to prove the affirmative, not on the accused to prove the negative. Upon the whole, therefore, we are of opinion that the conviction cannot be sustained and we accordingly set it aside, and direct that the petitioner be discharged from bail.

Rule made absolute.

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PRIVY COUNCIL.

PRESENT :

The Lord Chancellor, and Lords Macnaghten, Robertson, and Lindley.

THE EAST INDIAN RAILWAY COMPANY (*Defendants*) *v.* KALIDAS MUKERJI (*Plaintiff*). [20th and 21st February, 1901].

[*On appeal from the High Court at Fort William in Bengal.*]

Railway Company—Passengers—Responsibility of a Railway Company, in the care of passengers—Injury to the latter by the illegal act of a fellow passenger—Indian Railways' Act (IX of 1890), s. 59—Negligence.

The legal obligation upon a Railway Company to exercise due care and skill in carrying passengers does not extend so far that the Company can be held responsible under all circumstances, for not carrying them safely. Negligence alleged against them must be proved affirmatively, where denied. It was not the duty of the railway servants to search every parcel that passed the ticket barrier, carried by a passenger.

Words in the judgment of the Chief Justice, Q. B., in *Collett* v. *The London and North-Western Railway Company* (1), as to the duty to "carry safely," explained.

As no act, or omission, of neglect had been proved against the Company or their servants, the decrees below were recommended for reversal, and the suit for dismissal.

APPEAL from a decree (17th February, 1899) of the Appellate High Court (2) affirming a decree (8th June, 1898) of a Judge of the High Court in the Ordinary Original Civil Jurisdiction.

[402] This suit was brought by the respondent for damages upon the alleged negligence of the defendants, appellants, as having resulted in the death of his son, Atindra Nath Mukerji, who died from injuries received on the 27th April, 1896 from an explosion and a fire, which took place in the Company's train on the railway between Secunderabad and Dadri. The fire was caused by the explosion of fireworks illegally brought into the compartment, in which the deceased was travelling at the Aligarh station.

The plaint charged that the Railway Company undertook to carry Atindra Nath safely, but conducted themselves so negligently in that behalf, that the explosion occurred, in consequence of their servants having allowed fireworks to be brought into the carr age. The defendants denied that the disaster was caused, or contributed to, by any negligent, unskilful or improper conduct on their part, or that of their servants.

The question at issue resolved itself into whether due care had been taken by the defendants for the purpose of preventing fireworks from being taken, as they had been, by two persons, Abed Hossein and Gholam Hossein, both of whom were killed by the explosion, into the compartment.

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(1) (1851) 16 Q. B. 984.

(2) (1899) I. L. R. 26 Cal. 465.

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On this appeal the main question decided was, whether upon the evidence brought forward for the plaintiff to establish the averment of negligence on the part of the defendants, enough had been shown to establish a *prima facie* case against them, and to justify the decree of the Courts below in the plaintiff's favour.

By s. 59 of the Indian Railways' Act, 1890, it is provided that no person shall take dangerous or offensive goods with him upon a railway, without giving notice of their nature; that the servants of a Railway Company may refuse to receive such goods for carriage, and that any railway servant, having reason to believe that any such goods are contained in a package, may cause the package to be opened for the purpose of ascertaining its contents.

The Judge of the High Court in the Original Jurisdiction, O'Kinealy, J., at the conclusion of his judgment, found that the defendants had not exercised that degree of care in providing for **[403]** the safety of their passengers, which the law imposed upon them; and decided that therefore they were liable to pay damages to the plaintiff in this suit.

This judgment appears in the report of the appeal to the Appellate High Court, where the judgments of the Chief Justice, and of Prinsep, J., and Amir Ali, J., are given with full statements of the facts (1). The Chief Justice, in whose judgment Prinsep, J., concurred, expressed his opinion, that it was for a Railway Company to show such a degree of care as might reasonably be required from them, considering all the circumstances of this case; which on this appeal appeared to him to range itself under that class of claims, where a *prima facie* case has been so presented as to require an answer from the defendants to satisfy the Court, that they have taken all reasonable care and precaution in the matter. It had been contended for the defendants that the case differed from others of the class, inasmuch as the fireworks were not under the control of the Company, but under that of third parties. However, no evidence had been given to shew that any care or precaution was taken at the station, where the fireworks were brought in, to stop passengers, who might be carrying, or be suspected of carrying, dangerous goods. He referred to the Railways' Act, 1890. It had not been shown that the fireworks were not openly carried in. It was well known that they were then in much demand, being used for the marriage festivities, at that season most frequent. The Company, then, might not unreasonably be expected to take precautions in regard to fireworks. None of their servants had been called to show what took place at the barrier on the station. Thus, in the absence of evidence as to matters lying peculiarly within the knowledge of the defendant servants, the presumption raised, in the opinion of the Judge trying the case, that there had been absence of reasonable precaution, was well grounded. The appeal was therefore dismissed.

Mr. *R. B. Haldane, K.C.*, Mr. *R. E. Bray, K.C.*, and Mr. *S. A. T. Rowlatt*, for the appellant. The judgments appealed against are in error. Upon the admitted facts of the case the disaster **[404]** occurred in consequence of the unlawful act of third persons, for whom the appellants were not responsible. And there was no evidence that such unlawful act was accompanied by any negligence, or breach of duty, on the part of the appellants, who had no knowledge, or means of

(1) (1899) I. L. R. 26 Cal. 465.

knowledge, of the coming danger, still less had they allowed, in the sense of permitted, the bringing in of the fireworks. The expression, "res ipsa loquitur" had been referred to as applicable here, but the circumstances, when regarded, showed that it did not apply. The accident was not due to, or the disaster increased by, any defect in the appliances or rolling-stock, or anything under the control of the appellants. And as to negligence on their part or on that of their servants, there was no evidence of it, either direct or inferential, or presumptive. In fact the accident and all the causes that led to it were in matters beyond the control of the Company and their servants, as shown in the evidence adduced, which consisted largely of what the Company had supplied. In such a suit as the present it was for the plaintiff to establish that there had been a breach of the obligation on the defendants, as carriers of passengers, to take due care and due skill. The obligation was limited to that. *Readhead* v. *The Midland Railway Co.* (1). It also was for the plaintiff to show that there was something in the way of the defendants' duty that they might have done, and that they had omitted to do; *Smith* v. *Great Eastern Railway Co.* (2). To bring home the charge of negligence much depended on the degree of control exerciseable by the defendants and their servants, and the mere knowledge of the possibility of danger, in the quarter whence it arose, would not be enough to cause responsibility to attach. A plaintiff, in short, in such a case must prove some negligent act or omission on the part of the defendant, as shown in *Wakelin* v. *London and South Western Railway Co.* (3). Again, where there was an even balance of evidence, the claim, upon the imputation of negligence, could not be maintained, and as to this *Cotton* v. *Wood* (4) was cited. **[405]** Also in *Welfare* v. *London and Brighton Railway Co.* (5) no proof was given, that the Company knew that they were exposing the person coming on to their premises to danger, and the result in the action was a non-suit, which was held to be right. In *Briggs* v. *Oliver* (6) there was a difference of opinion as to whether a non-suit was right, but it was agreed that there was no case to go to a jury, where the evidence was consistent with the absence of negligence. And *Toomey* v. *London and Brighton Railway Co.* (7) shows that, in order to render the defendant liable, the plaintiff must show an act or omission more consistent with there having been negligence than with its absence.

It was not in itself negligent to regard the improbability of a third person's default; *Daniel* v. *Metropolitan Railway Co.* (8). The proposition on which the defendants could rely was stated by Erle, C. J., in *Scott* v. *London and St. Katharine Dockes Co.* (9), to the effect as follows: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those, who have the managment, use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." Here, it was submitted, the bringing in the fireworks was not under the management of the defendants, in the sense meant.

(1) (1867) L. R. 2 Q. B. 413; and on appeal (1869) L. R. 4 Q. B. 379.
(2) (1866) L. R. 2 C. P. 4.
(3) (1886) L. R. 12 Ap. Ca. 41.
(4) (1860) 8 C. B. (N. S.) 568.
(5) (1869) L. R. 4 Q. B. 693.
(6) (1866) 4 H. & C. 403.
(7) (1857) 3 C. B. (N. S.) 146.
(8) (1871) L. R. 5 H. L. (Eng. & Ir. Ap. Ca. 45.
(9) (1865) 3 H. & C. 596.

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Mr. *H. H. Asquith*, *K.C.*, and Mr. *J. H. A. Branson*, for the respondents. Sufficient evidence has been given upon which the Courts below rightly inferred negligence. In the case last cited it was said that when the facts were more within the knowledge of the defendants than of the plaintiff some weight might be attributable to the absence of explanation by the former, and such absence was referred to in the judgment already quoted. The general principle on which the decision of the High Court proceeded was, that it had been the duty of the company to exercise that degree of care, which might reasonably be **[406]** required under all the circumstances. That was right; and it was incumbent on the defendants, after the evidence of those circumstances had been given, for the plaintiff to attempt to clear up how the package, or parcel, had passed the barrier. It was for them to show that its dangerous nature was not recognizable. As the case was left, it was left unknown, whether there was anything that should have aroused attention and suspicion of dangerous articles being carried. This case did not fall within that class, where in consequence of there having been neither power nor means to avert the danger, there was no evidence that could be submitted to a jury. This case was also outside the class, where the evidence on the question of negligence, or no negligence, was equally balanced. The case really fell within the proposition declared in *Scott* v. *The London and St. Katharine Docks Co.*, (1) which expressly mentioned the absence of explanation by the defendants, as giving rise to a presumption. The Courts below had acted rightly upon this. In short, the plaintiff averring negligence had presented evidence, which required explanation on the part of the defendants. Special circumstances might render special care obligatory on the Company. The provision in the Indian Railways Act, 1890, s. 59 gave them the control, to exercise which they should have shown themselves ready, when called upon. There was the well-known fact that at that time of year the local traffic in fireworks was active, and there was the evidence of the passengers having been stopped after the event by only a few days, from carrying in fireworks. No evidence whatever was adduced by the defendants, after the plaintiff's case was closed. Nothing had been brought forward to show that precautions would have been useless, that fireworks were undistinguishable in ordinary bundles, or other particulars relevant to this important part of the defence.

Mr. *R. B. Haldane*, *K.C.*, in reply, referred again to *Scott* v. *The London and St. Katharine Docks Company* (1), and to the general rule stated in the judgment in *Cotton* v. *Wood* (2), that where the evidence is equally consistent with the existence or **[407]** non-existence of negligence, the party alleging negligence has not made a case for a jury to decide.

1900, FEB. 21. Their Lordships' judgment was delivered by—

LORD HALSBURY:—In this case the plaintiff, who is entitled to bring the action, sues the defendant Company for the death of his son, who was killed by an explosion in a railway carriage. The explosion was caused by the bringing into the carriage of a quantity of fireworks. The carriage was one in which smoking was permitted; and a small charcoal stand was there for the accommodation of the smokers. The two persons, responsible for bringing in the combustibles, themselves became the victims of the explosion; but the action is brought against the Railway

(1) (1865) 3 H. & C. 596. (2) (1860) 8 C. B. (N. S.) 568.

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Company upon the allegation that they were guilty of negligence in permitting the explosives to be brought into the carriage.

No precise evidence was given as to the course of business at the station, at which the two persons in question got in. The fact that the fireworks were brought in was clear. But it is contended that it was the duty of the Company to see that dangerous articles, such as fireworks, should not be permitted to be brought into a passenger train. That it would be negligence knowingly to permit such articles to be carried in a passenger carriage is obvious enough, but it is not suggested, so far as the Railway Company, or their servants, are concerned, that they were knowingly permitted to be brought in.

The sole question is whether, upon such facts as are here proved, their Lordships can find reasonable evidence of a neglect of duty on the part of the Company, in not detecting the nature of the parcel or parcels which it is presumed that one, or both, of the persons, who brought the fireworks to the train, had with them, when they passed the ticket barrier at the station at which they got into the train.

No evidence is given by anyone of the appearance, or even the bulk, of the parcel, or parcels. No evidence is given by the Railway Company of any inspection of any passenger's luggage at the station in question. The parcel, whatever it was, was placed under the seat of the carriage; and some expert evidence was given that the extensive explosion which occurred, and in which **[408]** the two people, responsible for carrying the fireworks, were themselves killed, might be caused by half a dozen bombs, such as are usually used on such an occasion as these fireworks were intended for, namely, a Hindu marriage; and these bombs are described as being about the size of ordinary cricket balls.

There is no evidence, direct or indirect, of the dimensions of the parcel or parcels; and it seems to have been assumed on both sides that the practice of passengers carrying some of their own parcels into the carriages, in which they travel, prevails in India, as in England.

The question then is reduced to this; whether there is any proof that the parcels carried by the two passengers exhibited such signs of their real nature as ought to have called the attention of the railway servants to them, and thus prevented such dangerous goods being carried. Their Lordships can find none. If one puts into plain words the duty, the neglect of which is relied on, it at once discloses the absence of evidence on the part of the plaintiff. The duty is to prevent dangerous goods from being carried. What evidence is there that any servant of the Company knew, or had any opportunity of knowing, or enquiring, what these parcels contained? It has been already pointed out, that there is no evidence of what they looked like, or whether any part of them was so uncovered as to suggest danger to anyone.

Their Lordships cannot think that the Railway Company were under the obligation to disprove what was not proved, *i.e.*, to disprove that these were dangerous looking parcels, when not a shred of evidence has been given, that they were dangerous looking. It was not indeed contended, as it could not be, that it was the duty of the Company to search every parcel, which every passenger carried with him.

One source of error, which their Lordships think has been committed in the judgment below is an apparent misunderstanding of what has been decided in the Courts of this country as to the true obligation, which exists on the part of a Railway Company towards its passengers. The learned

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Judge, Mr. Justice Ameer Ali, in terms says :—" Now it may be regarded as settled law that, in the case of carriers of passengers under statutory [409] powers, there exists an express duty, independently of any implied contract, to carry them safely." Their Lordships observe that in the course of Mr. Asquith's argument yesterday, he used the same phrase : that the extent of the obligation of a Railway Company is to carry safely ; in short, that they are common carriers of passengers. That is not the law. It appears to have given rise to the impression that, that being the state of the law, it was for the Railway Company to prove beyond doubt, that they were not responsible for the accident that occurred. As a matter of fact, the arguments would be illogical, because, if they were carriers of passengers in the sense of being common carriers, they would be responsible, quite independently of any question whether there was negligence or not. It would be enough to show that the passenger had not been carried safely, which would at once establish liability. The learned Judge appears to have been misled by an observation of Lord Campbell in the case that he quotes, of *Collet* v. *The London and North-Western Railway Company* (1). That turned upon the duty of the Railway Company, which was set out in the Declaration, to carry a Post Office clerk under certain provisions of Railway Legislation. It was demurred to, upon the ground that there was no contractual relation between the Post Office clerk and the Railway Company. The judgment upon demurrer is sufficiently explained, if one looks at the allegations in the declaration, and the judgment upon it. But unfortunately Lord Campbell used a phrase which the learned Judge, Mr. Justice Ameer Ali, quotes : " that the Railway Company were under an obligation to carry safely," which their Lordships think has been the origin of the error. Lord Campbell says ; " I am of opinion that there is no difficulty in the question, which has been raised. The allegation that it was the duty of the Company to use due and proper care and skill in conveying is admitted," that is to say, be the demurrer. " That duty does not arise in respect of any contract between the Company and the persons conveyed by them, but is one which the law imposes. If they are " bound to carry, they are bound to carry safely." That, probably, is the origin of the error, which their Lordships think the learned Judges below have fallen into. What [410] Lord Campbell is saying there is that they are not relieved from the ordinary obligations which would exist by contract, because by statute they were compelled to carry the Post Office clerk ; and he goes on to say that the obligation is not satisfied by carrying a man's corpse, and not himself. His mind is not applied at all to the extent of the obligation created, but his mind is upon the argument that there was no obligation at all ; and he practically says : " You must take as much care of him, as if he was a passenger, who contracted with you." Whatever may be the difficulty that arises about such a phrase in Lord Campbell's mouth, there is no difficulty whatever, if one looks at the declaration and the assignment of the breach of duty, where the duty is set up, as indeed, Lord Campbell, in the earlier parts of his judgment points out, to carry with reasonable care and diligence : and the allegation in the declaration, corresponding to the duty which exists, is that they did not do so ; and then the assignment of breach is not that the man was not carried safely, which according to the argument would be sufficient, but the allegation is, that they did not use proper care and

(1) (1851) 16 Q. B. 984.

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skill in the carrying. If one looks at that, as indeed at the two other cases which the learned Judge, Mr. Justice Ameer Ali, quotes as justifying the onus that he throws upon the Railway Company, it is intelligible enough. In the one case it was a child under three years of age, between whom and the Railway Company, of course, there was no contract, and the other is a case of the same character. It is important, perhaps, to observe, what runs through the judgments, and to observe that Mr. Asquith, naturally enough, used the same phrase yesterday in his argument as enforcing the necessity of the Railway Company discharging themselves by any conceivable evidence, by saying that their contract was to carry safely. Their Lordships think it is desirable that the error should be plainly stated, because it may mislead others hereafter. It is enough to say that, in their Lordships' judgment, there is no such obligation on the part of the Railway Company.

Their Lordships will therefore humbly advise His Majesty that the judgments appealed from must be reversed, and judgment entered for the defendants in both Courts below; **[411]** but having regard to what fell from Counsel at their Lordships' Bar, without disturbing any directions given in India as to costs.

Appeal allowed.

Solicitors for the appellants: Messrs. *Freshfield & Co.*
Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

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28 C. 411.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

RAMAN SINGH AND OTHERS (*Petitioners*) *v.* QUEEN-EMPRESS (*Opposite Party*).* [6th July, 1900].

Special constables—Refusal by persons appointed, to accompany police officer to obtain authority of appointment and arms, whether refusal to serve as such—Arrest—Arrest on refusal, legality of—Public servant—Obstructing him from discharge of his duty—Rioting—Police Act (V of 1861), ss. 17 and 19—Penal Code (Act XLV of 1860), ss. 147, 149 and 353.

N., S. and *G.* were appointed special constables under s. 17 of the Police Act. A Police Inspector accompanied by some police went to their village and informed them that they had been so appointed, and requested them to accompany him to the police station of *B.*, which they declined to do. The Inspector then had *N.* arrested, whereupon *N.* shook himself free and *N., S.* and *G.* with other persons, who had assembled, abused and threatened the police and compelled them to withdraw from the village.

N., S. and *G.* were convicted under s. 19 of the Police Act, and they were also convicted with other persons under s. 353 read with s. 149 of the Penal Code.

Held, that the refusal of *N., S.* and *G.* to accompany the Inspector constituted no offence under s. 19 of the Police Act, as the order was intended not for any purpose of police duty, but simply that they might obtain the authority of their appointment and the necessary arms.

Held, futher that the refusal of *N.* to accompany the Inspector was not an offence, for which *N.* could be arrested, and, as the police when obstructed were not acting in lawful discharge of their duty, none of the persons concerned could be convicted of an offence under s. 353 of the Penal Code, but that they were guilty of rioting under s. 147 of the Code.

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* Criminal Revisions Nos. 381 and 382 of 1900, made against the order passed by G. W. Place, Esq., Sessions Judge of Patna, dated the 5th of May 1900, affirming the order passed by E. E. Forrester, Esq., Sub-Divisional Magistrate of Barh, dated the 26th of March, 1900