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EMPIRENS
v.
PITAMBUR
SINGH.

this seems to us additional reason for requiring the actual facts to be brought properly before the Court, so that it may determine the validity or invalidity of the marriage in each case that comes before it."

No one appeared to argue the case.

The judgment of the Full Bench was delivered by

GARTH, C. J.—We think it clear that, in this case, the evidence of the marriage is not sufficient to justify a conviction for adultery.

The marriage of the woman, as observed by the learned Judges who referred the case, is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (s. 50) seem to point out very plainly, that where the marriage is an ingredient in the offence, as in bigamy, adultery, and the enticing of married women, the fact of the marriage must be strictly proved in the regular way.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

1879
Aug. 8.

IN THE MATTER OF A COLLISION BETWEEN THE "AVA" AND THE
"BRENHILDA."

Board of Trade Certificate—Public Documents—Merchant Shipping Act of 1854, s. 138—Investigation of Charges of Misconduct—Condition precedent—Act IV of 1875, ss. 5, 13, 14—Evidence Act (I of 1872), ss. 65, 74—Secondary Evidence.

An investigation under Act IV of 1875, s. 5, into charges of incompetency or misconduct cannot proceed, unless the person whose competency or conduct is to be enquired into has been proved to be the holder of a certificate granted by the Board of Trade.

Such a certificate is not a 'public document' within the meaning of s. 74 of the Evidence Act.

In a case falling under cl. (f), s. 65 of the Evidence Act, and also under cl. (a) or (c) of the same section, any secondary evidence is admissible.

THE facts of this case have been already reported, *ante*, p. 453, on the question of the jurisdiction of the Court to proceed with the charges against Whittard, the mate of the *Ava*, and

Scurr, master of the *Brenhilda*, respectively. The charges against the mate of the *Ava* were first gone into. As it was necessary to show that he held a Board of Trade certificate, evidence was given to show that he had been served with a notice to produce it. It was proved also, that he had stated "the number of my certificate is No. 10,219; it is a master's certificate issued at Liverpool." It was proved also, that he had been served with a copy of the report of the Court of Inquiry, the petition of the Advocate-General, and a copy of the charges brought against him by the Government. At the close of the evidence for the prosecution, Whittard was called upon for his defence.

Mr. *Woodroffe*, Mr. *Jackson*, and Mr. *Henderson*, for Whittard.

The *Offg. Advocate-General* (Mr. *J. D. Bell*), The *Standing Counsel* (Mr. *Phillips*), and Mr. *O'Kinealy*, for the Government.

Mr. *Woodroffe*.—Assuming Whittard holds a Board of Trade certificate, this Court cannot cancel it, as the accused has not been furnished with a copy of the statement of the case upon which the investigation has been ordered—Section 14, Act IV of 1875. This investigation cannot go on unless the certificate is produced to the Court—Section 13, Act IV of 1875. There is, however, no evidence that Whittard holds a certificate issued by the Board of Trade. Whittard's admission does not show that, and even if it did, it is not relevant, as no case for the admission of secondary evidence has been made. Besides, no secondary evidence of the certificate will be admitted, unless it be a certified copy; for the certificate is a public document—Merchant Shipping Act of 1854, s. 138; Act I of 1872, s. 74; and it comes therefore within cls. (e) and (f) of s. 65 of Act I of 1872. An oral admission is, therefore, not admissible as evidence of its contents. Statutory requirements must be strictly followed, as this is a quasi-criminal proceeding.—*Reg. v. Bholanath Sen* (1), *Martin v. Mackonochie* (2).

The *Offg. Advocate-General* (Mr. *J. D. Bell*).—The certificate is not a 'public document' within the meaning of s. 74 of the Evi-

(1) I. L. R., 2 Calc., 23.

(2) 3 Q. B. D., 730.

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dence Act. Whittard admitted that it was in his possession, and he must be assumed to have sailed from Calcutta with it, as otherwise he would be liable to a penalty under s. 136 of the Merchant Shipping Act of 1854. It being in his possession, then, at the time of the collision from which nothing was saved, cl. (a) or (c) of s. 65 of the Evidence Act would apply.

The following judgment was delivered by

WILSON, J. — Mr. Woodroffe has raised two objections, in respect of which he contends that the Advocate-General has not produced sufficient evidence to allow the Court to proceed with this investigation. One of these objections goes, not strictly to the jurisdiction, but to the power of taking effective action. It is, that a copy of the statement of the case upon which the investigation was ordered has not been served upon Whittard, the second mate of the *Ava*, as required by s. 14 of Act IV of 1875. It is apparent that the report of the special Court is the statement of the case referred to in s. 14. There is nothing on the record to suggest that there was any other statement. It appears that a copy of the report was served upon Whittard. I think, therefore, that a copy of the statement of the case was served in compliance with the terms of s. 14. Then it is suggested that the statement ought to have been furnished before the investigation was ordered; but it seems to me this is too strict an interpretation of the words of the section. I do not think that up to the 1st of August any investigation had commenced. This further contention, therefore, fails.

The second objection is not so easily dealt with. It is admittedly a condition precedent to the investigation, that the person whose competency or conduct is to be enquired into, should have a certificate from the Board of Trade.

Section 65 of the Evidence Act says, that "secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

"(a) When the original is shown or appears to be in the possession or power

"of the person against whom the document is sought to be proved, or

"of any person out of the reach of, or not subject to, the process of the Court, or

"of any person legally bound to produce it, and when, after the notice mentioned in s. 66, such person does not produce it ;

"(b) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

"(c) When the original has been destroyed or lost, or when the party offering evidence of its contents, cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

"(d) When the original is of such a nature as not to be easily moveable ;

"(e) When the original is a public document within the meaning of s. 74 ;

"(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence ;

"(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the result of the whole collection.

"In cases (a), (c), and (d), any secondary evidence of the contents of the document is admissible.

"In case (b), the written admission is admissible.

"In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence is admissible.

"In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

Now it has been shown that coming out to India the second mate must have had a certificate. Whittard stated to Captain Atkinson, the Marine Superintendent of the British India Steam Navigation Co., to which the steam ship *Ava* belonged, that he had a certificate, though Captain Atkinson was not sure whether it was from the Board of Trade.

I should be inclined to hold on the evidence that the certificate went down with the *Ava*, and that the case was met by cl. (c) of s. 65 of the Evidence Act. It has, however, been

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sufficiently shown that it comes under either cl. (a) or cl. (c). Notice to produce it has been given, and therefore secondary evidence may be taken as to its contents. It is necessary to look also at cls. (e) and (f), which purport to give additional cases in which secondary evidence may be given.

Clause (e) deals with public documents. Section 74 says the following documents are public documents, *viz.* :—(1) Documents forming the acts or records of the acts (i) of the Sovereign Authority; (ii) of official bodies and tribunals; (iii) of public officers—legislative, judicial, and executive: (2) Public records kept in British India of private documents. Now, it does not seem to me that this certificate is a public document. I do not say that the duplicate kept by the Registrar-General of Soamen under s. 138 of the Merchant Shipping Act, 1854, is not a public document. If the certificate were a public document then very many documents would be made public documents, which were not intended to be such,—*e. g.*, a hundred-rupee note. Sub-section (f.) of s. 65 of the Evidence Act says:—"Secondary evidence may be given when the original is a document of which a certified copy is permitted by this Act or by any other law in force in British India to be given in evidence." To estimate the bearing of this section we must turn to s. 138 of the Merchant Shipping Act of 1854, 17 and 18 Vict., Cap. 104; but although, for many purposes, that Act has force in India, I doubt whether the rule of procedure in that section applies, namely, that a certified copy shall be evidence of such certificate. But whether or not the words apply in India, that duplicate would, I think, be a public document within the meaning of s. 74 of the Evidence Act; and under s. 65 any such document may be proved by a certified copy. Therefore the certificate might be so proved unless there be a difference between a document which may be proved by a certified copy and a document which is a duplicate of such document. This is a point of some difficulty, but I should be disposed to say there is no difference, and that the case falls under cl. (f). This brings us to the real question, what kind of secondary evidence is admissible. By s. 65, in cases under cls. (a) and (c), any secondary evidence is admissible; in cases under cls. (e) and (f), only a

certified copy. The present case falls under (a) or (c), and also under (f). In such a case which rule applies? I think the words, "In cases (a), (c), and (d) any secondary evidence is admissible," are too clear and too strong to be controlled by anything that follows, and that therefore in this case any secondary evidence might be received. Mr. Woodroffe pointed out that cl. (e) might apply to a judgment lost. Where a certified copy might be, but was not produced, I admit the difficulty; but I think danger might be avoided by sufficient caution being exercised.

If effect were given to the other view, irreparable injury would result in the case of the accidental loss of the record of a Court. Mr. Woodroffe has submitted that no sufficient evidence has been given of the existence at any time of a certificate or of its contents. I agree with him that there is a distinction between evidence for the purpose of identification and evidence to enable the Court to ascertain the contents of the document. We must, however, look to see how much of the document is wanted. In the case of a Government note, for example, it might, in some cases, be sufficient to give the number or the amount. For our present purpose all we want to know is, whether there was a Board of Trade certificate identified by a number.

Now, there is evidence that it was a master's certificate that was issued at Liverpool and bore a certain number. I know of no such certificate but a Board of Trade certificate. Therefore, there is sufficient evidence that it was a Board of Trade certificate.

The Government Solicitor : *Messrs. Sanderson and Co.*

Attorneys for Whittard : *Messrs. Orr and Harris.*

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