The costs of the second appeal will abide and follow the result, and be provided for in the revised decree.

NOTES.

[CIVIL PROCEDURE—Sec. 331—LIMIT OF ENQUIRY.

I. Enquiry under Sec. 331 of the Civil Procedure Code (1882) is not limited to questions of mere possession. Questions as to title also have in some cases to be determined :—

(1) When in an enquiry under Sec. 331 the person obstructing to possession being given to decree-holders, was setting up adverse title to the Judgment-debtors, the question regarding title must necessarily be decided :—(1890) 14 Bom. 627; (1905) 27 All. 453; (1901) 25 Bom. 478, where possession was with the tenants whose landlord was obstructing to possession being given to the decree-holder.

(2) When possession is shown to be with the plaintiff in an enquiry under Section 331, defendants must show title in themselves and they cannot be allowed to set up *jus tertii*.

II. EXCEPTION.

But no question requiring the decree to be re-opened can be raised.

So in a case where a tenant was obstructing possession as against the decree-holder, the only question to be decided is on whose behalf is the tenant holding possession :—(1903) 27 Bom. 302.]

[3 Mad. 107.]

APPELLATE CIVIL.

The 15th February, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE INNES.

The British India Steam Navigation Company, Limited...........(Defendants) Appellants.

versus

Hajee Mahomed Esack and Company...........(Plaintiffs) Respondents.*

Bill of lading—Claim for short delivery to be made at a certain place within a month—Reasonable condition—Limitation Act, Sch. II, Cls. 30, 49, 63, 115—Common carrier, duration of liability of—Indian Carriers' Act III of 1865.

A stipulation by persons carrying on extensive business as carriers that they should be appraised of claims made on them for default on the part of their servants at a specified place and no other and within a time which will render inquiry likely to be attended with some result is not unreasonable.

The defendants were owners of a fleet of steamships plying periodically along the coasts of British India, by which they undertook to convey for freight parcels of goods for all persons indifferently from and to specified ports. They stipulated in their bills of lading that claims for short delivery should be made at the port of Calcutta only, and within one month after delivery of any portion of the goods entered in the bill of lading.

Held, in a suit against defendants for compensation for value of goods short delivered, that this was not an unreasonable stipulation, and that a claim made on agents of the

* Appeal No. 40 of 1880 from the Original Side, in C. S. 375 of 1879.

defendants, who were authorized only to retain the goods, receive freight, and give delivery, was not a sufficient compliance with the condition.

Held also, that defendants were common carriers, though not for the purposes of the Indian Carriers' Act, and that their character of carriers continued so long as the goods remained in their hands and undelivered.

Held also, that cl. 30,* Sch. II of the Limitation Act would apply to the defendants; but that as this suit was for breaches of the contracts to deliver, it was governed by cl. 115.†

[108] *Semble:* Clause 30, Sch. II of the Limitation Act applies to suits for compensation for loss or damage to goods arising from malfeasance, misfeasance, or non-feasance independent of contract.

IN this case the plaintiffs claimed 6,304 rupees compensation for value of goods short delivered.

The goods were shipped in different vessels of the defendant Company between October 1876 and March 1878 at *Calcutta* to be delivered at the port of *Madras*. The suit was brought on 31st October 1879.

The defendants pleaded (1) that by the terms of the bills of lading the claims should have been made within one month after the delivery of any portion of the goods entered in the bill of lading, and no claim was made till the end of 1878; (2) (in answer to an allegation that defendants' agents at *Madras* entered into an arrangement for the landing and delivery to the plaintiffs of the goods consigned within a reasonable time in consideration of plaintiffs' paying charges for boat hire, &c., to such persons as defendants' agents should appoint, and that the said charges had been duly paid) that no such arrangement had been made, but that under the bills of lading defendants were entitled to land the goods direct at the consignees' risk and expense, and that this right was exercised by them, and that they employed *P. Ramanjulu Naidu*, a ship dubash, to land the cargo of the various steamers.

The case was tried on 20th September 1880 by KERNAN, J.

Mr. *Handley* and Mr. *Gould* for the Plaintiffs.

The Advocate-General (Hon. *P. O'Sullivan) and Mr. Johnstone* or Defendants.

The Court found that no agreement, as alleged by the plaintiffs, had been made to land and deliver the goods; that there had been short delivery; and

* [Cl. 30 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
Against a carrier for compensation for losing or injuring goods.	Two years ...	When the loss or injury occurs.]

† [Cl. 115 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	Three years ...	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.]

that plaintiffs were entitled to Rupees 3,095 compensation. As to the questions (1) whether the condition in the bills of lading had been complied with and (2) whether the suit was barred by *Limitation* (not pleaded in the written statement), the Judgment of the Court was as follows :—

"The *Advocate-General* for the defendants contended—

"1. That no claim was made within the time specified in the bills of lading, and that no action could be therefore maintained.

[109] "He waived the necessity of making the claim at *Calcutta*, but contended that a claim from *Ramanjulu and Sons* was not enough, but that the claim should be made on *Binny and Co.* He urged truly that the claim was stale.

"On this point my view is that the claim on *Ramanjulu and Sons*, made, upon the evidence, from day to day was sufficient, as the term of claim being made at *Calcutta* had been waived.

"2. The *Advocate-General* contended that suit was barred by *Limitation* cl. 30, Sch. II, Act XV of 1877, as to all, except a claim in respect of dholl, which was within time in February or March 1878.

"On this point my opinion is that the suit is not one against the defendant as carriers within the meaning of Article 30. It is a suit on the contract contained in the bills of lading, under which the defendants exercised their option to land the goods, the possession of which they claim by their written statement to hold for lien, and under which they were bound to deliver the goods on being paid their lien. Art. 63* or 115.‡

"Or it may be treated as a suit for detaining specific moveable property. Art. 49."

Defendants appealed.

The Advocate-General (Hon. *P. O'Sullivan*) and Mr. *Johnstone* for the Appellants.

Mr. *Handley* for the Respondents.

The Court (TURNER, C.J., and INNES, J.) delivered the following

Judgment: The appellants are the owners of a fleet of steamships, plying periodically along the coasts of *British India*, by which they undertake to convey for freight parcels of goods, for all persons indifferently from and to specified ports. In 1876-77 the respondents made several shipments of goods in the steamers of the appellants, to be carried from *Calcutta* to the port of *Madras* and to be there delivered. It was a Condition of the bills of lading that the Company should have the option through its agents or commanders of "landing goods direct at the consignees' risk and expense." It was also a condition of the bills of lading that any claim for short delivery of goods should be made at the port of *Calcutta* and at no other port, and that no claim for

* [Art 63 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For money payable for interest upon money due from the defendant to the plaintiff.	Three years ...	When the interest becomes due.]

‡ [Art. 115 :—*q. v. supra* 3 Mad. 77.]

short delivery would be entertained unless made within one month after the [110] delivery of any portion of the goods entered in the bills of lading respectively.

The respondents complained that these contracts had been broken by the failure of the appellants to make full delivery of the goods received by them and they sued to recover the value.

The appellants pleaded that the suit was barred by *Limitation*, that no demand had been made at the port of *Calcutta* nor within the period stipulated, and that they had performed the several contracts by making complete delivery of the goods.

The suit was brought on the 31st October 1879, and with the exception of a shipment made in February or March 1878, it is admitted that the other contracts were made and should have been performed more than two years before suit.

It is also admitted the defendants exercised their election and employed a firm, *Ramanjulu and Sons*, to land and deliver goods to the plaintiffs and other consignees.

It is contended that the suit falls under Clause 30 of the *Limitation Act* in that it is a suit against a carrier to recover compensation for the loss of goods. On the other hand, it is argued that the defendants are not carriers within the meaning of that clause; that their character of carriers ceased when the goods were landed, and they became ordinary bailees in the position of warehousemen holding the goods till payment of the hire for carriage and landing; and that the suit is governed either by Clause 63 or Clause 115.

We hold that although the defendants are not common carriers for the purposes of the *Indian Carriers' Act*, of which the operation is restricted to inland carriers, they are nevertheless common carriers, and that their character of carriers continued so long as the goods remained in their hands and undelivered; but we nevertheless hold that the suit is not governed by Clause 30 but by Clause 115.

Looking to the terms of Clause 30 and the place in which it is found in the schedule, we understand it to apply to suits for compensation for loss or damage to goods arising from malfeasance, misfeasance or non-feasance independent of contract. There may no doubt be reasons for prescribing a short period of *Limitation* for suits against carriers, but the principle has not apparently been adopted. On the other hand, a shorter period [111] of *Limitation* has been in the earliar *Limitation Acts* provided for suits for tort than for suits for breach of contract.

The present suit is clearly a suit for breaches of the contracts to deliver, and there being no special provision for compensation for the breach of such contracts, the suits is governed by Clause 115.

On this point then we must overrule the objection of the appellants.

It is next argued that the suit cannot be maintained, inasmuch as the respondents did not make the claim at the place and within the time stipulated.

The learned Judge has recorded that the *Advocate-General*, who appeared before him for the appellants, waived proof that claims had been made at *Calcutta*, but insisted that claims made to *Ramanjulu and Sons* were not a fulfilment of the condition, and that the claims should have been made to Messrs. *Binny and Co.*, the general agents of the company at this port.

The *Advocate-General* has explained to us that he consented to admit that claims made to *Binny and Company* would be a sufficient compliance with the

condition from his confidence that that firm would have at once communicated with their principals at *Calcutta*. We have nothing before us to show that proof of compliance with the condition was waived except to the extent admitted.

The Counsel for the respondents contends that the condition was unreasonable, that a claim made to *Ramanjulu* would be a sufficient compliance with the condition, and that such claims were made.

There is general evidence that the respondents from time to time made demands on *Ramanjulu* for the delivery of the goods which had fallen short of the shipments, but there is no evidence that they made claims on them for compensation for the loss occasioned by non-delivery. Assuming such claims were made on *Ramanjulu and Sons*, we could not hold them a sufficient compliance with the condition. *Ramanjulu and Sons* were the agents of the appellants to retain the goods, receive freight and give delivery : they were also the agents of the respondents to land the goods, but they were not the agents of the appellents to receive claims for compensation for the non-delivery of goods.

[112] Nor can we hold the condition unreasonable. It is not unreasonable to require that the claim should be made at *Calcutta*, in order that the respondents, who must carry on their business at out-stations through agents, may at once be put on inquiry into breaches of contract which may have been caused by the default of their agents, and moreover this point has been determined in 9 W. R. 397. It is not unreasonable that persons carrying on an extensive business as carriers should stipulate that they should be apprised of claims made on them for default on the part of their servants within a time which will render inquiry likely to be attended with some result.

On this plea we must hold the respondents have failed to show that the stipulation was unreasonable, and also that the respondents have not proved that they complied with it either in its terms or in the manner in which the appellants agreed to accept its performance as sufficient. The appeal is allowed, and the suit dismissed with costs.

Attorneys for the Appellants : Messrs. *Tasker* and *Wilson*.

Attorneys for the Respondents : Messrs. *Branson* and *Branson*.

NOTE.—If the opinion of Sir R. Phillimore in the case of *The Duero*, L.R., 2 A. and E., 393, is correct, no question could arise as to the condition being reasonable, but see *Nugent* v. *Smith*, L. R., 1 C. P. D., 423.

NOTES.

[I STATUTORY CHANGE—

Provision has been made by the amending Act of X of 1889 for the case of *non-delivery* of goods by a Common-carrier, Art. 31 of Sch. II of 1899.

Description of suit.	Period of limitation,	Time from which period begins to run.
Art. 31 :—Against a carrier for compensation for non-delivery or delay in delivering goods.	One year ...	When the goods ought to be delivered.

II Suit for compensation for *non-delivery* as distinguished from a suit for compensation for *loss* of goods owing to negligence, etc., was held governed by Art. 115 of the Act of 1877 and not by Art. 30, as the latter article was applicable when there is no contract :—(1881) 3 Mad. 107 ; (1881) 3 Mad. 240 ; (1885) 12 Cal. 477.

ENGLISH LAW.—

III In **(1898) Q. B. 56** it has been pointed out that in dealing with *breachs of duty* it is *not enough* in order to displace the contention that the action is founded on *tort* to aver that the duty in the last resort arose out of some contract:—**(1898)** *1* **Q. B. 56.**

Bombay High Court was holding the same view:—(1894) 19 Bom. 165, (188). But now as the above Art. 31 has been introduced, the period of limitation is only one year while under Art. 115, the period was three years.

IV. COMMON CARRIERS.

Owners of sea-going merchant ships are common carriers though not so defined in Act III of 1865:—3 Mad. 107; 26 Bom. page 573.

V, NON-DELIVERY OF GOODS NOT NECESSARILY LOSS OF GOODS:—
(1885) 12 Cal. 477.]

[3 Mad. 112.]

APPELLATE CRIMINAL

The 22nd February, 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND Mr. JUSTICE KINDERSLEY.

Tarada Baladu

versus

The Queen.*

Criminal Procedure Code, Act X of 1882, Section 328†—*New trial.*

The power given by the Criminal Procedure Code to a Magistrate to pronounce a judgment upon evidence partly recorded by his predecessor and partly by himself does not extend to a Sessions Judge.

THIS was a referred trial in which the prisoner appealed. He was not represented at the hearing of the appeal.

The Court (TURNER, C.J.. and KINDERSLEY, J.) delivered the following

[113] Judgment:—The trial of this case was commenced before Mr. *Happell*, officiating Agent, and with one exception all the witnesses were

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* Criminal Appeal 886 of 1880 from the sentence of J. H. Garstin, Agent to the Governor of Fort St. George at Vizagapatam, in Cal. Case 40 of 1880.

†[Sec. 328:—Whenever any Magistrate, after, having heard part of the evidence in a case, ceases to exercise jurisdiction in such case and is succeeded by another Magistrate who has and who exercises jurisdiction in such case. such last named Magistrate may decide the case on the evidence partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and commence afresh:

Convictions on evidence partly recorded by one Magistrate and partly by another.

Provided that the accused person may, when the second Magistrate commences his proceedings, demand that the witnesses shall be re-summoned and reheard, in which case the trial shall be commenced afresh:

Provided also that any Court of appeal or revision, before which the case may be brought, or in cases tried by Magistrates subordinate to the Magistrate of the District, the Magistrate of the District. without appeal.

May set aside any conviction, passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court or Magistrate is of opinion that the accused person has been materially prejudicedthereby; and may order a new trial.]