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greater part of that surplus, and by the other partners making up and putting into the business the sums required to complete their shares; and (secondly) by the partnership accounts made up seven years after the new arrangement was made, in accordance with which the profits were ascertained and divided.

It may be added that the new arrangement appears to have only a natural and reasonable one, inasmuch as it gave somewhat larger advantages to Annamallay Chetti and Arnachellum Chetti than they would have obtained under the original partnership, for it was contemplated that with an increasing business they should in future give a personal superintendence, such as they had not previously done, as in point of fact they did; and it is difficult, if indeed possible, to reconcile the actings of the partners in their dealings with their accounts after 1869,—the withdrawal by Sethumbram Chetti of 7,000 rupees from the business, and the payment in of sums by the other partners to make up their capital,—with the view maintained by the defendants that the interests of the partners were not to undergo any change.

Their Lordships will humbly advise Her Majesty to dismiss the appeal, and to affirm the decrees complained of, including the award of interest to the plaintiffs, as to which they see no reason to differ from the view taken by the Recorder. The appellants must pay the costs of the appeal incurred by the respondents who have appeared.

Solicitor for the appellants: Mr. *R. T. Tasker.*

Solicitors for the respondents: Messrs. *Bramall and White.*

C. B.

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*P.C.**
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April 24, 25, 28, *and July* 4.

THE IRRAWADDY FLOTILLA COMPANY (DEFENDANT) *v.* BUGWANDAS (PLAINTIFF).

[On appeal from the Court of the Recorder of Rangoon.]

Common carrier—Liability for non-delivery not affected by sections 148, 151, *and* 152 *of the Contract Act, IX of* 1872—*ss.* 148, 151, 152, *Carriers' Act, III of* 1865—*Construction—The Railways Acts, IV of* 1879 *and IX of* 1890, *as to the liability of carriers by railway.*

That the duties and liabilities of a common carrier are governed in India by the principles of the English common law on that subject,

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, SIR R. COUCH, and MR. SHAND.

however introduced, has been recognized in the Carriers' Act, III of 1865.

His responsibility to the owner does not originate in contract, but is cast upon him by reason of his exercising this public employment for reward.

His liability as an insurer is an incident of the contract between him and the owner not inconsistent with the provisions of the Contract Act; and the law of carriers, partly written and partly unwritten, remained as before that Act.

The Railways' Acts of 1878 and 1890 reduced the responsibility of carriers by railway to that of bailees under the Contract Act, but this does not affect the construction of the law relating to common carriers and the Act of 1865.

Notwithstanding some general expressions in the chapter on bailments, a common carrier's responsibility is not within the Contract Act, 1872.

The decision of the High Court in *Moothoora Kant Shaw* v. *I. G. S. N. Company* (1) approved, and that of the Bombay High Court in *Kuverji Tulsidas* v. *G. I. P. Railway Company* (2) not supported.

APPEAL from a decree (3rd January 1890) of the Recorder of Rangoon.

The decree, from which this appeal was preferred, was in favour of the plaintiff, now respondent, for Rs. 3,315, in a suit for the value of 195 bales of cotton destroyed by fire whilst on board the steam-ship *Yomah*, belonging to the defendant Company, now appellant, to be carried by them.

On the 4th December 1888, when the bales had been put on board to be carried from Mingyan, in Upper Burma, down the river to Rangoon, and whilst the *Yomah* was lying at the former place, the fire broke out from some unexplained cause.

The question now raised was, whether the appellant Company, as carriers of goods for hire, were answerable for the goods, independently of any negligence on their part, or were responsible only for that amount of care which the Contract Act, IX of 1872, in the sections 151 and 152 relating to bailment, required of all bailees alike in the absence of special contract. The sections are set forth in their Lordships' judgment.

The respondent commenced this suit on the 30th March 1889, alleging the negligence of the appellants' servants to have caused the loss.

(1) I. L. R., 10 Calc., 166. (2) I. L. R., 3 Bom., 109.

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He also alleged that it would have been possible to save the cotton, he having sent coolies to remove the bales, but that the servants of the appellants prevented this being done.

The defence was that the goods had been received by the defendant Company on the terms that the latter should take such care of them as was required under sections 151 and 152 of the Contract Act, 1872, and that the appellants had taken such care.

The Recorder found that the fire broke out suddenly, and was not due to any negligence on the part of the defendants' servants; that all usual precautions were taken; that everything that could be done was done to stop the fire which spread rapidly; that even assuming that application was made for the removal of the cotton by bringing in a gang of coolies, which, however, he doubted, such an application could not have been granted, as the only possible chance of putting out the fire would have been lost if the hatches had been opened. There was thus no negligence on the part of the defendants' servants. The Recorder, nevertheless, considered that *Moothoora Kant Shaw* v. *India General Steam Navigation Company* (1) was an express authority that the defendant company was liable as a common carrier, and this liability was not affected by sections 151 and 152 of the Contract Act, 1872; and that notwithstanding a decision to the contrary effect by the Bombay High Court in *Kuverji Tulsidas* v. *The G. I. P. Railway Company* (2), he was bound by the decision of the Calcutta High Court. He accordingly gave judgment for the plaintiff for Rs. 3,315.

The Recorder on the 9th May 1890 gave his certificate, under sections 595 and 614, Civil Procedure, that the decree in this case involved a substantial question of law, and that it was a fit one for appeal to Her Majesty in Council directly from his Court.

On this appeal—

Mr. *R. B. Finlay, Q.C.*, and Mr. *Reginald Browne* (with whom was Mr. *J. D. Fitzgerald*) appeared for the appellants.

(1) I. L. R., 10 Calc., 166.

(2) I. L. R., 3 Bom., 109.

Their arguments are stated in their Lordships' judgment. The following outline is, however, added:—

The liability of a carrier for hire is defined and limited by legislation in India, and is not governed by the English law on that subject. The Carriers' Act, III of 1865, assumes that a common carrier is under the stringent rule of the English common law, without directly enacting that he is so. That Act was not repealed. But inasmuch as the delivery of the goods by the customer to a common carrier constitutes a bailment to him, the responsibility for non-delivery is now determined by Chapter IX of the Contract Act, 1872, which deals exhaustively with the whole subject of a bailee's responsibility and applies, except in the cases mentioned in its own saving clauses. These are (section 1) that it shall not affect the provisions of any Act not expressly repealed by it, nor any usage or custom of trade, nor any incident of any contract not inconsistent with its provisions. By these words the liability of a carrier is not excepted from the operation of the Contract Act, 1872, it being an incident distinctly inconsistent with the sections 151 and 152. The carrier's liability is not a usage or custom of trade, but part of the common law, as being a custom of the realm of England introduced into India. That Act III of 1865 should not be repealed, and yet that the greater responsibility of the common carrier should cease as being inconsistent with the bailment sections in the Act of 1872, involves no difficulty. This results from the fact of this responsibility existing independently of Act III of 1865. The contention is that this liability is within the scope of the Contract Act, 1872, and that the bailment sections of the latter Act are substituted for it; that *Kuverji Tulsidas* v. *G. I. P. R. Company* (1) was correctly decided by the Bombay High Court; and that the judgment of the Calcutta Court (2) is not in accordance with law.

The Railway Acts, IV of 1879 and IX of 1890, were referred to.

That there was negligence has been negatived by the finding of the Court below, and the appellants cannot be held liable

(1) I. L. R., 3 Bom., 109.
(2) I. L. R., 10 Calc., 166.

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in the absence of negligence. Reference was made to *Mackillican* v. *The Messageries Maritimes* (1), where a company, not a common carrier, was held liable under section 151 of the Contract Act, 1872.

Mr. *J. G. Barnes, Q.C.*, and Mr. *Aviet Agabeg*, for the respondent.—The defendant Company are common carriers within the meaning of the Carriers' Act, III of 1865, and not bailees, whose liability is governed by the provisions of the Contract Act, 1872. Neither the law imposing the more complete liability on the carrier nor Act III of 1865 has been superseded. If the appellants' contention were correct, the principal sections in the latter Act would be rendered of no effect; and in connection with this regard should be had to the proviso in the Contract Act, 1872, that no Act shall be taken to be repealed by it unless expressly in the Act itself declared so to be. It does not appear to be the intention, as shown by the latter enactment, to alter the law recognized in the Carriers' Act, 1865. The Railway Act, IV of 1879, in no way assists the appellants' argument, excluding the operation of the Carriers' Act, 1865, from affecting the liability of carriers by railway; but consequently treating it as in force as regards other carriers. The liability of the common carrier was said in *Morgan v. Ravey* (2) to arise from the customary relation between the parties founded on the custom of the realm.

Even if, however, the common law liability has been got rid of, and negligence, to enable the respondent to recover, has to be established against the company or their servants, still it is not necessary to prove it affirmatively by evidence of their acts or omissions. There are some cases of loss by accidents, where the accident itself, without further proof of negligence, gives rise to a presumption of it—*Scott* v. *London Dock Company* (3).

Mr. *R. B. Finlay, Q.C.*, replied.

Their Lordships' judgment was afterwards, on July 4th, delivered by

LORD MACNAGHTEN.—The question involved in this appeal is one which has given rise to a conflict of judicial opinion in India,

(1) I. L. R., 6 Calc., 227. (2) 6 H. & N., 265.
(3) 34 L. J., Exch., 220.

In 1878 the High Court of Bombay held that the effect of the Indian Contract Act, 1872, was to relieve common carriers from the liability of insurers answerable for the goods entrusted to them "at all events," except in the case of loss or damage by the act of God or the Queen's enemies, and to make them responsible only for that amount of care which the Act requires of all bailees alike in the absence of special contract. In 1883 the same point was brought before the High Court of Calcutta. The case was referred to a Full Bench, and the Court came to the conclusion that the liability of common carriers was not affected by the Act of 1872.

Their Lordships have now to determine which of these authorities is to be preferred. There is no other question in the case. It was admitted that the appeal must fail unless the decision of the High Court of Bombay can be supported.

For the present purpose it is not material to inquire how it was that the common law of England came to govern the duties and liabilities of common carriers throughout India. The fact itself is beyond dispute. It is recognized by the Indian Legislature in the Carriers' Act, 1865, an Act framed on the lines of the English Carriers' Act of 1830 (11 Geo. IV. and 1 Wm. IV., c. 68).

The preamble of the Act of 1865 recites that "it is expedient "not only to enable common carriers to limit their liability for loss "of or damage to property delivered to them to be carried, but "also to declare their liability for loss of or damage to such property "occasioned by the negligence or criminal acts of themselves, "their servants, or agents." The Act defines a common carrier as "a person, other than the Government, engaged in the business "of transporting for hire property from place to place, by land "or inland navigation, for all persons indiscriminately," and it includes under the term person "any association or body of persons, whether incorporated or not." Section 3 declares that no common carrier shall be liable for the loss of or damage to property delivered to him to be carried, exceeding in value 100 rupees and of the description contained in the schedule, unless the value and description thereof are declared. Section 4 authorizes every common carrier to require payment for the risk undertaken in carrying such property at such rate of charge as he may fix,

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provided that notice of a rate of charge higher than the ordinary rate is exhibited in the manner prescribed by the Act. Section 5 provides that in case of the loss of or damage to such property, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid in consideration of the risk. Section 6 provides that the liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule, shall not be deemed to be limited or affected by any public notice, but that any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863, may, by special contract, signed by the owner of the property to be carried, or some one on his behalf, limit his liability in respect of the same. Section 7 declares that the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part, or on that of his agents or servants. Section 8 declares that, notwithstanding anything thereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier, or any of his agents or servants. Section 9 enacts that in any suit brought against a common carrier for the loss, damage, or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage, or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. Section 10, the last section of the Act, is not material to the present inquiry. The schedule to the Act contains a list of articles of large value in small compass, corresponding with the list contained in the English Carriers' Act.

The Indian Contract Act, 1872, recites that "it is expedient to define and amend certain parts of the law relating to contracts." Section 1 repeals the enactments mentioned in the schedule, among which the Carriers' Act, 1865, is not included, and then proceeds as follows:—"But nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of

any contract not inconsistent with the provisions of this Act." Their Lordships may observe in passing, and indeed it was admitted by the learned Counsel for the appellants, that the words "not inconsistent with the provisions of this Act," are not to be connected with the clause "nor any usage or custom of trade." Both the reason of the thing and the grammatical construction of the sentence—if such a sentence is to be tried by any rules of grammar—seem to require that the application of those words should be confined to the subject which immediately precedes them.

Chapter IX of the Act of 1872 treats of bailments. Section 148 defines bailment in words wide enough to include bailment for carriage. Sections 151 and 152 are in the following terms:—

"151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151."

The only section in the Act in which bailment for the purpose of carriage is mentioned is section 158. That section, however, deals only with gratuitous bailments.

The learned Counsel for the appellants took their stand on sections 151 and 152 of the Act of 1872. They pointed out that the rule there laid down extends to every description of bailment. They argued that one measure of liability, and one measure only, is to be applied to all cases in the absence of special contract. A special contract, they said, if not an expressed contract, must at least be a contract special to the occasion. It would be absurd to speak of a condition which the English common law attaches to all contracts of carriage by common carriers as a special contract. There was nothing in section 1 of the Act of 1872 inconsistent with this view. The Carriers' Act, 1865, was preserved intact: it was only the common law that was altered. No usage or custom of trade was affected; the only thing affected was the custom of the realm. And if the duty cast on common carriers by the custom of the realm could properly be described as an incident of the contract

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between the carrier and the owner of the property to be carried, it was, as they maintained, inconsistent with the provisions of the Act of 1872.

In support of their arguments, the learned Counsel for the appellants turned to the Indian Railways Act, 1879, and to the Indian Railways Act, 1890. Their Lordships think that no assistance is to be derived from either of those Acts. The Act of 1890 reduces the responsibility of carriers by railway to that of bailees under the Act of 1872. But then it declares that nothing in the common law of England, or in the Carriers' Act, 1865, shall affect the responsibility of carriers by railway. The reason for dealing with railways in this exceptional manner may perhaps be found in the circumstance that railways in India are to a great extent in the hands of the Government, and it will be remembered that the Government is excepted from the definition of a common carrier in the Act of 1865. The Act of 1879, which is now repealed, declared that nothing in the Carriers' Act, 1865, should apply to carriers by railway. But it did not negative the application of the common law of England to such carriers. In section 10 it spoke of "the obligation imposed on a carrier by railway by the Indian Contract Act, 1872." It did not, however, declare that that obligation was to be the measure of the liability of carriers by railway, but only that their liability was not to be reduced below that limit except in a specified manner. It may be that section 10 was so expressed, in view of the decision of the High Court of Bombay which had been pronounced in the preceding year, and it may be that the Legislature then assumed that decision to be correct. But, however that may be, the section is much too obscure in meaning to throw any light on the present question.

Notwithstanding the able arguments of the learned Counsel for the appellants, it seems to their Lordships that there are several considerations, not all of equal weight, but all pointing in the same direction, which lead irresistibly to the conclusion that the Act of 1872 was not intended to alter the law applicable to common carriers.

The Act of 1872 does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in a separate chapter. But there is nothing to show

that the Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts. On the other hand, it is to be borne in mind that at the time of the passing of the Act of 1872, there was in force a statute relating to common carriers, which, in connection with the common law of England, formed a Code at once simple, intelligible, and complete. Had it been intended to codify the law of common carriers by the Act of 1872, the more usual course would have been to have repealed the Act of 1865 and to re-enact its provisions, with such alterations or modifications as the case might seem to require. It is scarcely conceivable that it could have been intended to sweep away the common law by a side wind, and by way of codifying the law to leave the law to be gathered from two Acts, which proceed on different principles, and approach the subject, if the subject be the same, from different points of view.

At the date of the Act of 1872 the law relating to common carriers was partly written, partly unwritten, law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. "A breach of this duty," says Dallas, C.J., (*Bretherton* v. *Wood*, 3 B. & B., 62) "is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it." If in codifying the law of contract, the Legislature had found occasion to deal with tort, or with a branch of the law common to both contract and tort, there was all the more reason for making its meaning clear.

Passing from these general considerations to the language of the Act of 1872, it is to be observed that the Act of 1865 is not merely left unrepealed by the later Act. As it is not "expressly repealed," nothing in the Act of 1872 is to "affect" its "provisions." It seems a strong thing to say that the provisions of an Act are not affected, when the whole foundation upon which the Act rests is displaced, and almost every section assumes a different meaning, or comes to have a different application. Moreover, there is certainly one provision in the Act of 1865 which is

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deprived of much of its original significance, and, so far at least, is rendered nugatory, if the appellants' view is correct. The combined effect of sections 6 and 8 of the Act of 1865 is that, in respect of property not of the description contained in the schedule, common carriers may limit their liability by special contract, but not so as to get rid of liability for negligence. On the appellants' construction the Act of 1872 reduces the liability of common carriers to responsibility for negligence, and consequently there is no longer any room for limitation of liability in that direction. The measure of their liability has been reduced to the minimum permissible by the Act of 1865.

Another consideration is suggested by section 4 of the Act of 1865. That section authorizes common carriers to charge extra rates for the risk involved in carrying articles of great value in small parcels. The risk intended to be covered is the risk of carriers who are also insurers, and part of the extra charge would of course be in the nature of a premium for insurance. When the Act of 1872 was passed, the Act of 1865 had been in operation for seven years, and it may be presumed that common carriers, in some cases at least, had taken advantage of the Act of 1865 in settling their rates. It seems hardly fair that common carriers should be relieved from the liability of insurers, without any provision pointing to a re-adjustment of their charges, and without distinct notice of a change affecting so materially the interests of the public.

Then the Act of 1872 provides that nothing in the Act contained shall affect any usage or custom of trade. It was said that the liability of common carriers as insurers was not a usage or custom of trade. That may be conceded. But it is certainly singular that, according to the appellants' argument, usages and customs of trade, which are local and partial, are not to be affected, while a custom so universal as to be a custom of the realm, or, in other words, part of the common law, is not treated with the same respect.

It was hardly disputed that the liability of a common carrier as an insurer was an incident of the contract between the common carrier and the owner of the property to be carried. Is that incident inconsistent with the provisions of the Act of 1872? No one could suggest that it was inconsistent, merely by reason of

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its being a term of the contract implied and not expressed. Then it would seem that the proper way of trying whether it is or is not inconsistent with the provisions of the Act of 1872 would be to write it out as part of the contract. Would it then be inconsistent? Clearly not. It would be within section 152; it would be a special contract, saved by that section. It is difficult to see how a term of a contract can be inconsistent with the provisions of the Act of 1872 if it is implied, while it would not be inconsistent if it were expressed in the contract.

These considerations lead their Lordships to the conclusion that the Act of 1872 was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act. They are therefore compelled to decide in favour of the view of the High Court of Calcutta, and against that of the High Court of Bombay.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants: Messrs. *Sanderson, Holland, and Adkin.*

Solicitors for the respondents: *Messrs. Bramall and White.*

C. B.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

PEARY MOHUN AICH (JUDGMENT-DEBTOR) v. ANUNDA CHARAN BISWAS (DECREE-HOLDER).*

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Execution of decree—Transfer of decree for execution—Civil Procedure Code (Act XIV of 1882), ss. 223, 230—*Limitation Act (XV of* 1877), ss. 5, 6—*Extension of time when Court is closed.*

Where parties are prevented from doing a thing in Court on a particular day not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity.

* Appeal from Order No. 111 of 1891, against the order of Baboo Koylash Chunder Mookerjee, Subordinate Judge of Khoolna, dated the 30th of December 1890, affirming the order of Baboo Narendra Krishna Dutt, Munsiff of Bagirhaut, dated the 19th of August 1890.