Court of Errors and Appeals,

IN THE LAST RESORT, &c.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendants in Error.

adsm.

EVERITT MESSENGER AND OTHERS,
Plaintiffs in Error.

On Demurrer to Declaration.
Points of Defendants in Error.

The declaration is clearly defective in these particulars:

1. It does not disclose for what other parties besides those in whose behalf the alleged contract was made, the defendants did transport hogs in violation of the same. It does not set forth to whom the rebates were allowed on the [illegible] of transportation.

2. The contract set forth in the declaration is void, inasmuch as the same is without limit as to its duration.

3. The contract is void as being against public policy.

4. The contract was void for the reason that its object was to give an unjust advantage to certain parties to the detriment of others. The defendants in the action being common carriers, were bound to treat all persons who desired to have goods transported between the same termini alike; and the agreement set forth in the declaration, was

a clear violation of such duty on the part of the defendants in the action.

The New England Express Company *vs.* The Maine Central Railroad Company. American Law Register, Dec., 1870.

1 Redfield on Railways, 35.

Sandford *vs.* The Catawissa and Erie Railway Company, 24 Penn., State Reports, 378.

2 Redfield on Railways, Sec. 152.

Inhabitants of Worcester *vs.* Western Railroad Company, 4 Metcalf, 564.

Swan *vs.* Williams, 2 Mich., 427.

State *vs.* Hartford R.R. Co., 29. Conn., 543.

Chicago and Aurora R.R. Co. *vs.* Thompson, 19 Ill., 584.

The Western Trans. Co. *vs.* Newhall, 24, Ill. 466.

Marriatt *vs.* The London and Great Western Railroad Company, 1 Common Bench New Series, 499 (87 English Com. Law.)

Garton *vs.* The Bristol and Exeter R.R. Co., 95 Eng. Com. Law, 638.

Crouch *vs.* The London and Northwestern R.R. Co., 78 Eng. Com. Law, 254.

Chicago and Northwestern R.R. Co. *vs.* The People, 56 Ill., 372.

State *vs.* Hartford and New Haven R.R. Co., 29 Conn., 538.

Rogers Locomotive Works *vs.* Erie R. W. Co., 5 C. E. Green, 380.

2 Parsons on Contracts, 746, Sec. 11.

New Jersey Supreme Court.

ARGUED JUNE TERM, 1873.

BEFORE CHIEF JUSTICE, DEPUE AND VAN SYCKEL.

EVERETT MESSENGER AND OTHERS,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

In Case

Upon Demurrer.

The declaration sets out (first and second counts), that the plaintiffs were large shippers of live hogs from Chicago and Pittsburgh, to Jersey City, and that the defendants in the city of New York, on the 1st December, 1870, agreed with the plaintiffs that if they would ship by them they would, on and after January 1, 1871, transport their hogs from Chicago and Pittsburgh, to Jersey City, at the regular rates, allowing them a drawback of twenty cents per hundred pounds upon all hogs shipped from Chicago, and ten cents per hundred upon those shipped from Pittsburgh; and further, should the defendants, after January 1, 1871, transport the same description of freight for others, between the same points, except seven parties named, at less than their regular rates, or should allow such others a drawback, then they should allow the plaintiffs such further drawback as would bring their freights twenty cents per hundred and ten cents per hundred lower than the lowest.

The plaintiffs aver that they shipped twelve millions of

pounds from Chicago, and a like amount from Pittsburg to Jersey city, by defendants roads; that they paid the regular rates, and have received the twenty cents and ten cents drawback, but the defendants during the same year, carried for other parties than those excepted in the contract, allowing such parties the same drawback, or making a reduction in the rates equal to the drawback, whereby the plaintiffs became entitled to have a further drawback of twenty cents and ten cents per hundred.

The third and fourth counts set out like contracts, with like exceptions, by which the defendants agree to pay drawbacks equal to twenty cents and ten cents from the regular rates; and further, that if either the defendants, the New York Central Railroad Company, or the Erie Railway Company, should rebate for other parties from the regular rates, or should give them drawbacks, then the defendants should allow the plaintiffs such further drawbacks as would make their rates twenty cents and ten cents lower than the lowest.

The fifth count sets out like contracts made with the defendants, the New York Central Railroad Company and the Erie Railway Company, by which they severally agreed for like shipments, to give the plaintiffs like drawbacks, and with the same exceptions as to other parties, to make the drawback twenty cents and ten cents per hundred lower than the lowest.

I. W. SCUDDER,
For Defendants.

LINN,
For Plaintiffs.

BEASLEY, *Chief Justice.*

The Pennsylvannia Railroad Company, who are the defendants in this action, agreed with the plaintiffs to carry certain merchandise for them between certain termini, at a fixed rate less than they should carry between the same points, for any other person. The allegation is, that goods have been carried for other parties at a certain rate below what the goods of the plaintiff's have been carried, and this suit is to enforce the foregoing stipulation. The question is whether the agreement thus forming the foundation of the suit is legal.

There can be no doubt that an agreement of this kind is calculated to give important advantage to one dealer over other dealers, and it is equally clear that, if the power to make the present engagement exists, many branches of business are at the mercy of these companies. A merchant who can transport his wares to market at a less cost than his rivals. will soon acquire by underselling them a practical monopoly of the business; and it is obvious that this result can often be brought about if the rule is, as the plaintiffs contend that it is, that these bargains giving preference can be made. A railroad is not, in general, subject to much competition in the business between its termini; the difficulty in getting a charter and the immense expense in building and equipping a road, leaves it, in the main, without a rival in the field of its operation; and the consequence is, the trader who can transmit his merchandise over it on terms more favorable than others can obtain it in a fair way of ruling the market. The tendency of such compacts is adverse to the public welfare which is materially dependent on commercial competition and the absence of monopolies; consequently, the inquiry is of moment whether such compacts may be made. I have examined the cases and none that I have seen is, in all respects, in point, so that the problem is to be

solved by a recurrence to the general principles of the law.

The defendants are common carriers, and it is contended that bailees of that character cannot give a preference in the exercise of their calling to one dealer over another; it cannot be denied that at the common law every person, under identical conditions, had an equal right to the services of their commercial agents; it was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation, upon receiving a reasonable hire; if he refused the offer of such goods he was liable to an action, unless he could show a reasonable ground for his refusal; thus in the very foundation and substance of the business there was inherent a rule which excluded a preference of one consignor of goods over another the duty to receive and carry was due to every member of the community and in an equal measure to each; nothing can be clearer than that, under the prevalence of this principle, a common carrier could not agree to carry one man's goods in preference to another.

It is important to remark that this obligation of this class of bailees is always said to arise out of the character of the business; Sir William Jones importing the expression from the older reports, declares that this as well as the other peculiar responsibilities of the common carrier is founded in the consideration that the calling is a public employment; indeed the compulsion to serve all that apply could be justified in no other way as the right to accept or ~~neglect~~ an offer of business, is necessarily incident to all private traffic.

Recognizing this as the settled doctrine, I am not able to see how it can be admissable for a common carrier to demand a different hire from various persons for an identical kind of service under identical conditions; such partiality is legitmate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefits of all, and, therefore, to permit the common carrier to charge various prices, according to the person with whom he deals for the same services, is to

forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind between the same points, he violates as plainly, though it may ~~not be~~ in the same degree, the principle of public policy, which, in his own dispute, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A. over the goods of B., when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rule that the carrier shall receive all the goods tendered loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement, so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another, for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect.

Indeed, when a charge made to one person, and a lesser charge for precisely the same offices to another, I think it should be held that the higher charge is not reasonable. A presumption which would cut up by the roots the present agreement, as by the operation of this rule, it would be a promise founded on the supposition that some other person is to be charged more than the law warrants.

From these considerations it seems to me that testing the duties of this class of bailees by the standard of the ancient principles of the law the agreement now under examination cannot be sanctioned. This is the sense ~~under~~ which Mr. Smith understands the common law rule. In his leading cases, p. 174, speaking of the liabilities of carriers, he says: "The ~~line~~ charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more to one (though a rival carrier) than to another, for the same

service." I am aware that in the case of Bakendale *v.* The Eastern Counties Railway, 4 C. B. (N. S.) 81, this definition of the common law rule was criticised by one of the judges, but the subject was not important in that case and was not discussed, and the expression of opinion, with respect to it, was entirely cursory. Indeed the whole question has become of no moment in the English law, as the subject is specifically regulated by the statute, 17 and 18 Victoria, ch. 31, which prohibits the giving "of any undue or unreasonable preference or advantage to, or in favor of any particular person or company, or of any particular description of traffic in any repect whatsover." The date of this act is 1854, and since that time the decision of the courts of Westminster have, when discussing this class of the responsibilities of common carriers, been devoted to its exposition. But the courts of Pennsylvania have repeatedly declared that this act was but declaratory of the doctrine of the common law. This was so held in the case of Sandford *v.* The Catawissa, Williamsport and Erie Railroad Company, 24 Penna, 378, in which an agreement by a railway company to give an express company the exclusive right to carry goods in certain trains was pronounced to be illegal. In a more recent decision Mr. Justice Story refers to this case with approval, and says that the special provisions which are sometimes inserted in railroad charters in restraint of undue preferences, are "but declaratory of what the common law now is." This is the view which, for the reasons already given, I deem correct.

But even if this result could not be reached by fair induction from the ancient principles which regulate the relationship between this class of bailees and their employers, I should still be of opinion that we would be necessarily led to it by another consideration.

I have insisted that a common carrier was to be regarded, to some extent, at least, as clothed with a public capacity, and I now maintain that, even if this theory should be rejected and thrown out of the argument, still the defendant must be considered as invested with that attribute. In my opinion, a railroad company, constituted under statutory authority, is not only by force of its inherent nature a common carrier, as was held in the case of Palmer *vs.* Grand

Junction Railway, 4 M. & W., 749, but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important perogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the Government, and public utility is the consideration for them, although in the hands of a private corporation they are still sovereign franchises, and must be used and treated as such; they must be held in trust for the general good. If they had remained under the control of the State, it could not be pretended that, in the exercise of them, it would have been legitimate to favor one citizen at the expense of another. If a State should build and operate a railroad, the exclusion of everything like favoritism, with respect to its use, would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. And it seems to me impossible to concede that when such rights as these are handed over on public considerations, to a company of individuals, such rights loose their essential characteristics; I think they are unalterably parts of the supreme authority, and in whatsoever hands they may be found, they must be considered as such; in the use of such franchises all citizens have an equal interest and equal rights, and all must under the same circumstances be treated alike; it cannot be supposed that it was the legislative intention when such priveleges were given that they were to be used as private property, at the discretion of the recipient, but to the contrary of this, I think an implied condition attaches to such grants that they are to be held as a quasi public trust for the benefit at least to a considerable degree, of the entire community; in their very nature and constitution, as I view this question, these companies become in certain aspects public agents, and the consequence is they must, in the exercise of their calling, observe to all men a perfect impartiality. On these grounds the contract now in suit must be deemed illegal in the very particular on which a recovery is sought.

The result is the defendants must have judgment on the demurrer.

NEW JERSEY COURT OF ERROR AND APPEALS.

EVERETT MESSENGER AND OTHERS,	*In Case.*
	On Demurrer.
vs.	
THE PENNSYLVANIA RAILROAD COMPANY.	*Assignment of Error.*

Afterwards, that is to say, on the second Tuesday of March, eighteen hundred seventy four, before the judges of the Court of Errors and Appeals, in the last resort in all causes of law and in equity, came the said Everett Messenger, Amasa Spring, Cyrus Haynes and Wesley Hedges, partners, doing business under the name of Messenger & Co., by Potts & Linn their attornies, and say, that in the record and proceedings aforesaid, there is manifest error in this, that by the decision of said court the agreement made by defendants to carry goods for the plaintiffs, were under the same conditions, cheaper than for others, is void at common law, whereas by the law of the land, the said agreement is valid and binding.

And there is further error in this, that by decision of said court it is held that a charge as common carrier made by one person, and a lesser charge for precisely the same offices to another, the higher charge is not reasonable; whereas at common law, the reasonable rates required by law, was not necessarily the lesser rate.

And there is further error in this: that in the decision of said court it is held, that railroad companies are public agents, and bound in the exercise of their calling, to observe to all men a perfect impartiality, both as to service and price; which cannot be varied by an agreement giving to one party more favorable terms than are given to another, and that

the reasonable rate required by the common law is the lowest rate charged to any one for the same identical service; whereas, by the charter of the defendant, and by the law of the land, they are authorized to charge such rates as the president and directors may deem reasonable, not exceeding certain rates therein specified, and are not restricted to equality of price to all for the same identical service.

And there is further error in this: that the decision and judgment aforesaid, by the record aforesaid, appears to have been given for the said defendants, when, by the law of the land, the said judgment ought to have been given for the said plaintiffs against the said defendants.

And there is further error in this: that judgment was rendered for said defendants on the third and fourth counts in said declaration, whereas, on those counts, it should have been rendered for the plaintiffs, even if given correctly for the defendants on the first and second counts.

And the said plaintiffs pray that the judgment aforesaid for the errors aforesaid, and for other errors in the said record and proceedings, may be reversed, annulled, and for nothing holden, and that they may be restored to all things which they have lost by the occasion of said judgment.

POTTS & LINN,
Attorneys for Plaintiff in Error.

POINTS OF PLAINTIFF'S COUNSEL.

I. The importance of the question involved. The decision, if law, creates a revolution in railway business.

II. This great change in this vast business is here sought to be made, not by legislation but by judicial action.

III. The revolution is not limited to New Jersey, but is co-extensive with the Union.

IV. The decision claims to announce the common law, but admits the absence of precedent.

V. As to *price*, the common law only required that it should be reasonable.

> Angel on Carriers, sec. 124; Harris *v.* Packwood, 3 Taunt., 272; 12 Gray, 399; 2 Kent, 598; Edwards on Bailments, 469; Baxendale *v.* Eastern Counties R., 4 Com. Bench, N. S., 63.

VI. Inequality of charges, allowed in cases of competition, under Railroad Acts of Parliament.

> Gaston *v.* The Bristol and Exeter Railway Co., Eng. Com. Law, 101, pp. 129 and 132, and 159, 160, 165; Chitty on Contracts, 11 American edition, vol. 1, p. 687, and cases there cited, and note.

VII. American legislation as to preferences.

New Hampshire, General Statutes, chap. 149, sec. 2; Illinois, State Constitution, article 9, sec. 15; article 11, section 12.

VIII. Can the change be made without legislative action? We say it cannot.

IX. If it can, then where does the rule stop? Does it apply to places as well as persons? It must do so, or be inequitable.

X. The element of competition upon the laws of traffic considered.

XI. How does the act inflicting penalties for unlawful charges apply?

XII. The argument that the company represents the State considered.

XIII. Inequality is inseparable from competition. Is the latter against public policy?

XIV. The 3rd, 4th and 5th counts set out contracts by which the defendants were to carry for the plaintiffs, at rates twenty per cent. lower than the New York Central or Erie carried for others, even under the ruling of the court, we insist that these contracts are good and may be recovered on.