1881 MAY 3. FULL BENCH. 5 B. 338 (F.B.).

on to release those who, in the Velanpur dacoity case and others like it, have been wrongly thought to have had stolen property in their possession, because in a popular sense it had been stolen. Even within a month I believe some residents in British India have been imprisoned for receiving property which could not properly be deemed "stolen," because it was taken in foreign territory. The restoration of these victims of misconstruction to what must now be pronounced their legitimate calling, will be of essential service to the other enterprising persons across the frontier (not now to be called dacoits) who, without the aid of friends on our side, must soon have been hampered by the cumbrous gains of their activity and daring.

Conviction quashed.

Attorney for the prosecution: Mr. *R. V. Hearn* (Government Solicitor).

Attorneys for the prisoner: Messrs. *Payne and Gilbert.*

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5 B. 371=5 Ind. Jur. 646.

[371] ORIGINAL CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

THE GREAT INDIAN PENINSULA RAILWAY COMPANY (*Original Defendants*), *Appellants v.* RADHAKISAN KHUSHALDAS (*Original Plaintiff*), *Respondent.** [4th May, 1881.]

Railway companies—Agreement for interchange of traffic—Principal and agent—Loss of goods—Liability.

The plaintiff delivered to the Madras Railway Company a bale of cloth for carriage from B, a station belonging to that company, to S, a station belonging to the defendants, the G.I.P. Railway Company, and obtained from the Madras Company a receipt, which recited that it was granted "subject to the rules and regulations and charges in force on that or any other railway over which the goods might pass." The goods were lost while on the line and in the charge of the defendants, the G. I. P. Railway Company, and the plaintiff sued them for damages for breach of the contract of carriage. Between the two railway companies there existed an agreement arranging for the interchange of traffic, which provided, *inter alia* that goods should be booked through to and from all stations on both lines at certain stated rates; that in such cases one company should receive payment and should account to the other; that any claim for loss or damage should be paid by the company in whose custody the goods were then lost or damaged, or if that could not be ascertained, then by both companies rateably; and that no alteration affecting the through traffic should be made by either company without previous notice to the other. The defendants pleaded that the suit was wrongly brought against them, as there was no contract between themselves and the plaintiff.

Held, that the suit, whether or not it might also have been brought against the Madras Railway Company, was rightly brought against the defendants, inasmuch as the agreement between the two companies, if it did not actually constitute a partnership between them, showed, at least, that the Madras Railway Company became the agent of the defendants to make the contract for carriage with the pliantiffs.

Gill v. *Manchester, Sheffield and Lincolnshire Railway Company* (1) followed.

[R., 3 Bom. L.R. 260.]

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* Suit No. 400 of 1878. Appeal No. 395.

(1) L.R. 8 Q.B. 186.

1881
MAY 4.

ORIGINAL CIVIL.

5 B. 371 = 5 Ind. Jur. 646.

THIS was an action brought against the G. I. P. Railway Company to recover Rs. 1,250 for breach of a contract for the carriage of goods of the plaintiff, made with the plaintiff by the Madras Railway Company, acting therein, it was alleged, as agents for the defendants. The goods in question, *viz.*, a bale of cloth, were delivered by the plaintiff to the Madras Railway Company, at Bellary to be carried from that station, belonging to the Madras Railway Company, to Sholapur, a station belonging to [372] the defendant company. The lines of the two companies joined at Raichore, and it was between Raichore and Sholapur, and, therefore, while the goods were in the custody of the defendants, that the loss admittedly took place. The plaintiffs also founded their case in the alternative in tort, alleging that the loss was occasioned by the defendants' negligence.

The defendants (1) denied their liability *in toto*, asserting that they had entered into no contract with the plaintiffs; and (2) alleged that, if that point should be found against them, they were only liable to the plaintiffs to the amount of Rs. 825.

The other material facts of the case appear at length from the judgment.

The original hearing took place before Sir Charles Sargent, when the preliminary point of liability or no liability, raised by the defendants, was alone gone into; and Sir Charles Sargent held that the suit was rightly brought against the defendant company, and made a decretal order to that effect, and adjourned the further hearing of the case.

Against that order the defendant company now appealed; the memorandum of appeal alleging (1) that the learned Judge ought to have held the plaintiffs' cause of action (if any) was against the Madras Railway Company, and not against the defendants; and (2) that he was wrong in holding that the Madras Railway Company acted as the agents of the defendants in concluding the contract with the plaintiffs.

A preliminary question having arisen at the hearing of the appeal, as to whether the order of Sir Charles Sargent appealed from, not being an order final in form, was one properly appealable, it was suggested and agreed to by counsel on either side that that order should be amended so as to be in the form of a final decree for the plaintiffs for Rs. 1,100, the amount of damage agreed between the parties to have been suffered by the plaintiffs.

Hon. *F. L. Latham* (Acting Advocate-General) (with him *Farran*), for appellants.—No negligence has been shown: so the liability, if any, must be merely that of a common carrier, growing out of the contract of carriage. The question raised by this case is this: [373] when a railway company contract for carriage beyond their own line, and a loss occurs beyond their own line, who is liable to be sued, the contracting company, or the company on whose line the loss occurred, or both? The contract in this case is embodied in the ordinary railway receipt. Sir Charles Sargent decided against us on the authority of the case of *Gill* v. *Manchester Railway Company* (1), but that case is distinguishable from the present in two important particulars. First, the agreement between the two companies in that case was such as almost to constitute them partner; the agreement in this case is very different. And, secondly, in that case the contract made was to carry exclusively on the defendant company's line, and that appeared expressly on

(1) L. R. 8 Q. B. 1868.

1881
MAY 4.
ORIGINAL
CIVIL.
5 B. 371=
5 Ind. Jur.
46.

the contract, and was strong evidence of agency. The goods in that case were from beginning to end on the defendant's line And it is apparent that the case was considered a special one, for no earlier cases were cited. And see Chitty on Contracts (10th ed.), p. 451, where that case is treated as creating an exception to the general rule. If that case is not to be explained by its special circumstances, then it must yield to the authority of several cases inconsistent with it. It is a significant fact that in most of the cases the action has been brought against the contracting company: *Muschamp* v. *Lancaster Railway Company* (1), *Scothorn* v. *South Staffordshire Railway Company* (2), *Great Western Railway Company* v. *Blake* (3). But in two cases, *Collins* v. *Bristol and Exeter Railway Company* (4) and *Mytton* v. *Midland Railway Company* (5), the defendants were the non-contracting companies, and in both cases they succeeded in evading liability. The later cases consider the question whether the special features of each case bring it within the recognized principle or not: *Buxton* v. *North-Eastern Railway Company* (6), *Thomas* v. *Rhymney Railway Company* (7), *Foulkes* v. *Metropolitan Railway Company* (8).

The only resemblance between this case and the case of *Gill* v. [374] *Manchester Railway Company* (9) is that there is a written agreement between the two companies in both; but similar arrangements between the various railway companies, though not in writing, existed in other cases, *e.g.*, *Mytton* v. *Midland Railway Company* (5), *Great Western Railway Company* v. *Blake* (3). The agreement in this case does not amount to a quasi-partnership. The cases cited show that there is no contract here with the G. I. P. Railway Company, and the suit, therefore, was wrongly brought against them.

Starling (with him *Pigot*), *contra*, for respondents:—In no case has it been decided that no one else besides the contracting company was liable. No doubt the cases decide that the contracting party is himself liable. In *Great Western Railway Company* v. *Blake*, at p. 993, Cockburn, C. J., says: "It is unnecessary to say whether the plaintiff would have had a right of action against the South Wales Railway Company; at all events he has against the defendants."

The only cases cited in which the company sued was not the contrating company, but the company on whose line the loss occurred, were *Collins* v. *Bristol and Exeter Railway Company* (4) and *Mytton* v. *Midland Railway Company*. In both plaintiff failed because he sought to vary the contract; here he does not. The agreement in this case is conclusive as to the agency of one company for the other. But I submit that the defendants are also liable on another ground, exclusive of contract. They were in possession of plaintiffs' goods; it was their duty to carry safely, and they did not. That is good *prima facie* evidence of negligence, and they have not disproved negligence, and are liable: *Foulkes* v. *Metropolitan Railway Company* (8), *Marshall* v. *York and Berwick Railway Company* (10) *Austin* v. *Great Western Railway Company* (11), *Martin* v. *Great Indian*

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(1) 8 M. & W. 421. (2) 8 Ex. 341. (3) 7 H. & N. 987.
(4) 11 Ex. 790; 1 H. & N. 517 (Cam Sc.); 7 H.L.C. 194. (5) 4 H. & N. 615.
(6) L.R. 3 Q.B. 549. (7) L.R. 5 Q.B. 226; L.R. 6 Q.B. 266.
(8) L.R. 4 C.P.D. 267; 5 C.P.D. 157. (9) L.R. 8 Q.B. 186.
(10) 11 C.B. 655. (11) L.R. 2 Q.B. 442.

Peninsula Railway Company (1), *Berringer v. Great Eastern Railway Company* (2).

1881
MAY 4.

ORIGINAL CIVIL.

Cur. adv. vult.

5 B. 371 = 5 Ind. Jur. 646.

JUDGMENT.

[375] May 4, 1881.—The judgment of the Court was delivered by WESTROPP, C.J.—This is an appeal from a decretal order made by Sir Charles Sargent, J.

In August, 1877, the plaintiffs' agent at Bellary, a station on the Madras Railway, delivered there to the Madras Railway Company a bale of cloth belonging to the plaintiffs to be conveyed thence to Sholapur, a station on the G. I. P. Railway, and there to be delivered to the plaintiffs. The bale was conveyed safely from Bellary past Raichore, where the Madras Railway terminated, and was lost between Raichore and Sholapur on the defendants' (the G. I. P. Railway Company's) line, and was never delivered to the plaintiffs, who, by their present suit, claimed damages to the extent of Rs. 1,250 as the value of the bale. The fifth para. of the plaint alleged "that the defendants (the G. I. P. Railway Company) through their agents in that behalf, the Madras Railway Company, agreed with and promised the plaintiffs to safely carry the aforesaid bale from Raichore and deliver the same to the plaintiffs at Sholapur." The following receipt for the bale was given by the goods clerk at Bellary to the plaintiffs' agent:—

"Madras Railway.

T. (79).
Goods Receipt Note No. 135.

Traffic Department.
Co. 101.
Bellary Station, 11-8-77.

Received from Balmookund.
Consigned to Radhakisan Ganeshdas,
Sholapur Station.
* Number and description of goods—
1 B. cloth.

(Signed) RUGANLAL, Clerk.

N.B.—This receipt is granted subject to the Rules and Regulations in force on this Railway or any other Railway over which the goods may pass, and must be produced before the goods can be delivered.

[376] The defendants by their written statement (after a general denial of their liability to pay the sum of Rs. 1,250 in the plaint claimed, or any part thereof) submitted that the plaintiffs' cause of action (if any) was against the Madras Railway Company and not against the defendants; and that, if the action did lie against the defendants, the plaintiffs are entitled to recover Rs. 825 only, such sum being the full value of such part of the goods as is not comprised in s. 10 of Act XVIII of 1854.

The issues were:—

1. Whether the defendants promised and agreed with the plaintiffs as in the 5th paragraph of the plaint alleged? and

2. Whether the plaintiffs are entitled to maintain this suit.

* Number to be expressed in words as well as in figures.

(1) L.R. 3 Ex. 9. (2) L.R. 4 C.P.D. 163.

1881 MAY 4. — ORIGINAL CIVIL. — 5 B. 371= 5 Ind. Jur. 646.

Both of those issues Sir Charles Sargent, J., found in the affirmative, and so stated in his decretal order of that date, and he adjourned the further hearing of the suit.

The present appeal is against that order. For the purpose, however, of avoiding any question as to the jurisdiction of this Court to hear this appeal, the parties, by their respective counsel, agreed that Sir Charles Sargent's order should be amended by making it a decree for the plaintiffs for Rs. 1,100, as damages for the bale of goods, the subject of this suit, with costs, reserving to the defendants the right to appeal against the ruling of Sir Charles Sargent on the issues 1 and 2 as to the liability of the defendants to pay any damages or costs; and that so much of his order as directed the adjournment of the cause should be struck out.

At the time of the occurrences the subject of this suit, there was in force an agreement in writing between the Madras Railway Company and the Great Indian Peninsula Railway Company intituled "A Memorandum of Agreement between the Madras and the Great Indian Peninsula Railway Companies for interchange of Traffic and Rolling Stock."

By the second of its provisions the joint station at Raichore was erected and maintained at the joint expense of both companies. The 16th, 17th, 18th and 19th clauses of the agreement were as follows:—

[377] "16. That goods and parcels be invoiced and booked through to and from all stations on both lines where such traffic is dealt with. The traffic managers of both Companies to supply to each other, from time to time, the names of such small stations of their respective Railways as do not book goods and parcels.

"17. That the through rates and fares be in all cases the sum of the local rates and fares of the two Companies to Raichore, including terminals and cartage of both Companies, but that no terminal be charged by either Company for Raichore station on through traffic.

"18. That each Company be responsible for collecting the proportion due to the other Company on all through traffic, and that on goods traffic, invoiced through 'to pay,' the receiving Company check the invoices, and be responsible for collecting any amounts that may be undercharged by the forwarding Company, but the receiving Company not to reduce below the charge mentioned in the invoice or through way-bill without the consent of the forwarding Company.

"19. That the mileage to Raichore from stations on each line be taken for the purposes of this agreement, as per appendix annexed, the G. I. P. mileage to include in all cases (except as mentioned in cls. 32, 33, and 34) 20 miles for the Thull Ghat and 32 miles for the Bhore Ghat extra, as sanctioned by Government."

The 22nd clause was as follows:—

"22. The exchange of stock, both passengers and goods, between the two Companies, to extend to the whole of the lines of either Company, and to branches that may be worked by them respectively."

The 24th clause was as follows:—

"24. The division of the receipts on the through traffic to be carried out monthly by the audit officers of the two Companies, and each Company to have, in division, its own local rates and fares, except in the case of minimum charges, as provided in cl. 23."

The 40th clause was as follows:—

[378] "40. That goods claims be settled by the Company in whose custody the loss or damage occurred; that, when this cannot be ascertained with certainty, the claim be paid in mileage proportion, but in such

1881
MAY 4.

ORIGINAL CIVIL.

5 B. 371 = 5 Ind. Jur. 646.

cases the consent of both Companies is to be obtained before settlement is made."

The 44th clause was as follows:—

"44. No alteration of rate or fare, or classification affecting the through traffic is to be made by either Company without one month's previous notice to the other." The contention of the appellants (the G.I.P. Railway Company) is that the contract to carry the bale was made by the plaintiffs (respondents) with the Madras Railway Company and not with the G. I. P. Railway Company. It may be that, according to the law as laid down in *Great Western Railway Company* v. *Blake* (1); *Buxton* v. *North-Eastern Railway Company* (2), and *Thomas* v. *Rhymney Railway Company* (3), the Madras Railway Company, if sued, would have been liable for the loss of the bale of cloth; but it is unnecessary for us to say, and we do not say whether or not that company is so liable.

In our opinion the written agreement between the two companies, of which we have above quoted the material clauses, brings this case within the authority of *Gill* v. *Manchester Railway Company* (4), upon which we understand Sir Charles Sargent to have acted in arriving at his decision upon the issues; and albeit that agreement may not have actually constituted a partnership between the two companies, yet it rendered the Madras Railway Company the agents of the G. I. P. Railway Company for the purpose of making a contract for carrying the bale of cloth over, at least, so much of the line of the latter company as forms part of the distance from Bellary (the place of booking) to Sholapur (the place of delivery,) *i.e.*, from Raichore to Sholapur. The G. I. P. Railway Company have by that agreement made the Madras Railway Company their agents for the purpose of, at least, so much of the traffic as benefits the G. I. P. Railway Company. We think that we may in this case adopt, *mutatis mutandis*, the [379] following passage from the judgment of Mellor, J., in *Gill* v. *Manchester Railway Company* (4):—"The action was rightly brought against the defendants, inasmuch as if the provisions of the agreement of the 17th June, 1857, did not constitute an actual partnership between the respective companies as to all the matters embraced by it, still they came within the rule expressed by Lord Cranworth in *Cox* v. *Hickman* (5) —'The real ground of liability is that the trade has been carried on by persons acting on his (the defendant's) behalf;' and *per* Lord Wensleydale to the same effect in the same case (5). In our opinion the Great Northern Railway became, by virtue of their agreement with the defendants, the agents of the latter for the carriage of the cow with the plaintiff." And, during the argument of the same case, Blackburn, J., said: "We need not consider whether the two companies are partners; the traffic is carried on for the joint benefit of the two, so that they are joint principals, and either may be sued (6)."

A passage from the judgment of Grove, J., in *Foulkes* v. *Metropolitan District Railway* (7), when that case was in the Common Pleas Division, was cited to us as supporting the principle on which *Gill* v. *Manchester Railway Company* was decided, although that case does not appear to have been cited to the Common Pleas Division. It was this: "Were it necessary to decide this case upon the question of agency, the inclination of my opinion is that the South-Western Company were, as regards the

(1) 7 H. & N. 987. (2) L.R. 3 Q. B. 549. (3) L. R. 5 Q. B. 226.
(4) L. R. 8 Q. B. 186 (191). (5) 8 H.L.C. 306 (315). (6) At p. 188.
(7) L.R. 4 C.P.D. 280.

1881
MAY 4.
ORIGINAL
CIVIL.
5 B. 371 =
5 Ind. Jur.
646.

plaintiff, the agents of the Metropolitan District Company, and that there was a kind of mutual agency for their mutual convenience, each Company undertaking to act when it was most convenient for them to issue tickets for their own benefit and the benefit of the South-Western Company." Since the present case was argued, an appeal lodged in *Foulkes* v. *Metropolitan Railway Company* has been decided (1). On the appeal the case assumed, to some extent, a different aspect from that which it had borne in the Common Pleas Division. The decision of that Division was affirmed. There Thesiger, L.J., refers with approbation to *Gill* v. *Manchester Railway Company*. He said (2): "If the right of the plaintiff to [380] maintain his judgment depended solely on his establishing a contractual relation between him and the defendants, I should not dissent from the view that such relation has been proved. The affidavit of Mr. Forbes is not in itself inconsistent with the notion that the London and South-Western Railway Company, in issuing tickets at their Richmond station for stations on the defendants' line, so issue them as agents for, or as partners with, the defendants. The notion, too, receives sanction from the decision in *Gill* v. *Manchester Railway Company* (3). There the contract of carriage purported to be made with the Great Northern Railway Company; but the animal, which was the subject of the contract, was to be conveyed upon the defendants' line, and there were traffic arrangements between the two companies, under which their rolling stock was treated as one stock, their traffic was interchanged, and the receipts from through traffic were divided by mileage. It was held that by virtue of those arrangements the Great Northern Railway Company, whether as partners with the defendants or otherwise, became the agents of the latter to make the contract of carriage with the plaintiff. In the present case, under the traffic arrangements between the two railway companies, the defendants supply the rolling stock and carry, in the exercise of their running powers, the whole of the through traffic, taking a mileage proportion of the receipts from such traffic with an allowance for working expenses. It is admitted that traffic between Richmond and the defendants' station at Hammersmith constitutes through traffic, and it may therefore be urged with force that, in booking such through traffic at Richmond, the London and South-Western Railway contract, either as agents for the defendants, or for the defendants jointly with themselves. This view is further strengthened by the form of the ticket issued at Richmond to passengers travelling from Richmond on to the Metropolitan District line when contrasted with that issued to passengers travelling elsewhere, and by what is written over the booking office; and although I am by no means prepared to hold that, under traffic arrangements similar to those which exist between the two companies, it is not open to a company in the position of the London and South-Western [381] Railway Company to make the contracts of carriage in such a way as to make itself exclusively liable upon them, or to deny that, in most cases, it must be a question for the jury whose the particular contract may be, I think that, under the peculiar circumstances of the present case and upon the materials before us, the Court would not be justified in disturbing the judgment for the plaintiff, and sending that question down for trial."

Mytton v. *Midland Railway Company* (4) was cited to us on behalf of the appellants. But that case seems irreconcileable with the subsequent

(1) L.R. 5 C.P.D. 157.
(2) L.R. 5 C.P.D. 166.
(3) L. R. 8 Q. B. 186.
(4) 4 H. & N. 615.

1881
MAY 4.
ORIGINAL CIVIL.
5 B. 371 = 5 Ind. Jur. 646.

decision in *Gill* v. *Manchester Railway Company* (1) already mentioned, and also with the passages which we have quoted from *Foulkes* v. *Metropolitan Railway Company* (2). And in a case of *Hooper* v. *London and North-Western Railway*, decided in the Common Pleas Division on the 2nd December, 1880, and reported in the *Times* of the 3rd December, 1880, Denman, J., is reported as saying: "The case of *Mytton* v. *Midland Railway* does not appear to have been cited in the subsequent case of *Foulkes* v. *Metropolitan Railway*, but it was really overruled by it." Lindley, J., seems to have concurred in that view.

Amongst other cases relied upon for the appellants was *Bristol and Exeter Railway* v. *Collins* (3) which, in its various stages, afforded a strong example as to the possible variety of judicial opinion (4). Neither its facts, however, nor those of any other case cited for the appellants, tally so closely with those in the present case as the facts in *Gill* v. *Manchester Railway*, which appears to us to have been a just and reasonable decision, and recognized [382] as such in *Foulkes* v. *Metropolitan Railway* (2) by the Court of Appeal.

For these reasons we concur with Sir Charles Sargent in his finding on the issues.

The defendants have not excused their non-delivery of the bale. The plaintiffs were not bound to prove negligence: *Ishvardas Golabchand* v. *G.I.P. Railway Company* (5). There must, therefore, having regard to the amendment (made by consent of the parties) of Sir Charles Sargent's decretal order, be a decree for the plaintiffs for Rs. 1,100 damages, and for the costs of the suit, and of this appeal.

Solicitors for the plaintiffs:—Messrs. *Lynch and Tobin.*

Solicitors for the defendants:—Messrs. *Hearn, Cleveland and Little.*

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5 B. 382.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Pinhey.

SAYAD NASRUDIN (*Original Plaintiff*), *Appellant* v. VENKATESH PRABHU (*Original Defendant*), *Respondent.**

[26th March, 1879.]

Act XXIII of 1861, *s.* 11—*Procedure—Execution—Possession—New cause of action.*

A plaintiff who has obtained a decree declaring him entitled to the possession of immoveable property must, under s. 11 of Act XXIII of 1861, proceed by execution of the said decree, and not otherwise; if he neglect to do so till he is time-barred, he cannot any the more on that account bring another suit for

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* Appeal No. 184 of 1877.

(1) L.R. 8 Q.B. 186. (2) L.R. 5 C.P.D. 157. (3) 7 H.L.C. 194.

(4) The Court of Exchequer decided in favour of the defendants, the company (11 Exch. 719). The Exch. Chamber (Coleridge, J.; Wightman, J.; Cresswell, J.; Erle, J.; Williams, J.; Crompton, J.; Crowder, J. and Willes, J.); unanimously reversed that decision, and entered a verdict for the plaintiff (1 H. & N. 517). The House of Lords consulted the Judges; of these four: Byles, J.; Crompton, J.; Williams, J. and Wightman, J.—were in favour of the plaintiff, and two only—Watson, B., and Martin, B.—were in favour of the defendants. The case was decided against the opinion of the majority of the Judges in favour of the defendants by the House of Lords, there being present Chelmsford, C., and Lords Cranworth, Wensleydale, and Kingsdown, which two last Lords gave their judgments with much doubt.

(5) 3 B. 120.