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decree-holder before execution was stayed. The application for stay of execution is not even supported by an affidavit.

Gangaram Bapsoba Rele, for respondent.—There is no provision in the Code of Civil Procedure requiring notice to be given to the decree-holder before an order is made under s. 545.

JUDGMENT.

BIRDWOOD, J.—The plaintiff obtained a decree for money, and the District Judge has, on the application of the defendant, ordered stay of execution without giving notice of the application to the plaintiff. There is no express provision in s. 545 of the Code of Civil Procedure requiring notice to be given to the decree-holder before an order is made under the section; but it is obviously unjust to pass a final order for staying the execution of a decree without giving the decree-holder notice of the judgment-debtor's application. It is the universal practice of the Courts to give notice to the decree-holder before disposing finally of an application for stay of execution. Moreover, the allegation in the defendant's application is unsupported by any affidavit. There was really, therefore, no evidence before the District Judge to enable him to arrive at any decision as to the truth of the allegation. Nor, again, was the allegation, even if proved to be true, of a kind to justify an order for stay of execution in the present case.

We reverse the District Judge's decree in execution and reject the defendant's application, with costs throughout on him.

Order reversed.

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ORIGINAL CIVIL.

Before Mr. Justice Farran.

LALJIBHAI SHAMJI AND OTHERS (*Plaintiffs*) *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY (*Defendants*).*

[12th January, 1891.]

Railway Company—"Terminal charges"—Right of G. I. P. Railway Company to levy terminal charges—Stat. 12 and 13 Vic., Cap. LXXXIII (Local & Pers.)—Act IX of 1890, *ss.* 41, 45, 46.

"Terminal charge" means a charge for the use of goods station and for the various duties which a railway company, as common carriers, perform in connection with the goods consigned to them for carriage.

[538] The plaintiffs sued to recover from the defendants the sum of Rs. 1,34,152-11, which during the three years prior to suit the plaintiffs had been obliged by the defendants to pay as "terminal charges" on consignments of cotton made by the plaintiffs from up-country stations to Bombay. The plaintiffs contended(1) that such charges were illegal; (2) that if not illegal they were excessive.

Held, dismissing the suit, that the defendants were entitled to charge "terminal charges" on the goods carried by them for the plaintiffs, subject only, as to the rates and amounts thereof, to the sanction of Government; and that the rates charged to the plaintiffs were not higher than the sanctioned charges.

Semble.—Under ss. 41, 45 and 46 of Act IX of 1890 the High Court has no jurisdiction to consider or entertain a claim relating to terminals charged by the defendants subsequently to the time at which that Act came into operation.

[**Affirmed**, 16 B. 434; **R.**, 17 B. 723.]

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* Suit No. 488 of 1890.

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SUIT to recover Rs. 1,34,152-11.

The plaintiffs were cotton merchants in Bombay to whom large consignments of cotton were made from up-country stations. They complained that before delivery of such consignments the defendants, in addition to freight for carriage, exacted from them a further charge, called a "terminal charge," of Rs. 2-7-1 for twenty seven maunds at Bombay and twelve annas and five pies for twenty-seven maunds at the forwarding station. They alleged that during the three years prior to suit they had been thus obliged by the defendants to pay, as terminal charges, a total sum of Rs. 1,34,152-11, which they now sued to recover, contending (1) that such charge was wholly illegal, and (2) that, if the defendants were entitled to levy any such terminal charge, the amount levied was excessive.

The defendants in their written statement contended that they were entitled to levy terminal charges, subject only to the sanction of Government as to rate and amount, and that a much higher rate had been sanctioned than had been charged to the plaintiffs. They relied on Stat. 12 and 13 Vic., Cap. LXXXIII (Loc. & Pers.), and on agreements made from time to time with Government, and in particular on Bombay Government Resolution No. 2052 of 1865, Railway Department, and Bombay Government Notification, Railway Department, dated 30th April 1868.

Lang and *Inverarity*, for plaintiffs.

Latham (Advocate-General) and *Chitty*, for defendants.

The following authorities were referred to:—Wharton's Law Lexicon, pp. 722, 731, 294; Railway Act, IX of 1890, s. 43; Act [539] IV of 1879, s. 2; Act IX of 1890, s. 3, cl. 14; Hodges on Railways, p. 560; *Pegler* v. *Monmouthshire Railway Co.* (1); *South Yorkshire Railway and River Dun Co.* v. *Great Northern Railway Co.* (2); *Hall & Co.* v. *London, Brighton and South Coast Railway Co.* (3).

JUDGMENT.

FARRAN, J.—The main and indeed the only question raised in this suit is as to the right of the defendant Railway Company to make what are called "terminal charges" in respect of goods carried by them upon their railway. The plaintiffs have paid during the three years immediately preceding the institution of this suit large sums on this account to the defendants, amounting, they allege, to Rs. 1,34,152-11-0. These sums they now seek to recover from the defendants, contending that the defendants were not legally entitled to charge them. The defendants say that, subject to the sanction of Government as to the amount, they are legally justified in charging terminals in respect of goods carried by them.

The defendants' Company are incorporated under the provisions of Stat. 12 and 13 Vic., Cap. LXXXIII (Loc. & Pers.). The fifth section of that Act enacts "that it shall be lawful for the Company from time to time to enter into and conclude with the East India Company, on account of the Government of India, such contracts, agreements and arrangements as the respective parties may think fit and agree upon for making any

(1) 30 L.J. Ex. 249=6 H. & N. 644. (2) 9 Ex.55.
(3) L.R. 15 Q.B.D. 505.

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railway or railways in India * * * and for maintaining and working the same, including, so far as the said respective parties may agree thereto, all or any of the provisions, that is to say * * * any provision as to the tolls, receipts and profits thereof and the application of such tolls, receipts and profits." The rest of the section is not material to the purpose of this judgment. The section does not direct what tolls, receipts and profits the Company may demand and receive, but it subjects the taking of tolls, receipts and profits by the Company to such provisions as the Company and the Government of India may agree to from time to time in reference thereto.

[540] In pursuance of the provisions contained in the above section an agreement, bearing date the 17th August 1849, was made between the East India Company and the defendants' Company, under which the defendants' Company agreed to construct their railway upon certain terms; and the eighth clause provided that as soon as a portion of the railway should be completed, and so on from time to time the Company should commence and carry on the business of common carriers of goods and passengers upon it, and "that the Company should and would allow the use of the railway to the public on such terms as should be approved by the East India Company, and that the Company should be authorized and empowered to charge such fares for the carriage of passengers and goods and such tolls for the use of the railway as should have been approved by the East India Company, and should not in any case charge any higher or different fares or tolls whatsoever without such approval being first obtained." In other words, the terms upon which the public were to be allowed the use of the railway and the tolls and fares which were to be paid by them were to be such as should from time to time be approved by the East India Company. Subject, therefore, to the approval of the East India Company or the Government of India (for the Act speaks of the East India Company as entering into the agreement on account of the Government of India), the Company could impose upon the public using the railway such terms and levy from them such tolls and fares as their own interest or the necessity of the case should dictate. The interests of the public are safeguarded by the necessity imposed upon the Company of obtaining the approval of Government to the terms, fares and tolls which they seek to impose and charge. The decision in *Pegler* v. *Monmouthshire Railway Company* (1), which turned on the Company's special Act, is not, therefore, in point in this case. It is admitted that the plaintiffs' goods were carried upon an extension of the defendants' railway to which the above-quoted section of their Act and the above provisions of their agreement are applicable.

The rates originally sanctioned for the carriage of goods upon the defendants' railway having proved inadequate, the Agent **[541]** of the defendants, in conjunction with the Agent of the B. B. & C. I. Railway Company, approached the Government of Bombay upon the subject, and after negotiations, that Government on the 4th September, 1865, sanctioned the scale of maximum tolls, terminal charges and rates of insurance recommended by the joint Agents, *viz.*, certain tolls for the carriage of goods, which are not objected to by the plaintiffs, and for terminal charges, to include collection and delivery, Rs. 5 per ton at Bombay and Rs. 2-8 per ton at up-country stations. The rates and terminal charges

(1) 30 L. J. Ex. 249=6 H. & N. 64.

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thus sanctioned were published in the *Bombay Government Gazette* of the 30th April, 1868 (Ex. 4). The terminals which the plaintiffs allege that they have been charged, *viz.*, Rs. 2-7-1 for twenty-seven maunds in Bombay and Re. 0-12-5 for twenty-seven maunds at the forwarding stations, is far less than those sanctioned charges. The Company, I am told, considerably lessened their terminals when they ceased to collect and deliver goods.

"Terminal charges" being a technical expression, it may be desirable here to note that it means a charge for the use of the goods station and for the various duties which the Company, as common carriers, perform in connection with the goods consigned to them for carriage. In the view I take of this case it is unnecessary to determine what should be taken into account, in order to ascertain what is a fair charge to fix for such use and services, for it appears to me that if the Company are entitled to make such a charge, the sanction of Government, and not the reasonableness of the charge, is the limit to its extent. I am of course treating of the law as it existed previous to the recent legislation upon this subject: see, as to what are proper terminal charges, *Hall and Co.* v. *London, Brighton and South Coast Railway Co.*(1). Although "toll" is a word of rather loose application when used in connection with railway charges, I incline to agree with Mr. Lang's argument that "terminal charges" are not "tolls for the use of the railway" within the meaning of the eighth clause of the agreement above referred to; but when that clause provides that the use of the railway is to be allowed to the public upon such terms as **[542]** the East India Company may approve and upon payment of such fares for the carriage of goods as they may sanction, it uses words of such wide import that it seems to me impossible to hold that terminal charges are not within their purview. Even if terminal charges are not fares for the carriage of goods—fares which the Railway Company, as carriers, may legitimately charge—and I incline to think that they are, yet it cannot be doubted, but that the payment of such charges may be a term on which the public may be allowed the use of the railway. Whether, however, this be so or not, terminals, are clearly a charge which, under s. 5 of the incorporating Act, the East India Company on behalf of the Government of India and the defendants' Company can agree, is to be made. That they have so agreed is plain, unless the Bombay Government in sanctioning these terminal charges acted without authority from the Government of India. The letter of the Secretary of the Government of India, of the 27th March 1868 (Ex. No. 6), shows that the Bombay Government had full authority in this respect; and Act XVIII of 1854, s. 43, recognized the local Government as the proper authority to sanction a tariff of charges to be made by Railway Companies within its area. For these reasons I must hold that the defendants were entitled to charge terminal charges on the goods carried by them for the plaintiffs, subject only, as to the rates and amounts thereof, to the sanction of Government, and that the rates charged to the plaintiffs were not higher than the sanctioned rates.

It would seem that under ss. 41, 45 and 46 of Act IX of 1890 this Court has no jurisdiction to consider or entertain the plaintiffs' claim so far as it relates to terminals charged by the defendants subsequent to the coming into operation of that Act.

(1) L. R. 15 Q. B. D. 505.

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Issues 1 and 2 will be found for the defendants. No finding will be recorded on the remaining issues, and the suit will be dismissed with costs.

Suit dismissed with costs.

Attorney for the plaintiffs :—Mr. *Mirza Hussein Khan.*

Attorneys for the defendants :—Messrs. *Little, Smith, Frere and Nicholson.*

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[543] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

KRISHNANATH NARAYAN AND ANOTHER (*Original Plaintiffs*), *Appellants v.* ATMARAM NARAYAN AND OTHERS (*Original Defendants*), *Respondents.** [16th January, 1891.]

Will—Construction—Right to live in a house given to parents and their children—Right of children under such gift independently of the parents—Gift to the children of A—Gift to a class some members of which not in existence at testator's death—What is a gift to a class within the meaning of the rule in Leake v. Robinson (1).

B., who died in 1836, left a will, in the English form, whereby he bequeathed a house to his two sons, Venkoba and Moroba, and directed that they should not sell or mortgage it, but were either to live in it, or enjoy the rents and revenue thereof for ever. He further directed as follows :—" My son-in-law, Narayan Ganoba, with his wife Sokabai and children to live in the house for ever." Venkoba died in 1838, and his four grandsons were the first four defendants in this suit. Moroba became insolvent, and his interest passed to the Official Assignee, who was the fifth defendant. Sokabai was the testator's daughter, and she and her husband, Narayan Ganoba, went to live in the house in question when the testator first went to reside there, and they and their family had lived there ever since. Both the plaintiffs (her sons) were born in the testator's life-time. Narayan Ganoba died in 1844. Sokabai died in 1887. Subsequently to her death her children (the plaintiffs) continued to reside in the house and to occupy the rooms which they had always occupied until April 1889, when the first four defendants, who were grandsons of Venkoba, dispossessed them. The plaintiffs filed this suit, praying for possession of the rooms and for a declaration that they and their families were entitled to reside there. The defendants contended (1) that there was no gift to Sokabai's children independently of Narayan Ganoba ; (2) that if there was a gift to the children, it was void, as being a gift to a class some members of which might have come into existence after the testator's death.

Held—

(1) that the clause in the will should be construed as giving the right to live in the house to Sokabai and the children after Narayan Ganoba's death. The benefit was intended to be conferred, not only on Narayan Ganoba, but also on his wife and children ;

that this was not a devise to a class in the sense in which that expression was used in *Leake* v. *Robinson* (1), *viz.*, a gift to a body of persons uncertain in number at the time of the gift to be ascertained at a future time, the share of each being dependent for its amount upon the ultimate number of persons. The benefit which each member of the class was to take, was in no way dependent, on the number of the children, each had a distinct and independent right to [544] reside in the house, and the number of persons who might ultimately belong to the class was in no sense regarded as a criterion of the interest which each was to take.

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* Suit No. 597 of 1889 ; Appeal No. 690.

(1) 2 Mer. 363.