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CHAND MAL v. LACHHMI NARAIN.

We may refer the Court of the Chief Commissioner to the case of *Doe d. Elizabeth Cross* v. *Arthur Cross* (1) the effect of which is stated in Jarman on Wills (5th ed., vol. 1, p. 25). It was there held that "there was no objection to one part of an instrument operating *in præsenti* as a deed and another *in futuro* as a will."

The costs will be disposed of in accordance with section 20 of the Ajmere Courts' Regulation of 1877. Let the case be returned.

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December 22.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

RAMPAL SINGH (DEFENDANT) *v.* MURRAY & Co. (PLAINTIFFS).*

Act No. IX of 1872 *(Indian Contract Act, Sections* 148, 151, 152—*Contract—Bailment—Liability of bailee—Liability of guest at hotel in respect of furniture used by him.*

The defendant's wife went to stay at a hotel owned by the plaintiffs. While there she was seized with cholera and died. In consequence of the infectious nature of the disease, the plaintiffs were obliged to destroy the furniture which was in the rooms of the defendant's wife, and used by her during her illness. The plaintiffs subsequently sued to recover the value of such furniture from the defendant. *Held* that in the absence of evidence to show that the deceased had not taken as much care of the furniture as a person of ordinary prudence would, under similar circumstances, take of his own goods, the defendant was not liable, having regard to sections 121 and 152 of the Indian Contract Act, 1872. *Shields* v. *Wilkinson*, (2) referred to.

THE facts of the case sufficiently appear from the order of the Chief Justice.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellant.

The respondents were not represented.

STRACHEY, C. J.—This is a reference to the Court by the Local Government under Rule 17 of the Kumaun Rules, 1894, made under section 6 of the Scheduled Districts Act, 1874. The suit out of which it arises was brought in the Court of the Assistant Commissioner of Naini Tal by the proprietors of the Grand Hotel, Naini Tal, against Raja Rampal Singh. The plaintiffs claimed by their plaint to recover Rs. 580 as due by the defendant

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* Miscellaneous No. 246 of 1899.

(1) (1846) 8 Q. B., 714; S. C., 15 L. J., (N. S.) Common Law, 217.

(2) (1887) I. L. R., 9 All., 398.

for board and lodging, and incidental expenses incurred during his and the late Rani's residence at the Grand Hotel, Naini Tal. They filed an account, from which it appeared that they claimed Rs. 164 for board and lodging and the balance of Rs. 416 as incidental expenses for the value of certain hotel furniture. The defendant in his written statement admitted liability for the Rs. 164, but denied liability for the balance. From the written statement and from the issues framed by the Assistant Commissioner the following facts appear to have been undisputed. The defendant's wife while staying at the plaintiff's hotel was seized with cholera and died, the defendant not being then at Naini Tal. There was no evidence to show how she caught the disease or whether the source of infection was within the hotel or outside it. Three days after her death the furniture of the rooms occupied by her during her illness was destroyed by the plaintiffs in order to prevent the risk of infection to the residents of the hotel. The defendant did not in his written statement deny that the destruction of the furniture was necessary for that purpose. The only grounds upon which he denied liability were that his wife had contracted the disease after her admission to the hotel, that it should be inferred that she contracted it in consequence of "something wrong in the culinary 'process' of the hotel, and that it was not in accordance with the usage of hotels in Naini Tal to claim value for destruction of property necessitated by death from any epidemic originating in the hotel itself." No special contract varying the ordinary relation of inn-keeper and guest in respect of the goods was alleged. The only issue framed by the Assistant Commissioner, which need be referred to, was as follows :—"Is the defendant liable for the value of hotel property destroyed owing to defendant's wife having died of cholera in the hotel ; and if so to what extent?" There was no issue of fact and no evidence was given by either side. The Assistant Commissioner gave judgment upon the pleadings. He decreed the claim on the grounds that the defendant had adduced "no authorities in support of his somewhat extraordinary contention that he is not liable," and that "plaintiffs have probably suffered in pocket as it is from the scare which a death from cholera in their hotel would doubtless cause ; it would be unfair

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in the extreme to saddle them with the cost of new furniture."

Against this decision the defendant appealed to the Court of the Deputy Commissioner of Naini Tal. The Deputy Commissioner held that inasmuch as the defendant and his wife knew, when the latter was admitted to the hotel, "that an incident of such illness as cholera is that articles used by the patient must be destroyed," there was an implied contract by the defendant "to make good any damage caused by the illness of his wife." He accordingly dismissed the appeal. A further appeal by the defendant to the Court of the Commissioner of the Kumaon Division was rejected summarily. The Local Government has referred the decree of the Commissioner to this Court for our report and opinion. The question upon which our opinion is asked is "as to the liability or otherwise of the Raja to pay the cost of the articles belonging to the hotel which were destroyed to prevent the danger of infection in consequence of the death of Rani Rampal Singh from cholera."

At the hearing of the reference the learned advocate who appeared for the defendant stated that his client did not contest his liability, should the Court hold that the wife, if she had survived, would herself have been liable to such a claim. The question therefore is whether, in the absence of express agreement, a guest at a hotel is liable to compensate the owner for the loss of hotel furniture used by the guest while suffering from an infectious disease and destroyed by the owner in order to prevent infection, there being no evidence of negligence on the part of the guest either in the contracting of the disease or in the use of the furniture during its continuance, and it being admitted that the destruction of the furniture was necessary. There appears to be no reported case in point. To decide the question it is necessary first to see what is the true legal relation between the guest and the hotel-keeper in respect of the furniture used by the former. It is clearly the relation of bailor and bailee as defined by section 148 of the Indian Contract Act, IX of 1872. The bailment is one of hire; the guest hires not only the rooms which he occupies, but the furniture which they contain. The nature and extent of his liability are shown by section 152 of the Act

which provides that "the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151." And section 151 provides that "in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed." So that the guest is not responsible for the loss, destruction or deterioration of the furniture hired by him if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own. Ordinary prudence is the test. In the present case the plaintiff has never alleged or suggested that the defendant's wife did not exercise ordinary prudence in taking care of the furniture, nor is there any evidence that she did not. In the absence of evidence either way, does the burden of proving the exercise of ordinary prudence rest on the hirer, or is it for the owner of the goods to show that ordinary prudence was not exercised? The question of burden of proof in cases of injury to goods delivered under a bailment of hiring was considered by this Court in *Shields* v. *Wilkinson* (1). If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence: otherwise I think that the owner must give some evidence of negligence. Such goods as those in question here, that is, bed-room furniture and articles in the patient's personal use, could not have been used by a person suffering from cholera without being so infected as to require destruction; such damage is a practically irresistible consequence of such use, no matter what degree of prudence is exercised. That being so, it was for the plaintiffs to give some evidence that the defendant's wife did not take as much care of the goods as a person of ordinary prudence would have taken of her own goods under similar circumstances, and no such evidence having been given the defendant is not liable. There is no ground for the Deputy Commissioner's assumption, that because the defendant and his wife may be supposed to have

(1) (1887) I. L. R., 9 All., 398.

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known that in the event of infectious disease the articles used by the patient would have to be destroyed, there was an implied contract by them to make good the loss irrespective of any neligence; in other words to insure the owner against such loss. The *primâ facie* inference would rather be that in forming with the owner the relation of bailor and bailee, they intended the usual legal consequences to follow, including the ordinary restricted liability of a bailee for hire. If the owner denied any further protection than this, if he wished to throw upon the hirer the entire risk of accidental or irresistible destruction of the goods, he could not do so by the special contract which section 152 allows, but in the absence of any special contract and of any want of ordinary prudence making the hirer responsible, he must be taken to have accepted the risk as an incident of his business. If the goods had remained with him he would have had to bear any loss which ordinary prudence could not have prevented, and his having entrusted them to a hirer, who exercises an equal degree of prudence, is no reason for putting him in a better position, or for exacting from the hirer a greater amount of care than the owner himself would probably have taken.

I think that the Commissioner ought to have allowed the defendant's appeal and dismissed the suit so far as the claim to recover the value of the furniture was concerned. This is our answer to the reference.

BANERJI, J.—I am of the same opinion.

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January 16.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

BANKE LAL AND OTHERS (PLAINTIFFS) *v.* JAGAT NARAIN (DEFENDANT).
BANKE LAL AND OTHERS (PLAINTIFFS) *v.* DAMODAR DAS AND ANOTHER (DEFENDANTS).*

Execution of decree—Sale in execution—Sale set aside—Second sale in execution of a different decree—First sale subsequently confirmed in suit for that purpose—Title of purchasers at first sale—Civil Procedure Code, sections 311, 312.

Certain immovable property was sold in execution of a decree, but on objections being raised by the judgment-debtors under section 311 of the Code of Civil Procedure the sale was set aside. After the sale had been thus set aside

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* First Appeals, Nos. 115 and 116 of 1898, from decrees of Babu Madho Das, Subordinate Judge of Bareilly, dated the 30th March 1898.