No Judge who has considered the evidence has expressed a doubt as to credibility of the witnesses who depose to these events. But the trial Judge and Shah, J., are not satisfied that Bussia can remember the day when he saw Mahomedkhan leave preceded by Sabit, Honya and Umya. Shah, J., also appears to have doubted the story of the letter received in Kirvatti. I do not share these doubts, for the date of Mahomedkhan's departure from his village on the day after the Vansha would be known to all the residents, and I see no reason to doubt the truth of the story told by Wycunt and Anant about the letter; it is entirely consistent with the other evidence of the false story spread by Sabit that his brother had gone to Miraj for treatment, although we do not know by what agency Sabit got the letter written and sent to Kirvatti.

I concur in the conclusion arrived at by Heaton, J. I find the accused guilty of the murder of Mahomedkhan and sentence him to transportation for life.

Appeal allowed.

R. R.

APPELLATE CIVIL.

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

1919.
April 8.

THE BOMBAY BARODA & CENTRAL INDIA RAILWAY COMPANY, (ORIGINAL DEFENDANTS), APPLICANTS *v.* RANCHHODLAL CHHOTALAL AND COMPANY, AGENTS TO THE AHMEDABAD SPINNING & WEAVING MILLS COMPANY, LIMITED (ORIGINAL PLAINTIFFS), OPPONENTS.*

Contract—Goods consigned by rail—Risk note—Liability of Company for goods consigned on a risk note—Burden of proof—Indian Evidence Act (I of 1872), section 103.

The plaintiff consigned certain bales of piecegoods by the defendants' Railway under a risk note. By the terms of the risk note in consideration of a special reduced rate being charged the consignor agreed to hold the Railway

*Civil Application No. 257 of 1918 under Extraordinary Jurisdiction.

1919.

B. B. & C. I. RAILWAY COMPANY v. RANCHHODLAL CHHOTALAL & Co.

Administration harmless for any loss except for loss of a complete consignment due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants: provided that wilful neglect was not to be held to include robbery from a running train or any other unforeseen event. The goods were properly carried in a closed waggon, but one of the bales was lost in transit. The plaintiff having sued the defendant Railway Company for the value of the missing bale, the Subordinate Judge decreed the plaintiff's claim holding that the defendant Company failed to prove the theft from the running train though he found that there was no evidence to prove that there was any theft from the train. The defendant Company having applied to the High Court under its revisional jurisdiction,

Held, reversing the decree and dismissing the suit, that the burden lay on the plaintiff under section 103 of the Indian Evidence Act to give proof of the fact that there was wilful neglect or theft by railway servants and, he not having done so, no question was reached of robbery from a running train.

East Indian Railway Company v. *Nathmal Behari Lal*[1], approved.

CIVIL application under Extraordinary Jurisdiction against the decision of M. N. Choksi, Judge of the Court of Small Causes at Ahmedabad in Suit No. 419 of 1917.

The facts of the case were as follows:—

On the 23rd July 1916, the opponents consigned twenty-three bales of piece goods from Ahmedabad to Calcutta by the Bombay Baroda & Central India Railway Company, under a risk note, Form B. The terms of the risk note were as follows:—

"I, the undersigned, do, in consideration of such lower charges, agree and undertake to hold the said Railway Administration...harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment, from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them... provided the term "wilful neglect" be held not to include fire, robbery from a running train or any other unforeseen event or accident."

(1) (1917) 39 All. 418.

The goods were properly carried in a covered waggon which was sealed, and the train to which the said waggon was coupled stopped at Ankleshwar Station. From Ankleshwar without any stoppage it reached Surat Station where the east door of the waggon conveying the said goods was found to be open and one bale out of the twenty-three bales was found to be missing from the waggon and lost. Delivery of the twenty-two bales was given to and taken by the opponents.

Subsequently some of the cloth from the bales was discovered to have been sold by an inhabitant of Mitali, four miles on the Surat side of Ankleshwar. He was convicted and sentenced but at the trial there was no finding that any Railway servant took part in the theft of the cloth.

The opponents then instituted a Suit No. 419 of 1917 in the Court of Small Causes at Ahmedabad against the applicants, claiming Rs. 325 as the value of the missing bale.

The Subordinate Judge observed that there was absolutely no evidence to prove that there was any theft from the train ; but that the bale was undoubtedly stolen and the goods must have found their way out ; but there was no evidence to prove that the bale was lost whilst the train was running. He, therefore, held that the defendants had failed to prove the theft from the running train and passed a decree in favour of the plaintiff for the amount claimed.

The defendants applied to the High Court under its revisional jurisdiction.

Coltman instructed by Messrs. *Crawford, Bayley & Co.*, for the applicants :—Under the terms of the risk note, the Railway Company was responsible only for

1919.

B. B. & C. I. RAILWAY COMPANY v. RANCHHODLAL CHHOTALAL Co.

thefts committed by their servants or for their wilful neglect. The lower Court ought to have thrown the burden of proving it on the plaintiff: see *East Indian Railway Company* v. *Nathmal Behari Lal*[1]; *East Indian Railway Company* v. *Nilkanta Roy*[2].

N. K. Mehta for the opponent:—Under section 76 of the Indian Railways Act, if we once show that loss has been caused, it is not for us to show how that loss was caused. Further, it is not possible for us to show how the loss occurred. We rely on section 106 of the Indian Evidence Act which says that when any fact is within the knowledge of any person, the burden of proving that fact is upon him. The principle underlying the said section is recognised as an exception to the general rule that the burden of proof rests with the party which asserts the substantial affirmative: see Taylor on Evidence, 10th edition, section 376 A page 292; *Mahony* v. *W. L. & W. Railway Company*[3].

SCOTT, C. J.:—The plaintiffs shipped on the Bombay, Baroda & Central India Railway some 23 bales of cloth under a risk note, Form B, from Ahmedabad to Calcutta. The cloth was loaded in a closed waggon which was sealed. It was the duty of the guard to examine the seals at every station. He went round the train at Ankleshwar and gave a certificate that all was right. At Surat, the next Station at which the train stopped, one of the doors of the waggon was found to be open and one of the plaintiff's bales was missing. Some of the cloth from the bale was subsequently discovered to have been sold by an inhabitant of Mitali, four miles on the Surat side of Ankleshwar. He was convicted and sentenced but at the trial there was no finding that any

(1) (1917) 39 All. 418.

(2) (1913) 41 Cal. 576.

(3) [1900] 2 Ir. Rep. 273 at p. 280.

Railway servant took any part in the theft of the cloth. Under the risk note, in consideration of a special reduced rate being charged, the consignor agreed to hold the Railway Administration harmless for any loss except for loss of a complete consignment or complete package due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants: provided that wilful neglect was not to be held to include robbery from a running train.

The learned Judge after recording evidence observed that there was absolutely no evidence to prove that there was any theft from the train; but no doubt the bale was stolen and the goods must have found their way out, but there was no evidence to prove that the bale was lost whilst the train was running. He therefore held the defendants had failed to prove the theft from the running train and passed a decree for the plaintiff for the amount claimed.

This judgment shows confusion as to the terms of the risk note.

In the absence of proof of wilful neglect or theft by the Railway servants the Administration is to be held free from responsibility. If, however, neglect or theft by Railway servants is proved the Administration will escape liability for loss if proof is given of robbery from a running train, &c. The plaintiffs wish the Court to believe that there was wilful neglect or theft by Railway servants; it therefore lies on the plaintiffs under section 103 of the Indian Evidence Act to give proof of the fact. This they have not done and no question is reached of robbery from a running train.

This conclusion accords with the decision of the Allahabad High Court in *East Indian Railway Company* v. *Nathmal Behari Lal* [1].

[1] (1917) 39 All. 418.

1919.

B. B. & C. I, RAILWAY COMPANY v. RANCHHOD-LAL CHHOTALAL & Co.

We set aside the decree and dismiss the suit with all costs on the plaintiffs.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

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

1919. *April* 8.

RAMCHANDRA SWAMINAIK JORAPUR (ORIGINAL JUDGMENT—DEBTOR No. 3), APPELLANT *v.* MANUBAI KOM RAMDAS GUJJAR, WIDOW OF DECEASED RAMDAS NARSIDAS GUJJAR (ORIGINAL DECREE-HOLDER), RESPONDENT.*

Hindu Law—Adoption—Adopted son treated as having been from his birth in adoptive father's family—Adopted son cannot acquire a vested interest in the property of his natural father.

Under Hindu law, an adopted son is treated as having been from his birth in the family of his adoptive father and therefore he cannot for any purpose be regarded as having existed so as to acquire a vested interest in the property of his natural father.

The applicant having applied after the date of his adoption to execute a decree which was obtained by his natural father when the applicant was a member of the natural family,

Held, that he could not execute the decree as by reason of his adoption he must be treated as non-existent for the purpose of the execution of the decree.

SECOND appeal against the decision of A. C. Wild, District Judge of Bijapur, confirming the decree passed by V. V. Kamat, Subordinate Judge at Bagalkot.

Proceedings in execution.

In 1908, one Narsidas obtained a decree in Suit No. 262 of 1905, which gave him a right to open a new door in the southern wall of his house. After the said decree

* Second Appeal No. 250 of 1917.