1866. December 4. R. A. No. 10 of 1866.

ground that since the celebration thereof her husband has been guilty of adultery with a married, or fornication with an unmarried, woman, not being a prostitute, or of bigamy coupled with adultery, or of adultery coupled with cruelty, or of adultery coupled with wilful desertion for two years or upwards, or of rape, &c. But bigamy coupled with adultery must have reference to a marriage which was unlawful, and therefore bigamous. I do not see any reason why marriages contracted before the passing of the Act should be made subject to the consequences of the Act. When it was passed, nothing could have been further from the intention of the Legislature than to give a retrospective effect to it. Hence questions with reference to past marriages cannot be raised under this Act. They must be governed by the law which prevailed before it came into operation.

TUCKER and WARDEN, JJ., concurred.

Order affirmed.

Regular Appeal No. 19 *of* 1863.

ARDESHIR DHANJIBHA'I.....*Appellant.*
THE COLLECTOR OF SU'RAT .....*Respondent.*

Suit relating to land—sanad—destruction of document by party.

In a suit brought against a Collector to compel him to refrain from preventing the plaintiff executing his decree against certain land—the only issue being, whether the land was the private property of the judgment debtors, or Government service land—the plaintiff alleged that the land had been granted in free *inám* by a *sanad*, which he petitioned the Mámlatdár of the parganá to search for, and send to the Collector; and, on a reference by the High Court, the District Judge found that "the Collector did destroy the document that purported to be a copy of a *sanad* such as the plaintiff petitioned the Mámlatdár to search for" :—

Held that it was not competent for the defendant to say that the document was not such a one as could be legally admitted in evidence; and that the case came within the rule *omnia præsumuntur contra spoliatorem.*

1866. August 1. R. A. No. 19 of 1863.

THIS was a regular appeal from the decision, in Original Suit No. 3 of 1863, of R. H. Pinhey, Acting Judge of the Súrat District, whose judgment was as follows :—

1866. August 1. R. A. No. 19 of 1863.

"The plaint sets forth that Girdhar Govan and his son Hargovan Girdhar mortgaged to plaintiff Ardeshir and his brother, in A.D. 1832, eight and a half bighás of land at Singápúr, in the Chaurásí Parganá of the Súrat District; that a suit, No. 874 of 1860, being brought on the mortgage bond, a decree was given in plaintiff's favour by A'zam Daulatrái Sampatrái, Munsif of Súrat; that plaintiff sought to execute this decree against the land mortgaged by Girdhar Govan and Hargovan Girdhar, but was prevented from doing so by the Collector of Súrat, on whose representation that the land was service land, the Munsif, on the 21st of May 1862, raised the attachment placed on it by plaintiff; that the land is not service land, but *inám* land, against which plaintiff's decree may be executed; and that, therefore, this action is brought against the Collector to compel him to refrain from preventing plaintiff executing his said decree against the said land.

"This case was set down for settlement of issues on the 1st of July; but was postponed to this day, in consequence of the Government Pleader being absent on leave. The defendant, the Collector of Súrat, declines to tender any written statement under Sec. 120 of the Code of Civil Procedure.

"The Government Pleader being examined, under Secs. 125 and 139 of the Code of Civil Procedure, states that neither Girdhar Govan nor his son Hargovan had any land in the village of Singápúr; that the whole eight bighás of land against which plaintiff seeks to execute his decree are Government land, and are assigned, for services performed, to the pátel of the village for the time being; that, therefore, this action is barred by Sec. 13 of Act XI. of 1843; that when Girdhar Govan was pátel, he held the land until he became blind, when the land passed with the pátelship to his son Hargovan; that Hargovan held the land as pátel up to the time of his death, last year; that Hargovan was succeeded in the pátelship by Bhávaníshankar, who now holds the office, and with the office enjoys the proceeds of the land which plaintiff desires to sell in execution of his decree; and that,

1866. August 1. R. A. No. 19 of 1863.

although the land is called *inám*, it is in fact *service inám*, and is so entered in the village accounts.

"The only question at issue in this case is:—Is the land, against which plaintiff seeks to enforce his decree, the private property of his judgment debtors, Girdhar Govan and Hargovan Girdhar? or is it Government service land, assigned by the Collector for the fit maintenance of the officiating pátel of the village of Singápúr?

"I think it unnecessary to call on the defendant to produce any witnesses or to file any proofs on his own behalf; as I consider that the plaintiff has altogether failed to make out his claim, and that judgment must be given for the defendant on the issue laid down.

"It is admitted on both sides that the land mentioned in the plaint is *inám*. It is notorious that, besides many other divisions and subdivisions and descriptions, all ináms, in the Bombay presidency at least, may be divided into two classes, viz., *service ináms*, and ináms to the enjoyment of which no service is attached. If this point, instead of being notorious, were a matter of doubt, it is sufficiently established by plaintiff's own witnesses in this case. On the motion of plaintiff, the defendant has filed forty books and accounts. In every one of these, in which the land in dispute is entered in any other head than the simple one of inám, it is described as service inám, and in the very oldest of the forty it is entered as inám, in the occupation of the then pátel, Girdhar Govan. It is proved by the same forty books and accounts, and by the Majmudár, plaintiff's witness No. 21, that the land has been held successively by four pátels up to the present time. There is not an atom of proof that the land was the private property of the plaintiff's judgment debtors, the former pátels, Girdhar Govan and Hargovan Girdhar.

"A technical objection might be taken *in limine* to plaintiff's claim: inasmuch as he has not filed either the original deed or a copy of it, under which the land was first assigned to him by the former occupants, Girdhar Govan and Har-

govan Girdhar. But leaving this objection on one side, there is an objection to the claim which it is impossible to leave unconsidered. Plaintiff asserts that the mortgagors held this land under a sanad; but this sanad is not produced. It does not appear ever to have been given over to plaintiff when he took the land in mortgage. The very existence of this sanad is not proved. If it ever existed, it is not proved to have ceased to exist, or to be at this date not produceable: all that plaintiff has done is to challenge the defendant, the Collector, to produce a copy of the original sanad from his records. The Collector in the first place denies the existence of such a sanad as plaintiff refers to; secondly, he denies his liability to produce a copy of such a sanad so long as plaintiff fails to prove that the original is not forthcoming; thirdly, he denies that he ever had a duly authenticated copy of any sanad regarding the inám lands of Singápúr; fourthly, he contends that the only copy of any such sanad that he ever had was an unauthenticated copy, which has been destroyed as useless.

1866. August 1. R. A. No. 19 of 1863.

"Considering all these circumstances and facts, and the provisions of Sec. 13 of Act XI. of 1843, I consider that plaintiff's claim fails.

"It is scarcely necessary to notice the arguments based on the deposition of the witnesses Pestanji Fakirji and Dádábhái Naoroji, as they are so easily disposed of. Pestanji Fakirji was called to show that he had bought three-fourths of a bighá of inám land at Singápúr, but it does not appear whether this land was service land or not; and even if it were service land, it is shown by the title-deeds which he produces that the transfer of the land was made out of court, and without the Collector having either to sanction or to refuse sanction to the arrangement. In fact it is not shown that the Collector is aware of the transfer. The other witness, Dádábhái Naoroji, was called to prove that he had twenty-three bighás of inám land at the village of Umrá, for which he does no service. If this be the case, the only inference to be based thereon is, that the inám so enjoyed is not service inám. I throw out the claim with costs."

1866.
August 1.
R A. No. 19 of 1863.

The appeal first came on for hearing on the 7th of September 1864, before Sir JOSEPH ARNOULD, Acting C.J., TUCKER and WARDEN, JJ.

Anstey (with him *Shántárám Náráyaṇ* and *Dádábhái Frámji*) called the Court's attention to the destruction of the sanad, which the appellant relied upon, and had applied to the Mámlatdár to forward to the Collector. The doctrine *omnia præsumuntur contra spoliatorem* applied: The *Le Louis* (*a*). The exhibits upon which the Judge had found for the Collector were commented upon as being incomplete and untrustworthy.

Dhirajlál Mathurádás for the respondent:—The exhibits which had been filed at the instance of the plaintiff himself showed clearly that his judgment debtor had no right to the land except by virtue of his páṭelship,—in other words, that it was a service inám. [ARNOULD, C.J.—We should like to hear you first on the subject of the non-production of the documents.] The notice to produce requires the production, among other things, of a petition to the Mámlatdár, his report thereon, and the copy of the sanad which accompanied it; but the Collector had the right of refusing to produce official correspondence. It was merely a copy, and, as such, secondary evidence; and, consequently the plaintiff could not compel its production, without first accounting for the original, which he did not do. Besides, it was not destroyed after receipt of the notice to produce: it had been previously destroyed; the Collector had a right to destroy it, if he considered it useless; and he was not bound to preserve evidence, in anticipation of being called upon to produce it by his adversary. There was no notice to produce.

ARNOULD, C.J.:—This is a peculiar case. A suit is commenced; the Collector has notice of it; a document is required by the plaintiff; he applies to the Mámlatdár to make a search for it; a search is made; the document is found; it is sent to the Collector, and he destroys it. If this is not spoliation, I do not know what is.

(*a*) 2 Dods. 245.

1866.
August 1.
R. A. No. 19 of 1863.

PER CURIAM :—The Court returns the proceedings to the District Judge, and directs him, first, to compare the extracts filed by plaintiff (Nos. 26 to 66) with the Collector's books and accounts, and to certify if they be correct, and if not, or where not, to supply correct copies; secondly, to examine the gentleman who was officiating as Collector of Súrat at the time of the alleged destruction of the copy of the sanad, as to the exact circumstances and time under and at which such alleged destruction took place, in order to ascertain whether he destroyed, or caused to be destroyed, a document which purported to be the copy of such a sanad as Ardeshir Dhanjibhái petitioned the Mámlatdár to search for.

The following finding was returned by C. H. Cameron, Judge of the Súrat District :—

"I have examined and compared exhibits Nos. 25 to 66 with the originals. I found one or two clerical errors, and in one paper where an erasure had been made in the original, and a correction written above it in the copy, no notice was taken of the erasure : the correction was entered at once ; the copy has been prepared not showing erasure and correction.

"As Mr. Ravenscroft, the Collector of Súra tat the time of the alleged destruction of the copy of the sanad, was officiating as Secretary to Government in Bombay, and as he intimated that his services could hardly be spared from Bombay, and as Ardeshir Dhanjibhái's vakíl, Dáyabhái Saváichand, had no objection to the arrangement, I issued a commission to the Small Cause Court, Bombay, before one of the Judges of which (Mr. Spencer) Mr. Ravenscroft's deposition was taken, and it is now forwarded.*

* NOTE.—The following are extracts from the evidence of Mr. Ravenscroft :—"I know that a petition was addressed by the plaintiff in this suit to the Mámlatdár of the Chaurásí Pargana, requesting that the register of sanads might be examined. The petition was sent to my office by the Mámlatdár. A Persian document was sent with the petition. * * * I sent the Persian document to the Judge's Court, and got a translation made. After the document was returned with the translation, I destroyed it, as I considered it to be a useless document. To the best of my recollection it was not in the usual form of a sanad. It purported to be a grant of land. My general impression is that it purported to be such a document

1866. August 1. R. A. No. 19 of 1863.

"It seems right that I should point out that Mr. Ravenscroft was mistaken in supposing that when documents are sent to the Judge, or Agent for the Honourable the Governor at Súrat, for translation, a copy is kept. This arrangement has always been a demi-official one, of which no record was kept. Persian documents are even sent sometimes with an English note, and sometimes a Gujaráti note. The translation was made, and the papers returned at once with a like note, no record whatever being made.

"On the first issue, I return the corrected exhibits Nos. 26 to 66.

"On the second issue, my finding is that Mr. Ravenscroft did destroy the document that purported to be a copy (whether it was a copy available as proof in a court, or not, does not appear) of a sanad such as Ardeshir Dhanjibhái petitioned the Mámlatdár to search for."

The case came on for further hearing this day, before the same Judges.

Reid and *Shántárám Náráyaṇ* for the appellant.

Dhirajlál Mathurádás, for the respondent, asked to have the case remanded for further evidence, which would show that the land was *service inám*.

ARNOULD, J.:—As to the point whether the defendant should now be allowed to give additional evidence, I think

as was described by the plaintiff at the trial of the suit. I do not remember the contents of the document. * * * I was served with a notice to produce the Persian document. I had destroyed it before the notice was issued. When I destroyed the document I knew that the suit was pending. * * * I considered the document to be useless, as it was not numbered or registered in the office, nor did it bear any mark of having been received in the Mámlatdár's office; and because I knew that, if it was genuine, the plaintiff could have procured a copy from the proper source. In accordance with [certain] Regulations, the sanads of all the landholder have been, and are, registered at Súrat, copies of them being made in a book. Another reason for destroying the document was that, as it had been sent to the Judge's office for translation, the plaintiff could have obtained as copy of the translation, and of the document itself, from that office; as I presumed a copy of it was retained there. * * * At this distance of time I cannot say, from my recollection of the translation, whether the Persian document purported to be an original, or a copy, or the copy of a copy; but in the notice served on me by the plaintiff it was described as a copy. It is the practice in the offices at Súrat to destroy all useless documents."—ED.

1866. August 1. R. A. No. 19 of 1863.

that the application should have been made when the case first came on for hearing before this court; and that it is now too late to make such an application, after the case has been already remanded, and has come back for final disposal.

With reference to the destruction of the document, it has been found by the District Judge that Mr. Ravenscroft did destroy what purported to be a copy of a sanad such as Ardeshir Dhanjibhái petitioned the Mámlatdár to search for. The case, therefore, comes within the rule *omnia præsumuntur contra spoliatorem;* and it is not now competent for the defendant to say that the document was not such a one as could be legally admitted in evidence.

The Acting Judge was wrong in holding that the plaintiff had not made out a *primâ facie* case; and his decree must be reversed.

TUCKER and WARDEN, JJ., concurred.

PER CURIAM:—The Court reverses the decree of the Acting District Judge; and declares that the land described in the plaint is free, and not service, inám, and that the appellant Ardeshir Dhanjibhái, is entitled to execute the decree, which he holds against Hargovan Girdhar and others, by the sale of the said land.

The Court orders the respondent to bear all costs, including the costs of the commission from the District Court to the Bombay Court of Small Causes.

Appeal allowed.

NOTE.—"As to the third point decided in this case (*Armory Delamirie*, Stra. 504), it is an illustration of that favourite maxim of the law *omnia presumuntur contra spoliatorem*, which signifies that if a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted: *Crisp* v. *Anderson* 1 Stark. N. P. C. 35; [*Attorney General* v. *Dean and Canons of Windsor*, 24 Beav. 679]; *Clunnes* v. *Pezzey*, 1 Camp. 8, *et notas*." [followed, *Lawton* v. *Sweeney* Ex.), 8 Jur. 964.]—1 Smith L. C., 5th ed., 308.

"If," says Lord *Holt*," a man destroys a thing that is designed to be evidence against himself, a small matter will supply it." Anon. 1 Ld. Raym. 731. This rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong."—Best, Ev. § 399 *et seq*. *Nullus commodum capere potest de injuriâ suâ propriâ*: Co. Litt. 148 *b*; Broom, Leg. Max., 3rd ed. 255. *Nemo ex suo delicto meliorem suam conditionem facere potest*: Dig. 50, 17, 134, § 1.—ED.