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arrive at the conclusion, though reluctantly, that it does seem to me to fall within the language of this act of Parliament; and that for these reasons there must be judgment for the plaintiffs. Judgment for the plaintiffs.

Court of Queen's Bench, England.

BUTCHER *vs.* THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.[1]

1. Carriers by railway—Delivery of luggage to passengers.
2. A railway company, as common carriers of passengers and their luggage, are bound, on the arrival of a train at the terminus of the journey, to deliver a passenger's luggage into a carriage to be conveyed from their station, if required so to do, and if such is their usual practice.—Affirming Richards *vs.* The London and South Coast Railway Company.[2]
2. Therefore, where a passenger on the arrival of the train got out of the railway carriage on to the platform with a part of his luggage, a small hand-bag, in his hand, which he gave to one of the company's porters to take to a cab, and the porter lost it, the company were held liable as for a non-delivery of the bag; it not being found by the jury that the passenger, by taking the bag into his own possession on the platform, had accepted that as a performance of the company's contract to deliver, according to their usual practice, into a cab.

APRIL 16, 1855.—The declaration stated, that the defendants were owners of a railway for the carriage and conveyance of passengers and their luggage from Farnham station, Hampshire, to Waterloo bridge station, London, and were common carriers for hire in and upon the said railway; that the plaintiff became a passenger on their said railway, to be carried and conveyed from Farnham to the Waterloo bridge station, and that the defendants, as such common carriers, received the plaintiff and divers chattels of the plaintiff, to wit, a carpet-bag, &c., to be safely and securely kept and carried by the defendants as such carriers along their railway, and at the end of their journey to be safely and securely delivered up to the plaintiff for reasonable reward to the defendants in that behalf. Breach, that the defendants did not safely

[1] 24 Law Journ. C. B. 137. The arguments of counsel are omitted.

[2] 7 Com. B. Rep. 839; s. c. 18 Law J. Rep. (N. S.) C. P. 251.

and securely carry or deliver the said chattels, but took so little and such bad care in and about the carrying and conveying the same, that by and through their negligence the carpet-bag was lost.

Pleas, *inter alia*, not guilty, and a traverse that the defendants received the plaintiff with the said chattels to carry, convey and deliver *modo et formâ*. Issues thereon.

At the trial before Maule, J., at the last Spring Assizes at Kingston, it appeared that the plaintiff in November last took tickets for himself and his wife as passengers by the defendants' railway from Farnham to the Waterloo bridge station, and that his luggage consisted of a portmanteau, which was placed in the luggage-van, and a small hand-bag containing money and valuable articles worth £240, which he kept in the carriage with him. On the arrival of the train at the Waterloo bridge station the plaintiff got out of the carriage with the bag in his hand, and the portmanteau was placed on the platform, and his wife sat down upon it. One of the company's lamp-cleaners, who was dressed as a porter, shortly afterwards came up and said to the plaintiff, "Cab, sir?" The plaintiff having said "Yes," the man took the bag from the plaintiff's hand, and disappeared among the rows of cabs attending at the station, and shortly after returned to take the portmanteau. The plaintiff inquired what he had done with the bag, and he said he had put it on the foot-board of a cab, and took the plaintiff to the cab, but the bag was not there, and the driver denied that it had ever been put there. Search was made among the cabs and at the station for it, but without success, and the bag was lost. It appeared also that no persons were allowed to assist as porters at the station but the company's servants; and that it was usual for the porters to assist, without any gratuity being given them for so doing, in removing passengers' luggage from the platform to the cabs which were allowed to attend at the station; and that as each cab left the station, a servant of the company took the number of the cab, and ascertained where it was going to.

On this evidence the defendants' counsel contended that the

plaintiff ought to be nonsuited, but the learned judge left the case to the jury, and they having found a verdict for the plaintiff, he reserved leave to the defendants to move to set the verdict aside, and to enter a nonsuit if the Court should be of opinion that there was no evidence to support the declaration.

E. James having obtained a rule *nisi* accordingly,—

Montague Chambers and *Lush* now showed cause.

Bovill, in support of the rule.

JERVIS, C. J. — At first I was strongly of opinion that this rule ought to be made absolute, as I thought, until I heard the ingenious way in which the case was put by Mr. Lush, that there had been a perfect delivery to the plaintiff, and that he had afterwards given instruction to the porter to get a cab for him, and had made himself responsible for the safety of the bag. But I think that is not so, and that this rule ought to be discharged. It has been decided in *Richards* vs. *The London and South Coast Railway Company*, that it is part of the contract by the company that the delivery of passenger's luggage shall be in the usual mode in which such delivery is made by them on the arrival of the train at their station, that is, in this case, by the porters of the company to cabs within the station. There is no question, though that may be the usual mode of delivery, yet that a passenger may, if he pleases, have something short of that to satisfy the contract; and it was open to the defendants to have shown, (though they might have had some difficulty in doing so with the jury) that the plaintiff, in this instance, had accepted some delivery other than that he had contracted for, and whether he had done so or not was a question for the jury. This rule is to be made absolute only if my Brother Maule ought, on the evidence at the trial, to have nonsuited the plaintiff. Now, in the absence of any finding by the jury that the plaintiff, when he stood on the platform with the bag in his hand, had accepted a delivery in fulfilment of the contract short of what he was entitled to, I cannot say, as argued by Mr. Lush, whether he intended to do so or not, especially as it appears that he intended to have a cab for the rest of his luggage. The further point does not arise, whether the company would have been liable if the bag had been

stolen from the cab before it left the station, because, if there had been no delivery to the plaintiff when he stood with the bag in his hand upon the platform, and that was a question of fact for the jury, the company have not shown what became of the bag after it was taken from the plaintiff. For aught that appears, it was never delivered at all, and then this case is the same as *Richards* vs. *The London and South Coast Railway Company*. This rule must, therefore, be discharged.

CRESSWELL, J.—I am of the same opinion. There was *primâ facie* evidence that the bag in this case was delivered to the company to be carried. If it was contended that that was not the case by reason of the plaintiff taking the bag into his own custody, the question ought to have been put to the jury. Then the question is, did the defendants fulfil their undertaking? According to the decision in *Richards* vs. *The London and South Coast Railway Company*, they were bound to deliver according to their usual practice, that is, into a cab, if the passenger wished it. It is clear that they did not do so in this case. There might be evidence that the plaintiff accepted some other mode of delivery, instead of the usual one, but the defendants did not ask to have that question left to the jury, and they cannot now ask us to find it in their favor. Then there is a third question, whether the plaintiff was himself the cause of the loss, so as to excuse the company. I think that cannot be imputed to him. He delivered the bag, not to a stranger, but to a man wearing the livery of the company and one of their servants, and cannot be said, therefore, to have prevented them from performing their contract.

WILLIAMS, J.—I am of the same opinion, and I think the judge upon the evidence could not have nonsuited the plaintiff without overruling *Richards* vs. *The London and South Coast Railway Company*. It is suggested, that it would be hard upon the company to make them liable for the loss of this bag, if after the lamp-cleaner had been deputed by the plaintiff as his agent to select any cab into which to put the bag, and he had selected one and placed the bag in it, the cabman had driven off with it. Certainly, if that was the case, it is very much to be regretted that it

was not proved, for I should have had great difficulty in saying that the company in that case were liable.

CROWDER, J. — I also think that the judge ought not to have nonsuited the plaintiff. There was evidence that the bag was given to the company to be conveyed and delivered, and it appeared that the usual mode of delivery adopted by them was, that when the luggage arrived at the terminus, the company's porters, if required so to do, assisted in carrying it and placing it on cabs within the station; and that assistance, as it seems to me, was included in the company's contract, for no gratuity is given by the passengers to the porters for it, but it is included in the fare paid at the commencement of the journey, and it is, of course, an advantage to the company to have the luggage removed from the platform as speedily as possible. The only distinction between this case and *Richards* vs. *The London and South Coast Railway Company* is, that the plaintiff here had the bag in his hand on the platform after the arrival of the train, but as it is not found that he had elected to treat that as a complete delivery, and as he intended to have a cab, and gave the bag to one of the company's porters to deliver to a cab, and, for anything that appears to the contrary, the porter did not deliver it, there was no delivery according to the contract. The case is much the same, as put by Mr. Lush, as if the plaintiff had got out of the carriage without the bag, and the porter had then handed it out. I think, therefore, that this rule should be discharged. Rule discharged.

ABSTRACTS OF RECENT ENGLISH DECISIONS.

Affidavit.—The taking of an affidavit is a ministerial, not a judicial act. *Kerr* vs. *The Marquis of Ailsa*, 1 Macq. Scot. App. Cas. 736. (H. of L.)

Criminal Law—Disposing of the body.—There need not be a final disposing of the dead body of the child to constitute an offence within the 9 Geo. 4, c. 31, s. 14, but it is sufficient if there be only a temporary disposition of the body, with the intention of concealing the birth. (See