

APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS v. SHIVRAM AND TWO OTHERS.*

Penal Code (Act XLV of 1860), Secs. 378 and 22—Theft—Earth—
Moveable property.

, that is soil, and all the component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached, is the property capable of being the subject of theft. Whoever dishonestly removes such earth from the earth commits theft.

Where a person dishonestly carried away 100 cart-loads of earth from the complainant's land, held that he was guilty of theft.

In *Queen-Empress v. Kotayya*⁽¹⁾ dissented from.

There was an appeal by the Local Government from an order of acquittal passed by Ráo Sáheb P. W. Sáthe, Magistrate (Second Class,) at Khed, in the case of *Queen-Empress v. Shivrám and two others*.

The three accused were charged with theft for taking away 100 cart-loads of earth from the complainant's land.

The trying Magistrate held, on the authority of *Queen-Empress v. Kotayya*⁽¹⁾, that earth removed by digging was not moveable property, and, therefore, could not be the subject of theft. The accused were, therefore, acquitted.

Against this order of acquittal the Government of Bombay appealed to the High Court.

Shántarám Nárayán, (Government Pleader,) for the Crown.

Ganesh Rámchandra Kirloskar for the accused.

BIRDWOOD, J.:—The accused in this case were charged with stealing 100 cart-loads of earth from the complainant's land; and have been acquitted by the Magistrate (Second Class,) on the ground that earth so taken cannot be the subject of theft. This decision is in accordance with the ruling of the Madras High Court in *Queen-Empress v. Kotayya*⁽¹⁾. We are unable, however, to follow that ruling. It appears to us that earth, when dug or

*Criminal Appeal, No. 133 of 1889.

(1) I. L. R., 10 Mad., 255.

ploughed up, so as to be in a state in which it can be a cart and taken away, ceases to be "land" or a thing 'to the earth or permanently fastened to anything attached to the earth' within the meaning of section 2 of the Indian Penal Code. By the process of digging or ploughing the earth may become severed from "the earth" or from any thing to which it was attached; and may so become "moveable property" within the definition contained in that section. If the earth is so severed, "it becomes capable of being the subject of theft," as appears from explanation 1 of section 378 of the Code, and "a moving effected by the same act which effects the severance may be a theft," as appears from explanation 2 of that section. We must, therefore, reverse the order of acquittal and that the accused be retried.

PARSONS, J. :—I concur. Explanation 1 to section 378 of the Indian Penal Code provides that "a thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft soon as it is severed from the earth." Section 22 of the same Code states that "the words 'moveable property' are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to any thing which is attached to the earth." Two Judges of the Madras High Court have held that the property referred to in these sections means property different and distinguished from the earth itself, and that it is not theft to dig up and carry away earth—*Queen-Empress v. Kotayya*⁽¹⁾. I am unable to agree with them, and I prefer to follow the dissentient Judge and the previous ruling of the same Court in the *The Queen v. Tamma Ghan-taya*⁽²⁾. Section 22 of the Penal Code does not exempt "earth and things attached to the earth," but "land and things attached to the earth;" "land" and "earth" are not synonymous terms, and there is a great distinction between "the earth" and "earth." By severance, things that are immoveable become moveable; and it is, in my opinion, perfectly correct to call those things attached which can be severed; and undoubtedly it is possible to sever earth from the earth and attach it again thereto

(1) I. L. R., 10 Mad., 255.

(2) I. L. R., 4 Mad., 228.

here earth is scarce, it is a common article of purchase. A cart or donkey-load of earth may be bought any bázár. This earth is certainly moveable property, and become so by reason of its having been severed from the land to which it was once attached, and to which it will come attached when deposited thereon. Under the law, it does not matter by whom the severance is effected, if a person is said to cause a thing to move by separating it from any other thing," while "a moving effected by the same person which effects the severance may be theft" (Explanations 3 to section 378). In my opinion, earth, that is soil, and the component parts of the soil, inclusive of stones and shells, when severed from the earth, are moveable property capable of being the subject of theft. Whoever, therefore, seizes such earth from the earth, with the dishonest intention provided in section 378, can be said to commit theft.

Their Lordships reversed the Magistrate's order of acquittal, and directed a retrial of the case by the same Magistrate.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Jurdine.

RA'MABA'I SA'HEB PATWARDHAN, (ORIGINAL PLAINTIFF), APPELLANT,
v. BA'BA'JI AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Lease, construction of—Perpetual tenancy.

Where the terms of a lease did not appear to create a perpetual tenancy, there being no circumstances in the evidence from which the Court ought to infer that the intention of the parties was to create such a tenancy,

Held, that the lease was not a perpetual lease,

Gangabai v. Kalapa(¹) and *Gangadhar Bhikaji v. Mahadu*(²) referred to.

SECOND appeal from the decision of A. S. Moriarty, Assistant Judge of Sátára.

Ejectment for non-payment of rent.

The plaintiff sued to eject the defendant from certain land

* Second Appeal, No. 67 of 1890.

(¹) L. R., 9 Bom., 419.

(²) P. J., for 1889, p. 321.