1892 OCT. 5.

APPELLATE CIVIL.

17 B. 570.

sale of the property mortgaged. Refers to *Deo Chand Sahoo* v. *Teeluck Singh* (1).

JUDGMENT.

[572] PARSONS, J.—This suit was brought on a mortgage, executed by the defendant No. 1, to recover the mortgage-debt by the sale of the mortgaged property which had passed into the possession of the defendant No. 5 by purchase. The defendant No. 1 was a resident of a Native State, and the mortgage was executed, and the property was situated, in the same Native State. As, however, the defendant No. 5 was a resident of Poona, the Subordinate Judge, on the strength of the decision in *Yenkoba* v. *Rambhaji* (2), held that he had jurisdiction, and awarded the claim for Rs. 7,000 and costs against the mortgaged property.

We think that he had no jurisdiction. The language of s. 5 of Act VIII of 1859 is not the same as that of s. 16 of the Code of Civil Procedure, 1882. The former mentioned only "suits for land or other immoveable property." The latter enumerates six different descriptions of suits, and among them are suits, (*c*) for the foreclosure or redemption of a mortgage of immoveable property, and suits (*d*) for the determination of any other right to, or interest in, immoveable property. We think that this suit falls within one or other of these descriptions, and can therefore be instituted only in the Court within the local limits of whose jurisdiction the property is situate. We are supported in this view by the decision of the Allahabad High Court in *Gudri Lal* v. *Jagannath Ram* (3). In the present case the property is not even situate in British India. Moreover, the relief sought can in no way be obtained by the personal obedience of the defendant No. 5, since he is not personally liable for the claim. The relief sought can only be had by proceeding against the property.

We reverse the decree of the Subordinate Judge, and order that the plaintiff's suit be dismissed as against the appellant with costs throughout.

Decree reversed.

---

17 B. 573.

[573] CRIMINAL REFERENCE.

Before Mr. Justice Telang and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* BALKRISHNA VITHAL.* [17th January, 1893.]

Defamation—Penal Code (Act XLV of 1860). s. 499—Statement by a witness—Privilege—Witness.

A witness cannot be prosecuted for defamation on account of statements made when giving evidence in the witness-box.

[**Diss.**, 32 C. 756=2 C.L.J. 105=9 C.W.N. 111=2 Cr. L.J. 459; **F.**, 27 C. 262 (263); **R.**, 22 A. 234 (235); 29 A. 685=4 A.L.J. 605=27 A.W.N. 235=6 Cr. L.J. 197; 19 B. 51 (62); 19 B. 340 (347); 13 Cr. L.J. 494=15 Ind. Cas. 494=244 P.L.R. 1912=31 P.W.R. 1912 Cr.=5 P.R. 1913; 1 L.B.R. 84 (85); 3 L.B.R. 268 (270); **D.**, 19 B. 717 (723).]

THIS was a reference under s. 438 of the Code of Criminal Procedure (Act X of 1882).

---

* Criminal Reference, No. 41 of 1892.

(1) 14 W. R. 238. (2) 9 B. H. C. R. 12. (3) 8 A. 117.

1893
JAN. 17.

CRIMINAL REFERENCE.

17 B. 573.

The facts of this case were as follows:—The complainant had filed a suit in a Civil Court against the accused. In that suit the accused in the course of his examination as a witness for the plaintiff made the following statement:—

"The plaintiff has brought this false suit against me. He has undergone imprisonment in the Thana Jail, and he is a man of damaged character."

After the decision of the civil suit the complainant prosecuted the accused on a charge of defamation under s. 500 of the Indian Penal Code.

The trying Magistrate found the accused guilty of the offence charged and sentenced him to a fine of Rs. 50.

The Sessions Judge of Ratnagiri, being of opinion that the conviction was illegal, and opposed to the ruling in *Queen-Empress* v. *Babaji*(1), referred the case to the High Court under s. 438 of the Code of Criminal Procedure.

Ghanasham Nilkanth, as *amicus curiæ*, for the accused:—A witness is absolutely protected in respect of defamatory expressions used by him in the witness-box—*Queen Empress* v. *Babaji*(1). If he makes a false statement, he is liable to a prosecution for perjury. But he cannot be prosecuted for defamation. The English law gives the fullest privilege to parties and witnesses for words spoken in giving evidence —*Seaman* v. *Netherclift* (2). The expression "words either spoken," &c., in s. 499 of the Indian Penal Code does not apply to words [574] spoken in the witness-box. Refers to *Bhikuzhar* v. *Becharam* (3); *Manjaya* v. *Sesha Shetti* (4); *Dawan Singh* v. *Mahip Singh* (5). I further contend that the alleged defamatory statement was made in good faith. The trying Magistrate has omitted to consider this point.

Rao Saheb *Vasudev J. Kirthikar*, Government Pleader, for the Crown:—The mere fact that the defamatory statement was made by the accused while giving evidence in a judicial proceeding is no defence. The words of s. 499 of the Penal Code are clear. They must be read in their plain grammatical sense. There is nothing to show that the Legislature intended to except from the provisions of that section defamatory words used by a witness in the witness-box. Had this been the intention of the Legislature, it would have been expressed in clear language. The wording of s. 499 is wide enough to cover a case like the present. It does not fall within any one of the exceptions mentioned in that section. Considerations of public policy cannot control the express provisions of a penal statute. Refers to *Crawford* v. *Spooner* (6); *Eastern Counties Railway Companies* v. *Marriage* (7); *Moonshee Buzloor Ruheem* v. *Shamsoonnissa Begum*(8); *Annaji* v. *Bapuchand* (9). Under s. 105 of the Evidence Act (I of 1872) it is incumbent on the accused to prove good faith—*Queen-Empress* v. *Slater* (10); *Nathji Muleshvar* v. *Lalbhai*(11); *Queen-Empress* v. *Dhum Singh* (12); *Hayes* v. *Christian* (13). This he has failed to do.

JUDGMENT.

TELANG, J.—I confess that if the point which arises in this case had been *res integra*, I should have been of opinion that the conviction should be affirmed. I am unable to adopt the view that on any

(1) 17 B. 127.
(2) 1 C. P. D. 540.
(3) 15 C. 264.
(4) 11 M. 477.
(5) 10 A. 425.
(6) 4 M.I. A. 179 (187).
(7) 9 H.L.C. 36.
(8) 11 M.I.A. 551 (604).
(9) 7 B. 520.
(10) 15 B. 351.
(11) 14 B 97 (100).
(12) 6 A. 220.
(13) 15 M. 414.

1893
JAN. 17.
CRIMINAL REFERENCE.
17 B. 573.

correct principles of construction we should limit the meaning of the words of the section of the Indian Penal Code, defining defamation, so as to exclude therefrom any evidence given by a witness before a Court of Justice. It is admitted that the words are wide enough to include such evidence, and I do not think that judicial interpretation can [575] properly limit their scope either in view of general considerations about the policy of protecting witnesses from being harassed, or of the absence of any prosecutions being hitherto instituted in such cases. It is true, no doubt, that there is an anomaly in holding that a certain act, not recognised as a test by the civil law, should nevertheless be punishable as an offence by the criminal law. That anomaly, however, whatever weight it might have been entitled to on the question of construction in other cases, cannot weigh much in this, for it certainly exists on another point in the law of defamation. According to the explanation to s. 499, a prosecution may be maintained for defamation of a deceased person. But, on the other hand, it has been ruled in *Luckumsey Rowji* v. *Hurbun Nursey* (1) that no suit for damages will lie in such a case. It seems also to result from illustrations to which I drew attention during the argument that the rule of the civil law is not in entire harmony with that of the criminal law. Under these circumstances I should have been disposed to give their ordinary signification to the words of the Indian Penal Code, and not to limit them as suggested by Mr. Nadkarni in his argument. This Court, however, has already decided the contrary (2), and it has done so, following the opinion expressed by the High Court of Madras. I am, therefore, content to follow such decision, especially as my brother Fulton concurs in it. And I agree to reverse the conviction and order the fine, if paid, to be refunded.

FULTON, J.—The accused has been convicted of the offence of defamation. The Sessions Judge has referred the case to this Court for orders on the ground (amongst others) that the imputation complained of was made in the course of evidence in a judicial proceeding. It appears that the complainant instituted a suit against the accused, who, while giving evidence on the plaintiff's behalf, was asked whether he had been criminally prosecuted, and is alleged to have replied to the effect that the plaintiff had been in the Thana Jail. The statement has not been proved as regularly as it ought to have been, for as it was spoken in evidence its terms ought to have been proved by the production of a certified copy of the deposition. [576] However as the accused himself has admitted having made it, it is unnecessary to dwell further on this technical irregularity.

For the accused, Mr. Ghanasham Nilkant, who has argued the case as *amicus curiæ*, has drawn our attention to two cases in which it has been expressly held that a witness cannot be prosecuted for defamation in respect of statements made in the witness-box. In the first of these (*Manjaya* v. *Sesha Shetti* (3)), Collins, C. J., after referring to the observations of Cockburn, C.J., in *Seaman* v. *Netherclift* (4), and of Field, J., in *Goffin* v. *Donnelly* (5), and the judgment of the Madras High Court in *Hinde* v. *Baudry* (6). continued as follows:—"The Judges there (in *Hinde* v. *Baudry*) said that the *principle* of public policy guards the statements of a witness against an action, whether the statements were malicious or not. I think the same observations will apply if the criminal law is set in motion and proceedings are taken under s. 500 of the Indian

(1) 5 B. 580. (2) 17 B. 127. (3) 11 M. 477 (479).
(4) 2 C. P. D. 53. (5) 6 Q.B. D. 307. (6) 2 M. 13.

1893
JAN. 17.
CRIMINAL REFERENCE.
17 B. 573.

Penal Code;" and Shephard, J., drew attention to the opinion strongly expressed by the Judicial Committee in *Baboo Gunnesh* v. *Magneeran* (1) that witnesses are free from any other consequences with respect to statements made by them as such, except that of indictment for perjury. The second case was that of *Queen-Empress* v. *Babaji* (2), in which Birdwood and Parsons, JJ., followed the Madras decision above referred to.

On the other hand, it was contended by the Government Pleader, on behalf of the prosecution, that unless circumstances could be proved such as to bring the case within one of the exceptions to s. 499, Indian Penal Code, the making of defamatory statements, whether in the witness-box or elsewhere, undoubtedly fell within the definition of defamation given in that section. It was urged that considerations of public policy could not override the express words of the Penal Code, and our attention was called to the remarks of the Privy Council and of this Court in the following cases:—*Crawford* v. *Spooner* (3); *Moonshee Buzloor Ruheem* v. *Shamsoonnissa Begum* (4); and *Annaji*[577] v. *Bapuchand* (5); and of Lord Bramwell in *Hill* v. *East and West India Dock Company* reported in 9 App. Cas. at p. 464.

Allusion was also made to Mr. Mayne's note on the 9th exception to s. 499, Indian Penal Code. For the accused it was not seriously contended that the case fell within any of the exceptions. It did not come under the 1st, as the allegation was not proved to be true, nor under the 9th, inasmuch as it was not proved to have been made in good faith. The following cases—*Nathji Muleshvar* v. *Lalbhai* (6), *Queen-Empress* v. *Slater* (7), *Queen-Empress* v. *Dhum Singh* (8) and *Hayes* v. *Christian* (9)—were quoted by the Government Pleader to show that the burden of proof of good faith lay on the accused, and s. 105 of the Evidence Act leaves no doubt on this point. But Mr. Ghanasham argued that s. 499 was wholly inapplicable, on the ground that it was not the intention of the Legislature to bring statements made in the witness-box within the definition of defamation. The words of the section are: "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." It is urged that although the language of this section is comprehensive enough to include words wherever spoken, it ought not to be applied to words spoken in evidence, as they were not within the contemplation of the Legislature.

It, therefore, becomes necessary for us to determine what was the intention meant to be expressed; for, as pointed out in Maxwell on the Interpretation of Statutes, p. 24 it is an elementary rule of construction that a thing, which is within the letter of a statute, is not within the statute, unless it be also within the meaning of the Legislature. To ascertain such meaning is sometimes a task of much difficulty. The primary canon of construction is, that the Legislature must be intended [578] to mean what it has plainly expressed, and that when the words admit of but one meaning, a Court is not at liberty to speculate on the intention or to construe an Act according to its own notions of what ought to have been enacted. In *Moonshee Buzloor Ruheem* v. *Shamsoonnissa Begum* (4), the Judicial Committee of the Privy Council remarked that if the

(1) 11 B.L.R. 321. (2) 17 B. 127. (3) 4 M.I.A. 179 (187).
(4) 11 M.I.A. 551 (604). (5) 7 B. 520. (6) 14 B. 97.
(7) 15 B. 351. (8) 6 A. 220. (9) 15 M. 414.

1893
JAN. 17.
CRIMINAL REFERENCE.
17 B. 573.

words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. But many cases may be quoted in which, in order to avoid injustice or absurdity, words of general import have been restricted to particular meanings. An instance of such restriction will be found in the decision of the House of Lords in *Hill* v. *East and West India Dock Company* (1), in which the majority of their Lordships found it necessary to limit the meaning of s. 23 of the Bankruptcy Act so as to confine its effect within the purposes of the Act. Other instances will be found in many cases in which it has been held that, where an enactment would prejudicially affect vested rights, retrospective effect will not be given to its language unless such effect is clearly intended.

The precise extent to which in certain cases it is permissible to restrict the meaning of general words in a statute is always a question of much nicety. It is undoubtedly a serious measure to limit the meaning of words in such a carefully drawn Act as the Indian Penal Code, and it is one which no Court would attempt, unless it were practically certain that the matter to be eliminated was not within the contemplation of the Legislature. There seems, however, to be such certainty in the present case. In civil suits it has been laid down on such high authority as to be no longer open to doubt that in India an action will not lie for damages on account of defamatory words spoken in the witness-box. The latest reported decision of this Court on the subject is the case of *Nathji* v. *Lalbhai* (2), in which the learned Chief Justice remarked as follows:—"We doubt whether there is any thing in the circumstances of this country which makes it [579] less desirable from the point of view of public policy as concerning the public and the administration of justice, as it is expressed by the Privy Council in the case above cited (*Baboo Gunnesh* v. *Magneeram*), that such statements, though false and malicious, should, in no case, be made the subject of civil action quite independently of the question as to their being criminally punishable." In the case of *Baboo Gunnesh* v. *Magneeram* (3) the Privy Council held that (in India) witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. The ground of it is this: that it concerns the public and the administration of justice that witnesses giving their evidence on oath in Court should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur, if they give evidence falsely, should be an indictment for perjury.

If, then, it be admitted, as I think it must be, that public policy requires that witnesses shall not be harassed by the fear of suits for damages, it must, I think, be conceded that it is equally undesirable that they should be liable to be prosecuted for defamation. The intention of the Legislature to protect witnesses from the fear of improper prosecutions is shown by s. 195 of the Criminal Procedure Code, which forbids their prosecution for perjury without the express sanction of a Court cognizant with the facts of the case in which the false evidence is said to have been given. But all this solicitude for their protection would be wholly unavailing if it were open to any private individual to prosecute for defamation any witness who made a statement which he considered

(1) 9 Ap. Ca. 448. (2) 14 B. 97. (3) 11 B.L.R. 321 (329) (P.C.).

1893
JAN. 17.
CRIMINAL REFERENCE.
17 B. 573.

injurious to his reputation. In a prosecution for giving false evidence the burden of proof lies on the prosecution to establish that the evidence is false, but in a prosecution for defamation it would usually be otherwise, and (assuming the words to be *prima facie* defamatory) it would be incumbent on the accused to prove either that his statement was actually true, or that he believed in good faith that it was so in order to entitle him to the benefit of s. 79 or of exception 1 or 9 to s. 499, Indian Penal Code. Under [580] these circumstances the position of a witness would be a very precarious one, and the reason for his protection in the Civil Courts, when exposed in this manner to risks in the criminal Courts, would be unintelligible. It could not even be argued that whereas it was desirable to protect him from civil suits at the interest of private persons who might be actuated by personal malice, the interests of the public required that he should remain liable to criminal prosecution for defamation, for the right of prosecution in such cases is expressly limited by s. 198, Criminal Procedure Code, to the person aggrieved.

These considerations incline me strongly to the belief that s. 499 was not intended to include statements made in the witness-box. But there is one further reason for thinking so, which is that since the enactment of the Indian Penal Code there seems to have been a general impression amongst those whose duty it has been to administer the law that such a charge as the one now under consideration will not lie. No Indian case has been brought to our notice in which it has been held that such a prosecution is maintainable. Had it been maintainable, there can be little doubt that the reports would have contained many cases of the kind, for it is obvious that a prosecution for defamation would be, if it were allowable, a much more easy remedy for a person aggrieved by the evidence of a witness than a prosecution for giving false evidence. If, however, it be correct that Judges and Magistrates and legal practitioners have been hitherto of opinion that s. 499 was not intended to refer to statements made in the witness-box, it seems not unreasonable to believe that there was no intention on the part of the Legislature to refer to them. *Optima est legum interpres consuetudo* is an ancient maxim, the validity of which has long been recognized.

Under these circumstances, I think we may safely follow the decisions of the Madras High Court and of this Court, above adverted to, and hold that a witness cannot be punished for defamation on account of statements made when giving evidence in the witness-box. Our attention was called to the reference to a Judge in the illustration to the 7th exception to s. [581] 499, as suggesting that all statements made in the course of judicial proceedings were not privileged; but it would seem hardly correct to infer from an illustration stating that a Judge, censuring in good faith the conduct of a witness, was within the 7th exception, that if he failed to prove good faith he would be liable to punishment, for he would appear to be expressly protected by s. 77 of the Code, and at any rate, even if it could be held that the case of a Judge might come within the intention of s. 499, notwithstanding the provisions of s. 77, it would not follow that the definition of defamation should be equally applicable to a witness to whom other considerations would apply. It may, perhaps, be said that although s. 499 is not intended to apply to witnesses giving relevant evidence, it may include the case of a witness volunteering statements wholly irrelevant to the proceedings. On this point it is unnecessary to express an opinion, for in the present case, as the

1893
JAN. 17.

CRIMINAL REFERENCE.

17 B. 573.

proceedings have not been put in evidence, it is impossible to hold it proved that the accused's statement was in fact irrelevant. For the foregoing reasons I would set aside the conviction and direct that the fine be refunded.

Conviction set aside.

17 B. 581.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

VINAYAKRAO DHUNDIRAJ (*Plaintiff*) *v.* NAROTAM ANANDJI (*Defendant*).* [28th March, 1893.]

Inspection—Discovery—Production—Documents of title—Refusal to produce—Ejectment—Practice.

The plaintiff sued to eject the defendant from certain pieces of land belonging to him, being portions of a passage upon which the defendant had encroached. In his written statement the defendant denied the plaintiff's title and stated that he would rely on certain deeds set forth in a schedule annexed thereto. In his affidavit of documents subsequently filed he objected to produce the deeds for the plaintiff's inspection on the ground that they related solely to his own title to the land in dispute, and did not in any way tend to prove or support the title of the plaintiff thereto.

Held, that the defendant was entitled to refuse production of the deeds. The Court could not go behind the defendant's affidavit of documents.

[582] IN chambers. The plaintiff sued the defendant, alleging that he had encroached upon a certain passage which belonged to the plaintiff by building thereon two *otlas*. He prayed that the defendant might be ordered to give up possession of the two pieces of ground encroached upon, and remove the said *otlas*. In the alternative he prayed that he might be declared entitled to a right of way over the said passage, and that the defendant might be ordered to remove the encroachments.

The defendant denied the plaintiff's title and (*inter alia*) pleaded limitation. In his written statement he stated that he would rely on certain deeds set forth in the schedule annexed.

The defendant subsequently made an affidavit of documents in his possession relating to the matter in question in the suit. He objected in this affidavit to produce these documents for the plaintiff's inspection, on the ground that they related solely to his own title to the land in dispute and did not in any way tend to prove or support the title of the plaintiff thereto.

In the schedule annexed to the affidavit he set forth (*inter alia*) the deeds referred to in his written statement.

The plaintiff took out a summons calling upon the defendant to show cause why he should not give inspection of the said documents.

Kirkpatrick, for the defendant, showed cause.

Lang (Acting Advocate-General), for the plaintiff in support of the summons.

* Suit No. 182 of 1891.