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THE

# NAUTICAL MAGAZINE.

VOLUME XLIV.—No. I.

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## OUR ANNUAL ADDRESS.

IN presenting our annual address to our readers, we have to state that, this day, the old *Nautical* enters on the forty-fourth year of its existence. With its age, it is to us satisfactory to be in a position also to state that its use and circulation have concurrently increased.

In addition to the dissemination of our views on political economy, we may remind our readers that one of the chief objects for which our *Magazine* was incorporated is the diffusion of trustworthy information affecting safe navigation. The care with which our hydrographic notices, and other official information are compiled, will, we think, render any observation on our part superfluous. The necessity for encouraging useful inventions, as aids to navigation, has not been, and will not be, lost sight of, for we quite recognise the value of a medium like the *Nautical Magazine* for making such things known for the benefit of the world at large.

With every confidence we once again appeal for continued support from the community which has already supported us so well.

We have, as our readers well know, never found ourselves able to plunge into the stream of popularity, but have held our own views, founding them as we believed on truth and justice, totally regardless whether the masses accepted them or not, so long as we have been persuaded that the thinking part of the community, interested in ships and shipping, has supported us. There is no doubt that had we floated with the stream of popular sentiment, and been carried away with the tide of enthusiasm, we might have drifted into a course of policy which would



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have pleased the masses better than the one we have pursued; but the fact has always been kept before us that mere popularity is inevitably associated with a departure from sound principle, and we have preferred the prospective satisfaction which comes from advocating solid truths, in preference to the applause of the general public for taking up the cause of blind enthusiasm.

In the articles which have appeared in our pages, we have always endeavoured to present views that in themselves are likely to tend to the public good; at times our articles have been misunderstood and misappreciated, but that they were nevertheless right and were wholly in the direction of personal responsibility and in the spirit of our British national character, the only direction in which thoroughly English literature ought to be written, subsequent events and subsequent legislation have fully proved. In the full belief that our policy is sound, we shall continue to exert our influence against the assumption by the State of the rights, duties, and responsibilities of the individual, while we shall at the same time endeavour to prove that the commerce of Britain, as well as the safety of the individual, are only to be upheld and secured by holding every shipowner, master, and seaman, responsible for such of his personal acts as may tend to jeopardise the one or the other.

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## SEA RISK.

THE extent to which carriers ought to be held accountable for the safety of property while in their possession, has always been a question of great importance and is now especially so, as the carrying trade has attained great proportions and is becoming daily more extensive. Still, much misconception seems to prevail as to how far carriers' liability in general extends; and much difference of opinion exists whether their responsibility should be increased or diminished; a misconception and difference of view exists, probably due to the fact, that the different conditions under which the various branches of the carrying trade are conducted, are not invariably distinguished: and, consequently, it is not always perceived, that what may be reasonable in one case, is not necessarily so in another.

Now, although the term "carrier" is a comprehensive one, and includes a number of persons differing widely as to the manner of conducting, and as to the extent of, their trade; yet (in this country at least) two classes of carriers practically divide this business between them, and therefore

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"liability questions" of any moment may be said to affect them only, and these carriers are shipowners and railway companies. Laying aside then the consideration of all other carriers, the several positions of these two classes will be examined, and in the following way.

An account will be given of the manner in which the Legislature has respectively acted towards shipowners, and railway companies, and a statement will be made showing what the laws regarding carriage by sea and carriage by rail actually are. The peculiar position occupied by shipowners will be shown, that it is different from that in which any other carrier is placed, and that for this reason they have obtained a certain amount of protection, and are not hindered from protecting themselves against claims for which they would be otherwise liable; and then, the reasonableness of this being admitted, it will fairly follow that a railway company, being authorised by law to own ships, should have the shipowners rights and immunities, and that it is unjust, and contrary to common sense to hold a railway company employing a shipowner and acting as an agent or shipbroker for the owner of the traffic, liable for the damage which may happen to it while in the hands of the shipowner, and for which the shipowner is not accountable.

Before proceeding, a distinction not always remembered must be pointed out, and that is the common law distinction between a "common" and a "private" carrier, the former being one whose professed or recognised occupation is that of a carrier, and who as such is bound to carry, and to carry safely, the property tendered to him. Loss caused by the act of God and the King's enemies only excepted. The latter is one who carries on an occasion if he pleases, and, consequently, on his own terms, his own gross negligence or fault excepted. But the common carrier, unless debarred by special legislation, is not precluded from giving a notice disclaiming liability, and, by so doing, placing himself in the position of a private, or special carrier for hire. Thus, a common carrier who, before he accepts goods from their owner, gives him a notice disclaiming liability in respect to them, which notice is not repudiated, becomes, in regard to these particular goods, a private carrier for hire. This difference is important, and it follows that, as a shipowner is a common carrier, he can avail himself of the special carrier's right, no statutory provision to the contrary existing.

From a comparatively remote period, the intimate connexion between the prosperity of the shipping trade and that of the country, has been recognised; nevertheless, until the early part of the last century, shipowners, as common carriers, were, in event of accident, liable without any limitation either to the shipper of goods or to any person suffering loss from some cause traceable to the shipowner. An Act was then passed which, after reciting the great consequence and importance of



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promoting the increase in the number of ships, and preventing discouragement to merchants interested in them, provided, that no shipowner should be liable for loss "by reason of any embezzlement by the master or mariners" of any merchandize put on board the vessel, "or for any damages or forfeiture done or incurred by the master or mariners" without the shipowner's privity of knowledge, further than the value of the ship, all her appurtenances, and the full amount of the freight to grow due for and during the voyage. The law remained unaltered until the year 1786, when by an Act the preamble of which gave similar reasons to those stated in the former Act, why a change in the law was required, and recited in addition that discouragement to persons from being interested in ships was likely to happen on account of the responsibility to which they are exposed, notwithstanding the "salutary intention" of the former Act. It was accordingly established that shipowners were not to be held liable for any loss by robbery of merchandize shipped on board their vessels, or for damages or forfeiture, provided such were done or incurred without the owner's connivance, further than the value of the ship, her appurtenances and freight. This Act provided that shipowners were not to be liable for damage done to goods by fire, nor for loss of gold, silver, jewels, &c., unless their value was declared at the time of shipment and additional freight paid. These Acts were amended by an Act passed in 1813, which limited a shipowner's liability for all loss or damage caused by any Act or neglect (the owner's excepted) to merchandize on board his ship, or to any other ship and its cargo, to the value of the ship causing the loss and her freight for the voyage. No further alteration took place until 1854, when, by the Merchant Shipping Act, the former Acts were repealed, and the shipowners total immunity from liability for damages arising from fire, or from robbery of valuables, the value not having been declared, was confirmed, and in event of liability for loss of life or personal injury to a person, or loss of or damage to merchandize carried in his ship, or loss of life, or personal injury to a person, or loss of or damage to merchandize carried in another ship, the damages incurred were not to exceed in amount the value of the ship in fault, provided, however, that in no case should the ship's value, when loss of life or personal injury occurred, be taken at less than £15 per registered ton. An amending Act was passed some years subsequently which fixes this liability at £15 per ton if loss of life or personal injury occurs either alone or together with loss of merchandize, and if loss of life does not occur, to a maximum of £8 per ton of the ship's registered tonnage, and this is the present state of the law. But the shipowner's right of receiving traffic for carriage on their own terms, and so freeing themselves from all liability in connexion with it, has not been in any way interfered with.

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Having thus stated how shipowners are circumstanced as to liability, the position of railway carriers will be considered. The first Act affecting them, although not passed with that intention, but now held to affect them in their capacity of common carriers, is that known as the Carriers' Act, which frees common carriers from liability for loss of packages containing gold, silver, or valuable articles above the value of £10, unless their value is declared at the time of delivery, and an additional freight paid. In case, however, the loss is proved to have arisen through the felonious act of the carriers' servants no protection is afforded, and the carrier is held liable.

Until the year 1854, railway companies appear to have been viewed in regard to liability, as any other land carrier. The Railway Companies Consolidation Act expressly stated that railway companies were not to be held liable to a greater extent than common carriers, but should be entitled to the benefit of every protection and privilege that the latter had. In the year above referred to the Railway and Canal Traffic Act was passed, and by the seventh section railway companies were made liable for any loss of, or injury done to, any traffic carried by them, and caused by the company's or their servants' neglect or default, and all notices and conditions given by the company to limit such liability were declared void. This section, however, allowed companies to make any other conditions as to forwarding of traffic that a court or judge before whom any question relating to such conditions may be decided should deem just and reasonable; it also confirmed the application of the Carriers' Act to railway companies; and further it declared that companies were not to be liable for damage done to live stock beyond a certain amount per head according to kind, unless the value was declared at the time of delivery, so as to allow an increased rate to be charged, and, lastly, it provided, that a special contract would not bind the party who delivered the goods unless it were signed by him.

Thus it appears that as regards their several liabilities a like course of legislation has not been adopted in dealing with the two chief classes of carriers—viz., shipowners and railway companies, or in other words liability as common carriers towards consignors of traffic, and liability as individuals towards individuals injured is not the same in the case of shipowners as it is in the case of railways. For the reason already stated, as well as for others to be given hereafter, all the statutes passed in reference to shipowners have either exempted them altogether as common carriers from liability for loss or injury to traffic carried in ships, or have fixed an aggregate amount of damages to be recoverable when liability attaches, but whilst conferring these advantages in exemption from and limitation of liability, the statutes have in no way interfered with the common law rights of shipowners of becoming special carriers,

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and so freeing themselves from liability of every kind, excepting that arising from damage caused by their own personal act. On the other hand, railway companies, as common carriers, if the very equivocal relief afforded by the Carriers' Act be excepted, have not only obtained no such exemption or limitation, but also have been specially deprived of the unrestricted right of becoming special carriers by notice, and so limiting their liability; while as to loss or injury caused by shipowners in carrying on their trade, to some person other than a consignor of traffic—as, for example, when one ship damages another—they can, in no case, be obliged to pay more than a stated amount. It need hardly be said no such interference has ever been exercised in regard to a railway company, who, if they injure another company, or person, are liable in damages without any statutable limitation.

Now, if the principles on which these various statutes have been enacted are considered, the reasonableness of affording protection to shipowners will be readily admitted. For, although the proximate object of the immunities granted to shipowners was to benefit them and make their trade profitable, the ulterior and main object was to benefit the whole community, by inducing persons to undertake a hazardous trade, without which commerce would cease altogether (for it cannot be called commerce where members of a State supply their own wants, and neither receive or give to foreign countries, a position in which islanders must necessarily be, unless they possess the means of water-carriage); and just as the workers in any dangerous employment receive higher pay than those whose occupation is otherwise, so as carrying by water involves greater risk than carrying by land, the position of shipowners must be equalized with that of land carriers by giving the former some special protection, without which solvent people would hesitate to become shipowners at all, for the dangers to be encountered at sea are very great and such as cannot with certainty be guarded against, and while on this account the probability of loss is greater than can ever be the case during a land transit, the quantity of property endangered is also much greater, so that were shipowners made liable for the results of disasters at sea their losses would be far heavier than those resulting from accidents on land. Shipowners, moreover, are at a disadvantage in being unable to exercise constant supervision over their ships and servants, for although they may send the former to sea in perfect order and exercise the greatest care in the selection of the latter, so soon as the voyage commences there is no further opportunity for supervision, and whatever loss or damage may arise is out of the shipowner's power to prevent; lastly, shipowners are free traders, trading without interfering in the slightest degree with the person or property of any, and as every one may own ships without limit as to number and carry goods at any freight, it is

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clear that a shipowner may have to contend, and in the majority of cases does contend, with numerous competitors.

Exercising then this right which they undoubtedly possess, as recent decisions prove, of receiving traffic on their own terms, shipowners commonly embody in their bills of lading conditions freeing themselves from liability in relation to the goods named in such bills. Among these conditions are exemptions not only against liability for loss caused by the mistakes in navigation or negligence of the master and crew, but against that caused by their criminal negligence—viz., barratry.

While these rights of the shipowner cannot be denied, some persons may be disposed to contend that shipowners ought to be liable unconditionally for losses at sea, such persons arguing that it is plainly unjust for senders of traffic to lose their property and have no remedy against the shipowners in whose charge it had been placed. This objection is unsound and could not be made when it is once clearly seen that carrying involves two things—trouble, and risk, and that payment for the former does not necessarily involve payment for the latter, and one may be undertaken, the other not. To quote a recent work on the subject, "Insurance may be a trade just as carrying is, and these two trades may be conjoined or combined either by the will of the individual or by the force of the common law. When by the force of the common law these two trades are necessarily associated, the carrier has evidently a perfect right to his remuneration for both, he is entitled to be paid for carrying the goods which cannot be done without time, trouble and expense, and he is entitled to ask an amount which will enable him to make good the losses of his customers' goods, when any such loss occurs."

Now we have seen that these trades are not necessarily associated in shipowners by the force of the common law, although sometimes they are by choice, as some shipowners offer to effect insurance on the goods carried if an extra payment beyond the freight is made for the risk ; consequently, a consignor who has paid only the freight for the carriage of his goods by sea has paid for nothing more than for the trouble their carriage will involve, and nothing whatever in consideration of the risk ; if then he allows these goods to encounter the risks of the sea without covering them by a policy of insurance, he voluntarily takes these risks on himself in order to save the payment of the premium, whether wisely or not, he himself decides, and having decided he has no more reason or right to complain, if the goods are damaged or lost, than the insurance office when called to pay the value of the goods insured. In reality persons who say that shipowners should be liable unconditionally would claim something for which they did not contract, and having paid the shipowner for carriage only would seek to make him liable for risk which he was not paid to undertake. If a person is thought imprudent who

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neglects to insure his house and property against fire—the only contingency likely to occur on shore involving total or extensive loss, similar, to the many likely to arise at sea—how much more imprudent ought he to be thought if he exposes property to these latter contingencies without a similar precaution.

The several positions of shipowners and railway companies, in respect to liability having been explained, and an attempt having been made to show that the reasons why the law is not alike in its operation, are reasons not merely founded on a desire of giving one branch of the carrying trade an advantage over another, in order to encourage that branch, but as depending, in reality, on the nature of the circumstances under which carriage by sea and carriage by rail are respectively conducted. The position of railway companies, in relation to sea transit, will now be discussed; first, when they send in ships which they are authorised by special Acts to own and use; and, secondly, when not having such powers, they send traffic in ships belonging to independent shipowners.

While reasons have been assigned to prove the justice of protecting shipowners from certain claims, and of not preventing them from protecting themselves against claims made by shippers, no opinion has been expressed as to whether it is reasonable or otherwise; when, on the other hand, no limitation of liability has practically ever been granted to railway companies to hinder them from receiving traffic on their own terms, as to the land transit. The law is so, and there seems no probability of its being altered; but the reasonableness of the position of shipowners being admitted, there is no sufficient reason why, if railway companies receive powers from Parliament to own ships, they should not be allowed to do so on the same terms as other shipowners? Such companies being in the same position as to the sea transit, as any other shipowner, all the reasons why a shipowner is protected, and is allowed to protect himself, apply with equal force to railway companies in their shipowning capacity, so that, even were it contended that on account of an Act which extends the application of the Railway and Canal Traffic Act, 1854, to steamboats belonging to railway companies, and traffic conveyed on them, the conditions under which the traffic is carried by sea, must, as those under which it is carried by land, be proved to be just and reasonable, to the satisfaction of the Judge before whom any question arising out of such conditions shall be tried. They should, undoubtedly, be held so, because the mere circumstance that such shipowners are also a railway company, neither places them in a different position in regard to the sea and its risks from that of an ordinary shipowner, nor prevents the consignor or shipper from protecting himself against loss, by insuring his goods, as was shown he can, and ought to do, in the former instance. This opinion is supported by a recent case, where it

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was held that whatever protection the Merchant Shipping Act, as to limitation of liability afford a shipowner, it gives a similar protection to railway companies, in regard to ships owned by them. In a word, the permission to a railway company to become shipowners, certainly gives them concurrently all a shipowner's rights and privileges.

Hard as it would be to debar railway companies, who own ships, from securing themselves from loss, as other shipowners do, it would be infinitely harder to hold a railway company, not owning ships, liable for damage occurring on the sea part of the transit, a part over which the railway company have no control whatever, they, like any shipper requiring sea carriage, employing a shipowner to convey the traffic across the sea, and thus being in the same position regarding him, whether in his capacity as a common or special carrier, as any of his employers are, and consequently unable to hold him responsible for loss or damage happening to the traffic while in his keeping.

The service rendered to the public by railway companies in providing transit across the sea for traffic, is usually done by through booking, or, in other words, when traffic to reach its destination must pass through the hands of more than one carrier, the sender contracting only with the carrier at the point of starting—a system which of late years has become general. This traffic is conveyed with a minimum of inconvenience, a single payment covering all charges, which payment is then divided among the respective carriers. It might be naturally supposed, by a person hearing for the first time of such an arrangement, that a higher freight would be charged in consideration of the convenience thus enjoyed by senders, and the extra trouble thus devolving on the carriers, but such is not the case, for the invariable rule in through booking arrangements is to charge less than the sum of the local rates for the several parts of the entire distance.

It would appear, then, unreasonable to consider a railway company, who being bound only to send traffic to a seaport station, in addition undertakes to send it across the sea, so taking extra trouble and receiving less remuneration than had the freight to the seaport only been paid, liable for what may occur on the sea-passage—in other words, that they should be debarred from giving to consignors of goods sending at through rates a binding notice disclaiming liability for damage or loss happening on the voyage, similar to that which shipowners give their own consignors. However one-sided as to most reasonable minds such a view must seem, it is an opinion held by some who contend that certain sections contained in recent Acts of Parliament have this effect; railway companies, at the instance of some of whom these sections were inserted, holding, it need hardly be said, a directly contrary view. Which opinion is correct, or will be held to be law when

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a case bearing on this question is decided, will not here be considered. But independently of what the strict legal construction of some words in these Acts will be, any one admitting the fairness of the immunity that shipowners can have from liability for damages, or loss arising from various causes, in particular from the mistake or negligence of servants, must admit that there is even more reason why a railway company, having nothing to do with the conduct of the sea transit, should be free from all liability in connection with it, or at least be free to protect themselves by noticė against all such liability; most just is it that those who render more service and receive less remuneration should do so on their own terms, and in particular be allowed to protect themselves from claims, the causes of which arise through the negligence of the servants of others.

All the reasons given in favour of a shipowner protecting himself against loss arising from any causes, inclusive of his servants' acts, apply with greater force in favour of a railway company booking traffic at through rates to be sent by sea, for everything is beyond their control so soon as the traffic is put on board the vessel; and this cause referred to, which somedeclare railway companies can in no case protect themselves against, is that by which accidents at sea and consequent damages most frequently arise—viz., the alleged negligence or mistake of the master or other servants of the shipowner.

Now, it is obviously unjust and unreasonable to hold one individual responsible for the acts of the servants of another, who is not himself responsible; for the reason why a man is held liable for injury arising from the acts of his servants is, "because he has chosen those servants, and if he has chosen those who are untrustworthy, while he held himself out to the public, by the fact of his business and employment as capable of choosing those that were trustworthy, he must suffer for it." Admitting, as most people will, the truth of this, it follows that it is unjust to make a railway company liable for the acts of a shipowner's servants over whom they exercise no authority or supervision whatever. Many persons, however, cannot see the injustice of this opinion, and bring forward, as an analogous case, that when a railway books through by land only, and a loss occurs on the part of the transit when the goods are in the hands of another company, the company receiving the goods must make good the loss to the consignor. The answer to this is, that the company not in fault has a remedy against the company that is, and can compel them to pay the amount claimed; while if the loss takes place on a voyage, the railway company has, as we have seen, no remedy against the owner of the vessel.

Briefly then, shipowners' exceptional position as carriers being granted, the reasonableness of the freedom from liability necessarily follows—

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