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15 B. 697.

JUDGMENT.

SARGENT, C. J.—The plaint alleges that Bai Javer has made a will of the property, which was the subject of the award and to which by the award the plaintiff was to be entitled after Bai Javer's death. The will is said to be in favour of the defendants, who thus, it was contended, became, in the language of s. 42 of Specific Relief Act, "interested to deny" the plaintiff's title as reversioner.

It has been contended before us that these allegations do not constitute a case in which in the exercise of a sound judicial discretion a declaratory decree ought to be made. Had this objection been taken in the first Court, we should hesitate much before holding that a declaratory decree ought to be made in such a suit as against either the widow or the other defendants. The judgment of the Privy Council in *Rani Pirthi Pal Kunwar* v. *Rani Guman Kunwar* (1) has an important bearing on that point, and also shows that a declaratory decree may be reversed, on appeal, on that ground. But here the objection has been taken for the first time on appeal, and we agree with the remarks of Mitter, J., in *Ram Kanaye Chuckerbutty* v. *Prosunno Coomar Sein* (2) that it would be "unjust to allow the defendants to benefit by it after they had failed to resist the plaintiff's claim on the merits." After Bai Javer's death there was still the same cause of action against the defendants as existed at the time the plaint was filed, *viz.*, that they were "interested in denying the plaintiff's title." The decree of the Court, however, should, we think, to avoid doubts which might arise in future litigation, be amended by declaring that the will of Bai Javer is invalid so far as it operates to defeat the award, having regard to what subsequently took place during Bai Javer's lifetime. Parties to pay their costs.

Decree amended.

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15 B. 702.

[702] APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* SHIVRAM AND TWO OTHERS.* [24th March, 1891.]

Indian Penal Code (Act XLV of 1860), ss. 378 and 22—Theft—Earth—Moveable property.

Earth, that is soil, and all the component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached, is moveable property capable of being the subject of theft. Whoever dishonestly severs such earth commits theft.

Where a person dishonestly carried away 100 cart-loads of earth from the complainant's land, *held* that he was guilty of theft.

Queen-Empress v. *Kotayya* (3), dissented from.

[Appl., 27 M. 531=14 M.L.J. 155 (159)=1 Weir 417.]

THIS was an appeal by the Local Government from an order of acquittal passed by Rao Saheb P. W. Sathe, Magistrate (Second Class) at Khed, in the case of *Queen-Empress* v. *Shivram and two others.*

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* Criminal Appeal, No. 133 of 1889.

(1) 17 I.A. 107=17 C. 933. (2) 13 W.R. C.R. 176. (3) 10 M. 255.

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15 B. 702.

The three accused were charged with theft for taking away 100 cart-loads of earth from the complainant's land.

The trying Magistrate held, on the authority of *Queen-Empress* v. *Kotayya* (1), that earth removed by digging was not moveable property, and, therefore, could not be the subject of theft. The accused were, therefore, acquitted.

Against this order of acquittal the Government of Bombay appealed to the High Court.

Shantaram Narayan (Government Pleader), for the Crown.

Ganesh Ramchandra Kirloskar, for the accused.

JUDGMENT.

BIRDWOOD, J.—The accused in this case were charged with stealing 100 cart-loads of earth from the complainant's land, and have been acquitted by the Magistrate (Second Class) on the ground that earth so taken cannot be the subject of theft. This decision is in accordance with the ruling of the Madras High Court in *Queen-Empress* v. *Kotayya* (1). We are unable, however, to follow that ruling. It appears to us that earth, when dug or [703] ploughed up, so as to be in a state in which it can be put into a cart and taken away, ceases to be "land" or a thing "attached to the earth or permanently fastened to anything which is attached to the earth" within the meaning of s. 22 of the Indian Penal Code. By the process of digging or ploughing, earth may become severed from "the earth" or from any "land" to which it was attached; and may so become "moveable property" within the definition contained in that section. As soon as earth is so severed, "it becomes capable of being the subject of theft," as appears from explanation 1 of s. 378 of the Code; and "a moving effected by the same act which effects the severance may be a theft," as appears from explanation 2 of that section. We must, therefore, reverse the order of acquittal and order that the accused be retried.

PARSONS, J.—I concur. Explanation 1 to s. 378 of the Penal Code provides that "a thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth." Section 22 of the same Code states that "the words 'moveable property' are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth." Two Judges of the Madras High Court have held that the property referred to in these sections means property different and distinguished from the earth itself, and that it is not theft to dig up and carry away earth—*Queen-Empress* v. *Kotayya* (1). I am unable to agree with them, and I prefer to follow the dissentient Judge and the previous ruling of the same Court in the *The Queen* v. *Tamma Ghantaya* (2). Section 22 of the Penal Code does not exempt "earth and things attached to the earth," but "land and things attached to the earth;" "land" and "earth" are not synonymous terms, and there is a great distinction between "the earth" and "earth." By severance, things that are immoveable become moveable; and it is, in my opinion, perfectly correct to call those things attached which can be severed; and undoubtedly it is possible to sever earth from the earth and attach it again thereto. [704] In places where earth is scarce, it is a common article of purchase

(1) 10 M. 255. (2) 4 M. 228.

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and sale. A cart or donkey load of earth may be bought any day in the bazar. This earth is certainly moveable property, and it has become so by reason of its having been severed from the earth to which it was once attached, and to which it will again become attached when deposited thereon. Under the Penal Code, it does not matter by whom the severance is effected; and "a person is said to cause a thing to move by separating it from any other thing," while "a moving effected by the same act which effects the severance may be theft" (Explanations 3 and 2 to s. 378). In my opinion, earth, that is soil, and all the component parts of the soil, inclusive of stones and minerals when severed from the earth, are moveable property capable of being the subject of theft. Whoever, therefore, severs such earth from the earth, with the dishonest intention specified in s. 378, can be said to commit theft.

Their Lordships reversed the Magistrate's order of acquittal, and directed a retrial of the case by the same Magistrate.

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15 B. 704.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Jardine.

RAMABAI SAHEB PATWARDHAN (*Original Plaintiff*), *Appellant v.* BABAJI AND OTHERS (*Original Defendants*), *Respondents.**

[23rd April, 1891.]

Landlord and tenant—Lease, construction of—Perpetual tenancy.

Where the terms of a lease did not appear to create a perpetual tenancy, there being no circumstances in the evidence from which the Court ought to infer that the intention of the parties was to create such a tenancy.

Held, that the lease was not a perpetual lease.

Gangabai v. *Kalapa* (1) and *Gangadhar Bhikaji* v. *Mahadu* (2), referred to.

[R., 8 O.C. 61 (63).]

SECOND appeal from the decision of A. S. Moriarty, Assistant Judge of Satara.

Ejectment for non-payment of rent.

The plaintiff sued to eject the defendant from certain land [705] for non-payment of rent. The plaintiff alleged that the land had been let in 1872 to the defendant for a year for Rs. 60; that he had continued to hold at that rent ever since; that in April, 1886, he had been given notice to pay rent at the rate of Rs. 125 per annum, or to vacate. The enhanced rate had not been paid, and hence this suit.

The defendant alleged that he held under a perpetual lease, which had been granted to his father and one Mahadu *bin* Subhana, each of whom took a moiety. He contended that the plaintiff was entitled only to recover rent, and that she had no right to put an end to the lease.

The following is the translation of the lease relied on by the defendant:—

"To Parsu, son of Narayan Bhaigavda (inhabitant of) kasba Tasgaon.—The Sur year one thousand two hundred and thirty-four (A.C. 1833-34).

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* Second Appeal No. 67 of 1890.

(1) 9 B. 419. (2) P. J. for 1889, p. 321.