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to have thought. The question whether the lease, which had been granted to Balambhat in 1854, and transferred to plaintiff in 1878 was transferable as against the defendants, must depend upon the language of the lease itself and the custom of *khoti* villages. The Assistant Judge relies entirely on the former as showing that the tenant's interest was inalieable; but the words "you are to enjoy, you and your sons, grandsons, from generation to generation" do not of themselves have that effect, as was ruled by the Privy Council in *Raja Nursing Deb* v. *Roy Koylasnath* (1). The only conclusion to be drawn from them is that the tenant was to hold in perpetuity at a fixed rent, in consideration of his making the embankment. The defendants have not raised an issue as to the custom of the village, or given any evidence of such custom; and we do not find anything in the Act of 1880 which can be construed as a declaration of the existing custom of *khoti* villages when the Act was passed. The question can, therefore, only be decided in favour of the defendants [376] on one or other of the grounds on which the Courts below proceeded; and as each of those grounds, in our opinion, fails to establish the inalienability of the lease, the plaintiff is entitled to the declaration prayed.

We must, therefore, under these circumstances, reverse the decree of the Assistant Judge, and declare that plaintiff is entitled to hold the lands at a permanent fixed rent of eleven maunds and 6½ *pailis* of *bhat*. Costs on defendants throughout.

Decree reversed.

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CRIMINAL REVISION.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

DHANIA *v.* F. L. CLIFFORD.* [19th November, 1888.]

Further inquiry—Criminal Procedure Code (Act X of 1882), s. 437—Wrongful confinement—Wrongful restraint—Indian Penal Code (Act XLV of 1860), ss. 339, 340—Malice.

Malice is not an essential ingredient in the offence of 'wrongful confinement' as defined by s. 340 of the Indian Penal Code (Act XLV of 1860). The offence is complete when a person is wrongfully restrained in such a manner as to be prevented from proceeding beyond certain circumscribing limits. And a person is wrongfully restrained when he is voluntarily obstructed so as to be prevented from proceeding in any direction in which he has a right to proceed.

The accused as abkari inspector visited a toddy shop where the complainant and one Dhanjibhai were employed as agents for the sale of toddy. Having reason to suspect that an offence under the Abkari Act (Bombay Act V of 1878) had been committed, the accused made an inquiry, in the course of which the complainant made certain statements implicating his fellow servant. The accused thereupon resolved to prosecute Dhanjibhai and make the complainant a witness in the case. In order to prevent him being tutored, the accused ordered his sepoy to bring the complainant to his camp, and there detained him during the night, and on the following morning sent him in charge of a sepoy to a Magistrate's Court, where the complainant repeated the statements made by him before the accused. He was then allowed to go away. The accused prosecuted Dhanjibhai, and in the course of his trial admitted in his deposition that he had ordered his sepoy to bring the complainant to his camp, and had detained him there

* Criminal Review, No. 407 of 1888.

(1) 9 M.I.A. 55.

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during the night. After the termination of Dhanjibhai's trial the complainant charged the accused with wrongful confinement under s. 342 of the Indian Penal Code. The accused pleaded that the complainant had voluntarily come to his tent to have his statements reduced to writing, and that he had of his own accord stopped in his camp during the night.

[377] The trying Magistrate held this plea proved and discharged the accused under s. 253 of the Code of Criminal Procedure (Act X of 1882).

The Sessions Judge held that though the accused had detained the complainant in his camp during the night, still he was not guilty of any offence under the Penal Code, as he had acted without malice and to the best of his judgment. He, therefore, declined to interfere, or order any further enquiry.

Held, by the High Court on revision, that the trying Magistrate had wrongly omitted to take into consideration the admissions made by the accused in his deposition in Dhanjibhai's case. Those admissions had an important bearing on the present case. They were admissible in evidence against the accused, and as they were left out of consideration, the inquiry was necessarily incomplete and imperfect. Further inquiry was, therefore, ordered.

The mere circumstance that the accused had acted without malice and to the best of his judgment, did not protect him, if his act otherwise satisfied the definition of s. 340 of the Indian Penal Code.

[R., 19 B. 72 (76).]

THIS was an application under s. 435 of the Criminal Procedure Code (Act X of 1882).

The accused, an abkari inspector, was charged under s. 342 of the Indian Penal Code (Act XLV of 1860) with wrongfully confining the complainant Dhania under the following circumstances.

In December, 1887, a fair was held at the village of Mora, in the Olpad Taluka. At this fair, one Dayal Fakira had obtained a license to open a temporary toddy shop. Dayal employed the complainant Dhania and one Dhanjibhai as his agents to sell toddy. The accused as abkari inspector visited the shop, and having reason to suspect that an offence under the Abkari Act had been committed, made an inquiry into the matter. In the course of this inquiry Dhania made certain statements which showed that an offence had been committed, and implicating Dhanjibhai. The accused thereupon resolved to prosecute Danjibhai, and make Dhania a witness in the case. In order to prevent Dhania from being got at and tutored, the accused ordered his sepoy to bring Dhania to his camp. There his statements were reduced to writing, and he was detained during the night, and on the following morning sent in charge of a sepoy to the Court of the Second Class Magistrate at Olpad, where he repeated on oath the statements made by him before the accused. He was then allowed to go.

[378] The accused prosecuted Dhanjibhai for an offence under the Abkari Act before the Second Class Magistrate at Olpad. In the course of this proceeding he was examined as complainant, and made the following statements.—

" I gave Dhania and Dhanjibhai in charge of my peon.

* * * * *

I brought Dhania the following morning to this Court to verify the statements he had made to me. * * *

He was with my peon close to my tent. He was allowed to go the next day after verifying his statement between 2 and 3 P. M.

* * * * *

I detained Dhania to prevent his being induced by the accused to alter his statement. If I remember right, Bajonji the other toddy seller,

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came and asked me to release Dhania, and to the best of my knowledge he offered to stand security. I did not release him on bail. I did not inquire who Dhania was. I was told that Dhania was acting as a middleman between purchaser and seller on behalf of the seller Dhanjibhai* *

"*Q*—Under what authority either of law or of any magisterial functionary did you detain Dhania as deposed to by you yesterday?

"*A*.—Dhania was a consenting party to the detention.

"*Q*.—Is it not true that you declined to release Dhania on bail?

"*A*.—Dhania never asked me to release him on bail. Bajonji asked me to release Dhania on bail, but not in Dhania's presence. I do not know where Dhania was at the time. I supposed him to be with my sepoy. I did give Dhania in charge of my sepoy.

* * * * *

"I cannot quote any authority for sending down a witness to a Court in custody or detention for verification of his statement."

After the conclusion of Dhanjibhai's trial Dhania filed the present complaint against Clifford, charging him with wrongful confinement from the moment of his removal from the toddy shop under Clifford's orders till the time when he was allowed to go away from Magistrate's presence.

[379] Clifford's defence was that the complainant went voluntarily from the toddy shop to his camp in order that his statement might be taken down in writing, that he consented to stop there during the night, and that of his own accord he went with a sepoy to the Magistrate's Court at Olpad on the following morning.

The trying Magistrate found this plea proved, and discharged the accused under s. 253 of the Code of Criminal Procedure.

The complainant thereupon applied to the Sessions Judge of Surat for a further inquiry into the matter, principally on the ground that the trying Magistrate had not taken into consideration Clifford's statements in Dhanjibhai's case, which clearly established the offence of wrongful confinement.

The Sessions Judge refused to order a further inquiry. He was of opinion that though the accused's act in detaining the complainant in his camp fell within the purview of s. 339 of the Indian Penal Code, yet as he had acted without malice and to the best of his judgment, he was not guilty of any offence under the Code. His reasons are stated in the following extract from his judgment:—

"If Dhania had been allowed to depart after his statement had been recorded at Clifford's camp, I think that no charge of wrongful confinement could have been sustained. It was Clifford's duty to detect and bring to light offences against the Abkari Act, and to do this he must be assumed to have the power to question persons who appear to have knowledge of such offences, and to record their answers. If, for the sake of convenience, he ordered a man to come or his sepoy to bring him to his tent, such a harm, if harm it is, would be so slight that no person of ordinary sense and temper would complain of it, and, therefore, the act would not be an offence under s. 95 of the Indian Penal Code.

"Therefore if Clifford has committed the offence of wrongful confinement, it must be by his act in retaining Dhania at his camp during the night, and sending him in charge of a sepoy to Olpad next day. It is, I think, idle for Clifford to contend that **[380]** Dhania remained at his camp all the night and went with the sepoy to Olpad of his own accord. I grant that the evidence appears to show that Dhania did not make any vigorous

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protest or try to depart, but no one can suppose for one instant that Dhania would not have left Clifford's camp had there not been some restraint imposed upon him by a will or power exterior to his own, which will or power was Clifford's.

"I am, therefore, of opinion, that Clifford imposed upon Dhania a notion of restraint, whereby he prevented him from proceeding in any direction in which he had a right to proceed, and, therefore, Clifford's act satisfied the definition of wrongful restraint—Indian Penal Code, s. 339.

"It remains to be seen whether Clifford has thereby committed an offence punishable under the Indian Penal Code. I think that he has not. It has not been alleged, and the circumstances of the case afford not the slightest ground for supposing, that Clifford was actuated by any malicious motive in detaining Dhania. He no doubt acted, as he thought, for the best. It was highly expedient in the interests of Government and of the public that offences against the Abkari Act should be detected, and the offenders be punished. He thought that, if the offenders got access to Dhania, they would by tampering with him secure their escape from justice. This would be injurious to the interests both of the Government revenue and of the public; and he, therefore, in good faith, for the purpose of preventing this harm, placed Dhania in temporary restraint. Clifford's statement to the Second Class Magistrate—"I detained Dhania to prevent his being induced by the accused to alter his statement"—is, in my opinion, the real explanation of the act, although he was ill-advised to say, when brought before the Firt Class Magistrate, that Dhania remained in his camp, and went with the sepoy to Olpad, of his own accord. Whether Dhania would have been tampered with had he been allowed to go his way is a question upon which no direct evidence has been offered: but it requires little knowledge of the country to perceive that such a result was so probable as to be practically certain. Whether the harm to be prevented was of such a [381] nature as to excuse Clifford's detention of Dhania, is a question upon which there may be two opinions. Clifford, however, acted apparently without malice and to the best of his judgment; and supposing that he erred, a mere error of judgment, apart from any intention to harm, does not, in my opinion, constitute a criminal offence. If Dhania suffered any loss or discomfort from Clifford's act, he might compel Clifford to pay him damages by a civil suit. But I do not think that it would be in accordance with the spirit of the Penal Code to stigmatise as criminal an act which was done without malice, and for the purpose of preventing a failure of justice. Section 171 of the Criminal Procedure Code provides that no witness shall be required to accompany a police officer to the Court of a Magistrate. This provision occurs in the chapter which regulates the powers of the police to investigate, but Clifford is not a police officer: and it is a fair argument that if such an act were an offence under the Indian Penal Code, a special provision to prevent it would not have found a place in the Criminal Procedure Code."

Against this order the complainant applied to the High Court under its revisional jurisdiction.

Manekshah Jehangirshah, for complainant.

Ganpat Sadashiv Rao, for accused.

JUDGMENT.

BIRDWOOD, J.—We think that further inquiry must be ordered in this case, as the accused made certain admissions, in his deposition before the Second Class Magistrate in the case in which he prosecuted one

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Dhanjibhai, the effect of which has not been considered by the Magistrate in dealing with the present complaint. That deposition was apparently given under circumstances which would permit its admission as evidence against the accused (*Queen Empress* v. *Ganu Sonba*(1); and in it the accused said that he told his peon to bring the present complainant Dhania to his office in his tent. He further said that the peon brought Dhania, and that Dhania was with the peon all night, and that he detained Dhania to prevent his being induced by Dhanjibhai to alter his statement. Moreover, he said that, to the best of his knowledge, the toddy-seller [382] Bajanji came and asked him to release Dhania, and offered to stand security, and that he would not release him on bail. The deposition containing these statements was accessible to the Magistrate, and the statements in it bearing on the complaint against the accused ought to have been taken into consideration. We express no opinion on the facts of the case. But we are distinctly of opinion that the enquiry has been incomplete, and that the discharge was, therefore, improper. The Sessions Judge thought that the complainant had been detained by the accused, but that the accused had not committed an offence, as he had acted apparently without malice and to the best of his judgment. But the offence of wrongful confinement is complete when a person is wrongfully restrained in such a manner as to be prevented from proceeding beyond certain circumscribing limits (s. 340, I. P. C.), and a person is wrongfully restrained if he is voluntarily obstructed so as to be prevented from proceeding in any direction in which he has a right to proceed (339th section of the I. P. C.). A person may, therefore, be guilty of wrongful confinement though he acts without malice. Of course it may always be a question whether such person is protected by s. 79 of the Indian Penal Code; but with any such question which might possibly arise in the present case we are not at present concerned.

We direct the District Magistrate, under s. 437 of the Code of Criminal Procedure, by himself, or by any of the Magistrates subordinate to him, to make further inquiry into the case of the accused.

JARDINE, J.—This case being of importance in that personal liberty is concerned, I would add to what my learned brother has said that I differ from the Sessions Judge's view of the law. I concur in *Parankusam Narasaya Pantulu* v. *Captain R. A. C. Stuart* (2), which was decided after consideration of *Bird* v. *Jones* (3), which distinguishes a restraint from going in a certain direction from an imprisonment. "I am of opinion," says Coleridge, J., (3) "that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total [383] obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or though real, still in the conception only; it may itself be moveable or fixed, but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

(1) 12 B. 440. (2) 2 M.H.C.R. 396. (3) 7 Q. B. 742 (744).

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"In Com. Dig. 'Imprisoment' (G) it is said: 'Every restraint of the liberty of a free man will be an imprisonment.' For this the authorities cited are 2 Inst., 482; Hobert & Stroud's Case, Cro. Car., 209. But when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the Statute of *Westminister* 2nd, (1 Stat. 13 Ed. 1, c. 48,) 'in prisona" and says, 'every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison.' The passage in Cro. Car. 209, (Hobert & Stroud's Case), is from a curious case of an information against Sir *Miles Hobert* and Mr. *Stroud* for escaping out of the Gate House prison, to which they had been committed by the king.

The question was, whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in *London*, and through the favour of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate House: the occasion is somewhat singularly expressed in the decision of the Court which was, 'that their *voluntary* retirement to the close stool' in the Gate House 'made them to be prisoners'. The resolution, however, in question is this, 'that the prison of the [384] King's Bench is not any local prison confined only to one place, and that *every place* where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison." *Per* Williams, J. (*Ibid.*, p. 748), "And it is that *entire* restraint upon the will which, I apprehend, constitutes the imprisonment."

If the Sessions Judge had applied that view of the law of the case to the facts he found, he would, it may be supposed, have passed an order under s. 437 of the Code of Criminal Procedure directing further inquiry. In that further inquiry the accused may meet the case for the prosecution by producing rebutting evidence. See *Hari Dass* v. *Saritulla* (1). The Magistrate may also take evidence which he has omitted to take, as in this case.

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13 B. 384.

CRIMINAL REFERENCE.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* SHANKAR.* [13th December, 1888.]

Sanction to prosecute—Criminal Procedure Code (Act X of 1882), s. 195 and 478—Court's power to proceed under s. 478 after sanction given to a private person—Dismissal of a complaint by a private person no bar to proceedings under s. 478.

The granting of a sanction to a private person under clause (c) of s. 195 of the Code of Criminal Procedure (Act X of 1882) does not debar a Civil Court from proceeding under s. 478; nor can the dismissal by a Magistrate of a complaint made by a private person be held to be a bar, till set aside to a proceeding under that section.

[F., 34 B. 88=11 Bom.L.R. 855 (857)=10 Cr.L.J. 431=3 Ind. Cas. 962; R., 31 M. 140 (148) (F.B.)=7 Cr.L.J. 54=17 M.L.J. 584=3 M.L.T. 79; 8 Bom.L.R. 694 (696); Rat, Unr. Cr. Cas. 587.]

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* Criminal Reference, No. 172 of 1888.

(1) 15 C. 608.