

1880

BANSI DHAR
v.
HAR SAHAI.

case. Accordingly, whether Act XIV of 1859 or Act XV of 1877 governs the suit, it is barred, as in either case the limitation period would run from the date of the execution of the bond. The decision of the Subordinate Judge is, therefore, correct, and this application must be rejected with costs.

Application rejected.

1880

December 7.

APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice.

EMPRESS OF INDIA v. McLEOD AND ANOTHER.

Defamation—Publication—Act XLV of 1860 (Penal Code), s. 499.

M, a medical man, and editor of a medical journal published monthly, said in such journal of an advertisement published by *H*, another medical man, in which *H* solicited the public to subscribe to a hospital of which he was the surgeon in charge, stating the number of successful operations which had been performed,—“The advertiser is certainly entitled to be congratulated on this marvellous success; but it is hardly consistent with the feelings and usages of the medical profession to herald them forth in this fashion. We are not surprised to find that the line he has elected to adopt has not met with the approval of his brother officer serving in the same province, and we have no hesitation in pronouncing his proceedings in this matter unprofessional.” *Held* that, inasmuch as such advertisement had the effect of making such hospital a “public question,” and of submitting it to the “judgment of the public,” and *M* had expressed himself in good faith, *M* was within the *Third* and *Sixth Exceptions*, respectively, to s. 499 of the Penal Code. *Held* also that *M* came within the *Ninth Exception* to that section.

The sending of a newspaper containing defamatory matter by post from Calcutta, where it is published, addressed to a subscriber at Allahabad, is a publication of such defamatory matter at Allahabad.

The publisher of a newspaper is responsible for defamatory matter published in such paper whether he knows the contents of such paper or not.

THIS was an appeal to the High Court by Surgeon-Major K. McLeod and Mr. F. F. Wyman convicted by Mr. A. M. Markham, Magistrate of the Allahabad District, by an order dated the 21st September, 1880, of defamation. The facts of the case are sufficiently stated in the judgment of the High Court.

Mr. Colvin, for the appellants.

Mr. Spankie and the Junior Government Pleader (Babu Dwarika Nath Banarji), for the Crown.

The following judgment was delivered by the Court:—

STUART, C.J.—This is an appeal from a conviction by the Magistrate of Allahabad for the offence of defamation under s. 499 of the Indian Penal Code with its “*Explanations*” and “*Exceptions*.” The facts which gave rise to the prosecution are these:— In the *Indian Herald*, a newspaper published at Allahabad, of the 29th January of this year, there appeared an advertisement headed “Allahabad Eye Hospital,” setting forth the number of patients who had been treated in it, the number of operations, and generally the success of the institution, and inviting subscriptions, which the advertisement stated “will be thankfully received by Dr. Geoffrey C. Hall, Central Prison, Allahabad (1).” This advertisement, it was explained at the hearing, had since been repeatedly published in the same newspaper. It is not disputed that it was inserted by Dr. Hall himself, and that it referred to his own Eye Hospital in the city of Allahabad, that is to say, that he made himself responsible for it by accepting and consenting to its insertion in the *Indian Herald*; for in his re-examination by Mr. Spankie, one of the counsel for the prosecution, Dr. Hall states:—“I did not draw out that advertisement myself: the editor of the *Indian Herald*, Mr. Crawford, drew it up: it was inserted gratis: I did not see the advertisement before it appeared in the paper.” It does not appear from the record that any particular notice was taken of this advertisement by any publication, professional or lay, till the publication of the *Indian Medical Gazette* of the 1st July of this year. This is a monthly medical journal published at Calcutta, and bearing on its front or title page to be “Edited by K. McLeod, M.D.,” who is a defendant in the present case, and there is evidence to prove that the other defendant, Mr. Wyman, is the publisher of the

1880

EMRESS OF
INDIA
”,
McLEOD.

(1). The advertisement was in the following terms:—

“ALLAHABAD EYE HOSPITAL.—Subscriptions are urgently needed for this institution, which has now been opened for little over a year, during which time 1,100 patients have attended suffering from various diseases of the eye. There have been 180 major operations, including 95 cataract operations, 31 iridectomies; with one exception these all have been successful. The Municipality for the last few months have given a grant of Rs. 50 a month, the remainder being paid by the surgeon in charge. The cost of the institution averages Rs. 90 a month, exclusive of cost of instruments, &c.; diet for in-patients, of whom there are at present nine, there being accommodation for 15, costing on an average 2 annas a day each. Subscriptions will be thankfully received by Dr. Geoffrey C. Hall, Central Prison, Allahabad.”

1880

EMPERESS OF
INDIA
v.
McLEOD.

same journal. In this *Indian Medical Gazette* then of the 1st July, 1880, there appeared, under the heading of "Current Medical Topics," the following short article:—"Our attention has been drawn to the fact that a medical officer, serving in a large town in the North-Western Provinces, is in the habit of soliciting, by advertisement, subscriptions to an Eye Hospital which he has established. The medical transactions of the institution are set forth in the advertisement. 'There have been 180 major operations, including 95 cataract operations, 31 iridectomies; with one exception, these have all been successful.' The advertiser is certainly entitled to be congratulated on this marvellous success; but it is hardly consistent with the feelings and usages of the medical profession to herald them forth in this fashion. We are not surprised to find that the line he has elected to adopt has not met with the approval of his brother officer serving in the same province, and we have no hesitation in pronouncing his proceedings in this matter unprofessional." This appears to have caught the eye of one of Dr. Hall's medical friends here, who takes the *Gazette*, and that gentleman at once showed it to the prosecutor, who forthwith, and without any previous communication with the defendants, or either of them, instituted this prosecution, explaining that he adopted this course by legal advice.

The charge against the defendants is that of defamation or libel under s. 499 of the Indian Penal Code, by reason of the article in the *Indian Medical Gazette* imputing to Dr. Hall or suggesting untruthfulness on his part in the advertisement referred to, and also for accusing him of unprofessional conduct by the publication of such an advertisement. After a trial, which I feel bound to say was patient and fair on the part of the Magistrate, the two defendants were convicted; Dr. McLeod being sentenced to pay a fine of Rs. 300, or in default to suffer simple imprisonment for one month, and Mr. Wyman, the publisher, to pay a fine of Rs. 150, or in default to suffer simple imprisonment for 14 days. It was further ordered by the Magistrate, under s. 308, Criminal Procedure Code, and subject to an appeal, if any be instituted, that the expenses of the prosecution properly incurred should be paid out of the fines if paid or levied.

Against this conviction, and the sentences, an appeal has been preferred to this Court, and has been argued before me by the counsel for both parties. The pleas taken by the defendants-appellants are that the article complained of was not defamatory, but was a fair criticism on Dr. Hall's advertisement, and that it falls within the scope of *Exceptions* 1, 3, 6, and 9 to s. 499, Indian Penal Code. It is also pleaded that it is not proved that the appellants either made, printed or published, the alleged defamatory matter; and it is further objected that the Magistrate of Allahabad had no jurisdiction to try the defendants-appellants for the alleged offence. These two last pleas had better be disposed of first.

Of the publication of the alleged libel or defamation there can be no doubt. The evidence of Dr. Deakin, who takes the *Indian Medical Gazette*, and who called Dr. Hall's attention to the article complained of, is sufficient to prove publication in Allahabad, for it was laid down so far back as at the State Trials that, "if a man write a libel in London and send it by post addressed to a person at Exeter, he is guilty of a publication in Exeter."—(12 St. Tr. 332). Mr. Wyman in particular repudiated, and no doubt truly, any knowledge of the inculpated article, but I must tell him and all in the same position that he is not thereby excused, but as publisher must, under all circumstances, answer for the libel imputed to his journal. For it has been laid down (Folkard, 4th ed., 1876, page 425,) that "the wilful and intentional delivery of a libel by way of sale or otherwise, as by a book-seller or hawker, is a sufficient publication, though the parties so publishing did not know the contents." And further that "it is not material whether the person who disperses libels is acquainted with their contents or otherwise, for nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing of the purport of them from an illiterate publisher would make him safe in dispersing them." And the law so laid down is all the stronger against Mr. Wyman, seeing he cannot be called illiterate, but is well known to be a very intelligent gentleman. But the evidence identifying the defendants as editor and publisher is not so clear perhaps as it should have been in a criminal prosecution.

1880

 EMPRESS OF
 INDIA
 v.
 McLEOD.

1880
 EMPRESS OF
 INDIA
 v.
 McLEOD.

No such objection, however, appears to have been taken before the Magistrate, and indeed at the hearing before myself I did not understand it to be disputed that the Dr. McLeod who is described as the editor on the face of the *Indian Medical Gazette* itself was as such the proper defendant to answer for the alleged defamation. Nor as to the defendant Wyman was it disputed that he is the publisher of the same *Indian Medical Gazette*. And both defendants have filed a power of attorney duly executed by them in favour of Messrs. Roberts, Morgan & Co., a firm of solicitors in Calcutta, by which these gentlemen are empowered "to appear in the Court of the Magistrate of Allahabad, or any other Court having jurisdiction in the matter, in certain proceedings instituted against us or one of us at the instance of Surgeon G. C. Hall, on a certain charge defined in s. 499 of the Indian Penal Code, and to take such steps and proceedings as may be necessary for defending the said charge and proceedings, or any further charges or other proceedings that may be brought against us or either of us of any nature or kind soever by the said G. C. Hall, and for that purpose to make, sign, verify and present all necessary petitions, written statements and other documents, and to nominate and appoint or retain counsel, vakils and other persons." It is not pretended or in any way even suggested that the K. A. McLeod and F. F. Wyman, who have signed this power of attorney, are not the identical persons of these names who are respectively editor and publisher of a journal called the *Indian Medical Gazette*, nor that the *Indian Medical Gazette* complained of in this case is the same *Indian Medical Gazette* that is conducted by these defendants. Moreover, it is very plain from the record that the defence in this case proceeds clearly and unmistakably on the assumption, I had almost said the confession, or what is tantamount to it, that there was no want of identity, and that the defendants, who by their counsel pleaded and argued on the merits before the Magistrate, were the persons truly responsible to the prosecutor for the matter of his complaint. I am therefore of opinion that the alleged defamatory article was legally published within the district of Allahabad, and that the defendants Dr. McLeod and F. F. Wyman are the persons legally responsible for such publication. Under these circumstances the Magis-

trate of Allahabad had undoubtedly jurisdiction to entertain and try the case, and the appellants' pleas to the contrary must be disallowed.

I have thought it necessary to say so much on these two points of publication and identity, although the conclusion I have expressed respecting them is of the less consequence, seeing that, on the merits of the case, I have formed the opinion very clearly that the article complained of in the *Indian Medical Gazette* is not defamatory within the meaning of the Indian Penal Code.

I have in the first place to observe that the medical evidence appears exclusively to relate to the question whether the advertisement was unprofessional, or, as one of the medical witnesses puts it, is against professional etiquette. This evidence is of a very partial kind and merely evidence of opinion, and, if I may be allowed the remark, it might be suggestive to some minds of the traditional jealousy supposed to be peculiar to the medical profession since the days of Hippocrates. Two of the doctors examined express the opinion, one of them Dr. Deakin who first brought the article to the notice of the prosecutor and must be understood as one of his own witnesses, that the advertisement was not unprofessional. But so far as the medical evidence goes, the weight of it is certainly, in my judgment, favourable to the contention of the defendants, and almost justifies the libel, if libel it was, for it undoubtedly supports the view expressed in the article that the advertisement was unprofessional, and the force of this evidence is not in the least affected by the remark of the Magistrate that the "stigma of unprofessional conduct (in the article) is plain and uncompromising." The question, however, which the Magistrate had to try was not whether the advertisement was liable to the charge of being merely unprofessional, but whether the defendants had incurred the penalties of the criminal law for saying so. That was the question, and the only question, before the Magistrate, and he has very unnecessarily incurred the record with medical depositions and medical opinions, which, to say the least, do not certainly dispose of the question of defamation. For myself, I am far from approving of the article and I differ in opinion from the writer of it. I think it shows bad taste on the part of its

1880

EMRESS OF
INDIA
S.
McLEOD.

1880

EMPEROR OF
INDIA
v.
MCLEOD.

author, and that to some extent it casts an unmerited slur on the prosecutor and does him injustice. I consider that Dr. Hall was quite entitled to advertise the claims of the Hospital as a public institution. All the medical witnesses say so, even those whose evidence is adverse to him, and if that be so, he was not only entitled but bound to show on the face of the advertisement itself that he was justified in appealing to the public for pecuniary help, and he could only do that by giving the particulars which the advertisement contained. Dr. Hall, however, could have very well afforded to have disregarded the unmerited attack, as perhaps it may be called. He is a gentleman well known and highly respected in these provinces for his many good qualities, and for his professional knowledge and skill, and I know of no officer of Government more worthy of esteem. But this is a criminal case, and what I have to consider is not merely its moral or social aspect, but whether by sneering or appearing to sneer at the facts stated in the advertisement, and calling Dr. Hall's conduct unprofessional, the defendants thereby brought themselves within the provisions of s. 499 of the Indian Penal Code.

It is in the first place to be observed that the article itself is not in terms altogether gratuitous. It refers to Dr. Hall's advertisement by which we are enabled to understand the nature and extent of the prosecutor's alleged misconduct; so that, if we have the bane, we have with it also the antidote, and the one document is the measure of the meaning and of the *animus* of the other, and the public to whom both documents were addressed are as well able to judge of the imputation on Dr. Hall as any body of, or number of, doctors can be. Nor is the article so very bad as some of the medical witnesses seem to think it. The word "marvellous" in it indeed is not used in a friendly, but rather perhaps in a somewhat spiteful, sense. That, however, is not necessarily the meaning of the writer. He may possibly have been sincere in describing Dr. Hall's success as marvellous, and, in fact, unless he was so, it is not easy to understand why he should have stigmatised the advertisement as unprofessional. No personal motive, however, is apparent on the face of the article itself, and there is ample evidence to prove the absence of any such feeling

on the part of the defendants towards Dr. Hall; and if, notwithstanding the conductors of the *Indian Medical Gazette* were of opinion that, in issuing the advertisement, which had been before the public since January last, and remained unnoticed by the defendants till the following July, Dr. Hall, as a professional man, had acted in a manner of which the defendants did not approve (for such appears to me to be the full extent of the meaning of the word "unprofessional"), the printing and publishing of such an opinion might not be in good taste, and might even be reprehensible, but to say that the editor and publisher thereby made themselves amenable to the criminal charge of defamation is to put a construction on s. 499, Indian Penal Code, which I cannot accept.

1880

EXPRESS OF
INDIA
J.
McLEOD.

The provisions of the Indian Penal Code for the offence of defamation are contained in chapter XXI., and s. 499 with its "*Exceptions*" and "*Explanations*" constitute nearly the whole of the chapter, there being only three other short sections in it, 500, 501, and 502, which provide for the punishment on conviction of the offence. It will be seen from these provisions of this part of the Penal Code that the framers of this part of the Code were careful to draw the line, so as not by their enactments unduly or unreasonably to interfere with legitimate liberty in speech and writing, especially in an Empire in which the Press is free, absolutely free, to the full extent of a living reality. And that being so, it is not difficult to understand what was intended by this important section of the Indian Penal Code. It begins by providing that "whoever, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." Now if the article complained of by the prosecutor had been based on a different and less open allusion than it was to its motive, there might have been some cogency in the argument that Dr. Hall had been defamed by the defendants. If, for instance, the article, instead of referring to an advertisement, which had been before the public for the very considerable period

1880

EMPRESS OF
INDIA
v.
McLEOD.

of seven months ere it provoked any unfavourable notice, had been called forth in the mind of the writer by secret information maliciously communicated, the words I have quoted from s. 499, taken in connection especially with the proviso in *Explanation 4* respecting an imputation which lowers the character of a person in respect of "his calling," would have applied; and the complicity of the defendants might have been very serious. But here the facts are of a different character,—the alleged defamation simply being a remark of a very doubtful nature respecting the prosecutor's veracity, with the expression of an opinion that his conduct in publishing the advertisement which appeared in the *Indian Herald* was unprofessional; and, if this was done in good faith (and I see no reason to doubt that it was), then the article comes within the terms of the 3rd *Exception* in s. 499, by which it is provided that: "It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further." For here the advertisement had clearly made the prosecutor's Eye Hospital a "public question;" and it further had the effect of submitting the Hospital to "the judgment of the public" within the meaning of the *Explanation* to the 6th *Exception*; and I think it is also rightly contended by the defendants that their conduct in publishing the article is protected by the 9th *Exception* in s. 499, which states that: "It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good." That such was the position of the defendants in relation to the prosecutor's advertisement of his Hospital will appear from those portions of the evidence which are material to the only question in the case, and that is, as I have before said, not whether Dr. Hall's conduct was, under the circumstances, unprofessional, but whether the defendants were criminally responsible for saying so. And of such evidence the most instructive is that of the prosecutor himself. He tells us at once that his object was a public one. He says: "I thought that a Hospital might advantageously be established in Allahabad for the

1880

 EMPRESS OF
 INDIA
 P.
 McLEOD.

North-Western Provinces : about six months after the Hospital had been established the Inspector-General of Hospitals came to see it with a view to its being taken over by Government." It is very intelligible that his counsel, seeing the bearing of such statements, endeavoured to exclude them. The Magistrate, however, very properly ruled that they were relevant. Then in his cross-examination Dr. Hall states that he had contributed articles to the same *Indian Medical Gazette*, which was said to have defamed him, adding: "I have never in my opinion been treated otherwise than with courtesy by the editor of the *Indian Medical Gazette* save in this instance." And he makes a statement which is quite inconsistent with the idea of any bad feeling or of any personal motive against him; for he deposes: "I am the author of a pamphlet on the causes of blindness in India: it was reviewed in the *Indian Medical Gazette*, favorably reviewed;" and again—"I have had no previous reason for supposing that the editor of the *Indian Medical Gazette* entertained any motive against me, nor had I in regard to Mr. Wyman, the publisher." He goes on to say that his object in publishing the advertisement was not to promote his own professional success, but simply to gain subscriptions for his hospital, which, he says, he considered a very useful institution, "and I wished to bring it before the public, and invited support: I wanted to awaken the public interest in the institution." Clearer evidence than this there could not be that the advertisement related to a matter not private or personal, but public, and that therefore the defendants, by their article, had not defamed the prosecutor within the true meaning of s. 499. Respecting his own position in the matter, however, in other respects, there appears to have been some confusion of mind on the part of the prosecutor when giving his evidence. He explains that by the expression in the advertisement, "the surgeon in charge," he meant himself, and he makes the admission: "I think that this was advertising the charity of the surgeon in charge: those who knew that I was the surgeon in charge might think that I was advertising my own charity,"—thus clearly challenging discussion of the question as to whether his conduct in publishing the advertisement was or was not unprofessional, and the defendants may therefore simply be said to have accepted the challenge. He adds: "I do not think that the tendency of the adver-

1880

EMPRESS OF
INDIA
"
McLROD.

tisement was to advertise the success and the charity of the surgeon in charge," although he admits that "that construction might certainly be put upon it." The evidence of the prosecutor further appears to be replete with statements going, if not to provoke, at least to justify and excuse, the defendants' article. He says: "Successful hospital work leads to reputation, and sometimes to promotion: reputation and promotion are material advantages: people might have thought that the surgeon in charge was advertising what might procure him reputation and promotion: I certainly think the advertisement was misinterpreted and misunderstood by the editor of the *Indian Medical Gazette*: it was an advertisement liable to misinterpretation and misunderstanding;" and he makes the rather startling admission, "I do not think that it would be professional knowingly to insert in a newspaper an advertisement liable to misinterpretation," although he had just informed the Court that the advertisement was liable to misinterpretation and misunderstanding. The prosecutor concludes his evidence as follows: "I did not see the advertisement before it appeared in the paper: the hospital was originally instituted by me at my own expense: it gradually involved me month by month in further expenses: I am not a rich man: I was not prepared to carry on the undertaking regardless of personal expense: I think the hospital is one which should be supported by public and not private expense: my object in stating in the advertisement that the expenses were borne in part by the surgeon in charge was to show the public that a private person was bearing part of the expenses, and to relieve myself: I do not know of any institution in England which was started by private means and afterwards taken up by public funds: I have no doubt there are such: I did not think the advertisement, when I read it in print, was unprofessional." Now really it appears to me impossible to read this evidence without seeing that it plainly proves all the circumstances of exemption from liability on the part of the defendants under s. 499 of the Indian Penal Code. It also goes to excuse the defendants, even if they had more plainly and distinctly than they have done, contravened the law. I have already adverted to the evidence of the other doctors, and for the reasons which I have already explained, it is not conclusively relevant to

the issue before the Magistrate, that being, not whether Dr. Hall's advertisement was unprofessional, but whether the defendants had made themselves amenable to the criminal law of defamation for simply expressing the opinion in their journal that it was. The prosecution has utterly failed, and it is very much to be regretted that it was ever undertaken. Dr. Hall's character as a gentleman and his reputation as a medical man did not require such an ordeal, and as regards the defendants' conduct, if made the subject of legal complaint at all, that might have been more appropriately considered by a Civil Court, for although the remedies in cases of libel by civil suit and criminal prosecution are co-extensive, the wrong complained of in this case could have been sufficiently and indeed more satisfactorily inquired into in a Civil Court than in the Court of the Magistrate. At the same time I by no means desire to be understood as saying or suggesting that if the prosecutor had been plaintiff in a Civil Court, he would have had a better chance of success than he has had in these proceedings. I am very clearly of opinion that the convictions before me in this appeal cannot stand, but must be, and they are, set aside, the sentences are quashed, and the fines imposed on the defendants are remitted.

1880

EMPEROR OF
INDIA
v.
McLEOD.

APPELLATE CIVIL.

1880

December 2

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

TALEMAND SINGH (DEFENDANT) v. RUKMINA (PLAINTIFF).*

*Joint Hindu Family—Widow's Right of residence in Family Dwelling-house—
Auction-purchaser.*

The widow of a member of a joint Hindu family can claim a right of residence in the family dwelling-house, and can assert such right against the purchaser of such house at a sale in execution of a decree against another member of such family. *Gauri v. Chandramani* (1) and *Mangala Devi v. Dinanath Bose* (2) followed.

THE plaintiff in this suit, Rukmina, claimed to be maintained in possession of a certain house, basing her suit on her right to

* Second Appeal, No. 631 of 1880, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 28th February, 1880, modifying a decree of Mirza Kamar-ud-din Ahmad, Munsif of Azamgarh, dated the 12th December, 1879.

(1) I. L. R., 1 All., 262. (2) 4 B. L. R., O. C., 72.