

REG. V. GAZI KOM A'BA' DORE.

1870.
July 23.*Bailiff—Execution of Decree of Civil Court—Breaking open of Doors.*

If a bailiff break the doors of a third person, in order to execute a decree against a judgment-debtor, he is a trespasser if it turn out that the person or goods of the debtor are not in the house; and under such circumstances the owner of the house does not, by obstructing the bailiff, render himself punishable under Sec. 183 or Sec. 186 of the Indian Penal Code.

THE accused was convicted of offering resistance to the taking of property by the lawful authority of a public servant, under Sec. 183 of the Indian Penal Code, and sentenced to pay a fine of Rs. 10.

The case was reviewed by GIBBS and MELVILL, JJ. The judgment of the court was delivered by

MELVILL, J.:—We have called for the proceedings in this case, on a review of the Magistrate's calendar, to consider the legality of the conviction.

The facts appear to be as follows:—A Kárkun of the Subordinate Civil Court of Pátas was sent to execute a decree for money obtained against one Máhádu, the father of the accused, Gazi. Máhádu and Gazi lived in separate houses. The creditor told the Kárkun that he believed that some of Máhádu's property was concealed in Gazi's house, and desired him to search it and to attach any property which might be found. What followed is thus related by the Kárkun:—"The door was locked, and I was going to break it open. Gazi came up and caught hold of the lock, and would not let me break it open; so I returned, and went on other business. The accused said the house and property were hers, and she would not allow the lock to be broken or the property taken. I did not go away because I believed her, but because she prevented me. I explained to the accused that she was committing an offence, and if the property was hers she must complain."

The finding of the Magistrate F. P. is as follows:—"There appears to be reason for the Kárkun believing that Máhádu kept some of his property in his daughter's house. He did

1870.
REG.
v.
GAZI A'BA'
DORE.

not offer to confiscate the house, but only some property which he supposed to be in it, and he was clearly entitled to satisfy himself on that point. If it can be shown that Máhádu wilfully concealed the property, he can be otherwise proceeded against. In the meanwhile Gazi kom A'ba' is clearly guilty of an offence under Sec. 183 of the Indian Penal Code, and the Court sentences her to pay a fine of ten rupees, or in default to undergo fifteen days' simple imprisonment."

The English law on the subject of the right of the Sheriff to break doors is laid down in *Semayne's* case (a). In that case the following points were resolved:—

(1) That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and, therefore, if thieves come to a man's house to rob him or murder, and the owner or his servants kill any of the thieves in defence of himself or his house, it is not felony, and he shall lose nothing.

(2) When any house is recovered by any real action, the Sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff, for the words of the writ are *habere facias seisinam* or *possessionem*, &c.; and after judgment it is not the house in right, and judgment of law, of the tenant or defendant.

(3) In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it he ought to signify the cause of his coming and to make request to open the doors.

(4) In all cases when the door is open, the Sheriff may enter the house and do execution at the suit of any subject, either of the body or of the goods. But it is not lawful for the Sheriff (on request made and denial) at the suit of a common person to break the defendant's house &c. to execute any process at the suit of any subject.

(a) 1 Smith's L. Ca., 4th ed., 73.

(5) It was resolved that the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought or conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and, therefore, in such cases, after denial or request made, the Sheriff may break the house.

1870.
REG.
v.
GAZI A'BA'
DORR.

As regards the first four of these points, there is little doubt that the law laid down in them is in accordance with the law in force in India. The provisions of the first are analogous to the provisions of the Indian Penal Code regarding the right of private defence. The second may be compared with Sec. 223 of the Civil Procedure Code, which authorises the Sheriff, in executing a decree for the recovery of a house, to remove any person who may refuse to vacate the same,—an authority which would probably be held to include the right to break the door of the house. The third point corresponds with Secs. 94 and 123 of the Code of Criminal Procedure. As to the fourth point, it may be remarked that the question of the right to break a debtor's house has never come before this court, but the Calcutta High Court have decided that no such right exists: *The Queen v. J. MacQueen* (b).

The question involved in the fifth point is the one which arises in the present case, namely, the right of a bailiff to break open the house of a third person in order to attach goods belonging to a judgment-debtor. As we have heard no argument, we should be unwilling to decide this question, unless it is necessary for the disposal of the case; and it does not appear to us that it is necessary, since we think that, even if the provisions of the English law were applied, the conviction would still not be sustainable. For, although it was laid down in *Semayne's* case that the Sheriff may justify (after request made) the breaking open the doors of a third

(b) 3 Rev. Crim. and Civ. Rep., Cr. 8.

1870.
REG.
v.
GAZI A'BA
DORÉ.

person's house, in order to execute the process of the law upon the defendant or his property, removed thither in order to avoid an execution, still he does so at his peril; for if it turn out that the defendant was not in the house or had no property there, he is a trespasser: *Johnson v. Leigh (c)*, *Ratcliffe v. Burton (d)*. And this doctrine has been carried still further: for it has been thought that the Sheriff cannot, even though he may have grounds for suspicion, justify entering the dwelling-house of a third person, although he break no door, unless it prove in the event that the defendant or his goods were actually therein: *Cooke v. Birt (e)*. Now in the present case there is no evidence whatever that there were any goods belonging to the defendant in the house of the accused Gazi; and in the absence of evidence the presumption must be in her favour that there were no such goods. As there was no such property in the house, Gazi did not offer any resistance to the taking of any property by the lawful authority of a public servant, which is the offence of which she has been convicted, under Sec. 183 of the Indian Penal Code; nor could she be convicted under what would appear to be a more appropriate section, namely, Sec. 186, for voluntarily obstructing a public servant in the discharge of his public functions; for the bailiff would have been exceeding his functions if he had done that which Gazi prevented him from doing.

On this ground we reverse the conviction and sentence, and order that the fine, if paid, be returned.

Conviction and sentence reversed.

(c) 1 Marsh. 565. (d) 3 B. & P. 229. (e) 5 Taunt. 769.