pleaded not guilty and it is your charge to say, having heard the evidence, whether he is guilty or not,"

the prisoner is said to have been given in charge to the jury.

The substance of the offence charged in the indictment has not in this case been stated to the jury, and, except the fact that the jury is sworn and allowed to be challenged with a view to their trying the prisoners in due turn, nothing has been done to warrant the supposition that the prisoners have been given in charge to the jury.

I, therefore, overrule the objection and direct that the trial shall take place upon the altered charge with a special jury.

Order accordingly.

B. K. D.

PRIVY COUNCIL.

THE SURAT COTTON SPINNING AND WEAVING MILLS LTD., APPELLANTS *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, DEFENDANT.

J. C.* 1937 *March* 5

[On Appeal from the High Court at Bombay]

Indian Railways Act (IX of 1890)—Risk Note B—Non-delivery of packages—Pilferage—Evidence—Duty of Railway Administration to give evidence—Presumption from failure to call witnesses.

The appellant Company consigned a number of bales of piece-goods to the B. B. and C. I. Railway at Surat for conveyance to Sealdah on the terms of Risk Note B.

Some of the bales were stolen in transit and the appellant Company claimed damages for their non-delivery.

The bales had been handed over to the E. I. Railway at Agra East Bank Station.

It was clear that the stolen bales were removed from a wagon while the train was in motion between Buxar and Arrah on the E. I. Railway.

The guard, engine-driver and firemen who were on the train at the time were not called as witnesses by the defendant, nor was any witness called from Arrah,

* *Present:* Lord Thankerton, Sir Shadi Lal and Sir George Rankin.

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a seal-checking station, and no explanation was given for not calling anyone from that station. A written statement which had been made by the guard was put in evidence.

Held, (1) that the statement by the guard was not admissible.

(2) It was the duty of the defendant to give the evidence of those of the railway servants who were responsible for the care of the consignment at Buxar and Arrah and during the intervening journey and, whilst the failure to submit the evidence of the guard was probably in itself a breach of the contractual obligation to give the evidence necessary for disclosure of how the consignment was dealt with, the Court was, in any case, entitled to presume under section 114 (*i*) of the Indian Evidence Act that the guard's evidence, if produced, would be unfavourable to the defendant and to infer misconduct by complicity in the theft of some servant or servants of the defendant.

APPEAL (No. 57 of 1936) from a decree of the High Court (December 21, 1934) reversing a decree of the First Class Subordinate Judge of Surat (April 30, 1928).

The material facts are stated in the judgment of the Judicial Committee.

Pritt, K. C., and *Sir Thomas Strangman*, for the appellants.

Sir Walter Monekton, K. C., and *Dickens*, for the respondent.

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February 1, 2 and 4

The judgment of the Judicial Committee was delivered by

LORD THANKERTON. This is an appeal from a judgment and decree of the High Court of Judicature at Bombay, dated December 21, 1934, which dismissed the appellants' suit, in reversal of a decree of the First Class Subordinate Judge of Surat, dated April 30, 1928, under which the appellants obtained decree for the sum of Rs. 25,820 with future interest at 6 per cent.

On April 7, 1925, the appellants consigned 58 bales of cotton piece-goods to the Bombay-Baroda and Central India Railway Company, at Surat, for carriage to Sealdah on the Eastern Bengal Railway, a Government railway, on the terms of Risk Note B. In order to reach the system of the Eastern Bengal Railway, the consignment had to

be carried for a considerable distance over the system of the respondent's East Indian Railway, which may be referred to as the E. I. Railway.

Risk Note B is in the form approved by the Governor-General in Council under section 72 (2) (*b*) of the Indian Railways Act, 1890, for use when the goods are despatched at a "special reduced" or "owner's risk" rate. In the present case the material part of the Risk Note is as follows :—

Whereas consignment of fifty-eight bales F. P. C. P. Goods I. B. tendered by us as per forwarding Order No. 666 of this date for despatch by the B. B. & C. I. Railway Administration to Sealdah station and for which we have received Railway receipt No. 942 of same date is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment, we the undersigned do in consideration of such lower charge 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 upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants; Provided that in the following cases :—

(*a*) Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instructions laid down in the Tariff or where there are no such instructions protected otherwise than by paper or other packing readily removable by hand and fully addressed where such non-delivery is not due to accidents to trains or to fire.

(*b*) Pilferage from a package or packages forming part of the said consignment properly packed as in (*a*) when such pilferage is pointed out to the servants of the Railway administration on or before delivery.

the railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and if necessary to give evidence thereof before the consignor is called upon to prove misconduct but if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence the burden of proving such misconduct shall lie upon the consignor.

This agreement shall be deemed to be made separately with all Railway Administrations or transport agents or other persons who shall be carriers for any portion of the transit.

Of the 58 bales consigned, only 15 were delivered to the consignee at Sealdah, the remaining 43 bales having been stolen while in course of transit on the E. I. Railway.

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The present suit was filed on March 20, 1926, by the appellants, claiming damages for the non-delivery of the 43 bales. No question is raised in the appeal as to the amount of the damages assessed by the Subordinate Judge, but the issue is as to the liability of the respondent, in view of the terms of Risk Note B, and, in particular, of the terms of the proviso, as the present case comes within case (*a*) of the proviso. It will be convenient to consider first the proper construction of the proviso, which contains two distinct provisions.

The first portion of the proviso lays an obligation of disclosure on the railway administration, the nature and extent of which it will be necessary to consider. The second portion of the proviso assumes that the obligation of disclosure, including the giving of the necessary evidence, has been discharged, and, impliedly, directs consideration of the material so disclosed before the consignor is relegated to the original burden of proof of misconduct laid upon him; if such consideration leads to the fair inference of misconduct, the railway administration will be liable; otherwise, the proviso will cease to operate, and the consignor will be relegated to his original burden of proof of misconduct. No question of misconduct of the railway administration, as distinct from its servants, arises in the present case, but it may be noticed that reference to such misconduct occurs only in the second portion of the proviso, and does not occur in the original obligation of proof laid upon the consignor. Their Lordships reserve any opinion as to the construction of this bit of imperfect draughtsmanship.

The first portion of the proviso provides that the railway administration shall be bound to disclose to the consignor "how the consignment was dealt with throughout the time it was in its possession or control, and, if necessary, to give evidence thereof, before the consignor is called

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upon to prove misconduct". In their Lordships' opinion, this obligation arises at once upon the occurrence of either of cases (*a*) or (*b*), and is not confined to the stage of litigation. Clearly one object of the provision is to obviate, if possible, the necessity for litigation. On the other hand, the closing words of the obligation clearly apply to the litigious stage. As to the extent of the disclosure, it is confined to the period during which the consignment was within the possession or control of the railway administration; it does not relate, for instance, to the period after the goods have been theftuously removed from the premises. On the other hand, it does envisage a precise statement of how the consignment was dealt with by the administration or its servants. The character of what is requisite may vary according to the circumstances of different cases, but, if the consignor is not satisfied that the disclosure has been adequate, the dispute must be judicially decided. As to the accuracy or truth of the information given, if the consignor is doubtful or unsatisfied, and considers that these should be established by evidence, their Lordships are of opinion that evidence before a Court of law is contemplated, and that, as was properly done in the present suit, the railway administration should submit their evidence first at the trial.

At the close of the evidence for the administration two questions may be said to arise, which it is important to keep distinct. The first question is not a mere question of procedure, but is whether they have discharged their obligation of disclosure, and, in regard to this, their Lordships are of opinion that the terms of the risk note require a step in procedure, which may be said to be unfamiliar in the practice of the Court; if the consignor is not satisfied with the disclosure made, their Lordships are clearly of opinion that is for him to say so, and to call on the administration to fulfil their obligation under

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the contract, and that the administration should then have the opportunity to meet the demands of the consignor before their case is closed; any question as to whether the consignor's demands go beyond the obligation should be then determined by the Court. If the administration fails to take the opportunity to satisfy the demands of the consignor so far as endorsed by the Court, they will be in breach of their contractual obligation of disclosure.

The other question which may be said to arise at this stage is whether misconduct may be fairly inferred from the evidence of the administration; if so, the consignor is absolved from his original burden of proof. But, in this case, the decision of the Court may be given when the evidence of both sides has been completed. It is clearly for the administration to decide for themselves whether they have adduced all the evidence which they consider desirable in avoidance of such fair inference of misconduct. They will doubtless keep in mind the provisions of section 114 of the Indian Evidence Act.

Turning to the facts of this case, the following facts may be taken as not in dispute. The consignment was loaded at Surat in E. I. Railway wagon No. 11893, which was an old type of wagon with two side doors and a lower flap door, and the doors fastened with rivets. On April 17, 1925, the wagon was handed over to the E. I. Railway at Agra East Bank Station, and Ellis patent locks were substituted for the rivets on both sides of the wagon. The wagon was despatched to Moghal Serai, where it was attached to goods train No. 132 down. The train consisted of 55 wagons, the wagon in question being 35th from the engine, and its locks and seals being then intact. The train was in charge of Guard J. Rohead from this point until Dinapore, a distance of about 125 miles. The times of down goods

train 132 on this section so far as given in evidence were as follows :—

21st April, 1925.. Moghal Serai, dep. 20·30.
22nd „ „ .. Buxar, arr. 0·6, dep. 0·45.
Baruna, run through 1·11.
Ragnathpura, arr. 2·2, dep. 2·22.
Arrah, arr. 3·57, dep. 5·0.
Dinapore, arr. 6·55.

Between Moghal Serai and Dinapore there are three stations, Dildarnagar, Buxar and Arrah, at which it is the duty of the guard—alone, or jointly with the railway police constable on duty—to check the seals and locks on both sides of the train. There is no evidence as to what happened at Dildarnagar, which is between Moghal Serai and Buxar. But there is nothing in the evidence to suggest any interference with the seals or locks before the train reached Buxar Station.

On the arrival of the train at Dinapore it was discovered that the seals and locks on the south or off side of the wagon in question had been broken and that only 15 bales were left, 43 having been removed. Guard Rohead then made a report at Dinapore, which will be referred to later.

Meantime, up goods train 137, which had passed down goods train 132 between Ragnathpura and Baruna, and which had run through Baruna at 1–40 was stopped by the discovery of goods on the line about two miles east of Buxar ; these proved to be four unbroken bales and some thans, or loose pieces of cloth, which had formed part of the appellants' consignment. These were taken to Buxar Station. At the point where up goods train 137 stopped, the guard saw 25 or 30 men outside the railway fence armed with lathis. Later, another train, No. 15 up express, which had left Ragnathpura at 3–15, was stopped shortly before reaching Baruna by the discovery of some thans, which

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were also identified as having formed part of the appellants' consignment. The railway sub-inspector of police at Buxar made a search, but nothing was found within the Buxar station yard up to its outer signal and its surroundings on the Baruna side, some date mats were found within a mile of Buxar, and further east and up to two miles east of Baruna some iron bands and outer coverings of bales were found. It may be added that certain contents of other bales were recovered from a village two or three miles from Buxar and from another village about 20 miles therefrom. No one has been convicted of the robbery or theft, but seven villagers, among whom there was no railway servant, have been convicted of receiving stolen property.

It thus appears that all the goods recovered were found between Buxar and Arrah, at which stations there was a duty to check the seals and locks, and the history of the consignment over that section of the railway was all-important. On the evidence, it seems certain that the Ellis patent locks were opened by means of a privately manufactured key, and it seems most likely that the opening of the lock would be done while the train was standing for 39 minutes at Buxar Station; it seems clear enough that most—and perhaps all—of the stolen bales were removed from the wagon while the train was in motion between Buxar and a point probably nearer Baruna than Arrah. Further, it seems almost certain that the thieves must have had information which enabled them to expect and to identify the train and the particular wagon in which this valuable consignment was being carried, and this information would be most easily obtained from railway servants. The thieves must have been prepared for the removal of bales which weighed about 340 lbs. a piece and which would require a large number of men for their removal within a time reasonable for their purpose.

In these circumstances, it was the duty of the respondent, in their Lordships' opinion, to give the evidence of those of the railway servants who were responsible for the care of the consignment at Buxar and Arrah and during the intervening journey. Their Lordships regard the possibility of the interference having occurred so far back as Dildarnagar as so remote that it may be disregarded in the view that they take of the case.

Guard Rohead, an engine-driver and a fireman were on No. 132; none of them was made a witness by the respondent. Of those on duty at Buxar during the stop of No. 132, Bhagwan Pathak Harischandra, the assistant station-master, and Alamshakhan Abdul Gafur, the railway police constable, who checked one side of the train, gave evidence; Sajatkhan Mahad Safilkhan, who was on duty at Ragnathpura, gave evidence that No. 132 stopped there from 2–2 to 2–22 for watering the engine and cleaning the fire, and that the guard did not leave his brake. There is no witness from Arrah, a seal-checking station, and no explanation as to their absence. The only documentary evidence bearing on this matter is a statement made by Guard Rohead at Dinapore, after the discovery of the theft, which will be referred to later.

The assistant station-master, Buxar, states that No. 132 down train arrived at 0–6 and left at 0–45, and that no wagon was taken out of it at Buxar. There being four lines in the station, the train was on the line next but one to the down platform. He states that, on the arrival of the train, the locks and seals of all the wagons were examined by Guard Rohead and the constable, Alamshakhan, and were found correct; it seems clear that he was relying on their report of their examination. Alamshakhan states that he examined the locks and seals of No. 132 down train, on the down platform side, immediately on the arrival of the train, and found them intact. He states that the offside was checked

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by the guard, and that the guard wrote the remark certifying all correct in the seal-checking book, the entry being also signed by him. That book remains in the police-station, but is preserved for one year only. It is clear that 39 minutes was beyond the time usual for locomotive requirements, and it is stated by some of the witnesses that the guard usually checks the platform side; these points might have been cleared up by the evidence of the guard, in addition to the evidence of his having in fact made the check, to which he alone could speak.

The statement of Guard Rohead made at Dinapore is not evidence of the correctness of the statements made in it; these should have been proved by Rohead. Further the statements made in it are such as call for explanation. Three of them may be quoted :—

"(7) Where did you last check seals, etc., and find them correct ? Arrah.

(10) Where was the joint Police and Traffic Check last made of the seals of wagons on your train and with what result ? Arrah Passia as correct. At Arrah the Policeman must have mistaken it for a non-seal wagon as there were a number on the train loaded with stone. The side I checked was correct.

(15) Further remarks which you consider might help the Police in obtaining a clue to the theft. As I thoroughly checked all seals at BXR this wagon was tampered with either at BXR after checking or at Ara when shunted on the up line for 6-Dn."

As already stated, no witness was called who could speak as to what happened at Arrah, where the train stopped for over an hour; there is no explanation as to the absence of the policeman who is alleged in the above statement to have checked the offside of the train.

In the opinion of their Lordships, the absence of Rohead is a serious matter, and it is necessary to refer to various steps in the proceedings which related to Rohead. But first it may be noted that Rohead's statement was not

produced until January 10, 1928. The trial began on November 29, 1927, when it was adjourned ; it was resumed on January 10, 1928, and the rest of the defendants' evidence was taken on January 11, 12, 13, 16, 17, 18 and 19.

On April 21, 1927, the defendants applied for a commission to Patna to examine seven named persons as witnesses, who were stated to reside at a distance of about 1,300 miles. The application was opposed and was refused on the ground that these persons were all then in the service of the defendants, who were in a position to compel their attendance in Court without any great cost. Five of these persons were among the defendants' witnesses at the trial. A sixth was Sital Prasad Singh, seal checker at Dinapore, whose absence from the trial was accounted for by illness. The seventh was Guard Rohead.

On December 10, 1927, the plaintiffs proposed interrogatories to be answered by the defendant, of which No. 3 was :—

"What is the standing of Guard J. Rohead who you say conducted 132 down on 21st April 1925 from Moghal Serai to Buxar ? Is he in your service now ? If not, when did he retire or resign ? State the cause of his retirement or resignation if any."

This application was opposed and was refused on the same day by the Court on the ground that it was too late, as the trial had already started.

In response to a request by the plaintiffs, probably as the result of the above refusal, for information as to the whereabouts of Guard Rohead, the defendant on December 15 replied that the information could not be supplied. The plaintiffs wrote again on December 24, and, on January 3, 1928, the defendant replied as follows :—

"I regret I am unable to disclose the address of the above named (Guard J. Rohead) who is at present on leave preparatory to retirement. However, I will be prepared to forward any communication from you to him at the address given me."

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On January 10, 1928, when the trial was resumed, the defendant filed an affidavit, giving answers to the interrogatories which had been refused on December 10, 1927, and, in answer to No. 3, stated, "Guard J. Rohead joined railway service in 1902. He is now on furlough prior to retirement from 14th December 1927. He retired under age limit".

On January 19, 1928, on the conclusion of the evidence of their last witness, the defendants made an application, which was opposed by the plaintiffs and was rejected by the Trial Judge as follows :—

The defendants submit that :—

1. That the defendants are prepared to examine, in addition to the witnesses already examined, any other witnesses whom the plaintiffs want the railways to examine in order to show how the consignment was dealt with while in possession of the railways provided the Honourable Court deems it necessary to do so.

Plaintiffs be therefore called upon to state whether they want any witness to be examined by the railways regarding the dealing of the consignment.

19th January 1928.

J. G. MODY.

21st January 1928.

Defendants have already submitted to Court on 19th January 1928 that they have closed their case. This application does not lie in face of the fact that the defendants have to lead evidence as to how the consignment has been dealt with and they have to satisfy their requirements of law. They have not chosen to examine the persons who conducted and guarded 132-Down and also other persons on this train and other important witnesses on their behalf nor have they tendered them for cross-examination in spite of over-repeated applications. Thereafter it will be for the Court to see whether the defendants have led the whole evidence satisfactory for the requirements under law and to make adverse inferences against the defendants if they have chosen not to examine such important witnesses before they close their case. This application is therefore made by the other side under the pretence of showing the *bona fides* which they have not shown. Under the circumstances such an application is not legal and maintainable.

B. B. MODI,
Vakil.

The plaintiffs cannot be called upon now to state if any other witnesses are necessary to be examined by defendants for the purpose in question. The

defendants have already closed their case and they themselves are the best judges as to what evidence they are bound to lead to satisfy the Court on the question in hand. Application filed.

P. C. DESAI,
Sub-Judge.

21st January 1928.

The learned Judge appears to have confused the two distinct questions at this stage, to which their Lordships have already referred. It must have been obvious to the defendants that Rohead was an essential witness as to the dealing with the consignment, and they are here clearly informed—and not for the first time—that the plaintiffs so regarded him. Not only was he essential to the proof of his statement at Dinapore, but he should have been submitted for cross-examination. The defendants' application for a commission over seven months before the trial of one of their own servants, was unreasonable and was rightly refused; apart from any other reason, the plaintiffs were entitled to claim that the evidence of such an important witness should be given at the trial. The ultimate absence of the witness from the trial was never adequately explained, for the attempt to get a commission to examine Rohead after the evidence of both sides had been closed merely throws into contrast their previous attitude, and suggests that they were trying to put a better appearance on their previous default. If that application had been made in December or early in January, it might then have at least shown their readiness to make Rohead's evidence available.

While their Lordships would be inclined to hold that the respondent, by his failure to submit the evidence of Rohead, was in breach of his contractual obligation to give the evidence necessary for disclosure of how the consignment was dealt with, they are clearly of opinion that the failure to submit the evidence of Rohead, in the circumstances of this case, entitles the Court to presume, in terms of section 114 (*g*) of the Evidence Act, that Rohead's evidence, if produced,

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would be unfavourable to the respondent, and that, in consequence, misconduct by complicity in the theft of some servant or servants of the respondent may be fairly inferred from the respondent's evidence. It is unnecessary to refer to the appellants' other contentions, but, except as to the unexplained absence of the policeman, who is said by Rohead to have checked the offside of the train at Arrah, their Lordships were not seriously impressed by the appellants' criticisms as to the non-production of witnesses by the respondent, including Devraj, Vira and others.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the High Court should be set aside and that the decree of the Subordinate Judge should be restored, the appellants to have the costs of this appeal and their costs in the High Court.

Solicitors for the appellants : Messrs. *Lattey and Dawe.*

Solicitor for the respondent : *The Solicitor, India Office.*

C. S. S.

PRIVY COUNCIL.

J.C.* 1937 *March* 12

THE TATA HYDRO-ELECTRIC AGENCIES, LTD., BOMBAY, APPELLANTS *v.* THE COMMISSIONER OF INCOME TAX, BOMBAY PRESIDENCY AND ADEN, RESPONDENT.

[On Appeal from the High Court at Bombay]

Indian Income-tax Act (XI of 1922), section 10 (2) (ix)—Payments made in pursuance of obligations incurred in acquiring a business, whether may be deducted from profits of business in ascertaining assessable income.

Where an obligation to make payments is undertaken in consideration of the acquisition of the right to earn profits, that is of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business, the

**Present:* Lord Russell of Killowen, Lord Macmillan and Sir John Wallis.