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but the stamp sheet on which the document was engrossed must have been produced by somebody from somewhere, and it seems to me incumbent upon the party who knows how it was produced to explain to the Court where it came from.

I therefore set aside the order of discharge and direct the District Magistrate, Prome, to have the case retried, either by himself or by a Special Power Magistrate or commit to Sessions if no Magistrate is available to deal with it under special powers, and the case should be tried in view of the remarks I have made.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

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Nov. 29.

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Penal Code (Act XLV of 1860), s. 379—Claim of right—Good faith in belief and in the act of taking, necessary—Extent of such defence.

Held, that where a person has a claim of right which he believes to be good and has attempted to assert that right by doing an act which in good faith he believed he had every right to do, and for such reason the Court is of opinion that he did not act dishonestly, then the person is innocent of theft. But where in asserting his right to some property which a person believes to be good, he does something which he knows he has no right to do, e.g., by taking the law in his own hands and removing such property from the possession of his opponent who claims the property himself, he may be guilty of theft.

CARR, J.—This is a case of considerable difficulty, to which I have had to give very careful consideration. There seems to be little doubt as to the facts; the difficulty is to determine whether the acts of the appellants were dishonest or not.

* Criminal Appeal No. 1163 of 1927.

The house in connection with which the case arises was the the property of the estate of one Biswamber Gowala, deceased. His widow, as administratrix of the estate sold the house to the complainant, R. K. Sen, in 1919. She took possession of the house and let it out to tenants, but in 1925 he evicted the tenants and the house remained untenanted. But it appears that one Jagmohan Lal, a son of Biswamber and his administratrix, entered into occupation without the complainant's permission, and apparently without his knowledge. In 1926 Jagmohan sold the house to the appellants for dismantling. The appellants are dealers in building materials and their purchase was one made in the ordinary course of their business. They began to dismantle the house and remove the materials. The complainant then made a report to the police who seized the materials and sent up Jagmohan for trial for theft. The present appellants were not accused in that case and there seems to be no doubt that up to that time they had acted entirely in good faith. The first appellant, however, was a prosecution witness in the case. The case was Criminal Regular No. 510 of 1926 of the Third Additional Magistrate, Rangoon. The Magistrate acquitted Jagmohan. His judgment was not very precise but his reason seems to have been that Jagmohan was asserting a *bonâ fide* claim of ownership of the house and that though his proper course would have been to file a suit against the complainant it could not be held that he had acted dishonestly. He directed the return of the materials that had been seized to the present first appellant, from whose possession they had been taken by the police.

This judgment was dated the 1st September, 1926. On the 1st November the first appellant applied to the District Magistrate (Criminal Revision No. 295 of 1926)

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for permission to dismantle the house in question and remove the materials. Notice of this application was given to the complainant, who appeared. It was stated in the application that on the 12th October the appellant had been demolishing the house in order to remove the materials but had been prevented from doing so by the respondent, who was accompanied by police constables.

The District Magistrate dismissed the application, holding that the criminal courts had no jurisdiction in the matter. In the course of his order he remarked that the respondent (R. K. Sen) was the rightful owner of the house.

On the 25th November R. K. Sen applied to the District Magistrate in his capacity of Deputy Commissioner to move the Local Government to appeal against the acquittal of Jigmohan. The proceeding is District Office Proceeding No. 105 of 1926. No notice of this application was given to the appellants but from the diary of the proceeding it would seem that it was heard with the revision case last mentioned. This, however, is not supported by the revision record according to which orders were passed in that case on the 9th December. The accuracy of the dates in the revision proceedings seems to me very questionable.

But it is certain at any rate that orders on R. K. Sen's application were not passed till the 11th January, 1927. There is nothing on that record to suggest that the appellants were present when the order was passed nor is there any evidence that they ever became aware of it. In fact the acts which are in issue in the present case were done, or at least begun, before that order was passed. In his order the Deputy Commissioner expressed the opinion that Jigmohan had been wrongly acquitted but declined to recommend an appeal.

On the 12th January R. K. Sen filed the present complaint charging the appellants with theft by removing materials of the house on the 1st to 4th January. On his examination and in his evidence he alleged removal also on the 11th January.

The appellants were first discharged, the Magistrate holding that they had acted in the assertion of a *bonâ fide* claim of right, and that their acts therefore did not amount to theft. On an application in revision (No. 223 of 1927) the District Magistrate ordered a further inquiry and on that inquiry the appellants have been convicted of theft and fined Rs. 500 each. The materials which had been seized under a warrant issued by the Court were ordered to be delivered to the complainant. It should be noted that Jagmohan was in the first instance made an accused in this case but never appeared. It is said that he is dead.

The only real ground of this appeal is a claim that the appellants acted in an honest belief that they were entitled to do what they did.

I have been referred to a number of cases which lay down the *dictum* that a person who takes property in the assertion of a *bonâ fide* claim of right cannot be convicted of theft. I do not like such *dicta*, which seems to me rather to obscure than to elucidate the law. What the Court has to decide in a case such as the present is whether the act of the accused person was dishonest or not. If it was not dishonest than it does not amount to theft. If the *dictum* abovementioned means that the accused has a claim of right which he believes to be good and has attempted to assert that right by doing an act which in good faith he believed he had every right to do and that for that reason the Court is of opinion that he did not act dishonestly and that therefore he is

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not guilty of theft, than I have no quarrel with it. Stated in this form it is merely a description of the process by which the Court arrives at the finding that the accused's act was not dishonest.

But with the dictum as more briefly set out above I do quarrel. It is quite possible that a person may have a claim which he believes to be good to certain property and yet that in asserting that right he may do something which he knows he has no right to do. For instance he may know perfectly well that his claim is disputed and that if he wishes to enforce it his proper course is to do so by having recourse to the Courts. If knowing that he prefers to take the law into his own hands by removing the property from the possession of his opponent, knowing that his opponent also lays claim to the property, then I should say that his act is dishonest and amounts to theft. He has caused wrongful gain or possession to himself and wrongful loss of possession to his opponent.

In the present case I have no doubt that in the first instance the appellants bought the materials of the house from Jagmohan in good faith, believing that Jagmohan had a right to sell them. But in view of the facts set out there can be no doubt that when in January they did the acts complained of they were fully aware that their claim was disputed by the complainant who himself claimed to own the property. They must also have known that the complainant's claim was based on a transfer by the administratrix of the estate. They may have thought that there was a flaw in the complainant's title and that their own was better, but they must have known that the dispute between them could only be finally decided by a competent Civil Court. If there were nothing else in the case I should have held that they had acted dishonestly and I should have refused to interfere.

But there is another factor in the case. This is contained in the evidence of an advocate of this Court who was the first witness for the defence. This gentleman says that he appeared for Jagmohan on the first trial and that he also argued the first appellant's application for permission to remove the materials. Nevertheless after the District Magistrate had dismissed that application he advised the appellants to take the law into their own hands and to remove the materials from the house site.

Now I consider that that was very bad advice and that it was wrong for an advocate to give such advice. But that does not affect the fact that the advice was given. This fact shows that the appellants did not act on their own initiative either knowing that their action was wrong or not caring whether it was right or wrong. Instead they took care to obtain advice from an advocate of some standing and I think they were entitled to expect that the advice given to them would be such as they would be safe in following. In the face of this fact I find myself unable to find, as I should have found on the other facts of the case, that the appellants acted dishonestly. In my opinion therefore the appellants are entitled to acquittal.

I therefore set aside the convictions and sentences passed upon Rangaswamy and Rackiah Pillay and direct that they be acquitted and that the fines, if paid, be refunded to them. Their bail bonds will be cancelled.

The order of the Magistrate for the return to the complainant of the materials seized is confirmed. And I note for the information of the appellants that if they wish to assert their claim to the materials of the house in question they must do so by due process of law. Should they again take the law into their own hands it is unlikely that any plea of a *bona fide* claim will avail them.

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