REVISIONAL CIVIL.

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

1934.

July, 4.

SUNDARJI SHIVJI

v.

SECRETARY OF STATE FOR INDIA.*

Railways Act, 1890 (*Act IX of* 1890), *sections* 55(2) *and* 77—*notice of sale, object of—material particulars to be inserted in the notice—sale without compliance with formality provided by section* 55 (2), *effect of—section* 77, *scope of—section, whether refers to the broad liability of Railway Company as tort-feasers—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Article* 48—*suit for damages for conversion—terminus a quo—plea of limitation—onus.*

Section 55 (2), Railways Act, 1890, provides :

" When any animals or goods have been detained under sub-section (1), the railway administration may sell by public auction, in the case of perishable goods at once, and in the case of other goods or of animals on the expiration of at least fifteen days' notice of the intended auction, published in one or more of the local newspapers....."

Held, (*i*) that the object of a public notice of auction and the provision that the notice is to be inserted in local newspapers is an indication that it was the intention of the legislature that the local public shall be informed of a particular auction in order that persons may be attracted to bid at the auction ;

(*ii*) that in order to attract bidders to the auction the notice should contain adequate materials so that possible bidders may be informed of the class of the goods to be offered for sale, the quantity of the goods and the time and place where the sale is to be held ;

(*iii*) that unless the sale is conducted with the formality provided by the section, the Railway Company is not protected from what is, but for the section, a tortious act notwithstanding that they have a right to detain goods, and a person whose

* Civil Revision nos. 487 and 553 of 1933, from an order of Babu Harihar Prasad, Subordinate Judge of Dhanbad, exercising Small Cause Court powers, dated the 29th June, 1933.

goods are lawfully detained can justly claim damages if the goods are wrongfully sold.

Section 77 of the Act refers to the special liability of the carrier as such; it has no application to the broad liability of the Railway Company as tort-feasers quite apart from their position of railway carriers.

The terminus a quo under Article 48, Limitation Act, 1908, in a case of conversion is the date when the person who has the right to possession first learns of the act of conversion.

When a defendant in an action based on tort seeks to show that the suit is not maintainable by reason of the expiry of the statutory period of limitation, it is upon him to prove the necessary facts.

Applications in revision by the plaintiff.

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

S. N. Basu and *S. N. Banerjie*, for the petitioner.

S. M. Mullick and *N. C. Ghosh*, for the opposite party.

COURTNEY TERRELL, C. J.—These are two applications in civil revision against the judgment of the learned Subordinate Judge of Dhanbad sitting as a Small Cause Court.

The petition is by the plaintiff whose suits were dismissed. The facts are similar in so far as they are material for our decision.

The plaintiff is a coal merchant at Jharia: the defendant is the Secretary of State for India in Council on behalf of the Railway Administration. The suit in each case is a suit for damages for the conversion of certain truck loads of coal of which the plaintiff was the proprietor.

The defence was that the acts alleged by the plaintiff to be acts of conversion are in fact protected by statutory enactments, that is to say, by section 55 of the Railways Act.

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The plaintiff through certain colliery proprietors (in the first case Messrs. Villiers Limited) ordered certain consignments of coal to be sent to his customers in different parts of the country. In the first case the customers were a firm known as Sikri Brothers of Atampur and Messrs. Villiers Limited made arrangements with the Railway Company for the moving of this quantity of coal by the Railway Company to Sikri Brothers but owing to some mistake on the part of the plaintiff in directing Messrs. Villiers Limited as to where the coal was to be sent, it was sent to a wrong destination. The plaintiff made efforts to arrange with another customer at the place where the goods ultimately arrived to take delivery of the coal and they offered to the Railway Company to take the coal provided that the Railway Company would remit the charges for wharfage. This proposed arrangement, however, was not carried out. The ultimate result was that the Railway Company were in the position of having at one of their stations a truck load of coal for which the wharfage and freight were not forthcoming. Thereupon they communicated with Messrs. Villiers Limited demanding the wharfage and freight and naming a considerable sum amounting in all to something over Rs. 1,100 as their charges in respect of this truck load of coal but they stated, however, that if a considerably reduced sum were paid promptly it would be accepted. They also informed Messrs. Villiers Limited that the consignment of coal had actually been sold under section 55 of the Railways Act, realising a sum of Rs. 205 odd and that the balance of the charges amounted to Rs. 126 odd. They reduced their demand from the consignor from something about Rs. 1,100 down to a sum of Rs. 327. This offer was contained in a letter dated the 15th September, 1930 (Exhibit A—1), which is as follows:—

"Dear Sir,

The above consignment having been sold for Rs. 205, a sum of Rs. 1,170-4-0 is still due to the Railway on account of freight, wharfage and advertisement charges.

		Rs.	a.	p.
Invoice freight		328	4	0
Sale proceeds		205	0	0
Loss in freight		123	4	0
Wharfage		1,044	0	0
Advertisement charges		3	0	0
Total ...		1,170	4	0

This is to advise you that I am agreeable, strictly without prejudice to our claim for the entire amount, to forego the amount of wharfage and shall look to you to make good the loss in freight Rs. 123-4-0 and the out-of-pocket advertisement cost, viz., Rs. 3 (Total Rs. 126-4-0) if the consignee do not pay."

Messrs. Villiers Limited promptly sent the balance of Rs. 126-4-0 and handed the communication to their principals (the plaintiffs) for whom they were agents and the plaintiffs had to reimburse Messrs. Villiers Limited in the sum of Rs. 126-4-0 which the latter had, in compliance with the terms of the letter of the 15th September, 1930, sent to the Railway Company.

Now some discussion has arisen in the course of the case as to the meaning of this letter. It is, in my opinion, quite clearly an offer of a settlement of the claim against the consignor by the Railway Company in respect of the charges for freight and wharfage and is nothing more than that. An attempt was made to argue that it was also an offer of settlement of any claim by the consignor against the Company by reason of the sale which had taken place; but no such claim had at that time been made and the letter makes no reference to such a possible claim. Sometime afterwards it came to the knowledge of the plaintiffs that the sale of the coal by the Railway Company mentioned by them in their letter had not been conducted in circumstances which, according to their construction of section 55 of the Railways Act, would have constituted a valid sale, and therefore they began this suit against the Railway Company which is a suit for conversion of their property. In their

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plaint they state, what is in fact a piece of gratuitous information, that the Railway Company would be unable to seek protection from the consequences of a conversion under section 55 of the Railways Act, because the formalities prescribed by section 55 of the Railways Act had not been complied with and consequently the ordinary law of conversion would apply and accordingly they sought to recover damages.

In specifying the amount of damages to which they considered themselves entitled in the schedule they set forth first the amount which the coal had cost them at the pithead. To this they added a sum which they deemed would have been a normal profit to them. To this they added not the entire cost of the freight which amounted to, as I have said, something like Rs. 326 but only the excess which they had been called upon to reimburse Messrs. Villiers Limited, that is, the sum of Rs. 126-4-0, and they also added a claim for a small sum by way of interest on their money over a period of some months, with the net result that they claimed a sum of Rs. 256 and some odd annas.

The facts in the second case are very similar and I will refer to them later.

The suit, as I have said, being a suit for conversion of property, it is for the defendants to show that they are protected from the consequences of having committed tort by reason of a statutory enactment and that burden they failed to discharge. They replied that they are protected by section 55 of the Railways Act. The first sub-section of that section provides for the detention by the Railway Company of goods in respect of which a lawful demand by the Railway Company has been made. Sub-section (2) gives the right to the Railway Company, in case of delay after detention of the goods, to sell the goods by public auction in order that they may be recouped for the lawful demands, and the real point for our determination is as to the proper construction to be placed on

that part of the sub-section which prescribes the circumstances in which a sale is allowed to take place. Sub-section (*2*) is as follows:

"When any animals or goods have been detained under sub-section (*1*), the railway administration may sell by public auction, in the case of perishable goods at once, and in the case of other goods or of animals on the expiration of at least fifteen days' notice of the intended auction, published in one or more of the local newspapers....."

In this case what was done by the Railway Company was that they preceded the sale by auction, which ultimately took place, by announcing in the newspapers as follows:

"North-Western Railway—Sale of unclaimed property. Notice is hereby given that unless the undermentioned consignments lying undelivered are removed on payment of all charges due before the 16th July 1929, they will be sold by public auction and the sale proceeds disposed of in terms of sections 55 and 56 of the Indian Railways Act IX of 1890."

Then follows a very long list arranged in columns of various stations, the date of arrival at the stations, the wagon numbers, the names of the consignor and consignees and amongst them is the particular consignment with which we are concerned in this case. The list of stations covers an immensely wide area but it does not state when the sales would take place or the nature of the goods or the places at which they would be sold or the condition of the goods or indeed any particulars which would be calculated to attract purchasers to the sale. In short it is not "notice of the intended sale" as prescribed.

The first sub-section to section 55 provides for a demand of the charges to be made by the Railway Administration upon the person who is responsible for payment. The second sub-section provides for a notice to be published of a public auction and the words of the sub-section are

"fifteen days' notice of the intended auction."

It is argued on behalf of the Railway Company that the true construction of these words is "fifteen days'

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notice of intention to put the goods up for auction ". To my mind the meaning of the expression used in the sub-section is perfectly clear and its purpose is equally clear. The object of a public notice of auction and the provision that the notice is to be inserted in local newspapers is an indication that it was the intention of the legislature that the local public shall be informed of a particular auction in order that persons may be attracted to bid at the auction. In order to attract bidders to the auction the notice should contain adequate materials so that possible bidders may be informed of the class of the goods to be offered for sale, the quantity of the goods and the time and place where the sale is to be held. Such information would attract bidders and it is in the interest of the Railway Company itself that the bids received should be as high as possible in order that by the sale of the goods advertised as much as possible of the indebtedness to them should be wiped out. It was not sufficient for the notice to have been framed in the way in which it was framed in this particular case.

Now unless the sale is conducted with the formality provided by the section, the Railway Company is not protected from what is, but for the section, a tortious act notwithstanding that they have a right to detain goods, and a person whose goods are lawfully detained can justly claim damages if the goods are wrongfully sold. Therefore, the Railway Company not having provided themselves with the necessary protection under the Act, that is to say, not having adopted the necessary procedure, they must pay damages.

But various further defences were raised to the suit to which effect has been given by the learned Subordinate Judge. In the first place it was argued that the contract to carry the goods was not made with the plaintiff but with Messrs. Villiers Limited. Now this suit was not a suit for breach of contract nor was

it a suit founded upon a contract; it was a suit for conversion, that is to say, tort committed by the defendant in respect of the goods which was the property of the plaintiff. But even if it were a suit based on a contract, the undisclosed principal, that is to say, the plaintiff had a perfect right to enforce the contract.

Further disputes arose in the course of the case as to whether the goods were in fact sold at auction or not. It became unnecessary in the course of the hearing before us to investigate this minutely because it was frankly conceded that if the proper construction of section 55 were to compel a notice to be published of the auction in the sense in which such a notice is required, then whether or not an auction took place, the plaintiff must succeed in so far as his right to recover damages for tort is concerned.

Then two points of limitation were raised. In the first place it was argued that the suit was barred by reason of Article 2 of the Limitation Act. That Article refers only to suits for compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India. It was argued on behalf of the Railway Company that this was a suit for damages against the Railway Company for omitting to advertise the sale in the prescribed manner. It is nothing of the sort. The suit was a suit for conversion and it was the defendant who relied upon section 55 of the Railways Act as a protection against the ordinary consequences of the law. This Article has no application and the period of limitation, therefore, is immaterial. The Article which is properly applicable is, in my opinion, Article 48. This Article reads as follows:

"For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same."

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The period of limitation is three years and is to be counted from the time—

"When the person having the right to the possession of the property first learns in whose possession it is."

Now when a person in lawful possession of another's goods wrongfully sells those goods, he is said to convert them into his own use. But the section deals with circumstances wider than those of a case of conversion pure and simple, and the date which is mentioned as the starting date of limitation is the date which is applicable to all those circumstances. The starting date of limitation in the case of conversion is the date when the person who has the right to possession first learns of the act of conversion. That, to my mind, is the interpretation of the starting date clause as applied to the specific case in the Article in regard to conversion.

Now when a defendant in an action based on tort seeks to show that the suit is not maintainable by reason of the expiry of the statutory period of limitation, it is upon him to prove the necessary facts. There is nothing in the pleadings which would show precisely at what period the plaintiff or the plaintiff's agent, which is the same thing, became aware of the sale and its wrongfulness, that is to say, became aware of the fact of conversion. The defendant was unable to provide us with any materials to fix that date and therefore his plea of limitation fails altogether, because he is unable to show a date outside the period of three years which would entitle him to succeed.

A further point was raised by the defendant based on section 77 of the Railways Act. He claimed that a notice in writing had not been conveyed to the Railway Administration by the plaintiff of his claim within six months of the date of the delivery of the goods. The section in question, to my mind, has no application to the circumstances of a case of this kind; it refers only to a claim to a refund of an overcharge

or compensation for loss, destruction or deterioration of goods delivered to be so carried, that is to say, it refers to a suit against the carrier in his capacity as a carrier for the loss, destruction or deterioration of goods. This section, therefore, refers to the special liability of the carrier as such; it has no application to the broad liability of the defendants in this case as tort-feasers quite apart from their position of railway carriers. This section, therefore, in my opinion, has no application whatever.

The learned Judge who heard this case dismissed the suits partly on the ground that the plaintiff, according to his view of the matter, was no party to the contract for carriage of his goods. That, as I have pointed out, is immaterial, first, because the suit was a suit not founded upon a contract but a suit founded upon conversion, and if the contract was merely a contract that was made by the agent of an undisclosed principal, then the undisclosed principal can claim damages. Secondly, on the construction of section 55, sub-section (*2*) of the Railways Act, in my opinion, the notice of the sale in the local newspapers was clearly not in compliance with the Act and, therefore, it gives no protection to the defendant. Thirdly, there is no bar of limitation either by reason of Article 2 or by reason of Article 48, which, to my mind, is the proper Article to be applied; and lastly, section 77 of the Railways Act has no application whatever to the circumstances of this case.

For these reasons I would set aside the decision of the learned Small Cause Court Judge and give judgment for the plaintiff in the first case for the amount of damages which he has claimed, that is to say, Rs. 256-13-6. He might have claimed more but he is limited to that amount by reason of this claim.

With regard to the other case, the facts of which are similar in all material respects, the plaintiff merely limited his claim to damages up to the amount

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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.

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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.

(1) (1603) 2 Buls. 323; 80 E. R. 1157.