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W. & A. GRAHAM & Co. v. CHUNILAL HARILAL & Co.

In my opinion, this is clearly a case in which the Court should exercise its discretion in refusing to give third party directions. The summons is discharged and the third parties must be dismissed from the action. The defendants must pay the costs of the third parties and the plaintiffs.

Attorneys for plaintiffs: Messrs. *Craigie, Lynch & Owen.*

Attorneys for defendants: Messrs. *Little & Co.*

Attorneys for third parties: Messrs. *Thakurdas & Co.*

K. McI. K.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1909.
August 28.

DULLABHJI SAKHIDAS SANGHANI, PLAINTIFF, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY, DEFENDANTS.*

ANNA RANU, PLAINTIFF, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY, DEFENDANTS.†

Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations.

The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company.

Where there is a statutory obligation, any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence.

In view of the contractual relations between the parties, a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling, provided that such injuries could not have been received had the passenger remained inside the carriage.

The application of the rule that, where there is negligence on both sides, the negligence of the person who had the last chance of averting the accident is the efficient cause thereof, must be restricted to cases where the danger was apparent to both or at least one of the parties before the accident actually happened.

* Original Suit No. 706 of 1908. † Original Suit No. 751 of 1908.

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THESE two suits arose out of the same incident. The plaintiffs were passengers in an up local train of the defendant Company, proceeding from Mazagaon to Masjid. At a point just before Masjid, a down mail train passed, with the door of one of its compartments open and swinging. The door caught the arms of the plaintiffs which were projecting slightly outside the carriage windows and inflicted severe injuries. As a result these two suits were filed against the Company for damages, and, as they involved the same points of law and of fact, were consolidated and heard together.

The plaintiff charged the defendant Company with negligence in allowing the door to swing open and further in having infringed the statutory regulations with regard to the dimensions of carriages and of the open way between the tracks.

The defendant Company denied negligence, and alleged that the accident was due solely to the negligence of the plaintiffs in putting their arms outside the windows in spite of notices to the contrary, and relied alternatively on the plea of contributory negligence.

It was agreed that the question of liability should first be decided, and that, if necessary, the question of damages should be considered afterwards.

Baptista (with *Joshi*) for the plaintiff in the first suit, and (with *Kajiji*) for the plaintiff in the second suit :—

The open door is evidence of negligence : *Gee* v. *Metropolitan Railway Company*[1], *Bromley* v. *The G. I. P. Railway Company*[2].

The guard neglected his duty. See the general rules published by Government under section 47 of the Indian Railways Act, and also the Traffic Instructions Book of the G. I. P. Railway.

The Company has in addition infringed the standard dimensions. The width of the carriages is too great, while the space between the tracks is too small.

In the case of a breach of a statutory duty, the defendant is liable without further proof of negligence : *David* v. *Britannic Merthyr Coal Company*[3].

(1) (1873) L. R. 8 Q. B. 161. (2) (1899) 24 Bom. 1.
(3) (1909) 2 K. B. 146.

The position of the windows is such that a person in the plaintiff's seat naturally puts his arm out.

The notices forbidding leaning out of the windows were in English, a language which very few 3rd class passengers can read. The defendant Company knew the notices were disregarded. Since the accident, an additional bar had been put on the windows.

Robertson (*Strangman*, Advocate-General, with him) for the defendant Company:—

The plaintiffs took the risk themselves. It would be a serious responsibility for the Company to have to look after passengers and prevent them leaning out of windows. All the cases show that a Company does not insure its passengers, but is bound only to take reasonable care for their safety, and that only when they remain inside the carriage: *Simon* v. *London General Omnibus Co.*[1], *Hase* v. *London General Omnibus Co.*[2], *Pirie* v. *Caledonian Railway*[3]. See also Beven on Negligence, p. 988.

The leading case on the general responsibility of railway companies is *Readhead* v. *Midland Railway Company*[4]. See also *The East Indian Railway Company* v. *Kalidas Mukerji*[5], and *Hanson* v. *Lancashire and Yorkshire Railway Company*[6].

If the plaintiffs had remained wholly inside the carriage, the accident could not have happened. This is therefore most apparent contributory negligence.

As regards standard measurements, we had permission to increase the width of carriages. There is no connection between the width of the space between the tracks and the width of carriages.

The placing of an additional bar on the windows after the accident is no evidence of negligence. *Hart* v. *Lancashire and Yorkshire Railway Company*[7].

Evidence shows that the guard did actually lock the door, so that the presumption of negligence is rebutted.

(1) (1907) 23 T. L. R. 463.
(2) (1907) 23 T. L. R. 616.
(3) [1907] 17 Rettie, 1165.
(4) (1869) L. R. 4 Q. B. 379.
(5) (1901) 28 Cal. 401.
(6) (1872) 20 W. R. 297.
(7) (1869) 21 L. T. N. S. 261.

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There is no case similar to this in England, but in America the case of *Todd* v. *Old Colony, etc., Railroad Co.*[1] in the Massachusetts Court is wholly in my favour.

Baptista in reply:—

True the Railway Company does not insure, but it must exercise great care. It is liable for the smallest negligence, though not for unforeseen accidents. For the degree of care to be taken, see Macnamara on Carriers, p. 577, and Beven on Negligence, p. 33.

This case is of course distinguishable from *McCawley* v. *Furness Railway Company*[2], see also *Thatcher* v. *Great Western Railway Company*[3].

With reference to the standard dimensions, the Company ought to have widened the centre way of the track before building wider carriages. The circulars relied on as sanctioning the increased width of carriages do not really do so, as the centre way was not widened in proportion. The Company's construction of the circulars leads to absurdity.

BEAMAN, J.—These are two consolidated suits by two third-class passengers, on the defendant Company's train, for damages. The plaintiffs complain of injuries received and attribute them to the defendants' negligence. The defendants deny negligence in fact and further plead that, if there was negligence on their part, there was contributory negligence on the plaintiffs' part disentitling them to recover.

The facts, which are virtually undisputed, are, that the plaintiffs were travelling by the 1-30 local up train from Matunga to Masjid on the 22nd March 1908. A short way before Masjid station, between Mazagaon and Masjid, the down Nagpur mail passed at high speed. A door of one of the compartments on that train was open and swinging. It caught the projecting limbs of the plaintiffs inflicting very serious injuries. The first question I am to decide is the question of liability. As to the second plaintiff, the defendant contends that he had opened the door and was standing with his arm on the outside sill. About he position of the first plaintiff, there is virtually no dispute.

(1) 89 Mass. 207. (2) (1872) L. R. 8 Q. B. 57.
(3) (1893) 10 T. L. R. 13.

He was sitting with his back to the engine, on a window seat, with his arm resting on the sill. The upper part of the arm naturally projected a little, and just before the accident he was turning to the window to spit, which may have caused the arm to project a little further. But whether it was five or seven inches outside the window appears to me to be of no consequence. The second plaintiff makes a like case for himself. And again the extent to which the limb was outside the window seems unimportant; though it might be important for the defendant to show that he had opened the door while the train was on the track and not in a station, and so voluntarily exposed himself to an unusual risk.

The defendant Company denies, first, that it was in any way guilty of negligence. I had better, therefore, deal with that contention. If it be found in the defendant's favour, there is an end of the case. The defendant alleges that before the Nagpur down mail left Victoria Terminus the guard in charge of the train went down its whole length closing the doors. It is to be observed that while the train lay at the platform the doors on the platform side were the doors which became the off-side doors as soon as the train was on the open track. There is a statutory obligation on the Company to close all doors. This they say they did. They go further and point to their own rules by which guards are ordered not only to close but lock all doors on the off-side. Kinsley, the guard in charge of the mail, swears that he entered the carriage to which the door which caused the injuries belongs. It was a compartment reserved for ladies. It was unoccupied. Accordingly, he swears that he put the shutters up, got out, closed and locked the door. He remembers having done this distinctly. Munro, the rear guard, Kinsley's subordinate, corroborates him. He swears that he saw Kinsley going down the train closing and locking the doors. Dr. Fonseca, a passenger by the train, has also been called to swear to this. But I cannot attach much value to his evidence. It is quite possible that he may have seen Kinsley closing some doors and yet not have seen him close this door. This evidence shows that all the off-side doors were closed and locked in three minutes or so before the train started. I confess it seems to me

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a little doubtful whether that would prove conclusively that the doors were all closed and locked when the train started. Certainly it would not in England, where belated passengers seek to enter trains up to the last moment, and railway officials may open doors that have been closed to let them in, and forget to close and lock them again. In the particular case, however, there were no lady passengers and the compartment was, in fact, empty. It is still possible that after Kinsley closed and locked the door, assuming that he did, some passengers got a member of the platform staff to open it for him, and then finding it was a lady's reserved compartment, rushed off, and so the door got left open. The alternative suggestion that a passenger with a railway key came up, opened the door, and left it open seems to me too improbable. The truth appears to me to lie between two possibilities neither of which is highly improbable. The first is that Kinsley is mistaken, and thought he had closed and locked this door, but had not. The other is that, after he had done so, some member of the railway staff opened the door and forgot to close it. In either case, there would be evidence of negligence to go to a Jury. The fact that a door on a moving train is open, is evidence of negligence on the part of the Company: *Gee* v. *Metropolitan Railway Company*(1); *Richards* v. *Great Eastern Railway Company*(2). Evidence only, be it observed, is not necessarily a conclusive proof. And a very great Judge doubted whether the fact alone ought to be even evidence of negligence. Taking that, however, to be settled as matter of law, I should find on this point that there was negligence on the part of the Company in respect of the open door on carriage 1846 of the Nagpur down mail. For, whether Kinsley forgot or omitted to close and lock the door, or whether another servant of the Company opened it after Kinsley had locked it and forgot to close it, I apprehend that the Company would be equally affected with negligence. It is not alleged by the plaintiffs that there was any defect in the lock or catch of the door, so that once it was closed and locked it could not possibly have opened of itself. And it is not the Company's case that any one unauthorizedly opened it after the train had left Victoria Terminus. I do not

(1) (1873) L. R. 8 Q. B. 161. (2) (1873) 28 L. T. N. S. 711.

accept the suggestion that any one did so unauthorizedly by the use of a private railway key in the three minutes which intervened between Kinsley having, as he swears, closed and locked the door and the train starting.

That, then, must be taken to be my first finding of fact upon the evidence. I do not wish to reflect in any way upon the honesty of either Kinsley or Munro. But it is plain that Kinsley was bound to swear what he did, and it is quite possible that he may have sworn the truth, just as it is quite possible that he may have been mistaken, without shaking my conclusion. As to Munro, I have no doubt that he has told the truth to the limit of his knowledge and belief.

I will now deal with the next question of law which has given rise to a great deal of agrument and minute analysis of measurements. Briefly, I take the rule of law to be that where there is a statutory obligation, any breach of that which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach of the duty must, in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence. If I am right, the result will show that this part of the case is of little importance. The plaintiffs' contention is that the dimensions of carriages were exceeded. The defendants reply that they were within their circulars of 1896 and 1905 and that the latter read with the special sanction obtained in 1904, completely covers them. The plaintiffs meet this by alleging that the sanction and circulars are all to be read with the orders regulating the minimum width of central track. Thus when the Company were permitted to widen their carriages to ten feet, that permission was conditioned by a minimum width of twelve feet, and a recommended width of fourteen feet between central track points. Whereas in fact the Company widened their carriages without widening their track. The result of this was to narrow the distance between passing trains from a minimum of three feet five or six inches to a minimum of about two feet six inches at the outside. Assuming, for the sake of argument, though I am not prepared to hold that it is so, that the plaintiffs are right, then while no doubt the breach of the statutory obligation coupled with the negligent act of the defendant in leaving the door open con-

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tributed to the accident, it was not in itself the cause of the accident, nor could it alone have caused the accident. As a special legal argument, then, standing alone, this appears to me to lose all point. It is left to be a factor of the whole negligence charged upon the defendant which the plaintiff must prove. And it is therefore, in my opinion, quite unnecessary to go into all the minutiæ of the measurements and the terms of the circulars and sanction. The defendant Company admits that in the existing state of the track, the carriages being of their actual dimensions, when the door swung open, it reached to within four and a half inches of the limit of the crossing carriages. (I am not particular to the fraction of an inch because, in my opinion, that makes no real difference and I therefore say, roughly, four and a half inches.) Now the defendant's case is that it is only bound to carry its passengers safely inside the carriages provided for their use. No obligation whatever lies upon it to look to their safety if they get outside the carriages. Therefore, it being admitted that the plaintiffs sustained their injuries outside the limits of the carriage or carriages in which they were travelling, they took their own risk and the defendant Company is in no way responsible. If that proposition is correct, it is plain that there is an end of the case. For no matter how near the open door of carriage 1846 came to the surface exteriors of carriages on the up local, no matter what negligence the Company was guilty of in leaving that door open, no matter how much or how little they had exceeded the dimensions prescribed by statute, no injury could possibly have been done to the plaintiffs had they kept within the carriages provided for them. And this brings me to a consideration of the very difficult question of contributory negligence.

The defendant's case is that a passenger, who puts any part of his person outside the carriage and receives an injury to the part so extruded, is guilty not only of negligence by putting himself outside the carriage but of contributory negligence which disentitles him to recover against the Company, provided that, no matter what negligence the Company has been guilty of, that could not have caused the passenger any injury so long as he remained inside the carriage. The plaintiffs, on the

other hand, contend that resting their arms on the sills of the windows was as ordinary natural every-day act, which was not even negligence, and certainly could not have been contributory negligence disentitling them to recover for injuries done to them in such positions by an act of negligence on the part of the defendant Company. It will probably be seen that these contentions approach the central question from different points; the Company appears to rest mainly upon its contractual obligations, the plaintiffs on the general principles of the common law. We contracted, say the defendants, to carry passengers inside and not outside our carriages. If they put themselves outside the carriages they exceeded their rights under our contract, and were to that extent mere trespassers. We cannot be made answerable for any injuries which they courted, and actually suffered by such unauthorized acts. The plaintiffs reply, we had a right to be carried safely, and to be protected against all ordinary and expected risks. A person is not bound to do more than look out for what ordinarily happens; he is not bound to guard against wholly unusual and unforeseen contingencies. Such a contingency was the open door of a passing train. No one can be expected to anticipate that a train will pass at speed with a door wide open, reaching to within four and a half inches of the windows of another train. In placing our arms on the sills of the windows, we did what millions of passengers in this country do every day, on the same track, with perfect safety. Our acts in themselves were not negligent. They were common every-day acts; every one does them; and not one in twenty million has ever incurred or been supposed to incur any risk by doing them. It is this possibility of putting the case in different ways, looking at it from different points of view, involving the application of different principles, that makes the decision difficult.

The general rule was thus stated by Baron Alderson in *Blyth* v. *Birmingham Waterworks Company*[1]. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of

(1) (1856) 11 Ex. 781 at p. 784.

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human affairs, would do, or doing something which a prudent and reasonable man would not do." It was not necessary for him to state (goes on Pollock in his work on Torts), but we have always to remember that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care. This, it will be observed, says nothing of the party's state of mind; and rightly. Jurisprudence is not psychology, and law disregards many psychological distinctions, not because lawyers are ignorant of their existence, but because for legal purposes it is impracticable or useless to regard them. This is the kind of ground which the plaintiffs would take. They would allege, and I cannot help feeling with great show of reason, that the circumstances were not such as to impose upon them the duty of taking special care. They would say, all passengers in this country sitting by open windows on an open track are, and have always been, in the habit of resting their arms for comfort or convenience on the sills of the windows. The distance between the tracks if maintained and not invaded by some object which never ought to have been there, and the presence of which could not possibly have been anticipated, makes this practice so perfectly safe, it has been so firmly established, that no passenger ought to be affected with a false kind of contractual negligence merely because he followed it, and, owing to an utterly unforeseen piece of negligence on the part of the Railway Company, was seriously injured. Before going, as shortly as may be, into the case-law, I will mention the philosophical ground of the doctrine of contributory negligence derived by philosophical jurists from Aristotle. The four categories of causation are—

(1) The essence of formal cause. That would, I suppose, in the present case, be the actual contact of the door with the arms of the plaintiffs.

(2) The necessitating conditions or the material cause. These would be the open door, and the arms of the passengers within its reach.

(3) The proximate mover, the efficient cause.

(4) The final cause, that for the sake of which the act was done. The last category has no bearing upon a question of this kind, being restricted, as I understand, to motive and therefore to the intentional acts of sentient beings.

The doctrine of contributory negligence resolves itself into the second and third categories and the determination upon all the factors found existing within them of the question which of these factors was the efficient cause? A plaintiff's act may make one of the necessitating conditions, and so be negligence. But to take it further and convert it into contributory negligence, it must further be found to have been the efficient cause of the accident.

Then the text-book writers and the Judges have deduced a rule of practice, which may be roughly stated thus. Where there is negligence on both sides, the test to be applied in trying to find out which was the efficient cause is, who had the last chance of averting the accident? A consideration, however, of the numerous cases giving rise to an enquiry into contributory negligence will show that this rule, though sometimes of great use, cannot be made universally applicable. In the present instance, since the plaintiff at any rate could hardly in fairness be deemed to have known that the door which injured him was open, how was he to avert the accident? True he had, in one sense, the last chance of doing so, but merely on the supposition that neither he nor the defendant knew that the danger existed. If the defendant knew that the door was open, it would be as fair to say that they should have stopped their train as that the plaintiff should have pulled in his arm. I apprehend that the application of the rule must be restricted to cases in which both parties or one party at any rate is in fact aware of the danger before the accident actually happens. I will now deal with some of the authorities. I take this opportunity of thanking Mr. Baptista for the great industry he has shown in collecting every case which has any bearing on the point, his ability in commenting upon them and the text-book writers and the zeal and thoroughness which he has shown in presenting his clients' cases to the Court. I may frankly add that my

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sympathies have been throughout and still are with the plaintiffs. I cannot help feeling that these poor men, doing what their fellows have always done with impunity, very naturally believe that they are entitled to the protection of the law when they find that, owing to an utterly unforeseen occurrence, they are maimed for life or seriously injured; and if the law should turn out to be against them, I still think that the sense of most average men would be with them on the general merits of their grievance. On the other hand, I can quite understand that the Company is obliged to lay aside all sentimental considerations when a principle, so far-reaching and of such vital importance to the conduct of their business, is at stake. But for that, I do not doubt that common humanity would have impelled them to offer some compensation at any rate to these poor men whose injuries, whatever the strict legal rights of the parties may be, were, no doubt, caused by the Company's negligent act. But a Judge has nothing to do one way or the other with sentiment. My duty is to find out, if I can, what the law enjoins and keep myself strictly to that.

Now, it a is singular thing that, notwithstanding the millions and millions of passengers who have travelled over railway lines in England, and the doubtless innumerable instances of putting parts of their persons outside the carriage windows, the point I have to decide is absolutely, as far as English Courts go, *res integra*. There is not a single reported case of the kind. No passenger in England has ever sustained injuries in this way, or, if he has, has sued to recover damages from the Company for them. Two of the State Courts of America have considered the question. The Pennsylvanian Court has held that the Company is liable, "where the road is so narrow as to endanger projecting limbs, unless the windows of the cars are so barricaded with bars as to render it impossible for the passenger to put his limbs outside the window." *New Jersey Railroad Co.* v. *Kennard*[1]. Stripped of the rather ambiguous language in which the principle of liability is stated (which I quote from Beven), this amounts

(1) 21 Pa. St. 283.

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to fixing the Company with liability in every case where the road is so narrow as to endanger passengers who may put their limbs out of the carriage. For the remainder of the qualification amounts to this only, that no accident could have happened. Of course, if the Company make it impossible for a passenger to put his arm or hand out of the window, he could not possibly receive any injury by doing that which is, *ex hypothesi*, impossible. Waiving that and going to the more intelligible ground of the decision, it seems to me to really go all the way, and impose upon the Company the duty of making accidents of the kind impossible, or if the Company cannot do that, then of imposing upon them liability for the consequences. If the track is so wide that putting an arm or hand out of the window could not bring about an accident, there could be no liability upon the Company, because there could be no accident. But taking the sense of the decision, I think that it is clearly in favour of the plaintiffs. For what the Court fixed its mind upon was the risk to the passengers from a standing and permanent peril—the narrowness of the track. If the Company did not or could not guard against that, it was liable. *A fortiori*, it would be liable for a peril independent altogether of the width of the track and against which it could guard. Such for example, as allowing a train to start on a double track with one of its doors wide upon. On the other hand, the Massachusetts Court decided that there was no liability in such circumstances upon the Railway Company. That Court has adopted the rule, that if a passenger's elbow extends through the window beyond the place where the sash would have been if the window had been shut, the passenger's conduct would indicate such carelessness as would disentitle him from recovering. *Todd* v. *Old Colony &c. Railroad Co.*[1]. Upon this Beven comments: "The point has not arisen in England, where there is no reason to doubt that, should it, the Massachusetts rule would be adopted." And he adds that since the above was in type, *Simon* v. *London General Omnibus Company*[2] and *Hase* v. *London General Omnibus Company*[3] have

(1) 89 Mass. 207.

(2) (1907) 23 T. L. R. 463.

(3) (1907) 23 T. L. R. 616.

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been decided in accordance with the above forecast. I entertain some doubt whether this is a strictly accurate application of the rulings in those two recent cases. In the first place, there appears to me to be a clear distinction between the case of a man in a railway carriage travelling on an open track, and that of a man on an omnibus, which, every one knows, has to thread dense traffic and frequently risk close shaving. Referred back to the general fundamental principle of negligence, it might be doubted whether the same kind of duty, or at any rate, a duty of the same degree, is imposed upon persons respectively so situated. What might be ordinary and reasonable care in the one case might fall far short of it in the other. A man on an omnibus knows that he will be constantly at varying distances from vehicles and pavement structures, that at any moment he may be brought into almost actual contact with them. A man in a railway carriage does not know this. He expects—every one expects—that the track distances will, on an open line, be maintained, and that nothing will come much nearer to him than the face of a passing train. Again, he knows that in all ordinary circumstances that will be some distance away from him, certainly more than a few inches. This is a matter of common every-day experience on which passengers, who are to be judged by the standard of ordinary reasonable care and prudence, may well claim to rely. That is one reason why I think the two omnibus cases do not as fully make good Beven's forecast as that eminent writer is disposed to think. Another reason is that in both these cases the Omnibus Company was found in fact not to have been guilty of any negligence at all. In one case the passenger was actually within the limits of the omnibus and was injured by a projection from some structure on the pavement. It was held that the driver could not have known of this, and, in taking the course he did, acted with perfect propriety. The resultant injury in that case had to be put down to unavertable accident. In the other case the passenger leant over the rail of the omnibus, and again it was held that the course the driver took was perfectly proper and there was no negligence at all on the part of the defendant

Company. These cases, therefore, are distinguishable and the point I am to determine is, in my opinion, entirely *res integra*, except for the American decisions. True, there is the great weight of Beven's own authority. The opinion of a text-book writer is not binding on any Court. But where he is of such eminence as Beven, there can be little doubt that the expression of his opinion in this book has contributed to the absence of all claims like the present being formulated in the English Courts. Further, while I admit that Beven's opinion does not bind me, I set a high value on it, as the considered opinion of a very profound and philosophical student of this particular branch of the law and an authority amongst text-book writers of the first eminence. The nearest case to this is a Scotch case—*Pirie* v. *Caledonian Railway Company* (1). There a woman seized with sudden illness put her head out of the carriage window and was killed by a mail bag on an apparatus put up by the Company to give facilities to the Post Master-General for putting the mails on and off trains. The case was much relied on by the defendant Company. But it appears to me that, standing alone, it is about as favourable to the one side as to the other. The Jury found for the Company. But it was never thought, I believe, that the decision went so far as to cover every case in which a passenger might put his head out of a train window and so sustain injuries. The facts were very special and Lord Adam's direction to the Jury shows that the verdict really turned upon the reasonableness or otherwise of the manner and extent to which the Company had complied with the Post Master-General's requisitions. Beven says: "The case must not be stretched to the length of inferring that in all cases a passenger thrusting his head out of window will be disentitled to recover in the event of injury happening to him through doing so". I confess that I find some difficulty in reconciling this expression of opinion with that which shortly preceded it, that a passenger putting his arm through the window does so at his own risk, and that there can be no doubt that the English Courts, should such a case come before them, would follow the rule of the Massachusetts Courts and disallow the plaintiff's claim.

(1) 17 Rettie 1165.

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Adams v. *Lancashire and Yorkshire Railway Co.*(1) was decided on the ground that the injury was not the necessary consequence of the Company's negligence in leaving the door open. It was afterwards much reflected upon and has little bearing on the present case.

In *Gee* v. *Metropolitan Railway Company*(2), the facts were that the plaintiff got up and placed his hand on the door in order to look out at the lights of an approaching station. The door flew open, the plaintiff fell out and was injured. The case was argued on a rule before the Exchequer Chamber, and Kelly C. B. laid it down that there was not only evidence of negligence on the part of the defendant Company but evidence of liability (which is a different thing) to go to the Jury; further, that there was no question of contributory negligence raised on the rule, so that was not to be considered. Martin B. thought that there was a question of contributory negligence which was properly left to the Jury. And his observations on the point are instructive. He relies a good deal upon the railway being an under-ground railway, where there is little to look at but walls, and also upon the windows being barred, thereby warning passengers that there was danger in putting their heads or hands out of the windows. He says: "Therefore it seems to me that you cannot possibly shut out from the consideration of the Jury, whether or not a man may not do wrong and know that he is doing wrong in putting his head or hand out of the window." As I understand the gist of that learned Judge's remarks, even had the passenger put his head or hand out of the window, that would have been matter proper to be left to the Jury on a plea of contributory negligence and ought not to have been withheld from the Jury as matter of law conclusively disentitling the plaintiff from recovering. The whole of Brett J.'s judgment is useful. He says "was there evidence that it (*i.e.*, the Company's negligence) was the sole cause? Now that becomes somewhat complicated. If during the plaintiff's case an act of his was proved, which was so clearly contributory to the accident, that it would be unreasonable for any reasonable man to find to the contrary, and if that act was so clearly a negligent act that it

(1) (1869) L. R. 4 C. P. 739. (2) (1873) L. R. 8 Q. B. 161.

would be unreasonable in reasonable men to find that it was not negligence, so that any Court would, upon either of those points, immediately set aside a verdict of the Jury, finding the contrary of either, I am not prepared to say that the Judge might not then rule that the plaintiff had failed to put forward evidence upon which a Jury might find in his favour that the accident was solely caused by the defendant's negligence." Now this appears to me hard to reconcile with what had already fallen from Kelly C. B. and Martin B. For if merely putting a head or hand out of window is negligence of the kind indicated by Brett J., then that fact being proved, would justify a Court in withholding the question from the Jury and at once non-suiting the plaintiff. This was what the Scotch Court did in another case. In *Toal* v. *North British Railway Company*(1), the pursuer complained that while standing on the platform of one of the Company's stations, one of their trains was set in motion, with a carriage door open, and that the door struck and injured him. The Court of Session non-suited the pursuer on the ground that there was no relevant averment. This, however, was reversed in the Lords. I only mention this case, otherwise having no bearing on my present enquiry, as an illustration of the length to which the Scotch Courts will go in deciding upon the pleadings whether or not there are facts to be laid before a Jury at all; possibly, therefore, useful in considering whether, when the plaintiff admits that he was travelling with a part of his person outside the carriage, any injury to that part would entitle him to maintain an action for damages against the Company.

Richards v. *Great Eastern Railway Company*(2), is a case following *Gee* v. *The Metropolitan Railway Company*(3), and the two cases together seem to me to be direct authority for this proposition and this proposition only, that the fact of a door being open on a train is evidence of negligence on the part of the Company.

Graham v. *North Eastern Railway Company*(4) was the case of a guard on a dominant railway, who suffered injuries to his head

(1) [1908] A. C. 352.
(2) (1873) 28 L. T. N. S. 711.
(3) (1873) L. R. 8 Q. B. 161.
(4) (1865) 18 C. B. N. S. 229.

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from a post on the servient railway while looking out in the discharge of his duty. The ground of the decision against the defendant Company was the Jury's finding of fact that the post was put up in a position dangerous to a guard whose duty it was to look out of his van. It cannot be inferred from this that the decision or the Jury's verdict would have been the same had the guard been under no obligation to look out. Passengers are under no such obligation. But read with some of Beven's own observations on the Scotch case of *Pirie* v. *Caledonian Railway Company*(1), an impression may be created that a Company is bound not to construct its track in such a way as to be a trap for unwary passengers. So that were an injury occasioned to a passenger whose head or arm was out of the window by some structure on the track, which came very close to the window, and could fairly be regarded as a trap, it would appear that Beven would qualify, or might qualify, the opinion he has expressed against the right of passengers, who extrude any portion of their persons from the carriage, to recover for injury. For this rule must be uniform and reducible to a definite principle if it is to be a rule at all. It could not be a rule, and yet susceptible to modification in such cases as Beven suggests. Nor would its application in such circumstances, as far as I can see, be helped by adding that if the Company built a line full of such traps, its construction as a whole would be deemed to be negligent and careless. For, *ex hypothesi*, if the passenger did not put any part of his person out of the window, no number of such traps, no degree of propinquity could possibly cause him an injury. These appear to me to be the only cases which have anything like a direct bearing on the present question.

Dublin, Wicklow, and Wexford Railway Company v. *Slattery*(2) decided that there was evidence to go to a Jury on a disputed question of fact, though several of the learned Judges of appeal thought that on the facts alleged by the plaintiff himself there was not. The plaintiff was crossing the line at a place where this was forbidden. He was caught and killed by the incoming express. The express was bound to whistle, and the engine

(1) (1907) 17 Rettie 1165. (2) (1878) 3 App. Cas. 1155.

driver swore that he had whistled twice, other servants of the Company supported him. The plaintiff's evidence was that if the whistle had been sounded they must have heard it but did not. Apart from that, the point of interest was that where there was evidence that notwithstanding the Company had put up warnings and prohibitions, these were consistently disregarded, and no effort was made to enforce them, that too was evidence to go to a Jury. In this case the defendant Company contends that it put notices in the compartments with the words "Do not lean out of the window" legibly written in English. Evidence too has been given that the guards of the Company frequently tell passengers who are leaning out of window not to do so.

In *Hanson* v. *Lancashire and Yorkshire Railway Company*[1] the plaintiff was injured while sitting in his carriage by a projecting piece of timber which was being carried on a passing goods train. The timber was loaded on a truck secured by a chain only, and not in the best way by stanchions. The question was whether the plaintiff had successfully proved negligence. The mere happening of the accident was thought not to be sufficient. That early doctrine was founded on a decision of Lord Denman in *Carpue* v. *London and Brighton Railway Company*[2]. In some cases *res ipsa loquitur*, the accident may be of such a nature that negligence may be presumed from the mere occurrence of it. But when the balance is even, the onus is on the party who relies on the negligence of the other to turn the scale. That is now, I think, the accepted rule. And here while the swinging door might be thought at first to be a strong instance of *res ipsa loquitur*, the Company's defence has to be taken into account. It then appears that if that defence is sound, it was not the open door which was the cause of the accident at all, but the fact that the passengers were outside and not inside their carriages. If they had been inside the door might have swung as it did and done them no harm. Had the door struck the compartments and so caused injury to the passengers inside, then, indeed, I think, that the Company would have had to admit that

(1) (1872) 20 W. R. 297. (2) (1844) 5 Q. B. 747.

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res ipsa loquitur and would have found it hard to plead that there was no negligence on their part, which being the cause of the accident rendered them liable to the persons injured.

The next case cited by Mr. Baptista is *Cooke* v. *Midland Great Western Railway of Ireland*(1). Here the Company kept a turntable unlocked and therefore dangerous to the children near a public road. The children obtained access to the turntable through a well-worn gap in a hedge which the Company were bound by Statute to keep in repair. A child playing on the turntable was seriously injured and it was held that there was evidence of actionable negligence on the part of the Railway Company. It was found that there was a gap in the hedge although the Company were bound by Act of Parliament to maintain the hedge, but it was also held that this mere breach of the statutory obligation was not the effective cause of the accident.

David v. *Britannic Merthyr Coal Company*(2) was a case under the Coal Mines Regulation Act, and the Court held that a breach of the statutory duties imposed by that Act rendered the defendant Company liable for negligence without special proof of particular personal negligence. But there the injury was directly caused by the breach of the obligation.

In *McCawley* v. *Furness Railway Company*(3) it was held, that the plaintiff, a drover who was carried free at his own risk, according to his contract with the Company could not recover for an injury, although it was alleged to have been caused by the "gross and wilful negligence of the Company." The principle of this decision may be extended to such a case as the defendant Company here relies on; for if it be truly a part of the implied agreement between passengers and the Company that the former are to be carried inside and not outside the carriages, then it appears to me that if they insist upon putting themselves outside the carriages they do so at their own risk like the drover McCawley, save only that he consented to take all risks inside or outside the carriages in which he was travelling. This

(1) [1909] A. C. 229. (2) [1909] 2 K. B. 146.
(3) (1872) L. R. 8 Q. B. 57.

decision brings into strong relief the contractual basis of the respective rights and liabilities of passengers and carriers. And it goes some way at least towards confirming the defendant's contention, that in questions of this kind, no liability at all can be fixed on the Company which they did not contract themselves into.

Crocker v. *Banks*[1] was the case of a girl employed in a soda water manufactory. She was injured by the explosion of a bottle. She had been warned to wear a mask and such masks were provided. Nevertheless, the Company defendant was held liable, although the plaintiff had neglected to put on the protecting mask. This case is cited, I suppose, to show that the defendant Company here cannot evade liability on the ground that they had put up notices warning passengers not to lean out of the windows, and had also barred the windows. It was said by the Master of the Rolls in giving judgment that the precautions which the defendant had taken showed that he was aware of the danger. And an argument from that is directed against the Company. It was held not to be contributory negligence on the part of the plaintiff that she had refused to obey the caution and avail herself of the protection of the mask. So here, I suppose, it might be contended that it was not contributory negligence on the part of the plaintiffs to disregard the notice in the carriage and ignore what was implied by putting bars across the window. But I do not think that the analogy is very close, or the authority directly in point. Much in *Crocker* v. *Banks*[1] appears to have turned on the tender age of the plaintiff. Further, it does not appear to have been decided on the basis of a strict and defined contractual relation.

Blyth v. *Birmingham Water-works*[2] was a case of injury caused to the plaintiff by the bursting of some of the defendant's pipes under pressure of extreme cold. I do not think it has much bearing on this question. It was cited, I believe, in support of the same general argument as that which was founded on the preceding case. The judgment of Alderson B., however,

(1) (1888) 4 T. L. R. 321.

(2) (1856) 11 Ex. 781.

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contains the general definition of negligence which has met with the approval of subsequent text-book writers, and on which the plaintiffs here rely.

In *Wakelin* v. *London and South Western Railway of Ireland*[1] it was held that, assuming there was negligence on the part of the defendant Company, there was no evidence to go to a jury connecting that negligence with the death of the man killed at the level-crossing. There are weighty observations by Lord Watson in giving judgment which, I think, I may quote with advantage. "It appears to me that in all such cases the liability of the defendant Company must rest upon these facts,—in the first place that there was some negligent act or omission on the part of the Company or their servants which materially contributed to the injury or death complained of, and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the Company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury." Now, applying those observations to the facts here, we may go so far as to hold that the plaintiff has proved an act of negligence which (apart from the strict contractual relations set up by the defendant) materially contributed to the injury. But if it only contributed "materially" or, for that matter at all, because of a breach on the plaintiff's part of his contractual obligation to remain inside the carriage, if apart from that breach there would have been no material contribution to the accident by the defendant because there could have been no accident at all, the bearing of these remarks, at any rate so far as they might be

(1) (1886) 12 App. Cas. 41.

supposed to favour the plaintiff, appears to me to be entirely changed. Lord Watson goes on,—"If the plaintiff's evidence were sufficient to shew that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence." Those remarks were made with reference to the facts of that case. The man who was killed was found dead on the line, and no one knew how the accident had happened. But that is not the case here. For the Court is in full possession of every fact. The Court knows exactly how this accident happened. It happened owing to two contributing causes: the door of the down mail being open, and the arms of the plaintiffs being out of the windows of the up local. The only question, therefore, here is whether the latter circumstance is to be taken as the efficient cause of the accident? There is no question here of the shifting of the onus of proof, which was the point most debated in *Wakelin* v. *London and South Western Railway of Ireland*[1], for all the facts have been virtually admitted from the commencement, excepting, of course, the manner in which the door came to be opened, and the precise extent to which the plaintiff's limbs protruded.

In *Cockle* v. *London and South-Eastern Railway Company*[2], the Judges appear to have taken different views of the liability of a railway company, in such circumstances as were there disclosed. This, however, was the case of an alighting passenger, and different principles apply. I do not think it needs any further notice.

Now if I turn to some older cases, I find that Parke B. laid it down in *Bridge* v. *The Grand Junction Railway Company*[3], approving *Butterfield* v. *Forrester*[4], "there may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester*[4], and that rule is, that,

(1) (1886) 12 App. Cas. 41.
(2) (1870) L. R. 5 C. P. 457.
(3) (1838) 3 M. & W. 244.
(4) (1809) 11 East. 60.

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although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind."

In *Scott* v. *London Dock Company*[1] it was held in the Exchequer Chamber by a majority of the Judges that "in an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant a Judge in leaving the case to the jury. But 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 management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Arguing from that case, which was a dockyard case, where an inspector was injured by six bags of stuff falling on him, the plaintiffs might, I suppose, say that here the door of the down mail was in the management of the defendants, and that what happened was what does not ordinarily happen, and so forth. But although I see that arguments of that kind may be drawn from many of these cases, I miss in all of them the one point of identity with the present case which I so anxiously seek. These are not cases founded on the contractual relation of the defendant to the plaintiff and the resulting obligation to do certain things and avoid doing certain things, and not others, which are not in the scope of the risk fairly raised by the understood terms of the contract.

I might indefinitely extend this examination of the case-law. I have carried it this length rather to satisfy the plaintiffs and leave them no room to think that the Court has not given the fullest and most careful attenion to every point in their case, than for any practical use, to which I feel I shall be able to put

(1) (1865) 3 H. & C. 596.

it. For, after studying these and many other cases, as well as the dicta of the text-book writers, the point I have to decide appears to me to remain precisely where it was—unamplified, unilluminated. We have these facts. Passengers in this country habitually and almost universally travel with their arms thrust out of the windows of their crowded compartments; not infrequently they thrust their heads out too. When they are sitting by windows it is almost impossible for them to help resting their arms on the sills, and when they do this some part, at least, of their arms must project outside the limits of the carriage. Before the new type of carriage was introduced, they could do this, in reason, with perfect safety. For other projecting parts of the carriages would have afforded them complete protection against such an accident as has overtaken these unfortunate plaintiffs. But with the new type of corridor car the conditions have changed. There is nothing outside the car to shelter limbs against passing objects. So far, then, as the simple rule of observing ordinary care goes, the plaintiffs may quite fairly claim to be within it. Indeed, as I have said, any number of passenger might do what these passengers did any number of times and come to no harm.

But although they may do this at their own risk and usually with impunity, ought they to do it, and if they do it, and are injured, can they make the Company liable to compensate them? The Company has put up notices forbidding passengers to "lean out of the windows." And I think that no distinction can fairly be drawn to the Company's disadvantage between "leaning out" and putting arms or heads out.

Again, the Company have placed bars across these windows. The bars are not close enough to prevent passengers protruding their arms. But they would be a warning. Men of sense might suppose that the Company would not bar the windows were there no risk at all, if travellers chose to loll out of them. Again, whatever may be said of the limits of reasonable care and prudent conduct while the train is running on an open track alone, the conditions are changed as soon as another train crosses. Ordinarily the most rash and curious English traveller, who, as

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long as there is no apparent risk of that kind menacing him, will lean out of window to admire the view, instinctively draws himself well within the compartment while another train is passing. True he has every reason to believe that nothing on that train will reach his carrage window; he may rely upon the Company seeing to that. But however that may be, instinct seems to side with the strict rule of contract and remind him that he ought to be inside and not outside his carriage. For no human foresight and care are infallible. Such an accident as an unfastened door is always a possibility—a remote possibility. But the English traveller would not take the chance. He would almost certainly draw back into his carriage the moment he knew that another train was about to pass him. Indians are differently constituted. They have not, perhaps, had the same amount of experience, and the conditions of travelling by train in this country are different from those which obtain in a country like England or America. So that perhaps the same instinct of self-preservation has not yet been developed in the average Indian passenger. But is the Company to know and reckon with this? The point is of vital importance to the defendant Company and to all railway companies in this country; it is essential that they should have a clear decision upon it—a decision, too, upon the principle for which the defendant here contends. The true issue comes to this—is the defendant Company liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling? To decide the case upon any other ground, any ground less sharply defined than that, would defeat the object with which alone, I believe and hope, the defendant Company has contested the plaintiffs' claims. In my opinion the defendant is not liable. I cannot whittle away the principle of this decision by any qualifying words. It must stand or fall upon its own principle. And that principle, if it be good law, would set all questions of this kind for ever at rest. If Courts attempt to refine upon it by qualifying words and phrases such as that passengers may extrude their limbs in reason, or anything of that kind, there will be no end to disputes. But if it be once held that a passenger has no right of action against a railway Company for injuries suffered to any part of his person volun-

tarily placed at the moment the injury was inflicted outside the carriage, all future uncertainty is dispelled, and I do not doubt a vast amount of litigation will be averted. I cannot allow, if the principle is sound, that a passenger is in any better case if he puts half an inch of his person only outside the carriage, than if he puts a yard of himself outside. If any distinction of that kind are admissible at all, I should say at once that this is a case in which the plaintiffs were entitled to the full benefit of them. I do not believe that even the second plaintiff was standing outside the carriage as the defendant contends. I am quite prepared to accept his own account of the manner in which he came to be so seriously hurt. I do not attach any weight to the evidence led by the defendant Company to prove that he had opened the door and was standing with virtually his whole arm outside the carriage. I do not think the witnesses who speak to this would have been in the least likely to have observed what the second plaintiff was doing. Besides, had he been so standing with the door open and facing the approaching train, I can hardly believe that he would not have noticed the swinging door and withdrawn himself into safety. The case of the first plaintiff is plain. I have no doubt that he has spoken the truth. I am quite prepared to accept his story and his brother's measurements. I will take it to be the fact that his arm was not more than five inches or so at most outside the window. According to the principle upon which I am deciding, that makes no difference at all. His arm ought not to have been outside at all, not the fraction of an inch. Now, accepting the principle as the basis of this rule of law, that a passenger must travel inside and not outside his compartment, and therefore that if he does travel outside, he does so entirely at his own risk and the Company cannot be held liable for any injury which he suffers in consequence, it comes to this, that a passenger who gets injured owing to putting any part of his person outside his carriage is guilty of contributory negligence. And it would follow that where the plaintiff admitted that he had incurred the injury in this way, no matter what negligence there might be on the part of the Company, he would have no case to lay before a Jury. The Judge would be bound to enter a verdict

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for the defendant on the pleadings. And that I take to be the true law, notwithstanding the apparently conflicting dicta of many of our most eminent Judges, to which I have already referred. Supposing I am wrong here, and that this is a case which in England ought to be left to a Jury, then the further question would arise, whether the accident was caused by the negligence of the plaintiff in putting himself in a position of risk, or to the negligence of the defendant. In this particular case were that question to be tried by me as it would be tried by an ordinary Jury, I should hesitate long before I decided that the plaintiffs were not entitled to compensation. I am pretty sure that any average English Jury would find that they were. And if I were not bound by any rule of law such as I have enunciated, which restricts the Company's liability for accidents to such as happen to passengers inside their compartments, were I merely to treat the case on general principles of ordinary prudence and average conduct, I think that I should find that the accident was caused by the negligence of the Company, and not by the negligence of the plaintiffs. I do not feel at liberty to give effect to that strong leaning of my own mind. I cannot resist the conviction that the principle upon which the defence to this claim is based, is the true principle. And while on the one hand it may appear to work great hardship on these unfortunate men, on the other any derogation from it (if it really be the law, as I believe that it is) would expose all railway companies to unfair risk, harassment, and expense. There are two sentimental sides even to this particular case, though railway companies are little in the habit of expecting, still less of receiving, sentimental indulgence.

I must therefore hold, looking to the peculiar obligations under which a railway company lies—essentially, as I understand, contractual obligations—that their liability in these two suits is discharged by the admitted facts that the injuries complained of could not have been suffered had the plaintiffs remained inside the carriages in which they were travelling. It therefore becomes unnecessary to go into the question of damages. Looking to all the circumstances of the case, bearing in mind that it is a new point upon which the plaintiffs might very reason-

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ably have expected in this country, at any rate, to succeed, looking too to the injuries they have suffered, I think that it will be fair while dismissing their suits against the defendant Company to leave all parties to bear their own costs.

Attorney for the plaintiffs: *S. B. Mehta.*

Attorney for the defendants: Messrs. *Little & Co.*

K. McI. K.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1910. *February* 7.

GADIGEYA, ADOPTIVE FATHER ADIVEYA HIREMATH (ORIGINAL PLAINTIFF), APPELLANT, *v.* BASAYA BIN MALLAYA RAPATI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Regulation II of 1827, section 21—Caste question—Civil Court Jurisdiction—Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself.

The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his title to be called the Ayya of that Hiremath, and to obtain a perpetual injunction to restrain the defendant from using the name of "Ayya of Hiremath." The plaintiff's complaint was that the defendant had assumed a name to which the plaintiff had the exclusive right, and that that assumption would enable, as it had enabled, the defendant to attract to himself a large number of the plaintiff's followers, and thereby appropriate to himself fees, which would otherwise have been paid to the plaintiff.

Held, that it was a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honors at the hands of the members of the caste in virtue of that office. It was a caste question not cognizable by a Civil Court.

Held, also, that the fact that there had been no allegation of any specific damage by reason of the assumption by the defendant of the name of Ayya of Hiremath, and also the admission that after all the result of the assumption of that name would be merely to enable some of the followers of the plaintiff to go over to the defendant showed that what the parties had been fighting for was merely a question of dignity under the cover of a religious office. If the

* Second Appeal No. 133 of 1909.