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What is meant by a gift to a class, as understood in *Leake* v. *Robinson* (1), is explained very clearly in Jarman on Wills (4th ed.), p. 268. The learned author says :—

"A number of persons are popularly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews;' but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons."

In the present case the benefit which each member of the class takes is in no way dependent on the number of the children. Each [549] has a distinct and independent right to reside in the house, and the number of persons who may ultimately belong to this class is in no sense regarded as a criterion of the interest which each takes. We must hold, therefore, that the rule laid down in *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (2) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (3) has no application to the present case, and that the plaintiffs, who, it is admitted, were in existence when the testator died, are entitled to share in the benefit which, in our opinion, was intended to be conferred, not only on Narayan Ganoba, but also on his wife and children.

The decree of the Court below must, therefore, be reversed, and a declaration made that the appellants are entitled to live in the house, and the case must be sent back for trial on the other issues so far as they raise the question as to the right of the plaintiffs to the possession of the particular room in the pleadings mentioned. Costs of this appeal to be dealt with by the Court which hears the case on remand.

Attorneys for the appellants :—Messrs. *Balkrishna and Dikshit.*

Attorneys for the respondents.—Messrs. *Wadia and Ghandhy* and Messrs. *Roughton and Byrne.*

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*Before Mr. Justice Farran.*

BAI MANIGAVRI (*Plaintiff*) *v.* NARONDAS CALLIANDAS AND OTHERS (*Defendants*).* [24th, 26th and 27th January, 1891.]

*Voluntary deed—Suit by settlor to set aside his deed—Burden of proof.*

One Manekram, (the original plaintiff), was priest in the family of the first and second defendants, and was treated with much kindness by the first defendant (Narondas), upon whom he chiefly relied for advice in worldly matters. A sum of Rs. 30,000, which was the bulk of his property, was in deposit in the defendants' firm at interest. Early in 1887 he became ill, and in June, 1887, he expressed a wish to execute a trust-deed and an English will. He gave instructions to Narondas, (defendant No. 1), for the trust-deed. By this deed, which contained no power of revocation, he settled Rs. 30,000 upon the first and second defendants,

* Suit No. 421 of 1888.

(1) 2 Mer. 363. (2) 2 C. 262. (3) 4 C. 455.

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(who were uncle and nephew), as trustees to perform his funeral ceremonies and to [550] carry out certain religious observances and to pay two annuities, each of Rs. 25, and with the residue to found a Sanskrit class. The deed provided for the payment, during his lifetime, of a sum of Rs. 100 *per mensem* for his maintenance and expenses, or such larger sum as he might require for such purposes, but in other respects it was not to come into operation until after his death. The will of even date gave certain property to his wife, and subject to this bequest gave the residue of his property to his sister Manigavri. After receiving instructions for these documents, Narondas (defendant No. 1), took them to an attorney. From these instructions drafts were prepared, which were read over to Manekram in his room by the attorney's managing clerk. Neither drafts, nor instructions, nor the documents themselves were, however, left with Manekram. The drafts were then engrossed, Manekram having made some trifling corrections in them. On the 23rd June, 1887, he attended at the house of the attorney. The documents were explained to him by the attorney, and were interpreted to him by a High Court interpreter. Manekram was then examined by a medical man (Dr. Bhalchandra) with a view to ascertain whether he was capable of understanding what he was doing. Manekram then executed the trust-deed and the will, and both were then duly attested. At the same time Manekram signed the accounts in the defendants' books, and the balance of the money, which stood to his credit over and above the Rs. 30,000 comprised in the deed, was produced and made over to him, and he made it over to Narondas (defendant No. 1) to be kept by him personally. Shortly after this, Manekram's sister, Manigavri, and her son came to Bombay and he fell under their influence. He became dissatisfied with what he had done with the Rs. 30,000, and on the 21st November, 1887, he executed a will by which he purported to revoke the deed and the will of the 23rd June, and he left the whole of his property to his sister. On the 2nd September, 1888, his nephew took him to Surat, and on the 14th September, 1888, at Surat he executed a deed revoking the trust-deed of the 23rd June, 1887. He also signed instructions and a power of attorney under which this suit was filed. He died subsequently to the filing of the suit, and his sister and executrix, Manigavri, became plaintiff. The plaint prayed that the deed of the 23rd June, 1887, should be set aside on the ground of undue influence, &c., but the personal charges against the defendants were abandoned at the hearing.

*Held*, that the deed must be set aside on the ground that the circumstances of the case threw upon the defendants the burden of showing that Manekram understood the effect of the settlement and its finality. This they had failed to do. The facts of the case brought it within the principles deducible from *Anderson* v. *Elsworth* (1), *Forshaw* v. *Welsby* (2) and *Wollaston* v. *Tribe* (3).

**[D., 31 B. 271=8 Bom. L.R. 652.]**

SUIT by a settlor to set aside a voluntary deed of settlement. The plaintiff was the executrix of one Manekram Soorugram by whom the suit was originally filed, but who died before the hearing. The first defendant was the uncle of the second, and both were the trustees of a certain deed of settlement dated 23rd [551] June, 1887. The third defendant was the Advocate-General of Bombay.

The plaint stated that Manekram and his elder brother Balvantrav had been for many years family priests of the first two defendants and their family. Balvantrav died in November, 1871, but Manekram continued to be priest as before. The plaint alleged that by reason of such relationship the defendants possessed great influence over Manekram.

Manekram and his brother Balvantrav were jointly entitled (*inter alia*) to certain Government promissory notes which stood in the name of the latter. The plaint alleged that immediately after Balvantrav's death in 1871 the first defendant, Narondas, got possession of the said notes without Manekram's knowledge; that subsequently the notes were transferred into Manekram's name, but remained in the possession of the

(1) 3 Giff. 154. (2) 30 Bea. 243. (3) L.R. 9 Eq. 44.

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defendants' firm; that in 1876 the defendants induced Manekram to sell the said notes and certain shares, which realised Rs. 30,000, and to deposit the proceeds with the defendants' firm.

The plaint further stated that Manekram used to live in a *chawl* of the defendants under their supervision, and was not allowed to see his relations or friends; that in June, 1887, he became very ill and was confined to bed, and that while in this state the defendants repeatedly urged him to make some disposition of his property, but he was too weak to be able to understand what they recommended him to do; that about the 20th June while he was in this condition he was made to sign a writing, in English, which he did not understand, and which remained with the defendants; that on the 23rd June while he was still weak and ill he was taken to a certain house by the defendants and induced to execute a certain trust-deed, which he at the time believed to be a testamentary disposition which would be annulled in the event of his recovery. No copy was given to him, and he did not know the contents thereof.

The plaint further alleged that the defendants' surveillance continued until the 2nd September, 1888, when Manekram managed to escape from them and go to Surat.

[552] Manekram, as above stated, filed this suit on the 26th September, 1888, seeking to have the said trust-deed set aside on the grounds of undue influence, misrepresentation, mistake, want of independent advice, and of a proper knowledge and understanding of the document.

On Manekram's death pending this suit, his executrix, Bai Manigavri, was made plaintiff.

The trust-deed of the 23rd June, 1887, which the plaintiff sued to set aside, vested the sum of Rs. 30,000 in the defendants Narondas and Devidas as trustees, in trust, out of the income thereof to allow the settlor (Manekram) the sum of Rs. 100 per month for his maintenance during his life or such larger sum as he might require, and after his death to expend certain sums in funeral ceremonies and for religious and charitable purposes; and as to the residue of the income to apply the same "for and towards the formation, support and maintenance of a Sanskrit class consisting of Nagar Gujarati Brahmin caste." The deed set forth a scheme for the said class, and it also provided that the future trustees should (until failure thereof) be qualified male descendants in the descent of male lines of the defendants Narondas and Devidas, and that they should become trustees in order of seniority, &c., &c.

The defendants filed a written statement, in which they denied the allegations of the plaint, and stated that everything that was done by them in connection with this property was done at his express wish and desire; that Manekram had been removed to Surat by some of his relations, who desired to obtain his money, and that the false statements made in the plaint were made at their suggestion. They further stated that they did not believe that Manekram himself really wished to set aside the trust-deed, but that if he did, they submitted themselves to the Court; they had no personal interest in maintaining the deed, and had no wish to do more than submit to the Court the true facts relating to its execution.

*Latham* (Advocate-General) and *Gazdar*, for plaintiff.

*Lang* and *Inverarity*, for the defendant.

[553] The following authorities were cited:—*Moore* v. *Prance* (1); *Anderson* v. *Elsworth* (2); *Forshaw* v. *Welsby* (3); *Phillipson* v, *Kerry* (4);

(1) 9 Hare. 299. (2) 3 Giff. 154. (3) 30 Bea. 243. (4) 32 Bea. 628.

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*Coutts* v. *Acworth* (1) : *Wollaston* v. *Tribe* (2) ; *Everitt* v. *Everitt* (3) ; *Dutton* v. *Thompson* (4) ; *James* v. *Couchman* (5) ; *Price* v. *Price* (6) ; *Hall* v. *Hall* (7) ; *Rujabai* v. *Ismail Ahmed* (8) ; *Ellison* v. *Ellison* ; 1 White and Tudor's Leading Cases, p. 123.

JUDGMENT.

FARRAN, J.—The claim of the plaintiff Manekram in his lifetime and of his executrix since his death was, and is, to set aside a voluntary deed in favour of certain religious and charitable purposes which Manekram executed on the 23rd June, 1888. The personal charges of fraud and undue influence on the part of the defendants in inducing, or rather compelling, Manekram to execute the deed having been abandoned, the only question which remains for me to consider is, whether, under the circumstances of this case, there is any ground established for setting aside the deed, having regard to the principles which the English cases lay down to guide the Court in dealing with the subject of voluntary settlements which the settlors or their representatives seek to avoid—*Rujabai* v. *Ismail Ahmed* (8).

The defendants, who are united uncle and nephew, are the trustees of the deed. They are wealthy and influential members of the Nagar Bania caste, and carry on business under the name of Hurivalabdas Culliandas. The settlor Manekram was one of the two priests of the defendants' caste. He had a brother Balvantrav, who died in 1871. They lived as tenants in one of the defendants' *chawls*, and after Balvantrav's death Manekram continued to live there as a tenant. Many years ago the two brothers and their father by the advice of the defendant Narondas's brother Hurivalabdas invested Rs. 4,000 in the purchase of a house. It proved a very fortunate investment, for it was subsequently sold by the brothers Balvantrav and Manekram for Rs. 24,000. The sale-proceeds were invested in [554] Government paper, notes, and shares. In 1871, when Balvantrav died, Manekram obtained letters of administration to his estate. Hurivalabdas managed this legal business for him through his solicitors, Messrs. Craigie, Lynch and Owen. Manekram at this time also deposited his Government promissory notes and shares with Hurivalabdas. They were then of the value of about Rs. 28,200. In 1874 the shares were sold by Manekram through the brokers of the defendants' firm, and their net proceeds together with the proceeds of the Government promissory notes, which were subsequently sold, were deposited in the defendants' firm in 1878. This account bore interest at the rate of 4½ per cent. per annum. Manekram, previous to this, had another account with the defendants' firm which, in 1878, amounted to Rs. 2,669. This account bore interest at 6 per cent. per annum ; the larger account was allowed to accumulate at interest. Upon the smaller account, Manekram used to operate by drawing sums personally and by giving written orders against it. In 1887, the larger account seems to have amounted to over Rs. 30,000, and the smaller to Rs. 2,000 or Rs. 3,000.

About the time of Balvantrav's death, Manekram married at Surat his wife Kandagavari. The marriage turned out unhappily, and the wife would not come to live with him in Bombay. In 1887 he went to Surat,

(1) L.R. 8 Eq. 558.
(2) L.R. 9 Eq. 44.
(3) L.R. 10 Eq. 405.
(4) L.R. 23 Ch. D. 278.
(5) L.R. 29 Ch. D.212.
(6) 1 DeG. M. & G. 308.
(7) L.R. 8 Ch. Ap. 430 (438).
(8) 7 B.H.C.R. O. C. J. 27.

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and there he was induced to execute a power-of-attorney in favour of his wife's relatives, which permitted of their managing his property for him. He was at this time detained at Surat against his wish, for he sent a message to Hurivalabdas complaining of it, and Hurivalabdas sent some of his retainers, and had him brought back to Bombay. Hurivalabdas also caused his solicitors to publish a notice in the *Surat Prakash*, revoking the power-of-attorney—acting in this, of course, under Manekram's instructions. Some time afterwards Hurivalabdas died, and his brother, the defendant Narondas, became the head of the family. Manekram did not after this return to Surat, nor did his wife visit him in Bombay. He entertained a great distrust of her and her relations, and, according to the evidence of Narondas, was apprehensive lest they should obtain possession of his property after his death. **[555]** Manekram attended frequently at the defendants' family house. He used to consult the defendant Narondas whenever he felt himself in any difficulty, and placed in his advice the most implicit confidence. The defendant Narondas, on the other hand, treated him with the utmost kindness, and in addition to allowing him the usual *panch bag* or dole of provisions, lent Manekram his carriage, assisted him in hiring his servants, put Naran Juggonath and the *bhaya* of his cart practically at his disposal, called in a doctor when Manekram was ill, and performed other acts of a kindly nature for him.

It is difficult to find a word which expresses the exact relations between Narondas and Manekram. The former, after Hurivalabdas's death, became the active benefactor as well as banker of Manekram, and Manekram became his devoted, though subsequently ungrateful, adherent. Manekram, though a man of average intellect and intelligence, or perhaps a little below the average, was of a naturally weak character. This was the estimate which Narondas entertained of him in his lifetime (see Ex. A), and a general view of the evidence satisfies me that it is a far more reliable estimate than that which Narondas now professes to entertain. Though able to perform his priestly functions in the usual manner, Manekram was quite unversed in worldly affairs. In such matters he was little more than a child. The episode of his visit to Surat in 1877 and of his executing a power-of-attorney there and secretly leaving Surat in a bullock cart, as described in paragraph 9 of the affidavit of Narondas (Ex. A), shows this to be the case; as well as the childlike leaning on the advice of Narondas, which he evinced in all his later actions, until he fell under the influence of his sister and her son towards the close of his life. Manekram at the beginning of 1887 fell ill, being attacked with severe rheumatism, and in the April following had a stroke of paralysis in his left extremities, which left him extremely weak, though he retained possession of his mental faculties and power of speech. In May, 1887, Dr. Magonlal attended him by the directions of the defendant Narondas, and under the care of Dr. Magonlal he gradually improved, though he never regained the use of his left limb.

**[556]** Manekram (Narondas tells us) had often asked Narondas to get a trust-deed prepared for him, but did not tell him what it should contain; and his mind seems, from the nature of the Gujarati will which he executed in May, to have been in a rather chaotic state as to the proper objects of his proposed charitable dispositions. About the 20th May, 1887, he asked the defendant Narondas to get a will prepared for him. Norandas took down his instructions, and drew up a Gujarati will from them, which Manekram executed on the 23rd May (Ex. B). This will scarcely

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disposes of his property at all. It directs his funds to remain with the defendants' firm at interest at 4 per cent., the ornaments in the possession of his wife, and which she was concealing, to be left with her, and gives her a life-interest in his house at Surat, directs certain outlays, mostly of a religious character, to be made out of the income of his property, makes no disposition of the principal, which he desires to remain intact, appoints the defendants his executors and trustees, gives them liberty to increase the outlays at their pleasure, and provides that they should not be accountable to any one for their management of his property, and makes no disposition of the residue. The validity of the will is not in question. It was revoked by later wills. I refer to it here to show that Manekram's mind was not at its date permeated with the idea of a Sanskrit class, and that his trust in the defendant Narondas was unbounded. Narondas in his evidence explains that the leaving of the money with his firm at 4 per cent. was Manekram's express wish, as he (Narondas) would not retain the money on any other terms, and that he refused to become a trustee if he were liable formally to be called on to account. I am satisfied that, this proviso notwithstanding, he would have managed the trust committed to him with the most scrupulous fidelity. I refer to these provisions only to show the childlike disposition of Manekram. This will was read over, and he executed it while possessing a clear disposing mind and understanding its provisions, but probably not its effect, which possibly would have been to plunge his estate into a law suit, ending in a considerable portion of it passing to his wife.

[557] It does not appear how, after this, the ideas of founding a Sankrit class and of having English documents prepared suggested themselves to Manekram's mind. The defendant Devidas states that, about eight or ten days after the execution of this will, Manekram told him to ask his uncle Narondas to get an English will and trust-deed prepared for him. The evidence of this witness is important. (His Lordship read the evidence referred to, which was to the effect that Manekram had expressed a desire to have an English will and trust-deed executed.)

After this Narondas saw Manekram, and took instructions from him for the trust-deed, which is now sought to be set aside, and for an English will. Manekram's property then consisted of a house at Ahmedabad of little value, a house at Surat in the possession of his wife, and ornaments which she had possession of, and which were practically irrecoverable; the 4½ per cent. fund in the defendants' books, which amounted to about Rs. 32,000, and the 6 per cent. fund, which amounted to Rs. 2,000. Besides his wife, he had a sister, Manigavari, who had a son and daughter. He was attached to them, but during his illness was annoyed at their, as he supposed, neglecting him; for he told Narondas, when he had been a long time ill, that no one cared for him, or came to see him, or enquired after him. He said this on several different occasions. From what he said, Narondas inferred that he was on bad terms with his sister. Subsequent events show that this was not really so. He was only sore at her supposed neglect. Beyond his sister and her family, Manekram does not seem to have had any relations whom he knew or cared for. He was resolved that his wife should get nothing beyond her maintenance and the ornaments she had taken possession of.

Under these circumstances he gave instructions to the defendant Narondas for the trust-deed in question which, without containing a power

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of revocation, settles Rs. 30,000—the main bulk of his property—upon the defendants as trustees, to perform his funeral ceremonies, and to carry out certain religious directions and observances, nearly the same as those contained in the Gujarati will, and to pay an annuity of Rs. 25 to his [558] sister Manigavri, and another annuity of Rs. 25 to the sons of one Ranigavri, and with the residue to found a Sanskrit class. The deed provides for the payment, during Manekram's lifetime, of a sum of Rs. 100 per mensem for his maintenance and expenses, or such larger sum as he might require for such purposes; but, in other respects, it was not to come into operation until after his death. The will of even date gives the house at Surat to his wife for life, and the ornaments to her absolutely, and, subject to this bequest, gives the residue of his property, including the houses at Surat and Ahmedabad, to his sister Manigavri. The evidence shows that the defendant Narondas after receiving instructions for these documents took them to Mr. Shamrao Pandurang, or his managing clerk, Shivdas Anandji. The actual instructions, which were in the handwriting of the defendant Narondas, are not forthcoming. From these, drafts were prepared, which were read over to Manekram in his room by Shivdas. These drafts also are not forthcoming, but neither they, nor the original instructions, nor the documents themselves nor copies of them were left with Manekram. Manekram made no changes in the drafts beyond correcting a name or two. The drafts were then engrossed, and when they were ready for execution on the 23rd June 1887, Manekram attended at the house of Mr. Shamrao. The documents were explained to him by Mr. Shamrao, and were interpreted to him by the Court's interpreter, Mr. Muncherji; and Manekram was then examined by Dr. Bhalchandra with a view to ascertain whether he was capable of understanding what he was doing, and Manekram then executed the trust-deed and the will, and they were both duly attested. At the same meeting he also signed the accounts in the defendants' books, and the balance of the money which stood to his credit in them over and above the Rs. 30,000 comprised in the deed was produced, and made over to him, and he made it over to the defendant Narondas to be kept by that defendant personally.

The evidence establishes to my satisfaction that the actual provisions of the English will and deed were explained to the settlor, and that he was then, though in weak health, of sound mind, and capable of understanding their purport; but it is also [559] established that the legal effect of the deed, which was to give him an annuity out of his own property during his life-time, and irrevocably to determine the disposition of that property after his death, was not explained to him at any time by any one. Whether he knew that such was its legal effect, can only be conjectured from the general circumstances of the case. After the execution of the deed and will, of which, as I have said, no copy was left with Manekram, he continued to live as defendants' tenant and under their kindly protection. He was supported out of his monies in the hands of the defendant Narondas. His sister and her son learned that he had executed some documents. The son Bhagwalishanker at once came to Bombay, and put up with Manekram. Manigavri, the mother, came a little later. The natural result followed. Manekram forgot and forgave their neglect of him, and became on friendly terms with them, and fell under, what I may call, their legitimate influence. He became dissatisfied with what he had done with the Rs. 30,000, and on the 21st November of the same year he executed a will, by which he purported to revoke the two documents of the 23rd June, 1887, which he in his new will styles

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"wills," and left the whole of his property to his sister Manigavri. This will she proved after his death. She is the executrix named in it and the present plaintiff. Manekram did not inform the defendants of the execution of this will, but they heard of it. For nearly a year after this, Manekram lived as before. He was on the 2nd September, 1888, taken by his nephew Bhagwalishanker to Surat. Rather ungratefully he did not inform the defendants of his intended, departure, and they only learned it when the victoria driver whom Bhagwalishanker employed to take Manekram to the fair in the Fort first, and afterwards to the Grant Road Station, and who had not been paid, came to the defendant Narondas for his fare. The form of the entry of such payment—Rs. 2—at the foot of Ex. J. shows the feelings of the defendant Narondas on this occasion. On the 14th September, 1888, Manekram at Surat executed a deed, revoking the trust-deed of 23rd June 1887. He also signed instructions and a power of attorney, under which the present suit was filed, on the 28th September, 1888. He has since died without being [560] examined *de bene esse*; so the Court is compelled to consider the case in the absence of the light which his examination and cross-examination would have thrown upon it.

The plaintiff has tendered an affidavit of the 22nd November 1888, which Manekram made on the subject of having a commission issued for his examination on commission. I consider that under the ruling in *Elias* v. *Griffiths* (1), I have a discretion to admit it under s. 194 of the Civil Procedure Code (Act XIV of 1882); but as the defendants had not the opportunity of cross-examining the deponent, its contents are valueless for the purposes for which the affidavit was tendered. I notice it only to remark that the absolutely baseless and unfounded charges made in it and in the deed of revocation and in the plaint against the defendants afford cogent proof of the weakness of mind of the man who could make them, as there is no reason to think that the settlor was in himself other than a well-meaning man. I do not, however, entertain any doubt but that, under the influence of the plaintiff and her son, the settlor was, in fact, before his death really desirous of setting aside the trust deed, and no objection to the present suit can be taken on that ground. Such an objection was shadowed out in the defendants' written statement, and I, of course, am bound to find that it was the wish of the settlor to set aside the deed, before I can consider whether the settlor was entitled to have it set aside.

Upon the main question, I have come to the conclusion that the settlor was entitled to have the deed set aside. The primary object of the deed is to provide for the funeral expenses of the settlor, and for the feasts and ceremonies which Hindu custom renders almost a necessary adjunct of the death of a pious Hindu. The establishment of a Sanskrit class is an afterthought to dispose of the residue. The settlor had not thought of it when he executed his Gujarati will. That a man should irrevocably determine the expenses of his funeral and the nature and extent of the after-ceremonies is a strange conception, and that within some eight or ten days of the idea occurring to him he should deprive himself of the control of the residue of almost the [561] whole of his really available property in favour of a Sanskrit class is rather improbable; but it was quite possible for him to do so, and if he has deliberately and with eyes open adopted that course, meaning to adopt it, this Court is powerless to help him—*Phillips* v. *Mullings* (2). The Court will not, if satisfied of his deliberate act, consider

(1) 46 L.J. Ch. 806. (2) L. R. 7 Ch. Ap. 244.

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the propriety or impropriety of the clauses of the deed. It is not the province of a Court of justice to decide upon what terms or conditions a man of competent understanding may choose to dispose of his property—*Dutton* v. *Thompson* (1); *James* v. *Couchman* (2). But the absurdity and improvidence of the provisions of a deed afford an argument that the settlor did not understand the settlement (per Jessel, M.R., in *Dutton* v. *Thompson* (1); *Hall* v. *Hall* (3)). Did the settlor understand in his case the effect of his acts? It is admitted that it was never explained to him.

I do not, however, say that it was the duty of the defendant Narondas to have done so, or to have pointed out the desirability of a clause of revocation being inserted in the settlement. It may be contended that Narondas, in effect, undertook the duty of a solicitor when he took instructions for a settlement and to have one drawn up, and it may, on the other hand, be contended that he fully discharged his duty when, himself unversed in law, he carried out literally the only instructions which were given to him. I give no opinion as to that. But the fact remains that the legal effect of executing such a trust deed as this was not explained to the settlor, and his attention was not called to the desirability of a power of revocation being inserted in it. That in a deed of this kind it would have been usual and proper to insert such a clause, is plain. The deed was not, in reality, to come into effect till after Manekram's death, and it (as well as the will) was of a testamentary character. The two documents were, in fact, a substitute for the original Gujarati will, and were intended to supply some of its omissions. The form of a trust-deed in lieu of a will, according to the [562] evidence of Narondas, was adopted by the settlor, because he thought that the property comprised in it would be more effectually secured from the grasp of his wife by a deed than by a will; but a deed with a power of revocation would be equally effectual for this purpose. He had no reason to secure the property from himself, as the young man had in *Phillips* v. *Mullings* (4). Why, then, was the settlement made irrevocable? There is ground for supposing that the settlor thought that he was not debarred from revoking it at or about the time he executed it. It was, as I have said, a substitute for a will. If I could accept the evidence of Dr. Bhalchandra to the full, it would prove that the testator thought that he was executing two wills; but I cannot do so. The other evidence satisfies me that the settlor knew that he was executing a trust-deed and not a will. Dr. Bhalchandra's accuracy of statement or recollection must be at fault, or possibly the settlor may have used the Gujarati word *vyavastha patra*—an ambiguous expression—with reference to both documents, confounding the legal effect of the two together. The settlor was quite unversed in law. In the following November, when he executed his last will, Manekram had doubts in his mind as to the effect of the documents which he had signed in June, or at least expressed himself to Mr. Sayani as though he had. In the November will he refers to them as two wills. The Court in *Hall* v. *Hall* (3) did not wholly disregard evidence of this class. The original instructions taken down by the defendant Narondas might have thrown some light upon this part of the case, but the defendants do not produce them. It was, I think, the duty of Narondas to preserve them as well as the draft of the settlement. He must have known, having regard to the state of health Manekram was

(1) L. R. 23 Ch. D. 278 (281).
(2) L. R. 29 Ch. D. 212.
(3) L.R. 8 Ch. Ap. 430.
(4) L. R. 7 Ch. Ap. 244.

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in when he executed the settlement, and to the elaborate precautions which were taken by him and Manekram to establish the capacity of the latter to execute the deed, that it would most likely be contested by the relations. The defendants are trustees of the settlement, and the deed contains elaborate provisions for keeping the trusteeship in their family. They have the power [563] of keeping the trust funds in their business at a low rate of interest. They have probably more *onus* than benefit to derive from their office, but they are the proper parties to support the deed.

There are, in my opinion, in the circumstances which I have detailed, sufficient grounds for throwing upon the defendants the burden of showing that Manekram understood the effect of the settlement and its finality. This they have not done. The facts of the case bring it within the principles deducible from *Anderson* v. *Elsworth* (1), *Forshaw* v. *Welsby* (2) and *Wollaston* v. *Tribe* (3), and I think that the Court is justified, according to these principles, in holding that the settlement cannot stand.

Decree declaring the trust of the 23rd of June void, and directing that it shall be cancelled, and that the defendants 1 and 2 do pay to the plaintiff the sum of Rs. 30,000, with interest thereon at the rate of 4 per cent. per annum till payment, or at the option of the plaintiff the Government promissory notes in which the same has been invested. The defendants 1 and 2 must have their costs out of the trust funds, but such costs not to include the costs of the doctors who examined Manekram at Surat. Costs of Advocate-General as between attorney and client out of the funds.

Attorneys for plaintiff :—Messrs. *Jefferson, Bhaishankar and Dinsha.*

Attorneys for defendants :—Messrs. *Craigie, Lynch and Owen* and Messrs. *Little, Smith, Frere and Nicholson.*

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## [564] CRIMINAL REFERENCE.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

QUEEN-EMPRESS *v.* HUSAIN VALAD TAJBHAI.*

[20th November, 1890.]

*Indian Penal Code (Act XLV of 1860), s. 183—Resistance to taking of property by the authority of a public servant—Objection to attachment of property in execution of a decree.*

A mere oral statement by a person claiming to be the owner of certain articles attached by a bailiff in execution of a decree, to the effect that he would not allow the bailiff to take away the articles unless he entered them as his property, does not amount to an offence under s. 183 of the Indian Penal Code.

THIS was a reference, under s. 438 of the Code of Criminal Procedure (Act X of 1882), by S. Hammick, Sessions Judge of Ahmednagar.

The accused was convicted by the First Class Magistrate at Nagar under s. 183 of the Indian Penal Code and sentenced to a fine of Rs. 10.

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* Criminal Reference No. 103 of 1890.

(1) 3 Giff. 154. (2) 30 Bea. 243. (3) L. R. 9 Eq. 44.