reference to the master. It is a matter for the discretion of the court.

I think that the costs (as between party and party) of all parties up to decree should be paid out of the estate. In taxing these costs, the master will consider whether the costs of and incidental to the order made on motion were reasonably and properly incurred. No sale took place, and I have not before me the materials for judging whether the abortive proceedings were justifiable and reasonable.

I presume the parties are agreed as to the proper terms of the decree in other respects, as no other question was argued before me.

NOVA SCOTIA.

SUPREME COURT.

DODSON v. GRAND TRUNK RAILWAY COMPANY.

Common carriers—Responsibility at common law—Special contract.

As the (English) Carrier's Act of 1830 and the Railway and Canal Traffic Act of 1854, have not been adopted in Canada, the responsibility of a common carrier here rests wholly upon the principles of the common law, and may be so limited by special contract that he shall not be liable, even in cases of gross negligence, misconduct, or fraud on the part of his servants.

[Halifax, August 7, 1871.]

In February, 1868, the plaintiff imported from Montreal, *via* Portland, by the defendants' railway, one hundred dressed hogs, under the usual shipping papers signed by his agent and by the Managing Director of this Company, and forming a special contract which is set out in the amended writ. By the second condition, fresh fish, fruit, meat, dressed hogs and poultry or other perishable articles, were declared to be carried only at the owners' risk; while by the 16th condition in respect to live stock, the owner undertook all risk of loss, injury, damage and other contingencies in loading, unloading, transportation, conveyance and otherwise, no matter how caused.

On arrival the hogs were found to be damaged to the extent of $488, and the jury found upon the trial that the injury was caused by the negligence of the defendant's servants, and gave a verdict for the plaintiff subject to the opinion of the court on all legal objections.

Hon. J. McDonald, Q. C., for the plaintiff.

Hon. H. Blanchard, Q. C., for defendants.

SIR WM. YOUNG, C. J.—There was no imputation, as we read the amended counts, nor was there any evidence, of wilful wrong, destruction, or wanton abuse of the property, but only of mismanagement, carelessness, and neglect which, in the opinion of the jury, rendered the defendants liable: and the court would undoubtedly confirm that finding, unless it should appear that the defendants are protected by the terms of the special contract

Upon the pleadings and the evidence that is the sole question before us. It is to be decided according to the principles of the common law, neither the English Carriers Act of 11 Geo. 4. & 1 Wm. 4, nor the Railway and Canal Traffic Act of 1854, being in force in this Province.

The numerous cases cited upon the argument have, therefore, only a partial application, and will aid us chiefly by way of illustration and analogy. They are reviewed at much length and with singular ability in the case of *Peek* v. *North Staffordshire Railway Company*, 10 H. L. Cas. 473, decided in 1863. Several of the Common Law Judges were called in to assist the Lords in that case, and Mr. Justice Blackburn delivered an elaborate opinion, which was endorsed by Lord Wensleydale (better known as Baron Parke), both of them, as we all know, very eminent lawyers. Of the opinions in this leading case we will, of course, avail ourselves, as affording a sounder view of the decisions, and of higher authority than any we could ourselves prepare.

According to Mr Justice Story, (Commentaries on the Law of Bailments, 5th Ed. sec. 549) "Common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the Common Law. They cannot, therefore, by a special notice, exempt themselves from all responsibility in cases of gross negligence and fraud, or, by demanding an exorbitant price, compel the owners of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants, as he would be in case of his own personal fraud or misconduct." Judge Blackburn (10 H. L. Cas. 494) argued that the weight of authority was in 1832 in favor of this view of the law, but he added that the cases decided in the English Courts between 1832 (*i. e.* two years after the passage of the Carriers Act, but not depending upon it) and the year 1854, established that the doctrine so enounced by Story was not law, and "that a carrier might, by a special notice, make a contract limiting his liability even in the cases there mentioned, of gross negligence, misconduct or fraud on the part of his servants;" and the judge held that "the reason why the Legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought the companies took advantage of those decisions (in Story's language) to 'evade altogether the salutary policy of the Common Law.'"

It is to be observed, however, while recognizing such power, that the right of making special contracts or qualified acceptances by common carriers, seems to have been asserted in early times. Lord Coke declared it in *Southcote's Case*, 4 Co. Rep. 84 (Vol. 2 p. 487), where he says "that if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged by his general acceptance." See also the case of *Mors* v. *Slue*, 1 Ventr. 238. This, says Story, is now fully recognized and settled beyond any reasonable doubt; and he cites a whole array of cases. See also 1 Parsons on Contracts, 708–715.

In *Nicholson* v. *Willan*, 5 East 512, decided long before the passage of the Carriers Act, Lord Ellenborough said that there is no case to be met with in the books in which the right of a carrier to limit by special contract his own responsibility has ever been by express decision denied,—the Court "cannot do otherwise than sustain such right, however liable to abuse and productive of inconvenience it may be, leaving to the Legislature, if it shall think fit, to apply such remedy hereafter as the evil may require." It is remarkable that just fifty years elapsed after this wise