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their doing so as my brother Baguley has done (and I would add that I entirely agree with all he has said on that point) I will content myself with adding that, quite apart from the obvious good sense of the matter, the decree in Civil First Appeal No. 107 of 1935, in this Court, is, from its very form and terms, clearly a personal order against the appellant-defendant to pay the Rs. 1,200 to the respondent-plaintiff. Therefore in my judgment the appellant in the present appeal should succeed on this second point.

I accordingly agree with my brother Baguley that the order proposed by him is the one which we should pass. I also agree that each of the parties to this appeal should bear their own costs.

APPELLATE CRIMINAL.

Before Mr. Justice Mosely.

PAW DIN *v.* THE KING.*

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Aug. 16.

Theft and mischief—Separate and distinct offences—Separate sentences for each offence at one trial—Cattle grazing in jungle—Possession of owner—Separate punishments for two offences—Offences need not be distinct—Criminal Procedure Code, s. 35—Penal Code, ss. 71, 379, 429.

The accused stole a bullock from the jungle, where it was put to graze by its master, a cartman, and then killed it for food. He was convicted of the offences of theft and mischief at one trial and was sentenced separately for each offence. *Held* that the sentences were legal.

Theft and mischief are two distinct offences covered by two separate definitions and punishable separately as such.

Emperor v. *Bhawan Surji*, 38 Bom. L.R. 164, followed.

Hussain Buksh v. *King-Emperor*, I.L.R. 3 Pat. 804 ; *Jairo* v. *Emperor*, (1916) Cr. L.J. Vol. 17, Sind J.C.'s Court, 238 ; *Madar Saheb and another*, (1905) 1 Weir 497 ; *Queen-Empress* v. *Aung So*, (1893-00) P.J.L.B. 633 ; *Queen-Empress* v. *Paik Hmwe*, (1892-96) 1 U.B.R. 241, dissented from.

Cattle turned out to graze in the pasture or jungle are still in the possession of the owner unless the contrary is shown, and the taking of such cattle is theft and not criminal misappropriation.

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* Criminal Appeal No. 813 of 1937 from the order of the Subdivisional (S.P.) Magistrate of Allanmyo in Criminal Trial No. 93 of 1937.

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Queen-Empress v. *Nga Thein O*, (1892-96) 1 U.B.R. 238, referred to.

Under s. 35 of the Criminal Procedure Code, as amended, it is not necessary in order to give separate punishments that the two offences should be distinct; and a man can be convicted of and separately punished for any two offences, subject to the provisions of s. 71 of the Penal Code.

King-Emperor v. *Mi Hlwa*, I.L.R. 12 Ran. 419, referred to.

MOSELY, J.—The appellant Paw Din stole a bullock from the jungle, where it was put to graze by its master, a cartman, and then killed it for food. He had three previous convictions, for theft, cheating, and taking ransom, for which he served two years' rigorous imprisonment in each case. No doubt all three cases were concerned with cattle. In the present case he was sentenced by the Special Power Subdivisional Magistrate to three years' rigorous imprisonment on a charge under section 379, Penal Code, and to two years' rigorous imprisonment on a charge under section 429, Penal Code, the sentences to run consecutively.

This appeal was admitted only for consideration of the question whether the separate sentences were legal or proper. In my opinion, the question is purely academic, as, if one was found to be illegal, the other would have to be enhanced to the extent of the combined sentences, in view of the previous convictions.

It appears to me, however, that the sentences were legal and justified. I notice that in a former case, where an accomplice of the present accused was tried and convicted of theft (the present accused then having absconded), the conviction was altered in appeal to one under section 403, Indian Penal Code. This was incorrect. I agree with what was said in *Queen-Empress* v. *Nga Thein O* (1) that cattle turned out to graze in the pasture or jungle are still in the possession of the owner unless the contrary is shown, and the taking of such cattle is theft and not criminal misappropriation.

(1) (1892-96) 1 U.B.R. 238.

As to the combined charges, it was held in *Queen-Empress* v. *Nga Aung So and others* (1) that the law does not contemplate that a thief should be more severely punished because he rendered the recovery of the stolen property impossible. It was added that if the bullock had merely been maimed to prevent its recovery the conviction for both theft and mischief could be supported.

The same view was taken in *Queen-Empress* v. *Nga Paik Hmwe* (2). Here it was said that to constitute the offence of mischief the offender must act with intent to cause wrongful loss ; that by stealing a bullock a thief had taken it dishonestly, according to the definition in section 378, Indian Penal Code, and to do a thing dishonestly is defined in section 24 as doing it with the intention of causing wrongful loss : therefore, it was said, the wrongful loss to the owner of the bullock was already caused, and there could be no intention of causing him wrongful loss when the animal was slaughtered. It appears to me that, on the face of it, this ignores the fact that the theft might merely ensue in a temporary deprivation to the owner of the animal, and that the slaughter of it must ensue in a permanent deprivation of the animal, so that further or aggravated wrongful loss could be caused after the offence of theft, by a further offence of mischief. *Madar Saheb and another* (3) is to the same effect. *Jairo and another* v. *Emperor* (4) is also to the same effect. The judgment is based on the curious ground that the object of the destruction of the animal was no doubt that of benefiting the offender, and not of injuring the complainant and, therefore, did not amount to the offence of mischief. It was overlooked that the offence

(1) (1893-00) P.J.L.B. 633.
(2) (1892-96) 1 U.B.R. 241.
(3) (1905) 1 Weir, 497.
(4) (1916) Cr. L.J. Vol. 17, Sind J.C.'s Court, 238.

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of mischief, by its definition (section 425, Penal Code), comprises not merely acts that were committed with intent to cause wrongful loss, but also acts committed with the knowledge that they were likely to cause wrongful loss. *Hussain Buksh Mian* v. *King Emperor* (1) is a decision to the same effect.

It is to be noted that when the earlier of these rulings were published (those before 1923), section 35 of the Criminal Procedure Code contained the word "distinct", which is omitted in the present Code. The section now reads :

"When a person is convicted at one trial of two or more offences, the Court may . . . . sentence him for such offences . . . . ."

It is not necessary now, in order to give separate punishments, that the two offences should be distinct, and a man can be convicted of and separately punished for any two offences, subject to the provisions of section 71 of the Penal Code. See on this *King-Emperor* v. *Mi Hlwa* (2). In the present case, not only are the two offences distinct, but they are covered by two separate definitions, and were committed at different times. I would respectfully agree with what was said in *Emperor* v. *Bhawan Surji* (3), which is quoted here *in extenso* :

"These two offences are distinct offences and constitute two different acts falling within the definitions of theft as well as of mischief. For the offence of theft what is necessary is 'the dishonest removal of moveable property out of the possession of any person without his consent', and the essence of the offence of mischief is the wrongful destruction or diminution in the value of any property so as to cause loss or damage to any person.

It is true that the element of dishonesty, that is to say, the causing of wrongful loss or wrongful gain to some person, is a common element in both these offences. But it cannot be said that simply because the accused has caused wrongful loss to

(1) (1924) I.L.R. 3 Pat. 804. (2) (1934) I.L.R. 12 Ran. 419.
(3) 38 Bom. L.R. 164, 166.

another person by taking away his property without his consent, the subsequent act of destruction of that property would not be an offence because the wrongful loss is already caused by taking it away from its possessor. Wrongful loss to a person can be caused in a variety of ways. Wrongful loss to a person whose property is stolen may be a temporary loss so long as he is kept out of its possession without his consent, while the wrongful loss to a person whose property is destroyed is a permanent loss. The nature of the loss in both cases is different and falls under the definitions of distinct offences. It is, therefore, possible to commit the offence of mischief in respect of the stolen property even though some loss has already been caused to its possessor by the offence of theft. The explanations to section 425 say that the offence of mischief may be committed with regard to any property, and against a person who may not be the owner of the property, and it may be committed with regard to the offender's own property. This would show that the essence of the offence of mischief consists in the wrongful destruction or diminution in value of the property, whether it is one's own, or somebody else's. It seems to me, therefore, on the wording of ss. 378 and 425, Indian Penal Code, that these two acts are distinct offences, and that the intention to cause wrongful loss by the destruction of property is different from the intention to cause wrongful loss by its mere removal from a person's possession.

It may be noted that ss. 428 and 429 deal with certain aggravated forms of mischief one of which is killing certain animals and are made punishable with a higher sentence. Thus killing an animal in certain cases is made a distinct offence. A man may thus simply kill an animal without stealing it, and if his case falls under the definition of mischief, he would be guilty of the offence of aggravated form of mischief in certain cases, or he may at first intend to steal it and thereafter intend to kill it, in which case, there is no reason why the two acts which are both recognized as distinct offences should not be punished as such. Even if the animal is stolen with the intention of subsequently killing it, and thereafter it is killed, the legal position would not be different."

There was ample evidence of the commission of the crime, which I do not propose to discuss. The sentences passed were, in my opinion, proper ones. This appeal will be dismissed.