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ENGLISH CARRIERS' COMMON-LAW RIGHT TO REJECT UNDECLARED CARGO: THE MYTH OF THE CLOSED-CONTAINER CONUNDRUM

JOHN R. PAGAN*

When text and reason fail them, modern courts frequently attempt to shore up their sagging constitutional constructs with materials scavenged from the common law. They use "the good old law"¹ for ornamental purposes as well. Judicial antiquarians festoon their opinions with references to Coke and Mansfield, hoping, perhaps, that hoariness will ensure credence. Blithely they thumb through musty reports in search of a convenient precedent, seldom canvassing enough cases to discover a doctrine's true scope and path of development. Sometimes bad history makes bad law. But more often, poorly researched law yields distorted history. This Article will try to correct one such distortion: the claim that, at English common law, a common carrier's need to protect himself against insurance fraud warranted his refusing to transport a container unless the shipper² revealed the nature and value of the goods inside.

This fallacy arose as an offshoot of the controversy over whether airfreight searches conducted solely by airline employees constituted governmental action subject to fourth amendment restrictions. Unlike inspections of passengers' luggage,³ airfreight

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1. The phrase is Professor A.W. Brian Simpson's. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 535 (1979).

2. Unless the context indicates otherwise, the term "shipper" refers to any person with a legal interest in either cargo or luggage. The terms "container," "parcel," "package," "cargo," "freight," "goods," "property," and "consignment" encompass baggage travelling with a passenger as well as unaccompanied shipments, unless a distinction is explicitly drawn. Throughout this Article, the term "carrier" refers to a common carrier, not to a private carrier.

3. Federal antihijacking regulations required airlines to search passengers and their luggage for weapons and explosives. The mandatory nature of those inspections made them governmental action subject to the fourth amendment. See *United States v. Davis*, 482 F.2d

searches were permitted,⁴ but not compelled,⁵ by federal law. Criminal defendants seeking suppression of evidence uncovered in airfreight searches contended that the government's imprimatur amounted to a delegation of law enforcement functions to the airlines. Thus, the argument went, airline personnel were *de facto* federal agents bound by the fourth amendment's probable cause and warrant requirements. State and federal courts uniformly rejected this delegation theory and held the searches private,⁶ largely because they thought the government had not conferred upon airlines broader discovery powers than they already possessed at common law⁷ by virtue of their status as common carriers.⁸ The com-

893 (9th Cir. 1973). See also *United States v. Gumerlock*, 590 F.2d 794, 796-99 (9th Cir. 1979) (en banc).

4. Tariffs approved by the Civil Aeronautics Board allowed carriers to search airfreight consignments. Rule 24, Official Airfreight Rules Tariff, C.A.B. No. 96, provided: "*Inspection of Shipments*—All shipments are subject to inspection by the carrier, but the carrier shall not be obligated to perform such inspection." See 44 J. AIR. L. & COM. 862, 869-70 (1979).

Section 403(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1373(a) (1976), required carriers to file tariffs with the Civil Aeronautics Board. Pursuant to 49 U.S.C. §§ 1388(c) and 1386(b)(1) (1976 & Supp. III 1979), the Board exempted air cargo carriers from the tariff-filing requirement effective November 9, 1978. 14 C.F.R. § 291.31(a)(1) (1981). The Board's action was upheld on appeal. *National Small Shipments v. Civil Aeronautics Bd.*, 618 F.2d 819 (D.C. Cir. 1980). Because of the Board's action, airlines can no longer cite government-approved tariffs as the source of their authority to conduct cargo inspections. On January 1, 1983, the Board will lose its authority to require air carriers to file tariffs governing passengers' luggage. 49 U.S.C. § 1551(a)(2)(A) (Supp. III 1979).

5. The federal antihijacking program did not oblige air carriers to search airfreight. *United States v. Andrews*, 618 F.2d 646 (10th Cir.), cert. denied, 449 U.S. 824 (1980); *United States v. Edwards*, 602 F.2d 458 (1st Cir. 1979); *United States v. Rodriguez*, 596 F.2d 169 (6th Cir. 1979); *United States v. Gumerlock*, 590 F.2d 794 (9th Cir. 1979) (en banc).

6. Since *Burdeau v. McDowell*, 256 U.S. 465 (1921), private searches have been immune from fourth amendment requirements. See *Walter v. United States*, 447 U.S. 649, 656 (1980). See generally W. LAFAYE, *SEARCH AND SEIZURE* § 1.6 (1978 & Supp. 1981); Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627 (1981); Euler, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649 (1980); Note, *Private Searches and Seizures: An Application of the Public Function Theory*, 48 GEO. WASH. L. REV. 433 (1980).

7. See *United States v. Jennings*, 653 F.2d 107, 110 (4th Cir. 1981); *United States v. Edwards*, 602 F.2d 458, 462-63 (1st Cir. 1979); *United States v. Gumerlock*, 590 F.2d 794, 798, 799 n.17 (9th Cir. 1979) (en banc); *United States v. Pryba*, 502 F.2d 391, 399-401 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975); *Snyder v. State*, 585 P.2d 229, 233 (Alaska 1978). See also *United States v. Andrews*, 618 F.2d 646, 650 (10th Cir. 1980); *United States v. Bulgier*, 618 F.2d 472, 473 n.2, 478 (7th Cir.), cert. denied, 449 U.S. 843 (1980); *United States v. Crabtree*, 545 F.2d 884, 885-86 (4th Cir. 1976); *United States v. Ford*, 525 F.2d 1308, 1311-12 (10th Cir. 1975); *United States v. DeBerry*, 487 F.2d 448, 449 n.1, 450 (2d Cir.

mon law gave a carrier the right to know cargo's nature and value, these courts declared, and if a shipper failed to furnish that information upon demand, the carrier could refuse to accept his property for transport. Disclosure served a variety of purposes: "detection of insurance fraud, detection of rate cheating by improper declaration of contents, inventory and identification of unclaimed baggage and parcels, insulation of the carrier from criminal liability, ensuring that the carrier's property is not used in the commission of a crime, . . . protection of the carrier's and other shipper's [sic] property,"⁹ and avoidance of injury to passengers, carrier employees, and bystanders.¹⁰

Most courts based their conclusions about the range of carriers' common-law discovery rights wholly upon American authorities. The United States Courts of Appeals for the District of Columbia and Sixth Circuits were exceptional in this regard. To lend verisimilitude to their pronouncements, they sprinkled a few nineteenth-century English citations among their footnotes. The Dis-

1973); *United States v. Echols*, 477 F.2d 37, 39-40 (8th Cir. 1973); *United States v. Harding*, 475 F.2d 480, 483-84 (10th Cir. 1973); *United States v. Cangiano*, 464 F.2d 320, 324-25 (2d Cir. 1972); *Gold v. United States*, 378 F.2d 588, 591 (9th Cir. 1967); *United States v. Blum*, 329 F.2d 49, 52 (2d Cir. 1964); *United States v. Averell*, 296 F. Supp. 1004, 1009-11 (E.D.N.Y. 1969); *McConnell v. State*, 595 P.2d 147, 149 n.3, 151-52 (Alaska 1979); *Stange v. State*, 559 P.2d 650, 651, 655 (Alaska 1977); *Bell v. State*, 519 P.2d 804, 807 (Alaska 1974); *State v. Fassler*, 108 Ariz. 586, —, 503 P.2d 807, 812 (1972); *People v. McKinnon*, 7 Cal. 3d 899, 913-14, 500 P.2d 1097, 1107, 103 Cal. Rptr. 897, 907 (1972); *People v. Sapper*, 102 Cal. App. 301, 305-06, 162 Cal. Rptr. 360, 362-63 (1980); *People v. Superior Court*, 11 Cal. App. 3d 887, 891-92, 90 Cal. Rptr. 123, 126 (1970); *State v. Pohle*, 166 N.J. Super. 504, —, 400 A.2d 109, 111-14 (1979); *People v. DeSantis*, 59 App. Div. 2d 257, —, 399 N.Y.S.2d 514, 516 (1977); *People v. Goodman*, 51 App. Div. 2d 1008, —, 380 N.Y.S.2d 768, 769-70 (1976); *State v. Morris*, 41 N.C. App. 164, 166-67, 254 S.E.2d 241, 243 (1979); *State v. Johnson*, 569 S.W.2d 808, 810-11 (Tenn. 1978); *Chaires v. State*, 480 S.W.2d 196, 198-99 (Tex. Crim. App. 1972). *But see* *United States v. Newton*, 510 F.2d 1149 (7th Cir. 1975) (tariff-authorized airline inspection is government action if sole purpose of search is to determine whether a bag contains narcotics and government agents are present and participate); *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) (en banc) (tariff-authorized airline inspection constitutes government action if government agents instigate and participate).

8. By statute, holders of Civil Aeronautics Board certificates who are engaged in air transportation of cargo or baggage have the status of common carriers. 49 U.S.C. §§ 1371(a), 1388(d), 1301(3), (10), (11), (24) (1976 & Supp. III 1979).

9. *United States v. Rodriguez*, 596 F.2d 169, 173 (6th Cir. 1979) (footnotes omitted).

10. *United States v. Edwards*, 602 F.2d 458, 463-64 (1st Cir. 1979); *United States v. Pryba*, 502 F.2d 391, 399 (D.C. Cir. 1974); *United States v. Cangiano*, 464 F.2d 320, 324 (2d Cir. 1972).

trict of Columbia Circuit's scholarship proved more or less correct, but when the Sixth Circuit received its historical inspiration, Clio was bemused.

Citing *Crouch v. London & North-Western Railway Co.*¹¹ and *Brass v. Maitland*,¹² along with several American decisions, the District of Columbia Circuit in *United States v. Pryba* stated that modern carriers' inspection privilege "is rooted in the rule of the common law that common carriers have the right to decline shipment of packages proffered in circumstances indicating contents of a suspicious, indeed of a possibly dangerous, nature."¹³ At best *Crouch* supported the court's assertion only tangentially. True, in *Crouch* the Common Pleas did say carriers lawfully could "refuse to take any parcel that they suspect to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact."¹⁴ That statement referred, however, to a power created by statute,¹⁵ not to a common-law right.¹⁶ *Brass*, on the other hand, directly substantiated the District of Columbia Circuit's position. In *Brass*, the Queen's Bench held that one who tenders dangerous freight for carriage by ship must disclose its nature so the master and crew can intelligently exercise their option to accept or refuse the consignment.¹⁷ A few years later the Common Pleas applied

11. 14 C.B. 255, 139 Eng. Rep. 105 (C.P. 1854).

12. 6 El. & Bl. 470, 119 Eng. Rep. 940 (Q.B. 1856).

13. 502 F.2d 391, 399 (D.C. Cir. 1974) (footnote omitted).

14. 14 C.B. at 295, 139 Eng. Rep. at 121 (per Maule, J.). See also 14 C.B. at 291, 139 Eng. Rep. at 120 (per Jervis, C.J.).

15. The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 20, § 105, granted railway companies the right "to refuse to take any Parcel that they may suspect to contain Goods of a dangerous Nature, or require the same to be opened to ascertain the Fact."

16. In all fairness, though, one should note that in *The Nitro-glycerine Case* [Parrot v. Wells, Fargo & Co.], 82 U.S. (15 Wall.) 524 (1872), which the District of Columbia Circuit cited in the same footnote as *Crouch*, 502 F.2d at 399 n.48, Justice Field, writing for the Court, discussed *Crouch* in common-law terms. He said *Crouch* "recognizes the right of the carrier to refuse to receive packages offered without being made acquainted with their contents, when there is good ground for believing that they contain anything of a dangerous character." 82 U.S. at 536.

17. 6 El. & Bl. at 485, 119 Eng. Rep. at 946. *Brass* also established the rule that, unless the shipper discloses latent dangers, he impliedly warrants his goods are safe for transport. See A. LESLIE, *THE LAW OF TRANSPORT BY RAILWAY* 29-31 (1920); A. MOCATTA, M. MUSTILL, & S. BOYD, *SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING* Art. 50 (18th ed. 1974); Maloof & Krauszlis, *Shipper's Potential Liabilities in Transit*, 5 MAR. LAW. 175, 176-77 (1980).

the principle recognized in *Brass* to a land carrier.¹⁸ Without question, then, the limited cargo-refusal right described by the District of Columbia Circuit actually existed at nineteenth-century English common law.

The Sixth Circuit portrayed English law far less accurately. Unlike the District of Columbia Circuit, the Sixth Circuit in *United*

18. *Farrant v. Barnes*, 11 C.B. (N.S.) 553, 561-62, 142 Eng. Rep. 912, 915 (C.P. 1862); see Hill, *The Carriage of Dangerous Goods by Land*, 1978 LLOYD'S MAR. & COM. L.Q. 74, 74. Relying primarily upon English authorities, Justice Story compiled the following list of additional grounds for refusing to receive and carry certain goods:

If a carrier refuses to take charge of goods because his coach is full; or because the goods are of a nature which will at the time expose them to extraordinary danger, or to popular rage; or because the goods are not of a sort which he is accustomed to carry; or because he has no convenient means of carrying such goods with security; or because they are brought at an unseasonable time: these will furnish reasonable grounds for his refusal; and will, if true, be a sufficient legal defence to a suit for the non-carriage of the goods.

J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 508 (8th ed. E. Bennett Boston 1870) (1st ed. Cambridge, Mass. 1832) (footnotes omitted). See generally W. MACNAMARA & W. ROBERTSON, THE LAW OF CARRIERS OF MERCHANDISE AND PASSENGERS BY LAND ch. IV (2d ed. 1908).

Chitty and Temple also stated that "it would be a reasonable excuse for not carrying goods of *great value*, either if it appeared that the carrier did not hold himself out as a person ready to convey all sorts of goods, or that he had no convenient means of conveying *with security* such articles." T. CHITTY & L. TEMPLE, A PRACTICAL TREATISE ON THE LAW OF CARRIERS *24 (Amer. ed. D. Sellers 1857).

According to the treatise writers, a carrier who *knew* property was extraordinarily valuable could reject it because he did not profess to transport such goods or because, although a general cargo carrier, he lacked the facilities to safeguard that particular consignment. They might have added that rejection probably was warranted if the carrier just *suspected* the parcel contained something that he did not profess to carry. See *Great N. Ry. v. Shepherd*, 8 Ex. 30, 39, 155 Eng. Rep. 1246, 1250 (Ex. 1852) (dictum). Note, however, that Story and Chitty and Temple did *not* say a carrier who held himself out as willing to transport general cargo, including valuables, had the right to refuse a parcel of undisclosed worth merely because he feared, or perhaps even suspected, it might be unusually valuable and thus beyond his security capabilities. Such an assertion would have been untenable. See section III *infra*. Angell made the erroneous claim nonetheless, declaring that "if the owner of the goods will not tell the carrier what his goods are, and what they are worth, the carrier may refuse to take them." J. ANGELL, A TREATISE ON THE LAW OF CARRIERS § 125 (3d ed. Boston 1857) (1st ed. 1849). In support of that proposition, Angell cited *Shepherd*. An examination of *Shepherd* reveals, however, that Angell's statement was based not upon the court's judgment but rather upon an argument by counsel. 8 Ex. at 37, 155 Eng. Rep. at 1249. Angell simply paraphrased the lawyer's quotation of Chief Justice Best's dicta in *Riley v. Horne*, 2 Moo. & P. 331, 5 Bing. 217, 130 Eng. Rep. 1044 (C.P. 1828). As the text accompanying note 171 *infra* points out, two years after *Shepherd* Best's dicta were repudiated in *Crouch*, a fact Angell evidently overlooked.

*States v. Rodriguez*¹⁹ did more than simply acknowledge the existence of a common-law right to reject cargo suspected of being dangerous. After correctly conceding that "at early common law, carriers apparently lacked authority to inspect packages,"²⁰ the Sixth Circuit added a misbegotten footnote which said, "Carriers merely could refuse carriage if the consignor would not state the nature of the goods."²¹ The footnote's use of the adverb "merely" is incongruous, for, read literally, the statement ascribes to carriers enormous power: the privilege to invade shippers' privacy at will. Taken at face value, the *Rodriguez* footnote asserts that at common law carriers possessed an unqualified right to decline undeclared parcels. From the standpoint of English legal history, the footnote is clearly erroneous. In *Crouch*, decided in 1854, the Common Pleas demolished the "broad and general proposition, that, whatever be the nature or quality of a package delivered to a carrier, he is not bound to receive it, unless informed of the description of its contents."²² The Sixth Circuit did not mention *Crouch* in its *Rodriguez* opinion. However, as authority for its summary of carriers' cargo-refusal rights, the Sixth Circuit cited *The Nitroglycerine Case*,²³ a United States Supreme Court decision which explicitly adopted *Crouch*'s reasoning.²⁴ Given that citation, we can only presume the Sixth Circuit meant less than it said. The Sixth Circuit must not have intended to suggest that a carrier *always* could decline to transport undeclared cargo; rather, the court "merely" meant that *under certain circumstances* a carrier was privileged to reject a closed container because the shipper would not reveal what was inside. Fair enough, but what circumstances did the court have in mind? The citations in *Rodriguez*²⁵ indicate

19. 596 F.2d 169 (6th Cir. 1979).

20. *Id.* at 173.

21. *Id.* at 173 n.10.

22. 14 C.B. at 292, 139 Eng. Rep. at 120 (per Jervis, C.J.). See also *Pianciani v. London & S.W. Ry.*, 18 C.B. 226, 139 Eng. Rep. 1354 (C.P. 1856); *W. MACNAMARA & W. ROBERTSON*, *supra* note 18, at 62.

23. 82 U.S. (15 Wall.) 524 (1872), cited in *United States v. Rodriguez*, 596 F.2d at 173 n.10.

24. 82 U.S. at 535. Section III, *infra*, discusses *Crouch* in greater detail.

25. In support of the statement quoted in the text accompanying note 21 *supra*, the Sixth Circuit cited three cases and a textbook: "*Riley v. Horne*, 5 Bingham's Rpts. 217, 2 Moore & Payne's Rpts. 331 (1828); *Brass v. Maitland*, 6 Ellis & Blackburn's Rpts. 470 (1856); *Parrott*

that, in the Sixth Circuit's view, rejection was warranted if (1) the shipper would not supply sufficient information to allay the carrier's well-founded suspicion that the cargo contained something dangerous; or (2) the shipper would not furnish the valuation data which the carrier needed to calculate the proper insurance rate. The citations in *Rodriguez to Brass* and *The Nitro-glycerine Case* seem designed to support the first proposition. For reasons already stated, those cases provide ample proof that the common law recognized such a cargo-refusal privilege. The Sixth Circuit's citation of *Riley v. Horne*²⁶ apparently was intended to establish the second proposition. The evidence shows, however, that the right of rejection *Riley* described had no historical basis.

According to the dicta in *Riley* on which the Sixth Circuit relied, if a shipper refused to disclose the nature and value of his goods, the carrier lawfully could decline to take charge of them.²⁷ Chief Justice William Best, delivering the Court of Common Pleas' judgment, linked the carrier's cargo-refusal privilege to the right to receive an adequate premium for insuring consignments.²⁸ Ideally, a

v. *Wells, Fargo & Co.* (The Nitro-Glycerine Case), 15 Wall. 524, 82 U.S. 524, 21 L.Ed. 206 (1872). See generally J. Ridley, *The Law of Carriage of Goods by Land, Sea & Air*, (Shaw & Sons, London, 3d ed. 1971) pp. 15-17." *United States v. Rodriguez*, 596 F.2d at 173 n.10.

26. 2 Moo. & P. 331, 5 Bing. 217, 130 Eng. Rep. 1044 (C.P. 1828).

27. In one part of his judgment, Chief Justice Best remarked:

A carrier has a right to know the value and quality of what he is required to carry. *If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them*; but if he does take charge of them, he waives his right to know their contents and value.

2 Moo. & P. at 339-40, 5 Bing. at 222, 130 Eng. Rep. at 1046 (emphasis added). Elsewhere Best asserted:

We have established these points,—that a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that *he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are*; that if he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be . . .

2 Moo. & P. at 341-42, 5 Bing. at 224, 130 Eng. Rep. at 1046-47 (emphasis added). Jasper Ridley's shipping textbook, which *Rodriguez* cited, 596 F.2d at 173 n.10, relied upon Best's dicta as support for the proposition that a "common carrier is apparently entitled to refuse to carry if the consignor refuses to inform him, at his request, as to the nature of the goods to be carried." J. RIDLEY, *supra* note 25, at 15 (citing *Riley v. Horne*).

28. At common law, a carrier was considered an insurer of cargo. See text accompanying

carrier's premium reflected the level of risk associated with handling particular goods. To a large extent, risk was a function of worth: the greater the property's value, the greater its chances of attracting thieves' attention. Since value affected risk and risk determined premium size, value figured prominently in rate computations. In many instances, however, before a carrier could take value into account he had to ascertain the contents of a closed parcel. Chief Justice Best thought the need for this information created a conundrum. On the one hand, if a carrier accepted a package without inquiring about its contents, he possibly exposed himself to risks vastly disproportionate to his fee. If he asked questions, on the other hand, there always was the danger that the shipper might refuse to answer, putting the carrier right back where he started. Best saw only one way out of the bind: empower the carrier to back up his query with a refusal to carry all undeclared cargo.

The Sixth Circuit obviously considered Best's statements in *Riley* an historically sound exposition of nineteenth-century English common law. Thus, in *Rodriguez*, the Sixth Circuit seemingly took the position that, in order to prevent a shipper from obtaining undeserved insurance coverage, a carrier was entitled to make disclosure a prerequisite to acceptance of goods for transport. This Article will attempt to prove that the *Riley* dicta and, by extension, the *Rodriguez* footnote exaggerated the breadth of English carriers' common-law right to reject undeclared cargo. It will try to demonstrate that, owing to the availability of less intrusive ways to avoid liability, carriers' privilege to exact information by threatening to deny service actually was much narrower than Chief Justice Best and the Sixth Circuit indicated.

The rules governing cargo rejection make sense only when viewed in historical context. We therefore must examine in some detail the evolution of common-carrier liability. Section I of the Article traces the history of liability doctrines from the middle ages through the late eighteenth century, devoting particular attention to ways carriers could escape responsibility for undeclared property. Section II, which focuses upon the period between 1769 and 1854, describes the development of public-notice disclaimers

and analyzes their role in preventing insurance fraud. Section III explains that carriers' capacity to avoid liability for undisclosed valuables obviated any need for a cargo-refusal privilege of the sort *Riley* and *Rodriguez* claim existed under English law. The Conclusion addresses the policy implications of *Crouch's* prohibition against unnecessary invasions of shippers' privacy.

I. EVOLUTION OF COMMON-CARRIER LIABILITY FOR PROPERTY LOSS OR DAMAGE: THE TRANSITION FROM DETINUE TO TRESPASS ON THE CASE

The shipper-carrier relationship is a species of bailment for hire. During the middle ages, detinue served as the primary means by which a bailor could compel his bailee either to return his chattel or compensate him for its value.²⁹ Detinue, however, had serious procedural and substantive shortcomings. The defendant was allowed to plead the general issue and then, aided by possibly perjurious oath-helpers, to wage his law, a process hardly conducive to fair and accurate fact-finding. Return of the bailor's property completely discharged the bailee even if the chattel suffered damage while in the bailee's custody. Moreover, the bailee escaped liability if the chattel no longer existed at the time of suit or if it had changed form since the bailee took possession of it.

A more comprehensive remedy—trespass on the case—began to emerge in the latter part of the fourteenth century. Among the new action's most important progenitors was a 1348 suit against a ferryman,³⁰ a person later generations of lawyers would classify as a

29. For accounts of the history of detinue on a bailment, see J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 325-28 (2d ed. 1979); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 336-50 (5th ed. 1942); O. HOLMES, THE COMMON LAW LECTURE V (1881); S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 266-69 (2d ed. 1981); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 476-80 (5th ed. 1956); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 169-78 (2d ed. 1898).

30. The Case of the Humber Ferryman [Bukton v. Townsend], 22 Lib. Ass. f. 94, pl. 41 (K.B. 1348). The best text is the one reprinted in the appendix to A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 623-24 (1975). For other texts, see C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 330 (1949); A. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 187 (1957) [hereinafter cited as A. KIRALFY, SOURCE BOOK]; T. PLUCKNETT, *supra* note 29, at 470. The case is discussed in J. BAKER, *supra* note 29, at 274, 329; S. MILSOM, *supra* note 29, at 316-18; and A. SIMPSON, *supra*, at 210-13.

The record indicates that the plaintiff sued in "trespass." However, he did not accuse the

common carrier. The plaintiff sought damages on the ground that the ferryman had received his mare for safe carriage across the River Humber and had so overloaded the craft with other animals that the mare perished.³¹ The court adjudged the defendant's misconduct actionable, implying that when the ferryman assumed custody of the mare he placed himself under a legally enforceable duty to exercise reasonable care; he breached that duty when he carelessly overloaded the boat.³² *The Case of the Humber Ferryman* paved the way for suing negligent carriers in tort.

One easily can surmise that the mare owner did not sue in covenant because the parties had not entered into an agreement under seal. But why did he choose to sue in tort rather than in detinue?³³ Probably because in trespass and case, unlike detinue, the defendant could not elect compurgation; he had to submit to trial by

defendant of acting by force and arms or contrary to the king's peace. Hence the suit really involved a forerunner of trespass on the case rather than true trespass. Kiralfy, *The Humber Ferryman and the Action on the Case*, 11 CAMBRIDGE L.J. 421 (1953).

31. None of the texts says how the mare died. Maybe the overloaded craft capsized and she drowned; or perhaps the horse was fatally injured by the other animals crowded onto the ferry. See A. SIMPSON, *supra* note 30, at 210-11.

32. A. SIMPSON, *supra* note 30, at 205-07, 210-12; 1 T. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 186-87 (1906). In the fourteenth century, the carrier's duty of care, unlike that of an innkeeper, see A. KIRALFY, *SOURCE BOOK*, *supra* note 30, at 202-05, was not yet based upon the custom of the realm. Rather, the duty arose by reason of the carrier's participation in a voluntary transaction.

33. Professor Samuel Stoljar suggested that the mare owner sued in tort because, *inter alia*, detinue did not lie against a carrier. Stoljar, *The Early History of Bailment*, 1 AM. J. LEGAL HIST. 5, 13-14 (1957). He appears to have been incorrect, however. Even if it is true that the extant medieval sources do not record "one instance of a carrier being sued in detinue for the loss of goods," *id.* at 13, the absence of authority does not necessarily prove Stoljar's contention. As Professor S.F.C. Milsom has observed, the dearth of detinue cases probably signifies little more than defendants' propensity for pleading the general issue and waging their law. S. MILSOM, *supra* note 29, at 267. Dicta in *The Carrier's Case* [Anon. v. The Sheriff of London], Y.B. 13 Edw. IV, f.9, pl. 5 (Exch. Ch. 1473), reprinted in 2 SELECT CASES IN THE EXCHEQUER CHAMBER BEFORE ALL THE JUSTICES OF ENGLAND 1461-1509, at 30 (64 Selden Society, M. Hemmant ed. 1948) directly contradict Stoljar's position. That case involved the question whether a carrier-bailee who broke open containers and stole the goods therein committed a felony. Discussing the matter before the king's council in the Star Chamber, Chief Justice Thomas Bryan of the Common Pleas answered in the negative and concluded that "there can be no action for these goods except action of detinue etc." *Id.* at 31. Bryan treated the carrier like any other type of bailee and considered his potential liability in detinue to be a matter of settled law. The law of detinue did not materially change between 1348, when the *Case of the Humber Ferryman* was adjudicated, and 1473, when *The Carrier's Case* was decided. Therefore, unavailability of the writ was *not* the reason why the mare owner failed to sue the ferryman in detinue.

jury. Also, the tort remedies lacked detinue's loopholes. In tort, a shipper could recover for damage as well as loss, and a carrier could not exculpate himself merely by returning the bailed chattel. Had the mare owner sued in detinue for the animal's value, the ferryman could have avoided having to pay anything by giving the plaintiff his horse's carcass (assuming it was salvageable, of course).³⁴ No wonder the owner eschewed the traditional bailment remedy and sued in tort!

As trespass on the case developed over the next four centuries, whenever shippers could avoid the rule against double remedies they increasingly tended to follow the mare owner's example. By the eighteenth century, detinue, although theoretically still available, had lapsed into relative disuse³⁵ because actions on the case occupied the field. Shippers had several sub-categories of case to choose among.³⁶ If a carrier misappropriated property, he was suable in trover for conversion.³⁷ If he undertook to carry in a particular manner and breached his promise, the shipper could bring an action against him in express assumpsit.³⁸ In the absence of an explicit undertaking, the law implied an assumpsit to exercise reasonable care, and a carrier who failed to perform with the requisite skill was subject to liability for negligence.³⁹ But the most sweeping, and thus most important, kind of action on the case originated in the custom of the realm.⁴⁰ Customary liability, which applied

34. J. BAKER, *supra* note 29, at 64-65, 331; A. SIMPSON, *supra* note 30, at 211. Wager was never possible in trespass; it became unavailable in case no later than the fourth quarter of the fourteenth century. J. BAKER, *supra* note 29, at 59 n.23; A. SIMPSON, *supra* note 30, at 219-20.

35. Writing in 1724, Thomas Wood commented that, due to the rise of actions on the case, "Actions of *Detinue* are not so frequently brought as formerly." T. WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND* 543 (London 1724).

36. The choice affected pleading and joinder rules but not the validity of disclaimers or (until late in the nineteenth century) the measure of damages. See Adams, "*Hadley v. Baxendale*" and the Contract/Tort Dichotomy, 8 *ANGLO-AMER. L. REV.* 147, 151-53 (1979).

37. The action on the case for conversion developed into a useful substitute for detinue on a bailment in the fifteenth and sixteenth centuries. See Simpson, *The Introduction of the Action on the Case for Conversion*, 75 *L.Q. REV.* 364 (1959).

38. See C. FIFOOT, *supra* note 30, at 161; G. PATON, *BAILMENT IN THE COMMON LAW* 67, 74 (1952).

39. 3 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 163-64 (Oxford 1768).

40. The term "custom of the realm" was employed to distinguish rights and obligations based on the common law from those arising from special customs, such as the practices of merchants. Thompson, *The Relation of Common Carrier of Goods and Shipper, and Its*

solely to a *common carrier*⁴¹ and rested upon the public nature of his calling, provided a potent yet simple mode of recovery. To obtain redress for property loss or damage, the plaintiff did not have to prove the carrier promised to use due care or voluntarily undertook to complete a certain task. Instead, an aggrieved shipper needed only to invoke the defendant's common status, whence flowed his obligation to carry safely. Eventually carriers, in contrast to all other practitioners of common callings except innkeepers, became strictly liable when sued in customary actions on the case.

Customary liability underwent a major transformation between 1500 and 1800. St. German's *Doctor and Student* indicates that in 1530 proof of negligence still was required to hold a common carrier responsible for goods lost or injured while in his possession.⁴² Indeed, during the early and middle years of the sixteenth century,

Incidents of Liability, 38 HARV. L. REV. 28, 47 n.57 (1924).

41. A common carrier was a person who held himself out as willing to serve any shipper who offered him a reasonable fee to transport the kinds of goods he professed to carry to a place he professed to serve, provided they were not unfit and his conveyance was not already full. See *Lovett v. Hobbs*, 2 Show. K.B. 127, 89 Eng. Rep. 836 (K.B. 1680); *Jackson v. Rogers*, 2 Show. K.B. 327, 89 Eng. Rep. 968 (K.B. 1683); *Johnson v. Midland Ry.*, 4 Ex. 367, 154 Eng. Rep. 1254 (Ex. 1849); J. KENT, COMMENTARIES ON AMERICAN LAW 464-65 (New York 1827); J. STORY, *supra* note 18, §§ 495, 508. Parliament empowered justices of the peace to fix the maximum rate carriers could charge. 3 & 4 W. & M., c. 12, § 24 (1691); 21 Geo. 2, c. 28, § 3 (1748). If no rate was set, a carrier could charge a reasonable sum for his services. See note 96 *infra*. Magistrates lost some of their regulatory authority in the latter part of the eighteenth century. See 7 Geo. 3, c. 40, § 61 (1766); 13 Geo. c. 84, § 86 (1773); R. BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 315 (16th ed. J. Burn London 1788) (1st ed. London 1743). In 1825 a House of Commons committee urged complete deregulation of land-carriage rates. P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 507 (1979). Describing the rate-setting statutes as "inoperative, and inapplicable to the present Times," Parliament repealed them in 1827. 7 & 8 Geo. 4, c. 39 (1827). Thenceforth, except when special railway rate legislation applied, carriers could charge whatever the traffic would bear so long as the levy was reasonable.

42. [Y]t ys comonly holden in the lawes of Englande yf a comon caryer go by wayes that he dangerous for robberyng/ or dryue by nyght or in other vnconuenient tyme and be robbed/ or yf he ouer charge a horse whereby he fallyth into the water or otherwyse/ so that the stuffe ys hurte or empeyred/ that he shall stande charged for hys mysdemeanoure/ and yf he wolde percase refuse to carye yt/ onelesse promyse were made vnto hym that he shall not be charged for noo mysdemeanour that sholde be in hym/ that promyse were voyde/ For it were agaynste reason and agaynste good maners . . .

C. ST. GERMAN, DOCTOR AND STUDENT 261 (f. 100a), Second Dialogue (London 1530) (91 Selden Society, T. Plucknett & J. Barton eds. 1974) (editorial footnotes omitted).

liability created by operation of law appears to have been less stringent than liability stemming from an undertaking.⁴³ In a 1553 case,⁴⁴ for example, the court held that, because a common carrier could be compelled to carry certain goods, he was not liable if they were stolen from him at an inn through no fault of his own, whereas a private carrier who voluntarily undertook to carry cargo safely would be liable. Similarly, under the law merchant negligence principles rather than strict liability determined whether sea carriers had to compensate owners of lost or damaged cargo.⁴⁵

Toward the end of the sixteenth century, judges began showing signs of reluctance to excuse nonnegligent common carriers who lost goods through theft.⁴⁶ Perhaps influenced by the tough detinue liability rules laid down in Coke's report of *Southcote's Case*,⁴⁷

43. 2 THE REPORTS OF SIR JOHN SPELMAN 225 (94 Selden Society, J. Baker ed. 1977).

44. Anon., Dalison 8, 123 Eng. Rep. 231 (C.P. 1553), discussed in A. SIMPSON, *supra* note 30, at 32 n.4, 232 n.9, and Beale, *The Carrier's Liability: Its History*, 11 HARV. L. REV. 158, 164 n.6 (1897).

45. E. FLETCHER, *THE CARRIER'S LIABILITY* at xiii, 51-101 (1932).

46. See, e.g., *Woodlife's Case*, Moore (K.B.) 462, 72 Eng. Rep. 696, Owen 57, 74 Eng. Rep. 897 (Q.B. 1597). See also Bordwell, *Property in Chattels III*, 29 HARV. L. REV. 731, 746-47 (1916).

47. In his report of *Southcote's Case* [*Southcott v. Bennett*], 4 Co. Rep. 83b, 76 Eng. Rep. 1061, 1062 (Q.B. 1601), a detinue action arising out of a gratuitous bailment, Coke claimed the court held that "to be kept, and to be kept safe, is all one." In other words, a bailee who accepted goods generally, that is, unconditionally, did so at his peril and, irrespective of fault, had to compensate the bailor for all losses except those caused by an enemy of the crown. (The exception reflected the conceptual linkage between the bailee's liability to the bailor and the bailee's ability to recover from the third-party wrongdoer who dispossessed him.)

Coke's version was more elaborate than that of other reporters. Compare 4 Co. Rep. 83b, 76 Eng. Rep. 1061, with Cro. Eliz. 815, 78 Eng. Rep. 1041 and the manuscript reprinted in Beale, *Southcott v. Bennett*, 13 HARV. L. REV. 43 (1899). In *Coggs v. Bernard*, 2 Ld. Raym. 909, 913, 92 Eng. Rep. 107, 110 (Q.B. 1703), Lord Holt wryly observed that "my Lord Coke has improved the case in his report of it." Justice Holmes thought Coke's report contained an accurate statement of medieval and early modern bailment law: "Down to this time [i.e., the date when *Southcote's Case* was decided], at least, it was clear law that, if a person accepted the possession of goods to keep for another even as a favor, and lost them by wrongful taking, wholly without his fault, he was bound to make good the loss, unless when he took possession he expressly stipulated against such a responsibility." O. HOLMES, *supra* note 29, at 179. Street and Holdsworth agreed with Holmes, but Beale, Fletcher, and Paton took issue with him, claiming Coke exaggerated the severity of pre-1601 law. E. FLETCHER, *supra* note 45, at 29-35; 8 W. HOLDSWORTH, *supra* note 29, at 259; G. PATON, *supra* note 38, at 76; 2 T. STREET, *supra* note 32, at 302 n.7. Siding with Holmes's critics, Milsom maintains that freedom from fault excused a bailee from liability for lost chattels in the fourteenth century. S. MILSOM, *supra* note 29, at 267-69. Milsom notes, however, that a "stiffening of

seventeenth-century courts moved closer, step by step, to holding common carriers strictly liable in customary actions on the case. They did so by treating carriers as public utilities. Like innkeepers, common carriers were regarded as having impliedly warranted against theft, irrespective of who was at fault.⁴⁸ Early in the seventeenth century, shippers who grounded their right to recover on common carriers' special status cautiously hedged their bets by including allegations of fault in their declarations.⁴⁹ By 1638, however, an accusation of negligence probably was superfluous in a customary action on the case for the value of goods stolen while in the carrier's custody.⁵⁰ In 1672 sea carriers became strictly liable at common law for thefts committed *infra corpus comitatus*.⁵¹ As Bacon's *Abridgment* put it, strict liability "was introduced the better to secure People in their Dealings, and to prevent Carriers, who are often intrusted with Things of the greatest Value, from confederating with Robbers, &c."⁵²

At the beginning of the eighteenth century, Chief Justice John

liability" occurred in the fifteenth and sixteenth centuries. *Id.* at 269. *Southcote's Case* consolidated that process, and thereafter bailees could not plead robbery as a defense to detain. *Id.*

Southcote's Case was cited in several reported actions on the case against carriers. Beale, *supra* note 44, at 162. Because *Southcote's Case* involved detainee, not case, judges treated it as persuasive rather than as binding authority.

48. See E. FLETCHER, *supra* note 45, at 112-16; Beale, *supra* note 44, at 163, 165.

49. See, e.g., *Rich v. Kneeland*, Cro. Jac. 330, 79 Eng. Rep. 282, Hobart 17, 80 Eng. Rep. 168 (Exch. Ch. 1613). The record is printed in A. KIRALFY, *SOURCE BOOK*, *supra* note 30, at 209.

50. *George v. Wiburn* (K.B. 1638), reported in 1 H. ROLLE, *UN ABRIDGMENT DES PLUSIEURS CASES ET RESOLUTIONS DEL COMMON LEY* 6, pl. 4 (London 1668), translated in 1 C. VINER, *A GENERAL ABRIDGMENT OF LAW AND EQUITY* 242, pl. 4 (Aldershot, England 1741). *George* is discussed in E. FLETCHER, *supra* note 45, at 117. According to Rolle, in 1668 courts applied this general rule: "If a Man delivers Goods to a common Carrier to carry to a certain Place, if he loses them, an Action upon the Case lies against him; for by the common Custom of the Realm he ought to carry them safely." 1 H. ROLLE, *supra*, at 2, pl. 1, translated in 1 C. VINER, *supra*, at 219, pl. 1. The three subsidiary rules that follow in that same section ("Action sur Case (C) Vers Carrier") suggest, however, that although common carriers were strictly liable in case for goods lost through robbery, see *id.* pl. 4, liability for losses caused in other ways still depended upon proof of negligence, see *id.* pls. 3 & 4.

51. *Morse v. Slue*, 1 Vent. 190, 238, 86 Eng. Rep. 129, 159, 2 Lev. 69, 83 Eng. Rep. 453, Sir T. Raym. 220, 83 Eng. Rep. 115, 2 Keble 866, 84 Eng. Rep. 548, 3 Keble 72, 84 Eng. Rep. 601, 3 Keble 112, 84 Eng. Rep. 624, 3 Keble 135, 84 Eng. Rep. 638, 1 Mod. 85, 86 Eng. Rep. 752 (K.B. 1672).

52. 1 M. BACON, *A NEW ABRIDGMENT OF THE LAW* 345 (Carriers B) (5th ed. Dublin 1786) (1st ed. London 1736-66).

Holt uttered an expression that enabled later jurists, most notably Lord Mansfield, to expand the scope of strict liability beyond theft. In *Coggs v. Bernard*, Holt said a common carrier must transport goods safely "against all events but acts of God and of the enemies of the King."⁵³ Sir William Jones considered "act of God" synonymous with "inevitable accident."⁵⁴ In his view, negligence remained a prerequisite to holding a carrier responsible for loss or damage caused in any manner other than robbery.⁵⁵ Dr. Eric Fletcher, the leading modern authority on common-carrier liability, thought Jones's exegesis accurately captured Holt's meaning.⁵⁶ But in *Forward v. Pittard*,⁵⁷ a 1785 decision rendered just four years after Jones's essay appeared, Mansfield gave the *Coggs* dictum a far different reading. To Mansfield, the phrase "act of God" did not simply mean any form of loss, save theft, that happened without the carrier's negligence. Rather, it meant "something in opposition to the act of man," that is, "such act as could not happen by the intervention of man, as storms, lightning, and tempests."⁵⁸ Mansfield's meteorological definition of "act of God" prevailed. With the exception thus narrowed, common carriers became strictly liable for loss or damage resulting from fire, collision, theft, and every other source except natural phenomena and foreign foes. Mansfield neatly summarized this principle when he said:

53. 2 Ld. Raym. 909, 918, 92 Eng. Rep. 107, 112 (Q.B. 1703). Holt offered the following explanation for subjecting common carriers to extraordinary liability:

For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c. and yet doing it in such a clandestine manner, as would not be possible to be discovered.

Id.

54. W. JONES, AN ESSAY ON THE LAW OF BAILMENTS 105 (London 1781) (italics omitted).

55. *Id.* at 104 (italics omitted). Jones attributed the special robbery rule to the need to prevent the formation of "confederacies . . . between carriers and desperate villains with little or no chance of detection." *Id.*

56. E. FLETCHER, *supra* note 45, at 156-68.

57. 1 T.R. 27, 99 Eng. Rep. 953 (K.B. 1785).

58. 1 T.R. at 33, 99 Eng. Rep. at 956-57. See also Mansfield's judgment in *Proprietors of the Trent Navigation v. Ward*, 3 Esp. 127, 131, 170 Eng. Rep. 562, 563 (K.B. 1785).

[T]here are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law: *a carrier is in the nature of an insurer*. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies.⁵⁹

By definition, a common carrier had to serve all comers. If he wrongfully refused to accept a consignment, he was suable in tort.⁶⁰ The twin policies of strict liability and compulsory transport were not unfair, Mansfield reasoned, because the carrier could protect himself by adjusting his security measures and his fees to comport with the risk he was forced to assume.⁶¹ Whenever valuables were entrusted to his care, he could lock them in a fireproof safe or strongbox, post extra guards, or take other action aimed at reducing the danger of liability-producing loss or damage. The cost of this added protection could then be spread among shippers through increased freight rates.

In order for the insurance system to work as intended, however, a carrier had to find out every shipment's nature and value. Without that information he could not assess potential risks, employ appropriate safeguards, and prevent the shipper from cheating him of his just reward. Closed containers impeded acquisition of crucial data; thus they hindered performance of carriers' assigned functions and invited shipper fraud. Holding a carrier strictly liable for goods he knew nothing about produced such obvious unfairness that a mitigating doctrine had to be devised. Judges had available to them at least four possible solutions: allow the carrier to plead ignorance of contents as a defense to actions on the case; permit him to contract out of liability for undisclosed property; empower

59. 1 T.R. at 33, 99 Eng. Rep. at 956 (emphasis added). "This case must be regarded as the one which established the keystone in the arch of carrier's liability." G. PATON, *supra* note 38, at 87.

60. *Jackson v. Rogers*, 2 Show. K.B. 327, 89 Eng. Rep. 968 (K.B. 1684); *Johnson v. Midland Ry.*, 4 Ex. 367, 154 Eng. Rep. 1254 (Ex. 1849); *Crouch v. London & N.W. Ry.*, 14 C.B. 255, 139 Eng. Rep. 105 (C.P. 1854). See also notes 18 & 41 *supra*.

61. See Lord Mansfield's judgment in *Gibbon v. Paynton*, 4 Burr. 2298, 2300, 98 Eng. Rep. 199, 200 (K.B. 1769). See also *Barclay v. Cuculla y Gana*, 3 Dougl. 389, 390-91, 99 Eng. Rep. 711, 712 (K.B. 1784).

him to search closed containers; or authorize him to reject undeclared cargo. They adopted the second approach and either explicitly or implicitly disapproved the other three.

The first approach would have brought trespass on the case into conformity with detinue. As early as 1315, courts allowed bailees to plead ignorance of contents as a defense to detinue. The bailee in *Bowdon v. Pelleter*⁶² argued that she should not be held liable in detinue for the bailor's lost jewelry and other chattels because (1) the bailed goods were delivered in a locked chest and she was not apprised of their presence; and (2) the chest was carried off by thieves through no fault of her own.⁶³ The bailor, in turn, (1) denied that the chattels were hidden from view in a chest when bailed; and (2) denied that they were stolen. The parties having joined issue on each point, both questions of fact were submitted to a jury.⁶⁴ No record of *Bowdon*'s outcome survives, and historians disagree as to whether robbery excused a nonnegligent bailee from liability in the fourteenth century.⁶⁵ One point seems clear, though: the court would not have asked the jury to determine how much the bailee knew unless liability for property inside a closed container depended upon awareness of its nature and value.

The ignorance-of-contents defense recognized in *Bowdon* apparently remained available in detinue actions until at least the eighteenth century.⁶⁶ Even Coke, who considered carriers and other

62. Y.B. 8 Ed. II (C.P. 1315), reprinted in 17 YEAR BOOKS OF EDWARD II 136 (41 Selden Society, W. Bolland ed. 1925) [hereinafter cited as YEAR BOOKS OF EDWARD II].

63. The bailee said the thieves stole some of her goods as well as the bailor's. *Id.* at 136-37. By implying that she had taken as much care of the bailor's property as of her own, the bailee tried to show she had not acted negligently. *Id.* at xxiv. See also 2 T. STREET, *supra* note 32, at 256-57.

64. Both parties requested a jury trial. 17 YEAR BOOKS OF EDWARD II, *supra* note 62, at 137.

65. See note 47 *supra*.

66. See T. WOOD, *supra* note 35, at 543. Wood said a common carrier, unlike an ordinary bailee, could not invoke the ignorance defense if he accepted goods unconditionally. *Id.* Although Wood made that comment in the midst of his detinue discussion, the authority he cited in support of his proposition—*Morse v. Slue*, 1 Vent. 238, 86 Eng. Rep. 159 (K.B. 1672)—dealt with defenses to actions on the case rather than with detinue defenses. Ignorance did not excuse a carrier from liability if the shipper sued him in trespass on the case. See text accompanying notes 69-77 *infra*. However, we have no reason to doubt that ignorance was a good plea to a detinue action against a carrier *qua* bailee. Wood probably skipped over carriers' detinue defenses and moved right into the niceties of case because by 1724 shippers largely ignored detinue, preferring to sue in case instead.

bailees strictly liable in detinue for goods accepted unconditionally,⁶⁷ acknowledged the defense's legitimacy. According to Coke's report of *Southcote's Case*, if the bailor (whom Coke denominated "A.") failed to tell the bailee ("B.") what items his chest contained, "B. shall not be charged, for A. did not trust B. with them, nor did B. undertake to keep them, as it is adjudged in 8 E. 2 [*Bowdon*]."⁶⁸ In other words, a bailee did not assume legal responsibility for goods unless he knew he had been entrusted with them. Regardless of whether Coke's rather formalistic entrustment theory or a more basic fairness principle furnished *Bowdon's* rationale, the ignorance-of-contents defense prevented bailor fraud and obviated any need for a bailee to search or reject closed containers.

For reasons that remain obscure, courts declined to extend the *Bowdon* rule beyond detinue. Consequently, the ignorance-of-contents defense declined in practical importance as trespass on the case gradually replaced detinue. *Kenrig v. Eggleston*,⁶⁹ a 1648 decision, evinced judges' unwillingness to recognize ignorance as an independent defense to an action on the case. The plaintiff in *Kenrig* wished to ship a box containing a book, some tobacco, and £100 via the defendant's coach line. Had the carrier known the cargo included money, he would have added a £3 insurance premium to the ordinary freight rate. To avoid this extra charge, the shipper told the carrier's porter about the book and the tobacco but failed to mention the £100. Someone stole the box while it was in transit, and the owner sued on the custom of the realm to recover its actual value. King's Bench Justice Henry Rolle, sitting in the Guildhall at *nisi prius*, instructed the jury that the shipper was under no duty to "tell the carrier all the particulars in the box."⁷⁰ The shipper had, of course, done more than simply refrain from giving information. By disclosing the less risky items but not the money, he had deliberately misled the carrier. This type of misrepresentation was an "intended cheat,"⁷¹ to be sure, but in Rolle's view the

67. See note 47 *supra*.

68. 4 Co. Rep. 83b, 83b-84a, 76 Eng. Rep. 1061, 1062 (Q.B. 1601). See also E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND, OR, A COMMENTARIE UPON LITTLTON § 123 at 89a-89b (London 1628).

69. Aleyn 93, 82 Eng. Rep. 932 (N.P. 1648).

70. *Id.*

71. *Id.*

shipper's acts only furnished a basis for mitigating damages rather than a complete defense. He left to the jurors' discretion the task of deciding how much the damages should be reduced due to the shipper's fraud. They returned a verdict for £97, merely diminishing the shipper's recovery by the amount of the insurance premium he would have been obliged to pay had he accurately disclosed the box's contents.⁷²

Kenrig and a similar case decided a couple of decades later⁷³ tacitly disagreed with *Bowdon's* conclusion that ignorance should excuse a bailee from liability for theft. In *Coggs v. Bernard*,⁷⁴ Chief Justice Holt attacked *Bowdon* directly, saying he could not

see the reason . . . why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other.⁷⁵

Holt's comments were patently illogical. The degree of care needed to defend chattels depended upon their nature and value. If goods were "out of a chest," i.e., visible, when delivered to the bailee, he was able to estimate their worth, calculate risks, and take necessary precautions. But since "no man can proportion his care to the nature of things, without knowing them,"⁷⁶ the bailee of "goods in a chest" could not, except by sheer fortuity, give them the same protection he would have provided had he known what they were. Despite Holt's flawed reasoning, his opinion became the accepted

72. The verdict was for the money only, "the other things being of no considerable value." To some the verdict seemed unduly harsh, prompting the reporter to remark, "quod durum videbatur circumstantibus." *Id.*

73. In *Morse v. Slue*, 1 Vent. 238, 238, 86 Eng. Rep. 159, 160 (K.B. 1672), Chief Justice Matthew Hale referred to a recent case with facts like *Kenrig's*. When asked what his box contained, the shipper replied that "it was filled with silks and such like goods of mean value." *Id.* He omitted to mention, no doubt intentionally, that the box also contained a large sum of money. The carrier accepted the parcel unconditionally and was later robbed. Disregarding both the shipper's falsehood and the carrier's ignorance of the box's true contents, the court held the carrier liable for everything, including the money. See note 80 *infra*.

74. 2 Ld. Raym. 909, 92 Eng. Rep. 107 (Q.B. 1703).

75. 2 Ld. Raym. at 914, 92 Eng. Rep. at 110.

76. W. JONES, *supra* note 54, at 38 (italics omitted).

rule governing actions on the case. By the latter part of the eighteenth century, Jones reported, it was "generally understood, that a common carrier is answerable for the loss of a box or parcel, be he ever so ignorant of its contents, or be those contents ever so valuable"⁷⁷ unless he accepted the goods specially.

Properly employed, the special acceptance⁷⁸ shielded trespass-on-the-case defendants from undeserved liability as effectively as the ignorance-of-contents defense sheltered detainee defendants. The term "acceptance" had two related but distinct meanings. First, it referred to the act by which a carrier acquired physical custody of a shipper's goods. Second, it denoted a carrier's assumption of legal responsibility for property. The words "general" and "special" modified "acceptance" when used in the second sense. The modifiers indicated the terms under which a carrier was willing to expose himself to potential liability. Unless the parties stipulated otherwise, a carrier's acceptance was deemed *general*, which meant he insured the cargo in accordance with the custom of the realm. Put more precisely, in return for payment of the ordinary freight rate, which usually was based upon a parcel's size, weight, and destination rather than upon the value of its contents, the carrier assumed an unconditional obligation to indemnify the shipper for any loss or damage not caused by an act of God or the king's enemies. A *special* acceptance, by contrast, created only a qualified duty to compensate an aggrieved shipper. To recover the value of specially accepted cargo, a shipper had to satisfy whatever conditions precedent to insurance coverage the parties adopted when the goods were bailed. Two conditions became standard features of carriage contracts: a requirement that the shipper reveal the nature and value of his consignment, and a requirement that he pay an insurance premium in addition to the basic transport fee.

77. *Id.* at 106 (italics omitted).

78. The special acceptance originated as a detainee defense. In a note following his report of *Southcote's Case*, 4 Co. Rep. 83b, 84a, 76 Eng. Rep. 1061, 1063 (Q.B. 1601), Coke advised bailees to use special acceptances to insulate themselves from detainee liability: "*Nota* reader, it is good policy for him who takes any goods to keep, to take them in special manner, *scil.* to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them, ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance." See also E. COKE, *supra* note 68, § 123 at 89b.

The carrier's failure to use a special acceptance explains the result in *Kenrig*.⁷⁹ He easily could have protected himself against fraud by telling the shipper that he would not take responsibility for undisclosed money. Such a warning would have forced the shipper either to declare the money and pay an extra fee, thereby placing the risk of theft on the carrier, or to ship the parcel uninsured, bearing all risks himself. Instead of safeguarding himself in this manner, the defendant in *Kenrig* accepted the box generally, giving the dishonest shipper the best of both worlds: a low freight rate and full insurance coverage.

To accept goods specially, a carrier had to follow certain procedures. If the shipper did not volunteer information, the carrier had to ask him pointblank what his parcel contained. A question directed at the public at large did not suffice: the carrier had to interrogate shippers individually. Moreover, inquiries alone were not enough to bring the special acceptance into play. The carrier also had to caution shippers that he considered certain kinds of property so risky that he would not insure them at his standard rate.⁸⁰ As the volume of England's internal carrying trade grew over the course of the seventeenth and eighteenth centuries,⁸¹ however, requiring carriers to ask questions of, and explain liability limita-

79. In his charge to the jury in *Kenrig*, Justice Rolle drew particular attention to the carrier's failure to make a special acceptance. Aleyn 93, 93, 82 Eng. Rep. 932, 932 (N.P. 1648).

80. In *Morse v. Slue*, 1 Vent. 238, 86 Eng. Rep. 159 (K.B. 1672), Chief Justice Hale stressed the warning requirement's importance:

There was a case (not long since) when one brought a box to a carrier, in which there was a great sum of money, and the carrier demanded of the owner what was in it, he answered, that it was filled with silks and such like goods of mean value; upon which the carrier took it, and was robbed. And resolved that he was liable. *But if the carrier had told the owner, that it was a dangerous time, and if there were money in it, he durst not take charge of it; and the owner had answered as before, this matter would have excused the carrier.*

1 Vent. at 238, 86 Eng. Rep. at 160 (emphasis added). By saying "he durst not take charge of it," the carrier would have communicated either of two messages: that he was not a common carrier of money owing to his inability to protect it; or that, although a common carrier of money, he refused to accept legal responsibility for it in return for only an ordinary fee (implying that he would do so upon payment of a surcharge).

81. See J. CHARTRES, *INTERNAL TRADE IN ENGLAND 1500-1700*, at 39-46 (1977); E. PAWSON, *TRANSPORT AND ECONOMY: THE TURNPIKE ROADS OF EIGHTEENTH CENTURY BRITAIN 15-60* (1977); Chartres, *Road Carrying in England in the Seventeenth Century: Myth and Reality*, 30 ECON. HIST. REV. 73 (2d ser. 1977).

tions to, individual shippers proved increasingly impractical.

Judges responded to these new circumstances by liberalizing the special acceptance. *Tyly v. Morrice*,⁸² a 1699 case, recognized the validity of implied conditions of acceptance and sanctioned carriers' use of written receipts as disclaimers of liability for undisclosed valuables. *Tyly* was an action on the custom of the realm against a carrier from whom robbers had stolen £450 belonging to the plaintiffs. The carrier's defense rested on his receipt, which promised to transport and deliver only £200, the sum the shippers had said their bags contained, in consideration for a "carriage and risque" fee of ten shillings per £100. The receipt did not expressly exclude liability for cash in excess of £200. Nevertheless, treating the receipt as a *de facto* special acceptance, Chief Justice Holt held that the shipper could not recover more than £200. The receipt let the shippers know "there was a particular undertaking . . . for the carriage of [£200] only"⁸³ and told them the carrier expected a fee commensurate with his responsibility. By "defraud[ing] the carrier of his reward," Holt concluded, the shippers "barred themselves of that remedy which is founded only on the reward."⁸⁴ Ultimately, however, it was the shippers' failure to satisfy the implied conditions precedent to liability—disclosure of the cargo's real worth and payment of the proper premium—and not their subjective intent which led to Holt's decision in the carrier's favor.

Fraudulent intent acquired greater independent significance a couple of decades later when judges began to realize that, despite carriers' ability to use receipts in lieu of oral disclaimers, special acceptances did not provide complete protection against misrepresentation and nondisclosure of packages' contents. To use special acceptances effectively, carriers had to include conditions as part of each transaction either by issuing individual receipts or by giving particularized oral warnings. From time to time careless carrier employees forgot to hand a shipper his receipt or ask him the right questions, thereby enabling a swindler to ship his valuables at ordinary rates and still reap full insurance benefits if they were lost or damaged. To plug this loophole, Sir Peter King, chief justice of

82. Carthew 485, 90 Eng. Rep. 879, Holt, K.B. 9, 90 Eng. Rep. 903 (N.P. 1699).

83. Carthew at 486, 90 Eng. Rep. at 880, Holt, K.B. at 10, 90 Eng. Rep. at 903.

84. *Id.*

the Common Pleas, tried to develop a fraud defense complementary to, yet separate from, the special acceptance. In a 1719 case, *Titchburne v. White*,⁸⁵ King suggested that even though a carrier failed to accept cargo specially, he still escaped liability if the shipper lied to him about its nature and value: "if the carrier asks [whether a parcel contains money], and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases I hold the carrier is not liable."⁸⁶

A couple of decades later, however, in *Drinkwater v. Quenell*⁸⁷ the Common Pleas tacitly rejected the notion that misrepresentation independently barred a shipper's recovery. The carrier in *Drinkwater* told the shipper's agent that he would not transport money unless notified in advance and paid five shillings per hundred pounds. Later the shipper hid £200 in a parcel which his agent's servant delivered to the carrier. The servant said the parcel contained silk and paid a freight charge of one shilling and three pence, far less than the ten shilling premium he ought to have paid for the money alone. The parcel was lost and the court, relying on *Kenrig*, held the carrier liable for all its contents, including the £200. Delivering a unanimous judgment that ignored *Tyly* and *Titchburne*, Chief Justice John Willes took the position that the special acceptance constituted carriers' sole protection against fraud, saying, "as to the fraud in this case, we are all of opinion, that a man is not obliged to let a carrier know what is in a parcel, and therefore he may disguise it; for he may accept it specially."⁸⁸

85. 1 Strange 145, 93 Eng. Rep. 438 (N.P. 1719). According to the *English Reports*, *Titchburne* was decided on "16 Febr. 1618." Obviously "1618" is a printer's error. The judgment is reported in a section of Sir John Strange's reports devoted to the decisions of Hilary Term in the fifth year of George I's reign, which began on August 1, 1714. Strange notes that the case was tried at the Guildhall by Chief Justice King of the Common Pleas. Henry Hobart was chief justice of Common Pleas in 1618; Sir Peter King held that office in 1718. 6 E. Foss, *THE JUDGES OF ENGLAND* 330 (London 1864); 8 *id.* at 135. Therefore, *Titchburne* must have been decided in February 1718/19.

86. 1 Strange at 145, 93 Eng. Rep. at 438 (emphasis added).

87. 7 Mod. 248, 87 Eng. Rep. 1220 (C.P. 1738).

88. 7 Mod. at 249, 87 Eng. Rep. at 1221. Willes claimed disclosure "might be an encouragement for robberies rather than an hindrance." *Id.* George Joseph Bell later elaborated on this theme: "It is not always safe, and in the hurry of travelling quite intolerable, that one should be required to show money or jewels in the confusion of a coachyard, or to undo a package, or turn out the contents of a portmanteau, to satisfy a carrier or stage-coachman." 1 G. BELL, *COMMENTARIES ON THE LAW OF SCOTLAND, AND ON THE PRINCIPLES OF MERCANTILE*

Willes's special acceptance required more than a simple refusal to assume responsibility for undeclared valuables on which no insurance premium had been paid. A carrier had to demand disclosure and state his disclaimer at the time the container actually changed hands. The defendant in *Drinkwater* neglected to utter the magic incantation at the proper time and therefore, notwithstanding his earlier warning, remained unconditionally answerable for everything in the parcel. Judicial pedantry of the sort displayed in *Drinkwater* impaired the special acceptance's utility until 1769, when Lord Mansfield and his fellow King's Bench justices sanctioned a streamlined method of limiting liability for undeclared cargo.

II. DEVELOPMENT AND REGULATION OF PUBLIC-NOTICE DISCLAIMERS, 1769-1854

*Gibbon v. Paynton*⁸⁹ marked a turning point in the history of common-carrier liability because it authorized the public-notice disclaimer, a device which enabled carriers to employ special acceptances routinely, thereby reducing their vulnerability to insurance fraud. *Gibbon* was a suit against a stagecoachman for the loss of £100 which the shipper had concealed in hay inside "an old nail-bag."⁹⁰ When the coachman took custody of the nail-bag, he did not make any inquiries, state any conditions, or issue a receipt. Had the case arisen in the seventeenth or early eighteenth century, the coachman's acceptance probably would have been considered general. Nevertheless, Mansfield and his brethren excused the carrier from liability on the ground that he had, in fact, accepted the nail-bag specially by informing the public, through handbills and newspaper advertisements, that he would not accept responsibility for undeclared money, jewels, and other extraordinarily valuable property. The carrier was unable to prove the plaintiff actually saw one of these notices, but he did produce evidence showing that the plaintiff knew special conditions governed transportation of money. The court regarded concealment of money in the face of a

JURISPRUDENCE 500 (7th ed. J. M'Laren Edinburgh 1870) (1st ed. Edinburgh 1804). See also *Harris v. Packwood*, 3 Taunt. 264, 271, 128 Eng. Rep. 105, 108 (C.P. 1810).

89. 4 Burr. 2298, 98 Eng. Rep. 199 (K.B. 1769).

90. *Id.*

constructive special acceptance as a form of fraud because it deprived the carrier of a chance to take adequate precautions and cheated him of his rightful compensation. Following the maxim "Ex dolo malo non oritur Actio,"⁹¹ the court denied recovery.

Gibbon relaxed the rigid timing rule laid down in *Drinkwater* by allowing carriers to post or publish general disclaimer notices in advance of any particular transaction. Provided a shipper somehow learned about the notice's terms, he had to adhere to them in all his subsequent dealings with the carrier whether or not they were reiterated on those occasions. Besides operating prospectively, multitransactional disclaimers fought fraud wholesale, eliminating the need to question shippers individually. They reduced the danger of employee oversights and required less effort to administer than receipts.⁹² Moreover, they brought fairness to the common

91. 4 Burr. at 2300, 98 Eng. Rep. at 200 (per Mansfield, C.J.). Like his brethren, Lord Mansfield attached importance to the carrier's notices and the commercial customs they reflected. But his primary theme was the equitable principle that persons who act with fraudulent intent should not profit from their wrongdoing. His dicta suggest that he, like Chief Justice King in *Titchburne*, was willing to recognize shipper fraud as an independent defense to common-carrier liability. Mansfield argued that Rolle and Hale erred in holding carriers liable simply because they neglected to observe the special acceptance's formalities. *Kenrig* was wrongly decided, Mansfield asserted, because the shipper in that case committed fraud when he told the carrier about the book and the tobacco but not the money. Thus, Mansfield found himself in agreement with those who thought the plaintiff's award harsh and unjust. See note 72 *supra*. He criticized the decision cited by Hale in *Morse v. Slue*, see notes 73 & 80 *supra*, for much the same reason. Mansfield thought it absurd to award damages to a shipper who had "artfully concealed" money in a box said to contain only goods of little value merely because the carrier "had not expressly proposed a caution against being answerable for money." 4 Burr. at 2301, 98 Eng. Rep. at 200.

To Mansfield, only Holt's jury instructions in *Tyly* adhered faithfully to "the true principles." *Id.* Conveniently ignoring the fact that *Tyly* involved a receipt which functioned as an implied special acceptance, Mansfield interpreted Holt's ruling as standing for the broad proposition "that the carrier was liable only for what he was fairly told of." Sir James Burrow, who reported *Gibbon*, put quotation marks around Mansfield's statement and indicated that the chief justice took the words from "The Case of *Sir Joseph Tyly and Others* against *Morrice*, in Carthew, 485." *Id.* The language attributed to *Tyly* appears neither in Carthew's report nor in the only other printed report of the case, Holt, K.B. 9, 90 Eng. Rep. 903. Hence, the phrase set out in quotation marks in *Gibbon* must be Mansfield's own, not Holt's (unless Mansfield quoted *Tyly* accurately and Burrow garbled the excerpt).

In any event, largely as a result of the holding in *Gibbon*, which legitimated public-notice disclaimers, special acceptances became so widely used that Mansfield's successors seldom had occasion to ponder the need for an independent fraud defense.

92. From an evidentiary standpoint, however, receipts were superior to notices. The effectiveness of any type of special acceptance depended upon proof that the shipper had actual knowledge of its terms. Several judges cautioned carriers to use receipts instead of notices

law's transport insurance system, for if a person dissembled or remained silent in the face of a notice predicated liability upon disclosure of valuables and payment of a premium, any loss or damage fell on him, not on the carrier.

Public-notice disclaimers, like individual special acceptances, operated contractually. A carrier could not unilaterally alter his common-law liability,⁹³ but by agreement with the shipper he could replace implied terms with express provisions. The notice constituted an offer to do business on a noncustomary basis, and acceptance occurred when the shipper, knowing of the offer, tendered goods for carriage.⁹⁴ The resulting express contract modified the underlying implied contract in either of two ways, depending upon the type of notice used. The most common variety usually read something like this: "[C]ash, plate, jewels, writings, or any such kind of valuable articles, will not be accounted for if lost, [if] of more than [£5] value, unless entered as such, and a penny insurance paid for each pound value"⁹⁵ Once assented to, this kind of notice made the carrier's common-law liability contingent upon both declaration of value and payment of a surcharge.⁹⁶ Since failure to fulfill either requirement completely barred recovery,⁹⁷

because it was easier to show that a shipper knew what a receipt said than to prove he read a newspaper advertisement or a sign posted on an office wall. *See* *Kerr v. Willan*, 6 M. & S. 150, 152, 105 Eng. Rep. 1199, 1200 (K.B. 1817); *Rowley v. Horne*, 3 Bing. 2, 3, 130 Eng. Rep. 413, 414 (C.P. 1825); *Brooke v. Pickwick*, 4 Bing. 218, 222, 130 Eng. Rep. 753, 754 (C.P. 1827).

93. *Kirkman v. Shawcross*, 6 T.R. 14, 17-18, 101 Eng. Rep. 410, 412 (K.B. 1794) (dictum).

94. Eighteenth and early nineteenth-century cases analyzing the legal significance of carriers' notices did not employ modern "offer and acceptance" terminology. However, the reasoning in those decisions clearly was influenced by the contemporaneous emergence of formal rules governing contract formation, a process which took place between approximately 1790 and 1830. *See* P. ATIYAH, *supra* note 41, at 446-47.

95. *Clay v. Willan*, 1 H. Bl. 298, 298, 126 Eng. Rep. 174, 174 (C.P. 1789). For another example, see *Izett v. Mountain*, 4 East 371, 371, 102 Eng. Rep. 873, 873 (K.B. 1803).

96. The insurance premium had to be reasonable. *Harris v. Packwood*, 3 Taunt. 264, 271-72, 128 Eng. Rep. 105, 108 (C.P. 1810); *see* note 41 *supra*. A carrier could waive the usual requirement that the premium be paid in advance. *Wilson v. Freeman*, 3 Camp. 527, 170 Eng. Rep. 1470 (N.P. 1814). If the carriage company had more than one owner, however, all had to join in waiving the notice's demands. *Bignold v. Waterhouse*, 1 M. & S. 255, 105 Eng. Rep. 95 (K.B. 1813).

97. *Clay v. Willan*, 1 H. Bl. 298, 126 Eng. Rep. 174 (C.P. 1789); *Izett v. Mountain*, 4 East 371, 102 Eng. Rep. 873 (K.B. 1803); *Nicholson v. Willan*, 5 East 507, 102 Eng. Rep. 1164 (K.B. 1804); *Harris v. Packwood*, 3 Taunt. 264, 128 Eng. Rep. 105 (C.P. 1810); *Bignold v. Waterhouse*, 1 M. & S. 255, 105 Eng. Rep. 95 (K.B. 1813); *Down v. Fromont*, 4 Camp. 40,

the shipper's declaration had to allege specifically that he had satisfied each condition precedent.⁹⁸ The other, less frequently used type of notice typically provided: "[N]o more than [£5] will be accounted for, for any goods or parcels delivered at this office, unless entered as such and paid for accordingly."⁹⁹ This species of notice, unlike the first, left the carrier unconditionally liable for undeclared valuables but fixed a ceiling on the amount which the shipper could recover. In other words, it functioned like a liquidated damages clause. The shipper did not have to mention this type of special acceptance in his declaration because the damages agreement was collateral to the main carriage contract.¹⁰⁰

By 1800 public-notice disclaimers had become a ubiquitous feature of the English transport system, a development not everyone welcomed. Several judges bemoaned creation of the doctrine that allowed substitution of pro-carrier contract terms for pro-shipper common-law rules. In 1802 Justice Alan Chambre of the Common Pleas said the public-notice special acceptance had been "extended as far or rather farther than it ought to be upon principles of public policy."¹⁰¹ Two years later Lord Ellenborough, chief justice of the King's Bench, complained that notices were "liable to abuse,"¹⁰² and in 1810 Sir James Mansfield, the Common Pleas chief justice, grumbled that special acceptances produced "great frauds" and "great inconvenience."¹⁰³ Lord Ellenborough pointedly remarked in 1814 that he was "very sorry for the convenience of trade, that carriers have been allowed to limit their common law responsibility," and asserted that "some legislative measure upon the subject will soon become necessary."¹⁰⁴ Parliament did nothing,

171 Eng. Rep. 13 (N.P. 1814); *Levi v. Waterhouse*, 1 Price 280, 145 Eng. Rep. 1403 (Ex. 1815); *Thorogood v. Marsh*, Gow. 105, 171 Eng. Rep. 853 (N.P. 1819); *Batson v. Donovan*, 4 B. & Ald. 21, 106 Eng. Rep. 846 (K.B. 1820); *Alfred v. Horne*, 3 Stark 136, 171 Eng. Rep. 799 (N.P. 1822); *Lowe v. Booth*, 13 Price 329, 147 Eng. Rep. 1007 (Ex. 1824); *Mayhew v. Eames*, 3 B. & C. 601, 107 Eng. Rep. 856 (K.B. 1825); *Marsh v. Horne*, 5 B. & C. 322, 108 Eng. Rep. 120 (K.B. 1826).

98. *Latham v. Rutley*, 2 B. & C. 20, 22, 107 Eng. Rep. 290, 291 (K.B. 1823). *See also* *Clarke v. Gray*, 6 East 564, 102 Eng. Rep. 1404 (K.B. 1805).

99. *Clarke v. Gray*, 6 East 564, 565, 102 Eng. Rep. 1404, 1405 (K.B. 1805).

100. *Clarke v. Gray*, 6 East 564, 102 Eng. Rep. 1404 (K.B. 1805).

101. *Oppenheim v. Russell*, 3 Bos. & Pul. 41, 52, 127 Eng. Rep. 24, 30 (C.P. 1802).

102. *Nicholson v. Willan*, 5 East 507, 513, 102 Eng. Rep. 1164, 1167 (K.B. 1804).

103. *Harris v. Packwood*, 3 Taunt. 264, 271, 128 Eng. Rep. 105, 108 (C.P. 1810).

104. *Down v. Fromont*, 4 Camp. 40, 41, 171 Eng. Rep. 13, 14 (N.P. 1814).

however, and the judges' groans grew louder as it dawned on them that, having permitted disclaimers of liability for undeclared valuables, they soon would find themselves hard-pressed to conceive a principled basis for denying carriers the right to contract out of liability altogether.¹⁰⁵ "The doctrine of carriers exempting themselves from liability by notice has been carried much too far," groused Justice James Park of the Common Pleas in an 1818 decision.¹⁰⁶ His colleague Justice James Burrough used somewhat stronger language, saying he "lament[ed] that the doctrine of notice was ever introduced into Westminster-Hall."¹⁰⁷ Burrough renewed his attack on carriers' practices a few years later when he took them to task for "constantly endeavouring to narrow their responsibility, and to creep out of their duties," adding that he was "not singular in thinking that their endeavours ought not to be favoured."¹⁰⁸ Noting carrier employees' propensity for "leaguings with thieves," in 1827 Common Pleas' Chief Justice William Best said he wished "these notices had never been holden sufficient to limit the carrier's responsibility."¹⁰⁹

Forced to administer a doctrine many of them vehemently disliked, early nineteenth-century judges did what they could to narrow its reach. Their first tactic was to tighten the offer-and-acceptance rules governing modification of common-law liability. They devised an elaborate set of rules¹¹⁰ prescribing what carriers had to do to "bring home" their notices to shippers.¹¹¹ Awareness of trade

105. See *Maving v. Todd*, 1 Stark. 72, 73-74, 171 Eng. Rep. 405, 405 (N.P. 1815). See also *Leeson v. Holt*, 1 Stark. 186, 187-88, 171 Eng. Rep. 441, 442 (N.P. 1816).

106. *Smith v. Horne*, 8 Taunt. 144, 146, 129 Eng. Rep. 338, 338 (C.P. 1818).

107. 8 Taunt. at 146, 129 Eng. Rep. at 339.

108. *Duff v. Budd*, 3 Brod. & B. 177, 183, 129 Eng. Rep. 1250, 1253 (C.P. 1822).

109. *Brooke v. Pickwick*, 4 Bing. 218, 222-23, 130 Eng. Rep. 753, 754-55 (C.P. 1827).

110. Rules developed piecemeal because notices took so many different forms that a workable general principle could not be devised. F. BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* 71a n.(a) (7th ed. R. Bridgman London 1817) (1st ed. London 1772).

111. Early nineteenth-century judges insisted upon stronger proof that shippers possessed actual knowledge of conditions precedent to liability than Mansfield's court had demanded. Compare cases cited in notes 112-122 *infra* with *Gibbon v. Paynton*, 4 Burr. 2298, 2300, 2302, 98 Eng. Rep. 200, 201 (K.B. 1769). Carriers had to establish such knowledge through circumstantial evidence rather than by cross-examining shippers because at this time the parties to a lawsuit generally were incompetent to serve as witnesses. Adams, *The Standardization of Commercial Contracts, or the Contractualization of Standard Forms*, 7 *ANGLO-AMER. L. REV.* 136, 142 (1978).

customs no longer provided an adequate substitute for seeing, or at least hearing about, the notice itself.¹¹² A disclaimer clause was invalid if printed in much smaller type than the rest of the notice.¹¹³ It also was ineffective if the shipper was illiterate¹¹⁴ or if, despite being able to read the notice, he simply did not bother to do so.¹¹⁵ A shipper who already had seen one of the carrier's handbills was free to ignore an inconsistent sign.¹¹⁶ Notwithstanding a plethora of advertisements, leaflets, and office posters, a carrier exposed himself to full common-law liability if he picked up the shipper's goods in a wagon that lacked its own notice.¹¹⁷ Similarly, posting notices at the termini of his route afforded a carrier no protection if he neglected to display one at the intermediate stop where he received the shipper's consignment.¹¹⁸ The mere fact that the shipper subscribed to a newspaper in which the carrier's notice regularly appeared did not prove he had actual knowledge of the carrier's conditions.¹¹⁹ Ambiguity also proved fatal; a notice had to make clear that noncompliance immunized the carrier himself and not just the proprietor of the office whence the freight was shipped.¹²⁰ Notice to a consignor served as notice to his consignee and vice versa, at least where the former was the latter's agent.¹²¹

112. *Clarke v. Gray*, 4 Esp. 177, 178, 170 Eng. Rep. 682, 683 (N.P. 1802).

113. *Butler v. Heane*, 2 Camp. 415, 170 Eng. Rep. 1202 (N.P. 1810).

114. *Davis v. Willan*, 2 Stark. 279, 171 Eng. Rep. 646 (N.P. 1817).

115. *Kerr v. Willan*, 2 Stark. 53, 171 Eng. Rep. 570 (N.P. 1817), 6 M. & S. 150, 105 Eng. Rep. 1199 (K.B. 1817).

116. *Cobden v. Bolton*, 2 Camp. 108, 170 Eng. Rep. 1097 (N.P. 1809). Likewise, a shipper who saw a sign limiting the carrier's liability and subsequently obtained a receipt containing terms less favorable to the carrier could ignore the former and rely on the latter. *Munn v. Baker*, 2 Stark. 255, 171 Eng. Rep. 638 (N.P. 1817).

117. *Clayton v. Hunt*, 3 Camp. 27, 170 Eng. Rep. 1294 (N.P. 1811).

118. *Gouger v. Jolly*, Holt 317, 171 Eng. Rep. 257 (N.P. 1816). But by posting a notice at only one terminus, a carrier could bind a consignee of goods sent from the other terminus by an agent who, like his principal, knew the carrier made round trips between the termini. *Riley v. Horne*, 2 Moo. & P. 331, 344-45, 5 Bing. 217, 227-28, 130 Eng. Rep. 1044, 1047-48 (C.P. 1828).

119. *Rowley v. Horne*, 3 Bing. 2, 130 Eng. Rep. 413 (C.P. 1825); *Munn v. Baker*, 2 Stark. 255, 171 Eng. Rep. 638 (N.P. 1817). But the shipper would be bound by the newspaper notice if the jury found he had read it. 2 A. STEPHENS, *THE LAW OF NISI PRIUS, EVIDENCE IN CIVIL ACTIONS, AND ARBITRATION AND AWARDS* *998 (Amer. ed. G. Sharswood 1844); S. GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 216 (15th ed. S. Crosswell 1892).

120. *Macklin v. Waterhouse*, 5 Bing. 212, 225, 130 Eng. Rep. 1042, 1047 (C.P. 1828).

121. *Maving v. Todd*, 1 Stark. 72, 171 Eng. Rep. 405 (N.P. 1815); *Alfred v. Horne*, 3 Stark. 136, 171 Eng. Rep. 799 (N.P. 1822); *Mayhew v. Eames*, 1 Car. & P. 550, 171 Eng. Rep.

Although notice to a servant bound his or her master, a carrier had to be sure the servant knew enough about the cargo and about a shipper's legal duties to declare and insure the goods properly, for if he did not, the carrier faced unlimited liability.¹²²

Anti-notice judges' second tactic was to read qualifying language into facially absolute disclaimers. They held that disclosure of cargo value was a condition precedent to liability only if such information would have influenced the carrier's level of safety precautions. To describe loss-producing conduct that bore no causal relation to nondisclosure, courts employed the terms "misfeasance" and "gross negligence." Misfeasance occurred when a carrier wilfully renounced his duty to transport cargo in the manner he and the shipper had agreed upon. Examples included carrying cargo beyond its designated destination,¹²³ sending goods by another company's conveyance without authorization,¹²⁴ and failing to furnish a seaworthy craft.¹²⁵ Gross negligence consisted of failing

1312 (N.P. 1825), 3 B. & C. 601, 107 Eng. Rep. 856 (K.B. 1825).

122. *Macklin v. Waterhouse*, 5 Bing. 212, 226-27, 130 Eng. Rep. 1042, 1047 (C.P. 1828).

123. *Ellis v. Turner*, 8 T.R. 530, 101 Eng. Rep. 1529 (K.B. 1800); *Bodenham v. Bennett*, 4 Price 31, 146 Eng. Rep. 384 (Ex. 1817). Allocation of the burden of proof played an important role in determining which party ultimately had to bear the loss. If a carrier failed to show that his disclaimer notice had been "brought home" to the shipper, he had the burden of proving that the loss or damage resulted from an act of God or the king's enemies. Failure to discharge that burden saddled the carrier with liability whether or not he was at fault. S. GREENLEAF, *supra* note 119, § 219; W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL § 463 (Boston 1844). If the carrier brought his notice to the shipper's attention and the shipper did not comply with its conditions, the burden of proof shifted, and the shipper then had to prove that the carrier caused the loss or damage by committing an act of misfeasance or gross negligence. W. STORY, *supra*, § 471; S. GREENLEAF, *supra* note 119, § 218.

124. *Garnett v. Willan*, 5 B. & Ald. 53, 106 Eng. Rep. 1113 (K.B. 1821); *Sleat v. Fagg*, 5 B. & Ald. 342, 106 Eng. Rep. 1216 (K.B. 1822). *But cf.* *Nicholson v. Willan*, 5 East 507, 102 Eng. Rep. 1164 (K.B. 1804) (carrier who negligently booked goods on wrong coach also owned by his company held not guilty of misfeasance).

In *Sleat* the court emphasized that "the defendant would have sent the parcel by the same coach, even if the plaintiffs had described it as a parcel of value, inasmuch as all parcels sent to the office before a certain hour, were forwarded by that coach; and, therefore, the concealment of the value was not the cause of the non-performance of the contract." 5 B. & Ald. at 349-50, 106 Eng. Rep. at 1219 (per Holroyd, J.). The court also stressed the jury's finding that, because the defendant used a "substituted mode of conveyance, the property was exposed to greater risk than it would have been, had it been sent by the mode elected by the plaintiffs." 5 B. & Ald. at 347-48, 106 Eng. Rep. at 1218 (per Abbott, C.J.).

125. *Lyon v. Mells*, 5 East 428, 102 Eng. Rep. 1134 (K.B. 1804).

to exercise care commensurate with cargo's apparent value.¹²⁶ Undeclared goods presumptively were worth up to, but not more than, the sum stated in the carrier's notice, *e.g.*, £5.¹²⁷ Hence, a carrier was not guilty of gross negligence if he handled an undeclared parcel stuffed with banknotes in a manner befitting property valued at £5,¹²⁸ but he lost his notice's protection if he treated the package as though it were "not . . . worth two-pence."¹²⁹ Gross negligence took several forms: leaving a parcel in the hands of a

126. See *Bodenham v. Bennett*, 4 Price 31, 33, 146 Eng. Rep. 384, 385 (Ex. 1817); *Batson v. Donovan*, 4 B. & Ald. 21, 36, 42, 106 Eng. Rep. 846, 851, 853 (K.B. 1820); *Lowe v. Booth*, 13 Price 329, 331, 147 Eng. Rep. 1007, 1008 (Ex. 1824); *Brooke v. Pickwick*, 4 Bing. 218, 221-23, 130 Eng. Rep. 753, 754-55 (C.P. 1827).

Ordinary negligence had a much broader meaning than gross negligence: "every thing is a negligence in a carrier or hoyman that the law does not excuse." *Dale v. Hall*, 1 Wils. K.B. 281, 282 (K.B. 1750). Failure to take precautions proportionate to cargo's actual worth constituted ordinary negligence. If the carrier's lack of due care resulted from the shipper's nondisclosure of his goods' nature and value, the carrier's notice insulated him from liability. Thus, a shipper was not "allowed to complain of a negligent performance of the contract by the carrier, where that negligence [was] occasioned by the [shipper's] own act, viz. by his treating the parcel as a thing of no value." *Sleat v. Fagg*, 5 B. & Ald. 342, 347, 106 Eng. Rep. 1216, 1218 (K.B. 1822) (per Abbott, C.J.). Put another way, a shipper "could not make . . . negligence a ground of action" if "he had superinduced it by his own neglect, in not communicating the value of the parcel to the [carrier]." 5 B. & Ald. at 348, 106 Eng. Rep. at 1218 (per Bayley, J.). See also *Batson v. Donovan*, 4 B. & Ald. at 35-37, 106 Eng. Rep. at 851-52 (K.B. 1820).

127. A shipper could rebut the presumption by proving that, when the cargo changed hands, the carrier knew its value exceeded £5. See *Bodenham v. Bennett*, 4 Price 31, 146 Eng. Rep. 384 (Ex. 1817). Although the carrier's level of knowledge affected his duty of care, and thus helped determine whether he committed gross negligence, knowledge alone did not strip him of his notice's protection. Prior to 1815, if a carrier knowingly accepted property worth over £5 without requiring a formal declaration of value and advance payment of an insurance premium, he impliedly waived those conditions precedent to liability. *Beck v. Evans*, 16 East 244, 247-48, 104 Eng. Rep. 1081, 1082-83 (K.B. 1812). See also *Wilson v. Freeman*, 3 Camp. 527, 528, 170 Eng. Rep. 1470, 1470 (N.P. 1814); *Down v. Fromont*, 4 Camp. 40, 41, 171 Eng. Rep. 13, 14 (N.P. 1814). In *Levi v. Waterhouse*, 1 Price 280, 284-85, 145 Eng. Rep. 1403, 1404 (Ex. 1815), however, the Court of Exchequer rejected the concept of implied waiver. See also *Thorogood v. Marsh, Gow*, 105, 171 Eng. Rep. 853 (N.P. 1819); *Alfred v. Horne*, 3 Stark. 136, 171 Eng. Rep. 799 (N.P. 1822). The King's Bench endorsed *Levi* in *Marsh v. Horne*, 5 B. & C. 322, 327-28, 108 Eng. Rep. 120, 122 (K.B. 1826), laying to rest the notion that a carrier's awareness of a consignment's actual value, without more, deprived him of his right to insist upon full compliance with his notice's conditions. Thereafter, he forfeited his right to invoke the notice as a defense to liability only if he handled cargo in a manner inappropriate to its known worth.

128. See *Batson v. Donovan*, 4 B. & Ald. 21, 106 Eng. Rep. 846 (K.B. 1820).

129. *Lowe v. Booth*, 13 Price 329, 331, 147 Eng. Rep. 1007, 1008 (Ex. 1824) (Graham, B., dissenting).

drunken coachman after it had reached its destination;¹³⁰ permitting brandy to leak out of a punctured cask;¹³¹ sending only one employee to deliver packages instead of the usual pair, thus exposing the open and unguarded cart to theft;¹³² leaving a trunk behind or fastening it insecurely to the top of a coach;¹³³ and delivering goods to the wrong person.¹³⁴

Despite hostile judges' attempts to diminish their potency, notices remained enormously effective weapons in 1828, when *Riley* was decided. By using a form disclaimer, a carrier could immunize himself from liability for undisclosed, uninsured valuables provided he (1) brought the disclaimer to the shipper's attention; (2) avoided willful default; and (3) based his risk calculations and custodial conduct on the consignment's apparent value. During the next quarter century, the tide turned even more decidedly in carriers' favor as legislators and judges fostered technological innovation and economic growth.

In 1830 Parliament passed "An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for Hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof."¹³⁵ Known as the Carriers' Act, this statute, which

130. *Bodenham v. Bennett*, 4 Price 31, 146 Eng. Rep. 384 (Ex. 1817).

131. *Beck v. Evans*, 16 East 244, 104 Eng. Rep. 1081 (K.B. 1812).

132. *Smith v. Horne*, Holt 643, 171 Eng. Rep. 371 (N.P. 1818), 8 Taunt. 144, 129 Eng. Rep. 338 (C.P. 1818). See also *Beckford v. Crutwell*, 5 Car. & P. 242, 172 Eng. Rep. 957 (N.P. 1832).

133. *Brooke v. Pickwick*, 4 Bing. 218, 130 Eng. Rep. 753 (C.P. 1827).

134. *Birkett v. Willan*, 2 B. & Ald. 356, 106 Eng. Rep. 397 (K.B. 1819); *Duff v. Budd*, 3 Brod. & B. 177, 129 Eng. Rep. 1250 (C.P. 1822).

135. Carriers' Act, 1830, 11 Geo. 4 & 1 Wm. 4, c. 68. The Act's preamble stated that it was designed to deal with three interrelated problems: (1) shippers' growing tendency to send "Parcels and Packages containing Money, Bills, Notes, Jewellery, and other Articles of great Value in small Compass," a practice which greatly increased both the danger of "Depredation" and carriers' exposure to potential liability; (2) consignors' frequent failure to inform carriers of the nature and value of their cargo, thus thwarting the exercise of "due Diligence"; and (3) the occasional ineffectiveness of disclaimers owing to "the Difficulty of fixing Parties with Knowledge of Notices." *Id.* § 1.

Although the preamble referred specifically to parcels and packages of "small Compass," the Act's coverage extended to large containers as well. *Owen v. Burnett*, 2 C. & M. 353, 357-59, 149 Eng. Rep. 796, 798-99 (Ex. Pl. 1834).

applied to all common carriers by land¹³⁶ and covered luggage as well as cargo, augmented rather than altered the protection carriers already enjoyed at common law. Section 1 relieved common carriers of all liability for loss of or injury to gold, silver, money, jewelry, watches, silk, glass, china, paintings, writings, and other enumerated materials, if worth more than £10, unless the shipper declared the property's nature and value and paid an insurance premium.¹³⁷ This statutory exclusion of liability worked automatically: the carrier did not have to "bring home" any sort of notice to the shipper, who conclusively was presumed to have knowledge of the law's disclosure requirement.¹³⁸ In order to collect an insurance premium, however, the carrier had to post a notice in his office stating his tariff. This list of charges bound a shipper whether or not he actually was aware of its existence.¹³⁹ Upon receiving cargo information¹⁴⁰ and a reasonable premium,¹⁴¹ the carrier became subject to common-law strict liability.¹⁴² Failure to declare valu-

136. Sea carriers already enjoyed statutory immunity from liability for undeclared valuables lost or damaged due to "robbery, embezzlement, making away with, or secreting thereof." 26 Geo. 3, c. 86, § 3 (1786).

137. 11 Geo. 4 & 1 Wm. 4, c. 68, § 1. Professor Richard Danzig has suggested that the Act's disclosure requirement may have influenced the decision in *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (Ex. 1854), which limited liability for breach of contract to such damages as arose naturally from the breach or "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." 9 Ex. at 354, 156 Eng. Rep. at 151 (per Alderson, B.). Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 264 (1975).

138. *Hart v. Baxendale*, 6 Ex. 769, 788-90, 155 Eng. Rep. 755, 764-65 (Exch. Ch. 1851); see 1 E. BOYLE & T. WAGHORN, *THE LAW RELATING TO TRAFFIC ON RAILWAYS AND CANALS* 46-47 (1901).

139. 11 Geo. 4 & 1 Wm. 4, c. 68, § 2. If the carrier failed to issue a receipt for the valuables upon request, or if he collected premiums without posting a notice, he lost his protection under § 1 and became "liable and responsible as at the Common Law, and . . . liable to refund the increased Rate of Charge." *Id.* § 3.

140. An express formal declaration of value was required to avoid a § 1 automatic exclusion of liability for enumerated items worth over £10. The shipper's duty to declare was unaffected by the carrier's possession of actual knowledge concerning the cargo's nature and value. See *Boys v. Pink*, 8 Car. & P. 361, 173 Eng. Rep. 531 (N.P. 1838).

141. Having declared his cargo's nature and value, a shipper owed no duty to offer an insurance premium; the carrier had to demand it. Acceptance without such a demand barred the carrier from asserting nonpayment as a defense to liability. *Great N. Ry. v. Behrens*, 7 H. & N. 950, 158 Eng. Rep. 756 (Exch. Ch. 1862).

142. The shipper's recovery was limited to the property's actual value or its declared value, whichever was less. 11 Geo. 4 & 1 Wm. 4, c. 68, § 9. In addition to damages, the

ables or pay the proper premium barred a shipper from recovering even though the loss or damage resulted from the carrier's gross negligence.¹⁴³ The Act did not exempt a carrier from liability for wilful damage, conversion, intentional misdelivery,¹⁴⁴ or employee felony,¹⁴⁵ however.

The Act allowed carriers to contract out of liability for property not covered by a section 1 automatic disclaimer. Section 4 restated the well-established principle that a carrier could not unilaterally cast off his common-law responsibilities by means of a public notice.¹⁴⁶ Section 6 made clear, however, that bilateral agreements modifying common-law rights and duties remained valid.¹⁴⁷ To enter into such an agreement, a carrier had to draw the shipper's attention to a notice or give him a ticket or waybill reciting the conditions under which the carrier wished to do business.¹⁴⁸ Shipment of goods—even under protest—after the disclaimer had been "brought home" signified assent to the carrier's terms.¹⁴⁹ A shipper

shipper also was entitled to recover his insurance premium. *Id.* § 7.

143. *Hinton v. Dibbin*, 2 Q.B. 646, 114 Eng. Rep. 253 (Q.B. 1842). See also *Morritt v. North E. Ry.*, 1 Q.B.D. 302 (Q.B.D.), *aff'd*, 1 Q.B.D. 311 (C.A. 1876).

144. *Morritt v. North E. Ry.*, 1 Q.B.D. 302, 308 (Q.B.D.), *aff'd*, 1 Q.B.D. 311 (C.A. 1876) (dictum).

145. 11 Geo. 4 & 1 Wm. 4, c. 68, § 8. See *Machu v. London & S.W. Ry.*, 2 Ex. 415, 154 Eng. Rep. 554 (Ex. 1848); *Great N. [Great W.] Ry. v. Rimell*, 18 C.B. 575, 139 Eng. Rep. 1495 (C.P. 1856); *Metcalf v. London, Brighton, & S. Coast Ry.*, 4 C.B. (N.S.) 307, 140 Eng. Rep. 1102 (C.P. 1858); *Stephens v. London & S.W. Ry.*, 18 Q.B.D. 121 (C.A. 1886). Notwithstanding § 8, a carrier could contract out of liability for thefts committed by his employees. See *Shaw v. Great W. Ry.*, [1894] 1 Q.B. 373. See also *Murray, The Warehouseman's and Carrier's Liability for Theft By Their Employees In England and the United States*, 39 U. Prrt. L. Rev. 707, 735-37 (1978).

146. 11 Geo. 4 & 1 Wm. 4, c. 68, § 4. Nevertheless, the Act did not prohibit a carrier from using a public notice to define the categories of goods he professed to carry. A. LESLIE, *supra* note 17, at 106.

147. Section 6 stated that "nothing in this Act contained shall extend or be construed to annul or in anywise affect any special Contract between such Mail Contractor, Stage Coach Proprietor, or common Carrier, and any other Parties, for the Conveyance of Goods and Merchandizes." 11 Geo. 4 & 1 Wm. 4, c. 68, § 6.

148. See *Palmer v. Grand Junction Ry.*, 4 M. & W. 749, 150 Eng. Rep. 1624 (Ex. Pl. 1839) (notice held ineffective because no proof shipper received ticket bearing disclaimer); cf. *Walker v. Jackson*, 10 M. & W. 161, 152 Eng. Rep. 424 (Ex. Pl. 1842) (notice disclaiming implied contractual liability held invalid because not posted where shippers could see it).

149. *Walker v. York & N. Midland Ry.*, 2 El. & Bl. 750, 118 Eng. Rep. 948 (Q.B. 1853). Thus, the Act did not diminish "the ease with which a carrier could impose conditions in his own favour without any *real* assent on the part of the consignor." A. LESLIE, *supra* note 17, at 97 (emphasis added). The shipper's assent, whether implied or express, was ineffective,

who found those terms unacceptable could reject the carrier's offer and, provided he was willing to declare his cargo and pay a reasonable surcharge, insist that the carrier transport his goods subject to full common-law liability. If the carrier declined to handle the consignment on that basis, the shipper could sue him in tort for wrongful refusal to carry.¹⁵⁰

Until the late 1840s, judges bent over backwards to avoid construing notices as disclaimers of liability for negligence.¹⁵¹ In a series of cases decided between 1849 and 1852, however, all three principal courts abandoned their former position and recognized carriers' right to enforce agreements relieving them of responsibility for all degrees of carelessness.¹⁵² This about-face came directly in response to the railway boom.¹⁵³ Baron James Parke's judgment in *Carr v. Lancashire & Yorkshire Railway*¹⁵⁴ illustrated how pro-

however, if procured by fraud. See *Simons v. Great W. Ry.*, 2 C.B. (N.S.) 620, 140 Eng. Rep. 560 (C.P. 1857).

Like late eighteenth- and early nineteenth-century special acceptances, contracts made after passage of the Carriers' Act often predicated strict liability upon disclosure of cargo's nature and value and upon payment of an insurance premium. A shipper who declared that his consignment was worth a certain amount was estopped from later claiming that the goods had a higher value. See *M'Cance v. London & N.W. Ry.*, 7 H. & N. 477, 158 Eng. Rep. 559 (Ex. 1861), *aff'd*, 3 H. & C. 343, 159 Eng. Rep. 563 (Exch. Ch. 1864). If the shipper chose to remain silent, paying only the basic freight rate, the contract relieved the carrier of his insurance obligation. *Wyld v. Pickford*, 8 M. & W. 443, 151 Eng. Rep. 1113 (Ex. Pl. 1841).

150. *Carr v. Lancashire & Yorkshire Ry.*, 7 Ex. 707, 712, 715-16, 155 Eng. Rep. 1133, 1135, 1137 (Ex. 1852) (*dicta*).

151. See *Wyld v. Pickford*, 8 M. & W. 443, 460-62, 151 Eng. Rep. 1113, 1120-21 (Ex. Pl. 1841).

152. *Shaw v. York & N. Midland Ry.*, 13 Q.B. 347, 116 Eng. Rep. 1295 (Q.B. 1849); *Austin v. Manchester, Sheffield, & Lincolnshire Ry.*, 10 C.B. 454, 138 Eng. Rep. 181 (C.P. 1852); *Carr v. Lancashire & Yorkshire Ry.*, 7 Ex. 707, 155 Eng. Rep. 1133 (Ex. 1852).

By the 1850s, the distinction between gross and ordinary negligence, see note 126 *supra*, had become hopelessly blurred. See *Wyld v. Pickford*, 8 M. & W. 443, 460-61, 151 Eng. Rep. 1113, 1120 (Ex. Pl. 1841); *Hinton v. Dibbin*, 2 Q.B. 646, 661, 114 Eng. Rep. 253, 258 (Q.B. 1842). See also *Wilson v. Brett*, 11 M. & W. 113, 116, 152 Eng. Rep. 737, 739 (Ex. Pl. 1843). Judges therefore abandoned the old terminology and held that carriers could contract out of liability for any type of omission, "[w]hether . . . called negligence merely, or gross negligence, or culpable negligence." *Austin v. Manchester, Sheffield, & Lincolnshire Ry.*, 10 C.B. at 476, 138 Eng. Rep. at 190.

153. See P. BAGWELL, *THE TRANSPORT REVOLUTION FROM 1770*, at 92-95 (1974); T. BARKER & C. SAVAGE, *AN ECONOMIC HISTORY OF TRANSPORT IN BRITAIN* 58-70 (3d ed. 1974); H. DYOS & D. ALDCROFT, *BRITISH TRANSPORT* 118-138 (1969); W. JACKMAN, *THE DEVELOPMENT OF TRANSPORTATION IN MODERN ENGLAND* ch. 7 (3d ed. 1966).

154. *Carr v. Lancashire & Yorkshire Ry.*, 7 Ex. 707, 155 Eng. Rep. 1133 (Ex. 1852).

foundly the transport revolution influenced judicial attitudes:

Prior to the time of the establishment of railways, the Courts were in the habit of construing contracts between individuals and carriers much to the disadvantage of the latter. By the introduction of railways, a new description of property was carried, and many articles are now transferred from one place to another which had not been commonly carried before. . . . [C]ontracts are now made with reference to this new state of things; and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks and dangers of carriage to which they are in modern times exposed.¹⁵⁵

Railroads soon exploited this new freedom, using their dominance of the transportation market to extract shippers' assent to "stringent and oppressive" conditions.¹⁵⁶ Prompted by public disquiet over railways' overreaching,¹⁵⁷ Parliament passed the basically ineffectual Railway and Canal Traffic Act, 1854.¹⁵⁸ Although

155. 7 Ex. at 712-13, 155 Eng. Rep. at 1136.

156. *Peek v. N. Staffordshire Ry.*, 10 H.L.C. 473, 557, 11 Eng. Rep. 1109, 1141 (H.L. 1862-63) (per Cockburn, C.J.). Sir Alexander Cockburn, chief justice of the Queen's Bench, told the House of Lords that monopolization, coupled with the rise of freedom of contract, enabled carriers to wield enormous power at shippers' expense:

There cannot be a doubt that, practically speaking, the introduction of railways has destroyed the competition which formerly existed, and the effect of which was to secure to the goods owner fair and reasonable terms [T]he absence of other means of conveyance, as well as the increased rapidity of transport, compels the owner of goods, at least for all the purposes of business, to resort to railway conveyance. He is thus at the mercy of the carrier, and has no alternative but to submit to any terms, however unjust and oppressive, which the latter may think fit to impose.

. . . Masters of the field, railway companies lost no time in introducing into their contracts conditions of immunity, not only against liability in respect of loss or injury arising from circumstances beyond their control, but also against liability in respect of loss or injury resulting from their own negligence, however gross and inexcusable. And to these stipulations courts of law felt themselves compelled to give effect, on the undeniable principle that, in the absence of fraud or illegality, courts of justice are bound to give effect to conditions, however stringent and oppressive, to which the parties to a contract have deliberately agreed.

10 H.L.C. at 556-57, 11 Eng. Rep. at 1141.

157. See A. MANCHESTER, *A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750-1950*, at 279 (1980).

158. 17 & 18 Vict., c. 31. The Act's express purpose was, in Chief Justice Cockburn's

it neither disturbed the protection afforded by section 1 of the Carriers' Act nor abridged the right to contract out of strict liability, the 1854 Act restricted negligence disclaimers in two ways. First, the Act provided that a contract limiting liability for "Neglect or Default" did not bind a shipper unless he had signed it.¹⁵⁹ By routinely requiring shippers to sign standard-form waybills containing boilerplate exclusionary clauses, carriers could fulfill this requirement fairly easily. Second, the Act stated that railway and canal companies were liable for negligence "notwithstanding any Notice, Condition, or Declaration" to the contrary unless a judge found the exonerating provision "just and reasonable."¹⁶⁰ This rule also proved only a minor hindrance to carriers, for, as Professor P. S. Atiyah has remarked, "[s]o long as the contract was made in a just and reasonable way, the result would be deemed just and reasonable."¹⁶¹ To conclude a procedurally satisfactory agreement, all a railway or canal company had to do was offer a shipper the option of purchasing negligence coverage at a reasonable rate. If the shipper then chose to send his cargo at the reduced-liability rate, he had no grounds for challenging the contract.

words, to protect "the public from the abuse of a power which the Legislature itself, by assisting to create these great companies, had helped to bring into existence." *Peek v. N. Staffordshire Ry.*, 10 H.L.C. 473, 556, 11 Eng. Rep. 1109, 1141 (H.L. 1862-63). *See also* 133 PARL. DEB., H.L. (3d ser.) 601-05, 608-10 (May 19, 1854) (remarks of Earl of Derby, Lord Lyndhurst, Earl Grey, & Lord Brougham); *id.* at 985-88 (May 26, 1854) (remarks of Earl of Derby, Earl Grey, & Lord Lyndhurst).

For a thorough explanation of the Act, see A. LESLIE, *supra* note 17, at 98-105, 107-08, 111-52.

159. 17 & 18 Vict., c. 31, § 7.

160. *Id.* The terms "Notice, Condition, or Declaration" were considered synonyms for "contract." *See Peek v. N. Staffordshire Ry.*, 10 H.L.C. 473, 11 Eng. Rep. 1109 (H.L. 1862-63); *Simons v. Great W. Ry.*, 18 C.B. 805, 139 Eng. Rep. 1588 (C.P. 1856), *judgment rendered in London & N.W. Ry. v. Dunham*, 18 C.B. 826, 829-30, 139 Eng. Rep. 1596, 1598 (C.P. 1856). According to Queen's Bench Justice Colin Blackburn, the task of determining a condition's reasonableness was entrusted to a judge rather than to a jury because Parliament was impressed by carriers' argument "that the bias of a jury is so decidedly against them, that, especially in the county courts, they do not get impartial justice." *Peek v. N. Staffordshire Ry.*, 10 H.L.C. at 510-11, 11 Eng. Rep. at 1124.

The 1854 Act fixed a ceiling on the amount a shipper could recover for injury to livestock if he failed to declare its value and pay the surcharge listed on a tariff notice posted in conformity with § 2 of the Carriers' Act. 17 & 18 Vict., c. 31, § 7; *see text accompanying note 139 supra*; *Robinson v. London & S.W. Ry.*, 19 C.B. (N.S.) 51, 144 Eng. Rep. 704 (C.P. 1865).

161. P. ATIYAH, *supra* note 41, at 559.

Judges believed the availability of a fairly priced alternative to limited liability furnished an adequate safeguard against coercion.¹⁶²

III. CARRIERS' RIGHT TO REJECT UNDECLARED CARGO: MYTH AND REALITY

As we have seen, by 1828, when Chief Justice Best delivered his judgment in *Riley*, a prudent carrier no longer had reason to fear closed containers. He could prevent insurance fraud simply by making certain that each shipper either obtained a receipt or saw a notice disclaiming liability for undeclared valuables. Having taken that elementary step, the carrier could take charge of cargo without worrying about whether he might face a ruinous claim if the goods were lost, stolen, or damaged in transit. His special acceptance left him responsible only for gross negligence and misfeasance. A carrier never could be misled into committing gross negligence because, by definition, such conduct consisted of failing to handle cargo in a manner suited to its *apparent* value, which a shipper could not distort. Similarly, if a carrier deliberately mistreated freight or intentionally violated the terms of his contract, he had only himself to blame for giving the nondisclosing shipper a windfall.¹⁶³

By the time *Crouch* was decided in January 1854, liability for gross as well as ordinary negligence had become excludable by contract. The Railway and Canal Traffic Act, which went into effect in July of that year, complicated matters only slightly by requiring companies to offer alternative rates and to secure shippers' written assent to agreements limiting liability for negligence. In addition to their common-law rights, carriers enjoyed considerable statutory protection. Section 1 of the Carriers' Act, 1830, relieved them of

162. See *Manchester, Sheffield & Lincolnshire Ry. v. Brown*, L.R. 7 App. Cas. 703 (H.L. 1883); *Great W. Ry. v. Callaghan McCarthy*, L.R. 12 App. Cas. 218 (H.L. 1887); *Lewis v. Great W. Ry.*, 3 Q.B.D. 195 (C.A. 1877). A contract was unreasonable if it disclaimed liability for wilful misconduct. *Ashendon v. London, Brighton, & S. Coast Ry.*, 5 Ex. D. 190 (1880). See also Willis, *The Right of Bailees to Contract Against Liability for Negligence*, 20 HARV. L. REV. 297, 307 (1907). But see A. LESLIE, *supra* note 17, at 110, 139-41 (contending that the Railway and Canal Traffic Act's reasonableness requirement did not apply to contracts relieving carriers of liability for deliberate misconduct or conversion).

163. See text accompanying notes 123-134 *supra*.

responsibility for undisclosed money, jewelry, and most other types of valuable property unless the loss or damage resulted from intentional wrongdoing or a carrier employee's felony.¹⁶⁴ Furthermore, dicta in *Walker v. Jackson*¹⁶⁵ and statements by leading commentators¹⁶⁶ suggest that fraud *simpliciter* constituted an independent ground for denying a shipper recovery. The carrier also prevailed if the goods were not of the type he held himself out as willing to carry.¹⁶⁷ Collectively these rules guaranteed just compensation for risk taking.

Having examined the history of liability doctrines, we must now delineate the circumstances under which nineteenth-century English common law permitted a carrier to reject undeclared cargo. *Riley* affords us no guidance, for, contrary to the Sixth Circuit's implication in *Rodriguez*,¹⁶⁸ Chief Justice Best's dicta expressed his own idiosyncratic views rather than settled principles. Best, one biographer tells us, "was apt to form hasty and questionable opinions."¹⁶⁹ His sweeping and utterly unsupportable assertions in *Riley* exemplified that tendency. Best claimed that in all instances a carrier had the right to know what cargo contained and always could reject a consignment if he did not get the information he sought.¹⁷⁰ In *Crouch* the Common Pleas found "not a shadow of authority" to support Best's obiter and concluded that the proposition he advanced "in its generality cannot stand the test of reasoning."¹⁷¹ *Crouch* indicated, moreover, that even if the *Riley*

164. See notes 137, 145 & accompanying text *supra*.

165. 10 M. & W. 161, 168-69, 152 Eng. Rep. 424, 428 (Ex. Pl. 1842).

166. J. ANGELL, *supra* note 18, §§ 258-261, 264; T. CHITTY & L. TEMPLE, *supra* note 18, at *32; J. KENT, *supra* note 41, at 468; J. SMITH, A COMPENDIUM OF MERCANTILE LAW 275-76 (Amer. ed. J. Holcombe & W. Gholson New York 1847); J. STORY, *supra* note 18, §§ 565-569. See also W. MACNAMARA & W. ROBERTSON, *supra* note 18, at 31-32.

167. *Belfast & Ballymena Ry. v. Keys*, 9 H.L.C. 556, 11 Eng. Rep. 846 (H.L. 1861); *Great N. Ry. v. Shepherd*, 8 Ex. 30, 155 Eng. Rep. 1246 (Ex. 1852); *Cahill v. London & N.W. Ry.*, 10 C.B. (N.S.) 154, 142 Eng. Rep. 409 (C.P. 1861), *aff'd*, 13 C.B. (N.S.) 818, 143 Eng. Rep. 322 (Exch. Ch. 1863). In each of these cases, the carrier was held not liable for undeclared merchandise inside a passenger's luggage.

168. See text p. 797-98 *supra*.

169. 9 E. Foss, *supra* note 85, at 12.

170. See note 27 *supra*.

171. *Crouch v. London & N.W. Ry.*, 14 C.B. 255, 295, 139 Eng. Rep. 105, 121 (C.P. 1854) (per Maule, J.). For over a century and a quarter, American scholars have recognized that *Crouch* repudiated Best's *Riley* dicta. See, e.g., J. CHITTY & L. TEMPLE, *supra* note 18, at *32 n.(c), *50; J. SCHOULER, A TREATISE ON THE LAW OF BAILMENTS 376 (1880). Justice

dicta were read narrowly and confined to cargo rejected for the purpose of preventing insurance fraud, Best's position still would not pass muster.

Crouch was an action against a railroad for wrongfully refusing to carry "packed parcels" (containers of smaller packages) between cities the company publicly professed to serve. The railway contended that rejection was warranted because the shipper had rebuffed its demand for disclosure of each package's contents. The court ruled in the shipper's favor, finding the railway's actions unnecessary and therefore tortious. The justices adopted a need-to-know test for deciding whether, on the facts of a particular case, a carrier properly could decline to serve someone who failed to answer his questions. In Chief Justice John Jervis's view, before a carrier could make declaration of contents a condition precedent to his transporting (as opposed to insuring) a package, he had to have "a reasonable ground for requiring that information."¹⁷² Justice William Maule said a carrier had to have a "special ground"¹⁷³ for insisting upon disclosure, and Justice Cresswell asserted that rejection was privileged only if "it was essential that the [carrier] should receive this information."¹⁷⁴ In short, the common law

Field's opinion in *The Nitro-glycerine Case*, 82 U.S. (15 Wall.) 524, 535 (1872) manifests similar awareness by the Supreme Court. Apparently *Riley's* fall from grace escaped the notice of both the Sixth Circuit and Jasper Ridley, author of the English textbook cited in *Rodriguez*. See note 25 *supra*.

Crouch, like *Riley* and *Rodriguez*, dealt primarily with carriers' common-law rights. Except for a couple of references to the Carriers' Act, 1830, and to railroads' statutory power to refuse possibly dangerous cargo, see notes 175 *infra*; notes 14-15 & accompanying text *supra*, *Crouch* did not canvass carriers' legislatively created privileges. For purposes of this Article, common-law rights are the only ones that matter since they alone formed the basis for the Sixth Circuit's historical observations in *Rodriguez*. Nevertheless, in the interest of completeness, one should note that the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 20, §§ 98-99, gave railway companies much greater powers than they enjoyed at common law, as interpreted by *Crouch*. To help companies calculate the appropriate carriage charge, the Railways Clauses Consolidation Act authorized them to demand written information regarding packages' contents. If the shipper failed to comply or answered falsely, intending to evade the applicable freight rate, he had to pay a penalty plus the correct toll. See *Barr, Moering & Co. v. London & N.W. Ry.*, [1905] 2 K.B. 113. The Act did not confer authority to reject or inspect undeclared parcels, however. See generally W. MACNAMARA & W. ROBERTSON, *supra* note 18, at 137-40.

172. 14 C.B. at 291-92, 139 Eng. Rep. at 120.

173. 14 C.B. at 295, 139 Eng. Rep. at 121.

174. 14 C.B. at 296, 139 Eng. Rep. at 122.

allowed a carrier to withhold his services only if there existed no other way to protect his legitimate interests.

Under *Crouch's* least-intrusive-means analysis, a carrier had the right to inspect or reject a parcel he reasonably suspected of containing a hazardous substance, for, as a practical matter, he had no other method of safeguarding employees, passengers, and property. After all, disclaimers offered no insulation against explosives and nitric acid. Hidden valuables presented an altogether different problem, however. Unlike a carton of dynamite, a nail-bag full of money was not intrinsically dangerous. It posed a threat solely because the common law made the carrier an insurer. Consequently, once the carrier's underwriting obligation disappeared, the bag's capacity to hurt him likewise vanished. As Chief Justice Jervis observed in *Crouch*, a carrier did not have to take the radical step of refusing cargo in order to avoid being victimized by dishonest shippers:

[W]ith regard to goods of a peculiar value, or of a particular description, if their value be not disclosed at the time they are delivered to the company, the law . . . provides a remedy; the liability of the company is qualified and the party sending them is, by reason of the concealment, prevented from recovering the full value of the goods.¹⁷⁵

Having created a satisfactory substitute, the common law outlawed using rejection as a fraud-prevention measure.

Given the disclaimer's advanced state of development in 1828, the Common Pleas ought to have employed in *Riley* the same reasoning utilized a quarter of a century later in *Crouch*. Chief Justice Best reached the wrong conclusion in *Riley* because he presupposed a conundrum which never existed. He recognized, correctly, that forcing carriers to insure property they knew nothing about put them in an intolerable predicament.¹⁷⁶ He erred, however, in assuming that refusal to take physical custody of undeclared cargo provided carriers' only sure way out of their plight. Although aware of carriers' power to limit their liability by notice,¹⁷⁷ Best

175. 14 C.B. at 291, 139 Eng. Rep. at 120.

176. *Riley v. Horne*, 2 Moo. & P. 331, 337-38, 5 Bing. 217, 220-21, 130 Eng. Rep. 1044, 1045 (C.P. 1828).

177. The actual question for decision in both *Riley* and its companion case, *Macklin v.*

failed to grasp that *acceptance of custody* and *acceptance of responsibility* were separate concepts. He did not fully understand that, thanks to disclaimers, a carrier could become a bailee without necessarily incurring the obligations of an insurer.¹⁷⁸ In *Crouch*, by contrast, the court comprehended the distinction between physical acceptance and legal acceptance. Chief Justice Jervis and his colleagues saw the crucial point which Best's custody fixation had caused him to miss: the ability to limit or exclude liability for undisclosed valuables afforded carriers all the protection they needed against insurance fraud.

CONCLUSION

Nineteenth-century English common law prohibited a carrier from rejecting undeclared cargo except as a last resort. If able to protect his interests by any means short of refusal to carry, he had to do so or face liability for breaching his duty to serve all shippers. By disclaiming responsibility for undisclosed valuables, a carrier could prevent dishonest exploitation of his status as an insurer. Therefore, fraud avoidance did not furnish a lawful justification for declining to transport closed containers. *Riley* and *Rodriguez* erred in suggesting otherwise.

Why was rejection allowed only as a last resort? Because the common law sought to forestall needless invasions of shippers' privacy. Although the judges who decided *Crouch* did not articulate their concern for privacy rights, their intent seems unmistakable. The rules they laid down plainly were designed to thwart intrusive conduct on the part of powerful carriers.¹⁷⁹ The judges knew full

Waterhouse, 5 Bing. 212, 130 Eng. Rep. 1042 (C.P. 1828), was whether, under the circumstances, the defendants' notices effectively disclaimed liability for undisclosed valuables.

178. Best evidently missed or disregarded King's Bench Chief Justice Charles Abbott's observation, "A person may engage to place goods in a course of conveyance and delivery, and yet declare that he will not be answerable for their loss." *Marsh v. Horne*, 5 B. & C. 322, 326, 108 Eng. Rep. 120, 122 (K.B. 1826).

179. Samuel Warren and Louis Brandeis contended that nineteenth-century English courts recognized privacy as a legally protectible interest. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *Crouch*, which Warren and Brandeis overlooked, furnishes stronger support for their claim than many of their citations provided. See generally Pratt, *The Warren and Brandeis Argument for a Right to Privacy*, 1975 PUB. L. 161 (asserting that the cases relied upon by Warren and Brandeis protected property rather than privacy).

well that in an increasingly monopolistic market shippers trapped between the Scylla of disclosure and the Charybdis of rejection almost invariably would choose conveyance over privacy. To spare shippers that harsh election, Chief Justice Jervis and his brethren gave consignors the option of either declaring the nature and value of their goods, receiving insurance coverage in return, or keeping that information secret, assuming the risk of loss or damage. Under *Crouch*, the price of privacy was merely loss of insurance, whereas under Best's *Riley* dicta the cost was much higher—loss of transport. By repudiating *Riley*, the Court of Common Pleas reaffirmed principles dating back at least as far as Coke's time¹⁸⁰ and struck a wise balance between the competing interests of shippers and carriers. The Sixth Circuit's resurrection of *Riley* misrepresented history and demonstrated a lamentable disregard for shippers' rights.

180. See note 78 & accompanying text *supra*.