PRIVY COUNCIL.

EAST INDIAN RAILWAY COMPANY

v.

KIRKWOOD.

P. C.* 1919

Dec. 15.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Negligence—Railway Company—Derailment of train—Removal of rail—Onus of proof—Discharge of onus.

The respondent was injured by reason of a train of the appellants in which he was a passenger leaving the line and being wrecked, and he sued the appellants for damages for negligence. The immediate cause of the accident was the removal of a rail, which the appellants pleaded had been effected maliciously by some person for whom they were not responsible :—

Held, that the onus of proof that the respondents' injuries were not due to the appellants' negligence was upon the appellants, but that upon the evidence they had discharged that onus.

Judgment of the High Court (Sanderson C. J. dissenting) reversed.

APPEAL from a judgment and decree of the High Court (August 29, 1917) reversing a decree of the District Judge of Patna (May 12, 1913).

The respondent, Major A. T. Kirkwood, instituted a suit in the Court of the Subordinate Judge of Patna against the appellants claiming damages in respect of injuries which he suffered in consequence of the appellants' train in which he was a passenger being derailed and wrecked ; he alleged that the accident was due to the negligence of the defendants or their servants. The accident was caused by a length of rail of about 36 feet having been removed from the railway line between Sudiapur and Neora in the Patna district, and occurred at about 5-38 A. M. on April 11, 1911.

* *Present* : VISCOUNT FINLAY, LORD SUMNER, LORD PARMOOR AND LORD JUSTICE CLERK.

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The defendants by their written statement denied the alleged negligence; stated that the derailment was caused by the malicious and criminal act of some person or persons unknown in removing the rail; and submitted that even if such persons were in the employment of the Company the removal was not done in the course of their employment and that the appellants were not liable.

The case was transferred for trial to the District Judge who found upon the evidence that the rail must have been removed maliciously by some persons over whom the appellants had no authority, and that the accident was not due to any negligence on the part of the defendants or their servants.

The plaintiff appealed to the High Court, and the appeal was first heard by D. Chatterjee and Beachcroft JJ. who differed in opinion, the former holding that the appeal should be allowed, and the latter that it should be dismissed. The appeal was accordingly dismissed under section 98 of the Code of Civil Procedure.

A further appeal, under clause 15 of the Letters Patent, was heard by the Chief Justice (Sir Lancelot Sanderson) and Woodroffe and Mookerjee JJ. and was allowed, the Chief Justice dissenting.

The Chief Justice said that the onus was upon the defendants, but that he did not think that the plaintiff had been prejudiced by the fact that the trial Judge had in the first instance treated the onus as being upon the plaintiff. Upon an examination of the evidence he was not satisfied that the trial Judge was wrong in his finding, and he was of opinion that the defendants had discharged the onus which lay upon them. The learned Chief Justice further said that it did not appear to have been urged at the trial that there had been a defective look-out kept by the driver, and that he did not think that it would be right for an

Appellate Court to hold that the defendants were negligent in that respect without further enquiry; but that in his view that was not necessary because he was of opinion that there was no negligence on the part of the driver, nor anything to show that the apparatus was out of order, or that anything more could have been done to avert the accident. He held that the appeal should be dismissed.

Woodroffe J. said that the trial Judge had wrongly placed the onus upon the plaintiff and that that error had vitiated his judgment. He could not accept the earlier denial that they had been working on the line on the morning of the accident. In his opinion the defendants' evidence failed to prove that there was no negligence, and he was not satisfied that the accident could not have been averted by due care on the part of the defendants' servants, upon which point he concurred with the judgment of Mookerjee J.

Mookerjee J. was of opinion that the defendants had failed to show that the accident, which was due to the defective state of the line, was not imputable to their negligence. Further, that the defendants were bound to establish that the accident was unavoidable by human foresight, and that in his opinion (*a*) the break in the line should have been discovered sooner if a proper look-out had been kept in the engine, and (*b*) that portions of the line had been left unballasted and a caution signal should have been put up. Though this view of the case had not been elaborated at the trial, these matters were within the special knowledge of the defendants' officers and they should have called evidence to negative that view.

The judgment of the District Judge was accordingly reversed by a majority, and a decree made in favour of the plaintiff for Rs. 13,500, the amount of damages proved by the trial Judge.

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Sir John Simon, K. C., and *Sir William Garth*, for the appellants.

F. Baden Fuller, for the respondent.

Dec. 15. The judgment of their lordships was delivered by LORD SUMNER. No question of law is involved in this case nor are the facts in themselves of an out of the way kind, but in the Courts below they have led to great differences of opinion. It has been common ground that the burthen of proof was on the appellants, except as to the question of damages, though before the trial the District Judge made an order that the plaintiff should give his evidence first on all issues. On appeal much stress was laid on this error. The District Judge is said to have been led by it into misconceptions as to the truthfulness of the plaintiff's witnesses, to have thought that the plaintiff must fail if his witnesses were not believed, to have been provoked by the conduct of the plaintiff's case into believing the wrong side, and, having gone to see the site of the accident for himself, to have mentioned what he saw in his judgment, which was not evidence. In the view of some members of the High Court, these matters seem to have gone some way to the reversal of his judgment, even though it turned largely on his view of the demeanour of witnesses called before him on a pure question of fact.

Their Lordships are of opinion that these strictures do the learned trial Judge less than justice. Perusal of his elaborate and detailed judgment shows that, when he came to weigh the evidence, his mind was fully alive to the true aspect of the burthen of proof, and that his reasons for giving credence to some witnesses and not to others are judicial and clear, and give no ground for saying that his conclusions of fact are "vitiated" (per Woodroffe, J.) by any error of law

as to the burthen of proof. They find no misdirection of himself in his judgment; they acquit him of any suspicion of bias, and if, in the course of an arduous trial which lasted sixteen days, he made any observations of too severe a character (which they by no means are inclined to affirm), they were not made without provocation and had no effect upon his judgment. Their Lordships cannot find that the order criticised worked any injustice to the plaintiff in substance, and in general litigants consider that they gain an advantage by having the first word and the last.

On the other hand, their Lordships think that some portions of the judgments of the members of the High Court, who thought that the judgment of the trial Judge ought to be reversed, were unduly influenced by consideration of the question of the burthen of proof. However important this question may be in the early stages of a case, after all the evidence is out on both sides, it must be looked at as a whole, and the truth of the occurrence must be inferred from it. The judgments in question have not sufficiently observed this.

Two questions have been discussed, one "How came the rail to be displaced?" the other, "Why was not the displacement seen in time?" Upon the first, the great controversy was whether any servants of the railway company were on the spot at all when the rail was taken out. The time when this was done, could be determined within narrow limits, for trains had passed over the spot in safety down to about 4 a.m., and the time of the accident was fixed at 5-38 a.m. or thereabouts. The removal of the rail in itself was to say the least of it equally consistent with sabotage by strangers as with negligent conduct of the Company's own men. The defendants gave a considerable quantity of credible evidence to show that in ordinary

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course their gangs of linesmen would not assemble for the day's work till after this time, and so far from this being contradicted, the plaintiff's case assumed this to be so, for an ingenious but hardly convincing attempt was made to show that on this particular day all the men must have been independently misled as to the time by the passage of a special train, although the state of the light would have told them plainly that they were getting up and going to work needlessly early. The coolies themselves were called and denied that they were on the line at the material time at all. Some of their tools were found close to the scene of the accident, and they denied the identity and ownership of these tools. This falsehood is capable of being explained without necessarily assuming that nothing that they said was true, but let it be that their evidence was wholly untrustworthy. The statement of shifty witnesses that they were not at a given place, is not of itself proof that they were. The plaintiff accordingly called witnesses, who swore to having seen these men on the line at the critical time and place, but the learned trial Judge disbelieved them on grounds connected with their demeanour in the witness-box and the impression they produced on him, and nothing in the record shows that effect should not be given to the view formed of these witnesses by the only Judge who saw and heard them. There remains the question of the tools. In the High Court, D. Chatterjee, J., speaks of this incident as furnishing "the key to the whole situation." Its importance greatly depends on its significance, and unless its nature is such as to point with reasonable probability to the presence of the railway coolies at the place where the rail was removed at or just before the time when this was done, the incident is not of great significance. One hypothesis, namely, that the

tools were accidentally left behind when the men left work the evening before, may be set aside for they ought not to have been left behind, and the man responsible for them said that he locked them up in their box and kept the key. Next day the box with its lock was intact, and most of the tools were in it, but the three tools in question were found on the line. There does not appear to have been anything singular about this box or its lock. That might have been unlocked with another key if it ever was really locked at all is not in itself an extravagant hypothesis, and the evidence does not exclude it. Even if the train-wreckers obtained the key by the connivance of one of the Railway Company's coolies, that does not show that the removal of the rail which caused the accident was the work of persons for whose act in so doing the Railway Company was responsible. The incident of the tools would undoubtedly be very material as corroboration of trustworthy evidence that the Railway Company's coolies took out the rail, but if the evidence of this essential fact fails because the witnesses are unworthy of credit, there is nothing for this corroboration to operate upon.

The plaintiff's theory was that the defendants' gang of coolies, having assembled at an exceptionally and needlessly early hour, proceeded to their work at the place of the accident, turning a deaf ear to a tamasha, which was proceeding at a neighbouring village, and then began to remove the rail; that then they thought better of it and, without waiting to turn and replace the rail, which was what they were there to do, returned to the tamasha, and took their chance that no unexpected and unscheduled train would appear on the scene. It is true there was such a tamasha, for puja with a nautch in honour of the

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sun was being performed at the time in question, but the evidence that the coolies came there after first going along the line and removing the rail did not satisfy the trial Judge, and his conclusion in this respect does not seem to be open to serious criticism. The theory laboured under obvious difficulties but they need not be dwelt upon, for the necessary foundation of fact was never laid on which such a theory might have been successfully reared. Upon this part of the case their Lordships are in agreement with the Judges who were in a minority in the High Court, and although it was for the Railway Company under the circumstances of such an accident on their line to acquit themselves of responsibility, think that on a review of the whole of the evidence they succeeded in doing so. They established that at the material time their coolies had no occasion to be at this spot at all, and in any case ought not to have removed a rail, and the evidence with which the plaintiff met this *primâ facie* answer, that they actually were there nevertheless, was not believed by the trial Judge, who was best qualified to appraise it.

The second point, that there was a bad look-out on the engine, was presented at the trial in a somewhat peculiar way. There was a good deal of evidence about it, and it cannot be said that enough foundation was not laid to enable the point to be developed on appeal, but the fact remains that at the trial, the case was not presented as a case of bad look-out failing to prevent the accident, but the driver's conduct was treated as evidence going to the precise state of the light, and therefore to the precise time of the occurrence, corroborating the plaintiff's case that the defendants' coolies removed the rail. One may be surprised that a separate case of bad look-out was

not fought, but it was not. Perhaps the plaintiff's advisers, being fully informed of the local circumstances, decided not to raise the contention that the absence of the rail could have been seen far enough off to enable the train to be stopped in safety. Otherwise they ought in fairness to have put to the engine driver and fireman the plain question, whether they were not negligent in failing to see that the rail was gone in time to stop the train. Suggestions were made that the engine was out of order, in some way that would prove negligence causing the accident, and that the speed was excessive, but clearly both broke down. Their Lordships are unable to agree with those members of the High Court, who considered that the condition of the engine and the failure to pull up in time, established liability.

The case is no doubt one of complexity in its details, and presents in very full measure the evidentiary difficulties which attend all accident cases and particularly Indian accident cases, but, in spite of the sharply divergent opinions expressed in the High Court which their Lordships have been much assisted in appreciating by the fullness with which they have been stated and maintained, they are of opinion that the judgment of the trial Judge was right and ought to be restored. Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the judgment in favour of the plaintiff should be set aside and that judgment should be entered for the defendants.

Appeal allowed.

Solicitors for appellants: *Freshfields & Leese.*
Solicitors for respondents: *Light & Fulton.*

A. M. T.