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[170] What ceremonies were performed on the occasions of the marriages, or either of them, and by whom?

Parties to be allowed to give fresh evidence. The finding to be returned to this Court within two months.

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REVISIONAL CRIMINAL.

*Before Mr. Justice Scott and Mr. Justice Jardine.*

QUEEN-EMPRESS *v.* JAMUDIN VALAD MAHOMED.\* [30th July, 1889.]

*Shipping—Merchant Shipping Act (17 and 18 Vic., c. 104), ss. 24 and 26—Its applicability to India as regards the rules of measurement—Act XIX of 1838, ss. 4 and 13—Act X of 1841—Temporary additions to open vessels—Strake—Meaning of the term—Rules of measurement made by the Marine Department in 1873.*

The Merchant Shipping Act of 1854 (17 and 18 Vict., c. 104), applies, as regards the rules of measurement, to the whole of Her Majesty's dominions, and is law in India so far as it is not superseded by local legislation; Acts XIX of 1838 and X of 1841 do not conflict with it.

The accused was the owner of a vessel registered under Act XIX of 1838 as being of 163<sup>60</sup>/<sub>100</sub> tons. In the course of a voyage the vessel's bulwarks were raised by an additional structure of a temporary character for the purpose of protecting the cargo from the sea. During this voyage the vessel was measured by a coast-guard inspector, who, following the rules of measurement issued by the Marine Department in 1873, which provide that the measurements must be taken from the top of the highest strake, temporary or otherwise, found an increase of 27 tons in the burthen of the vessel by reason of the temporary structure.

This change in the burthen of the vessel having been made, the accused was prosecuted, under s. 13 (1) of Act XIX of 1838, for omitting to register the [171] vessel anew, and obtain a fresh certificate of registry under s. 4 (2) of the Act. The accused was convicted, and sentenced to pay a fine of Rs. 33-12.

\* Criminal Revision Petition No. 159 of 1889.

(1) Section 13 of Act XIX of 1838 provides as follows:—

13. And it is hereby enacted that in case any such vessel employed as aforesaid, fishing vessel, or harbour craft, shall not be so marked or branded in all respects as hereinbefore directed: or in case the name and number of any such vessel employed as aforesaid, fishing vessel, or harbour craft, shall not be so painted, or shall not continue so painted on such vessel, employed as aforesaid, fishing vessel or harbour craft, in all respects as hereinbefore directed; or in case any such vessel employed as aforesaid, fishing vessel, or harbour craft, shall not be furnished with such certificate as herein before specified; or in case the owner or owners or commander of any such vessel, employed as aforesaid, fishing vessel, or harbour craft, shall not produce such certificate on demand thereof as hereinbefore directed—the owner or owners of every such vessel employed as aforesaid shall be [171] subjected to a fine ten times the amount of the fees payable in respect of the certificate of registry of such vessel, the same being a vessel for the certificate of the registration of which any fee is payable, and the owner or owners of any such fishing vessel or harbour craft shall be subject to a fine of ten rupees, which fine may be recovered on conviction before any Magistrate, Justice of the Peace, or person exercising the powers of a Magistrate having jurisdiction within the said territories by sale of such vessel, fishing vessel, or harbour craft, her furniture, ammunition, tackle and apparel, and such fines shall be payable as often as the owner or owners or commander of any such vessel employed as aforesaid, fishing vessel, or harbour craft, shall make such default as aforesaid: Provided every such subsequent default be made after the expiration of one month from the date of the last conviction.

(2) Section 4 of Act XIX of 1838 provides as follows:—

4. And it is hereby enacted that the name and number of every such vessel employed as aforesaid, fishing vessel, and harbour craft, and her burthen, and also the name

*Held*, reversing the conviction and sentence, that there being no express provision applicable to temporary additions to open vessels either in the Indian Acts XIX of 1838 or X of 1841, or in the Merchant Shipping Act of 1854, the rules of measurements issued in 1873 by the Marine Department were *ultra vires*, so far as they insisted on the measurement being taken from the top of a temporary addition to the upper strake.

*Held*, also, that the additional structure put up by the accused being only of a temporary character, to be removed at the end of the voyage, did not come within the meaning of "strake," which is a structural portion of the vessel defined as a "continuous line of planking or plates on a vessel's side reaching from stem to stern."

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THIS was an application by the Government of Bombay under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The accused was the owner of a vessel registered under Act XIX of 1838 as being of 163 $\frac{60}{100}$  tons. In the course of a voyage from the Malabar Coast to Bombay a temporary superstructure [172] was added to her sides by fixing planks, &c., all round above the upper railing, for the purpose of protecting the cargo from the sea. During this voyage while she was at anchor in a port near Ratnagiri, a coast-guard inspector measured the ship, and found her tonnage to be 190 $\frac{60}{100}$  tons. For this change in her burthen the accused was prosecuted, under s. 13 of Act XIX of 1838, for neglecting to re-register the vessel, and obtain a certificate under s. 4 of the Act.

The accused pleaded that the superstructure was of a temporary character to be removed at the end of the voyage; that there was no change in the burthen of the vessel; and that, therefore, it was not necessary to obtain a fresh certificate under Act XIX of 1838.

The prosecution relied on certain rules of measurement passed by the Marine Department with the sanction of Government in 1873, which provided that in ascertaining the tonnage of open vessels the depths were to be measured from the upper strake, temporary or otherwise.\*

The First Class Magistrate of Ratnagiri convicted the accused, and sentenced him, under s. 13, to pay a fine of Rs. 238-12, being ten times the fee payable for the registration of a vessel of 190 $\frac{60}{100}$  tons.

On appeal the conviction was confirmed, but the fine was reduced to Rs. 33-12.

The Government of Bombay applied to the High Court for a revision of the Session Judge's order, on the ground that the fine had been improperly reduced.

*Shantaram Narayan*, Government Pleader, for the Crown, contended that the fees leviable on a fresh certificate of registry should be calculated on the whole burthen, and not merely on the portion added since the previous registry.

or names of the owner or owners thereof, shall be registered in a book to be kept for that purpose by the person hereinafter directed to make such registry. At Bombay such registry shall be made by the Master Attendant, and at other places within the said territories by the Collector of Sea Customs at such places respectively or by such other person as shall be appointed by the Government of Bombay to act at such places respectively in the execution of this Act; and whenever any change shall take place in the burthen of such vessel employed as aforesaid, fishing vessel, or harbour craft, or in the name or names of the owner or owners thereof, such registry shall be made again: Provided, however, that it shall not be lawful to give any name to such vessel employed as aforesaid, fishing vessel, or harbour craft, other than that by which she was first registered.

\* *Vide Government Gazette* dated 13th October 1873.

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*V. G. Bhandarkar*, for the accused:—The conviction and sentence are illegal. The additional structure was only of a temporary character. It was to be removed at the end of the voyage. It is not proved that the burthen of the vessel was permanently changed by reason of this structure. There is no necessity, therefore, [173] for getting a fresh certificate of registry. There is, moreover, no provision in Act XIX of 1838 regarding temporary additions. The rules of the Marine Department are, therefore, *ultra vires*, so far as they refer to temporary structures.

#### JUDGMENT.

The judgment of the Court was delivered by

SCOTT, J.—This is a question which turns on the construction of ss. 4, 6, 7 and 13 of Act XIX of 1838. Section 4 says that in the case of all vessels trading on the coast of Bombay, the name, number, and burthen of every such vessel, with the name of the owner, shall be registered by the person directed to make such registry: and "whenever any change shall take place in the burthen of such vessel, \* \* \* such registry shall be made again." The burthen of a ship is its carrying capacity—the number of tons it will carry (see *Imperial Dictionary*). Section 6 throws the duty of ascertaining the burthen on the official named in each port for that purpose. Section 7 obliges every owner to "obtain a certificate of registry from the person authorized to make such registry as aforesaid." Section 13 says, "In case any such vessel shall not be furnished with such certificates as hereinbefore specified (*i.e.*, in s. 4), the owner shall be subjected to a fine of ten times the amount of the fees payable in respect of the certificate of registry of such vessel."

In the present case the evidence of the prosecution, including that of Mr. Payne, Inspector of Coast Guards, showed that, for the purposes of a voyage along the coast to Bombay with a cargo of timber, the vessel's bulwarks were raised by an additional structure of a temporary nature. It was contended that she had increased her tonnage without renewing her certificate. The object of the structure was not, however, shown to be an increase of the carrying capacity. The defendant said the erection was only put there to protect the timber from the sea. Mr. Payne put in evidence certain rules of measurement for native boats issued with the sanction of Government in 1873, which say the measurements must be taken from the top of the highest strake, *temporary or otherwise*, of the vessel. Act XIX of 1838 lays down no rules of measurement, but Act X of 1841 says, "In order to ascertain the tonnage of open vessels, the depths are to [174] be measured from the upper strake." The rule of 1873 adds the words "temporary or otherwise." Following that rule of measurement Mr. Payne found an increase of 27 tons by reason of the temporary bamboo structure. He, therefore, contended that "a change had taken place in the burthen," and the Magistrate decided in his favour that the owner ought to have registered anew, and was subject, under s. 13 of the Act of 1838, to a fine of ten times the amount of fee payable on the renewed certificate. This was the order of the Magistrate. The Sessions Judge decreased the amount; otherwise he confirmed the decision.

We are of opinion that this view of the law is not correct. The erection of planks and bamboos, which caused the increased burthen, was admitted to be only of a temporary character, and was to be removed at the end

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of the voyage. It was argued that the construction was clearly made at least for one voyage of the vessel, that it came within the definition of the "upper stake" from which the measurement must be taken, and that it, therefore, came within the Act, and required renewed registration. The definition of "strake," as a ship-building term, is "a continuous line of planking or plates on a vessel's side reaching from stem to stern" (see Imperial Dictionary). The strakes are, in fact, a structural portion of the vessel. It seems impossible to hold that a temporary addition to the bulwarks comes within this definition. The Merchant Shipping Act of 1854 lays down a principle of measurement similar to that in Act X of 1841. Section 24 says, "In ascertaining the tonnage of open ships, *the upper edge of the upper strake* is to form the boundary line of measurement, and the depths shall be taken from athwart ship line, extending from upper edge of the said strake at each division of the length." The Merchant Shipping Act goes on to say (s. 26) "that the tonnage thus ascertained shall be deemed thenceforth to be the tonnage of the ship, *unless any alteration is made in the form, or capacity of such ship.*" There is no express provision applicable to temporary additions to open vessels either in the Indian Acts of 1838 or 1841 or in the Merchant Shipping Act. The words "temporary or otherwise" only occur in the rules of 1873. Even if it were a matter of doubt whether the words "temporary or otherwise" are or are not by implication in [175] the Act, the fact of the doubt ought to exclude them, for "*indubio* you are always to lean against the construction which imposes a burthen on the subject" (1). It is a well-known rule of construction that penal Acts must be construed strictly. In construing some ambiguous clauses of an Act for the Registry of Ships, Heath, J., said: "Though this Statute be remedial, yet it is very penal if all its requisitions be not complied with.\* \* \* These Statutes are made for the advancement of trade and commerce, and to regulate the conduct of merchant. If laws of this sort be not perfectly clear and intelligible to persons of their description, the legislature, by the use of such ambiguous clauses, would lay a snare for the subject; a construction which conveys such an imputation ought never to be adopted. I think that the same rule ought to obtain here, as in the construction of clauses inflicting pains and penalties in the revenue laws, if they be ambiguously and obscurely worded, the interpretation is ever in favour of the subject; for this plain reason, that the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed"—*Hubbard v. Johnstone* (2). Although the Acts are silent about temporary additions to open vessels, as regards vessels with decks, the Merchant Shipping Act (s. 21, sub-s. 4) provides that a closed-in space on the upper deck must be permanent, or the tonnage of such erection is not to be ascertained (see *Lord Advocate v. Clyde Steam Navigation Company* (3)). The Merchant Shipping Act applies, as regards the rules of measurement, to the whole of Her Majesty's dominions, and is law in India so far as it is not superseded by local legislation. The Acts of 1838 and 1841 do not conflict with it, and there is no other local legislation. Its rules, therefore, must be applicable, at any rate as illustrating by their more careful phraseology the meaning of the rule of measurements laid down in the Act of 1841. The construction in the present case is admittedly temporary, and corresponds in an

(1) 11 Cl. &amp; Fin. 500 (607).

(2) 3 Taunt 177 (220).

(3) L.R. 2 H.L. Sc. 409.

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open vessel to a closed in space on the upper deck in a decked vessel. If temporary alterations had been intended to be included, the Act would have said so.

[176] But the prosecution rely on the rules of 1873. They are not issued under any Act. They appear in the *Government Gazette* of 13th October, 1873, as rules issued by the Marine Department for the measurement of open native boats. The power to make rules does not authorise the making of a rule which goes beyond the power given by the Act. We think those rules are *ultra vires* so far as they insist on the measurement being taken from the top of a temporary addition to the upper strake. To enforce such a rule would be to legislate by the addition to the Act of the words "temporary or otherwise."

We, therefore, differ from the Courts below, and hold that the defendant was not obliged to renew his registration. The conviction and confirming order must, therefore, be reversed, and fine returned.

*Conviction and sentence reversed.*

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#### APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.*

PUTAPPA (*Original Defendant*), Appellant *v.* TIMMAJI, deceased BY HIS HEIRS (*Original Plaintiffs*), Respondents.\* [18th July, 1889.]

*Mortgage—Redemption—Equity of redemption—Adverse possession—Limitation.*

In 1845 the plaintiff's grandfather Appanna mortgaged the house in dispute to Dyavapa with possession. Appanna died in 1849, leaving him surviving his daughter K., (the plaintiff's mother), and a daughter-in-law Narsubai, the widow of his predeceased adopted son. In 1856 the mortgagee Dyavapa brought a suit on his mortgage against Narsubai, and obtained a decree against her, directing (*inter alia*), a sale of the house in the event of the non-payment of the mortgage-debt. Narsubai in consequence sold the house in the same year (1856) to Ramappa, and paid off the mortgagee, who thereupon at her instance gave up the house to Ramappa. He held possession from 1856 to 1884. In 1881 the defendant Putappa obtained a decree against Ramappa for Rs. 2,000. In execution of this decree the house was sold, and Putappa bought it himself, and obtained possession on 17th January, 1884. While that suit was pending, the plaintiff Timmaji, the grandson of Appanna, brought a suit (No. 247 of 1881) against the son of Dyavapa, (the original mortgagee), and Ramappa to redeem the mortgage of 1845 and recover possession. The plaintiff obtained a decree against Dyavapa's son for redemption, and proceeded to execute the decree. He was obstructed by Ramappa's son, who, however, in suit No. 205 of 1882 was found to have no right to the house. The [177] present suit was brought in 1884 by the plaintiff to recover the house from the defendant.

*Held*, that the suit was barred. The defendant in 1884 purchased the house from Ramappa, who had bought it in 1856 from Narsubai. Ramappa's possession since that time had been adverse to the plaintiff. There can be adverse possession of the equity of redemption, and Narsubai's possession had been adverse up to the sale in 1856.

[F., 6 C.W.N. 601; R., 15 Ind. Cas. 146=(1912) M. W. N. 669; 17 O.C. 294; 1914 M.W.N. 417 (423); Expl., 18 B. 51; 27 B. 43; 21 M. 153 (165)=8 M. L. J. 92 (103); 5 Bom. L.R. 146; D., 21 B. 793; 25 M. 507 (512).]

THIS was a second appeal from a decision of J. L. Johnston, Acting District Judge of Dharwar.

\* Second Appeal No. 480 of 1886.