APPELLATE CIVIL.

Before Mr. Justice Addison and Mr. Justice Bhide.

SECRETARY OF STATE AND ANOTHER
(DEFENDANTS) Appellants

versus

GHANAYA LAL-SRI KISHAN
(PLAINTIFFS) Respondents.

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May 21.

Civil Appeal No. 2915 of 1926.

Indian Railways Act, IX of 1890, section 72—Risk Note B—Loss of goods in transit—responsibility therefor—'wilful neglect'—meaning of—whether a question of fact or law in Second appeal—Thefts on railway—whether Court can take judicial notice thereof.

Out of a consignment of 17 blocks of tin booked from Howrah to Amritsar in the name of the plaintiff, only 9 blocks were delivered to him at Amritsar, the rest having been lost in transit. The plaintiff sued the Railway Administrations concerned for the value of the missing blocks. The defendants admitted the loss but claimed protection under Risk Note B. The suit was decreed by the Courts below on the finding that the loss of the goods was due to 'wilful neglect' on the part of the defendants. There was no evidence to show how the goods were lost. The wagon in which the tin blocks were sent was not locked but only sealed. The sealing consisted in passing a piece of string through the hasp on the door of the wagon knotting it, pressing some tin round the knot to prevent its loosening and sealing the ends of the string. On these facts, the District Judge came to the conclusion that the defendants were guilty of 'wilful neglect' in sending the wagon without being locked as the wagon had to travel over a very long distance from Howrah to Amritsar, and there were no watchmen employed. In the High Court a preliminary objection was raised on behalf of plaintiff-respondent that the finding in respect of 'wilful neglect' being one of fact could not be challenged in second appeal.

Held, (repelling the preliminary objection), that it is well settled that the legal effect of proved facts is a question

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of law. That the term 'wilful neglect' has a special significance in law as established by judicial decisions and the question whether facts established in the case amounted to 'wilful neglect' was a question of law and not of fact.

Nafar Chandra Pal v. *Shukur Sheikh* (1), referred to.

'Wilful neglect' means that the act is done deliberately and intentionally and not by accident or inadvertance, but so that the mind of the person who does the act goes with it.

Tamboli v. *G. I. P. Railway Co.* (2), relied upon.

Held, therefore, that the *onus* of proving 'wilful neglect' on the part of defendants being on plaintiff, plaintiff had failed to show that defendants were guilty of 'wilful neglect' inasmuch as there was nothing on the record to show that the practice of sealing wagons in vogue had been proved to be an inadequate safeguard, or that a system of locking wagons was known to be a necessary precaution in the case of a train travelling over a long distance and yet was deliberately and intentionally not adopted by the Railways (defendants).

Held also, that the Court cannot take judicial notice of the occurrence of thefts on a railway from the reported cases cited before it and that the fact of the occurrence of thefts and the inadequacy of the method of sealing wagons should have been proved by leading evidence on these points.

Baldeo Sahai v. *B. B. and C. I. Railway* (3), followed.

Bhagai Ram-Bahadur Ram v. *B. N. W. Railway* (4), *Agent Rohilkhand and Kumaon Railway* v. *Gauri Lal* (5), and *Smith Ltd.* v. *Great Western Railway Co.* (6), referred to.

Second appeal from the decree of A. L. Gordon Walker, Esquire, District Judge, Amritsar, dated the 4th October 1926, affirming that of Thakar *Ishar Singh, Subordinate Judge, 2nd class, Amritsar, dated the 14th December 1925, directing that both the defendants do pay to the plaintiff the sum of Rs. 1,624-14-0.*

(1) (1916) I. L. R. 46 Cal. 189 (P. C.).
(2) (1928) I. L. R. 52 Bom. 169 (P. C.).
(3) (1926) 95 I. C. 945.
(4) (1925) 87 I. C. 215.
(5) (1925) 90 I. C. 46.
(6) (1922) 1 A. C. 173.

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CARDEN NOAD, Government Advocate, for Appellants.

MOTI SAGAR and W. CHANDRA DUTTA, for Respondents.

JUDGMENT.

BHIDE J. BHIDE J.—Out of a consignment of 17 blocks of tin booked from Howrah to Amritsar in the name of the plaintiff only 9 blocks were delivered to him at Amritsar, the rest having been lost in transit. The plaintiff sued the Railway administrations concerned for the value of the missing blocks. The defendants admitted the loss but claimed protection under Risk Note B. The suit has been decreed by the Courts below on the finding that the loss of the goods was due to 'wilful neglect' on the part of the defendants. From this decision the defendants have appealed.

The main contention urged by the learned Government Advocate on behalf of the appellants was that the facts proved in this case do not amount to 'wilful neglect' within the meaning of that term in Risk Note B. On behalf of the respondents a preliminary objection was raised that the finding as regards 'wilful neglect' being one of fact cannot be challenged in second appeal. We are unable to uphold this objection. 'Wilful neglect' is a matter of inference from facts proved. The term has a special significance in law as established by judicial decisions and the question for consideration is whether the facts established in this case amount to 'wilful neglect' in law. It is well settled that the legal effect of proved facts is a question of law, *(vide inter alia, Nafar Chandra Pal v. Shukur Sheikh* (1).

(1) (1918) I. L. R. 46 Cal. 189 (P. C.).

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We accordingly overrule the preliminary objection.

Coming to the merits of the case, it is necessary to clear the ground by stating at the outset the facts found by the learned District Judge, which in his opinion amount to 'wilful neglect.' The learned District Judge found that there is no definite evidence to show how the goods were lost. The wagon in which the tin blocks were sent was, however, not locked but only sealed. The sealing consisted in passing a piece of string through the hasp on the door of the wagon, knotting it, pressing some tin round the knot to prevent its loosening and sealing the ends of the string. The main point for consideration according to the learned District Judge, was whether the sealing of the wagon door in this manner was sufficient to exculpate the defendants from the charge of wilful negligence. Considering that the wagon had to travel over a very long distance from Howrah to Amritsar, and that there were no special watchmen employed, he came to the conclusion, that the defendants were guilty of 'wilful neglect', in sending the wagon without being locked. In support of his finding he relied on the following rulings of the Allahabad High Court: *Bengal North-Western Railway* v. *Haji Mutsaddi* (1), *Bengal North-Western Railway* v. *Manorath Bhagat-Dhian Ram* (2) and *Balram Das-Fakir Chand* v. *G. I. P. Railway Co.* (3).

Before proceeding to discuss whether the above facts, as found by the learned District Judge, amount to 'wilful neglect,' it is necessary to consider first of all the exact significance of that expression. In *Jagan Nath-Baij Nath* v. *Secretary of State* (4), a

(1) (1910) 7 All. L. J. 833.
(2) 1925 A. I. R. (All.) 172.
(3) 1925 A. I. R. (All.) 562.
(4) (1926) 94 I. C. 173.

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single Bench decision of this Court, Campbell J. followed a definition of that term as given by the Judicial Commissioner, Sindh, in *Doulat Ram* v. *Secretary of State* (1), which was as follows :—" A person is said to be guilty of wilful neglect when he intentionally and of set purpose does something which ought either to be done in a different manner or not at all, or omits to do something which ought to be done." This definition is in accord with a recent pronouncement by their Lordships of the Privy Council. In *Tamboli* v. *The G. I. P. Railway Co.* (2), their Lordships adopted Lord Russell's interpretation of the expression 'wilful neglect' in *R.* v. *Senior*, in which it was taken to mean that " the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it."

The question for decision in this appeal, therefore, is whether the failure to lock the wagon in which the plaintiffs' goods were placed amounted to 'wilful neglect' in the above sense in the circumstances of the case. In none of the cases relied upon by the learned District Judge is there any discussion as to the meaning of the term 'wilful neglect' and hence it is not clear, what meaning was attached to it by the learned Judges who decided those cases. But the rulings are clearly distinguishable on facts. In *Bengal North-Western Railway* v. *Haji Mutsaddi* (3), which was followed in the other two cases the facts found were that the wagon was not properly fastened, that the means used by the Railway for fastening the doors were quite ineffective and that thefts were constant. The learned Judges remarked, " Now if the Railway Company had knowledge

(1) (1916) 32 I. C. 551. (2) (1928) I. L. R. 52 Bom. 169 (P. C.).
(3) (1910) 7 All. L. J. 833.

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as we assume from the finding of the Court below it had, that the fastenings of the doors of the wagons were absolutely insecure and ineffective and that constant thefts were taking place, it was their duty to see that these fastenings were made more secure so that goods of consignors might be carried over the line with reasonable security." No such evidence was produced in the present case There was no evidence of any thefts, nor was any attempt made to prove that the method of sealing the doors was quite ineffective, and that other means were necessary to ensure the goods being carried over the line with reasonable security The other two rulings relied upon by the learned District Judge are similarly distinguishable. In *Bengal North-Western Railway* v. *Manorath Bhagat-Dhian Ram* (1), there was evidence to show that ten cases of breaking of seals were being reported every month. In *Balram Das Fakir Chand* v. *G. I. P. Railway Co.* (2), also there was evidence of prior thefts.

Certain other rulings were cited by the learned Counsel for the respondent before us in support of the learned District Judge's decision, but these are also distinguishable on the same ground. In all these rulings, the occurrence of frequent thefts on the Railway is emphasized and inference of 'wilful neglect' is drawn from the inadequacy of the method of sealing of wagons known to the Railway on account of thefts (*vide inter alia, Bindraban* v *G. I. P. Railway Co.* (3), *Abdul Karim* v. *Secretary of State* (4), and *Mathura Prasad* v. *Great Indian Peninsula Railway Co.* (5). As remarked in *Bindraban* v. *G. I. P. Railway Co.* (3), "as an abstract proposition,

(1) 1925 A. I. R. (All.) 172.
(2) 1925 A. I. R. (All.) 654.
(3))1926) 96 I. C. 1046.
(4) (1926) 97 I. C 195.
(5) (1927) 101 I. C. 536.

it is imposible to lay down that a mere failure properly to secure wagons always amounts to wilful neglect or that the mere sealing of wagons necessarily excludes wilful neglect. Every case must depend on its own circumstances." Where a Railway Company chooses year after year merely to seal wagons inspite of repeated thefts, when the sealing has been proved by the thefts to be an inadequate safe-guard, the continuance of that inadequate method may show neglect on their part amounting to wilful and determined neglect not to avail themselves of any other measures that may be open (*vide Mathura Prasad* v. *Great Indian Peninsula Railway Co.* (1). But no evidence of this description has been produced in the present case and it will, therefore, serve no useful purpose to discuss these rulings. It was urged by the learned counsel for the respondent that we should take judicial notice of the occurrence of thefts on the East Indian Railway from the reported cases cited before us. As to this point, it may be noted at the outset that the goods had to pass over two Railways, and it has not been proved that the loss took place wholly on the East Indian Railway. But even apart from this, I find myself in accord with the view taken by Mukerjee J. on this point in *Baldeo Sahai* v. *B. B. & C. I. Railway* (2), in which the learned Judge refused to take any such judicial notice and remarked that he was not aware of a single case in which judicial notice of such thefts had been taken. It would be obviously unfair to the defendants to take any such judicial notice of thefts on the Railways. It was for the plaintiff to prove 'wilful neglect' on the part of the defendant Railways. If he wished to rely on the occurrence

(1) (1927) 101 I. C. 536. (2) (1926) 95 I. C. 945.

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of thefts and the inadequacy of the method of sealing wagons, it was for him to lead evidence on the point. If he had done so, the defendants would have been in a position to rebut that evidence. It has been contended by the learned Government Advocate, that thefts on the defendant Railways are not only not common, but are, in fact, negligible in comparison with the volume of traffic carried by the Railways, that the method of sealing wagons has not been proved by experience to be inadequate, and that there is no warrant for the assumption that a system of locking wagons (which is bound to entail an enormous amount of expenditure) will be of any substantial advantage. Attention was invited in this connection to the fact that the Judicial Commissioner's Court in Oudh has frequently held that the practice of sealing wagons was the usual one and does not show any wilful neglect (*vide Bhagai Ram-Bahadur Ram* v. *B. N. W. Railway* (1), and *Agent Rohilkhand and Kumaon Railway* v. *Gauri Lal* (2). If the plaintiff had led evidence as regards the occurrence of thefts, defendants might have been in a position to produce evidence in rebuttal in support of the above contentions.

As stated already all that the learned District Judge has found in this case is that the wagons were merely sealed and not locked, although the train had to travel over a long distance and no special watchmen were employed. It seems impossible to draw from these facts alone any inference of 'wilful neglect' as interpreted by their Lordships of the Privy Council in *Tamboli* v. *G. I. P. Railway Co.* (3). There is nothing on the record to show that the

(1) (1925) 87 I. C. 215. (2) (1925) 90 I. C. 46.
(3) (1928) I. L. R. 52 Bom. 169 (P. C.).

practice of sealing wagons in vogue had been proved to be an inadequate safeguard or that a system of locking wagons was known to be a necessary precaution in the case of a train travelling over a long distance and yet was deliberately and intentionally not adopted by the Railways.

It was finally urged that it will be almost impossible for a plaintiff to prove 'wilful neglect' in the above sense in any case. But it must be remembered that the plaintiff has himself chosen to send the goods under the special contract embodied in Risk Note B at 'Owner's risk', and reduced rates. The following remarks of Lord Buckmaster in *H. C. Smith, Ltd.* versus *Great Western Railway Co.* (1), in connection with similar provisions in the Risk Note in that case are noteworthy, "It is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the railway company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it

(1) (1922) 1 A. C. 178.

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may be almost impossible for him to prove. Nonetheless, that is the burden that he has undertaken.

I accordingly hold that the learned District Judge's finding on the question of 'wilful neglect' cannot be sustained. I would, therefore, accept the appeal and dismiss the plaintiff's suit, but in view of all the circumstances leave the parties to bear their costs.

ADDISON J.

ADDISON J.—I agree.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Bhide.

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May 25.

DEWA SINGH AND ANOTHER (DEFENDANTS) Appellants

versus

FAZAL DAD (PLAINTIFF) SECRETARY OF STATE AND OTHERS (DEFENDANTS) } Respondents.

Civil Appeal No. 1205 of 1925.

Civil Procedure Code, Act V of 1908, section 9—Jurisdiction of Civil Courts—Criminal Procedure Code, Act V 1898, sections 87, 88—"proclaimed" person—attachment and sale of property of—Civil suit for recovery—whether barred—remedies.

Held, that a "proclaimed" person whose immoveable property had been attached and sold by the Criminal Court under sections 87/88 of the Criminal Procedure Code, had no right to maintain an ordinary civil action against the auction-purchaser for its restoration, even though the procedure laid down for issuing the proclamation and attachment had not been strictly followed; the jurisdiction of the Civil Courts being impliedly barred under section 9 of the Civil Procedure Code 1908.

Once the attached property has been placed at the disposal of Government, the remedies of the "proclaimed" person are