CRIMINAL REVISION.

1915.

February 16.

Before Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR *v.* GULAM HYDER PUNJABI.*

Indian Penal Code (Act XLV of 1860), sections 337, 338—Hurt caused by rashness or negligence—Hakim—Performance of eye-operation with ordinary scissors—Neglect of ordinary precautions—Partial loss of eye-sight.

The accused, a Hakim, performed an operation with an ordinary pair of scissors, on the outer side of the upper lid of the complainant's right eye. The operation was needless and performed in a primitive way, the most ordinary precautions being entirely neglected. The wound was sutured with an ordinary thread. The result was that the complainant's eye-sight was permanently damaged to a certain extent. The accused was on these facts convicted of an offence punishable under section 338 of the Indian Penal Code. He having applied to the High Court:—

Held, that the accused had acted rashly and negligently so as to endanger human life or the personal safety of others.

Held, also, that the act of the accused amounted to an offence punishable under section 337 of the Indian Penal Code, since there was no permanent privation of the sight of either eye in consequence of the operation.

Where a Hakim gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law.

THIS was an application from conviction and sentence passed by Chunilal H. Setalvad, Second Presidency Magistrate of Bombay.

The facts were as follows:—The accused was a Hakim professing to be a specialist in eye-diseases. The complainant was suffering from granulations in her right eye. She was taken by a friend of her husband to the accused, who examined her eyes and said he would charge Rs. 30 and cure her eyes within two hours.

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The accused then performed an operation on the upper lid of the complainant's right eye with an ordinary pair of scissors. The wound was sutured with an ordinary thread. The accused did not even take the precaution of sterilizing the instruments used in the operation. It appeared that "the operation was a needless one and performed in a primitive way." The result of the operation was that the complainant lost partially the sight of her right eye.

The accused was charged with causing grievous hurt to the complainant. His defence was that the operation was performed with the consent of the complainant; that it was properly performed according to the native methods; and that he was competent to perform it as he had already performed a large number of such operations.

The trying Magistrate found that the complainant did not consent to the operation; and that the accused did the act so rashly and negligently as to endanger the personal safety of the complainant. The accused was therefore convicted of an offence punishable under section 338 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two months and to pay a fine of Rs. 150, awarding the whole of the fine to the complainant by way of compensation.

The accused applied to the High Court.

P. N. Godinho, for the accused.

S. S. Patkar, Government Pleader, for the Crown.

SHAH, J.:—The applicant in this case has been convicted of causing grievous hurt by a rash and negligent act under section 338, Indian Penal Code.

It is urged on his behalf that his act was neither rash nor negligent as alleged by the prosecution, that he is

protected by section 88 of the Indian Penal Code, as the complainant consented to suffer the harm caused to her, and that the hurt caused is not proved to be grievous hurt. As regards the first contention, the facts which are either proved or admitted are these: The accused, who is a *Hakim*, performed an operation, on the outer side of the upper lid of the right eye of the complainant. The instruments used were a pair of scissors and a needle, which would be ordinarily used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. As the Magistrate correctly finds: the most ordinary precautions, such as, using proper instruments for the operation as well as for protecting the eye-ball, disinfecting and sterelizing the instruments and using antiseptics, were entirely neglected. The medical evidence shows that the operation was needless and performed in a primitive way. It is not shown that it was in accordance with any recognized Indian method. Dr. Prabhakar, who has been examined on behalf of the defence, says that he has not seen lid operations performed by Hakims, though he has seen cataract operations performed by them. On these facts, it was quite open to the learned Magistrate to find that the accused acted so rashly and negligently as to endanger human life or the personal safety of others. For where, as here, a Hakim gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law. This case has been very fully argued before us; but we have heard nothing to induce us to think that the finding of the lower Court is not proper. The fact of the accused having treated a large number of cases and, according to him, successfully, was relied upon by Mr. Godinho. Quite apart from the infirmity of the evidence bearing

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on this point, which has been mentioned by the Magistrate, it appears that in many cases the diseases treated and the operations performed by the accused were quite different. And there is not a single case in which it is shewn that the disease and the circumstances connected with the operation were the same as in this case. This renders the evidence relating to these several cases practically useless, if not irrelevant. The point in the case is not whether the petitioner is at liberty to use such skill as he may possess in performing such operations, but whether, in doing so, he has acted rashly or negligently. It matters not, for this purpose, whether a practitioner is trained or not; he is bound by law to avoid such rashness or negligence as would endanger human life or the personal safety of others, if he undertakes an operation. In our opinion, the petitioner has been properly found to have acted rashly and negligently.

As regards the argument based on section 88 of the Indian Penal Code, it is rather difficult to accept the learned Magistrate's finding that the accused acted without the complainant's consent and against her wish. If he did so, he would be guilty of causing hurt, simple or grievous, whichever it may be, quite independently of the consideration whether he acted rashly or negligently. This apparently is not the prosecution case, and that is not the charge against him. The gravamen of the charge against him is that he acted rashly and negligently. On the evidence, what appears to have happened is this. When the complainant was taken to the accused the latter persuaded her to accept his treatment, and her companion, Sayad Hassanally, who had taken her to the accused and who apparently had faith in the skill of the accused as a *Hakim*, wanted her to submit to his treatment. The complainant had neither time nor opportunity to realise what it was that she

was asked to submit to; but on the persuasion of both she submitted to the operation. In that sense she consented to the operation. But she hardly realised the harm or the risk of the harm, which the operation involved, and did not consent expressly or impliedly to the harm or the risk of the harm as required by section 88 of the Indian Penal Code. It is not suggested—certainly not proved—in this case that the complainant had anything like a real opportunity to realise the nature of the accused's act, and the harm and the risk incidental to that act, so as to be a consenting party to the operation, in whatever manner it might be performed. It is clear, therefore, that the accused is not protected by section 88 of the Indian Penal Code, even if we assume that the other conditions necessary to invite the application of that section are fulfilled.

Lastly, it is urged that the hurt caused is not proved to be grievous. The medical evidence on this point is that as a result of the operation performed by the accused, complainant's eye-sight would be permanently damaged to a certain extent. This is not sufficient to establish that there has been a permanent privation of the sight of either eye in consequence of the operation. It is not suggested in this case that the hurt is otherwise grievous as defined by section 320 of the Indian Penal Code. This contention appears to be good, and must be allowed.

As regards the sentence, having regard to all the circumstances a substantial fine would meet the justice of the case and no sentence of imprisonment is necessary.

The result, therefore, is that the conviction under section 338 is set aside and the petitioner is convicted of causing hurt under section 337, Indian Penal Code. The sentence of imprisonment is set aside and that of

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fine confirmed. The order as to compensation must, of course, stand.

Conviction and sentence altered.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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March 9.

DALPATSINGJI NAHARSINGJI (ORIGINAL PLAINTIFF) APPELLANT, *v.* RAISINGJI NAHARSINGJI AND OTHERS (ORIGINAL DEFENDANTS 1 and 2) RESPONDENTS.*

Hindu Law—Adoption—Effect of invalid adoption—Invalidly adopted son not entitled to maintenance—Declaration in writing that the declarant will give certain lands as maintenance—Formal agreement not executed—Grantor cannot be sued on the declaration—Incomplete contract.

Under Hindu Law, a boy whose adoption has been found to be invalid has no right to be maintained out of the estate of the adopted family.

The plaintiff, claiming to be the adopted son of the late Thakor of Mehelol, applied to obtain certain lands from the estate by way of maintenance, to the Collector who was in charge of the estate. The Collector persuaded the present Thakor (defendant) to settle the matter. Accordingly, the defendant made a declaration in writing that he would give the Kankanpur *wanta* by way of maintenance to the plaintiff and his direct lineal heirs. The defendant did not execute any formal deed to convey the lands. The plaintiff sued to recover the Kankanpur *wanta* from the defendant on the strength of the declaration:—

Held, that the defendant was not bound by the declaration, which marked only a stage in the negotiations, which, unless completed, could be broken off at any time by either side.

FIRST appeal from the decision of C. N. Mehta, Joint Judge of Ahmedabad.

Suit to recover possession of lands, which belonged to the Mehelol estate in the Panch Mahals District.

* First Appeal No. 281 of 1912.