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LARS GORTON

The Concept of the Common Carrier in Anglo-American Law

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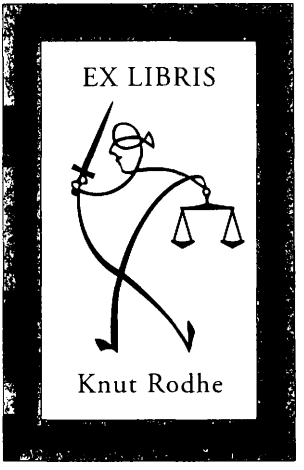

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Gothenburg, July 1970.

LARS GORTON

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PART III

THE COMMON CARRIER CONCEPT IN LEGISLATION

INTRODUCTION

This study grew from a discussion among Scandinavian jurists of the questions of who is a carrier and who may issue a bill of lading. My starting point was then to examine the Anglo-American standpoint and the implications of the concept of the common carrier in this respect.

It very soon became evident that the concept of the common carrier has several facets; it is still frequently used and applied in different connections, but its precise meaning is rarely made clear. The common carrier concept is an intermingling of several theories. Its development has extended over a long period of time, and its substance has consequently been influenced by a large number of factors. Moreover the concept links together different relations which in present legal doctrine are categorized within different subject domains. Thus different relations may be distinguished: between the carrier and his individual customers; between the carrier and the public in general; between the carrier and other carriers; and between the carrier and the public authorities. Relations of a different nature, which are in legal terminology assigned to public law, private law, contractual law, competition law, antitrust law etc., depending on the particular legal system, must be born in mind when discussing the development of the common carrier doctrine and its connections with the present law.

Three concepts seem to be of particular interest to the understanding of the common carrier doctrine: the concept of the evolution from status to contract and the further development of the law of contract (freedom of contract, sanctity of contract, unreasonable terms etc.); the concepts of common calling and public utility; and finally the broader view connected with private property, the idea of franchises for doing business and conditions concomitant therewith, such as freedom of competition, freedom of engaging in business, restrictions of these rights, cartels, and unfair competition (the protection of competition and consumers). It should be observed that the concept of the common carrier is a connecting link between the law of bailment, the law of tort, and the law of contract in Anglo-American law, and furthermore the common carrier doctrine may be

regarded as an illustration of the three basic principles which sometimes have been said to govern legal rules: 1) autonomy of will; 2) public order and interest; and 3) just balance of conflicting private interests.

The origin of the debate on status and contract, usually assigned to Sir Henry Maine, demonstrated that in every developed society certain obligations are imposed on the citizens by law, while others could be assumed, or not, more or less voluntarily by agreement. It is safe to state that no society has ever founded its regime solely on status, but on the other hand status has nowhere been completely replaced by contract. The two institutions have co-existed but to a varying extent at any given time or place. Duties imposed by law expressed the mandate of the government, and those subject to them risked suffering if not adhering to its principles. One consequence was also that certain obligations followed a legal status maybe not quite in the sense of fully developed public utilities as the term is used to-day, but at least as an embryo of this institution.

Thus the conflict between freedoms of contract and of engaging in business, and considerations of public policy and the concepts of common calling and public utility have had significant effect on the common carrier doctrine. The increasing importance of the doctrine of freedom of contract meant that efforts were made to an ever-growing extent to escape from status obligations imposed by law, as in the case of common carriers, and it was for the courts an important step in the evolution of law to decide whether it was at all possible to exempt oneself from a duty imposed by law, and if so in what manner such exceptions could be made and to what extent. With respect to this conflict the law itself may take a very liberal standpoint regarding the freedom of contract as an absolute value never to be interfered with, and thereby regarding all agreements as lawful and enforceable; but the courts may intervene declaring certain contracts to be against public policy and unenforceable, or alternatively the legislative bodies may step in creating mandatory rules which make certain contracts unlawful and void.

While in English law the doctrine of freedom of contract was from the start regarded fundamental, the American courts were more inclined to declare certain agreements as contrary to public policy, and during the 19th century there was also a development towards legislation to the same effect. The Sherman Act, 1890, was introduced to restrict and control cartel agreements detrimental to competition, the Interstate Commerce Act, 1887, to set a standard for railways in their business of carriage, and

the Harter Act, 1893, to create a balance of risks between the carrier by sea and his customers, i.a. to protect the bill of lading as a document of title. And a similar, although perhaps less articulated, development took place in English law, with respect to both judicial and legislative interference with certain agreements.

By law certain liabilities were imposed upon the bailee, and at one point a distinction with respect to the liability for loss of or damage to goods grew up between the status liability of an ordinary bailee, which was for negligence only, and that of a common carrier or other practisers of common callings, which was for all damages except when caused by an act of God or the king's enemies. Thus a difference appeared between private carriers and common carriers which has been assigned to "customs of the realm", i.e. common law.

But there were also differences in other duties. While a common carrier had a duty to carry for anyone who wished to use his services, and to demand only a reasonable charge in return for a reasonable service etc., no such obligations were placed on the private carrier. It should be observed that this liability is a status type liability although it has in many instances been replaced by legislation.

Thus it is important to determine the prerequisites for being a common carrier. The most frequent definitions of this concept state that a common carrier is one, who holds himself out to the public in general to carry for them in return for compensation. One of the consequences of this capacity is that the common carrier may not pick and choose among his customers, but has to serve them all without discrimination.

Possibly such a definition was satisfactory at a time when no notices or special contracts were used, notices limiting the sphere of the carrier's profession to certain routes, to certain classes of goods etc., notices or special contracts exempting the common carrier from or limiting his liability. But as soon as this idyllic state of affairs disappeared the definition seems less precise, and it becomes difficult to distinguish the prerequisites for being a common carrier from the consequences of being one. Through the mixture of ideas that join together in the common carrier concept one may reach the definition that "he is a common carrier who is a common carrier", for he who holds himself out to the general public is a common carrier, and he who is a common carrier must hold himself out to carry for anybody who chooses to use him. This circular reasoning is imprecise and unsatisfactory but the mentioned definition still seems to be the accepted one.

To avoid the heavy duties placed on common carriers at common law there was a growing use among them to try to restrict their profession and liability by notice and special contract. While in England the courts chose to accept exemption clauses to a great extent, and legislation in the beginning only to a limited extent interfered with the carriers' rights and possibilities of limiting their liability, at least not if made by special contract, the American courts were more apt to declare certain exemption clauses to be against public policy and unenforceable.

International conventions were gradually introduced, which to a large extent governed the relation between carriers and customers and distributed the risks among them. Naturally, such conventions being introduced in British and U.S. law, the special Anglo-American common carrier doctrine, at least as far as liability was concerned, declined in importance.

Domestic legislation based on declared transportation policies was also passed establishing the particular duties of carriers with respect to permits to engage in business, charges, facilities, etc. The immediate practical importance of the common carrier doctrine therefore became less significant, at least in England, where the terminology of common and private carrier has been avoided in statutes, while the American administrative legislation largely remained founded on the common carrier concept. So, one may say that whereas in English law the immediate significance of the common carrier doctrine is rather a subsidiary foundation for the interpretation of modern legislation, in American law the concept of the common carrier is still of direct basic importance.

Nevertheless, the question may then be raised whether the present concept of the common carrier is equivalent to that, which originally developed at common law, since this should not necessarily be taken for granted. A Scandinavian jurist by tradition will try to make a clear distinction between private law and public law, a distinction that is less obvious to an English and above all American legal mind. Thus in Scandinavian law questions concerning the carrier's liability are usually assigned to private law, while the carrier's duties with regard to rates, facilities etc. are rather classified among public law obligations. This distinction which presently appears to be regarded as more or less fundamental at least for a Scandinavian lawyer does, however, seem less appropriate under certain circumstances. Why should an unreasonable term with respect to price be regarded as fundamentally different from that of an unreasonable term with respect to liability? The different duties of the common carrier were

all prescribed by common law, and every deviation should therefore be equally treated. It may be suggested that one way of regulating the relation between the carrier and his customer is to legislate on the liability. And therefore also a study of the concept of the common carrier may facilitate a corresponding investigation in another legal system.

When confronting status and contract it should be kept in mind that standard form contracts are frequent in modern business, including transportation, whether they are documents containing all terms, or referring to general conditions of carriage, or possibly to legislation. Such form contracts have as a practical consequence the limitation of contractual freedom.

The Act to Regulate Commerce (The Interstate Commerce Act, 1887) was intended by Congress to give an effective and comprehensive means for redressing wrongs resulting from unjust discrimination and undue preferences by carriers, when these wrongs affected interstate commerce. In short, its scope is essentially limited to securing just and reasonable charges for transportation, prohibiting unjust discriminations, preventing undue or unreasonable preferences, and abolishing combinations between carriers for the pooling of freight, and establishing the carriers' contractual responsibilities to shippers, whose property is in the course of transportation.

Finally, the aim of the study should be made clear. The material is extensive, as so many varying implications are involved, and naturally, it is not possible to determine the concept of the common carrier if totally excluding any discussion on the substance of the concept. Owing to the disparity of the material it is thus essential that a balance is reached, in order that the necessary elements of the common carrier doctrine are illustrated and yet the proportions of the study are not distorted. This disparity also requires repeated approaches from different angles in order to render the picture more complete, which also necessitates a certain reiteration of the factors involved. My intention is not to give an extensive survey of cases to definitely determine the concept of common carrier, as I believe there is no such exhaustive and precise definition. Furthermore it would both be impossible to gather all cases, even all pertinent cases, and also such an exhaustive study would offer relatively little reward. Neither is my object to give a detailed description and analysis of the different duties and liabilities of the common carrier. My object is rather to discuss the substance of this concept in order to give a general idea of its functions. This means that the concept will here be used as a common key to make a

comparison between different means of transportation, to point at variations and similarities and to show the relationship between rules of public and private law. Further, a comparison between English and American law will not only show the development of the common carrier concept into somewhat varying directions for economic and political reasons, but also how in the end in practice the similarities in spite of various methods used are greater than the dissimilarities. In the sense now described this book can be characterized as a study in legal techniques.

The involved situation which I shall try to discuss from a legal point of view using the concept of the common carrier as an intersection is illustrated by Glassborow, p. 1: "The systems of regulation and control of transport in force in Western Europe, including the United Kingdom, are the end products of historical events and of the efforts of administration to deal with the complex problems which have arisen from the development of road, rail, and in some regions, inland water transport, with the balance of technical economic advantage shifting in the course of time." This statement applies with equal force to ocean and air carriage.

The complexity of the common carrier concept has convinced me that it should be investigated from different angles: How can it be defined? What are its most important ingredients? Should all vehicles be treated equally with respect to the common carrier doctrine? What implications has it had on legislation? Is modern legislation based on it? etc. I am mainly concerned with the carriage of goods, as the common carrier doctrine did not originally apply equally to passenger transportation.

The question may be posed why a subject like this should engage a Scandinavian lawyer. It would of course have been possible to carry out the study as a comparison between Scandinavian law on the one hand and Anglo-American law on the other.

There are however a number of reasons for limiting the scope of the investigation as I have chosen to do. The theoretical distinction between public and private law is upheld more rigidly in Scandinavian law than in American—a distinction which may, however in the future become less marked owing to the government's increasing engagement in business, the development of a consumer's law, etc. The concept of the common carrier, unknown in Scandinavian law, is an intersection of these two subject fields, and although there are obvious contact areas between the Anglo-American and the Scandinavian law systems, such a comparison would have necessitated a very extensive investigation. The concept of the common

carrier is by no means unambiguous, and further the divergence between English and American law is so substantial that a comparison between those systems is sufficient for an illustration of different legal techniques. The considerable trade between Europe and United States also implies that anyone engaged in the carriage of goods to and from the United States is interested in the American regulation of common carriers. And further this American regulation of the transportation industry very likely has influenced the American interpretation of international conventions of private law nature.

This study is thus mainly a comparison between English and American law, but a number of references have nevertheless been made to Scandinavian law. I have regarded this approach as natural and essential, since any lawyer tends to reflect any investigation that he is making on to his own legal surrounding. Consequently, such references, although superficial, have been made when corresponding problems have appeared to be obvious in Swedish law.

When studying a subject based on both English and American material the language will create certain problems. I have tried to use English as the basis but with American terminology when required. The risk is of course also imminent in a study like this, which is a synthesis of divergent material, that matters are omitted which should have been treated and vice versa, but the author must choose what he regards to be of central interest for the aim of the study. With this in mind I have among other things omitted all discussion on documentation, of great importance generally, but which does not throw any direct light on the concept of the common carrier. Also the insurance aspects of great practical significance when discussing liability questions has been deleted on the same ground, even though the common carrier's liability has often been said to be that of an insurer. Since the American legislation is still based on the common carrier concept, more space has been allowed for U.S. cases and statutes, particularly when taking into consideration the special difficulties created for combined transports by the conflicting jurisdiction of the different regulatory commissions.

PLAN OF THE STUDY

It is apparent that the concept of the common carrier is an intersection where political, economical and legal doctrines meet. My aim is to study the common carrier concept from the jurist's position, but the legal aspect must not be isolated from its social environment.

Thus a general background with a historic outline of the development of the common carrier doctrine and a short presentation of English and American transportation policy must be regarded as necessary elements in order that a general direction might be drawn up from there.

The frame of the study must then be to determine what is embraced by the concept of the common carrier and to analyse the different elements which together lead up to it. The purpose of the study is to broadly investigate the common carrier concept; to determine who may carry on business as a common carrier; to give a background of the particular common carrier doctrine and the legal environment in which it has developed, its importance for transportation legislation and its impact on the transportation policies in England and the United States respectively. It must be stressed that I have been concerned with the contractual relation only insofar as this illustrates the concept of the common carrier. My principal object has been to show a legal evolution with the basis in the concept of the common carrier, and I have not been involved with an interpretation of contracts in relation to the mandatory rules. Therefore hardly any modern material on the interpretation of contracts of carriage is found.

The study is divided into three parts.

Part I gives the general background and embraces three different sections, the first giving an outline of the development of common callings and public utilities, the second treating the organization of the transportation industry, particularly from government control point of view, and the third containing a brief exposition of the historial background and the evolution of the common carrier doctrine.

In Part II is mainly dealt with the development of the common carrier doctrine at common law from about 1700, and certain factors are deter-

mined which affect the common carrier status. An attempt has been made to lay down the pertinent elements which make up the concept of the common carrier through a number of definitions and I have been particularly concerned with the factor of "holding out", which appears to be essential. § 6 discusses the question of who may be regarded as common carriers. The concept was originally applied to stage coaches and similar vehicles but was in the course of time attributed to a number of means of transportation. It is regarded to be applicable to vessels, but the authorities do not agree on whether it may apply also to air carriers and other modern devices of transportation. Having thereby made an effort to establish the prerequisites for being a common carrier I deal in § 7 with the consequences of being one; the different duties resting with common carriers are analysed. Several different duties lie upon common carriers; it is hard to isolate those which stem directly from the common carrier doctrine from those emanating from other legal theories, and I have therefore chosen to describe very briefly some of the duties which are regarded as essential in connection with carriers generally and common carriers particularly. Certain attention is paid to the contractual limitation of the common carrier's liability being of basic interest as an illustration of the swing from status to contract, but here I have been mainly concerned with case material from the period prior to mandatory legislation.

In Part III I have tried to carry the study through the next step in the evolution, namely the role of the common carrier concept in legislation. Public authorities did not stay completely passive as to the development of contractual "anarchy", but legislation was introduced to circumscribe the carrier's freedom to limit his liability. Thereby the pendulum is sometimes said to be swinging back from contract to status. In § 8 I deal generally with legislation both of "private" and "public" nature, affecting duties and liabilities of carriers, and try to illustrate the reasons for legislating, as well as how the legislation introduced came to differ from the common carrier doctrine at common law. I have treated different categories of carriers separately and also kept English and American legislation apart. In § 9 an attempt is made to determine what impact the concept of the common carrier has had on certain legislation, particularly in connection with the COGSA as being national legislation based on an international convention and the Harter Act as being of essential interest for the accomplishment of the COGSA. In §§ 10 and 11 I am particularly concerned with the concept as determined in different American regulatory agencies. The concept

of the common carrier remains as a basic term in American administrative legislation, and it is therefore also essential to establish the important characteristics of the concept in this connection in order to see whether the basic approach has possibly changed from the common law determination, where the concept is employed in connection with a declared transportation policy. Particular regard has also been paid to freight forwarders being a link in the transportation chain of steadily growing importance.

Chapter 5 is a summing up, and here a few references to Swedish law have been made. My firm belief is that although Scandinavian conditions have not been analysed, certain facts seem so apparently similar or dissimilar that a brief reference should be made, in order that a Scandinavian reader might also recognize some questions of more "local" character.

In an appendix intermodal carriage is dealt with, particularly from the American regulatory point of view. The reason for discussing this part separately is that although it does possibly not have an immediate connection with the common carrier doctrine, proposed American legislation in this connection is still based on the concept of the common carrier, and so I regard a brief account of this particular development as a natural and necessary follow up.

PART I
GENERAL BACKGROUND

Chapter 1

BACKGROUND OF THE COMMON CARRIER DOCTRINE AND ITS IMPLICATIONS IN DIFFERENT CONTEXTS

§ 1. *The Concept of the Common Carrier in the Perspective of the Law relating to competition*

§ 1.1. *The Common Carrier Doctrine as outlined in Niagara v. Cordes*

In the case of *Niagara v. Cordes*[1] the U.S. Sup. Ct. thoroughly considered the common carrier doctrine and gave an exhaustive description of it, saying in part:

"A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. In all cases where there is no special agreement to the contrary, he is entitled to demand the price of carriage before he receives the goods; and if not paid, he may refuse to receive them; but if he take charge of them for transportation, the non-payment of the price of carriage in advance will not discharge, affect or lessen his liability as a carrier in the case, and he may afterwards recover the price of the service performed. When he receives the goods, it is his duty to take all possible care of them in their passage, make due transport and safe and right delivery of them at the time agreed upon; or in the absence of any stipulation in that behalf, within a reasonable time. Common carriers are usually described as of two kinds, namely carriers by land and carriers by water. At common law, a carrier by land is in the nature of an insurer and is bound to keep and carry the goods entrusted to his care safely, and is liable for all losses, and in all events, unless he can prove that the loss happened from the act of God, or the public enemy, or by the act of the owner of the goods.

Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happen by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and ex-

[1] 62 U.S. 7 (1858).

pressly excepted in the bill of lading. A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skilful master, of sound judgment and discretion; and in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his acts and negligence. He must take care to stow and arrange the cargo, so that the different goods may not be injured by each other, or by the motion of the vessel, or its leakage; unless, by agreement, this duty is to be performed by persons employed by the shipper. In the absence of any special agreement, his duty extends to all that relates to the lading, as well as the transportation and delivery of the goods; and for the faithful performance of those duties the ship is liable as well as the master and owners . . ."

This extensive summing up, containing a great number of aspects, points out the complexity of the common carrier doctrine. The dictum of the court makes it evident that there is no simple formula to be applied for the comprehension of the common carrier doctrine but rather underlines its intricate nature, and the court's description suggests that the common carrier doctrine might be approached from several angles with respect to the underlying different relationships.

§ 1.2. *Some General Aspects*

The complexity of the common carrier doctrine thus results from a diversity of events that have confronted and influenced each other during a long period of time, while the concept itself has survived. The substance of the concept of the common carrier has undergone mutations under the influence of conflicting theories, which should be indicated at this stage to facilitate the understanding of the study as it proceeds.[1]

The development from status to contract, the theory of freedom of contract and freedom of competition, the debate as to private or state ownership, the public utility concept, the public policy aspect and the procedural changes have all affected the common carrier doctrine. This utterly com-

[1] As what is said under this paragraph will be dealt with later, I have chosen to postpone the explanation of certain terms to the more detailed discussion below.

plicated procedural development has had a substantial influence on the evolution of the distinction between the law of bailment, tort and contract.[1a]

The financial, technological, and functional development has had an important bearing on the process. The evolution of the Western world's economy into a corporate structure with large-scale and interconnected units of finance and production has been accelerated by the technological revolutions particularly of the twentieth century. Correspondingly, in the early days the common carrier was e.g. a carter or a hoyman, but technology made it possible to construct large ocean going vessels, railways and airplanes, thereby raising the question whether the common carrier doctrine applied also to these new devices. In the early days the common carrier was usually one person with one vehicle, while to-day there are large organizations owning or disposing of a fleet of vehicles. The nature of the carrier's functions has also changed. These were in previous times separated from each other, and a great number of intermediaries participated in the transportation chain, while at present there is a trend towards integrated transports. The new structure has also, from a functional point of view, created a number of new contractual relations.

At one time royal privileges were granted to people engaging in business, and attached to this privilege was a duty to charge only a certain price for the particular service offered. Ideas of freedom of trade gradually came to affect the economic life, and through the doctrine of freedom of contract the parties were allowed to fix the price they wanted. But in several countries the transportation industry remained a regulated industry, although the regulation is of varying design and extent depending on the mode of transportation. Thus the transportation industry is a more pronounced instrument for government planning than many other sectors of trade, and through legislation certificates may be required for carriers to engage in business, and/or freight charges may be determined as well as other conditions, which may be linked to the franchise. The public interest in the transportation industry has also brought about government engagement in certain branches, and for example the railway and air carriage industry are state owned in several countries.[2]

[1a] See e.g. WINFIELD, The Province, pp. 40 et seq. and 92 et seq.; CHESHIRE & FIFOOT, pp. 3 et seq. and 72 et seq.; and WINFIELD on TORT, p. 7 et seq.

[2] Cf. with respect to Swedish conditions WESTERBERG, particularly p. 23 et seq.

The common carrier status was vested with certain duties and liabilities, but the theory of freedom of contract allowed common carriers to exempt themselves from liability under certain circumstances. In some instances the courts declared such exemption clauses void as contrary to public policy. Later, legislation was enacted specifying mandatory rules which allocated the risks for the transportation adventure on the parties involved. These mandatory rules are often founded on international conventions.

The muddle of ideas and doctrines makes it probable that the common carrier is a diffuse concept, and that its present substance is different from that which was developed in legal theory several hundred years ago. Originally, the concept of common carriage was contrasted to that of private carriage, and these antithetical concepts should thus be compared. I believe this study will, however, give some evidence that there is a trend in Anglo-American law to eliminate the distinction between common and private carriage, at least as far as the carrier's liability to the shipper is concerned.

§ 1.3. *The Concepts of Common Calling and Public Employment*

"The idea of the common carrier is associated with that of common callings. This grew up at common law under the guild system in England and related to activities considered essential to community life which were undertaken only by those who were given specific authorization to do so. These activities were said to be clothed with a public interest, and those who performed them were not only subject to special obligations but also could be regulated by public authority even though a special grant of monopoly privilege had been afforded by the Crown."[1]

Pegrum's comments indicate the dichotomy of the common carrier doctrine, as he touches upon both the special obligations and the aspect of regulation. As an economist Pegrum is more interested in regulation and public policy than in a satisfactory legal distinction between these two implications, but nevertheless his statement may serve as a basis for the understanding of the theory of common calling and its influence on the common carrier doctrine.

Kitchin expresses the consequences attached to a common calling thus:[2] "If a person takes up a public profession it is a natural consequence that he should incur certain obligations to the public; his customers are paying

[1] PEGRUM, p. 113. Cf. JEREMY, p. 1 as cited below in § 4.3 note 1.

[2] P. 1.

for skilled workmanship and have a right to receive it. In accordance with this principle, he who becomes a public carrier incurs the liabilities and obligations attached to that profession."[3]

The early distinctions between "common" and "private" referred to the manner in which a trade or business was carried out; it was "common" if the trade was carried on as a business where the general public was sought as customers; and it was "private" if there was no holding out to the general public.[4]

"A person engaged in a common employment had special obligations that were not attached to private employments, particularly the duty to provide, at reasonable prices adequate service and facilities to all who wanted them."[5]

Thus very early certain tradesmen and artificers were treated in an exceptional way, as they were engaged in a "common" or public occupation.[6] The persons undertaking a common employment "were not only at the service of the public, but were bound so to carry on his employment as to avoid losses by unskilfulness or improper preparation for the business".[7]

The persons regarded as exercising a public employment vary between different writers. Winfield[8] suggests several common callings, including

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[3] None of the writers referred to in this section really tries to define a common calling, but they enumerate different occupations regarded as common callings. In connection with the concept of public utility and its implications on the common carrier doctrine I shall further somewhat consider the definition of the public utility concept.

[4] BARNES, Public Utility, p. 13. Cf. ADLER, p. 135 et seq. and SUNDBERG, Air Charter, p. 164.

[5] PHILLIPS, p. 53.

[6] BEALE, The Carrier's Liability, p. 163.

[7] Ibid. p. 163. The corresponding development in Swedish law from guild system and thorough regulation of trade towards freedom of trade, although based on a different legal tradition, seems to be similar to the English development. Cf. e.g. ADLERCREUTZ, p. 27 et seq., BERNITZ, in chapter 2 and SCHMIDT, p. 27 et seq.

[8] The History of Negligence, p. 185 et seq. At page 188 he further states: "The man who followed a 'common' calling (e.g. an innkeeper or farrier) was liable for his defaults independently of contract, and whether his defaults took the form of acts or of omissions. If there were *assumpsit* as well, that did not alter the liability implied by the law. But if there were *assumpsit* on the part of an ordinary workman, whose vocation was either unskilled or not reckoned as a 'common' one, the Courts wavered considerably as to whether this *assumpsit* applied to nonfeasance as distinct from misfeasance." Cf. also WINFIELD, The Province, p. 59.

carriers, innkeepers, surgeons, smiths, farriers and others. Holmes[9] proposes smiths, carriers, and innkeepers, while Pollock[10] denied that a smith was a common calling, and Plucknett[11] even questions the carrier, at least at an early stage. Beale[12] mentions with references innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sheriffs, and gaolers. "Indeed it is hard to say where the law stopped in this direction except for the somewhat vague limit that the calling must be 'common' or 'public'."[13]

The liability of persons engaged in a public calling was, of course, entirely independent of bailment, as they might or might not have the status of bailees. Their liability was of ancient derivation and based upon the customs of the realm.[14] Thus it is said in an often quoted opinion: "If a smith pricks my horse with a nail, etc., I shall have my action on the case against him without any warranty by the smith to do it well; . . . for it is the duty of every artificer to exercise his art rightly and truly as he ought."[15] The duty was to exercise skill in the calling which the defendant undertook. By undertaking the special duty he warrants his special ability to perform it. The liability arose from the fact of a person holding a definite status to which the liability was annexed by law,[16] and the skill required in different callings together with the corresponding degree of responsibility varied with the different species of employment. "Thus the gaoler warranted

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[9] P. 145 et seq.

[10] P. 429.

[11] P. 451 et seq. Cf. p. 481: "In the case of the innkeeper it was early established that his liability exceeded that of the contemporary bailee, but the similar case of the common carrier was not settled until much later. It may be doubted whether transport by land was a regular trade in the middle ages."

[12] The Carrier's Liability, p. 163. Cf. BEALE & WYMAN, pp. 8 and 20.

[13] FIFOOT, p. 166. Cf. also MILNE & LAING, p. 9 enumerating a number of occupations.

[14] FLETCHER, p. 112.

[15] FITZHERBERT, as quoted in FIFOOT, p. 89. Cf. WINFIELD, The History of Negligence, p. 185 and The Province, p. 59.

[16] As indicated in note 5 the relation between a person in a common calling and his customer was based on status, although a certain possibility was left with them in varying degrees to arrange by contract their relations. For the development from status to contract, and possibly, owing to e.g. the increasing use of standard documents, a development back towards status, see MAINE, Ancient Law, particularly chapters V and IX; FRIEDMANN, Law in a changing Society, particularly pp. 91 et seq., and 485 et seq.; WEBER, Wirtschaft und Gesellschaft, p. 413 et seq.; see also WEBER, Rechtssoziologie, p. 105 et seq.; COOTE, p. 20 et seq.; essays in Col. L. Rev. vol. 43 by WIGMORE, RADIN, LENHOFF, HALE, KESSLER and DODD; and ADLERCREUTZ, p. 27.

against a breaking of the gaol, but not against fire; the smith warranted against pricking the horse; the innkeepers against theft but not against other sorts of injury; the carrier against theft on the road but probably not against theft at an inn. It will be observed that in no case did the obligation implied by law amount to an obligation to insure against all events."[17] Thus the confusion was great between the two sets of duties, the strict liability for all bailees, as laid down in *Southcote's Case*[18], and the liability derived from the custom of the realm applying to a person engaged in a public calling.[19] The development here sketched has obviously had an important bearing upon Lord Holt's statement in *Coggs v. Bernard*[20] where he distinguished between bailees for reward exercising a public employment, such as common carriers, common hoymen, and masters of ships, on the one hand, and all other bailees on the other.[21]

It is, however, at the same time important to keep in mind that economic and social changes during the 17th and the 18th centuries were associated with a substitution of contract for status in commercial relationships and with an increasing emphasis on the value of commercial freedom in business activities. The economic expansion brought with it a breakdown of many local monopolies so that competition came to be regarded as a means of prosecuting public policy in place of common law obligations.[22] And it may be said with the words of Milne & Laing[23]: "That common callings have been the subject of regulation derives not so much from the fact that these callings were "common" as from the fact that they were monopolistic."

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[17] FLETCHER, p. 113.

[18] *Southcote v. Bennet* (1601) 4 Coke. Rep. 83 b. In this case an ordinary bailee, not a carrier, was held liable, notwithstanding a loss by robbery without negligence. Cf. FLETCHER, p. 118. There is, however, among the authorities no perfect unanimity as to whether *the Southcote's Case* really placed upon all bailees a strict liability, and in this connection it is important to be aware of, that some authors use the concepts of strict liability and absolute liability etc. without making a clear distinction between them.

[19] See ibid. p. 112. In *Lane v. Cotton* (1701) 1 Ld. Raym. 646 it was held that a man who undertakes a public employment is bound to serve the public as far as the employment extends, and an action lies against an innkeeper refusing a guest when he has room, and against a carrier refusing to carry goods when he has space for them.

[20] (1703) 2 Ld. Raym. 909.

[21] Cf. FLETCHER p. 145.

[22] MILNE & LAING, pp. 12–13.

[23] P. 13.

§ 1.4. *The Concept of Public Utility*

The later development of the common carrier doctrine must be seen in the light of the concept of public utility, a later reconstruction of the idea of common calling used particularly in the United States.[1] The idea of public utilities is important in order to sketch the other aspect behind the common carrier doctrine, namely not the individual relation between one carrier and one customer, but the relation between carriers and the public in general, thus in practice the government regulation of the transportation industry, and the competition aspect. The public utility concept can be traced back to several different origins.[2] Glaeser mentions for example the theory of "just price" (*justum pretium*)[3] but he also traces it back to the guild system during the Middles Ages, to the exclusive royal charters given e.g. to trading companies,[4] and to Chief Justice Hale's treatise *De Portibus Maris*.[5] Barnes sets up several different theories which may one by one or jointly have led up to the public utility concept: The holding out doctrine, the implied contract theory, the constructive-grant theory, the government-function theory and the all-inclusive police power-theory.[6]

In law a distinction has been made between private callings and public callings.[7] The theory of free competition which has played a significant role for modern social organization largely superseded practices with their origins in the middle ages, particularly during the 19th century.[8] During the

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[1] A great number of elaborate pictures of this evolution are available, but suffice it here, for a general idea, to refer to pertinent sections in e.g. BERNITZ, FRIEDMANN, Law in a changing Society, HANDLER, LASKI and WELINDER.

[2] PHILLIPS, p. 51 et seq.

[3] GLAESER, p. 196. Cf. also ROLL, pp. 35, 46, 47, and BERNITZ, pp. 91 and 93.

[4] GLAESER, p. 201.

[5] See below in connection with the case *Munn v. Illinois*, 94 U.S. 113 (1877).

[6] P. 13 et seq.

[7] Cf. e.g. ROBINSON, The Public Utility Concept, p. 277; BEALE & WYMAN, p. 4.

[8] Cf. SCHMIDT, p. 13 et seq. BERNITZ, pp. 11 et seq. and 89 et seq. During the 20th century the wars 1914–1918 and 1939–1945 and the intermediary economic crisis meant in both United States and Western Europe that the efforts to create a society with the freest possible competition were replaced by necessary regulation. After the war ending 1945 great efforts were carried through to secure free world trade between the industrial nations, and organizations like GATT, OECD, EFTA and EEC have been created to this effect. The complexity of modern society has brought industrial and commercial life into closer co-operation with governments, and government planning is at present a more accepted instrument than it used to be. It should however also be noted that the liberation of world trade has taken place during times of steadily expanding world trade,

mediæval period most trade in the towns was restricted by the guild system, and the fundamental principles were then the establishment of special privileges, and government regulation, both with respect to service and to price.[9] In the 17th century for example price control regulations came into existence relating to a great number of professions and merchandise.[10] By patents from the crown monopolies were established.[11] Exclusive privileges are to-day still found in certain business but more often franchises are granted.[12] During the 19th century the liberal theory largely came to influence economic doctrine. Private property and private enterprise were regarded as the basis of a free society in Western Europe and United States, and free competition was regarded as advantageous for the interests of society as a whole. With the prevalence of the "laisser-faire" attitude little attention was paid to public callings during the first part of the 19th century, but in the course of time it became evident that free competition did not render the public all protection that was required.[13]

Free competition and the theory of freedom of contract together caused the undermining of competition, and different means were introduced to balance this occurrence. In some countries certain industries were nationalised, while in others government regulation was introduced to supervise certain private enterprises, where the public was regarded as having a special interest that deserved better protection. Thus the Sherman Act

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and one may assume that a new crisis would bring about new measures of regulation. An exhaustive exposé of this development is found in BERNITZ, pp. 129–230.

[9] BEALE & WYMAN, § 5 et seq.; TEDROW, p. 9, and ROLL, particularly p. 40 et seq. Cf. ADLERCREUTZ, p. 27 et seq.

[10] BEALE & WYMAN, § 13.

[11] See e.g. ROLL, e.g. pp. 40, 56 and 151; BEALE & WYMAN, § 14 and § 55 et seq. Cf. BERNITZ, p. 89 et seq. One may distinguish between certain types of monopolies originating from different circumstances such as, for example natural monopolies, legal monopolies, technical monopolies, and financial monopolies. Cf. WELINDER's terminology at p. 53 et seq.

[12] PHILLIPS, p. 5 et seq. Cf. GLAESER, p. 201. Royal charters resembling the franchises of to-day were granted by the government to trading companies.

[13] BEALE & WYMAN, § 20. At p. 14 the change of attitude was thus expressed: "General but not absolute restriction of the freedom of trade was the policy of the middle ages; general freedom of trade, with the restriction of certain exceptional occupations, has become the policy of modern times." See also ROBSON, Nationalized Industry, p. 119 et seq. where he deals with competition, monopolies and public utilities. Cf. SCHWARTZ, Legal Restriction, p. 436 et seq.

was introduced in the United States in order to neutralize the detrimental effect which the creation of enormous trusts and cartels had on competition.[14] During the last 50 years such tendencies have been obvious in both Western Europe and United States.[15]

Seen in this relation carriage in the mediæval period must be regarded as a natural monopoly, the villages being isolated from each other owing to comparatively long distances and little transportation carried out by few carters. Yet "one who pursued the calling of common carriage must in order to do so effectually establish a certain regular course of business, and must be prepared to take care of traffic when it presented itself."[16]

The concepts of public utility and the common carrier can be traced back to early times, and particularly as to American law some understanding of the former concept is necessary in order to comprehend the changes of substance regarding the latter. The public utility "concept is legal in its origins and usages, but it applies to a combination of economic and social (and perhaps political) facts".[17] The efforts to define public utility have not been very successful, and I believe that it is difficult to construe an adequate definition, as those industries which are regarded as public utilities vary from one country to another, and may also vary considerably at different times between themselves.[18] Furthermore the experts within one

[14] See e.g. NEALE, pp. 2, 12, 462 et *passim;* and BERNITZ, pp. 147, 248 et seq. The official name of this Act is "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies".

[15] See e.g. BERNITZ, p. 249 et seq. The Clayton Act 1914 which introduced a more detailed system was amended in 1950 through the Celler-Kefauver Act. See e.g. BERNITZ, p. 260 et seq. See also HANDLER. The principle of non-intervention established by the House of Lords in *Mogul S.S. Co. v. McGregor, Gow & Co.* (1892) AU E.R. Rep. 263 basically survived till after 1945, but during the fifties and sixties a complete break occurred and a comprehensive and fairly complicated normative system has been designed in English law in order to protect competition as a market mechanism. See e.g. BERNITZ, p. 351 et seq. A simple but still elucidatory booklet on this subject is also found in KORAH's Monopolies and Restrictive Practices.

[16] BEALE & WYMAN, § 56. Cf. RIDLEY, An illustrated History, particularly in chapter 4.

[17] BARNES, Public Utility, p. 1, who also gives a definition of the public utility though with reservations. Cf. efforts to define this concept in ROBINSON, The Public Utility Concept, p. 277; BONBRIGHT, p. 4, and PHILLIPS, p. 3 who states that: "The public utility is a regulated industry whereby is referred to a group which has been subjected over several decades to detailed local, state, and federal regulation as to rates and service."

[18] Cf. GORDON; WELINDER, p. 47, and LASKI, pp. 462 and 525–26. KUHN, p. 13 states: "Indeed, under common law all business is public; only an arbitrary distinction separates private and public business". BEALE & WYMAN in § 1 state that private callings are the rule and public callings the exception, cf. however also § 11 and above note 13.

country often disagree as to what types of undertakings should be classified under this heading. But one may at least distinguish two conditions: Firstly, that the undertaking should be considered so essential that public regulation, ownership or operation is necessary; and secondly, that the undertaking should be monopolistic.[19] Robson exemplifies the public utilities as water, gas and electricity service, ports and harbours, and perhaps also public transport services and telecommunication.[20] Consequently the very characteristics—economic, social, and legal—of a public utility susceptible to regulation are not very easily described, and the reasons that one industry has been regarded as a public utility and others not depend on several factors.[21] One may say that when an industry is considered as a public utility, then there will also be some form of government regulation. But this may also be expressed the other way around, *viz.* when the government considers that a certain industry should be regulated, then it may be declared a public utility.

The U.S. origin of the concept of business "affected with public interest" is usually derived from the case of *Munn v. Illinois*,[22] but other cases have naturally also had a significant bearing on this development.[23]

The background of the Munn case was the following: by reason of the Granger movement[24] a provision had been incorporated in the Illinois Constitution of 1870 designating grain elevators as public warehouses and the following year the legislature adopted a maximum charge that owners of grain elevators were allowed to charge their customers. The rates had been fixed by agreement among

[19] ROBSON, Nationalized Industry, p. 17. Cf. CLEMENS, p. 25. "Necessity and monopoly are almost prerequisites of public utility status." See also WHEATCROFT, p. 46, suggesting that air transport is a quasi-public utility, as it lacks the natural monopoly characteristics.

[20] P. 17. Cf. FRIEDMANN, Law in a changing Society, p. 5 et *passim;* and WELINDER, p. 47 et seq.

[21] Cf. PHILLIPS, p. 19. "Regulation is an economic, legal, and legislative concept. The legislature usually decides what industries should be regulated. This decision may be based upon the economic characteristics of certain industries, existing social philosophies, or political considerations. The policies adopted, however, must conform to the existing legal concepts and procedures. Compromise is thus a basic ingredient of existing economic policies." See also KAYSEN & TURNER, pp. 189–190.

[22] 94 U.S. 113 (1877). See BARNES, Public Utility, p. 2 et seq.; cf. PHILLIPS, p. 45 et seq. In this case i.a. article I in section 8 of the constitution was discussed. Cf. however also KORAH in sec. 21. "Definition of the public interest", at p. 151 et seq.

[23] Like the *Slaughter House Cases*, 83 U.S. 36 (1873); *Davidson v. New Orleans*, 96 U.S. 97 (1878); *Adair v. U.S.*, 208 U.S. 161 (1908).

[24] See below § 2.3. where the Granger movement is mentioned in connection with the Interstate Commerce Act, 1887.

the grain elevators of the district, and Munn and Scott, in spite of the legislation, charged higher rates than those prescribed, and were subsequently therefore fined in the State courts. In their appeal to the U.S. Sup. Ct. they alleged that the state of Illinois had no right to regulate their business, by reason of the due-process clause.[25] Lord Hale's treatise *De Portibus Maris* was cited as authority on the common law in relation to business "affected with a public interest", and nowhere in Lord Hale's enumeration of such business were grain elevators mentioned. Thus grain elevators should be considered a private business, and their public regulation the equivalent of a seizure of property in violation of the due-process clause. The dictum runs:[26]

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only'. This was said by Lord Chief Justice Hale more than two hundred years ago, ... and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control."

Regarding the due process clause in the Fourteenth Amendment of the Constitution historically Chief Justice Waite could find no ground to interpret price-fixing legislation as an unconstitutional interference with private property. Rather he pointed out that the power in question had always been exercised to regulate the use or even the price for the use of private property when deemed necessary for the public good.

Two judges dissented, finding that the asserted power to regulate price was a real deprivation of property contrary to the constitutional rights of private property. Mr. Justice Field argued that the power to regulate (police power) should be restricted to securing the "peace, good order, safety, and health of the community".[27]

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[25] PRENTICE, p. 20 et seq. touches upon conflicts of similar kind.

[26] Pp. 125–126.

[27] P. 146, cf. pp. 142–43.

At the time when *Munn v. Illinois* was under consideration the regulation of railroad rates was also before the Court.[28] There was an apparent need for regulation of railroads, owing to various forms of discrimination, exaggerated rates, and indifference to the desires of the public. "Though it was possible to find precedents for railroad regulation in the English law relating to "common carriers" or in the doctrine that the privileges conferred on the railroads by the governments implied a contractual right to follow privileges with regulation, the Court chose to use the public-interest doctrine to uphold these controls."[29] In *German Alliance Insurance Comp. v. Lewis*[30] Mr. Justice Mc Kenna stated that "[t]he transportation of property business of common carriers—is obviously of public concern and its regulation is an accepted governmental power".

During the following decades several public utility cases were decided.[31] In *Wollf Packing Co. v. Industrial Court*,[32] the court analysed the doctrine and divided into three classes the businesses with a public interest character which justified some kind of public regulation:[33]

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and grist mills . . .

(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest

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[28] In *Chicago, Burlington, and Quincy R.R v. Iowa*, 94 U.S. 155 (1877) the Supreme Court stated that railroad companies are carriers for hire, and as they are engaged in a public employment affecting the public interest, they are unless protected by their charters, subject to legislative control as to their rates of fare and freight. See also *Peik v. Chicago & N.W. Ry.*, 94 U.S. 164 (1877).

[29] BARNES, Public Utility, p. 4. Cf. ROBINSON, The Public Utility Concept, p. 279.

[30] 233 U.S. 389 (1914).

[31] E.g. *Budd v. New York*, 143 U.S. 517 (1892); *Brass v. N.D.*, 153 U.S. 391 (1894). Cf. BARNES, p. 4 et seq.; and HAMILTON, p. 1089 et seq.

[32] 262 U.S. 523 (1923).

[33] At p. 535.

although the property continues to belong to its private owner and to be entitled to protection accordingly."

This threefold classification should be seen in the light of the different theories on the origin of public utility doctrines.[34] However this analysis cannot be regarded as all-inclusive and precise since the distinction between public utility in (1) and other industries vested with a public interest seems doubtful. The classification to me seems to be a pseudo-classification, unless an effort to determine the concept of public utility is made. Furthermore, although it explains that this type of industries may be of varying character, it leads nowhere, since no fundamental difference seems to be linked to the consequences of belonging to one or the other of the three categories. It may, however, be possible to establish certain differences by classifying the industries concerned into groups depending on e.g. the degree of government control. I believe that the Court has tried to tie the public utility concept to a particular category of business, which seems superfluous when considering the relative vagueness of that concept. When the concept of public utility was adopted, the concept of the common carrier was long since well established. Thus when regulation was introduced in the field of transportation it was often based on the concept of the common carrier as a natural starting point,[35] while in contrast when regulation was considered necessary in other fields, such regulation was adopted gradually, and the industries thus regulated were classified.

The two concepts cover each other, but have developed under somewhat different conditions, and possibly also certain differences may be distinguished with respect to the intention behind their evolution.

§ 1.5. *Certain Aspects of the economic and legal Structure in the Field of Transportation*

From the preceeding discussion it is evident that the concept of the common carrier has been and still is of great significance in Anglo-American law—although nowadays of less practical importance in England—as a link connecting different legal approaches to regulating different relationships.

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[34] This analysis should be compared to what has been said above at notes 2–6. See also SCHWARTZ, Legal Restriction, at p. 436; and cf. BONBRIGHT, p. 4.

[35] See next §. Cf. ROBINSON, The Public Utility Concept, p. 279 et seq. One reason why transportation is so frequently treated as a separate subject is that not all forms of transport fall within the public utility category; see BONBRIGHT, p. 4.

Before venturing further into the development of the common carrier doctrine a brief survey is necessary to give an idea of certain conditions under which transportation operates in England and U.S.A.

The different branches of the transportation industry operate under different conditions. While carriage by sea and air have since their inception been based on international trade, carriage by railway and road was in the first instance built upon domestic trade. Further the attitude to private or public ownership in the transportation sector varies in different countries as well as the attitude to interference through regulation with privately operated transportation businesses. In some countries a macroeconomic perspective predominates, i.e., the transportation industry is regarded as an important planning instrument, while in others a microeconomic perspective is prevalent and the transportation enterprises left free to compete with less interference with respect to their activities.[1]

Regarding the international aspect of the transportation industry some few remarks may be made concerning the organizations at work, and their engagements, as well as some pertinent international conventions. It should first be noted that international organizations such as e.g. UNCTAD (United Nations Conference on Trade and Development), ECE (Economic Commission for Europe), and UNIDROTT (Institut International pour l'Unification du Droit Privé) have significance also in the field of transportation.

Concerning liner service in air transportation public operation is frequent. Most air lines in liner service are members of IATA (International Air Transport Association), a world wide cartel, regulating tariffs and other carrying conditions for its members. ICAO (International Civil Aviation Organisation) is an official body often co-operating with IATA in matters concerning for instance international legislation in the field of air law.

Generally one may say that shipping companies in the Western world are privately owned and enjoy relatively little interference from government authorities. Liner service in shipping is almost invariably performed within a conference, a cartel, where carriers in a certain trade are supposed to be members. With respect to international legislation in the field of carriage by sea the private organization CMI (Comité Maritime International) has played a great role, and the official IMCO (Intergovernmental Consultative Organization) is carrying out important work particularly as concerns rules on technical questions, such as safety.

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[1] In this connection it is of course also important to remember demographic and geographic differences; whereas England is an overpopulated island with few natural resources and highly dependent upon international trade, U.S.A. is a vast continent, with a large market and enormous natural resources. (The difference in approach is thus understandable. See e.g. PEGRUM and GORTON, Transportreglering, with references.)

Railroads are mostly government operated. The Western European railways, which are co-operating, have a central bureau, Office central de transports internationaux par chemins de fer at Bern, where e.g. various legislative questions are investigated.

In the field of transportation by road private operation is predominant, and much traffic is carried out by carriers operating one or two vehicles only. The international interest organization IRU (International Road Transport Union) deals with various matters such as carrying conditions and negotiations with governments etc. FIATA (Fédération Internationale des Associations de Transitaires et Assimilés) is the interest organization of the forwarding agents and has functions similar to those of IRU.

Land transportation is somewhat unique seen from the angle of competition. During the war 1939–45 general regulation was predominant in most forms of business. After the war, when there was a significant expansion in carriage by road, regulation remained in this field in spite of the general efforts towards less trade restriction. Nevertheless much traffic was taken over from the railroads by the truckers. Therefore also EEC (European Economic Community) should be mentioned as an important organization in this connection. Part II of the Rome treaty contains a number of sections dealing with transportation (basically transportation by road and inland waterways). In spite of the Commission's unambiguous interpretation with respect to transportation little success has been obtained in reducing the regulation between the member countries. As for domestic carriage the Rome treaty so far has no effect.

The work carried out in the different organizations concerning the unification of the law in this field—particularly regarding the "private law" conventions directly affecting the legal positions of carriers vis-à-vis passengers, shippers, consignors or consignees of goods has been rather successful.

As to air law the Warsaw convention was passed in 1929, and the constant work on revision led in 1955 to the signature of the Hague Protocol. In 1961 the Guadalajara convention was adopted, and in 1966 international air carriers operating to the United States concluded the Montreal agreement increasing the passenger limits of liability.

With respect to the ocean carriage of goods, the Brussels convention, 1924—more commonly called the Hague rules—has had a profound impact on the conditions of carriage, and several countries have adopted these mandatory rules. An amendment—the Hague-Visby rules—was adopted by a diplomatic conference in Brussels in 1967/1968.

The CIM (Convention Internationale concernant le Transport par Chemins de Fer des Marchandises) of 1890, most recently revised in 1961 and 1967 has been of similar importance for railway carriage of goods in Western Europe, and the CMR (Convention relative au Contract de Transport international de Marchandises par Route) from 1956 will most certainly have the same impact with respect to carriage of goods by road.

The development particularly during the last five years towards "unit" transportation whereby a new transportation system has been created, has led to a

change of the competition conditions within certain trades. Some large groups of forwarding agents have started to undertake transportation, and through transportation is offered to the customers to an increasing extent. Large investments in new equipment, such as containers and pallets, and in new port facilities etc. demand large amounts of capital. To meet these new requirements there is a trend towards company mergers, co-operation, and the integration of capital and functions within the transportation industry.

Thus the combined transport operation, i.e. carriage where two or more carriers participate in the movement of goods, is evolving with the increased use of containers. Intermodal carriage[2] may change the pattern of shipping and other transportation, as particularly Asia, Europe and North America may serve as bridges between oceans. "The three possibilities that loom as natural 'land-bridges' are (1) United States or Canadian railroads connecting the Atlantic and Pacific Oceans, (2) the Eilat-Ashdad land-bridge across the Negev Desert which is operating in a limited fashion, and (3) the Europe/Siberia land-bridge using the Trans-Siberian Railway which has been tried. The railroads appear to be the natural continental land-bridge connections for reason of speed and durability of equipment, although the Eilat-Ashdad land-bridge used trucks on a nine hour haul across the desert."[3]

The new transportation system also demands a new approach to the carrier's liability and to the documentation involved, and extensive work has been carried out to solve connected problems. The work has been started within CMI and the International Chamber of Commerce, and in 1969 CMI adopted at a meeting in Tokyo a draft convention establishing special rules regarding the liability of the combined transport operator in international carriage. At a round table meeting in Rome in January 1970 arranged by UNIDROIT a new draft convention on combined transport based on the Tokyo rules was prepared under the name of the Tokyo/Rome rules. Thereby ocean carriers, railway and road carriers and forwarding agents have declared their interest in such a convention. The next step will apparently be to convince the air lines and IATA that there is a real need for new rules regulating the combined transport operator's liability.[4]

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[2] See below Appendix.

[3] BLUM, p. 96. Cf. GHT Jan. 3, 1970 reporting plans to establish a truck service Eilat—Ashdad, which would diminish the importance of the Suez canal. See also SvSjT 1969 no. 24, p. 7, announcing that a truck line would be opened on the route Gothenburg-Stockholm-Helsinki-Moscow with one weekly departure and connections with the continent. Cf. further also in GHT March 26, 1970, reporting plans of a container service London-Yokohama via Switzerland and the Soviet Union and similar reports in later issues as well as frequent notices in SvSjT during the last years to the same effect. This "land-bridge theory" is, however, not generally accepted. U.S. West coast transportation authorities e.g. have criticized such statements, and among others Johnson Line is still competitive with respect to direct ocean carriage between Europe and the U.S. West coast.

[4] About the development of this new set of liability rules, see CMI:s CONTAINERS 1–6; GRÖNFORS, Successiva transporter, particularly p. 274 et seq.; RAMBERG, The Combined

§ 2. *Organization of the Transportation Industry in the United Kingdom and the United States of America*

§ 2.1. *General Remarks*

As we have already seen, the common carrier doctrine is connected with the concept of public utility. The national regulations of transportation are of significance in understanding the further development of the concept of the common carrier. The transportation industry is in several countries,[1] among them both England and the United States, singled out as a branch where government planning has played a greater role than in many other fields of industry. But the English approach in a number of ways has differed and still differs from the American.

Basically in both England and United States there has been an unfavourable attitude towards nationalization, and one may say that as a general rule all carriers have developed under private operation, and not until lately has public operation become more common in England, in the fields of railway, road and air carriage. In the United States all carriers are still basically privately operated.[2] However, the governments in England as well as in the United States have interfered with private industries where such interference for different reasons has been regarded necessary.

The international character of trade by air and ocean carriage has together with certain other factors naturally influenced the method of government control. In United States the body regulating air carriage is a powerful organization with great influence also on the international development. All air carriers are privately owned and at present there are few—

Transport Operator; and MANCA, vol. II, p. 343 et seq. contain material on the CMI Draft Convention on Combined Transports ("Tokyo Rules") and a Draft Convention on the International Combined Transports of Goods, worked out by leading members of CMI and UNIDROIT ("the TCM Convention"). For a general survey of the difficulties to apply the Hague Rules in container traffic see KIRSTEN.

[1] WEBER, Wirtschaft und Gesellschaft p. 83 et seq. treats the principal forms of appropriation and of market relationship and mentions specifically the transportation industry. For an analysis of the concept of transportation policy see NUPP, p. 143 et seq. Cf. LANSING, pp. 12 et seq. and 59 et seq. and HILL, *passim*, particularly p. 119 et seq. and WESTERBERG, *passim*.

[2] Recently, however, there have been reports in the press concerning American debate on the nationalization of the railroads owing to the financial difficulties of some large companies, see e.g. S.D.S. Dec. 21, 1970, p. 13.

if any—subsidies awarded in this field. The regulation of air carriers is, however, rigorous. In England the air liner service is almost exclusively publicly operated, while in charter traffic several private companies are in business. As in the United States there is considerable regulation in this field. The American shipping industry is basically privately owned but scrupulously supervised by the authorities.[3] In England on the other hand there is little government interference with ocean carriers.[4] While in United States transportation by land both as to railroads and road haulage is privately owned but rigorously regulated, the railway industry in England is nationalized as well as part of the road haulage industry and there is further extensive regulation relating to the latter. Even freight forwarders are subject to regulation in United States while forwarding agents in England are basically exempted therefrom.[5]

In England the agencies or regulatory bodies supervising the transportation industries have a somewhat different competence from those in United States, which is at least partly a consequence of the structure of the transportation service in these two countries. While in American regulation the concept of the common carrier is the basis upon which legislation is built, this concept has little direct significance in English transportation regulation.

§ 2.2. *United Kingdom*

British transportation policy is set forth in a number of Merchant Shipping Acts and Transportation Acts.

As indicated above the organization of the British transportation industry is somewhat different from the American.

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[3] The U.S. merchant fleet is rather small considering the U.S. foreign trade, but much tonnage is placed under so-called flags-of-convenience. There are both direct subsidies to operators in liner service—principally common carriers—and indirect subsidies through government support to the shipyards. The defense aspect has played an important role in U.S. maritime policy.

[4] However a number of ships are operated by the British Railways Board. Also in Britain there are subsidies to the shipyards. But legislation appears to be pending, following the ROCHDALE REPORT, which suggests the abolishment of the investment grant system.

[5] Owing, partly at least, to the particularity of the American regulation of the transportation industry non-vessel-operating common carriers (NVOCC) have expanded during the last 10–15 years. Concerning the establishing of Inter Freight Inc. see e.g. SvSjT 1970 no. 14, p. 3. Cf. also below in Appendix. An informative study on land transportation is found in KOHLSEN, particularly pp. 151, 165 and 176.

Part of the inland transport system of Great Britain is nationalized[1] including railways, certain road haulage and passenger services, most of the inland waterways and some of the vessels running on them. Most of the road haulage industry, however, and the entire coastal shipping industry is privately owned. Most of the shipping industry in foreign trade is in the hands of private industries, except the rather important merchant fleet owned and run by the British Railways (BR). As for the British civil aviation British Overseas Airways Corporation (BOAC), engaged in longhaul operations, and British European Airways (BEA), operating within Britain, or on short distances within Europe, are both public corporations, but in addition to these two there are a number of independent air transport operators.

The main government bodies supervising the transport industry are the Board of Trade and the Ministry of Transport.

§ 2.2.1. Board of Trade

The Board of Trade has general responsibility for the United Kingdom's commerce, industry and overseas trade. It is concerned with the formulation and administration of policy on such subjects as commercial relations with other countries, import and export trade, protective tariffs, industrial development and general economic matters, consumer protection, shipping and civil aviation. Among other responsibilities the Board supervises the promotion of exports, statistics of trade and industry, the administration of certain regulative legislation, for example in relation to patents, trade marks, companies, insurance, shipping and civil aviation, and also the management and development of the United Kingdom air traffic control organizations.

The Board of Trade took over most matters connected with merchant shipping from the Ministry of Transport in 1965. Under the Merchant Shipping Act 1894 and subsequent legislation it administers many regulations for marine safety and welfare, such as standards of safety in ship construction, provisions of adequate life-saving, etc.[2] There is also a Registrar-General of Shipping and Seamen, keeping a complete record of all British ships and seamen.

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[1] See e.g. GARNER, p. 278 et seq.; GORDON, *passim*; ROBSON, Nationalized Industry pp. 18 et seq., 48 et seq. and 119 et seq.; ROBSON, The Public Corporation, p. 1321 et seq.; and GWILLIAM, p. 94 et seq. THORNHILL covers bodies such as BR, BOAC, and BEA in great detail.

[2] Some of the Board of Trade's functions are rather similar to those of the U.S. Coast Guard.

General responsibility for the development of the United Kingdom civil aviation was transferred in 1966 from the Ministry of Aviation to the Board of Trade.[3] The Board of Trade has certain statutory powers and duties in respect of the two public air corporations. It is responsible for approving the air lines' capital expenditure, and, after consultation with them, it sets their financial targets. There is between the Board and the corporations a close consultation on overseas traffic rights and air safety.

Under the post-war nationalization legislation the two public air corporations had a statutory monopoly of British scheduled services, and independent operators were principally confined to charter work. However from 1949, and to a greater extent from 1952, a limited scope to develop new scheduled services was allowed to the independent operators on condition that they secured Ministerial approval and operated, technically, as associates of the public corporations. Through the Civil Aviation (Licensing) Act, 1960 the corporations' monopolies were abolished, and a licensing system was introduced administered by the Air Transport Licensing Board (ATLB), to which the nationalized and independent operators could apply on an equal footing for licences for scheduled or charter services, or for revocation or variation of existing licences. The members of the Air Transport Licensing Board are appointed by the Board of Trade.[4]

§ 2.2.2. Ministry of Transport

The Minister of Transport has powers and duties relating to inland transport in Britain, including certain statutory duties concerning railways, roads, road transport and inland waterways. He is responsible to Parliament for the nationalized transport undertakings,[5] appoints the members of their

[3] The Ministry of Aviation is mainly concerned with development of technology in aircraft construction. The conservative government elected in 1970 has announced a reduction of the number of ministries, and at least part of this reduction has been carried out. A new Department of Trade and Industry has been created with two assistant ministers for shipping, shipbuilding and insurance. The new Department has been established through a merger of the Board of Trade and the Ministry of Technology. All functions of the former Board of Trade have thus been transferred to the Department of Trade and Industry. Cf. SvSjT, 1970 no. 44, p. 13.

[4] See e.g. "Civil Aviation in the United Kingdom".

[5] These are for example British Railways Board, London Transport Board, British Transport Docks Board, British Waterways Board, Transport Holding Company, and, under the Transport Act of 1968, National Freight Corporation and National Bus Company.

Boards, and may determine the broad policies to be pursued, including the formulation of capital investments programmes.

The organization of British land transport is somewhat involved.[6] The railway system was nationalized under the Transport Act, 1947, as was a large sector of the road haulage industry, and these were placed under the control of the British Transport Commission (BTC). The functions of BTC were modified under the Transport Act, 1953 and the Transport Act, 1956 provided for the further denationalization of road haulage which had started three years earlier. It was later decided that the activities of the BTC were so large and diverse that they could not be run effectively as a single undertaking. Through the Transport Act, 1962 the BTC was dissolved and replaced by four boards, whereof British Railways Board is the most influential.

Under the 1962 Act the British Railways Board, thus set up, was given the sole responsibility for managing railway affairs, and was made responsible directly to the Minister of Transport. Under the Act the railways were relieved of much of their burden of accumulated debt and were given freedom to alter their charges at will, except for passenger fares in the London area.

The cross-channel shipping services operated by British Railways also passed over to the Board.

The nationalized road haulage industry, which had been under the control of the BTC, was transferred under the Transport Act, 1956 to the control of the newly created British Road Service (BRS), which was set up as a division of the BTC.[7] In the Transport Act, 1962 the road haulage industry was reorganized anew, and the Transport Holding Company came into existence to control the companies that prior to this date had been under the control of BRS.

In the Transport Act, 1968 a new step was taken towards a more efficient organization. Most of the functions of the Transport Holding Company were transferred to the National Freight Corporation (NFC). Also all parcel services previously under the control of the Railways Board were transferred to the NFC, and the intention is that only full carloads will

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[6] For a survey of this development see e.g. KITCHIN; CORPE on Road Haulage Licensing; HILL, p. IV: 70; and MCGRATH, p. IV: 81.

[7] When the road haulage industry was denationalized, efforts were made to sell back the government owned lorries; BRS was established to control those some 10,000 trucks that were not sold but which remained in government ownership.

remain under the British Railways Board, and thus the NFC and its subsidiaries will also have a consolidating function.[8]

During the time when the railways were private owned important legislation such as on undue preference was enacted, which has had no equivalences as to goods traffic by road. Nor have the charges for carriage of goods by road been regulated by statute.[9] "All that was done was to regulate the conditions of entry into the road haulage business, and the conditions under which a person may use a vehicle for the transport of goods. The basic principle is that no person must use a goods vehicle on a road for the carriage of goods except under a licence, . . ."[10]

§ 2.3. *United States of America*

With its common law heritage the U.S.A. also took over the English concept of the common carrier. As time passed the doctrine of common carrier came to be used in two different types of legislation, one "administrative", *regulating*[1] the common carrier, and one "private", governing mainly the liability of a common carrier towards his shippers etc. However, these groups are necessarily mingled with each other to a certain extent, as one way to economically regulate the conditions under which a carrier is operating is to legislate about his liability.[2]

During the early part of the 19th century railroad construction was encouraged as an aid to the expanding U.S. economy. The railroad industry grew rapidly, as did the industry on the whole. Bitter competitive battles were fought between the railroads, and frequently the public—the consumer—was the loser. The cut-throat competitive practices included financial trickery and rate abuses. At times railroads lowered rates sharply to

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[8] Through the 1968 Transport Act the system of licensing for road vehicles—licences have been issued by particular licensing authorities—will be greatly changed. See below § 8.2.1.

[9] KAHN-FREUND, p. 111 et seq. The Licensing Authority for Public Service Vehicles can however regulate the fares which both may and must be demanded by operators of buses and coaches.

[10] Op. cit., p. 113.

[1] Art. 1, § 8 of the U.S. Constitution—the so-called Commerce Clause—declares that "Congress shall have power to regulate commerce with foreign nations and among the several states". Cf. VAN METRE, *passim*, and particularly p. 291 et seq.

[2] The Interstate Commerce Act of 1887 contains a more thorough and universal legislation for carriers within its jurisdiction, than the Shipping Act of 1916 and the Federal Aviation Act of 1958 for carriers within their respective domains.

kill off competition, and when that goal was reached the rates went up again. Discrimination became widespread, and rebates, special rates, and underbilling contributed to the unfair treatment of the public. In the light of this Congress passed the Act to Regulate Commerce (Interstate Commerce Act) in 1887, which was the first act passed to regulate the transportation industry in U.S.A.[3]

Regulation has been built upon two main principles, *viz.* private enterprise and the public good, and is today extremely complex—regulation feeds regulation. Even the railroad and aviation industries are privately owned, as contrasted to the conditions in Europe (particularly with respect to the railroads), but on the other hand parts of the transportation industries are subsidized and supervised by the Federal Government, as is for instance particularly the case with the shipping industry.

The U.S. National transportation policy is principally set forth in the Transportation Acts of 1920, 1940, 1958, and 1966 and the Merchant Marine Act of 1936. A form of national transportation policy has also been written into the Motor Carrier Act of 1935, and the Civil Aeronautics Act of 1938. In the Doyle report of 1961 one finds a thorough investigation of the U.S. transportation industry.

By degrees Congress has given the power of economic regulation to the Interstate Commerce Commission (ICC), the Federal Maritime Commission (FMC) and the Civil Aeronautics Board (CAB). These commissions or regulatory agencies have been established by the Interstate Commerce Act of 1887, the Shipping Act of 1916, and as to aviation most recently by the Federal Aviation Act of 1958. The regulations have gradually become more sophisticated and detailed through several amendments.

The regulatory agencies are not part of any department, or other office of the executive, legislative, or judicial branches of the Government but have obtained their power from Congress, but the work of the commissions also relates to judicial and executive responsibilities of the Government. They are independent regulatory agencies with regulatory functions which are essentially executive in nature, although they perform quasi-legislative functions, as delegated by Congress, and quasi-judicial functions which are subject to judicial review. One may conclude that they are not courts,

[3] Cf. NEALE, p. 12; PEGRUM, p. 258 et seq.; ULMER, p. 4 et seq.; NELSON, p. 111 et seq.; and LANSING, p. 91 et seq. For a general survey on the relation between Commissions and Departments in U.S. administrative law see SCHWARTZ, An Introduction, p. 18.

but have recourse to the courts in order to enforce their orders, although they exercise quasi-judicial powers, as well as quasi-legislative powers. Decisions by these bodies are often appealed directly to the Circuit Courts of Appeal on restricted grounds.[4] The Commissions handle matters such as certificates of necessity, permits to operate, the filing of tariffs, rates, mergers and so on.[5]

In 1967 the Department of Transportation came into being as a branch under the presidential power, and several functions were transferred to it from the Departments of Commerce and Defence and others, and some functions were transferred from the regulatory agencies, particularly questions concerning safety.

§ 2.3.1. Interstate Commerce Commission (ICC)

Prior to the enactment of the Interstate Commerce Act railroad traffic in the United States was regulated by the common law principles regarding common carriers, requiring that they should carry for all who applied and charge only reasonable charges.[6] The Interstate Commerce Act became effective in 1887 and thereby the ICC was created.[7] The object of ICC is to regulate interstate surface transportation. About 20,000 for-hire companies provide domestic surface transportation and are subject to ICC's economic regulation, including railroads, trucking companies, bus lines, oil pipelines, freight forwarders, transportation brokers, and express agencies. ICC also regulates most domestic water carriers.

In broad terms ICC regulation includes transportation economics and

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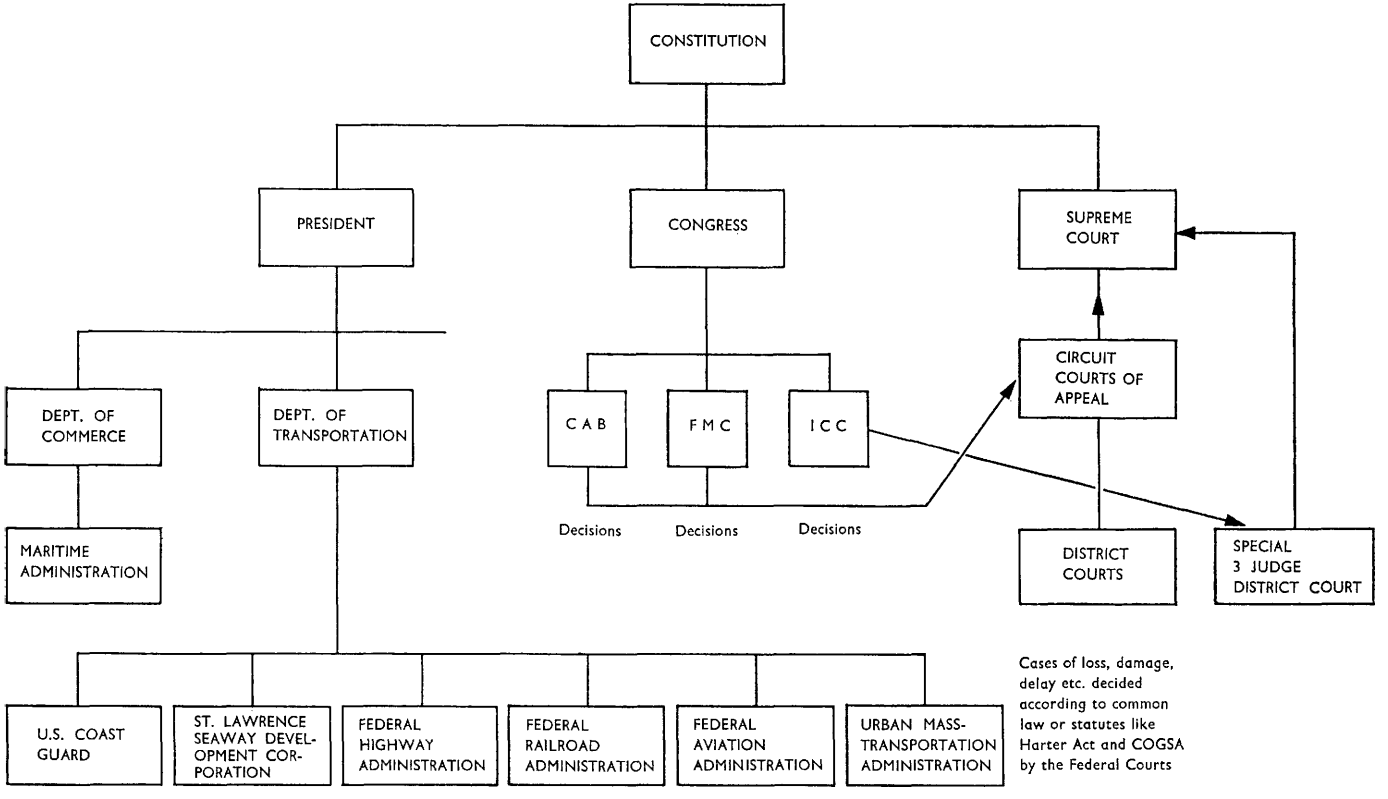
[4] Appeals from decisions by the ICC are taken directly to a statutory Court composed of one circuit court judge and two district court judges. Appeals from this court are taken directly to the U.S. Supreme Court. Efforts are now under way to implement the usual appeal route through district and circuit courts to the Supreme Court established for the review of ICC decisions. See Title 28, Chapter 81, U.S. Code (62 Stat. 928).

[5] Cf. e.g. SCHWARTZ, Legal Restriction, p. 444 et seq. Mergers and cartels would under the antitrust laws normally be handled within the Department of Justice for prosecution, but the regulated industries are very often regulated also in this respect by the regulatory agencies. The Commissions enforce their decisions through orders, which, if not obeyed, are the basis for criminal prosecution and civil contempt actions. An illustration of such course of events is reported in SvSjT 1970, no. 50, p. 6 according to which competitors have demanded that FMC take up new hearings in a merger case between Sea-Land and U.S. Line.

[6] TEDROW, p. 7.

[7] See *U.S. Government Organization Manual*, p. 485 et seq.


CONSTITUTION
PRESIDENT
CONGRESS
SUPREME COURT
DEPT. OF COMMERCE
DEPT. OF TRANSPORTATION
C A B
F M C
I C C
CIRCUIT COURTS OF APPEAL
Decisions
Decisions
Decisions
MARITIME ADMINISTRATION
DISTRICT COURTS
SPECIAL 3 JUDGE DISTRICT COURT
U.S. COAST GUARD
ST. LAWRENCE SEAWAY DEVEL-OPMENT COR-PORATION
FEDERAL HIGHWAY ADMINISTRATION
FEDERAL RAILROAD ADMINISTRATION
FEDERAL AVIATION ADMINISTRATION
URBAN MASS-TRANSPORTATION ADMINISTRATION
Cases of loss, damage, delay etc. decided according to common law or statutes like Harter Act and COGSA by the Federal Courts

service. It grants certificates, settles controversies over rates and charges among competing carriers, shippers and receivers of freight, travellers, and others. It rules upon applications for mergers or sale of carriers and issuance of their securities. The agency also acts to prevent unlawful discrimination, destructive competition, and rebating. ICC grants the right to operate to trucking companies, bus lines, freight forwarders, certain water carriers, and transportation brokers. It approves applications to construct or abandon railroad lines and rules upon applications to discontinue passenger train service.

ICC does not control carriers, but its role is to regulate them. The Commission has power to *prescribe* maximum, minimum or actual rates for all carriers subject to its jurisdiction, and can also *suspend* tariffs filed by carriers for as long as seven months.[8] The carriers themselves decide whether they want to merge with, buy or acquire control of other carriers, but to carry out such a decision the approval from ICC is necessary, for the protection of the public, to assure continued service, to guard against destructive competition and to protect employees and stockholders.

ICC does not have jurisdiction over transportation within any state.[9] In intrastate commerce the State Governments regulate the commerce including the transportation industries.

ICC does not have economic regulatory authority over interstate trucks carrying certain agricultural products, over water carriers transporting bulk commodities—such as oil and carriers engaged in private operations —not holding out service to the public.[10]

§ 2.3.2. Federal Maritime Commission (FMC)

The FMC[11] was established in 1961 to regulate the waterborne foreign and domestic offshore commerce of the United States, and to assure that United

[8] See Interstate Commerce Act Part I, sec. 15 (1) for authority over rail rates. See also Part I, sec. 15 (a), "The Rule of Rate Making as amended by the Transportation Act 1958."

[9] If any state law or the holding of any state court conflicts with the Interstate Commerce Act or the interpretation put upon it by the U.S. Sup. Ct., the federal law controls, *Shroyer v. Chicago R.I. & G. Ry.* 222 S.W. 1095 (Commission of App. of Texas, 1920). Cf. PRENTICE, p. 20 et seq.

[10] The Federal Power Commission regulates pipeline movements of artifical or natural gas.

[11] See *U.S. Government Organization Manual*, p. 451. The agency regulating shipping has been reorganized on several occasions. In 1916 the U.S. Shipping Board was created

States international trade is open to all nations of the 'free world' on fair and equitable terms, without undue prejudice and undue discrimination.[12]

FMC protects against unauthorized monopoly[13] in the waterborne commerce of the United States, and the interests of exporters and importers by maintaining surveillance over steamship conferences and common carriers by water; by ensuring that a common carrier charges only that freight rate which is filed with the Commission and operates under an approved agreement; and by guaranteeing equal treatment to shippers, carriers by piers, terminals and freight forwarders as well as other persons subject to the shipping statutes.

The responsibilities of FMC summarized, embrace five principal areas:

1) regulation of services, rates, practices, and agreements of common carriers by water and other persons engaged in the foreign commerce of the United States;

2) acceptance, rejection, or disapproval of freight rates filed by common carriers by water operating in the foreign commerce of the United States;

3) regulation of rates, charges, classifications, and practices of common carriers by water in the domestic offshore trade of the United States.

4) investigation of discriminatory rates, charges, classifications and practices of common carriers by water in foreign and domestic commerce and by pier, terminal and freight forwarders;

5) rendering decisions, issuing orders, rules and regulations governing and affecting common carriers by water in the foreign and domestic offshore commerce; surveillance of pier, terminal, freight forwarders, and other persons subject to the shipping statutes.

An important function of FMC is to regulate activities of steam-ship

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which in 1933 became the U.S. Shipping Board Bureau; in 1936 the U.S. Maritime Commision and in 1961 the Federal Maritime Commission. See also e.g. LOWENFELD, p. 26, MARX, p. 105 et seq., FRIHAGEN, p. 238 et seq. and REISENER, p. 16 et seq.

[12] Suffice it to mention e.g. the *Bonner Bill* and the discussions during the last years on cargo preferences reported in several issues of SvSjT to realize the complexity of this program. FMC has to administer the functions and discharge the regulatory authorities under the Shipping Act, 1916; the Merchant Marine Act, 1920; the Intercoastal Shipping Act, 1933; and the Merchant Marine Act, 1936. Cf. LOWENFELD, p. 21 et seq. and REISENER particularly p. 37 et seq.

[13] For a general survey of antitrust questions and common carriers see the case of *New York Lumber*, 1935 AMC 1013, aff'd 1935 AMC 1580 (Sup. Ct. of New York, 1935, and App. Div., New York, 1935).

conferences insofar as they affect foreign commerce of the U.S.[14] FMC does not grant operating permits as do ICC and CAB (below). Any ocean water carrier could undertake transportation without the permission of FMC but if he is a common carrier he is required to file his tariffs with the Commission and adhere to its rules and regulations. The commission, however, issues or denies licences to persons, partner-ships, corporations, or associations desiring to engage in ocean freight forwarding activities.

§ 2.3.3. Civil Aeronautics Board (CAB)

Regulation of the airline industry commenced with the Civil Aeronautic Act of 1938, whereby the CAB was created, and the regulation of economic matters was little changed when this Act was replaced by the Federal Aviation Act of 1958.[15] "The airline industry in the United States is a regulated industry in the "public utility" sense, and, in common with the other similarly regulated industries, is subject to regulation by an independent commission."[16] In section 102 of the Federal Aviation Act of 1958 its policy was declared thus: "In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defence;

b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relation between, and coordinate transportation by, air carriers;[17]

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[14] Public Law 87–346, approved Oct. 3, 1961.

[15] See *U.S. Government Organization Manual*, p. 427. The Civil Aeronautics Board came into existence in 1940 as a result of a Presidential Executive Order modifying the Civil Aeronautics Act of 1938. The Federal Aviation Act created the Federal Aviation Agency which took over from the former Civil Aeronautics Agency. The Federal Aviation Agency is now a subunit of the Department of Transportation.

[16] RICHMOND, p. 10.

[17] With the creation of the Department of Transportation, the safety matters have been transferred to it from CAB.

c) The promotion of adequate, economical, and efficient service by air carriers, at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices;

d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defence;

e) The promotion of safety in air commerce;[18] and

f) The promotion, encouragement, and development of civil aeronautics."

The general policy of the Board thus declared could in broad terms be broken down to ten elements: 1) commerce, 2) competition and monopoly, 3) national air transportation system, 4) national defence, 5) postal service, 6) public convenience and necessity, 7) public interest, 8) relation between carriers, 9) safety and 10) service.[19]

The CAB grants or denies certificates of public convenience and necessity or permits to engage in interstate, overseas or foreign air transportation. It has to investigate and see to it that the service to the public is reasonable and adequate. It surveys the rates and the practices of air carriers, including matters such as preferences or prejudices. It prescribes accounts, records and memoranda to be kept, approves or disapproves of contracts or agreements between air carriers, freight forwarders etc., affecting air transportation, and investigates consolidations, mergers, purchases, leases, and operating contracts. It also surveys unfair methods.

The CAB's economic regulatory activities may then be classified into six different groups: awards of operating authority; regulation of rates and fares; regulation of agreements and interlocking relationship among air carriers and between air carriers and other aeronautical enterprises; support of the air service through subsidy payments; regulation of air carrier accounting and reporting; and enforcement of applicable laws and regulations.

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[18] See above note 2.

[19] Certain cases may be referred to concerning CAB's jurisdiction: *S.S.W. v. Air Transport Ass'n of America*, 191 F. 2d. 658 (District of Col. CCA, 1951), cert. den. 343 U.S. 955 (1952), deals with the violation of antitrust laws; *Lichten v Eastern Airlines*, 189 F. 2d. 939 (2 CCA, 1951) with tariff regulations; and *American Airlines, Inc. v. North Am. Airlines*, 351 U.S. 79 (1956), with proceedings to protect the public from unfair competition.

The Board has significant responsibilities with respect to international aviation matters which cut across the activities mentioned above.

§ 2.3.4. Department of Transportation (DOT)

The Act[20] creating the Department of Transportation specifies as its declaration of purpose: "The Congress therefore finds that the establishment of a Department of Transportation is necessary in the public interest and to assure the coordinated, effective administration of the transportation programs of the Federal Government; to facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible; to encourage cooperation of Federal, State and local governments, carriers, labor, and other interested parties toward the achievement of national transportation objectives; to stimulate technological advances in transportation; to provide general leadership in the identification and solution of transportation problems; and to develop and recommend to the President and Congress for approval national transportation policies with full and appropriate consideration of the needs of the public, users, carriers, industry, labor, and the national defense."

Foremost among the Department functions is the general promotion of current and future transportation, plus the accompanying duty of protecting the public's interest.[21]

The most obvious area of endeavour within this broad mandate is safety, but equally important is the goal of achieving the most efficient, coordinated transportation network possible at the lowest cost to the user with a fair return to the carriers and their employees.[22] For example, the Department is concerned with the problems of urban mass transit. Other areas where

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[20] Public Law 89–670, approved Oct. 15, 1966 and made effective April 1, 1967, sec. 2. (b) (1).

[21] See *U.S. Government Organization Manual*, p. 397. The Federal Aviation Administration, in its entirety with all of its functions, was transferred to DOT and will continue to carry out all of its present functions within the new Department. Certain functions of the U.S. Coast Guard have been transferred as well as the safety functions of CAB and ICC. Further the office of the Under Secretary of Commerce for transportation, together with all of the transportation functions are now vested in the Secretary of Commerce, and other officers and offices of the Department of Commerce under various statutes including the high-speed ground transportation program, etc.

[22] Cf. "The Department of Transportation's Role in Facilitating the Flow of Commerce."

the Department plays a role are for instance oil pollution affecting coasts, administration of the Uniform Time Act, emergency transportation and the supersonic transport project.

Among those federal agencies with which the Department works closely are the traditionally independent regulatory bodies —ICC, CAB and FMC, as well as what may be described as the promotional agency for the merchant marine, the Maritime Administration.[23] The three regulatory agencies supervise carriers' fares, freight rates and other economic matters. DOT, which has no regulatory functions, however, works with these agencies indirectly and represents the public interest by appearing as a party in some of their proceedings.[24]

In the Department itself, the transportation system is represented by six major operating divisions—the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the Coast Guard, the Urban Mass-Transportation Administration and the St. Lawrence Seaway Development Corporation. Additionally, the National Transportation Safety Board, which concerns itself with improving safety of all modes of transport, operates within the Department but functions independently of the Secretary of Transportation in substantive matters. The heads of all these units—plus the Secretary of Transportation, the Under Secretary of Transportation, four Assistant Secretaries of Transportation, and the General Counsel—are appointed by the President and their appointment must be confirmed by the Senate.

Questions concerning only the special Administrations are handled directly by them, but matters such as intermodal transports are dealt with on the Secretarial level.

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[23] DOT has no authority with regard to merchant marine policy, subsidies, etc. All this authority was retained by the Maritime Administration in the Department of Commerce.

[24] Concerning jurisdiction it is explicitly spelled out that DOT should never interfere with the competence of the Commissions. In connection with disputes on jurisdictional questions as between the different agencies DOT may act to solve the conflict. Cf. in CPR, National journal, Nov. 15, 1969, p. 127 et seq.

Chapter 2

REMARKS WITH PARTICULAR RESPECT TO THE HISTORICAL DEVELOPMENT OF THE LIABILITY OF THE COMMON CARRIER

§ 3. *Basic Determination of the Relation between Carriage and Bailment*

When determining the concept of common carrier it is important to keep in mind that the carrier's obligations in Anglo-American law are not solely a product of contractual relations. The underlying status creates a liability independent of any compensation or contract. Broadly speaking, carriers may appear as common carriers in any case where there is a holding out on the part of the carrier to carry for every one, or as private carriers, when the carrier enters into business with particular persons only.

In Scandinavian doctrine there has been a lively discussion in recent years on the question of "who is a carrier".[1] This question has been particularly related to bills of lading, ocean carriage and the Hague Rules.[2] It is not easy to find a common approach to problems of carrier identity

[1] GRÖNFORS, Allmän transporträtt, 1 ed. p. 44 et seq.; cf. however 2 ed., p. 42 et seq. See also GRÖNFORS, Successiva transporter, particularly p. 55 et seq.; SELVIG, Hovedspørsmål, p. 376 et seq.; FALKANGER, p. 668; WETTER, particularly pp. 15–16; and RAMBERG, The Timecharterer's Liability. SUNDBERG, Air Charter, pp. 142 et seq. and 177 et seq. as to the legal construction in this connection distinguishes between the simple and the complicated situation.

[2] The discussion mentioned emanates from the Hague rules, which govern bills of lading as documents of title and important documents in international trade and give a definition of "carrier". See e.g. CARVER, p. 251; and SCRUTTON, p. 405. Cf. VAES, WETTER. and THE STOCKHOLM COLLOQUIUM. E.g. *The Quarrington Court*, 36 F. Supp. 278 (SDNY, 1941), aff'd. 122 F. 2d. 266 (2 CCA, 1942) illustrates some of the difficulties in this connection, and so do *Robert C. Herd. & Co., Inc. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959); *Scruttons Ltd. v. Midland Silicones, Ltd.* [1962] A.C. 446; and *Penney Co. v. American Exp. Co.*, 102 F. Supp. 742 (SDNY, 1952), aff'd 201 F. 2d. 846 (2 CCA, 1953). Cf. further KNAUTH, The American Law, pp. 146–147.

in different legal systems,[3] and decisions by Scandinavian courts do by no means conclusively clarify connected problems.[4]

"At common law a carrier is a person who carries goods or passengers whether for reward or not, by land or by water."[5] This definition does not say whether the carrier is he who undertakes the transport or he who actually performs it, and I believe this approach is correct, as status originally formed the basis for the relationship between the carrier and his customer. Later with the development of contract greater stress has been laid with the promise to carry as the basic element for being a carrier.[6] In some cases reward is made a necessary prerequisite for being a carrier, while in others nothing is said to that effect. Possibly this divergence in definitions may also be explained by the development from status to contract. During the 16th and the 17th centuries, a period of particular confusion in legal theory, the doctrine of consideration started to appear.[7] Thus, while a contractual obligation normally became connected with the doctrine of consideration, an obligation arising out of an underlying status probably did not necessarily require compensation. Rights and duties of carriers descend from the law of bailment, which is such a status relationship, and bailment could be either for reward or not.[8] On the one hand a common carrier at common law may always demand a reasonable charge,

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[3] See particularly VAES; and THE STOCKHOLM COLLOQUIUM.

[4] *NJA 1960* p. 742 (*Lulu*); *ND 1955* p. 81 (*Lysaker*). Cf. also the Stockholm City Court case, Aug. 5, 1966 (in AfL vol. 3, p. 215).

[5] HALSBURY, Vol. 2., p. 801.

[6] See C.J.S. vol. 13 under "Carriers"; cf. e.g. HUTCHINSON vol. 1, sec. 18.

[7] See e.g. CHESHIRE & FIFOOT, p. 11; CHITTY, vol. 2, p. 206; SELVIG, The Freight Risk, p. 147 et seq.; STORY, § 495; and LESLIE, p. 14: "No one can be under the liability of a common carrier unless he has a reward for his services. This is, of course, a mere consequence of the doctrine of consideration; but in the case of one who professes to be a common carrier, it has been expressly laid down that, in the absence of a reward, he is not liable. This view is, nevertheless, foreign to the original ground of a bailee's liability which had nothing to do with a reward." Cf. JOSIEN, p. 6 at note 8. In *Middleton v. Fowler* (1699) 1 Salk. 282 reward was regarded necessary and in *Tyly v. Morrice* (1699) Carth. 485 it was expressed that the reward makes the carrier responsible. Cf. also *Coggs v. Bernard* (1703) 2 Ld. Raym. 909. HOLMES, pp. 142 et seq. and 154 found no case in which a carrier's liability is rested on his reward before *Woodlife's Case* (1596) Moore 462. This question has been further elaborated by WINFIELD, The Province, p. 94 et seq. Cf. also *Olsen v. Draper*, 112 F. Supp. 859 (EDNY, 1953).

[8] HUTCHINSON, vol. 1, sec. 1 and 2. Cf. COOTE, p. 20 et seq., SUNDBERG, Air Charter, p. 162 et seq.

and he is not obliged to carry unless such is tendered to him, but on the other hand should the common carrier choose not to charge the customer he may not necessarily lose his common carrier status, although his liability may be less severe in such a case.[9]

Bailment is "a delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or the bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust."[10] This definition indicates the distinction between the status obligation and the contractual obligation, placing on the bailee two different layers of liability.[11]

Carriers are considered as one class of bailees.[12] "The authorities recognize two classes of carriers, namely private carriers and common carriers; all persons who undertake for hire, to carry the goods of another belong to one or the other of these classes; the class to which a particular carrier is to be assigned depending on the nature of the business, the character in which it holds itself out to the public, the terms of the contract, and its relations generally with the parties with whom it deals and the public."[13] Whatever the different categories of carriers may be and however they are

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[9] CLARKE, p. 10, however says: "A gratuitous carrier is not a common carrier; and if a common carrier, on occasion, conveys goods gratuitously, for that occasion, and as regards those particular goods, he loses his character of a common carrier." The distinction thus expressed may, however, possibly be explained by a difference in the use of words rather than in substance.

[10] BLACK'S LAW DICTIONARY, under "bailment". Cf. HUTCHINSON, vol. 1, sec. 1 and 2; JONES, e.g. at p. 117 et seq.; and ELLIOTT, § 1. In 9 WILLISTON § 1030 p. 875 bailment is defined as "the rightful possession of goods by one who is not the owner".

[11] COOTE, p. 20: "Apart from his liability under the special terms of his contract, the bailee is subject to a status liability, a duty to take care of the bailed goods, which exists side by side with any express or implied duty of care arising *ex contractu*." Cf. WINFIELD on Tort, p. 8; and PATON, p. 36 et seq.

[12] E.g. HUTCHINSON, vol. 1, sec. 1. Two interesting and important U.S. Supr. Ct. cases dealing with the question of common or private carriage are *Champlin Refining Co. v. U.S.*, 329 U.S. 29 (1947); and *United States v. Champlin Company*, 341 U.S. 290 (1951).

[13] C.J.S. vol. 13 under "Carriers". Cf. HUTCHINSON, vol. 1, sec. 15 who makes a distinction between three classes of carriers, *viz.* carriers without hire or reward, private carriers for hire, and common or public carriers for hire. Cf. what has been said above at notes 7–9.

distinguished, it is clear that there is a dividing line between common carriers and private carriers.[14] The reason for this division is that while private carriers have been regarded as "ordinary" bailees with respect to their liability, common carriers have continued to have, at least theoretically, strict liability for loss of or damage to goods. This distinction has implications with regard not only to the actual liability but also to the possibility of contracting out of this liability.[15] "Neither carriers without reward, nor other private carriers are, as to their responsibility, in any wise distinguishable from other ordinary bailees; ... Common carriers, however, in company with innkeepers, are exceptions in many respects in the government of the general law, being bailees upon whom it imposes extraordinary liabilities."[16]

The complexity of the common carrier doctrine has its ground in the several elements having influenced its development, and anyone making a thorough investigation of different definitions of carriers, common carriers, or private carriers from different periods would find certain variations, different aspects being stressed owing to the influence from changing theories. The relation between and the changing importance of these factors should therefore, as has been pointed out, be kept in mind.

The discussion of carrier identity in Scandinavian doctrine has been kept on an entirely private law level. In Swedish law there is no direct equivalence of the common carrier, although e.g. the "Royal decree 1940 on professional transportation, by automobile" (YTF) states as a definition of professional carriage by automobile that: "Professional transportation means ... transportation ... furnished to the general public in return for compensation for carriage of persons or goods", a definition resembling that of common carriage.[17] Certainly from the Swedish point of view, the Hague rules carrier is not a legally defined concept identical with the YTF carrier, the former having a contractual relationship with individual

[14] Another class of carriers, contract carriers, has later been developed in American administrative law.

[15] COOTE, p. 24 et seq.; cf. SUNDBERG, Air Charter, p. 166 et seq.

[16] HUTCHINSON, vol. 1, sec. 15. Cf. vol. 1, sec. 5 and sec. 37.

[17] Sec. 1 in its wording before 1968. Sw.: "Med yrkesmässig trafik förstås ... trafik ... mot ersättning tillhandahålles allmänheten för person- eller godsbefordran." (K.F. om yrkesmässig automobiltrafik (YTF).) Since the declaration of transportation policy in 1963 the 1940 decree has been revised. For comparison see also Kungl. stadga om skjutsväsendet 1911, upphävd 1933. (Royal decree on conveyance by carriage and horses 1911, abolished in 1933.)

customers, while the latter has a professional position casting upon him certain obligations in relation to the government or the public in general.[18] The YTF thus regulates carriage as a business.[19] The aspect of profession may nevertheless have some bearing upon the interpretation of the carrier regarded from the contractual angle.

Both these aspects are embodied in the present concept of common carrier and have to be distinguished from, as well as related to each other.

§ 4. *The History of the Liability of the Common Carrier*

§ 4.1. *In General*

In early law there was no difference between private carriers and common carriers and the liability of all carriers had as a common source the status of bailees.[1]

The description of a common carrier as outlined in *Niagara v. Cordes*[2] demonstrates that the common carrier is by no means an unambiguous concept. From this case it is evident that several different duties are imposed upon him, encompassing a strict liability for loss of or damage to goods. The court made a distinction between the common carrier's liability for damage to or loss of goods, his liability for refusing to carry merchandise tendered to him for transportation, and his liability for delay. Furthermore the court in this case observed a certain difference between carriers by land and carriers by water with respect to the common carrier doctrine.

"The common law attaches to the every-day business transaction of shipment of goods by common carrier for hire, from point to point, definite powers, rights and obligations, based upon the relationship which the parties occupy toward each other."[3] The law determined the relationship between two parties and thrust upon them their reciprocal powers, rights, and obligations. Their mutual position, for instance with regard to a particular business transaction, was enough to determine their further

[18] Cf. SUNDBERG, Om kommersiell biltrafik. As for the liability of a professional carrier without reward cf. *NJA 1948* p. 701.

[19] Cf. BERNITZ, p. 74.

[1] FLETCHER, p. 1.

[2] 62 U.S. 7 (1858).

[3] THOMPSON, p. 28. Cf. *Hannibal R.R. v. Swift*, 79 U.S. 262 (1870).

legal relationship.[4] "These ordinary business transactions and common social relations followed a routine of performance or fulfilment through a definite series of varying fact situations so standardized that the mere mention of the particular undertaking enabled its normal course of performance to be instantly visualized."[5] Bailment was enforced "quasi ex delictu" long before the contractual remedy in the writ of "assumpsit" developed. The theory of contract, which appeared later, made promises and voluntarily assumed obligations enforcible.[6] The first contract actions at common law were enforced by the writs of debt and covenant which was a slow process as their ambit was very restrictive.[7] Thompson thus describes this evolution: "The modern law constitutes a compromise of these divergent doctrines. It recognizes that the common-law relation of common carrier of goods and shipper governs the performance of this business undertaking, but subject to the true function of contract in the public

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[4] Cf. SUNDBERG, Air Charter, p. 162 with references. Thus according to 1 WILLISTON § 32 A, p. 90 this relational obligation means "that certain respective rights and duties are defined by law and imposed upon the parties without any question of their knowledge or assent to these specific terms"; on the other hand it "may be varied to some extent by contract". At p. 106 JONES mentions the importance of public utility, and he says i.a. that "too great stress is laid on the *reward*, and too little on the important motives of *public utility*, which alone distinguish a *carrier* from other *bailees for hire*".

[5] THOMPSON, p. 28.

[6] THOMPSON, p. 29. In 1 WILLISTON 3rd § 103 p. 385, bilateral contracts are said to have been recognized for the first time in about the end of the 16th century. Cf. SUNDBERG, Air Charter, p. 163: "The right of the shipper to sue a common carrier upon his contract was not recognized until 1750. For centuries prior thereto the exclusive remedy in carriage had been in tort." In note 145 he refers to the Humber Ferryman Case; cf. e.g. BORRIE & DIAMOND, p. 23 and particularly WINFIELD, The Province, p. 45.

[7] For the complicated development of forms of action at common law, see e.g. MAITLAND. Cf. also WINFIELD, The Province, p. 8 et seq.; and CHESHIRE & FIFOOT, p. 3 et seq. Some of the procedural forms may be very broadly described to facilitate the understanding of the complex pattern:

At a very early stage in English law, writs were framed for the more obvious causes of action. Each writ had its appropriate formula of complaint or claim, and its own procedure. This list came to be regarded as an exhaustive catalogue of the causes of action known to the law. Procedure was in a way more important than the right itself, and thus if the facts of the complainant's case did not fit the remedies available, he had no remedy. An *action on the case* was one brought to recover damages for a loss or injury resulting not directly but indirectly or consequentially, from the act complained of. *Trespass* was one of the old causes of action.

Under the old common law there were four different remedies for the wrongful deprivation of goods, *viz.*, the actions of *trespass* to goods, *detinue*, *replevin*, and *trover*.

utility field to vary, modify, or limit, so far as permitted by sound public policy, the powers, rights and obligations which in the absence of such contract the relationship would impose upon the respective parties."[8]

In spite of several studies on the bailee's and the carrier's liability a brief outline of the origin of the liabilities of the common carrier and the reasons for the differences between them is an essential prerequisite to an understanding of the vagaries of the later development of the common carrier doctrine. In the following I therefore wish to present to the reader some theories that have been advanced to explain this evolution.[9]

Fletcher having made a thorough investigation of the carrier's liability states that: "The absolute liability of the carrier has variously been ascribed (1) to a Germanic origin with a continuous history from the time of the Conquest (Mr. Justice Holmes); (2) to an Elizabethan innovation applicable to carriers by land, and afterwards extended to carriers by water (Sir William Jones); and (3) as derived from the Pretorian edict regarding shipmasters, and thence incorporated into the common law regarding carriage by land (Lord Esher)."[10]

Trespass and trover were actions to recover damages merely, but the actions of detinue and replevin were both brought for the return of the goods. The actions of trespass and replevin could be maintained against anyone who took the goods out of the possession of the plaintiff; the actions of detinue and trover lay against any person who came into possession of the goods by any means and wrongfully withheld them from the plaintiff. In trespass and replevin the plaintiff was always in actual possession of the goods when the defendant commenced the wrongful act.

At common law further an action grew up, which lay against a receiver or bailiff, or against a merchant by another merchant in respect of dealings between them as merchants, for not rendering a proper *account* of profits.

Assumpsit was the name of the action which lay to recover damages for breach of simple contract, *i.e.* of a contract either express or implied, not under seal. There were different forms of assumpsit.

[8] P. 29. Cf. WINFIELD, The Province, p. 37: "'Public policy' under one name or another has been a weighty influence in the growth of Anglo-American law." Cf. *Hannibal Railroad v. Swift*, 79 U.S. 262 (1870); *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. 344 (1848).

[9] The history of the common carrier doctrine has been the object of several studies, which will be referred to later in this chapter. In Scandinavian doctrine SUNDBERG, Air Charter, particularly p. 162 et seq. has presented the concept of the common carrier and its implications.

[10] P. XI. Cf. Cockburn J. in *Nugent v. Smith*, 1 C.P.D. 423 (1876) and Brett J. in *Nugent v. Smith* 1 C.P.D. 19 (1875) respectively. It is necessary to observe that the terminology varies with respect to the common carrier's liability. Some authors call it an

§ 4.2. *Coggs v. Bernard*

The famous case of *Coggs v. Bernard*[1] has been regarded as one of the most important cases in establishing the common carrier liability.[2]

The case concerned an undertaking by the defendant Bernard to carry a number of hogsheads of brandy from one cellar to another. One case broke, according to the plaintiff, through the negligence of the defendant. The defendant argued that no consideration had been offered. Lord Holt rejected the defendant's argument and found him liable but rather because he had started to move the casks than because he had undertaken to carry them. "The case was not one of contract at all, but turned upon the peculiar status of the bailee."[3]

If the case had been decided only with regard to the particular facts, it might have been completely forgotten to-day, but Lord Holt used the occasion to lay down and systematize the law of bailment.[4] Lord Holt stated the common law liability of carriers of that time thus:

"As to ... a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to *one that exercises a public employment*, or a delivery to a *private person*. First if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, etc: ... The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered."[5]

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absolute liability, others a strict liability. His liability is somewhat particular and best called *common carrier liability* to distinguish it from other forms of liability, and I therefore in this connection accept both *absolute* and *strict* liability as a way of expressing a more severe liability than that for negligence only. Cf. WINFIELD on Tort, p. 412 and WINFIELD, The Myth, p. 37 et seq.

[1] (1703) 2 Ld. Raym. 909.

[2] See e.g. HOLMES, p. 155; HOLDSWORTH, A History, vol. 2, p. 289; BARNES, Limitation of Common Carriers' Liability, p. 1 et seq. Cf. SUNDBERG, Air Charter, p. 172, who spells out that Lord Holt in his statement conformed the Anglo Saxon law "to the Continental ideas of contract types".

[3] CHESHIRE & FIFOOT, p. 73.

[4] FIFOOT, p. 163.

[5] Also quoted in FIFOOT, p. 178.

Certain principles can be derived from this opinion; that a bailee who exercises a public employment[6] is, for example, a common carrier, and that a common carrier carrying goods for reward has a liability for the safety of the merchandise, with the exception only for an act of God and the king's enemies. Whether the historical analysis, on which Lord Holt based his statement, was correct or not, has been much debated and might be regarded as a somewhat academic question. At any rate it was in fact Lord Holt's opinion that came to direct the further development of the common carrier doctrine. A brief notion of this process whereby a number of more or less independent factors were developed and combined into a synthesis as stated by Lord Holt nevertheless is of importance for the understanding of the later evolution of the common carrier doctrine, particularly as the underlying development of the common carrier doctrine was not cut off by Lord Holt's summing up. With regard to his systematizing, it is necessary to keep in mind that Lord Holt was much influenced by Continental law.

Five principal factors seem to have influenced the development of the concept of the common carrier: the liability of bailees as it originated in the early Germanic laws; the influence of Roman law with liability for negligence only; the theory of public callings; the evolution of the different forms of action; and the theory of contract.

§ 4.3. *The Bailee's Liability*

"The liability of the carrier has always been an anomaly in English law. The causes of this anomaly are rooted deep in the origins of legal history. In the early days of the common law, and for a long period afterwards, a carrier occupied the same position in the eye of the law as any other

[6] Lord Holt classifies the common carrier, the common hoyman, and the master of a ship as examples of some of the bailees who exercise a public employment. Masters of ships or common hoymen are often classified as common carriers. The reason for Lord Holt's scheme may be the uncertainty whether a carrier by sea was also to be regarded as a common carrier. Cf. HOLMES, p. 149. Below in § 6 certain categories of professions exercising a common calling, their liabilities and their relations to bailment will be further discussed.

bailee. It follows that the origin of the modern law of Carriage of Goods has to be sought in the early law of bailments."[1]

In the early law no distinction was made between ownership and possession, but he who had possession was, so to speak, regarded as the owner.[2] Generally the term "bailment"[3] was used to express any voluntary parting with possession, and covers many different kinds of transactions, such as loans for use or consumption, pledges, hirings, and deliveries for many special purposes such as safe custody or carriage.[4] In *Coggs v. Bernard*[5] Lord Holt on the basis of the Civil Law divided bailments into six kinds, involving different rights and duties on the part of the bailor and the bailee.[6] With respect to one of them, the hiring of carriage of goods from one place to another, he made a distinction between those exercising a public employment and private carriers. This classification was later modified by Jones.[7] Story classifies the bailments into three categories: "1. Those in which the trust is exclusively for the benefit of the bailor, or of a third person;

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[1] FLETCHER, p. 1. Cf. however JEREMY, p. 1 "The Law of Carriers is founded upon the most universal rules of commercial policy, and finds a place in the internal administration of almost every civilized government". See also HUTCHINSON, vol. 1, sec. 9, expressing the view that the law of bailment is insufficient to determine the liability of the common carrier.

[2] HOLDSWORTH, A History, vol. 2, p. 79. Cf. HOLMES, p. 130 et seq. Cf. also HOLDSWORTH, op. cit., vol. 2, p. 110: "As we might expect from the law as to ownership and possession, the Anglo-Saxons, in common with the other Germanic peoples did not know an action, based on ownership."

[3] See e.g. JONES, p. 117, where bailment is defined as "a delivery of goods in trust, on a contract, expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use, for which they were bailed, shall have elapsed or be performed". Cf. PATON, p. 37 and STORY, § 2. At p. 1, however, JONES defines bailment as "a delivery of goods on a condition expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose, for which they were bailed, shall be answered".

[4] HOLDSWORTH, A History, vol. 3, p. 336: "Bailment certainly has its roots in Roman law and has developed under the influence of Germanic laws." Cf. GODDARD, Outlines, § 12: "Until very recent times the Common Law of bailment was in a crude and formative condition. As bailment law in Rome was well defined, early English legal writers on the subject were greatly influenced by the Civil Law and adopted the Roman division, which was a mere catalogue rather than a scientific classification."

[5] (1703) 2 Ld. Raym. 909.

[6] Cf. HUTCHINSON, vol. 1, sec. 2, particularly note 4: "Lord Holt's classification was, in terms, into 'six sorts of bailments', but the six sorts naturally reduce themselves to the three greater classifications given in the text."

[7] JONES, p. 117.

2. Those in which the trust is exclusively for the benefit of the bailee; and 3. Those in which the trust is for the benefit of both parties, or of both or one of them and a third party. The first embraces Deposits and Mandates; the second, Gratuitous Loans for Use; and the third, Pledges or Pawns, and Hiring, and Letting to Hire."[8] However Goddard points out that "[t]here is not an exact correspondence between the Roman and the Common Law bailments, and this has sometimes led to confusion."[9] All bailees have the possessory remedies so that in the theory of the common law every bailee has a true possession, and he recovers on the ground of his possession.[10] "It is for this reason that originally the liability of the bailee to the bailor was absolute."[11] It was only fair that the bailee, in the position of an owner with the remedies against third parties should be held liable to the bailor, if he could not redeliver goods entrusted into his care.[12]

Holmes and Holdsworth are both of the opinion that the law of bailment is of a pure Germanic origin[13] and based upon a principle of strict liability

[8] STORY, § 3. In a sketch GODDARD, Outlines 1, § 12, outlined the various bailments and their relations to each other thus:

"Bailments
- gratuitous
  - gratuitous services
    - *depositum*
    - *mandatum*
  - gratuitous loans
    - *commodatum*
- mutual benefit
  - *pignus*, or pledge
    - *locatio rei*, the hired use of a thing
      - ordinary
        - *locatio custodiae*
        - *locatio operis faciendi*
        - *locatio operis mercium vehendarum*
      - extraordinary entered into by
        - innkeepers
        - common carriers of goods"
  - *locatio*, or hiring
    - *locatio operis* hired services about a thing

For classification and a synthesis of bailment see also e.g. FIFOOT, p. 163; HUTCHINSON, vol. 1, sec. 2; JONES, p. 117 et seq.; and 9 WILLISTON § 1031, p. 881 et seq.

[9] Outlines, § 12.

[10] HOLMES, p. 138.

[11] HOLDSWORTH, A History, vol. 3, p. 337. See also HOLMES, p. 138 et seq. and GODDARD, Outlines, § 161.

[12] HOLDSWORTH, A History, vol. 3, p. 337.

[13] See also LESLIE, p. 4, who accepted HOLMES' views. Modern historians have questioned HOLMES' interpretation of Anglo-Saxon laws as based on insufficient and misleading data.

which lasted through the middle ages.[14] Not until Lord Holt's statement in *Coggs v. Bernard* was there any discussion concerning negligence or public calling as the basis for absolute liability.[15] Fletcher[16] and Plucknett[17] have both critizized the conclusions of Holmes. Thus Fletcher states: "It is submitted that assuming that in the feudal period and until the reception of Roman influence in Bracton's time the practice was to hold a bailee strictly to account in all circumstances, it is impossible to establish that such an absolute standard of duty was continuously maintained down to the enumeration of the legal position of the bailee by Lord Coke in Southcote's case, 1601."[18] Fletcher[19] further shows that the cases that Holmes relied on to show that the bailee's strict liability remained through the centuries,[20] did not adequately support Holmes' opinion. On the contrary Fletcher finds that the "conclusion to be drawn from these 14th century cases of detinue against a bailee is that the liability of a bailee was something substantially less than an absolute liability, and that the old Anglo-Norman rule had not survived. Robbery by thieves, burning without negligence, and presumably other unavoidable accidents were felt to relieve the bailee from responsibility."[21] Plucknett goes still further and says that "it seems clear that from Britton down to 1431 it was familiar doctrine

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FLETCHER agrees with HOLMES as to the origin of the bailee's liability, p. 2: "The rules of the absolute responsibility of the bailee, as it existed in this country certainly seems to have corresponded with the Germanic common law of the Norman conquest which made bailees of all sorts (including innkeepers, pledgees and carriers) responsible absolutely for the goods delivered, even when lost by theft, and regardless of negligence." However, he remarks at p. 29 on the case of *Southcote v. Bennett* (1601) 4 Coke. Rep. 83 b, where an ordinary bailee, not a carrier, was held liable for a loss through robbery without his negligence, that ". . . it is insignificant that before that case there is no actual decision holding an ordinary bailee liable for loss, such as theft, occasioned without any fault or negligence on his part". The procedural changes taking place at this time may have affected the outcome of that case.

[14] HOLDSWORTH, A History, vol. 3, p. 343, however points out that there was no rectilinear development of the liability of the bailee.

[15] HOLMES, p. 130 et seq. Cf. HOLDSWORTH, op. cit., vol. 7, p. 433 et seq. and WINFIELD, The History of Negligence, p. 188 et seq.

[16] P. 14 et seq.

[17] P. 478 et seq. Cf. also FIFOOT p. 157.

[18] P. 11.

[19] P. 13.

[20] P. 134 et seq.

[21] P. 18.

that a bailee was liable for fraud and negligence only. Just after the middle of the fifteenth century the discussion took a different turn."[22] Beale has also challenged Holmes' theories, presenting the view that the bailee was not originally absolutely liable to the bailor, but that the measure of his liability was gradually increased[23]; that the *Southcote's Case*[24] went further than any previous case; that Lord Holt, in refusing to follow it, was going back to the old law; that he ought equally to have denied that it applied to carriers; and that his failure to do so, coupled with the fact that Lord Mansfield accepted his view in *Forward v. Pittard*[25] is the true origin of the carrier's peculiar liability. In *Nugent v. Smith*[26] Brett J. traced the rule of the carrier's strict liability to Roman law, which he described as the origin of the English law of bailment.[27]

Without a thorough study of the sources it is impossible to criticize the different theories—Fletcher's and Plucknett's views must to-day be regarded as generally accepted—and it is not my object to go into a detailed historic analysis.

§ 4.4. *The Carrier's Liability*

Some further points should be added to what has been discussed above. It is certain that the origin of the carrier's liability is that of the bailee,[1] but some controversy still remains with respect to the extent of the original liability of the bailee.[2] Holmes[3] is anxious to show that the bailee had an absolute liability independent of negligence, and that only some few kinds of bailees still remain under this liability, such as the common carrier.[4]

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[22] P. 478.

[23] The Carrier's Liability, p. 158 et seq.

[24] (1601) 4 Coke. Rep. 83 b.

[25] (1785) 1 T.R. 27.

[26] (1875) 1 C.P.D. 19. So also Lord Esher, cf. above § 4.1.

[27] CONRADIE, p. 1, contends that South African law relating to carriers has its origin in the Praetor's edict. DÖNGES, p. 60 et seq. also makes a comparison between the common carrier of English law and the public carrier of Roman Dutch law.

[1] FLETCHER, pp. 1 and 34.

[2] FIFOOT, p. 158 et seq.; LESLIE, p. 4; BEALE, The Carrier's Liability, p. 158; and GODDARD, The Liability of the Common Carrier, pp. 399–400. Cf. also WINFIELD, The Myth p. 37 et seq.

[3] P. 130 et seq.

[4] Cf. BORDWELL, p. 747: "That he [the carrier] was liable beyond the liability of others, seems to have been accepted without question; but whether to place this liability on his

Southcote v. Bennett,[5] where an ordinary bailee, not a carrier, was held liable, notwithstanding a loss by robbery without negligence, was in Holmes' view decided in accordance with past precedent.[6] Fletcher remarks on this case that "When the liability of the bailee came to be laid down in *Southcote's Case* it is clear that it applied equally to all classes of bailment —and that it arose from the common status of a bailee."[7]

During the 17th century between *Southcote's Case* and *Coggs v.Bernard* several important events with respect to the carrier's liability took place. Thus e.g. detinue was superseded by case as the popular action against bailees—including carriers; common law actions took the form of declarations upon the custom of England against persons occupying common callings; the business of the Admiralty Court was absorbed by the Common law courts; and the idea of freedom of contract was emerging.[8] "As regards the law of carriage the transition from detinue to case was particularly

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hire, on the custom of the realm, or on his common calling, there seems to have been no settled conviction." As far as innkeepers are concerned see e.g. HOLMES, pp. 148, 150 and 157 and BORRIE & DIAMOND, pp. 15, 23 et seq. and 256 et seq. Cf. WINFIELD, The History of Negligence, p. 186: "Two conspicuous examples were the innkeeper and the common carrier. Their liability was strict, for men must put a great deal of trust in them . . ." See in this connection also CHARLESWORTH, Mercantile Law, at p. 340: "An hotel proprietor's legal position is similar to that of a common carrier. He is bound to receive all travellers who come to his inn, provided that he has sufficient room, that the traveller is able and willing to pay, and that no reasonable objection can be taken to the traveller's personal condition. Failure to accept a traveller renders the hotel proprietor liable in damages." He also adds: "Like a common carrier, an hotel proprietor is an insurer of the property brought by the guest to the hotel . . . If, therefore, any of the guest's luggage is lost, damaged or stolen, the innkeeper is liable at common law unless he can prove that the loss was due to (1) act of God, (2) the King's enemies; or (3) the guest's own negligence." Cf. also ELLIOTT, p. 113 et seq. and GODDARD, Outlines, §§ 160 and 161. For a more detailed study see Ross. See also however the Hotel Proprietors' Act, 1956.

[5] (1601) 4 Coke. Rep. 83 b.

[6] HOLMES, p. 141 et seq. Cf. BEALE, The Carrier's Liability, p. 161: "There seems to be no actual decision holding an ordinary bailee responsible for goods robbed until Southcote's case." See also FLETCHER, p. 18: "The conclusion to be drawn from these 14th century cases of detinue against a bailee is that the liability of a bailee was something substantially less than an absolute liability, . . . Robbery by thieves, burning without negligence, and presumably other unavoidable accidents were felt to relieve the bailee from responsibility."

[7] P. 27.

[8] FLETCHER, p. 102. Cf. HOLMES, p. 143 et seq.

complicated by the growth of the practice of charging carriers and others following a public calling upon the custom of the realm relating to their particular profession. The duties of common carriers, therefore, were twofold. As bailees they were within the rule of *Southcote's Case*, a rule which might or might not survive the transition from detinue to case. As following a common calling they were subject to the liability arising by the custom of the realm from such calling."[9]

Without having carried out any independent primary research into the history of the carrier's liability, but basically relying on Fletcher, I am convinced that *Coggs v. Bernard* came to be a most important case for the further development of the common carrier doctrine. In this case Lord Holt separated the bailee's liability from the liability of a person exercising a public calling. From this case conclusions can also be drawn concerning the background of the difference between the liability of a private carrier, now liable as an "ordinary" bailee for negligence only, and the common carrier with his severe and twofold liability.[10]

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[9] FLETCHER, p. 106.

[10] Cf. CONRADIE, p. 1, who is of the opinion that South African law relating to carriers has its origin in the Prætor's edict. "Whenever shipmasters, innkeepers or stablekeepers have received the property of anyone '*salvumfore*'" (i.e. for safekeeping or on the terms of safe custody) "then, unless they restore it I will give an action against them". CONRADIE points out that according to Ulpian an edict was introduced to curb or restrain the dishonesty of the classes of persons to whom it referred, and to discourage them from conspiring with thieves against those whose goods had been entrusted with them. "The result of the Praetor's edict was, then, to impose on the class of professional or 'public' carrier by ship, a more onerous liability than that to which the non-professional or 'private' carrier was subject." He further says that a private carrier who carried gratuitously was liable for *dolus* and *culpa lata* (gross negligence), while a private carrier who was rewarded for his services would be liable to use every reasonable care, i.e. even for *culpa levis*. The public carrier was subject to liability for 'custodia', which laid on him an absolute obligation to restore undamaged the goods entrusted to him for carriage, except for loss or damage because of *vis major* or *damnum fatale*. This liability was received in the Netherlands and became a part of Roman-Dutch law.

DÖNGES, p. 60 et seq. makes a comparison between the common carrier of English law and the public carrier of Roman Dutch law. See also STORY, § 488 et seq. but cf. GODDARD, Outlines, § 12 and above § 4.3. at note 8.

PART II
THE STATUS OF THE COMMON CARRIER

Chapter 3

THE CONCEPT OF THE COMMON CARRIER AT COMMON LAW

§ 5. *Factors affecting the Common Carrier Status*

§ 5.1. *In General*

Notwithstanding the decision in *Coggs v. Bernard* the subsequent evolution of the common carrier doctrine was by no means unambiguous. As I have tried to show, it developed under the pressure from different legal theories continuously springing up. Apparently status was primarily the basis of the law of bailment, in connection with which the theory of negligence came to play an important role, and it was not until about the beginning of the 17th century that the theory of contract started to crystallize more clearly.[1] Originally the relation between the carrier and his customer was thus not founded on contract but on the law of bailment.[2]

Certain questions of particular interest then immediately seem to appear connected with the further development of the common carrier doctrine. What were the prerequisites for, and the consequences of being a common carrier, and in which way was the private carrier to be distinguished from the common carrier? What influence did the theory of contract have on the common carrier doctrine? How far, if at all, did the courts accept different efforts of carriers to exempt themselves from liability?

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[1] FRIEDMANN, Legal Theory, p. 219 et seq.; HOLDSWORTH, A History, vol. 7, p. 433 et seq. See particularly p. 434 "The fact that bailment thus came to be regarded as essentially contractual in its nature, enabled the older law as to the rights and duties of bailees to be modified, partly by the agreement of the parties, as *Southcote's Case* in 1601 recognized, and partly by the growth of rules of law relating to particular contracts of bailment." Cf. COOTE, p. 20: "Apart from his liability under the special terms of this contract, the bailee is subject to a status liability, a duty to take care of the bailed goods, which exists side by side with any express or implied duty arising *ex contractu*."

[2] SUNDBERG, Air Charter, p. 162 et seq. Cf. WILLISTON, as quoted above § 4.1. note 4.

The common carrier doctrine is an excellent illustration of the development from status to contract to mandatory legislation. In the law of bailment the obligations of the parties were fixed beforehand by law. The gradually growing use of contracts allowed the parties to agree to their respective obligations and immunities, with the exception of certain types of exemption clauses, which were not accepted by the courts as contrary to public policy or similar, like those clauses relieving the carrier from liability for gross negligence. Then mandatory rules were introduced by the legislature to counteract far reaching exemption clauses, regarded to be of an abusive character.

In the following quotation Holdsworth states certain important circumstances relating to and spells out some of the connected problems:[3]

"It is not always easy to determine to which class a particular carrier belongs for they rarely put their profession formally into writing though sometimes they give public notice that they are not Common Carriers of certain goods and so it generally has to be decided from their past conduct, the types of vehicles they use and the other surrounding circumstances. But once it is proved that the carrier is a Common Carrier of the particular consignment in question, he is placed in a very different legal position from that of a private carrier or other bailee for reward. The Common Carrier's profession may be limited to any extent in respect of the kinds of goods and the termini of the carriage and the profession may be varied from time to time; he may also be a private carrier as well of such goods as are not within his public profession; he may also withdraw his profession altogether if he goes the proper way about it, but as long as a carrier is a Common Carrier he is in two quite different respects under a serious legal liability; one is his obligation to carry and the other is his liability for any loss or injury to the goods while in the course of carriage . . ."

Obligations of a different character are associated with the concept of the common carrier, some of which will be dealt with below. The test is whether there is carriage for certain persons only or for every one. If the carrier holds himself out to everyone he is a common carrier, but if he carries for

[3] The Law of Transport, p. 45. See e.g. *Ingate v. Christie* (1850) 3 Car. & Kir. 61. Cf. *Denton v. G.N. Ry.*, (1856) 5 E.& B. 860 where the railway company published a timetable indicating that a train would depart at a particular time. The plaintiff trying to buy a ticket at the booking office, was told that the service had been cancelled. The defendants were held liable by the whole court for deceit, and by a majority of the court alternatively for breach of contract. One judge suggested yet another possible ground, viz. that the defendants had committed a breach of their duties as public carriers in not accepting the plaintiff as passenger. See WINFIELD, The Province, p. 69.

particular persons only he is a private carrier.[4] Whether there is a case of common carriage or not is a question of fact, not of law,[5] and common carrier liability may be undertaken by someone who is not a common carrier.[6] Further the common carrier at common law is bound to carry for a reasonable reward all goods tendered to him according to his profession—both as to the type of goods and as to the places—, and he is liable to carry the goods safely. The common carrier's liability at common law for the safety of the goods is absolute with only some exceptions.[7] His strict liability is, however, only for loss of or damage to the goods, and in the absence of a special contract to the contrary his status liability is in all other respects the liability of an "ordinary" bailee.[8]

It was, however, a widespread practice among common carriers to mitigate their heavy common law liability through notices or special contracts with the consignor of the goods.[9] In this way the theory of contract gradually became more important in carriage, and the distinction between common and private carriers also became more important.[10] The question concerning common and private carriage has had as a consequence a certain split between English and American law. As Sundberg points out[11] two questions —"1) Can the common carrier contract out of his common carrier obligations? 2) Can a carrier avoid common carrier status altogether?"— reveal the difference between these two legal systems. In England the trend was that the courts were little inclined to restrict the power of the common carrier to exempt himself from liability, whereby the distinction

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[4] According to SUNDBERG, Air Charter, p. 165, the judicial test for common carriage was established in *Gisbourn v. Hurst* (1710) 1 Salk. 249, where it was determined that "any man undertaking for hire to carry the goods of all persons indifferently" was to be considered a common carrier with respect to his liability.

[5] E.g. *Tamvaco v. Timothy and Green* (1882) Cab. & El. 1.

[6] *Robinson v. Dunmore* (1801) 2 Bos. & P. 416.

[7] Like an Act of God, the king's enemies, inherent defect in the goods themselves, improper package and default or misconduct of the consignor himself, see e.g. *Lister v. Lancashire and Yorkshire Ry.* [1903] 1 K.B. 878, and *Gould v. South Eastern and Chatham Ry.* [1920] 2 K.B. 186.

[8] COOTE, p. 20 with references. This is e.g. the case of delay. Cf. however HOLMES as quoted below in § 7.2.4.

[9] See i.a. *Macklin v. Waterhouse* (1828) 5 Bing. 212. See e.g. COOTE, p, 20 et seq.; CHARLESWORTH on Negligence, p. 619 et seq.

[10] One may, however, at the same time say that through the use of special contracts the difference between private and common carriage also in a way is being eliminated.

[11] Air Charter p. 166.

between common and private carriage became less important. Finally, however, mandatory legislation was adopted in some fields to counteract the use of exemption clauses.[12] In the United States, on the other hand, the courts were less willing to accept exemption clauses.[13] Furthermore most British legislation concerning carriage has generated a disappearance of the earlier important distinction between private and common carriage, while in the United States statutes with respect to carriage have been based directly upon the common carrier doctrine. However, also in British law, there are reminiscences of the common carrier doctrine and further, common law still remains as the basis.[14]

The common carrier concept has thus undergone several changes, and in spite of solemn declarations of the courts to the effect that the substance of this concept was determined principally at common law, it is evident that to-day's common carrier is different from his 18th century counterpart.

It is therefore difficult to structure the elements of the common carrier, as they may vary at different times and in different countries owing to economic, ideological and political circumstances. The pattern of the common carrier doctrine has to a certain extent changed in varying directions. In spite of similarity of wording, several definitions of common carriers, including "holding out" and "general public", certainly have, at least partly, another substance to-day than they had when Lord Holt decided *Coggs v. Bernard.* Several circumstances have to be considered simultaneously, which added together make up a common carrier, and the conclusion must be reached after a careful appreciation of the legal relevancy of all these various factors in combination.

As a consequence of the elasticity of the concept of the common carrier it is somewhat difficult to choose the better way of approaching the subject for an analysis. Can the common carrier be regarded as a monolithic concept applied equally to all vehicles? Can the divergencies between English and American decisions be neglected, etc.? The answer to these

[12] Below § 7.3.

[13] Below § 7.3. Cf. WILLIS, p. 297 et seq.

[14] See e.g. the Road Traffic Act 1960 where the A licence is described as a "public carrier's licence", sec. 166 (2) and the C licence is described as a "private carrier's licence", sec. 166 (4) (b). Also in English law the questions concerning common carriage and the liability of the common carrier have been at stake in some modern cases, of which *Webster v. Dickson*, [1969] 1 Lloyd's Rep. 89, and *Transmotors Ltd. v. Robertson Buckley & Co. Ltd.*, [1970] 1 Lloyd's Rep. 224 may be mentioned here.

two questions is in my view most definitely No. To throw light on the problem one may then choose to approach it historically giving a broad and thorough outline decade by decade of the concept of the common carrier irrespective of the mode of transportation. But the tremendous number of cases make such an investigation overwhelming and of comparatively little interest to illustrate the modification of the principle, which is a process covering a long period of time. What also complicates the picture is the dividing line between the private and the public law aspect.[15] Is there any difference between the common carrier as "regulated" in American administrative law and the one at common law? Considering these difficulties I have chosen to present a number of cases determining the common carrier status and I have tried to select them from different periods, and with respect to divergencies between different vehicles, both in English and American law. I have also chosen to make one *general* comparison covering the aspects already indicated, and one *special*, particularly from the aspect of American administrative law. This, of course, means a certain overlapping which, however, I consider necessary as the classification into common and private carriers is of such importance in e.g. the Interstate Commerce Act. But since the American administrative agencies in deciding the common carrier status use as a starting point the concept of the common carrier as laid at common law I have also chosen to mention some "administrative cases" in the "general" part. Furthermore legislation has also been enacted to cover the more "private" law aspect which has also had an important influence on the common carrier doctrine, and these I have chosen to take into the general comparison.

Thus I shall try to put forward certain elements of importance to establish the common carrier status. The question of reward has already been touched upon, but certain other problems remain. Briefly they can be put thus: How does one become or remain a common carrier? How can common carrier status be avoided? Can the common carrier status be avoided by a common carrier in individual cases? What significance does it have that the business is regular or occasional? Is the concept of the common carrier applicable to all kind of vehicles, to all kinds of goods and also to passengers? What importance do notices or special contracts have?

[15] Cf. e.g. FRIEDMANN, Legal Theory, p. 281.

§ 5.2. *Definitions of Common Carrier*

Story's classic work on bailment[1] states that in order to belong to the category of common carriers the carriage must be exercised as a public employment; there must be an undertaking to carry for persons generally; and the carrier "must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*".

Firstly, the distinction between the private and the common carrier is important, since in the former case there is only a liability for negligence while in the latter the liability is strict as to loss of or damage to goods, and that further certain other duties are imposed on the common carrier.

Who then are common carriers? The definitions vary, some adding certain elements as necessary prerequisites, others disregarding them. Much effort from more or less learned writers has then been put into the classification of carriers. This is a hard task, and he who tries will have difficulties in getting out of a vicious circle, as the prerequisites for being a common carrier and the consequences of being one are so closely connected. He who is a common carrier has a strict liability, but it has also been suggested that he is a common carrier who exercises a public profession and has not exempted himself from liability. Furthermore, a common carrier holds himself out to carry for all, and then he must not refuse to carry for certain persons unless he has good grounds; on the other hand he who does refuse to carry for certain persons may possibly not be regarded as a common carrier. The confusion is apparent, and a result of the changes of the common carrier doctrine, owing to new legal theories being developed and applied.

Leslie[2] states: "It is submitted that the following classification alone meets all the facts: (1) Carriers are either public and habitual or private and casual. (2) Public carriers may or may not be common carriers, this

[1] § 495. STORY's definition has had a direct or indirect impact in several cases, like e.g. *Bennett v. Peninsular Steamboat Co.* (1848) 6 C.B. 775; *Ingate v. Christie* (1850) 3 Car; & K. 61; *Nugent v. Smith* (1875) 1 C.P.D. 19; *Chattock v. Bellany* (1895) 64 L.J.Q.B. 250. and *Belfast Ropework Co., Ltd. v. Bushell* [1918] 1 K.B. 210. See also MACNAMARA, pp. 6 och 11 and PATON, p. 227.

[2] P. 10. Cf. MACNAMARA, p. 6: "A private carrier of goods is one (a) who undertakes to carry for reward on occassion, but not as a public employment or (b) who, although inviting all and sundry to employ him as a carrier for reward, reserves the right to reject their offers of goods."

being dependent on the existence of a profession as the latter. (3) Whether a public carrier can be sued for a refusal to carry certain goods depends on the existence of a profession to be a common carrier of such goods. (4) All public carriers, when they carry without a special contract, are under the liability of a common carrier as regards the particular customer, irrespective of the existence of a profession to be common carriers of the goods in question." Leslie in this quotation systematizes carriers according to the methods of transportation, as to the professional character, and with regard to the liability and special contracts involved. His classification is an effort to summarize into a synthesis different cases pulling into somewhat varying directions, and thereby to overcome the difficulties created by a doctrine which has developed during a long period of time steadily amalgamating new components without an open recognition of the basic changes of the concept.

I have stated above that the dividing line is between common carriers and private carriers, but the category of public carriers has also been introduced in a number of cases,[3] being used sometimes as a synonym for common carriers, and sometimes as distinguished from common carriers. As Leslie says it "is sometimes stated, and more often assumed, that every carrier must be either a common or a private carrier. Such a view cannot easily be reconciled either with the law or the facts of modern carriage."[4]

The ground for his statement is that the carrier may exclude certain goods from his profession, and is then not a common carrier with regard to those goods and cannot be sued for refusing to carry them. Nevertheless, he may regularly or occasionally accept such goods and then "the measure of his liability, and not his right to refuse them altogether, is the important

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[3] Cf. e.g. *Liver Alkali Co. v. Johnson* (1872) L.R. 7 Ex. 267; (1874) L.R. 9 Ex. 338; *Nugent v. Smith* (1876) 1 C.P.D. 423. Cf. also *Consolidated Tea and Lands Co. v. Oliver's Wharf* [1910] 2 K.B. 395; and *Watkins v. Cottell* [1916] 1 K.B. 10.

[4] P. 8. The distinction between common and private carriage goes back to a rather early period of time. The structure of the transportation industry has changed considerably. E.g. RAMBERG, Cancellation of Contracts, p. 20 et seq. and GRÖNFORS, Allmän transporträtt, 2 ed., pp. 14 et seq. and 22 et seq. have given an account of the maritime service as performed to-day. Cf. also e.g. FAULKS, FULDA, JACKMAN, SAVAGE, and SCHUMER. To me it seems clear that also the class of private carriers evolved through a historical development. At a very early stage most carriers probably offered their services to the general public, and it was only at a later stage that carriage by special contract, or private carriage, depending particularly on the theory of contract became a special category as distinguished from common carriage.

question."[4] In cases of a special contract this alone will be the frame of his liability, but where there is none, his liability is determined by law. "Now if every carrier be either a common or a private carrier, it is manifest that, as he is not a common carrier, he must be a private carrier of the goods in question, and be liable merely for negligence. It is clear, however, that this is not the law. Suppose his profession is set out in a public notice, and is limited to exclude certain goods, and suppose he accepts such goods without making a special contract. Now, although he could have refused to carry them, if he accepts them without a special contract he will be under the liability of a common carrier."[5]

The distinction between the public and the common carrier is a result of the common carrier's two main liabilities, the one concerning the refusal to carry and the other regarding loss of or damage to goods.[6] Leslie's classification is an accurate statement when taking into consideration cases like *Liver Alkali Co. v. Johnson* and *Nugent v. Smith*,[7] where the judges have desired to reach a wanted solution without applying the concept of public carrier. It is of course then again a question of what is put into the concept, thus at least to some degree a question of wording, and it must be observed that the common carrier is a vague concept, and presumably, seen in a perspective of time, it cannot be fixed with a predetermined

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[5] LESLIE, p. 8. Cf. however e.g. *Baxendale v. G.E. Ry.* (1869) L.R. 4 Q.B. 244 and *Great Northern Ry. v. L.E.P. Transport and Depository, Ltd.* [1922] 2 K.B. 742, where is stated that a common carrier may exempt himself from the status liability through special contracts without ceasing to be a common carrier.

[6] Cf. ELLIOTT, § 124: "The essential distinction between the common and private carrier lies in the fact that the former is under a public duty to carry for every one, under certain conditions, usually of his own making, so that if he refuses to carry within these limitations, he is liable." Cf. also *Watkins v. Cottell* [1916] 1 K.B. 10. In this case the defendant, a furniture remover, had undertaken to remove plaintiff's furniture from one place to another for an agreed price. Before fixing the price, defendant first inspected the furniture. Apart from the fixing of the price there were no other terms expressed with regard to the removal. On the journey a fire broke out, through no fault of defendant, and destroyed some of the furniture. Plaintiff sued defendant for the loss. It was admitted that defendant was not a common carrier, but it was contended that he was carrying on the public employment of a carrier, and was consequently under the same liability as a common carrier. It was held however, that in the absence of any express agreement that defendant undertook the liability of a common carrier, the admission that he was not a common carrier was sufficient to defeat plaintiff's claim. Cf. among modern cases e.g. *Webster, Ltd. v. Dickson Transport, Ltd.*, [1969] 1 Lloyd's Rep. 89.

[7] See note 3.

substance for all times. Then again hardship emanates from the difficulty in distinguishing between the prerequisites for, and the consequences of being a common carrier. When applied to modern American law I am not fully convinced that Leslie's statement is quite correct.[8]

From Story[9] it is evident that the carrier to be a common carrier must exercise a public profession, in other words he must submit to the status imposed on that category of businessmen by common law. Story's description also states that the carrier has to publicly declare his intention to exercise the profession as a common carrier,[10] and that he is not regarded as a common carrier for want of such a declaration.[11] The declaration could be done by an express sign admitting such profession, but the carrier could also show his intention implicitly, by the manner in which he is carrying out his business.[12]

Leslie defines the common carrier as "one who holds himself out, either expressly or by a course of conduct (a), as willing to carry for reward (b), without special conditions (c) and between fixed termini if he elects to fix them (d), the goods generally, or any particular class or classes of goods (e), of all such persons as desire to employ him."[13]

Hutchinson makes the following comment: "What circumstances will be sufficient to invest the employment of the carrier in particular cases with the character of a public one, and what profession or course of dealing on his part will be considered as enough to constitute him a common carrier instead of a private carrier for hire is, however, sometimes a question of no little difficulty, and has given rise to considerable diversity of opinion and controversy. The criterion by which it is to be determined whether he belongs to the one class or the other is generally considered to be, whether he has held himself out or has advertised himself in his dealings or course of business with the public as being ready and willing, for hire to carry particular classes of goods for all those who may desire the transportation

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[8] As for the role of limitation by contract see further below § 7.3.

[9] Above at note 1.

[10] See however *U.S. v. Brooklyn Eastern Distr. Terminal*, 249 U.S. 296 (1919): "Whether a carrier is a common carrier ... does not depend upon whether its charter declares it to be such, ... but upon what it does."

[11] Cf. *Johnson v. M. Ry.*, (1849) 4 Exch. 367.

[12] E.g. *Nugent v. Smith* (1875) 1 C.P.D. 19; *Belfast Ropework Co. Ltd. v. Bushell* [1918] 1 K.B. 210.

[13] P. 7. Cf. e.g. STORY, § 495 and HUTCHINSON, vol. 1, § 48. See also *Fish v. Chapman*, 46 Am. Dec. 393 (Sup. Ct. of Georgia, 1847).

of such goods between the places between which he professes in this manner his readiness and willingness to carry. If he has done so, he is of course to be regarded as a common carrier; but if not, he will be treated only as a private carrier for hire."[14]

Leslie thus makes the want of a special contract a prerequisite for being a common carrier, but like Hutchinson, allows him to restrict his profession to certain categories of goods and on certain routes.[15] This would mean that while Leslie accepts certain restrictions of the common carrier profession he regards special contracts, whereby the common carrier exempts himself from certain liabilities, as immediately depriving him of his common carrier status. This is probably not the case; on the contrary, the common carrier's right to make special contracts has been recognized by the courts, but he has not been allowed to impose unreasonable conditions.[16]

A presentation of a number of American cases may also contribute to a better understanding of the confusion.

The FMC stated in *Carrier Status of Contantainerships, Inc.*[17] that: "The regulatory significance of a carrier's operation may be determined by considering a variety of factors—the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging rates. All of the factors present in each case must be considered and their combined effect determined."

In one case the court said:[18] "Whether a person is a common carrier or a private carrier depends upon the facts; and where there is a question whether the carrier is a private or a common carrier, it is to be determined by the facts relating to first, whether it is public business or employment, and whether the service is to be rendered to all indifferently; and, second, whether one has held himself

[14] Vol. 1, sec. 49.

[15] A great number of cases support that view, e.g. *Dickson v. G.N. Ry.*, (1887) 18 Q.B.D. 176.

[16] MACNAMARA, p. 28 and WILLIAMS, Modern Railway Law, p. 50. See also *Garton v. Bristol & Exeter Ry.* (1859) 6 C.B.N.S. 639 and (1861) 1 B. & S. 112; *Great Northern Ry. v. L.E.P. Transport and Depository Co., Ltd.* [1922] 2 K.B. 742; *Hirschel & Meyer v. G.E. Ry.* [1906] 96 L.T. 147; *Scaife v. Farrant* (1875) L.R. 10 Ex. 358. See further below § 7.3. The confusion of the common carrier doctrine is also illustrated in *Robinson v. Dunmore* (1801) 2 Bos. & P. 416. In this case it was stated that the defendant was not a common carrier by trade but had put himselves in the situation of a common carrier by his particular warranty that the goods would go safely.

[17] FMC No. 1216, served September 28, 1965. Pike and Fischer, 6 SRR p. 483.

[18] *Mc Intyre v. Harrison*, 157 S.E. 499 (Sup. Ct. of Georgia, 1931).

out as so engaged as to make him liable for a refusal to accept the employment offered." Basing its decision on this principle the court concluded: "The mere fact that a carrier invites all and sundry persons to employ him does not render him a common carrier, if he reserves the right of accepting or rejecting their offers of goods for carriage, whether his vehicles are full or empty, being guided in his decision, by the attractiveness or otherwise of the particular offer, and not by his ability or inability to carry, having regard to his other engagements."

In *Beatrice Creamery Co. v. Fisher*[19] the court gave a negative definition: "When a carrier does not maintain either published rates or schedules, regular trips, fixed termini, or freight depots, and refuses divers shipments offered, it is persuasive evidence that he does not hold himself out to serve the public generally."

In *Thomas v. National Delivery Association*[20] the court remarked: "The law determines 'common carrier' status by what is done rather than by the corporate character or declared purposes, and so long as the service is actually rendered on a public basis, lack of authority so to operate, disclaimer or subterfuge designed to stimulate private carriage will not absolve the proprietor from the duties of common carriage."

It has been said that a 'common carrier' is one who undertakes as a public employment the transportation of goods for persons generally from place to place to be delivered at the place appointed, for hire or reward, and with or without a special agreement as to price,"[21] and that the 'common carrier' is he "who by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all who may choose to employ him, and everyone who undertakes to carry for compensation for all persons indifferently is, as to liability, to be deemed a common carrier."[22]

In *U.S. v. Smith*[23] the court declared that a carrier undertaking "for hire to transport from place to place the property of others who may choose to employ him, offering such service to the public generally, is a 'common carrier' and neither the maintenance of a station nor the issuance of a bill of lading is required."

It has also been expressed that a "common carrier is one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place. The real nature of the occupation of common carriers and of the legal duties and obligations which such occupation imposes on common carriers is to be ascertained from a consideration of the kind of service which the carriers hold themselves out to the public as ready to render to those who may have

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[19] 10 N.E. 2d. 220 (App. Ct. of Illinois, 1937).

[20] 24 F. Supp. 171 (DC Pennsylvania, 1937).

[21] *Carpenter v. Baltimore & Q.R. R.*, 64 A. 252 (Superior Ct. of Delaware, 1906) quoting and adopting definition in *Mc Henry v. Philadelphia W. & B.R. R.*, 4 Har. 448 (Sueripor Ct. of Delaware, 1846).

[22] *Grauer v. State*, 181 N.Y.S. 2d. 994 (Ct. of Claims of New York, 1959).

[23] 215 F. 2d. 217 (6 CCA, 1954). Cf. *Morrisey v. S.S.A. & J. Faith*, 252 F. Supp. 54 (DC Ohio, 1965). "Relationship of common carriers to shipper and carrier's attendant duties exist independently of terms of contract of affreightment or bill of lading."

occasion to employ them. The essence of the contract of a common carrier is that the goods are to be carried to their destination unless the fulfilment of this undertaking is prevented by the Act of God or the public enemy."[24]

In another case[25] the court stated with reference to the tests whether a carrier is a common carrier or not: "He must be engaged in the business of carrying goods for others as a public employé, and so hold himself out; second, he must undertake to carry goods of the kind to which his business is confined; third, he must undertake to carry by the methods by which his business is conducted and over his established roads; fourth, transportation must be for hire; and, fifth, an action must lie against him if he refused without reason to carry such goods for those willing to comply with his terms."[26]

As can be seen from these definitions there are a number of different elements that must be present before the common carrier status may be applied. The calling of a common carrier is regarded as a public one. He assumes a public duty and the law holds him bound to receive and carry any person or goods of anyone who offers, provided, in the latter case, the goods be of the kind he professes to carry.[27] To constitute a person a public or common carrier it is not essential, that he owns the means of transportation; the contract of carriage is sufficient to establish such status.[28] Whether all the elements must be present in each case, or if it is sufficient that some of them exist, is difficult to say, as the courts determine a concrete situation, where several facts have been introduced and may influence the judge. However, the basic elements must undoubtedly exist in every case, the "undertaking for hire to carry the goods of all persons indifferently".[29] In *Larson v. Aetna Life Ins. Co.*[30] the court stated that generally, to constitute one a common carrier, he must make the carriage a regular

[24] *Paine Furniture Co. v. Acme Transfer & Storage Co.*, 195 N.E. 302 (Sup. Judicial Ct. of Massachusetts, 1935).

[25] *Santa Fé P. & P. Ry. v. Grant Bros. Const. Co.*, 108 P. 467 (Sup. Ct. of Arizona, 1910), which is a more or less word by word quotation from HUTCHINSON, vol. 1, sec. 48.

[26] Cf. e.g. *American Trucking Associations, Inc. et al. v. Atchinson, Topeka and Santa Fé Ry.*, 387 U.S. 397 (1967) where the U.S. Supreme Court stated: "From the earliest days, common carriers have had a duty to carry all goods offered for transportation."

[27] HUTCHINSON, vol. 1, sec. 47 et seq. Whether carriage of passengers may also be regarded as common carriage is a particular problem.

[28] *Highway Freight Forwarding Co. v. Public Service Commission*, 164 A. 835 (Pennsylvania Sup. Ct., 1933). See also HUTCHINSON, vol. 1, sec. 47 et seq. The statement that the contract is sufficient to establish the status of common carrier may be taken as an illustration of the confusion between status and contract.

[29] *Gordon v. Hutchinson*, 37 Am. Dec. 464 (Sup. Ct. of Pennsylvania, 1841).

[30] 143 P. 2d. 850 (Sup. Ct. of Washington, 1943). Cf. for example the words in *Circle*

and constant business or must for the time hold himself ready to carry for all.

The question whether there could be a case of common carriage of passengers has been raised on several occasions.[31] In *Aston v. Heavan*[32] the court stated that carriers of passengers are private carriers, the reason being that the character of a common carrier can attach only to a carrier of goods. In *Clarke v. West Ham Corporation*[33] it was said that the "carrier of passengers is free from liability as an insurer, not because he is not a common carrier, but because, although a common carrier, he is not a bailee of his passengers." It is clear that at common law there is no strict liability attached to a carrier of passengers, but on the other hand a common carrier of passengers could not refuse to carry unless he had accepted reasons. The court's statement in the last case makes a strange impression when regarding the connection between bailment and common carriage as outlined above and one may of course ask whether this statement should not be regarded as semantic hocus-pocus, as the concept of the common carrier is based on bailment, but what is aimed at is probably that a common carrier of passengers may have a duty to carry without having a strict liability for the safety of the passengers.[34] From a present point of view there seems to be little reason not to apply the common carrier status to a carrier of passengers if he is holding himself out to carry all persons, but at common law his liability will be less heavy than in the case of carriage of goods. But if this reasoning is accepted, one must also be aware of the distinction then made between the common carrier's two main liabilities[35].

From the cases mentioned it is clear that many factors are applied with varying weight by different courts and writers. Almost all general definitions have a number of counterparts making it impossible to definitely determine the decisive elements for being a common carrier, and further

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Exp. Co. v. Iowa State Commerce Commission, 86 N.W. 2d. 888 (Sup. Ct. of Iowa, 1957) ". . . as a public employment, and not as a casual occupation." See also BEALE & WYMAN, p. 119.

[31] SUNDBERG, Air Charter, pp. 167 and 168 with references. At any rate it must be considered as well settled law that a carrier may be a common carrier of the luggage conveyed with the passengers. See e.g. *Middleton v. Fowler* (1699) 1 Salk. 282.

[32] (1797) 2 Esp. 533. Cf. CLARKE, p. 6.

[33] [1909] 2 K.B. 858.

[34] Above § 4.

[35] Cf. SUNDBERG, Air Charter, p. 167.

some of the decisions mentioned must be considered to be of less significance. Nevertheless a cautious summing up may lead to certain conclusions. Whether a person is a common or a private carrier depends upon the facts; and where there is a question whether the carrier is a private or a common carrier it is to be determined by the facts relating to first, whether it is public business or employment, and whether the service is to be rendered to all indifferently; and second, whether one has so held himself out as so engaged as to make him liable for a refusal to accept the employment offered. A common carrier may then be characterized as one who holds himself out as ready to receive for carriage, goods for hire, which he is accustomed to carry, for all people indifferently so long as he has capacity. Such an undertaking may be evidenced by the carrier's own notice, or practically by a series of acts, e.g. by his own habitual continuance in his line of business.

Two criterias seem to be constant and must be regarded as of basic importance. They are "the holding out" and "the public in general" which are wholly intermingled with each other, but which I shall nevertheless try to subject to separate analysis in the next chapter. An analysis of these elements may be of some help to an understanding of how the business of common carriage is established and when it has a "public nature".

§ 5.3. *The Profession: Questions concerning the "holding out"*

I now revert to discuss what constitutes a "holding out". As was earlier pointed out, several factors may together convince the court that there is a holding out.[1]

"The essential part of the definition of a common carrier is that he professes to the public his readiness to carry for any one who wishes to engage his services and is prepared to pay his charges. By this 'profession' he 'holds himself out' as one who exercises a 'public calling'."[2]

[1] To avoid missunderstanding it should be observed that in the law of agency there is a *doctrine of holding out*, with a different implication than the holding out in connection with common carriers. See e.g. in Scandinavian law GRÖNFORS, Ställningsfullmakt, p. 40. The appearance of being authorized must be the consequence of some act done by the principal, who must "hold out" the intermediary as his authorized agent. For references in connection with this doctrine see op. cit. notes 26 and 27.

[2] KAHN-FREUND, p. 196. See also *Tamvaco v. Timothy & Green*, (1882) Cab. & El. 1. Cf. BARNES, Limitation of Common Carriers' Liability, p. 13 et seq.

"The question whether a man is a common carrier or not is one of fact",[3] and in order to be a common carrier the carrier has to profess or hold himself out as such. "Profession is a unilateral act; it is the act of the carrier alone ... Profession is not merely an offer, which anyone may accept, and so bind the carrier in contract; it is an act by which the carrier takes upon himself a legal duty for breach of which he is liable apart from contract altogether."[4] In *Belfast Ropework*[5] the judge stated: "A man may be a common carrier without so styling himself." The law apparently never required a formal or written profession, and nearly always it is a carrier's conduct or habits that constitute his profession.[6]

The following case citations illustrate some facts that courts have considered important when deciding whether a person has "held himself out" as a common carrier or not. I have chosen to quote the pertinent *obiter dicta* and *ratio decidendi* from them, one after the other so as to compile a subsequent summary.

1) "Evidence that at the door of a booking office, there is a board on which is painted, "conveyances to all parts of the world", and a list of names of places, is not sufficient proof that the owner of the office is a common carrier ..."[7]

2) "The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of these responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character."[8]

3) "The defendant solicits all of its customers, as above described, through trade publications, direct mail advertisements, telephone books and personal contact with prospective shippers. These solicitations, with the various franchises

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[3] *Belfast Ropework Co. v. Bushell* [1918] 1 K.B. 210.

[4] LESLIE, p. 7.

[5] See note 3.

[6] LESLIE, p. 8. Cf. STORY above § 5. 2. at note 10.

[7] *Upston v. Slark* (1827) 2 C. & P. 598.

[8] *Liverpool Steam v. Phenix*, 129 U.S. 393 (1888).

above referred to, are relied upon by defendant as complete holding out to serve the public."[9]

4) "In each of these operations the defendant sought the traffic and advertised for it, and carried all offered to the limit of its capacity, for compensation or hire; and therefore, as to such operation it was beyond doubt a common carrier."[10]

5) ".. . respondent contends that its operations . . . have not been those of a common carrier. This contention is predicated upon the view that respondent did not advertise nor hold out services to the traveling public, nor were its services so held out by the ticket agents from whom its passengers were obtained. On the contrary, respondent asserts the belief that the passengers did not know the identity of the carrier concerned but relied upon the ticket agency to provide transportation, and that these agencies were not its agents but independent contractors over whom it had no control . . . Further, the evidence of record refutes the contention that Praco did not hold out service in the name of respondent. It did so by selling respondent's tickets, by inserting respondent's name in exchange orders, and by selling reservations on flights operated by respondent in response to requests therefore. Accordingly, we hold that in the solicitation and procurement of traffic actually transported by respondent, the ticket agencies acted on respondent's behalf (in so holding, we express no opinion concerning the status of the agencies as indirect air carriers under the Act). Respondent's services were thus held out to the public both directly and indirectly, and were those of a common carrier."[11]

6) "Advertising is not an essential to constitute one a common carrier. Whether one is a common carrier depends in most part upon its availability to everyone who desires its service, whether such availability is broadcast to the world or acknowledged only upon inquire or by the actual course of conduct in continuing to accept all who desire its services."[12]

7) In one case the court recapitulating the arguments of the parties and stating its opinion said: ". . . as a basis for the steady house service, defendant has entered into contracts with shippers to serve them for a definite period of time and at a rate which is agreed upon by bargaining between them, and therefore this type of business is clearly that of a private carrier, because it lacks the one element requisite to making it a common carrier operation, that is the holding out by the carrier that it will serve the public generally. *Defendant* urges that the stipulation shows that it has solicited business by advertisement, by listings in the classified telephone directory, by personal contacts and other avenues of solicitation, including published tariffs of the Cartage Exchange, which, it insists, is a holding out that it will serve the public generally." *Opinion:* "Every undertaking to transport merchandise for hire is under some form of contract, usually

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[9] *Fleming v. Chicago Cartage Co.*, 160 F. 2 d. 992 (7 CCA, 1947).

[10] *Pacific Northern Airlines, Inc. v. Alaska Airlines*, 80 F. Supp. 592 (DC Alaska, 1948).

[11] *American Air Transport and Flight School, Inc. (Noncertificated operations)*, 11 C.A.B. 105 (1949).

[12] *Page Airways, Inc. (Investigation)*, 6 C.A.B. 1061 (1946).

a bill of lading, and the mere existence of contracts between the Cartage Company and the shippers does not exclude the common carrier status if the transportation services are offered to the public generally. Nothing has been called to my attention to prove that defendant has at any time refused to perform transportation services for any one who has applied for it."[13]

8) "What did it do? It held itself out to the public as performing the things done by a common carrier. It solicited the patronage of the traveling public. It advertised schedules for routes, times of leaving, rates of fare. It established general rules and regulations. It published schedules which stipulated what baggage the passenger might carry, and added the usual conditions for passenger-carrying service, that excess baggage would be charged for at published rates. It will thus be seen that, in all its approach to the public and in its rendering service to the public, defendant did precisely what railway and steamship lines do, and it sets the stamp of its common carrier character by coming in competition with rail and steamship lines."[14]

9) ". . . that the respondent advertised for cargo and passengers, and carried general cargo; that it refused to carry what would taint other cargo, or be dangerous to passengers, or would overload the vessel, but with those exceptions it took what cargo was offered, if the rate of freight was satisfactory; and that the ships sailed on regular advertised days, and had been running since 1866, and had a regular pier in New York and a regular landing-place in Liverpool. If this does not make the respondent and its ships common carriers, nothing can do so."[15]

10) "But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not devest it of the character."[16]

11) "When a carrier does not maintain either published rates or schedules, regular trips, fixed termini, or freight depots, and refuses divers shipments offered, it is persuasive evidence that he does not hold himself out to serve the public generally."[17]

12) "A carrier is a common carrier if it holds itself out to the public as willing to carry all passengers for hire indiscriminately. The holding out may be either by advertising or by actually engaging in the business of carriage for hire."[18]

The other side of the "holding out" is the "public in general". One of the criterias for being a common carrier is that the carrier is ready to carry

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[13] *Bowles v. Chicago Cartage Co.*, 71 F. Supp. 92 (DC Illinois, 1946).

[14] *Curtiss-Wright Flying Service v. Glose.*, 66 F. 2 d. 710 (3 CCA, 1933).

[15] *The Montana*, 22 F. 715 (Circuit Ct. New York, 1884).

[16] *Mengel Co. v. Inland Waterways Corporation*, 34 F. Supp. 685. (DCED Louisiana, 1940).

[17] *Beatrice Creamery Co. v. Fisher*, 10 N.E. 2 d. 220 (App. Ct. of Illinois, 1937).

[18] *Arrow Aviation Inc. v. Moore*, 266 F. 2 d. 488 (8 CCA, 1959).

goods for anybody who wants to employ him, and therefore it has to be determined whether he carries for certain persons only or for all.[19] He who reserves the right to accept or reject the offers made to him although he still has space is regarded as a private carrier.[20] How then is the "public in general" determined? What factors are considered?

From a number of cases it is apparent that what has been taken into consideration is the conditions in the individual case. And then it has been found that in cases of ocean transportation a charter of an entire ship to one charterer for one particular cargo makes the contract one of private carriage and not of common carriage.[21] In one case concerning regulation by the U.S. Maritime Commission it was held that charters for carriage of a single shipper are not for common carriage, and rate schedules need not be filed. Where charterers carry miscellanous cargoes of numerous shippers, the carriage is common and rate schedules must be filed.[22] In one case where a small ocean freighter was carrying several lots of cargo shipped by one shipper but consigned to several different parties at various ports of destination the court said: "Counsel for the shipowner relies largely on the proposition that as all the bills of lading were issued to the Atlas Powder Company (although the consignees and the ports of delivery were varied), the carrier in this case should be treated as a private and not a common carrier . . . I think it very doubtful . . ."[23]

In *Hissem v. Guran*[24] it was held that where an owner of trucks employed the same vehicle partly in the prosecution of his own business and partly in hauling goods and merchandise for the public for hire, there is a partial dedication of such property to public service, and, to the extent of such

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[19] *Ingate v. Christie* (1850) 3 Car. & K. 61.

[20] *Electric Supply Stores v. Gaywood* [1909] 100 L.T. 855; *Consolidated Tea & Lands, Co. v. Olivers Wharf* [1910] 2 K.B. 395; *Belfast Ropework Co., Ltd v. Bushell* [1918] 1 K.B. 210.

[21] This was the case in e.g. *Thomas J. Howard*, 1943 AMC 1263 (DCED New York, 1943); *Monarch of Nassau*, 1946 AMC 853 (5 CCA, 1946); *Oakley C. Curtiss*, 4 F. 2 d. 979 (2 CCA, 1924); *Fri*, 154 F. 333 (2 CCA, 1907); *Rokeby*, 202 F. 322 (DCSD New York, 1911); *Robin Gray* 65 F. 2 d. 376 (2 CCA, 1933); *H.A. Rock*, 23 F. 2 d. 198 (DCWD New York, 1927); and *Cape Charles*, 198 F. 346 (DCED North Carolina, 1912).

[22] *Transportation by Southeastern Terminal & Steamship Co. between Continental United States and Puerto Rico*, 1946 AMC 1694 (U.S. Maritime Commission, Docket No. 650).

[23] *Louise*, 1943 AMC 1246 (DC Maryland, 1943).

[24] 146 N.E. 808 (Sup. Ct. of Ohio, 1925).

dedication and such use, the haulier is a common carrier. Further an employer who did hauling by truck between states for a published list of customers by contract, was held not to be a "common carrier" engaged in interstate commerce.[25]

As for the question of the "general public" the cases referred to seem to lead to the consequence that as soon as there is one shipper, one document, and one consignee, there is always a case of private carriage. This also seems to have as a consequence that if a common carrier in one particular case, chooses to load his vehicle with the goods of one consignor, he is to be regarded as a private carrier with respect to that consignor. I think, however, that such conclusion could not immediately be drawn. The character of the common carrier's business must be determined from a broader perspective, taking into consideration also the general character of the carrier's business. The question whether the common carrier may simultaneously perform business as a private—or contract—carrier should be judged similarly. "The term 'dual operation' is usually employed to denote the performance of both common and contract carriage by the same carrier. Is this permitted by law? Yes, but safeguards exist to prevent the use of the contract carriage for avoidance of the carrier's legal duties as a common carrier. In particular, common and contract carriage cannot be performed in the same vehicle at the same time."[26]

Another question is: Does he have the right to refuse to carry for anybody?[27] Some of the cases indicate that if there are several shippers, documents and consignees, this is truly a case of common carriage. In cases between these two extremes there is no absolutely clear line to be drawn.

[25] *Zelle v. Industrial Commission of Colorado*, 65 P. 2d. 1429 (Sup. Ct. of Colorado, 1937).

[26] GROSSMAN, p. 149. Cf. CHAPLIN, p. 555 et seq.; BEALE & WYMAN, § 2805 et seq.; STORY, §§ 500–501; and below § 10.4.

[27] A common carrier has a duty to carry for everybody the goods he professes to carry. However he has the right to refuse, in case his conveyance is full, see below §§ 7.2.1. and 7.2.2. Through a special contract a common carrier may also come in a situation where he no longer has the strict common carrier liability. All these questions are, however, very complicated, and reveal the complexity of the concept of common carrier. He who carries for everybody and assumes the severe liability is a common carrier. He who is a common carrier has to carry for everybody and then incurs the severe liability. This is a result of the two dimensions of the common carrier doctrine, the private law and the public law dimension, which have to be borne in mind continuously. Cf. e.g. *New York Central R.R. v. Lockwood.* 84 U.S. 357 (1874); *Mengel v. Inland Waterways Corporation*, 34 F. Supp. 685 (DCED Louisiana, 1940); *Louisville & N.R.R. v. U.S.*,

It has been suggested in a number of cases that as soon as there are more than one shipper, the carrier is a common carrier. It does not seem very rational that the common carrier status would be determined on such criteria as the number of shippers in the individual case. The most important factor in the concept of the common carrier is whether the carrier holds himself out to the "general public", or to individual shippers, and this element is general in its character and should have nothing to do with the circumstances in the individual case, i.e. a carrier who holds himself out to the general public is a common carrier but ought to be able to contract with one shipper only in an individual case without losing his character as a common carrier. Here again we are back to the vicious circle owing to the many theories which have gradually influenced and distorted the concept of common carrier, and as we shall see below the American transportation commissions have often been influenced by the number of shippers when determining the nature of the transportation performed.[28]

It has been held in some 19th century American cases that a carrier who holds himself out as ready to carry for all on a particular journey or voyage is at that moment a common carrier, though this is in fact his first journey and he has never yet carried,[29] and this is equally the case where he does not intend to continue his profession, and makes his offer for the single journey only.[30]

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106 F. Supp. 999 (DCWD Kentucky, 1952); *Overseas National Airways, Inc. v. CAB*, 307 F. 2 d. 634 (Distr. of Col. CCA, 1962); *Fleming v. Chicago Cartage Co.*, 160 F. 2 d. 992 (7 CCA, 1947); *Jackson v. Northwest Airlines*, 70 F. Supp. 501 (DC Minnesota, 1947), aff'd. 185 F. 2 d. 74 (8 CCA, 1950), cert. den. 342 U.S. 812 (1952).

[28] Other factors have to be taken into consideration. See below in the sections about the common carrier as determined in the different commissions, ICC, FMC and CAB. There should be no difference between a court judgment concerning who is a common carrier and what the commissions consider one; nevertheless there are differences, which is certainly a consequence of a long and complicated evolution of the common carrier doctrine where the courts have during the last phase been mainly concerned with the liability for loss of or damage to goods while the commissions have been concerned with the regulatory aspect; such differences may also be distinguished between the commissions, which among other things may be a consequence of the distinction made in the ICC between common, contract and private carriers, but certainly also is a result from differences in operational structure.

[29] *Fish v. Chapman*, 46 Am. Dec. 393 (Sup. Ct. of Georgia, 1847).

[30] *Gordon v. Hutchinson*, 37 Am. Dec. 464 (Sup. Ct. of Pennsylvania, 1841).

When regarding the enumerated cases it is evident that most of them are American 20th century cases, and it may be said that such a selection is not representative when trying to determine the "holding out". But I have made the choice from cases where different concrete factors have been brought out which are important in this connection, and after all it is my conviction that the important factors are found among those mentioned.

In order to determine the "holding out" the courts and the agencies are influenced by several factors, which may in varying constellations constitue a "holding out". No exact standard could be found, but every case must turn on its own facts. Some conclusions may, however, if made with caution, be drawn from the cited cases. It seems not to be necessary to advertise[31] in order to be regarded as a common carrier, nor to circulate messages etc., though such efforts would often be taken as a token of "holding out". It is rather the character of the business as continuous plus the intention of the carrier to deal with everybody or contract just with some few persons that is decisive.

An effort at this point to summarize the common carrier status may have as a result that a common carrier is one who openly professes to carry for hire the goods of all who choose to employ him, and whose duty it is to carry for all who comply with the terms, as to freight, etc.; while a private carrier is one who, without being engaged in the business generally, undertakes to carry goods for hire in particular cases. This description is apparently little different from those mentioned, which may be taken as an indication of the difficulty to create a general formula covering all aspects of the common carrier concept. Furthermore this general formula must be very hard if not impossible to find owing to the large number of legal theories and more "practical" events which have taken place and molded together into the concept of the common carrier. And so it is, for example, a hard task to balance between bailment and contract when dealing with the common carrier doctrine, where both actually play such an important role.

In bills of lading and similar documents one sometimes meets with the term "common carrier". In some European documents, like e.g. The General Steam Navigation Comp. Ltd. London, and the Belgian Scantic Line bills of lading are found clauses of the following wording: "The carrier is not and does not hold

[31] It is of course also important that there has been not only a technological evolution, but also a managerial development and a great number of new techniques have been used in the field of distribution.

himself out as a Common Carrier." A similar clause is found in the Standard Trading Conditions of the Institute of Freight Forwarders: "The Company is not a Common Carrier."[32] This clause is e.g. referred to in the Stockholm City Court case decided Jan. 9, 1970, reported in AfL, vol. 4, p. 231.

A clause of this character must be regarded as questionable. If a carrier actually holds himself out as a common carrier, even if he contends he does not, he will probably be regarded as a common carrier. A carrier may in his business performance restrict his services to a limited number of merchandise etc. and a clause like those quoted may be considered as one factor of importance to decide the character of his business performance but the clauses mentioned may be regarded as too wide and not sufficiently strict in its wording. Such a clause may probably not be taken as conclusive evidence, but the character of the service has to be determined on all pertinent factors.

Another thing is that the common carrier has a certain right to exempt himself from liability by contract.

§ 6. *Carriers who may be regarded as Common Carriers*

§ 6.1. *In General*

The classes of persons grouped under the concept of common carrier is not homogenous.[1] Hutchinson discusses this question at length.[2] According to him "it is wholly immaterial in what kind of vessel or vehicle or for what distance the carrying is done".[3] This statement expresses a view similar to the one expressed in *Mc Cusker v. Curtiss Wright Flying Service*,[4] where the court made the following summing up of the development of common carriers:

"The term 'common carrier' is not of statutory origin. Its meaning is to be found in the history of the law of the early days when means of travel and communication were slow, and uncertain and innkeepers, and carriers were restrained from robbery and ofttimes murder of those to whom they offered their hospitality, or service only by the imposition of heavy penalties and the responsibility for the safekeeping of their patrons' goods and persons ... With the development of traveling facilities from the post horse to the chaise, the stage coach, and to the modern railroad train or steamboat, the term 'common carrier' has been applied to each new development catering to the public generally, and the strict rules of the old law have been relaxed but little, for with the development came new dangers of a mechanical sort inherent to swiftly moving machines ...

[32] Cf. below § 8.2.1.

[1] Cf. BEALE & WYMAN, § 16 et seq.

[2] HUTCHINSON, vol. 1, particularly sec. 64 et seq.

[3] HUTCHINSON, vol. 1, sec. 64.

[4] 269 Ill. App. 502 (App. Ct. of Illinois, 1933).

Today, ... the term 'common carrier' should be applied to the 'jitney bus', and tomorrow, in a proper case, it may well be that it may be applied to that most recent device ... the aeroplane presenting as it does new dangers unknow to the average man which can only be decreased by a high degree of care upon the part of those in control of the mechanism which operates them."[4a]

The court further referring to Hotchkiss, sec. 52, stated: "The loose application of the term 'common carrier' to railroads alone is far from accurate ... The term has also been applied to hoymen, bargemen, lightermen, and canalboat men, and it has been said that 'it is wholly immaterial in what kind of vessel or vehicle, or for what distance the carrying is done'."

These two opinions seem to settle all further discussion in this connection, but it may nevertheless be of some interest to examine in greater detail certain aspects, particularly those regarding sea carriers and air carriers, as the concept of the common carrier has been developed under changing conditions, originally very different from those of the present time.[5] New industrial technology has developed new vehicles, and new management technology has developed a more complex organization, and very likely the law cannot be regarded as settled once and for all times.

The construction of railways brought a technical innovation of great impact for transportation, and naturally questions were raised as to whether the old concept of the common carrier could be applied to this new type of carrier. Referring to the case of *Norway Plains Company v. The Railroad*[6] Hutchinson states the law to be that railway companies, by their very nature are common carriers, and this has so been held more or less everywhere with perfect unanimity.[7]

[4a] Similar reasoning has been used also in the Swedish law of tort.

[5] In a way it is of course correct to say as DISNEY p. 1 that railways had to take the law as they found it, but the question remains whether and how the settled law applies to a new device.

[6] 1 Gray 263 (Sup. Judicial Ct. of Massachusetts, 1854). In this case it was held "that railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law and make them eminently common carriers. Their iron roads, though built in the first instance by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can only be justified on that ground ... Being liable as common carriers the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods during the transit, except those arising from the act of God or the public enemy."

[7] HUTCHINSON, vol. 1, sec. 76. See also cases cited in note 71. Cf. POWELL, p. 237; CLARKE, p. 137; GUNN, p. 19; ELLIOTT & ELIOTT, vol. 4, § 1393; DISNEY, p. 1; and BOYLE & WAGHORN, vol. 1, p. 17. See also i.a. *Great Northern Ry. v. L.E.P.* [1922] 2 K.B. 742.

The term common carrier has also been applied to various categories of carriers like belt lines and terminal railroad companies,[8] bus companies,[9] escalators,[10] express and messenger companies,[11] pipe lines[12] etc., and it is not unlikely that it would also be regarded as applicable to a new device like e.g. the Hovercraft.[13]

A particular group of functionaries in the transportation chain are the forwarding agents whose duties are not basically those of carriage but "whose business is to receive goods and to send them on to their destination by some selected carriers. They are not themselves carriers and do not incur the liability of common carriers. But once they receive reward for their services they are in the same position as private carriers, and are responsible for anything that happens to the goods owing to want of good faith and reasonable and ordinary diligence on their part."[14] If the purpose of the forwarding agent's undertaking is only to choose a proper carrier, he is a bailee with that liability.[15] Apparently the purpose of the promise is basic. As soon as the forwarding agent undertakes to move and deliver the goods he is legally in the same position as a carrier, and may then also be regarded as a common carrier, if he is holding himself out as such.[16]

To determine whether a forwarding agent is a common carrier or not the character of his business has to be decided, and this may, depending

[8] *Fort Street Union Depot Co. v. Hillen*, 119 F. 2 d. 307 (6 CCA, 1941); *U.S. v. Sioux City Stock Yards Co.*, 162 F. 556 (C.C. Iowa, 1908).

[9] *Illinois Highway Transp. Co. v. Hantel*, 55 N.E. 2 d. 710 (App. Ct. of Illinois, 1944).

[10] *Weiner v. May Department Stores Co.*, 35 F. Supp. 895 (DCSD California, 1940).

[11] *Railway Exp. Agency v. Kessler*, 52 S.E. 2 d. 102 (Sup. Ct. of App. of Virginia, 1949).

[12] The Act to Regulate Commerce, section 1, as amended by the Act of June 29, 1906, provides that pipe lines for the transportation of oil or other commodity, except water and some other products, are common carriers within the meaning and purposes of the Act. However in states, where pipe lines have not by statute been declared common carriers, there are cases, where the purchaser has got the right to use pipelines exclusively in his private business, see for example *Prairie Oil & Gas v. United States*, 204 F. 798 (Commerce Ct., 1913).

[13] For a brief survey on Hovercraft see e.g. LØDRUP, Hovercraft—fågel eller fisk?

[14] CLARKE, p. 13. Cf. STORY, § 502; and MACNAMARA, p. 35.

[15] BEALE & WYMAN, § 97. Cf. e.g. *Pontifex & Wood, Ltd. v. Hartley & Co.* (1893) 62 L.J.Q.B. 196; *Jones v. European & General Express Co.* [1921] 90 L.J.K.B. 159; *Lynch Brothers, Ltd, v. Edwards and Fase* [1921] 90 L.J.K.B. 506; *von Traubenberg v. Davies, Turner & Co., Ltd.* [1951] 2 Lloyd's Rep. 179 and 462; and *W.L.R. Traders (London), Ltd. v. B. & N. Shipping Agency, Ltd.* [1955] 1 Lloyd's Rep. 554. Cf. also e.g. *Reid v. Fargo*, 241 U.S. 544 (1916).

[16] JOSIEN, p. 9. Cf. *Troy v. Eastern Co. of Warehouses, Ltd.* [1922] 91 L.J.K.B. 632.

on the circumstances be that of a carrier as well as that of a more "conventional type" forwarding agent. Owing to a changing pattern of competition in the field of transportation it has become in recent times more usual for a forwarding agent to hold himself out as a common carrier and therefore this question has great practical significance.[17]

§ 6.2. *Sea Carriers*

Does then the concept of the common carrier apply to sea carriers as well? This question is a rather involved one.[1] The historically most common and probably correct view is that the "conception of a common carrier was developed in connection with road carriers and not in connection with carriers by sea".[2] Looking at different definitions of common carriers by sea, one shall find that they vary. Carver[3] distinguishes the public carrier from common carriers although he recognizes that their liability is the same, since they are exercising a public employment.[4]

In *Liver Alkali Co. v. Johnson*[5] Brett, J. laid down the rule that the liability of a shipowner is the same as that of a common carrier, and he confirmed this rule in *Nugent v. Smith.*[6] His explanation of the common law rule was that it was founded on the Praetor's edict relating to the responsibility of shipowners and innkeepers, which had been extended

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[17] Cf. as to the freight forwarder below in § 11. With respect to Scandinavian conditions, where the forwarding agent has been characterized as the "cameleont" of transport law see e.g. GRÖNFORS, Allmän transporträtt, pp. 44, 48, 52 et seq. with references.

[1] On this question KOUSHNAREFF says pp. 9 and 10: "However, while the law is very strict regarding liability of land carriers, such as railroads, buses, or motor trucks, such is not the case with the ocean carriers", and continues: "The law is much more lenient to ocean carriers, and their liability is governed not by the English common law but by the general maritime law." Cf. ROBINSON, Admiralty Law, p. 5. KOUSHNAREFF observes that the ancient maritime codes were very strict as to the ocean carrier's liability and outlines how as time passed by the liability was reduced. Cf. PALFREY, p. 777 et seq.; FIFOOT, p. 160; and HOLDSWORTH, Some Makers of English Law, p. 159.

[2] KAHN-FREUND, pp. 204–205.

[3] Vol. 2, 1, p. 3 et seq. Cf. above § 4.

[4] Cf. LESLIE, p. 7 et seq.

[5] (1872) L.R. 7 Ex. 267; Brett, J. held that the shipowner was not a common carrier, because he was not bound to accept the goods first tendered, but was by custom under the liability of a common carrier. Thereby a distinction was made between the duty to carry for all and the duty to carry safely. For a more detailed discussion see MACLACHLAN, pp. 88 et seq. and 455; and LESLIE, p. 9 et seq.

[6] (1875) 1 C.P.D. 19. Cf. LEGGETT, p. 232.

from shipowners generally to common carriers by land. On appeal[7] Cockburn, C.J. disagreeing with Brett, J. said among other things: "I cannot help seeing the difficulty which stands in the way of ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such a vessel or vehicle if required to furnish it." The view of Cockburn, C. J. is apparently that in accordance with general principles a shipowner, not being a common carrier, like a carrier by land is liable only for negligence.[8] "However, the weight of modern authority supports the conclusion that at common law all shipowners incur the same liability for goods carried by them as common carries."[9]

This confusion is not difficult to explain when going back to the origin of the common carrier doctrine. The common law from which the concept of the common carrier stemmed developed in Britain without any direct influence from the Civil law, though certain judges were influenced to various degrees. The general maritime law had another origin and developed in an international milieu.[10] "In most of the European countries which possessed

[7] (1876) 1 C.P.D. 423.

[8] Cf. STORY, §§ 457–459 and 501.

[9] MACLACHLAN p. 88. For this conclusion he refers to *Barker v. M'Andrew* (1865) 34 L.J.C.P. 191; *Pandorf v. Hamilton* (1885) 16 Q.B.D. 629; and *Hill v. Scott* (1895) 2 Q.B. 371. To me this statement, however, does not necessarily contradict what has been said at note 8. MACLACHLAN further refers to *Internationale Guano en Superphosphaatverken v. Macandrew* [1909] 2 K.B. 360, where it was held that a shipowner, who in consequence of a deviation could not set up the exceptions in the charterparty, was, during the whole voyage, under the obligations of a common carrier. This case, however, is not really directly connected with the common carrier doctrine, but it is well settled law that geographical deviation voids the contract of carriage and any carrier in such a case is vested with common carrier liability (or probably rather an absolute liability). If considering cases like e.g. *Chattock v. Bellany* (1895) 64 L.J.Q.B. 250; *Consolidated Tea & Lands Co. v. Oliver's Wharf* [1910] 2 K.B. 395; *Watkins v. Cottell* [1916] 1 K.B. 10; *Kopitoff v. Wilson* (1876) 1 Q.B.D. 377; *Travers v. Cooper* [1915] 1 K.B. 73; *Belfast Ropework Co. v. Bushell* [1918] 1 K.B. 210, it is clear that MACLACHLAN's statement is not unambiguous. Cf. below in § 7.3.

[10] HOLDSWORTH, A History, vol. 5, p. 80; ROBINSON, Admiralty Law, p. 1 et seq.; PLEIONIS, p. 173 et seq.; and ASHBURNER, p. 172 et seq. One needs only draw the attention to the Rhodian Sea Law, Consolato del Mare, the Laws of Oléron, Visby and Lübeck.

seaports and a coasting trade the customs of the sea were codified from an early date, and these customs applied to a group of ports."[11] As there was a limited number of ports, and one port often borrowed the customs of another port maritime law became rather homogenous. Jurisdictional problems arose in England, but soon special Admiralty Courts were introduced, and the common law courts and the Admiralty Courts were given separate jurisdiction.[12] "It is well known that Roman law contained a distinction between carriers by land and carriers by sea. No liability for loss or damage was imposed upon carriers by land beyond that of other bailees for reward. But in the 6th century after the founding of Rome the sea-carrier was made an insurer of the goods he carried."[13] However the principles became different in the middle ages. "The underlying principle of the civil law was that the master should be liable for negligence or fault, but not otherwise . . . By the year 1570 the defences of bad weather, and of capture by pirates were recognised defences available to the shipowner or master who could establish the truth of his contention."[14]

It should also be taken into consideration that during the 16th century the principle emerged that the parties had the right to make their own bargain on their own terms. The bill of lading which has been in use for a long time came to contain clauses excepting perils of the sea. The use of exception clauses may have been a result of a judgment that made the shipowner liable. But at this time there was generally no need for an exception clause for perils of the sea, as the shipowner or master would be free from liability for perils of the sea without an exception clause. Negligence or fault was the ground for the shipowner's liability. Such were the rules in Northern Europe as well as in the Admiralty Courts. However during the 17th century the common law courts became more and more important. The jurisdiction started to shift from the Admiralty to the common law courts. And with common law courts the risk became greater that a shipowner would be held liable as a common carrier according to common

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[11] HOLDSWORTH, op.cit., vol. 5, p. 100. Cf. PLEIONIS, p. 190.

[12] HOLDSWORTH, op. cit. vol. 5, p. 101. Cf. KOUSHNAREFF, p. 30 et seq. Cf. however also PALFREY, particularly at pp. 793, 796 and 797.

[13] FLETCHER, pp. 95–96. Cf. DÖNGES, p. 69: "The strict liability was imposed on the sea carrier through the Praetor's edict." See further ASHBURNER, p. 88. See also MACLACHLAN, p. 89.

[14] FLETCHER, p. 51. Cf. ASHBURNER, p. 141.

law.[15] In 1640 there was a decision absolving a sea-carrier from liability for loss by thieves.[16] This was after *Southcote's Case*, where there was laid upon a bailee an absolute liability.[17] With respect to carriers by sea there is no absolute unambiguity concerning the question of liability.[18] Probably it was in the case of *Morse v. Slue*[19] that the liability of the master of a ship was assimilated to that of a common carrier by land.[20] This case was the first in which the liability of a master of a ship was considered in the common law courts.[21]

In one leading case the U.S. Sup. Ct. expressed the rules concerned in the following words:[22]

"By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier." A similar decision was reached in *the Willdomino*:[23] "The Will-

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[15] About this development see FLETCHER, p. XIII et seq., HOLDSWORTH, A History, vol. 5, p. 102 et seq. and p. 153 et seq., KOUSHNAREFF, p. 26 et seq. Prior to Lord Coke in the 17th century the Admiralty courts were used, almost exclusively, for commercial litigation of which there was very little in the common law courts which were principally concerned with land transactions. Coke largely put an end to commercial litigation in Admiralty through the use of "Writs of prohibition" from the superior common law court of King's Bench. Thereafter only maritime litigation took place in the Admiralty Court.

[16] *Peade v. Stile*, H.C.A. 24, File 101, No. 62. Allegation File 101 No. 269, Sentence.

[17] *Southcote v. Bennett* (1601) 4 Coke. Rep. 83 b.

[18] HOLMES, p. 150 et seq.

[19] (1671) 1 Vent. 190.

[20] FLETCHER, for instance pp. 102 and 124; HOLMES, pp. 152 and 156, LESLIE, p. 16.

[21] FLETCHER, p. 133.

[22] *Liverpool Steam Co. v. Phœnix Insurance Co.*, 129 U.S. 397 (1888). In the lower court, *the Montana*, 22 F. 715 (Circuit Ct. ED New York, 1884), it was said "that one who carries by water in the same way and on the same terms as a common carrier by land is also a common carrier; or, in other words, it is not the land or water which determines whether a carrier of goods is a common carrier, but other considerations, which are the same in both cases ..." Concerning the term "general ship" which has significance for the concept of the common carrier by water RAMBERG, Cancellation of Contracts, p. 20 et seq. gives a survey of the main feature of the maritime adventure dealing particularly with liner trade and voyage charter but also with time charter, bareboat charter (demise) and general carrying contracts. See also GRÖNFORS, Allmän transporträtt, 2. ed., p. 22 et seq.

[23] 300 F. 5 (3 CCA, 1924); cert. den. 270 U.S. 641 (1925). Cf. *the Vermont*, 47 F. Supp. 877 (DCSD New York, 1942) but also *the Ella Pierce Thurlow*, 300 F. 103 (DCSD

domino was a general ship engaged in the common carriage of merchandise for hire. A carrier of goods by water like a carrier by land is an insurer, and though no actual blame is imputable to it, is absolutely liable, in the abscence of a special contract limiting its liability, for all damages sustained by the goods intrusted to its care unless the damage is occassioned by the act of God, the public enemy, the public authority, the fault of the shipper, or the inherent nature of the thing shipped." In one case an action was brought against an ocean carrier for refusal to receive certain cargo offered to it for shipment from Shanghai to San Francisco, and the court found that the carrier was a common carrier and had no lawful excuse for refusal.[24]

§ 6.3. *Air Carriers*

As already indicated several different kinds of carriers can be regarded as common carriers, but doubts have been raised as to the air carrier's possibilities of being a common carrier.[1]

Thus Fletcher expresses the opinion that the common carrier doctrine should not be applied to air carriers, as there is almost always an express contract in air carriage. But it should be kept in mind that beside the contractual relation there is also a status relation. Fletcher[2] also seems to make a reasonable rate a *prerequisite* for being a common carrier.[3] He also argues that the common carrier doctrine was a set of rules that had sprung up

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New York, 1921), aff'd 300 F. 106 (2 CCA, 1924), where the ship was chartered for a lump sum for one voyage for a complete cargo of merchandise but nevertheless was regarded as a common carrier "in issuing bills of lading". It is difficult to say from the case whether the court made its decision affected by the view that all shipowners are common carriers or by the opinion that the ship was holding itself out to the general public.

[24] *Swayne & Hoyt, Inc. v. Everett*, 255 F. 71 (9 CCA, 1919). Cf. also VAN DOREN, p. 757.

[1] FLETCHER, p. 248 et seq. Cf. MCNAIR, pp. 138 et seq., 192 and 211. Cf. below §§ 8.2.3., 8.3.3., 9, and 10.4.

[2] P. 249. "We will assume that a carrier by air carries on a public employment, that he carries for all indifferently, that he holds himself out as ready to carry for hire as a business and not as a causal occupation; that he carries the goods of such as choose to employ him from place to place, and that he carries at a reasonable rate."

[3] As has been repeated it is often hard to decide whether the characteristics of a common carrier are the prerequisites for or consequences of, being one. However the "reasonable rate" should be regarded as a consequence of being a common carrier rather than a condition for being one. See however SEABROOKE, p. 245.

from a situation where carts and boats were used and no-one thought of air transport, and he further contends that the *Belfast Ropework* case[4] restricted the class of common carriers, and notes that a shipowner "incurs the same liability as a common carrier because of his public profession".[5]

McNair rebuts Fletcher's view saying:[6] "But the fact that a particular phenomenon was unheard of when a legal rule was laid down is no reason for excluding it from the operation of that rule, provided that it is otherwise within the scope of the principle embodied in the rule ... If air carriers have invariably chosen to employ written notices and contracts limiting their liability, this surely shows, if anything, that they are concerned to escape the duties which might otherwise be imposed upon them as common carriers ... the air carrier who otherwise fulfils the necessary requirements of a common carrier, does not represent a completely new genus of bailee for reward."

Most writers seem to have accepted the common carrier doctrine even for air carriers without making any analysis like that of Fletcher or McNair.[7] Knauth traces back the air carrier's liability to the general rules concerning the carrier's liability.[8] Harriman states that, "transportation by air in this country has hitherto been largely in the hands of private carriers. The number of common carriers is rapidly increasing, however, and it therefore becomes important to determine under just what circumstances a carrier by air becomes a common carrier."[9] He does not discuss whether an air carrier can at all be regarded as a common carrier, but makes the test of common carriage by air to be the holding out. Rosenbaum contends that "aircraft common carriers fit readily into the established category of common carriers either by analogy or by application of any of the numerous legal tests."[10]

To this there can be added some minor points. Air carriage has largely expanded in the field of passenger transport and mail service, for which the

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[4] *Belfast Ropework v. Bushell* [1918] 1. K.B. 210.

[5] P. 251.

[6] P. 139.

[7] For example SEABROOKE, p. 245; SHAWCROSS & BEAUMONT, vol. 1, pp. 386–388; HOTCHKISS, p. 48.

[8] Air Carrier's Liability, p. 2 et seq.

[9] P. 34.

[10] P. 195. Neither WILSON & ANDERSON, p. 281 et seq. nor ZOLLMAN p. 190 et seq. express the view that the concept of common carrier does not apply to the air carrier.

common carrier doctrine was not originally intended,[11] and it is not until the last decade that carriage of goods by air has become really important. On the one hand the common carrier doctrine could be regarded as a symbol for a relationship and the rules that govern that relationship, and in this way it has gradually been applied to new transportation devices. Here the reasoning is that as long as that relationship exists, although the vehicle may change, there is little reason not to apply the concept of the common carrier to air carriers. On the other hand the argument would run that air transport is so remote from the original way of carriage, and the varying modes of transportation being so different from one another with respect to the manner in which they are carried out, that there is no reason, why the common carrier doctrine should immediately be applied also to air carriage.

Since the liability of a common carrier could be changed by legislation, which has in fact been the case in most fields of transportation, and since the parties furthermore have a certain possibility to make special contracts, I am inclined to accept the application of the concept of common carrier also in the field of air carriage, then of course not considering the little practical importance of the concept, since particular legislation has been passed.

There seems to be no English decision where this question has been directly considered. In *Aslan v. Imperial Airways, Ltd.*[12] the judge however discussed the matter and reached the conclusion that there was no good reason why the concept of the common carrier should not also be applied to air carriers. In the United States it is well estblished law that the common carrier doctrine is pertinent also in air transport,[13] and it has been said that "[w]hether an air carrier is a common carrier is determined by the same principles as are applied in the cases of carriers by other means."[14]

[11] Under all circumstances, however, the question would remain, whether the common carrier doctrine applies to air carriers of passenger luggage.

[12] [1933] 45 Ll.L.R. 316. This may be taken as a proof of the generally, decreasing practical importance of the concept of the common carrier in English law but also as a substantiation of British legislation not being based on the common carrier.

[13] *Allison v. Standard Air Lines, Inc.*, 1930 U.S. Av. Rep. 292 (DCSD California, 1930); *Conklin v. Canadian Colonial Airways, Inc.*, 1934 U.S.Av.Rep. 21, aff'd 1935 U.S.Av.Rep. 97 (Sup. Ct. of New York, 1933, App. Div., 1934, and Ct. of App., 1935). See also e.g. *McCusker v. Curtiss—Wright Flying Service*, 269 Ill. App. 502 (App. Ct. of Illinois, 1932); *Pan Am. Airways, Inc. v. U.S.*, 150 F. Supp. 569 (U.S. Customs Ct., 1957); and *Curtiss Wright Flying Service, Inc. v. Kathleen I. Glose*, 290 U.S. 696 (1933). Cf. also 66 F. 2 d. 710 (3 CCA, 1933.)

[14] *Arrow Aviation, Inc. v. Harry H. Moore*, 266 F. 2 d. 488 (8 CCA, 1959).

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Errata

p.	Line (corresponding)	for:	read:
15	27	has been	have been
27	11	Middles Ages	middle ages
27	note 6	P. 13.	Public Utility, p. 13
28	12	"laisser-faire"	"laissez-faire"
30	note 23	Like	E.g.
32	14	Wollf	Wolff
32	note 31	BARNES, p. 4	BARNES, Public Utility, p. 4
34	20	UNIDROTT	UNIDROIT
48		for note 17	read note 18
48		" " 18	" " 17
63	4	critizized	criticized
73	note 1	3 Car;	3 Car.
73	note 1	250.	250;
78	18	that a 'common	that "a 'common
78	note 21	448 (Sueripor)	448 (Superior)
81	7	has so held	has held
89	18	The classes ...	The class...
105	note 8 line 6	statue	statute
125	3	enforceiable	enforceable
131	19	himslef	himself
144	14	causalty	casualty
149	16	there seems	there seem
205	4	Transportation Act, 1968	Transport Act, 1968
220	19	consequences for	consequences of
223	5	railvay's	railway's
228	1	higway	highway
230	10	involve	involves
231	note 24	(35 FR. 639 4)	(35 FR. 6394)
129/263	note 41/14	Gibbon v. Paymment	Gibbon v. Paynton

§ 7. *Legal Consequences of being a Common Carrier at Common Law*

§ 7.1. *In General*

In the previous chapter I have tried to analyse the prerequisites for being a common carrier as they developed at common law and to show the ambiguity of that concept. I shall now deal with the consequences of being a common carrier, although as already pointed out on several previous occasions the prerequisites for, and the consequences of being a common carrier are so intermingled with each other, that when dealing with one the other has also to be taken into consideration.[1] It is necessary to make this distinction as clear as possible in order to be able to examine the duties and liabilities of the common carrier. For the ensuing discussion it is necessary to be aware of the combination of theories that lie behind the development of the common carrier doctrine. This miscellany of legal theories, such as bailment, contract, tort, different procedural theories, theories of public interest and thereby public supervision, public policy, etc.—ideas of a public and private law nature—have all contributed to the puzzle of the common carrier doctrine.

It is important to bear in mind that the development of the common carrier doctrine was an outflow of court activities, recognized as basically settled (rightly or wrongly) through Lord Holt's dictum in *Coggs v. Bernard*.[2] A certain distinction between court activity and legislation should be drawn, since particularly during the last hundred years a number of acts have been passed to deal with the duties and liabilities of common carriers in order to protect the consumers of transportation (both the public in general and the individual shipper). Thus the duties and liabilities of carriers are to-day found largely embodied in different acts in England, as well as in the United States—where they exist as state and federal legislation. These statutes constitute an elaborated and detailed extension of the traditional status and liabilities of carriers at common law and have often made the concept of the common carrier superfluous in using other requirements, but the new acts have mostly been based on the established liabilities

[1] It was said by BROWNE, p. 68 that "[a]ll that the common law liability of carriers means is this, that all those who carry on the trade of common carriers shall, by the fact of that trade, be presumed to hold to the public generally a permanent offer of carriage of goods and insurance of the same, which offer, whenever it is accepted by any individual at once becomes a complete contract binding on both parties".

[2] (1703) 2 Ld. Raym. 909.

of carriers, and particularly American transportation regulation is based on the concept of the common carrier. How far these common law duties can be extended rests with the courts to be determined, particularly in the case of the United States.[3]

A common carrier is subject to certain duties and liabilities.[4] Lord Mans-

[3] A general idea of the relation between the function and jurisdiction of legislative and administrative authorities and courts is given in ECKHOFF, chapter 2, MAYERS, chapters 1 and 2, SCHWARTZ, An Introduction, chapters 1, 2 and 4, and GARNER, chapters 1, 2, 3, 6, 7 and 8. From HALSBURY's Statutes of England, vol. 2, p. 53 et seq. (aviation) and p. 801 et seq. (carriers), vol. 19, p. 553 et seq. (railways and canals) and vol. 23, p. 323 et seq. (shipping and navigation) the process mentioned is evident, as is for American conditions U.S.C.A. under pertinent titles. Illustrations of this development are also found in e.g. FLETCHER, particularly the Introduction, ROBINSON, Admiralty Law, chapters 1 and 2, and KAHN-FREUND, particularly Part 1. In connection with the separate treatment of the duties and liabilities further references will be made.

[4] At this point I find it of interest to introduce a scheme by GRÖNFORS, first launched in his Allmän transporträtt (1 ed.) p. 65 and thereafter refined in Successiva transporter p. 55 et seq., based upon an analysis of different elements in the transportation *promise*. He is thus describing the structure of this promise and its close connection with the carrier's liability:

Promise to carry	acknowledgment of receipt	— liability for not rendering account	Carrier's liability
	promise to deliver	— liability for mis- or non-delivery	
	duty to carry	— liability for non-carriage	
	duty to perform within the right time	— liability for delay	
	duty to take care of the goods	— liability for non-care	
	particular statements	— liability for incorrect statements	

It should be observed that the duty to carry is not the same duty as for the common carrier. In this later case there is a duty to carry already because of the carrier's profession (status) while in the scheme there is a duty to carry because of the specific promise to carry (contract). In this study I am not going into the analysis of the different elements in the transportation promise as I am basically concerned with the common carrier's particular duties and liabilities. When considering, however the common carrier's severe liability in cases of loss of or damage to goods, this scheme simplifies the understanding of the numerous elements which are actually involved. GRÖNFORS' scheme should be compared to SELVIG, The Freight Risk, p. 14, suggesting the following elements of contractual performance on the part of the carrier to be the most important ones:

"(a) to procure a seaworthy ship,
(b) to receive and load the goods at the port of departure,
(c) to pursue the voyage and carry the goods to their destination,
(d) at the destination, to deliver the goods to the consignee,
(e) to deliver the goods in the like good order and condition as received, and
(f) to perform the carriage without delay." Cf. also COOTE, p. 24 et seq.

field in *Forward v. Pittard*[5] declared that the common carrier being a bailee has a duty under the contract, to show reasonable diligence for the goods entrusted in his care, and he is liable for his negligence, but because of the customs of the realm, i.e. the common law, there is a supplementary liability imposed upon him, and that is why he is "in the nature of an insurer". If the carrier is a common carrier he is generally speaking bound to accept goods offered to him for carriage, he is not entitled to require unreasonable payment, or impose unreasonable conditions, he must carry by his usual route, he must deliver within a reasonable time, and he is responsible for the safety of the goods except only for certain circumstances, as e.g. where the loss arises from an act of God or the king's enemies etc. With respect to American conditions particularly, it is also encumbent upon the common carrier to carry out certain requirements imposed on him by different regulatory commissions.[6]

Thus a carrier's obligation to carry embraces different elements: "Within the terms of his public profession a common carrier may not lawfully refuse to carry the goods of any person who tenders them at a reasonable time, together with a payment, or an offer of payment, of the usual charge or, if that be excessive, a reasonable sum, unless his conveyance is full, or the size or nature of the goods is such that he is unable to carry them, or their carriage would be attended with extraordinary danger."[7]

The liability is described: "A common carrier is responsible for the safety of goods entrusted to him in all events, so long as they remain in his hands in his capacity as a carrier, unless loss or damage has resulted, without negligence on his part, from one or more of the following causes: The act of God, the King's enemies, the fault of the consignor, the inherent vice or natural deterioration of the thing carried."[8] The liability runs from the moment the carrier receives the goods until they are delivered to the consignee.[8a]

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[5] (1785) 1 T.R. 27. Cf. also *Gisbourn v. Hurst* (1710) 1 Salk. 249. Cf. WINFIELD, The History of Negligence, p. 184 et seq. and WINFIELD, The Myth, p. 37 et seq.

[6] This will be dealt with further below § 8.

[7] LESLIE, p. 27.

[8] LESLIE, p. 30. The reference above at note 5 uses the expression that the common carrier is in the nature of an insurer. This wording must be taken merely as a way to express the common carrier's strict liability although it has also been used in a number of later cases.

[8a] The period of liability at common law could be compared to that in the various transportation legislations.

The traditional obligations of the common carrier are basically four in number, namely 1) the duty of service, 2) the responsibility for the safe delivery of that which is entrusted to the carrier's charge, 3) the duty to treat all customers without discrimination, and 4) the duty to charge a reasonable and only a reasonable price for the service that is performed.[9]

One may of course ask generally whether the duties and liabilities imposed upon the common carrier are of a mandatory nature, in other words whether the common carriers were allowed by contract to exempt themselves from liability beyond the limits set by law or whether they were prohibited to make such exceptions. It should then be recalled that originally with respect to loss of or damage to goods the common carrier immediately by accepting the customer's goods for carriage was subject to the strict liability which the common law imposed upon him and notices and special contract were broadly speaking not used until a later period.[10]

§ 7.2. *Duties of the Common Carrier and Exceptions therefrom*

§ 7.2.1. The Duty to serve — and to serve alike

It must be borne in mind that the transportation industry cannot be regarded as a monolith. Different branches of that industry work under different conditions, which must be taken into consideration to avoid too far reaching generalizations. After all, what is said in this section does not

[9] PEGRUM, pp. 107, 108. Cf. ROBINSON, Admiralty Law, p. 468, where he distinguishes between the common carrier's duties *of* service and *in* service. In the *York Manufacturing Co. v. Illinois C.R.R.*, 70 U.S. 107 (1865) the U.S. Sup. Ct. stated: "The law prescribes the duties and responsibilities of the common carrier. He exercises, in one sense, a public employment, and has duties to the public to perform. Though he may limit his services to the carriage of particular kinds of goods, and may prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons, or vary his charges from their condition or character. He is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal." The duties have as we shall see changed somewhat in character as time has passed.

[10] Cf. LESLIE, p. 7. "Profession is not merely an offer, which anyone may accept, and so bind the carrier in contract; it is an act by which the carrier takes upon himself a legal duty for breach of which he is liable apart from contract altogether." It must however be recognized that in ocean carriage some kind of document was almost always used.

only stem from common carriage by land,[1] but applies also in most instances to common carriers in general. It is often difficult to determine with certainty which rules apply to common carriers in general and which apply to certain categories only, this being especially true with regard to the duty to serve. Neither must the difference that may exist between English and American law be overlooked.

The law with respect to competition within the transportation industry, as it is known to-day, with rules on e.g. undue preferences, maximum rates and powers of charge,[2] has its foundation in the common carrier doctrine. The changing nature of the common carrier concept, is a result of, among other things, the changing conditions under which the carriers perform their business, and the duties of the common carrier have consequently undergone certain changes. It is difficult, however, to say exactly which were his original duties, which ones have later been imposed upon him and how these duties have in the course of time been modified.

The development in English and American law as to the duty to serve shows some differences, which could to a certain degree be attributed to the American attitude to competition and public policy. The basic rule, however, seems to be the one stated by Leslie.[3]

The common carrier "is under a public duty to carry for every one, under certain conditions, usually of his own making, so that if he refuses to carry

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[1] Cf. above § 6. Usually national transportation policies still cover only transportation by land, while shipping and aviation policies are declared separately.

[2] Cf. e.g. CLARKE, pp. 209, 237 and 250. Of course it is necessary to be aware of the different market structures in different branches of the transportation industries; the character of competition of carriage by sea is very different from that of carriage by air, road, railway, and inland waterways. Cf. above § 1.5.

[3] P. 27, as quoted above § 7.1. at note 7. MILNE & LAING at p. 7 distinguish the following duties as having at one time or another been associated with the idea of public obligations of the railways: "1) To serve all who wish to avail themselves of a railway service. 2) To provide the service with care and to assume full or "insurer's" liability for the traffics entrusted to the railways. 3) To serve for reasonable remuneration. 4) To provide reasonable or adequate facilities. 5) To give impartial treatment in respect of both services and charges to persons in similar circumstances. 6) To make public the details of the services being provided and charges made for them. 7) To submit to the control of independent bodies." I think a comparison is essential between these general duties of the railway carrier and the analysis of the contractual obligations of the carrier as pointed out above in § 7.1. note 4.

within these limitations he is liable".[4] He is bound to receive and transport all freight tendered, according to the custom and usage of their business.[5] To carry out his service duty the common carrier at common law is not allowed to refuse transportation for certain persons except in some cases (in other words he cannot freely choose his customers), he is not allowed to charge unreasonable rates (that would in fact be another way to refuse to carry) and he has to provide reasonable facilities (which is true particularly for the railways).

The common carrier's basic duty is to accept and carry impartially for all who wish to engage his services.[6] "Originally the common law courts treated actions for non-feasance and mis-feasance as based on tort which required the assumpsit that the defendant had set himself out to perform or to perform with skill, as the case may be, and that assumpsit might be represented by the fact that the defendant was exercising a common calling. But, by the seventeenth century a failure to perform the duties of serving all and sundry and of serving with skill came to be regarded as a breach of contract. Hence a person seeking redress had the opportunity of proceeding by alternative course of action. He could bring an action on the case sounded in tort or he could allege breach of contract, for the duties of a person in a common calling came to be regarded as terms of an implied contract."[7]

Thus a common carrier may not carry for one and refuse to carry for another, but instead he must perform his duty without discrimination, and

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[4] ELLIOTT, § 124. See also *Jackson v. Rogers*, (1683) 2 Show. 332 and *Garton v. Bristol & Exeter Ry.*, (1861) 1 B. & S. 112. Cf. LESLIE, p. 28; HOLDSWORTH, The Law of Transport, p. 46 and HUTCHINSON, vol. 1, sec. 62 with references. It is not quite clear whether this obligation applies to carriers by water. See CARVER, vol. 2, sec. 7, referring to *Liver Alkali Co. v. Johnson*, (1874) L.R. 9 Ex. 338. Cf. however *Swayne & Hoyt v. Everett*, 255 F. 71 (9 CCA, 1919). Originally refusal to carry was a criminal offense, a misdemeanor, see e.g. DISNEY, p. 3 and GUNN, p. 10.

[5] LESLIE, p. 26. Cf. *Illinois Central R.R. v. Frankenberg*, 5 Am. Rep. 92 (Sup. Ct. of Illinois, 1870).

[6] E.g. BEALE & WYMAN, § 201; and GUNN, pp. 1 and 10. Cf. *Lane v. Cotton*, (1701) 1 Ld. Raym. 646. A similar attitude is found in Scandinavian law, since a charter or certificate granted to perform certain kinds of business has almost invariably been associated with a duty to serve everybody. This has also been the traditional approach within the regulated segments of the transportation industry, and it is not until recent years that such duty has been somewhat relaxed in at least Sweden. Cf. below in chapter 5.

[7] MILNE & LAING, p. 10. See e.g. *Hadley v. Baxendale*, (1854) 9 Exch. 341 and WINFIELD, The Province, p. 41 et seq. Cf. also *Denton v. G.N.Ry.*, (1856) 5 E. & B. 860.

theoretically, at least, in the order in which the applications are made.[8] The practical implications of the rule to serve and to serve alike is subject to slightly different opinions among the authorities. They agree that the charge must be reasonable, and many of them share the opinion that unjust discrimination in charges for transportation and in furnishing facilities for transportation are prohibited. Beale & Wyman express as their view that a common carrier has to serve all and all alike, as there would otherwise be no use of the obligation to serve.[9] Hutchinson says that the latter rule does not necessarily mean that every shipper shall be charged exactly the same rates, but that the rule is against discrimination which is undue and unreasonable.[10] "Expression in many of the opinions seem to indicate that even as to rates all shippers must be treated alike and one rate charged in all cases, but this presses the rule beyond its legitimate scope."[11] "Discrimination in charges was not forbidden at common law. Provided the charges to him were reasonable, the shipper could not complain that goods were carried for another at a less rate."[12]

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[8] Under ordinary circumstances a carrier doing business with all shippers is eager to take all shipments offered, as common carriers solicit traffic to utilize capacity and to increase revenues. But extraordinary business volume, war and other unusual conditions may increase the traffic so that some carriers will try to avoid less profitable cargo. To discriminate and select traffic is contrary to common law and is usually prohibited by statue. See FAIR & WILLIAMS, p. 179. These rules have survived in statutes, that have been enforced, see, for example, the Interstate Commerce Act. In most countries similar regulations prevail in cases of monopolies of a public nature, where a charter or power has been granted to a certain person to perform a service. He who has the right of service also has the duty of service. In this connection, however, one could, for example, point at the latest transportation policies in England and Sweden, where the railways, though they have a monopoly of public nature, do no longer have an absolute obligation to carry for all alike. There is not even, any more, an absolute obligation to maintain a service.

[9] § 201. As to American cases supporting this view, see e.g. *State v. Goss*, 59 Am. Rep. 706 (Sup. Ct. of Vermont, 1886); *Bluthenthal v. Southern Ry.*, 84 F. 920 (Circuit Ct. ND Georgia, 1898).

[10] Vol. 2, sec. 521.

[11] ELLIOTT & ELLIOTT, vol. 4, p. 2283.

[12] GODDARD, Outlines, § 205. Cf. also e.g. LESLIE, p. 29; BROWNE, p. 82; and FLETCHER, p. 193. In *Great Western Ry. v. Sutton*, (1869) L.R. 4 H.L. 226, the view is expressed that the charge must be reasonable. See also *Branley v. S.E. Ry.* (1862) 12 C.B.N.S. 63. Since there are no provisions against undue preferences at common law, it is at most evidence of the unreasonableness of a charge, that the carrier charges less to someone else. There may be a certain distinction between English and American law as to the question of discrimination. In several American cases as has already been said the de-

Also in an American case the rule has been similarly stated:[13] "The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation and no more. If the carrier confines himself to this, no wrong can be done and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief."

In order not to lose the perspective it should be added that in 1877 the Interstate Commerce Act was enacted prohibiting every unjust and unreasonable charge; all rebates and unequal charges to different persons for like and contemporaneous services under substantially similar circumstances as well as all undue and unreasonable preferences, which could be compared to the English Railway and Canal Traffic Act 1854 prohibiting undue or unreasonable preference or advantage to or in favour of any particular person or company.[14]

The position at common law therefore is that the common carrier is not bound to treat all customers with absolute equality, but he must carry for each shipper at a reasonable rate. What amounts to discrimination will depend on the circumstances. Does it amount to discrimination where a lesser rate has been charged a particular shipper or class of shippers who, for example, offer their goods in larger quantities, or under conditions that enable the carrier to transport them at less expense?[15] This is appa-

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finition of common carrier includes "to serve alike". Cf. also cases like *West v. London, Ry.* (1870) 5 C.P. 622; *Cooper v. London Ry.* (1858) 4 C.B.N.S. 738; *Butchers' & Drovers' Stock Yards Co. v. Louisville, R.R.*, 67 F. 35 (6 CCA, 1895); and *Lough v. Outerbridge*, 143 N.Y. 271 (Ct. of App. of New York, 1894).

[13] *Fitchburg R.R. v. Gage*, 12 Gray 399 (Sup. Judicial Ct. of Massachusetts, 1859).

[14] Both the duty to serve and the duty to serve alike have largely remained in English as well as American legislation, cf. MILNE & LAING, p. 14 et seq. With respect to English legislation such absolute duty was relaxed through the Transportation Act, 1968, but a trend in that direction could be discerned also in previous legislation.

[15] *Johnson v. Pensacola, R.R.*, 26 Am. Rep. 731 (Sup. Ct. of Florida, 1877); *Baxendale v.* G.E. *Ry.* (1869) L.R. 4 Q.B. 244.

rently not the case, but it has been regarded as reasonable that the price increases with the risk, and it is not evident unreasonableness if the charge for a small valuable article is greater than that of a big, bulky one.[16]

As a part of the duty to serve there is at common law a duty of the common carrier to have and to furnish facilities, so that he could carry out his undertaking. This does not, however, place all carriers under an obligation to carry any amount tendered. When a ship is fully loaded there is no duty of the water carrier to furnish another vessel to take the remaining goods immediately or within a short time. But at common law a duty is imposed upon e.g. a railroad company and similar carriers to have and to furnish facilities for the reasonably prompt transportation of goods tendered to them, and there may be liability for a delay in transporting goods owing to unreasonable lack of facilities, as well as in case of unreasonable refusal to carry.[17]

It was held in *Cobb v. Illinois Cent. R.R*,[18] that a railroad company is bound to use all reasonable means, by increasing the number of its tracks and warehouses, to accommodate its increased business, and whether it has done this in a given case, is a question of fact, not of law. In *International R.R., v. Young*[19] the opinion was that a railroad company is liable to a shipper for damages caused by its delay in furnishing refrigerator cars, although it may not own such cars, where it appears that it had an arrangement with the owners of such cars whereby it could secure them for the use of its shippers whenever needed.[20]

A common carrier is under no obligation at common law to supply a vehicle of a particular form or description, if such form or description has no reference to the safety of the transportation. So long as the carrier's equipment is adapted to the safe transportation of goods entrusted to it, the rights of the carrier are not restricted to choosing and selecting the vehicle for transportation which it regards most satisfactory for the conduct of its business. It is thus the duty of the carrier at common law to furnish

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[16] *Harris v. Packwood* (1810) 3 Taun. 264.

[17] *Chicago R.R. v. Thrapp*, 5 Ill. App. 502 (App. Ct. of Illinois, 1937). See also MILLER, p. 64.

[18] 38 Iowa 601 (Sup. Ct. of Iowa, 1874). This case could hardly be regarded as a leading case but rather as an illustration of an extreme solution.

[19] 28 S.W. 819 (Ct. of Civil App. of Texas, 1894).

[20] See also *Louisville & N.R.R. v. Crain*, 224 S.W. 1063 (Ct. of App. of Kentucky, 1920).

suitable cars whenever reasonably demanded by a shipper, the duty existing by law arising out of the relation which the carrier sustains from the public or out of special contract or statutory requirements.[21]

In many of the American states statutes have declared it to be the duty of a common carrier to furnish facilities for transportation to shippers,[22] and the common law duty of a common carrier to have and furnish facilities for transportation, is also expressed in the Interstate Commerce Act.

Damage arising from a breach of the duty of service imposes liability upon the common carrier.[23] In order to make the common carrier liable in damages for his refusal to carry there must be a tender of goods for shipment.[24] "The duty of the carrier to accept and carry the goods may arise either upon his common-law obligation to that effect or upon some express contract made by him in that behalf."[25]

The measure of damages recoverable for a carrier's refusal to receive property for transportation includes loss occasioned by the delay in securing transportation, cost of keeping the goods during the delay,[26] the difference between the value of the goods when tendered for transportation and value at the intended destination less freight charges,[27] reasonable profits on such goods[28] etc.

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[21] See for example *De Vita v. Payne, Director General of Railroads*, 184 N.W. 184 (Sup. Ct. of Minnesota, 1921); *Wilson & Co. v. Hines*, 213 Pac. 5 (Sup. Ct. of Washington, 1923).

[22] Cf. *Galveston, R.R. v. Schmidt*, 25 S.W. 452 (Ct. of Civil Appeals of Texas, 1894).

[23] E.g. *Messenger v. Pennsylvania R.R.*, 18 Am. Rep. 754 (Ct. of Errors and App. New Jersey, 1874); *Wheeler v. San Francisco, R.R.*, 89 Am. Dec. 147 (Sup. Ct. of California, 1866). Cf. above note 4. Cf. BEALE & WYMAN, p. 265 et seq. stating that service had to continue, but if there was no provision in the franchise agreement a partial withdrawal may be accepted. They also discuss whether and under what circumstances a permanent withdrawal is allowed.

[24] *Little Rock, R. R. v. Conatser*, 33 S.W. 1057 (Sup. Ct. of Arkansas, 1896).

[25] HUTCHINSON, vol. 3, sec. 1359. Cf. JEREMY, p. 59. "But however the carrier may have succeeded in limiting his common law liability, by becoming a special contractor, there is no doubt but that he is still to be considered in the light of a public servant, and as such, is liable to an action for refusing to take charge of goods, if the hire be tendered to him, and he has convenience to carry the same."

[26] *Inman v. St. Louis, Southwestern R. R.*, 37 S.W. 37 (Ct. of Civil App. of Texas, 1896).

[27] HUTCHINSON, vol. 2, sec. 1359; cf. *Central, R.R. v. Morris*, 3 S.W. 457 (Sup. Ct. of Texas, 1887).

[28] *Louisville, R. R. v. Queen City Coal Co.*, 13 Ky. L. Rep. 832 (Sup. Ct. of Kentucky, 1892).

§ 7.2.2. Refusal to carry: Justifications

Notwithstanding the rule that a common carrier must carry indifferently the goods of all who may choose to employ him, there are certain circumstances that will justify his refusal to carry.[29] If the goods are not of the character that the carrier transports he may refuse carriage.[30] The common carrier may establish reasonable regulations as to time, nature of goods, and mode of carriage of the goods he professes to carry. He is allowed to limit his undertaking to a certain type of goods and refuse to carry them under any other conditions. Thus the carrier may refuse to receive goods defectively packed.[31] A carrier may further decline to carry goods not tendered at a proper place, or unless delivered at the carrier's depot. He has the right to refuse to take goods if he does not carry to the place to which the owner wants to send them, and he may refuse property of a dangerous nature, and also if he does not have the means for immediate transportation, he should refuse to receive perishable goods.[32]

The common carrier is entitled to charge a reasonable sum for his service and is not bound to give credit, which means that unless payment is offered with the goods the carrier may refuse to carry them. "The carrier is entitled to have his reward paid to him before he takes the packages into his custody."[33]

Time and place of delivery. A common carrier has the right to make reasonable regulations governing the acceptance of freight for transportation, such as the manner and place in which he receives those articles which he professes to carry, and it may thus fix the times, the places and the methods in which it will receive commodities it offers to transport.[34]

At common law, it is not necessary in all cases to deliver to the carrier at the place appointed by him, or at his office or place of business, provided

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[29] See particularly HUTCHINSON, vol. 1, sec. 143 et seq. and vol. 2, sec. 668.

[30] See LESLIE, p. 8 with references. Also *Johnson v. Midland Ry.* (1849) 4 Exch. 367.

[31] This is an interesting point, as the carrier is strictly liable for damage to goods but defective packing may be a cause of exception. There may be a conflict between defective packing as a cause of exception of the carrier's liability and an obligation to refuse to carry goods which he realizes is not sufficiently packed for carriage, as part of his basic liability to take care of the goods.

[32] See LESLIE, p. 7 et seq. and HUTCHINSON, vol. 2, particularly sec. 668.

[33] *Batson v. Donovan* (1820) 4 B. & Ald. 21. See also LESLIE, p. 29 and cf. HUTCHINSON, vol. 1, sec. 150.

[34] HUTCHINSON, vol. 1, sec. 105, 111. Cf. BEALE, The Beginning of Liability, p. 207 et seq.

the delivery is made to a person who is authorized to receive the goods.[35] Lord Holt expressed in *Lane v. Cotton*:[36] "It was said in the case of Mors v. Slue that if a man came to lade goods at an unreasonable time, he (the shipsmaster) was not obliged to take them in, as before he was ready to sail. But if he takes them in before, and they are lost, he will be liable to an action. So a common carrier may refuse to admit goods into his warehouse before he is ready to take his journey, but yet neither the one nor the other can refuse to do the duty incumbent upon them by virtue of their public employment." The principle as to the time of delivery seems to be "that a carrier is entitled to refuse to receive goods tendered to him so long before he professes to start on his journey as will necessitate his becoming a warehouseman of the goods, with the liability of a common carrier, for any considerable period."[37] The carrier cannot, however, say that the hour is unreasonable if, at the same time he would accept goods of another.[38]

Conveyance full. There is imposed upon common carriers a duty, to have and to furnish facilities for the reasonably prompt transportation of goods tendered to them. The common carrier's liability for delay in transporting goods is as much predicated upon the lack of facilities, as it is upon unjustified refusal to carry.[39] In spite of the case *Cobb v. Illinois Cent. R.R.*[40] it must be regarded as an established rule that a common carrier is bound only to provide facilities for such transportation as might reasonably be expected in the ordinary course of its business, and he is not liable for delay caused by sudden and unusual press of business arising from exceptional causes which he could not reasonably have anticipated.[41] This rule was of much more importance during a period when it was usual for a carrier to possess only one or two carts.[42] And thus in *Riley v. Horne*[43] Best, C. J., said "that a carrier . . . is obliged for a reasonable reward to

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[35] HUTCHINSON, vol. 1, sec. 111.

[36] (1701) 1 Ld. Raym. 646.

[37] LESLIE, p. 28.

[38] *Garton v. Bristol & Exeter Ry.* (1861) 1 B. & S. 112.

[39] *Chicago R. R. v. Thrapp*, 5 Ill. App. 502 (App. Ct. of Illinois, 1937). See particularly HUTCHINSON, vol. 1, sec. 146 and vol. 2, sec. 495.

[40] 38 Iowa 601 (Sup. Ct. of Iowa, 1874).

[41] Cf. *Marine Ins. Co. v. St. Louis I.M. & S. Ry.*, 41 F. 643 (Circuit Ct. E.D. Arkansas, 1890); *Thomas v. Wabash, R.R.* 63 F. 200 (C.C. of Illinois, 1894).

[42] LESLIE, p. 29.

[43] (1828) 5 Bing. 217.

carry any goods to the place to which he professes to carry goods that are offered to him, if his carriage will hold them."

Exceptional or dangerous goods. Several times it has already been stated that one of the essential elements of a carrier's character as a common carrier is his obligation to carry goods tendered to him for transportation. He may, however, restrict himself to carry only certain classes of goods.[44]

Even if a common carrier is holding himself out to carry any goods—which in practise would be very hard—he could legally refuse to carry goods of a dangerous character that might expose him or his vehicle, or other goods to the risk of damage.[45] When there is good ground for the common carrier to believe that goods offered to him for carriage are dangerous, he may refuse to carry them, without full acquaintance of their content.[46] A common carrier may likewise decline to accept goods of a physical size that makes it impossible or very difficult for him to transport them on his vehicle, and further a common carrier may refuse to carry a particular parcel containing goods of such great value that he is not able to take adequate measures for its protection.[47] In other words the common carrier does not profess to provide a suitable vehicle for every species of goods even when they are within the terms of his profession.

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[44] HUTCHINSON, vol. 1, sec. 144.

[45] Thus the carrier may refuse to accept goods likely to injure goods that he has already received for carriage. This common law rule should of course be compared to e.g. the Hague Rules, art. IV.6. or as it reads in the British and U.S. COGSA, art. IV.6.: "Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any."

Also in other transport legislations there are similar rules specific with respect to dangerous goods.

[46] The *Nitro-Glycerine Case*, 82 U.S. 524 (1872). However a carrier may have difficulties in showing the good reason for the dangerous nature of the goods. See also *Bamfield v. Goole* [1910] 2 K.B. 94.

[47] *Batson v. Donovan* (1820) 4 B. & Ald. 21. See also LESLIE p. 30.

§ 7.2.3. Duty of the Common Carrier to take Care of what has been entrusted to him for Carriage

The followers of "common callings" were subjected to liabilities that arose, not out of agreement, but rather from their status and from the idea that it was in the interest of the community that people who offered their services to the public at large should show care, skill, and honesty in their dealings.[48] Having delivered property into the custody of a common carrier for transportation a customer must be able to count upon its safe keeping during the common carrier's performance of his service. His second basic duty is thus to take care of the goods while in his possession, and there is imposed upon him a strict liability to keep the goods safely. In cases of "ordinary" bailment, among which private carriers and warehousemen are classed, "the bailee's duty is to perform his contract with regard to the work to be done and to use ordinary diligence in the care and presentation of the property entrusted to him."[49] The growing use among common carriers to exempt themselves from liability, either by public notice or by clauses inserted into their contracts, forced the courts to take a stand with respect to the question whether such clauses were enforcible or not. In the case of common inns no contractual terms nor warning to guests to take special precaution could alter or diminish the innkeeper's liability, while common carriers were not generally prohibited to do so.[50]

Basically the common carrier had a more or less strict liability for goods entrusted to him for carriage, comprising an absolute liability to provide a seaworthy ship,[51] and an obligation to load, carry and discharge the

[48] Cf. above § 4.

[49] FLETCHER, p. 156. Cf. CHARLESWORTH's Mercantile Law, p. 335 et seq.; STEVENS & BORRIE, p. 386 et seq.; PATON, p. 300 et seq.; CHITTY, vol. 2, sec. 159.

Some new cases concerning the road carrier's negligence are *Webster Ltd. v. F. Dickson Transport, Ltd.*, [1969] 1 Lloyd's Rep. 89; *Transmotors Ltd. v. Robertson, Buckley & Co. Ltd.*, [1970] 1 Lloyd's Rep. 224; and *B.G. Transport Service Ltd. v. Marston Motor Company Ltd.*, [1970] 1 Lloyd's Rep. 371.

[50] Below § 7.3. Cf. CHITTY, vol. 2 sec. 168 and 174. The first amelioration of the innkeeper's position of strict liability for his guests' luggage came in 1863 through the Innkeepers' Liability Act. Cf. the Hotel Properietors Act, 1956. For a modern case illustrating the innkeeper's liability in this latter Act, see *Kott & Kott v. Gordon's Hotel, Ltd* [1968] 2 Lloyd's Rep. 238.

[51] This duty is one resting on a private as well as a common carrier. As for the nature of this duty see e.g. HOLT, p. 47. Cf. particularly BJÖRKELUND's study treating seaworthiness from both private and public law aspect. *Parallels* to the theory of seaworthiness have also been laid upon road hauliers and air carriers, cf. e.g. KAHN-FREUND,

goods safely. Another duty that lies upon the common carrier is the obligation to perform within reasonable time, a duty that probably does not emanate directly from the common carrier doctrine, but rather should be regarded as a general legal obligation also imposed on private carriers. There is further a duty imposed on the carrier not to depart from an intended course without sufficient cause. Neither this duty seems to originate directly in the common carrier doctrine but is probably rather linked to the theory of contract, and this doctrine of deviation is also very likely related to the later developed doctrine of fundamental breach of contract in the general law of contract.[52]

As stated above the common carrier has a strict liability for the goods, while e.g. a warehouseman is liable for negligence only. Owing to the

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p. 268; WINFIELD, on Tort, p. 131; MCNAIR, inter alia pp. 144 et seq., 337 et seq. and 373 et seq. Cf. also SELVIG, Strict Shipowner Liability, p. 384, where he talks of strict liability for technical shortcomings. FLETCHER, pp. 200 and 211 seems, however, somewhat uncertain as to the air carriers. On the other hand it may be read in 76 H.L.R. p. 819 et seq. in "The Doctrine of Seaworthiness" that "the courts while developing the liability of the land-based common carrier for injury to cargo or passengers, found it natural to extend this warranty to the common carrier by sea", where is also referred to *the Southwark*, 191 U.S. 1 (1903) and *Work v. Leathers*, 97 U.S. 379 (1878).

[52] E.g. COOTE, p. 80 et seq.; CARVER, vol. 3, sec. 706–51 dealing with deviation and delay; CHESHIRE & FIFOOT, p. 117; LESLIE, p. 70 et seq.; and BORRIE & DIAMOND, pp. 41 et seq. and 190 et seq. KRÜGER's extensive study on the deviation doctrine gives a survey of the Anglo-American approach, particularly in § 7.13. Cf. below in § 7.3. at note 36. See also e.g. *Reed v. Spaulding*, 30 N.Y. 630 (Ct. of App. of New York, 1864). About this so-called deviation doctrine the following might be mentioned. The liability rests with both private and common carriers under general law. A common carrier although not absolutely obliged to do so, usually carried between fixed points and was then obliged to do it without traveling around. A railroad carrier has in the Interstate Commerce Act the obligation to provide for the swiftest and safest carriage and so has a motor carrier, whereby an obligation may lie on a carrier to use another carrier to fulfil his transportation undertaking. The deviation doctrine is probably of admiralty origin, and while it has been applied to some cases involving land transit, I have not found any recent federal cases which make the doctrine applicable to land and air transit in conveyances which operate under filed tariffs such as do the railroads under the Interstate Commerce Commission or the airlines under the Civil Aeronautics Board. "The exact limits and scope of the doctrine in carriage by land and air are uncertain for lack of litigation." CHITTY, vol. 2, sec. 372, cf. sec. 385 and LESLIE, p. 70. In fact, there is an American decision which holds quite definitely that the doctrine is not applicable to cases of this kind, *Lichten v. Eastern Airlines, Inc.*, 189 F. 2d. 939 (2 CCA, 1951). The District Court decision is found in 87 F. Supp. 691 (DCSD New York, 1949).

several functions in the transportation chain a carrier may at one moment appear as a common carrier, and in the next as a warehouseman. Will he then be liable as a common carrier also when performing the service as a warehouseman or will the liability shift?

It has been held that in cases where goods have been delivered to the common carrier for transportation, but something remains to be done by the shipper or by a third party—such as further deliveries to complete the shipment, preparation of the goods for transportation, shipping instructions—or where they are ready for transportation but held for the convenience of the shipper, then the carrier keeps them as a warehouseman with responsibility for negligence only.[53]

Likewise the common carrier's liability ends with the completion of the transportation and the delivery or deposit of the goods in a reasonably safe warehouse, after the consignee has had reasonable notice and time to accept delivery and remove them. This means that a common carrier may become a warehouseman as to the goods in its possession and custody, when he has completed their transportation and properly offered the goods for delivery and fulfilled other obligations in connection with the delivery.[54]

§ 7.2.4. Liability for Delay

In *Taylor v. G. N. Ry.*[55] Erle, C. J. said: "I think a common carrier's duty to deliver safely has nothing to do with the time of delivery; that is a matter of contract, and when, as in the present case, there is no express contract there is an implied contract to deliver within a reasonable time, and that I

[53] See above all THOMPSON, p. 31, with references. See also CHITTY, vol. 2, sec. 159: "and where there is a carriage of goods which is merely ancillary to the general business of the undertaker as warehouseman, the measure of responsibility during such transit is that of a warehouseman and not that of a carrier". Cf. *Consolidated Tea Co. v. Oliver's Wharf* [1910] 2 K.B. 395 and also *Aslan v. Imperial Airways, Ltd.* [1933] 45 Ll. L. Rep. 316. Cf. also the mandatory liability of the Hague rules, sec. 1 (e), covering only "the period from the time when the goods are loaded on to the time when they are discharged from the ship".

[54] See e.g. LESLIE, p. 105 et seq. Cf. e.g. *Standard Brands, Inc. v. Nippon Yusen Kaisha*, 42 F. Supp. 43 (DC Massachusetts, 1941) with references. It must in this connection be observed that whereas the COGSA applies only from loading till discharge the Harter Act embraces also the period until the goods have been delivered. It seems to me that "carrier" must be determined functionally; cf. below § 11 concerning freight forwarders.

[55] (1866) L.R. 1 C.P. 385. Cf. CLARKE, p. 92 and KAHN-FREUND, p. 277 who states: "Even a common carrier of goods has never been absolutely liable for delay." HUTCHINSON, particularly in vol. 2 discusses thoroughly the question of delay.

take to mean a time within which the carrier can deliver, using all reasonable exertions." Although the liability for delay is not an off-spring of the common carrier doctrine some few remarks are required considering the growing importance of this problem in connection with modern transports and its different solutions in different transportation legislation. While the common carrier incurs a strict liability for loss of or damage to goods, his liability for delay probably rather has its roots in the general contract law, and thus no particular liability is placed upon him for delay, but he is responsible only for negligence.[56] "All the carrier has to do is to apply reasonable care to make sure that the goods arrive within a reasonable time. He is not responsible for loss caused by delay which is not due to his or his servants' negligence."[57]

With respect to delay similar rules then apply to private as well as common carriers. "In the absence of any express term in the contract, the duty of the carrier is to use all reasonable care to deliver the goods within a reasonable time."[58] What constitutes "reasonable" is a question of fact.

[56] *Southern P. Co. v. Arnett*, 126 F. 75 (8 CCA, 1903); *Northern P. Ry. v. American Trading Co.*, 195 U.S. 439 (1904). In an editor's notice in Harv. L. Rev. 10 (1896/97) p. 246 on then recent cases it was however stated in connection with *Bradley v. Chicago Ry.*, 68 N.W. 410 (Sup. Ct. of Wisconsin, 1896): "The obligation to carry does not rest on contract, though the decision in the principal case might give one that impression. The carrier is bound to transport goods though he expressly refuses to take them. On the other hand he has a duty to the shipper only, not to all the world. A breach of it therefore is not a tort. The courts recognize this, and that there is no action specially fitted to enforce the carrier's obligation by allowing suit in either assumpsit or case. In the principal case there was a breach of the duty to carry with reasonable speed, and when the carrier learns of additional cause for haste he should use corresponding care. If he negligently delays he violates his common law duty."

Delay may often cause physical damage to goods. E.g. tomatoes start rotting owing to late delivery; in such a case the severe common carrier liability for loss of or damage to goods will apply. See e.g. CARVER, vol. 2, sec. 16 referring to *Baldwin v. L.C. & D. Ry.* (1882) 9 Q.B.D. 582.

[57] KAHN-FREUND, p. 277. In *Wald v. Pittsburg R.R.*, 44 N.E. 888 (Sup. Ct. of Illinois, 1896) it was held that a carrier was responsible for the loss of goods which he negligently shipped late, although they were destroyed by the act of God. Cf. also *Geismer v. Lake Shore R.R.*, 102 N.Y. 563 (Ct. of App. of New York, 1886). Cf. HOLMES, p. 157: "That is to say, he has become an insurer to that extent, not only against the disappearance or destruction, but against all forms of damage to the goods except as excepted above." This statement seems to indicate an equally strict liability in case of delay as when damage to goods is concerned, which is clearly not the case. However, I may have drawn the conclusion too far from HOLMES' statement.

[58] RIDLEY, p. 23. Cf. *Raphael v. Pickford* (1843) 5 Man & G. 551.

To make the carrier liable for delay the plaintiff must establish that he failed to deliver the goods within reasonable time, and that this was due to his negligence.[59] The question of reasonable time may be determined by the distance transported, the mode of conveyance, the state of the weather, the season of the year, the facilities available for transportation, and any other circumstances which may be properly taken into consideration in determining whether the carrier has been guilty of improper delay.[60]

In case the carrier should know of any cause that is likely to delay transportation he must inform the shipper of it, unless the latter is aware of the risk. If he fails in this duty a delay in the transportation will not be excused.[61] The rule supported by the authorities is that if the carrier has reasonable equipment for all ordinary purposes, and delay occurs owing to unusual press of business, but the carrying is done with reasonable dispatch under the circumstances, then the carrier is not responsible for the delay.[62] Extraordinary weather like floods, snow storms etc. are ordinarily sufficient excuse for a delay.[63] But the carrier is liable for the negligent or wrongful acts of its servants during the course of their employment, and, so if employees go on a strike, abandoning the performance of their duties and causing delay in the transportation of property in their charge or control, the carrier is liable.[64]

I already touched upon the case when delay actually causes physical damage, when the ordinary rules concerning loss of, or damage to the goods apply, but also the deviation doctrine is an important corrective in situations of delay.

As has already been hinted legislation has to an extensive degree superseded common law.

The approach to determine delay and the liability for delay varies between the different international conventions. In the CIM special final dates for delivery

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[59] KAHN-FREUND, p. 277 and RIDLEY, pp. 23, 114 and 198.

[60] *Helliwell v. Grand Trunk Ry. of Canada*, 7 F. 68 (CC ED Wisconsin, 1881); see also e.g. MILLER, p. 181 et seq.

[61] MILLER, p. 181.

[62] *Ormsby v. Union P. R.R.*, 4 F. 706 (CC Colorado, 1880).

[63] *Missouri, K. & T. Ry. v. Truskett*, 104 F. 728 (8 CCA, 1900); aff'd 186 U.S. 480 (1901).

[64] *Sherman v. Pennsylvania R.R.*, 21 Fed. Cas. No. 12769 (CC Pennsylvania, 1880). It is not unlikely that the attitude to strikes has changed, cf. RAMBERG, Cancellation of Contracts, p. 355 et seq., and that it may also vary depending on the means of transportation.

are determined, while the liability is not the same as in case of loss of or damage to goods.[65] In the Warsaw convention the carrier has a duty to perform within a "reasonable time", and it then has to be decided in the individual case whether the delay is unreasonable. The carrier's liability for delay is the same as for loss of goods.[66] According to the CMR there is delay when goods are not delivered within reasonable or agreed time, but the liability is determined differently than in case of loss.[67] The Hague rules contain no explicit article on delay, but some fairly recent leading cases seem to apply these rules also in case of delay, so that the liability will be the same as for loss of or damage to goods.[68]

As to national legislation in this connection the following should be briefly mentioned. Only to a certain extent do statutes concerning the carrier's liability contain provisions as to liability for delay. The Carrier's Act, 1830, section 1, refers only to loss of and damage to the goods, not to delay, but it has been applied to temporary as well as permanent loss.[69] The Carriage by Air (Non-International Carriage) Order, 1952,[70] contains nearly the same rules as the Warsaw convention, but as for delay it provides for a different limitation of liability. The common law rules with respect to delay apply to all carriers by rail and by road, and are reflected in the General Conditions of the British Railways Board[71] as well as in Conditions of Carriage for road hauliers.[72]

Neither in the U.S.A. are there any specific provisions to be found in the statutes as to the liability for delay but generally a bill of lading contains a clause concerning delay.[73] Clause 2 (a) of the common rail and motor carrier bills of lading stipulates that no carrier is bound to transport by any particular schedule, train, vehicle, or vessel or in time for any particular market or otherwise than with reasonable dispatch.

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[65] CIM art. 26 § 1.

[66] Warsaw Convention, art. 19 and 22 (2).

[67] CMR, art. 19 and 23, 5.

[68] Thus particularly the *Saxon Star Case* (*Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co.*) [1958] 1 Lloyd's Rep. 73 is regarded in support of the view that art. 3.8 of the Hague Rules includes damages for delay and indirect damages. See CARVER, vol. 2, sec. 226; GRAM, p. 139; RAMBERG, Cancellation of Contracts, p. 31; and SCRUTTON, p. 417. Cf. GORTON, Rev., p. 641 et seq.

[69] *Millen v. Brasch & Co.* (1882) 10 Q.B.D. 142.

[70] See MCNAIR, pp. 194–95.

[71] Clause 10. Cf. below § 8.2.1.

[72] See e.g. Lawther and Harwey Ltd., Conditions of Carriage, clause 5. Cf. also below § 8.2.1.

[73] See e.g. MILLER, p. 181 et seq., but cf. also BURNS, p. 11.

§ 7.2.5. Common Law Exceptions as to the Common Carrier's Liability for Loss of or Damage to Goods

Common law imposed upon the common carrier a strict liability for loss of or damage to goods—he was often said to be an insurer of the goods[74]—but also granted him exceptions from liability in some cases. In *Coggs v. Bernard*[75] Lord Holt stated the rule that the "law charges this person [the common carrier] thus intrusted to carry goods, against all events, but acts of God and of the enemies of the King". During the subsequent period there was hardly any mitigation in the rigour of this rule, but in the course of time the number of exceptions were extended. One may determine the present common law rule[76] as a liability for the common carrier in the absence of express stipulations in the contract of affreightment for loss of or damage to goods, except when such loss or damage was caused by an act of God, the act of a public enemy, the act of a public authority, the act or default of the shipper or consignee, and the inherent nature of the goods.[77] The common carrier does not, however, escape liability merely by proving that the damage was an excepted peril. It also lies upon him to show that no negligence on his part contributed to the damage.[78]

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[74] The use of "insurer" has been heavily criticized, see for example BEALE, The Carrier's Liability, particularly p. 166 et seq. In *Hall v. The Railroad Companies*, 80 U.S. 367 (1871), Justice Strong said: "A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, or even greater but its nature is not the same."

[75] (1703) 2 Ld. Raym. 909.

[76] This does not play too great a role owing to the use of special contracts and to the legislation which has in most instances superseded common law in this connection. But the common law rule still exists and must be regarded as a basic rule.

[77] The number of exceptions from the strict liability varies between the authorities, but most writers mention at least the act of God, the act of the king's (queen's) enemies, inherent vice in the goods and the consignor's own fault. See for example KAHN-FREUND, p. 199; LESLIE, p. 31; FLETCHER, pp. 145 et seq. and 207 et seq.; CARVER, vol. 2, sec. 9 et seq.; MCNAIR, p. 138; and MILLER, p. 4. The pattern of exceptions could be recognized in modern legislation to shifting extent, see CIM, CMR and the Hague rules. Particularly the Hague rules contain a long, detailed catalogue of exceptions, which has caused the criticism by e.g. BRÆKHUS, p. 15 et seq. The framing of the carrier's liability varies in different legislations, but one may say that irrespectively of the frame the exceptions from liability acknowledged at common law have a considerable impact on the interpretation of the modern rules.

[78] CARVER, vol. 2, sec. 19; LESLIE, p. 31; and COOTE, p. 26 with references: "Because a bailee is liable for all loss or damage of which his fault has been 'a' co-operating cause."

The common law rule concerning the common carrier's strict liability originally is a rule based on status,[79] and the recognized exceptions developed in the course of time, in which there was also a growing usage among carriers to exempt themselves from liability by notice or special contract. The growing use of exemption clauses, together with e.g. the monopolistic situation created by the railways, made the way for legislation of a mandatory nature that imposed on carriers certain inescapable duties, and prohibited exemption clauses unless such exemptions were permitted by law. In this way common law was to a great extent superseded by legislation.

The exceptions from liability recognized at common law developed during a long time and have been the object of several cases and of the close examination by several writers.[80] An investigation of these exceptions would therefore seem rather superfluous, and as they hardly require any explanation to be understood suffice it to quote only two cases defining the act of God.[81] In *Forward v. Pittard*[82] Lord Mansfield said: "Now, what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by his permissions; every thing by his knowledge . . .", and in *Nugent v. Smith*[83] it was stated by

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Also HOLDSWORTH, The Law of Transport, p. 50 referring to the case *Siordet v. Hall* (1828) 4 Bing. 607 where a common carrier was held liable, when goods had been damaged by the freezing and bursting of a water pipe, but the carrier, although the severe frost was regarded as an act of God, had been negligent in not emptying the pipe. Cf. however CHITTY, vol. 2, sec. 380.

[79] Above § 6.2. it was pointed out that the common carrier doctrine applies also to water carriers, but a slight reservation should perhaps be made in this connection. As far as I understand, a distinction has to be made with respect to the relation between customer and carrier in carriage by land and ocean carriage, the former being originally based on status while the latter, which developed in a more international surrounding, at an earlier date had a more distinct feature of contract. Cf. FLETCHER, p. 199: "Carriage by sea became in general a matter of written contract at a much earlier date than carriage by land."

[80] See e.g. HUTCHINSON, vol. 1, sec. 269 et seq.; MILLER, p. 76 et seq.; RIDLEY, p. 15 et seq.; CARVER, vol. 2, sec. 1 et seq.; LESLIE, p. 30 et seq.; KAHN-FREUND, p. 198 et seq.; SCRUTTON, p. 201 et seq.; and MCNAIR, p. 138 et seq.

[81] The reason for choosing to briefly define the act of God is that this was the basic exception, and that it has undergone considerable changes when comparing its 18th century substance with that implied in e.g. the Hague rules. RAMBERG, Cancellation of Contracts, pp. 162 et seq. and particularly 210 et seq. treats "act of God" in connection with the doctrine of frustration of contract. With the growing number of different exceptions the scope for applying the act of God has decreased.

[82] (1785) 1 T.R. 27.

[83] (1876) 1 C.P.D. 423.

Mellish, L. J.: "The 'act of God' is a mere short way of expressing this proposition: A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him."

In a summary of the common law rules Carver[84] states that in the absence of an express contract it is implied at common law with respect to the common carrier's liability:

"That he is to carry and deliver the goods in safety, answering for all loss or damage which may happen to them while they are in his hands as carrier:

Unless that has been caused by some act of God, or of the King's enemies; or by some defect or infirmity of the goods themselves, or their packages; or through a voluntary sacrifice for the general safety;

And, that these exceptions are not to excuse him if he had not been reasonably careful to avoid or guard against the cause of loss, or damage; or has met with it after a departure from the proper course of the voyage; or if the loss or damage has been due to some unfitness of the ship to receive the cargo, or to unseaworthiness which existed when she commenced her voyage."

§ 7.3. *Contractual Limitation of the Common Carrier's Liability*

The material with which I am dealing in this section is indeed of an intricate nature and really requires its own separate treatment.[1] But it is so closely related to the common carrier doctrine that the picture of the common carrier concept would become distorted if I chose to leave it out.

The complexity of the common carrier concept may at this stage be illustrated by quoting Elliott:[2] "Thus the carrier enters into a contract implied by law, if not express, every time he accepts goods for carriage, and is liable for the violation of such contract, while if he violates the duty

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[84] Vol. 2, sec. 20.

[1] In Scandinavian law especially GÜNTHER PETERSEN in a general study has treated connected problems and particularly at pp. 32 et seq., 49 et seq., and 71 et seq. he is concerned with Anglo-American law. Cf. GRÖNFORS, Rev., p. 517 et seq. Further could be referred to e.g. GRÖNFORS, The Mandatory and Contractual Regulation of Sea Transport; and RAMBERG, Cancellation of Contracts, p. 413 et seq.

[2] P. 133. This statement stresses the dual influence from status and contract on the law of carriage. Cf. § 7.2.4. note 2.

of a carrier by his negligence, he is also liable in tort, and in many cases the carrier may be sued either in contract or in tort for the same act."

Also when discussing the right of the common carrier to exempt himself from liability the ambiguity of this concept has an effect. It must be borne in mind that the theory of contract also had a long evolution "from the clumsy institution that it was in the sixteenth century into a tool of almost unlimited usefulness and pliability".[3] It is evident that the conflict between the status liability of the common carrier and the contractual limitation of his liability passed through several stages of development, and one may even ask whether from present point of view the relation between the parties is still based on status or whether the contractual aspect has wholly broken its way through.[4]

It is important to understand the common carrier doctrine that the relationships referred to under the concepts of bailment, contract and tort are somewhat clarified. In common carriage there is a basic status relationship, i.e. the duties and rights are laid down at law. "In the law of tort the duty is towards persons generally, but the duties of the parties in bailment are towards each other and do not travel beyond that."[4a] Another way to express this, which to me seems more accurate, is to say that the duties are general both in bailment and in tort, but whereas in bailment it is normally required that the persons involved have entered into a relationship before liability may be released, in tort the relationship is created and the liability is released simultaneously. In a contractual relation the obligations are set by the contract, but they may be supplemented by implied conditions, etc. The liability is here often determined in the contract itself, but otherwise the law may provide rules in this connection too.

The border line between these three legal categories is by no means fixed, but a certain relation may contain features of them all simultaneously.[4b]

Thus the consequences of the "holding out" and the promise to carry could be related to each other, although the former is "general" in its character, while the latter is "special".

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[3] KESSLER, p. 629.

[4] SUNDBERG, Air Charter is treating this subject in subchapters 2 and 3 of chapter 3. "Air charter: A problem of legal construction," particularly at pp. 162–186. To a large extent mandatory legislation has been introduced to govern the carrier's liability, and contracts almost invariably regulate the relation between the carrier and his customer, but theoretically, at least, the question may be raised whether there are still reminiscences of the old status liability underneath, and as the common carrier cannot be regarded as an obsolete concept, this must be the case, as far as I understand.

[4a] WINFIELD, The Province, p. 99.

[4b] WINFIELD, The Province, pp. 40 et seq. and 92 et seq., and WINFIELD on Tort, p. 7 et seq.

There are among the authorities, as we shall see, somewhat diverging opinions as to the question whether common carriers were completely free to exempt themselves from liability by a notice or by contract. Such divergencies may be a result from the fact that the different legal theories of importance have been differently stressed at different periods. It seems difficult to find an immediete answer to the question, whether the liability of the common carrier at common law was of mandatory nature, since this liability originated as a status liability, at a time when contracts were "a clumsy institution" and certainly not used too frequently at least in land transportation.[5] It is clear that the common carrier gradually through notices and special contracts made attempts to change his business to that of a private carrier, often successfully, since "a carrier who holds himself out as being prepared only to carry certain classes of goods between fixed termini is not a common carrier of goods, or to places, outside the profession. When he steps outside his profession, and provided he makes a special rather than general acceptance, he carries as an ordinary, not as a common carrier".[6]

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[5] As already pointed out contracts were the rule in maritime transportation at a much earlier date than in carriage by land, cf. FLETCHER, p. 199. Also in present transportation the contractual situation varies between different modes. E.g. a general carrying contract may be really negotiated with all terms between the parties; in ocean liner service bills of lading are used which are ordinarily drafted by the carrier; in case of charter, documents are often used, which are drafted jointly by organizations to which the parties belong, changed in minor details to suit the trade and signed by the parties; in road traffic the conditions are generally worked out by the carriers; in railway traffic tariffs and other conditions are often determined by the government on proposal by the carrier, although sometimes subject to minor alteration; and in air traffic IATA is setting the conditions of carriage in international traffic, while in domestic traffic a government body often has to approve suggested tariffs etc.; concerning cabs, trams, underground etc. the contractual element is even harder to distinguish. Cf. SUNDBERG, ibid. and also p. 271 et seq. It is evident that the vision of two equal parties negotiating freely is not very close to the practical situation. It is equally clear that the type of contracts with which I am concerned must be judged also from the point of view of general contract law; i.e. that rules like *contra proferentem* etc. apply in this connection too. See e.g. RAMBERG, Unsafe Ports and Berths, p. 41 et seq. and Cancellation of Contracts, p. 413 et seq. KAHN-FREUND discusses the question of standard form contracts at p. 214 et seq. See also CHESHIRE & FIFOOT, pp. 24–25. The transportation business is a good illustration of what KESSLER, p. 641 calls "the return back from contract to status".

[6] COOTE, p. 21 with references. According to COOTE, the common carrier is subject to three tiers of liability: his contractual liability, his status liability, and his insurer's liability for loss, damage, or destruction of the bailed goods. The distinction made by

The authorities do not seem to agree as to whether originally at common law a common carrier could exempt himself from liability, and it has been said that "[a]t common law, an insurer's liability was fixed on common carriers for the goods they carried. They were not allowed to contract themselves out of this liability".[7] Elliott is somewhat more detailed and combines different factors: "It was formerly held that contracts lessening the liability of the common carrier were against public policy, but with the introduction of better and safer methods of transportation, and the large increase in the amount of transportation, and with the reflection that the shipper entering into a contract limiting this liability may take advantage by obtaining lower rates than if the carrier were held to the common-law liability, the most of the courts of this country now recognize the right of a common carrier to limit liability by contract to some extent."[8] Fletcher on the other hand states that at common law the common carrier was an insurer except in case the damage was a consequence of the act of God or the King's enemies but that he had the right to limit his liability.[9] According to Knauth the basis in England was public policy, and some special contracts were accepted as fair and reasonable, while others were held to be unfair and unenforceable.[10] As suggested above the divergencies pronounced should maybe not be attributed to a basic difference in opinion among the authors.

COOTE between the status liability (the liability for negligence) and the insurer's liability seems to be open to question, as the "insurer's liability" is a status liability imposed only on certain categories of bailees, like the common carrier and the common innkeeper. On the other hand the distinction is important, as both liabilities are imposed on the common carrier, and a stratification of his liabilities is therefore necessary. See also op. cit. p. 27. Cf. below at note 28.

[7] Editor's remarks Harv. L. Rev. 36, p. 746. See also cases like *Hide v. Proprietors of Trent & Mersey Navigation* (1793) 1 Esp. 35; *Hollister v. Nowlen*, 19 Wend. 234 (Sup. Ct. of New York, 1838); *Cole v. Goodwin*, 19 Wend. 251 (Sup. Ct. of New York, 1838); *Atwood v. Reliance Transp. Co.*, 9 Watts 87 (Sup. Ct. of Pennsylvania, 1839); *Gould v. Hill*, 2 Hill 623 (New York Ct. of App., 1842).

[8] P. 193. Cf. JEREMY, p. 36: "The Law has indeed always recognised the existence of a contract, whilst it has at the same time declared the obligation of the carrier to be a public duty, . . ."

[9] P. 195. Cf. WILLIAMS, Modern Railway Law, p. 50 stating that the common carrier is "free (as common carriers always have been) to negotiate with consignors special contracts . . ."

[10] Air Carrier's Liability, p. 3. Cf. MACNAMARA, p. 27 et seq.

The correct way to approach this question appears to be step by step, i.e. in the early days no notices or contracts were used, and when such "remedies" were introduced the tendency in the courts was at first to hold that, since the duties of a common carrier are of a public nature, it was against public policy, or as otherwise expressed, not just and reasonable to permit a common carrier to stipulate for any modification in his common law liability. The common carrier's exemptions varied, the first types probably aimed at limiting his profession, but as soon as one type of exemptions had been recognized and approved the field was open for new and more extensive stipulations.[11]

The principle as interpreted in the 19th century may then be stated as in *Garton v. Bristol & Exeter Ry.*:[12] "Persons holding themselves out to the world as common carriers are bound to act as such in respect to such goods as they profess to carry, and have accommodation to carry, on such goods being tendered to them to be carried, and, on a reasonable tender of proper remuneration, without subjecting the person tendering them to any unreasonable condition."

Whatever may have been the original standpoint it is clear that the rigor of the common law liability of the common carrier was relaxed at an early date in England, and the U.S. courts soon followed suit, though retaining a more strict attitude to extensive exemption clauses.[13]

The growing importance of contract[14] mitigated the strict attitude of the courts which more and more recognized the possibility of the common carrier to limit his liability.[15] One of the first steps in this connection was to allow the carrier effectively to specify that he should be liable only for losses caused by his own negligence.[16] Later stipulations were upheld limiting the amount of recovery to an agreed valuation,[17] and such stipula-

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[11] Cf. COOTE, pp. 21–22 with references; GODDARD, The Liability of the Common Carrier, p. 401 et seq.; MCCLAIN, p. 552 et seq.; SUNDBERG, Air Charter, p. 166 et seq.; and THOMPSON, p. 36 et seq. See also Exculpatory Clauses, p. 215 et seq.

[12] (1861) 1 B. & S. 112.

[13] HUTCHINSON, vol. 1, sec. 390. See also KNAUTH, The American Law, p. 138. Cf. also *Macklin v. Waterhouse* (1828) 5 Bing. 212.

[14] Cf. KESSLER, p. 629 et seq.

[15] *Nicholson v. Willan* (1804) 5 East. 507. Cf. particularly GODDARD, The Liability of the Common Carrier, p. 402 et seq.

[16] *New Jersey Steam Nav. Co. v. Merchant's Bank*, 47 U.S. 344 (1848); *York Mfg. Co. v. Illinois Central R.R.*, 70 U.S. 107 (1865).

[17] *New York Central R.R. v. Lockwood*, 84 U.S. 357 (1874).

tions were ordinarily upheld also when the injury was due to the carrier's own negligence.[18] The court decisions, however, expressed different opinions as to the circumstances under which such valuation clauses were enforceiable.[19] "If any principle can be deduced from the conflicting decisions, it is that such contracts, to be valid, must be just and reasonable."[20] It could be added that certain types of exceptions might be distinguished, like 1) exceptions for valuables, 2) exceptions for excessive non-declared values, 3) general limitation of liability.[21]

In ocean carriage bills of lading and charter parties were used to govern the relation between carrier and shipper at an earlier date than corresponding documents in land carriage. "Declarations continued to be made in tort on the custom of the realm against common carriers by land long after it had become normal to declare against a shipowner in assumpsit on the express words of the contract."[22]

Obviously, it is not my object to go into all questions that could be raised in this connection, but an attempt will be made to very broadly outline certain problems of particular interest to the understanding of the subsequent development.

English courts were more apt to accept far reaching exceptions from liability than American courts.[23] In cases of fraud the attitude seems to have been unanimous: "Where fraud exists the bailee is liable, even though the contrary be stipulated."[24] In the event of negligence, however, there

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[18] *Kansas City Southern v. Carl*, 227 U.S. 639 (1913); *Boyle v. Bush Terminal R.R.*, 210 N.Y. 389 (Ct. of App. of New York, 1914).

[19] GODDARD, Op. cit., p. 411 et seq.

[20] Editor's remarks, Harv. L. Rev. 36, p. 746 with references. Cf. MCCLAIN particularly p. 556 et seq.

[21] HOLDSWORTH, The Law of Transport, p. 53 quotes the following extract from a poster used by a Manchester carrier in the beginning of the 19th century: "The Proprietor will not be accountable for Goods taken up on the road, unless a proper note be delivered with the same, addressed to him, nor for Glass, China, Cash, Plated Goods, Deeds, Writings, or other valuable Articles above £ 5 value if lost, stolen or broken unless entered as such and paid for accordingly at the time of entry, nor for any damage unless well and sufficiently packed." GRÖNFORS, Successiva Transporter, and RAMBERG, Cancellation of Contracts, contain several examples particularly from the maritime field of clauses used at early times and still in use. DOR analyzes a great number of bill of lading clauses in relation to the Hague Rules.

[22] FLETCHER, p. 199. Cf. e.g. KNAUTH, The American Law, p. 115.

[23] SUNDBERG, Air Charter, p. 166 et seq.

[24] CHITTY, vol. 2, sec. 113.

seems to have been no such unanimity. With respect to private carriers, which had only a liability for negligence, the question may be raised whether the law permitted him to limit his liability to a larger extent than the common carrier.[25] Further, it is important to recognize that the legislative bodies might interfere with the development, if the actions of the courts were considered insufficient, and in this connection the transportation law displays an interesting evolution, a transformation of common law into statutory law.

The carrier used two methods to limit or contract out of his liability, either by public notice or by a special contract;[26] further he went two different ways to limit his liability; either he exempted himself wholly from liability under certain circumstances—thereby actually extending the number of exceptions from his basically strict liability—or he also often stipulated that even if he were liable he would not have to pay damages above a certain amount. "Initially the common carriers sought to escape their extraordinary liability by publication of notices to the effect that their liability would be limited to indicated amounts unless the shipper elected to pay a higher rate which would impose upon the carrier the assumption of greater liability."[27]

It should therefore be observed that by status a strict liability was imposed on the common carrier for loss of or damage to goods with the exceptions mentioned above, but also a liability for negligence in other cases, like e.g. delay, and in addition he might have a liability according to the contract entered into with the customer.[28] Three sets of liabilities, whereof two of a basically different nature, could be distinguished, naturally causing much difficulty with respect to the interpretation of exemption clauses. This means that a clause exempting the common carrier from liability has to pass three layers of liability: his strict status liability for loss of or damage to the goods; his status liability for negligence as an "ordinary" carrier; and his contractual liability.

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[25] E.g. COOTE, p. 31 et seq.

[26] E.g. GODDARD, The liability of the Common Carrier, p. 402 et seq.

[27] MILLER, p. 4. Cf. also the reasoning below in § 9.3.

[28] Cf. above note 5. As distinguished from Scandinavian law "Anglo-American law does not operate with a sweeping concept of negligence . . .", RAMBERG, Unsafe Ports and Berths, p. 42. With respect to negligence in general see especially CHARLESWORTH on Negligence.

Though it may be contended that where there was a contract, the status duties were pushed aside, as long as the courts accepted the exemption clauses, the status duties cannot be disregarded, as they are after all primary, though in practice often superseded by contract.[29] This means that if a common carrier by notice declined to carry certain categories of goods, he did not have the common carrier's strict liability for such goods, but the question was then whether he would escape all liability or if he would have the liability of a private carrier.[30] "In the first place, under the older law, if the carrier limited his profession by notice and the consignor, in disregard of the notice, consigned goods of the excepted classes without special arrangement, the carrier escaped all liability, at least where he was unaware of the nature of the goods. He was not liable *qua* common carrier since the goods were outside his profession; nor could he be made liable as an ordinary carrier since no special arrangement had been made."[31] According to the latter view the carrier's notices were regarded as special acceptances in themselves, and then the carrier should continue to be liable for negligence as an ordinary carrier.[32] Eventually this "view triumphed in 1841 so far as land carriage was concerned, and in 1857 in respect of carriage by sea."[33] "But in the meantime, under the influence of the Car-

[29] At this moment I disregard from legislation.

[30] See particularly COOTE, pp. 22–24 with references. Cf. SUNDBERG Air Charter, pp. 166–168.

[31] COOTE, p. 22. Cf. *Nicholson v. Willan* (1804) 5 East 507.

[32] COOTE, p. 23. The wording used by COOTE leads one to believe that when using notices or special contracts the status changed from that of a common carrier to that of an ordinary bailee. Owing to the interaction between the prerequisites for, and the consequences of, being a common carrier, it is hard to bring out clearly the definite rule but it must be underlined generally that as long as the common carrier holds himself out as such his status is that of a common carrier irrespective of the change of his liability owing to the use of a contract.

FLETCHER, p. 206; GODDARD, Outlines, § 271. Cf. also *New York Central R.R. v. Lockwood*, 84 U.S. 357 (1874), where it was stated that "common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of any superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed."

[33] COOTE, p. 23.

rier's Act, the courts had conceded the right to exclude liability for fault",[34] and the latter view only became a rule of interpretation. Even if the two status liabilities have been excluded the contractual obligations still remain,[35] and therefore the general law of contract naturally is of direct importance also in this context. The implications of the general law of contract, however, must be regarded as far beyond the scope of this study, and only some few words will be mentioned concerning the doctrine of fundamental obligations, being a rather recent legal remedy against exceptions from liability in case of breach of a fundamental contractual obligation and most probably being connected with the doctrine of deviation.[36]

"Every contract contains some fundamental basic obligation which is the primary object of the whole contract. This basic obligation must be distinguished from the terms of the contract, which are the ancillary provisions made by the parties for the purpose of carrying out the contract . . . The main practical importance of the distinction is that a person may exempt himself by a provision of the contract itself from liability for breach of a term of the contract, but he can in no circumstances exclude his liability for non-performance of the fundamental obligation of the contract."[37] The doctrine of fundamental breach of contract is of general application, but the principle may be traced back to the deviation doctrine since long established in at least the carriage of goods by ship. A deviation, that cannot be justified is a fundamental breach of the contract, and in such a case the carrier may not rely upon the exemption clauses of the contract.[38]

The basic question concerning the bailee's status liability and his contractual liability does not become an easier task, if taking into consideration e.g. the

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[34] Op. cit., p. 24 with references.

[35] Ibid. Cf. SUNDBERG Air Charter, i.a. p. 170 et seq.

[36] Cf. above § 7.2.3. note 5. CHESHIRE & FIFOOT, p. 116 et seq.; KAHN-FREUND, p. 234; COOTE, pp. 104 et seq. and 70 et seq.; RAMBERG, Cancellation of Contracts, p. 438; and RAMBERG, Unsafe Ports and Berths, p. 44 et seq. The doctrine of fundamental obligation has developed particularly during the last decades, and was a mean for the courts to strike back on certain unreasonable exemption clauses, not only by referring to lack of clear language, but on the ground that such clauses made the whole contract a fiction and could not be accepted. Cf. further note 39. DOR deals with connected problems at particularly pp. 43 et seq. and 61 et seq.

[37] ATIYAH, p. 96.

[38] CHITTY, vol. 2, p. 216; SCRUTTON, pp. 206 and 260; DIPLOCK, p. 8 et seq.; COOTE, p. 80 et seq.; and BORRIE & DIAMOND, p. 41 et seq. Cf. FLETCHER, p. 213, who says that unreasonable deviation displaces the contract, which is possibly a better expression, as the doctrine of deviation is much older than that of fundamental breach. In *Suisse Atlantique Société d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale* [1966] 1 Lloyd's Rep. 529 the court seems to mean that the deviation doctrine should not necessarily be connected with the doctrine of fundamental breach.

methods used by the courts to intepret exemption clauses used, and the doctrine of fundamental breach of contract. Evidently this perspective cannot be wholly left out, and without going into the doctrine of fundamental breach, a number of cases may illustrate the considerations which may have contributed to the evolution of this theory.[39] One important principle with respect to the interpretation of standard form contracts is the *contra proferentem* rule,[40] but as is well-known it is neither always evident whether the courts have applied one rule or another, nor easy to understand why a rule applied in one case is not applied the next time in a seemingly corresponding case.

As has already been mentioned the English and American courts took a somewhat different standpoint as to the question of the validity of a public notice limiting the common carrier's liability. In England various court decisions resulted in a general acceptance of a liability limitation through a reasonable notice.[41] But, "there was a continuing protest against the lessening of a responsibility which it was insisted had originally been recognized on broad reasons of public policy dictated by the nature of the relation which the public carrier has assumed towards society".[42] Sometimes the question was raised whether it was enough that the notice had been brought to the knowledge of the owner of the property, or whether

[39] It is important to observe that the doctrine of fundamental breach has been applied under greatly varying conditions. In some cases the court's opinion appears to be more in line with the traditional law of contract, but in other cases the court rather seems to have been guided by a consumer protective conception: *Andrews Brothers (Bournemouth) Ltd. v. Singer & Co. Ltd.* [1934] 1 K.B. 17; *Alderslade v. Hendson Laundry Ltd.* [1945] 1 All E.R. 244; *Davies v. Collins* [1945] 1 All E.R. 247; *White v. John Warwick & Co. Ltd.* [1953] 1 W.L.R. 1285; *Wolmer v. Delmer Price Ltd.* [1955] 1 Q.B. 291; *Karsales (Harrow), Ltd. v. Wallis* [1956] 2 All E.R. 866; *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 1 All E.R. 474 (C.A., 1961); *Hunt v. Winterbotham (West of England) Ltd. v. B.R.S. Parcels Ltd.* [1962] 1 All E.R. 111 (C.A., 1961); *Lee Cooper, Ltd. v. C.H. Jenkins & Sons, Ltd.* [1964] 1 Lloyd's Rep. 300; and *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.* [1970] 1 All E.R. 225.

[40] See below note 50.

[41] See for example *Nicholson v. Willan* (1804) 5 East. 507; *Harris v. Packwood* (1810) 3 Taun. 264; *Sleat v. Fagg* (1822) 5 B. & Ald. 342; *Batson v. Donovan* (1820) 4 B. & Ald. 21 *Riley v. Horne* (1828) 5 Bing. 217; and *Clarke v. West Ham Corporation* [1909] 2 K.B. 858. SUNDBERG, p. 167 suggests that this right might be traced back to *Southcote's Case* (1601) 4 Coke Rep. 83 b and that the rule was upheld by Lord Mansfield in *Gibbon v. Paynment* (1769) 4 Burr. 2298.

[42] MCCLAIN, p. 552. Notices were not always accepted, cf. e.g. *Sleat v. Fagg* (1822) 5 B. & Ald. 342. See also FLETCHER, p. 184 et seq. who also gives a survey of the effect of different notices, and GÜNTHER PETERSEN, pp. 16 et seq. and 32 et seq.

it had to be actually assented to by him.[43] But generally the English courts accepted the notice.[44] By a public notice brought to the knowledge of the customer, the carrier could protect himself from liability beyond a fixed amount, unless the carrier revealed the real value of the goods, so that the carrier could make reasonable charges for additional risks and take necessary steps.[45] The public notices had to be strict in language and they had to be public.[46]

American courts did not follow the English decisions but applied a reasoning founded upon the public service-feature of the common carrier's business and were even of the opinion that although the customer had knowledge of the notice there was no presumtion that he had accepted it.[47] "For a notice can, at the most, only amount to a proposal for a special contract which requires the assent of the other party. The mere delivery of goods after receiving a notice cannot warrant a stronger presumtion that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law, as he had a right to do."[48]

As already mentioned English courts hardly restricted the common

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[43] GODDARD, Outlines, § 257. Cf. however *Leeson v. Holt* (1816) 1 Stark. 186, where the carrier's right to exclude his liability, also in events when he had committed a fault was accepted. In this case a public notice was also regarded to be construed as a special contract.

[44] The situation led to the enactment of the Railway and canal traffic act, 1854, wherein special contracts signed by the shipper were demanded; already in 1830 the Carrier's act had been enacted.

[45] GODDARD, Outlines, § 255. See also JEREMY, p. 39. The courts were favourable to these "valuation clauses", as the shippers often concealed the true value of the goods to get a lower freight. See also MCCLAIN, p. 556.

[46] JEREMY, p. 42. Cf. FLETCHER, p. 181 et seq. Cf. *Chapelton v. Barry*, [1940] 1 All E.R. 357.

[47] See MCCLAIN, p. 553 et seq. and GODDARD, The Liability of the Common Carrier, p. 401. See also *Hollister v. Nowlen* (1838) 19 Wend. 234 (Sup. Ct. of New York, 1838). A reason for the reexamination in American courts of the validity of public notices limiting the common carrier's liability may have been that it was not until after the American independence that the English courts reached their definite solution, so these English conclusions were not of sufficient age to justify that they were regarded as a part of common law accepted in the U.S.

[48] GODDARD, Outlines, § 259. *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. 344 (1848); *New York Central Railroad v. Lockwood*, 84 U.S. 357 (1874); *Hollister v. Nowlen*, 19 Wend. 234 (Sup. Ct. of New York, 1838).

carrier's right to limit his liability by special contract.[49] One may say therefore that the immediate practical difference between private carriers and common carriers came to be the interpretation of contracts limiting their liability. The private carrier is liable only for negligence and the burden of proof is on his counter part.[50] Therefore a provision in a contract whereby the private carrier limits or excludes his liability without expressly referring to negligence will be judged as having reference to negligence, as it cannot refer to anything else. In the case of common carriers they have to be clear; any ambiguity is interpreted against the common carrier. "If, therefore, a clause which purports to exclude his liability does not clearly refer to negligence, it will be construed by the courts as limited in its effect to the peculiarly arduous duties cast upon him by his status."[51]

With respect to the right of the common carrier's right to exempt himself from liability through a special contract, the American position was more confused. For "in connection with the question as to the policy of permitting a carrier to limit his liability by notice, even though brought home to the shipper before shipment had been made, arose at once the further question whether limitation of the strict common-law liability was not against public policy and therefore invalid".[52] A few years after the case of *Hollister v. Nowlen*[53] the court in *Gould v. Hill*[54] put a special contract in the same position as a notice, regarding the individual shipper in such a weak position in relation to the large carrying corporations that it did not make any difference whether the carrier sought the exemption by public notice or by special contract, as the parties were on such an unequal footing.[55] The view was, however, also expressed that the shipper was competent to make any agreement that he saw fit, and in *New Jersey Steam Navigation Co. v.*

[49] CHESHIRE & FIFOOT, p. 108 et seq.; KAHN-FREUND, p. 209 et seq. See also MCCLAIN, p. 553.

[50] Such at least was the rule set in *Whalley v. Wray* (1799) 3 Esp. 74.

[51] CHESHIRE and FIFOOT, p. 113. Cf. KAHN-FREUND, p. 232; FLETCHER, p. 175 et seq.; and RAMBERG, Cancellation of Contracts, p. 413 et seq. See cases like *Price & Comp. v. Union Lighterage Comp.* [1904] 1 K.B. 412; *Phillips v. Clark* (1857) 2 C.B.N.S. 156; *City of Lincoln (Master and Owners) v. Smith* [1904] A.C. 250; and *Travers v. Cooper*, [1915] 1 K.B. 73.

[52] MCCLAIN, p. 554. Cf. SUNDBERG, Air Charter, pp. 168–69, and GÜNTHER PETERSEN, p. 49 et seq.

[53] 19 Wend. 234 (Sup. Ct. of New York, 1838).

[54] 2 Hill. 623. (New York Ct. of App., 1842).

[55] GODDARD, Outlines, § 260; MCCLAIN, p. 554.

Merchant's Bank[56] the U.S. Sup. Ct. reversed the ruling in *Gould v. Hill*, and allowed the carrier to exempt himself from his strict liability by a special contract.[57] But this case did not settle the matter, as it remained inter alia to be decided what kinds of exemption clauses that were acceptable, and it was held in a number of cases by U.S. courts that stipulations must be just and reasonable and not contrary to public policy.[58] The common carrier is not allowed to contract out of his own negligence, and probably neither of negligence by his servants.[59]

In *New York C.R.R. v. Lockwood*[60] the Court reached the following conclusions: "*First.* That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law. *Secondly.* That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." When limiting his liability the carrier must observe a fair amount, and the shipper should also have the right to get a higher liability against additional freight.[61] Furthermore, it should be added that it has been held that in case of private carriage there are no rules of public policy forbidding a private carrier to relieve himslef from all liability.[62]

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[56] 47 U.S. 344 (1848).

[57] Cf. MILLER, p. 13.

[58] GODDARD, Outlines, § 267. Cf. *Liverpool, etc. Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397 (1888); *Alair v. R.R.*, 54 N.W. 1072 (Sup. Ct. of Minnesota, 1893).

[59] GODDARD, Outlines, §§ 268–69; E.g. *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884); *the Jason*, 225 U.S. 32 (1912). In New York, however, the rule developed that the common carrier could exempt himself from liability for negligence of his servants. See MCCLAIN, p. 555 with references. Before the Carrier's Act was passed in 1830 there were several cases in English law showing that a notice limiting liability would not protect a carrier if the loss were occasioned by his gross negligence, e.g. *Batson v. Donovan* (1820) 4 B. & Ald. 21; and *Sleat v. Fagg* (1822) 5 B. & Ald. 342. See FLETCHER, pp. 192 et seq. and 202.

[60] 84 U.S. 357 (1873).

[61] GODDARD, Outlines, § 270 and BARNES, Limitation of Common Carrier's Liability, p. 72 et seq. Cf. also below in § 9.2.

[62] *The Maine*, 170 F. 915 (2 CCA, 1909); *Oceania*, 170 F. 893 (2 CCA, 1909); *Santa Fe Ry. v. Grant Bros.*, 228 U.S. 177 (1913); and *T.N. no. 73*, 1939 AMC 673 (DCSD New York, 1939). In e.g. *the Jason*, 225 U.S. 32 (1912) and *the Royal Sceptre*, 187 F. 224 (DCSD New York, 1911), it was said that a private carrier could exempt himself from negligence of his servants.

Common carriers' growing use of notices and contracts exempting them from liability, and the lenient attitude of the English courts to such clauses created the need for legislation. The English courts overstating the aspect of freedom and sanctity of contract and disregarding the aspect of public policy, also with respect to unreasonable clauses, forced the legislative bodies to interfere with this unacceptable development. But the increasing railway monopolies also necessitated legislative intervention. Step by step the range of legislation increased both in England and the United States; in 1830 the Carrier's Act, in 1854 the Railway and Canal Traffic Act, both in England, in 1887 and in 1893 respectively the U.S. acts, the Interstate Commerce Act and the Harter Act. So it was in land carriage that the first steps were taken to reduce the effects of carriers' exemption clauses, not astonishingly, since the international character of ocean carriage also required diplomatic moves. And it is natural that the first step against unreasonable clauses in ocean carriage was taken by the United States, largely relying on foreign keels to carry their goods, through the Harter Act. When the time came for similar measures with respect to aviation the common carrier doctrine did no longer have the same immediate impact on carriers' liability.

The intention behind all this legislation has been to distribute between the different interests the risk of the transportation adventure. The legislation on the carriers' liability was thus largely based on the common carrier doctrine with due regard taken to certain reasonable exemption clauses used by the carriers. Mandatory legislation passed was then a result of this apportionment of risk, and usually prohibited the carrier to exempt himself from liability, or to limit it to a larger extent than was prescribed by the Act. Certain acts also contained extensive rules on tariffs, facilities, etc., what in present terms would be regarded as provisions of a public law nature.

PART III

THE COMMON CARRIER CONCEPT IN THE LEGISLATION

Chapter 4

PRIVATE AND PUBLIC LEGISLATION WITH RESPECT TO CARRIERS GENERALLY AND COMMON CARRIERS PARTICULARLY

§ 8. *Legislation affecting the Duties and Liabilities of Carriers*

§ 8.1. *In General*

Thus much far reaching legislation has been enacted in the field of transportation in order to interfere with an unacceptable development in business practices, but in certain fields the common law still remains the basis of the common carrier liability. The British and the American transportation legislation and organization show both similarities and differences; a fundamental difference within the frame of this study is that American administrative legislation is directly based upon the concept of the common carrier, which is not the case in England. But the legislation in question also varies within each country depending on which branch of the transportation business is concerned, as competition and other conditions differ.

My intention at this point is to give a general view of English and American transportation legislation. I am certainly not aiming at any detailed description of the relevant statutes—that would be far beyond the scope of this study—, but merely at a broad outline of their functions, in order to put the common carrier doctrine as a background for the modern transportation legislation, in other words to give some idea of what influence the concept of the common carrier may have had on present transportation legislation in England and the United States. Consequently I am not going to examine a great number of cases, however interesting they are in themselves for the interpretation of the pertinent legislation.

Owing to their peculiarities I have then also chosen to treat separately the concept of the common carrier as determined in the U.S. transportation commissions to see whether the criterias for its determination in modern transportation legislation are the same as those at common law. Further

the rapid development of "unit" transportation, particularly during the last decade, has given freight forwarders more prominent and somewhat different functions in comparison with their traditional ones. The tendency with respect to modern transportation is to break down the walls between the different transportation branches, and to create integrated transports. Since one of the main streams of containerized goods is the North Atlantic, and since in the United States particular problems have arisen owing to the split jurisdiction of the transportation commissions with respect to different vehicles, a new concept has been invented, namely the *non-vessel-operating-common-carrier* (NVOCC) which now also requires some explanation. The new American legislation proposed in 1967 to mitigate these jurisdictional problems will also be touched upon in the Appendix.

§ 8.2. *England*

§ 8.2.1. Railroad and Road Carriers

Railroad and road carriers could be treated as forming one particular area of competition.[1] "The general duties, liabilities and rights of railway carriers were originally, and still in a great measure actually are co-extensive with those of land carriers; and they are regulated by the same common law principles, except when they are controlled by statute."[2] The first act of general interest in this connection, to govern the carrier's liability in England was the Carrier's Act, 1830, which applies only to *common carriers by land*.[3]

This Act had two main purposes, namely to interfere with the use by the carriers of public notices limiting their liability, and to protect the common carriers from their common law liability when carrying valuable parcels. In its first section the Act recognizes the common carrier's right to demand

[1] Cf. the Transportation Act, 1947 and the Swedish Transportation Act, 1963, but also the transportation policy for the Common Market as laid down in the Rome Treaty art. 74–84.

[2] POWELL, p. 237.

[3] See HALSBURY's statutes, vol. 2, pp. 802 and 804. Sec. 1 of the Act reads: "No mail contractor, stage coach proprietor, or other common carrier by . . . land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following: . . . the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, . . . the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge . . . , be accepted by the person receiving such parcel or package."

an increased freight for the carriage of valuable goods, and it limits the carrier's liability to £ 10 per parcel for certain valuable goods.[4] The consequences of the Act may thus be summed up: No common carrier by land is liable, for certain valuable goods over the value of £ 10, unless their value is declared, and an additional freight is accepted according to sec. 2. The carrier is not liable for loss if such declaration is not made, unless the loss or damage is a consequence of the felonious act of his servants (sec. 8), i.e. not even in case of gross negligence.[5] According to sec. 4 the carrier is prohibited from limiting his liability by public notice, but in sec. 6 his right to do so by special contract is preserved,[6] including his right to exempt himself from liability for negligence. Railways which came into existence in the 1820's were held to be common carriers at common law, and the Carrier's Act applied to them as to all common carriers by land,[7] but the Act does not apply to carriage of goods by sea. As for the liability of road carriers, the common law and the Carrier's Act still apply, but in most cases the relationship between the carrier and his customer in practice is governed by the General Conditions.[8]

In 1965 the CMR became part of English law through the Carriage of Goods by Road Act which is operative since 1967.

Taking certain restrictions into consideration[9] the road carrier was thus rather free at common law to contract out of most liability with respect to loss, damage or delay of goods. Several different documents have been in use, such as the Standard Trading Conditions of the Institute of Freight Forwarders—formerly called the Institute of Shipping and Forwarding Agents—the Conditions worked out by the Road Haulage Association and the Conditions of the newly formed National Freight Corporation (NFC).[10]

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[4] HOLDSWORTH, The Law of Transport, p. 54, compared with HALSBURY's statutes, vol. 2, p. 804. See also LESLIE, p. 182 et seq.

[5] Held in *Hinton v. Dibbin* (1842) 2 Q.B. 646.

[6] Cf. e.g. HALSBURY, vol. 2, p. 802; RIDLEY, p. 45 et seq. Cf. also KAHN-FREUND, p. 218 et seq.

[7] The opening of the Stockton to Darlington Railway in 1825, and of the Liverpool and Manchester line in 1830, began a widespread railway development. The great period of railway building was from 1840 to 1875.

[8] KAHN-FREUND, particularly p. 242 et seq.; also p. 221 et seq. Cf. HILL, p. IV: 70 et seq.

[9] Above § 7.3.

[10] In connection with the 1968 British Transport Act the National Freight Corporation has taken over e.g. the former Freightliner and Sundries Divisions of British Rail,

As a result of the creation of NFC Common Conditions of Carriage are now in use by all parts of the nationalized transport industry, both road and rail, except that certain additional clauses are inserted in rail traffic to cover certain factors peculiar to carriage by rail.[11]

According to the Standard Trading Conditions, under which a number of international freight forwarders carry, and the R.H.A. Conditions 1961, which are still in effect to a certain extent, the carrier does not accept any liability for loss or damage unless caused by the "wilful negligence" of his servants.[12]

New Conditions of Carriage were introduced in 1967 by the Road Haulage Association[13] similar to those formerly used by British Road Services, which to-day basically make up the National Freight Corporation Conditions. According to these Conditions liability is accepted for all loss or damage unless a certain list of excepted perils applies.[14] These conditions are undoubtedly influenced by the CMR.[15]

Likewise the Institute of Freight Forwarders introduced new Standard Trading Conditions 1970, which do, however, not materially differ from those issued in 1956.

Clause 2 of R.H.A. Conditions of 1967 states: "The Carrier is not a common carrier and will accept goods for carriage only on these conditions."[16]

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which now operate as Freightliner Ltd. and National Carriers Ltd. Road haulage companies formerly controlled by the Transport Holding Company, and in particular British Road Services, are also part of the Corporation. See HILL, p. IV: 70 et seq. Cf. above § 2.2.2.

[11] Like cl. 5 B (owner's risk), cl. 10 (3) (c) (private sidings), and cl. 12 (2) (carriage by water).

[12] Cl. 13 Standard Trading Conditions, and cl. 8 R.H.A. Conditions 1961. Cf. SCHMITTHOFF, p. 150 et seq. As for the wording of certain clauses see further below in this §.

[13] Howevever, the R.H.A. Conditions 1967 are not mandatory on members, who are still free to use the more restrictive conditions of 1961.

[14] Cl. 5 B.R.S. Conditions, cl. 11. R.H.A. Conditions of 1967.

[15] Cf. art. 17 C.M.R.

[16] For such clauses cf. above § 5.3. As for the liability cf. the Standard Trading Conditions of the Institute of Shipping and Forwarding Agents and the British Railway's Board's General Conditions of Carriage. The Road Haulage Association has also issued an explanation of the Conditions of Carriage by Road. It should be borne in mind that the Standard Terms and Conditions under the Railways Act, 1921, to their legal nature are different from the General Conditions of Carriage, although they resemble each other. Cf. KAHN-FREUND, pp. 76–77.

As to the carrier's liability for loss of and damage to goods sections 11 and 12 of the Conditions read:[16a]

"11. Liability for Loss and Damage.

Subject to these Conditions the Carrier shall be liable for any loss, or misdelivery of or damage to goods occasioned during transit unless the Carrier shall prove that such loss, misdelivery or damage has arisen from:

(a) Act of God;

(b) any consequences of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, insurrection, military or usurped power or confiscation, requisition, destruction of, or damage to property by or under the order of any government or public or local authority;

(c) seizure under legal process;

(d) act or omission of the Trader or owner of the goods or of the servants or agents of either;

(e) inherent liability to wastage in bulk or weight, latent defect or inherent defect, vice or natural deterioration of the goods;

(f) insufficient or improper packing;

(g) insufficient or improper labelling or addressing;

(h) riots, civil commotion, lockouts, general or partial stoppage or restraint of labour from whatever cause;

(j) consignee not taking or accepting delivery within a reasonable time;

Provided that the Carrier shall not incur liability of any kind in respect of a Consignment where there has been fraud on the part of the Trader or the owner of the goods or the servants or agents of either in respect of that consignment.

12. Limitation of Liability.

Subject to these Conditions the liability of the Carrier in respect of any one consignment shall in any case be limited:

(1) where the loss or damage however sustained is in respect of the whole of the consignment to a sum at the rate of £800 per ton on either the gross weight of the consignment as computed for the purpose of charges under clause 9 hereof or where no such computation has been made, the actual gross weight;

(2) where loss or damage however sustained is in respect of part of a consignment to the proportion of the sum ascertained in accordance with (1) of this condition which the actual value of that part of the consignment bears to the actual value of the whole of the consignment.

Provided that:

(a) nothing in this clause shall limit the Carrier's liability below the sum of £10 in respect of any one consignment;

(b) the Carrier shall not in any case be liable for indirect or consequential damages or for loss of a particular market whether held daily or at intervals;

[16a] I have chosen to make extensive quotations from conditions concerned, although they are similar and in parts largely identical. Their disposition, however, varies somewhat, as do certain exceptions from liability, including the limitation amount.

(c) the Carrier shall be entitled to require proof of the value of the whole of the consignment."

As a comparison certain clauses may be extracted from the 1956 edition of the Standard Trading Conditions of the Institute of Shipping and Forwarding Agents, which have come out in a later edition with no apparent changes regarding the pertinent clauses.

"1. All and any business undertaken by Express Container Transport Ltd. (hereinafter called "the Company") is transacted subject to the conditions hereinafter set out and each and every condition hereinafter set out shall be deemed to be a condition of any agreement between the Company and its customers.

2. The Company is not a Common Carrier. All goods are dealt with subject to these conditions and to the conditions stipulated by carriers and all other parties into whose possession or custody the goods may pass.

11. The Company shall not be liable for loss of or damage to goods unless such loss or damage occurs whilst the goods are in the actual custody of the Company and under its actual control and unless such loss or damage is due to the wilful neglect or default of the Company or its own servants.

12. The Company shall not in any circumstances be liable for damages arising from loss of market or attributable to delay in forwarding or in transit or failure (not amounting to wilful negligence) to carry out the instructions given to it.

13. In no case shall the liability of the Company exceed the value of the goods or a sum at the rate of £50 per ton of 20 cwt. of goods lost or damaged, whichever shall be the smaller. In the case of furniture, plate, china, glass, and household effects of any kind the liability of the Company in respect of any one article, suite of furniture, service or complete contents of a package, shall be limited to £10.

14. (a) In the case of goods of a value exceeding £100 per package or unit or the equivalent of that sum in other currency, the value will not be declared or inserted in the Bill of Lading for the purpose of extending the Shipowners' liability under Article IV, Rule 5 of the Carriage of Goods by Sea Act, 1924, except upon express instructions given in writing by the customer.

(b) In the case of Carriage by Air, no optional declaration of value to increase the Air Carrier's liability under the Carriage by Air Act, 1932, Article 22 (2) of the First Schedule will be made except on express instructions given in writing by the customer.

(c) In all other cases where there is a choice of tariff rates according to the extent of liability assumed by carriers, warehousemen or others no declaration of value (where optional) will be made for the purpose of extending liability, and goods will be forwarded or dealt with at owners' risk or other minimum charges, unless express instructions in writing to the contrary are given by the customer."

The Carrier's Act 1830 was amended in 1865, and also revised by the Railways Act of 1921 with regard to railways in the following respects: a) Certain articles were removed from the list; b) £ 25 instead of £ 10 was the maximum amount of liability in case the value of the goods had not

been declared; c) The Act was to apply also to carriage by water where a railway company is a carrier by land and water.[17]

The rights and liabilities of the railway companies were, however, also governed by the Railways Clauses Consolidation Act, 1845, and the Railway and Canal Traffic Acts, 1845–88.[18] The 1854 Railway and Canal Traffic Act laid down that any contract of carriage wherein the railway company limited its liability for negligence had to be in writing and signed by the owner of the goods or the consignor, and also *just and reasonable*.[19] A contract of carriage limiting the railway company's liability for negligence was often held just and reasonable if the carrier offered to the consignor a fair alternative of carriage under contract whereby the carrier undertook liability for his negligence at a reasonable additional charge. A custom thus came into being, in that the railway companies offered two alternative contracts of carriage at the company's risk and carriage at owner's risk.[20] Through the different Railway and Canal Traffic Acts[21] the common law rules concerning reasonable charges were further developed to impose upon the railway carrier a prohibition against undue preference;[22] a duty to provide reasonable facilities and a duty to carry;[23] and general legislation on rates and charges.[24]

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[17] HOLDSWORTH, The Law of Transport, p. 57.

[18] LESLIE, particularly p. 121 et seq. KAHN-FREUND, particularly p. 775 et seq. Cf. also BUTTERWORTH & ELLIS, p. 23 et seq.

[19] RIDLEY, p. 55 et seq. Cf. sec. 7 stating that every railway and canal company "shall be liable for the loss of or injury done to . . . in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void". Cf. LESLIE, p. 136 et seq.

[20] KAHN-FREUND, p. 223 et seq., particularly pp. 227–228.

[21] Cf. HOLDSWORTH, The Law of Transport, p. 66 et seq.

[22] Sec. 2 of the Act 1854. Cf. CLARKE, p. 209; GODDARD, Outlines, § 207; DISNEY, p. 261; and MACNAMARA, pp. 366 and 373.

[23] Sec. 2 of the Act 1854. Cf. DISNEY, p. 254 and MACNAMARA, p. 312. According to BOYLE & WAGHORN, vol. 1, p. 18, it "appeared to the Railway Commission that it was not open for a railway company who had once held themselves out as being common carriers of a given traffic, passengers e.g., to withdraw from their public profession on the ground that the traffic proved unremunerative (Winsford Local Board v. Cheshire Lines Committee (401) and Darlaston Local Board v. L. & N.W.R. (409)). The Court of Appeal, mainly on other grounds, overruled the Railway Commissioner's decision." Cf. above § 7.2.1.

[24] Sec. 24 of the Act 1888. Cf. CLARKE, p. 250 and DISNEY, p. 236.

By this last Act[25] every railway company was ordered to submit to the Board of Trade a revised classification of merchandise and a revised schedule of maximum rates. Sec. 33 (6) required that before any future increase in charges certain notices should be given and the 1894 Act, sec. 1 forbade any increases that were not justified. Through the Railways Act, 1921, sec. 32, charges were fixed by the Railway Rates Tribunal,[26] and the railway companies had then no power to change their rates. If any rate change was necessary the Tribunal had to decide it.

The relationship between the railway carrier and the consignor after the 1921 Act was governed by the provisions of the Standard Terms and Conditions,[27] which were given force of law, but the Transport Act of 1962[28] liberated the railway carrier from his common carrier status and this Act also laid down that the conditions of carriage by railway should be settled by the contract between the parties. Furthermore all statutory obligations concerning the publication of charges, undue preferences, or the granting of reasonable facilities for the carriage of goods or passengers have ceased to apply. Thus the railways now have the right to offer the same service at different rates.[29] In the British Railways Board's General Conditions of Carriage, as revised April 1, 1965 (based on the Railways Act 1965) the railway carrier's liability is set out in clauses 8–13, inter alia fixing the limitation of liability at a rate of £ 800 per ton of the gross weight of the consignment. These General Conditions do not require the approval of the Ministry of Transport, but the British Railways Board has to follow the lines of the transport policy, and the limitation amount cannot be changed without the approval of Parliament. The relevant clauses relating to the railway carrier's liability read:

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[25] HOLDSWORTH, The Law of Transport, p. 101 et seq.

[26] LESLIE, p. 332 et seq. Cf. KAHN-FREUND, p. 781 and MACNAMARA, p. 237 et seq.

[27] RIDLEY, p. 56. Cf. KAHN-FREUND, p. 227: "Of these the most important were Standard Terms and Conditions A and B, i.e. the conditions for the carriage of ordinary merchandise by goods train. From January 1, 1928, until December 31, 1962, all such merchandise carried without special contract was carried under Conditions A which incorporated the carrier's risk conditions. They thus took the place of the common law. If an owner's risk rate was in operation and the consignor requested in writing that the goods should travel at owner's risk, Standard Terms and Conditions B applied under which on principle the carrier was liable only on proof of wilful misconduct."

[28] E.g. KAHN-FREUND, pp. 9 et seq. and 201 et seq. Cf. sec. 43 in the Transport Act, 1962.

[29] Cf. a similar development in Sweden according to the Transportation Act 1963.

"Liability for loss or damage

8. Subject to these Conditions the Board shall be liable for any loss or misdelivery of or damage to merchandise occasioned during transit as defined by these Conditions unless the Board shall prove that such loss, misdelivery or damage has arisen from: —

(a) Act of God;

(b) any consequences of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, insurrection, military or usurped power or confiscation, requisition, destruction of or damage to property by or under the order of any government or public or local authority;

(c) seizure under legal process;

(d) act or omission of the Trader, his servants or agents;

(e) inherent liability to wastage in bulk or weight, latent defect or inherent defect, vice or natural deterioration of the merchandise;

(f) causalty (including fire or explosion).

Provided that: —

(i) where loss, misdelivery or damage arises and the Board have failed to prove that they used all reasonable foresight and care in the carriage of the merchandise the Board shall not be relieved from liability for such loss, misdelivery or damage;

(ii) the Board shall not incur liability of any kind in respect of merchandise where there has been fraud on the part of the Trader.

Circumstances in which liability will not be accepted

9. The Board shall not in any case be liable for loss, damage or delay, proved by the Board to have been caused by or to have arisen from: —

(a) insufficient or improper packing; or

(b) riots, civil commotions, strikes, lockouts, stoppage or restraint of labour from whatever cause, whether partial or general; or

(c) consignee not taking or accepting delivery within a reasonable time.

Liability for delay

10. The Board shall, subject to these Conditions, be liable for loss proved by the Trader to have been caused by delay to, or detention of, or unreasonable deviation in the carriage of merchandise unless the Board prove that such delay or detention or unreasonable deviation has arisen without negligence on the part of the Board, their servants or agents.

Defective privately owned wagons and sheets

11. In the event of any loss of, or damage or delay to merchandise arising from a defect in a wagon, roadrailer, container or sheet not belonging to or provided by the Board, and upon proof by the Board that such loss, damage or delay was not due to any negligence of the Board or their servants, the Board shall not be liable for: —

(a) loss of or damage or delay to merchandise contained in such wagon, roadrailer or container, or covered by such sheet arising from any such defect; or

(b) loss of or damage or delay to merchandise which may be suffered by the Trader by whom such defective wagon, roadrailer, container or sheet is provided and results from such defect.

Liability when loading or covering is performed by the sender

12. Where loading or covering is performed by the sender, the Board shall not be liable for loss of or damage or delay to merchandise so loaded or covered upon proof by the Board that such loss, damage or delay would not have arisen but for faulty and/or improper loading or covering on the part of the sender. For the purpose of this Condition merchandise shall not be deemed to be loaded or covered in a faulty and/or improper manner if loaded or covered in the manner directed by the Board.

Limitation of liability

13. Subject to these Conditions the liability of the Board under the preceding Conditions in respect of any one consignment shall in any case be limited: —

(i) where the monetary loss however sustained is in respect of the whole of the consignment to a sum at the rate of £800 per ton on the gross weight of the consignment;

(ii) where the monetary loss however sustained is in respect of part of a consignment to the proportion of the sum ascertained in accordance with (i) of this Condition which the actual value of that part of the consignment bears to the actual value of the whole of the consignment."

Provided that: —

(a) nothing in this Condition shall limit the Board's liability below the sum of £10 in respect of any one consignment; and

(b) the Board shall be entitled to require proof of the value of the whole of the consignment."

The Road and Rail Traffic Act, 1933[30] established a system of licensing for road haulage vehicles, designed to restrict vehicle operations to proved needs and to eliminate wasteful competition.[31] Thereby reasonable charges and reasonable service would be saved to the customers. The main licensing provisions contained in the Road Traffic Act, 1930,[32] and the Road and Rail Traffic Act, 1933, as subsequently amended, were consolidated in Part IV of the Road Traffic Act, 1960.[33] "The licensing system established by what is now the Road Traffic Act of 1960 serves the purpose of creating 'a fair basis of competition and division of function between rail and road transport of goods' and to cope with the 'actual or prospective congestion or overloading of the roads'".[34] Before a goods vehicle was allowed to be used on the road, a licence had to be secured from the licensing authority. There were three types of licences, A, B, and C licences.[35]

[30] Cf. STURGE & CORPE, pp. 27 et seq. and 64 et. seq. See also MCGRATH, p. IV: 81 et seq.

[31] CORPE, p. 1, and DENNIS & CORPE, p. 15 et seq. The Act was a result of a campaign started by the railways. Cf. GWILLIAM, pp. 128 et seq. and 168 et seq.

[32] Cf. e.g. SUNDBERG, Air Charter, p. 167.

[33] CORPE, p. 3. Cf. BRIGGS, p. 1 et seq., and DAVIES, pp. 425–426.

[34] KAHN-FREUND, p. 110 and references. See also KITCHIN, p. 42 et seq.

[35] CORPE, p. 4 et seq.

The A licence was for general public haulage and entitled its holder "to use the authorised vehicles for the carriage of goods for hire or reward," and also "for the carriage of goods" (otherwise than for hire or reward) "for or in connection with his business as a carrier of goods (whether that business is conducted by the use of road transport or any other kind of transport).[36] The standard period of duration for an A licence was two years and the maximum five years.

The B licence was for public haulage limited to certain goods or certain areas and covering also the carriage of the licensee's own goods.[37] This type of licence was issued for a maximum time of two years.

The C licence was for carriage by traders solely of their own goods,[38] and was granted for a period of up to five years.

Applications for A and B licences were examined by the licensing authorities, which had to consider whether the granting of a licence was necessary in view of existing transport services, and competitors had a right to raise objections. A decision of the licensing authority could be appealed to the Transport Tribunal. The C licence was granted on application, and as a rule it was granted as of right.[39]

Through the Transport Act of 1968 the licensing system has been changed.[40] For small lorries no licence will be required, but for the others an operator's licence will be issued. There will however be no examination of need, but only a test of suitability of the applicant from a personal and a financial aspect. Further a transport manager's licence has been introduced, which aims at binding at least one person by a personal responsibility in case the security regulations are not followed. The 1968 Act is to a high degree a security Act. Through this Act great changes have also taken place with respect to the organization of the nationalized transportation enterprises.[41]

Regarding successive carriage English law faces largely the same problems

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[36] KAHN-FREUND, pp. 115–116. See sec. 166 (2) and (5) of the Act.

[37] Op. cit. p. 136.

[38] Op. cit. p. 140.

[39] Except the need for these licences goods vehicle operators are then of course also bound by regulations concerning the fitness and loading of vehicles, driving hours, rest periods etc.

[40] See Part V of the 1968 Act. Cf. MCGRATH. p. IV: 83 and CHANDLER, pp. 7 et seq. and 22 et seq.

[41] See above § 2.2.

as Swedish law with respect to the liability of the carrier.[42] However, as distinguished from the American conditions there seem to be few particular problems regarding through rates.

As far as international carriage is concerned England is a party to both the CIM and the CMR conventions.

The provisions of CIM are not applied by legislation in the United Kingdom, nor do they apply to domestic carriage within England; they do, however, apply to *international* carriage within United Kingdom and to the carriage of goods between England and other countries party to the convention. The first CIM Convention to which England adhered was that of 1952, and the new revised Convention of 1961 was adhered to by England in 1963.

§ 8.2.2. Water Carriers

In case of water carriers a distinction has to be made between ocean carriage, coastal shipping and carriage by inland waterways.[43]

In ocean carriage there is no government control of the right to engage in business, charges and services, and for the rest there are mainly safety regulations.[44] Regarding the ocean carrier's liability COGSA governs in most cases, and in those cases where it does not apply, the ocean carrier is more or less free to contract out of his liability, also where he is a common carrier.[44a]

As for national shipping by water a distinction has to be made between privately and publicly operated[45] barges and vessels on the inland waterways and in coastal traffic. In the Transport Act, 1947 sec. 36 laid down that the British Transport Commission had certain rights to require acquisition of canal carrier undertakings and sec. 70 and 71 gave the Commission

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[42] See KAHN-FREUND, pp. 57, 321 et seq. and 325 et seq. Cf. HILL, p. IV: 70 et seq. and cf. particularly GRÖNFORS' study on "Successiva transporter".

[43] A distinction has also to be made between those who own canals and those who perform the business of carriage by canal barge, i.e. between "canal or inland navigation undertakings" in sec. 13 (1) (a) of the 1947 Transport Act and "canal carrier undertakings" in sec. 125 (repealed by the 1962 Transport Act). Cf. KAHN-FREUND, p. 81, and GWILLIAM, p. 197 et seq.

[44] I disregard subsidies.

[44a] Cf. above § 7.3. and DOR.

[45] Privately and publicly operated barges have nothing to do with the concept of common and private carriage, the former being a question whether ownership or disposal is of a private or public nature.

the power "to enter into and carry out agreements with any person engaged in coastal shipping for co-ordinating the activities of that person with those of the Commission, and, in particular, for facilitating the through carriage of goods, for the quoting of through rates, and for the pooling of receipts or expenses". Further a Coastal Shipping Advisory Committee was set up. The Transport Act, 1962 established the British Waterways Board, and its duties and powers were fixed in sec. 10, and they were further elaborated in the 1968 Transport Act sec. 104–115. But also the Railways Board retained under its control some coastal shipping services connected with railway traffic.[46]

The Waterways Board through the Transport Act[47] ceased to be a common carrier and has the same freedom of contract with regard to charges, terms and conditions as the Railways Board. The freedom of contract applies equally to "independent inland waterways undertaking."[48]

Sec. 53 in the Transport Act, 1962 took over earlier rules protecting coastal shipping against certain types of unfair competition, particularly from the railways,[49] and sec. 150 of the 1968 Act established a Committee, called the Railways and Coastal Shipping Committee to deal with the competition conditions affecting railways and coastal shipping.

The British Railways Board performs certain carriage by sea, and the conditions of carriage used show influence both from the law of inland transport and from the law of carriage by sea. The "General Conditions of Carriage" do not apply in such instances,[50] but there are special "Conditions of Carriage by Water" which may under some circumstances conflict with COGSA, not applicable to carriage between ports in Great Britain, Northern Ireland and Eire, where no bill of lading has been issued. The Hague Rules have obviously had an important influence on the content and wording of the "Conditions of Carriage by Water", particularly with respect to loss of, or damage, to goods. The exceptions from liability are a combination of the Hague Rules exceptions and the listed exemption clauses in the General Conditions.[51] Further the Railways Board as a

[46] These powers were inherited and no new service could be started without the approval of the Minister of Transport. Cf. KAHN-FREUND, p. 55.

[47] Sec. 43. Cf. KAHN-FREUND, p. 83 and § 8.2.1. above at note 28.

[48] Sec. 52. Cf. op. cit. p. 83.

[49] KAHN-FREUND, p. 77.

[50] Op. cit. p. 263.

[51] Op. cit. pp. 263–66.

carrier by water is not "liable for any loss of or damage to or loss or damage in connection with merchandise in any amount exceeding £200 per package or unit".[52]

Concerning the contract of carriage by inland waterways and in domestic coastal traffic the general principles of common law apply, and thus the liability of the carrier is basically depending upon whether he is a private or a common carrier.[53]

The British Waterways Board is not a common carrier, and has therefore no duty to accept consignments offered to it for carriage. According to the General Terms and Conditions of Carriage of Merchandise used by the Board, the basic principle is the common carrier liability but with a number of exceptions stated in the Conditions. The excepted perils resemble those in the British Railways Board's General Conditions but there are differences.[54] So for instance the maximum amount of liability is £400 per ton gross weight.[55]

In carriage performed by independent canal carriers there seems to be no standard terms and conditions. In certain traffic, goods are accepted for carriage only at owner's risk, while in other cases terms are used that are more similar to those applied by the Waterways Board. The conditions vary extensively and obviously common law principles have to be applied to the terms of these contracts.[56]

§ 8.2.3. Air Carriers

Under the postwar nationalization legislation in England the air corporations (BOAC and BEA) had a statutory monopoly of British scheduled services, and independent contractors were broadly speaking confined to charter work.[57] From 1949, and increasingly from 1952, the independents were allowed to develop new scheduled services, provided they secured Ministerial approval and operated technically, as associates of the corporations. The Civil Aviation (Licensing) Act, 1960 abolished the corporations' monopoly and provided for a licensing system, administered by an Air Transport Licensing Board (ATLB), to which the nationalized and inde-

[52] Conditions of Carriage by Water, Cl. 10 (1).

[53] KAHN-FREUND, p. 272.

[54] Op. cit. pp. 273–74.

[55] Op. cit. p. 345.

[56] KAHN-FREUND, p. 272. Cf. RIDLEY, p. 61.

[57] GWILLIAM, p. 191 et seq., and JENKINS, *passim.*

pendent operators could apply on an equal footing for licences for scheduled or charter services, or for revocation or variation of existing licences.[58] ATLB must have regard to an applicant's financial resources, staffing, organisation, the need for the proposed services, the adequacy of, and possible effect on, existing services, and any objections or representations made by interested parties. ATLB also has the general duty of furthering the development of British civil aviation. ATLB decisions can be appealed to independent commissioners, appointed by the Board of Trade.

As already discussed the common carrier doctrine may also be applicable to air carriers.[59] In English domestic air carriage, however, the Carriage by Air Order, 1952, applies.[60] These non-international rules contain some minor alterations as compared to the Warsaw Convention, and also three more important differences.[61] In international air carriage the Carriage by Air Act, 1932, based on the Warsaw Convention of 1929 prevails, regulating the liability and the exemptions therefrom, including a per weight unit limitation. In the Warsaw Convention the air carrier has to prove that he has not been negligent, and he is also free from liability where the damage occurred owing to the management and navigation of the airplane, but the Carriage by Air Act, 1961, based on the Hague Protocol, 1955, abolished this exception.[62]

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[58] See e.g. WHEATCROFT, p. 24 et seq. and WORCESTER, p. 119 et seq. In 1967 the Government set up a committee to enquire into the affairs of the civil air transport industry, including the methods by which it is regulated and controlled.

[59] See above § 6.3. Cf. also e.g. KAHN-FREUND, pp. 696–97.

[60] Only in some few cases of carriage by air the old common law applies, when namely the Warsaw Convention or the Carriage by Air Order, 1952, are not applicable. See RIDLEY, pp. 189 and 205. About the order, see MCNAIR, p. 192 et seq. and KAHN-FREUND, p. 702 et seq. Cf. also CHENG, p. 603.

[61] The domestic rules give the consignor a right to demand an air consignment note, but do not prevent the carrier from relying upon the rules if he does not issue one. Further the limitation of liability provision is somewhat differently written, and the domestic rules also impose a different limitation of the maximum damages recoverable from the carrier in respect of damages for delay.

[62] MCNAIR, at i.a. pp. 192 et seq. and 470 et seq. treats these statutes. Cf. also KAHN-FREUND, p. 697 et seq. The Guadalajara Convention of 1961 was given statutory effect in England through the Carriage by Air (Supplementary Provisions) Act, 1962.

§ 8.3. *United States of America*

§ 8.3.1. Railroad and Motor Carriers

Previously has been discussed the attitude of the American courts to contracts exempting common carriers from liability or limiting their liability to a certain amount.

"The Interstate Commerce Act continues the common law principles of common carriers liability for loss or damage to freight and, indeed, in one respect it extends that liability by requiring common carriers to accept liability for loss or injury occuring beyond their own lines."[1]

Section 20 of the Interstate Commerce Act as originally enacted concerned very little the carrier's liability, and the rail carriers continued to issue bills of lading containing clauses that relieved them from liability, often even in cases of negligence.[2]

Particular concern was shown the carrier's liability for any loss or damage occurring beyond its line of operation. In common law it is a well settled rule of both English and American courts that the initial carrier in a route of carriage, embracing the lines of two or more carriers, may wherever the common law prevails, by clear and express provisions in the shipping contract, exempt itself from liability for losses occurring beyond the end of its line.[3]

In its original wording the Interstate Commerce Act contained no provisions concerning the common carrier's liability for goods beyond its own lines when receiving them for shipment on their own lines. The contract for shipment could provide that the carrier was discharged from his obligation when the goods had passed safely into the hands of another carrier.[4]

This lack of regulation of the carrier's liability resulted in amendments being made to the Interstate Commerce Act, namely, by the Hepburn Act, 1906 (the Carmack amendment) and the Clayton Act, 1914 (the Cummins amendment). *In Re The Cummins Amendment*[5] it was said in this connection:

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[1] MILLER, p. 61. Cf. LEVY, pp. 327 and 852.

[2] Cf. above § 7.3. Clauses relieving common carriers from liability for negligence have usually been held unreasonable by the U.S. courts.

[3] This is a complicated question connected with the extent of the promise to carry, the actual performance and the general business activity of the carrier.

[4] BARNES, Limitation of Common Carrier's Liability, p. 79 et seq. Cf. KNORST, vol. 3, p. 157 et seq.

[5] 33 I.C.C. 682 (1915).

"For many years, if not, indeed, from the origin of railroad transportation in this country, common carriers by railroad have sought, by provision in shipping contracts, bills of lading, tariff publications, etc., to limit their common-law liability, not only as insurers against loss or damage to property received by them for transportation, but also as tortfeasors for loss or damage caused by their negligence. One method was by so called release, executed by shipper and carrier, and intended to be effective whether the loss or damage was due to negligence of the carrier or to other causes. The courts in different jurisdictions have differed as to the validity of such limitations, and they have been the subject of legislation in some of the states."

The Carmack amendment required the originating common carrier to issue a receipt or bill of lading for a shipment and made the initial carrier responsible to the holder of the receipt for damages occurring while the goods are in its custody or the custody of any succeeding carrier. Before the Carmack amendment was passed there had been no clear definition of the common carrier's liability in connection with interstate shipments, but with its passage the liability was set out in the receipt and was placed on the originating carrier.[6] Although the Carmack amendment made a common carrier "liable to the lawful holder thereof [bill of lading] for any loss, damage, or injury to such property caused by it", it did not forbid all limitation of the carrier's liability, but allowed released valuation in bills of lading, which caused several disputes,[7] and in 1915 the First Cummins amendment was passed, imposing on the carrier liability for the full loss or damage caused by it or by any connecting carrier regardless of any agreed limitation, the only exception being in the case of packaged goods where

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[6] See i.a. MILLER, p. 9 and BARNES, op. cit., p. 80 et seq. The material provisions of the Carmack amendment reads: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefore and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed:

Provided. That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

[7] See e.g. *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913). Cf. *Hart v. Pennsylvania R.R.*, 112 U.S. 331. (1884).

the carrier had not been notified of their character.[8] However, in 1916 the Second Cummins amendment was enacted whereby common carriers were allowed to lawfully limit their liability by released rates authorized by ICC.[9] This section of the Interstate Commerce Act was subsequently further amended—section 10, par. 11—whereby both the initial and the connecting carrier were made liable to the holder of the receipt or the bill of lading.

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[8] BARNES, op. cit., p. 82 et seq. The most pertinent part of this amendment reads: "That any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation . . . any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: Provided, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water."

[9] BARNES, op. cit., p. 90. The Second Cummins Amendment gave ICC power to authorize or order the establishing of "rates dependent upon the value declared in writing by the shipper or agreed upon in writing, as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released . . ." One exception was live stock, which had to be shipped subject to full recovery. Cf. WATKINS, vol. 1, § 2.27.

Under present terms of the Interstate Commerce Act, 49 U.S.C. § 1 et seq. the rail carrier is liable for all loss and damage, however caused, unless the result from an act of God, or the public enemy, restraint of princes, fault of a shipper or owner of the goods, or inherent vice of the goods. The rail carrier is liable for the full, actual loss or damage sustained by the goods, unless they have been shipped under "Released Rates" set out in a valid, filed tariff, in which case the limit of liability is that provided by the released rate tariff. The carrier whose fault has caused the loss or damage may always be held liable for it. In addition, because of the difficulty in many instances to establish where the loss or damage occurred, the statutes provide that the initial rail carrier, or the delivering one, may also be held liable for the loss, regardless of where the loss occurred.[10]

Carriage by lorry became more and more frequent, and prior to 1935 this business was largely unregulated. A motor carrier was regarded as a common carrier if his business was of such a nature, and he was then subject to the strict liability imposed on such carriers. But some particular difficulties arose in connection with the common carrier liability of motor carriers.[11] They often refused or were unable to pay for lost or damaged goods, and if the pressure for payment became too great they could rather easily move to another place and start in business anew. They attempted to limit their liability to nominal amounts, and often shipping receipts or bills of lading contained a provision to the effect that liability was limited to e.g. $50 per shipment. Prior to the Motor Carrier's Act there was the ordinary distinction between private carriers and common carriers also with regard to motor carriers, but this Act created a new category, *contract carriers*, and thereby a new difficulty arose with respect to the liability of these latter carriers. Through the Motor Carrier's Act the provisions in the Interstate Commerce Act were made applicable also to motor common carriers, which then had the same liability as the railroads for the safe delivery of their cargoes.[12] In accordance with the Act motor carriers are permitted to limit their liability for loss or damage if a lower rate is charged for hauling goods upon which the liability is limited. Numerous rates are published in the tariffs of the railroads, trucking companies and freight forwarders, subject to released valuations authorized by ICC in appro-

[10] Cf. corresponding provisions in CIM.

[11] RODDA, p. 150 et seq. and MILLER, p. 10 et seq.

[12] See Part II of the Interstate Commerce Act, sec. 219. Cf. also shipments via freight forwarders in Part IV of the Act, sec. 413.

priate orders, but motor carriers have used this right to a lesser extent than railroad carriers.[13]

Prior to 1887, carriers were free to make such rates on interstate transportation as they saw fit, subject only to the power of the courts to prevent unreasonable or unjustly discriminatory rates.[14] Unreasonable rates and discrimination, undue preferences and combining agreements among railroads necessitated legislation and the Interstate Commerce Act was enacted in 1887.[15] It was made applicable to all common carriers by railroad engaged in interstate or foreign commerce. While not applicable to common carriers wholly by water it included common carriers partly by water and partly by rail when under common control or arrangement for continuous carriage or shipment.

Sec. 1 required all rates to be just and reasonable, and provided that if otherwise they were unlawful. This was simply a statutory enactment of the old common-law rule. Sec. 2 made it unlawful for a common carrier directly or indirectly, to charge one person more than another for the same and contemporaneous service under substantially similar circumstances and conditions. Sec. 3 was a blanket prohibition against unreasonable or undue preference or advantage, or rather a limitation of what might be considered just and reasonable. Sec. 5 made it unlawful for common carriers to enter into any contract, agreement, or combination, for the pooling of freight, or for the division of the aggregate or net proceeds of their earnings. Sec. 6 stated that schedules of rates and fares were to be printed, made available for public inspection, and filed with the Interstate Commerce Commission. There was to be strict adherence to the published schedules, and ten days' public notice was required before rates could be advanced. Through several amendments the power of ICC over the ratemaking has been enlarged. Now there is a 30 days' notice for railroads, and ICC can suspend charges for 7 months.

With regard to motor carriers a distinction has been made by the Motor Carrier's Act 1935 between common, contract and private carriers. Con-

[13] RODDA, p. 154.

[14] *Texas & P.R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1906).

[15] Sec. 1. There are equivalent provisions in Parts II, III and IV. Concerning the development of the regulation of railroads and other carriers, see KNORST, vol. 1, p. 21 et seq., but also vol. 4, p. 1 et seq. Cf. particularly GUANDOLO pp. 216 et seq., 228 et seq., 299 et seq., 397 et seq., 496 et seq. and 529 et seq., LANSING, p. 189 et seq., and HILLMAN, *passim.*

cerning the common carriers the law provides that all rates and fares must be just and reasonable, and requires that they be published, and that thirty days' notice must be given in case of changes.[16]

The contract carriers are required to file their actual rates with the commission in order to supply the common carriers with the information on the actual rates being granted by their competitors. To reduce the rates the contract carriers have to give 30 days' notice. ICC may, after a hearing, prescribe the minimum below which the rate cannot go.

In order to give better service to the shippers there is need for cooperation between carriers for the interchange of traffic, both by carriers of the same mode and by carriers of different modes of transportation.[17] Railroads which are almost always obliged to establish through routes with each other and to give through rates, have co-operated between themselves to a greater extent than other carriers. Motor carriers of property are not required to establish through routes and joint rates with other motor carriers, but they are allowed to do it on a voluntary basis.[18] CAB has no authority to order through routes and joint rates from air carriers, but they have established these on a voluntary basis. There is nothing to prevent ocean water carriers from establishing through routes.[19]

Through routes and joint rates may also be established among the carriers of different modes of transportation. Most of this has been undertaken in connection with water carriers. ICC can order common carriers by railroad and water (ICC water carriers) to establish through routes and joint rates when it is in the public interest, but it has no power to compel through routes and joint rates between rail and motor carriers or between motor and water carriers. There has been, however, voluntary action for trailer-on-flatcar service (T.O.F.C.), and motor and water common or contract carriers are permitted to use rail T.O.F.C. offered to all shippers.[20]

On domestic rail-truck, rail-water or truck-water movements, the applicability of through rates, routes, and the liabilities of the participating carriers will ordinarily be specified in the tariffs covering the particular transaction.

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[16] KNORST, vol. 1, p. 35 et seq., and LANSING, p. 217 et seq.

[17] GUANDOLO, p. 271 et seq. KNORST, vol. 3, p. 36 et seq. Cf. p. 46 et seq. See also WILLIAMS, The ICC, p. 1349 et seq.

[18] Motor carriers of passengers however may be required to do it. Cf. KNORST, vol. 3, pp. 38–39. Cf. GUANDOLO, p. 278.

[19] KNORST, vol. 3, p. 39. Cf. GUANDOLO, p. 280.

[20] Cf. e.g. MILLER, p. 71.

Part I, section 11 of the Interstate Commerce Act states: "*Provided*, that if the loss, damage or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water . . ."[21]

§ 8.3.2. Water Carriers

Also in U.S. law a distinction has to be made between ocean and domestic carriage with respect to carriage by water.

The United States Maritime Commission, now known as the Federal Maritime Commission, was created through the Merchant Marine Shipping Act, 1936, which transferred to this Commission all the functions, powers and duties formerly imposed on the United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, the Merchant Marine Act, 1928 and the Intercoastal Shipping Act, 1933.[22] This Act also made it unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference association, understanding or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project by the Congress, or through it by any other agency of the federal government, lying with the continental limits of the U.S., at the same rates which it charges at the nearest port already regularly served by it.[23] A common carrier by water regulated by FMC has a duty to file with the Commission the rate that he is charging, but FMC has no power to set minimum or maximum rates, and there is no need to apply for a certificate or permit to operate as an ocean carrier. Conferences also have to file their tariffs with FMC.[24]

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[21] Bills are pending to give ICC more power and enable it to require through routes between truck lines and intermodal carriers.

[22] See above § 2.3.2. Cf. LANSING, p. 337 et seq. In GILMORE & BLACK, p. 754 et seq. is given an outline of the American governmental activity with respect to shipping.

[23] Sec. 205 of the Act. Cf. KNORST, vol. 3, p. 2, and ROBINSON, Admiralty Law, p. 466 et seq.

[24] GUANDOLO, p. 313 et seq. and KNORST, vol. 1, p. 51. Cf. above § 2.3.2. See also FRIHAGEN, p. 238 et seq., and Liner Conference System.

With respect to the ocean carrier's liability in foreign traffic the American COGSA containing substantially similar provisions to the British COGSA, is applicable.[25] When the former does not apply the Harter Act governs.[26]

The regulation of domestic water transportation was until 1940 carried out in a restricted manner by different agencies under a number of laws passed by Congress at certain intervals. One aspect of regulation was the water carrier operation related to rail transportation, over which ICC in 1887 gained jurisdiction, where they are both under common control or arrangement for continuous service. The Shipping Act, 1916, created the U.S. Shipping Board with authority to promote and regulate deepwater shipping. In domestic service this was limited to carriers operating regular routes in coastwise or intercoastal trade, and to common carriers on the Great Lakes.[27] Common carriers had to publish and file rates, fares and charges with the Board which could not, however, fix minimum or actual rates. The Intercoastal Shipping Act, 1933 required common and contract carriers operating in intercoastal trade via the Panama Canal to publish their actual rates, and further the law was amended in 1938 to give the regulatory agency, the authority to set minimum rates for domestic deepwater common carriers.[28]

In the period after the war 1914–1918 domestic shipping particularly in the coastwise and intercoastal trade, was subject to severe competition and declining earnings, and their regulation was felt necessary. The Transportation Act—Part III of the Interstate Commerce Act—placed domestic water carriers under the jurisdiction of the ICC.[29] Their regulation follows the same general pattern as that applying to motor carriers. Thus common carriers by water are required to have certificates of public convenience and necessity, while contract carriers by water have to secure permits and must publish their minimum rates. Private carriers are exempt from regulation.[30]

With respect to the liability of water carriers domestic voyages are governed by the Harter Act, but in this connection certain conflicts may

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[25] ROBINSON, op. cit., p. 501 et seq.

[26] Op. cit. p. 497 et seq.; KNAUTH, The American Law, p. 121 et seq.; and GILMORE & BLACK, p. 124 et seq.

[27] PEGRUM, p. 386 et seq. and ROBINSON, op. cit., p. 473 et seq.

[28] GUANDOLO, p. 316 et seq.

[29] KNORST, vol. 1, p. 41 et seq.; and also vol. 3, pp. 128–29; and GUANDOLO, p. 318 et seq.

arise.[31] So for example, on shipments moving via barge on the inland waterways of the United States, the common practice with respect to liability for loss or damage of cargo is based on a maximum liability of $ 500 per ton, net or gross, as rated. An extra charge has to be made for a higher limit of liability when such value is declared on the bill of lading at the time of the shipment. Obviously this figure is somewhat different from the corresponding figure in the U.S. COGSA.

§ 8.3.3. Air Carriers

At the outset the federal aviation policy was concerned with matters of navigation, safety and promotion. The main air traffic was at the start made up by air mail service, but soon the importance of passenger service increased. The first Air Commerce Act was passed in 1926, and provided for the construction and maintenance of civil air ways, aids to navigation, and regulation with regard to safety matters by the Department of Commerce. Financial difficulties and a number of accidents increased the demand for new and more efficient legislation, and in 1938 the Civil Aeronautics Act was passed.[32] This Act provided for the comprehensive control of civil aviation, and for the regulation of for-hire air transport engaged in interstate commerce similar to that prescribed for certain other carriers by the Interstate Commerce Act. A new body was created to carry out the provisions of the law, and functions previously exercised by the Department of Commerce and ICC were transferred to the Civil Aeronautics Authority.[33] A structural change was accomplished in 1940 and the name of the latter was changed to the Civil Aeronautics Board.[34] In 1958 the Federal Aviation Act was passed, which embraces all legislation in connection with the regulation of aviation, thus continuing the powers of the CAB.[35]

The Federal Aviation Act states a number of definitions and a declaration of policy to guide the Board in its economic regulation of air traffic.

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[30] GUANDOLO, pp. 104 et seq. and 133 et seq.

[31] ROBINSON, op. cit., p. 497 et seq., particularly p. 500 and note 71. Cf. RODDA, pp. 112–13.

[32] PEGRUM, p. 362 et seq. Cf. e.g. KNORST, vol. 3, p. 267 et seq. and FREDERICK, p. 107 et seq. Cf. LANSING, p. 302 et seq. and RICHMOND, *passim.*

[33] FREDERICK, p. 249 et seq. and CAVES, p. 123 et seq.

[34] PEGRUM, p. 364.

[35] KNORST, vol. 1, p. 53.

The principal task of the Board is the powers with respect to certificates of public necessity and convenience, rates, fares, and methods of competition.

The Act prohibits air carriers from engaging in air transportation unless they have a certificate of public necessity and convenience.[36] Certified carriers are not allowed to abandon a route without the permission of the Board,[37] and foreign carriers are required to have a permit from the Board to engage in transportation between the United States and another country.[38] Rates and fares must be published and the tariffs must be open to public inspection.[39] They must be strictly observed and all rebates are prohibited.[40] In the case of changes in rates there is a 30 days' notice requirement, and CAB may suspend proposals for such changes for 180 days.[41] Undue preferences or advantages are prohibited.[42] Certified air carriers are required to establish just and reasonable rates, reasonable through service with other air carriers, and adequate service, equipment, and facilities.[43] The Board may, after a hearing, prescribe the lawful rate to be charged, or the maximum and/or minimum rate. But with respect to overseas traffic of American lines the Board may prescribe maximum and/or minimum rates only and not the exact rate.[44] Air carriers may establish through service and joint rates and fares with other common carriers.[45] When such common carriers are subject to the jurisdiction of ICC, matters concerning joint arrangements may be referred to a joint board.[46]

CAB has proposed legislation that would authorize it to establish just and reasonable rates, fares, and charges in foreign air transportation in a manner similar to that now authorized with respect to domestic air transportation.[47]

With respect to the air carrier's liability the Warsaw Convention, as

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[36] Sec. 401 (a). Cf. GUANDOLO, p. 113.

[37] Sec. 401 (j).

[38] Sec. 402 (a). GUANDOLO, p. 146.

[39] Sec. 403 (a). Cf. KNORST, vol. 2, p. 3.

[40] Sec. 403 (b). Cf. GUANDOLO, p. 310.

[41] Sec. 403 (c).

[42] Sec. 404 (b).

[43] Sec. 404 (a). Cf. GUANDOLO, p. 307.

[44] Sec. 1002 (d). Cf. GUANDOLO, p. 304 et seq.

[45] Sec. 1002 (h) and (i).

[46] Sec. 1003 (a).

[47] CAB, Annual Report to Congress, 1968, p. 96. Cf. GILLIAND, p. 236 et seq.

proclaimed in 1934, applies in international traffic.[48] In domestic U.S. air carriage the common law liability is still the basis for the carrier's liability.[49] Since the beginning of carriage of property by air carriers have imposed a limitation on their liability.[50] There is no federal legislation on this subject and hardly even any state legislation.

Air carriers have always limited their liability, usually to the declared value of the shipments carried. The Civil Aeronautics Act, 1938—and the Federal Aviation Act, 1958—requires the carriers to file tariffs with the CAB, and in these tariffs the carriers' limitation amounts are found. United Airlines filed its first tariff in 1946, and their shipments were accepted subject to a released valuation not exceeding $ 50 for shipments of 100 pounds or less, or 50 cents per pound for shipments in excess of 100 pounds. The shipper has the opportunity to declare a value in excess of the above amounts, and to pay an additional 10 cents charge for each $ 100 or fraction thereof above the released value. This limitation has been adopted by other carriers and is to-day the usual limitation figure among air carriers.[51] With respect to the regulation of air traffic, such covers at present certificates of public convenience and necessity to common carriers offering trunk service, feeder, and local services, etc., but CAB does not have the authority to regulate the economic affairs of contract carriers, although it has continually sought this power from Congress.[52]

§ 9. *The Concept of the Common Carrier as determined in certain Statutes*

§ 9.1. *In General*

It must be appreciated, that the common carrier was a concept developed over a long period of time, and that its use in different statutes is by no means self-evident, particularly in the case of international conventions.

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[48] See BILLYOU, p. 123, and KNORST, vol. 1, p. 53.

[49] As for passengers the common carrier liability at common law is not that of an insurer, but particularly in U.S. law it has been said, that the carrier has to exercise the highest degree of care.

[50] RHYNE, p. 69 et seq.

[51] Traffic World, August 12, 1967, pp. 72–73. Compare BILLYOU, p. 119 et seq. Cf. also Legal Aspects, p. 47: "... the domestic air carrier may limit his liability for cargo damage by setting forth reasonable limitations in his tariff filed with the CAB. If the CAB accepts the tariff, thereby implying reasonableness to any limitation on liability, the terms and conditions of the tariff automatically become a part of the contract of carriage between the shipper and the air carriers." Cf. also ANDERSON, p. 135 et seq.

[52] CAB, Annual Report to Congress, 1961, p. 10.

It may rather be said, that a statute governing the conditions and liabilities of carriers is not immediately directed to the concept of common carrier, although this concept may still have some implications also where legislation has been passed. In this section the aim is to examine some statutes of a private law nature, particularly the Harter Act and the COGSA, with reference to the concept of the common carrier.

A survey of the relevant statutes shows, that legislation in most instances superseded the common carrier doctrine at common law with respect to the contractual relation between the individual carrier and the individual customer, as well as to the general competitive relation between carriers, carriers and customers, and carriers and authorities. At this point I am mainly concerned with the former, but in spite of the theoretical difference—which is less clear in American than in e.g. Scandinavian law—between these two relations it is necessary to observe that the border line is not always very distinct. It may be broadly stated that the private and the public law relations are governed respectively by separate statutes. Such is the case with regard to the former aspect e.g. national legislation based on the Hague Rules, the Warsaw Convention and the CMR, and with respect to the latter aspect acts such as the different Transportation Acts, the Merchant Marine Act, the Shipping Act, and the Federal Aviation Act, while e.g. the Railways Clauses Consolidation Act and the Interstate Commerce Act provide evidence of the relative closeness between these sets of rules.[1]

For curious reasons it may be mentioned that in a proposed convention concerning the carrier's liability in international carriage by bus of passengers and luggage "carrier" has been suggested to mean professional carrier.

Business practices and competitive patterns varied between different branches of the transportation industry and consequently the measures taken by the legislator in this respect varied. The legislation carried through in most instances was a compromise between the very harsh attitude of the common law regarding the common carrier's liability for loss of, or damage to goods, and the theory of freedom of contract allowing the

[1] Not even in Swedish law the distinction between public law and private law is strictly upheld. The Swedish Air Traffic Act, 1957 thus contains provisions both with respect to the air carrier's liability and the right to engage in the business of air carriage. A similar construction is found in the legislation concerning the railroads, but then also there is a theoretically fundamental difference, since the Swedish railroads are government operated.

carrier, at least theoretically, any limitation of his liability. Naturally one may ask if there is any contract at all if a carrier has undertaken to carry, and simultaneously exempts himself from any liability whatsoever with respect to the goods.[2]

Conventions like the Brussels and the Warsaw conventions, the CIM, and the CMR, and the national legislation based on them, might then be regarded as compromises between carrier and cargo owner interests, and they express a distribution of liability on the two interests, which was accepted by the legislator as reasonable at the time when these acts were passed. Thus no absolute liability was placed upon the carrier but certain risks were placed upon the cargo owner, and one may possibly in broad terms state as a "general principle of transport law"[3] that the carrier is liable for his own negligence and that of his agents with the burden of proof placed upon him to *exculpate* himself. There are, however, a number of exceptions from this general principle both in European and American legislation. And then, of course, if this be stated as a general principle of transport law, it must be kept in mind that the common carrier doctrine is still regarded as basic in Anglo-American law. Thus an inconsistency has to be recognized between these two principles which might both be regarded as basic, and this conflict may be regarded as a consequence of a "contractual approach" as distinguished from a "relational approach". Firstly, it should be observed that certain acts are explicitly based upon the concept of common carrier, such as the Carrier's Act, the Interstate Commerce Act, the Pomerene Act, and the Shipping Act, others mention it more *en passant* like the Federal Aviation Act, while many acts do not at all refer to this concept. The problem then is whether the common carrier concept nevertheless must be regarded as the basis for the interpretation of the legislation, or whether it should be considered obsolete in these connections.

Despite the common carrier doctrine having lost a great deal of its immediate importance, since statutes without any explicit connection with the concept of common carrier to a large extent has superseded common law in practical use, the term is still and carriers are often, referred to as

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[2] COOTE, p. 4 et seq. As for the doctrine of fundamental obligation see above § 7.3. notes 35 et seq.

[3] GRÖNFORS in Allmän transporträtt, 2. ed. pp. 40 and 41 and Successiva transporter, pp. 32 and 231 also referring to the Swedish case NJA 1947 p. 539 uses the term "general principles of transport law" but warns as to the vagueness of the term.

common or private carriers also where this should be of less significance owing to legislation.

It needs to be repeated that the split between separate acts governing different aspects cause some problems. The modern private law legislation is based on the promise to carry, while public law legislation lays down that a carrier performing certain types of carriage is required to have a licence. These different approaches often cause in practice great confusion, particularly in European-American discussions, and may to a certain extent be explained by the concept of the common carrier being regarded as a link between these two starting points.[4]

The Warsaw Convention regulating the relationship between the air carrier and his customers in international air carriage, has led to some legal debate with respect to the question of who is considered a carrier.[5] The air carrier's liability was revised by the Hague Protocol, 1955.[6] Neither the convention itself nor the national legislation refers to the term "common carrier" but uses the word "carrier" only. A basic prerequisite for the application of the Warsaw Convention is that a contract of carriage has been entered into and only then will it govern the relation between the parties who made the contract.[7] The main questions discussed in this connection were whether the Warsaw Convention applied also to "air charter", and the question concerning the status of the air carrier within the meaning of the convention in cases of charter agreements where the charterer in his turn sold all, or some space of the aeroplane, to one or more subcharterers.[8] The Guadalajara Convention, 1961 "for the unification of certain rules relating to international carriage by air performed by person other than the contracting carrier" however has eliminated most of

[4] See below §§ 9.3., 10.3., and in the Summing up.

[5] It has become part of British law through the Carriage by Air Act 1932, and was proclaimed by the American president in 1934 as part of American law.

[6] In England the Hague Protocol received the force of law through an amendment to the Carriage by Air Act in 1962, while it has not been accepted by the Americans. About the tense situation whereby the Americans barely failed to withdraw from the Warsaw Conventions, see LOWENFELD & MENDELSOHN, p. 497 et seq.

[7] See art. 1 no. 2; art. 3 no. 2; art. 4 no. 4 and art. 5 no. 2 of the Convention.

[8] E.g. SUNDBERG, Air Charter, pp. 214–310 and GRÖNFORS, Air Charter, p. 32 et seq. with references.

[9] The amendment to the Carriage by Air Act, 1962 put into force the Guadalajara Convention in British law.

these difficulties.[9] Suffice it to say that the concept of common carrier apparently has little significance in these connections.

The British Carrier's Act of 1830 on the other hand, as we have already seen, is explicitly based on the concept of common carrier.[10]

The Pomerene Act, 1916[11] regulating the bill of lading as a commercial document is self evident in so far as it concerns the question, whether it applies only to common carriers, or to private carriers as well, as its first section reads: "That bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this act."[12]

In international conventions the specific Anglo-American concept of common carrier is obviously not applied, while it may have some bearing on the interpretation of national legislation which has been enacted on the basis of the convention. In some "purely national" statutes the concept has been applied, but this can by no means be regarded as a general rule,

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[10] See above § 8.2.1.

[11] The Federal Bills of Lading Act, 1916 was derived from the Uniform Bill of Lading Act. See KNAUTH, The American Law, p. 306. The British Bills of Lading Act, 1855 in its turn does not refer to the concept of common carrier.

[12] This could be compared to the wording the Uniform Bill of Lading Act, section 1. Cf. KNAUTH, op. cit. pp. 323–324. In view of the uniform bill of lading prescribed by the ICC all interstate shipments are deemed to be under the right and liabilities thereof, *New England Fruit & Produce Co. v. Hines, Director General of Railroads*, 116 Atl. 243 (Sup. Ct. of Errors of Connecticut, 1922), and where a railroad receives an interstate shipment without issuing any bill of lading or making a contract with the shipper its liability is governed by the terms of the uniform bill of lading published and filed with the ICC, *Lazarus v. New York Cent. R.R.*, 271 F. 93 (DC New York, 1921). Through ocean bills of lading issued by railroad carriers under the Interstate Commerce Act are subject to the COGSA, c.f. POWERS p. 214.

The documents used for transportation in the United States are among others:

(1) for shipment via railroad, common carrier truck and common carrier barge line

a) Uniform straight bill of lading—not negotiable.

b) Uniform Order bill of lading—negotiable.

(2) for shipment via air—Domestic Airbill—non-negotiable.

(3) for shipment to off-shore destinations via water carrier—Ocean bill of lading, which may be either negotiable or non-negotiable.

(4) for shipments via R.E.A. Express or Air-Express—Express Receipt—non-negotiable.

particularly in British law.[13] This leads to the question whether the general conditions in transportation may be said to have changed to a degree, where the concept of the common carrier is impractical, whether, even if no directly used the concept still has importance with respect to the interpretation of the connected legislation, or whether, when directly applied, its substance is different from that at common law.

§ 9.2. *The Harter Act*

The Harter Act of 1893[1] was passed in order to give some uniformity to the carrier's liability in water carriage, and impose on the shipowner certain duties and liabilities from which he should not be allowed to exempt himself. Through it the carrier is barred from unlimited exemption by contract but at the same time he is granted a number of exceptions from liability. While the U.S. COGSA covers foreign traffic from and to the United States, the Harter Act deals with most of the other U.S. seaborne trade.[2]

The Pomerene Act is attached to the concept of "common carrier", and the COGSA to the concept of "carrier", but the Harter Act is hinged to neither of these terms, but refers to "manager, master, agent, or owner" in its first section, and to "the vessel, her owners, agent or charterer" in

[13] See the following § and also above in § 8.2.

[1] The Harter Act was introduced because of the strong shipper interests in the U.S. to protect them from excessive carrier limitations of liability. In *the Willdomino*, 300 F. 5 (3 CCA, 1924), and 270 U.S. 641 (1925), the Circuit Court of Appeals after havin stated the common carrier's "insurer liability" at common law, said: "The law however, recognized the right of the carrier to limit in many particulars its common-law liability by special agreements or stipulations in the bill of lading. But in America it was established that a common carrier by sea could not so exempt itself from liability to the owner of cargo for damage arising from the negligence of the master or crew of the vessel . . . To meet the ever increasing attempts further to limit the liability of the vessel and her owners by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, negligence and other causes of liability by which the common-law responsibility of carriers by sea was being frittered away the Harter Act was passed."

[2] ROBINSON, Admiralty Law, pp. 495 and 497 et seq., KNAUTH, The American Law, pp. 121 and 163 et seq., and GILMORE & BLACK, p. 124 et seq.

[3] WRIGHT states at p. 602 that "the applicability of the various sections of the Harter Act to the transportation contracts of private carriers by sea is still more or less unsettled". KNAUTH, op. cit. p. 176 states that private carriage is not governed by the Harter Act and refers to *the G.R. Crowe*, 294 F. 506 (2 CCA, 1923); *the Blue Crest*, 1937 AMC 719 (2 CCA, 1937); *the Ettore*, 1933 AMC 323 (2 CCA, 1933); *the Westmoreland*, 1936 AMC 1680 (2 CCA, 1936); and *the Tregenna*, 1941 AMC 1282 (2 CCA, 1941).

its third section. The question has arisen several times whether the Act applies to all water carriers, or only to common carriers, or whether some sections of the Act apply to both common and private carriers, while others cover common carriers.[3] Robinson stresses that "[n]either all of the Harter Act nor any of the Carriage of Goods by Sea Act apply directly to charter parties".[4]

The Harter Act superseded common law within its sphere, enacting a mandatory minimum liability for the carrier. Nevertheless the common law is still in the background, important both in filling up any vacuum and influencing the interpretation of the rules. Section 4 of the Harter Act makes it a duty of the shipowner to issue a bill of lading to the shipper, and sections 1 and 2 make it unlawful for him to insert in the bill of lading or shipping document a clause exempting him from certain liabilities.

At common law carriers had a strict liability for seaworthiness, but in the Harter Act there is only a duty of the owner to exercise due diligence to make the ship seaworthy. Thus the court said in *the Agwimoon:*[5] "Since this is a private contract of carriage the Harter Act, § 2 — — —, does not apply of its own force. But it has been expressly incorporated in the charter and thereby becomes applicable in all its terms. — — — It therefore reduces the otherwise absolute warranty of seaworthiness to an obligation to use due diligence only."[6]

In *Southern Pacific, S.S. Co. v. New Orleans Coal & Bisso Towboat Co.*[7] it was stated that sec. 1 of the Harter Act does not apply to private carriers.

In *the Monarch of Nassau*[8] the court found, that a charter of an entire ship to carry bananas from Haiti to Miami for one charterer was a contract of private carriage and not subject to the Harter Act.[9]

In a number of cases it has been held that sections 1 and 2 of the Harter Act do not apply to a private carrier. The court said in *the G.R. Crowe:*[10] "We think

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[4] Admiralty Law, p. 496.

[5] 24 F. 2 d. 864 (DC Maryland, 1928), aff'd 31 F. 2 d. 1006 (4 CCA, 1929).

[6] See also *Fort Gaines*, 1927 AMC 1778 (DC Maryland, 1927); *John Francis*, 1925 AMC 1624 (DC Florida, 1925); *Golcar S.S.Co. v. Tweedie*, 146 F. 563 (DCSD New York, 1906); *the Fri*, 154 F. 333 (2 CCA, 1907); and *the Carib Prince*, 170 U.S. 655 (1897).

[7] 43 F. 2d. 177 (DCED Louisiana, 1930).

[8] 155 F. 2d. 48 (5 CCA, 1946). It merits to be stressed that the court used the wording *contract of private carriage.*

[9] See also *the Munamar*, 1927 AMC 1437 (DCSD New York, 1927); *the Cornelia* 1926 AMC 1337 (DCSD New York, 1926); and *the Elizabeth Edwards*, 1928 AMC 1281 (2 CCA, 1928).

[10] 294 F. 506 (2 CCA, 1923).

the language of sections 1 and 2 so clearly does not comprehend a case of a private carrier, and so clearly relates to the duties of a common carrier that, in the absence of controlling authority to the contrary, we need do no more than read these sections of the statue to sustain the conclusion of the court below in that respect."[11]

It has also been frequently held that a private carrier by water may make its own contract for carriage, and will not be bound by the Harter Act, unless it is expressly incorporated in the charter agreement.[12]

In *the Blue Crest*[13] the respondent alleged that section 3 of the Harter Act should be read into the agreement on the theory that this law must be deemed to have been part of the contract. The court said: "If respondent had been a common carrier this would be done, Crowe, 294 F. 506. If a private carrier expressly so contracted for release from such liability it would be allowed to do so, Warner Sugar Refining Company vs. Munson S.S. Line, 23 F. (2d) 194 (DC), 1927 AMC 1437, aff'd 32 F. (2d) 1021. Nothing of this sort appears here. Respondent seeks to apply a portion of this legislation (sec. 3), without regard to the purpose of the legislation and on a theory that it must apply by reason of "its own force" to private carriers and bailees as well as to common carriers." Quoting *the Delaware*[14] and *the Jason*[15] where it was concluded that the Harter Act should be taken as a whole, the court deemed the Harter Act sec. 3 not to be part of the contract, unless expressly agreed to.

In *the Fort Gaines*[16] the court stated that section 2 of the Harter Act apply only to common carriers, while section 3 apply to both common and private carriers.

In *the Alberta M.*[17] the ship pleaded the Harter Act, although this was not mentioned in the contract. The court citing cases pro and con finally allowed the ship the benefit of sec. 3 of the Harter Act, and referring to *the Fort Gaines* it stated that in relation to private carriers there was a distinction between sections 2 and 3 of the Harter Act. The court said: "To put the matter quite badly, it would seem that to exclude private carriers from the provisions of section 3, in the absence of an express contract, would require reading into the act words to

[11] See also *Robin Gray*, 65 F. 2 d. 376 (2 CCA, 1933); *the Westmoreland*, 86 F. 2d. 96 (2 CCA, 1936); and *the Wildenfels*, 161 F. 864 (2 CCA, 1908).

[12] *The Fri*, 154 F. 333 (2 CCA, 1907); *the G.R. Crowe*, 294 F. 506 (2 CCA, 1923); *Fort Gaines*, 24 F. 2d. 849 (DC Maryland, 1928); *the Blue Crest*, 89 F. 2d. 865 (2 CCA, 1937); *Oakley C. Curtiss*, 4 F. 2d. 979 (2 CCA, 1924). Cf. also *Hercules Powder Company v. Commercial Transport Corporation and barge Chem VI*, 1968 AMC 171 (DCND Illinois, 1968) where it was stated: "Private carriers are exempt from the purview of the Harter Act limitation of liability provisions."

[13] 89 F. 2d. 865 (2 CCA, 1937). The quotation is from 1937 AMC 276 (DCED New York, 1937), aff'd 1937 AMC 719 (2 CCA, 1937).

[14] 161 U.S. 459 (1896).

[15] 225 U.S. 32 (1912).

[16] 32 F. 2d. 154 (4 CCA, 1929).

[17] 60 F. 2d. 154 (DCED New York, 1932).

the effect that: 'The owner of any vessel' as provided in section 3 hereof, shall not apply to a private carrier; and 'the vessel' as therein referred shall not apply to a vessel engaged in private carriage, unless the bill of lading or shipping document shall in terms incorporate reference to this statute—a process of amendment which lies beyond the judicial province."

But in *the Herkimer*[18] section 3 of the Harter Act was found not to apply to a private carrier: "— — — if, as in the G.R. Crowe, 1924 AMC 5, sections 1 and 2 of the Harter Act do not apply automatically to a private carrier, it would be illogical to hold that sec. 3, in the absence of a specific agreement should apply."

In *Sun Co. v. Healy*[19] it was held that section 5 of the Harter Act applies to both private and common carriers, and in *the Ferncliff*[20] the question whether the Harter Act was applicable was complicated by the fact that the claim in this case was launched by a holder of a negotiable bill of lading. The court referred to Carver,[21] to Scrutton[22] and to a number of cases, finding that although the Harter Act is not in its terms limited to common carriers, its inapplicability to private carriers has been established by a series of court decisions. Nevertheless the court concluded that in the case of a bona fide holder of a negotiable bill of lading, the bill of lading must be held to be subject to the Harter Act, whether common or private carriage is involved.[23]

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[18] 1930 AMC 1596 (DCED New York, 1930).

[19] 163 F. 48 (2 CCA, 1908).

[20] 1938 AMC 206 (DCED Maryland, 1938).

[21] Sec. 152, 150.

[22] Pp. 191, 192.

[23] This question is of an intricate nature, and it may be asked, whether a bill of lading may have an influence on the character of transportation service in itself. As a matter of principle this should not be the case, as the character of common carriage is determined by the manner in which the business is carried out, but then of course a bill of lading issued may be one of the elements in this determination. However, it must also be recalled that the Pomerene Act applies only to common carriers. In other words there is a connection between the use of bills of lading and common carriage. In *Coastal States Petrochemical Co. v. Montpelier Tanker Comp.*, 1970 AMC 1183 (DCSD Texas, 1970), partly relying on the *Heinz Horn*, 404 F. 2d. 422 (5 CCA, 1968) the Court stated that the cargo "was carried under a contract between plaintiff and defendant known as a charter party. There were no bills of lading issued and a manifest served as a receipt. The plaintiff was the owner of the cargo at the time it was loaded and when it was discharged from the ship. Accordingly, the carriage was entirely private and not common carriage. The charter party's terms did not incorporate any carriage legislation such as the Harter Act or U.S. Carriage of Goods by Sea Act, and the relationship of the parties, their duties and obligations, are therefore measured solely by the contract and not by any such legislation." The indicated problem is equally if not even more apparent with respect to COGSA, since the intention behind this legislation was to safeguard above all the bill of lading as a document of title, and will be further discussed in § 9.3.

No final conclusion can be drawn from the cases cited. It is clear that the Harter Act is applicable to all common carriers, i.e. in case of common carriage by water the Harter Act governs—unless of course the U.S. COGSA is applicable. Further several cases clearly express the opinion that the Harter Act does not apply to private carriage. But then also a number of cases establish that parts of the Act apply to both private and common carriage, while others apply only to common carriage. If the Harter Act shall govern also with respect to a private carrier, this means that he is not free to exempt himself from liability but he is bound by the minimum liability in the Harter Act. However he is then also automatically exonerated from liability in some stated circumstances. That is, he does no longer have the common law liability, and he is not free to exempt himself from liability, but on the other hand the law has rendered him certain circumstances when he is automatically exonerated from liability. It seems evident that if one or some sections of the Act shall apply to a private carrier, then the whole act shall apply, unless the contrary were clearly stated, and it appears to me somewhat peculiar to say as some courts have done in the above cases, that some parts of the Act apply to private carriage while others do not. If a private carrier is allowed to limit his liability freely at common law, then he also ought to specifically contract out of it, to avoid the risk that a court would regard the clause ambiguous and not accept it. To my understanding the Harter Act must be regarded as primarily aimed at the protection of the customer in common carriage or similar activities, and in case of private carriage the contract made up should govern the relation between the parties without any interference, whether beneficial or unfavourable to the carrier, from legislation that is not by clear word applicable. This is to say that the legislator may have deliberately chosen to avoid the terminology of common and private carriage, although this must nevertheless be influential.

§ 9.3. *The U.S.Carriage of Goods by Sea Act*

The Brussels Convention of 1924—commonly referred to as the Hague Rules— became a part of British law in 1924 through the British Carriage of Goods by Sea Act, and in the United States of America through the U.S. Carriage of Goods by Sea Act, 1936. Except for some points of lesser

importance in this connection, there are no divergencies between these two acts.[1]

Very often lawyers in their pleadings, as well as courts in their opinions use the term common carrier in cases where COGSA is involved.[2] As a result of the Brussels Convention shipping and cargo interests reached an international compromise to apportion the risk of the adventurous transportation of goods by sea; through the enactment of COGSA ocean carriers were limited in their efforts to exempt themselves from liability for loss of or damage to goods, whereby the value of the bill of lading as a negotiable document was increased.[3]

COGSA defines in its first section the carrier as including "the owner or the charterer who enters into a contract with a shipper",[4] and the question then arises if this carrier concept has any connection with the common carrier doctrine. This issue could be regarded from several angles. It is quite clear that Britain was a dominating party at the Hague negotiations, its law and language being of particular importance in international shipping.[5] The common law therefore had a special bearing on contracts concerning the international ocean carriage of goods. On the other hand the common carrier doctrine was not embodied in the law of most of the other countries contracting to the Brussels convention. Furthermore, the main issue of the Convention was to protect the small shipper from unreasonable terms in the contract of carriage, and above all to protect the

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[1] The U.S. COGSA is found in U.S. Code, Title 46, sec. 1301 et seq. As the Pomerene Act is referred to in this chapter, the U.S. COGSA, sec. 1303 (4) should be kept in mind: "... Provided that nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, ... commonly known as the 'Pomerene Bills of Lading Act'." See e.g. KNAUTH, The American Law, pp. 79, 86–88, and POWERS p. 17.

[2] The cases and literature with which I am dealing in this section contain further references to other cases.

[3] The circumstances leading to the initiation of the Brussels Convention are set out in e.g. GRÖNFORS, Allmän transporträtt, 2. ed., p. 28; KNAUTH, The American Law, p. 115 et seq.; POWERS, p. 4 et seq. In the *Falconbridge Nickel Mines, Ltd, v. Chimo Shipping, Ltd.* [1969] 2 Lloyd's Rep. 277 the Exchequer Court (Quebec, admiralty district) undertook a thorough analysis of the relation between the contract of carriage and the Canadian Water Carriage of Goods Act 1936.

[4] See SCRUTTON, p. 405; cf. the discussion above in § 3.

[5] For an analysis of interpretation of conventions see GRÖNFORS, Om konventionstolkning, SUNDBERG, Uniform interpretation of Uniform law, and LØDRUP, Luftfart og ansvar, § 3.2.

bill of lading holder in order to preserve the bill of lading as an international negotiable document.

The question to what degree the concept of common carrier is implied in COGSA has been discussed in jurisprudence but cannot be regarded as definitely settled yet. Healy and Currie[6] thus state their opinion, citing as authority the *Instituto Cubano de Estabilizacion del Azucar v. T/V Golden West*[7]: ". . . it is inaccurate to consider COGSA as statutory regulation of common carriage, as distinguished from private carriage. It is generally considered that if any part of a vessel is available to the public, the owner is a common carrier, even though the other portion may be taken up by cargo shipped under a special charter. COGSA applies not only to the carriage of goods under bills of lading on vessels engaged wholly or partly in common carriage, but also to carriage on vessels under voyage charter, from the time the bills of lading issued for the cargoes become the contracts of carriage by negotiation to third parties. COGSA should therefore be considered as statutory regulation of bills of lading and similar documents of title which evidence contracts of carriage by water, whether the carriage be private or common, as distinguished from charter parties and other contracts of affreightment, which do not also serve as documents of title."

A similar view may be discerned in Carver.[8]

Tetley[9] advocates the same opinion in words close to those expressed by Healy and Currie: "The Rules make no distinction and apply to common carriage as well as private carriage, because the criterion is neither private nor public carriage, but whether there is a contract of carriage by virtue of a bill of lading or similar document of title."

The question whether COGSA in case of common carriage is mandatory without regard to the contract is illustrated from a somewhat different

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[6] P. 502.

[7] 246 F. 2d. 802 (2 CCA, 1957). Cf. *Jefferson Chemical Company v. M/T Grena*, 292 F. Supp. 500 (DCSD Texas, 1968), where the court stated (p. 503): "The application of COGSA does not depend upon the fact of the GRENA being engaged in public or private carriage." The court further concluded (p. 504) "that the bills of lading issued for the two shipments in question here were nothing more than receipts for the cargoes shipped, and that the Charter Party represented the actual agreement between the parties. I also find that COGSA does not apply to a bill of lading which remains in the hands of the charterers."

[8] Vol. 2, sec. 67.

[9] P. 2.

angle in *the Temple Bar*.[10] In this case it was held, that a vessel owner did not, by incorporating in a charter party provisions of COGSA, convert the contract of carriage from that of a private to that of a common carrier, in effect assuming liability of an insurer, since all that the owner did by agreeing to become subject to the provisions of the act was to contract that his liability as private carrier might be different from that which the law would otherwise impose.

In some cases however the courts have expressed a contrary view. The Court of Appeal thus stated in *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*:[11] "Universal [the shipowner] is a common carrier and its legal relations may be affected by public interest. Congress has recognized this, with regard to shipment of cargoes out of the ports of this country in ocean going vessels, through enactment of the Harter Act, 46 U.S. Code sec. 190, et seq., and the Carriage of Goods by Sea Act (COGSA), 46 U.S. Code, sec. 1301, et seq."

In the *Jefferson Chemical Company v. M/T Grena*[12] the Court of Appeal took a firm position as to the question concerned.

In this case Jefferson, the appellant, had entered into a contract, a tanker voyage charter party (Warshipoilvoy) concerning shipment of various chemical products on owners' ships. The appellant had agreed to ship about 10.000 tons a year of these products and the charter party did not name a specific vessel but rather pledged "Mowinckels' tonnage" [the shipowner] to the charterer on a time demand basis and permitted the charterer to take up the full reach of a vessel, although it was not actually contemplated by the charterer that it would do so during the term of the agreement. The charter party also provided for the issuance of bills of lading by the master in due course pursuant to the charter party and subject to the terms and provisions thereof.[13]

The court stated[14]: "Jefferson did not agree to employ the "entire ship", . . . or "the full capacity of the ship", . . . The essence of a charter agreement is that the charterer employs the entire ship or a substantial portion of it for a particular voyage or a particular period of time from one holding himself out as a public carrier. . . . Here the contract of carriage between

[10] 45 F. Supp. 609 (DC Maryland, 1942). Cf. TEMPERLEY, p. 85.

[11] 1969 AMC 1741 (2 CCA, 1969).

[12] 413 F. 2d. 864 (5 CCA, 1969). Cf. JMLC 1970 p. 341 et seq.

[13] For a general outline on different contractual relations in maritime adventures, see e.g. RAMBERG, Cancellation of Contracts, p. 20 et seq., and SELVIG, The Freight Risk, p. 3 et seq.

[14] P. 867.

Jefferson and Mowinckels without question partook of these characteristics. On both voyages there were others utilizing the vessel's space for carriage. The agreement did not specify any particular vessel nor any particular space upon a vessel but rather left furnishing of a vessel within the control of Mowinckels. During the two voyages Jefferson used but ten to fifteen percent of the *Grena's* carrying capacity, and Jefferson never shipped as much as the *Grena's* full reach in an entire year, much less in a single voyage. Clearly Mowinckels held itself out as a common carrier in this case, and the Jefferson—Mowinckels agreement was a contract of carriage subject to COGSA. . ." The Court *therefore* concluded that the shipowner's exemption clauses in the charter party were contrary to COGSA.

No doubt we have to do with a case of common carriage,[15] and undoubtedly the bill of lading is the current document in cases of ocean carriage of general merchandise in liner service. But is this decisive? The Court of Appeal seems to be of the view that COGSA embodies in statute form the common carrier doctrine, in other words in case of ocean common carriage COGSA is always applicable, and without regard to the contractual situation of the parties. Sec. 1 (a)[16] of the Hague Rules may be interpreted to mean that they are aimed at common carriage. But sec. 1 (b)[17] clearly states that the "contract of carriage" in the meaning of the Hague Rules applies only to contracts of carriage covered by a bill of lading or any similar document of title. Further, logically the court's opinion would *e contrario* mean that the COGSA is not applicable in cases of private carriage, whether the contract is embodied in a charter party or a bill of lading, not even if the bill of lading has been transferred to a third party, and this would clearly be contrary to the COGSA. The vitality of the common carrier doctrine in American law may have carried the court to its view. One is also led to believe that the court possibly suggests that in cases of common carriage agreements contrary to COGSA are against public policy.[18] But this would put the United States in a special position as to

[15] Mowinckels was holding itself out to the general public, no particular vessel was named, only part of the ship was used and there were several shippers. Cf. above § 5 and below § 10.3.

[16] U.S. COGSA sec. 1301 (a).

[17] U.S. COGSA sec. 1301 (b).

[18] Cf. *Encyclopaedia Britannica*, note 11. U.S. courts were as we have seen above § 7.3. much more inclined to disqualify clauses exempting the carrier from liability, as contrary to public policy.

the application of COGSA.[19] There may be a difference between the English and the American interpretation of the Hague Rules in this connection which then may be explained by the vigour of the common carrier doctrine in the United States. Nevertheless regarding the circumstances put forward, it is submitted that the common carrier doctrine should not be regarded as a part of COGSA, and it cannot, in a case like the Jefferson, be regarded as contrary to public policy to make a contract of carriage covered by a charter party.[20] In spite thereof, it must be recognized that the common carrier doctrine has had a great impact on the development and the understanding of COGSA.

As was said above[21] the situation is complex, since basically the COGSA does not concern common carriage only, but is rather aimed at the protection of the bill lading as a document of title, whether in liner service the holder of the bill of lading is also the consignor or whether the document has been transferred to a third party.

Evidently the bill of lading is the current document in common carriage, but it may also be used in case a charter party regulates the relation between the parties. There are apparently still cases where one set of rules will apply, or another, depending on the character of the service performed, at least in the United States, where the concept of common carrier still plays a role. My impression is that it is hard, if not impossible, to refine the question involved which is again linked to the conflict between status and contract. I can see no possibility how a general answer could be given, but can only point at the problem. Also under other, similar circumstances these difficulties arise when an international convention of private law nature has to be interpreted with due attention paid to domestic law. Thus the concept of common carrier may be used in different connections

[19] In the U.S. the Hague Rules would *then* be hinged to the concept of common carrier, while as far as I know, at least the Western European countries—including England—have adopted a view in conformity with sec. 1 (b).

[20] Cf. the D.C. in *Jefferson Chemical* (note 7) where it was stated (p. 504): "One of the main purposes of COGSA was to equalize the apparent lack of bargaining power of the small shipper of goods, whose rights were governed by the bill of lading with the vessel or charterer ... Jefferson is not the type of party that COGSA was intended to protect. It is a substantial corporation who, with full knowledge, *signed a contract of carriage* [my italics] which contained a clause exonerating the other party from liability for the type of contamination that occurred here."

[21] Cf. the problem posed above § 9.2. note 23.

in American law to affect the understanding of an international convention on carriage of private law nature.[22]

An interesting illustration of different approaches with respect to freedom of contract, mandatory rules in connection with contracts and rules concerning pricing is found in the discussion on the interpretation of the container clause in the Hague-Visby rules particularly between the Scandinavian and the American delegation.[23] The pertinent sections read (art. 2, and in the revised version of the Hague rules, art. 4.5.):

a) "Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to, or in connection with, the goods in an amount exceeding the equivalent of 10,000 F. per package or unit or 30 F. per kilo of gross weight of the goods lost or damaged, whichever is the higher.

c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid, such article of transport shall be considered the package or unit."

[22] Cf. below in the Summing up.

[23] GRÖNFORS, The Hague-Visby Rules and SISULA. Material with respect to this discussion is filed at the Institute of Legal Science at the University of Gothenburg. A joint P.M. of May 28, 1968, by SJUR BRÆKHUS, KURT GRÖNFORS, ALEX. REIN and ERLING SELVIG reads:

"All agreed that the Hague Rules have nothing to do with freight rates. The Carrier is free under the Rules to fix any freight he thinks fit for his services as long as he adheres to their mandatory provisions. He cannot refuse to insert in the Bill of Lading the number of packages in a container if so requested by the Shipper (Art. 3.3), but he is free to charge additional freight for an enumerated Bill. One reservation should, however, be made: prohibitive rates for certain services may, under the national law, be deemed illegal because the intention is to circumvent mandatory rules. Thus, the Carrier will probably not be free to make a high extra charge for stating in the Bill the apparent good order and condition of the goods. Similarly, an excessive rate for enumerated Bills may be held to be illegal.

The *ad valorem* clause in Art. 4.5 of the present Rules has been construed to mean that the Shipper can always require extra freight if the value of the goods is "declared", even if no specific reservation to that effect was made when the contract was concluded for carriage of the goods at a certain freight rate. At the Brussels Conference certain delegations wanted to avoid a similar construction of the Container Clause, and the provisions of Art. 3.3 make that clear. The Carrier has the duty to insert, at the Shipper's request, the number of packages, and if, prior to entering into the contract of carriage, he has made no reservation for extra freight for enumerated bills he is bound to insert the number without extra charge."

The purpose of this clause is to protect the holder of an enumerated bill of lading in container transports. The dispute concerned the question whether the shipowner/carrier might charge a higher freight in exchange for an enumerated bill of lading—an enumerated bill of lading being a document spelling out specifically the goods carried as distinguished from a document stating only e.g. "1 container said to contain TV-sets".

The Scandinavian approach was (and is) that pricing has nothing to do with the Hague Rules being merely of private law nature with no application to the question of unreasonable charges. This means that according to the Scandinavian view a shipowner/carrier might charge an extra freight for an enumerated bill of lading—which may then also impose upon him a more extensive minimum liability—as long as the higher freight is not exorbitant and could be regarded as an effort to get around the mandatory rules. The American approach, on the other hand, was that principally the shipowner/carrier was not allowed to charge anything extra for an enumerated bill of lading, apparently not even for additional costs. The limited liability as determined was to be regarded as a minimum liability and an extra charge for an enumerated bill of lading was to be considered as unreasonable.

This difference in interpretation may have several explanations, e.g. that the dividing border line between public and private law is less distinct and rigid in American than in Scandinavian law. It must be recognized that in the U.S.A. the FMC investigates and supervises the shipping industry, and in this connection the price plays a large role, and the concept of common carrier still has a direct impact. The American interpretors were lawyers working with FMC and thus accustomed to the tariff approach and possibly more inclined to adopt a view such as they did. My impression is that the duty of a common carrier not to charge unreasonable freight may have influenced the suggested American interpretation.

§ 10. *The Concept of the Common Carrier as determined by the different American Regulatory Agencies*

§ 10.1. *In General*

In England the concept of the common carrier and the common carrier doctrine thus have lost much of their immediate relevance as a result of legislation. Nevertheless behind the enacted statutes the common carrier doctrine may

be discerned. In the United States, on the other hand, the common carrier concept plays a more important and direct role, since in certain fields no legislation has been passed with respect to carriers' liability, and further since the economic regulation of carriers is based on this concept.

The question may be posed why in the United States economic regulation came to be linked with the common carrier concept, while the British economic regulation established a new terminology. In this connection it must also be asked whether the common carrier concept in the American legislation referred to is identical with the common law concept, and also if and then to what extent the 20th century concept differs from the concept developed in the 18th century.[1]

Naturally, when the term *contract carrier* was created by the Motor Carriers Act this meant a substantial change in the common and private carrier concepts contained within this Act. I therefore regard the overlapping between this section and § 5 above as necessary to determine whether the concept of the common carrier has undergone a substantial change as used in American administrative legislation as compared to the common law definition and substance. It must then also be borne in mind that I am here mainly concerned with the concept from the public law aspect, and from the particular American horizon, but at least theoretically, similar questions might be put with regard to the determination of the common carrier at modern common law.

§ 10.2. *ICC and the Common Carrier*

As already pointed out the Interstate Commerce Act regulates different carrier operations or business arrangements. Part I of the Act embracing sec. 1–26, applies principally to common carriers by rail, including express and sleeping car companies, to common carriers by pipe line (however, not when carrying water or gas), and to water and motor carriers performing

[1] CAVES, p. 169, stresses one point which is important in connection with all the regulatory bodies: "Since the Civil Aeronautics Board has never felt a strong obligation to maintain legalistic consistency in its decisions, cases of a type that comes up only now and then are much less likely to show a consistent pattern than those often appearing before the Board. Such individual cases will reflect instead the Board's membership and its major concerns at particular moments in time."

terminal services for the rail common carriers.[1] Part II, embracing sec. 201–228, applies to carriers by motor vehicle and to brokers. Part III, embracing sec. 301–323, applies to domestic water carriers, and part IV, embracing sec. 401–422, applies to freight forwarders.[2]

Originally the first section of the Act defined the carriers to be brought within its jurisdiction thus: "That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment . . ." Water carriers successively became regulated through the Shipping Act, 1916, the Merchant Marine Act of 1920, the Intercoastal Shipping Act of 1933. But not until 1940 was the regulatory authority over water carriers transferred from the USMC to the ICC as for the regulation of Inland Waterways, Coastwise, Intercoastal and Great Lakes common and contract carriers.

In the Interstate Commerce Act sec. 302 the common carrier by water is defined as: "any person which holds itself out to the general public to engage in transportation by water in interstate or foreign commerce of passengers or property or any classes thereof for compensation". In one case[3] ICC said, that a common carrier need not actually operate a vessel; the requirement is for its use irrespective of ownership. The commission further stated that transportation includes the use of any transportation facility; and that a transportation facility includes vessels or other instrumentalities used in connection with water transportation.

In the same sec. (e) a contract carrier is defined as "any person which, under individual contracts or agreements, engages in the transportation . . . by water of passengers or property in interstate or foreign commerce for compensation. The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation, of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'." The commission concluded in

[1] Railroads, regulated in Part I of the Act, are all common carriers, with the exception, of course, of railways exclusively used within a factory area for internal transports.

[2] Freight forwarders will be separately dealt with below in § 11.

[3] *Strittmatter, Common Carrier Application*, 250 I.C.C. 639 (1943).

Atwacoal Transportation Co., exemption,[4] that transportation for a single shipper under contracts precluding similar transportation for other shippers, and giving him the exclusive use of the vessel until all his cargo is discharged, is contract carriage.

A classification of carriers have been made in the Interstate Commerce Act imposing different obligations on them. This classification is not identical in all parts of the Act. The basic categories are those inherited from common law, private and common carriers, but to these have been added particularly the contract carrier, and with respect to Part II of the Act, Knorst[5] makes the following summing up:

"The Act recognizes four types of motor vehicle operations or business arrangements, which are as follows:

1. Common carriers: Defined as motor carriers that undertake directly or by lease or any other arrangement, to transport passengers or property for the general public for hire over regular or irregular routes. This classification includes also the motor vehicle operations of railroads, steamship companies, express companies, forwarding companies and other carriers engaged in common carrier interstate service by motor vehicle.[6]

2. Contract carriers: — Include carriers that conduct motor transport service for compensation under special and individual contracts or agreements, whether the operations are conducted directly or by lease or by other arrangements.[7]

3. Private carriers: — Those carriers that transport goods by motor vehicle as owners, lessees, or bailees, when the transportation is in the furtherance of any commercial enterprise, including the sale, lease, rental or bailment of the goods.[8]

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[4] 250 I.C.C. 33 (1941).

[5] Vol. 1, p. 40.

[6] Sec. 203 (a) 14. Cf. WATKINS, vol. 1, p. 547: "A common carrier by motor vehicle means any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for compensation, whether over regular or irregular routes." In connection with the classification of motor common carriers cf. GUANDOLO, p. 42 et seq. with references.

[7] Sec. 203 (a) 15. Cf. WATKINS, Vol. 1. p. 587: "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property . . . for compensation under continuing contract with one person or a limited number of persons either (a) for the furnishing of transportation service through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation service designed to meet the distinct need of each individual customer."

[8] Sec. 203 (a) 17. Cf. WATKINS, vol. 1, p. 613: "The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee,

4. Brokers: — All persons who, as principals or agents and not as the bona fide agents or employees of any motor carrier, undertake to sell any type of transportation services subject to the Act, or who hold out by solicitation, advertisements, or otherwise as one who sells, provides, furnishes, contracts or arranges for such transportation."

To these groups might also be added "exempt" carriers, which are not subject to the control of ICC except for rules concerning maximum working hours, standards of equipment, etc.[9]

It appears important at this stage to determine the prerequisites for belonging to these categories and to draw the border line between them. It seems immediately striking that, even if the common carrier is an essential concept, this classification is based on a division between different carriers depending on their modern functions.

ICC in accordance with the Interstate Commerce Act regulates the different types of carriers within its jurisdiction in several respects. Thus common carriers must secure a certificate of public convenience and necessity before undertaking to offer their services. In order to obtain such a certificate the common carrier must prove that he is willing and capable to give the service which he is proposing, and that it is a service needed by public convenience and necessity. The certificate must indicate the service to be given and the area to be covered.[10] Contract carriers must also acquire a permit, and must then prove that they are also willing and capable to perform the service of a contract carrier, and that the proposed operation is consistent with the public interest and the national transportation policy. The permit must specify the carrier's business and may specify such reasonable conditions as the commission sees fit.[11] Private carriers are not subject to regulation.[12] Brokers need a licence to conduct their operations.[13]

Through the Motor Carriers' Act rules were introduced to regulate motor carriers, which to a certain extent necessitated an automatic granting of certificates and permits to carriers which were already in business—so-called

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or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

[9] PEGRUM, p. 345, GUANDOLO, p. 190 et seq.

[10] PEGRUM, p. 341. Cf. e.g. GUANDOLO, pp. 42 et seq. and 104 et seq. With respect to obligations imposed on them, se above § 8.3.1.

[11] PEGRUM, p. 344. Cf. e.g. GUANDOLO, pp. 123 et seq., and 133 et seq. The tariff provisions governing contract carriers by motor and water are similar to those governing common carriers with certain exceptions.

[12] GUANDOLO, p. 185 et seq.

[13] GUANDOLO, p. 148 et seq.

"grandfather" rights. A case of particular interest in this connection is *United States v. N. E. Rosenblum Truck Lines, Inc.*[14]

The facts were that the appellee had been hauling only for common carriers by motor vehicle, and in every case principally only for one single common carrier between St. Louis and Chicago, and were paid a lump sum for dock to dock movements. They protected their equipment by insurance and also paid maintenance and operating costs. The drivers of the appellee's trucks were their employees. Insurance to protect the customers and the general public was paid by the common carriers and sometimes charged to the appellees, who also on some occasions paid cargo damage claims not covered. The freight handled was always solicited by the common carriers, accumulated at its terminal, loaded and unloaded by its employees, and moved from consignor to consignee on his way bills. After February 1936 appellees ceased to haul for common carriers by motor vehicle and began hauling for individual shippers. ICC concluded that the appellee was not entitled to a permit under the "grand father" clause, but the court characterized his service as bona fide operation as contract carrier.

The Supreme Court stated: "The point of divergence between the Commission and the court below seems to have been whether the evidentiary facts supported the Commission's ultimate conclusion that appellees operated solely under the control of the common carriers. Because of our views as to the proper construction of the Act, we need not determine whether substantial evidence supports that conclusion of the Commission. In any event the evidence clearly shows that on the critical date, and from then until February 1936 appellees helped the common carriers move their overflow freight and, as to each job, were an integral part of a single common carrier service offered to the public by the common carrier for whom they hauled.

The question here, as in any problem of statutory construction, is the intention of the enacting body. Congress has set that forth for us broadly in the declaration of policy—in essence it is the regulation of transportation by motor carriers in the public interest so as to achieve adequate, efficient and economical service. To implement that policy Congress forbade common carriers by motor vehicle to operate in interstate commerce without securing a certificate of public convenience and necessity from the Commission, and required contract carriers to secure a permit from that body. Those carriers engaged in either of such operations on the respective critical dates and continuously thereafter were to be given the requisite certificate or permit as of right under the "grandfather" provisos of §§ 206 (a) and 209 (a). We think it clear that Congress did not intend to grant multiple "grandfather" rights on the basis of a single transportation service. Presumably the common carriers which appellees served were entitled to common carrier "grandfather" rights over the entire line. It was the common carriers who

[14] 315 U.S. 50 (1941). The reason for the extensive citing of this case is that although not of central interest as to the determination of common or private carrier status it is important for the understanding of the construction of the Act in the regulation of carriers.

offered the complete transportation service to the general public and the shipper. To hold that appellees who performed part of that complete transportation service for those common carriers under agreements with them, acquired contract carrier "grandfather" rights over the same line entitling them also to serve the public is to ascribe to Congress an intent incompatible with its purpose of regulation. The result would be to create in this case two services offering transportation to the public when there had been only one on the "grandfather" date, without allowing the Commission to determine if the additional service was in the public interest. And, instances can readily be imagined where a single common carrier might utilize the services of several operators such as appellees. Automatically to grant contract carrier rights to such operators might result in such a wholesale distribution of permits as would defeat the very purpose of federal regulation."

A certificate and a permit may not be held by the same person as common and contract carrier unless, for good cause shown ICC finds that it is consistent with the public interest and with the national transportation policy. A private carrier of property by motor vehicle who is engaged in transporting his own goods as an incident of his own non-transportation business, is not subject to regulation except as to safety regulations.[15] It should also at this point be mentioned that railroad companies are precluded from acquiring motor carriers, or from obtaining certificates or permits for motor carriage, except where the motor carriage is auxiliary or supplementary to train service.[16] What implications then did the introduction of contract carriers have on the determination of the concepts of common and private carrier? It must evidently have created certain changes with respect to the determination of the common carrier concept.

Some cases may illustrate the borderline between common, contract and private carriers as interpreted in this connection.

Generally speaking, private carriers are not economically regulated, while carriers for hire are regulated as common or contract carriers. The private

[15] LOCKLIN, p. 676. Cf. PEGRUM, p. 344. Especial mention should however in this connection be made of Part II, sec. 203 (b) (5) dealing with vehicles controlled by a cooperative association as defined in the Agricultural Marketing Act—this exemption was drastically modified by Public Law 90–433 approved in 1968, sec. 203 (b) (6)—the "agricultural commodities exemption" as amended in 1958 and sec. 203 (b) (8) exempting interstate transportation conducted in a municipality or commercial zone. Exempted transportation may be performed by any motor carrier—common, contract, or private—without any need for a certificate or permit and at any rate negotiated with the shipper; only the safety requirements, which are now administered by the Department of Transportation must be observed.

[16] PEGRUM, p. 345. *U.S. v. Rock Island Motor Transit.*, 340 U.S. 419 (1951).

carrier is not in the business of transportation of property for hire, but is ordinarily carrying commodities which he owns in the furtherance of his business or occupation. Mere ownership does not, however, immediately make a carrier a private carrier under all circumstances.[17] Carriers for hire have often tried to restrict industries from performing their own transportation service, contending that whenever a concern carrying its own goods clearly receives compensation for the carriage, it is a carrier for hire and not a private carrier. And they have argued that when goods are sold by the industry including the transportation service at factory price plus the regular railroad or motor carrier rates, there is a clear case of transportation for compensation. ICC has, however, refused to apply this "compensation test", and instead has applied the "primary business test".[18]

In *Transportation Activites of Midwest Transfer Co.*[19] a contract carrier was defined: "A contract carrier is essentially an independent contractor whose undertaking is defined and limited by an individual contract which calls for a service specialized to meet the peculiar needs of a particular shipper or a limited number of shippers and operates to make the carrier virtually a part of each shipper's organization."

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[17] *Carpenter Common Carrier Application*, 2 MCC 85 (1937); *Monninger Common Carrier Application*, 2 MCC 501 (1937). See LOCKLIN, p. 676. Cf. GUANDOLO, p. 187: "Two inquiries must be satisfied before an operation may be held to constitute private carriage. It would have to be found that no person other than the shipper has any right to control, direct and dominate the transportation; and that no person before the Commission was, in substance, engaged in the business of transportation of property for hire." Cf. *H.B. Church Truck Service Co.*, 27 MCC 191 (1940) where it was expressed that: "Essentially the issue is as to who has the right to control, direct, and dominate the performance of the service. If that right remains in the carrier, the carriage is carriage for hire and subject to regulation. If it rests in the shipper, it is private carriage and not subject to regulation."

[18] *Woitishek Common Carrier Application*, 42 MCC 193 (1943); reaffirmed in *Lenoir Chair Company Contract Carrier Application*, 48 MCC 259 (1948), 51 MCC 65 (1949); *Schenley Distillers Corp. Contract Carrier Application*, 48 MCC 405 (1948), 51 MCC 65 (1949). Both these decisions have been upheld in *Brooks Transportation Co. v. United States*, 93 F. Supp. 517 (DC Virginia, 1950), aff'd by the Supreme Court, per curiam, 340 U.S. 925 (1951). See also sec. 203 (c) as amended in 1958 which contains the "primary business test". Cf. LOCKLIN, p. 677.

[19] 49 MCC 383 (1949).

ICC v. A. W. Stickle & Co.[20] may illustrate the borderline between private and contract carriage.

In this case ICC contended that the company was a common or contract carrier, the company alleging that it was a private carrier, its main business being that of selling lumber in which it also undertook to transport the lumber to its customers. The company had an office in Oklahoma City with some storage space for lumber. The two owners of the company previously were engaged in the lumber business on a commission basis. To meet competition in the sale of lumber to the retail trade in its territory it was necessary for the company to use its own trucks in the delivery of the lumber. The company bought most of its lumber from mills situated in the western part of Arkansas. By printed circulars distributed among its customers, the company solicited business upon the basis of a certain sum per M board feet f.o.b. the mill plus a designated charge for hauling the lumber in truck load lots to certain towns.

The court said: "In this instant the company solicits business from retail lumber dealers generally in its territory. It agrees to deliver to any customer the lumber purchased for which it charges and receives compensation for the transportation. These essential facts appear throughout its operations both prior to and at the time of trial. It would appear that this defendant Company essentially undertakes through special arrangements to transport lumber for the general public (meaning retail lumber dealers) and therefore comes within the statutory definition of a common carrier."

One of the characteristics when determining the status of a contract carrier has been that his service is specialized and that he is carrying for a limited number of customers.[21] With respect to the number it was held by ICC in *Motor Ways Tariff Bureau v. Steel Transportation Co. Inc.*[22] that

[20] 41 F. Supp. 268 (DC Oklahoma, 1941). A leading case on the question of contract or private carriage is *United States v. Drum*, 368 U.S. 370 (1962). An important case involving the status of private trucking is the "*Shannon Case*", (*Red Ball Motor Freight, Inc. v. Shannon*) 81 MCC 337 (1959), 219 F. Supp. 781 (DCWD Texas, 1963), 375 U.S. 901 (1963); and 377 U.S. 311 (1964).

[21] Cf. LOCKLIN, p. 679. See also *Transportation Activities of Midwest Transfer Co.*, 49 MCC 383 (1949) where the Commission suggested that this type of service be evidenced "a) by the use of special equipment required by the commodities transported or adapted to the convenience of the shipper, b) by the transportation only of certain commodities or of commodities the transportation of which requires the use of special equipment, equipment accessories, or specially trained personnel, c) by the strict observance of shipper—designated loading and unloading hours, or by other similar practices". In this connection it is however important to observe that also common carriers may have specialized service. Cf. below § 10. 4.

[22] 62 MCC 413 (1954).

a contract carrier by increasing the number of his shippers from 13 to 69 had become a common carrier. The Supreme Court[23] overruled this decision finding that ICC had not erred in establishing specialization of service as a criterion for contract carriage, but reached the conclusion that the carrier's service was sufficiently specialized to satisfy this requirement, and that service for 69 shippers was not necessarily common carriage and also stated: "A contract carrier is free to agressively search for new business within the limits of its licence." On the request of ICC the Congress in 1957 enacted additional legislation specifying that a contract carrier must be transporting "under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."[24]

In the case of *J.-T. Transp. Co. v. U.S.*[25] the court interpreted two amendments of 1957 to the Interstate Commerce Act dealing with motor carriers. The carrier asked to have its operations as an irregular-route contract carrier extended to include carriage of parts for Boeing Aeroplane Company, which supported the application, asserting that contract carriage could be better integrated with its production than could common carriage. The Commission denied the application, but a court set aside the Commission's order. The Supreme Court affirmed on the ground that the amendments to section 203 (a) 15 and 209 (b) of the Interstate Commerce Act expressed a Congressional intent that the Commission not manifest special solicitude for the situation of common carriers at the expense of shippers seeking contract carriage.

The creation of a new category of carriers, *viz.* contract carriers—a necessity owing to political and economical circumstances—did affect the

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[23] *United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409 (1956). An informative case on the question of common or contract carriage is *Bowles v. Chicago Cartage Co.*, 71 F. Supp. 92 (DCND Illinois, 1946).

[24] Public Law 85-163. The definition thus emphasizes the specialization of service and the limited number of shippers.

[25] 74 MCC 324 (1958), 79 MCC 695 (1959), reversed and remanded to ICC in 185 F. Supp. 839 (DC Missouri, 1960), affirmed in 368 U.S. 81 (1961). Cf. *Reddish v. U.S. and ICC*, 188 F. Supp. 160 (DC Arkansas, 1960). For the interpretation of motor carrier service, see also *Personnel Service, et al.—Investigation of Operations and Practices*, ICC, No. MCC 5425, served Dec. 15, 1969.

determination of private and common carriers, as they were determined at common law. The economic situation required a new class of carriers, whose professional character was such as to impose on them somewhat less restriction than on common carriers, but at the same time placed on them rather heavy obligations to carry out their services in accordance with the declared transportation policy. Subsequently the distinction between common carriers and private carriers underwent a change in comparison with their determination at common law. The consequence then appears to be that although the old terminology, as developed at common law, is still basically applied, the conceptualization used in the Interstate Commerce Act, owing to the more modern sophisticated methods of transportation, has more in common with English licences than with the old common law rules. But on the other hand, and this must still be regarded as current American administrative law, "each case requiring a determination whether or not common carriage exists, when brought to its irreducible minimum, turns finally on the question whether or not a holding out to the public generally is shown".[26]

§ 10.3. *FMC and the Common Carrier*

While the ICC broadly speaking regulates domestic water carriage, foreign water carriage falls under FMC jurisdiction.

The Shipping Act[1] of 1916, is based on the distinction between the common and the private carrier and its regulations concern common carriers only. The first section of this Act states:

"The term 'common carrier by water in foreign commerce' means a common carrier, except ferryboat running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, that a cargo boat commonly called an ocean tramp shall not be deemed such 'common carrier by water in foreign commerce'.

The term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State,

[26] *Craig Contract Carrier Application*, 31 MCC 705 (1941).

[1] Parts of the original Shipping Act have been repealed by the Merchant Marine Acts 1920 and 1936 and later enactments. Thus important changes were made by Public Law 87–346 approved Oct. 3, 1961 whereby sections 14, 14 b, 15, 16, 18 and 20 were amended.

Territory, District, or possession of the United States, or between places in the same Territory, District or possession.

The term 'common carrier by water' means a common carrier by water in foreign commerce or common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port."

"The Shipping Act of 1916 was modeled after and had the same purpose as the Interstate Commerce Act of 1887. In numerous cases the federal courts have held that the Shipping Act should be interpreted in the same way as Interstate Commerce Act and have used railroad discrimination cases in reaching a Shipping Act decision."[2] While, however, the Interstate Commerce Act is aimed both at the public and private law relation, the Shipping Act regulates the competition aspect only, the liability question being governed by COGSA and the Harter Act.[3] In section 14 of the Shipping Act common carriers by water are prohibited from giving deferred rebates, to use "fighting ships", to retaliate against shippers and to discriminate unjustly or unfairly between shippers. But this provision is modified by section 14 (b) where FMC has the power to allow certain agreements, for example conference agreements.

Section 15 requires that every common carrier by water file with FMC agreements with another such carrier to fix transportation rates or fares, and other types of agreement that prevent or destroy competition. FMC has the power to prescribe reasonable practices.

Section 18 (b) (1) prescribes that every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission tariffs showing all rates and charges for transportation to or from United States ports and foreign ports between all points on its own route and any other route that is established.

Section 33 provides that the Shipping Act shall not affect the power or jurisdiction of ICC, and that it shall not apply to intrastate commerce.

FMC has jurisdiction over common carriers by water, meaning principally such common carriers at common law. The Intercoastal Act of 1933 conferred jurisdiction over common carriers and contract carriers— within the meaning of that Act—to FMC. But in 1940 the Transportation Act transferred to ICC the regulatory control over the rates and practices of both common and contract carriers by water in most domestic trades.[4]

[2] SULZBERGER, pp. 266–67 with references.

[3] Cf. above §§ 9.2. and 9.3.

[4] Cf. above § 2.3.

The jurisdiction remaining with FMC is limited to common carriers as stipulated in the Shipping Act sec. 1. In some cases the Commission has stated that only common carriers and not contract carriers are within its control.[5] This conflict is of course a consequence of the creation of the contract carrier concept in the Interstate Commerce Act and should as a matter of principle be disregarded when determining the common carrier concept in connection with the Shipping Act. But this distinction must have influenced the interpretation also in this connection, and the question raised thereby, is whether the carrier performing the business of a "contract" nature is a common or a private carrier.

Grace Line v. Federal Maritime Board[6] is an important case with respect to the question of common or contract carriage within FMC jurisdiction.

Prior to 1934 Grace Line (petitioner) had been engaged in carrying passengers and goods as a common carrier between ports on the Pacific coast of South America and the United States Atlantic coast. In 1934 Grace Line installed special refrigeration compartments, called "reefers", provided special care, and began carrying bananas for three shippers on a contract basis[7] as a private carrier. Between 1946 and 1957 Grace Line refused to carry bananas for other shippers in the trade because of limited space and earlier contractual agreements reserving the space. The injured shippers contended that these contractual agreements were contrary to the provisions of the Shipping Act forbidding unjust and unfair discrimination against a shipper by a common carrier by water.[8] Grace Line contended that it was not a common carrier of bananas as it had never held itself out as such, and thus had not violated the Act. Further the shipping line

[5] *Galveston Chamber of Commerce v. Saguenay Terminals*, 4 F.M.B. 375 (1954); *Pacific Coastwise Carrier Investigation*, 2 U.S.M.C. 191 (1939). See also *United States of America v. Stephen Brothers Line*, 1968 AMC 1635 (5 CCA, 1968), where the court said: "The big issue as to each was whether the carrier's activity was that of a common carrier by water, not a tramp or so-called contract or private carrier." This is one of many examples of the confused terminology.

[6] 280 F. 2d. 790 (2 CCA, 1960), cert. den. 364 U.S. 933 (1961). See about this case particularly ROBERTS and SULZBERGER. Cf. *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957), rev'd 263 F. 2d. 709 (2 CCA, 1959).

[7] "Contract" basis means the actual contractual relation and has no direct reference to the terminology "contract carriage". As far as I understand this question there was originally at common law no need for contract in common carriage, but the common carrier could on occasions carry on "special contracts" without losing his status of common carrier. Cf. e.g. the *Express Cases*, 117 U.S. 1 (1896). However the situation has become more involved since contracts often "take over" and govern the relation between carrier and shipper also when the carrier is holding himself out to the general public. Cf. above §§ 7.3., 9.2. and 9.3. and below in the summing up.

[8] Sec. 14.

contended that bananas are a specialty not capable of common carriage, as they require special handling and coordination. The Federal Maritime Board decided that bananas are susceptible of common carriage and that Grace Line's status was that of a common carrier. Grace Line was ordered to cancel its old contracts and offer space to the complainants and others.

This holding was confirmed by the Court of Appeals. The court conceded that at common law the "holding out" test of common carriage was used. It was also of the opinion that at common law a carrier could be both a common and a contract carrier and that the Shipping Act had changed the common law, insofar as at common law Grace Line would have been able to carry bananas on contract basis.[9] Grace Line, however, as a common carrier within the meaning of the Act could not carry bananas on a contract basis even though it had never held itself out to the public as a banana carrier. In other words, once a common carrier always a common carrier.

Sulzberger and Roberts disagree on the justness of the decision.[10] Roberts is of the opinion that the decision is correct. "The statute is concerned with the regulation of carriers, not of carriage. Therefore it is not necessary to go any further than to determine whether petitioner falls within the regulated class of carriers. The statute recognizes only two classes of carriers by water, the common carrier and the bailee for hire or 'tramp', the latter being specifically exempted from regulation."[11] Sulzberger is of a contrary view: "It would appear that the majority's decision in *Grace Line* has limited foundation in law. In reaching a decision under the Shipping Act, the court should have consulted the Interstate Commerce Act, Part I, Chapter I. The Act is declaratory of the common law, and as the common law allowed a common carrier to be a contract carrier in areas in which it had made no holding out of common carriage, it should be allowed the same privilege under the Shipping Act."[12] Sulzberger finds an additional reason why Grace Line should not be held to be a common carrier of bananas, as bananas are "*an unusual subject of carriage*" requiring special treatment.

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[9] The court even stated that the term common carrier "was used to include all those who were to some degree "common carriers". At common law there was a distinction between private, common and possibly public carriers. The term contract carrier was introduced in the Interstate Commerce Act, where it has a distinct meaning. In England the term "contract carriage" has another sense, see KAHN-FREUND, p. 134.

[10] SULZBERGER, p. 266 et seq.; ROBERTS, p. 538 et seq.

[11] ROBERTS, p. 538.

[12] SULZBERGER, p. 267.

I agree with the view expressed by Roberts, and also with the judgment of the court, but I have general difficulties in making out what may have been in the mind of the court when distinguishing between contract carriage and common carriage at common law. Sulzberger's statement may be an explanation, but if so I find it hard to regard the Interstate Commerce Act as declaratory of common law. It seems strange that when a new classification, necessitated by a particular type of carriers, has been created through legislation, this legislation should be regarded as declaratory of common law. A more correct way of expressing the situation would be to say that the legislation in question was intended to change the common law with respect to that particular category of carriers and to the extent set out in the Act. Further it appears too far reaching to declare the carriage of special cargo as contract carriage, merely because there is not a case of general cargo. This is clearly not a consequence of common law but may possibly be a construction in the Interstate Commerce Act. At common law the basic prerequisite is not the character of the cargo but the holding out.

In a later case this question came again before the Commission.[13]

Container Ships operated between North Atlantic ports to ports in Puerto Rico and had filed tariffs with FMC offering to carry wheeled vehicles and general commodities for the public. A schedule was maintained which offered two or three sailings per month. In October 1964 Container Ships notified the Commission that it would withdraw its tariffs and cease common carrier operations, and thereafter consider itself a contract carrier; and its expressed policy was to limit service to three or four shippers per voyage southbound.

Concerning the question of the status of contract carriers Kline suggests that the contract carrier occupies a role somewhere between the common carrier and the private carrier.[14] The term nowhere appears in the Shipping Act which mentions only common carriers and tramps. The contract carrier operated under charter, usually carried a few bulk or low-rated commodities for a few shippers, and unlike the tramp began to ply predictable routes.[15] Kline does not reach a clear opinion on the question

[13] *Carrier Status of Containerships, Inc.*, 6 S.R.R. 483 (FMC, 1965).

[14] KLINE, p. 28 et seq.

[15] Cf. Interstate Commerce Act, Sec. 302 (e): "The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation by water of passengers or property in interstate or foreign commerce for compensation. The furnishing for compensation (under a charter, lease, or other

whether the term contract carrier has any significance before FMC, as he concludes that this is a case of common carriage. FMC ruled: "After enactment of the Transportation Act of 1940 transferring to the Interstate Commerce Commission regulatory control over rates and practices of both contract and common carriers by water in some but not all of the domestic trades, the jurisdiction in the Maritime Commission was limited to common carriers. 'Contract carrier' as a legal entity has no significance before the Commission."

This ruling makes Sulzberger's argument even less convincing. As already pointed out there is little reason to look at the Interstate Commerce Act for guidance with respect to the question of contract carriage, since the Shipping Act together with the Transportation Act of 1940, are clear on this point, which Sulzberger presumably must have overlooked. The term common carrier is not defined in the Shipping Act but the legislative history indicates that the person to be regulated is the common carrier at common law. The essential characteristics of the common carrier at common law are that he holds himself out to the world as such; that he undertakes generally to carry goods for hire; and that the public profession of his employment is such that, if he refuses, without some just ground, to carry goods for anyone for a reasonable and customary price, he will be liable to an action.[16]

In *Puget Sound Tug & Barge Co. v. Foss Launch & Tug Co.*[17] the Commission said: "Common carrier is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accomodate itself to efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers' burdens. Where the holding out is indirect (through an agent acting technically as sole shipper under an arrangement with the carrier), this holding out will nevertheless be attributed to the carrier, and considered to bring it within the scope of the ancient phrase that a common carrier is a carrier which holds itself out as willing to carry for the public. Where the service is essentially the carriage of cargo for the general public it is nonetheless common carriage because the carrier adopts a device to make it appear that vessels are serving one shipper, whereas they are actually serving many."

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agreement) of a vessel to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'."

[16] *Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953).

[17] 1 S.R.R. 591 (FMC, 1962).

The FMC interpretation follows closely that of the courts according to common law.[18] Thus in some instances the common carrier may advertise sailings, solicit freight and issue bills of lading.[19] The common carrier's status is not lost by the carrier's failure to advertise or to publish sailing schedules.[20]

For that matter, the common carrier status can be acquired without regular calls at ports, or regular sailings, and even without sailing schedules.[21] Moreover, the common carrier status is maintained even if the carrier chooses not to solicit cargo.[22] In fact, it makes no difference if he solicits or is solicited.[23] Nor does a common carrier lose that status if he uses shipping contracts other than bills of lading, or even if he attempts to disclaim liability for the cargo by express exemption in the bills of lading or other contracts of affreightment.[24] He may execute written contracts with shippers individually for each lading and not lose common carrier status.[25] Nor is his status as a common carrier modified by the occasional carriage of cargo under special contract.[26]

Furthermore, a common carrier may carry only a particular type or kind of property.[27] In some instances he may reject certain goods from carriage.[28] It also has been held that a common carrier may limit his service to limited groups in the vicinity of its operations rather than to the public at large.[29] A common carrier may also fix rates for each movement in the

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[18] Cf. KLINE, p. 19 et seq. *United States of America v. Stephen Brothers Line*, 1968 AMC 1635 (5 CCA, 1968) discusses the concept of common carrier at some length.

[19] *In Re Coast Steamship Co.*, 1 U.S.S.B. 230 (1931); *Intercoastal Rates to and from Berkeley and Emeryville, California*, 1 U.S.S.B. 365 (1935); *Intercoastal Investigation*, 1 U.S.S.B. 400 (1935).

[20] *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190 (1950).

[21] *In Re Alaskan Rates*, 2 U.S.M.C. 558 (1941); *Rates, Charges and Practices of General Atlantic S.S. Corp.*, 2 U.S.M.C. 681 (1943).

[22] *Transportation by Mendes & Company, Inc.*, 2 U.S.M.C. 717 (1944).

[23] *Hastings Express Comp. v. Chicago*, 135 Ill. App. 268 (App. Ct. of Illinois, 1907).

[24] *Transportation—Pacific to Hawaii*, see note 20.

[25] *Dairymen's Co-op Sales Ass'n v. Public Service Commission*, 177 Atl. 770 (Sup. Ct. of Pennsylvania, 1935). Cf. 13 C.J.S. sec. 30.

[26] *Express Cases*, 117 U.S. 1 (1886).

[27] *ICC v. A.W. Stickle & Co.*, 41 F. Supp. 268 (DCED Oklahoma, 1941).

[28] *Hasting's Case*, see note 23.

[29] *United States v. Brooklyn Eastern Terminal*, 249 U.S. 296 (1919); *United States v. California*, 297 U.S. 175 (1935); *Johnson Express Co. v. Chicago*, 136 Ill. App. 368 (App. Ct. of Illinois, 1907).

absence of a general tariff, and, may it be added the size and scope of the carrier's operation is not a consideration in determining his status as a common carrier.[30]

The contentions of a carrier as to what it legally considers to be its status are of little weight. It is settled that it is not selfcontention, lables on documents issued by carriers, or charters of incorporation that determine a carrier's status but rather the nature and scope of its actual operations.[31]

The above cases have all been referred to in connection with the determination of the common carrier status in the Shipping Act. Whatever of these characteristics a carrier may have, they must, however, always indicate a general holding out to carry to the general public or a portion of the public. The Shipping Act clearly is based on the concept of the common carrier as determined at common law, but here again, there is a certain distinction from common law, in that the ocean tramp is expressly excluded from the Act. At common law there is nothing absolute to prevent an ocean carrier from being regarded as a common carrier, if he in fact holds himself out to the general public, and in the individual case happens to serve only one or two shippers—at common law it is not the number of shippers that count. The private carrier at common law is thus not necessarily identical with the ocean tramp of the Shipping Act although they most frequently coincide.

§ 10.4. *CAB and the Common Carrier*

Sec. 101 (3) of the Federal Aviation Act of 1958 reads: "'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation: *Provided*, that the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest."[1] Although the Act does not define "air carrier" as common carriers only this category apparently is of particular interest, since sec.

[30] *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190 (1950).

[31] *United States v. California*, 297 U.S. 175 (1935); *Terminal Taxicab Co. v. Dist. of Columbia*, 241 U.S. 252 (1916); *United States v. Brooklyn Terminal*, 249 U.S. 296 (1919); *Colorado v. United States*, 271 U.S. 153 (1926); *Black Diamond S.S. Corp. v. Cie M'M'Me Belge (Lloyd R.) S.A.*, 2 U.S.M.C. 755 (1946); *Rates Between Places in Alaska*, 3 U.S.M.C. 79 (1947). Cf. also above § 5.

[1] "Foreign air carrier" is similarly defined in sec. 101 (19).

101 (21) reads: "'interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively— . . ."

The Federal Aviation Act is divided into XV titles of which title IV, the most important one in this connection, deals with the economic regulation.[2] By its terms CAB exercises an economic regulatory jurisdiction over air carriers and air transportation but also over air freight forwarders. Sec. 401 prescribes that: "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."[3] Thus air carriers may not engage in air transportation within the United States, or to or from the United States, without a certificate of public convenience and necessity, or a permit, or an exemption from CAB authorizing such air transportation. Air transportation for this purpose means the carriage by aircraft of persons or property as a common carrier for compensation or hire, or the carriage of mail by aircraft.[4] Services by U.S. carriers are usually covered by certificates of public convenience and necessity, and services by foreign air carriers by foreign air carrier permits. There is obviously no blanket regulatory coverage over all flight and operations of all aircraft. Non-certificated air carriers, while subject to certain rules by the Board have been exempted from compliance with certain requirements of economic regulation.[5]

CAB applies basically the same prerequisites as the courts when deciding whether an air carrier is a common carrier or not.[6]

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[2] E.g. BILLYOU, p. 237 et seq. and CAVES, p. 125 et seq.

[3] This apparently means air transportation as defined in sec. 101 (21), as there is in the Act no other definition of this term.

[4] As was discussed above § 6.3. no case in England has definitely established the common carrier doctrine to apply also to air carriers and the English regulation of the air transport industry is not based on the common law distinction between common and private carriers, though one may find some traces thereof in the distinction between scheduled and non-scheduled flights. On the other hand in domestic U.S. traffic it is clear that the common carrier doctrine still plays a great role to determine the status of an air carrier including the liability of such carrier.

[5] Concerning regulation of air carriers, see for example, CAVES, p. 123 et seq. "Third level" carriers operating planes of 12,500 lbs. gross weight such as air taxis are excepted from economic regulation at present time. Their business is growing rapidly.

[6] See for example, *Alaska Air Transport, Inc, v. Alaska Airplane Charter Co.*, 1947 U.S. Av. Rep. 548 (DC Alaska, 1947); *Mc Cusker v. Curtiss Flying Service*, 269 Ill. App. 502 (App. Ct. of Illinois, 1933); *Pacific Northern Airlines, Inc. v. Alaska Airlines, Inc.*,

One who is in the aviation business principally for "passenger flying", maintains a definite place of business to that end, and has a fixed charge for a trip, is a common carrier.[7] And so is a corporation which solicits the patronage of the traveling public for its airplane service, advertises schedules, and fares, and comes in competition with rail and steamship lines.[8]

A recent case decided by the Board is *Seaboard World Airways, Inc. v. Capitol International Airways, Inc.*[9] Seaboard filed a complaint with the CAB alleging that Capitol was performing air transportation between Baltimore and Amsterdam without the authorization of the Board.

The transportation in question was performed by Capitol for Du Pont, between December 1968 and March 1969, in order to carry by air synthetic fibers which Du Pont ordinarily shipped by surface from its plants in eastern United States to its subsidiaries in Europe, but for which surface transportation was unavailable because of a dock strike.

Capitol had no certificate or exemption authorizing the airlift it performed for Du Pont and was charged with a violation of Section 401 (a) of the Federal Aviation Act.

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80 F. Supp. 592 (DC Alaska, 1948). Cf. also e.g. *Meteor Air Transport, Inc., Non-certificated Operations*, 12 C.A.B. 372 (1950), and *Intercontinental, Enforcement Proceeding*, 41 C.A.B. 583 (1965).

[7] *Smith v. O'Donnell*, 12 P. 2 d. 933 (Sup. Ct. of California, 1932).

[8] *Curtiss-Wright Flying Service v. Glose*, 66 F. 2d. 710 (3 CCA, 1933), cert. den. 290 U.S. 696 (1933). For comparison could be mentioned *Marsh Aviation Co. v. State Corp. of New Mexico*, 228 P. 2d. 959 (Sup. Ct. of New Mexico, 1951), where it was held that an aviation company which is engaged solely in crop dusting services is not to be defined as a common carrier and need not obtain a licence from the State Corporation Commission. The reasoning of the court was that the aviation company was engaged in the business of selling special services of crop dusting to farmers and the carrying of insecticides pursuant thereto did not make the company a common carrier.

[9] Order 70—2—25 on Febr. 6, 1970, Docket No. 20660. Since the case is recent and illustrative I have chosen to treat it extensively. The case concerns two primary aspects, both the question of "supplemental carriage" and the question of common or private carriage. Seabord and the Bureau of Enforcement contend that a supplemental carrier cannot as a matter of law engage in private carriage of planeload cargo charter not authorized in its certificate. If they prevail the decision must go against Capitol because it has concededly engaged in carriage of planeload cargo transportation not authorized in its certificate. The Federal Aviation Act was amended by Public Law 87-528, 1962, to empower the Board to issue certificates to supplemental air carriers authorizing them to engage in supplemental air transportation. After extensive discussion on this point it was concluded that there is no statutory prohibition of private carriage by a supplemental carrier. The other aspect is in this connection of more interest.

Early in 1968 Du Pont reached the conclusion that a dock strike would probably occur and commenced plans to effect air transport of its products which normally move by water to Europe. It contacted common carriers authorized to provide air cargo service and found that full aircraft charters would not be available during a longshoremen's strike because of excessive shipper demand for space.

Du Pont then contacted Capitol to find out whether it could make one or two aircraft available to Du Pont in an operation including ground and other services, adapted to Du Pont's requirements and to be controlled by Du Pont except for physical operations related to the aircraft.

The contract, signed by the parties on September 5 and 6, 1968, provided that Capitol would furnish, operate, and maintain two aircraft together with equipment and personnel.

The contract provided that Capitol was to operate planeload air cargo service between Baltimore and Amsterdam, or such alternate locations as might be agreed upon, and that Capitol was to provide all services in accordance with reasonable instructions of Du Pont. Capitol was to perform a certain number of round trips per month against a fixed compensation per round trip.

Capitol was to arrange for complete terminal services at Baltimore and Amsterdam, including loading, unloading, and freight processing, and costs were refunded by Du Pont. Capitol was also required to procure and provide 86 aircraft containers of a type satisfactory for use in the aircraft, with provision for Du Pont to pay 50 percent of the difference between the purchase price and the market value of the containers at the time of termination of the contract.

Du Pont had complete control and discretion as to the cargo to be carried on the aircraft, and Capitol was exempted from liability for improper packing or packaging by Du Pont or for the perishability of the cargo.

The contract further provided that it was subject to all applicable laws and regulations and to governmental and other approvals which Capitol would obtain, and that Capitol would perform the services as a private contractor and would have exclusive control of the operation of the aircraft and other equipment and its employees, agents, or servants, none of whom were to be regarded as employees, agents, or servants of Du Pont.

The 92,000 pound per trip available lift capacity required by the contract necessitated a conversion of Capitol's aircraft which then also required restoring of the aircraft after termination of the contract.

The cargo shipped from Baltimore to Amsterdam consisted of synthetic fibers, and was for the most part, transported to Baltimore by truck and rail common carriers. At Baltimore the cargo was placed in a warehouse some miles from the airport and sorted. Warehouse labor at Baltimore and local cartage between the warehouse and airport were performed by help and services secured by a Baltimore warehouseman and paid for by Du Pont with both Capitol and Du Pont having supervisory personnel assigned to this operation.

Four van trailers, purchased by Capitol—the ultimate cost was, however, shared equally between Capitol and Du Pont—were used at Baltimore to move the Du

Pont cargo between the warehouse and the airport. Certain other costs for special equipment were paid by Capitol. All ground service costs at Amsterdam and Baltimore were paid directly or indirectly by Du Pont.

Detailed operating procedures for the entire movement between Du Pont plants and the Amsterdam warehouse were established by Du Pont specifically for the airlift operation, covering everything from labelling, packing lists, bills of lading, flight schedules etc. and Du Pont's Principal Intermodal Engineer directly supervised the entire airlift operation. Du Pont maintained a complete control over cargo to be moved on the aircraft and controlled the priority for various products.

A total of 100 flights were operated in the four months of the contract's duration.

With respect to the parties involved the following should be mentioned: The Bureau of Enforcement argued that Capitol's transportation of planeload cargo charters for Du Pont was not entirely restricted and limited so as to be clearly distinguishable from Capitol's general transportation business as a contract planeload carrier and was in common carriage under its holding out as a common carrier.

Seaboard contended that Capitol held itself out as a common carrier by advertising, tariffs, and course of conduct (referring to Capitol's reputation, intra-European cargo operations, acknowledgment upon inquiry, and the contemplation of the parties). It viewed the transatlantic cargo charters for Du Pont as an integral part of Capitol's common carriage operations, and took the position that Capitol's Du Pont charters did not meet the criteria of specialization and were neither of such unusual nature as to qualify as private carriage because Capitol holds extensive passenger and cargo authority in the transatlantic market and the Du Pont charters were not distinguished by special characteristics.

Capitol contended that the Du Pont contract constituted private carriage and that the proceeding should be dismissed. It took the position that while the Act requires the authorization of a certificate of public convenience and necessity for "air transportation", the term "air transportation", as defined by the Act, is limited to carriage by aircraft as a common carrier, and that private carriage can be performed by any air carrier, including a supplemental air carrier, without the authorization of a certificate. It asserted that it has not held itself out as a common carrier of transatlantic cargo because it did not advertise, solicit, or accept any such traffic, since its authority to provide such cargo service on an infrequent and irregular basis was terminated in 1966.

Capitol saw the Du Pont contract as coming well within established standards of private carriage in that (1) there was only one customer; (2) Capitol did not solicit cargo charters anywhere through agents, paid solicitors, advertisement or otherwise and there was no solicitation addressed to Du Pont; (3) the Du Pont operations were clearly segregated from Capitol's other operations; (4) there was a continuing mutually binding contract with a period of four months, guaranteed minima of at least 21 trips a month, and actual operation of 100 round trips; and (5) there was a unique set of circumstances with exclusive use of the aircraft, the requirement that Capitol specially configure its aircraft in such

manner that it could not be used in its other services, and special undertakings as to liability, rates to be applied, insurance, and the right in Du Pont to determine schedules and give the carrier reasonable instructions.

Some interested parties were also heard. Du Pont asserted that it entered into the Capitol contract after determining that the common carriers serving the transatlantic with all-cargo service could not meet its expected needs during the dock strike in the winter of 1968–1969, that its only alternative was to establish its own air lift, and that for that purpose it made a special arrangement with Capitol for the exclusive use of an aircraft, intended to be an arrangement of private carriage.

Pan American World Airways and Trans World Airways both expressed as their opinion that the Capitol-Du Pont agreement was not private carriage.

It was initially held by the examiner, that the operations of Capitol constituted common carriage, and this was upheld by the Board.

It was said: "As previously indicated, the operations of Capitol under the Du Pont contract resulted in a violation of the Act only if they are found to be carriage by aircraft by Capitol as a common carrier for compensation or hire. The term "common carrier" is not defined in the Act. Generally speaking a common carrier is defined as one who holds himself out as ready and willing to undertake for hire the transportation of passengers or property from place to place, and so invites the patronage of the public. On the other hand, a private carrier for hire is generally defined as one who, without being engaged in the business of carrying as a public employment, undertakes to deliver goods or persons in a particular case for hire or reward.[10] Capitol is, of course, a common carrier as to the operations under its certificates of public convenience and necessity, but under some circumstances a carrier can be both a common and a private carrier.

The Board has set forth in many cases the various detailed considerations which go into a determination whether particular transportation is common carriage or private carriage . . .[11]

While the courts have held that it is possible to be both a common carrier and a private carrier, it is well established that to be classified as private carriage under such circumstances the transportation in question must be clearly outside the holding out as a common carrier.[12]

The traditional ways in which carriers have been found to hold out services to the public as a common carrier are by advertising through magazines, newspapers, posters, brochures, and the like, personal solicitation through salesmen or

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[10] *Transocean A.L., Enforcement Proceeding*, 11 C.A.B. 350, (1950).

[11] Cf. above § 5.3. See also GUANDOLO, p. 151.

[12] *Transocean A.L., Enforcement Proceeding*, 11 C.A.B. 350 (1950); *Terminal Taxicab Co. v. Dist. of Col.*, 241 U.S. 252 (1916); *Santa Fe P. & P. Ry. v. Grant Bros. Const. Co.*, 108 P. 467 (Sup. Ct. of Arizona, 1910); *Memphis News Publ. Co. v. Southern Ry.*, 75 S.W. 941 (Sup. Ct. of Tenessee, 1903); *Honeyman v. Oregon & Co. R.R.*, 10 P. 628 (Sup. Ct. of Oregon, 1886).

through agents, or by a course of conduct.[13] Taking different characteristics which authorities have looked at in the analysis of transportation which is claimed to be private carriage, Capitol's Du Pont contract meets some and fails some of the tests. Capitol argues that it was a highly unusual arrangement, not normally encountered in common carrier operations; that it was a specialized arrangement, not only in the sense that it was handled by Du Pont outside of its normal arrangements with common carriers, but also in the sense that Du Pont undertook to perform and pay for a substantial portion of the services normally provided by a common carrier; that the equipment used by Capitol was specifically configured for this single operation and was devoted exclusively thereto; and that it was a one-time arrangement of a type the carrier performed neither prior thereto or subsequently.

There is no doubt that the contract was a one-time arrangement which included a continually mutually binding contract, or that there was only one customer. And the first overt act in the negotiations was made by Du Pont.

To Capitol's contention that the operation was completely divorced and clearly distinguished from its general transportation business, the opponents bring out that its crews for these flights were selected from its regular complement under the usual union procedure of bidding for flights and the other personnel were regular employees assigned to this job, the aircraft was maintained and overhauled by Capitol's regular maintenance employees and its maintenance schedule integrated with the rest of its fleet, and no separate accounts were set up to segregate the revenue or expenses and they were intermingled with those for Capitol's common carrier services. The opponent also came back with arguments such as that the changed aircraft configuration was not much different from that which Seaboard uses regularly.

Actually, most of the special arrangements were variations of customary relationships between carriers and large shippers who do such things as prepalletizing their freight and delivering it to the carriers. There is nothing unusual about a sophisticated shipper of a large volume of goods designing and arranging efficient methods of collecting and preparing its goods for shipment. Du Pont ran and paid for the warehousing operation. Capitol altered its aircraft for maximum capacity to enable itself to handle the large volume involved here in an efficient manner. The pallets and igloos used are of a type which it had not used before but they are of a standard type used throughout the industry and were obtained from the regular stock of standard suppliers.

Capitol's regular aircraft was used, its regular personnel supervised and performed the work of readying the aircraft and performing the airlift. The specialness of the aircraft conversion is placed in perspective when it is realized that the carrier spent an estimated $ 107,000 to make a multimillion dollar airplane capable of better handling two million dollars worth of business. A charter

[13] *Transocean A.L., Enforcement Proceeding*, 11 C.A.B. 350 (1950); *Investigation, Seabord & Western Airlines*, 11 C.A.B. 372 (1950); *Meteor Air Transport, Inc. Noncertificated Operations*, 12 C.A.B. 372 (1950).

specialist would be expected to be ready to do this type of arranging its facilities in competing for charter business.

Nor were the commodities carried of a unique nature.

The principal extraordinary characteristic of the Du Pont airlift is, in the last analysis, its bigness. This size justified special work by Capitol and efforts by Du Pont which would not be economical for a more modest shipper. This is not a specialization that takes an operation out of common carrier status.

In appraising the airlift in question these matters must, of course, be considered as a whole and cannot be viewed individually and in isolation.[14] In any event, the above considerations of the airlift's characteristics are set forth only to assist in the appraisal of the single test which all private carriage must pass in a case such as this: For Capitol cannot get past this test—the holding out test, i.e., that a carriage must be clearly outside a common carrier's holding out to the public in order to constitute private carriage. It would therefore be a long and useless exercise in fine distinctions to attempt a resolution of the other positions of the parties . . .

It would be anomalous indeed if a certificated charter which has been assigned areas of authority but has been excluded from a particular area as a common carrier could pick out the especially large airlifts in that area and be able to compete for them as so called private carriage. The Capitol airlift for Du Pont was clearly within Capitol's holding out as a common carrier and was carriage of property by aircraft as a common carrier for hire."

The evidences pro and con common carrier status have been carefully weighed, almost so carefully to make it hard for the reader to find out what factors have been regarded relevant. Personally I am not quite convinced by the conclusions if turning to common law decisions for directions.

The case seems illustrative with respect to the determination of the common carrier concept in American administrative law in general, and in the regulation of air carriers in particular, and it is characteristic of the conflict between the intent of a rather modern legislation and an old conceptualization.

A great number of questions could be asked, which may lead to the more general question, *viz.* if the Board actually decided on the question whether the business performed by Capitol was that of common or private carriage, or if the actual issue was, although well hidden, whether owing to the object of the air transportation policy, Capitol, as a common carrier, should be prevented from the possibility of establishing also as a private carrier without a certificate in a case like the one at stake. Considering the facts of the case and the contentions of the parties the result reached does

[14] *Seven Seas Air, Enforcement*, 34 C.A.B. 45 (1961).

not necessarily seem fully compatible with the common carrier concept as determined at common law.

Capitol apparently prepared part of its business for a special contract with Du Pont, and the compensation was to be paid monthly. Du Pont had complete control and discretion as to the cargo to be carried on the aircraft, a factor which has been regarded as decisive under other circumstances.[15] One may wonder if the Board would have considered the case differently had Capitol undertaken to carry out no ground function at all, or whether it would have been sufficient for Capitol to create a new, separate, administrative entity to deal with the Du Pont contract in order not to be regarded as common carriers.

If turning to the "holding out" test one has an impression that as far as this particular contract is concerned there was no holding out. On the other hand the particular contract was a result of occurrences in liner service business carried out as common carriage.

Comparing this case with the Grace Line case and the Container Ship case referred above[16] certain distinctions are apparent. In both these cases the carrier tried to change his status, in the Capitol case it tried to offer service in one, remaining practical way—although to his own benefit—; further the carrier here had only one shipper; the contract was made up for a certain period, and the shipper was apparently going back to the common carriers after the strike was over. Such comparison hardly gives any evidence for immediately regarding Capitol as a common carrier but rather distinguishes it to an extent where its business might be regarded as private carriage.

Obviously the concept of the common carrier must have undergone certain changes owing to the development of more sophisticated business practices, nevertheless it still must be asked if there was really a holding out in this case. Did Capitol actually offer as a common carrier the service required by Du Pont? From the common law point of view generally I believe that the answer must be No. But on the other hand, Capitol had naturally, through its common carriage business, acquired a well-known name, which must have influenced Du Pont; or in other words, how could the business to be performed be confined to one part of the activity as completely distingusihed from the other. The general border line in cases like this one

[15] Cf. above § 10.2. note 15.

[16] Cf. above § 10.3.

must be very hard, if not impossible to draw. In my opinion the Du Pont contract, when regarded separately, undoubtedly bears the characteristics of private carriage, but considering the question in relation to other business performed by the carrier my impression is that in order to comply with the air transportation policy the result reached by the Board may be regarded as correct. But then again a somewhat different standard has been set for the determination of the concept of the common carrier as compared to that at common law.

§ 11. *Freight Forwarders*

With growing intermodal traffic freight forwarders are steadily becoming a more important group of intermediaries in the transportation chain and therefore require some consideration in this connection, but only in so far as the concept of the common carrier is concerned.[1]

Firstly, it must be stated that both the term forwarding agent and freight forwarder are in use, but whether a difference in sense is intended between the terms is hard to say.[2] Probably there is no such difference, which then rather ought to be ascribed to varying language use in England and United States.[3] Possibly, still, the term freight forwarder may to a larger extent disclose the varying operations of business performed than the term forwarding agent, which rather stresses the element of agency.

The term forwarding agent suggests that there is a case of agency, and then of course such rules will apply to the undertaking. But the actual business of forwarding agents may vary greatly, from a mere contracting

[1] Cf. above § 6.1. It merits to be mentioned that the Forwarding Agents Certificate of Transport (FCT) expressly states that the signer of that document is a forwarding agent, not a carrier.

[2] In England, where "forwarding agent" seems to have been the current term the Institute of Shipping and Forwarding Agents recently changed its name to the Institute of Freight Forwarders. SCHMITTHOFF deals with forwarding agents at p. 150.

[3] *English Law Dictionary* defines a Forwarding Agent or a Forwarding Merchant as "one who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, having no concern in the vessels or vehicles by which they are transported, and no interest in the freight, and not being deemed a common carrier, but a mere warehouseman and agent".

Black's Law Dictionary gives the following description of a Forwarding Merchant or Forwarder: "One who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, having no concern in the vessels or wagons by which they are transported, and no interest in the freight, and not being deemed a common carrier, but a mere warehouseman and agent."

for the transportation by a carrier to the grouping and/or custody of the goods and also a formal undertaking to carry them, and it depends on the nature of the business what set of rules will apply. For if the forwarding agent acts as a warehouseman one set of rules will apply, and if his undertaking is that of a carrier other rules will govern the relation, irrespectively of what his business may be labelled.[4]

Thus Carver considering who is a Hague Rule carrier states[5]:

"'Carrier' no doubt also includes anybody who enters into a contract of carriage with a shipper, *e.g.* a forwarding agent, if the shipper's contract with him is one of carriage and not of agency." Similar is the case in U.S. law which may be illustrated by *Penney Co. v. American Express Co.*,[6] where an express company which handled details of shipment, procured overseas transportation by carrier and paid all charges but was reimbursed from cargo owner and received payment of fee for its services, was regarded not as a carrier but merely as a forwarding agent and as such, was liable only for its own negligence. In *Highway Freight Forwarding Co. v. Public Service Commission*[7] the Court stated: "A mere forwarding agent, who does not receive goods into his custody, but, as agent for shipper merely contracts for their transportation by carriers, and who has no interest in the freight, but receives compensation from the shipper as his agent, is not a common carrier, but an alleged forwarding agent who receives goods for transit, issues bills of lading, makes contracts in his own name for carriage, is as to a person with whom he contracts for the delivery of the goods, a common carrier." And it was held that a freight forwarding company receiving goods from shippers, retaining them in warehouse, and then subletting carriage thereof to other carriers, was a common carrier within the meaning of a statute requiring certificate, and not merely a forwarding agent.

The starting point is then, whether there are any particular rules concerning the liability or the regulation of freight forwarders in England or United States. As already mentioned with respect to English law the starting

[4] The Scandinavian law with respect to forwarding agents is similar; see GRÖNFORS, Successiva transporter, e.g. pp. 68 and 83; GRÖNFORS & HAGBERG, p. 9 et seq.; RAMBERG, Några rättsliga speditionsproblem, p. 137 et seq.; TIBERG, p. 94 et seq.; and WETTER. Cf. the Stockholm City Court judgment of Jan. 9, 1970.

[5] Vol. 2, § 251. See also §§ 48 and 102. Cf. the conditions cited above § 3.

[6] 102 F. Supp. 742 (DCSD New York, 1951), aff'd. 201 F. 2d. 846 (2 CCA, 1953).

[7] 164 A. 835 (Sup. Ct. of Pennsylvania, 1933).

point is that the business undertaken and/or performed determines what liability rules will apply.[8] As to economic regulation there is no such in England with particular respect to the freight forwarder, but he may, of course, be subject to regulation under *e.g.* the Transportation Act, 1968, when complying with the requirements set up therein.[9]

The situation is somewhat different in the United States. The "advance in transportation was accompanied by the establishment of the new business enterprise of forwarding agent, who took the shipper's goods, prepared them for shipment and shipped them, paying the freight to the common carrier and being reimbursed therefore by his employer. It is significant that the courts, called upon to determine the legal character of the forwarding agent, defined him as merely a type of warehouseman and not a common carrier, since he received no part of the carriage charges as such."[10]

In the United States legislation was passed to regulate the freight forwarder comprising also a statutory standard of his liability.[11] The Interstate Commerce Act provides concerning the freight forwarder's statutory liability rules similar to those governing the rail carrier's liability.[12]

The term "freight forwarder" is defined by Sec. 402 (a) (5) of the Interstate Commerce Act as "any person which (otherwise than as a carrier subject to part I, II or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (a) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-

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[8] Cf. e.g. *Lee Cooper, Ltd. v. C.H. Jenkins & Sons, Ltd.* [1964] 1 Lloyd's Rep. 300.

[9] Cf. the Swedish YTF § 33, directed towards business like ASG and Bilspedition.

[10] THOMPSON, p. 36. For a more thorough discussion of the freight forwarder, see DAGGETT, *passim*, AHEARN, p. 248 et seq., DOUGLASS, p. 298 et seq., MILLER, p. 379 et seq., and ULLMAN, *passim*.

[11] Not even in American law the term freight forwarder is unambiguous, as the different transportation legislations contain different rules.

[12] Sec. 413, which reads: "The provisions of section 20 (11) and (12) of part I of this Act, together with such other provisions of such part ... as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this part, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purpose of such section 20 (11) and (12)." Cf. Ullman, p. 9 et seq.

bulk and distributing operations with respect to such consolidated shipments, and (b) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (c) utilizes, for the whole or any part of the transportation of such shipment, the services of a carrier or carriers subject to Part I, II or III of this Act".[13]

The meaning of the term freight forwarder, however, varies in the different transportation regulatory agencies, and the conflicting jurisdictions create certain problems. Domestic freight forwarders are common carriers under Part IV of the Interstate Commerce Act, as amended in 1950, if they hold themselves out to serve the general public. They perform their services their revenues being derived from the difference between the contract rates, which they are permitted to make with the underlying carriers and the rate the shipper pays, which is the same as that which would apply if he dealt with the carrier directly. Freight forwarder rates are not always identical with common carrier truck rates, their only real competitors, since almost no U.S. railroads now transport shipments smaller than a carload.[14]

Surface freight forwarders may negotiate contract rates only with motor carriers under Part II, sec. 409. They are now seeking the same arrangements with railroads, but Congress has not yet approved a bill to allow this.[15] Air freight forwarders pay the airlines' regular published rates, the same as other shippers.[16]

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[13] Cf. GUANDOLO, p. 135 and PEGRUM, p. 110. In connection with ocean carriage the freight forwarding business is somewhat more involved from the regulation aspect, and I shall deal with that below. The Shipping Act regulates the ocean freight forwarders, whose duties are somewhat different. Cf. particularly ULLMAN, *passim.*

[14] Cf. above § 6.1. with respect to corresponding conditions in England.

[15] A new step in this direction has recently been taken by ICC; see Investigation into the Status of Freight Forwarders.

[16] Cf. GUANDOLO, p. 496 et seq. I have chosen not to specifically deal with the conflicts between forwarding companies and the so-called "Shippers Associations" which have proliferated under the exemption in Part IV Sec. 402 (c) (1). For legal interpretation of the status of these associations, see *Pacific Coast Wholesalers' Association—Investigation of Forwarder Status*, 264 I.C.C. 134 (1946) and 269 I.C.C. 504 (1947). The order of the ICC was set aside in 81 F. Supp. 991 (DC California, 1949) and the judgment affirmed in 338 U.S. 689 (1950). A more recent series of cases involving the status of shippers' associations under sec. 402 (c) (1) includes *Atlanta Shippers Association, Inc.—Investigation of Operations*, 316 I.C.C. 259 (1962), and 332 I.C.C. 273 (1964); and *National Motor Freight Traffic Association, Inc. v. Columbia Shippers Association*, 105 M.C.C. 846 (1967).

ICC tends to be more restrictive in the regulation of indirect common carriers than the other regulatory bodies. The procedure to obtain an ICC freight forwarder permit is similar to a certificate proceeding for a common carrier. The need for additional service and the effect on freight forwarders, already in business, is stressed. ICC operating permits authorize operations with regard to particular points and commodities, and very few ICC forwarders obtain nationwide operating authority.

Prior to the advent of large-scale motor freight transportation, the operations of freight forwarders were confined to the export-import business, and to the consolidation of less-than-carload, or package freight, into carload lots to be transported by the rail carriers. Domestic operations were, of necessity, limited to operations between large cities on rail lines.

The initial legality of freight forwarder operations in the U.S. was decided by the Supreme Court in *Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R.*[17]

With the growth of motor transportation, the forwarders inaugurated a nationwide assembling and distribution service, the motor carriers being utilized to bring freight to forwarder consolidating points, and to distribute freight to point within large areas surrounding break-bulk points. Motor carriers also soon came to be used in performing the line-haul transportation from consolidating to distributing stations, either complementary to, or in substitution for rail service. Through rates were collected from shippers by the forwarders and special agreements or contracts between the forwarders and the motor carriers were utilized as the basis of carrier compensation. Following the enactment of Part II of the Interstate Commerce Act in 1935, the forwarders filed tariffs containing joint rates as carriers with the Commission, and the motor carriers filed concurrences to these tariffs as participating carriers. For the most part the divisions received by the motor carriers were of amounts less than those contained in the motor carriers published rates between the same points.

The lawfulness of these tariffs was questioned by the Commission in various proceedings upon applications filed by the freight forwarders for "grandfather" rights as common carriers by motor vehicle under § 206 (a) of the Act. The Commission found that forwarders were neither common carriers nor contract carriers under Part II and could not participate lawfully in joint rates with common carriers by motor vehicle.[18]

[17] 220 U.S. 235 (1910), reversing 166 F. 499 (CC New York, 1908). AHEARN, p. 248 et seq. also gives a historic background.

[18] *Acme Fast Freight*, 2 M.C.C. 415 (1937), 8 M.C.C. 211 (1938), upheld in *Acme Fast Freight v. United States*, 30 F. Supp. 968 (DC New York, 1940), aff'd 309 U.S. 638 (1940), and *Chicago and Wisconsin Proportional Rates*, 10 M.C.C. 556 (1938) and 17 M.C.C. 573 (1939) upheld in the *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344 (1940).

In the *Freight Forwarding Investigations*[19] ICC called for legislation to regulate freight forwarders, both in relation to other transportation companies and to shippers.

Following years of uncertainty over the status of freight forwarders in the United States national transportation system these problems were clarified by the passage of the Freight Forwarder Act (56 Stat. 284) approved by Congress on May 16, 1942 which became Part IV of the Interstate Commerce Act, thereby bringing the operations of freight forwarders under the jurisdiction of ICC.[20]

ICC shall with respect to freight forwarders inter alia inquire into their management and investigate complaints.[21] According to sec. 404 rates, fares, and charges of freight forwarders must be just and reasonable, and undue preference is forbidden.

Section 418 reads: "Freight forwarders, except within terminal areas, may employ as underlying carriers only common carriers by railroad, motor vehicle, and water carriers, express companies and air carriers subject to the Civil Aeronautics Act." This also prevents them from owning and operating their own line-haul freight services. In this connection reference should also be made to sec. 410 (h) reading: "Freight forwarders may not conduct any railroad, water, or motor carrier operations except as incidental terminal operation by motor vehicle."

The operation authorization for freight forwarders are referred to as permits: "No such permit shall be issued to any common carrier subject to Part I, II or III of this Act; but no application made under this section by a corporation controlled by, or under common control with a common carrier subject to Part I, II or III of this Act shall be denied because of the relationship between such corporation and such common carrier."[22]

In order to qualify as a freight forwarder, an applicant must also show that it assumes responsibility from the point of receipt of a shipment to the point of destination. The issuance of through bills of lading and the assessment of the applicant's established through rates from point of origin

[19] 229 I.C.C. 201 (1938).

[20] Cf. *Howard Term., Freight Forwarder Appl.*, 260 I.C.C. 240 (1944). Although the Freight Forwarder Act did in its original form treat freight forwarders as "common carriers" these two words were added to Part IV sec. 402 (a) (5) by Public Law 881, 81st Congress, 2d. Sess. approved Dec. 20. 1950 (64 Stat. 1113).

[21] Sec. 403.

[22] Sec. 410 (c), cf. (d).

to point of destination are the usual indications of such an assumption.[23]

A forwarder need, however, not issue bills of lading or publish rates in order to assume responsibility. An applicant which did neither of this was held to have assumed responsibility for through transportation, when it prorated rail-carload charges among shippers and collected a service charge based on the difference between the through carload and less-than-carload rates.[24] The Commission found that without an unequivocal showing that the forwarder's charges contemplated only a consolidation service, it must be concluded that they also covered distribution at destination and that it was therefore subject to responsibility for the through service. When an applicant receives from shippers tonnage to be assembled, transported and distributed, and he bills the shipment in his own name, and expressly states in the enclosure receipt sent to each shipper and its customer buyer that the negotiable original copy of that document must be presented to the applicant's agent at the breakbulk point before shipment will be released, the Commission also finds the forwarder to have assumed responsibility.[25]

In connection with ocean carriage one may speak of two types of freight forwarders, one, the agent type of forwarder, the ocean freight forwarder, regulated by FMC and the other, who may be an Interstate Commerce Act part IV freight forwarder, but who when offering carriage by sea to the public generally will be regarded as some sort of indirect carrier by water (non-vessel-operating common carrier) and then as such will have to file tariffs with the FMC.

The FMC does licence and regulate the agent type of forwarders through an amendment to the Shipping Act in 1961,[26] and defines thus the independent freight forwarder in its first section:

"The term 'carrying on the business of forwarding' means the dispatching of shipments by any person on behalf of others, by ocean going common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.

An 'independent ocean freight forwarder' is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or

[23] *Republic Carloading & Distributing Co., Freight Forwarder Application*, 250 I.C.C. 670 (1943). Cf. GUANDOLO, p. 140.

[24] *Judson—Sheldon*, 260 I.C.C. 473 (1945).

[25] *Howard Terminal*, 260 I.C.C. 773 (1946), *Stockton Port District*, 265 I.C.C. 810 (1947).

[26] Public Law—87–254, Sept. 1961. Cf. GUANDOLO, p. 143 et seq.

purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such beneficial interest."

Sec. 44 of the Shipping Act prescribes the duties of ocean freight forwarder, such as, the co-ordination of the movement of cargo to the shipside, the preparation and processing of the ocean bill of lading, the preparation and processing of consular documents or export declarations, etc. These activities do not include common carrier service by the forwarder, pursuant to the independent ocean freight forwarder licence; the ocean freight forwarder cannot issue his own bill of lading, hold out his own common carrier tariffs, or assume common carrier responsibility for shipments. Nevertheless, the shipper may turn his cargo over to the agent type of forwarder for complete handling from origin to vessel, which means that he need deal with only one person, the ocean freight forwarder.

No restrictions are placed on entry into the field in so far as the number of members, or the need for service is concerned. However, a diligent effort is made to limit the issuance of licences to qualified persons.

The other type of forwarder is the consolidator, the intermediary assembling and shipping goods under a single bill of lading thereby securing lower rates, an important function with regard especially to the containerization. His functions are wider than those of an ocean freight forwarder. Consolidators who assemble cargo for ocean shipments in their own name via underlying common carriers normally have the status of so called non-vessel operating common carriers (NVOCC). The FMC does not license such forwarders, but they have to file tariffs with the Commission as common carriers.[27]

Air freight forwarders are not directly mentioned in the Civil Aeronautics Act 1938 or the Federal Aviation Act 1958, but they are nonetheless subject to the regulation of CAB. Section 101 (3) of the 1958 Act defines air carrier thus: "'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly, or by lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of air craft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest."[28] The CAB grants all air for-

[27] With respect to intermodal carriage see more below in Appendix.

[28] Freight forwarders are not directly mentioned in the Act, but may be embraced by the word "indirect", and it has been laid down that they are air carriers within the

warders operating authority on a nation wide or world wide basis.

The history of the development of air freight forwarders is cumbersome, and the definite solution is not yet seen.[29]

The first case dealing with an indirect air carrier was the *Railway Express Agency (REA), Grandfather Certificate Case.*[30] CAB here found that those who as common carriers, forward by air, whether Railway Express Agency or some other type of freight forwarder, are air carriers within the meaning of the Civil Aeronautics Act, but its application was nevertheless dismissed. REA was however temporarily relieved from the requirements and was allowed to engage in the transportation of property by air under the express contract.

Up to 1948 REA was the only air freight forwarder but several applications for certificates had been made with CAB after the war 1939–45 and in *Air Freight Forwarder Case*[31] these applications were consolidated to be decided in one proceeding, where the Board took the whole question of air freight forwarder activities under consideration. The Board deemed that there was a need for air freight forwarders activities and imposed no limitations on the number of air freight forwarders nor upon the number of points between which air freight forwarder service might be provided.

In 1955 the status of the freight forwarding industry was reviewed anew in the *Air Freight Forwarder Investigation,*[32] and the Board decided that the existing authorizations should be renewed for an indefinite period, based on several findings e.g. that there was a substantial and increasing acceptance of the forwarders' services by the shipping public; that the forwarders handled many shipment at lower rates than would the air lines; that they provided efficient ground handling services, extensive personal solicitation, and advertising for air freight; and that these results benefited the shipping public and stimulated the development of air transportation.

The *Air Freight Forwarder Authority Case*[33] involved the applications of seven direct motor carriers and one subsidiary of a direct motor carrier, for domestic and international air freight forwarder authority. All the

meaning of the Act, *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948). Cf. PENNER, p. 273 et seq.

[29] See An Economic Study of Air Freight Forwarding, p. 18 et seq., and SNOW, p. 485 et seq. Cf. Regulation of Air Freight Pickup and Delivery, p. 405 et seq.

[30] 2 C.A.B. 531 (1941).

[31] 9 C.A.B. 473 (1948).

[32] 21 C.A.B. 536 (1955).

[33] Docket 12193, Order E-21056 dated July 19, 1964.

applicants were common carriers of household goods, and limited their applications to the forwarding of such goods as defined by the ICC. The Board reached the conclusion that although some surface carriers had been denied authority on the ground that there was a risk of conflict of interest between air and surface operations that might result in material diversion of traffic from air to surface operations. As for household goods the Board found, however, that there was hardly any risk, and authority was granted the applicant for an experimental period of five years.

In the *Motor Carrier—Air Freight Forwarder Investigation*[34] the question was raised whether long-haul motor carriers of general commodities should be granted entry into the air freight forwarding field either directly or through subsidiaries. The Board concluding that the air cargo industry had changed since it first evolved a policy of restricting entry of surface carriers into air transportation, and that there was no longer any compelling reason to withhold authorization from such carriers granted for three of the applicants operating authorization for a period of five years.[35]

As for international freight forwarders the development has been similar.[36]

Thus the freight forwarder in American regulatory legislation is an interesting legal character, as he is defined as a person holding himself out to the general public as a common carrier mainly performing business other than carriage. The common carrier is at common law most often defined as a person holding himself out to the general public and as the term common carrier is not particularly defined in American regulatory legislation the result logically must be that a freight forwarder is a person holding himself out to the general public as a person holding himself out to the general public, which is indeed an intelligible definition.

The legislator hopefully must have had something in mind, and he was probably guided by the concept of the common carrier at common law as a well-known and established term. But the burden of further developing the substance of the concept was placed on the different Commissions.

[34] Docket 16857, Order E-25725, Sept. 22, 1967.

[35] This order was appealed and the case was sent back to the CAB for further findings. *ABC Air Freight, Inc. v. CAB*, CAB 2, No. 31795, decided March 13, 1968. CAB again has granted operating authority to several motor carriers to function as air freight forwarders and such cases have been appealed to courts. For further development of this case see 391 F. 2d. 295 (2 CCA, 1969), and U.S. Court of Appeals, 2 circ. No. 254. Decided Oct. 24, 1969, Docket No. 33623.

[36] *Air Freight Forwarder Case* (*Int.*), 11 C.A.B. 182 (1949); *International Air Freight Forwarder* (*Investigation*), 27 C.A.B. 658 (1958) and 30 C.A.B. 13 (1959).

And thus, here again, the conclusion must be that there is some difference between the American regulatory common carrier and the common law common carrier. The basic importance in American legislation is with the description of the carrier's business—the way he holds himself out—the way he performs, in what manners he operates, but other aspects may be more or less disregarded, and again it must be borne in mind that other factors must be guiding in modern transportation policy than an old concept can fully provide, unless its substance is adjusted to new requirements.

Chapter 5

SUMMING UP

When trying to find a course of development in connection with a concept like that of the common carrier one is to a large extent involved with a relational problem, but the question may also be put so, as to whether there is any similarity between the 17th century concept of the common carrier and that of present time, and if so to what extent.

The common carrier doctrine was adopted in those countries taking over the English legal system, such as the United States, Canada and India. On the European continent or in Scandinavia there is no immediate equivalence. Nevertheless the solution of problems concerning public as well as private transportation law is not very much different in these countries as compared to the solution chosen in the countries influenced by common law. At present the common carrier doctrine in England is of little practical importance, since special transportation legislation to a large extent has superseded the common law, and in this legislation there is little, if any, reference to the concept of the common carrier. But, the basic common carrier thinking still exists, the term plays a great role in the legal language though it has little direct impact, and the common carrier doctrine has had great significance for the transportation legislation, both as for legislation concerning the liability for damage to and loss of goods carried, and for statutes regulating the transportation industry.

The dilemma is manifold. At one time the concept was monolithic to its nature, but a more complex society with several different institutions has of course influenced it. So, when trying to determine the common carrier concept a great number of factors have to be taken into account and weighed against each other.

Then it has also to be kept in mind that transportation embraces services with different vehicles and different economical structure, which have in various ways been influenced by different economic and political ideologies. Nevertheless, all transportation business has a fundamental element in common, being a bailment with a mandate to carry, which does distinguish

it from other businesses. Thus, naturally, the concept of the common carrier is applicable only where carriage is concerned, but it does not necessarily apply equally to all carriers irrespectively of vehicle used.

Apparently the common carrier doctrine among other things grew out from the public's interest in good, efficient, cheap, and safe transportation and should in present terminology in its origine probably be regarded as a doctrine of public law. The common carrier doctrine developed in England, probably influenced by Germanic law on bailment as well as Roman law and applied basically to inland transportation. With growing ocean transportation the more or less international laws on ocean carriage to a certain extent influenced by Roman law, came to be amalgamated with the common carrier doctrine, which, however, also went through modifications owing to the changes in the legal procedure. Even if the common carrier concept thus came to apply also to ocean carriers some of the consequences linked to the term may differ.

Several functions, duties, and liabilities are linked with the common carrier concept, and an effort to analyse them and thereby also the concept itself, also requires some synthesis in order to get a more comprehensive picture.

The starting point is, and after all must be, the concept of carrier. Anybody undertaking to carry or possibly performing carriage is regarded as a carrier.[1] When Grönfors made the owning or disposing of a vehicle a requirement for being able to enter into a contract of carriage,[2] this may have been a reflection of thinking in terms of status. A certain influence of public law aspects may have influenced his conclusion. From a private law point of view there is probably no such requirement as then suggested by Grönfors.[3] The general basis is that anybody is allowed to enter into any contract unless prohibited by law. The basic approach of the law is that all agreements are reached by two equal parties, neither of whom needs any particular protection, even if the one party is in fact much stronger and can force the other to conclude an agreement without passing the legal treshold to fraud or illegal force. This approach is a consequence of the idea of freedom of contract and sanctity of contract, but is gradually being modified.

The theories of status and contract go back far in legal history. "Contract" represented legal relations voluntarily assumed, in distinction from

[1] Cf. above § 3 and TIBERG, The Hague Rule Carrier, p. 127 et seq.

[2] Allmän transporträtt, 1 ed., p. 45.

[3] Cf. above § 3 and op. cit., 2. ed. p. 43.

"status" representing relations inherited or imposed.[4] As Wigmore points out "contract" has later had a more narrow and specific meaning, and he further stresses that with new types of relations that have come into use, there is need for a re-analysis, re-classification, and re-naming. "Society grew . . . out of a situation in which obligations and functions were determined by a man's status into one in which all obligations were created by free contract."[5] This generalization, however, was never quite true; never were all social and economic functions determined by status. Most relations have been constantly changing in different directions, and one could hardly talk about a surge from status to contract. "The rise of the guilds created a special status for the emerging economic function of commerce, and this status became a matter of free choice in England—in theory at least—at the beginning of the seventeenth century."[6] "If we deal with the matter from the point of view of legal analysis, the essence of a status is that it involves a complex of legal relations, obligations, rights, privileges, powers, just as so many other legal transactions and situations do. In a status, however, we are prone to stress the obligations and the fact that they are imposed on us without our precious self-determination or that they cannot be shaken off or seriously modified by any act of the will."[7] One may say that status brings "compulsory" contracts, and two things have to be considered when discussing "compulsory" contracts or obligations. Is there on the one hand a compulsion to make the contract, and on the other, once the contract is made, are the terms the result of an agreement or are they created by law with respect to every contract of that particular type?[8] This same pattern is found and similar questions may posed when discussing the common carrier doctrine from certain aspects. If carriage has been undertaken by promise the carrier is responsible to carry out his obligation according to his promise, but other rules may also come into the relation.

It is also necessary to comply with certain requirements set up by the law, like an air carrier has to apply for a certificate or a permit, etc. From early times the common law made a distinction between the obligations of the ordinary man and the duties of those who professed a particular calling,

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[4] WIGMORE, p. 569. Cf. FRIEDMANN, Law in a changing Society, p. 90 et seq., and FRIEDMANN, Legal Theory, p. 186.

[5] RADIN, p. 576.

[6] Op. cit. p. 576.

[7] Op. cit. p. 577.

[8] Op. cit. p. 578.

whose goods or services were available to all. Those practising so-called "common callings" were subjected to liabilities that arose less from agreement than from their status, and from the idea that it was in the interest of the community that people who offered their services to the public generally should show particular care, skill, and honesty in their dealings.[9] The common carrier is thus linked with a particular profession, in that he turns to the public at large for business, and this must be regarded as an important element in distinguishing the concept of the common carrier from that of the carrier. The professional function and relation is also the most important factor to distinguish common carriers from private carriers.

With the liberalism the theories of freedom of contract, sanctity of contract, freedom of engaging in business, freedom of competition etc. had a growing importance, but a balance is required between the different "freedoms" to prevent one of them from totally ruining the others. The carriers had early introduced clauses by notices or by special contracts to avoid and/or to diminish their liability. Such clauses were normally upheld in England where the theory of freedom of contract had strong implications, whether such clauses were used by common carriers or private carriers, but a tendency might be discerned, also in the English courts, to be more negative to such clauses when employed by common carriers, at least when no special contracts were used. U.S. courts were more inclined to declare clauses relieving common carriers from their liability void as against public policy, although no absolutely straight line could be distinguished.

Anyhow, mandatory legislation was passed to the effect that the carriers could not avoid a certain minimum liability, and these mandatory rules often do not specifically refer to common carriers.

A similar development took place with regard to the freight. A common carrier was at common law not allowed to charge more than a reasonable freight, and stipulations to the same effect were introduced into the legislation in the United Kingdom as well as United States of America. The situation with large carrying companies abusing their dominating market power particularly in relation to small customers with respect to both price and liability forced the authorities to intervene; some carriers were nationalized, some were required to apply for certificates and permits to operate, charges of certain carriers had to be approved by the authorities, and mandatory rules were introduced concerning the carrier's liability.

[9] BORRIE & DIAMOND, p. 23.

Thus one may discern a development from status with predetermined duties and liabilities to contract with greater freedom to agree on liabilities and price in the individual case back to a situation rather similar to that of status. But then again, in modern legal doctrine different relations are differently labelled. Thus so-called private law relations are regulated by rules concerning the liability, while e.g. pricing is governed by another set of rules. A similar pattern could be seen in purchase law which governs the responsibilities of the buyer and the seller, while the price might have to comply with other stipulations outside the purchase law. A number of different factors are thus important to observe when analysing the common carrier doctrine, which encompasses rules on both the price factor and the liability factor but also ranges over the antitrust aspect and that of trade-licensing. This does create a certain difficulty, because four hundred years ago one set of rules applied to the concept of the common carrier which has partly survived and partly been replaced by new legislation often not applicable only to common carriers, but still much legislation, particularly in United States, is based on the concept of the common carrier while much of the contents of the rules has been modified.[10]

The concept of the common—and private—carrier is the basis for the American regulatory legislation, as this concept is recognized at common law. But the nature of the common carrier has changed between the 17th and 20th century, as the way of performing business has changed. Transportation is to-day rather performed by a large corporation with considerable capital than by a person operating his own vehicle as his own master, and the question might be put whether the old concept of common carrier, rather aimed at the business practice where one man operated his own vehicle, also applies in cases where large corporations are involved with complicated financial structure and where leasing and chartering of vehicles are frequent. There are cases which could be interpreted to mean that the concept of the common carrier applies to the vehicle itself—to e.g. a ship—but in most instances the concept is used with respect to the person exercising his business—the professional carrier. A large corporation might, however, perform both common and private carriage at the same time with different vehicles in different trades, and the question may then be posed whether it is possible for one carrier to carry in both these capacities simultaneously.

[10] Such a variation in the use of the term common carrier is illustrated by FRIEDLAENDER, p. 100 et seq. in a chapter "The common carrier today", where is also described the declining role of the common carrier in transportation business.

This is by no means certain but depends on the circumstances. Some cases indicate that he who exercises business as a common carrier may not at the same time perform as a private carrier, while others are not explicit on this point. It is necessary to observe that no final conclusion to this effect could be drawn. Rather, it is apparent that the concept of the common carrier in to-day's business has to be related to management, vehicle, trade, and enterprise, or in other words the common carrier concept should be related to *functions* rather than *form*. Some cases further indicate a certain difficulty to change the nature of one's business, which would if drawn to its full consequences lead to "once a common carriers always a common carrier". What has here been said might under certain circumstances be true with respect to American regulatory legislation, and may not have been true at common law.[11]

What then are the implications remaining from the common carrier doctrine? The common carrier concept has ceased to have immediate importance in English law, while it still has a central place in American law. The common carrier doctrine originally embraced both the safe carriage aspect and the carriage for reasonable compensation aspect. In the Interstate Commerce Act they are both represented, but the Shipping Act and the Federal Aviation Act mainly lay down the economic regulatory viewpoint.

Above[12] I have suggested that the common carrier concept may have had at least an indirect impact on the American interpretation of the COGSA and the Hague-Visby Rules. Another illustration of the particular American approach, where the concept of common carrier prevents a clear distinction between private law and public law aspects, is also found in the IMCO/ECE negotiations on the TCM-convention in London, January 1971.[13] This convention is of private law nature providing for regulation of the combined transport operator's (CTO) liability. Nevertheless the American delegation proposed two amendments to the Draft Convention, which in Scandinavian terminology rather represent regulation of public law nature. They were both rejected.

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[11] The principle is of course that somebody exercising a public employment ordinarily may terminate it by a withdrawal of the offer to the public. Cf. CHAPLIN, p. 555 et seq.

[12] Above § 9.3.

[13] Cf. above § 1.5. and below in Appendix.

One reads: "Nothing in this Convention shall prevent a State Party from taking action to ensure that there are no discriminatory practices in the making or carrying out of CT agreements."[14] The other: "Nothing in this Convention shall affect the right of any State party to determine who may act as a CTO within its territory."[15]

The common carrier concept originally had several implications, but in present American administrative law it is used to describe a profession, to which certain consequences have been hinged by legislation, and it has also been extended to embrace carriage of passengers.

It is evident that in present Anglo-American law the consequences of being a common carrier are largely legislated about, both with respect to charges, liability, services etc. One main reason for such far-reaching legislation obviously was the courts' acceptance of the contractual freedom to limit one's liability in different ways. The concept of the common carrier is seldom defined in the legislation, but the common law definitions have to be used. Thus, with respect to the prerequisites for being a common carrier, the traditional factors are still basically determining, but it has also to be kept in mind that the legislation carried through concerning the consequences for being a common carrier might also have—and certainly has had—an impact on the determination of the concept itself.

As a matter of development it must then be interesting to notice that from the heavy liability imposed on common carriers at common law, basically also ocean carriers, there was a development among all carriers to mitigate their liability which led to varying mandatory legislation depending on the vehicle, but in present days there is a development to generally decrease these variations and at least in intermodal carriage to create a single liability, although several carriers may be involved. The general trend is also rather to increase the carrier's minimum liability than to allow him to further mitigate it.

Different elements of the common carrier doctrine have been stressed at different periods, and although the term is frequently used and practically important in above all United States, I believe it is fair to say that to-day's common carrier is something very different from that of earlier times. It is used in partly different contexts, and legislation has been passed to set a standard for the need of the community.

The evolution of the common carrier doctrine may be regarded as an

[14] CTC 6.
[15] CTC 9.

illustration of different legal techniques, and a superficial comparison to Swedish conditions may be made to indicate similarities and dissimilarities between one system, where the common carrier doctrine developed and another where this doctrine is basically unknown.

In Swedish law the border line between questions concerning liability and those concerning price and duty to carry by tradition has been more distinct than in above all American law, although this difference may be declining. As for the private law aspect with regard to liability Swedish legislation, heavily influenced by international convention does not differ very much from English law—cf. moreover the common carrier's liability at common law with the ocean carrier's liability in the Swedish Maritime Code 1891[16]—while the public law aspect—what may often be referred under the heading "transportation policy"—has developed under more purely national conditions. Although there is no common carrier doctrine in Swedish law, concepts like traffic duty, duty to carry, and duty to announce tariffs[17] are well familiar in Swedish transportation regulation in connection with licensing to perform business.

Firstly should be observed some apparent distinctions between English and American transportation industry with regard to its relation to the respective government. In the U.S. the transportation industry is wholly privately[18] owned but heavily regulated through various government bodies, while in England most railways, part of the trucking industry and part of the air transport industry are government owned. The status of the British transportation industry is thus more similar to other Western European countries than to the United States, as in most states of Western Europe the railways are mainly nationalized. All transportation branches are regulated in the United States, including ocean transportation. Large direct subsidies are paid to some of the big steamship corporations, both as economic aid to build new ships constructed at U.S. shipyards and to maintain traffic—in this connection common carrier status also plays a great role. The transportation industry on the whole is regarded as a public utility and is also exempted from the ordinary antitrust laws. In England, on the contrary, ocean carriage is exempted from economic regulation,

[16] Cf. GRÖNFORS, Successiva transporter, p. 45 where the liability question is thoroughly discussed. Cf. RAMBERG, Unsafe Ports and Berths, p. 28.

[17] WESTERBERG, p. 44.

[18] The recent discussion on whether U.S. railways ought to be nationalized must however be observed.

while the other branches are supervised and regulated to various extents.

The transportation industry in the U.S. is thus, while privately owned, thoroughly regulated and to a certain extent directly subsidized, whereas in England there are some efforts to decrease the amount of regulation to give way to more competition also with respect to the nationalized transportation enterprises.

In Sweden, the general organization of the transportation industry is similar to particularly that in England. Largely the same industries are nationalized within the transportation industry, and also the structure and organization are much alike.

As for ocean carriage no permit is demanded in order to be able to profess as an ocean carrier. Freight charges are decided by the shipowner himself without any involvment from any government body; although conferences and other international agreements may interfere with this right of the individual shipowner. Except for some few interior lines where the government is partly involved there is no general obligation to carry for anybody. Questions concerning maritime transports are dealt with by the Ministry of Communication and the National Swedish Administration of Shipping and Navigation, which later body is concerned only with safety matters etc. and not directly with economic questions of maritime transportation. The Swedish Maritime Code and the so-called Statute of Hague, based on the Hague Rules, regulate questions on i.a. the water carrier's liability.

As to air traffic there is an Air Traffic Act which embraces both private and public legislation. To be allowed to profess air carriage the air carrier is obliged to have a permit, issued with respect to regular carriage by the Government, and as to other types of air carriage by the National Swedish Administration of Air Traffic. Several factors, like the demand for carriage and competition are taken into consideration when a permit is issued. Freight charges are examined and approved by the authorities. In Swedish carriage by air SAS and Linjeflyg play a similar role as BEA and BOAC in England. No general obligation to carry is imposed upon the air carriers. As to the air carrier's liability for loss of and damage to goods carried pertinent laws are founded upon the Warsaw Convention and the Hague Protocol.

In 1963 a Transportation Act was introduced, whereby a new Swedish transportation policy was drawn up. This Act intended to create a good, efficient and cheap transportation apparatus for all parts of Sweden and to wind up restrictions hampering competition in the transportation industry. It embraces only rail and road traffic.

With regard to railway traffic the conditions, like in England, are specific depending on the nationalization. The act on railway traffic has both public law and private law character, including both economic regulation and rules as for the railway carrier's liability. The pricing is here somewhat more complicated because of the railways' character of public institution, apparent above all in passenger traffic. The tariff must be approved by the public authorities, but there are also certain possibilities to reach special agreements with the railway. (Normal Conditions in Railway Traffic, §§ 2 and 41.) In the Normal Conditions there is also a certain duty to carry, §§ 3 and 42. With regard to international carriage by railway such is regulated by CIM.

Concerning professional road haulage the YTF of 1940,[19] has been partly superseded by the Transportation Act. A statute of 1951 is regulating road haulage abroad. The YTF originally regulated the road haulage industry rather thoroughly both as to pricing and permits; it also stated an obligation to carry.

To get a soft transition to the new system the steps of reorganization were to be taken in three stages, 1964, 1966 and 1968, but this last stage has been postponed. The Act has e.g. been of the effect to repeal the Swedish Railways' obligation to carry for all alike. As to professional road haulage a less restrictive test of need is applied, in certain cases the control of tariffs has been abolished and so has the duty to carry. However a test of the carrier's financial position and personal conditions has been introduced. As to the carrier's liability the CMR has been incorporated as Swedish law (July 1, 1969) as for international carriage, while with regard to interior Swedish traffic there is no particular legislation, but many conditions of carriage are similar to those existing in railway carriage.

As to freight forwarders there is no specific law governing their liability in relation to the customer, but the YTF contains certain rules regulating freight forwarders.

In spite of a common foundation through the common carrier doctrine English and American transport law appears to differ more than English and Swedish law, where no such concept has played a role. Naturally there is no reason why a common concept would prevent laws in different countries to become divergent, although the original common carrier doctrine in a way may be said to express a kind of transportation policy. The struc-

[19] See above § 3.

ture of American economy evidently has influenced also the transportation industry, which explains this larger difference. The reason for not using the concept of the common carrier in English administrative law may have been a wish to avoid the influence of a well-known and established concept in an area where new regulatory authorities were to have the controlling function, i.e. it may have been easier and less risky to use a new terminology to carry out the purpose of the new legislation, although behind it at least traces of the common carrier concept may be discerned.

In the private sector of transportation law international conventions have played an unusually great role, while the public law sector has been and has remained of rather national character, in spite of e.g. efforts to create a common transportation policy within the Common Market, etc. Thus a study emanating from both domains may embrace so different material, that there is no natural intersection between them. The common carrier concept in Anglo-American law however gives a natural starting point for such a study, and this concept may indirectly facilitate a similar study of the concept of carrier in public and private law in other legal systems.

Appendix

INTERMODAL CARRIAGE

Above has been indicated that particular questions arise in successive carriage, i.e. carriage where two or more carriers are involved in the performance of a promise to carry.[1] Such specific problems are a consequence of legislation prescribing varying liability for different carriers. Thus a shipper entering into a contract of carriage with one carrier, who is to perform only part of the contract himself, cannot with certainty foresee what rules of liability will apply if damages occur to the goods during another part of the transport. This is regarded as an unsatisfactory state of things for the shipper, and as intermodal carriage is becoming increasingly important through containerization and the use of other unit loads, much attention has been paid to these questions during recent years. Apparently connected problems are not national to their nature and not specific for the United States or United Kingdom but are common where unit carriage is involved, i.e. above all in the trade between the most industrialized nations. Great efforts have been made to overcome the difficulties by incorporating in the transportation documents clauses whereby the contracting carrier extends his liability to last from door-to-door.[2] But these objects are also the object of close examination by different international organizations, and at the CMI conference in Tokyo, March/April 1969 the delegates reached a unanimous agreement on the liability of the "combined transport operator" and at a round table meeting arranged by UNIDROIT in Rome, January 1970, the same proposition was also accepted with some alterations.

[1] Cf. above § 1.5 and § 3.

[2] So for instance Atlantic Container Line, Tor Line, England-Sweden Line, and Scanfreight. Cf. e.g. Sea-Land and Container Marine Line but also ACT and the OCL experiment with an insured bill of lading, which did not become a total success. Cf. however also with the ACL Parcel document, recently launched. GRÖNFORS, Successiva transporter, discusses thoroughly the use of this type of clauses, pp. 217–307 and in SvSjT. 1970, no. 46, p. 30 et seq. he presents the Combiconbill—a new document for combined transports adopted by BIMCO.

Since then efforts have also been made to include the air carriers in a proposed convention on "combined transport operators". During 1971 several international meetings are being held in an effort to prepare a TCM convention that could be adopted by a diplomatic conference within the next few years.[3] Connected problems are, however, in practice to a certain extent an insurance matter.[4]

The carrier's liability in intermodal carriage has been dealt with extensively by several writers and I shall in this brief appendix approach another problem which is a result of above all American regulation, although only indirectly connected with the concept of the common carrier.

The jurisdiction of one Commission may come in conflict with that of another one thus, of course, obstructing the further evolution of intermodal carriage. The problems caused by the jurisdictional conflict[5] in American regulation seem to be specifically American, and less pronounced elsewhere including England.

One advantage of intermodal carriage for the customer is that he might be offered one document, one rate, and one liability although several carriers may be involved in the shipment. "Under the two basic regulatory statutes, rail lines, motor carriers and water carriers, who are subject to the Interstate Commerce Act, are prohibited from entering into arrangements with water carriers and terminal operators subject to the Shipping Act in the fixing of joint through container rates in the foreign commerce of the United States."[6]

"A maze of transportation laws and regulatory procedures inhibits the growth of a truly coordinated, intermodal transportation system for foreign commerce. The fact that three separate agencies regulate commerce ... reveals a diffused approach to a transportation system needing coordination. Separate rates are required to be quoted for the various segments of an international shipment, different rules of liability govern each mode of

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[3] See e.g. RAMBERG, The Combined Transport Operator; GRÖNFORS, Successiva transporter, pp. 217–307, particularly from p. 275; GRÖNFORS, Container Transport and the Hague Rules; MANCA, vol. 2, particularly pp. 245 et seq., 300 et seq., and 344 et seq. See also Containers 1–6, and notice in no. 3 the discussion on the concept of common carrier at p. 33.

[4] Cf. e.g. Cargo Insurance and modern Transport.

[5] With respect to the jurisdiction between ICC and FMB see e.g. *Baltimore & O.R.R. v. United States*, 201 F. 2d. 795 (3 CCA, 1953).

[6] SCHNEIBER, p. 1.

transportation, and a separate set of documents is required by each participating carrier."[7]

Before going into the complications of intermodal carriage in foreign commerce, I should like to somewhat discuss the American domestic intermodal service.

Much railroad traffic, passenger or freight, must move over the lines of different carriers from point of origin to destination. Co-operating railroads thus interchange traffic, and do this by through billing and through tickets, so that the customer will only have to deal with one single carrier.[8] Sec. 1 (4), 15 (3), (4) and (6), and sec. 307 (d) provide for the establishment of through routes and joint rates, all rail, all water, and rail-water between carriers subject to part I and III of the Interstate Commerce Act.[9]

Sec. 216 (a) provides for through routes and joint fares for common carriers by motor vehicles, and 216 (c) provides that common carriers of property by motor vehicle may, but are not required to, establish through routes and joint fares with each other or with common carriers by rail or water.[10] So while ICC may require railroads and ICC water carriers to establish through routes and joint rates, it has no power yet to do so for railroads and motor carriers, or water carriers and motor carriers. On a voluntary basis such transport may, however, be established, with the sanction of ICC. CAB does not have the authority to require through routes and joint rates between air lines and other carriers, though such arrangements may be worked out through ICC and CAB. If controversies arise, such questions may be referred to a joint board, consisting of an equal number of members from ICC and CAB.[11]

Such provisions with respect to through rates and interchange facilities are not necessary in connection with freight forwarders, as they use underlying carriers by rail, water or motor vehicle. Nevertheless sec. 404 (c) prescribes that common carriers by rail, motor vehicles or water may not discriminate as between freight forwarders.[12] The severe loss of freight

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[7] Legal Aspects, p. 534. Cf. Intermodal Transportation, p. 1360 et seq., and SCHMELTZER & PEAVY, p. 203 et seq.

[8] PEGRUM, p. 122.

[9] Cf. WATKINS, p. 212; KNORST, vol. 2, particularly p. 106 et seq.; GUANDOLO, p. 270 et seq.

[10] Cf. WATKINS, p. 213.

[11] PEGRUM, pp. 123 and 250.

[12] WATKINS, p. 214.

traffic from the railroads to higway carriers in recent years has made the railroads look for new means to reverse the trend. Therefore trailers loaded on flat cars (T.O.F.C.), so-called "piggyback" service, has been used to an increasing extent in railroad shipments.[13] Though there is no authority to compel through routes and joint rates between rail and motor carriers or between motor and water carriers, there has been voluntary action for trailer-on-flat-car service under five piggyback plans, and practically all other trailer-on-flatcar arrangements represent a modification of one of these basic plans.[14]

The connected problems are still more complex in foreign commerce, and although this is not the place for their thorough investigation some should be made.

"A logical outgrowth of this new vehicle[15] for coordination among transportation carriers in foreign commerce is a single rate applicable to each segment of the international transportation."[16] Under present procedure a shipper contracting for transportation of goods from an interior point in the United States to an interior point in Europe is quoted three separate rates with different rate factors, each applying to one part of the movement. He would eventually also have to deal with three carriers, with an inland U.S. carrier, or freight forwarder, with an ocean carrier and with an inland

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[13] WATKINS, p. 267; PEGRUM, pp. 123–24. PEGRUM gives the following figures on the growth of the piggyback service at page 124: "Piggyback transport has grown rapidly in the last ten years. Some 65 railroads now offer piggyback service as compared with 19 at the start of 1955. In 1954, 44,102 flat cars loaded with truck trailers were handled by the railroads. In 1955, piggyback loadings increased to 168,150; they reached 415,156 in 1959 and 1,216,900 in 1964."

[14] PEGRUM, p. 249; KNORST, vol. 2, p. 129.

[15] Vehicle here refers to containers.

[16] Legal Aspects, p. 537. DAUSEND in Selected Remarks, p. 12 et seq. heavily criticizes the opinion that there is a great need for a single onefactor rate, which he finds theoretically appealing, but he is of the view that in practice there is little need for it. On p. 22 he states: "I hope I have established by now that the proposal for joint one-factor rates does not fit the needs either of the shippers or the container steamship lines. I do think, however, that the steamship container operators, U.S. and foreign, and their shippers would benefit by the creation of a separate intermodal container conference to discuss, among other subjects, the further development of the very high quality of intermodal business cooperation so far achieved. But we believe that the next draft of the Trade Simplification Act should delete the question of joint one-factor rates." Cf. however BLACKWELL, in the same paper, p. 26 et seq. where several views are presented in favour of joint single factor rates.

European carrier or freight forwarder.[17] For the inland portions, the rates charged are normally based on cents per pound, while for the ocean movement the rate would in most cases be termed in dollars per weight or measurement ton. A joint rate can, however, be based on a single factor applicable to the whole movement, for instance, $ 3.00 per 100 pounds for cartons of TV tubes shipped in a container from Chicago to Munich. This price or rate includes the freight and accessorial charge for a door-to-door movement from inland point to inland point or from port-to-port.[18] So, normally on a movement from a point in the United States to a point in another country,[19] the shipper will find that ICC believes that it cannot accept any rate which incorporates ocean transportation, while FMC believes that it cannot accept a rate which includes inland movement in the United States, and so separate rates are quoted from each mode of transportation employed.[20]

In addition to these impediments, a shipment could involve as many different rules of liability as there are carriers involved, which is a further obstacle for single bills of lading, and thereby also uncertainty for a shipper, should his goods be lost, damaged or delayed.

The situation involving combined or intermodal transport is therefore complicated and not susceptible to simple formulation. In some instances, a single, through bill of lading may be issued to cover the movement from origin to destination; in other cases the shipment will be rebilled at point of transfer from one mode to another. For example, Uniform Through Export bills of lading, both negotiable and non-negotiable, may be used on rail-steamship or truck-steamship service from interior points in the United States to overseas destinations, but only through Pacific Coast ports. Via Atlantic, Gulf or Great Lake ports, separate bills of lading are requried for the inland and ocean portions respectively, and each is subject to its own liability provisions.

There is one basic difference between on the one hand ICC and CAB regulations and on the other FMC operations, namely that ICC and CAB authorize carriers within their jurisdiction while FMC only requires common carriers by water within its authority to file tariffs with the Commission

[17] BLUM, p. 93; Legal Aspects, p. 537.

[18] BLUM, p. 93.

[19] With respect to Railroad carriage to or from Canada or Mexico these difficulties do not arise.

[20] BLACKWELL, Selected Remarks, p. 29. Cf. SAMPSON, p. 294 et seq.

and to adhere to its rules; in other words FMC does not award permits or certificates to carry. This also contributes to the problems.

The need for improved coordinated and particularly intermodal transportation is true also with respect to coordinated traffic in aviation. As has been said above the Federal Aviation Act regulates both direct and indirect air carriers.

Most intermodal carriage with air transportation has been a combined air-truck service, which has been carried out in two ways, either line-haul services of truck lines or pickup and delivery services of truck lines.[20a] The former normally involve a combination-rate arrangement rather than joint rates, while the latter service is usually rendered under an agency contract arrangement between the air carrier and the trucker, and the shippers are charged for such service by the air carriers, who publish the charges in their scale of tariffs.[21]

Under the Federal Aviation Act air freight forwarders may not establish joint rates with common carriers subject to the Interstate Commerce Act[21] and the Board has decided that air freight forwarders may not establish joint rates with direct air carriers.[22] ICC has ruled, however, that air freight forwarders were permitted to receive shipments from, or turn them over to authorized over-the-road motor carriers, but this ruling is in practice less far reaching than it may seem.

Only a few direct air carriers publish joint air-surface tariffs for the transportation of freight.[23]

The main difficulty of course lies in the jurisdictional conflict between the different regulatory agencies. None of them is interested in having its power cut down, and this naturally has caused serious problems. In a case where one agency has come to one conclusion, another, finding its competence infringed, may rule in another direction. Such conflicts may then prevent a different development, whereby the agencies may lose some possibility to control the evolution.[24] However, I shall not now elaborate

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[20a] Cf. Regulation of Air Freight Pickup and Delivery, p. 405 et seq.

[21] Section 1003 (b).

[22] *Air-freight Forwarder Investigation*, 24 C.A.B. 755 (1957).

[23] An economic Study of Air Freight Forwarding, pp. 105 and 106.

[24] The difficulties are illustrated i.a. by some recent cases, *American Trucking Associations Inc., v. Atchinson, Topeka & Santa Fe Ry.*, 387 U.S. 397 (1967) and *Disposition of Container Marine Lines Through Intermodal Container Tariffs, Nos. 1 and 2*, FMC, Nos. 10 and 11. Docket No. 68–8. See about this case p. 5 in the 7th Annual Report

in detail these problems, which although of great significance, may be regarded as being outside the scope of this study.

Three new concepts of particular importance in the intermodal carriage are the non-vessel operating common carrier (NVOCC), the intermodal carrier, and the transmodalist. "A transmodalist is someone who puts together the connecting parts of a through transportation movement and offers it to a shipper at one all inclusive price. — — — Some transportation companies in the U.S. are presently offering such a service although it is not encouraged by present U.S. regulatory statutes. Transportation companies for the most part however do not offer a truly 'transmodalist' or 'intermodal' service."[25] The non-vessel operating common carrier is a concept created by FMC for persons who offer to transport cargo but do not operate vessels. A NVOCC is often a land carrier or freight forwarder with a certificate from the ICC, and has been defined as an entity who:

"(1) holds itself out by publication of tariff or otherwise to provide transportation for hire by water in the domestic offshore or foreign commerce of the U.S.;

(2) assumes responsibility or has liability imposed by law for the safe transportation of shipments it offers to transport; and

(3) transports such shipments utilizing underlying water carriers."[26]

In some cases the NVOCC character has been established by the FMC.[27]

A NVOCC may operate on a port-to-port basis and is then not required to have an operating authority from any U.S. regulatory agency, but, as already mentioned, he will have to file his tariffs with FMC.[28]

A NVOCC has to file his rates for the domestic inland portion of the transport with ICC and for the port-to-port part with FMC. For the inland part in a foreign country he does not have to file a rate with any U.S. agency, but he would not be allowed to use the charge for this part as a device for rebating or otherwise violating the Shipping Acts.

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by the FMC (1968). Legal Aspects, p. 545 et seq.; and BLUM, p. 94. Cf. also regulations affecting maritime carriers and related activities, Part 535, Filing of tariffs by common carriers by water in the foreign commerce of the United States and by conferences of such carriers—filing of through rates and through routes, Issue of Federal Register, April 21, 1970 (35 FR. 639 4). In connection with these questions cf. also above § 11.

[25] BLUM, p. 93.

[26] P.M. of the FMC.

[27] *Determination of Common Carrier Status*, 6 F.M.B. 245 (1961) and *Bernhard Ulmann Co. Inc.*, 3 F.M.B. 771 (1952).

[28] Cf. Nonvessel operating Common Carriers.

The intermodal carrier is a concept suggested by the FMC container committee, while the transmodalist is a concept launched by the U.S. National Committee of the International Cargo Handling Coordination Association. They will both be important persons in the new container traffic developing not the least between the United States and Europe.

As a result of these conflicts a surface carrier at an inland domestic point at present time normally has several choices in connection with international ocean traffic.[29]

He may:

1. Carry to the port at domestic rates and remain uninvolved in the export transportation process.

2. Obtain an ocean freight forwarder licence from FMC, charge the shipper for clearance services, and the ocean carrier for booking services. To obtain business the domestic surface carrier is likely to publish proportional rates to the port applicable only to international traffic.

3. Solicit the shipper's business at the port as an NVOCC which requires the surface carrier to establish and publish a line of ocean rates filed with FMC. Here the surface carrier will seek to take his profit on the international movement from the spread between his rate and that of the underlying ocean carrier, rather than from a commission paid by the ocean carrier.

4. Seek agency permission to publish a single factor combination of his domestic rate to the port and his NVOCC transocean rate.

This guarantees the surface carrier the through-route business from the time of initial interior pickup. However, it renders his service to the port at this level unavailable to shippers who desire to use a different NVOCC at the port.

5. Seek agency permission to join with another NVOCC in the publication of joint, single-factor through rates.

In a through carriage with the same means of transportation, e.g. two ships, the first carrier could issue one bill of lading, give the shipper one through rate, and undertake the liability for the whole trip.[30]

Concerning intermodal carriage, however, the situation is complex, since two or more different modes of transportation are involved, and also two or more regulatory agencies.

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[29] There may of course arise some difficulties in proving where the damage actually occurred in the event of a recovery case.

[30] See ASHTON, Selected Remarks, pp. 45–46.

Thus three particular points render intermodal carriage an involved business. One is the documentation, negotiable ocean bills of lading being bankable, others not,[31] one is the liability question, and the third is the economic regulation, which mainly seems to be an American problem.

With respect to the rate, it appears to be very difficult to file a through single factor rate with two different regulatory bodies, as these agencies are independent from one another and also involved in a conflict of prestige with one another. It is possible, however, to calculate a through rate and file each part with its respective agency. It may even be possible to file a through rate with several agencies, but there is a great risk, that one agency would approve of it while the other would not. To overcome these difficulties a bill was introduced in the House of Representatives dealing with these problems on March 18, 1968.[32] This bill[33] "To authorize and foster joint rates for the international transportation of property, to facilitate the transportation of such property, and for other purposes" has been called the Trade Simplification Act, 1968. The bill was reintroduced in a modified version in 1969, but has not yet been passed.

[31] I am not going into this question at all, but it should be pointed out that much work has been expended on its solution, particularly within the International Chamber of Commerce. Cf. SASSOON, p. 73 et seq.

[32] H.R. 16023, the bill was later introduced to the senate S. 3235.

[33] The third section of the bill reads: "(Section 3.) *Definitions.* As used in this Act—

(1) 'Agency' means the Civil Aeronautics Board, the Federal Maritime Commission, or the Interstate Commerce Commission.

(2) 'Carrier' means a common carrier subject to the jurisdiction of an agency, or a transporter of property by land, water, or air for hire between points both of which are outside the United States.

(3) 'Common carrier subject to the jurisdiction of an agency' means:

(a) An air carrier, foreign air carrier, or air freight forwarder holding a certificate, permit, or operating authorization from the Civil Aeronautics Board;

(b) A common carrier by water (including a non-vessel operating common carrier by water) subject to the jurisdiction of the Federal Maritime Commission; or

(c) A common carrier subject to Parts I, II, III, or IV of the Interstate Commerce Act.

(4) 'Joint rate' means a rate jointly offered for a through service, and expressed as a single, comprehensive rate, by

(a) two or more carriers, at least one of which shall be a common carrier subject to the jurisdiction of an agency, or

(b) one common carrier subject to the jurisdiction of more than one agency, or

(c) one common carrier subject to the jurisdiction of an agency and also performing transportation wholly outside the United States: *Provided,* however, that an ocean rate and a charge for pick-up or delivery service in the port area of origin or delivery cannot be combined to form a joint rate."

Some of the practical questions connected with the regulation problems in intermodal carriage might be somewhat further indicated. Can an ocean carrier be the contracting carrier? He would meet with one immediate and probably insurmountable hindrance, as he would hardly get a permit to be an ICC carrier and he would thereby be prevented from operating as an ICC carrier for the ICC part of the voyage.

An ICC carrier or Part IV freight forwarder is in a better position. He has his permit to operate as an ICC carrier and FMC does not require that he shall have a permit to operate as an ocean carrier, but only that, if he acts as such, he has to file his tariff with the commission, and that is how non-vessel-operating-common carriers may operate. An ICC carrier is thereby in an advantageous position in intermodal carriage.

Sea-Land, Inc. is an ICC-carrier in its coastwise or intercoastal services, i.e. New York-Galveston or New York-San Francisco etc. But it cannot operate beyond terminal areas of the ports it serves except in conjunction with regulated truck lines. Sea-Land does thus not undertake a through common carriage in its North Atlantic traffic from U.S. inland points to European inland points. In transports from Chicago to Europe, Sea-Land issues a bill of lading covering the whole transport, but then again the bill of lading covering Chicago-New York is issued *as agent* for Pennsylvania Central railroad.

Concerning liability there is no legal rule really preventing a carrier from undertaking a common carrier's liability for a through intermodal transport, since no mandatory legislation imposes upon carriers a more severe liability.[34]

In domestic traffic Sea-Land introduced in its Puerto Rico service a liability system with an insured bill of lading, but in the North Atlantic routes no stemship company, as far as I am aware, has up to now undertaken such far reaching liability.

Evidently the division between the three regulatory agencies in American transportation regulation causes inconveniences for a smooth development of intermodal carriage and there is need for a joint approach. Whether the outcome of the difficulties will be the Trade Simplification Act or a joint

[34] Certainly, however, the CMR should be interpreted to mean that the carrier under this convention is not allowed to undertake a liability which diverges from the rules, not even to the advantage of the customer. This being so, the reason may be that since carriage by road is a much regulated industry in all Europe, the legislator will prevent the road carriers from using the liability as a means of competition.

agreement from the regulatory agencies, hardly makes any difference in practice, but the proposed Act must then, anyhow, be regarded as an interesting step in the evolution.

The pattern with respect to the American economic regulation is thus maintained in the Trade Simplification Act, insofar as this Bill is based on the concept of the common carrier. As a matter of principle there should be no variation in the determination of this concept as between the different regulatory bodies, but certain slight divergencies may under certain circumstances be discerned, and presumably the situation created in this Bill will have some influence on the future development and interpretation of the common carrier concept.

ABBREVIATIONS

A.	Atlantic Reporter
A.C.	Appeal Cases, Appellate Court
A.C. (preceded by date)	Law Reports, Appeal Cases, House of Lords (1891–)
ACL	Atlantic Container Line
ACT	Associated Container Transportation
A.L.R.	American Law Reports
AMC	American Maritime Cases
ASG	Aktiebolaget Svenska Godscentraler
ATLB	Air Transport Licensing Board
aff'd	affirmed
AfL	Arkiv for Luftrett
AfS	Arkiv for Sjørett
All E.R.	All England Reports (1936–)
Am. Dec.	American Decisions
Am. Rep.	American Reports (Selected Cases)
App. Cas.	Appellate Cases
App. Ct. Div.	Appellate Court Division
Asp. M.L.C.	Aspinall's Maritime Law Cases
Atl.	Atlantic Reporter
AU. E.R.Rep.	All England Law Reports Reprint
B.	Beaven's Reports, Rolls Court (1838–66)
BIMCO	Baltic and International Maritime Conference
B.R.F.	British Road Federation
BRS	British Road Services
B. & Ald.	Barnewall and Alderson's Reports, King's Bench (1817–22)
B. & S.	Best and Smith's Reports, Queen's Bench (1861–70)
Bing.	Bingham's Reports, Common Pleas (1822–34)
Bos. & P.	Bosanquet and Pulley's Reports, Common Pleas (1865–75)
C.A.	Court of Appeal
CAB	Civil Aeronautics Board
C.A.B.	Civil Aeronautics Board Reports
C.B.	Common Bench Reports (1845-56)
C.B.N.S.	Common Bench Reports, New Series (1856–65)
CCA	United States Circuit Court of Appeals
C.D.	Law Reports, Chancery Division

CIM	Convention internationale concernant le Transport par Chemins de Fer des Marchandises
CJS	Corpus Juris Secundum
CMI	Comité Maritime International
CML	Container Marine Line
CMR	Convention relative au Contrat de Transport international de Marchandises par Route
COGSA	Carriage of Goods by Sea Act
C.P.	Law Reports, Common Pleas Cases
C.P.D.	Common Pleas Division (1875–80)
CTO	Combined Transport Operator
C. & P.	Carrington and Payne's Reports, Nisi Prius (1823–41)
Cab. & El.	Cababé and Ellis' Reports
Car. & Kir.	Carrington and Kirnan, English Nisi Prius Reports
Carth.	Carthew's Reports, King's Bench (1687–1700)
cert. den.	certiorari denied
Coke Rep.	Coke, English King's Bench Reports
Col. L.Rev.	Columbia Law Review
Ct. of App.	Court of Appeal
DC	United States District Court
DOT	Department of Transportation
E. & B.	Ellis & Blackburn, Queen's Bench (1851–1858)
ED	Eastern District
ECE	Economic Commission for Europe
EEC	European Economic Community
E.R.	English Reports (1220–1865)
ETL	European Transport Law
East.	East's King's Bench Reports
Esp.	Espinasse's Reports Nisi Prius (1793–1810)
Ex.	Exchequer Reports, Welsby, Hurlstone & Gordon (1847–56)
Exch.	English Law Reports, Exchequer
F.	Federal Reporter
F.2d.	Federal Reporter, Second Series
FAA	Federal Aviation Agency
FIATA	Fédération internationale des Associations de Transitaires et Assimilés
FMB	Federal Maritime Board
F.M.B.	Federal Maritime Board Reports
FMC	Federal Maritime Commission
F.M.C.	Federal Maritime Commission Reports
F. Supp.	Federal Supplement
F. & F.	Foster and Finlason's Reports, Nisi Prius (1856–67)

FT	Förvaltningsrättslig tidskrift
Fed. Carr. Rep.	Federal Carriers Reporter [π; Carr. Cas.]
Fed. Cas.	Federal Cases
GHT	Göteborgs Handels- och Sjöfartstidning
Georgetown L.J.	Georgetown Law Journal
Gray	Gray's Massachusetts Reports
H.L.	House of Lords
Harv. L. Rev.	Harvard Law Review
Hill.	Hill's New York Reports
How.	Howard's United States Supreme Court Reports
IATA	International Air Transport Association
ICC	Interstate Commerce Commission
I.C.C.	Interstate Commerce Commission Reports
ICAO	International Civil Aviation Organisation
IMCO	Intergovernmental Consultative Organization
I.R.U.	International Road Transport Union
Ill. App.	Illinois Appeal Reports
Iowa	Iowa Reports
J.	Justice, judge
JALC	Journal of Air Law (up to 1938) Journal of Air Law and Commerce (from 1939)
JBL	Journal of Business Law, The
JMLC	Journal of Maritime Law and Commerce
K.B. (preceded by date)	Law Reports, King's Bench Division (1900–)
Ky. L. R.	Kentucky Law Reports
L.J.C.P.	Law Journal, Common Pleas (1831–1875)
L.J.K.B.	Law Journal, New Series, King's Bench
L.J.Q.B.	Law Journal, New Series, Queen's Bench
L.Q.R.	Law Quarterly Review, The
L.R.C.P.	Law Reports, Common Pleas (1865–1875)
L.R.H.L.	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords (1866–75)
L.R.Q.B.	English Law Reports, Queen's Bench
L.T.	Law Times Reports (Privy Council)
L.T.O.S.	Law Times Reports, Old Series (1843-60)
L.R.Ex.	Exchequer Cases (1865-75)
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas (1694–1732)
Ll.L.Rep.	Lloyd's List Law Reports (1919–50)

Lloyd's Rep.	Lloyd's List Law Reports (1951–1967) Lloyd's Law Reports (from 1968)
M.A.	Maritime Administration
MCC	Motor Carrier Reports
Man. & G.	Manning and Granger's Reports, Common Pleas (1840–45)
Moore	Moore's English Law Reports
ND	Northern District
N.D.	Nordiske Domme i Sjøfartsanliggender (Scandinavian decisions in maritime matters)
N.E.	North Eastern Reporter
N.E. 2d.	North Eastern Reporter, Second Series
NJA	Nytt Juridiskt Arkiv (Swedish Sup. Ct. decisions)
N.W.	North Western Reporter
N.W. 2d.	North Western Reporter, Second Series
N.Y.	New York Court of Appeals Reports
N.Y.S.	New York Supplement
N.Y.S. 2d.	New York Supplement Reporter, Second Series
OCL	Overseas Containers, Ltd.
OECD	Organisation for Economic Cooperation and Development
P. (Pac.)	Pacific Reporter
P. 2d.	Pacific Reporter, Second Series
Pa. Super	Pennsylvania Superior Court Reports
Q.B.	Queen's Bench Reports (Adolphus and Ellis, New Series, (1841–52)
Q.B. (preceded by date)	Law Reports, Queen's Bench Division (1891–1901)
Q.B.D.	Law Reports, Queen's Bench Division (1875–90)
R.C.L.	Ruling Case Law
R.H.A.	Road Haulage Association
S.C.L.Q.	South Carolina Law Quarterly
SD	Southern District
S.D.S.	Sydsvenska Dagbladet Snällposten
S.E.	South Eastern Reporter
S.E. 2d.	South Eastern Reporter, Second Series
S.R.R.	Shipping rules and regulations
S.W.	South Western Reporter
S.W. 2d.	South Western Reporter, Second Series
Salk.	Salkeld's Reports, King's Bench (1689–1712)
Show.	Shower's Reports, King's Bench (1678–95)

Stark.	Starkie's Reports Nisi Prius (1814–23)
Sup. Ct.	Supreme Court[1]
SvJT	Svensk Juristtidning
SvSjT	Svensk Sjöfarts Tidning
T.R.	Term Reports, Dunford and East (1785–1800)
T.L.R.	Times Law Reports, The, (1884–1952)
Taun.	Taunton's Reports, Common Pleas (1807–19)
TfR	Tidsskrift for retsvitenskap
U. Chi.L. Rev.	University of Chicago Law Review
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	Institut International pour l'Unification du Droit Privé
U.S.	United States of America, United States Supreme Court Reports
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated
USMB	United States Maritime Board
U.S.M.B.	United States Maritime Board Reports
USMC	United States Maritime Commission
U.S.M.C.	United States Maritime Commission Reports
USSB	United States Shipping Board
U.S.S.B.	United States Shipping Board Reports
U.S. Av.Rep.	United States Aviation Reports
Vent.	Ventris' Reports (Vol. I King's Bench; Vol. II Common Pleas, 1668–91)
W.D.	Western District
W.L.R.	Weekly Law Reports
Wash. L.L.R.	Washington and Lee Law Review
Watts.	Watt's Pennsylvania Reports
Wend.	Wendell's New York Reports
Yale L.J.	Yale Law Journal

[1] In e.g. New York state the Supreme Court is no longer the highest court, but is a court of general, original jurisdiction.

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