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our answer to the question propounded is in the affirmative.

C. C. GHOSE J. I agree.

SUHRAWARDY J. I agree.

B. B. GHOSE J. I agree.

DUVAL J. I agree.

S. M.

CRIMINAL REVISION.

Before Suhrawardy and Panton JJ.

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July 10.

E. J. JUDAH

v.

EMPEROR.*

Theft—Removal by owner, from possession of bailee, article given him for repairs—Dishonest intention—Repairs partly done, but not completed within stipulated or reasonable time—Lien of bailee till payment for part of work done—Penal Code (Act XLV of 1860) ss. 24, 378 and Illust. (j)—Contract Act (IX of 1872) s. 170.

Where an electric kettle was given to a repairer for repairs, and he did not complete the work within the stipulated period, or even within a reasonable time thereafter, and the owner forcibly removed the article from the repairer's shop, without payment of the sum demanded by the latter for work already done to it: *Held*, that the owner was not guilty of theft, as his intention was not to cause wrongful loss to the repairer, or wrongful gain to himself, within s. 24 of the Penal Code, but to recover his property after the lapse of a reasonable time.

*Criminal Revision No. 353 of 1925, against the order of T. Roxburgh, Chief Presidency Magistrate, Calcutta, dated April 27, 1925.

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A bailee entrusted with an article to repair has no lien over it, if he has not completed the repairs within the stipulated time ; or when time is not of the essence of the contract, within a reasonable time ; and he cannot refuse to part with it, after doing a certain amount of work, till payment for such work, in the absence of an agreement to receive part payment for the work done ; and the owner is entitled, in the circumstances, to recover his article without payment for the same.

Skinner v. *Jager* (1) followed.

THE petitioners, E. J. Judah, R. M. Sassoon and A. M. Sassoon, were tried by the Chief Presidency Magistrate, convicted under section 380 of the Penal Code, and sentenced to imprisonment till the rising of the Court, and to a fine of Rs. 75 each, and in default to one month's rigorous imprisonment.

It appeared that Judah gave the complainant, Nilmoney Mukerjee, an electric repairer at 7-1, Middleton Street, an electric kettle for repairs some 11 or 12 days before the occurrence, according to the prosecution, and on the 28th March 1925, according to the defence. The price settled was Rs. 6, and the repairs were to be executed within six or seven days. Judah called several times at the complainant's shop thereafter for the kettle, and was informed that the repairs were not completed. On the 18th April, Judah went to the shop with the other petitioners and demanded the return of the kettle. The complainant stated that he had done all the work except the fitting-in of the washer, and declined to allow the kettle to be taken away without payment of Rs. 5 for the repairs already done. One of the petitioners thereupon took the kettle out of an almirah and left the shop with it. The complainant laid a charge against the three petitioners at the thana, and the police sent them up for trial. The complainant admitted in his cross-examination, that until the washer was fixed, the

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kettle was unserviceable. The petitioners were convicted and sentenced as stated above, and thereupon obtained the present Rule.

Mr. Pugh (with him *Babu Promode Kumar Ghose*), for the petitioners. The complainant undertook to repair the kettle within a stipulated period but failed to do so, and he cannot claim to be entitled to retain it till payment for part of the repairs on the principle of "*quantum meruit*". As there was an express contract, the work must be done in entirety within the stipulated period, otherwise no claim for payment can be made. The complainant had no lien, and the taking of the kettle from his custody did not constitute theft. Refers to section 170, Contract Act, and *Skinner* v. *Jager* (1). There was no dishonest intention on the petitioner's part in removing the kettle.

The Deputy Legal Remembrancer (*Mr. Khundkar*), for the Crown. The case falls under section 378 *illust.* (*j*) of the Penal Code. refers to *Queen-Empress* v. *Gangaram Santram* (2). Under section 170 of the Contract Act the complainant had a lien for the repairs already done. The accused prevented the completion of the repairs. Time was not of the essence of the contract, and the complainant was entitled to payment *quantum meruit*. Refers to sections 53 and 55 of the Contract Act.

SUHRAWARDY J. The three accused in this case have been convicted under section 380 of the Indian Penal Code, and sentenced to imprisonment till the rising of the Court, and to pay a fine of Rs. 75 each, or in default to one month's rigorous imprisonment. The case for the prosecution is that the accused No. 1

(1) (1883) I. L. R. 6 All. 139. (2) (1884) I. L. R. 9 Bom. 135.

gave a kettle for repairs to the complainant, who has an electric repair shop at 7-1, Middleton Street, eleven or twelve days before the occurrence (as stated by the complainant), or on the 28th March, as stated by the accused in the petition filed in this Court. The complainant promised to finish the repairs within six or seven days. On the 18th April the accused went to the shop and demanded return of the kettle. The complainant refused to part with it as the repairs were not complete, and ultimately agreed to return it to the accused if he was paid Rs. 5 for the repairs already done. I may mention here that the amount fixed for the repairs of the kettle was Rs. 6. The accused refused to pay the amount, took away the kettle from the almirah, and walked out with it. He was accompanied by the other accused, and all of them were tried and found guilty as stated above. In order to sustain a conviction under section 380 of the Indian Penal Code, it must be found that the accused dishonestly took the property out of the possession of the complainant: and "dishonestly" has been defined as meaning "with intent to cause wrongful gain to one person, and wrongful loss to another person." It is necessary, therefore, to prove in this case, all the other facts being admitted, that the accused took away the article from the possession of the complainant with the intention of causing wrongful gain to himself or wrongful loss to the complainant. The matter stands thus. The complainant took the article for repairs on promise to finish them within six or seven days. Not having done the work within the time stipulated, the accused went to his shop and took, admitting for argument's sake, forcible possession of the article. Did he, in these circumstances, commit the offence of theft? My answer to the question is in the negative. It is argued on

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behalf of the prosecution that the complainant had a lien on the kettle, and the accused having removed it from his possession, has committed an offence, as defined in section 378 of the Indian Penal Code, and illustrated in *illustration (j)* to that section. The learned trial Magistrate also relied upon the *illustration (j)* to find dishonest intention of the accused. *Illustration (j)* runs thus: "If *A* owes money to Z "for repairing the watch, and if Z retains the watch "lawfully as a security for the debt, and *A* takes the "watch out of Z's possession, with the intention of "depriving Z of the property as a security for his "debt, he commits theft, inasmuch as he takes it "dishonestly." Apparently the framers of the Code had in their mind the provisions of the law of Contract as embodied in section 170 of the present Contract Act which creates a lien in favour of the bailee over goods on which he is entitled to remuneration. The Deputy Legal Remembrancer in support of the conviction argues that the complainant had a lien of Rs. 5 on the kettle for the amount of work done. This raises the intricate question of civil law relating to "*quantum meruit*". In the first place, who has to determine that the complainant is entitled to Rs. 5? In the second place, as has been held in the case of *Skinner* v. *Jager* (1), where a certain sum is fixed for the repair of an article, and there is nothing to indicate that the repairer would be entitled to receive remuneration for a part of the repair, he has no right to retain the article until he receives his remuneration for the amount of work done. There is no evidence in this case that there was any agreement or understanding, implied or express between the parties, that if the kettle is repaired even in such a way as to be useless (the complainant admits it is useless in its present

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state), the complainant will be entitled to remuneration for the amount of work done. I am of opinion that the complainant had no lien over the kettle, and section 170 of the Contract Act does not apply.

We have been referred to the case of *Queen-Empress* v. *Gangaram Santram* (1), and upon the authority of that case it is argued that in order to constitute theft it is enough if the property is removed from the possession of a person who has an apparent title or colour of a right to it. On the facts of that case, though scantily reported in the Report, the decision may be justifiable. But on the plain reading of the section of the Indian Penal Code I think it must be clearly established that the accused did commit the act with the intention as defined in section 24 of the Indian Penal Code. It will be preposterous to lay down, as a general rule of law, that a person, who is entrusted to repair a certain article, is entitled to claim lien or to refuse to part with it after doing a certain amount of work which makes no improvement thereupon, and the owner is not entitled to recover it from him without paying for such work as has been done. If I give a piece of cloth to a tailor to make a coat and he sews only a sleeve, but does not do the rest of the work within the time stipulated or within a reasonable time, I have no right, according to the view urged on behalf of the Crown, to take back the cloth until I have paid for the work done. In the present case the complainant failed to perform his part of the contract, namely, to do the work within six or seven days, and the accused was justified in asking for a return of the article if the work was not done within a reasonable time. The learned Deputy Legal Remembrancer refers to certain sections of the Contract Act which deal with certain circumstances where-

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time is of the essence of the contract. In a case where time is not of the essence of the contract, it must be performed within a reasonable time. In simple everyday transactions like the present it is not inconsistent with law to look to the commonsense side of the matter. Kettle is an article of everyday use. A man may require to have this household article repaired with as little delay as possible. According to the accused it was retained by the complainant for twenty days, and according to the complainant for eleven or twelve days. Conceding that the accused acted improperly in demanding and taking back the article, they have not certainly acted dishonestly. Their intention was not to cause wrongful loss to the complainant or wrongful gain to themselves, but to recover their thing after lapse of reasonable time. In my opinion the conviction cannot stand. I hold that the conviction of the petitioners under section 380 is bad in law. I must express, however, my strong disapproval of the conduct attributed to the petitioners—conduct unworthy of gentlemen which they claim to be. The conviction of the petitioners, and the sentence passed upon them are set aside. The fines, if paid, will be refunded.

PANTON J. I agree.

E. H. M.