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seem that consequential relief can be insisted upon when the plaintiff will not get any redress by having merely a declaratory decree; for instance, when the property is in possession of the defendant, the plaintiff will not be allowed to seek merely a declaration of his title but must pray for recovery of possession as a consequential relief, and where a mere declaration is sufficient to give the plaintiff full relief a further declaration will be deemed to be redundant; and the fact that the plaintiff asked for a redundant relief will not alter the nature and scope of the suit and would make the suit one for a declaration with consequential relief. The present is a case where relief no. 4 in the plaint is a mere surplusage, for upon the declarations made under reliefs 1 to 3 the plaintiffs would be entitled to attach and sell the right, title and interest of defendant no. 1 in the property in suit. On the other hand, the granting of relief no. 4 will not at all improve the position of the plaintiffs for they would not be entitled to get the property unless defendant no. 1 has interest therein. The decision of their Lordships in the case of *Bibi Phul Kumari* v. *Ghanshyam Misra*(1) is instructive.

I would, therefore, hold that the relief should be treated only as a declaratory and the court-fee should be charged under Schedule II, Article 17, of the Court-Fees Act.

REVISIONAL CRIMINAL.

Before Adami and Bucknill, J. J.

1924.

April, 4.

HUSSAIN BUKSH MIAN

v.

KING-EMPEROR.*

Penal Code, 1860 (Act XLV of 1860)—sections 379 and 429—theft of an animal—animal subsequently killed by thief—

* Criminal Revision no. 154 of 1924, from a decision of Ananta Nath Mitter, Esq., Sessions Judge of Saran, dated the 28th January, 1924.

(1) (1908) I. L. R. 35 Cal. 202: L. R. 35 I. A. 22.

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conviction for both theft and mischief illegal—person assisting in skinning the carcass not guilty of mischief.—

Where a person who has stolen an animal subsequently kills it for the purpose of eating it, he cannot be convicted under both sections 379 and 429 of the Penal Code.

Madar Saheb, In the case of(1), *Bichuk Ahar* v. *Auchuck Bhoonea*(2) and *Emperor* v. *Ramla Ratanji*(3), followed.

Where, after a thief has stolen and killed an animal, another person assists him in skinning the carcass, the person so assisting is not guilty either of an offence under section 379, Penal Code, or of an offence under section 429.

This was an application in criminal revisional jurisdiction made on behalf of three persons named Hussain Buksh Mian, Pachkodi Mian and Khairati Mian. These three men were convicted of certain offences in connection with the theft and killing of a cow; their convictions were by a first class Magistrate of Saran on the 12th of December, 1923. The first applicant was convicted of an offence punishable under the provisions of section 429, Penal Code (mischief by killing cattle) and was sentenced to one year's rigorous imprisonment and to pay a fine of Rs. 200; in default of payment of the fine he was to undergo four months' further rigorous imprisonment; the whole of the fine was to be given, if realized, to the complainant in respect of whose cow the applicants were concerned. The second and third applicants were each found guilty of two distinct offences; first, of an offence punishable under the provisions of section 379, Penal Code (theft), and secondly, of the same offence as that of which the first applicant had been convicted. In respect of the first offence (that is, theft) they were sentenced each to six months' rigorous imprisonment whilst in respect of the offence punishable under the provisions of section 429 they were each sentenced to a further one year's rigorous imprisonment; these sentences of imprisonment being ordered to run consecutively.

(1) (1902) 1 Weir. 497. (2) (1866) 6 W. R. (Cr.) 5.
(3) (1903) 5 Bom. L. R. 460.

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The applicants appealed to the Sessions Judge of Saran but on the 28th of January last that Judge upheld the convictions although he modified the sentences which had been passed upon the 2nd and 3rd applicants by ordering that the two separate periods of imprisonment of which they had each been sentenced should run concurrently.

An application was then made to the High Court in its revisional jurisdiction and a rule was issued, on the question of sentence only, on the 11th March.

Muhammad Yunus (with him *Manmatha Nath Pal*), for the applicant.

BUCKNILL, J. (after stating the facts as set out above, proceeded as follows) :—

The first point which is made with regard to the second and third applicants, by the learned Counsel who appears for the applicants here, is that under the circumstances of this case it was impossible for them to have been convicted both of an offence punishable under the provisions of section 379 and of another under section 429, Penal Code. It is therefore necessary to state shortly what the circumstances were in this case.

The complainant was a man called Babu Lal Ahir. His cow appears to have strayed away and entered a field which contained some crops. His daughter was unable by herself, she being but a very small child, to persuade the animal to come out of the place into which it had trespassed; and she ran home to tell her father. When her father came to turn the cow out it was not to be found. One of the prosecution witnesses, however, heard some noise in the fields behind his hut and he noticed the second and third applicants driving the cow through the fields. He gave information of what he had seen and several persons then went as quickly as they could to the locality, which was some few *bighas* away from where the accused persons lived, and there they found the cow dead and the three applicants all skinning it.

Mr. *Yunus* contends, and I think rightly, that so far as the second and third applicants who were convicted of both offences of theft *and* mischief are concerned, the circumstances do not warrant any such double convictions. The modern law on the subject appears to be quite clear that this contention is sound. In the case of *Madar Saheb* (1) it was held that the killing of a stolen sheep cannot be indicted separately as constituting mischief; in *Bichuk Ahar* v. *Auchuck Bhoonea* (2) it was there held that a double sentence for theft and mischief is illegal and improper; in *Emperor* v. *Ramla Ratanji* (3) it was again held that a person who steals a fowl and then kills it cannot be punished separately for the offence of theft and mischief.

I think that there can be no doubt that where theft of an animal has been committed, the mere killing of it afterwards by the person who stole it for the purpose of eating it himself cannot add another offence. In this case, therefore, I think that the two convictions recorded against the second and third applicants cannot stand. The real offence which here was committed was their theft of the cow; and its being subsequently killed and eaten by them and their friends or disposed of does not justify their being separately convicted in addition to the conviction and sentence on the charge of theft, of an offence punishable under the provisions of section 429

With regard to the question of sentence upon these two applicants, as their conviction under the provisions of section 429 has to be set aside, the only sentence which will stand against them will be that recorded against them in connection with the offence of theft of which they have been convicted; that is a sentence of six months' rigorous imprisonment. Under the circumstances of this case I see no reason why that sentence should really be reduced; it was a somewhat

(1) (1902) 1 Weir, 1497. (2) (1866) 6 W. R. (Cr.) 5.
(3) (1903) 5 Bom. L. R. 460.

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barefaced theft and the carrying out of it shows from the evidence the determination and effrontery of these applicants.

The position, however, of the first applicant is somewhat different; he was not seen at the time when the theft was committed and there is really hardly any evidence, except of a somewhat inferential character, to show that he was present when the cow was killed. Supposing he had joined the other two after they had killed the cow and had assisted them to skin it, he would certainly neither be guilty of an offence of theft or of an offence punishable under the provisions of section 429 of the Penal Code; whether if he had guilty knowledge that the animal had been stolen he could be prosecuted under some other section of the Indian Penal Code, I am not prepared here to say. But it is quite clear that under neither of the sections 379 and 429 could he have been successfully prosecuted.

Now in this case, as I have said, there is no direct evidence which shows that he was present either at the theft or before the cow was killed; there is only evidence to show that after the cow was dead he was assisting the two other applicants to skin it. It is true that, in the judgment of the lower appellate Court, it is stated that a head-constable met the first applicant when he was in charge of a *dafadar* and after his name had been mentioned as one of the accused in the first information, and, on enquiring from him *as an accused person* what had happened, the head-constable was told, so he says, by the first applicant, that he (the first applicant) had slaughtered an *ox* which he had purchased and that the people were making an unnecessary fuss about it. Mr. *Yunus* has, I think, rightly pointed out that this statement, although it might be regarded as of exculpatory character for one purpose, cannot be regarded as receivable in evidence for the purpose of incriminating the applicant. It is also true and it seems quite clear that neither the first applicant nor in fact any of the applicants put forward a defence which was true. They alleged, so I understand, that

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the animal which had been killed was one which had been purchased by them from a third party. However, whatever may be the nature of the evidence, the fact remains that with the exception of the statement (which I do not think was admissible in evidence to which I have already referred) there is nothing, so far as could be pointed out to us on the record, which shows that this applicant appeared upon the scene prior to the slaughter of the cow in question.

BUCKNILL, J.

Under those circumstances, although I myself may say that I have great doubts as to whether this applicant was not really present at the time when the cow was killed, I do not think that there is sufficient evidence against him to prove that fact. In consequence the conviction and sentence which have been recorded against this applicant must be set aside and the applicant set at liberty. The fine if paid should be refunded to him.

ADAMI, J.—I agree.

Order modified.

REVISIONAL CRIMINAL.

Before Adami and Bucknill, J. J.

H. V. LOW AND COMPANY, LIMITED

v.

MAHARAJA SIR MANINDRA CHANDRA NANDY.*

1924.

April, 8.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 145(4)—*wrongful but not forcible dispossession, effect of.*

In 1917 the Maharaja of Kassimbazar appointed the petitioners managing agents of his collieries, including the Ekra Colliery, for a term of 20 years. On the 4th February, 1924, the Maharaja's attorney sent a notice to the petitioners

* Criminal Revision no. 128 of 1924, from an order of E. S. Hoernle, Esq., I.C.S., Assistant Deputy Commissioner of Dhanbad, dated the 15th February, 1924.