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law relating to such petitions, 23 and 24 Vict., c. 34, will show that proceedings against the Crown in England, even where there is a legitimate case for the remedy, have in effect reduced the procedure from the elevation of prerogative to that of ordinary right as between subject and subject, and that the only difference is a mere matter of form; the procedure even in respect of petitions of right being substantially identical with that of an ordinary action at law. And it is to be observed that the Act in question is throughout mandatory and not in any way merely provisional or conditional. Nor can the Sovereign's *fiat* that "right be done" be refused, the endorsement to that effect being a mere matter of form. Of course the petition, or suit as it may be called, being thus admitted to a hearing, has to run the gauntlet of the ordinary course of pleading before issue is joined, and a *demurrer* if allowed might, as in other cases, extinguish the claim. Very little therefore is taken by a reference to the procedure under such petition, the rights of the Crown being in fact given up, and resort to the ordinary tribunals being expressly allowed, not merely by the grace of the Crown, but by the express law provided by an Act of the Legislature.

I have thought it right to offer these observations on the Government's alleged immunity from litigation of this kind, but it is unnecessary for me to say more on the subject, as I have formed the clear opinion that the plaintiff's case fails by reason of his non-compliance with the conditions imposed upon him by his contract or treaty, or whatever it may be called, with the Government. The appeal is dismissed with costs.

Appeal dismissed.

CRIMINAL JURISDICTION.

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Before Mr. Justice Straight.

EMPRESS OF INDIA v. INDARMAN.

Obscene Book—Act XLV of 1860 (Penal Code), s. 293—Destruction of book by order of Criminal Court—Act X of 1872 (Criminal Procedure Code), s. 418.

A book may be obscene, within the meaning of the Penal Code, although it contains but a single obscene passage.

The defence to a charge of selling and distributing certain obscene books was that they were sold and distributed in good faith in prosecution of a religious

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controversy. *Held* that the excessive obscenity of such books took away the protection which their controversial nature might otherwise have afforded them. Also that the intention of the seller and distributor must be gathered from the character of the matter contained in such books. As he had chosen to sell and distribute what was obscene, it must be presumed that he intended the natural consequences of his act, namely, corruption of the minds and prejudice of the morals of the public. It was not sufficient for him to say that his intentions were good. It was his public act that must be the test of his intentions, and having done an unlawful act, it was no answer to say that he thought it lawful.—*Queen* v. *Hicklin* (1) and *Steele* v. *Brannan* (2) followed.

At the conclusion of the trial of a person for the sale and distribution of obscene books, the Court trying him ordered the destruction of certain copies of such books, voluntarily surrendered by him, under s. 418 of the Criminal Procedure Code. *Held* that such Court was not empowered by that section to make such an order.

THIS was an application to the High Court for revision of an order of Mr. H. D.'O. Moule, Magistrate of the Moradabad District, dated the 24th July, 1880, convicting the petitioner of the sale and distribution of obscene books, an offence punishable under s. 293 of the Indian Penal Code. The petitioner was the author or compiler of two works called respectively "*Hamla-i-Hind*" and "*Sam-sam-i-Hind.*" These works were controversial works in favour of Hinduism and in disparagement of the Muhammadan religion. They were printed by the petitioner and copies of them were kept by him at his residence for sale and distribution. When the Magistrate became aware of the existence of the books, he requested Mir Imdad Ali Khan, C.S.I., a Muhammadan, one of his Subordinate Magistrates, to examine the books and report on them. The Subordinate Magistrate did so, and upon reading the report and the passages extracted, the Magistrate of the District instituted criminal proceedings against the petitioner. The Magistrate at the trial of the petitioner selected two passages from the "*Sam-sam-i-Hind*" and one from the "*Hamla-i-Hind,*" which were, in his opinion, obscene; and convicted the petitioner under s. 293 of the Penal Code with reference to these passages, sentencing him to pay a fine of Rs. 500. He also directed, with reference to s. 418 of Act X of 1872, that the copies of the books voluntarily surrendered by the petitioner should be destroyed. On appeal by the petitioner the Sessions Judge of Moradabad, by an order dated the

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22nd September, 1880, affirmed the conviction, but reduced the sentence to a fine of Rs. 100. 1881

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The grounds upon which the petitioner applied for revision of the case are set out in the judgment of the High Court.

Messrs. *Ross* and *Hill*, for the petitioner.

Mr. *Colvin* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

STRAIGHT, J.—This is an application for revision, under s. 297 of the Criminal Procedure Code, of a decision passed by the Judge of Moradabad, on the 22nd September last, dismissing an appeal from an order of the Magistrate of the same place, by which the applicant was convicted under s. 293 of the Penal Code, and sentenced to pay a fine of Rs. 500. The grounds taken in the petition are somewhat prolix, but the points urged by the learned counsel were shortly as follows:—(i) That the charge was insufficiently stated, in that it did not set out the several passages alleged to be obscene; (ii) that the Magistrate should have summoned the witnesses named by the defendant; (iii) that, in his judgment, the Judge has relied upon portions of the books to which no reference was made at the time of the hearing of the appeal; (iv) that the three passages excerpted by the Magistrate do not make the books obscene books within the meaning of the Penal Code; (v) that the books are not obscene, and that the circumstances of publication were not considered either by the Magistrate or the Judge; (vi) that the *mens rea* of the defendant was not established; (vii) that the order for the destruction of the books under s. 418 of the Criminal Procedure Code was *ultra vires*; (viii) that having regard to the loss inflicted upon the defendant by the destruction of his books, the fine inflicted on him should be wholly remitted. (After disposing of the first three grounds, the learned Judge continued:) I cannot accede to the principle enunciated in the fourth ground taken on behalf of the applicant, nor am I prepared to hold that a book cannot be an obscene book within the meaning of the Penal Code, if it only contains a single obscene passage. To broadly accept such a doctrine would to my mind be mischievous in the

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extreme, for if the argument is of any value, the logical conclusion to which it must be carried is, that the most filthy and obscene matter might be published in, and made part of, a book, if it was only confined within a limited area. I entirely dissent from any such view, and did the exigencies of the case require it, I should most unhesitatingly hold that the matter appearing at page 94 of the *Hamla-i-Hind* was abundantly sufficient to constitute that work an obscene book and a fit subject for prosecution.

The substantial case for the applicant, however, is contained in the fifth and sixth of the grounds set out above, and to put it shortly it is this, that the *Sam-sam-i-Hind* and *Hamla-i-Hind* are not obscene books, and that they were published *bonâ fide* and with a good intention in prosecution of a controversy between the Hindus and Musalmans of Moradabad, respecting the relative merits of the Hindu and Muhammadan religions. This contention involves two considerations: first, are the books obscene in fact? second, if they are, were the circumstances of publication such as to justify it in point of law. As to the former of these points, both the Magistrate and the Sessions Judge have decided that the books are obscene, and with their findings in this respect it is not competent for me to interfere in revision, though I may add I entirely approve of the conclusions at which they arrived upon this point. For my own satisfaction, and to enable me to deal properly with the case as a whole, I thought it right to have a considerable portion of both pamphets translated, and I have no hesitation whatever in saying that each of them contains a large amount of obscene matter. The whole case for the applicant is therefore narrowed down to this single question, were the two books published by him under such circumstances that their publication was legally justifiable? Now it is said that there was a controversy between the Hindus and Musalmans of Moradabad concerning their several religions, and that books of a like kind to the *Sam-sam-i-Hind* and the *Hamla-i-Hind* had been printed and promulgated by the Musalmans in that city and elsewhere. I will assume this to be correct, and that those works contained the most offensive and obscene allusions to the deities of the Hindus, and to subjects and things held in veneration by them, and that they were in the fullest sense of the term objec-

tionable and insulting. But it is in so strongly urging this circumstance as the basis of his defence that the fallacy and weakness of the applicant's answer to the charge made against him are manifested. Because the Muhammadans, pleads he, have published filthy and revolting matter about my deities and my religion, therefore I was justified in retaliating in a similar fashion. This is a somewhat novel mode of conducting a controversy. This is no agitation of contrary opinions according to the well understood and generally accepted meaning of the word controversy, but a mere retorting of foul and indecent abuse for foul and indecent abuse, which it would be intolerable should be permitted in any civilized society. It is worse than no argument to say that because somebody else has committed an offence against you, you should have free leave and license to commit a similar offence against that somebody. Assuming that the Muhammadans were guilty of all that the applicant and his party allege against them, and that they ought to have been punished, this is no justification for the dissemination of matter such as that to be found in the two books the subject of the present prosecution. For any man to suppose that the cause of his religion could be benefited by the publication of works of such a character, would indicate a depravity of moral sense and mental incapacity with which I should be slow to credit a person of the apparent intelligence of the applicant or indeed any other educated native. If the Musalmans had published and promulgated disgusting anecdotes and stories concerning Vishnu, Brahma, and Mahadeo, in what way could it help the cause of the Hindu faith in the controversy with its assailants to publish, for example, matter like that to be found at pages 51 and 52 of the *Sam-sam-i-Hind*, and pages 62 and 94 of the *Hamla-i-Hind*? I care not whether these passages are quoted from other books or whether they originated in the brain of the applicant, they are revolting and obscene, and it is really shocking to think that any person possessed of common decency could have brought himself to publish them. No one would wish to interfere with the publication of such things as are necessary for the legitimate purposes of controversy, or for the discussion of any religious or social questions in the fullest and freest manner, but there are limits of decency which must not be transgressed, and it is by their very ex-

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cess of all bounds of propriety that the protection, which the appellant's books might otherwise have had accorded them, is taken away. Literature of such a kind could not but be calculated to have the most pernicious influence upon the minds of many of those into whose hands it would come, by directly appealing to their impure instincts and thoughts, and it is simply idle to contend that good morals would not be prejudiced by it. But it was also urged by the applicant's counsel that the moral standard and condition of those who were likely to buy such books was an important element for consideration in the case, and that both the Magistrate and Judge should have taken evidence upon this point. I am not quite sure whether I rightly understand the argument. If it means that the Hindus and Musalmans of Moradabad are mentally and morally of so low a type that what would appear obscene to an ordinary nature would not so present itself to their eyes, I cannot for a moment seriously entertain the contention. I can conceive no grounds of propriety or justice upon which any such consideration should be taken into account, in determining either the character of the incriminated books or the guilt of their author. The question of obscenity or no obscenity cannot be subjected to any such fluctuating test, but must be answered in a broad and intelligible manner, such as will be comprehensible and commend itself to the majority of ordinary and decent minded persons. If, however, the argument of the applicant's counsel means that the controversialists who were likely to purchase the *Sam-sam-i-Hind* and the *Hamla-i-Hind* would be so inflamed with the spirit of controversy that the books would not seem obscene to them, nor could they be injuriously affected, his proposition seems to me even more untenable. In dealing with a question of this grave public importance, it will not do to speculate as to who is or is not likely to buy the work. In this case, it is proved beyond dispute that the books were sold at a price within anybody's reach; that they were readily obtainable; and that no limitation or reservation was made as to the age or class of persons by whom they could be purchased. In short, it is clear that they were open to the public and that any member of the community upon payment of his eight annas could get a copy. The notion, therefore, that their circulation was restricted to the controversialists of Moradabad, a

very hazy and indefinite body of persons by the way, is directly negatived. But even had it been otherwise, I should have felt myself bound to hold that neither the necessities of controversy nor a defence of the Hindu religion from the attacks of the Muhammadans justified the excess of obscenity to be found in the pages of these two books. As I have already remarked, it is indifferent whether the applicant himself originated the indecent matter, or took it literally or in a garbled form from the works of other authors. There it is in his books, and he is equally responsible for it in the one case as in the other. The observation that many works of a similar description have escaped prosecution is wholly beside the question. There are many books in many languages which, if brought to the test of public trial, could not but be pronounced obscene. But the immunity they have so far enjoyed is not because the law was not strong enough to reach them, but because its aid has not been invoked, or the authorities have thought it wiser not to put it into force. With regard to the question of the intention of the applicant in publishing the two books, it is scarcely necessary to say more than this, that it must be gathered from the character of the matter to be found in them. If he has chosen to print what a competent tribunal has declared to be obscene, there is no alternative open but to presume that he intended the natural consequences of his act, namely, corruption of the minds and prejudice of the morals of the public. It is not sufficient for the applicant to say, my private motives and objects were dictated by a laudable and honest desire to expose the errors and fallacies of the Muhammadan creed, to prevent its obtaining converts, and to vindicate my own religion from the attacks of those who had assailed it. It is his public conduct that must be the test of his intention, and having done an unlawful act, it is no answer to say that he thought it was lawful. This principle is clearly laid down in the case of *Queen* v. *Hicklin* (1), a well known and generally accepted authority which was adopted by the Court of Common Pleas in *Steele* v. *Brannan* (2). Such being the views I entertain, I am clearly of opinion that, so far as the application invites a revision of the conviction of the applicant, it cannot be entertained and must be rejected. I think the Magistrate's decision that an offence had been committed under s. 293 of the Penal Code was a

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most proper one, and that the Sessions Judge rightly declined to disturb it in appeal.

With regard to the seventh ground urged in the petition, it appears to me that it has force. I do not think the Magistrate was empowered by s. 418 of the Criminal Procedure Code to direct the destruction of the books surrendered by the applicant. I am far from saying that it would not have been a most proper order for him to make, if express sanction had been given him by law to do so, but in my judgment it would be placing a very strained construction upon the words of s. 418 to hold them as giving him any such authority. I am glad to observe that in cl. 532 of the proposed new Code of Criminal Procedure a specific provision on the subject finds a place, though I may perhaps add, having regard to the fact in the present case that the applicant voluntarily handed over all the copies of his two books to the Magistrate, that it would be more convenient if no such limitation were made as might be inferred from the words—"which remain in the possession or power of the person convicted." I have only further to remark, with respect to the seventh ground urged for revision, that the books having been destroyed, it is obvious I can pass no order about them, which could have any practical effect. (The learned Judge then proceeded to dispose of the eight ground.)

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Duthoit.

AHMAD ATA (PLAINTIFF) *v.* MATA BADAL LAL (DEFENDANT).*

Death of plaintiff-appellant—Order directing suit to abate—Appeal—Act X of 1877 (Civil Procedure Code), ss. 2, 366, 588 (18).

An appellate Court rejected the application of the legal representative of a deceased sole plaintiff-appellant to enter his name in the place of such appellant on the record, on the ground that such application had not been made within the time limited by law, and passed an order that the suit should abate. *Held* that the order of the appellate Court, passed under the first paragraph of s. 366 of Act

*Second Appeal, No. 11 of 1881, from a decree of M. S. Howell, Esq., Judge of Jaunpur, dated the 29th September, 1880, affirming a decree of Pandit Soti Behari Lal, Munsif of Jaunpur, dated the 15th December, 1879.