

Special Appeal No. 300 of 1869.

1870.
August 17.

FRA'MJI HORMASJI.....*Appellant.*

THE COMMISSIONER AND DEPUTY COMMISSIONER OF CUSTOMS, SALT, and OPIUM...*Respondents.*

Omnia præsumentur contra spoliatorem—Salt thrown overboard to avoid measurement—Salt removed in excess of Permit—Confiscation—Interest—Damages.

Applying the maxim "*omnia præsumentur contra spoliatorem,*" the High Court held that, where a vessel was seized on suspicion of having a greater quantity of salt on board than was allowed by its permit, and immediately afterwards a number of men boarded the boat, and, with the assistance of the agent of the owner, threw a considerable quantity of salt overboard, a presumption arose that there was an excess of salt on board at the time of the seizure beyond the amount allowed by the permit.

Where, under a permit to pass a certain number of *mans* of salt on which duty has been paid, an amount in excess of such number is removed, the whole of such salt must be considered as removed contrary to the provisions of the Salt Acts (Act XXVII. of 1837 and Act XXXI. of 1850), and the whole of such salt, and not merely the excess, is, under these Acts, liable to confiscation.

Interest should not be awarded on unliquidated damages.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Tháná, in Appeal Suits No. 463 and 483 of 1868, confirming the decree of A. Lyon, Assistant Judge.

The facts of the case fully appear from the judgment of the Court.

The appeal was argued before WESTROPP, C.J., and LLOYD, J., on the 15th of June 1870.

Anstey (with him *Shántarám Náráyan*) for the appellant.

The Acting Advocate General (*the Honorable A. R. Scoble*) (with him *Dhírājál Mathurádás*, Government Pleader) for the respondents.

Cur. adv. vult.

August 17th. WESTROPP, C.J.:—This suit was brought to recover Rs. 939-0-6, the alleged value of certain salt confiscated by the Deputy Commissioner of Customs, under the

1870.
 FRA'ANJI
 HORMASJI
 v.
 COMMISSIONER
 OF CUSTOMS
 et al.

order of the Commissioner of Customs, by the authority of the Bombay Government, and Rs. 60-10-0 interest. The facts, as found by the Assistant Judge at Tháná, and subsequently, on appeal, by the District Judge also, were substantially the following:—

On the 15th of March 1867 a boat of about 707½ *mans*' burden, and of which Dharmá Rámji was master, or tindal, was laden, on behalf of the plaintiff, with salt, at certain Government salt-works, under a permit for 520 *mans*. The whole of the salt on board was contained in two tanks lined with matting. The boat arrived at Kalyán on the 18th of March, and was then seized by the Custom House officers, on suspicion of having a greater quantity of salt on board than was allowed by the permit. Almost immediately after this seizure, a number of Mussalmáns boarded the boat, and, with the active assistance of Dharmá Rámji, the master, threw a considerable quantity of the salt overboard. Subsequently the salt remaining on board was weighed, and ascertained to be 501 *mans*, namely, 19 *mans* less than the quantity for which the permit had been given, all of which, 501 *mans*, were confiscated, as already mentioned. The Assistant Judge treated the tindal, Dharmá Rámji, as the agent of the plaintiff, and, acting upon the maxim *omnia præsumuntur contra spoliatores*, held that there was an excess of salt on board to the extent of 187½ *mans* beyond the amount, 520 *mans*, allowed by the permit to be carried—187½ + 520 being equal to 707½, the burden of the boat. He also held that the excess only was liable to confiscation, and awarded damages to the plaintiff for the difference between 187½ *mans* and 501 *mans*, the amount left in the boat after the barratrous and fraudulent jettison, namely, 313½ *mans*, at Rs. 1-13-6 per *man*. He further gave to the plaintiff interest upon the damages, and costs. On appeal to the District Judge, he affirmed the decree of the Assistant Judge.

The plaintiff, insisting on compensation for the whole 520 *mans* mentioned in the permit, has brought the present special appeal against the decree of the Judge. He states his grounds of appeal thus:—

(a) "The lower court held that the confiscation of the salt was authorised by law, whereas it was not so."

1870.
FRA'JI
HORMASJI
v.

COMMISSIONER
OF CUSTOMS
et al.

(b) "The lower court held, without any evidence whatever, that there was an excess in the salt laden in the boat over and above the quantity mentioned in the permit held by the appellant."

(c) "Even supposing that there had been such excess, the lower court held, without any evidence, that the appellant's salt contained in the boat was liable to confiscation, although protected by the said permit from such confiscation."

(d) "The lower court held that the tindal of the boat was the agent of the appellant, as carrier of more than the salt mentioned in the permit, and put on board by the appellant, there being no evidence that the excess of salt was loaded by, or on behalf of, the appellant; and thereupon ruled that the appellant was responsible for the act of the tindal in throwing salt overboard."

(e) "The lower court applied the maxim relating to presumptions against spoliation, to the prejudice of the appellant, although, 1st, the only salt he claims was duty-paid salt, and not liable to confiscation; 2ndly, he did not take part in the spoliation; and 3rdly, the tindal had no connection with the appellant further than as carrier of the duty-paid salt."

The defendants have also lodged certain objections to the Judge's decree, namely:—

1. "The Judge was wrong in holding that the Governor in Council could not order the confiscation of the entire bulk, in cases where smuggled salt, and salt on which duty has been paid, are mixed up in one undistinguishable mass."

2. "The Judge has departed from the provisions of Act XXVII. of 1837, and Sec. 4 of Act XXXI. of 1850, in holding that the Government were entitled to confiscate only the excess of salt over and above the quantity for which a permit had been obtained.

1870. 3. "The Judge was wrong in allowing interest on
 FRA'JI HORMASJI damages."

v.
 COMMISSIONER
 OF CUSTOMS
et al.

The objection that there was no evidence of agency of the tindal on behalf of the plaintiff, either in lading the vessel with salt beyond the quantity sanctioned by the permit, or in getting rid of that excess by throwing some of the salt overboard, is not, in our opinion, sustainable. The evidence shows that the tindal, Dharmá Rámji, received the salt on board for the plaintiff and conveyed it to Kalyán, and actively assisted in throwing a portion of it overboard at Kalyán, after the boat had been seized on suspicion by the revenue authorities. The Sir-Kárkún of Ghorbandar, Mádhavráv Bápáji, one of the plaintiff's witnesses, has deposed that Dharmá Rámji paid the duty on the 520 *mans* mentioned in the permit. Under such circumstances, it is impossible successfully to maintain that there was not any evidence of agency. There having been some evidence of agency, it was for the courts below to say whether or not it was sufficient. The Assistant Judge has found, and the Judge, whose finding is conclusive upon this court in special appeals on a question of fact, has concurred with him, that the tindal was the agent of the plaintiff in what occurred. Were it necessary for us to express an opinion upon that finding, we should not dissent from it. There was not any evidence of salt having been laden on board the vessel for anybody but the plaintiff. Nor does he, in the course of this case in the courts below, appear to have suggested that salt belonging to anybody but himself had been shipped on board.

We think also that the courts below were quite right in applying the maxim *omnia præsumuntur contra spoliatorem* to the act of the plaintiff, by his agent the tindal, and those who assisted him in throwing the salt overboard. In Sir William Oldnall Russell's treatise on Crimes and Misdemeanours (Vol. III., p. 217, 4th ed.) the rule is rightly laid down thus:—"Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and

that his conduct is attributable to his knowledge of this circumstance." This is so at Common Law: *Armory v. Delamirie* (a), cited by the Assistant Judge; *Mortimer v. Cradock* (b); *Lawton v. Sweeney* (c); *Crisp v. Anderson* (d), and also, in Equity, *Childrens v. Sawby* (e); *Wardour v. Berisford* (f); *Sanson v. Romsey* (g); *Cookes v. Hellier* (h); *Delany v. Tenison* (i); *Dalston v. Coatsworth* (j) (in which some valuable cases are collected); *Gartside v. Ratcliff* (k); and also in Admiralty Prize Law—*The Johanna Emilia* (l), and *The Hunter* (m), in which latter case Lord Stowell said: "It is certain that, by the law of every maritime court of Europe, spoliation of papers not only excludes further proof, but does, *per se*, infer condemnation, founding a presumption, *juris et de jure*, that it was done for the purpose of fraudulently suppressing evidence, which, if produced, would lead to the same result; and this surely not without reason, although the lenity of our code has not adopted the rule in its full rigour, but has modified it to this extent, that, if all other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the act was done by a person who has interests of his own that might be benefited by commission of this injurious act. But though it does not found an absolute presumption *juris et de jure*, it only stops short of that, for it certainly generates a most unfavourable presumption. A case which escapes with such a brand upon it is only saved so as by fire. There must be that overwhelming proof, arising from the concurrence of every other circumstance in its favour, that forces a conviction of its truth, in spite of the powerful impression which such an act makes to its entire reprobation." The question which Lord Stowell then put to himself was—"whether, with the advantage of all the evidence that has been admitted, it"

1870.
 FRA'NJI
 HORMASJI
 v.
 COMMISSIONER
 OF CUSTOMS
 et al.

(a) 1 Stra. 504; S. C. 1 Sm. L. C., 3rd ed., 151.

(b) 12 L. J. C. P. 166; S. C. 7 Jur. 45. (c) 8 Jur. 964.

(d) 1 Stark. R. 35. (e) 1 Ver. 207. (f) *Ibid.* 452.

(g) 2 Ver. 561. (h) 1 Ves. Senr. 235, per Ld. Hardwicke.

(i) 3 Bro. P. C. 659. (j) 1 P. Wms. 731.

(k) 1 Chan. Ca. 292. (l) 18 Jur. 703, 705, per Dr. Lushington.

(m) 1 Dods. 480, 486.

1870.
 FRA' MJI
 HORMASJI
 v.
 COMMISSIONER
 OF CUSTOMS
 et al.

(the case before him) "answers the description of a case in which an unfortunate act of spoliation occurs, but which, in all other respects, wears the aspect of perfect sincerity and truth." He came to a conclusion in the negative, and allowed the presumption against spoliation to prevail, as the act of spoliation had not been satisfactorily accounted for.

In the present case, although evidence has been adduced on behalf of the plaintiff, no attempt whatever has been made, in that evidence, to account for or excuse the act of spoliation, namely, the destruction of a considerable portion of the salt by throwing it overboard. Putting aside the possibility that the small-salaried Government servants at the salt-works, at which the boat had been laden, had found it worth their while to connive at a larger quantity of salt being shipped than was covered by the permit, "it appears," the Assistant Judge remarked, "from the evidence, that there are several salt-works along the creek by which the boat came; and that there would not be any great difficulty in clandestinely removing salt from any of them." We have already noticed that there was no evidence of salt belonging to any other person but the plaintiff being on board the boat, so as to admit of any attempt to shift the responsibility from himself to any other shipper of salt. In making that observation we are not to be understood as giving any opinion whether the fact of there being salt on board belonging to another person could, or could not, affect the question as to the liability of the plaintiff's salt to confiscation. (See upon a similar point on Bengal Reg. X. of 1819, *In re Ram Rana Beoparee*, I. S. D. A. Sum. Cas. Pt. I., 5, and Morley Dig. N. S., p. 372, tit. "Salt.") There were several persons engaged in assisting Dharmá Rámji in throwing the salt overboard. Ghulám Husen, a customs lascar, says that they threw it overboard with their hands and pieces of board, and did so for five or ten minutes; and Vináyak Krishṇa says that 501 *mans* were afterwards found in the boat. There manifestly were ample means and time to throw overboard more than 19 *mans*. We think that there were not any facts in this case to counterveil the presumption arising from the act of spo-

liation, that there were more than 520 *mans* of salt on board the boat before the throwing over commenced, and, therefore, that the lower courts were perfectly justified in holding that there were more than 520 *mans* on board the boat. We think it unnecessary to carry the presumption any further, or to undertake to ascertain the extent of that excess. Our reason for so saying is that we do not agree with those courts in holding that the excess only was liable to confiscation. It is true that neither penal laws, nor revenue laws, where clauses inflicting pains and penalties are ambiguously or obscurely worded, are to be extended by construction. In such cases the interpretation is ever in favour of the subject, "for this plain reason," said Heath, J., in *Hubbard v. Johnstone (n)*, "that the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed." Neither, however, is it true, as it has been sometimes put, that the court, in the exposition of such statutes, are to narrow the construction. "We are to look to the words in the first instance," said Buller, J., in *Rex v. Hodnett (o)*, "and where they are plain we are to decide on them. If they be doubtful, we are then to have recourse to the subject-matter."

1870.
FRAMJI
HORMASJI
v.
COMMISSIONER
OF CUSTOMS
et al.

Act XXVII. of 1837 regulates the manufacture of salt within the territories subject to the Government of the Presidency of Bombay, and the duty leviable thereon, and the removal of the salt. The fourth section provides for the prevention of the removal of the salt until the duty thereon has been paid. The fifth section provides for the giving of a receipt and order by the Collector (pursuant to a form annexed to the Act), "which receipt and order shall specify the amount of duty paid, and the quantity of salt which the person who has paid that duty is entitled to remove, and the place whence, and the person to whom, that quantity of salt is to be delivered." The sixth section enacts that a part of that receipt or order shall be torn off and detained by the officer stationed at the salt-works, and that the remaining part shall be delivered "to the person who removes

(n) 3 Taunt 177.

(o) 1 T. R. 96.

1870.
 FRAMJI
 HORMASJI
 v.
 COMMISSIONER
 OF CUSTOMS
et al.

the salt; and the part of the receipt and order so delivered to the person removing the salt, shall be a pass authorising the removing of that salt." The seventh section provides for the establishment by Government of *choukis* near the salt-works, and authorises "any of the officers stationed at such *choukis* to stop and detain any salt which is removed otherwise than in conformity with the foregoing rules, and to search any load which may pass any such *chouki* and which may be suspected to contain salt, and to take and cancel every pass under which salt shall be suffered to pass." The ninth section enacted "that it shall be lawful for the Collector of a District to direct the confiscation of any salt which may have been removed from any-works within that district otherwise than in conformity with the foregoing rules, or which is found clandestinely stored for the purpose of evading the duty imposed by this-Act."

Upon these sections we are clearly of opinion that if, under a permit or pass to remove 500 *mans*, on which duty for that quantity only had been paid, 700 *mans* were removed, the whole 700 *mans* must be considered as removed "otherwise than in conformity with the foregoing rules," namely, the provisions of the Act. There is nothing in the Act to divide such a transaction into two transactions, one lawful and the other unlawful. To us it appears to be one single and indivisible transaction to remove in one boat 700 *mans*, where duty has been paid upon, and permission given to remove, 500 *mans* only, and that that transaction is a fraud upon the revenue.

But the case for the Crown does not rest upon that enactment alone.

Act XXXI. of 1850, entitled "an Act for protecting the Salt Revenue in Bombay," by Secs. 1 and 2, provided for the levy of customs duty on salt passing into or out of foreign settlements or territories, at the same rate as the excise duty leviable on salt within the territories subject to the Presidency of Bombay. Sec. 3 rendered any person concerned in passing salt, either by land or sea, contrary to the provisions of this or any other Act, liable to certain punishments. Sec.

4 is as follows:—“*All salt* passed, or attempted to be passed, or removed, contrary to the provisions of this or any other Act, and all vessels, carriages, and animals used in so passing or removing such salt, and the contents of any package in which such salt may be concealed, shall be liable to confiscation at the discretion of the Governor of Bombay in Council, but may be redeemed on payment of such fine as the Governor in Council, or any officer or officers of the Revenue Department to whom the Governor in Council shall think fit from time to time to delegate this power, may think reasonable.” That section renders all salt passed, or attempted to be passed, or removed, contrary to the provisions of this or any other Act, and, consequently, contrary to the provisions of Act XXVII. of 1837, liable to confiscation. We have already said that we consider that a removal of 700 *mans* under a permit for 500 *mans*, on which latter quantity, only, duty had been paid, would be a removal of the whole 700 *mans* otherwise than in conformity with the provisions of that Act. We, therefore, think that such a removal would come within Sec. 4 of Act. XXXI. of 1850, which goes even further than Act XXVII. of 1837, Sec. 9, by rendering liable to confiscation not only the salt, but also the vessels, carriages, and animals used in passing or removing it, and the contents of any package in which such salt may be concealed. This latter provision, as to the confiscation of vessels, animals, and carriages used in the removal, and of the contents of any package in which the salt may be concealed, repels any supposition that the Legislature intended to sever the excess from the rest of the salt. We do not refer to that latter provision with a view to uphold the argument suggested, but discarded in the courts below, that the word “package” meant duty-paid salt packed with smuggled salt, but because the inclusion of vessels, carriages, and animals used in the passing of the salt, and the contents (even assuming that they were not salt) of any package in which salt is concealed, indicates clearly that the intention of the Legislature was that the confiscation should be general, and not limited to the excess.

1870.
 FRA'ANJI
 HORMASJI
 v.
 COMMISSIONER
 OF CUSTOMS
 et al.

1870.
 FRA'MJI
 HORMASJI
 v.
 COMMISSIONER
 OF CUSTOMS
 et al.

We, therefore, reverse the decrees of the Judge and Assistant Judge in this case, whereby they gave damages to the plaintiff, in respect of the difference between the excess and the quantity found on board of the vessel, and we direct that judgment be entered for the defendants with costs.

We think it right to say that, even if we were of opinion that, so far as regards damages, the decrees of the courts below could have been sustained, we should have disallowed the interest awarded by them, inasmuch as interest does not run upon unliquidated damages.

LLÓYD, J., concurred.

Decree reversed and judgment entered for defendants, with costs.

NOTE.—In Special Appeal No. 301 of 1869 (Ali Saheb wullud Shurfoodin Hossein, a shipper of salt, against the same defendants), the facts were nearly the same as in the above-reported case, the evidence as to the amount of salt thrown overboard being somewhat stronger, as it appeared that salt to more than three feet in depth was thrown over. The Courts below applied the maxim, *omnia præsumuntur contra spoliatorem*, and, further, being of opinion that there was not any evidence to show that the boat could not contain salt to the full amount covered by the permit, namely, 720 *mans*, in addition to 672 *mans*, the amount of salt found in her after the jettison had taken place, presumed that the whole 720 *mans* was excess, and gave judgment for the defendants with costs. Their decree was, on the 17th of August 1870, affirmed by the High Court, but on the same grounds as those given in the judgment of the Chief Justice above reported, namely, that the Court would, from the fact of the throwing overboard of a considerable quantity of salt under the circumstances in evidence in the case, presume that there was an excess of salt on board, beyond the quantity sanctioned by the permit, and that, whatever the extent of that excess might be, the whole of the salt in the boat was liable to confiscation.

Decrees given by the courts below in the actions out of which Special Appeals Nos. 282, 284, and 296 of 1869 arose, were, on the same day, affirmed by the High Court. Those were actions brought against the same defendants by the owners of three boats confiscated in the same manner, and on the same occasion, as the salt. The courts below upheld the legality of the confiscation, under Act XXXI. of 1850, Sec. 4. It appeared that the plaintiffs themselves in all these cases had been actually engaged in throwing the salt overboard. The courts below, applying the same maxim, *omnia præsumuntur*, &c., gave decrees for the defendants.