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made the enquiry left three witnesses named in the petition of complaint unexamined, no contention was raised before the Sessions Judge that these persons ought to have been examined, or, if examined, would have thrown further light upon the case. I therefore agree in setting aside the order.

*Order set aside.*

## APPELLATE CIVIL.

*Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Prinsep Mr. Justice Wilson, and Mr. Justice O'Kinealy.*

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MOHESWAR DAS (PLAINTIFF) v. CARTER (DEFENDANT.)*

*Railway Company, Liability of, for loss—Special Contract—Railway Act (IV of* 1879), *s.* 10—*Contract Act (IX of* 1872), *ss.* 151-161—*Carriers.*

The plaintiff despatched certain goods by the E. I. Railway Co. for carriage to *A*, and signed a special contract, in conformity with the form approved by the Governor-General in Council under section 10 of Act IV of 1879, holding the Company "harmless and free from all responsibility in regard to any loss, destruction, or deterioration of, or damage to, the said consignment from any cause whatever, before, during, and after transit over the said Railway or other Railway lines working in connection therewith." The goods were short delivered, and the plaintiff brought a suit to recover their value.

*Held.*—*Per* GARTH, C.J., PRINSEP, J., and WILSON, J.—That the Railway Company could not be held liable to account to the consignee for any loss from any cause whatever during the whole time that the goods were under their charge, inasmuch as the plaintiff had entered into a special contract to hold them harmless in accordance with s. 10 of Act IV of 1879.

*Held.*—*Per* O'KINEALY, J., that it was doubtful whether ss. 151 and 161 of the Contract Act applied to carriers by rail; but even assuming that these sections did not apply, the Railway Company would be in the position of carriers before the passing of the Carriers Act, and were entitled to protect themselves from liability by special contract.

THIS was a reference under s. 617 of the Civil Procedure Code.

The suit was brought by the plaintiff against "Mr. Carter, Traffic Manager, on behalf of the East Indian Railway Co." for damages for the loss of 21½ seers of ghee.

* Civil Reference No. 19 of 1882, from Baboo Manu Lal Chatterjee, Subordinate Judge of Beerbhoom, dated the 5th July 1882.

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It was admitted that twelve canisters containing 6½ maunds of ghee had been delivered to the Railway Company for carriage from Agra to Ahmedpore, and it was proved that the plaintiff before taking delivery caused the canisters to be weighed, and found that there was a deficiency of 21½ seers, and seeing that one of the canisters had been cut open by a knife, caused these two facts to be noted on the back of the receipt given to the Company. The defendant (not taking the objection, that the Railway Company and not himself were the proper parties to be sued,) contended that the special contract entered into by the plaintiff exonerated the Company from all claim to damages. The special contract "or risk note" was as follows:—"I hold the Railway Company harmless and free from all responsibility in regard to any loss, destruction, or deterioration of, or damage of or to, the said consignment from any cause whatever, before, during, and after transit over the said Railway or other Railway lines working in connection therewith." This agreement was drawn up in the form prescribed by the Governor-General under Act IV of 1879, s. 10.

The Munsiff held the defence to be a good one and dismissed the suit.

The plaintiff appealed to the Subordinate Judge of Beerbhoom. At a late stage of the appeal the defendant raised the objection of non-joinder of the Railway Company as a defendant; but preferred no cross appeal, nor filed any cross objection. The Subordinate Judge gave the plaintiff a decree contingent on the opinion of the High Court as to whether, on the facts disclosed, the defendant or the E. I. Railway Co. could claim exemption from liability by reason of the special contract.

At the hearing of the reference the defendant waived his objection to the non-joinder of the Railway Company as a defendant.

Baboo *Kali Churn Bannerjee* for the plaintiff.

*The Advocate-General* (Mr. *Paul*) and Mr. *Evans* for the defendant.

The following judgments were delivered:—

GARTH, C.J. (PRINSEP and WILSON, JJ. concurring.)—This is a case referred under s. 617 of the Civil Procedure Code. It is

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unnecessary for us to express any opinion on any of the points which arise, except on that referring to the relations between the parties arising out of the risk note, which was the agreement under which the goods were received and despatched by the Railway Company, because the learned counsel on behalf of the Company in the present case has agreed to waive any objections to the suit as brought against the Traffic Manager, in order that he may obtain our opinion on the main point in issue.

It appears that twelve tins containing 6½ maunds of ghee were consigned to the Railway Company at Agra for delivery at Ahmedpore. It has been found, that when these tins were delivered, one had been cut upon by a knife, and there was consequently a deficiency of some 21½ seers in the quantity of ghee contained in them.

For the defendants it is contended that under the terms of the risk note, signed by the plaintiff, they are in no way liable for the loss.

The risk note runs as follows :—"I hold the Railway Company harmless and free from all responsibility in regard to any loss, destruction, or deterioration of, or damage of or to, the said consignment, from any cause whatever, before, during, and after transit over the said Railway or other Railway lines working in connection therewith." By s. 2 of Act IV of 1879 nothing in the Carriers Act, 1865, applies to carriers by Railway. By s. 10 it is declared that "every agreement purporting to limit the obligation or responsibility imposed on a carrier by Railway by the Indian Contract Act of 1872, ss. 151 and 161, in the case of loss, destruction, or deterioration of, or damage to, property, shall, in so far as it purports to limit such obligation or responsibility, be void, unless (*a*) it is in writing signed by, or on behalf of, the person sending or delivering such property, and (*b*) is otherwise in a form approved by the Governor-General in Council."

This agreement, which was signed by the plaintiff, is in a form approved by the Governor-General under Act IV of 1879, s. 10, and its terms leave us no alternative but to hold, that in no case would the Railway Company be liable to account to the consignee for any loss from any cause whatever

during the whole time that the goods were in their charge. Similar contracts have frequently been construed by English Courts and full effect has been given to their provisions.

The Legislature in this country has, in respect to the matter specified in s. 10, Act IV of 1879, imposed upon the Government the duty of determining beforehand the propriety of any proposed form of contract between any Railway Company and its customers, instead of leaving this to be decided subsequently by Courts of Justice.

Under such circumstances, we think the suit should be dismissed by the Judge of the Small Cause Court.

O'KINEALY, J.—I agree in the decision delivered by my learned colleague; but I am not quite sure that I agree in all the reasons on which it is based, as I feel some hesitation in assuming that the Contract Act applies to carriers. There is no doubt, if Railway carriers are subject to the provisions of ss. 151 and 161 of the Indian Contract Act, that the conditions required by s. 10 of the Railway Act have been properly complied with. The risk note is admittedly signed by, or on behalf of the plaintiff, and is in a form approved by the Governor-General in Council. On the other hand, if ss. 151 and 161 do not apply to carriers by Railway, the Railway Companies are in the position of carriers before the passing of the Carriers Act. Whichever view, therefore, is taken of the case, the question for decision is narrowed to this, namely, whether a Railway Company, which is not subject to the Carriers Act, can protect itself by contract from liability for the negligence or misconduct of its agents and servants.

This very question was elaborately discussed in the case of *Peek* v. *The North Staffordshire Railway Company* (1). There Mr. Justice Blackburn gave as his opinion that "the cases decided in our Courts between 1832 and 1854 established that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned of gross negligence, misconduct, or fraud on the part of his servants."

This view of the law has been adopted in several later cases. And it may now be taken as settled in England that a carrying

(1) 32 L. J. Q. B. 246.

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company, when not subject to limitation by Act of Parliament, may contract itself from all responsibility arising from the acts of its agents or servants. Looking then at the cases already referred to, I think that under the "risk note" in this case the owner undertook all risks of conveyance and loss, however caused by the servants and agents of the Company during the journey, and that the latter is not responsible for the abstraction of the plaintiff's ghee. Under these circumstances, our answer to the learned Subordinate Judge should be that the Railway Company is protected by the risk note in question, and that neither it nor the Traffic Manager is liable unless either one or the other has committed some independent wrong in connection with the property, and as no such allegation has been made, that the suit should be dismissed.

*Suit dismissed.*

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*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Prinsep.*

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*August* 30.

ARZAN (PLAINTIFF) *v.* RAKHAL CHUNDER ROY CHOWDHRY AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANTS).*

*Right of way—Easement—Limitation Act (XV of 1877), s. 26—User as of right—Prescriptive right.*

For the purpose of acquiring a right of way or other easement under s. 26 of the Indian Limitation Act, it is not necessary that the enjoyment of the easement should be known to the servient owner. In this respect there is a difference between the acquisition of such rights under that Act, and their acquisition under the English Prescription Act.

THIS was a suit to establish a right of way over certain lands rented by the defendant, and to remove a wall obstructing the alleged right of way.

The land over which the alleged way passed belonged originally to one Sherif Hossein, and was, in 1855, sublet by a tenant of Sherif Hossein to the Government on a mokurrari lease for the purpose of opening a burial ground. The entire land so leased was not required for that purpose, and the surplus land, over

* Appeal from Appellate Decree No. 1076 of 1882, against the decree of Baboo Krishna Chunder Chatterjee, First Subordinate Judge of Backergunge, dated the 27th March 1882, affirming the decree of Baboo Jogendro Nath Ghose, Second Munsiff of Burrisaul, dated the 31st December 1881.