REVISIONAL CIVIL.

Before Justice Sir Cecil Walsh and Mr. Justice Boys.

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* BHAGWAN DAS AND ANOTHER (PLAINTIFFS) AND B. N.-W. RAILWAY COMPANY (DEFENDANT).* 1927 *April*, 20.

Act No. IX of 1890 (*Indian Railways Act*), *section* 72(2)(b)—*Railway company—Liability of company for goods stolen out of a bale whilst in the custody of the company's servants—Construction of document—Risk-note in form "H."*

Held, on a construction of the new form of risk-note "H", that the note would not afford any protection to the railway company in a case where a bale or package, having been received into the custody of the company's servants properly packed and in good condition, with no sign of having been tampered with, was afterwards found, whilst still in the same custody, to have been opened and sewn up again and part of the contents abstracted. Either, and most probably, the theft had been committed by some of the railway servants themselves, or the railway servants in charge of the goods had allowed some trespasser to have access to them, in which case equally the company would be liable. *Secretary of State for India in Council* v. *U. P. Glass Works* (1), not followed.

THIS was an application under section 25 of the Small Cause Courts Act, 1887, against a decree of the Judge of the Court of Small Causes at Deoria, decreeing the plaintiff's claim against the Secretary of State as representing the Great Indian Peninsula Railway Company in respect of certain goods which had been stolen whilst in the custody of the railway. The case came in the first instance before LINDSAY, J., who, being disposed to doubt the correctness of the ruling relied on by the applicant, viz., *Secretary of State for India in Council* v. *U. P. Glass Works* (1), referred it to a Bench of two Judges.

* Civil Revision No. 186 of 1926.
(1) (1926) I.L.R., 48 All., 584.

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Dr. *Surendra Nath Sen* and Mr. *B. Malik*, for the applicant.

Pandit *Ambika Prasad Pandey* and Munshi *Rudra Narain Srivastava*, for the opposite parties.

WALSH, J. :—This case has been argued in revision, or rather under section 25 of the Small Cause Courts Act, and having regard to a decision of Mr. Justice DANIELS, reported in *Secretary of State for India in Council* v. *U. P. Glass Works* (1), and relied upon to some extent by the railway, Mr. Justice LINDSAY has referred the matter to two Judges, apparently feeling that unless he differed from the decision he ought to allow the revision, but that, on the other hand, he was not prepared to follow the decision.

Under the circumstances we do not think it necessary to discuss in detail the decision of Mr. Justice DANIELS beyond holding that it does not, in our opinion, apply to the facts of the case before us, and that if the true interpretation of it is that in the case before us the railway company would be exempt from liability unless the consignor proved actual misconduct, we should be unable to agree with it, leaving it to other tribunals in other cases which may arise to decide how far our decision is actually inconsistent with what Mr. Justice DANIELS decided. In this case the matter seems to us to be perfectly clear. The facts have been found in a very clear and ably stated passage in the judgement of the Small Cause Court Judge. We may summarize his findings in this way. There was one package or bale. It contained dhotis. When it was received at the station of despatch it was weighed in by the weighing clerk,

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and its weight was correct, and was entered on the forwarding note as being 4 maunds and 25 seers. There was no suggestion that the scales were out of order. The bale, when received into the custody of the railway servants at the station of despatch and weighed, appeared to be in a normal condition, that is to say, it appeared to have been properly packed and showed no signs of slackness in the sewing up or of interference. It then passed into the custody of the servants of the railway company for storage in the godown or warehouse or other place where such goods are kept awaiting transport. When the wagon for transport was ready the bale, which had not left the custody of the railway company's servants, was then placed in a wagon and the wagon was sealed for transit. On arriving at the destination it was found that, although the seal of the wagon was intact, the bale was quite the reverse. It had been opened, it had been re-stitched, it was short in weight, and there were eleven pairs of dhotis missing from it. The seal of the wagon appeared not to have been tampered with, and, therefore, unless some mischievous and dishonest servant had discovered some method of removing the seal and replacing it without leaving any indication of such an operation, it must be assumed that the pilfering, which undoubtedly took place, took place before the wagon was sealed. A faint suggestion seems to have been made by the railway company that the shortage in weight was due to evaporation of moisture. The learned Judge evidently experienced great difficulty in treating this suggestion seriously, and we are not surprised, because, whatever evaporation of moisture there may have been, and it is surprising to hear that dhotis can be sold in such a condition, it would be necessary to infer that the eleven pairs of dhotis had

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leaked out of the hole or re-stitching and somehow escaped from the parcel—a perfectly ridiculous suggestion. The result, therefore, is that on the evidence called by the company,—because the whole of the facts which we have just summarized constitute the history of the company's dealings with the parcel from the moment when it was received into their custody,—it follows that the leakage or pilfering must have taken place after the goods were weighed, while they were in the custody of the company and before the wagon was sealed. The material provision which relieves the consignor from the burden of proving misconduct is the following sentence:—"If misconduct on the part of the railway servants can be fairly inferred from such evidence." The learned Judge has inferred that the pilferage took place after the goods were received by the booking clerk, and, therefore, as a result of misconduct by the railway servants. We agree, and we hold, as no doubt he held, that it is the only possible inference to be drawn, because even if the railway servants did not themselves commit the pilfering and share the loot, which they probably did, it would have been impossible for anybody to have obtained access to the package in such a way as to extract eleven pairs of dhotis and to sew the package up again without a breach of duty on the part of the railway company's servants which would amount to misconduct, because even if it might not be criminal, though in most cases it would be, a railway servant who is placed as a kind of guardian over the goods of the public in transit is undoubtedly guilty of misconduct if he allows a trespasser to obtain access to such goods. In our view the risk-note creates no difficulty. Where the inference, which the learned Judge in this case has drawn, may legitimately be drawn, it is not necessary to call

upon the consignor to give evidence of misconduct. Therefore it was unnecessary in this case. We think the inference was legitimate and there is no ground for interference with the decision. The head-note of Mr. Justice DANIELS' judgement undoubtedly purports to deal with clause (*b*). This case before us arises under clause (*b*). To take the view that the railway is protected from liability where it is only a part of a consignment, not consisting of one complete package, which has been lost, seems to us to do violence to the expression "pilferage from a package" and to be inconsistent therewith. Pilferage from a package must in nearly every case be of a part of that package, however many packages there are in the consignment, and, therefore, we can only say that if the learned Judge intended his ruling to apply to that provision in clause (*b*), we are unable to agree with it.

This revision must be dismissed with costs.

BOYS, J. :—This revision raises a question of the interpretation of risk-note form H, one of the new forms provided for the despatch of goods by railway. It is to be found on page 651 of Part I of the *Gazette of India* of the 12th of July, 1924. I need not repeat the facts. They amount to this that out of eleven bales of cloth goods it was found on arrival that one of the bales had been tampered with and eleven pairs of dhotis were missing. The suit is to recover from the railway company the value of these dhotis. It may be taken as found in fact that the evidence in the case proves up to the hilt that the disappearance of the eleven pairs of dhotis was due to the "misconduct of the railway servants." The trial court held the railway company liable.

The defendant came to this Court in revision on three grounds, of which the only one that we have to

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consider is: "Because the consignment having been made under risk-note form H (new) the petitioner railway company is absolved from all liability to the plaintiff for non-delivery *of a part of the consignment not consisting of one or more complete packages.*"

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The risk-note set out that the consignor agreed to hold the railway administration "free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any of such consignments from any cause whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants." This is the only portion of the note which declares the liability or otherwise of the railway. It is followed by a proviso divided into two parts, but that proviso merely provides in two cases rules as to the production of evidence and as to how misconduct is to be proved and when it may be inferred. It is clear that primarily the burden of proof is on the claimant to establish misconduct. Recognizing, however, that a private consignor cannot ordinarily be fairly expected to be able, by any means in his own power, to lay before the court the history of the dealings with the consignment between the time he handed it over and the time the consignee took delivery, it has been provided that in two cases (*a*) and (*b*) the railway administration shall be bound to disclose their dealings with the package in transit and to give evidence thereof, before the consignor is called upon to prove misconduct. If, when such evidence has been given, an inference of misconduct on the part of the railway company can fairly be drawn from that evidence, the claimant has proved his case of misconduct and need do nothing further. If such an inference cannot fairly be drawn, then he has to discharge the burden of proving the

misconduct. This obligation is thrown on the railway company only in the two cases coming within the clauses (*a*) and (*b*) of the proviso. With what cases there may be not coming within those two clauses we are not here concerned, but alleged deterioration suggests itself as one such case. It has so far been necessary to refer to the proviso only in order to make it clear that the proviso does not deal with the primary issues in the case but only with the method of proof of such issues.

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The primary issues in this case were two:—

(1) Did the disappearance in transit of eleven pairs of dhotis constitute "loss, destruction or deterioration of, or damage to, all or any of such consignments?"

(2) If it did constitute "such loss, etc." did "such loss, etc." arise from the misconduct of the railway administration's servants?

The second question has been answered in favour of the plaintiff and in this case at any rate the answer amounts to a definite finding of fact.

As to the first issue it is contended in the ground of revision which we have set out that "non-delivery *of a part of a consignment not consisting of one or more complete packages*" does not come within the terms "the loss, etc.". It is contended that to bring the case within those terms there must have been loss of a whole consignment or of the whole of one or more packages forming part of a consignment. I am not concerned to consider decisions on the old form. It was notoriously a most unsatisfactory form, and it has, in my view, been wholly recast. It is obvious that many of the expressions that occurred in the older form must of necessity find a place in the new. But

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it is very far from being a necessary corollary that all decisions on the scope of particular words in the old form still hold good to assist us in interpreting the same words in the new form when the form has been wholly recast. I confine myself, therefore, to an interpretation of this form. We have been pressed with the decision of Mr. Justice DANIELS in *Secretary of State for India in Council* v. *U. P. Glass Works* (1), which is a decision upon the new form, and it is in consequence of that decision that Mr. Justice LINDSAY has referred this matter to a Division Bench. In that case, there was a disappearance in transit of 5 tons out of 15 tons of coal. Mr. Justice DANIELS held that the existence of the term " non-delivery " in proviso (*a*) showed that "loss, destruction or deterioration of, or damage to, all or any of such consignments " must be held to include " non-delivery." He held that " loss " must be held to include " non-delivery." In that finding and the reasons therefor I concur. He went further and held that the non-delivery must be non-delivery of the whole of a consignment or of one or more complete packages and there was in the case before him only non-delivery of a part of a consignment. He, therefore, dismissed the suit. While holding that the fact of the form being drawn up in the shape of a main provision followed by a proviso (*a*), showed that the case in the proviso (*a*) was included in the circumstances set out in the main provision, he did not consider the proviso (*b*) at all. I have no materials to say why he did not consider that second clause of the proviso, but possibly his reason was that the pilferage of 5 out of 15 tons of coal, presumably loaded in bulk in a truck, could hardly be described as pilferage from a package. Applying, however, his reasoning to the proviso (*b*) it is clear that " *pilferage from a package* " *must also*

(1) (1926) I.L.R., 48 All., 584.

be held to come within the main clause "loss, etc."; or, conversely, the phrase "loss, etc." must include, at any rate in one case (i.e., pilferage of part of a consignment) loss of part of a consignment. While, therefore, I am of opinion that Mr. Justice DANIELS was, if he held that the loss of 5 tons of coal, out of 15 tons, could not be held to be pilferage from a package, right in holding that the proviso could not be applied when considering the question of burden of proof [for it is clear that proviso (*a*) did not apply], I am unable to agree with him when he goes further and holds that "loss does not include loss of part of a consignment or package and that the railway company is "protected from liability for loss, including non-delivery, of a part of consignment not consisting of one or more complete packages." In my view, if the case before him could not be held to amount to "pilferage from a package" the proviso as to the burden of proof had no application, as it certainly did not come within clause (*a*) of the proviso. But, unless it can be held that "loss" includes some cases of "loss of part" and not others, which there seems no ground for suggesting, the railway was liable for the "loss" of a portion of the consignment, if the plaintiff could be held to have succeeded in proving misconduct (and in proof of that he was entitled to rely upon any evidence that was actually produced by himself or by the railway), even if the railway had produced proof which in law they were not obliged by the proviso to produce. I hold, therefore, that loss of a portion of a consignment or of a package does come within the main provision of the form. In this case it is further clear that the circumstances came within clause (*b*) of the proviso, and the railway were properly called upon to give information and evidence. On that evidence it has been found that there was misconduct,

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and these findings are sufficient to dispose of the case in the plaintiff's favour and he was rightly given a decree. I would dismiss the application.

Application dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Lindsay.

EMPEROR *v.* RAMESHWAR LAL.*

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April, 22.

Criminal Procedure Code, sections 476 *and* 478—*Order of Civil Court committing accused to Court of Session—Criminal Procedure Code, section* 195 (1) (c)—"*Produced*"—*Civil Procedure Code, order VII, rule* 17.

Held, (1) that a civil court, after starting proceedings under section 476 of the Code of Criminal Procedure and then acting under section 478 is in no way debarred from committing a person who seems to have committed an offence before it to the Court of Session, by reason of the fact that no appeal lies from such an order; (2) that a document, e.g., an account book, is none the less "produced" before a court, within the meaning of section 195(*c*), because it is brought into court for the purpose of verifying an extract therefrom made in the plaint according to the provisions of order VII, rule 17, of the Code of Civil Procedure.

THIS was an application in revision against an order of a Munsif passed under section 478 of the Code of Criminal Procedure, committing the applicant to the Court of Session on charges under sections 196, 467 and 471 of the Indian Penal Code. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Sir *Charles Ross Alston*, Mr. *A. P. Dube* and Babu *Indu Bhushan Banerji*, for the applicant.

* Criminal Revision No. 215 of 1927, from an order of Muhammad Junaid, Munsif of Saidpur, dated the 7th of March, 1927.