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brothers and the other heirs of the deceased, he was in the position of a trustee. That being so, the defendants were entitled to set up the *jus tertii* of the heirs of the deceased debtor other than Abdul Wahab, and under the decree which the plaintiff got he could proceed against the interests of Abdul Wahab alone in the estate of the deceased. I also would therefore restore the decree of the Court of first instance.

Appeal decreed.

APPELLATE CRIMINAL.

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March 14.

Before Mr. Justice Blair and Mr. Justice Aikman.

KING-EMPEROR *v.* JOHRI.*

Act No. XLV of 1860 *(Indian Penal Code), sections* 224, 411—*Escape from lawful custody—Actual thief arrested by private person whilst in possession of stolen property—Section* 411 *of the Indian Penal Code not applicable to the thief himself.*

Section 411 of the Indian Penal Code does not apply to the person who is the actual thief. Where, therefore, a person whose bullock had been stolen in his absence traced it to the house of the thief, and there and then arrested him, and made him over to a chaukidar, from whose custody he escaped, it was *held* that this was not an escape from lawful custody within the meaning of section 224 of the Code.

Semble that if the owner of the bullock had himself been entitled to make the arrest, the subsequent custody of the prisoner by the chaukidar would have been a lawful custody. *Queen-Empress* v. *Potadu* (1) referred to.

THE facts of this case sufficiently appear from either of the judgments.

The Government Advocate (Mr. *E. Chamier*), in support of the appeal.

BLAIR, J.—This is an appeal from an order of acquittal by a Magistrate under the following circumstances. One Johri had been convicted of stealing a bullock, the property of one Mata Bhikh. Mata Bhikh lost his bullock, apparently got wind of Johri, followed him into his house, and there found him in possession of the stolen bullock. Mata Bhikh then arrested him and made him over to the police chaukidar, from whose custody he shortly afterwards escaped. Johri was tried for and convicted

* Criminal Appeal No. 93 of 1901.

(1) (1888) I. L. R., 11 Mad., 480.

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of theft, and sentenced to six months' rigorous imprisonment. He was then put upon his trial for an offence under section 224 of the Indian Penal Code for escaping from the custody in which he was lawfully detained for the offence with which he was charged. The Magistrate acquitted him of that charge, holding that the offence of theft was not committed either in the presence of Mata Bhikh, complainant, or of the chaukidar to whom Mata Bhikh handed him over, and, as the law gives neither of those persons a right to arrest except for an offence committed in their view, the custody was an illegal custody, and that escape from such custody did not fall within the purview of section 224. The Local Government have appealed on the ground that the complainant was justified in arresting the accused, and that the subsequent detention being legal, the accused had escaped from lawful custody. It is admitted that the offence of theft was not committed in view either of Mata Bhikh or of the chaukidar. If, therefore, this appeal is to be supported at all, it must be on the ground that Johri was either receiving or retaining the stolen property in view of the person arresting him. In this case there is no suggestion of receipt, so the offence therefore could be nothing but a retaining of stolen property within the meaning of section 411 of the Indian Penal Code. Now in our opinion the retention by the thief of the stolen property is not an offence within the meaning of section 411. It is merely a continuation of that appropriation to himself of another man's goods which constitutes the gist of what was always called in England the principal felony or theft. Until the receipt of stolen goods was made a statutory felony, it was only an abetment of the principal felony of stealing, so that it would have been impossible to convict a man at once of the principal felony and of the abetment of such felony. Indeed, it is still possible in England to convict a man of abetment at common law, and it is not necessary that he should be prosecuted for the statutory felony. The framers of the Indian Act were, no doubt, cognizant of the fact that it was settled law in England that the receipt of stolen goods to be guilty must be a receipt with knowledge at the time of the receipt that they were stolen. No subsequent knowledge would make that guilty which was originally innocent. Therefore, in my opinion, the framers

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of the Indian Act added the word "retain" to the word "receive." The class of persons against whom section 411 is directed is a class to whom these alternative words apply—"knowing or having reason to believe the same to be stolen property." It seems to me that the application of these words to the thief himself would be wholly inappropriate, and that therefore the person who is himself the thief does not fall within the purview of section 411. The question raised by the Government appeal as to whether a qualified person having made an arrest, and having then handed over the person arrested to the custody of an agent, such custody continues to be, what it was originally, a lawful custody is one which I should be disposed to answer in the affirmative in accordance with the ruling in *Queen-Empress* v. *Potadu* (1) if it were necessary to do so. I would dismiss this appeal.

AIKMAN, J.—I am of the same opinion. The facts of the case are proved, and are admitted by the accused. On the 18th of August last a bullock belonging to one Mata Bhikh was stolen. Mata Bhikh traced it that same evening to the house of the accused, Johri, who was present in his house at the time. Mata Bhikh arrested Johri, and made him and the bullock over to the village chaukidar to be taken to the police station. Johri made his escape from the custody of the chaukidar, but was arrested four days afterwards. He was put upon his trial for the theft of the bullock, was convicted under section 379 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment. He was then put upon his trial for an offence punishable under section 224 of the Indian Penal Code, that is, for escaping from the custody of the village watchman. The Magistrate who tried the case, and who has written a very good judgment, came to the conclusion that as neither Mata Bhikh nor the chaukidar had seen the accused committing the offence of theft, he could not be said to have been lawfully detained, and on this ground he acquitted him of the offence punishable under section 224. Against this order of acquittal the present appeal has been filed by the learned Government Advocate under the direction of the Local Government. The learned Government Advocate admitted that the theft

(1) (1888) I. L. R., 11 Mad., 480.

had not been committed in the presence of Mata Bhikh or of the chaukidar. He endeavoured to support the appeal on the ground that when Mata Bhikh arrested Johri, the latter was then committing an offence punishable under section 411 of the Indian Penal Code, and that offence being cognizable and non-bailable, the complainant, Mata Bhikh, it was argued, was justified in making the arrest under section 59, sub-section (1) of the Code of Criminal Procedure. This argument, I may note in passing, could not apply to the chaukidar, as the offence under section 411 of the Indian Penal Code is not one of the offences mentioned in section 8 of the North-Western Provinces Police Act, 1873, for which the chaukidar has authority to arrest. It is true that it is sometimes doubtful whether an offender is himself the thief or only a receiver. In such a case there is no objection to the conviction being in the alternative. But where, as in this case, the facts clearly point to Johri being himself the thief, in my opinion he cannot be said, when arrested by Mata Bhikh, to have been committing an offence under section 411. The language of that section, I hold, is clearly directed against some person other than one who is proved to be the actual thief. I have arrived at the conclusion, therefore, that the arrest by Mata Bhikh was not justified by section 59, sub-section (1) of the Code of Criminal Procedure. The custody, therefore, in which the chaukidar detained Johri was not a lawful custody, and his escape therefrom did not amount to an offence under section 224 of the Indian Penal Code. Had the arrest by Mata Bhikh been lawful, I should have had little difficulty in holding, in concurrence with the Madras High Court (see the case cited by my learned colleague) that the escape from the chaukidar's custody was an offence under section 224. But it is unnecessary to decide this point. I agree in the order proposed.