sponsibility on account thereof, he clearly had a right to sue in his own name, upon a policy which he had taken in his own name and for his own benefit."

Decree affirmed.

NOTE.—Upon the points decided in this case, the following authorities may be referred to.

(1) With regard to the jurisdiction of equity to reform a mistake in a policy of insurance, even after a loss has occurred; see Delaware Insurance Co. *v.* Hogan, 2 W. C. C. R. 5; Lyman *v.* United Ins. Co., 2 Johns. Ch. 630; Andrews *v.* Ins. Co., 3 Mason, 10; Henkle *v.* Royal Ass. Co., 1 Ves. 317; Head *v.* Ins. Co., 2 Cranch, 417, 2 Phill. Ins. 583; Dela Vigne *v.* Ins. Co., 2 Caines, 243, Ewen *v.* Ins. Co., 16 Pick, 502.

(2) In a recent case in England, Knight *v.* Faith, 15 Q. B., 649, the same point as to the effect of damage after the expiration of a time policy, where the proximate cause, as stranding, was before, arose, and after a thorough discussion of the authorities, English and American, was determined in the same manner as in the principal case; see also on this point, Peters *v.* Phœnix Ins. Co. 3 S. & R. 25; Coit *v.* Smith, 3 John, Cas., 16; 1 Arnould, Ins. 410, &c.; Howell *v.* Ins. Co., 7 Ohio, 284.

(3) In addition to the cases cited in the text upon the question of negligence or barratry, see Ins. Co. *v.* Insley, 7 Barr, 233; Lawton *v.* Sun Ins. Co., 2 Cush. 500, *accord.*

(4) Upon the subject of deviation in a river, see Keeler *v.* Firemans' Co., 3 Hill, 250, *accord;* but *contra* Gazzam *v.* Ohio Ins. Co., Wright, 261; Jolly *v.* Ohio Ins. Co., Wright, 539.

(5) What risks are insurable, see 1 Arnould, 229; Hanlo *v.* Fishing Ins. Co. 3 Sumn. 132; Stainboule *v.* Fearing, 6 Eng. L. & E. 412; Venatta *v.* the Mutual Ins. Co., 2 Sandf., Sup. 490; Holbrook *v.* Ins. Co., *ante*, page 18.

RECENT ENGLISH DECISIONS.

Court of Commou Pleas.—Easter Term, May, 1852.

AUSTIN *v.* THE MANCHESTER RAILWAY.[1]

In an Action on the Case the Declaration alleged that the Defendants were Proprietors of certain Railways, and possessed of certain Carriages for the

[1] Abridged from 16 Jur. 764.

Conveyance of Horses, &c., for Hire: that, according to the known Course of Business by the Defendants, it was the Duty of the Defendants to cause due care to be taken in order to guard against Friction arising during the Journey from the Wheels and Axles of the said Carriages, &c.; and that, in order to preserve such Carriages, &c., from being injured by such Friction, the Persons employing the Defendants had no Power over the Management of the said Carriages, nor were they permitted to do any such Things as were necessary to guard against such Friction: that the Plaintiffs delivered to, and the Defendants received divers Horses from the Plaintiffs to be carried by the Defendants in their Carriages for Reward, according to the known Course of Business so practised as aforesaid, except so far as the same was altered by certain Terms expressed in a certain Ticket then by the Defendants prepared and produced to the Plaintiffs, and which Ticket expressed that it was issued "subject to the Plaintiffs undertaking to bear all the Risks of Injury by Conveyance and other Contingencies;" and that the Plaintiffs were to see to the Efficiency of the Carriages, and that the Defendants were not to be responsible "for any Damages, however caused, to Horses," &c. travelling upon the said Railways: that the Defendants did not take due and proper Care to provide against Friction of the Wheels and Axles, but altogether grossly and culpably neglected so to do; by Reason whereof, and of the gross and culpable Negligence of the Defendants, the Wheels of the Carriage in which the Horses were, took Fire, and that after such Fire had been produced, and the Carriage had become dangerous, &c., and after the Defendants had Notice thereof, &c., they recklessly, culpably, and with gross Negligence, and against the Will of the Plaintiffs, continued to carry the said Horses, &c., in the said Carriage until the Axle became further heated, and broke, whereby the Carriage was thrown off the Rails, and the Horses were injured:—It was *Held*, that the Negligence imputed, whether called "gross Negligence" or "culpable Negligence," was within the Exemption from Responsibility provided by the Contract, and that the Declaration therefore disclosed no Cause of Action, and was bad in Arrest of Judgment.

The facts of the case sufficiently appear from the reporter's syllabus, and in the opinion of the Court.

The question was argued by *Macaulay*, Q. C., *Rew* and *West*, who shewed cause upon a rule nisi or to arrest judgment. There had been a finding by a jury, and a verdict for plaintiff for £60.

The argument was that the charge against the carrier was one of wilful nonfeasance, or rather of misfeasance, that the terms of the ticket did not except the defendant from the consequences of such conduct; that the ticket did not contain the whole of the contract, but that their general duties as carriers remained for an injury arising from misfeasance or negligence, and that any sitipulation to

the contrary would be repugnant to a carrier's ordinary duty, and hence void.

Watson Q. C., and *Hawkins* supported the rule, and maintained the broad doctrine that the carrier might stipulate against any liability, although the result of negligence, and that such was the contract in question by its very terms. The opinion was delivered by

CRESSWELL, J.—We are of opinion that the rule for arresting the judgment must be made absolute. The declaration appears to have been drawn with care, in order to avoid the objection upon which the demurrer in *Shaw* v. *The York and North Midland Railway Company* proceeded, and to lead to the supposition that there was some duty cast upon the defendants beyond that which arose out of the special contract made between them and the plaintiffs; but after all the allegations as to the usual and known course of business practised and observed by the defendants, the plaintiffs found themselves obliged to aver that their horses were delivered to the defendants to be carried according to the usual and well-known course of business so practised and observed, except so far as the same was altered or qualified by certain terms expressed in a certain note or ticket then by the defendants prepared and produced to the plaintiffs. [His Lordship here read the ticket.] Notices of various kinds have from time to time been published by common carriers, with a view to limit the responsibility cast upon them by common law. At one period there was a disposition in our Courts to hold that common carriers could not, by their notices, shake off that responsibility; but Mr. Story, in his work of Bailments, 549, observes, "The right of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to *Southcote's case*, (4 Rep. 83;) and it was admitted in *Morse* v. *Shee*, (1 Vent. 238.) It is now fully recognized and settled beyond any reasonable doubt in England." For this assertion he cites a number of authorities, and we think that he has drawn a correct conclusion from them. The question to be considered then, is, what was the true nature of the

contract entered into between the parties in this case? The ticket, which contains the terms of the contract, was issued subject to the owners undertaking to bear all the risk of injury by conveyance or other contingencies. If this had been the only passage applicable to the risks to be borne by the owners, it might have been contended on their behalf that it did not extend beyond injuries sustained by reason of a journey by railway simply, or by means of some accident, and that it would not protect the carriers from the consequences of negligence on the part of themselves or their servants. But the ticket further states, that the company will not be responsible "for any damage, however caused, to horses, cattle, or live stock of any description, upon their railway or in their vehicles." The framer of the declaration appears to have felt that this latter part of the ticket (or contract, for so it was) protected the company from liability if injury was sustained by the want of what is usually called due care; and therefore, after alleging that the defendants did not take due and proper care to provide against friction of the wheels and axles, he charges them with grossly and culpably neglecting to do so, by reason whereof, and of the gross and culpable negligence of the defendants, the wheels of the carriage, in which the horses were, took fire, and the injury complained of was sustained. And if the terms of the contract are not sufficient to exonerate the company from responsibility for damages resulting from such negligence as is imputed, the judgment cannot be arrested. The term "gross negligence" is found in many of the cases reported on this subject, and it is manifest that no uniform meaning has been ascribed to those words, which are more correctly used in describing the sort of negligence for which a gratuitous bailee is held responsible, and have been somewhat loosely used with reference to carriers for hire; and in *Hinton* v. *Dibben*, a case depending on the Carriers Act, the 11 Geo. 4 & 1 Will. 4 c. 68, Lord Denman, C. J., in giving judgment, observed, with much truth, "It may well be doubted, whether between gross negligence and negligence merely, any intelligible distinction exists." In *Owen* v. *Burnett*, Bayley, B., said, "As for the cases of what is called gross negligence, which throws upon the carrier the respon-

sibility from which but for that he would have been exempt, I believe that, in the greater number of them, it will be found that the carrier was guilty of misfeasance." Such certainly were the cases of delivery to a wrong person, sending by a wrong coach, or carrying beyond the place to which the goods were consigned. But this observation will not explain all the decisions on the subject. There are others in which the carrier has been held liable for such negligence as warranted the Court in holding that he had put off that character. But there is nothing in this declaration amounting to a charge of misfeasance or renunciation of the character in which the defendants received the goods. The charge is, that they ought to have taken precautions to guard against the consequences of friction of wheels and axles, and that they did not do so, and were guilty of gross negligence in not doing so. The terms "gross negligence" and "culpable negligence" cannot alter the nature of the thing omitted, nor can they exaggerate such omission into an act of misfeasance or renunciation of the character in which they received the horses to be carried. The question, therefore, still turns upon the contract, which, in express terms, exempts the company from responsibility for damage, *however caused*, to horses, &c. In the largest sense, those words might exonerate the company from responsibility, even for damage done wilfully—a sense in which it was not contended that they were used in this contract; but giving them the most limited meaning, they must apply to all risks, of whatever kind, and however arising, to be encountered in the course of the journey, one of which is, undoubtedly, the risk of a wheel taking fire owing to neglect to grease it. Whether that is called "negligence" merely, or "gross negligence," or "culpable negligence," or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract; and that such exemption appearing on the face of the declaration, no cause of action is disclosed, and that judgment must be arrested.—Rule absolute to arrest the judgment.[1]

[1] This case also fully reported in 21 Law Jour. Rep. 179, C. P. See also same case in Queen's Bench, 20 Law Jour. Rep. (V. S.) 440; 15 Jur. 670; 5 English Rep. 329.