1871

THE QUEEN v. KALI CHARAN MISSER.

action for damages. A mere plea by the accused that the property, of the theft of which he is charged, is his own property, unsupported by proof, or by some circumstances which tend to indicate that there is some truth in the statement, is not sufficient to entitle him to be summerily discharged. If the accused fails to show that the alleged stolen property is his, but proves that he in good faith, believing the property belonging to the complainant to be his, took that property out of the complainant's possession, then in such a case, the dishonest intention being absent, the person accused will not be guilty of theft. See Illustration (p.) in section 378 of the Penal Code; and also Morgan and Macpherson's work, page 339.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

THE QUEEN *v.* HARGABIND PAL.*

1871, July 21.

Criminal Procedure Code—(Act VIII of 1869), s. 310—Award of Jury—Appointment of Jury.

A Magistrate cannot receive and enforce the award of a jury under section 310 of the Criminal Procedure Code, delivered long after the day fixed for the purpose.

A jury appointed under section 310 is not properly constituted when only the foreman is appointed by the Magistrate, and the rest of the members by the parties.

On the 27th February 1871, one Dinanath Chuckerbutty represented to the Magistrate that Hargabind Pal had dug a tank and heaped up some earth, whereby two roads were obstructed, and requested him to cause the same to be opened. On the same day the Magistrate ordered Hargabind to open the road or show cause (1). Hargabind appeared and asked for a jury.

On the 2nd March the Magistrate appointed a jury (2) consisting of five, each party nominating two, and the Magistrate the foreman. The 7th April was fixed for the submission of their report, which was on the 6th extended to the 24th April. On the 24th, Hargabind intimated to the Magistrate that two of the jury were not working, and expressed his dissatisfaction, upon which a report was called for from the jury.

A report dated 23rd April, was, on the 5th May, submitted to the Magistrate, signed by the foreman and two of the jurors named by the complainant. On the 19th May the Magistrate ordered the award of the jury to be carried out.

On the same day that the Magistrate ordered the award to be carried out Hargabind Pal, through his pleader, moved the Sessions Judge of the district, desiring him to send up the proceedings of the Magistrate to the High Court under section 434, with a view to have the above order quashed for the following reasons:—

*Reference under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Syleet.

(1) See sec. 308 of Act VIII of 1869. (2) See sec. 310, Act VIII of 1869.

1871
THE QUEEN v. HARGABIND PAL.

1st—That two of the jurors not having acted, there was no jury.

2nd.—That the Magistrate, instead of nominating the foreman and two of the jurors, had only nominated a foreman. On this application, the Sessions Judge sent up the papers in the case to the High Court.

The opinion of the Court was expressed by

JACKSON, J.—We think that the jury was not legally constituted, as the Judge has pointed out, and that its award long after expirey of the time fixed for giving an award was invalid (1), and that it was subsequently the duty of the Magistrate to take up the case himself, enquire into it, and decide it. We set aside his orders upholding the award of the jury.

Before Mr. Justice Paul.

1871
May 29.

RAMCHANDRA BOSE AND OTHERS *v.* G. T. SNEAD AND ANOTHER.

Service of Summons on one Partner for Co-partner—Lutchmeput Dogare v. *Sibnarayin Mundle* (2) *dissented from.*

THIS was a suit for the sum of Rs. 23,217-4-2, due to the plaintiffs by the defendants, under an agreement under which the plaintiffs had acted as banians to the defendants firm. The plaintiffs carried on business in co-partnership as such banians in Calcutta: the defendants were described as carrying on business in co-partnership as merchants in Calcutta under the name of George Snead and Co. The defendant Snead was, at the time the suit was brought, residing in London. Service of summons was effected on the defendant Snead by serving the summons on Behrends, but service was not accepted by him. The defendant Behrends, in his written statement, alleged that he was carrying on the business in Calcutta as agent only for the defendant Snead; and it appeared that he held a power of attorney from the defendant Snead, which, however, did not authorize him to accept service of commons. When the case came on for hearing, the question arose as to whether there had been sufficient service of summons on the defendant Snead, and the case of *Lutchmeput Dogare* v. *Sibnarayin Mundle* (2) was referred to.

Mr. *Lowe* for the plaintiffs.

Mr. *Phillips* for the defendants.

PAUL, J., after expressing his dissent from the ruling in the case of *Lutchmeput Dogare* v. *Sibnarayin Mundle* (2), and his opinion that the service of summons on one partner for his co-partner was a good service adjourned the case to allow of substituted service being made.

Attorneys for the plaintiff: Messrs *Judge* and *Gangooly*.

Attorneys for the defendants: Messrs. *Berners* and Co.

(1) See sec. 310, Act VIII of 1869. (2) 1 Hyde, 97.