ORIGINAL CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Farran.

GREAT INDIAN PENINSULA RAILWAY COMPANY (ORIGINAL DEFENDANTS), APPELLANTS, *v.* RAISETT CHANDMULL AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1894. *September* 28.

Railway Company—Indian Railway Act (IV of 1879), Sec. 11—Loss of goods—Liability of company—Declaration of value and nature of goods and payment of increased charge—Limitation Act (XV of 1877), Sch. II, Art. 30.

In January, 1890, a box containing rupees was delivered by the plaintiffs to the defendant company in Bombay to be carried to Saugor. From the evidence it appeared that the plaintiffs did not intend to insure the box. The box was taken to the booking office at the station, and the parcel clerk asked what it contained, and was told that it contained coin, and he learnt casually that the amount was Rs. 6,000. The clerk charged Rs. 18-1-0 for the box, which was the "treasure rate" for carriage. This sum was paid and the box was duly despatched, but was lost or stolen in the course of transit. The plaintiffs sued to recover the Rs. 6,000. The defendants contended that, having regard to the provisions of section 11 of Act IV of 1879, they were not liable, inasmuch as (1) the contents of the box had not been duly disclosed, nor (2) had an increased charge been paid. The plaintiffs obtained a decree in the lower Court. On appeal,

Held (reversing the decree) that the defendant company was not liable—

(1) Because there was no sufficient declaration of the value and contents of the box.

(2) Because the sum paid by the plaintiffs for the carriage of the box was the ordinary charge for treasure, and was not the increased charge which under section 11 of Act IV of 1879 should have been paid in order to make the company liable.

(3) *Per* BAYLEY, J.:—That the claim of the plaintiffs was one against the defendants for compensation for losing goods, and fell within article 30 of Schedule II of the Limitation Act (XV of 1877), and that as this suit was not brought until after the expiration of two years from the date of the loss it was barred by limitation.

APPEAL by the defendants from a decree passed by Starling, J.[1]

The plaintiffs filed this suit in December, 1892, to recover Rs. 6,000 from the defendants, being the value of a box delivered to them at Bombay to be carried by them to Saugor, but which had been lost.

The plaintiffs alleged that the box in question contained Rs. 6,000, and that on the 3rd January, 1890, they delivered it to the defendants, consigned to Raghunáthdás Hamirmull at Saugor.

* Suit No. 636 of 1892; Appeal No. 806.

(1) See I. L. R., 17 Bom., 723.

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The box weighed over two maunds, and was duly sealed and addressed both in English and Maráthi.

Saugor is a station on the Indian Midland Railway, about 654 miles from Bombay, and is the terminus of a branch line running from Bina junction on the main line of the said railway midway between Bhopál and Jhánsi.

The question raised in this appeal was whether, having regard to the provisions of section 11 of Act IV of 1879[1], the defendants were liable for the loss of the box. The defendants contended that they were not liable, inasmuch as (1) the contents of the box had not been duly declared, nor (2) had an increased charge been paid.

A book setting forth the rates charged for different classes of goods was put in evidence. These rates were stated under different headings. The following passages from this book were referred to in argument :—

"18. *Parcels.*—The rates for parcels are :—" (Then followed a table setting forth the rates).

"Fish, fruit, vegetables, bazár baskets, meat in small quantities (not more than 20 seers) are charged at half parcels rates at owner's risk, subject to a minimum of two annas, &c., &c.

"20. *Carriages*" (rates set forth).

"23 *Dogs*" (rates set forth).

"34 *Eggs.*—Baskets of eggs are charged at ordinary parcels rate on actual weight.

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(1) Indian Railways Act, IV of 1879, sections 10 and 11 :—

10. Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, sections 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.

11. When any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction or deterioration of, or damage to, such property, unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the

"35. *Butter.*—In baskets booked to Byculla by passenger train from all stations are charged at 3rd class goods rate at owner's risk.

"*Opium.*—(*a*) When more than one ton is sent as one consignment, the whole consignment should be charged for at the parcels rates upon the total aggregate weight and upon each package. These charges are at the owner's risk in each case. For the insurance charges, see clause (*c*) of this paragraph.

* * * *

"(*c*) Upon opium . . . which is carried at the company's risk at parcels' rate by passenger or mixed train the following charge is to be made for insurance in addition to the charge for conveyance, namely :—" (then follow the charges).

"39. *Treasure, plate, &c.*—The charges and arrangements for the conveyance, over the G. I. P. Railway, of treasure, that is, specie, bullion, gold and silver, whether coined or uncoined, and copper coins (whether belonging to the public or to Government,) and of plate, jewellery, trinkets, &c., are the following, namely—

"(2) First—For all treasure (except copper coin) the charges, per maund, per mile, are at the following scale, namely :—

Up to 27 maunds at	... ...	$2\frac{1}{2}$	pies
Above 27 do.	and up to 81	2	„
Above 81 do.	do. 270	$1\frac{1}{2}$	„
Over 270 do.	... ...	1	„

* * * * *

"(5) Treasure which is not insured, whether it is in owner's charge or not, is always carried at owner's risk, and the company are relieved by section 11, chapter 3, of the Indian Railways Act, 1879, from all responsibility or risk in regard to such treasure . . . . . .

"40. *Insurance charges.*—The following are the rates and rules for the insurance of goods, livestock, parcels, treasure, &c.

"(2) Insurance charges are made in addition to the ordinary charges for the conveyance of treasure, parcels, goods, horses, &c., and must always be prepaid. The contents of packages which are insured must always be examined.

"(3) The Railway Company is not responsible, whether they are insured or not, for damage to horses arising from fright or restiveness, nor for damage to horses or other articles of any kind which may be caused by delays to trains.

"(4) Station masters are authorized to insure both locally, and through with other railways, articles and animals of any kind (opium and horses only excepted) up to the value of five hundred rupees. Applications for the insurance of articles and animals (except opium and horses) valued at more than five hundred rupees, should be referred to the District Traffic Superintendents at Bombay, Sholapur,

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safe conveyance of the same or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf.

When any property, of which the value and nature have been declared under this section, has been lost, destroyed or damaged, or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared.

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* * * * *

"Subject to the condition that when the insurance charge for an article valued at more than five thousand rupees comes to less than the charge for five thousand rupees (that is 50 Rs.), the latter charge is made. For instance, for an article valued at six thousand rupees the charge for insurance will be fifty, not thirty rupees."

The evidence given at the hearing as to the despatch of the plaintiff's box of specie from the Byculla Station at Bombay was as follows:—The manager (Motilal Panalál) of the plaintiff's firm said:—

"Another man Buria came and packed them in a box in my presence. The bags were each tied up with string when I received them from the currency office, and were not opened on the road to the shop. Each of the bags was weighed before I received them. The bags were not opened before they were packed. When they were packed, the lid of the box was nailed down, and the box was covered with gunny cloth sewn up; and seals were placed along the seams, and the box addressed to the consignee at Saugor. Then it was taken in a carriage by me and Buria to Byculla Station. On the road to the station the box was not interfered with in any way. We arrived at Byculla Station about 7 P.M., and the box was taken to the booking office, and Buria told the parcel clerk that the box contained three bags containing Rs. 2,000 each. It was weighed, and showed 2 maunds and 5 seers. Then I asked the clerk to take the money for carriage and give me a bill. I paid him what he asked, and he gave me a receipt. This is it.

"I paid Rs. 18-1-0, which was the amount he asked for. That was all that took place. The box was addressed to Raghunathdás Hamirmul, Saugor. It was written on the gunny with ink."

Buria, who was also examined, said:—

"I and Motilál took the box in a carriage to the Byculla Station where I placed it on the scale in the parcels' office. The box and its contents were then in the same condition as when it left the shop. I told the clerk the box contained three bags, each containing Rs. 2,000. This is the man (Fonseca). I told him the box was to go to Saugor, and that he should charge what he pleased. The clerk then asked me to shake the box, which I did, and the rupees jingled. Afterwards Motilál paid the money and we got a receipt, and then returned home." . . . . "When we arrived at the station, the clerk asked what was in the box. I did not say the box contained silver (*chándi*). The clerk did not ask if we wished to insure. We had Rs. 20 or 25 with us to pay for the carriage of the box. I do not remember whether it was more than Rs. 25, as Motilál had the money."

For the defendants the assistant parcel clerk (C. M. Fonseca) at the Byculla Station was examined. He said:—

"I recollect the parcel being brought. There were three persons who brought it, Motilál and Buria being two of them. When they brought it, I asked them what it contained and they said '*chándi rokra.*' They then said they wanted it despatched to Saugor. I then wrote the receipt, charging the carriage at treasure rate. They gave me some money. I gave them the change and they went away. The parcel was put into the brake by the mukádam, with the label on it. It went by the mail train. We do not get a receipt from the mukádam. This is the counterfoil. I had often specie before from these very persons; they never had insured their specie."

The defendants' traffic manager (H. Conder) gave evidence as follows:—

"There is an ordinary rate for parcels and an ordinary rate for carrying treasure apart from insurance; the insurance is extra.

"We have a working agreement with the Indian Midland Railway Company, and we had it in January, 1890. The conversation I had with these people was in English; one could speak English, and the other I think could not. My impression is that we spoke of silver all the time, not specie. A larger rate is charged for carriage of treasure at owner's risk than for ordinary parcels at company's risk. We charge it because it is more valuable, and there are many other articles of a valuable nature for which we charge higher than ordinary rates, some being carried at company's risk and some at owner's. Everything that goes by a passenger train is given into charge of the guard.

"We do not accept treasure at all at any rate lower than the rate charged in this case."

The Traffic Inspector (C. Bedford) stated as follows:—

"I have checked the charge of Rs. 18-1-0 in all on this parcel with the weight as described on the counterfoil of the weigh bill. It is $2\frac{1}{2}$ pies per maund per mile multiplied by 651 miles, the distance from Byculla to Saugor, and multiplied by $2\frac{1}{8}$ maunds, the weight of the parcel. That calculation is in accordance with Rule 39 at p. 66 of No. 10 (coaching tariff book.) The insurance which would have been payable, assuming the box to contain Rs. 6,000, would amount to Rs. 52-8-0 according to the rule on p. 68. The ordinary parcel rate for such a box if it did not contain treasure would have been Rs. 9. If the clerk had been told that the box contained Rs. 6,000 he would not have been at liberty to insure it, but would have had to apply to the station master, and he would have had to apply to the District Traffic Superintendent, as provided by Rule 4 at p. 68. Uninsured treasure is at owner's risk—Rule 5, p. 67.

"The extra rate is not charged that extra care may be taken. The Railway Company do nothing for it but carry."

Starling, J., held that the company were liable, and gave judgment for the plaintiffs (see I. L. R., 17, Bom. 723).

The defendants appealed.

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Lang (Advocate General) and *Kirkpatrick* for the appellants (defendants) :—The company have power within certain limits to prescribe the rates at which they will carry goods on the railway. (See *Government Gazette*, 30th April, 1868.) They have accordingly within those limits fixed certain ordinary rates which vary for different kinds of goods, *e.g.* there is an ordinary charge for parcels generally, an ordinary charge for opium, and an ordinary charge for treasure, &c. But where only this ordinary charge is paid for treasure, &c., the company is expressly exempted from liability by section 11 of Act IV of 1879. That section fixes the company with liability only where an "increased charge" is paid. The question here, therefore, is whether the payment made for the plaintiffs' box was the "ordinary charge" or the "increased charge." We contend that it was the former and not the latter, and that, therefore, the company is not liable. Section 11 empowers the company to make an "increased charge," and the company by its rules has declared that the increased charge shall be the "insurance charge." There is nothing in the Act to prevent the company from doing this so long as the charge is within the prescribed limits. The "increased charge" means not an increase upon the ordinary charge for *parcels* generally, but an increase upon the ordinary charge for *treasure*. The fact that this latter charge for treasure is higher than the charge for parcels, does not make it an "increased charge." The *parcels* rate is not the standard by which all other charges are measured. The ordinary "treasure charge" has no relation to the charge for "parcels," and the "increase" spoken of in the section means an increase upon the ordinary treasure charge, and not (as contended by the plaintiffs) a higher rate than the charge for parcels. The Court below has erred in assuming that the rate prescribed for "parcels" is the standard by which all the other rates are to be measured. The plaintiffs' goods were not insured. There was no application to the officer authorized to insure, and no proper declaration. The suit, moreover, is barred by limitation. The following authorities were cited:—Act IV of 1879; Act XVIII of 1854, sec. 10; Indian Contract Act IX of 1872, sec. 151; Stat. 11 Geo. IV and 1 Will. IV, c. 68; *Secretary of State for India* v. *Budhu Nath*[1]; *Behrens*

[1] I. L. R., 19 Calc., 538.

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v. *Great Northern Railway Co.*[1]; *Venkatachala* v. *South Indian Railway Co.*[2]; *Robinson* v. *The South-Western Railway Co.*[3]; *Great Western Railway Company* v. *McCarthy*[4]; *Irrawady Flotilla Co.* v. *Bugwandáss*[5]. As to limitation, the Limitation Act (XV of 1877), Schedule II, arts. 30 and 115; *Mohansing* v. *Henry Conder*[6]; *British India Steam Navigation Co.* v. *Hajee Mahomed Esack and Co.*[7]; *Danmull* v. *British India Steam Navigation Co.*[8]

Inverarity and *Scott* for the respondents (plaintiffs):—The Court below was right in holding the defendants liable as bailees. We adopt the argument in the judgment, which was this:—Act IV of 1879, section 10, imposes upon a railway company the liability of a bailee upon all articles carried. But by section 11 in the case of silver, &c., that liability does not attach unless an "increased charge" is paid. Upon such payment being made, that liability (*i. e.* of a bailee) attaches. That increased charge is plainly not an insurance charge, but merely the further charge necessary to impose the ordinary liability of a bailee upon the company for excepted articles which would rest upon it for other goods without any such increased charge. The company cannot decline all responsibility for treasure, &c., unless it is insured. But it is contended that they have done this by their rules. They contend that in order to make them liable for treasure it must be insured, that is to say, that they have power to require two increased charges, *viz.*, first an higher charge for carriage only, the payment of which, however, imposes no liability at all upon them, and, secondly, a further higher charge which imposes upon them the liability of insurers. The Act does not sanction this. It contemplates that without insuring they must carry treasure and other excepted articles as bailees with the liability of bailees just as they carry ordinary goods, but for the excepted articles they may under section 11 make a further or "increased" charge. We rely on *Chogemul* v. *Commissioners, &c., of the Port of Calcutta*[9]. As to limitation, this suit is not barred. All the authorities will be found in *Kalu Rám* v. *The Madras*

(1) 6 H. and N., 366; 7 H. & N., 950.
(2) I. L. R., 5 Mad., 208.
(3) 34L. J.(C. P.), 234.
(4) 12 Ap. Ca., 218.
(5) L. R., 18 Ind. Ap., 121.
(6) I. L. R., 7 Bom., 478.
(7) I. L. R., 3 Mad., 107.
(8) I. L. R., 12 Calc., 477.
(9) I. L. R., 18 Calc., 427.

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Railway Company[1] and *Hassaji* v. *The East Indian Railway Company*[2]. As to the declaration of these goods, we rely on *Bradbury* v. *Sutton*[3].

BAYLEY, C.J. (ACTING):—The plaintiffs, who carry on business in Bombay as shroffs and commission agents, state in their plaint that on or about the 3rd January, 1890, they delivered to the defendants at their station at Byculla a box containing Rs. 6,000 to be carried to Saugor, a station on the Indian Midland Railway. The box was consigned to one Raghunáthdás Hamirmull at Saugor and weighed 2 maunds and 5 seers, and was sealed with the plaintiffs' seal and addressed to the consignee in the English and Márwádi languages, and that on the delivery of the box the plaintiffs were handed the railway receipt dated 3rd January, 1890.

The plaint then states that at the time of the delivery of the box to defendants' servant at Byculla the nature and value thereof were duly declared and an increased charge over and above the charges for ordinary parcels was paid to the defendants for the carriage thereof, and the defendants agreed to carry the same to Saugor. The plaintiffs say that the defendants were bound to take such care of the box and its contents as a prudent man would have taken of his own goods of similar nature and value; that the box was not delivered to the consignee at Saugor, but a box weighing 33 to 36 seers only was tendered to him there, the box being in a broken and damaged condition, and the consignee refused to accept the same. And the plaintiffs say that the non-delivery of the box was a breach of their contract on the part of the defendants; that correspondence thereupon ensued, and on the 8th May, 1890, the defendants' traffic manager wrote to the plaintiffs (Exhibit 9) stating that no trace could be discovered of the box containing Rs. 6,000 either on the defendants' or on the Indian Midland Railway.

With regard to the contentions raised by the defendants' manager in his letters, *viz.*, that the defendants are not liable as the box and its contents were not insured, the plaintiffs say that an increased charge for the carriage of the box

(1) I. L. R., 3 Mad., 240. (2) I. L. R., 5 Mad., 388.
(3) 19 W. R., 800; S. C. 21 W. R., 128.

and its contents on and above the charges for their carriage of ordinary parcels was paid to them; that no intimation was given to them that such increased charge was not for the insurance of the box and its contents; that they were always ready and willing and would have paid any further sum had they been informed that such further sum was required for the insurance of the box and its contents, and that the contention so raised by the defendants' manager is unsustainable.

The plaint then alleges that all conditions have been fulfilled and all things been done to entitle the plaintiffs to recover the value of the box and its contents from the defendants and interest on the said sum of Rs. 6,000, and the plaintiffs pray that the defendants may be ordered to pay as compensation for the said breach of contract Rs. 6,010, being Rs. 6,000 the contents of the box delivered by the plaintiffs to defendants to be carried to Saugor and Rs. 10 the value of the box, but which have been wholly lost to the plaintiffs, and which were not carried and delivered by the defendants in accordance with their contract with the plaintiffs. There is a prayer also for interest on Rs. 6,000 at 6 per cent. from the 3rd January, 1890, to judgment together with the costs of the suit and interest on the judgment at 6 per cent., and for such further and other relief as the nature of the case may require.

The defendants in their written statement admit that a parcel which was stated by the consignor to contain specie was delivered to the defendants on the 3rd January, 1890, at their Byculla Station to be carried to Saugor. They deny that at the time of the delivery of the parcel the value thereof was declared, or that an increased charge was paid for the carriage thereof, and allege that only the ordinary rate for carriage of treasure at owner's risk calculated on the weight of the parcel was charged, and an increased charge for the safe conveyance of the parcel was not charged or paid, nor was any engagement to pay such increased charge entered into with the defendants, and they submit that under the provisions of section 11 of Act IV of 1879 they are not liable to the plaintiffs in respect of the loss of the contents of the parcel.

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The defendants then say that if the parcel when delivered to them in fact contained specie, the parcel was lost or stolen while in course of transit to Saugor or at the Saugor Station, or its contents were stolen in such transit or at the Saugor Station, and earth and iron sledge hammer heads were placed in it instead of the specie. That a parcel afterwards found to contain earth and iron sledge hammer heads addressed to Raghunáthdás Hamirmull arrived at Saugor on or about the 5th January, 1890, but the consignee refused to accept it. Diligent search was made for the said specie, but no portion thereof had been found, nor had any parcel, except that containing earth and hammer heads, been found. The defendants submit that they are in no way liable to the plaintiffs for the loss of the said specie, and they further submit that the plaintiffs' claim is barred by limitation, and that the suit should be dismissed with costs.

The following issues were framed at the hearing:—

1. Whether the parcel delivered to the defendants contained specie to the extent alleged in the plaint?

2. Whether at the time of the delivery to the defendants of the parcel referred to in paragraph 1 of the plaint the value thereof was declared?

3. Whether the charge paid to the defendants for the carriage of the said parcel was not the ordinary rate for the carriage of uninsured treasure?

4. Whether the said parcel was not carried by the defendants at the owner's risk?

5. Whether the said parcel was not lost or stolen in the course of transit as alleged in paragraph 4 of the written statement?

6. Whether this suit is barred by limitation?

7. Whether the plaintiffs are entitled to recover from the defendants the sum claimed, or any and what part thereof?

The learned Judge in the Court below held that the suit was not barred by limitation, and that the defendants were liable to the plaintiffs, and he passed a decree for the plaintiffs for Rs. 6,000 and by way of damages for the non-delivery of the parcel,

and awarded the plaintiffs interest at 6 per cent. on such amount from the 6th January, 1890, until judgment (7th August, 1893), together with the costs of suit and interest on the judgment at 6 per cent. The defendants appealed against such decree, and the appeal was argued before us on the 20th, 21st and 28th September last, when the Court reserved its judgment.

The principal questions argued before us were whether the requirements imposed by section 11 of Act IV of 1879 upon consignors of treasure and other valuable articles had been complied with by the plaintiffs; whether the defendants upon the facts disclosed by the evidence were exempted from all liability in regard to the Rs. 6,000 which were proved to have been in the parcel when it was delivered to their servants at the Byculla Station; and whether the suit was barred by limitation.

I will first consider whether the value and nature of the property contained in the parcel were duly declared at the Byculla Station as required by section 11 of "The Indian Railway Act of 1879" (Act IV of 1879), which was the Act in force in January, 1890.

Section 11 of that Act enacts that "when any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction or deterioration of or damage to such property unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same, or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf.

"When any property, of which the value and nature have been declared under this section, has been lost, destroyed or damaged or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared." That section is based upon and in part copied from section 10 of the Indian Railway Act XVIII of 1854.

The English Carrier's Act 11 Geo. IV and 1 Will. IV, c. 68, s. 1, provided that mail contractors, stage-coach proprietors

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or other common carriers by land for hire should not be liable for the loss of certain specified goods above the value of £ 10, unless at the time of the delivery thereof the value and nature of such article or property shall have been declared by the person sending or delivering the same, and such increased charge as thereinafter (*i. e.*, in section 2) mentioned or an engagement to pay the same be accepted by the person receiving such parcel or package; and in section 2 such increased charge is stated to be "required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles." Section 3 of the Act states that carriers are, if thereto required, to give receipts acknowledging that the increased rate of charge has been paid, and "sign a receipt for the package or parcel acknowledging the same to have been insured," and if such receipt be not given when required, the carrier "shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

In *Baxendale* v. *Hart*[1], which was a decision of the Court of Exchequer Chamber upon section 1 of the English Carrier's Act just cited, it was held that the person who sends or delivers the parcel containing any of the valuable articles mentioned in that section must take the first step by giving that information as to its contents to the carrier which he alone can give, and if he does not take that first step he could not maintain an action, as section 1 of that Act said that the carrier shall not be liable unless the declaration is made.

The words "increased charge for the safe conveyance of the same" which occur in section 10 of Act XVIII of 1854 and in section 11 of Act IV of 1879 were apparently adopted from the passage I have quoted from section 2 of the English Carrier's Act 11 Geo. IV and 1 Will IV, c. 68, the words in that section (2 of 11 Geo. IV and 1 Will. IV, c. 68) "as a compensation for the greater risk and care to be taken" being omitted, I presume because the framers of the two Indian Railway Acts,

(1) 6 Ex., 769.

XVIII of 1854 and IV of 1879, considered that they were unnecessary, and that the words they used were sufficiently explicit without them. In my opinion, the three sections are substantially the same, and must be regarded as having the same meaning. It will be noticed that in section 3 of 11 Geo. IV and 1 Will. IV, c. 68, the receipt to be given for the increased rate of charge for the specified articles is to acknowledge the same to have been insured—the increased rate being in fact for the insurance.

Was there, then, a sufficient declaration of the value and nature of the contents of the parcel in the present case?

Motilál, the Bombay manager of the plaintiffs' firm, said that he arrived at the Byculla Station about 7 P. M., and the box was taken to the booking office; and Buria, who was with him, told the parcel clerk that the box contained three bags containing Rs. 2,000 each, that it was then weighed and showed 2 maunds and 5 seers. Then he said he asked the clerk to take the money for carriage and give him a bill. He paid him what he asked, *viz.* Rs. 18-1-0, and the clerk gave a receipt.

The receipt was printed so as to show three kinds of charges, *viz.*, "Charges for carriage," "Insurance charge," "Delivery charges."

The Rs. 18-1-0 were entered as paid for charges for carriage. Nothing was entered as paid for insurance charge or delivery charges.

Buria in his evidence said that he told the clerk the box contained three bags each containing Rs. 2,000, that the box was to go to Saugor, and that he should charge what he pleased. The clerk then asked him to shake the box, which he did, and the rupees jingled. Afterwards Motilál paid the money, and having got a receipt they returned home.

In cross-examination he stated that he did not say the box contained silver (*chándi*), and that the clerk did not ask if they wished to ensure. They had Rs. 20 or Rs. 25 with them.

That neither Motilál nor Buria intended or asked that the box should be insured, is clear. Motilál said that before 1890 the

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plaintiffs' firm were sending specie up country two or four times a month. He did not insure the box, but simply asked the clerk (Fonseca) to charge what was right, and whatever he asked for he paid. He did not know what insurance of goods by the railway company was. That he did not then (on the 3rd January, 1890) know that insurance meant the payment of an extra charge. He had since come to know what insurance was, and when he afterwards asked a European police officer what it was, and on being told by him, he said the box was not insured.

Fonseca, who in January, 1890, was assistant booking clerk at the Byculla Station, said he recollected the parcel being brought by three persons, Motilál and Buria being two of them. When they brought it he asked them what it contained, and they said "*chándi rokra*," and that they wanted it despatched to Saugor. He then wrote the receipt charging the carriage at treasure rate. They gave him some money, he gave them the change, and they went away. He had had often before specie from these very persons and that they had never insured it. He knew that *chándi rokra* meant rupees. This was a heavy parcel, and he knew it contained a large quantity of rupees. Nobody told him. He did not ask how much there was in it. *He heard them talking about Rs. 6,000 in the box. They did not say anything to him, and they never told him there were Rs. 6,000 in the box.* One of them asked him to take from him whatever money he required for the box.

There is thus a conflict of evidence between Motilál and Buria on the one hand and Fonseca on the other as to what was said by the former at the time the box was delivered to Fonseca, and having regard to the previous practice of the plaintiffs of not insuring when conveying specie to be carried by the defendants and to the probabilities of the case, I think that Fonseca's account of what passed is most likely to be the correct one.

Mr. Conder, Traffic Manager of the G. I. P. Railway, said that there was an ordinary rate for parcels and an ordinary rate for carrying treasure apart from insurance, the insurance being extra, a larger rate being charged for carriage of treasure at owner's risk than of ordinary parcels at the company's risk. They charge it because it is more valuable, and that the company do not

in consideration of the larger payment engage to look more carefully after a parcel for which it is paid than for any other, unless it is insured. The company do not accept treasure at all at any rate lower than the rate charged in this case.

In the notification published in the *Bombay Government Gazette* of 30th April 1868 (Exhibit No. 8) certain maximum rates for goods for the Bombay railways sanctioned by Government were published for general information. Among them the maximum rate for parcels for every 50 miles beyond the first 50 is stated to be 3 pies per seer; and for insurance rates the maximum rate for most precious articles is to be 3 per cent.

Mr. Bedford, Traffic Inspector of the Great Indian Peninsula Railway Company, stated that he had checked the charge of Rs. 18-1-0 on the parcel in question with the weight as described in the counterfoil of the weigh bill, and it came to 2½ pies per maund per mile, multiplied by 651 miles the distance from Byculla to Saugor, and multiplied by 2⅛ maunds the weight of the parcel; that such calculation was in accordance with Rule 39 at page 66 of Exhibit No. 10, being the Great Indian Peninsula Railway Time and Fare Tables and Coaching Tariff. He said that the ordinary parcel rate for such a box if it did not contain treasure would have been Rs. 9, and that the insurance which would have been payable, assuming the box to contain Rs. 6,000, would amount to Rs. 52-8-0 according to the rule on page 68 of Exhibit No. 10. He further stated that if the clerk had been told that the box contained Rs. 6,000 he would not have been at liberty to insure it, but would have had to apply to the station master, and he would have had to apply to the District Traffic Superintendent as provided by Rule 4 at page 68 of Exhibit No. 10, and that uninsured treasure was carried at owner's risk —Rule 5, p. 67, which rule states that "treasure which is not insured, whether it is in owner's charge or not, is always carried at owner's risk, and the company are relieved by section 11, Chapter III of the Indian Railway Act, 1879, from all responsibility or risk in regard to such treasure."

Two cases relied upon by the learned Advocate General on behalf of the defendants may here be referred to. In *Robinson*

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v. *The South-Western Railway Company*(1) decided in 1865 upon section 7 of the Railway and Canal Traffic Act, 1854 (17 and 18 Vict., c. 31), Erle, C. J., said: "A declaration would be within the statute if so made as to create a liability on the part of the company to pay the higher value, as well as a liability on the part of the sender to pay the insurance thereon, but here the sender says he does not intend to insure, but he mentions the value of the horse, and he calls upon the company to take the animal. I cannot find in that a declaration within the statute" (page 238)

Byles, J., said: "The declaration must come from the sender, and must be so expressed as to be understood by the carrier as such, and, as I think, understood also as the foundation of a contract." Smith, J., said: "I agree with the rest of the Court that the declaration to be within the statute must be made with the intention that it should so operate as to entitle the company to charge the higher rate."

In *Venkatachala* v. *South Indian Railway Company*(2) it was held by Turner, C. J., and Kindersley, J., that the conditions of section 10 of the Indian Railway Act XVIII of 1854 are not fulfilled by the sender merely giving an account of the quantity and description of the goods delivered for carriage when required to do so by the booking clerk. In that case a box containing seven bars of silver valued at Rs. 4,296-10-9 had been delivered to the Railway Company at Trichinopoly Station for carriage to Bombay. And it was held that to establish the liability of the Railway Company in the case of excepted articles the declaration required by section 10 must be made in such a manner as to intimate that the sender invites the railway company to undertake the special risk and is willing to pay the increased charge.

In the present case the plaintiffs' man Buria says that he told Fonseca that the box contained three bags each containing Rs. 2,000 (a statement which Fonseca positively denies); that the box was to go to Saugor, and that he should charge what he pleased. Motilál, too, says that he simply asked the clerk to charge what was right, and that Fonseca did not ask him whether he wished

(1) 34 L. J. (C. P.), 234. (2) I. L. R., 5 Mad., 208.

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to insure; that he (Motilál) did not insure the box in question, and in fact did not then know what insurance of goods by the Railway Company was. I am, therefore, of opinion that there was no sufficient declaration of the value and nature of the contents of the parcel belonging to the plaintiffs, and that the defendants are consequently protected by the provisions of section 11 of the Indian Railway Act No. IV of 1879.

It was contended before us that the "increased charge for the safe conveyance" mentioned in that section had been paid, and, moreover, that the Railway Company were liable either as common carriers or as bailees under the Indian Contract Act (No. IX of 1872). I think, however, that the additional rate charged and paid for the plaintiffs' box, *viz.* Rs. 18-1-0, and not the ordinary parcel rate of Rs. 9, was not "an increased charge for the safe conveyance of the same" within the meaning of section 11 of Act IV of 1879, but only the ordinary charge for treasure. As already pointed out, the sum charged was within the maximum rate for parcels sanctioned by Government, and Mr. Conder stated the Railway Company do not accept treasure at all at any rate lower than the rate charged in this case.

It may be useful, having regard to the conflicting decisions of the High Courts of Calcutta and Bombay, as to the responsibility of carriers by railways in India reported in I. L. R., 3 Bom., 109 (*Kuverji* v. *G. I. P. Railway Co.*), and I. L. R., 10 Calc., 166 (*Moothora Kant* v. *The India General Steam Navigation Co.*), and to the question raised by the 6th issue in the Court below, as to whether the suit is barred by the law of limitation, to make a few remarks here upon the nature of the obligation of common carriers to carry goods with safety.

In *Riley* v. *Horne*[1], Best, C. J., in delivering the judgment of the Court elaborately examined the policy and foundation of the rule, and said: "To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer the carrier is only

(1) 5 Bingh., 217.

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relieved by two things. . . . *viz.* the act of God and the king's enemies."

Fifty years after that decision, *viz.*, in 1878, the case of *Bergheim* v. *The Great Eastern Railway Company*[1] was decided by the Court of Appeal (Bramwell, Brett and Cotton, L.JJ.), and the Court expressed itself thus:—"He" (the common carrier) "is considered as having contracted to insure the safe delivery of, that is to say, as having contracted to carry and deliver safely and securely (the act of God and of the Queen's enemies alone excepted) the goods of which he as common carrier is bailee. The reason why the law implied that this is his contract, was that the carrier had by himself or his servants during the bailment at times and in places where he could not even be supervised, the exclusive control and care of the goods intrusted to him by the owner, and consequently, to prevent fraud, the law imposed on those who contracted to carry goods as common carriers the obligation also to undertake to insure their safety." The Court then quote a passage from Lord Chief Justice Holt's judgment in *Coggs* v. *Bernard* [2] in which it is said: "And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons that they may be safe in their ways of dealings." Later on the Court calls it "a contract of insurance, which the law had originally implied, because the carrier had the exclusive, or, at least, absolute control and care of the goods."

The same view was taken by the High Court in Calcutta in a case which came before a Full Bench of five Judges in 1883 (*Moothora Kant* v. *The India General Steam Navigation Co.* [3]) when the Bombay decision *Kuverji* v. *G. I. P. Railway Co.*[4] was carefully considered and dissented from. Garth, C. J., whilst discussing the duties and responsibilities of common carriers by the law of England said (p. 182): "And it is important to note that this duty was imposed upon him irrespective of any contract. It was imposed upon him by the custom of the realm, for the

(1) 3 C. P. D., 221.

(2) Lord Raymond, 918, and 1 Smith's L. C., 8th Ed., p. 199.

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

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

benefit of the public, by reason of the important trust which he undertook. (See the observations of Lord Holt in *Coggs* v. *Bernard*, 1 Smith's L. C., 199, 8th edition.)"

Mr. Scott in the course of his argument before us on behalf of the plaintiffs cited a passage from Bullen and Leake's work on Pleading with the object of showing that actions against common carriers were founded on contract, or, as they were formerly called, actions *ex contractu,* and were not actions founded on tort. But Sir Richard Garth, C. J., in his judgment already cited says (p. 186) :—

"It must be borne in mind that the law and liabilities of common carriers are, as I said before, founded on custom, irrespective of contract. A common carrier is and always has been liable to be sued for any breach of this common law duty in an action of tort . . . The Bombay High Court, while fully admitting that the English law on this subject prevails in the Indian Mofussil, seems to have lost sight of the fact that this law is founded upon a common law duty apart from contract. It is true that when the employment of a common carrier has commenced, the law implies a contract on his part to perform the duty imposed upon him ; and consequently he is liable to be sued in an action either of tort or contract, according to the convenience or advantage of the plaintiff in each suit. (See Bullen and Leake on Pleading, pp. 101 and 243.)"

In the well-known treatise by the late Mr. Selwyn on the "Law of Nisi Prius," first published in the years 1806, 1807 and 1808, (I cite from the 13th edition, 1869), under the title "Carriers," it is stated that "Formerly the declaration in actions against common carriers stated their employment as common carriers, their liability by the custom of the realm, and delivery to and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods, but it afterwards became usual to declare in *assumpsit*, and not to state either the employment of the defendants as common carriers, or the custom of the realm as to their liability. This form of declaration has prevailed since the decision of *Dale* v. *Hall*, Michaelmas Term, 1750, in which it was settled, that it did

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not make any difference whether the plaintiff declared on the custom, or more generally in *assumpsit*; for by stating that the defendant carried for hire it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract"—Selwyn's Nisi Prius (13th Ed.), Vol. I, pp. 362-363.

I may here remark that in the case I have first cited on this point, *Riley* v. *Horne*(1), the action was an action on the case against the defendants as common carriers for negligence in losing goods entrusted to them to be safely carried by them, an action *in delicto*.

In 1891, in the case of the *Irrawady Flotilla Company* v. *Bugwandáss*(2), where the Judicial Committee of the Privy Council decided in favour of the view of the High Court of Calcutta, *viz.*, that the liability of common carriers in India was not affected by the Indian Contract Act, 1872 (I. L. R., 10 Calc., 166) and against that of the High Court of Bombay (I. L. 3 Bom., 109), their Lordships stated the nature of the obligation in the same way that Garth, C. J., had done, and said: "The written law is untouched by the Act of 1872" (the Indian Contract Act, 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., in *Bretherton* v. *Wood*(3), "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."

At the end of their judgment, their Lordships say that they are led to the conclusion that the Indian Contract Act of 1872 was not intended to deal with the law relating to common carriers, and that notwithstanding the generality of some expressions in the chapter on bailments they think that common carriers are not within the Act (p. 131.)

(1) 5 Bingh., 217. (2) L. R., 18 Ind. Ap., 121.
(3) 3 B. & B., 62.

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I think that the plaintiffs' contentions above referred to are unfounded, as I consider that the liability of the Railway Company as common carriers was taken away by the provisions of section 11 of the Railway Act IV of 1879, the plaintiffs at the time of delivery of the very valuable property to the defendants' booking clerk not having declared the value and nature thereof as required by that section; and that the Railway Company cannot be held to be liable as bailees under the Indian Contract Act— the Judicial Committee of the Privy Council in the *Irrawady Flotilla Company* v. *Bugwándáss*(1) having held, as had (as I have pointed out) previously been decided in several cases in England, that the obligation imposed by law on common carriers has nothing to do with contract in its origin, it being a duty cast upon them by reason of their exercising a public employment for reward, and, consequently, that the liability of Indian Railway Companies as common carriers was not affected by the Indian Contract Act, 1872. As their Lordships say (p. 129): "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" (the Indian Contract Act) "was not intended to alter the law applicable to common carriers."

Lastly, as to the question of limitation. The learned Judge in the Division Court said that there are a number of cases cited at page 132 of Starling's Limitation Act, 1877, which show that article 30 in the 2nd Schedule of that Act does not apply to a case like the present, and that this suit having been brought within three years is in time. Article 30 is in these words: "Against a carrier for compensation for losing or injuring goods; two years from the date when the loss or injury occurs." Article 115, which gives a limit of three years, applies to suits "for compensation for the breach of any contract, express or implied, not in writing registered, *and not herein specially provided for.*"

The only Bombay decision referred to at page 132 of the work just cited is *Mohansing* v. *Henry Conder*(2), as to which the learned author says that, if the defendant wishes to avail himself of the benefit of article 30 on the ground that goods

(1) L. R., 18 Ind. Ap., 121. (2) I. L. R., 7 Bom., 478.

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have been lost, it is incumbent on him to prove the loss. In that case the G. I. P. Railway Company did not, so far as the evidence showed, announce their inability to deliver the missing bags of wheat on account of having lost them either in transit or by misdelivery to some one not entitled. On the other hand, they took from plaintiff's agent receipts for the full number of bags as arrived at their destination and gave gate passes for delivery at Sholápur, the place to which they were to be carried.

In the present case the defendants' traffic manager by his letter of 8th May, 1890, to plaintiffs' solicitors (Exhibit G) intimates the loss of the parcel, and that although diligent inquiries have been made by the defendants' officers and by the police, no trace of the parcel can be found, and that a like result has followed the inquiries made on the Indian Midland Railway. That decision does not appear to me to be any authority for holding that article 30 is not applicable to the present case.

The other cases cited at page 132 in Starling on Limitation to the effect that where there is a contract between the plaintiff and the carrier, article 30 does not apply, were decided in Calcutta and Madras, and, therefore, have no binding effect in this Court. They are doubtless entitled to respectful consideration, but no further. Each of the four High Courts in India frequently dissents from the views taken by one or more of the other High Courts, as they are perfectly justified in doing.

One of the Madras cases cited at page 132 of the work on Limitation, *Kalu Rám* v. *The Madras Railway Co.*[1], seems rather to favour the view that article 30 applies in a case like the present. There Mr. Justice Kindersley, who tried the case, said: "As it has not been shown that there was any contract between the plaintiff and defendants I must hold, following the decision in this Court in *Háji Mahomed Isack* v. *British India Steam Navigation Company*[2], that the suit, so far as it is founded, not on contract but upon the alleged negligence or want of proper care on the part of the defendants, is barred by the Limitation Act, article 30 of Schedule II."

(1) I. L. R., 3 Mad., 240. (2) I. L. R., 3 Mad., 107.

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There being, in my opinion, no decision of the Bombay High Court applicable to the present case, and having regard to the real nature of the suit, and the evidence given in the Court below, I am of opinion that the claim of the plaintiffs is one against the defendants as carriers for compensation for losing goods, and falls within article 30, and consequently that as the present suit was not brought until December, 1892, two year, and eleven months after the loss, it is barred by limitation.

For these reasons I am of opinion that the appeal must be allowed, and the decree reversed. The plaintiffs (respondents) to pay the defendants (appellants) their costs of suit throughout, and also pay the appellants their costs of the appeal.

FARRAN, J.:—The learned Judge of the Division Court has held that the suit is not barred by limitation, applying to the plaintiffs' claim the limitation prescribed by article 115, and not that prescribed by article 30 of the Limitation Act. Had the question been *res integra* I should have felt much difficulty in concurring in that view. The authorities cited by the Chief Justice show that a common carrier, who failed to deliver a parcel committed to him for carriage, could be sued either in tort for negligence in carrying out his common law duty, or in contract for breach of his contract, express or implied, to deliver in accordance with his instructions. I refer particularly to *Bretherton* v. *Wood*[1], cited in *Irrawady Flotilla Company* v. *Bugwandáss*[2]. The Legislature must be credited with this knowledge when framing the Limitation Act, and must, I incline to think, have intended when in general terms limiting the responsibility of carriers to make compensation for loss of goods to two years after the loss, to make that time the outside period within which they could be sued, whether the claim was laid in tort or as arising out of contract. Otherwise they would have used less broad and comprehensive words to express their meaning, and would hardly have employed language which indisputably is wide enough to cover a claim for compensation for loss of goods based on the breach of an express or implied contract of the carrier to carry safely.

(1) 3 B. and B., 62. (2) L. R., 18 Ind. Ap. at p. 129.

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I incline to think that the Courts would have better fulfilled the intention of the Legislature by treating all claims against a carrier which could fairly be deemed to arise out of the loss of, or injury to, goods (and, liberally interpreted, almost all claims against a carrier, unless he were actually in possession of the goods uninjured, would be embraced within one or other of these two categories) as coming within the purview of articles 30 and 31 than by confining the general words of the former article to a claim for compensation for loss of goods arising otherwise than out of contract. The position of the article in the schedule is to my mind a most fallacious guide. In Part IV of the schedule claims arising out of contract and claims arising out of tort are mixed together, and certainly a claim under article 31 is much more naturally based upon contract than upon tort.

Having regard, however, to the current of decisions in the other High Courts I feel constrained to say that the learned Judge below could not have decided differently upon this branch of the case, and I think that now it is rather the part of the Legislature to make its meaning more clear if it has been misinterpreted, than for us to run counter to the authorities in the other High Courts, upon the strength of which parties may have forborne to sue within the two years' limit, even though we may not be convinced of the reasoning upon which these authorities are based. However, it is not necessary for me to express a final opinion upon this point, as I agree with the Chief Justice on the other branch of the case.

Turning to the merits I proceed to consider whether the Division Court is correct in holding that the plaintiffs have paid an "increased charge" for the safe conveyance of their box of specie within the meaning of section 11 of the Indian Railway Act of 1879. In my opinion they have not.

In the Small Cause Court reference in *Bálárám* v. *S. M. Railway Company*[1] we have already held that a consignee, who pays the treasure rate charged by the railway administration for the conveyance of treasure, does not in doing so pay "a percentage on the value" within the meaning of the Indian Railways Act, 1890, section 75, "by way of compensation for in-

(1) *Ante* p. 159.

creased risk." The wording of that section is different from that of section 11 of the Act which we are now considering, and that ruling does not, therefore, decide the present case. Now the Act, beyond providing that a copy of the tariff of charges shall be exhibited at each station (section 9), does not deal with the charges which the defendant company may levy. That subject is otherwise provided for. The agreement of the 17th August, 1849, between the defendant company and the East India Company provides that the defendants shall *(inter alia)* be common carriers of goods and shall charge such fares for the carriage of goods as shall be approved by the East India Company (Exhibit 4). The power to give the requisite approval is now vested in the Government of Bombay (Exhibit 6). Government regulate the charge by fixing a maximum rate for the carriage of parcels *(inter alia)* and a maximum insurance rate. So long as the company keep within these maxima they are at liberty to fix the rate for carriage and insurance. The company acting on the liberty thus afforded to them have not fixed one uniform rate for all parcels, but have adopted a classification of parcels under which they are charged for according to their contents. Thus there is a charge for bread, for ice, leaves, opium, treasure, and various other articles specially laid down, and in addition there is a comprehensive charge which includes all articles not specifically provided for. Some of these special charges are above and some below the comprehensive charge for ordinary parcels, but all are within the maximum charge allowed by Government, and are, therefore, charges which the company may legitimately levy for the mere carriage of parcels. In determining these classified charges the company no doubt take various circumstances into consideration, fixing the rate low in some instances in order to foster the traffic, and high in other instances where they are sure of the traffic and where they feel the traffic is able to bear such high rate without diminishing its volume. In this way the company has fixed a low rate for leaves and a high rate for treasure, but each rate alike is the ordinary rate for the carriage of goods of that particular class. This is certainly, as I have shown, within their powers. I fail, therefore entirely to see how in paying this ordinary rate for treasure the

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consignee pays "an increased charge for the safe conveyance of the same." He pays the ordinary charge for the carriage, and no more and no less.

In addition to this ordinary rate the company make an extra charge for what they call "insurance" in the case of the valuable articles specified in the schedule to section 11 of the Act. About this there can be no mistake. In their tariff of charges they say in so many words (page 67 of the Company's book of rates) referring to section 11 of the Act that they are not responsible for loss * * * of gold, silver, &c., "unless an increased charge for the safe conveyance of the same is paid." This can mean nothing else than an increased charge over the ordinary charge for the carriage of the particular article specified in the tariff. Article 40, clause 2, at page 68 of the Company's book of rates is still more clear. "Insurance charges are in all cases made in addition to the ordinary charges for the conveyance of treasure * * * * and must always be prepaid. The contents of packages which are insured must always be examined."

Now this "increased charge" is not levied on the weight of the article carried, but on its value. In this case also the Government have given the company a free hand below a certain maximum. The maximum allowed by Government is 3 per cent. The company charge a percentage varying from ½ to 1 per cent. The confusion in the present case has probably arisen from the use of the word "insurance" in the tariff of charges. The use of the word has arisen in this way. A common carrier in England is often spoken of as an "insurer," not because he "insures" in the ordinary acceptation of the word, but because he warrants or contracts that he will (with specified exceptions) carry and deliver the goods entrusted to him safely—*Bergheim* v. *The Great Eastern Railway Company*[1]. In the case of articles of small bulk and great value (being above the value of 10£) the Carrier's Act (11 Geo. IV and 1 Will. IV, c. 68) enacted that a carrier should not be liable for their loss (not arising from the felonious act of his servant) unless an increased rate of charge was paid over and above the ordinary rate; and the third section of the Act referred to parcels upon which increased rate was paid as

(1) 3 C. P. D., 221.

"insured." Hence Judges in England have referred to the payment of such increased charge as an "insurance" (see for example the language of Channell and Wilde, B. B., in *Behrens* v. *Great Northern Railway Co.*(1), and the word thus became the usual term to denote goods upon which the increased rate was paid. In the present case the increased rate was not paid, and in my opinion the plaintiffs have not, therefore, paid "an increased charge" for the safe conveyance of their specie within the meaning of section 11 of the Act.

The more difficult question hence arises, whether, inasmuch as the company did not call upon the plaintiffs to pay such increased charge (which I shall now refer to as "insurance"), they are liable as if the same had been paid. In order to decide that question it is in the first case necessary to determine what actually took place before and at the time when the box in question was received by the company for carriage from Byculla to Saugor. It appears from the plaintiffs' letter of the 27th May, 1890, that their practice (as well as that of other native merchants) was to send specie by railway uninsured. The plaintiff writes that the railway fare at the rate chargeable for silver was paid for the parcel, and adds: "Relying on the strict supervision and just dealings of the Railway authorities, valuable parcels without being insured are generally transmitted by railways, but hardly such a case as mine happens." A person who described himself as coming on behalf of the plaintiffs replied to Mr. Conder, in answer to the question why the plaintiffs had not insured: "It was not worth while. They are constantly sending parcels of large value all over the country and they never lost anything." C. M. Fonseca, the assistant parcel clerk, who booked the box in question, said that he had often specie from the servants of the plaintiffs who handed him the box, and that they never insured. Motilál Panalál says that Buria, who went with him with the box to the station, told the parcel clerk that it contained three bags of Rs. 2,000 each. It was weighed at 2 mans (maunds) and 5 seers, and he (Motilál) asked the clerk to take the money and give him the bill. He paid what he was asked (Rs. 18-1-0) and

(1) 6 H. & N., 366.

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received a receipt. The insurance would have been Rs. 50 extra. The man brought with him Rs. 20 or 30 only to pay the fare. He did not, he says, insure the box, nor did Fonseca ask him whether he wished to insure. Buria says pretty much the same, adding that he shook the box, and the rupees jingled. Fonseca says that he was told the box contained "*chándi rokra*" and did not ask and was not told its value, but admits that he heard the men say that there were Rs. 6,000 in the box.

From this evidence the only legitimate inference which can be drawn is, I think, that the men took the box to the station without the slightest intention of insuring it, and that, if the number of rupees which it contained was mentioned in the booking office, it was not so mentioned that the clerk might have the opportunity of charging insurance if he pleased, but only in the course of casual conversation.

Now the law in England under the Carrier's Act has been, since the decision in *Behrens* v. *Great Northern Railway Company*(1), well ascertained. It is this :—If the sender declares the nature and value of the articles, and the carrier has the proper notice affixed in his office, he may demand an extra charge according to such notice. If he neglects to demand it, the sender is not bound to tender it, and the carrier receiving the goods is liable for their safe conveyance. The provisions of the Carrier's Act are wrapped up in many words, and are very involved. The Exchequer Chamber in *Behrens* v. *Great Northern Railway Company*(1) had doubts as to their meaning, but by reading the first and the second sections together arrived at the true interpretation of the statute. (See the judgment of all the Judges in the Court of Exchequer (*supra*).)

The general law being thus settled, the question as to what is a sufficient declaration of the contents and value came to be considered, and it was decided that it need not be an express and formal declaration, and such statements as the following were held sufficient :—"Take care. These are pictures of the value of £100"—*Behrens* v. *Great Northern Railway Company* (*supra*). "There are about £100 worth of goods in the parcel" which were described as "silks"—*Bradbury* v. *Sutten*(2). In fact, any

(1) 6 H. & N., 366. (2) 19 W. R. 800; 21 *ib.*, 128.

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declaration of the sender made at the time of delivery calculated to inform the carrier of the nature and value of the articles, so as to enable him to demand the increased charge, was held sufficient.

Now it is the second section of the Carrier's Act which enables the carrier *to demand* the increased rate of charge. Section 1 relates to the duty of the sender of the goods; sections 2 and 3 relate to the duty of the carrier and his power to make an increased charge. In the Railway Act of 1879, as was the case with the Railway Act of 1854, sections 2 and 3 of the Carrier's Act are not embodied. Section 1 of the Carrier's Act is enacted as section 10 of the Act of 1854 and as section 11 of the Act of 1879. These are in substance the same and differ from section 1 of the Carrier's Act principally in this that whereas the declaration of value could be made to any person receiving the parcel under the Carrier's Act, and an engagement might be accepted by him, the Indian Acts provide that the increased charge shall be accepted by some railway servant *specially authorized* in this behalf. It does not seem to be necessary that the declaration should be made to the latter. Section 11 after providing for the general non-liability of the company for articles of value runs thus:—"Unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same, or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf." It appears to me that reading that section alone and without the addition of a section similar to section 2 of the Carrier's Act, which the Courts in England had to read in combination with the first section, it implies that the sender of the goods must make the declaration in such a form as to invite the company to make the insurance charge, and that otherwise the company are not entitled to demand it. This was the view taken by the High Court of Madras in *Venkatachala* v. *South Indian Railway Company*(1). That case, I think, in substance governs the case before us. It may be that (as was there suggested) the company may, if they please, waive the increased charge; but if it is waived, it

(1) I. L. R., 5 Mad., 208.

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must be on the declaration of value and the invitation to insure being brought to the notice of some duly authorized servant of the company who alone is entitled to bind the company in such matters.

The station masters are under article 40 of the Tariff Charges, as a general rule, authorized to insure, but in case of insurance above Rs. 5,000 applications for insurance are to be referred to various specified officers. I do not say that if an offer to insure were made to the parcels clerk, and he received the insurance money for the company without referring the matter to the station master, or if, in the case of large insurance, the latter neglected to refer the matter to the higher authorities and received the insurance, the company would not be bound; but I am clearly of opinion that a mere casual conversation as to the contents of the parcel taking place before the parcel clerk, through which he becomes acquainted with its value, does not bind the company to make good its contents or operate as an increased charge for the safe conveyance of the same, or an engagement to pay such charge accepted by a railway servant specially authorized in this behalf. To hold otherwise would be in effect to deprive section 11 of the Railway Act of all force. The circumstances here are similar to those in *Robinson* v. *The South-Western Railway Company*[1], a case decided under 17 and 18 Vict., c. 31, s. 7, which is in the same lines as the Carrier's Act. The present is, therefore, an *a fortiori* case to that.

I have given my reasons at length in this case, as the conclusion I have arrived at differs from that of the Calcutta High Court Bench in the case of *Secretary of State for India* v. *Budhu Nath*[2], composed of Judges for whose opinion I entertain sincere respect, unless indeed it be considered that that case was decided upon the special facts stated in the case which the judgment does not refer to. I do not consider that it makes any difference in the construction of section 11 whether we regard the decision in *Kuverji* v. *G. I. P. Railway Company*[3] as overruled by the *Irrawady Flotilla Company* v. *Bugwandass*[4] and *Choje-*

(1) 34 L. J. (C.P.) 234.
(2) I. L. R., 19 Calc., 988.
(3) I. L. R., 3 Bom., 109.
(4) L. R., 18 Ind. Ap., 121.

mull v. *The Commissioners of Calcutta*(1), or as still in force in this Court.

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I am, therefore, of opinion that the company are protected in this case by the provisions of section 11 of the Railways Act, 1879, and that the appeal ought to be allowed, and the plaintiffs' suit dismissed with costs throughout.

Appeal allowed.

March 1, 1895. The respondents applied under clause (*c*), section 595, of the Civil Procedure Code for leave to appeal to the Privy Council, but the application was refused.

Attorneys for appellants:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for respondents:—Messrs. *Crawford, Burder and Co.*

(1) I. L. R., 18 Calc., 427.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

QUEEN-EMPRESS *v.* PAHUJI AND ANOTHER.*

1894. *January* 23.

Evidence Act (I of 1872), Sec. 30—Confession of co-prisoner—Joint trial—Plea of guilty—Evidence.

A and B were charged with murder. A pleaded guilty, but he was not convicted or sentenced till the conclusion of the trial of his fellow prisoner B. The Sessions Judge, holding that both the accused were jointly tried for the same offence, took into consideration as against B the confessions made by A and convicted both of murder.

Held, that after A had pleaded guilty he could not be treated as being jointly tried with B. A's confessions were, therefore, not admissible against B under section 30 of the Indian Evidence Act (I of 1872).

THE accused Pahuji and Mánik were committed for trial to the Sessions Court at Dhulia on a charge of murder under section 302 of the Indian Penal Code (XLV of 1860). Mánik (accused No. 2) pleaded not guilty, and claimed to be tried. Pahuji (accused No. 1) pleaded guilty, but he was not convicted and sentenced till the conclusion of the trial of accused No. 2.

The Sessions Judge, holding that both the accused were being jointly tried for the same offence took into consideration as against accused No. 2 the confessions made by accused No. 1, under section 30 of the Indian Evidence Act (I of 1872).

* Confirmation Case, No. 34 of 1893.