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which in each case he had been called upon to pay in excess of the amount which had been realised by the Railway Company by reason of the sale. The amount claimed in the second case was accordingly Rs. 214-11-0 and that amount of damages will be paid by the Railway Company.

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The result is that the petitioner succeeds in both cases. The suits by the plaintiff will be decreed for the amounts claimed with costs.

We assess the hearing fee at five gold mohurs in each case.

AGARWALA, J.—I agree.

Rule made absolute.

LETTERS PATENT.

Before Courtney Terrell, C. J. and Agarwala, J.

1934.

July, 5.

SITARAM SYAM NARAIN

v.

ISWARI CHARAN SARANGI.*

Evidence Act, 1872 (*Act I of* 1872), *section* 106—*defendant wrongfully intermingling plaintiff's property with his own—burden of proving proportion lies upon the defendant—presumption—measure of damages.*

Where the defendant wrongfully intermingled a certain quantity of leaves belonging to the plaintiff with his own and the fact of what proportion of the same was the property of the plaintiff was not sought to be proved by the defendant,

Held, that the defendant being a wrong-doer, the burden of proving that proportion lay upon the defendant and he having made no effort to discharge that burden, the presumption was that the entire leaves belonged to the plaintiff and the same must be taken as the measure of the plaintiff's loss. *Warde* v. *Aeyre*(1), followed.

*Letters Patent Appeal no. 158 of 1933, from a decision of the Hon'ble Mr. Justice Wort, dated the 24th October, 1934.

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Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C. J.

G. C. Mukharji, for the appellant.

B. B. Mukharji, for the respondents.

COURTNEY TERRELL, C. J.—This is a Letters Patent appeal from a decision of a learned Judge of this Court sitting singly, affirming the judgment of the lower appellate court in second appeal dismissing the plaintiff's suit for conversion.

The plaintiff had a monopoly license for collecting Kendu leaves in a certain part of the Chaibassa forest. The defendants who do not enjoy any such license are proprietors of the village Sarashposh which is on the edge of the forest. The plaintiff employs labourers to gather the leaves and deliver them to his depot and in the course of their journey to the depot they have to pass this village Sarashposh owned by the defendants.

The finding of fact is that the defendants purchased from the labourers leaves which were the property of the plaintiff. They were subsequently found by the Forest Department to be in possession of some 50,000 bundles of leaves. As to these leaves, the case of the defendants was that they were all gathered from plants growing in their own neighbourhood. The Subordinate Judge in his finding of fact by which we are bound has found that some portion of the 50,000 bundles of leaves were those obtained by the defendants wrongfully from the plaintiff's own part of the forest and were not, as the defendants state, gathered from plants growing in their own village. The defendants after such finding made no attempt to show what portion of the 50,000 bundles were their own and what portion belonged to the plaintiff. The learned Subordinate Judge in those circumstances thought that as there was no definite

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evidence as to what proportion of the 50,000 bundles was in fact the property of the plaintiff, came to the conclusion that it was his duty to dismiss the suit although he had specifically found that part of the leaves in suit was the property of the plaintiff.

The plaintiff came in second appeal before a learned Judge of this Court and he by some accident, possibly by a confusion of the mind caused by the argument raised by the defendants, failed to notice that finding of fact by the learned Subordinate Judge notwithstanding that he quite correctly appreciated the law which was applicable to the circumstances which were found in fact by the Subordinate Judge.

The law is well established both by the Common Law and by the Indian Evidence Act. So long ago as the time of Chief Justice Sir Edward Coke the law was well settled. In the case of *Warde* v. *Aeyre*(1), Lord Coke stated the law as follows:

"In this case the law is, that if *J. S.* have a heape of corne, and *J. D.* will intermingle his corne with the corne of *J. S.*, he shall here have all the corne, because this was so done by *J. D.* of his own wrong."

And by the Indian Evidence Act, section 106, it is provided—

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Here it was within the knowledge of the defendants as to what proportion of the 50,000 bundles of Kendu leaves was the property of the plaintiff and what proportion was the property of the defendants and he being a wrong-doer the burden of proving that proportion lay upon him and that burden he made no effort to discharge. In those circumstances the law as stated by Lord Coke is applicable and it must be presumed as against the defendant that the whole of the 50,000 bundles was the property of the plaintiff

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and must be taken as the measure of the plaintiff's loss. The defendant attempted to show in the course of the case that the value of the 50,000 bundles of Kendu leaves was in the neighbourhood of Rs. 1,600. The plaintiff on the other hand has valued those bundles in his plaint at the rate of Rs. 500 and has sought to recover that sum only and to that sum he is entitled with costs throughout. It is clear that the learned Judge who decided this case was not aware of the finding of fact by the learned Subordinate Judge, for his attention was only directed to the concluding portion of the judgment which was an erroneous conclusion of law.

The result is that the appeal, in my opinion, should be allowed and the plaintiff's suit decreed for the sum of Rs. 500 with interest at 6 per cent. per annum from the date of suit till the date of realisation and costs throughout.

AGARWALA, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Luby, JJ.

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Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 63 *and Order XXI, rules* 58 *and* 63—*claim under rule* 58 *rejected as not entertainable—order, whether comes within the purview of rule* 63—*sale by court which attached later but sold first, whether valid—section* 63.

Where a claim under Order XXI, rule 58, Code of Civil Procedure, 1908, was rejected as not entertainable on the

* Appeal from Appellate Decree no. 1293 of 1930, from a decision of Khan Bahadur Najabat Hussain, District Judge of Shahabad, dated the 28th of May, 1930, confirming a decision of Babu Saudagar Singh, Subordinate Judge of Shahabad, dated the 27th of May, 1929.