

Present : De Sampayo J.

CASSIM v. PERERA.

411—C. R. Colombo, 53,489.

Fish sent by the railway—Insufficiently packed in ice—Refusal to deliver fish to consignee unless full parcels rate was paid—Action against parcels clerk for damages—Action based on tort—Wrongful conversion—Is the action only one on contract against the Government?

Fish packed in eleven boxes was sent by the Ceylon Government Railway to the plaintiff to the Slave Island station. As the boxes appeared to contain either no ice or insufficient ice, the defendant, the parcels clerk, reported the matter to the station master. The station master, on the orders of his superior officers, instructed the defendant not to allow the fish to be removed without the full parcels rate being paid (the concession of a reduced rate not being available to plaintiff, as the fish was not packed with sufficient ice).

The plaintiff refused to pay the full rate, and the fish was sold by auction by the Railway authorities. The plaintiff thereupon sued the defendant (parcels clerk) for the recovery of damages, alleging that the defendant acted illegally and wrongfully.

Held, that the action was not maintainable against the defendant, as the plaintiff's remedy, if any, was on the contract with the Government Railway, and not founded on tort.

"The plaint no doubt states that the defendant acted 'unlawfully,' and wrongfully refused to deliver, but the use of these strong terms does not alter the essential character of the action."

"Although a person who unlawfully refuses to give up property of which he has the custody cannot justify the refusal by saying that he is only agent or servant of another, yet, since in order to make him legally liable he must be shown to have had possession, it is material to consider his exact position towards the goods in question. A servant who has the care of goods on his master's premises cannot, as a general rule, be said to be in possession of them. The argument as to conversion of the fish by the defendant cannot be sustained."

THE facts are set out in the judgment.

Garvin, S.-G., for defendant, appellant.

E. W. Jayewardene, for plaintiff, respondent.

Cur. adv. vult.

January 24, 1917. DE SAMPAYO J.—

I think that the judgment of the Commissioner cannot stand, for the reason that the defendant is not legally liable to answer the plaintiff's claim. It appears that some fish, packed in eleven boxes, was carried by the Ceylon Government Railway from Mannar and Jaffna consigned to plaintiff at Slave Island, Colombo, and arrived

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at the Slave Island station on June 10, 1916. The rule is that, if fish is packed in ice in the proportion of one pound weight of ice at least for each pound weight of fish, it may be conveyed by the train at quarter parcels rate, and that otherwise it is charged at the ordinary rate. The defendant is the parcels clerk at Slave Island station, and as the boxes did not appear on arrival to contain the required quantity of ice, the defendant opened one box, and finding that there was no ice in it reported the matter to the station master, who got three more boxes opened, with the same result. The rest of the boxes were not opened but were weighed, and, an allowance being made for the weight of the boxes, were considered to contain no ice or insufficient ice. The station master reported the matter to his superior officers, and on their orders instructed the defendant not to allow the fish to be removed without the full rate being paid. The plaintiff refused to pay at that rate, and the fish was accordingly detained and ultimately sold by auction by the Railway authorities.

The plaintiff sued the defendant for the recovery of Rs. 200 as damages, and the Commissioner has given him judgment. In view of the legal points upon which this appeal turns, it is not necessary to discuss the evidence in detail, or to examine the criticisms of the Commissioner on the method of weighing and of calculating the quantity of ice. In the plaint the plaintiff, after reciting the consignment of the fish to him and its arrival at Slave Island station on June 10, states his cause of action against the defendant as follows: "That on the said date the defendant, acting illegally, wrongfully refused and prevented the removal of the said boxes of fish by the plaintiff, to the plaintiff's damage of Rs. 200."

The ordinary duties of the defendant are not disclosed, but it is clear that if as parcels clerk he has the business of delivering parcels to consignees, he can only be said to do so as a servant of the Government, or (to put it so for the sake of convenience) as a servant of the Ceylon Government Railway. The plaintiff's real cause of action is the non-delivery of the fish in breach of the contract of carriage. But it is said on behalf of the plaintiff that he has the option of suing in contract or in tort, and that his present action is founded on tort. We are familiar with cases where the owner of goods may frame his action in one of two ways, but the alternative is not always available. In *Kelly v. The Metropolitan Railway Company*¹ Lord Justice Smith stated the distinction thus: "If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendant be such that a duty arises from that

¹ (1895) 64 L. J. Q. B. D. 567.

relationship, then the action is one of tort." See also *Turner v. Stallibrass*.¹ Now, apart from the contract for conveyance of the fish, there was no duty on the defendant's part to deliver the fish to the plaintiff, and consequently the plaintiff's only remedy is on the contract. The relevancy of this point is that the contract was with the Ceylon Government Railway and not with the defendant, and therefore the defendant could not be sued for breach of that contract. The plaintiff no doubt states that the defendant acted "unlawfully," and "wrongfully" refused to deliver, but the use of these strong terms does not alter the essential character of the action. *Fleming v. The Manchester Railway Company*² is a strong case on the immateriality of the form of pleading. There, in an action against a railway company as common carriers, it was alleged that the defendants did not safely and securely carry and deliver a parcel of goods entrusted to them, but so carelessly conducted themselves that it was lost. The Court of Appeal, nevertheless, held that the action was founded on contract.

It is said, however, that there was such detention of the fish by the defendant as amounted to an act of wrongful conversion, and that this action was one for such wrongful conversion. In this connection it should be remembered that a carrier has a lien on the goods in respect of hire, and may decline to deliver until payment (*Wright v. Snell*³). By the rules such a lien is conserved to the Ceylon Government Railway. It is true that in this case there was a *bona fide* dispute as to what the hire should be, but that is no reason for holding that the detention until payment of the higher rate amounted to a conversion of the goods. The refusal should be unconditional (*Alexander v. Southey*⁴). Moreover, was it the defendant who detained the fish? As I said, he is what is called "parcels clerk." It does not appear that he, rather than the station master, has the custody of the goods carried by the railway. It is not even said that he is in charge of the goods shed or store at the station. It may well be that an employé, who has independent control and management of a warehouse, with the authority and duty to deliver goods according to his discretion, may be liable for unlawful detention, but the defendant is not an employé of that description, but is a subordinate officer acting under the immediate supervision and authority of the station master. The defendant, in fact, would have violated his duty if he delivered the fish to the plaintiff contrary to the orders of his superiors. Although a person who unlawfully refuses to give up property of which he has the custody cannot justify the refusal by saying that he is only agent or servant of another, yet, since in order to make him legally liable he must be shown to have had possession, it is material to consider his exact position towards the goods in question. A servant who has the care of goods on his

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master's premises cannot, as a general rule, be said to be in possession of them (*Davies v. Vernon* ¹), and nothing has been shown in this case for concluding that the defendant, occupying the position he did was in possession of the fish in question. In my opinion the argument as to conversion of the fish by the defendant cannot be sustained

The judgment appealed from is set aside, and the plaintiff's action dismissed, with costs in both Courts.

Set aside.

