transactions must occasionally bring them very close to the domain of wagering and yet who are in every sense perfectly honest dealers, the rules of this Association would have been worded in a much more simple direct and satisfactory manner.

Being perfectly satisfied of the real merits of the case and that on the ground of morality all those merits are on the side of the plaintiff, I shall, in dismissing his suit, direct that each party bear his own costs.

Attorneys for the plaintiff :—Messrs. *Motichand and Devidas.*

Attorneys for the defendant :—Messrs. *Tyabji, Dayabhai & Co.*

Suit dismissed.

G. G. N.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

BOGGIANO & Co. (PLAINTIFFS) *v.* THE ARAB STEAMERS Co., LIMITED (DEFENDANTS).*

1915.

October 21.

The Indian Contract Act (IX of 1872), sections 56, 65—Contract of charter-party—Contract impossible of performance—Freight paid in advance—Export of goods shipped on board prohibited by Government—Claim for refund of freight—Bills of lading—Shipping orders—Common carriers—Carriers by sea—Private carriers—Carriers Act (III of 1865)—Carriers by sea excluded by the Carriers Act—Loss by way of demurrage.

On the 1st April 1915, the defendant Steamer Company entered into an agreement with C & Co., a firm of freight contractors, whereby the latter chartered the steamer Hejaz for a voyage, Bombay to Naples, Genoa, and/or Marseilles, any two discharging ports at charterer's option. Subsequently, the

*O. C. J. Suit No. 966 of 1912.

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Jeddah was substituted for the Hejaz. The plaintiffs procured from C & Co. freight for 2,500 bales of cotton on the said steamer and were given the shipping orders which they presented to the defendants. The plaintiffs put 2,500 bales of cotton on board the Jeddah and the defendants issued twenty five bills of lading relating to them, having received in advance Rs. 32,610-6-2 for freight. The import of cotton into Genoa being prohibited by orders of Government, the Jeddah did not leave the harbour and the voyage had to be abandoned. Eventually the steamer unloaded her cargo, and the plaintiffs before getting delivery of their goods were required to deposit Rs. 12,500 to cover the expenses and loss incurred by the ship. The said sum was deposited by the plaintiffs under protest. The plaintiffs subsequently demanded the return of Rs. 32,610-6-2 paid by them for freight, and on the defendants' disputing their liability to return the amount filed the suit for the recovery of the freight paid and for an account of Rs. 12,500 deposited to defray the costs of unloading.

The defendants pleaded, (1) that money paid in advance for freight was irrecoverable at law ; (2) that they were common carriers and that the rights and liabilities of common carriers were governed by the principles of English Law as modified by the Common Carriers Act of 1865 ; (3) that in any event they were not liable to return the freight-money, as they were ready and willing to perform their part of the contract and (4) that they were entitled to retain Rs. 5,038-3-7 out of the sum deposited with them for expenses and loss incurred by the ship.

Held, (1) that the contract became impossible of performance under section 56 of the Indian Contract Act and that the defendants were bound under section 65 of that Act to restore the sum of Rs. 32,610-6-2, being the advantage they had received under the contract ;

(2) that on the evidence before the Court, the defendants could not be treated as common carriers, they having let out and chartered the whole ship to C & Co. for a private gain ;

(3) that carriers by sea in India are not entitled to the benefits of Act III of 1865 ;

(4) that the defendants were entitled to claim demurrage and expenses incurred for unloading the cargo.

Nugent v. *Smith*, [1] referred to ; *The Irrawaddy Flotilla Company* v. *Bugwandas*, [2] considered.

THE plaintiffs were a firm of Italian merchants carrying on export and import business. The defendants

[1] (1876) 1 C. P. D. 423. [2] (1891) 18 Cal. 620.

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were a limited company registered under the Indian Companies' Act having its registered office in Bombay, and carrying on business as carriers by sea.

By a charter-party dated the 1st April 1915, the defendants let to Messrs. Chhagandas & Co., a firm of freight contractors, the S. S. Hejaz belonging to the defendants for a voyage to Naples, Genoa and/or Marseilles, via the Suez Canal, any two discharging ports at charterer's option, or as near thereunto as she might safely get. By a subsequent arrangement the S. S. Jeddah was substituted for the S. S. Hejaz.

Under shipping orders received by the plaintiffs from the firm of Chhagandas & Co., the defendants received on board the S. S. Jeddah 2,500 bales of cotton belonging to the plaintiffs to be carried to Genoa. The plaintiffs paid to the defendants a sum of Rs. 32,615-6-2 being the aggregate amount of freight in respect of carriage of the said goods to Genoa. The defendants thereupon issued to the plaintiffs 25 bills of lading in respect of the cotton shipped on board.

After shipment, the plaintiffs were informed by the Collector of Customs on or about the 6th May 1915, that the export of cotton to Genoa could not be allowed. The defendants finding after representations made to Government that the steamer would not be allowed to proceed eventually decided to abandon the voyage and to put back the said steamer into dock and discharge the cotton so shipped. Before returning the plaintiffs' cotton to them, the defendants required the plaintiffs to pay them the sum of Rs. 12,500, computed at the rate of Rs. 5 per bale to cover certain expenses and loss alleged to have been incurred by them. The plaintiffs paid the amount under protest. The plaintiffs subsequently demanded the return of the amount of Rs. 32,610-6-2 paid as freight under the contract of

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carriage, alleging that as the defendants had not performed their part of the contract, they were not entitled to retain the said sum. They also called upon the defendants to furnish them with a statement of account of money payable by the plaintiffs in respect of the unloading and re-delivery of cotton by the defendants to the plaintiffs. The defendants denied their liability to repay the said sum, contending that they were at all times willing and ready to carry out the said contract so far as lay in their power, that the action of the Government authorities made the carrying out of the said contract impossible if not illegal, and that the loss must lie as it fell. The defendants also relied upon a slip attached to the shipping orders, but not to the bills of lading, issued to the plaintiffs after the said goods had been taken on board the said steamer. The slip ran as follows :—

"In the event of war being declared or commenced between the country to which either the shipowners or the shippers belong and any other country, the shipowners shall have the option of either cancelling their contract or of fulfilling it, but if they elect to fulfil it, any bill of lading which may have already been granted in respect of goods shipped under the contract shall be deemed to contain and any bill of lading which may thereafter be granted in respect of such goods as aforesaid shall contain a condition that all risks arising from such war shall be borne by the shippers and the occurrence of any such risks shall not deprive the shipowners of their right to receive payment of the freight or other payment for the carriage of the said goods which may be payable under the terms of the bill of lading."

As regards the expenses of unloading and the loss for detention, the defendants claimed to retain Rs. 5,038-3-7 and the balance of Rs, 7,461-12-5 was brought by them into Court.

Strangman and *Desai*, for the plaintiffs.

Weldon and *Campbell*, for the defendants.

MACLEOD, J. :—The defendant Steamer Company entered into an agreement, on the 1st April 1915, with

the firm of Chhagandas & Co. whereby the latter chartered the steamer Hejaz for a voyage, Bombay to Naples, Genoa and/or Marseilles, any two discharging ports at charterer's option. On the 14th April, the Jeddah was substituted for the Hejaz. The plaintiffs procured from Chhagandas & Co. freight for 2,500 bales of cotton on the said steamer and were given the shipping orders which they presented to the defendants. The 2,500 bales were put on board the Jeddah and twenty-five bills of lading relating to them were issued by the defendants, who were paid Rs. 32,610-6-2 for freight. Owing, however, to the import of cotton into Genoa being prohibited by orders of Government, the Jeddah did not leave the harbour and the voyage had to be abandoned. Negotiations were entered into with the various shippers of cotton, which are set out in the correspondence annexed to the pleadings, but eventually the Jeddah unloaded her cargo in the Alexandra Dock. Before getting delivery of their cotton the plaintiffs were asked to deposit Rs. 12,000 to cover the expenses and loss incurred by the ship and this sum was paid. The plaintiffs, thereupon, demanded the return of the amount paid by them for freight but the defendants claimed that under the events which had happened they were entitled to retain the money and especially relied upon the second slip attached to the shipping orders. The plaintiffs, therefore, filed this suit to recover the freight and for an account of the Rs. 12,000 paid by them to defray the costs of unloading. If the Indian Contract Act applies, the contract became void under section 56 of the Act and the defendants were bound, under section 65, to restore to the plaintiffs the advantage they had received under the contract.

But it has been contended, first, that money paid in advance for freight is irrecoverable at law. Secondly, that the defendants are common carriers and that under

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the decision of the Privy Council in the case of *The Irrawaddy Flotilla Company* v. *Bugwandas* [1] the rights and liabilities of common carriers are outside the Indian Contract Act and are governed by the principles of English law as modified by the Common Carriers Act of 1865.

By the policy of the law of England freight and wages strictly so called do not become due until the voyage has been performed. But it is competent to the parties to a charter-party to covenant by express stipulation in such manner as to control the general operations of law: per Lord Ellenborough C. J. in *De Silvale* v. *Kendall* [2].

Now the defendants, for their first proposition, relied on the case of *Kirchner* v. *Venus* [3] where it was held that freight paid in advance lost its legal character of freight and was money paid to the ship-owners for taking the goods on board and undertaking to carry them to their destination, while freight in law was money paid for the carriage of the goods and was payable on the arrival of the goods at their destination though it might, under the terms of the contract, be payable at the port of departure. But the question in that case was whether the ship-owner had a lien for freight on goods shipped from Liverpool to Sydney when, under the terms of the charter, the freight was to be paid in Liverpool one month after the date of sailing and, as a matter of fact, had not been so paid before the ship arrived at Sydney, and it was decided that as the money so to be paid was not freight in law, the ship-owner had no lien on the goods. I doubt whether in these days such a contract for the carriage of goods would be likely to be made in India; either

[1] (1891) 18 Cal. 620. [2] (1815) 4 M. & S. 37 at p. 42.
[3] (1859) 12 M. P. C. 361.

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the freight is paid before the goods are shipped in which case the shipper would insure the freight, or the freight is payable on arrival in which case the ship-owners would insure. Though if it is a term of the contract that freight is payable, ship lost or not lost, the shipper would have to insure in any case.

But freight to be paid in advance is not irrecoverable because it loses its legal character of freight but because by the common law of England the general rule is that when a contract becomes impossible of performance by the failure of a state of things contemplated as the foundation of the contract to exist, the parties are excused from further performance and acquire no rights of action, so that each must bear any loss or expense already incurred, and cannot recover back any payment in advance: *Civil Service Co-operative Society* v. *General Steam Navigation Company*[1].

Reading the charter-party, the shipping orders and the bills of lading together, I think that the money paid by the plaintiffs was freight paid in advance under the terms of the contract and was not merely money payable in Bombay on the completion of the voyage, which was paid prematurely at the will of the plaintiffs, as was the money paid for freight in the case of *Krall* v. *Burnett*[2]. It is admitted that under the common law of England the plaintiffs would not be able to recover because the contract became impossible of performance, and it is argued that the common law of England applies because the defendants are common carriers. The following definition of a common carrier by Parsons was approved by Cockburn C. J. in the case of *Nugent* v. *Smith*.[3]

"A common carrier is one who offers to carry goods for any person between certain termini and on a certain route. He is bound to carry for all who

[1] [1903] 2 K. B. 756. [2] (1877) 25 W. R. 305.

[3] (1876) 1 C. P. D. 423 at p. 427.

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tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage."

A common carrier is also entitled when goods are offered to him to demand and to be paid the full price of carriage, and if this is not paid he may lawfully refuse to carry at all. But the price demanded must be a reasonable one. It is also essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him.

Now the preamble to Act III of 1865 states: "Whereas 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;" and under section 2: "'Common Carrier' denotes 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," thus excluding carriers by sea. Therefore, carriers by sea in India are not entitled to the benefits of Act III of 1865 though it may be a question whether the common law of England is not still applicable to them.

In the case of *The British India Steam Navigation Company* v. *Hajee Mahomed Esack and Company*[1] the Court seems to have assumed it without further consideration, but considering the terms of the preamble I should feel inclined to doubt it. The law relating to the liability of common carriers was first established by our Courts with reference to carriers by land. In

[1] (1881) 3 Mad. 107.

the case of *Rich* v. *Kneeland*[1] it was decided that the common wayman or carrier by water stood on the same footing as a common carrier by land. The first case in which the liability of the owner of a sea-going ship comes in question was *Morse* v. *Slue*[2]; see per Cockburn C. J. in the case of *Nugent* v. *Smith*[3]. Now it is interesting to note that in that case it was argued in the lower Court, though without success, that the liability of the defendants' Company which agreed to carry the plaintiff's mare by steamer from London to Aberdeen could not be made to rest on the allegation that they were common carriers because it was said that liability was imposed by the custom of the realm and such a custom could not have force beyond the realm.

It may be that the owners of coasting steamers should be considered on the same footing as carriers by inland navigation, but it would be difficult for owners of seagoing steamers to come within the definition of 'common carriers,' though of course it is not impossible, and as the Indian Legislature designedly excluded common carriers by sea from the benefits of Act III of 1865 they may have intended to bring their liability under the common law of bailment.

But even supposing the defendants' Company run general ships as common carriers, the next question is whether in this particular case when they chartered the whole ship to Chhagandas & Co. they can be treated as common carriers. The whole question was very fully discussed in the case of *Nugent* v. *Smith*,[3] above-cited, by Cockburn C. J. (though it was not necessary for the decision of the case) in order to meet the opinion expressed by Brett, J. in the lower Court that by the

[1] (1614) Cro. Jac. 330; Hob. 17. [2] (1672) 1 Vent. 190.

[3] (1876) 1 C. P. D. 423.

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law of England all carriers by sea were subject to the liability which by that law undoubtedly attached to common carriers whether by sea or land.

"All Jurists who treat of this form of bailment carefully distinguish between the common carrier and the private ship...But if the owner of a ship employs it on his account generally...he will not be deemed a common carrier, but a mere private carrier (Story)...But the learned author does not say what would be the case where a ship-owner holds himself out as ready to send his vessel with cargo to any place that may be agreed on, on a private bargain, and not as a general ship...

"I cannot help seeing the difficulty which stands in the way of the ruling in the case of *Liver Alkali Co.* v. *Johnson*[1], that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required to furnish it...

"The importance of the question is materially lessened by the general practice of ascertaining and limiting the liability of the shipowner by charterparty or bill of lading."

Therefore, it is not sufficient to say that because the defendants' Company own steamers and carry goods by sea they are common carriers. For all I know they may own general ships, though there is no evidence that they run any ships on a particular line between certain termini on which they are bound to carry goods for the public on receipt of reasonable charges. Even if they did that would not make them common carriers as regards ships let out on charter. In this case the whole ship had been chartered by Chhagandas & Co. who brought the persons to whom they sold cargo space into contractual relationship with the defendants. Therefore the ship was not a general ship the owners of which were bound to carry goods for any of the public who might wish to despatch their goods in her.

(1) (1874) L. R. 9 Ex. 338.

The last question is whether, even supposing the defendants are common carriers, the provisions of the Contract Act applicable to all contracts in general are not applicable to the contract in this case. In the case of *The Irrawaddy Flotilla Company* v. *Bugwandas*[1] the only question was whether the Chapter of the Act relating to bailments applied. Their Lordships were only dealing with the liability of common carriers, and the common law of England relating to common carriers only differs from the common law of contract in respect of their liability as bailees. They held that as Act III of 1865 which codified only a part of the common law relating to the liability of common carriers was not repealed by the Indian Contract Act, it was intended to leave the law in India relating to the liability of common carriers as it was, that is to say, partly governed by the common law and partly by Act III of 1865, and not to substitute for that part of the common law which was not included in Act III of 1865 the provisions of the Act.

I do not think that when their Lordships said that there was in India before the Indian Contract Act a complete code for common carriers they intended to decide that the general provisions of the common law relating to the formation and performance of contracts, should still be applicable to contracts entered into by the public with common carriers.

The defendants appear to have conceded this before the hearing as it is nowhere suggested in the correspondence before suit or in the pleadings that the defendants were common carriers. The plaintiffs were asked to admit that the ship was under charter to Chhagandas & Co. and in para. 5 of the written statement the defendants rely on section 56 of the Indian

[1] (1891) 18 Cal. 620.

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Contract Act. The defence was really based on the decision in the case of *Civil Service Co-operative Society* v. *General Steam Navigation Company*[1] which is applicable to all contracts and not only to contracts with common carriers.

The special provisions of the common law of common carriers dealt with their liability and nothing else, and formed a special chapter of the law of bailment. Therefore, in any event, in my opinion, the case is governed by section 65 of the Indian Contract Act; and the plaintiffs are entitled, under the events which have happened, to recover the amount paid by them in advance for freight with interest at 6 per cent. from the 15th June 1915.

As regards the account rendered for expenses, the defendants have conceded that demurrage should only be charged for twenty-five days and the item for demurrage on waggons should be omitted.

The plaintiffs contest the item for insurance, on the ground that they were not informed that the defendants were going to insure the goods and if they had been, they would have asked the defendants not to insure as their goods were covered by a general policy. It is interesting to contrast the defendants' anxiety to insure the goods with their present contention that they were common carriers. However, I must accept Mr. Wardlaw Milne's evidence that at a meeting with the shippers on the 20th May the question of insuring the goods was discussed, so that plaintiffs must have had notice and could have told the defendants if they wished them not to insure their goods.

The charges for labour for removing the goods to Tank Bunder must stand, as the plaintiffs have not

(1) [1903] 2 K. B. 756.

proved that the defendants could have obtained cheaper rates for the work to be done considering all the circumstances of the case and especially the time of year.

As the defendants have paid into Court more than sufficient to meet the balance for expenses that can be set off against the freight which is repayable, there will be a decree for plaintiffs for the amount of the freight paid with interest at 6 per cent, from 15th June 1915, till judgment with costs and interest on judgment at 6 per cent.

Solicitors for plaintiffs: Messrs. *Crawford, Brown & Co.*

Solicitors for defendants: Messrs. *Little & Co.*

Suit decreed.

G. G. N.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

1916.

February 28.

SAYAD AMIR SAHEB VALAD SAYAD SAIDUMIA KADRI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* SHEKH MASLEUDIN VALAD GULAM MOHIUDIN, BY HIS GUARDIAN *ad litem* THE TALUKDARI SETTLEMENT OFFICER OF GUJARAT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 92—Suit for administration of religious wakf property—Court of Wards Act (Bom. Act I of 1905), sections 31 and 32—Court of Wards added as guardian ad litem *in appeal—Omission to name such a guardian from the commencement not fatal to the suit—Suit not bad for want of notice under section 31 of the Court of Wards Act—Cross-objections—Stamps.*

The plaintiffs instituted a suit under section 92 of the Civil Procedure Code, 1908, for the administration and management of a religious wakf property against the trustees of the institution. Out of the four trustees the District Judge found defendants Nos. 1 to 3 to be defaulting trustees and ordered defendant No. 1 to refund Rs. 6,000 to the institution. In providing for the appointment of new trustees, however, the Judge included defendant No. 4 as one of the

* First Appeal No. 50 of 1915.