THE LEGAL NEWS.

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The Postmaster General in England has recovered a judgment against the sender of an unstamped letter, which had been refused by the addressee, for the amount of postage due thereon. One Wanby, a commission agent at Leamington, was in the habit of sending circulars through the post unstamped. The addressees having declined to pay postage on them, the Post office has fallen back upon the sender, and sued him successfully.

Precisely how many bugs in a house let furnished will serve as a valid reason for the tenant leaving, is a question open to some doubt. Possibly the style of the apartments, and the amount of rent have some influence on its decision. In *Smith* v. *Marrable*, 12 Law J. Rep. Exch. 223. it was laid down that the appearance of bugs in force, in a house let furnished, justified the tenant in leaving and paying no rent. In *Randolph* v. *Greenwood*, tried July 3, before Mathew, J., the tenant was not so fortunate. The plaintiff, Mr. Randolph, sued the defendant, Mrs. Greenwood, for 210*l.*, the rent of a house. The plaintiff let a furnished house in the West End of London to the defendant from June 3 to August 1, 1885, at a rent for that period of 157*l.* 10*s.* On taking possession of the house, the defendant was informed by the servants that it was infested with bugs, of which she had a great horror. Thereupon she immediately packed up her things and left. The plaintiff's claim included, besides the rent, a sum of 52*l.* 10*s.* for alleged loss and expenses he had incurred through the failure of the defendant to perform her contract. The defence was that the house was unfit for human habitation, owing to the presence of the bugs, and the defendant put forward a counter-claim for 28*l.*, in respect of expenses she had been put to in removing, in finding another house, and of extra rent she had to pay. The case turned on the question whether or not the house was rendered unfit for habitation by the presence of the bugs. It was stated that when the defendant's daughter went into the house a bug dropped from the window-blind and bit her arm, whereupon she fled. The plaintiff asserted that he never saw more than one bug in the house. That one he found in a tube of the bell-pull. He picked it out with a pin, and stopped up the tube with sealing-wax. Afterwards, it was alleged, the upholsterer found half-a-dozen bugs in the same tube, and the defendant's servants declared that they drowned as many more in a basin, although it was noted, on the other hand, as a significant fact that only one specimen was preserved for the plaintiff's inspection. The bugs appeared to have been confined chiefly to the upper regions of the dwelling. —The learned judge, who heard the case without a jury, held that the bugs had not taken possession of the house so completely as to oust the tenant. The defendant, however, had no doubt incurred expense and inconvenience, and he thought the justice of the case would be met by giving the plaintiff 140*l.* The learned judge gave judgment for the plaintiff for that amount.

COUR SUPÉRIEURE.

FRASERVILLE, 21 mai 1886.

Coram CIMON, J.

ROY v. LA CORPORATION DE LA PAROISSE DE ST. PASCHAL.

Mandamus—Acte des Licences de Québec de 1878 et ses amendements—Refus par le Conseil Municipal de confirmer un certificat pour l'obtention d'une licence—Règlement prohibitif et limitatif.

JUGÉ:—1o. *Que le Conseil Municipal, même en l'absence de règlement prohibitif, ou limitatif, peut, dans sa discrétion, refuser de confirmer le certificat exigé pour obtenir une licence pour vendre des liqueurs enivrantes.*

2o. *Que le règlement du conseil ordonnant "que "le Percepteur du Revenu de l'Intérieur pour "la division de Kamouraska ne pourra "jusqu'à la révocation des présentes octroyer "dans la dite paroisse de St. Paschal plus*

" de deux licences pour vendre des liqueurs " enivrantes," est valide, bien qu'il ne distingue pas les classes de licences.

Le demandeur était hôtellier dans la paroisse de St. Paschal, depuis plusieurs années, et avait toujours tenu son hôtel d'une manière irréprochable. Le 1 mars dernier, il a demandé au conseil municipal de lui confirmer un certificat de licence d'auberge pour l'année commençant le 1er mai 1886, sous les dispositions de l'*Acte des licences de Québec*, 1878, et ses amendements. Le conseil a refusé. De là, le demandeur a pris un *mandamus* contre la corporation municipale pour l'obliger à confirmer ce certificat. Le demandeur allègue que la défenderesse, en l'absence de règlement prohibitif, ne pouvait refuser cette confirmation que dans les trois cas suivants : 1o. s'il eût été démontré que le demandeur est un homme de mauvaises mœurs, ayant permis l'ivrognerie dans sa maison ; 2o. ou qu'il eût été condamné deux fois pour vente de boissons sans licence ; 3o. ou que la majorité absolue des électeurs résidants de l'endroit s'y opposait. Le demandeur ne se trouvait dans aucun de ces cas.

La défenderesse a plaidé que le 24 avril 1884, son conseil a passé le règlement suivant :

" Il est ordonné et statué par règlement du " conseil comme suit: 1o. que le percepteur " du revenu de l'intérieur pour la division de " Kamouraska, ne pourra, jusqu'à révocation " des présentes, octroyer, dans la dite pa- " roisse de St. Paschal, plus de deux licences " pour vendre des liqueurs enivrantes ; 2o. " que tout règlement de ce conseil ayant des " dispositions contraires aux présentes soient " et demeurent résiliés, rescindés et annulés ; " 3o. que le présent règlement soit promul- " gué et qu'une copie en soit transmise au " dit inspecteur du revenu avant le premier " mai prochain."

Ce règlement a été publiée le 27 avril 1884, et une copie en a été transmise au percepteur du revenu le 28 avril 1884. Il est encore en force.

Pour l'année commençant le 1er mai 1884, le conseil municipal a confirmé deux certificats ; ceux du demandeur et de Neil McNeil. Pour l'année suivante, le demandeur s'est contenté d'une licence en vertu de la loi fédérale, depuis déclarée inconstitutionnelle ; et, en conséquence, le conseil municipal a, pour l'année commençant le 1er mai 1885, confirmé des certificats pour Neil McNeil et Nathanaël LeBel. Le 1er mars 1886, le conseil de la défenderesse a, de nouveau, confirmé les certificats des mêmes McNeil et LeBel, refusant de confirmer celui du demandeur ; et la défenderesse plaide que ce règlement limitatif l'obligeait à n'accorder que deux licences, et qu'elle a préféré les accorder aux deux personnes dont elle avait l'année précédente confirmé les certificats.

Le demandeur a répliqué que ce règlement limitatif était illégal ; qu'il n'était pas un règlement, mais une simple injonction à l'inspecteur du revenu ; que, dans tous les cas, il ne limite que les licences de magasin (et les licences de McNeil et LeBel sont de cette nature, tandis que la licence réclamée par le demandeur en est une pour auberge), et non pas les autres, qui sont autant de classes différentes de licences ; et que, par sa forme et teneur, il est nul.

La cour fit remarquer que la loi n'avait aucune disposition pour forcer le conseil à confirmer un tel certificat ; que la chose était complètement laissée à la discrétion du conseil, et celui-ci ne pouvait être recherché pour l'exercice de cette discrétion. Le statut de 1878 ne mentionnait aucun cas où le conseil serait tenu de refuser. De là sont nés des abus ; et, pour les réprimer par divers amendements, la législature a décrété que, dans les trois cas mentionnés plus haut, le conseil serait obligé *de refuser* la confirmation du certificat, mais elle n'a prescrit aucun cas où il serait tenu de confirmer. Elle a laissé cela à sa discrétion, comme auparavant. Voici le jugement :

" Considérant que la loi,—en exigeant que celui qui veut obtenir une licence pour vendre des liqueurs enivrantes fasse confirmer par le conseil municipal son certificat à cet effet,—n'a pas imposé au dit conseil municipal l'obligation de confirmer tel certificat, mais a laissé à sa discrétion de le faire, la loi ayant voulu par là donner à l'autorité municipale un contrôle à ce sujet dans l'intérêt du bon ordre et de la moralité, et que si le dit Léon Roy (le demandeur), n'était pas dans

un des cas où la loi prescrit au conseil de refuser la confirmation, cependant, le dit conseil avait, dans sa discrétion, encore le droit de ne pas l'accorder, que le conseil ne peut être recherché au sujet de la décision qu'il a prise de refuser de confirmer le certificat du dit Léon Roy ;

" Considérant que le règlement limitant à deux le nombre des licences pour vendre des liqueurs enivrantes, allégué en la défense, est suffisant, parait, par la copie produite, avoir été signé par le maire et le secrétaire-trésorier, et passé à une session du conseil, qu'il a été promulgué et est en force, et qu'il a été remis à l'officier du revenu, le tout tel que voulu, et que ce règlement, sous les circonstances, n'exigeait pas plus de formalités, et que le conseil avait raison de le prendre en considération pour refuser de confirmer le certificat du dit Léon Roy, attendu qu'il a confirmé deux autres certificats pour vendre des liqueurs enivrantes, et qu'il n'était pas nécessaire que le règlement distinguât les classes de licences, la volonté du règlement étant formellement exprimée que, de quelque classe que soit la licence, il ne pouvait y en avoir plus de deux qui permissent de vendre des liqueurs enivrantes ;

" Considérant, en conséquence, que la demande du dit Léon Roy, n'est pas fondée ;

" Renvoie le bref en cette cause qui a assigné la défenderesse à répondre à la demande contenue en la déclaration y annexée, et renvoie la dite demande, et condamne le dit Léon Roy à payer les frais à la défenderesse."

Taché & Taché, avocats du demandeur.

Chaloult & LeBel, avocats de la défenderesse.

CARRIER — PASSENGER — BAGGAGE DELIVERED TO PORTER TO ACCOMPANY PASSENGER.

COURT OF APPEAL.

LONDON, APRIL 13, 1886.

BUNCH v. GREAT WESTERN RY. Co. 17 Q. B. DIV. 215.

The female plaintiff arrived at a station on the defendants' railway forty minutes before the starting time of her train. She had a bag and two other articles of luggage, which a porter took into the station. She saw the two latter labelled, and told the porter she wished the bag to be put in the train with her, and asked if it would be safe to leave it with him. He replied that it would be quite safe, and she then went to meet her husband and get a ticket. They returned together in ten minutes and found that the two labelled articles had been put into the van but that the bag was not forthcoming. At the trial, the judge found that the porter had been negligent in not being in readiness to put the bag into the carriage on the return of the female plaintiff, and that the defendants were liable for its loss. Held (by Lord Esher, M.R., and Lindley, L.J., Lopes, L.J. dissentiente), that there was evidence to warrant the judge in finding that the bag was intrusted to the porter for the purpose of the transit, and not to be taken charge of while the journey was suspended, and that he was acting within the scope of his authority in taking charge of it.

Action for lost baggage. The opinion states the case.

LORD ESHER, M.R. In this case the question has been tried in the County Court, and upon that there was an appeal to the Divisional Court consisting of two judges, my Brothers Day and A. L. Smith, who differed in opinion ; and the latter, for the purpose of allowing the case to come to the Court of Appeal, withdrew his judgment, and the case is here by leave.

The question is, whether there was evidence before the County Court judge upon which he might reasonably find for the plaintiff. If there was such evidence, neither the Divisional Court nor this court is entitled to overrule the decision.

The evidence was that a ticket had been taken by the husband at Moorgate street by which he was to go to Paddington, and from there some distance into the country. His wife was to meet him at the station; she brought the luggage, and when she arrived at the Paddington station, the three articles were taken by a porter into the station. She told him where they were to go, but said she wished the Gladstone bag to be put into the train, that is, into the carriage with her,

and asked if it would be safe to leave it with him. It is obvious, or at all events it was obvious to the County Court judge, that the way to treat the matter is, as though she had said: "My husband is coming to meet me, we are going by the train, I have brought the luggage here and I am going to meet him at this station and take my ticket —will the thing be safe?" Then she goes and meets her husband at the station, at the ticket office where her husband has taken a ticket for her, and when they come back, the bag is gone. The evidence is that she was away for ten minutes. We must take into account, no doubt, that when she went to the station, it was forty minutes before the train was advertised to start, but the evidence is open to this construction—that the train actually came up to the platform ten minutes after she got there.

The question arises, what are the liabilities of the company with regard to that bag? It is said that the porter had possession of it beyond the scope of his authority; and that therefore if anybody is liable for its loss it is the porter and not the railway company. It seems to me, that with regard to the public, the scope of a porter's authority is to be measured by what the company deliberately allow their porters to do, and they cannot say that a porter is acting beyond the scope of his authority with regard to the public, by reason of some secret orders which they have given to him. That is the first proposition I put.

Now what do porters do, when you arrive at a station? The railway company, as we know, allow their porters to take the luggage on to the platform. That is the first step. When it is on the platform, or any part of the platform in some railway stations or at a particular part of the platform in other railway stations, tell them where you are going, and your luggage is to go into the van, it is labelled. But all that time, before it is labelled, and after and until it is put into the van, it is generally in the custody of a porter, and almost always of the porter who first took it.

Now with regard to that labelled property, it seems to me that it is within the scope of the porter's authority to take that luggage on behalf of the railway company; and from the moment it gets into the possession of a porter it is in the possession of the railway company for the purposes of carriage unless something intervenes to alter that state of things. Until that something intervenes, that luggage is in their custody for the purpose of conveyance; they are common carriers of it, and liable as common carriers.

Now comes the case of luggage which is not to go into the van. Here again it must be known to everybody that the porters take possession of such luggage at the same time that they take possession of the other, and they take it on to the platform or to the carriage. During the whole of that time it is in process of conveyance to the place to which the passenger is going, and is in possession of a servant of the railway company. I cannot see any distinction during that time between the luggage which is to be labelled, and the luggage which is not, or between the luggage which is labelled, and the luggage which is not, up to the time when they arrive at the train. Now when luggage arrives at the train, if you no longer leave it to the railway company to put it where they please in the train, but insist that it shall be put into a carriage in which you are going, you alter the state of things; you take it partly into your own control, but not absolutely, because as pointed out in some of the cases, when the company are carrying you, they are carrying your box or parcel as well. Under those circumstances, they are not liable as common carriers, although the thing is in process of conveyance, because you have taken it partly into your own control, but they are liable as bailees, as people who have undertaken to carry you and your luggage, and they are liable only for negligence.

When you arrive at the other end, it is equally well known that the companies hold out to the public that their porters may take luggage from the carriage to the entrance of the railway, and there put it into a cab. If they were common carriers at the beginning of the journey, that is from the entrance of the station to the carriage, I cannot see but that at the end of the journey, the thing being still in process of convey-

ance, and exclusively in their power, they are common carriers in such case also. Thus the condition and the liability of common carriers is only suspended during the time when joint possession is taken with the railway company, that is, whilst the parcel is in the carriage with you where you have directed it to be put. But when it is in the possession of the porters in a way in which, and at a time when the company allow their porters to take it, by holding them out as having authority to take it, then it seems to me that it is being conveyed by the company, they are paid for the conveyance of it, and they are common carriers of it.

There is another state of things. You may have your luggage taken on to the station, and you may not be for a time going on your journey; and if suspending your journey, you put your things into a cloak room, you put them there,not for the purpose of being conveyed, but for the purpose of being warehoused. If instead of putting the company into the position of warehousemen, you give the luggage to a porter, or to a bystander, or to anybody else upon the same conditions, the same reasoning applies. If, therefore, you ask a porter to take it under such circumstances that the proper conclusion of fact is that it is not there for the purpose of conveyance, but, for a time, for another purpose, of course you cannot put the railway company into a position of responsibility, and you must look to the porter alone. But that is always a question of fact, and depends upon a considerable number of circumstances. It is not because a person asks a porter "Would this be safe whilst I do a certain thing?" or because a person says to a porter "Will you take care of this?" that that is conclusive. Supposing, for instance, you take your luggage to the station, and the porter takes it from you, and you say "Will this be safe with you whilst I go to the ticket office to take my ticket?" The ticket office may not be open, or there may be ten or twenty people before you in line, and you have to wait your turn, but can anybody say that the transit of your luggage is stopped meanwhile because of these temporary checks, which are not intended to suspend the journey, but which are incidents of the journey? It would be monstrous to say—that is my opinion—that the porter is exceeding his authority if he holds your luggage for you whilst you take your ticket. I will go further, and ask if he carries it up toward the carriage, and you say "I am going to get a newspaper at the bookstall," and he loses it whilst you are gone for your newspaper at the bookstall, has the whole relation been changed whilst you go to the bookstall? Or if you go to the refreshment room, which has been opened there by the authority of the railway company, and in order that passengers may go to it during their journey, if the porter were to hold your bag whilst you go to the refreshment room, it being your understanding all the time that the journey is going on, and that that is part of it, and an incident in it, I cannot think that the relation between you and him is altered. As long as you do not suspend your journey, your luggage is in the care of the railway company, and they are liable as common carriers, except during a time when you yourself take part possession of your luggage, and although they are not common carriers during that time, that is from the moment when that relation of common control between you and them takes place, yet before you come into that position, they are common carriers, and after that position of common control ceases, they are common carriers. That is my view of the law.

Now it is said that view has been overruled, and decided by a court of equal jurisdiction with this in the case of *Bergheim* v. *Great Eastern Ry. Co.*, 3 C. P. D. 221.

In *Butcher* v. *London and South Western Ry. Co.*, 16 C. B. 13; 24 L. J. (C. P.) 137, the plaintiff, a passenger by railway, brought with him into the carriage a carpet bag containing a large sum of money, and kept it in his own possession until the arrival of the train at the London terminus. On alighting from the carriage with the bag in his hand, the plaintiff permitted a porter of the company to take it from him for the purpose of securing for him a cab. The porter having found a cab (within the station), placed the carpet bag on the foot-board thereof, and then re-

turned to the platform to get some other luggage belonging to the plaintiff, when the cab disappeared, and the carpet bag and its contents were lost. Now what was there the case? It is obvious that there, some of the luggage was in the van, and the porter went back to take it out. "*Held*, that this was a loss by the negligence of the company, for which they were responsible in damages." I note the word "negligence," but I take it they were held liable as common carriers, because it cannot be said that it was negligence to put a thing on the foot-board of a cab, which was the very place where it was to be put.

In *Richards* v. *London, Brighton and South Coast Ry. Co.*, 7 C. B. 839; 18 L. J. (C. P.) 251, it was proved that the plaintiff's wife, accompanied by a female servant, took places for London in a first-class carriage on the defendants' railway at the Woodgate station, near Bognor, bringing with them a considerable quantity of luggage, which was weighed, and the excess beyond the quantity allowed to first-class passengers paid for. On their arrival at the terminus at London Bridge, the lady, who was an invalid, was assisted to a hackney coach, into and upon which the luggage was placed by certain servants of the company, who upon the maid attempting to remove the small articles from the railway carriage to the coach, desired her not to trouble herself, as they (the porters) would see to the luggage. Upon reaching the residence of the plaintiff, it was for the first time discovered that part of the luggage, viz., a dressing-case containing trinkets and jewelry, which had been placed by the driver of the fly which conveyed the plaintiff's wife and her servant from Bognor to the Woodgate station, under the seat of the railway carriage, was missing. "*Held*, that the duty of the defendants as common carriers continued until the luggage was placed in the hackney carriage." There is a case directly in point, only it relates to the other end of the journey. I should mention also *Leach* v. *South Eastern Ry. Co.*, 34 L. T. (N.S.) 134, which seems to me to come to the same thing. Are they overruled by *Bergheim* v. *Great Eastern Ry. Co.*, 3 C. P. D. 221? In my opinion they are not. As I say, whilst the thing is in the carriage with you, or in the carriage where you have directed it to be put, inasmuch as you have taken part control during the time that you do so, the company are not common carriers, although they are carriers. That I take to be the law. The question must always be whether the facts bring it within that view of the law. In my opinion, therefore, the question must be a question of fact. Had this lady, who had the control over the thing at the time, given this luggage to the porter for the purpose of suspending the journey, so that it should be in his custody, not for the purpose of holding it for a time whilst she suspended the journey? It seems to me it was open to the County Court judge to say she brought it there and gave it to the porter at the commencement of the journey, and that she only asked him whether it would be safe in his custody whilst she proceeded to take a step in that very journey which had then commenced, namely, to go to the ticket office and take the ticket. Under those circumstances, until it was in the carriage where she told him it was to be put, whether it was ticketed or not, the porter, according to his usual habit, as authorized by the company, had taken it into his possession for the company, and it was in the possession of the company for the purpose of the transit. The transit was all the time proceeding, although, of course, subject to the ordinary delays, and therefore they held this bag as common carriers.

With regard to the question of liability being limited by the ticket. If the company authorized its servant to take possession of the luggage before a ticket was obtained, what is on the ticket cannot affect the matter. Whether this luggage was carried under the ticket taken by the husband at Moorgate street, or under the ticket given to the wife, is a problem which I do not care to solve. If the latter is the case, the bag was lost before that ticket was given. If the former, no evidence of what that ticket was was laid before the County Court judge; and further, a ticket taken in Moorgate street could not be any notice with regard to luggage which was put in at Paddington.

I am of opinion that there was evidence

in this case upon which the County Court judge might properly find the facts to be as I have suggested they might be, and what is more, if I myself had been the judge of fact I should have found exactly as the County Court judge has found.

I am of opinion there is no ground for disturbing the judgment of the County Court judge.

LINDLEY, L.J. This case has been argued in such a way as to raise a question of considerable importance, although the case seems to me to be one which need not necessarily raise any such question. No doubt this is an instance of the struggle which is going on day by day between railway companies and the public. The railway companies want to throw off from themselves all the responsibility which they can, and they try to do it to an extent which does not always succeed. On the other hand, it may be that the public want to throw on them responsibilities which are too onerous, and such attempts are, on their side, often unsuccessful.

Now the company, in this case, profess by their notice that they will not be in any case liable for luggage taken by the passengers into the carriage—not liable even for the negligence of their own servants. That appears to me to be entirely unreasonable, and goes a great deal too far. They are not common carriers in respect of luggage taken by passengers into the carriages, but they are liable for negligence, and it appears to me such a notice as they put out, and such a profession as they make, is met by the provision of the Railway and Canal Traffic Act, section 7. It is true that in *Cohen* v. *South Eastern Ry. Co.*, 2 Ex. D. 253, the luggage there was not taken with the passenger, but as I understand Mellish, J.'s judgment, it extends beyond that, and applies to all luggage which is carried, whether with passengers or otherwise. The other notice on which they rely is to the effect that if passengers are desirous of leaving luggage or parcels under the charge of the company, they must themselves take or see them taken to and deposited in the cloak room. Now whether this is unreasonable or reasonable, turns upon the construction of the notice that the company's servants have orders not to take charge of any luggage or parcels. A porter in one sense takes charge of luggage parcels if he takes them for a purpose which is admittedly within the scope of his employment. It strikes me, applying a reasonable construction, what is meant is this, if you want to leave parcels in the charge of the company as distinguished from having them taken to a train by which you are going, or taken from a train, you must leave them in the cloak room, and not leave them about the platform, or intrust them to a porter. If here the time was so long that as a matter of ordinary business it would be reasonable to say that the bag ought to have been put in the cloak room and not intrusted to the porter, I should have thought it would be just and reasonable on the part of the company to say they were not responsible. But the facts of this case appear to show, to my mind at all events, that this Gladstone bag never was taken charge of or given in charge to the porter at all, except for the purpose of transit. This was Christmas Eve, and at Paddington station, and there was a throng of people. The train started at five. The plaintiff's wife, who had got the luggage and took the ticket, arrived at twenty minutes past four, forty minutes before the train started. Whether the train was actually drawn up at the platform at the time she arrived, or not, I cannot make out from the notes, probably it was not. It certainly was drawn up at the platform at half-past four, how much earlier I do not know. The lady arrived, and then to use her own language—I will take the judge's notes — what happened was this: "A porter came forward and took the luggage on a trolly to be labelled. I saw the portmanteau and hamper labelled to Bath. I told him I wished the Gladstone bag to be put in the train," that, no doubt, means the carriage, "and I asked him if it would be safe to leave it with him. He replied that it would be quite safe, and he would guard the luggage and put it in the train. I then went back to meet my husband and get my ticket." Then she says she was away ten minutes, and when she returned, the trolly had gone away, and the luggage had been

put into the van. That shows to demonstration that the train was up. Can she be said to have employed that porter to take charge of those things as distinguished from taking them to the carriage? That is a question of fact on which, as I understand, Day, J., and A. L. Smith, J., differed. I take the view which has been adopted by the County Court judge and A. L. Smith, J. It seems to me to be a simple case of transit, not of intrusting to the porter in any sense than that in which everything put into his hands is intrusted to him. It is very true that there was some short time during which it would not be necessary for him actually to keep walking or rolling this trolly. There was a short delay, but a delay so short as to make it utterly unreasonable to suppose that this ought to be held to be beyond the scope of his duty. It is not essential in this case to say more than this, that the porter was acting within the scope of his employment in taking this luggage in the way he did from the cab to the train. Whether during that interval the railway company were common carriers, as is stated by the master of the rolls, or whether they were not, appears to me to be immaterial for the purpose of this particular decision. Because, even if they were not, if we once arrive at the conclusion that the porter was acting within the scope of his authority, the County Court judge has found negligence, and that is sufficient for this case. I prefer to stand upon that, and that is what we are to go on in this case. The other appears to be a difficult point. The view taken by the County Court judge appears to me to be right, and therefore the appeal ought to be allowed.

[To be continued.]

COUR D'APPEL DE NANCY (Ire Ch.).

16 janvier 1886.

Présidence de M. d'HANNONCELLES.

Société commerciale entre époux—Nullité—Cautionnement—Compétence commerciale.

1o. *Est nulle, à raison de l'incompatibilité entre le principe d'égalité entre associés, qui régit les sociétés civiles et commerciales, et les droits dévolus au mari dans l'association conjugale, la société commerciale formée par une femme avec son mari.*

2o. *Le cautionnement solidaire d'une obligation commerciale par un non commerçant ne constitue pas, de la part de celui-ci, un acte de commerce, le rendant justiciable de la juridiction commerciale.*

Mennesson et Cie. c. dames Martel et Mauduit.

La Cour,

Sur le déclinatoire de compétence soulevé par les dames Martel et Mauduit :

Attendu que le jugement dont est appel a décidé, avec raison, que les dames Martel et Mauduit n'étaient pas commerçantes et n'avaient pu valablement former avec leurs maris un contrat de société les rendant justiciables des tribunaux consulaires; qu'en effet le principe d'égalité entre associés qui régit les sociétés civiles ou commerciales est incompatible avec les droits dévolus au mari dans l'association conjugale, droits auxquels les époux ne peuvent déroger, d'après la disposition écrite dans l'art. 1338 du Code Civil; qu'il est certain, en outre, que l'engagement solidaire pris par les dames Martel et Mauduit en septembre 1884, envers les appelants, de répondre des actes et des dettes de la gérance de la société du tissage mécanique du Rabodeau, ne constitue pas un acte de commerce attribuant juridiction aux tribunaux consulaires; qu'ainsi, à tous les points de vue, la décision par laquelle le Tribunal s'est déclaré incompétent pour connaître de l'action, en tant qu'elle est dirigée contre les dames Martel et Mauduit, doit être confirmée.

Confirme.

NOTE.—Sur le premier point: V. conf. pour le cas d'époux communs en biens, Cass. 9 août 1851 (S. 52.1.281—J. du P. 53.2.132—D. 52.1.160); Paris 14 avril 1856 (S. 56.2.369—J. du P. 56 2.336—D. 56.2.231); Metz 22 août 1861 (S. 62.2.330—J. du P. 62.462); Paris 24 mars 1870 (S. 71.2.71—J. du P. 71.292—D. 72.2.43); Trib. com. Seine 24 février 1878; *Sic:* Duranton, t. XVII, No. 347 *ad notam;* Troplong, Contrat de mariage, t. I, No. 210; Duvergier, Sociétés, t. II, No. 102; Massé, Dr. comm., t. II, No. 1267. Au cas d'époux séparés de biens les tendances de la jurisprudence sont dans le même sens. V. Paris 9 mars 1859 (S. 59.2.502—J. du P. 59.403—D 60.2.12); Dijon 27 juillet 1870 (S. 71.2.268); mais, en doctrine, la question est vivement controversée. V. dans le même sens que la jurisprudence: Troplong, Duvergier, Massé *ubi suprà. Contrà:* Duranton, *ubi suprà;* Alauzet, Comm. du C. de com., t. I, Nos. 152 et 153. Quant à l'arrêt ci-dessus, la généralité des termes dans lesquels il est conçu, les motifs sur lesquels il s'appuie, ne permettent pas de douter que la Cour de Nancy ait entendu écarter toute distinction et considérer comme nulle toute société entre époux, quelque régime matrimonial qu'ils aient adopté.—*Gaz. du Palais.*

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