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WHATELEY v. PÁLANJI PESTANJI.

Innkeeper and guest—Boarding-house-keeper and lodger.

In a suit brought to recover the value of certain articles stolen from the plaintiff's rooms at an hotel in Bombay; the defendant being the licensed proprietor of the hotel, who was in the habit of entertaining, for shorter or longer periods, all comers willing to pay the usual charges; and the plaintiff being an exchange broker doing business in Bombay, who had lived at the hotel for more than a year, paying for his board and lodging, at first by the day, and afterwards, by agreement, at the rate of so much a month—but neither was the plaintiff under any obligation to remain, nor the defendant to accommodate him, for any fixed time:—

Held that the relation of innkeeper and guest (and not that of boarding-house-keeper and lodger) subsisted between the parties; and that the defendant was, *prima facie* and without proof of actual negligence, liable to make good the loss sustained by the plaintiff.

There is no law but the Common Law of England to regulate the relation of innkeeper and guest in Bombay, in a case between a European and a Pársi.

CASE stated for the opinion of the High Court by J. F. 1866.
 Here, First Judge of the Bombay Court of Small September 6.
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“In this case the defendant is sued, as a common innkeeper, for the value of certain articles which were stolen from the plaintiff's rooms at the Adelphi Hotel, whilst he was residing there as a guest.

“The facts proved at the trial are as follows:—The defendant is the licensed proprietor of the Adelphi Hotel at Byculla, where he is in the habit of receiving and entertaining, for shorter or longer periods, all such visitors as are able and willing to pay the usual charges. The plaintiff, an exchange broker in Bombay, lived at the hotel on the last occasion for seventeen months, from July 1864 to December 1865. At first he paid for his board and lodging by the day; but subsequently, by agreement, at the rate of Rs. 180 a month, the daily charge during the latter period being Rs. 9 a day. His rooms, a sitting and a bed room, situate the one behind the other, and divided by a screen, were furnished partly by himself and partly by the defendant. They

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formed one of several sets of rooms, having a veranda in front and another in the rear, both common to all the rooms. The door between the plaintiff's bedroom and the back verandah was fastened inside by an iron hook, which was capable of being unfastened from the outside. On the 24th or 25th of September last the plaintiff returned from his office about half-past three o'clock in the afternoon; and having placed his watch, chain, and two rings on the top of a chest of drawers, laid himself down on his bed and fell asleep. On awaking, about five o'clock, the articles were missing, and have never since been found. Several petty thefts have occurred at the hotel; and the plaintiff frequently remonstrated with the defendant, without avail, on the subject. At the time of the loss, the plaintiff had a butler and one or two outdoor servants; but on that day the butler had obtained leave of absence early in the morning, and was not seen again at the hotel until six o'clock in the evening: it was not attempted to be shown that any of the plaintiff's servants were implicated in the theft. When the plaintiff laid himself down to sleep, the front door of the sitting room, as well as that between the sitting and bed room, was open; but, whether the door between the latter and the back veranda was open, or whether the thief made his entry from the front or back veranda, does not appear. It was also proved that the value of the goods lost amounted to Rs. 1,000.

"It was contended, on behalf of the defendant, that he and the plaintiff stood in the relative position of boarding-house-keeper and boarder, and not in that of innkeeper and guest; that the common law of England with respect to innkeepers is not applicable to Bombay; and that the loss was occasioned by the negligence of the plaintiff. The Court decided all the questions in favour of the plaintiff, and gave him a verdict, subject to the opinion of the High Court, for Rs. 1,000 and costs. A written judgment was delivered, of which a copy is annexed.

"The opinion of the High Court is, therefore, requested:—
(1) Whether, upon the facts proved, the plaintiff and defend-

ant stood in the position towards each other as guest and innkeeper, or of boarder and boarding-house-keeper; (2) Whether the common law of England relating to innkeepers is applicable to Bombay; (3) Whether, under the circumstances stated, the Court was right in giving a verdict in favour of the plaintiff.

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(*Judgment.*)

“The question principally discussed at the hearing was, whether the relationship that existed between the plaintiff and the defendant was that of ‘guest’ and ‘innkeeper,’ or that of ‘boarder’ and ‘boarding-house-keeper:’ but another and very important question arises, whether the common law of England relating to innkeepers is applicable to this country. At first I was inclined to think that it was not; but on reflection, having regard as well to the circumstances of the country as to the policy upon which that law is founded, I have arrived at a different conclusion.

“It is said that, as travellers in this country are usually accompanied by their own servants, their goods ought to be considered as in the custody of the latter, and not in the custody of the innkeeper. Even if (as is not the case) travellers in India always took their servants with them, and their masters’ goods were always given into their charge, the custody of the servant (unless exclusive, under express agreement) would not, I apprehend, exempt the innkeepers from responsibility for loss, any more than the ordinary custody of the master himself would have that effect: for, according to the common law of England, it was immaterial in whose actual custody the goods were, so long as they were brought within the inn. In *Calye’s Case (a)*, which is the leading authority on this subject, it is laid down that although the innkeeper had delivered to the guest the key of the chamber in which he lodged, and the goods were stolen in consequence of the latter having left the door of his chamber open, the innkeeper was liable. ‘A delivery of the goods into the custody of the innkeeper is not necessary to charge him with them; for although the guest doth not de-

(a) 8 Co. 32; 1 Smith L. C. 102, 5th ed.

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liver them or acquaint the innkeeper with them, still the latter is bound to pay for them if they are stolen or carried away; even although the persons who stole or carried them away are unknown:’ Story, Bailm., Sec. 479, citing *Calye’s Case*.

“Again, it is contended that the law on this subject had its origin in uncivilised times, and is unsuitable to the exigencies of the present age; and that, as hotels in this country are of recent existence, the extraordinary responsibility to which innkeepers and hotel-keepers in England are subjected, ought not now for the first time to be extended to hotel-keepers in Bombay. The law had its origin in the edict of the Roman prætor, and has been adopted, with various extensions and modifications, by most, if not all European countries; and although in many States in America, inns are regulated by special statute, this branch of our Common Law is understood to prevail in all the States except Louisiana. It is considered to have been adopted, on the ground of public policy and from necessity, by all countries whose jurisprudence is based on the Roman law; and the necessity for its existence appears to be at least as urgent here at the present day as it was formerly found to be in other countries. In Story, Bailm., Sec. 464, it is said: ‘The soundness of the public policy of subjecting particular classes of persons to extraordinary responsibility, in cases where an extraordinary confidence is necessarily reposed in them, and there is an extraordinary temptation to fraud or danger of plunder, can hardly admit of question.’ In Burge’s Col-Laws, Vol. III., p. 692, it is stated that ‘the extraordinary confidence reposed in innkeepers and common carriers, and the temptation and facilities afforded them to violate that confidence, are assigned as the motives which justified the edict.’ In *Holder v. Soulbey* (b), *Byles, J.*, in the course of his judgment, with reference to the loss of goods, says: ‘It is a wholesome rule that if the goods are at an inn, the innkeeper is responsible for them; but that, if they are in a mere lodging-house, the lodger shall be bound to take care of the

goods himself.' And it has been observed by Sir William Jones that, 'rigorous as this rule may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield. For travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest would seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them : ' Jones on Bailm. 95. The reasons given by Sir W. Jones for the existence of the law in England, appear to me to apply to the circumstances and condition of this country at the present day, with the same force that they applied to the circumstances of England at the time he wrote his work on Bailments. Had the law on this subject been considered unsuitable to the present civilised state of society in England, there is no doubt it would have been entirely repealed before now. So far from this having been done, the principle and justness of the law have lately been recognised by the Legislature, in passing 26 & 27 Vic., c. 104, although they have by that Act limited, under certain circumstances, the liability of innkeepers. I am, therefore, of opinion that, as this particular law is a part of the general Common Law of England, which was introduced into India in 1726, it ought to be considered to have been introduced at that time, and that it ought to be allowed to prevail here, until repealed or amended by the Legislature.

"The next questions are, whether the defendant is an innkeeper, and whether the plaintiff is a guest. An innkeeper has been defined to be 'the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses, and attendants, for a reasonable compensation : ' Story, Bailm., Sec. 475, citing Bac. Abr., *Inns*, C. In *Thompson v. Lacy (c)*, Bayley, J., says : 'I take the true

(c) 3 B. and Ald. 286.

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definition of an inn to be, a house where the traveller is furnished with everything which he has occasion for whilst upon his way.' 'An innkeeper, moreover, is bound to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation : Story, Bailm., Sec. 476. And there is no distinction either in law or in the ordinary meaning of the words, between an inn and an hotel, the name hotel being given, according to Webster's and other dictionaries, to any inn. The defendant, upon his own evidence, clearly satisfies these requirements. Then, can the plaintiff be strictly regarded as 'a guest' ? The writ in the *Registrum Brevium*, 'which is in such case the ground of the common law,' shows that to be 'a guest' a person must be 'transiens.' And in *Calye's Case* it is laid down : 'The words are *ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes* : by which it appears that common inns are instituted for passengers and wayfaring men ; for the Latin word for an inn is *diversorium*, because he who lodges there is *quasi divertens se a viâ*, and so *diversorium*. And, therefore, if a neighbour, who is no traveller, as a friend, at the request of the innholder, lodges there, and his goods are stolen, &c., he shall not have an action : for the writ is *ad hospitandos homines &c., transeuntes, in eisdem hospitantes, &c.*' Here the word *transiens* has been translated 'a traveller,' 'a passenger,' 'a wayfaring man ;' but, although it literally embraces persons who are usually designated by those terms, it clearly extends further, and applies to persons who may be 'passing on,' to 'sojourners,' and to persons who avail themselves of the *hospitium* temporarily, and for no fixed time. And this interpretation of the word seems to be supported by authority. 'The length of time that a man is at an inn makes no difference ; whether he stays a week, or a month, or longer ; so always that, although he is not strictly *transiens*, he retains his character as a traveller. And if he still is in reality a traveller, the making of a special agreement with the innkeeper for the price of his board by the week will not

change his character as a guest, and make him a mere boarder.' Story, Bailm., Sec. 477. 'If A comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be *transiens*, according to the writ in the register:" Bac. Abr., *Inns*, C. 5. In *Thompson v. Lacy* it was contended that the plaintiff, who had resided at an inn in London for several months, was not a guest, 'inasmuch as he had previously been continually resident in London,' and therefore was not a traveller or way-faring man, but it was nevertheless decided that he was a guest in that case; the marginal note, which correctly represents the facts, is in these words: 'A house of public entertainment in London where beds, provisions, &c. are furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage-coaches and waggons from the country, and which had no stables belonging to it, is to be considered an inn; and the owner is subject to the liability of innkeepers, and has a lien on the goods of his guest for the payment of his bill; and that, even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in London.' And one of the Judges, *Best, J.*, in delivering judgment, says: 'An inn is a house the owner of which holds out that he will receive all travellers and *sojourners* who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received.'

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"These authorities show clearly, I think, that the plaintiff in the present case is legally a guest, unless the other circumstances disclosed by the evidence are sufficient to clothe him with a different character. It was contended on behalf of the defendant, that the plaintiff had entered into an express contract with him for board and lodging, and that he was consequently a boarder, and not a guest. Had this been proved, the defendant would have been exempt from responsibility; but there appears to me to be a total absence of

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facts to support the contention. The cases relied on by Mr. Leathes were *Parkhurst v. Foster (d)*, and *Thompson v. Lacy, supra*. Both of these authorities are directly adverse to the defendant. The first is reported in different places, but from the report in Salkeld it appears that the action was brought for 'Trespass, for quartering a dragoon upon the plaintiff to find him meat and drink, and hay and straw for his horse, &c. Upon 'not guilty' pleaded, a special verdict was found, that the plaintiff kept a house at Epsom *et dimisit conclavia*, Anglicè lodgings, *talibus qualis ibid. accedebant propter salubritatem aëris, et potionem aquarum, &c.*, and that he dressed meat for his lodgers at four pence per joint, and sold them small beer at two pence per mug, and also found them stable-room, hay, &c. for horses, at such and such rates; and that the defendant, being a constable, quartered a dragoon upon the plaintiff. *Holt, C.J.*, when this case was set down for the resolution of the Court, gave judgment for the plaintiff, and said the case was so plain, that there was no occasion for giving reasons; thereby deciding that the plaintiff was a lodging-house-keeper, and not an innkeeper. But in 12 Mod. Rep. 254, where the case is reported as *Parker v. Flint*, it is said, 'In this case *Holt, C.J.*, held that 'if one come to an inn, and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such is not under the innkeeper's protection; but if he eat and drink there, it is otherwise; or if he pay for his diet there, though he do not take it there. And a sign is not essential to an inn, but is an evidence of it.' Had the case now before the Court been before *Holt, C.J.*, as the plaintiff did eat and drink at the hotel, he would most undoubtedly have held him to have been a guest. The other case, *Thompson v. Lacy*, involved no question of special contract at all, and was to the effect already mentioned.

"In the case before the Court, there was in reality no agreement for board and lodging for a set time, but merely an agreement, entered into some time after the plaintiff became a resident at the hotel, to pay at the rate of so much a

(d) 1 Salk. 388.

month, instead of, as he had previously done, paying so much a day. The defendant himself stated in his evidence that the plaintiff agreed to pay, not so much a month, but at the rate of so much a month ; so that if he left at any time before the expiration of a month, he would only be charged up to the time he left. There was no obligation on the part of the plaintiff to remain any fixed time ; he might have left on any day he pleased, without notice ; and it was always uncertain how long he might find it convenient, or how long he might think fit, to stay. He was, therefore, strictly speaking, *transiens*, and therefore, according to Common Law, a 'guest.' And as the relationship of guest and innkeeper subsisted between the parties, the defendant is, *primâ facie*, and without proof of actual negligence, liable to make good the loss sustained by the plaintiff. It was open to the defendant to repel by evidence, if he could, this presumptive liability, by showing that the loss was occasioned by the fault of the plaintiff ; or that it arose from other circumstances for which innkeepers are not responsible. No attempt was made to do this, except that it was said that the loss occurred from the plaintiff's doors being left open, and that it was negligence on the part of the plaintiff to leave them open. But to leave doors open is the rule rather than the exception in this country, and the case of *Kent v. Shuckard* (e) shows that the defendant would formerly have been liable under such circumstances even in England.

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“The plaintiff is, therefore, entitled to recover ; and, as the evidence of the plaintiff as to the value of the articles lost has not been controverted, a verdict must be entered in his favour for Rs. 1,000 and costs. Attorneys' costs, Rs. 51, certified for.

The case was heard before ARNOULD and WESTROFF, JJ.

McCulloch and Green, for the appellant, defendant in the court below :—The parties in this case were rather in the relative position of boarder and boarding-house-keeper than of guest and innkeeper. The plaintiff had entered into a

(e) 2 B and Ad. 803.

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special arrangement with the defendant to board at his "hotel," in consideration of his paying at the rate of Rs. 180 *per mensem*, in place of Rs. 9 *per diem*, which was the ordinary rate. The "hotels" in Bombay were more like boarding-houses in England: inasmuch as persons staying in them were charged by the day, and not by the meal. The plaintiff, moreover, had himself partly furnished the rooms which he occupied; and had remained in them for seventeen months. Besides, he carried on business in Bombay, and had an "office," so that he could not be considered a mere sojourner.

Pigot and *Mayhew*, for the respondent, contended that the arrangement entered into between the parties was not such as to alter the position in which they previously stood to each other—of guest and innkeeper. There was no agreement for a set time.

Cur. adv. vult.

September 7. The judgment of the Court was given this day (ARNOULD, J., concurring) by—

WESTROPP, J.:—There is no law, but the Common Law of England, to regulate the relation of innkeeper and guest in Bombay in a case between a European and a Pársi. The effect, if any, upon that relation, of the reservation which was made, in the charter of the Supreme Court, in regard to the law of contract as between Gentoos, and the law of contract as between Muhammadans, is not now in question; we have neither Gentoos nor Muhammadans to deal with in this case.

The next point is the point of difficulty in the case:—Was the plaintiff a lodger, or what the English law deems to be a guest? We say a guest, because we think that for a long time past the question in such cases has been, not so much whether the person, who seeks to make the innkeeper liable, is a traveller, as whether he is a guest. It is clear that the plaintiff would not be a guest if there had been a demise to him, for a time certain, of the rooms which he occupied: *Watbrook v. Griffith (f)*, where it was said that

(f) Sir F. Moore, plac. 1229, p. 877.

it was resolved, in the case of an attorney who hired a chamber in an inn for the whole of the Term of Court, that the innkeeper was not chargeable for a robbery during that time, because the party was *quasi* a lessee. And the dictum of Jones, J., in *Drope v. Thaire (g)*, to which we shall presently refer, we interpret as meaning that, in order to relieve the innkeeper of his liability at Common Law, there must be a special agreement by which one party demises and the other takes the apartment for a time certain.

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From the written judgment of the learned First Judge of the Small Cause Court annexed by him to the special case, and which, by reason of his reference to it in that case, we think we may treat as incorporated in it—there appeared to have been nothing which could be held to amount to a demise of any of the apartments at the hotel by the innkeeper, the defendant, to the plaintiff. The First Judge said: "There was in reality no agreement for board and lodging for a set time; but merely an agreement, entered into some time after the plaintiff became a resident at the hotel, to pay at the rate of so much a month, instead of, as he had previously done, paying so much a day. The defendant himself stated in his evidence that the plaintiff agreed to pay, not so much a month; but at the rate of so much a month; so that, if he left at any time before the expiration of a month, he would only be charged up to the time he left. There was no obligation on the part of the plaintiff to remain any fixed time; he might have left on any day he pleased without notice; and it was always uncertain how long he might find it convenient, or how long he might think fit, to stay."

With those facts before us, it is impossible to say that, on the one side, the innkeeper could have insisted on the plaintiff remaining for a month, or paying for a month, whether he stayed during that period or not; or, on the other side, that the plaintiff could have insisted on being allowed to remain for a month, if it did not please the innkeeper that he should so remain. We do not think that there was any-

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thing in what took place between the parties that could be treated as a demise for a month, or for any fixed time, or as an agreement for such a demise.

It is reported by Latch to have been said by *Doddridge, J.*, in *Gulialm's case (h)*, that if a passenger lodged for three days together in an inn, the innkeeper was not responsible for goods: but that supposed *dictum* is inconsistent with the decision in *Drope v. Thaire*, reported at page 127 of the same volume, where it was held unnecessary to aver that the sojourner in the inn was *transiens*; *Doddridge, J.*, saying that clothiers who came to London to sell cloth, and stayed for a week or more, or men who came up to attend Term, nevertheless might maintain an action (for loss of their property) against their host, he being a common innkeeper. *Jones, J.*, concurred; but said it would be otherwise if the party stayed for quarter of a year and boarded there. But if he stayed half a year without such agreement for board &c., the case would be within the custom. I have already stated the interpretation which we place upon those not very clearly reported remarks of *Jones, J.*

The *dictum* in *Gulialm's case* is especially inconsistent with *Thompson v. Lacy (i)*, from which it appeared that the time the guest stayed (eighty-three days in that case) did not alter the relation of innkeeper and guest, unless there was a special agreement which changed the condition of the latter from that of guest to that of lodger. And in *Story on Bailments* there was an American case mentioned in a note to plac. 447, where it appeared to have been laid down that the length of time made no difference.

In *Burns' Justice*, Title "Alehouse," Sec. XVI. (e), it is said that "it is necessary to render the innkeeper thus liable, that the party leaving the goods in the innkeeper's custody should, at the time of the injury, be a guest at the inn. One who goes casually to an inn and eats and drinks or sleeps there, is a guest, although not a traveller, &c. &c. So

(h) Latch's Rep. p. 88. (i) 3 B. & A. 283.

(j) pp. 116, 117, 29th ed. by Chitty.

is one who remains at the end of his journey at an inn, without a special contract, even for a half-year."

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We do not think the fact of the plaintiff having some furniture of his own in the room—especially when we recollect what the habits of people in this country are—could alter the case. It would be very difficult to draw the line and say what amount of furniture made a person a lodger, and when in fact he ceased to be a guest—whether it would be one chair, or half a dozen chairs, in addition to the furniture already in the apartments. We think it would be a very unsatisfactory basis to rest a decision upon.

Here we have it stated by the learned Judge that the defendant was a common innkeeper, and that he entertained all comers; and that, as an ordinary comer, the plaintiff entered the inn, and was accommodated for a certain time, and the only alteration which appeared to have taken place in the terms as to which he remained in the inn, was that, instead of paying so much *per diem*, as he had paid at first, he was to pay at such a rate *per mensem*, and in the event of his going away at a broken period, before a month was completed, he was to pay for the expired portion of the month only. But we do not think that affected his character of guest in the slightest degree, or gave any certainty to his tenure: it was only the mode or rate of payment that was altered.

Under those circumstances we think the plaintiff must be regarded as simply a guest, and not as a lodger; and that the judgment should be affirmed, each party paying his own costs of the reference; the question being one of some nicety, and the distinction between a lodger and a guest being only a slight one, under such circumstances as were disclosed in the present case.

Judgment affirmed.