

Before Mr. Justice Field.

THE QUEEN EMPRESS *v.* GREGG OHUNDER BANERJEE.

1884
July 28, 29,
30.

Evidence—Absence of entry in a book irrelevant—Act I of 1872, s. 34—Reply, Prosecutor's right of—Criminal Procedure Code, Act X of 1882, ss. 289, 292.

Though under s. 34 of the Evidence Act the actual entries in books of account regularly kept in the course of business are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter.

The fact that the accused has, during the cross-examination of the witnesses for the prosecution, used certain documents, and that such documents have been put in as evidence on his behalf does not entitle the prosecutor to the right of reply, if when asked upon the close of the case for the prosecution whether he means to adduce evidence, the accused says that he does not.

THIS was a private prosecution at the instance of one Mohendro Nath Holder, an Attorney of the High Court, the charges consisting of forgery, using as genuine a forged document, and giving false evidence.

The charges were brought in respect of a promissory note and certain letters purporting to be in the handwriting of the complainant, which had been used by the accused as genuine in a certain suit in the Calcutta Court of Small Causes.

Mr. O. C. Mullick and Mr. Deva for the prosecution.

Mr. M. P. Gasper, Mr. Trevelyan and Mr. Roy for the defence.

During the examination-in-chief of the complainant, he said, referring to a book of account before him;—

“This is my cash book. It is written up by me. It is kept in the ordinary course of business. I am in the habit of entering in this book all sums received by me and all sums paid away by me. I did not receive from the accused the sum of Rs. 500 on the 26th day of October or on any other day.”

Mr. Mullick (to witness).—“Look at your book and say whether or not it contains any entry of a receipt by you of Rs. 500 from the prisoner on the 26th day of October 1880 or on any other day”; and he tendered the book as evidence to show that no such entries existed.

Mr. *Gasper* objected to the admissibility of the book itself for the purpose for which it was sought to be used. He relied on s. 34 of the Evidence Act, and contended that though that section made an entry in a book of account relevant, it did not also make the *absence* of an entry equally relevant. The value of such evidence is absolutely *nil*.

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Mr. *Mullick* pressed the question.

[FIELD, J.—It is no doubt fair of the prosecution to produce the book to give the prisoner an opportunity of seeing if the entry is there, but I think the book itself is not relevant to disprove the alleged transaction by the absence of any entry concerning it.]

During the progress of the trial, Mr. *Gasper* put certain documents into the hand of the witness for the prosecution, and having proved them by cross-examination, tendered them in evidence, and had them marked as exhibits on behalf of the prisoner, at the same time intimating that he would contend that by so doing he did not give the counsel for the prosecution the right of replying upon his case in the event of no witnesses for the defence being called.

When the case for the prosecution had closed, Mr. *Gasper* had stated that he did not intend to call any witnesses.

Mr. *Mullick* contended that under s. 292, coupled with s. 289 of the Criminal Procedure Code, he was entitled to a reply, in consequence of the documents above referred to having been put in. He argued that it was impossible for the prosecution to predicate what use the defence intended to make of the documents which had been put in.

Mr. *Gasper* was not called upon.

[FIELD, J.—You knew when summing up your whole case that they had been used for a certain purpose in cross-examination, and you had an opportunity of observing upon them. The Criminal Procedure Code being a penal statute, the principle to be applied in construing those sections is, that the construction most favorable to the prisoner must be adopted. In this view I hold that under ss. 292 the prosecution is not entitled to a reply.]