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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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15 B. 564.

[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.

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The reference was in the following terms:—

"The complainant is a bailiff of the First Class Subordinate Judge at Nagar. He was employed to attach the property of a judgment-debtor, who was a carpenter and maker of tongas. He proceeded to attach two tonga-tops which were lying on the road in front of the judgment-debtor's shop. Thereupon the accused Abdul Husain said that the said tonga-tops were his, and that he would not let the bailiff take them away unless he entered them as his property. Abdul Husain has on these facts been convicted of the offence of offering resistance to the taking of property by the lawful authority of a public servant, and punished with a fine of Rs. 10 under s. 183 of the Indian Penal Code.

"I venture to submit that the facts disclosed by the evidence do not amount to a resistance, as contemplated by the Indian Penal Code. It does not appear from the evidence whether the tonga-tops were or were not the property of Abdul Husain; even if they were not his property I think that a mere verbal direction to the bailiff not to remove them, cannot be regarded as an illegal regal resistance, and if they were his property, still less proper [565] would it be to regard his conduct as an offence against the Penal Code. The evidence does not show that, in this case, the bailiff was either abused, or intimidated, or that any physical resistance was attempted.

"I have, therefore, the honour to suggest that the conviction and sentence be set aside."

OPINION.

PER CURIAM:—For the reasons stated by the Sessions Judge, the Court reverses the conviction and sentence, and directs the fine to be restored, if paid.

Conviction and sentence reversed.

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15 B. 565.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

PATEL VANDRAVAN JEKISAN AND ANOTHER (*Original Defendants*), *Appellants v.* PATEL MANILAL CHUNILAL (*Original Plaintiff*), *Respondent.** [10th and 17th December, 1890.]

*Adoption—Adoption in Gujarat—Adoption by a widow whose husband died while a minor—Implied authority from minor husband—Adoption from corrupt and improper motives—*Onus *of proof—Kadwa Kunbi caste, adoption among—Custom as to adoption—Evidence—Statement as to custom made by witnesses—Admissibility in evidence—S. 32, cl. 4, of the Indian Evidence Act (I of 1872)—Proof of custom.*

In the Maratha country a Hindu widow may without the permission of her husband and without the consent of her kindred adopt a son to him if the act is done by her in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. But the adoption must not have been expressly forbidden by the husband, and must not have the effect of divesting an estate already vested in a third person.

There is no reason for drawing any distinction, as regards the general law, between Gujarat and the Maratha country properly so called. Apart from local

* Appeal No. 72 of 1890.