THE

INDIAN LAW REPORTS,

Bombay Series.

ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

BROMLEY (PLAINTIFF), *v.* THE G. I. P. RAILWAY COMPANY (DEFENDANTS).*

1899.
March 14 *and* 16.

Railway Company—Negligence—Negligence of Railway Company in leaving door of railway carriage open or unfastened—Hurt caused to passenger while trying to secure door.

Leaving the door of a railway carriage open or unfastened amounts to negligence on the part of a railway company, and the company is liable for any injury caused thereby to a passenger.

If any inconvenience or danger is caused by the negligence of the company, a passenger may lawfully attempt to get rid of such inconvenience or danger, provided that in doing so he runs no obvious risk disproportionate to the inconvenience or danger, and is not himself guilty of any negligence; and, if in such attempt he is injured, the company is liable in damages.

The door of a railway carriage attached to a train running from Poona to Bombay was left open or unfastened when the train left the Khandálá Station. The plaintiff was then asleep in the carriage. He subsequently awoke when the train was passing through a tunnel and found that the whole of the door, which opened outwards, had been torn away from its hinges, except the upper part or sunshade, which was flapping backwards and forwards against the side of the tunnel and the door-post of the carriage. In attempting to secure it, the top of the plaintiff's finger was torn away and the bone of one of his fingers fractured.

Held, that the injuries were caused by the negligence of the Railway Company and that the plaintiff was entitled to damages.

SUIT to recover damages for injuries caused to plaintiff by the alleged negligence of the defendants.

* Suit No. 726 of 1898.

1899.

BROMLEY v. THE G. I. P. RAILWAY COMPANY.

On the night of the 13th October, 1898, the plaintiff travelled from Poona to Bombay in a first class carriage on the defendants' railway. The train left Poona at 9-30 o'clock P.M. At one of the intermediate stations (Khandálá) one of the passengers in the same carriage alighted and the carriage door was left open. The plaintiff was asleep in the carriage, and the train left the station with the door open. This door opened outwards and towards the rear of the train. The plaintiff stated that shortly after the train left the station he awoke and found that the train had entered a tunnel and that the door was broken off, and "the sunshade or the remaining portion of the said door continued to frequently strike the side of the tunnel with such violence as to endanger the safety of the carriage." The plaint further stated :—

"The plaintiff endeavoured to secure the said sunshade or broken portion and to close the same, but in so doing the third finger of the plaintiff's right hand got jammed in the broken portion of the said door, the whole top of his said finger being torn away and the bone of his finger fractured."

He claimed Rs. 4,000 as damages.

The defendants (*inter alia*) pleaded that there was no obligation or duty cast on the plaintiff to endeavour to secure the said sunshade, nor was there any necessity for him to do so; that his attempting to do so was a voluntary act, and that, therefore, they were not liable. They further pleaded that the plaintiff's were caused by his own negligence, and that the negligence of the defendants (if any) was not the proximate cause of the injuries to the plaintiff.

Macpherson and *Scott*, for plaintiff:—The defendants' servants were negligent in leaving the door of the carriage open. The door was carried away when the train entered the tunnel, but the broken sunshade was left, and was an inconvenience to the plaintiff, and a danger to the carriage, and the plaintiff was justified in endeavouring to fasten it, so as to remedy the inconvenience and avoid the danger. In doing so he was injured and he is entitled to damages—*Gee* v. *Metropolitan Railway Company*[1]; *Metropolitan Railway Company* v. *Jackson*[2]; *Richards* v. *Great Eastern Railway Company*[3]; *Adams* v. *Lancashire and Yorkshire*

(1) (1873) L. R. 8 Q. B., 161 at p. 179. (2) (1877) 3 Ap. Ca., 193, pp. 205, 212.
(3) (1873) 28 L. T. (N. S.), 711.

1899.

BROMLEY v. THE G. I. P. RAILWAY COMPANY.

Railway Company[1]; *Robson* v. *North Eastern Railway Company*[2]; *Lee* v. *Nixey*[3].

Lang (Advocate General) and *Lowndes*, for defendants:—The plaintiff must prove negligence—*Wakelin* v. *L. & S. W. Railway Company*[4]; *Engelhart* v. *Farrant and Co.*[5]. The plaintiff does not allege there was any danger or inconvenience to himself. If there was, no doubt, he might try to remedy it—*Robson* v. *North Eastern Railway Company*[6]; *Lee* v. *Nixey*[7]. The plaintiff's act was reckless; it was his reckless act that caused the injuries.

TYABJI, J.:—The suit is filed by the plaintiff to recover the sum of Rs. 4,600 as damages sustained by the plaintiff by reason of the injuries caused to the third finger of the plaintiff's right hand by the alleged negligence of the company. The facts of the case may be shortly summarised as follows:—

The plaintiff is a dental surgeon carrying on business in Poona and Bombay in co-partnership with Mr. Charles Efford, the Poona branch being usually conducted by the plaintiff and the Bombay branch by his partner, Mr. Efford. On the 13th October, 1898, the plaintiff left Poona for Bombay by 9-30 P.M. train. He travelled in a first class carriage, and in the same compartment there was Mr. Saunders, an Assistant in Treacher and Co. Mr. Saunders alighted at the Khandálá Station and the door of the compartment was left open. This door was not shut or fastened by any of the servants of the Railway Company and appears to have been broken or torn away from the carriage just before the accident in question happened. The circumstances leading up to the accident are described by the plaintiff in his evidence in the following words. He says:—

"I remember the 13th October last. I travelled from Poona to Bombay by the 9-30 P.M. train in a first class compartment. One gentleman, Mr. Saunders, of Treacher and Co., was with me. I went to sleep. I was asleep when the train arrived at Khandálá. I was not conscious of Mr. Saunders leaving the carriage. I awoke with a start and I saw the door was gone except the

(1) (1869) L. R., 4 C. P., 739.
(2) (1875) L. R., 10 Q. B., 271.
(3) (1890) 63 L. T., 285.
(4) (1886) 12 Ap. Ca., 41.
(5) (1897) 1 Q. B., 240.
(6) (1875) L. R., 10 Q. B., 271.

( ) (1890) 63 L. T., 285.

1899.

BROMLEY v. THE G. I. P. RAILWAY COMPANY.

sunshade, the green part of the sunshade at the top. I saw it from the shaded gas light in the carriage flapping about. It seemed to be flapping against something—banging is the appropriate word. I could not say what it was banging against—banging to the door-post and back. I got up, and as the door came to, I went up to the door, and as the piece of door came towards me, I took hold of it. I mean the door was coming towards me. When I seized the door it nipped my finger. I cannot say how the door nipped my finger. It was all done of a sudden. I find the time from leaving Khandálá to the place where we stopped before the catch-siding is about four and a half minutes. I felt the door nip me. It was not a pleasant feeling. I was in great pain, not at the moment but after. The pain gradually increased until I got to Karjat. After I was nipped I let go. It was done in a second. I do not know whether I got hold of the door. I got out at the reversing station and told the guard and asked him for water. He brought a pail of water. The guard tied up the door with his pocket handkerchief to prevent its swinging open. I then went on to Karjat. The door was fastened up with wire at Karjat."

In cross-examination, the plaintiff said :—

"When I went to sleep, one of us put the shade over the lamp in the carriage. When the accident happened to my hand I cannot remember whether the shade was on or not. The carriage I was in was a carriage with two compartments and a bath-room in the middle. There was a seat at each side of the carriage and one at the end. The door was at the end of the carriage. The door that flew open was on the left-hand side going to Bombay. Facing the engine it was on the left-hand side. I was sleeping on a seat at the left-hand side of the carriage with my feet towards where the door was. After I was started from my sleep I walked up, and seeing that the door was gone, and the piece was flapping, I got hold of it. I cannot say how long it took me to get on my legs. It was all done immediately. The train was moving when I tried to catch the door. I should not like to say I was fully awake before I was pinched. I think I must have got hold of it. I think I did, and it pinched my finger. It was dark in the tunnel. I distinctly saw what I was going to catch as it came to. I tried to catch it as it was coming towards me. Immediately afterwards the train slowed down and stopped in the tunnel directly afterwards. The train has to stop before you go to the reversing station. I knew we had to stop there. I imagine my finger was hurt in the middle of the tunnel. I think it was hundred yards between the accident and where we stopped. When I woke up I did not know we were in the tunnel. I had no time to think. It was all done in a moment. I cannot remember whether it was a hot or cold night. I cannot say whether the windows were open then. The door opened outwards. The hinge of the door is furthest from the engine. * * * I do not know how many boards of the sunshade were gone. The whole of the door was gone except two pieces hanging. There was a piece of iron hanging at each end. Some of the boards were gone. I think they were the lower ones. I think some of the boards were gone from the bottom. I cannot say whether the part left actually struck the tunnel. The door had gone a long time. When I

got up, there was only the sunshade left. After the door had gone, the noise continued. The noise continued after my finger was injured. I cannot say if the sunshade hit the tunnel after I received my injuries. But I heard a noise of its hitting. The noise was caused through the remnants of the door hitting against the tunnel and flapping against the carriage."

The above evidence, which is entirely uncontradicted and was given in a fair and ingenuous manner, seems to me to establish the following facts :—

(1) That the door was broken away in consequence of its having been left open, or not fastened, at the Khandálá Station.

(2) That a sense of great present discomfort and a vague feeling of possible or impending danger crossed Mr. Bromley's mind when he was startled by the noise, and saw the door gone.

(3) That it was with a view to get rid of this inconvenience and real or supposed danger that the plaintiff attempted to seize and secure the sunshade or the remnant of the door.

(4) That it was in consequence of this attempt that he was injured.

The question for determination, then, is—whether the company is liable to the plaintiff under the above circumstances ?

Now a series of cases has laid it down, and indeed it was not disputed before me, that it is the duty of the Railway Company to see that the doors of the carriages are properly shut and fastened before the train leaves any particular station. (See *Gee* v. *Metropolitan Railway Company*[1], *Metropolitan Railway Company* v. *Jackson*[2], *Richards* v. *Great Eastern Railway Company*[3], and *Adams* v. *Lancashire and Yorkshire Railway Company*[4].) The above cases clearly establish that leaving the door open or unfastened amounts to negligence on the part of the Railway Company, for the consequences of which the company is liable to the passengers. These cases and also the cases of *Robson* v. *North Eastern Railway Company*[5], *Lee* v. *Nixey*[6], *Wakelin* v. *L. and S. W. Railway Company*[7] and *Engelhart* v. *Farrant and Co.*[8] seem to me to establish the legal propo-

(1) (1873) L. R. 8 Q. B., 161.
(2) (1877) 3 Ap. Ca., 193.
(3) (1873) 28 L. T. (N. S.), 711.
(4) (1869) L. R. C. P., 739.
(5) (1875) L. R. 10 Q. B., 271.
(6) (1890) 63 L. T., 285.
(7) (1886) 12 Ap. Ca., 41.
(8) (1897) 1 Q. B., 240.

1899.

BROMLEY v. THE G. I. P. RAILWAY COMPANY.

sition that if any inconvenience or danger is caused by the negligence of the company, a passenger may lawfully attempt to get rid of any such inconvenience or danger, provided that in doing so he runs no obvious risk disproportionate to the inconvenience or danger, and is not himself guilty of any negligence, and that if in such attempt he is injured, the company is liable in damages. The *onus* of proving the company's negligence of course lies on the plaintiff, but the *onus* of proving the passenger's negligence lies on the defendants.

The first question, then, which I have to consider is—was there any sufficient inconvenience or danger to the plaintiff caused by the breaking away of the door or the banging of the sunshade which he was entitled to get rid of? Now Mr. Bromley's evidence merely states the facts. He either did not or could not analyse his own motives and feelings before he attempted to secure the sunshade. He is evidently not of an analytical turn of mind and had great difficulty in placing before the Court clearly the reasons which must have influenced his conduct. It seems to me, however, a fair inference from his evidence and conduct that he must have apprehended a great inconvenience from the noise caused by the banging of the sunshade and a possible imminent danger from its striking against the tunnel or the side of the carriage itself. This state of things was admittedly produced by the defendants' negligence in not fastening the door at Khandálá. It follows that Mr. Bromley was *primâ facie* justified in attempting to remove this inconvenience and possible danger, though the extent and magnitude of it have not been clearly explained to the Court, and were from the very nature of the case incapable of being accurately ascertained or guaged at the time. Did he, then, run a risk disproportionate to the inconvenience and danger he was trying to remedy? What he attempted to do was to seize the flapping or banging sunshade in order to secure it in some way. He evidently did not consider there was any danger in doing so, and I am unable to see that there was any obvious danger in what he was doing. Was he, then, negligent in the mode in which he was carrying out his intentions? I cannot see how he could have attempted to catch hold of the sunshade otherwise than as he did. He had no other means to lay hold of it than his

own hands, and he used them, so far as I can see, in the ordinary way without any sense of danger.

Were there, then, any surrounding circumstances which made his act an act of negligence? It is true that the lamps were shaded and it was dark in the tunnel, but Mr. Bromley says, and I see no reason to doubt it, that he could distinctly see what he was attempting to catch. As to his statement that he would not like to say he was fully awake before he was pinched, I think it must not be taken too literally against him. This statement was evidently not meant seriously, and the words were put into his mouth in cross-examination, and were assented to by him in a humourous rather than a serious spirit. The only other circumstance relied on by the defendants is that Mr. Bromley knew the ground well, and that if he had thought for a moment he would have seen that he was near the reversing station, and that he ought to have waited till the train stopped, instead of trying to secure the sunshade himself. There is, no doubt, much force in this argument. Mr. Bromley admits that he acted on the spur of the moment, and that he had no time to think, and that the whole thing was done suddenly and without stopping to consider the bearings of all the surrounding circumstances. I am, however, of opinion that even after giving the fullest benefit to the defendants of Mr. Bromley's admissions, it would not be just to attribute any negligence to Mr. Bromley for what he did. It seems to me that considerable allowances must be made for a passenger who is suddenly startled from his sleep, with the door of the carriage smashed, and the remnant of the sunshade making a hideous noise (such as it made before me when produced in Court) and possibly striking against the tunnel. Whether there was any great actual or real danger in all this, I am unable to say. There is no evidence on the point, and I am left to draw my own inferences aided by nothing better than my own experience or imagination, but that Mr. Bromley must have felt a sense of possible, though perhaps a vague and undefined, danger, I cannot for a moment doubt.

Under these circumstances would it be reasonable to hold that Mr. Bromley ought to have remained quiet and done nothing till he got to the reversing station? As a matter of fact he did

1899.

BROMLEY v. THE G. I. P. RAILWAY COMPANY.

not know where he was. He could, no doubt, by a process of reasoning have discovered that he was near the reversing station. But under the circumstances was it negligent of him to act immediately in the way he did? In other words, was there anything unreasonable in his immediately trying to avert a great present inconvenience from the hideous noise and an imminent and possible danger from the sunshade striking against the tunnel or even against the side of the carriage? I am fully persuaded that nine persons out of ten would, under the same circumstances, have done precisely what Mr. Bromley attempted to do. On the whole, therefore, I have come to the conclusion, though after much hesitation and doubt, that the injury to the plaintiff's hand was connected with and is the result of the defendants' negligence in not fastening the door at Khandálá, and that the defendants are liable for the injuries according to the principles laid down in the authorities cited above.

As to the question of damages, I accept the plaintiff's evidence in the main, and I think that under the circumstances Rs. 2,000 for loss of income and medical charges and Rs. 2,000 for personal suffering would not be unreasonable. I accordingly award Rs. 4,000 in all for damages, and the costs of the suit.

Attorneys for the plaintiff:—Messrs. *Smetham, Bland and Noble.*
Attorneys for defendants:—Messrs. *Little and Company.*

TESTAMENTARY JURISDICTION.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

1899.
September 1.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF HAJI MAHOMED ABBA.

MARIAMBAI AND ANOTHER, PETITIONERS.*

Probate—Will—Nuncupative will of a Mahomedan—Probate and Administration Act (V of 1881), Secs. 3, 24, 25, 26, 62—Indian Succession Act (X of 1865), Sec. 244, and Chap. IX.

Probate may be granted of a nuncupative will.

PETITION for probate of a nuncupative will. The petitioners were the testator's widow Bai Mariambai and one Haji Sulleman

*Appeal, No. 1040 of 1899.