

Eng. Rep.] TAURMAN V. PACIFIC STEAM NAV. CO.—WELLS V. ABRAHAMS. [Eng. Rep.]

EXCHEQUER.

TAURMAN V. THE PACIFIC STEAM NAVIGATION CO.

Carriage by sea—Wilful act and default—Exemption of carrier from liability, under special contract.

A special contract, entered into between a shipowner and a passenger by sea, contained a provision that the shipowner would not be answerable for loss of baggage, "under any circumstances whatsoever."

Held, that such a stipulation covers the case of wilful default and misfeasance by the shipowner's servants.

Martin v. Great Indian Peninsular Railway Company (17 L. T. Rep. N. S. 849; 37 L. J. 27, Ex.; L. Rep. 3 Ex. 9) explained.

[26 L. T. N. S. 704, April 22. 1872]

The plaintiff became a passenger on one of the defendants' vessels from Rio Janeiro to England. On taking his passage he signed a contract by which the company engaged to carry him and his luggage upon condition, among other things, that the company would not be answerable for loss of or damage to the luggage "under any circumstances whatsoever." On the voyage the plaintiff's portmanteau was lost through the negligence of the defendant company's servants. The plaintiff brought an action for the loss of the portmanteau, averring in the declaration that the loss was occasioned by the wilful act and default of the defendants.

To this the defendants pleaded, setting out the terms of the contract.

Replication, that the defendants did not use proper skill and care, but were guilty of gross negligence and wilful default, and that, by reason of the said gross negligence and wilful default, the loss was occasioned, and demurrer to the plea.

Demurrer to the replication.

Garth, Q. C., with him, *Morgan Howard*, for the plaintiffs.—The act complained of is a wrongful act of the defendants' own doing, against the consequences of which no form of contract can protect them. The contract would protect the defendants in a case of ordinary negligence, but not in a case of wilful misfeasance or default. The courts have never held that a company could screen itself from liability in such cases, and it was to prevent such attempts that the Railway and Canal Traffic Act, 17 & 18 Vic. cap. 31, was passed. He cited *Perk v. The North Staffordshire Railway Company*, in the House of Lords, 8 L. T. Rep. N. S. 768; 32 L. J. 241, Q. B.; 10 H. L. Cas. 743; *Story on Bailments*, s. 549; *Martin v. The Great Indian Peninsular Railway Company*, 17 L. T. Rep. N. S. 849; 37 L. J. 27, Ex.; L. Rep. 3 Ex. 9.

Cohen, for the defendants, was not called upon.

Kelly, C. B.—The defendants in this case are entitled to our judgment. It is only necessary to read the contract in order to decide this case. The defendants are not to be liable for the loss of luggage "under any circumstances." This "gross negligence" of the defendants' servants is a "circumstance;" so is "wilful default." If the act had been actually done by the shipowners, the act would have been a trespass, whatever the contract might be. But this is the act of the servants, and the action is really one for breach of contract. *Martin v. The Great Indian Peninsular Railway Company* is distinguishable, for there the freedom from liability only extended to the time during which the baggage was to be in the charge of the troops.

Martin, B.—I am of the same opinion, as far as I can see from the imperfect statement of facts we have before us. The defendants are not under the liabilities of common carriers, and they are free to make any terms they choose. Probably the words in the special contract were inserted for the very purpose of exempting the company from liability for the acts of their servants.

Bramwell, B.—I am of the same opinion. *Prima facie*, the defendants are not liable, for the contract says they are not to be liable for the loss of baggage under "any circumstances." A loss has occurred under certain circumstances, and the plaintiff is seeking to recover. Next we must consider, is there any implied exception? I am of opinion that there cannot be, for the parties could easily have expressed it: see the judgment of Maule, J., in *Borradaile v. Hunter*, 5 M. & G. 639; 12 L. J. N. S. 225, C. P. Then it is urged that in certain cases the Legislature have interfered. That, as far as it goes, is against the plaintiff's case. And the court will not extend the Railway and Canal Traffic Act further than they can help, for it has been already the cause of more dishonest transactions than any Act of Parliament.

Cleasby, B.—What is the meaning of the word "circumstances?" I find in Johnson's Dictionary that the word "circumstance," in a legal sense, means "one of the adjuncts of a fact, which makes it more or less criminal." Arguing from this definition of "circumstance" by analogy, I should think the words in the contract will cover the present case.

QUEEN'S BENCH.

WELLS V. ABRAHAMS.

Trover—Felony by defendant—Defendant's application to set aside verdict.

In an action of trover for a brooch; pleas not guilty, and not possessed; the jury found a verdict for the plaintiff. Upon a rule for a new trial, on the ground that the facts alleged had established a felony by the defendant, and on the ground that subsequently to the verdict criminal proceedings had been instituted against the defendant: *Held*, that those were not grounds for setting aside the verdict upon application of the defendant. *Wallock v. Constantine*, 2 H. & C. 145, discussed and questioned.

[26 L. T. N. S.—May 2, 1871.]

This was an action for the conversion of a diamond brooch, tried before Lush, J., at the last Liverpool assizes. The defendant pleaded only not guilty. The jury found a verdict for the plaintiff; damages £150, the value of the brooch.

According to the evidence of the plaintiff's wife, she left a parcel of jewellery, containing amongst other things this brooch, with the defendant, who was a jeweller and pawnbroker, for the purpose of security for a sum of money she wanted to borrow. The defendant refused to advance the sum she required, and returned the parcel, but, as the plaintiff's wife alleged, the defendant abstracted and kept this brooch. Defendant and his son both asserted that the parcel did not contain such a brooch, but the jury found a verdict for the plaintiff. Criminal proceedings were afterwards commenced against