

necessary, therefore, for this Court to interfere: see *Bullock v. Dunlap* ⁽¹⁾, in which the accused had been acquitted, yet failed in his suit against the police officer, retaining a ring pending the Magistrate's disposal of his application for instruction as to disposal of it under Stat. 2 and 3 Vic., cap. 71, sec. 29. Reference may be made also to *Dover v. Child* ⁽²⁾.

These cases show that the Magistrate may make an order on such evidence as is available, which order is good as to the delivery and possession, without depriving the real owner of any action that he may have for the assertion of his right in the Civil Court. In the Code of Criminal Procedure the provisions in this respect are less explicit than in the English Statutes, but the principle recognized is the same, and leads to similar consequences.

(1) L. R., 2 Ex. Div., 43.

(2) L. R., 1 Ex. Div., 172.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Scott,

QUEEN EMPRESS v. GANGA'RA'M SANTRA'M.*

Theft—Indian Penal Code (Act XLV of 1860), Sec. 378—Removal of property against wish of ostensible purchaser thereof—Apparent title or colour of right to property.

To constitute theft it is sufficient if property is removed, against his wish, from the custody of a person who has an apparent title, or even a colour of right, to such property.

Cape v. Scott (1) followed.

THIS was a reference, under section 438 of the Criminal Procedure Code (Act X of 1852), by E. Hosking, Esquire, Sessions Judge of Khándesh at Dhulia.

The reference was stated as follows:—

“Gangarám Santrám, (the accused), a blacksmith, owed complainant Girju Rs. 60, and during Gangarám's absence his wife Dhondi on the 21st July, 1884, sold, by Gangarám's direction, his

*Criminal Reference, No. 133 of 1884.

(1) L. R., 9 Q. B., 269, at p. 277.

1884

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working implements for Rs. 25 of the debt. On Gangarám's return he took back the implements against the wish of the complainant's wife, complainant himself not being present on the 15th August, 1884.

"The First Class Magistrate, Ráv Bahádur Bápu Purshottam, on the 25th idem convicted Gangarám of theft, and sentenced him to pay a fine of Rs. 10, and directed that the implements should be given to complainant Girju.

"I am of opinion that it is not proved that Gangarám intended to act dishonestly in taking the implements. It is admitted that they belonged to him until they were given to the complainant by Gangarám's wife. There is no evidence that Gangarám authorized his wife to give the implements to Girju. Gangarám's conduct in taking back the implements makes it improbable that he had directed that they should be given in part payment of his debt. The prosecution having failed to prove that Gangarám had parted with his right to the implements, the taking the implements without complainant's consent did not constitute the offence of theft.

"Complainant made Gangarám's wife Dhondi pass a so-called receipt to him, setting forth that by her husband's direction she had given Girju her husband's working implements as part payment of the debt due to Girju. The fact of complainant taking this document from Dhondi, when he ought rather to have given her a receipt, and the reiteration in the document of the fact of Dhondi acting under the direction of her husband, throws strong suspicion on the *bona fides* of complainant in taking the implements from Dhondi.

"For these reasons I am of opinion that the conviction should be reversed, the fine repaid, and the implements restored to Gangarám."

There was no appearance for the accused or for the prosecution.

WEST, J.—The prisoner Gangarám may have been in a position to recover his tools from Girju. But the latter held by an apparent title, or at least an assertion of title that was not plainly illusory. Now the law is, that against even a colour of right, a person aggrieved shall not take the law into his own hands: see

Cape v. Scott⁽¹⁾ quoted in *Virjivandás v. Mahomed Ali Khán*⁽²⁾.
The conviction on the view of the evidence taken by the Magistrate is good. I would so inform the Session Judge.

(1) L. R., 9 Q. B., 269 at p. 277.

(2) I. L. R., 5 Bom. at p. 215.

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APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

RAMCHANDRA APA'JI (ORIGINAL DEFENDANT), APPELLANT, v. BA'LA'JI
BHAURA'V (ORIGINAL PLAINTIFF, RESPONDENT.)*

1884

October 8-

Possession—Mortgage—Redemption—Evidence Act I of 1872, Sec. 110—Burden of proof.

The plaintiff sued to redeem certain land, alleging that it had been mortgaged by his father to the defendant in 1854-55. The defendant denied the mortgage, and alleged that he purchased it under a deed of sale from the plaintiff's father in 1849, and had ever since been in his possession as owner. The deed of conveyance was not forthcoming, nor was the alleged mortgage deed. The Court of first instance rejected the plaintiff's claim on the ground that the mortgage was not proved. The lower Appellate Court reversed the decree of the Court of first instance. The defendant appealed.

Held, that the defendant's possession was *prima facie* evidence of a complete title, and that the plaintiff, who alleged that the defendant was merely a mortgagee, was bound to prove his own right as mortgagor clearly and indefeasibly. Mere statements that the property had been mortgaged, which failed to establish any particular mortgage, did not shift the burden of proof, or require the mortgagee to show what were the terms of such mortgage, or his right to retain possession under it.

THIS was a second appeal from the decision of M. N. Nánávati, First Class Subordinate Judge with appellate powers at Thána.

The plaintiff sued to redeem certain property from the defendant. He alleged that the property was mortgaged in 1853-54 by his father to the defendant for Rs. 60; that by the terms of the mortgage the debt was to be satisfied out of the rents and profits, and that it had been fully paid off in 1863 or 1864; that the plaintiff's father had died thirteen years before the institution of the plaintiff's present suit, the plaintiff being then a minor. He

* Second Appeal, No. 435 of 1883.

ERRATUM.

In the report of the case of the *Queen Empress v. Gungáram Santrám* (*supra*, p. 135) the first words of the reference by the Sessions Judge have been inadvertently omitted. The reference should commence thus:—“*The case for the prosecution was as follows:— Gungáram Santrám (the accused), &c. &c.*”