

Eng. Rep.]

THE GREAT WESTERN RAILWAY CO. v. TALLEY.

[Eng. Rep.]

4. If the court are of opinion that the verdict upon such finding should have been entered for the respondent, then to what amount not less than £4 10s. ought it to be reduced so as to be in accordance with the Act of Parliament?

*Paine (Lopes, Q.C. with him)* argued for the appellants.

*Finney* for the respondent.

The cases and the arguments are set out in the judgment.

*Cur. adv. vult.*

Nov. 11.—*WILLES, J.*, delivered the judgment of himself, *KEATING*, and *SMITH, JJ.*—This was an appeal from the judgment of the county court in favor of the respondent, who was the plaintiff below. The plaintiff, a passenger by the defendants' railway, upon a return journey from Cheltenham to Reading, had his portmanteau put into the same carriage with him. At Swindon the train stopped, as usual, for ten minutes, the plaintiff got out for refreshment, and upon returning, failed to find his carriage, which however, in fact, continued in the train until it reached Paddington. He continued his journey from Swindon in another carriage of the same train, and afterwards obtained his portmanteau minus a portion of its contents, which had been stolen by some person in the carriage after he had left it at Swindon, and before its arrival in London. This action was thereupon brought to recover the value of the missing articles. There was contradictory evidence as to what passed at Swindon, and especially as to the circumstances which led to the plaintiff getting into another carriage, and so becoming separated from his luggage. The jury must be taken to have believed the evidence of the company in preference to that of the plaintiff, for they negatived any negligence on the part of the company's servants, and found that the plaintiff, by his negligence, contributed to the loss. This latter finding also shows that the jury must have adopted, as the more probable conclusion, that the theft took place between Swindon and London, so that the portmanteau would have been safe under the plaintiff's protection, had he regained the carriage. Notwithstanding these findings of the jury, the verdict was, by the direction of the judge, entered for the plaintiff, with leave to appeal, whereupon this appeal was brought. The law laid down by *Chambre, J.*, in *Robinson v. Dunmore*, 2 B. & P. 419, as to stage coaches, has been considered by eminent authorities to be, in general, equally applicable to railway carriages, viz., that "if a man travel in a stage coach and take his portmanteau with him, though he had his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost;" *Richards v. The London, Brighton and South Coast Railway Co.*, 7 C. B. 839; *Butcher v. The London & South Western Railway Co.*, 3 Com. Law Rep. 805, 16 C. B. 13; *Le Couteur v. The London & South Western Railway Co.*, 6 B. & S. 961; though it has been questioned by equally high authority whether the liability in respect to passengers' luggage is as stringent as that in respect of the ordinary carriage of goods, and whether there be any larger obligation in respect of goods carried with passengers than in respect

of the passengers themselves, to whom they are accessory: *Stewart v. The London & North Western Railway Co.*, 3 H. & C. 135, 139; *Munster v. The South Eastern Railway Co.*, 4 C. B. N. S. 701; and it should be remarked that in the case of *Butcher v. The London & South Western*, and *Le Couteur v. The London & South Western Railway Co.*, there was evidence of negligence on the part of the company's servants. Whatever may be the correct solution of this question, it is obvious at least that with respect to articles which are not put in the usual luggage van, and of which the entire control is not given to the carriers, but which are placed in the carriage in which the passenger travels, so that he, and not the company's servants, has *de facto* the entire control of them while the carriage is moving, the amount of care and diligence reasonably necessary for their safe conveyance is in fact considerably modified by the circumstance of their having been during that part of the journey in which the passenger might under ordinary circumstances be expected to be in the carriage, intended by both parties to be under his personal inspection and care. To such a state of things the rule which binds common carriers absolutely to ensure the safe delivery of the goods, except against the act of God or the Queen's enemies, whatever may be the negligence of the passenger himself, has never, that we are aware of, been applied.

If the passenger packed up articles liable to ignition by friction, and by the shaking of the carriage they caught fire—if a passenger were to look on while his luggage was being taken away or rifled when he might reasonably be expected to interfere—if he were to expose small articles of apparent great value in a conspicuous part of the carriage and leave them there whilst he unreasonably absented himself, and they were in consequence purloined—he would have no more just reason for complaint against the carrier, than if he had on some false alarm thrown his property out of the carriage window. The latter case, equally as the former, would in terms be out of the exception of the act of God or the Queen's enemies, and the rule especially affecting the liability of common carriers, if construed literally, and without regard to the reason upon upon which it is founded, would prevail. There is great force in the argument that where articles are placed, with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of a common carrier which is found on the bailment of the goods to him, and his being entrusted with the entire possession of them should not attach, because the reasons which are the foundation of the liability do not exist. In such cases, the obligation to take reasonable care seems naturally to arise, so that when a loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them.

There is, moreover, a general principle applicable to these as to all bailments, namely, that the bailee shall not be heard to complain of loss occasioned by his own fault; and the loss in this case was so occasioned, and without such fault would not have taken place. In truth, the expression, "contributory negligence," in such a