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when the application was made to us; but, if it had been, we should still have been under the necessity of referring the question to a Full Bench.

the facts found to be correct, I think that the prisoners are rightly convicted.

I wish to add that, in our opinion, the case which has been referred to —*The Queen* v. *Allah Buksh* (*a*)—is quite distinguishable from the present one. The observations of the Chief Justice in that case, we think, were only intended to apply to the facts of that case and the charge then under consideration. That was not a charge under s. 424, nor was there any allusion to that section, but the charge was one of the theft under s. 378, and the Chief Justice only says that, if any offence had been committed at all, it certainly was not theft.

The case will, therefore, go back to the Magistrate of the District, who will give necessary orders for carrying out the sentence passed upon the prisoners.

(*a*) *Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Loch.*

The 15th April 1871.

THE QUEEN *v.* ALLAH BUKSH.*

Penal Code (Act XLV of 1860), *s.* 378—*Partner—Theft.*

NORMAN, J.—The facts of this case are as follow:—Kiamooddeen, the gomasta of a shop, called the shop of Mozuffer Meah, was coming out of the Small Cause Court with some books, a *khatiyan* and a *jama-kharch* account, belonging to that shop. Allah Buksh, who had a share in that shop, took these books out of the possession of Kiamooddeen, and kept them against the will of Kiamooddeen, saying they were his.

The Deputy Magistrate says: "The fact of Allah Buksh having a right to the papers is not questioned in this case. He may have every right to them; but, so long as they are legally in the possession of another person, he can not get possession of them, except through the Civil Court. It matters little either whether he is any special gainer by taking possession of the papers, when the fact remains that he did take them, and that against the will of the complainant."

The Deputy Magistrate found Allah Buksh guilty of theft, and sentenced him to a fine of Rs, 10, and ordered the papers to be returned to the complainant.

It appears to me that this conviction cannot be sustained.

Kiamooddeen was the servant of the prisoner Allah Buksh and his partners. By s. 27 of the Indian Penal Code, it is declared that, when property is in the possession of a person's servant, it is in that person's possession within the meaning of that Code. The *khatiyan* and *jama-kharch* account must, therefore, be taken to have been in the possession of Allah Buksh and his co-sharers at the time when Allah Buksh took them from Kiamooddeen. S. 378 does not include under the offence of theft the case where one joint proprietor takes into his own sole

* Reference to the High Court under s. 434, Act XXV of 1861, by the Officiating Magistrate of Backergunge, dated Barisal, the 27th March 1871.

We think the words of s. 405 of the Penal Code are large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with a dominion over it, and has dishonestly misappropriated it or converted it to his own use. There is no reason that the case of a partner should be excepted from the operation of this section. In deep there is every reason that it should be included in it. It is a question of fact whether there has been an entrusting of the property, or giving a dominion over it, sufficient to come within what is required. But if it be made out by the evidence, that one partner was entrusted by his co-partners with property or with a dominion over it, and that he had dishonestly misappropriated it, or dishonestly used it in violation of the mode in which his trust was to be discharged, or of the agreement between the parties as to the use he was to make of the property, he ought to be tried for that offence. I, therefore, think we should say that the decision *In the matter of the Petition of Lall Chand Roy* (1) cannot be supported, and that the Magis-

possession property belonging to him self and his co-proprietors, which had been previously in their joint custody. If the law were as supposed by the Magistrate, no master could safely take his own property from the hand of his servant: no partner in a business could safely take a rupee from the till for the most urgent necessity. It may be that the accused did, or intended to do, some wrong to his co-sharers in taking possession of the books. But if so, the offence, if and, is not theft.

I am of opinion that the conviction and order of the Deputy Magistrate must be quashed, and the fine refunded.

LOCH, J.—To constitute the offence of theft, there must be not only a taking against the will of the person in possession, but a taking dishonestly. The definition of "dishonstly," as given in s. 24 of the Penal Code, is the doing anything "with the intention of causing wrongful gain to one person or wrongful loss to another person." Did Allah Buksh take the book from the gomasta dishonestly as defined above? He does not appear to have done so with any intent to injure his co-partners, or to derive gain to himself. it is true that the gomasta says in his examination that the papers showed an entry of Rs. 500, by not showing which the accused would gain. But there is nothing to show that Allah Buksh intended to make away with these papers, and the gomasta admits that they were heretofore in the possession of Allah Buksh and his two co-sharers.

I do not think the charge of theft is made out, and I concur with the Chief Justice in quashing the conviction and directing the repayment of the fine.

(1) 9 W. R., Cr. Rul., 37.

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trate ought to enquire into the charge, and determine whether, upon the evidence which may be produced before him, there is sufficient ground for putting the accused upon their trial. I do not think that we can make an order of that kind in the Full Bench. The matter will, therefore, stand over until Ainslie, J., returns (1).

PRIVY COUNCIL.

RANI MEWA KUWAR (PLAINTIFF) *v.* RANI HULAS KUWAR (DEFENDANT).

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

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Agreement defining Shares of Parties in Immoveable Property—Deed of Compromise—Limitation—Cause of Action act XIV of 1859, *s.* 1, *cl.* 12—*Estoppel.*

An agreement by way of compromise of disputed title to immoveable estate, under which shares are allotted to the parties thereto, gives to each party a cause of action founded not merely upon contract within the meaning of Act XIV of 1859, s. 1, cl. 10, but upon the title which is acknowledged and defined by the agreement, and a suit brought to recover a share of the estate is governed by s. 1, cl. 12.

Those who rely upon a document as an estoppel must clearly establish its meaning; if there is any ambiguity the construction may be aided by looking at the surrounding circumstances.

APPEAL from a judgment of the Judicial Commissioner of Oudh, dated the 19th September 1871, affirming a judgment of the Civil Judge, dated the 9th May 1871.

The case arose on the following facts. One Raja Rattan Singh died in 1851, possessed of large estates, situate, partly in the then native State of Oudh, and partly in the adjoining district of Bareilly in Rohilcund, which was under British rule. The plaintiff and one Chattar Kuwar were the daughters of

(1) Ainslie, J., was at this time absent on leave.

* *Present*:—SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P. COLLIER,.