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IN THE MATTER OF THE PETITION OF MAHÁDÁJI SADÁSHIV TILAK.

thereupon it became the duty of the Magistrate, under section 137 of the Code of Criminal Procedure, to take evidence as a basis for the order he was to make. Mr. Drew went to inspect the place, but he did not take evidence. His proceedings consequently show only his own opinion that the structure was a nuisance. They do not show, by evidence, that the privy was an unlawful obstruction or nuisance to a way, channel, or public place. But, unless there was such a case for interference, the Magistrate had not authority to issue the order, or to enforce it. It cannot be inferred, from the mere order of an inferior Court or an administrative authority, that all the conditions of its jurisdiction were satisfied, and here the proceedings show rather that they were not satisfied. When a statute, too, directs anything to be done in a particular way, that "includes in itself a negative, *viz.*, that it shall not be done otherwise" (Plowden, 206); *Morgan* v. *Leech*[1]. The order made by Mr. Drew does not satisfy the requisite conditions: the confirming order of the District Magistrate was simply *otiose*. We accordingly reverse them.

Order reversed.

(1) 2 Moo. I. A. at p. 435.

APPELLATE CRIMINAL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *February* 10.

QUEEN EMPRESS v. MANGESH JIVA'JI.*

Penal Code (Act XLV of 1860), Secs. 503, 507, 511—Criminal intimidation—Attempt to commit an offence.

The accused sent a fabricated petition to the Revenue Commissioner, S. D., containing a threat, that if a certain forest officer were not removed elsewhere, he would be killed. The accused was charged with the offence of criminal intimidation under section 507 of the Indian Penal Code (XLV of 1860). The Sessions Judge found that the Commissioner had neither official nor personal interest in the forest officer. He, therefore, acquitted the accused of the offence of criminal intimidation, but convicted him of an attempt to commit the offence punishable under section 507, and sentenced him to four months' simple imprisonment.

Held, reversing the conviction and sentence, that as the person to whom the petition was addressed, was not interested in the person threatened, the act intended and done by the accused did not amount to the offence of criminal intimidation within the meaning of section 503 of the Indian Penal Code.

* Criminal Appeal, No. 2 of 1887.

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Per WEST, J.:—"The offence of criminal intimidation, as defined, seems to require both a person to be threatened and another in whom he is specially interested. Then there must be the intent to cause alarm to the former by a threat to him of injury to the latter. The intent itself might be complete, though it could not be effected. But the existence of the interest seems essential to the offence, as also and equally to the attempt at the offence, since otherwise the attempt would be to do something not constituting an offence."

Per BIRDWOOD, J.:—"No criminal liability can be incurred, under the Indian Penal Code, by an attempt to do an act, which, if done, would not be an offence against the Code. In the present case, therefore, if the accused was not guilty of committing criminal intimidation, because the act intended and done by him lacked an ingredient of that offence, he could not be guilty of an attempt at that offence."

THIS was an appeal from the conviction and sentence recorded by E. M. H. Fulton, Sessions Judge of Belgaum.

The accused was charged with the offence of criminal intimidation under the following circumstances. The accused had been for some time employed as a clerk in the Forest Department, but was dismissed by the Divisional Forest Officer, Mr. MacGregor, for neglect of duty. He applied to be reinstated, but Mr. MacGregor refused. Thereupon the accused fabricated a petition, purporting to be written by the inhabitants of certain villages, and sent it by post to the Revenue Commissioner, Southern Division. The petition contained, among other things, a threat that, unless Mr. MacGregor were transferred to some other district, he would be killed. The Revenue Commissioner, finding on inquiry that the accused was the author of the petition, directed criminal proceedings to be instituted against him on a charge under section 507 of the Penal Code (XLV of 1860).

The Sessions Judge of Belgaum, who tried the accused with the aid of assessors, convicted him, under section 511 of the Indian Penal Code, of an attempt to commit the offence of criminal intimidation, and sentenced him to four months' simple imprisonment. The following extract from his judgment shows the reasons for the conviction:—

"It does not appear to me to be proved that the Commissioner has either personal or official interest in Mr. MacGregor. Whether he knows him personally or not, the evidence does not show. As regards official interest, it does not appear that Mr. MacGregor

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is subordinate to the Commissioner; and though, as chief executive officer of the province, the latter doubtless watches the working of the various departments of the public service, it can hardly be said, I think, that he has any particular interest in the heads of departments not serving under his orders. It is very possible that he does feel a personal interest in Mr. MacGregor's welfare; but, as there is no evidence on the point, I cannot, in a criminal trial, assume the existence of any such feeling. I think, then, the petitioner cannot be convicted of criminal intimidation; but I consider that he may be convicted of attempting to intimidate criminally. He must have intended to produce some effect by his threat, and, therefore, evidently believed that the Commissioner was sufficiently interested in Mr. MacGregor to be alarmed by the threat. The notes to section 511 in Mayne's edition of the Penal Code and illustration (*b*) show that an attempt to commit an offence is punishable in India, even though the perpetration of that offence was an impossibility (*Reg.* v. *Cassidy*)[1] If, then, the accused is the person who sent the petition, he ought to be convicted of an offence under sections 509 and 511 of the Indian Penal Code; and though he has only been charged under the former section, he can legally be convicted of an attempt, having regard to section 238 of the Criminal Procedure Code."

Against this conviction and sentence the accused appealed to the High Court.

Vásudev Gopál Bhandárkar for the accused.

Pándurang Balibhadra, (Acting Government Pleader), for the Crown.

WEST, J.:—The prisoner fabricated a letter purporting to be written by the inhabitants of certain villages, and sent it by post to the Commissioner of the Southern Division. Such is the finding of facts. The letter contained a threat that, unless Mr. MacGregor, a divisional Forest Officer, were removed elsewhere, he would be killed. There is no suggestion that this threat was intended to reach Mr. McGregor's ear, and so cause him alarm, or constrain him to any act or omission. It is found that the Commissioner, Southern Division, was not so interested in Mr.

(1) 4 Bom. H. C. Rep., Cr. Ca., 17.

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McGregor that a threat against the latter was likely to have an effect on the feelings or conduct of the former. Indeed, there is nothing to indicate that the one had any interest in the other beyond that of one human being in another. The Sessions Judge has, accordingly, held that though the material elements of the offence defined in section 503 of the Indian Penal Code (Act XIV of 1860) exist in the present case, yet, as the requisite personal interest was wanting, the offence was not and could not be committed. But the prisoner, he finds, intended to commit the offence; and his intention having been frustrated only by the natural impossibility of effecting his purpose, he has convicted him of an attempt to commit the offence punishable under section 507, and he sentenced him accordingly.

It may be a fine distinction that separates an attempt, such as the one in the present case, from an attempt according to the illustration (*b*) to section 511 of the Indian Penal Code (Act XLV of 1860); but still, we think, the distinction exists. In the illustration, the act completed so far as the accused could complete it, and constituting, if completed, the principal offence, is supposed to be frustrated by the accidental circumstance of there being nothing at the moment in a pocket, where ordinarily something would be found. If it were the normal condition of a pocket to be empty, the Legislature could hardly be supposed to have intended to guard against an endeavour which could not be conceived as injurious. In the present case, the attempt as found by the Sessions Court, as distinguished from the complete offence, rests on the impossibility of frightening the Commissioner, Southern Division, by the threat against Mr. McGregor. Now, this relation of no special interest was a permanent and essential relation. It was not variable from day to day, much less was it a relation of an interest generally existing, but accidentally absent on the present occasion. The attempt could not succeed for a reason which would operate against any attempt, however often repeated. There might, indeed, be an intent to cause alarm; but the person addressed being always and essentially insusceptible of the particular alarm purposed, there was nothing for the penal law to guard either in the species or the instance. The offence of criminal intimidation, as defined, seems to require in

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such a case as the present, both a person to be threatened and another in whom he is specially interested. Then there must be the intent to cause alarm to the former by a threat to him of injury to the latter. The intent itself might be complete, though it could not be effected: see *Reg.* v. *Goodhall*(1), but the existence of the interest seems essential to the offence, but also and equally to the attempt at the offence, since otherwise the attempt would be at something not constituting the offence. The accused has been acquitted of the principal offence, on the ground of there being no special interest, and the absence of that interest equally prevented, we think, the perpetration of an attempt, as the offence itself was impossible, and not through any mere accident.

The offence, in any case, was of the most trivial character. The threat could hardly have caused alarm, even to Mr. McGregor himself.

We reverse the conviction and sentence for the reasons given.

BIRDWOOD, J.:—I concur with Mr. Justice West. No doubt, an attempt, within the meaning of section 511 of the Indian Penal Code (Act XLV of 1860), is possible, even when the offence attempted cannot be committed; as when a person, intending to pick another person's pocket, thrusts his hand into the pocket, but finds it empty. That such an act would amount to a criminal attempt, appears from the illustrations to section 511. But in doing such an act, the offender's intention is to commit a complete offence, and his act only falls short of the offence by reason of an accidental circumstance which has prevented the completion of the offence. In the present case, it cannot be said that the accused intended to do more than he actually did. He intended to send a fabricated petition to the Commissioner, containing a threat directed against Mr. McGregor. And that intention,—assuming the facts to be as found by the Sessions Judge,—he carried out completely. If, therefore, he committed an offence at all, he committed the offence which he intended to commit;—not an attempt, but the offence attempted. The Sessions Judge has, however, found that the offence attempted was not, as a matter of fact and law, committed, because the person to whom

(1) 1 Denison's Crown Cases, p. 187.

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the petition was sent by the accused was not himself threatened, and was not "interested" in the person threatened. It appears, therefore, that the act intended and done by the accused lacked an essential element of the offence of committing criminal intimidation as defined in section 503 of the Indian Penal Code (Act XLV of 1860). But it does not follow that the accused could still be legally convicted of an attempt to commit that offence. It is possible to attempt to commit an impossible theft, and so offend against the Code, because theft is itself an offence against the Code, and may, therefore, be attempted within the meaning of the Code. But no criminal liability can be incurred under the Code by an attempt to do an act, which, if done, would not be an offence against the Code. In the present case, therefore, if the accused was not guilty of committing criminal intimidation, because the act intended and done by him lacked an ingredient of that offence, he could not be guilty of the attempt of which he has been convicted. The conviction and sentence must, therefore, be reversed.

Conviction and sentence reversed.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1887. *February* 14.

RA'VJI VINA'YAKRA'V JAGGANNA'TH SHANKARSETT, (PLAINTIFF), *v.* LAKSHMIBA'I, WIDOW OF VINA'YAKRA'V JAGGANNA'TH SHANKARSETT, (DEFENDANT).*

Adoption—Adoption among Brâhmans—Daivadnya caste—Adoption by untonsured widow—Ceremonies essential to adoption—Effect of conflicting opinions among Shâstris as to validity of adoption—Estoppel—Adopting widow estopped from denying validity of adoption—Evidence—Custom of caste—Opinion of caste expressed at meeting—Inheritance—Effect of adoption—Inheritance of adopted son—Widow divested of estate—Conditional adoption—Agreement at time of adoption affecting rights of adopted son.

The defendant's husband, V., died intestate in 1873, leaving his widow, (the defendant), and a son, B., him surviving. A posthumous son, R., was subsequently born to him, who died an infant aged four months. B. died in July, 1877, aged seven years. The plaintiff alleged that on the 18th April, 1878, the defendant adopted him as the heir of her husband, V., and on the same date made an agree-

* Suit No. 405 of 1886.