

no claim ; *Prosonno Kumar Patra v. Uday Sant* (1). There is a difference of opinion as to whether it is theft to take the property of another in order to compel payment of a just debt.—*Queen-Empress v. Agha Muhammad Yusuf* (2)—but it has never been suggested that there can be no theft unless there is an intention to deprive the owner of the property permanently. In the present case there was ‘wrongful gain’ to the applicant and ‘wrongful loss’ to the school-boy within the definition of those terms in the Code. I must, therefore, hold that the applicant took the books dishonestly and that he was rightly convicted of theft under section 379, Indian Penal Code. This application is dismissed.

Application dismissed.

Before Mr. Justice Champier.

EMPEROR v. GUR PRASAD GIR. *

Act No. IX of 1890 (*Indian Railways Act*), section 125—*Cattle left in charge of keeper allowed to stray on a railway line—Liability of owner.*

The owner of cattle which have been allowed to stray upon a railway in consequence of the negligence of the person actually in charge of them on the owner's behalf is not liable to punishment under section 125 (1) of the Indian Railways Act, 1890. *Queen Empress v. Andi* (3) followed.

THIS was a case referred by the Sessions Judge of Jaunpur under section 438 of the Code of Criminal Procedure. The facts of the case appear from the following order :—

“ In this case the applicant has been fined Rs. 5, under section 125 (1) of the Railways Act, as the owner of certain cattle which strayed on the railway line at Barasathi in this district. Referring to the case of *Queen-Empress v. Andi* (3) which has been cited by the learned pleader for the applicant, the learned Magistrate says that ‘it is not proved to his satisfaction that the applicant (who was not present when the trespass took place) had, as a matter of fact, appointed a person in charge of the cattle, and that it was due to the negligence of that person that the cattle did stray.’ On the evidence I think that the learned Magistrate had really no alternative but to be satisfied of both those matters. Musai, who was convicted and sentenced along with him, corroborates applicant's assertion that he is his cow-herd, and that he was appointed by him to look after the cattle ; and, further, Musai admits negligence in having idly suffered another person to guard the cattle instead of looking after them himself. There is no evidence to rebut these assertions of the two accused, which are clearly true. The case consequently is on all fours with the

* Criminal Reference No. 575 of 1911.

(1) (1895) I. L. R., 22 Cal., 669. (2) (1896) I. L. R., 18 All., 89.
(3) (1894) I. L. R., 18 Mad., 228.

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case of *Queen-Empress v. Andi*, and there is no ground for making the owner of the cattle liable.

"I would, therefore, report the case to the Hon'ble High Court with the recommendation that the conviction and sentence be set aside, and the fine, if paid, be refunded. The record will first be laid before the learned Magistrate, for any remarks which he may wish to submit."

The Magistrate's explanation was as below :—

"As I have remarked in my judgement, the Railways Act seems to make the owner of cattle trespassing on the railway responsible for the offence unless he can show that he has taken all reasonable care and precaution to prevent the trespass. The appointment of a person to guard the cattle will not, in my opinion, relieve the owner of the responsibility unless it is proved that it was due to the negligence of that person that the cattle did stray. The absence of the owner from the place where trespass takes place is immaterial.

"In the present case the petitioner, Gur Prasad Gir, states that his cow-herd, Musai, was in charge of the cattle, but no evidence has been produced by him to support this allegation. In fact he refused to summon or examine any witnesses on his behalf. The assertion of Musai, who was convicted and sentenced along with the petitioner, though corroborating that of the applicant, Gur Prasad Gir, cannot be treated as evidence in his favour. The evidence for the prosecution clearly shows that on the day of occurrence there was no person to look after the cattle. I think the burden of proving that the trespass took place owing to the negligence of Musai who is alleged to be the applicant's cow-herd lay on the applicant. The bare assertions of the two accused, uncorroborated as they are by independent evidence, are not, in my opinion, sufficient to exonerate him from the liability."

CHAMIER, J.—Gur Prasad Gir was convicted under section 125 of the Railways Act. On the evidence, there seems no doubt, that he had placed his co-accused Musai in charge of his cattle and that it was due to the negligence of Musai that the cattle strayed on the railway. Following the decision of the Madras Court, reported in *Queen-Emperor v. Andi* (1), I hold that Gur Prasad Gir should not have been convicted. I set aside his conviction and direct that the fine, if paid by him, be refunded.

Conviction set aside.

(1) (1894) I. L. R., 18 Mad., 228.