ORIGINAL CIVIL.

Before Mr. Justice Davar.

1911. *February* 28.

TEMULJI JAMSETJI JOSHI, PLAINTIFF, *v.* THE BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LIMITED, DEFENDANTS.*

Negligence—Suit against Tramway Company—Passenger entering car while in motion—Contributory negligence.

T. brought an action against the Tramway Company claiming damages for injuries sustained by him by reason of the Company's negligence. T. alleged that while attempting to board a stationary tram car the car was suddenly started at a signal given by the conductor and the footboard tilted and slipped sideways from beneath T.'s foot, in consequence of which T. lost his balance, was thrown to the ground and his right foot was injured.

Held, dismissing the suit, that the footboard was not loose and that T.'s fall was due to his attempting to enter a car while in motion and was not due to any fault or defect in the fixity of the board.

Per Curiam.—Whether there is a Bye-law or there is not a Bye-law to that effect, the fact remains that if a passenger chooses to attempt to enter or leave a moving car, he does so at his own risk. It is not what a prudent or a reasonable man should or would do, and if he does it and sustains injury while in the act of so doing, it would be an accident or a misfortune for which the defendant Company would in no way be liable.

THE plaintiff, Temulji Jamsetji Joshi, brought this action against the Bombay Electric Supply and Tramways Company, Limited, claiming Rs. 5,000 by way of compensation for injuries caused to the plaintiff through the negligence of the defendant Company. The plaintiff alleged that on the 16th November 1908, at about 8-30 p. m., he saw a tram car belonging to the defendant Company standing still at a tram station near the Arya Samaj, and with the object of getting on the car he went up to the middle entrance, caught hold of the railing, put his right foot on the footboard and was about to put his left foot on the car, when all of a sudden the car was started at a signal given by the conductor, the footboard tilted and slipped side-

* Original Suit No. 852 of 1909.

ways from beneath the foot of the plaintiff, in consequence of which the plaintiff lost his balance and his hold on the railing and he was forcibly thrown to the ground and his right foot was severely injured. The plaintiff attributed his injuries solely to the negligence of the defendant Company.

In their written statement the defendant Company alleged that the car was not standing still when the plaintiff attempted to board it but that it was proceeding at a pace of about seven miles an hour to the next stopping place, when the plaintiff improperly and negligently tried to get on the car while it was in motion and, failing to make good his footing, fell.

The defendant Company further denied that the footboard tilted and slipped slantwise or that in consequence thereof the plaintiff lost his footing and fell. The footboard was examined two days after the accident and found not loose or in a defective condition. The Company alleged that the plaintiff's injuries were occasioned solely by his own negligence and improper conduct in trying to board a tram car when in motion and in the alternative they alleged that the plaintiff contributed by his negligence to the accident in question.

Jinnah and *Kanga*, for the plaintiff.

Strangman, Advocate-General, and *Inverarity*, for the defendants.

DAVAR, J.:—The plaintiff in this case is employed in the workshops of the B. B. & C. I. Railway Company, and works there as a fitter, earning a rupee and twelve annas a day.

On the 16th of November 1908, he was residing at Bandora, but having heard that there was illness in the family of his sister, who was residing at Foras Road, after finishing his work on that day, he went to his sister's house. He found her child ill and he was sent to call in Dr. Fernandez, who resides at Girgaum Back Road. After having called at the doctor's bungalow, he started to go back to his sister's house. He attempted to board one of the defendant Company's long bogey carriages and was trying to get in by the middle entrance,

1911.

TEMULJI JAMSETJI v. BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LIMITED.

when he fell, his right foot got under one of the wheels and the wheel ran over and caused injuries to his toes. He has filed this suit claiming Rs. 5,000 from the defendant Company, charging that the accident and the consequent injuries were due to their negligence.

The defendants deny that they were guilty of any negligence. They charge on the contrary that the accident was due to the plaintiff's negligence, and in any event deny liability, alleging that the plaintiff was guilty of contributory negligence. They say that the injuries complained of by the plaintiff are very much exaggerated and deny that he has suffered damage as claimed.

The story told by the plaintiff, as to how this accident happened, is that on emerging from Girgaum Back Road into Charni Road he found one of the defendant Company's tram cars "standing still at a tram station near the Prarthna Samaj, and with the object of getting on to the car he went up to the middle entrance of the said car, caught hold of the railing, put his right foot on the footboard, and was about to put his left foot to the car, when all of a sudden the car was started at a signal given by the conductor and the said footboard tilted and slipped slantwise from beneath the foot of the plaintiff, in consequence of which the plaintiff lost his balance and his hold on the railing, and was forcibly thrown on the ground and his right foot was severely injured." This is his story as told by him in his plaint.

In his examination before the Court he repeated this story as to the cause of his accident, and was fully examined by the learned Counsel who appeared for him on the whole of his case.

In traversing the allegations of the plaintiff, the defendants say, "That the car mentioned in the plaint was not standing still when the plaintiff attempted to board it, the said car was running and in motion, it had passed the Prarthna Samaj stopping place and was proceeding at a pace of about seven miles an hour to the next stopping place, when the plaintiff improperly and negligently tried to get on the car when it was in

motion at a distance of about 165 ft. from the Prarthna Samaj starting place and, failing to make good his footing, fell."

After the plaintiff had been cross examined on the question of his own and the Company's negligence and just as the learned Advocate-General was starting to question him as to his injuries and damages, it seemed to me that, if I found against the plaintiff on the question of negligence, all the evidence that would have to be recorded on the question of the plaintiff's injuries and his damages would be entirely useless. Mr. Jinnah for the plaintiff told me that he had lengthy evidence to call on the latter questions. Under these circumstances I suggested to the learned Counsel for both parties that the hearing should then be confined to the first three issues which covered the question as to negligence, and that the case should proceed further in the event of my finding in favour of the plaintiff on those issues. Counsel on both sides assented to this suggestion and the evidence thenceforward was confined to the first three issues, which are: (1) whether the alleged injuries to the plaintiff were caused by the negligence of the defendants, as alleged in para. 5 of the plaint; (2) whether the said injuries were not caused by the negligence of the plaintiff, as alleged in para. 3 of the defendants' written statement; and (3) whether, if the defendants were guilty of negligence, the plaintiff was not guilty of contributory negligence.

These questions involve considerations of facts, the legal principles involved in the consideration of the questions before me are well settled and clearly defined.

In *Blyth* v. *Birmingham Waterworks Company*[1], Baron Alderson says:—

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precaution would not have done."

(1) (1856) 11 Exch. 781.

1911.

TEMULJI JAMSETJI v. BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LIMITED.

The question of contributory negligence was considered in *Butterfield* v. *Forrester*(1), as early as 1809, and the principle is most tersely put by Lord Ellenborough in one sentence, wherein he says, "One person being in fault will not dispense with another's using ordinary care for himself."

Amongst the cases where charges of negligence are made and denied and contributory negligence pleaded, the case most favourable to the plaintiff is that of *Radley* v. *London and North-Western Railway Company*(2), where Lord Penzance in delivering the judgment of the House of Lords lays down certain propositions of law which, he says, cannot be questioned.

"The first proposition is...that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident."

And as a qualification to this proposition the next proposition laid down is,

"that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

I think it is necessary to refer to only one other case, that of *Wakelin* v. *London and South-Western Railway Company*(3), where Lord Watson, in the course of his judgment, lays down the law of negligence in the following words:—

"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

(1) (1809) 11 East 60. (2) (1876) 1 App. Cas. 754.
(3) (1886) 12 App. Cas. 41.

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."

With these principles before my mind, I will now proceed to discuss the evidence given in this case. The plaintiff in his evidence maintains that the tram car was stationary when he attempted to enter it, and he relies on two acts of negligence on the part of the defendant Company and says that the accident and the consequent injuries were the direct result of these two acts of negligence. First of all, he charges that the footboard of the middle entrance was loose and shook violently, when the tram started, as he was trying to get in; and, secondly, the conductor negligently and without giving him sufficient time to get in started the car, and the jerk with which the car started, coupled with the insecure condition of the footboard, caused the accident. He then goes into details as to what happened afterwards, and tells the Court how the tram was stopped to pick him up, how it was stopped again to enable one of his witnesses to examine the footboard, and how it was stopped a third time before reaching the next stopping station in order to enable certain other witnesses also to examine the footboard. His evidence is corroborated almost in every detail by his witness Mr. Burjorji Framji Mehta, a young gentleman who had just then passed his pleader's examination and had not started practising as a pleader.

[His Lordship after discussing the evidence in detail proceeded :—]

After carefully considering all the evidence in the case, I have come to the conclusion that the footboard of car No. 68 was not loose on the night of the 16th November 1908, and the fall of the plaintiff while attempting to board that car was not due to any fault or defect in the fixity of the board.

And now we must look elsewhere for an explanation as to how the plaintiff fell and sustained the injuries he complains of.

There is direct conflict of evidence between the plaintiff and his witness Mehta on the one side and his witness Lewis and

1911.

TEMULJI JAMSETJI v. BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LIMITED.

the conductor and the driver of the tram car on the other side, as to whether the tram was stationary or in motion when the plaintiff attempted to get in and as to the exact spot at which he attempted to board the car.

After the electrification of the tram cars in Bombay, certain Bye-laws have been sanctioned by the Government but they came into force after the date of the accident. The previous Bye-laws, framed under section 24 of Bombay Act I of 1874, are published in the Government Gazette of the 15th of April 1875, at page 294, Part II. One of them is, "Passengers are forbidden to enter or to leave the car while it is in motion." The horse trams for which these Bye-laws were made used to stop at all places to pick up and put down passengers. The electric trams stopped at certain fixed places to take up and discharge passengers, and I take it that till the new Bye-laws came into operation, the old ones were in force. But whether there is a Bye-law or there is not a Bye-law to that effect, the fact remains that if a passenger chooses to attempt to enter or leave a moving car, he does so at his own risk. It is not what a prudent or a reasonable man should or would do, and if he does it and sustains injury while in the act of doing so, it would be an accident or a misfortune for which the defendant Company could in no event be held liable.

If this tram had been stationary when the plaintiff attempted to board it, I cannot conceive the possibility of his falling out. It does not take many seconds for a man to get into a tram car from the road. The evidence in the case conclusively establishes that electric trams after stoppage do not start with a jerk. Standing instructions to all drivers are to start on the first notch and then get on to the second, the third, and the fourth notches, one after the other. Assuming that the board had been loose, if the tram car had been stationary when the plaintiff attempted to board it, he would not have fallen out. If the car had been stationary, his hand grip on the bar would have been firm, and, when one foot was on the footboard and the car had started, he would have had no difficulty in putting his other foot on and getting into the car. The conductor and

the driver both say that the accident took place at some distance from the starting station and after the car had been in motion. There is no doubt that the plaintiff's witness Mr. Mehta was very much excited at the time of the accident. The plaintiff says he told him not to sit down there like a woman but to take the names of passengers. I have no doubt whatever that the excitement was due purely to good-heartedness. He ascertained the names of two or three passengers, wrote them on a piece of paper and put them in the plaintiff's pocket, and I quite believe that he was actuated in all he did by sympathy for a Parsee who had sustained injury. He says, when he saw the plaintiff's head come up and disappear, the car was stationary, but I think there his powers of observation are again at fault. The defendant Company in their plan, Exhibit No. 3, in the *de bene esse* examination of Mr. Crisp, put the place of accident at a distance of 183 ft. from the stopping place near the Prarthna Samaj. That plan is prepared on the statements made by the conductor Dolatia Raghu. It may be that the tram had not proceeded so far, but to my mind, on the evidence before me, it is quite clear that the tram had left the stopping station and was in motion when the plaintiff attempted to board it. The conductor Dolatia gave his evidence in a manner that impressed me favourably. He said he started the tram when there were no passengers left at the Prarthna Samaj station to pick up, and I believe he is telling the truth there. There is no doubt that the conductor also secured the names of some of the passengers. He says he gave them to Mr. Wilkinson. His statement taken down by Mr. Wilkinson, and the names of these two witnesses are not forthcoming. I do not believe that the defendants are intentionally keeping those back. Mr. Wilkinson is not in their service now and his letter to Mr. Crisp of the 8th of February 1909, Exhibit A, in the *de bene esse* examination of Mr. Crisp, is a very peculiar and unintelligible document. After telling Mr. Crisp that he was afraid if a suit was filed against the Company that the Company would not fare well, he suggests that therefore they should be prepared for eventualities "and secure the aid of the Police, if matters go too far." What

1911.

TEMULJI JAMSETJI v. BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LIMITED.

he means exactly it is difficult to conceive. He is not in the Company's service, and I have no doubt in my mind that I am told the truth when the defendants say they are not in possession of the report made by the conductor to Mr. Wilkinson or of the paper containing the names of the two witnesses obtained by the conductor.

The impression produced on my mind by the evidence given in this case is, that the plaintiff on that night, when he emerged from Girgaum Back Road on to Charni Road, saw a tram moving away from its stopping station near the Prarthna Samaj and that he attempted to get in while the car was in motion. If the car had been stationary, it seems to me that it is in the highest degree improbable that this accident could have happened. The most probable explanation of the occurrence appears to me to be that the plaintiff tried to jump on the footboard while the car was in motion, that he failed to get a firm grip of the bar, that although he succeeded in putting one foot on to the footboard and raising his body, he immediately fell back owing to the motion of the car and his inability to grasp the bar firmly.

I come to this conclusion with very great regret. The plaintiff is a poor man; he undoubtedly sustained serious injuries which necessitated his remaining in Hospital from the 8th of November 1908 to the 6th of January 1909. He was not able to rejoin his service till the 11th of February 1909, and I have no doubt he is telling the truth when he tells me that he is not as strong and as fit to do his work after the accident as he was before. He must have already spent a considerable sum of money in prosecuting this suit in this Court and his failure means ruin to a man of his means. It is most lamentable under the circumstances that he should have come to this Court with a case that he is not able to establish.

I find the 1st issue in the negative.

I find the 2nd issue in the affirmative.

Finding on the 3rd issue with regard to contributory negligence becomes unnecessary, as I have come to the conclu-

sion that the accident and the consequent injury were due entirely to negligence on the part of the plaintiff.

I dismiss the suit, and I must do so with costs.

Attorneys for the plaintiff: Messrs. *Kanga* and *Sayani*.

Attorneys for the defendants: Messrs. *Craigie, Blunt* and *Caroe*.

Suit dismissed.

B. N. L.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Rao.

KASHIRAM MANSING (ORIGINAL DEFENDANT 1), APPLICANT, *v.* RAJARAM WALAD DAYARAM PATIL (ORIGINAL PLAINTIFF), OPPONENT.*

1911. *July* 13.

Mamlatdars' Courts Act (Bom. Act II of 1906), sections 19, 23 (1), (2)(1)—Civil Procedure Code (Act V of 1908), section 115—Possessory suit—Decree of the Mamlatdar dismissing the suit—Application to the Collector—Revision—Non-interference with legal and regular findings of fact—Entry in Revenue Record.

A Collector acting under section 23 of the Mamlatdars' Courts Act (Bom. Act II of 1906) is not authorized to interfere with the findings of fact of the Mamlatdar in a possessory suit, the findings being on their face legal and regular and arrived after a consideration of the evidence on record.

The provisions of clause (2) of section 23 of the Act, which empower the Collector to interfere by way of revision when he considers any proceeding, finding or order in a suit to be improper, must be harmonized with the provision in clause (1) that there shall be no appeal from any order passed by a Mamlatdar.

* Application No. 87 of 1911 under extraordinary jurisdiction.

(1) Section 23 (1), (2) of the Mamlatdars' Courts Act (Bom. Act II of 1906) is as follows:—

23. (1) There shall be no appeal from any order passed by a Mamlatdar under this Act.

(2) But the Collector may call for and examine the record of any suit under this Act, and if he considers that any proceeding, finding or order in such suit is illegal or improper, may, after due notice to the parties, pass such order thereon, not inconsistent with this Act, as he thinks fit.