section to be construed, is a fighting unit o the fleet, a ship commissioned and armed for the purposes of offensive action in a naval engagement." Evidently this proposition is open to several objections. It makes the rights of His Majesty's forces depend on the purpose with which his enemies may have dispatched their vessel, on what either way is a warlike service.

It employs a term—"offensive action"—which in practice is of indefinite meaning, and in any case involves an inquiry into the state of mind of the hostile commander. Sir Samuel Evans elucidated his meaning thus in another passage—"In my opinion, if it were proved that she carried a few light guns, that would not constitute her an armed ship any more than a merchant vessel armed for self-defence; nor would the fact that she carried troops armed with rifles and some field guns and other ammunition intended to be used after the landing of the troops."

Their Lordships are unable to accept those propositions. Of the case of a merchant ship they say nothing, for this is a question on the meaning of the words "ship of the enemy," and the appellants did not contend, nor needed they to do so, that any ship but one in State service would be covered by those words. There is again no evidence that the rifles and field-pieces were not intended to be used at sea under any circumstances, little as any occasion for their use was to be looked for, and it must be recollected that defence is not confined to taking to one's heels or even to returning a blow, but in the jargon of strategy may consist of an offensive-defensive, or in plain words in hitting first. No criteria would more embarrass the application of the enactment than these, and to introduce the test of the ship's commission is to introduce something which involves a re-writing of the section. Their Lordships are of opinion that the words of the section are plain, and that the facts fit them, and accordingly the appellants are entitled to succeed; that the decree appealed against should be set aside and that this appeal should be allowed with costs, and that the case should be remitted to the Prize Court to make such formal decree in favour of the appellants as may be required. Their Lordships will humbly advise His Majesty accordingly.

Appeal sustained.

Counsel for the Appellants — Sir G. Richards, K.C. — Langton. Agents — Botterell & Roche, Solicitors.

Counsel for the Crown—Sir G. Hewart, Att.-Gen. — Pease. Agent — Treasury Solicitor.

## HOUSE OF LORDS.

*Monday, December* 8, 1919.

(Before the Lord Chancellor (Birkenhead), Lords Haldane, Dunedin, Atkinson, and Buckmaster.)

### NORTH STAFFORDSHIRE RAILWAY COMPANY *v.* EDGE.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

*Railway Traffic — Rates — Increase — Differential Charge—Railways Clauses Consolidation Act* 1845 (8 *and* 9 *Vict. cap.* 20), *sec.* 90 — *Procedure — Amendment of Record.*

In 1913 the appellants intimated an increase in the rates applicable to carriage of coal. The respondent disputed the legality of the increase. In 1914 the North Staffordshire Colliery Owners' Association applied to the Railway and Canal Commissioners to have the increase disallowed. A compromise (to which the respondent was not a party) was arrived at under which the appellants agreed to a smaller increase. The appellants sued the respondent for the full increased rates from July 1913 to December 1915. *Held* that to charge the respondent a higher rate than that fixed by the agreement with the association was in breach of section 90 of the Railways Clauses Act 1845, and that the appellants was only entitled to recover from the respondent the rates charged the association. *Further*, that it was incompetent at this stage to introduce a new plea on which the respondent might have led evidence at the trial, *i.e.*, that section 90 did not apply to "through rates."

Decision of the Court of Appeal, 1918, 1 K.B. 367, *affirmed.*

Appeal by the Railway Company, the plaintiffs in the action, from an order of the Court of Appeal affirming a judgment of ROWLATT, J.

The question turned upon what, having regard to the circumstances under which it was made, and the provisions of section 90 of the Railways Clauses Consolidation Act 1845, was the true effect of an agreement made on the 11th February 1916 between the appellants and the North Staffordshire Colliery Owners' Association, acting on behalf of a number of colliery companies and traders.

The respondent, who was a coal factor carrying on business at Manchester, had for many years employed the appellants to carry coal and coke for him from the North Staffordshire coalfields to various destinations in England and Wales. In May 1913 the appellants gave notice to the respondent of their intention to increase the rates for coal and coke carried to places beyond the North Staffordshire Railway—that is, where the termini of the journey were on different railways — as from the 1st July. The respondent disputed the validity of the

increase, and from the 1st July 1913 to the 31st December 1915 he deducted from the monthly accounts delivered to him by the appellants the amount of the increase. In 1914 the North Staffordshire Colliery Owners' Association took proceedings before the Railway and Canal Commission impeaching the validity of the increased rates, but ultimately these proceedings were compromised on the terms of an agreement of the 11th February 1916, whereby the association agreed to pay as from the 1st January 1916 on all coal and coke sent from their collieries to places beyond the appellants' railway (1) a rate of ½d. per ton above the original rate, and (2) for traffic from the 1st July 1913 to the 1st January 1916 a rate of ⅛d. per ton above the original rate for such carriage.

The rates under the agreement were lower than the increased or new rates which the appellants had sought to impose, but were higher than the old rates in force when the notice was served on the respondent in May 1913.

The Railways Clauses Consolidation Act 1845 provides by section 90 that it shall be lawful for a railway company, "subject to the provisions and limitations herein and in the Special Act contained, from time to time to alter or vary the tolls by the Special Act authorised to be taken either upon the whole or any particular portions of the railway as they shall think fit: Provided that all such tolls be at all times charged equally to all persons and after the same rate, whether per ton, per mile, or otherwise. . . ."

ROWLATT, J., held that the Railway Company were not entitled to charge the respondent more than ½d. per ton over the original rate in respect of the period from the 1st July 1913 to the 1st January 1916, as any charge above that sum would not be charged equally to all persons, and would therefore be contrary to section 90 of the Act of 1845. He therefore held that the company could only recover from the respondent for the period between the 1st July 1913 and the 31st December 1915 the difference between the old rate and the rate provided for by the compromise agreement of February 1916, and dismissed the claim of the company so far as they sought to impose the excess of the new rate upon the respondent. The Court of Appeal (BANKES, WARRINGTON, and SCRUTTON, L.JJ.) affirmed that judgment.

The Railway Company appealed.

After consideration their Lordships gave judgment, dismissing the appeal.

LORD CHANCELLOR (BIRKENHEAD)—This is an appeal from an order dated the 9th December 1918 of the Court of Appeal affirming the judgment dated the 25th July 1918 of Rowlatt, J.

The principal question which requires decision is whether the appellants are entitled to recover from the respondent certain sums representing increases of rates on traffic consigned by him to the appellants between the 1st July 1913 and the end of 1915. The contention for the respondent upon this part of the case is that the appellants on the 11th February 1916 entered into an agreement with certain traders in compromise of an application by them to the Railway Commissioners. It is urged that the effect of the agreement was that the appellants charged the companies for whose benefit the agreement was made a lower rate than they charged to the respondent. Such an agreement, it was contended, and the practice giving effect to it, involved an infringement of the provisions of section 90 of the Railways Clauses Act 1845. It was in the second place contended by the appellants that section 90 had no application to the case of through rates, and that the rates under consideration in this matter were in fact through rates. To this it is replied by the respondent, first, that the section did apply, and had been treated by this House as applying, to such rates. Secondly, that in any case this contention is not open to the appellants, on the grounds that it was not put forward before the trial Judge, that it was not raised in the pleadings, and that it is not included, or only very obscurely included, in the appellants' reasons summarising their contentions before your Lordships.

I deal with these points in order. Section 90 of the Railways Clauses Consolidation Act 1845 is as follows:- "And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties, it shall be lawful therefore for the company, subject to the provisions and limitations herein and in the Special Act contained, from time to time to alter or vary the tolls by the Act authorised to be taken, either upon the whole or upon any particular portions of the railway as they think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

The effect of the agreement already referred to, of the 11th February 1916, was, that the traders should after the 1st January 1917 pay an increased rate of one-halfpenny per ton on all coal sent from their collieries to places situated beyond the North Staffordshire Railway, and that for traffic from July 1913 to 1st January 1916 they should pay an increase of one-eight of a penny per ton on all coal despatched carriage paid by them to all places beyond the North Staffordshire Railway. Both the halfpenny and the eighth of a penny were less than the increase in the rates claimed.

The only question that calls for decision under this part of the case is whether the respondent is being required to pay a higher price for the services rendered to him by the Railway Company than the price which under the agreement is required from other traders. It is sufficient for me to say that in my opinion it is impossible so to construe the agreement which I have summarised as to answer this question negatively. It is the policy of Parliament that traders as a matter of indispensable right shall receive equal treatment. This agreement effects a differentiation to the prejudice of the defendant and it cannot be supported. It was argued that the agreement was a general compromise covering a number of matters, only one of which is a reduction of rate, and that therefore the familiar doctrine does not apply. To give effect to this contention would be to hold that every railway company could evade section 90 by entering into omnibus agreements with favoured traders, including in one of their clauses a rate preference.

I address myself now to the second contention, namely, that section 90 has no application to through rates. But I have only to say in this branch of the argument that I do not attempt to reach a decision upon it. Counsel for the respondent has argued that the case of *Evershed* v. *London and North-Western Railway*, 3 A.C. 1029, shows by *a fortiori* reasoning that the appellants' contention under this head is ill founded. I express no opinion upon this submission, because I have formed the clear view that having regard to the history of this litigation your Lordships ought not to treat the contention as one which is open to the appellants. It is admitted that it was not put forward in the original pleadings. It is admitted that no such argument was advanced before the trial Judge. An attempt indeed was made to present the argument to the Court of Appeal, but that tribunal refused, and in my opinion rightly refused, to be influenced by an attempt so belated. I share their view for many reasons, to some of which I attempted to give expression in *Wilson and Another* v. *United Counties Bank* (1920 A.C. 102). An attempt was made in the argument to distinguish the doctrines there laid down from those which it was said ought to govern the present case, on the ground that the issue here was a simple point of law of such a kind that the respondent could sustain no possible prejudice by the postponement of its discussion to the appellate stage. It is sufficient to say in reply to this contention that there are very few cases of which it can be confidently stated that a failure to raise a relevant contention at the appropriate stage will not prejudice the other litigant. It is, for instance, argued in this case that a proper order for costs would compensate the respondent for the expenses of the litigation unnecessarily incurred on the hypothesis that, being informed at first instance of the true contention, he might have been advised to abandon his claim. I do not think it necessary to point out that this suggestion may possibly in another case require qualification or consideration, having regard to the incompleteness of the indemnity notoriously furnished by our present system of costs, because in the present case counsel for the appellants satisfied me that there was reasonable ground for supposing that he might have been able to strengthen his case upon this branch of it by calling parole evidence. But I desire to draw attention to a consideration which in my view is both more general and more important. The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issue of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the Courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the Judges in the Courts below. Decisions of this House have laid it down that in very exceptional cases, and in spite of the considerations above referred to, new matters may be considered in this House — see *per* Lord Halsbury in *Sutherland* v. *Thompson*, 1906 A.C. 51, and *per* Lord Watson in *Connecticut Fire Insurance* v. *Kavenagh*, 1892 A.C. 480. I have carefully examined the cases upon the subject which have been decided in this House, and my examination of them has led me more and more to the conclusion that such attempts must be vigilantly examined and seldom indulged.

For these reasons I move your Lordships that the appeal be dismissed with costs.

LORD HALDANE—I concur in the conclusions reached by your Lordship on the Woolsack.

LORD DUNEDIN—On the point which forms the judgment of the learned Judges of the Court of Appeal I agree with them and have nothing to add.

The outcome of the compromise was practically the fixing of a rate, and that rate the respondent had a right to compare with the rate charged to him for carriage between the same points under the same circumstances.

Before your Lordships' House, however, the appellants wished to raise another and a formidable point, namely, that section 90 did not apply to through rates, that is, the rate when the termini of the journey are on different railways. It was objected on the part of the respondent that the point had not been taken in the Court of first instance, and had been rejected by the Court of Appeal on that ground. This raises what in my opinion is a very important question as to which there ought to be a settled rule of practice.

I personally think it is much to be regretted that the modern forms of pleading in England do not afford that clear statement of the grounds of fact and the propositions in law on which the respective parties rely which was afforded by the older methods and which is to-day secured by the forms of pleadings in Scotland.

That view, however, may seem to your Lordships to be a stranger's criticism, as the reform, if any, must come from those who make rules of Court and cannot be introduced by means of a judgment of this House. In this case the point is not taken in the pleadings. We are also informed that it was not put forward in argument in the Court of first instance, but in the Court of Appeal it was mooted, and as already stated rejected, as not having been taken in the Court below. I do not think that I am entitled to say that what the Court of Appeal did was wrong, but I confess I have doubts as to whether it was expedient. May I be allowed to say that in such a matter I am not without practical experience. During the nine years I sat as President in the First Division of the Court of Session such a case happened more than once. Now it is true that the situation is in Scotland expressly dealt with by statute. By the 29th section of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) it is provided (omitting unnecessary words)—"The Court or the Lord Ordinary" (that is, in other language, the Court of Appeal or the judge of first instance) "may at any time amend any error or defect in the record" (and an omitted plea-in-law is an error in the record) "upon such terms as to expenses or otherwise as to" them "shall seem proper, and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made."

That law is not binding on an English Appeal Court. It represents in my humble judgment the better rule. Yet as matters stand it must be a question for the discretion of the Court, and viewing it as that I should consider it one not for me sitting here to interfere in.

When, however, the case comes to this House I think the matter is different. If the omission be a mere omission to state and argue a legal proposition which requires for its discussion no underlying hypothesis of facts other than those which have been admitted or proved in the Courts below, I should hold that your Lordships should not turn a deaf ear to such argument even at the eleventh hour. But if the proposition is such that a variation in the admitted or proved facts or any addition to them would affect the argument, then I think it is too late and that your Lordships should not allow the argument to be put forward.

That is, I think, the position here. Mr Talbot says that had he been given notice of the point he would have been in a position to prove that the increased rate, as it was, was entirely on the North Staffordshire bit of the line. Whether that is the case or not I do not know. Neither do I necessarily say that it would alter the result, but it is obviously something which would give rise to a very stateable argument. By the default of the appellants the facts on which that argument is founded are not, and cannot at this stage be, before us. In very exceptional cases it might be that we should remit the case or even take evidence ourselves. I have no doubt that we have the power. But in a case like this, where the stake is comparatively small, where the same state of facts is not at all likely to recur so as to govern future cases, and where the omission to plead was quite the fault of the Railway Company, if they wished to raise the point, I think any remit is out of the question.

I am therefore in accordance with your Lordships that the point ought not to be allowed to be raised here.

I reserve my opinion on the merits of the point if it should ever be necessary to decide it.

LORD ATKINSON—I too concur with the judgment of the Court of Appeal on the points raised before it other than the new point.

The rules which should guide your Lordships in the exercise of your discretion as to permitting parties to raise upon appeals to this House points not raised on the tribunal appealed from, or not raised even in the Court of first instance where evidence was taken and issue of fact decided, are I think well established.

In the case of *The "Tasmania,"* 15 A.C. 225, Lord Herschell in clear words enunciated the rule. That was a case of a collision between two vessels named respectively *The "City of Corinth"* and *The "Tasmania."* The learned Judge who tried the case found that *The "City of Corinth"* was alone to blame for improperly starboarding and so bringing herself across the course of *The "Tasmania"* instead of getting out of her way. The Court of Appeal took the same view, and it was not contended in this House that this finding could be disturbed. In the Court of Appeal for the first time the point was raised that *The "Tasmania"* was also to blame, inasmuch as upon the evidence she had kept her course too long, and ought to have put her helm down and come into the wind earlier than she in fact did.

Lord Herschell said—"I think that a point such as this, not taken at the trial and presented for the first time in this Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is generally governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them. It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground then put forward for the first time if it be satisfied beyond a doubt, first, that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had been raised at the trial, and next, that no satisfactory explanation could have been offered

by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness-box."

In the present case it seems to me impossible to say either that the House has before it all the facts bearing on the new contention as completely as would have been the case had it been raised at the trial, and next that no satisfactory explanation could have been offered by those whose conduct was impeached (the Railway Company in this case) if an opportunity had been offered to them for explanation.

On the other hand it must be remembered that by the 4th section of the Appellate Jurisdiction Act of 1876 it is enacted that this House is to determine when an appeal is taken from the Court of Appeal "what of right and according to the law and custom of this realm ought to be done in the subject-matter of the appeal." In *Connecticut Fire Insurance* v. *Kavenagh* (1892 A.C. 473, at p. 480) Lord Watson said—"When a question of law is raised for the first time in a court of the last resort upon the construction of a document or upon the facts admitted or proved beyond controversy, it is not only competent but expedient in the interest of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than that of the courts below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would support the plea."

In *Sutherland* v. *Thompson* (1906 A.C. 51) Lord Halsbury, in delivering a judgment concurred in by Lords Macnaghten, Robertson, and Lindley, said (p. 55)—"I should have felt more difficulty about the other point if it had been raised in the Court below. I do not in the least mean to say that it is an absolute objection against a good point, if it is a good point, to say that it was not raised in the Court below, because the House ought to make such an order as ought to have been made originally. But the peculiarity of this case is that this is a question which could only have been settled by proof, and we are asked to overrule the Court of Session by a suggestion on which, if it was well founded, the Court might have been asked to reverse the proceedings before the Lord Ordinary and to order a proof. It is not merely a question of a point which is a good point, and remains a good point, not being argued, but here something has to be done. If the objection was a good one, what the parties complaining ought to have done was to have put it before the Court of Session, and asked the Court to do that which ought to have been done by the Lord Ordinary, namely, to allow a proof."

It is, no doubt, desirable that in every case coming on appeal before your Lordships you should enjoy the great advantage of having before you the decision of the Court of Appeal upon all the points raised upon the appeal to this House. But it by no means follows that parties should never be permitted in any case to raise and have decided here questions which were not raised in the Court of Appeal, nor even in the court of first instance, though this House should thereby lose the advantage of having before it the decisions of both these tribunals on the new point. This House cannot on this ground escape, in my view, from the duty (to use Lord Halsbury's words) "of making such an order as ought to have been made originally." In the present case the new point raised by the appellants is that section 90 does not apply to through rates, and that the increased rate charged in the present case was in fact charged in respect of the haulage of respondent's goods over lines other than and in addition to the lines of the appellant company. Otherwise it would not be a through rate at all. Mr Talbot, however, alleges that if he had had notice of this point he could have shown on grounds that he indicates that the increased charge is made in respect of the transit over the Staffordshire line, and that line alone. If that be so, the point is a bad point. Its goodness or badness depends accordingly on a controverted issue of fact, which the Railway Company have failed to raise at the trial or have determined upon evidence.

I think the case is completely covered by the authorities I have cited, and that the appellants ought not to be permitted to raise this new point now.

I think the appeal should be dismissed.

LORD BUCKMASTER—With the opinion expressed by your Lordships on the merits of this case I am in entire agreement. Upon the question as to whether the appellants should be permitted to raise here a contention not raised in the Court of first instance I find myself most closely in agreement with the view stated by Lord Atkinson. Such a question is not to be determined by mere consideration of the conveniences of this House, but by the consideration whether it is possible to be assured that full justice can be done between the parties by permitting a new point of controversy to be discussed.

If there be further matters of fact that could possibly and properly influence the judgment of a court, and one party has omitted to take steps to place such matter before the court, because the defined issues did not render it material there, leave to raise a new issue at a later stage ought to be refused, and this is settled practice. Subject to this it would not be wise in my opinion to fetter and restrain by fixed rules the discretion which the House has in this matter—a discretion which it would always be anxious to exercise so as to avoid injustice being done.

Appeal dismissed.

Counsel for the Appellants—Sir J. Simon, K.C.—Macmorran, K.C.—Vernon. Agent—Burchells, Solicitors.

Counsel for the Respondent—Talbot, K.C.—Miller, K.C. Agents—Parker, Garett, & Company—Alex. Wilson & Cowie, Liverpool, Solicitors.