there was a "pledge" within the meaning of section 172 of the Indian Contract Act, and the rights of the pawnee (the plaintiff) are governed by section 176 of that Act—that is the plaintiff could either sue upon the debt, retaining the pledge as a collateral security or he could sell the thing pledged, on reasonable notice to the defendant. His right of suit was barred by limitation, but his right of sale still remained and this was a right secured to him by law which he could exercise without suit. Hence the suit was not maintainable as there was no necessity for it. This point does not appear to have been considered in the cases of *Nim Chand Baboo* v. *Jagabundhu Ghose*(1) and *Madan Mohan Lal* v. *Kanhai Lal*(2).

My answer to the reference accordingly is that, so far as the suit was a suit for recovery of the money personally from the defendant, it was barred under article 57 of the second schedule of the Limitation Act, and so far as it was a suit for sale of the pledged goods it did not lie, and therefore no question as to limitation arises.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Russell.

SURI VENKATAPPAYYA SASTRI (COMPLAINANT), PETITIONER,

v.

MADULA VENKANNA (ACCUSED), COUNTER-PETITIONER.*

1904. January 18, 25. February 3.

Penal Code—Act XLV of 1860, s. 379—Theft—Dishonestly quarrying and removing stones from land in possession of another.

Stones, when quarried and carried away are "things severed from the earth" (within the meaning of section 378, explanation 1 of the Indian Penal Code) and are "moveable property" (within the meaning of section 22) and as such are capable of being the subject of theft.

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(1) I.L.R., 22 Calc., 21. (2) I.L.R., 17 All., 284.

* Criminal Revision Case No. 385 of 1903, presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of V. Venugopaul Chetty, Sessions Judge of Kistna Division, in Criminal Revision Case No. 12 of 1903, presented against the judgment of A. C. Kristna Row, Stationary Sub-Magistrate of Gunnavaram, in Calendar Case No. 33 of 1903.

SURI VENKATAPPAYYA SASTRI v. MADULA VENKANNA.

A person who quarries and carries away stones from land in the possession of another commits theft.

Queen-Empress v. *Kotayya*, (I.L.R., 10 Mad., 255), dissented from.

CHARGE of theft. The alleged theft consisted in the accused having dishonestly quarried and removed stones from land (a hill known as Sobhanadriswamy, at Agripalli) in possession of another. The Magistrate discharged the accused. Against that order of discharge the complainant presented this Criminal Revision Petition. The case first came before Sir S. Subrahmania Ayyar, Officiating C.J., and Russell, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—Assuming that the accused in this case quarried and carried away the stones dishonestly from the hill, the property of the temple, the question is whether he could be convicted of theft under section 379 of the Indian Penal Code. The Magistrate, following the decision in *Queen-Empress* v. *Kotayya*(1) is of opinion that the offence of theft has not been committed.

This opinion seems to be at variance with the opinion expressed in *Queen* v. *Tamma Ghantaya*(2).

In the case of *Queen-Empress* v. *Shivram*(3), also, a different view is taken. It was therein held that, "Where a person dishonestly carried away 100 cart-loads of earth from the complainant's land he was guilty of theft." We are of opinion that this is the correct view of the law. We, therefore, refer for the decision of a Full Bench the question whether, on the assumption mentioned above, the accused could be convicted of theft.

The case came on in due course before the Full Bench constituted as above.

C. V. Krishnasami Ayyar (*V. Krishnasamy Ayyar with him*) for petitioner.

S. Kasturiranga Ayyangar (*P. S. Sivaswamy Ayyar with him*) for accused.

The Court expressed the following

OPINION.—In this case the accused was charged with theft in that he dishonestly quarried and carried away stones from land in the possession of another. The Sub-Magistrate discharged the

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(1) I.L.R., 10 Mad., 255. (2) I.L.R., 4 Mad., 228.
(3) I.L.R., 15 Bom., 702.

accused on the ground that the stones were not moveable property, and so could not be the subject of theft, and he relied on the ruling in *Queen-Empress* v. *Kotayya*(1).

The question referred for our decision is whether, assuming that the stones were quarried and carried away dishonestly, the accused could be convicted of theft under section 379, Indian Penal Code.

We have no doubt but that the answer to this question must be in the affirmative. Under section 378, Indian Penal Code, "Whoever intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft." The only question is whether the stones in this case are "moveable property." Section 22 enacts that these words "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" and in connection with this definition explanations 1 and 2 to section 378 provide 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," and "A moving effected by the same act which effects the severance may be a theft."

We have no doubt but that stones when quarried and carried away are "things severed from the earth" and are "moveable property" and as such are capable of being the subject of theft. Before they were quarried out they formed part of "the earth," and as such they were not moveable property, but as soon as they were quarried out they were "severed from the earth" and became "moveable property." This was the view taken by this Court in the case of *The Queen* v. *Tamma Ghantaya*(2). There the Court (Turner, C.J., and Kernan, J.) referring to salt formed spontaneously in a swamp said "We cannot distinguish this case from theft of wood in a reserved forest, except that salt is actually a part of the soil, while trees are not; yet things immovable become movable by severance, and this would apply to severed parts of the soil, *e.g.*, stone quarried, minerals, iron or salt collected,

(1) I.L.R., 10 Mad., 255.

(2) I.L.R., 4 Mad., 228.

SURI VENKATAPPAYYA SASTRI v. MADULA VENKANNA.

as well as timber which has grown, or edifices which have been erected on the land."

In the case of *Queen-Empress* v. *Kotayya*(1) Collins, C.J., and Kernan, J. (Brandt, J., dissentiente) held that soil dug up by a person not the owner of the land and carried away by him could not be the subject of theft on the ground that such soil was not a thing attached to the earth and then severed from it, but was a part of the earth or land itself, and therefore excepted by section 22 from the corporeal things which were moveable property, and they distinguished the case of *The Queen* v. *Tamma Ghantaya*(2) on the ground that the salt in the latter case was a natural efflorescence on the surface of the earth—a natural produce attached to the earth. We think that this decision was erroneous and that the learned Judges were misled by supposing that it was the intention of the framers of the Indian Penal Code to reproduce the English law of larceny. The terms of the section show that this was not their intention, and it is by the terms of the section that the law is determined. As recently remarked by the Privy Council in the case of *Gokul Mandar* v. *Pudmanund Singh*(3). "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." Section 22 of the Indian Penal Code does not except "earth and things attached to the earth" but "land and things attached to the earth." "Land" and "earth" are not synonymous, and there is a wide distinction between "earth" and "the earth." "Earth" may be severed from "the earth" and attached to it again. When "earth" is severed from "the earth" it becomes moveable property. A cart-load of "earth" may be bought any day in the bazaar. Can it be held for a moment that "earth" when thus carted about and sold by one person to another is not moveable property, and is incapable of being the subject of theft? Under the Indian Penal Code it does not matter by whom the severance from "the earth" was made, and the explanation to section 378 expressly provides that "a moving effected by the same act which effects the severance may be theft." It was on these grounds that the Bombay High Court, in *Queen-Empress* v.

(1) I.L.R., 10 Mad., 255. (2) I.L.R., 4 Mad., 228.
(3) I.L.R., 29 Calc., 707.

Shivram(1) held that "earth" might be the subject of theft, and the same reasoning applies, *a fortiori*, to stones that are quarried from "the earth." We think that the view of Brandt, J., in *Queen-Empress* v. *Kotayya*(2) is correct and we hold that any part of "the earth," whether it be stones or sand or clay or any other component, when severed from "the earth" is moveable property, and is capable of being the subject of theft. Our answer to the reference is, therefore, in the affirmative.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

MANTHARAVADI VENKAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.*

1903. October 26, 27.

Limitation Act—XV of 1887, *arts.* 18, 120—*Land taken under Land Acquisition Act —Refusal by Collector to give award—Possession taken by Government.*

Land had been taken under the Land Acquisition Act, possession having been taken by the Collector before an award was made. The Collector subsequently refused to give an award, on the ground that the land belonged to Government. More than one year after the Collector's refusal to give an award, the present suit was instituted for a declaration that the land belonged to the plaintiffs and for recovery of possession, or, in the alternative, for damages for the wrongful refusal of the Collector to give the award. The finding was that the land was the plaintiffs'; but the plea of limitation was raised:

Held, that the suit was not barred by limitation. The land had vested absolutely in Government, and so plaintiffs were not entitled to recover possession but could only claim damages for breach of a statutory duty on the Collector's part. The suit contemplated by article 18 of the Limitation Act is one for compensation for non-completion, and that article does not apply to a case in which the land has vested in Government. Article 120, therefore, governed the suit.

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(1) I.L.R., 15 Bom., 702. (2) I.L.R., 10 Mad., 255.

* Second Appeal No. 242 of 1902, presented against the decree of I. L. Narayana Row Naidu, Subordinate Judge of Kistna, in Appeal Suit No. 28 of 1901, presented against the decree of S. Hanumanta Row Pantulu, District Munsif of Bapatla, in Original Suit No. 297 of 1899.