THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Edited by members of the Department of Law of the University of Pennsylvania under the supervision of the Faculty, and published monthly for the Department by OTTO KRAUS, JR., Business Manager, at S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa. Address all literary communications to the PRESIDENT EDITOR; all business communications to the BUSINESS MANAGER.

We take pleasure in announcing that the note by Mr. Henry P. Erdman, of the class of 1907, on "Liability for Injuries Done by Blasting without Proof of Negligence," which appeared in the last November issue of the REGISTER, has been noticed in a recent decision of the Supreme Court of Minnesota. It will be found cited in the case of *Gould* v. *Winona Gas Co.*, in the advance sheets of the *Northwestern Reporter.*

FEDERAL TREATIES AND THE STATE POLICE POWER—A REBUTTAL.—The side espoused by Dean Lewis of the Law Department of the University of Pennsylvania in his recent scholarly article on the Japanese school question[1] can undoubtedly call to its support adjudicated cases on the question of the right

[1] See AMERICAN LAW REGISTER, vol. 25, No. 2, also AMERICAN LAW REGISTER, vol. 54, No. 12.

of the Federal Government under its treaty-making power to interfere with the commercial and fiscal policy of a state. It is believed however that the court in deciding these cases did not consider or contemplate the questions which would have been involved if the interference had been with matters which were essentially personal and social.[2] There is no doubt that the framers of the Constitution and the people who adopted it intended to give to the central government large if not exclusive commercial powers in so far as foreign nations were concerned, and that they realized that in order that such a grant of power might be effective it must at times involve the right to interfere more or less with what may be termed the local business organization of the several states. A distinction however must be made between subjects which are commercial and national and those which are local and social. The history of the times shows conclusively that the treaty-making power was given to the central government for commercial and national purposes and for such purposes only.[3] The spirit of the day was essentially individualistic and Calvinistic[4] and a surrender to a central government of the right by treaty or otherwise to interfere with domestic privacy, to regulate domestic institutions and to force companionship in the social circle whether that of the family, the school, the township, the village or the state was so antagonistic to the thought of the time, that we believe that such a construction of the Constitution was undreamed of and its negation therefore unnecessary. If, indeed, immediately after the adoption of the Constitution the doctrine had been asserted that such an intrusion upon the domestic privacy of the state or of its localities was justified under the grant of treaty-making power, it, to use the language of Mr. Justice Cooley,

"would have been somewhat startling to our people, and would have been likely to lead thereafter to a more careful scrutiny of the charters of government framed by them, lest, sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether."[5]

It is argued by Doctor Lewis that the President and Senate may, by means of the treaty-making power, cede away a

[2] See AMERICAN LAW REGISTER, vol. 54, p. 700

[3] See Authorities cited in note 6 of Dean Lewis' Article. See also Curtis' Const. Hist. of U. S., Chapter xxvi.

[4] Calvinism was as much a social and political theory as it was a religious belief. The puritan of the Old and of the New World rarely got beyond the idea of the small industrial or religious unit. It was the interference with this unit by the crown which largely led to the English Revolution.

[5] Cooley, J. in *People* v. *Hurlburt*, 24 Michigan 97.

state and that it necessarily follows that they may regulate its internal policy. The premise however can hardly be conceded. There are dicta on both sides of the question.[6] There are adjudicated cases on neither. There is a precedent, however, and this is against the proposition. When in 1842, in order to settle the Northeastern boundary line, it was found necessary to cede to Great Britain portions of the territory belonging to Maine and Massachusetts, not only were particular pains taken to obtain the consent of both of the states concerned but compensation was made to them by the Federal government and provided for in one treaty.[7] Is there, indeed, any question as to what would have been the answer of the framers of the American Constitution to the question as to whether or not they intended that the treaty-making power should be so extensive? Grant the power to cede away Virginia, to cede the Old Dominion, to cede the battle-fields of Massachusetts!!! The illustration of the cession to Germany of the provinces of Alsace and Lorraine has been given. As a matter of fact Alsace and Lorraine were conquered and occupied before the treaty was made. It was a cession after an accomplished fact of conquest and occupation. Alsace and Lorraine were as much in the hands of the Germans as was Paris itself. But French precedents do not in any event apply to American or English conditions. In France the localities are essentially agencies of the central government. In the development of both Great Britain and America and in the mastery of the American continent the principle of home rule, and especially of a social home rule, has been the corner stone. The French ideal was essentially nationalistic and bureaucratic. The American and English ideal was essentially individualistic and Calvinistic. Theirs was a home rule not necessarily of colonies or states but rather of the family, of the village, of the hamlet, of the church, of the township and of the hundred. The right to choose one's associates was always insisted upon. It was for this reason that the English civilization outstripped the French civilization in America and overcame it. The growth in

[6] See Cases cited by Dr. Lewis in Notes 4 and 5. See also Thayer Cases on Const. Law, vol. 1, p. 373, note 1, in which Professor Thayer says: "The treaty making power, as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments and of those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter without its consent."

[7] Moore, International Arbitrations, p. 153.

America was the result of the growth and migration and pushing forward into the wilderness of small local groups whose members made their own laws, chose their own associates and set up their own standards of public and private morality. The West was not conquered, the Indians were not subjugated by the troops of Great Britain or of the United States. It was conquered and occupied by the hardy, individualistic, often Calvinistic, pioneer, who without aid, except that derived from his own axe and his own rifle, cleared and settled the land, admitted his own associates, established his own social customs, framed his own government, provided for his own defense and fought for the home and the social institutions which he himself had created. The French on the other hand were always looking to their central government for their support, their ideals and their policies. There has indeed been in America a local home rule, a right of flocking as one chooses, which as an accomplished fact has been more potent than the theory of state sovereignty itself and has not been dependent upon it. It has been the home rule of the local unit, of the family, of the local church, of the village and of the township, and in the history of Anglo-Saxon and American development no government has ever been able to ignore it. No law has ever been strong enough to force the Anglo-Saxon to change his natural habits or to mate or mingle with those whom he does not desire.[8] The Civil War may have destroyed to a large extent the doctrine of states rights. It did not destroy the doctrine of inherent social rights.

[8] See De Tocqueville, Democracy in America, Chapter 5, in which in speaking of New England township government, the author says: "In this part of the union the impulsion of political activity was given in the townships; and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy they were contented to assume the central power of the state. The townships of New England remained as they were before; and, although they are now subject to the state, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem on the contrary to have surrendered a portion of their independence to the state. The townships are only subordinate to the states in those interests which I shall term social as they are common to all the citizens. They are independent in all matters that concern themselves, and among the inhabitants of New England I believe that not a man is to be found who would acknowledge that the state has any right to interfere in their local interests." In commenting on this passage, Judge Cooley, in the case of *People* v. *Hurlburt*, 24 Mich. 99, also says: "The historical fact is that local governments universally in this country, were either simultaneous with or preceded the more central authority. In Massachusetts, originally a Democracy, the two may be said to have been at first identical; but when the colony

The question involved in the Japanese school controversy is essentially a social question.[9] You can enforce commercial rules by law. It is almost impossible to enforce social rules, except where the conscience and the will of the community are in favor of the regulation. From the power to admit aliens to citizenship there does not, as Doctor Lewis asserts, necessarily follow the power to regulate the social life of the people among whom they are allowed to settle. The right of the community to protect its own morals and to keep its own blood pure, has, except where the treaty-making power has been involved (and there are no adjudications on this question) been universally recognized. Is there any reason for believing that the framers of the American Constitution ever had anything but commercial considerations in mind when they granted to the central government the treaty-making power? Would the people of the several states have consented for a moment to grant to a new and untried government, of which the majority of them were jealous and fearful, the power to interfere with their domestic institutions and domestic privacy, a power which Great Britain herself has rarely asserted over her own localities and colonies? There is something which is more important than to be able to perform one's contracts with foreign nations or to pursue a consistent policy towards them, and that is the ability to preserve peace and concord within one's own dominions. It has been this yielding to local customs and institutions which has alone kept the British Empire intact, which alone has made the retention of India possible. When in 1841 a citizen of Great Britain was being tried for violating the laws of New York and set up the defense that his act, which was complicity in the destruction of the steamship *Caroline*, was committed in

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became a representative government, and new bands pushed out into the wilderness, they went bearing with them grants of land and authority for the conduct of their local affairs. But in Connecticut the several settlements originated their own governments, and though these were doubtless very imperfect and informal, they were sufficient for the time being, and the central government was later in point of time." See also Roosevelt, Winning of the West.

[9] In speaking of the segregation of the negro, the Supreme Court of the United States said: "The object of the amendment (14th) was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not be intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally if not universally recognized as within the competency of the state legislatures in the exercise of their police power." Opinion in *Plessy* v. *Ferguson*, 16 Sup. Ct. Rep. 1138, 1140.

pursuance of his duties as a British subject, the United States government risked a war with England rather than interfere with the undoubted jurisdiction of the state.[10]

The mere fact that there is in the Constitution no direct limitation on the treaty-making power of itself means nothing. It is admitted that there are limitations. It is admitted by Dean Lewis that there are implied limitations arising out of the fact that "the Constitution was adopted by a free people imbued with the importance of individual liberty and firmly believing in democratic institutions." Is there any exercise of liberty more sacred to the Anglo-Saxon than the freedom to choose his own associates and those of his children and to keep his race pure? Again to use the language of Judge Cooley:

"The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns and the choice, directly or indirectly of their local officers, if practically asserted would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been passed upon legislative authority in this regard we shall find them very simple. We have taken great pains to surround the life, liberty and property of the individual with guarantees, but we have not as a general thing guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government which are within the contemplation of the people when they agree upon the written charter, subject to which certain delegations of authority to the several departments of government have been made. That this last is the case appears to me too plain for serious controversy."[11]

These remarks, it is true, were made in considering the question of the right of home rule in the municipality and in the local community as opposed to the sovereign state. They are equally applicable, however, in the discussion of the question as to the existence of local rights and a local police power in a state or in a locality thereof as opposed to the power of the central government whether exercised by treaty or otherwise. The argument of Dean Lewis is rather an argument or statement of what would be reasonable than of what actually was the intention of the framers of the Constitution and the understanding of the people who ratified it, or, indeed, of what is the present construction of that

[10] Moore, International Arbitrations, p. 1441.
[11] In *People* v. *Hurlburt*, 24 Michigan 97.

instrument. It might be well to amend the Constitution so as to give to the central government a treaty-making power as extensive as that contended for, but that is not the question before us. The question is, what are the constitutional rights of the state of California and of the city of San Francisco under the Constitution as it now stands? and the determination of this question should largely depend upon the intention of the framers of the instrument, if that intention can be arrived at.

Andrew Alexander Bruce.

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LIENS FOR DEMURRAGE.—In view of the increasing importance of the question of freight and demurrage charges, all decisions of the courts on these subjects are noticed with peculiar interest by shippers and business men. In a very recent case—*Nicolette Co.* v. *Coal Co.*, 213 Pa., 379, 1906—the Supreme Court of Pennsylvania, reversing the Superior Court and the Common Pleas Court of Allegheny County, held that a common carrier, even if he has sustained damage by reason of the delay, has no *common law lien* for demurrage charges; and in strong dicta by Justice Brown it is said (page 382):

"Hence the consignee of goods shipped by railroad is not bound by rules and regulations of the company providing for a lien for demurrage, though published, without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules without assent thereto will not affect the shipper or consignee. * * * The carrier must seek his redress in the ordinary manner for breach of an implied contract."

The facts of the case were that a lien was claimed by a carrier of lumber on barges, who detained the lumber until the plaintiff company should pay demurrage charges, and on this the lumber company brought replevin and recovered the lumber. But throughout the entire opinion and in the cases cited to uphold its decision, the court treats it as if the lien was a lien claimed by a railroad company for demurrage charges on cars. So that it may be taken as settled that in Pennsylvania, unless this case should be reversed, a railroad company has no common law or "natural" lien for demurrage charges against the goods on the goods shipped, and it is in this aspect that the case will be discussed.

It is maintained that this rule grew up owing to the limitations of the old common law in its power over ships and to the mere dicta of one case, and the Pennsylvania court, had it deemed it wise to do so, by pointing this out, could

have treated the question as a *res integra*—a subject or point not yet decided—instead of treating it as a point definitely settled beyond dispute, as they did. Then had the court considered it as a *res integra*, the argument for granting the lien is really stronger than the argument against it, and so, if there is nothing in the very nature of a lien which prevents its being granted in this case, it should have been allowed. And finally, in some instances, either by statute or common law decision contrary to the Pennsylvania case, the lien has been permitted. It is not maintained that in point of law the decision of the Pennsylvania court is erroneous, but it is urged that a contrary decision would not have transgressed any settled rule of law and would have subserved better the just needs of modern transportation.

Story, in his "Treatise on Equity," says:

"A lien is simply a right to possess and retain property until some charge attaching to it is paid or discharged."

Since the Pennsylvania case admits that a lien for demurrage could arise by special agreement or special contract of the parties, we are concerned only with the court's denial that such lien exists at common law. The court admits that, by a particular agreement made on the bill of lading, a lien for demurrage will be granted to the railroad, but though the railroad can thus protect itself, the question remains important, for possible mistakes or a combination of circumstances might cause such agreement not to be specially entered into each time, and unless so specially entered into, under the Pennsylvania decision the railroad has no lien for demurrage.

Were there any instances at common law where a lien analogous to the railroad's lien on freight for demurrage was allowed? It is perfectly true that there was no lien at common law for demurrage in shipping cases, and yet the common law allowed very broad lien for freight charges. The ship captain had a lien on any part of one consignee's goods for the freight due on all that consignee's shipment.

In *Wright* v. *Snell*, 5 B. & Ald., 350, the court intimates very clearly its opinion, that by notice plainly and widely published though not specifically agreed to by the shipper, a special lien on freight may become a general lien for any back freight due from the same consignee, provided no injustice was done. There is besides this lien the well known lien on a passenger's baggage for the fare of that passenger, as in *Wolf* v. *Summers*, 2 Camp., 631, where a railroad was allowed to hold a passenger's baggage till he paid his fare. So that, by these two cases it would seem that when necessity and justice demanded it, the common law courts were not

irrevocably opposed to the extension of a common carrier's lien, from a special to a general lien, as in the first case, or even farther, as in the last case.

Indeed, the Pennsylvania court frankly admits that by special agreement the carrier can get his lien for demurrage, whereas formerly even this was somewhat of a doubtful proposition, as is shown by a case in the reign of George III.[1]

The truth of the matter is clearly set forth in a case in the Admiralty Court, viz., The Hyperion's Cargo, 2 Lowell, 93, where the court held that, under Admiralty law a ship owner had a lien on the cargo for demurrage. The court said:

"When the common law of England was modified by the introduction of many rules from the law merchant, the former law had no process for inforcing this reciprocal privilege of the ship and the goods, and had succeeded in repressing the only court that had the requisite mode of action, and was obliged to say that it could not recognize the maxim even when embodied in an express contract, as it usually was in English charter parties."

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[1] (*Birley* vs. *Gladstone* 3 Maule and Sel. 204) Then charter-parties were a frequent mercantile arrangement and the court held, that where in a charter party the ship owners covenanted to receive full cargo to be delivered at Liverpool and the freighter covenanted to pay so much per ton for the cargo and so much per diem for demurrage and the freighter and ship owner mutually bound themselves in the penal sum of £3,000 for the performance of all the articles of agreement, the ship owners binding the ship, tackle and appurtenances and the freighter the goods shipped by him as freight, yet even here there was no lien for a sum claimed for demurrage on the freight. The Court, Lord Ellenborough, C. J., giving the opinion, held that there was no lien here because the clause binding the parties in the penal sum of £3,000 and claiming to give a lien on the freight to one and on the ship and tackle to the other "can not be mutually obligatory." The remedy rests in a suit for breach of covenant and there is no lien; "for the owner of the ship may detain the goods of the freighter as security for performance of the covenants, but the freighter can never detain the ship and so there will be no mutuality of lien between them." Though this is a case of a ship and not of a railroad it would seem as if the Pennsylvania courts, by allowing a lien if special arrangements were made, had advanced a little, and are somewhat more liberal in allowing liens than the courts were formerly.

The view point of the Pennsylvania court is more advanced, for a contract is not void because it is not mutually enforceable, and had the English court agreed with the present Pennsylvania court the lack of mutuality in the contract need not have prevented its being enforced against one party. That the right of lien was not mutual was an objection only under the facts of this case where the parties apparently intended to create mutual liens. A lien does not need mutuality of enforcement and this argument would therefore not be in point to-day against granting a lien for demurrage, for there is no mutuality in the lien granted for freight, which is admittedly valid, and so none need exist in the lien for demurrage.

For this proposition the court here cites the same old English case of *Birley* v. *Gladstone*, cited *ante:*

"* * * The history of this question in the courts of common law in England has been that of a struggle between ship owners to create liens by stipulation, especially liens for demurrage, and that of the courts to narrow the stipulations by construction."

So it would seem fair to say that the attitude of the Pennsylvania courts differs from that of the old English courts, for the old courts disliked these specially created liens, while the courts to-day have gone at least one step in advance of them and freely allow the lien if specially agreed upon. It would seem also that the Admiralty Court in the case just quoted was of the opinion that the only reason the common law had not adopted the theory that a ship owner had a lien on the cargo for demurrage was because they had no courts where the lien could be enforced properly and for really no other reason.[a]

It is, of course, plain that if a common carrier by water had a common law lien for demurrage it would be a strong argument for granting the same right to a common carrier by land, and therefore the subject has been developed thus fully in order to show that the ship had such a lien in Admiralty courts, and that the lien was not denied to a ship owner by the common law courts because of any fundamental objection to it in the law as administered there. Besides which the Pennsylvania courts have already broken away somewhat from the strict and limited rule of the old English courts, thereby making this present step of a common law lien for demurrage not impossible had they chosen to advance again.

If we consider the rule against the lien apart from the ship cases it would appear to be an outgrowth or corollary of the following rule, as stated by Hutchinson in his work on "Carriers," Sec. 478:

"The lien allowed to the carrier by the law extends only to his charges for the transportation of the goods and does not include expenses for warehousing them."

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[a] In accord with this supposition would seem to be the situation in the Admiralty courts of this country. Here, the Admiralty courts retain the ability to enforce the lien of the cargo against the ship and so they allow the lien of the ship owner to exist on the freight for demurrage and other charges, denied by the common law courts of England because they could not enforce the lien of the freight shipper against the ship. In the case of *Hawgood* v. 1,310 *Tons of Coal*, 21 Fed. Rep. 681, the court held that a ship owner has a lien upon a cargo for demurrage enforceable in Admiralty courts even though the bill of lading contained no demurrage clause and the lien was in this case granted by no special agreement at all but by common law.

For the last part of this important proposition he cites two cases, one of which only is worthy of careful consideration. The first case is *Lambert* v. *Robinson*, in 1 Espinasse 119, and the other is *S. S. Virginia* v. *Kraft*, 25 Mo., 76. The latter case has really nothing to do with the proposition for which it is cited.[3]

The other case cited is one of the oldest cases which has a really important bearing on the lien allowed to a carrier on land. It has been very frequently cited to sustain propositions similar to Hutchinson's, as will be shown. In the case of *Lambert* v. *Robinson*, 1 Esp., the facts were as follows: A consignor of goods met a stage coach on the road and stopped it to give the driver a parcel to be delivered to the plaintiff at the next inn. When the coach arrived at the inn the plaintiff tendered the money due for the freight charges, but the driver refused to deliver it up to him unless he paid 2d. extra for bookage and warehouse room; and the plaintiff sued in trover and recovered the goods. The court held (Eyre, C. J., giving the opinion):

"The defendant had set up no color of title to warrant him in holding the goods, as there was no lien given by law in this case. But even admitting that by law he had a lien, it must be for some legal demand. That in the present case the demand was an exaction, as the defendant could not claim a sum where there was no duty performed, in this case there having been no entry on the books nor warehouse room occupied."

He therefore directed a verdict for the plaintiff. It is submitted that this case does not go as far as Hutchinson would have it, and considered in the most favorable light, the most that can be said is that there is dicta to uphold Hutchinson's rule. The case was to settle the ownership of 2d.; the opinion was a very short one, and what the case contains for our purpose is only dicta, and not strong dicta

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[3] *S. S. Virginia* v. *Kraft*. Here the carrier was suing the consignee of certain freight for charges paid by the carrier to a shipping agent at the point where the goods were loaded. These charges were owed to this shipping agent for traveling expenses and lawyer's fees due him from the carrier company. The consignee paid the freight charges but refused to pay any more of the bill which included in addition all these payments made previously to the shipping agent, for which the consignee was not responsible. Admittedly the consignee was the proper owner of the goods and so far as can be gathered from the report of the case had no knowledge at all of these advances made to the shipping agent for which the carrier now tried to hold him responsible. The court decided that the carrier company was guilty of gross negligence, and could not even collect in damages from the defendant. Plainly if they could not collect in damages they could have no lien and so the case here is not of great weight.

at that. And yet see how often that case is cited to sustain the same proposition:

In "Chitty on Carriers," page 176, the case is cited to sustain the proposition:

"Where goods are brought to an inn or warehouse, and the consignee is there ready to receive them, the carrier is bound to deliver them, and cannot impose upon him a liability for warehouse room or for booking the parcel."

He does not state that on the facts of that case the carrier could have had no right at law to sue for these charges because he had not earned them, and naturally he has not a lien for what he has not earned.

In "Cross on Carriers," page 287, the case is cited under this statement:

"It must, however, be a detention only for the amount actually incurred for carriage. Thus where goods are taken by the owner from the wagon, the carrier or warehouseman has no claim for booking or warehouse room, and there is consequently in such case no right of lien."

Here the statement is most nearly correct, and yet if the case had not been read by the person seeing the statement it might not be understood that, so far as the case decides, it did not grant a lien because the lien had not been earned, and was really asked for to sustain a fraudulent charge.

In "Moore on Carriers," page 441, the case is cited to sustain the proposition,

"where the carrier voluntarily parts with the possession it loses its lien,"

and though it is hard to see at first how the case on its face does stand for that, it is entirely aside from the subject at hand.

In "Jeremy on Carriers," page 78, the case is cited to prove the proposition it really stands for, viz., that a carrier has no lien on goods for an act which he did not perform. But this does not support the proposition that if he perform duties he has not then a lien.

"Jones on Lien," Sec. 281, cites the case twice to sustain the two following doctrines:

(1) "A carrier has no lien for charges not connected with the transportation of the goods and not within the contemplation of the parties."

(2) The second time Jones cites the *Lambert* v. *Robinson* case is to sustain the proposition in Sec. 281:

"A carrier has no lien for the storage of goods unless there be special contract allowing him to carhge for storage,"

and under this he cites only one other case besides *Lambert* v. *Robinson*, the case of *Somers* v. *British Co.*, in 30 J. L. Q. B., 229, which is not important.[4]

This shows how prevalent has become the idea that *Lambert* v. *Robinson* really decides the proposition for which it is so often cited. Compare the statement for which the case is made authority and correctly in Angell in "The Law of Carriers," Sec. 368:

"But cases of this sort depend much on circumstances. * * * In one case it appears that the detention can only be for the amount incurred for carriage; as where goods were taken by the owner from the carrier's wagon it was held that the carrier had no claim for booking and consequently he could set up no lien for delivery."

There are other instances of the misapplication of this case.[5]

Besides this old case of *Lambert* v. *Robinson*, which is the fountain head of this rule, the Pennsylvania court cites other authority. One is "The American Encyclopedia of Law," which says there is no lien for demurrage, and cites for the proposition only two cases not already discussed somewhere before. The cases are *Railroad* v. *Hunt*, 15 Lea, 261, which does not strengthen the position to any extent,[6] and another case which will be discussed.

The Pennsylvania case then cites "Redfield on Railways," page 193, as follows:

"The right of a common carrier to a lien extends to charges connected with the expense of transportation strictly."

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[4]*Somers* v. *British Co.* merely holds that an artifier who in the exercise of his right of lien detains the chattel upon which he has expended his labor and material, has no claim against the owner for taking care of the chattel while so detained.

[5]In *Crommelin* v. *N. Y. & H. R. R. Co.*, (1 Abbott, N. Y. App. 472), the court in an opinion by Hunt, Ch. J., held that the defendant railroad had no lien on the freight for the demurrage which was admittedly then due from the consignee for his delay. The situation as it was in the Superior Court is reported here thus: "The Superior Court on appeal held for substantially the same reasons as those assigned in the following opinion that there was no lien; citing besides other cases *Lambert* v. *Robinson*, 1 Esp. 119, and Whittaker on Liens." In the report of the same case in 10 Bosw. 77, the court cites practically two authorities in the way of cases, viz.: *Birley* v. *Gladstone*—the reason for which decision has been fully explained—and then the court, Mowell, J., says: "The only other case (besides the case of *Birley* v. *Gladstone*) I have found bearing directly on this question is *Lambert* v. *Robinson* 1 Esp. 119."

[6]For in this case the railroad itself was in fault and caused the delay during which it then tried to claim demurrage and a lien for demurrage, which of course was not allowed as the demurrage charge itself was wrong.

The only case cited to sustain this by Redfield is the case already mentioned here, viz., *The Virginia* v. *Kraft*, 25 Mo., 76, in which case, as said before, the court refused to allow a lien in a case where the carrier could not have recovered in damages anyhow, and so, of course, had no right of lien. The last case cited by the opinion in the Pennsylvania case and in the "American Encyclopedia" is an Illinois case (*Chicago & N. W. R. R.* v. *Jenkins*, 103 Ill., 588), which holds simply on its own authority that no such lien exists. and is in plain accord with the Pennsylvania decision.

Tracing out as far as possible the origin for the rule as laid down in Pennsylvania, New York and Illinois, and through the various cases and text books, the rule seems to be grounded primarily on two old English cases—*Lambert* v. *Robinson* and *Birley* v. *Gladstone*. The courts and text writers have laid special stress on *Lambert* v. *Robinson*, and more than any single case it seems to have been relied on. It would seem as though this old case, had the court in 213 Pa. chosen to do so, could have been distinguished very easily and the fact that the rule was based on dicta could have been pointed out. Courts of as high authority as the court which decided *Birley* v. *Gladstone* have openly said that that case was decided in that way because the court had no method of enforcing the lien. So that again, had the Pennsylvania court decided to depart from this case, it could have done so without any serious change of the law; and the entire question might therefore have been considered as a *res integra*, instead of which the court apparently treats the entire subject as one settled beyond every doubt, and pays no regard to the economic and practical side of the question.

Had the problem been viewed at all from a practical business or economic standpoint there might have been much said in favor of granting the lien. It seems hard to find any strong reason why a lien should not be granted for demurrage. The demurrage charges themselves are perfectly regular and legal, except in Nebraska, and they have been found to be absolutely necessary. Why endanger their existence and render them so much more cumbersome by forcing the railroad to sue for the damages at law, as the Pennsylvania case suggests, when the just and legal payment can so much easier be obtained by letting the railroad hold the property till the amount due is paid? Then, too, why is a lien given for freight? Because the railroad is forced by law to carry freight. But this first step having been forced by law, the result is of necessity that the railroad must store the freight till the consignee has a reasonable time in which to remove it. There is, it would seem, therefore, but little real distinc-

tion between freight and demurrage charges, which are both the result of the common carrier's position. It would be liable for damages if it did not store the goods in some proper way (*Porter* v. *Chicago & R. I. R. R.*, 20 Ill., 407), yet it cannot mandamus the consignee to unload; and the railroad must therefore either go to the expense of building and maintaining a warehouse or lose the use of its cars for that time. It would appear that the railroad is in such a position that, being forced by necessity to care for the goods, it should in justice have a lien on them for demurrage charges.

It is reasonably sure that the ease with which a railroad having this lien can collect the demurrage will greatly aid commerce and transportation. The consignee, knowing that he must pay demurrage as a just penalty for his delay, and that if he does not pay it he cannot get the goods, will hurry to remove the goods, or if he cannot avoid some delay, will pay the demurrage rather than be longer deprived of his property, and so in the latter case the railroad is not forced to bring suit. When the necessity and justice of the charge itself are realized it will be seen that the more readily collectible it is made, the fairer it will be to all concerned and the better will railroads be able to discharge their duties to the public.

There is nothing in the very nature of a lien which makes it unjust or otherwise to give the lien in this case. And Cross, in his book "On the Law of Lien," page 7 *et seq.*, says in part that a lien is very analogous to a right of set-off, and he makes four main distinctions, which do not affect the point at hand.[7]

Cross says in part that liens and set-offs are merely means by which the law avoids circuity of action. They are mere modes of convenience, which, however, must not be used if any real injustice is worked. Liens may arise through policy of the law, by custom of the realm or by agreement, either express or implied, between the parties. It will be seen how very simple a lien is. It is practically here nothing but a set-off. It cannot be sold to some entire outsider. It is not subject to execution. It is merely the right to hold the goods till a just charge due on them be paid. No basic objection to granting the lien here exists. It is a simple and direct

[7](1) Set-off is confined more generally to action *ex contractu*, while a lien may frequently be advanced in action of tort; (2) Set-off can be pleaded to an account less than or equal to the amount sued for, but a lien exists on security to any amount; (3) Set-off is not pleadable if barred by the Statute of Limitations, but goods may be detained as a lien notwithstanding that only the remedy by action is barred; (4) Set-off includes all mutual debts in the same right, but a lien cannot be maintained after the debt for which it is security is paid.

means for the collection of a just debt. Formerly there was a grave objection to this lien because the amount of the charge was not definite and could only be made definite by the findings of a jury.[8]

But this objection of uncertainty has to-day been entirely removed because the railroads now have as regular charges for demurrage as they do for freight, and these are published and known to every shipper and consignee.

Let us consider the arguments against the lien as presented in the cases denying its existence, aside from their discussion of the old cases. The two cases which present the strongest arguments against the lien, aside from all consideration of authorities, are the Illinois case and the Pennsylvania cases. The Illinois case (*C. & N. R. R.* v. *Jenkins, ante*), in showing why at maritime law the lien was allowed says:

"But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee."

The Pennsylvania court advances two other reasons against the lien: (1) Demurrage is not of frequent occurrence and is not anticipated, and (2) the charge is not certain.

The mere statement of these so-called objections shows their weakness. Why should a railroad be forced to have warehouses any more than a steamship company? The goods to-day are usually unloaded by the consignee or his agent. These are the plain answers to the Illinois case. As to the Pennsylvania objections, it is surprising to contend that demurrage is of infrequent occurrence, for it occurs but too constantly. And the charges are, as stated before, as definite as the freight rates and as well known to consignors, and being known to them,

"it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted with reference to these charges."

Yet these are all the arguments, apart from old authorities, advanced by courts refusing the lien; arguments which are not to be compared with the arguments on the other side,

[8] In the old case of *Phillips* v. *Rodie* (15 East 549) which was a case of very similar facts to *Birley* v. *Gladstone, ante*, and sited in that latter case, the court said: "It is impossible in this case without the intervention of a jury or an arbitrator to settle what is the sum to be tendered; it would be taking a leap in the dark. When there is no custom to regulate the proportion and the amount the case must necessarily rest in damages."

had the court but chosen to regard the question as undecided instead of following an old dicta.

The opposite rule—granting the lien for demurrage—does prevail in at least one jurisdiction by decision and has been made the law in others by statute. In Colorado Annot. St. 1891–2855, North Dakota Code 6286, and Wyoming Rev. Sts. 1887–2846, such a lien for demurrage would appear to exist if any fair interpretation of these statutes be given, though no cases making any interpretation of this point have been observed.

Massachusetts held in *Miller* v. *Mansfield*, 112 Mass., 260, directly *contra* to the Pennsylvania case. A railroad company had a lien on the freight of the plaintiff for demurrage which the defendant, the railroad company, had a right to charge and which the plaintiff knew would be charged.

"Being known to the plaintiff, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted with reference to it. It enters into and forms part of this contract, and defendant is entitled to recover the amount fixed by usage, by virtue of a plaintiff's promise to pay it. This charge is in its essential character a charge for storage. After the arrival of the goods at their destination the liability of the company as common carriers ceased, but they became liable to the custody of the goods as warehousemen, and if they were not removed within a reasonable time were entitled to compensation for which they had a lien as warehousemen."

There cannot be much doubt as to the correctness of this Massachusetts view. The grounds on which the lien is based here is that the railroad becomes a warehouseman when it holds the consignee's freight longer than a certain time. And perhaps the strongest argument of all against the present Pennsylvania decision is that in *Shenk* v. *Phila. Steam Co.*, 60 Pa., 109, Sharswood, J., says:

"The responsibility of the carrier ought, it would seem, to last either until delivery to the owners or until that of some other party begins. Transporters of merchandise may be both carriers and warehousemen, and they cease to be the former when they have placed the goods they have carried in a depot of their own or any other safe warehouse. Their responsibility as warehousemen is, however, only for ordinary neglect."

So the Pennsylvania court has imposed upon the railroad all the duties and liabilities of warehousemen, and yet denies to them one of the cardinal rights of a warehouseman—the right to hold the goods till the fair charges for storage be paid. It might almost seem as though the Pennsylvania court had taken a step backward simply to uphold the dicta of the old case of *Lambert* v. *Robinson* and had overruled a sound and eminently correct decision by a great judge. But

the court apparently pays no attention to this anomaly. A railroad still remains a warehouseman and responsible as such, and yet it cannot protect itself as an ordinary warehouseman can by holding the goods stored till the storage charges thereon are paid. This important right is denied to the railroad, merely because of the dicta in one old case deciding the ownership of twopence.

To sum up in conclusion:

(1) Demurrage was allowed to sustain a lien in the case of ships by the Admiralty courts and only refused by the courts of common law because of their inability to enforce it.

(2) The common law courts have been willing to extend the special lien for freight charges to a general lien, or even farther, if the circumstances warranted it; and so, since demurrage is a charge made necessary by the same basis as freight charges, the two are very analogous, and the difference between them is not great enough to allow the lien in one case and to deny it in the other.

(3) Especially since the rule denying it to carriers by land is based primarily on the dicta of one old case, the rule need not therefore have decided this court.

(4) Then the arguments against the lien, apart from the decisions themselves, do not seem so strong or convincing as the arguments for it, especially since there is absolutely nothing in the nature of a lien itself which makes its existence here impossible. Indeed, every requirement of a lien seems to be fulfilled here, and its convenience makes it almost a necessity.

(5) Besides which, the Pennsylvania court having already held the railroad to be a warehouseman in respect of keeping the freight, the right of a warehouseman to his lien is such a cardinal thing that it would seem very unjust to refuse it to a railroad when acting in this capacity.

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