damage to be lodged within fourteen days was not invalidated through the failure of the Commissioner to exhibit it on railway stations and other places in accordance with ss. 66 and 67 of the *Government Railways Act* 1912-1943 (N.S.W.).

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Held further by *Rich, Starke, Dixon* and *McTiernan* JJ. (*Williams* J. dissenting) that the condition was not just and reasonable and therefore, being contrary to the provisions of s. 9 (*a*) of the *Common Carriers Act* 1902 (N.S.W.), was invalid.

Held by *Rich, Starke, Dixon* and *McTiernan* JJ. that despite the fact that all the goods were tendered to the owner's agent, the Commissioner, in the circumstances of the case, remained a common carrier in respect of certain of the goods of which delivery had not been taken, and was not a bailee for the safekeeping thereof.

Appeal from decision of the Supreme Court of New South Wales (Full Court): *Quinn* v. *Commissioner for Railways*, (1945) 46 S.R. (N.S.W.) 163; 63 W.N. 69, dismissed, but pursuant to the order giving leave to appeal order that judgment be entered for the plaintiff in lieu of the order of a new trial.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the District Court of New South Wales by Mabel Irene Quinn, widow, against the Commissioner for Railways (N.S.W.) for damages for the loss of three suit cases and their contents valued in all at £90 7s. The suit cases and two other articles had been consigned as one consignment by Mrs. Quinn from Coolah Railway Station to herself at St. Leonards Railway Station. The goods arrived at that railway station but, as there were no facilities for handling goods there, they were forwarded to the goods shed at Chatswood for the purpose of delivery and Mrs. Quinn was duly notified. This shed is situate at some distance from the Chatswood Railway Station. Mrs. Quinn's son, on the Thursday before Good Friday 1944, went in a small motor car to the goods shed at Chatswood. A porter produced all the articles consigned, including the three suit cases in question. The son was unable to take them all in one load so he took the two other articles and told the porter he would come back for the three suit cases. There was a conflict of evidence as to whether the three suit cases were taken out of the shed on the occasion of the visit of Mrs. Quinn's son; he, and his sister who accompanied him, said they were not. The porter said that he had helped the son to carry all the goods, including the three suit cases, out of the shed and deposit them on a small platform just outside at which the son's motor car was standing, and that the son, when he found that the motor car would not hold all the goods, said he would leave the suit cases where they were (a position visible from the street) and come back and get them.

The son returned shortly afterwards but the goods shed was closed and, failing to find the porter or the suit cases, he departed without them. The Easter week-end intervened. On the following

Tuesday, Mrs. Quinn went to the goods shed to collect the three suit cases. The porter told her that her son had taken them. This she denied. The suit cases have not since been found. Two or three weeks afterwards, the porter visited Mrs. Quinn, spoke to her about the matter, and said that he would report it to the stationmaster and she would hear from the Railway Department. She waited, according to her about six weeks, and then saw the stationmaster who advised her to send in a claim. This interview would appear to have occurred on 24th June. A claim was submitted by her on some date between 24th June and 13th July.

The consignment note signed by Mrs. Quinn in respect of the conveyance of the goods by the Commissioner was, so far as material, in the following terms:—"Department of Railways, New South Wales. Coolah Station, 31/3/19—. Received from Quinn the undermentioned goods for conveyance from Coolah Railway Station consigned to St. Leonards subject to the provisions of the *Government Railways Act* 1912, as amended, to the provisions of the By-laws, Regulations and Conditions, published thereunder and to the terms and conditions of this Consignment Note. So far as regards those opposite which, in the column headed 'At whose risk' I have so indicated, I require the goods to be carried at the risk of the Commissioner. As regards such of the goods to which the two rates above referred to apply and in respect of which I have not so directed, I require them to be carried at Owner's Risk Rate, in consideration whereof I undertake all risks of loading and unloading and of the carriage of the same by railway and relieve the Commissioner from all liability for any damage, injury, misdelivery or delay whatsoever, and howsoever occasioned . . ." It was common ground that the goods were received for carriage at the risk of the Commissioner, not at the risk of the owner.

The *Government Railways Act* 1912-1934 (N.S.W.), by s. 33, provides that the Commissioner shall carry goods without negligence or delay, and in respect of the carriage of goods that he shall be a common carrier. Section 64 provides that "the Commissioners may make by-laws for all or any of the subjects or matters hereinafter mentioned . . . (1a) for regulating the terms and conditions upon which goods . . . will be collected or received or delivered, and for fixing charges for the collection or delivery thereof; (1b) for regulating the terms and conditions upon which goods . . . will be collected, received, carried, or delivered, subject to the collection of moneys on the delivery thereof . . . (35) for prescribing any matter or thing not inconsistent with this Act which is necessary or convenient to be prescribed to give effect to

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any power, duty, or authority of the Commissioners under this or any other Act." Section 65 provides that such by-laws shall (i) if approved by the Governor be published in the *Gazette*; (ii) take effect from three clear days after the date of publication or from a later date to be specified in such by-laws; and (iii) be laid before both Houses of Parliament as therein mentioned, and if either House passes a resolution within fifteen sitting days disallowing any by-law or part thereof, such by-law or part thereof shall therefrom cease to have effect. Section 66 requires the substance of the by-laws and a list of tolls, fares and charges to be painted upon or printed and affixed to boards and such boards to be exhibited on stations . . . or other places where such tolls, fares or charges, or any of them, are payable so as to give public notice thereof. Section 67 (1) provides that such exhibiting shall be deemed to have been complied with if it is proved that, at the time of any alleged breach, a board was exhibited at the station &c. nearest to the place where such breach took place. Section 67 (2) provides that the production of the *Gazette* containing such by-law shall be evidence that such by-law has been duly made and confirmed and that it is still in force. The *Government Railways (Amendment) Act* 1943 (N.S.W.) provides that a by-law made in relation to any of the matters referred to in s. 64 of the Act may adopt and incorporate by reference a handbook issued by the Commissioner setting out in detail the particular matters which were regulated, prescribed, fixed or otherwise dealt with by such by-law. By-law No. 1,002, which was approved by the Governor in Council on 22nd December 1943 and was published in the *Gazette* two days later, is headed "Merchandise and Live Stock Rates &c." and provides that:—"From the first day of January 1944, the several Rates and Charges for the carriage of Merchandise and Live Stock by Goods and Mixed Trains over the . . . railways and the Classification, Conditions and Regulations under which such Goods and Live Stock will be conveyed will be those set out in detail in the handbook issued by the Commissioner . . . entitled 'Merchandise and Live Stock Rates. To take effect from 1st January 1944,' and from the said day all previous By-laws, Charges, Classifications, Conditions and Regulations conflicting therewith are hereby repealed." One of the conditions referred to in the by-law is Condition No. 27, which is included in the "General Conditions for the Carriage of Merchandise" and reads:—"Claims. Claims for detention or loss of, or damage to Goods and Parcels Traffic, Live-stock, Passengers' Luggage tendered for conveyance by rail, will not be allowed unless lodged in writing with the Commissioner within fourteen days after the date when

delivery was or should have been given; and no claim will be allowed if lodged after removal from the railway premises of consignments or any portion thereof said to have been damaged, and for which clear receipts are held."

The District Court Judge said that he was in doubt as to whether the suit cases were left inside or outside the shed and that he made no finding on this point. He held, however, that Mrs. Quinn was debarred from recovering on her claim against the Commissioner as a common carrier by a condition of the contract of carriage that claims for detention or loss of goods tendered for conveyance by rail would not be allowed unless lodged in writing with the Commissioner within fourteen days after the date when delivery was or should have been given, and on her claim against him as a bailee, on the ground that there was no evidence that the porter had any authority from the Commissioner to hold the suit cases as bailee on the Commissioner's behalf for Mrs. Quinn.

This decision was reversed by the Full Court of the Supreme Court on three grounds, namely, (i) that under s. 66 and s. 67 of the *Government Railways Act* 1912, as amended, it was necessary for the Commissioner to prove that the substance of the by-law was painted upon or affixed to boards on railway stations before he could rely upon it as a regulation governing his liability, and no such proof was offered; (ii) that inasmuch as the Commissioner is declared by s. 33 to be a common carrier and the by-law-making power contained in s. 64 (35) authorizes only by-laws not inconsistent with the Act, a by-law cannot exonerate the Commissioner from any of the legal consequences flowing from his being a common carrier; a by-law could not abridge the time for suit and this by-law could not restrict the obligations of the Commissioner in the manner it provides; and (iii) that Condition 27, treated as a condition incorporated in a contract between the parties, had no application to a loss occasioned by the negligence of the Commissioner or his servants: *Quinn* v. *Commissioner for Railways* (1).

Special leave to appeal against that decision was granted to the Commissioner by the High Court upon terms, *inter alia*, that if his appeal were dismissed he should consent to judgment in the action for Mrs. Quinn for the amount claimed.

Fuller K.C. (with him *Conybeare*), for the appellant. All the clauses or conditions contained in By-law No. 1,002 are within the by-law-making powers conferred upon the Commissioner by sub-ss. (1a) and (35) of s. 64 of the *Government Railways Act*. Section 66

(1) (1945) 46 S.R. (N.S.W.) 163; 63 W.N. 69

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has nothing whatever to do with the validity of a by-law of the description of By-law No. 1,002. At most there is an obligation cast on the Commissioner to post-up or display by-laws. It is not, however, a condition precedent and failure so to do does not affect the validity of the particular by-law nor prevent its enforcement. The Act does not require that proof shall be given of the posting-up or displaying of a by-law, but, on the contrary, does provide that by-laws shall come into force when gazetted: See s. 67 (2). The amendment of s. 64 and s. 65 by Act No. 43 of 1943 does not affect the matter. The contract between the appellant and the respondent was a special contract. By virtue of signing the consignment note the respondent became bound by the conditions of the note itself (*Thompson* v. *London, Midland and Scottish Railway Co.* (1)). The by-law, and particularly Condition No. 27 thereof, complies with sub-s. (c) of s. 9 of the *Common Carriers Act* 1902 (N.S.W.); is reasonable within the ordinary meaning of that word; and is just and reasonable within the meaning of those words as used in sub-s. (a) of s. 9 of the *Common Carriers Act* (*Lewis* v. *Great Western Railway Co.* (2)). Condition 27 is a matter of procedure only; it is not an attempt by the Commissioner to absolve himself from his obligations to pay when a proper case is made out (*O'Keefe* v. *Great Western Railway Co.* (3)). The condition is a reasonable one; the matter is one of substance in fact and not one of substance in law (*Great Western Railway Co.* v. *Wills* (4)). The condition does not amount to an absolute negation of liability but merely limits the procedure by which such liability is to be enforced (*Great Western Railway Co.* v. *Wills* (5)), therefore no question can arise under the *Common Carriers Act*. A limitation of liability is different from an evasion of liability. The consignment note incorporated the by-law and formed a separate contract apart altogether from the question whether the by-law is valid or not. The evidence establishes that the contract of carriage had in fact terminated and that a contract of bailment had begun. This occurred when the goods were ready for delivery and the respondent's representative had indicated that he would take delivery of them (*Chapman* v. *Great Western Railway Co.* (6)). As a bailee the Commissioner, having regard to the condition and in the circumstances, is not liable for the negligence, if any, of his servants (*Rutter* v. *Palmer* (7)).

(1) (1930) 1 K.B. 41, at p. 46.
(2) (1860) 29 L.J. Ex. 425, at p. 429; 5 H. & N. 867 [157 E.R. 1427].
(3) (1920) 90 L.J. K.B. 155, at p. 156; 123 L.T. 269.
(4) (1917) A.C. 148, at pp. 164, 168.
(5) (1917) A.C. 148.
(6) (1880) 5 Q.B.D. 278, at pp. 280 et seq.
(7) (1922) 2 K.B. 87.

Wallace K.C. (with him *Regan*), for the respondent. The contract of carriage still subsisted at the relevant time. The Commissioner, by his servants, did not do, as a carrier, what was reasonable in the circumstances (*Halsbury's Laws of England*, 2nd ed., Vol. 4, p. 20). The contract was a contract of carriage and as there was no express reference to negligence the by-law must be deemed not to attach to claims founded on negligence. If it be a special contract within the meaning of sub-s. (c) of s. 9 of the *Common Carriers Act*, then it is not just and reasonable within the meaning of sub-s. (a) of s. 9. Decisions by courts in England on this point are not necessarily binding upon this Court because : (*a*) the words used in the relevant statutes and by-laws are dissimilar ; and (*b*) the geographical and social conditions in England differ from those which obtain in New South Wales or the Commonwealth. Whether the by-law is just and reasonable will be determined in the light of local conditions. The by-law is too vague and uncertain in its terms. The onus placed upon persons concerned of making a claim within fourteen days after the date " when delivery should have been given " is, in the circumstances, unreasonable. The period which closes the rights of the public should be either certain or capable of being easily and definitely ascertained.

[DIXON J. referred to *Moore* v. *Great Northern Railway Co.* (1).

STARKE J. referred to *Murphy* v. *Midland Great Western Railway Co. of Ireland* (2).]

A test of what is just and reasonable is indicated in *Beal* v. *South Devon Railway Co.* (3) and *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Brown* (4), that is, whether " the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly." In the circumstances, that test applies with greater force to this case. The intention of the *Government Railways Act* is that the provisions of s. 33 constitute an overriding direction at all times in respect of the making of by-laws under the Act. By-laws made under the Act must be consistent with the provisions of s. 33 (*Ira L. & A. C. Berk Ltd.* v. *The Commonwealth* (5) ; *Weir* v. *Victorian Railways Commissioners* (6) ; *Gregory* v. *Commonwealth Railways Commissioner* (7)). The uncertainty of its construction as to computation of time makes the by-law unjust and unreasonable. The by-law is void for vagueness and uncertainty (*Vardon* v. *The Commonwealth* (8) ; *Arnold* v. *Hunt* (9) ;

(1) (1882) 10 L.R. Ir. 95.
(2) (1903) 2 I.R. 5.
(3) (1864) 3 H. & C. 337, at p. 342 [159 E.R. 560, at p. 563].
(4) (1883) 8 App. Cas. 703, at p. 711.
(5) (1930) 30 S.R. (N.S.W.) 119 ; 47 W.N. 16.
(6) (1919) V.L.R. 454.
(7) (1941) 66 C.L.R 50.
(8) (1943) 67 C.L.R. 434.
(9) (1943) 67 C.L.R. 429

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Craies on *Statute Law*, 4th ed. (1936), p. 272). The real essence of the matter is whether the limitation as to liability is repugnant to the conception of the *Common Carriers Act*; in other words, whether it is customary. It is neither just nor reasonable between the parties. Although, perhaps, the Commissioner's liability under the *Common Carriers Act* can be cut down, his liability for acts of negligence cannot, having regard to the express provisions of s. 33, be limited or excluded by any by-law in the absence of express authority therefor in s. 64, that being the section which authorizes the making of by-laws for certain specified purposes. The Act does not confer any power of prescribing a time within which claims should be made. Section 64 does not give the Commissioner power to cut down common law rights or the public's rights which accrue by reason of the statutory duty imposed by s. 33 (*R. & W. Paul Ltd.* v. *The Wheat Commission* (1)); for this reason the by-law is ultra vires and inoperative. It is also inoperative because of the non-compliance with the provisions of s. 66 as to the posting-up or displaying of the by-law.

[DIXON J. referred to *Motterham* v. *Eastern Counties Railway Co.* (2).]

The statutory duty was imposed by the legislature in the interests of the public: See also s. 136. Sections 65, 66 and 67 should be read together. The by-law is not incorporated into the contract between the parties. The by-law is general in its terms; it does not specifically refer to negligence, therefore, inasmuch as a common carrier is liable for negligence, the operation of such a by-law in all relationships to negligence is excluded: See *Phillips* v. *Clark* (3); *Rutter* v. *Palmer* (4), *Beaumont Thomas* v. *Blue Star Line Ltd.* (5) and *Alderslade* v. *Hendon Laundry Ltd.* (6). *Lewis* v. *Great Western Railway Co.* (7) was discussed and doubted in *Murphy* v. *Midland Great Western Railway Co. of Ireland* (8). Limitation of liability must be stated expressly and not merely in general terms (*Price & Co.* v. *Union Lighterage Co.* (9)). The contract of carriage had not terminated; therefore the question of bailor and bailee does not arise. A reasonable time for delivery must be allowed: *Halsbury's Laws of England*, 2nd ed., Vol. 4, p. 20. Even if there was a bailment, Condition 27 is inapplicable because its whole tenor is directed towards governing the contract of carriage.

(1) (1937) A.C. 139, at pp. 153-157.
(2) (1859) 7 C.B. (N.S.) 58, at pp. 72, 80 [141 E.R. 735, at pp. 741, 744].
(3) (1857) 2 C.B. (N.S.) 156 [140 E.R. 372].
(4) (1922) 2 K.B., at pp. 90, 91.
(5) (1939) 3 All E.R. 127, at p. 131.
(6) (1945) 1 K.B. 189.
(7) (1860) 5 H. & N. 867 [157 E.R. 1427].
(8) (1903) 2 I.R. 5.
(9) (1904) 1 K.B. 412, at pp. 414-416.

Fuller K.C., in reply. The by-law is not void for uncertainty. There is no difficulty about ascertaining the time within which a person must submit a claim. It is reasonable that in cases of alleged negligence the carrier should be informed within a defined period in order to permit of the making of proper inquiries (*Shaw* v. *Great Western Railway Co.* (1)). The by-law is authorized by s. 64 (1a). The non-posting-up or -displaying of a by-law does not render it inoperative. Under sub-s. (2) of s. 67, the production of the *Gazette* containing such by-law is evidence that the by-law was duly made and confirmed and that it is still in force. The requirements of ss. 66 and 67 have nothing to do with the validity or otherwise of a by-law. A contract of carriage can, so far as the Commissioner is concerned, terminate otherwise than by actual delivery. The respondent, by her representative, was in default in not taking delivery of all the goods at the time they were made ready and available for delivery (*Chapman* v. *Great Western Railway Co.* (2)). The contract of carriage terminated when the goods were so made ready or available; the relationship then became one as between bailor and bailee.

Cur. adv. vult.

May 29.

The following written judgments were delivered :—

RICH J. This appeal comes to us by way of special leave which was granted upon the condition that in the event of the appeal being dismissed the applicant would consent to judgment being entered for the plaintiff for the amount claimed in the action in the District Court and in any event pay the costs of the appeal. In the District Court, the plaintiff failed because she had not given a notice in writing to the Railway Commissioner. The plaintiff's claim was for the value of three suit cases which could not be found. She had consigned them, together with some other articles, from a country town to a suburban station. Unfortunately for her, the goods arrived just before the opening of the Easter holidays. Her son applied for them at the Chatswood station but not at the station to which they were consigned but one at which the appellant Commissioner had more convenient equipment for handling goods traffic. The plaintiff's son went in a small car to the Chatswood station on the afternoon of Thursday before Good Friday. The porter produced all the articles consigned, including the three suit cases now in question. But the plaintiff's son found it impossible to take them all in one load. He left the three suit cases with the porter. What precisely occurred is in dispute and the District Court Judge did not

(1) (1894) 1 Q.B. 373. (2) (1880) 5 Q.B.D. 278.

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resolve the dispute by any finding of fact. I shall not go into the matter in detail. The judgment of *Jordan* C.J. states the facts on this and other matters sufficiently. It is enough for me to say that there is evidence that the suit cases were left with the porter until the return of the son that afternoon and that the porter closed the goods sheds a little ahead of time before the son returned. When he did return, the suit cases were nowhere to be seen and after the holidays they could not be found. I think that for the purposes of our decision we must take these to be the facts. The clause that defeated the plaintiff formed part of a book or pamphlet of by-laws, regulations and conditions promulgated by the Commissioner. As the case turns upon the clause, I shall set it out textually. It is number 27 and runs as follows :—" Claims. Claims for detention or loss of, or damage to Goods and Parcels Traffic Live-stock, Passengers' Luggage tendered for conveyance by rail, will not be allowed unless lodged in writing with the Commissioner within fourteen days after the date when delivery was or should have been given ; and no claims will be allowed if lodged after removal from the railway premises of consignments or any portion thereof said to have been damaged, and for which clear receipts are held."

To overcome the effect of this provision, the plaintiff set up a number of contentions, some of which were accepted in the Supreme Court. I shall deal with her contentions briefly :—(1) She contended that the clause was a by-law and that as such it was void because it fell outside the by-law-making power conferred by the *Government Railways Act* 1912. Prima facie, I should think the by-law was justifiable under s. 64, sub-s. (35), which authorizes the making of by-laws not prescribing any matter or thing inconsistent with the Act which is necessary or convenient to be prescribed to give effect to any power, duty or authority of the Commissioner under the Act or any other Act. (2) But the plaintiff contends that the by-law is inconsistent with the *Government Railways Act*, because s. 33 of that Act provides that in respect of the carriage of persons, animals and goods the Commissioner shall be a common carrier. The argument is that the clause purports to lessen the liability arising from the status of common carrier and is therefore inconsistent with the statutory provision imposing that status. But it is open to a common carrier by a signed contract to limit his liability by any condition that is just and reasonable : *Common Carriers Act*, s. 9. In this case, the consignment note which was signed incorporated the by-laws. (3) The plaintiff then maintained that, to avail himself of the by-law, the Commissioner must show that it had been stuck up or exhibited in the manner prescribed by ss. 66 and 67 of the *Government Railways*

Act. These provisions have a long history. They are examined by *Jordan* C.J. and it may be that in the primitive form of the regulation some such consequence as is contended for did ensue from it. But now we have this explicit provision by s. 65 requiring publication in the *Gazette* and stating that by-laws shall take effect three clear days after the date of publication, or from a later date if specified in such by-laws. We also have s. 136, which says that a penalty shall not be recoverable for an offence imposed by the Act or by-laws unless short particulars are published and painted on a board or printed upon paper posted upon a board and such board is hung up or affixed in some conspicuous part of the principal place of business of the Commissioner. There is also the amendment of ss. 64 and 65 by the Act No. 43 of 1943 allowing the incorporation of a handbook or pamphlet by mere reference in a by-law and dispensing with the publication of the handbook or publication in the *Gazette*. The legislation does not contain any express provision requiring proof that the by-law has been displayed at railways &c. and on the whole I do not think that such display is a condition precedent to its operation or continued operation. (4) Next it is said that the clause is void for uncertainty. Substantially this is based on the difficulty of saying when delivery should have been given of goods in fact lost. No doubt the words do set a problem, but I agree in the conclusion of *Jordan* C.J. :—" It might in a particular case be difficult for the consignor or the consignee to ascertain this date in time to admit of a claim being made within the 14 days, but whatever effect this may have upon the reasonableness of the condition it has none upon its clarity." (5) The plaintiff endeavoured to escape from the operation of the clause by limiting its construction. It was sought to impose upon the clause a limitation of its meaning which would exclude from its operation any case where the loss or damage is attributable to the negligence of the Commissioner or his servants. The principle upon which this contention rests is expressed by *Atkin* L.J., as he then was, in *Rutter* v. *Palmer* (1) :—" There is a class of contracts in which words purporting in general terms to exempt a party from ' any loss ' or to provide that ' any loss ' shall be borne by the other party, have been held insufficient to exempt from liability for negligence. Those are contracts of carriage by sea or land. The liability of the carrier is not confined to his acts of negligence or those of his servants ; it extends beyond liability for negligence ; therefore, when a clause in the contract exempts the carrier from any loss, it may have a reasonable meaning even though

(1) (1922) 2 K.B., at p. 94.

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the exemption falls short of conferring immunity for acts of negligence. That is the reason at the root of the shipping cases. The same reason does not so often apply to the railway cases because, when acting as carriers, railways generally come under special legislation. But where in the circumstances a railway company is exposed to one kind of liability only, and that is a liability for negligence, there if the parties agree that the risk of loss or damage is to be borne by the passenger or the owner of goods they must intend to exempt the company from liability in the only event which is likely to expose them to liability; that is the negligence of their servants." I think, however, the principle is not applicable to a clause in its present form having for its object not the demarcation of liability but the imposition of a time bar and a requirement of notice. (6) Finally the plaintiff contends that the clause is not just and reasonable and therefore does not come within the exception or proviso contained in par. (a) of s. 9 of the *Common Carriers Act* 1902. If it does not qualify under the proviso as just and reasonable, then the main provision stands and leaves the Commissioner "liable for the loss of . . . goods or things in the receiving forwarding or delivering thereof occasioned by the neglect or default of such carrier or his servants." Upon this matter, *Jordan* C.J. found it unnecessary to express an opinion, although some of his observations appear to tell against the justness or reasonableness of the clause. There is a long and confused line of authority dealing with analogous clauses. Mr. *Leslie*, in his book on the *Law of Transport by Railway*, 2nd ed. (1928), at pp. 170, 171, distinguishes between the provision for notifying damage after delivering the chattel and the provision for notifying loss where there has been no delivery. The former case he regards as outside s. 9—a view that has not been universally accepted. But, however that may be, his book contains a useful and succinct statement of the effect of the cases in a passage which concludes with some observations apposite to the present controversy:—"With regard to conditions which limit the time within which claims may be made *after delivery*, the authorities are in a most confused state. Such a condition was held to be reasonable in the absence of an alternative in several cases (e.g. *Lewis* v. *Great Western Railway Co.* (1); *Simons* v. *Great Western Railway Co.* (2)). These decisions were prior to that of the House of Lords in *Peek* v. *North Staffordshire Railway Co.* (3), and the latter decision invalidates most of the grounds on which

(1) (1860) 5 H. & N. 867 [157 E.R. 1427].
(2) (1856) 18 C.B. 805 [139 E.R. 1588].
(3) (1863) 10 H.L.C. 473 [11 E.R. 1109].

they rest, so that the view taken in Ireland in *Murphy* v. *Midland Great Western Railway Co. of Ireland* (1), that these cases are of no authority, is fully justified. On the other hand, in *Moore* v. *Great Northern Railway Co.* (*I.*) (2), *Barry* J. and *Fitzgerald* J. were of opinion that such a condition was outside the section altogether, as it did not relate to 'receiving, forwarding, or delivering' and it is contended above (3) that this view is correct. However, in *Murphy's Case* (4), the King's Bench Division in Ireland by a majority disapproved of this decision, though the decision of the majority on other points rendered a decision on this question strictly unnecessary. *Gibson* J. (5) appears to base his decision that such a condition is within the section on the ground that 'where the contract of carriage is entire with one consideration, any provision in such contract restricting statutory liability is inoperative if it be not reasonable.' But this seems to beg the question, which is whether a condition relating to claims after delivery is within the statutory liability at all. But the judges who held that such a condition is within the section also held that it is unreasonable in the absence of an alternative, and, therefore, however the question is eventually decided, there is very little ground for supposing that if the condition be within the section it is valid in the absence of an alternative.

In *O'Keefe* v. *Great Western Railway Co.* (6), which was a claim arising out of injury to goods due to negligence in course of delivery, *Darling* J. held a condition of this kind to be reasonable. He noticed the argument that conditions of this kind are not required to be reasonable, but did not decide the question.

A condition which restricts the time for claims after delivery generally contains a clause similarly restricting claims for loss in the case of loss to a certain number of days *after delivery ought to have taken place*. Such a clause cannot be said to relate to something to occur after delivery, and the decision in *Murphy's Case* (7) that such a provision is within the section when the loss itself is due to negligence, is hardly open to criticism. . . . A consideration of the authorities leads to the conclusion that there is no case which decides that a condition is reasonable in the absence of an alternative which is not open to the criticism that it may well be explained on the ground that the condition is not within the section at all. It may, however, be well to point out that all that is required of an alternative contract is that it shall leave the company liable for all neglect or default for which it would be liable at common

(1) (1903) 2 I.R. 5.
(2) (1882) 10 L.R. Ir. 95.
(3) (1882) 10 L.R. Ir., at p. 148.
(4) (1903) 2 I.R. 5.
(5) (1903) 2 I.R., at p. 27.
(6) (1920) 90 L.J. K.B. 155; 123 L.T. 269.
(7) (1903) 2 I.R. 5.

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law." This seems to me to bring the matter to the point whether the Commissioner has offered a reasonable alternative. Now, in the present case, the consignment was at the Commissioner's risk, so that we are dealing with the alternative " owner's risk rates." In most of the cases, including *Wade's Case* (1), where the question might have been but was not raised, the clause in question formed part of an owner's risk contract. To my mind the unreasonableness of the clause before us is illustrated by the facts of the case. A lady consigning her luggage from the country loses it altogether. She has paid the higher rate in order to get the maximum protection. She knows nothing about the clause which is hidden away in a pamphlet. She makes prompt application and complaint, argues the matter out with stationmaster and porter and presses her claim. Then she finds it is refused because her expostulations have been oral and not in writing. These facts are hard enough, but in her case she did know the date when the goods arrived and ought to have been delivered. But in many cases it would be quite impossible for the consignee to predicate when goods ought to arrive. Even if the consignee were notified by the consignor of their despatch, floods, drought, fires, strikes, the over-burdening of transport, troop-carrying and all " the moving accidents by flood and field " would leave him with no idea if and when his fourteen days would begin to run. The clause contains no symptom of any intention to give notice on the part of the railway authorities of the arrival or non-arrival of the goods. In these circumstances, I am not convinced that the clause is just and reasonable. The Commissioner, however, tried to save the clause on the particular facts of the case by a claim that he had ceased to hold the articles as a common carrier when the son left with the first carload of articles. At that moment, says the Commissioner, his custody of the three suit cases left behind ceased to be that of a carrier and was converted into a common bailment of safe keeping. As an ordinary bailee, he would not be governed by the *Common Carriers Act* and could make what contract he liked. I cannot agree with this view of the facts. The Commissioner was under an obligation to deliver the goods to the consignee who, in her turn, was obliged to take possession of them in a reasonable manner. There was nothing unreasonable in taking delivery piecemeal and making two calls for them.

For these reasons, I am of opinion that the appeal should be dismissed and the order of the Supreme Court varied by entering judgment for the plaintiff in lieu of ordering a new trial.

(1) (1921) 1 K.B. 582.

STARKE J. Appeal by special leave from a judgment of the Supreme Court of New South Wales in Full Court.

The claim was for a sum of £91 or thereabouts for the loss of certain goods belonging to the respondent which had been delivered for carriage on the appellant's (the Commissioner's) railways and alternatively the respondent claimed that the goods were lost through the negligence of the appellant as a bailee.

The goods were delivered by the respondent to the appellant for conveyance from Coolah Railway Station to St. Leonards upon terms stated in a consignment note which she signed. It was in these terms so far as material:—"Received from" (respondent) "the undermentioned goods for conveyance from Coolah Railway Station consigned to St. Leonards subject to the provisions of the Government Railways Act 1912, as amended, to the provisions of the By-laws, Regulations and Conditions, published thereunder and to the terms and conditions of this Consignment Note. So far as regards those opposite which, in the column headed 'At whose risk,' I have so indicated, I require the goods to be carried at the risk of the Commissioner. As regards such of the goods to which the two rates above referred to apply and in respect of which I have not so directed, I require them to be carried at Owner's Risk Rate, in consideration whereof I undertake all risks of loading and unloading, and of the carriage of the same by railway and relieve the Commissioner from all liability for any damage, injury, misdelivery or delay whatsoever, and howsoever occasioned." The case has been conducted and argued on the basis that the goods were carried at the risk of the Commissioner.

The goods arrived at St. Leonards station but there were no facilities for handling goods there so they were forwarded to the Chatswood Railway Station where some of the goods were delivered to the respondent's son whom she sent to obtain delivery. And the son arranged to come back for the rest. He did so, but the goods shed was shut and he could not find the porter or any officer in charge of the shed.

The trial Judge was in doubt whether the suit cases were left inside the goods shed (as the respondent asserted) or were taken outside the shed by the son and left on a small platform (as the appellant asserted). The suit cases containing the respondent's goods in question here cannot be found and both parties regard them as lost. But the trial Judge held that the respondent was debarred from recovery on her claim by a by-law of the appellant or a condition of the contract that claims for detention or loss of goods tendered for conveyance would not be allowed unless lodged in writing with

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the Commissioner within fourteen days after the date when delivery was or should have been given.

The *Government Railways Act* 1912-1943, s. 33, provides that the Commissioner for Railways shall carry goods without negligence or delay and in respect of the carriage of goods that he should be a common carrier. A common carrier by land is, in the absence of exemption by statute, contract or notice or on the ground of fraud, liable at common law for all loss or damage to the goods which he carries for hire, the act of God, the Queen's public enemies and inherent vice alone excepted (see *Peek* v. *North Staffordshire Railway Co.* (1); *Shaw* v. *Great Western Railway Co.* (2)). But I see no reason why the Railways Commissioner could not, as at common law, restrict his liability by special contract or other means not repugnant to any statutory provision (cf. *Gregory* v. *Commonwealth Railways Commissioner* (3); *Carriers Act* 1830, 11 Geo. IV. and 1 Wm. IV., c. 68, s. 4).

But in New South Wales the *Common Carriers Act* 1902 (adapted from the *Carriers Act* 1830 and the *Railway and Canal Traffic Act* 1854, 17 & 18 Vict. c. 31) provided that no public notice or declaration should be deemed to limit or in any wise affect the liability at common law of any common carrier in respect of any goods to be carried by him and that a common carrier should not restrict his liability in regard to damage to goods arising from his neglect or default except by such conditions in the form of a written contract signed by the consignor as he could satisfy the Court or Judge before whom any question relating thereto should be tried were just and reasonable.

" The question of the justice and reasonableness of such conditions is a question of law to be determined by the Court or Judge alone upon the circumstances of each particular case " (see *Sutcliffe* v. *Great Western Railway Co.* (4)). The history of the law is traced in the judgment of *Wright* J. in *Shaw's Case* (2) and all the relevant cases may be found in the notes in *Chitty's Statutes*, 6th ed. (1913), to the *Carriers Act* 1830 and the *Railway and Canal Traffic Act* 1854.

The provisions of the *Government Railways Act* and the by-laws, regulations and conditions under which the goods in question here were carried must now be stated. In 1943, the Commissioner made a By-law No. 1002 which prescribed that the conditions and regulations under which goods would be conveyed were those set out in detail in the handbook issued by the Commissioner.

(1) (1863) 10 H.L.C. 473 [11 E.R. 1109].
(2) (1894) 1 Q.B. 373.
(3) (1941) 66 C.L.R. 50.
(4) (1910) 1 K.B. 478, at p. 500.

The *Government Railways (Amendment) Act* 1943, No. 43, provided that a by-law made in relation to any of the matters referred to in s. 64 (1) of the Act might adopt and incorporate by reference a handbook issued by the Commissioner setting out in detail the particular matters which were regulated, prescribed, fixed or otherwise dealt with by such by-law. The Commissioner issued a handbook pursuant to these provisions which contained, *inter alia*, the following conditions or regulations for the conveyance of goods :—

1. The charges, classification, conditions and regulations under which goods would be conveyed in accordance with By-law No. 1002 are those set forth in the handbook.

2. The Commissioner does not guarantee under any circumstances the arrival or delivery of any goods (perishable or otherwise) at any particular time, by any particular train or for any particular market, neither does he undertake to advise consignees of the arrival of goods or consignors that delivery had not been taken of the goods.

3. Claims for detention or loss or damage to goods, parcels traffic, live-stock, passengers and luggage tendered for conveyance by rail would not be allowed unless lodged in writing with the Commissioner within fourteen days after the date when delivery was or should have been given and no claim would be allowed if lodged after the removal from the railway premises of consignments or any portion thereof said to have been damaged and for which clear receipts are held.

The by-law incorporating these conditions or regulations was made or purported to have been made under the following powers contained in s. 64 of the *Government Railways Act* 1912-1943.

"The Commissioners may make by-laws for all or any of the subjects or matters hereinafter mentioned . . .

(1a) for regulating the terms and conditions upon which goods . . . will be collected or received or delivered, and for fixing charges for the collection or delivery thereof;

(1b) for regulating the terms and conditions upon which goods . . . will be collected, received, carried, or delivered, subject to the collection of moneys on the delivery thereof, and for fixing the rate or amount of commission to be charged for the collection of such moneys or to be deducted from moneys so collected . . .

(35) for prescribing any matter or thing not inconsistent with this Act which is necessary or convenient to be prescribed to give effect to any power, duty, or authority of the Commissioners under this or any other Act."

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This by-law, it was said, is a law binding upon all persons (cf. *Weir* v. *Victorian Railways Commissioners* (1)), though many provisions of the handbook appear to regulate contractual stipulations or matters of administration (cf. *Perth General Station Committee* v. *Ross* (2)). The matter is not of vital importance in the present case, for the by-laws, regulations and conditions published by the Commissioner in his handbook are incorporated in the consignment note as contractual stipulations.

But the by-laws, regulations and conditions, whether binding as law or as contractual stipulations upon which the Commissioner relies, must be lawfully made or imposed. The provisions must not be repugnant to any Act of Parliament, whether the *Government Railways Act*, the *Common Carriers Act* or other Act. A condition wholly exempting the Commissioner from liability for neglect or default would be repugnant to the provisions of the *Government Railways Act*, s. 33, and the *Common Carriers Act* 1902 and therefore bad (*Peek* v. *North Staffordshire Railway Co.* (3); *Weir* v. *Victorian Railways Commissioners* (4)). A condition that was not just and reasonable would be repugnant to the *Common Carriers Act* and therefore bad.

But the *Government Railways Act* confers wide powers for regulating the carriage of goods upon the railways. The duties imposed upon the Commissioner as a " common carrier " are subject to his power to make by-laws and contracts. The power to prescribe any matter or thing not inconsistent with the Act necessary or convenient to be prescribed to give effect to the power, duty or authority of the Commissioner under the *Government Railways Act* or any other Act does not authorize a condition exempting him from all liability for neglect or default but this and other powers which I have referred to, do, I think, authorize just and reasonable conditions, limiting, but not excluding, his liability (cf. *Sutcliffe* v. *Great Western Railway Co.* (5)).

There is no fixed criterion of what is just and reasonable: the extent and nature of the condition must be considered and all the surrounding circumstances. It is not intrinsically unjust nor unreasonable that claims for loss or damage to goods carried by the Commissioner should not be allowed unless lodged in writing within a fixed period of time. Such a condition enables the Commissioner to investigate the claims before evidence is lost or records are mislaid or the claims are stale (see and cf. *Simons* v. *Great Western*

(1) (1919) V.L.R., at p. 459.
(2) (1897) A.C. 479.
(3) (1863) 10 H.L.C. 473 [11 E.R. 1109].
(4) (1919) V.L.R. 454.
(5) (1910) 1 K.B. 478.

Railway Co. (1); *Lewis* v. *Great Western Railway Co.* (2); *O'Keefe* v. *Great Western Railway Co.* (3); *Murphy* v. *Midland Great Western Railway Co. of Ireland* (4); *Great Western Railway Co.* v. *Wills* (5)).

The critical question is whether fourteen days after the date when delivery was or should have been given is too limited or too uncertain a time, especially in view of the regulation that the Commissioner does not guarantee arrival of goods at any particular time and does not undertake to advise consignees of the arrival of their goods or consignors that delivery had not been taken.

The consignment note itself may fix the day of delivery and, if not, the Commissioner must deliver within a reasonable time having regard to the means at his disposal for forwarding goods (*Hales* v. *London & North Western Railway Co.* (6)). Prima facie a consignee knows the accustomed route and the time ordinarily required in forwarding goods on that route. But the special terms of the Commissioner's contract in this case that he does not guarantee under any circumstances the arrival or delivery of any goods at any particular time or for any particular market and that he does not undertake to advise consignees of the arrival of goods appears to me an unjust and unreasonable stipulation. It may be that a condition exonerating the Commissioner from the consequence of a loss of market would not be unreasonable (*White* v. *Great Western Railway Co.* (7); *Beal* v. *South Devon Railway Co.* (8); *Lord* v. *Midland Railway Co.* (9)). But to exclude an implied liability to deliver goods carried by the Commissioner within a reasonable time is unjust and unreasonable (cf. *Hughes* v. *Great Western Railway Co.* (10)) and so, I think, is the stipulation that the Commissioner does not undertake to advise consignees of the arrival of goods (cf. *Bourne* v. *Gatliffe* (11)). These stipulations react upon the clause requiring claims to be lodged in writing within fourteen days after the date when delivery was given or should have been given. And the onus is upon the Commissioner to show that the stipulations of the consignment note are just and reasonable (*Peek* v. *North Staffordshire Railway Co.* (12)); not, I suppose, in the abstract but in relation to the particular contract of carriage or consignment which has been made. It is true in this case that the consignee might have given notice of claim within

(1) (1856) 18 C.B. 805 [139 E.R. 1588].
(2) (1860) 5 H. & N. 867 [157 E.R. 1427].
(3) (1920) 90 L.J. K.B. 155.
(4) (1903) 2 I.R. 5.
(5) (1917) A.C. 148.
(6) (1863) 4 B. & S. 66 [122 E.R. 384].
(7) (1857) 26 L.J. C.P. 158.
(8) (1864) 3 H. & C. 337 [159 E.R. 560]: 29 L.J. Ex. 441.
(9) (1867) L.R. 2 C.P. 339.
(10) (1854) 14 C.B. 637 [139 E.R. 262].
(11) (1844) 7 Man. & G. 850 [135 E.R. 345].
(12) (1863) 10 H.L.C. 473 [11 E.R. 1109].

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fourteen days after the suit cases disappeared but the justice and reasonableness of the stipulation cannot be justified by that circumstance: it must be a just and reasonable condition or stipulation of the contract, in all the circumstances of the case, when the contract was made. And here neither the consignee nor any one else could predicate when delivery of the goods should be given or with any certainty when her notice of claim should be given and she is not entitled according to the stipulation to any notice of arrival.

In my judgment, the Commissioner has failed to make out in the circumstances of the case that the condition upon which he relies is just and reasonable.

It is unnecessary in this view to traverse all the arguments addressed to this Court. But it was said in the Supreme Court that a by-law when approved and gazetted pursuant to s. 65 of the *Government Railways Act* 1912-1943 takes effect to the extent only that thereafter it becomes operative so as to make persons liable for an alleged breach if at the relevant time the substance of the by-law was posted up pursuant to ss. 66 and 67. These latter sections and s. 136 have been adapted from the provisions of s. 110 of the *Railways Clauses Consolidation Act* 1845. But it has never been held under the *Railways Clauses Consolidation Act* that the posting-up of by-laws and regulations on the front or other conspicuous part of every station belonging to the railway company was necessary to make by-laws operative. Thus in *Motteram* v. *Eastern Counties Railway Co.* (1) it was held that proof that by-laws were published at the station where a passenger got in or out was sufficient proof of publication upon which to convict him of an offence. So the effect of ss. 66 and 67 of the *Government Railways Act* 1912-1943 is not to invalidate or prevent the operation of a by-law but to give public notice thereof.

The production of the *Gazette* containing the by-law is evidence that the by-law was duly made and is in force, but it does not appear to me that the publication of the handbook pursuant to the Act No. 43 of 1943 wholly abrogates the necessity of exhibiting by-laws pursuant to ss. 66 and 67. The matter is of no importance if the Commissioner enters into signed contracts for the carriage of goods (as in this case) but it is of importance in cases in which the Commissioner relies upon his by-laws for the purpose of ascertaining the conditions of carriage of goods or in the case of prosecutions. In such cases, the doctrine of *Motteram's Case* (1) is convenient and open on the words of the sections in the *Government Railways Act* 1912-1943, that publication of the by-law or the relevant part thereof is

(1) (1859) 7 C.B. (N.S.) 58 [141 E.R. 735].

sufficiently proved if posted-up at the station or place where a transaction is effected or an offence committed and that it is not necessary to prove further that copies were posted-up at every station &c. belonging to the Commissioner.

Again, the Supreme Court relied upon the rule that in construing special contracts words of general exception from liability will not (unless the words are clear) relieve a carrier from liability for negligence. It followed, said the Court, the Commissioner being a common carrier, that the condition 27 (that is the condition requiring claims to be lodged in writing with the Commissioner within fourteen days after the date when delivery was or should have been given) cannot be construed as applicable to loss by negligence at all. The rule is well enough settled, but it is a rule of construction only and any stipulation must be construed in relation to the subject matter of the contract and the context in which it is found. Clause 27 provides for notice of claims for detention or loss or damage to goods. The clause does not relieve the Commissioner of liability or risks which he has undertaken but only requires notice of claims so that they may be investigated. Prima facie, in this setting, the words relate to all claims of the nature mentioned in the clause and the words used are large enough to bear that construction. And there is every reason for so construing them, for claims against the Commissioner for loss or damage to goods by reason of the negligence of his servants necessarily constitute a considerable proportion of claims made against him. It is improbable that claims based upon negligence are excluded from the operation of the clause and other claims only included.

The construction of clause 27 adopted by the Supreme Court cannot be sustained.

The contention of the Commissioner that he was in the position of an ordinary bailee of goods and only liable (if at all) as a warehouseman cannot be supported. He was not discharged from his liability as a carrier until a reasonable time elapsed after the consignee had notice of the arrival of the goods. She was not guilty of any delay in coming for the goods and was in the course of collecting them when they disappeared (*Bourne* v. *Gatliffe* (1); *Chapman* v. *Great Western Railway Co.* (2)).

The further contention of the Commissioner that he delivered the goods to the consignee cannot be sustained in view of the conflict of evidence.

Therefore the appeal of the Commissioner fails and should be dismissed and, in accordance with the order giving special leave to appeal, so much of the judgment of the Supreme Court of 6th September

(1) (1844) 7 Man. & G. 850 [135 E.R. 345]. (2) (1880) 5 Q.B.D. 278.

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1945 as directs a new trial of the action and that the costs of the first trial be costs in the new trial of the action should be set aside and judgment entered for the respondent here, the consignee, for the sum of £90 7s. with costs of the action including the first trial and of this appeal.

DIXON J. The Commissioner for Railways appeals by special leave from an order of the Supreme Court of New South Wales setting aside a decision of the District Court in his favour and ordering a new trial of the action.

The action was brought against the Commissioner by the respondent for the loss of three suit cases and their contents valued in all at £90 7s. The suit cases and two other articles had been received as one consignment by the Commissioner at Coolah for carriage to St. Leonards, North Sydney.

They had been consigned at the rates, and consequently upon the conditions, called " Commissioner's risk " and not those appropriate to " owner's risk."

Because there were goods sheds at Chatswood but not at St. Leonards, the consignment was sent on to the former place. They arrived there just before Easter and, on behalf of the respondent, who may be taken to be the consignor and consignee, her son and daughter attended to take delivery on the afternoon of Thursday before Good Friday. They had a small car, into which they were unable to load the whole consignment. They took away the other articles and left the three suit cases. They had only a short journey to make and were to come back for the suit cases. However, the goods shed was closed before their return and did not reopen until after the holidays. In the meantime, the suit cases had disappeared.

There is some dispute between the goods porter and the respondent's son and daughter as to precisely what occurred between them when the three suit cases were left behind and as to when the goods shed closed. But, having regard to the terms on which special leave was granted, the respondent is in the same position as if findings had been made in her favour where there is a dispute of fact. We should, I think, proceed upon the footing that the lost articles were left in the shed in the custody and control of the goods porter and disappeared owing to the neglect or default of the servants of the Commissioner. I think that we should also treat the Commissioner as having been still under his obligations as a carrier in respect of the suit cases in spite of the tender by the porter of delivery of the whole consignment. The removal by instalments, so to speak, was not unreasonable and, having regard to the fact that the goods porter

knew the son and daughter were to return immediately for the suit cases and to the fact that they did so return, I do not think that we should regard the Commissioner as having discharged his duties as carrier and, in respect of the short interval contemplated, as having assumed the character of simple bailee of the goods.

In the District Court, however, the respondent's case failed because she had not complied with the requirements of the by-law or condition which makes it necessary that claims for loss of goods shall be made in writing within fourteen days of the time when delivery should have been made. Though she had claimed the goods without delay after the close of the holidays and complained to the station master in respect of their loss, she did not in fact lodge a written claim.

In the Supreme Court, the decision of the District Court was reversed on three grounds, any one of which would have been sufficient to extricate the respondent from the operation of the by-law, viz.: (1) That under ss. 66 and 67 of the *Government Railways Act* 1912, as amended, it was necessary for the defendant to prove that the substance of the by-law was painted upon or affixed to boards on railway stations before he could rely upon it as a regulation governing his liability, and no such proof was offered.

(2) That, inasmuch as the Commissioner is declared by s. 33 to be a common carrier and the by-law-making power contained in s. 64 (35) authorizes only by-laws not inconsistent with the Act, a by-law cannot exonerate the Commissioner from any of the legal consequences flowing from his being a common carrier; a by-law could not abridge the time for suit and this by-law could not restrict the obligations of the Commissioner in the manner it provides.

(3) That the particular clause or condition could not be construed as applicable to loss by negligence, but, apparently, should be confined to liability apart from fault.

The Commissioner regarded these conclusions as matters of much importance to him because of their effect upon his power to limit his liability at law as a common carrier and also upon the validity, interpretation and enforcement of his by-laws. He, accordingly, sought special leave to appeal, which was granted, but upon terms, *inter alia*, that, if his appeal were dismissed, he should consent to judgment in the action for the plaintiff for the amount claimed.

The question for decision is, therefore, whether for the foregoing or any other reasons the by-law requiring that claims should be made in writing and within a limited time does not operate to defeat the respondent's prima-facie cause of action.

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It is convenient to deal first with the question whether proof that the by-law was properly exhibited at railway stations &c. is indispensable to a plea depending upon it.

The view that such proof is necessary rests upon ss. 66 and 67. Section 65, which has a much more recent legislative origin, provides that by-laws shall take effect from three clear days after the date of publication in the *Gazette*, or from a later date to be specified in such by-laws. Section 66 says that the Commissioner shall cause the substance of such by-laws and a list of any tolls, fares &c. imposed thereby to be painted upon or printed and affixed to boards in large and legible characters and shall cause such boards to be exhibited in some conspicuous place in or upon every station, pier, jetty, wharf or other place where such tolls &c. are payable and, according to the nature and character of such by-laws respectively, shall cause every such board from time to time to be renewed if destroyed or defaced.

This provision has its origin in s. 110 of the *Railways Clauses Consolidation Act* 1845 of the United Kingdom. That section, however, concludes : " and no penalty imposed by any such by law shall be recoverable unless the same shall have been published and kept published in manner aforesaid." It is an important consideration that this portion of the enactment no longer forms part of the New South Wales section. Moreover, the Act includes a different provision on the same point in relation to prosecutions : See s. 136.

In England the operation of the provision proved a source of difficulty. In *Motteram* v. *Eastern Counties Railway Co.* (1), it was contended that, upon a proceeding to enforce a by-law, the railway company which had adopted it was bound to prove that the whole by-law had been exhibited in manner prescribed by the section at every railway station and at every wharf belonging to the company. The majority of the Court, however, rejected this contention and by interpretation confined the requirements of the provision within more practicable bounds. It was held that provisions the operation of which might concern wharves should be posted on wharves, and those the operation of which might concern the railway and the stations should be posted at the stations. It was further held that, upon a prosecution, it was enough to show that the by-law had been exhibited at the stations or wharves actually involved in the occurrence forming the subject of the proceedings. Statutory effect appears to have been given in New South Wales to the latter part of the decision by the enactment of what is now s. 67 (1) of the *Government Railways Act* (N.S.W.). Sub-section (2), however, of s. 67 provides that the production of the *Gazette* containing such by-law

(1) (1859) 7 C.B. (N.S.) 58 [141 E.R. 735].

shall be evidence that such by-law has been duly made and confirmed and that it is still in force.

It is not easy to reconcile the provisions of s. 65, s. 66 and s. 67 (1) and (2), but I think that proof of the due exhibition of a by-law is not indispensable. When the statement in s. 66 (ii) that, within the stated time after gazettal, a by-law shall take effect is compared with sub-s. (2) of s. 67 making the production of the *Gazette* evidence that the by-law is still in force and the omission is considered of the provision originating in the last part of s. 10 of the English Act by which no penalty can be recovered unless the by-law shall have been published and kept published as prescribed, then I think it is difficult to avoid the conclusion that, under the New South Wales provisions, proof that the by-law has been exhibited at any railway stations or wharves is no longer required. Some confirmation for this conclusion may, perhaps, be found in the amendment made to ss. 65 and 67 by Act No. 43 of 1943 (N.S.W.) which adds to those sections provisions authorizing the adoption and incorporation by by-law of a handbook or pamphlet, which need not be gazetted and may be proved by the production of a copy bearing the Commissioner's seal. It seems a sure enough inference that the handbook was not meant to be reproduced on boards, &c. at every railway station. This power of adopting a handbook of conditions has in a way its relevance to the ground upon which the Supreme Court decided that, in any case, the Commissioner's power to make by-laws did not extend to limiting the time and prescribing the manner of making a claim. That ground is that the statute makes the Commissioner a common carrier and the responsibilities and liabilities which flow from that status cannot be lessened or impaired by any exercise of his by-law-making power.

One of the qualifications or conditions to the legislative restriction of a common carrier's right to contract out of his common law liabilities is his statutory authority to impose just and reasonable conditions by special contract signed by the party affected or the person delivering the goods to the Commissioner for carriage: s. 9 (a) and (c) of the *Common Carriers Act* 1902 (N.S.W.), a provision confined in England to railway carriers.

Now, when the actual by-law in question is looked at, it will be seen that all it purports to do is to prescribe that the rates and charges for the carriage of merchandise and live stock by goods and mixed trains and the classifications, conditions and regulations under which they will be conveyed shall be those set out in detail in the handbook issued by the Commissioner and called "Merchandise and Live Stock Rates." The by-law, therefore, does not assume to do more

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than prescribe the terms upon which goods and live stock may be consigned.

The case before us is not one in which no consignment note was signed, though doubtless such cases may be expected to occur. On the bare reading by itself of par. (a) of s. 9 of the *Common Carriers Act*, it might seem that, if the conditions were fixed and were just and reasonable, that would be enough. But, under the original provision from which s. 9 is derived, it was finally decided, after a great deal of controversy, that the proviso which in the New South Wales statute takes the form of par. (c) operated to require that the condition should be expressed in a signed special contract: *Peek* v. *North Staffordshire Railway Co.* (1). It is unnecessary for us to consider whether the Commissioner's by-law-making power would suffice. For it appears clear enough to me that there is nothing incompatible with the legal situation of a common carrier in establishing conditions under which goods will be received for carriage, provided that the conditions are just and reasonable. For a common carrier is allowed by law to impose such conditions. If, before the conditions so established can affect a given consignor or consignee, a signed note is indispensable, then it may be necessary to comply with that additional formality. But, in the present case, the respondent's signature appears on the consignment note.

As for the affirmative power to make by-laws, it does seem remarkable that, among the long enumeration of subjects in s. 64, none deals specifically with the regulation of the terms and conditions for the carriage of goods and live stock as a general case. But the power given by clause 35 to prescribe any matter or thing, not inconsistent with the Act, which is necessary or convenient to be prescribed to give effect to any power, duty or authority of the Commissioner, appears to me enough to support the making of a by-law establishing terms and conditions on which goods will be received, provided that they are found just and reasonable if they are restrictive of so much of a common carrier's obligations as concern loss or damage in receiving, forwarding and delivering due to neglect or default: s. 9.

The consignment note signed by the respondent said that the goods had been received subject to the provisions of the by-laws, regulations and conditions published thereunder. Doubtless it must be a valid by-law, a valid regulation, or a valid condition; otherwise such a reference would not be enough to incorporate it into the contract. But I think that if the condition now in question is just and

(1) (1863) 10 H.L.C. 472 [11 E.R. 1109 Dom. Proc.]; (1860) El., Bl. & El. 986 [120 E.R. 777, Cam. Scacc.]; (1858) El., Bl. & El. 958 [120 E.R. 766 B.R.].

reasonable, then, in adopting it and prescribing it as one of the conditions upon which goods are received for carriage, the Commissioner did not go beyond his power or attempt to impose an unlawful term upon consignors.

The condition which we are called upon to consider deals actually with three distinct matters. It deals with the necessity of making a claim in writing within a limited time for damage to or detention of goods of which the consignee receives delivery. It deals with the necessity of making a claim in writing within a limited time for the loss of goods which are not delivered. In the third place, it deals with the disallowance of claims for damage to goods removed if a clear receipt has been given and the claim is made after removal. It is the second of these matters that must be considered in this case. The condition provides that claims for loss of goods and parcels traffic, live stock and passengers' luggage tendered for conveyance by rail will not be allowed unless lodged in writing with the Commissioner within fourteen days after the date when delivery should have been made.

In the Supreme Court, a construction was placed upon this provision which confined its application to claims for loss of goods not attributable to negligence on the part of the Commissioner's servants. This is the third ground on which the decision appealed from was based. It is an artificial construction of the clause, adopted as the result of the presumption against treating general expressions excluding liability as covering negligence, where the liability imposed by law on the party seeking protection is for causes not implying negligence as well as for negligence. Clear and definite words are required to protect a carrier or bailee from the consequences of negligence. A common carrier has two sorts of liability: his liability as an insurer and his liability for the acts and negligence of his servants. Prima facie, in protective clauses, it is the more onerous sort of liability, namely for things which he or his servants cannot help, and not for things which he or his servants can help, against which he is endeavouring to secure himself by excepting losses that can be covered: Cf. per *Sankey* J. in *Turner* v. *Civil Service Supply Association Ltd.* (1) adopting expressions from the argument of Lord *Sumner* as counsel: See *Martin* v. *Great Indian Peninsular Railway Co.* (2); *Price & Co.* v. *Union Lighterage Co.* (3); *Rutter* v. *Palmer* (4); *Fagan* v. *Green & Edwards Ltd.* (5); *Alderslade* v. *Hendon Laundry Ltd.* (6). But the language of any protective clause is

(1) (1926) 1 K.B. 50, at p. 54.
(2) (1867) L.R. 3 Ex. 9.
(3) (1904) 1 K.B. 412.
(4) (1922) 2 K.B. 87.
(5) (1926) 1 K.B. 102.
(6) (1945) 1 K.B. 189.

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considered sufficiently clear to exclude liability for losses by negligence if the clause is expressed to exclude them whatever the cause, or whatever the description: *Chippendale* v. *Lancashire and Yorkshire Railway Co.* (1); *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Brown* (2).

In the present case, the provision to be construed is not concerned with the assumption or exclusion of liability, but with promptness of claim. Its purpose is to insure that the Commissioner shall have an opportunity of ascertaining the facts and perhaps of recovering the article. For a claim that is late he ceases to be liable. But the existence of his liability until the stipulated time has expired and until there has been a failure to claim in writing is recognized. A distinction between claims founded on negligence and claims founded on the general liability of a common carrier is quite foreign to the purpose of such a provision. The provision has nothing to do with the kinds of liability the carrier is prepared to undertake and the kinds he desires to exclude. It is concerned only with the time allowed for asserting that a liability has been incurred.

In my opinion, upon the face of the clause, it clearly applies to all claims, without regard to the basis of liability upon which a claim may be found to rest when it has been made and the facts are examined. I, therefore, think that the respondent's claim falls within the meaning of the clause.

Upon the foregoing views the matter is, in my opinion, reduced to the question whether the provision is just and reasonable. Under s. 9 (a) it is for the Court to decide that a special condition is or is not just and reasonable.

The section begins by fixing upon a common carrier a statutory liability from which he can contract out only in accordance with the provisoes. But the statutory liability is much narrower than the common law liability of a public carrier. It is for loss of or any injury done to animals or goods in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of the carrier or his servants. In respect of any liability outside that description, the carrier is free to make any special contract.

It has been suggested that the requirement of notice of claim relates to a matter occurring after delivery has taken place or after it has been made impossible by loss of the goods, and, therefore, that such a requirement falls outside the section altogether (*Moore* v. *Great Northern Railway of Ireland* (3)). But this view appears to overlook the significance of the fact that it is the loss or injury which must be,

(1) (1851) 21 L.J. Q.B. 22; 91 R.R. 844.
(2) (1883) 8 App. Cas. 703.
(3) (1882) 10 L.R. Ir. 95.

i.e. take place, in the receiving, forwarding or delivering in order that the section shall apply, not the act amounting to a fulfilment of the special condition. It is true that, in par. (a), the conditions which a carrier may impose are described as "conditions with respect to the necessary forwarding and delivering" and that, in par. (c), the special contract which must be in writing is described as one "respecting the receiving forwarding and delivering." But these words are capable of covering the consequences of loss or damage arising from the receiving, forwarding or delivering and, in any case, they could not operate to narrow the application of the main provision fixing the prima-facie liability. The suggestion has been rejected in a later case in Ireland (*Murphy* v. *Midland Great Western Railway Co. of Ireland* (1), *Wright* and *Gibson* JJ.; *O'Brien* L.C.J. diss.). In my opinion the suggested view is unsound.

As we are dealing here with a case where neglect or default may be inferred and as we are proceeding on the basis that the inference is made, it follows that the liability of the Commissioner is imposed by the principal provision in s. 9. In order validly to qualify that liability the condition requiring notice in writing within fourteen days must satisfy the provisoes expressed in pars. (a) and (c): *Peek's Case* (2). It is for that reason that I regard the matter as coming down to the question whether the condition is just and reasonable. This question has been made difficult by the course of authority. Before *Peek's Case* (2) the view was prevalent that under s. 7 of the *Railway and Canal Traffic Act* 1854, from which s. 9 of the *Common Carriers Act* 1902 (N.S.W.) is derived, a condition might be imposed by a railway company upon consignors independently of special agreement and, if just and reasonable, it would be effectual and that, on the other hand, it was open to a railway company to make a special contract with a consignor and, whether just and reasonable or not, such a special contract would be valid. In addition, before *Peek's Case* (2) there was little understanding of the almost decisive importance which, in considering whether special conditions are just and reasonable, ought to be attached to a standing offer of the railway company to carry goods at a higher though not exorbitant freight rate on terms implying the acceptance of practically the full liability of a common carrier. In both respects *Peek's Case* (2) placed the law upon its present footing. It was finally decided in 1863. In 1860, however, in *Lewis* v. *Great Western Railway Co.* (3) a condition very like that now in question was

(1) (1903) 2 I.R. 5.
(2) (1863) 10 H.L.C. 473 [11 E.R. 1109].
(3) (1860) 5 H. & N. 867 [157 E.R. 1427]; 29 L.J. Ex. 425.

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upheld as just and reasonable. The condition provided that no claim for deficiency, damage or detention will be allowed unless made within three days after the delivery of the goods; nor for loss unless made within seven days of the time they should have been delivered. *Pollock* C.B. said:—"The Company wishing to guard against any allegation of neglect in the delivery of goods confided to them, require that when the goods are delivered they shall be promptly examined, and complaint at once made if there is occasion for it. Such a condition is perfectly reasonable. The law allows persons to make their own bargains in matters of this sort" (1). *Channell* B. said no more than that he entertained a strong opinion that the condition was reasonable. *Bramwell* B. said that he was clearly of opinion that the condition was reasonable; that he thought seven days was ample time for sending in a claim of such a nature, and, if not, the party should have objected at the time when the contract was made.

In *Simons* v. *Great Western Railway Co.* (2) an inclination on the part of the Court of Common Pleas seems to be shown to the same view. In *Garton* v. *Bristol and Exeter Railway Co.* (3), speaking of *Simons' Case* (4), *Cockburn* C.J. said during the argument:—"The Court of Common Pleas there, however, seem also to intimate an opinion on a point which it was not necessary to decide; namely, that the condition that 'no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time they should be delivered,' is just and reasonable within the statute—a proposition which, with great deference to that Court, I consider very questionable. Three days is a very short time. Perhaps the consignee may not open the package until the fourth day, when he finds the goods damaged through the negligence of the Company's servants; and the consignee who does not receive goods may not know that they have been sent to him, while the consignor may not know that they have not reached their destination."

The decision in *Lewis* v. *Great Western Railway Co.* (5) was relied upon in the United States Supreme Court in *Southern Express Co.* v. *Caldwell* (6) and in *Queen of the Pacific* (7).

(1) (1860) 5 H. & N., at p. 873 [157 E.R., at p. 1430].
(2) (1856) 18 C.B., at pp. 809, 821, 824 [139 E.R., at pp. 1590, 1594, 1596].
(3) (1861) 1 B. & S. 112, at pp. 146, 147 [121 E.R. 656, at p. 670]; 30 L.J. Q.B. 273.
(4) (1856) 18 C.B. 805 [139 E.R. 1588].
(5) (1860) 5 H. & N. 867 [157 E.R. 1427].
(6) (1874) 21 Wall. 264, at p. 270 [22 Law. Ed. 556, at p. 559].
(7) (1901) 180 U.S. 49, at p. 54 [45 Law. Ed. 419, at p. 421].

But in *Murphy* v. *Midland Great Western Railway Co. of Ireland* (1) the case was treated as of little or no authority because it was decided before *Peek's Case* (2) and ignored the need of an offer by the railway company of an alternative rate and of a contract to carry at "company's risk." The Court in Ireland held a similar condition to be unreasonable and void in the absence of an alternative imposing the fuller liability on the company at a higher rate.

However, in *O'Keefe* v. *Great Western Railway Co.* (3), where in the process of actual delivery the company's servants broke a cask of wine and lost the wine, *Darling* J. held reasonable a clause excluding liability for loss from or damage or delay to a consignment or any part thereof unless a claim be made in writing within three days after the termination of the carriage of the consignment, and excluding liability for non-delivery of a consignment unless a claim be made in writing within fourteen days after its receipt by the company. As a result, he decided against the claim of the consignee.

In *Great Western Railway Co.* v. *Wills* (4) the only matter before the House of Lords was the construction of a similar clause in an owner's risk consignment note, the question being whether the facts disclosed a case of non-delivery for which the period was fourteen days, or of loss or damage for which three days was the limit. Lord *Parmoor* pointed out (5) that no question arose on the appeal whether the terms of the owner's risk consignment note were just and reasonable. But speaking of the condition he said :—" Condition 3 is a rule of procedure which limits the time within which a claim must be made in respect of goods for loss or damage during transit. It must be made within three days after delivery of the goods in respect of which the claim is made. Take the instance of a claim for loss from short delivery. It must be made within three days after the short delivery of the goods in respect of which it is made, this being the time at which the short delivery would come to the notice of the trader. It is not necessary in the present case to consider when the short delivery was complete, but the condition provides that delivery is to be considered complete at the termination of the transit as specified in condition 6. Condition 3 further provides ' or in the case of non-delivery of any package or consignment within fourteen days after despatch.' A provision of this character is obviously necessary where there has been a non-delivery of a package

(1) (1903) 2 I.R. 5.
(2) (1863) 10 H.L.C. 473 [11 E.R. 1109].
(3) (1920) 123 L.T. 269 ; 90 L.J. K.B. 155.
(4) (1917) A.C. 148.
(5) (1917) A.C., at p. 165.

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or consignment, or, in other words, where there has been a loss of the whole package or consignment " (1).

Further, in *Leonard* v. *Great Northern Railway Co.* (2), a condition was held reasonable that claims in respect of carriage of goods must be made within three days after delivery.

The considerations which tell against the justice and reasonableness of the limitation in this case are as follows :

(1) It requires the claim to be in writing and treats an oral claim as useless, even though it had been entertained and investigated by the Commissioner. Many consignees, expecting the arrival of articles despatched by railway, would be likely to make inquiries and then complain at the railway station, but it would not occur to them to reduce a claim to writing, until the station staff had rejected it.

(2) There is no definite time from which the period of fourteen days limited in the case of loss in transit begins to run. The long distances over which goods may be conveyed and the variable conditions affecting railway transportation in Australia make it very difficult for a consignee to make up his mind when he should treat failure of the goods to arrive as a reason for inferring their loss. The consignors may not advise the consignees promptly or at all of the despatch of the goods. Much of the goods traffic carried is for consignors and consignees outside the course of routine and organized business. The difficulty of being sure either of the meaning or the application of the expression " fourteen days after that date when delivery should have been given " led the respondent to contend that the provision was void for uncertainty, at all events if considered as a by-law. That is an extreme contention, but the difficulty has a real bearing on the reasonableness and justice of the clause in the conditions prevailing in Australia.

(3) The necessity of giving notice in writing is a thing of which many consignees would be unaware. The voluminous pamphlet in which it is contained would be in the hands of relatively few and of these not many could be expected to discover the clause. Non-fulfilment of the condition is fatal, and the ordinary man would not give notice in writing instinctively unless he knew that he was required to do so.

(4) The condition forms part of the Commissioner's risk contract. It is not part of the protection for which the Commissioner bargains in consideration of giving a reduced rate. There is no alternative offered. The consignor paying the higher rate in order to secure the greatest protection he can for the goods can obtain no better contract and finds that the Commissioner escapes liability unless notice

(1) (1917) A.C., at p. 168. (2) (1912) 46 Irish L.T. 220.

in writing is given within fourteen days of a hypothetically ascertained date. The fact that the clause forms part of the Commissioner's risk conditions is perhaps the most important consideration. It was for such a reason that it was held bad by the King's Bench Division in Ireland in *Murphy's Case* (1). It does not appear whether an alternative rate was available in *Lewis' Case* (2); but in *Murphy's Case* (1) *Gibson* J. assumed that there it was not so (3). At which risk the goods were carried is not shown by the reports of *O'Keefe's Case* (4).

A legitimate matter to take into account is how the question of notice of claim has been treated under s. 43 of the *Railways Act* 1921 of the United Kingdom, which provides for the settlement by the Railway Rates Tribunal of the terms and conditions upon which merchandise shall be carried. Alike for "company's risk" and "owner's risk" rates, the standard terms and conditions settled by that tribunal and established by S. R. & O. 1927 No. 1009 provide that in case of non-delivery the company must be advised in writing within fourteen days after the consignment was received by the company and that within twenty-eight days a written claim must be lodged. But, if there is a non-compliance and proof is made to the tribunal that it was not reasonably possible for the person sending the goods, or desiring to receive the goods, to advise the company in writing or make his claim in writing within the times limited and that such advice or claim was given within a reasonable time, the tribunal may, if it considers it equitable, declare that the condition shall not be a bar.

This condition is more favourable to the carrier than clause 6 of the Hague Rules, scheduled to the *Sea-Carriage of Goods Act* 1924, which makes failure to give notice in writing of loss or damage before removal of the goods prima-facie evidence only of delivery by the shipowner in accordance with the bill of lading.

The considerations which make it reasonable from the point of view of a carrier of goods by rail or sea that he should have prompt notice in a recorded form of loss or damage to goods are sufficiently obvious and need no elaboration.

The question really is whether the Commissioner has demanded a greater amount or a more inflexible form of protection than is just and reasonable as between himself and the consignor or consignee.

On the whole, I think that the foregoing considerations show that his clause is too stringent and too rigid and, therefore, that he cannot establish that it is just and reasonable.

(1) (1903) 2 I.R. 5.
(2) (1860) 5 H. & N. 867 [157 E.R. 1427].
(3) (1903) 2 I.R., at p. 19.
(4) (1920) 90 L.J. K.B. 155; 123 L.T. 269.

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Accordingly, I think the appeal should be dismissed.

To give effect to the consent or undertaking embodied in the order granting special leave, it appears necessary to vary the order of the Supreme Court by substituting, for the order of a new trial, the entry of judgment for the plaintiff for £90 7s. 0d. with costs.

McTIERNAN J. In my opinion, the appeal should be dismissed. I agree with the conclusion and reasons of my brother *Dixon*.

WILLIAMS J. The events to which this appeal by special leave is a sequel commenced by the respondent consigning certain goods by rail from Coolah Station to St. Leonards Station, North Sydney, on 31st March 1944. As there was no goods shed at St. Leonards, the goods were sent to Chatswood, and the respondent was notified that they were ready for delivery there. On 6th April the respondent sent her son and daughter in a small car to Chatswood to take delivery of the goods, but they were too bulky to be all loaded in the car at the same time, so that the son and daughter took some of the packages, leaving three suit cases behind. There is a conflict of evidence whether these suit cases were left just inside the goods shed or on the platform outside, the evidence of the son and daughter being to the former, and that of the porter in charge of the shed to the latter effect. The son said that the porter told him that it would be alright if he came back for them and that he would be there. The son returned later on the same day to get the three suit cases but the shed was closed. The Easter week-end intervened, and when the respondent returned on the Tuesday the suit cases had disappeared. They have not since been found.

About the end of June 1944, the respondent made a claim in writing for the suit cases and their contents as having been lost in transit by rail from Coolah to Chatswood, and on 13th July 1944 the appellant replied denying liability on the ground that the whole consignment had been handed to the son but he had driven away with part only, leaving the three suit cases unprotected on the platform. The respondent then sued the appellant in the District Court for £90 7s., the value of the goods lost. The counts were for negligence as a common carrier or, alternatively, for negligence as a bailee of the goods. The learned District Court Judge said that he was left in doubt whether the goods were left inside or outside the shed but found for the appellant on the grounds that if he was a common carrier he was protected by a condition of the contract of carriage, and if he was a bailee there was no evidence that the porter had any

authority to hold the three suit cases as bailee on his behalf for the respondent.

The goods were consigned under a consignment note signed by the respondent which provided that they were received for conveyance subject to the provisions of the *Government Railways Act* 1912 as amended, to the provisions of the by-laws, regulations and conditions, published thereunder, and to the terms and conditions of the consignment note. The relevant by-law is No. 1002 which was published in the New South Wales *Government Gazette* on 24th December 1943, and is headed " Merchandise and Live Stock Rates &c." and provides that :—" From the first day of January 1944, the several Rates and Charges for the carriage of Merchandise and Live Stock by Goods and Mixed Trains over the New South Wales Government Railways and the Classification, Conditions and Regulations under which such Goods and Live Stock will be conveyed will be those set out in detail in the handbook issued by the Commissioner for Railways entitled ' Merchandise and Live Stock Rates. To take effect from 1st January 1944,' and from the said day all previous By-laws, Rates, Charges, Classifications, Conditions and Regulations conflicting therewith are hereby repealed." The *Gazette* states that this by-law was approved by the Governor in Council on 22nd day of December 1943. One of the conditions referred to in this by-law is condition 27, which is included in the " General Conditions for the Carriage of Merchandise " and reads :—" Claims. Claims for detention or loss of, or damage to Goods and Parcels Traffic, Live-Stock, Passengers' Luggage tendered for conveyance by rail, will not be allowed unless lodged in writing with the Commissioner within fourteen days after the date when delivery was or should have been given ; and no claims will be allowed if lodged after removal from the railway premises of consignments or any portion thereof said to have been damaged, and for which clear receipts are held."

The respondent appealed to the Full Supreme Court of New South Wales, which ordered that the verdict and judgment given and entered in the District Court be set aside, and that a new trial be had. The Full Court held that the condition was not a defence because it would not operate as a by-law until it was posted in accordance with s. 66 of the *Government Railways Act* 1912 as amended, and no evidence had been given on behalf of the Commissioner of such posting, and that, while it must be regarded as a condition embodied in the contract, it did not apply to limit the liability of the appellant in respect of negligence because negligence was not expressly mentioned.

Section 64 of the *Government Railways Act* authorizes the appellant to make by-laws, and s. 65 provides that such by-laws shall (i) if

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approved by the Governor be published in the *Gazette*; (ii) take effect from three clear days after the date of publication or from a later date to be specified in such by-laws; and (iii) be laid before both Houses of Parliament as therein mentioned, and if either House passes a resolution within fifteen sitting days disallowing any by-law or part thereof, such by-law or part thereof shall therefrom cease to have effect.

The purpose of s. 65 is, to my mind, to define with particularity the period of time (namely three days after its publication in the *Gazette*) when a by-law comes into force, and the period of time (namely when it is disallowed by either House) when it ceases to have effect. Section 66 requires the substance of by-laws and a list of tolls, fares and charges to be painted upon or be printed and affixed to boards and such boards to be exhibited on stations, piers, jetties, wharves or other places where such tolls, fares or charges or any of them are payable, so as to give public notice thereof; and s. 67 (1) provides that such exhibiting shall be deemed to have been complied with if it is proved that, at the time of any alleged breach, a board was exhibited at the station &c. nearest to the place where such breach took place. Part X. of the Act creates certain offences for which penalties are recoverable. Section 136, which is contained in this Part, provides that the appellant shall publish short particulars of the several offences for which any penalty is imposed by the Act or any by-law affecting other persons than officers, and of the amount of every such penalty, and shall cause the board containing such particulars to be placed in some conspicuous part of the principal place of business of the appellant, and where any such penalties are of local application, in the neighbourhood to which such penalties are applicable, and that no such penalty shall be recoverable unless the requirements of this section have been complied with. Section 64 provides that the appellant may impose penalties not exceeding £20 for the breach of by-laws. The means prescribed by the Act for enforcing compliance with a by-law is therefore a prosecution and the recovery of a penalty for its breach: Cf. *Chilton* v. *London and Croydon Railway Co.* (1); *London and Brighton Railway Co.* v. *Watson* (2). The purpose of s. 66 and s. 67 (1), especially when read in conjunction with s. 136, is to require that the prescribed public notice shall be given as a condition precedent to a prosecution. But s. 64 confers a very wide by-law-making power, and such paragraphs as (1), (1a), (1b), (4), (12), (13), and (16) relate to matters other than conduct which could be enforced in this manner. The purpose of s. 66 is to ensure that the public shall be notified of the substance of all

(1) (1847) 16 M. & W. 212 [153 E.R. 1164]. (2) (1879) 4 C.P.D. 118.

by-laws so that it would be a breach of a statutory duty if the Commissioner failed to comply with its provisions. But the validity of by-laws, apart from their enforcement by way of penalty, would not be affected by such failure, so that the omission to exhibit Condition 27 in the manner provided by the section is not an objection to its validity.

Section 33 of the Act provides that the appellant shall carry persons, animals and goods without negligence or delay, and that in respect of the carriage of persons, animals and goods he shall be a common carrier. At common law the duty of a common carrier of persons is to carry them without negligence, whereas a common carrier of goods is liable for all loss or damage to the goods, the act of God, the King's public enemies, and "inherent vice" alone excepted, so that he is liable for loss of the goods by theft, whether by strangers or by his own servants: *Halsbury's Laws of England*, 2nd ed., Vol. 4, pp. 12, 13; *Gregory* v. *Commonwealth Railways Commissioner* (1). The first part of s. 33 standing by itself would have imposed upon the Commissioner the same duty in respect of the carriage of persons and goods, that is to say, the duty to carry them without negligence or delay, but the reference to common carriers in the second part of the section would appear to subject the appellant as a carrier of goods to the common and statute law relating to such carriers. At common law a common carrier could by "contracts or notices" when "brought home" protect himself from everything except wilful acts, such as the conversion of the goods by the carrier himself or by his agents for that purpose, or wilful misdelivery amounting to a renunciation of the character of bailee: See the authorities cited in *Gregory's Case* (2).

Mr. *Fuller* contended that the making of Condition 27 as a by-law was authorized by par. (1a) or, alternatively, by par. (35) of s. 64. Paragraph (1a) provides that by-laws may be made for regulating the terms and conditions upon which goods will be collected or received or delivered, and for fixing charges for the collection and delivery thereof. But Condition 27 relates to claims for detention or loss of or damage to goods during the whole of the carriage, and is therefore wider than the authority conferred by this paragraph. Paragraph (35) authorizes the making of by-laws prescribing any matter or thing not inconsistent with the Act which is necessary or convenient to be prescribed to give effect to any power, duty or authority of the Commissioner under the Act or any other Act. The relevant provisions of s. 33, apart from the inclusion of animals, are the same in substance as the provisions of ss. 34 and 36 of the *Commonwealth Railways Act* 1917-1925, which were discussed in *Gregory's Case* (1). But there is

(1) (1941) 66 C.L.R. 50.

(2) (1941) 66 C.L.R., at p. 74.

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the distinction that the appellant as a common carrier of goods is subject to the provisions of s. 9 of the *Common Carriers Act* 1902 (N.S.W.), whereas in *Gregory's Case* (1) the Commissioner, apart from the provisions of the *Commonwealth Railways Act*, was subject only to the obligations of a common carrier at common law, and entitled to limit those obligations to the extent and in the manner allowed by the common law. Section 9 of the *Common Carriers Act* provides, in effect, that a carrier shall be liable for the loss of any goods in the receiving, forwarding or delivery thereof occasioned by his neglect or default or that of his servants, notwithstanding any notice, condition or declaration made and given to the contrary or in any wise limiting such liability, and that every such notice, condition or declaration shall be null and void; but that these provisions are subject to the qualification that he may make a condition with respect to the forwarding and delivery of the goods which the court, before whom any question relating thereto is tried, adjudges to be just and reasonable, provided the condition is embodied in a special contract signed by the consignor or his agent delivering the goods for carriage.

A by-law made under s. 64 (35) of the *Government Railways Act* must not be inconsistent with the duties of the appellant under that Act or with the provisions of s. 9 of the *Common Carriers Act*. But it would not be inconsistent with his duty under the former Act to carry goods without negligence or delay to make a by-law providing that goods should be carried at a lower rate at the consignor's risk if the by-law also provided that the consignor should be given the option of having the goods carried at a reasonable higher rate at the risk of the appellant (*Clarke* v. *West Ham Corporation* (2)). Further, where two such rates are so provided, a contract signed by a consignor to have his goods forwarded at the lower rate at his own risk is a just and reasonable condition within the meaning of s. 9 (*Manchester, Sheffield and Lincolnshire Railway Co.* v. *Brown* (3)).

By-law 1,002 provides for two such rates, the consignment in dispute being at the higher rate. Condition 27 applies to the carriage of goods at either rate. So far as it relates to the detention or loss of or damage to goods due to negligence, it could only be effective under s. 9 if it is just and reasonable and is embodied in a contract signed by the consignor or his agent (*Peek* v. *North Staffordshire Railway Co.* (4)). The consignment note which the respondent signed states that it is subject to the provisions of the by-laws, regulations and conditions published under the *Government Railways Act* as amended. This statement is sufficient to make the conditions

(1) (1941) 66 C.L.R. 50.
(2) (1909) 2 K.B. 858.
(3) (1883) 8 App. Cas. 703.
(4) (1863) 10 H.L.C. 473 [11 E.R. 1109].

part of the special contract (*Thompson* v. *London, Midland and Scottish Railway Co.* (1)).

Condition 27 has been approved by the Governor as a by-law and published in the *Gazette*. It has also been made a condition of the contract signed by the respondent. It does not relieve the appellant from any neglect or default on his part or that of his servants. Its effect is to limit the time within which claims may be made for the detention or loss of or damage to goods howsoever caused. In deciding whether a by-law is valid it is necessary for the court to consider the ambit of the by-law-making power and then to consider whether the by-law is within that power. A by-law must be certain in the sense that it must contain adequate information as to the duties of those who are to obey it, and it must not be unreasonable in the sense that it must not involve such oppressive or gratuitous interference with the rights of those who are subject to it as could find no justification in the minds of reasonable men (*Brunswick Corporation* v. *Stewart* (2)).

It was contended on behalf of the respondent that Condition 27 was uncertain in the meaning of the words " within 14 days after delivery should have been given " and that this period was too short to be reasonable so that on either of these grounds the condition was beyond the by-law-making power conferred by s. 64 of the *Government Railways Act*. It was also contended that the condition was not just and reasonable within the meaning of s. 9 of the *Common Carriers Act*. It was also contended that the Supreme Court was right in holding that the condition did not apply to claims arising out of negligence. There are several conditions in by-law 1,002 relating to the delivery of goods included in the General Conditions for the Carriage of Merchandise. Condition 6 provides that the Commissioner does not guarantee the arrival or delivery of goods at any particular time, by any particular train, or for any particular market; neither does he undertake to advise consignees of the arrival of goods, or consignors that delivery has not been taken. Condition 10 fixes the hours for the receipt and delivery of goods. Condition 30 allows free storage for certain periods after goods are available for delivery at their destination, and then provides for storage charges. There is, in addition, the principle of the common law that the liability of a common carrier continues until he has notified the consignee that the goods are ready for delivery, and the consignee, having delayed in taking delivery, has become *in mora* (*Mitchell* v. *Lancashire and Yorkshire Railway Co.* (3)). There is no uncertainty in Condition 27 where the consignee takes delivery of the

(1) (1930) 1 K.B. 41.
(2) (1941) 65 C.L.R. 88, at pp. 97, 99.
(3) (1875) L.R. 10 Q.B. 256, at p. 260.

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goods. He has fourteen days after that date to make a claim although he may have been notified that the goods were available for delivery at an earlier date and have delayed in taking delivery. I am of opinion that there is also no uncertainty in the meaning of the words " when delivery should have been given," and that they relate to a demand for delivery by the consignee and a failure to deliver goods which should have been available for delivery had they not miscarried.

I am also of opinion that such a period of fourteen days is not unreasonable. It is essential that the appellant should be notified of claims at an early date in order that he should have a proper opportunity of investigating them. This period should be ample to allow a consignee who takes delivery himself to inspect the goods and make a claim. Even if he takes delivery by an agent, it should still be sufficient to allow the agent to inspect the goods and communicate with the consignee in time to enable him to make a claim. The question whether the condition is just and reasonable as a condition of the contract between the appellant and the respondent within the meaning of s. 9 of the *Common Carriers Act* must be determined by the court or judge alone and it is not a question proper to be left to a jury, even though questions of fact be necessarily involved in its determination. It must be looked at as a matter of business (*Great Western Railway Co.* v. *McCarthy* (1) ; *Williams* v. *Midland Railway Co.* (2) ; *Sutcliffe* v. *Great Western Railway Co.* (3)). Similar but somewhat more stringent conditions have been held to be reasonable in England (*Lewis* v. *Great Western Railway Co.* (4) ; *O'Keefe* v. *Great Western Railway Co.* (5) ; *Wade & Co. Ltd.* v. *London & North Western Railway Co.* (6)). I can see no sufficient difference between what counsel for the respondent termed the topographical and social conditions existing in England and in New South Wales to nullify the application of these authorities to s. 9. In my opinion, therefore, Condition 27 as a by-law is certain and reasonable and as a condition of the contract between the appellant and respondent is just and reasonable within the meaning of s. 9 of the *Common Carriers Act.*

The sole remaining question is whether the condition applies to the detention or loss of or damage to goods due to negligence. The respondent's goods were being carried at the risk of the appellant. The condition does not expressly refer to negligence but, as *Scrutton* L.J. pointed out in *Rutter* v. *Palmer* (7), (and cf. *Beaumont-Thomas* v. *Blue Star Line Ltd.* (8) ; *Alderslade* v. *Hendon Laundry Ltd.* (9))

(1) (1887) 12 App. Cas. 218, at pp. 229, 233.
(2) (1908) 1 K.B. 252, at p. 258.
(3) (1910) 1 K.B., at pp. 500, 501.
(4) (1862) 5 H. & N. 867 [157 E.R. 1427].
(5) (1920) 90 L.J. K.B. 155 ; 123 L.T. 269.
(6) (1921) 1 K.B. 582.
(7) (1922) 2 K.B., at p. 92.
(8) (1939) 3 All E.R., at p. 131.
(9) (1945) 1 K.B. 189 ; 172 L.T. 153.

it is in each case a question of construction whether a condition in a contract of carriage includes negligence though not expressly mentioned. His Lordship was there referring to a contract relieving the carrier from damage due to negligence, whereas Condition 27 does not purport to relieve the appellant from any liability. It merely limits the time within which claims may be made. It would be in respect of negligence that claims would ordinarily be made for damage to goods. Loss of goods could be caused by theft, but it could also be caused by negligence, as, for instance, misdelivery to the wrong person. The risk of loss of or damage to goods due to negligence is recognized by s. 33, which imposes upon the appellant the express duty of carrying goods without negligence. Condition 27 is a general condition intended to apply to every claim, howsoever arising, in respect of every carriage of merchandise, and is expressed in the most general terms. Its purpose is to give the appellant early notice of such claims, and it would be just as necessary for him to have notice of claims based on negligence as it would be that he should have notice of any other claim. It is to be noted that in each of the three cases relating to similar conditions already cited, the claims were for damage due to negligence, and it was assumed that the conditions applied to such claims. The condition discussed in *Williams* v. *Midland Railway Co.* (1) did not expressly refer to negligence but it was assumed to be included. Further, Condition 8 of the English Standard Terms and Conditions of Carriage of Merchandise when Carried by Merchandise Train at Company's Risk Rates 1927, which limits the times within which claims must be made, does not expressly refer to negligence but it must have been intended that claims for negligence should be included.

For these reasons, I am of opinion that, while Condition 27 as a by-law could not be a bar to a claim such as that of the respondent arising from negligence and could not be a bar to a claim however arising, unless " brought home " to the customer, it is a bar to the respondent's claim because it is just and reasonable and forms part of the consignment note.

I would therefore allow the appeal.

Appeal dismissed. Order of the Supreme Court varied by substituting for the order of a new trial an order that judgment be entered for the plaintiff for £90 7s. with costs.

Solicitor for the appellant, *Fred. W. Bretnall*, Solicitor for Railways.
Solicitor for the respondent, *F. P. McRae*, Public Solicitor.

J. B.

(1) (1908) 1 K.B. 252.