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* * * * *

No evidence was brought to prove that accused was by habit a thief. The order calling on accused to show cause was merely read out and accused undertook to give security and there the inquiry ended. This is not a compliance with section 117, Criminal Procedure Code. The Magistrate is bound, after the order has been read out, to inquire into the truth of the information, in the manner prescribed for conducting trials and recording evidence in warrant cases.

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Criminal Procedure—488.

Before H. Adamson, Esq.

MAUNG PO *v.* MA MYIT.

Mr. C. G. S. Pillay—for appellant.

Held—that, it is contrary to the intention of the legislature, as provided in Chapter XXXVI, Criminal Procedure Code, that arrears of maintenance should be allowed to accumulate for a long period, and that payment of the accumulated arrears should then be enforced under section 488, Criminal Procedure Code.

Criminal Revision No. 4 of 1902. April 8th.

References:—

Weir, page 1084.
B. L. R., Vol. IV, page 29.
I. L. R., 10 All., page 350.
Limitation Act, Article 178, Schedule II.

APPLICANT was, on 31st August 1891, ordered by the Subdivisional Magistrate of Salin, under the provision of section 488, Criminal Procedure Code, to pay Rs. 3 a month for the maintenance of his son, then three years old, to the respondent, the mother of the child. On 12th November 1901 respondent applied to enforce the order, stating that applicant had paid maintenance for only seventeen months, and demanding arrears for nine years, amounting in all to Rs. 324. Applicant's defence was that he had paid maintenance in accordance with the order up to a time, seven years, previous to the institution of the proceedings, that he had not paid thereafter as demand had not been made, and that he was unable to pay as he was in ill-health. It appears that he is suffering from cancer. However, it has been shown that he is in comfortable circumstances, having wealthy relatives, and he paid Rs. 324 into Court, either his own or borrowed, when the distress warrant issued. He contends that there was no wilful neglect to comply with the order, because demand was not made for payment. Respondent says that she frequently demanded payment, but it is proved only that she demanded payment immediately before institution of the proceedings, and that it was then refused. I can find no grounds for holding that a person in whose favour an order has been passed under section 488 is bound to make a monthly demand for payment. The order existed, and it is not alleged that there was any arrangement exempting applicant from payment. Under these circumstances I have no doubt that there was wilful neglect to comply with the order. The Magistrate found that there was wilful neglect, and directed applicant to pay arrears for seven years, Rs. 252. This sum was paid to respondent out of the amount deposited in Court, and the balance was returned to applicant.

The applicant now applies for revision of this order.

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There does not appear to be any rule of limitation for applications to enforce orders under section 488, Criminal Procedure Code. It has been held in *Queen-Empress* v. *Ajudiah Singh* * that Article 178 of the second schedule of the Limitation Act applies only to applications under the Civil Procedure Code. Rules of limitation are foreign to the administration of criminal justice, and it is only by specific legislation that periods of limitation can be rendered applicable to criminal proceedings. But it does not follow from this that criminal courts are bound to give relief after long and unexplained delay. For instance, the period of limitation for a civil suit for a trifling injury to the person, such as a simple assault, is one year. If such a suit were brought after the lapse of 11 months and 29 days, the delay in bringing the suit would not be a valid defence. But a criminal prosecution under section 352, Indian Penal Code, could, so far as the letter of the law is concerned, be instituted after the lapse of 20 years, and yet, however well established might be the facts of the complaint, a magistrate might be justified in dismissing it even if there was a lapse of only six months, for the reason that, after so long a delay, there was not sufficient ground for proceeding. A similar principle appears to me to apply to all criminal proceedings. The Magistrate has a discretion which he must exercise in accordance with reason and the intention of the law. Chapter XXXVI, Criminal Procedure Code, creates a summary jurisdiction enabling criminal courts to grant an order against a father for the payment of a monthly allowance for the support of his child. The allowance to be granted is a monthly allowance. It cannot be granted with retrospective effect, but only from the date of the application. If the order is not complied with, a Magistrate may, for every breach of the order, issue a warrant for levying the amount due, and for the whole or part of each month's allowance remaining unpaid imprisonment for a month may be awarded. The law thus provides for the levy of arrears which may be for several months, but I think it is very doubtful whether these provisions would authorize the issue of a warrant for a lump sum of arrears due for a long period of years, with the consequential penalty in the event of their not being realized of imprisonment for a long period of years. It appears to me that such action would be contrary to the spirit of the law, and contrary to the intention of the legislature whose object was to provide by a summary procedure for the monthly recurring expenses of the maintenance of the child. In the Indian Law Reports frequent instances are found in which the levy of arrears for three, four or six months has been allowed. In one case quoted in Weir, page 1084, the Madras High Court were not prepared to say that an order for the levy of 15 months' arrears was illegal. But I have not been able to find any other case in the Indian Law Reports in which arrears for a long period were levied, and even that case is widely different from the present, where arrears for nine years are demanded. The child in whose favour the order was passed is now a

* I. L. R., 10 All., 350.

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boy over 13 years of age, and is probably able to maintain himself. The only parallel case that I can find is one of the Judicial Commissioner of Lower Burma, *Charles Napean* v. *Ma Kyan*, reported at page 29, Vol. IV of Agabeg's Burma Law Reports. In it a Magistrate had issued a warrant for arrears of maintenance for seven years and eleven months, and the learned Judicial Commissioner (Hosking, J.) held that the Magistrate had acted with want of discretion, and remarked that it was obvious that it was never the intention of the legislature that arrears of maintenance should be allowed to accumulate for seven years, and that payment of the accumulated arrears should then be enforced in a summary manner. In this opinion I fully concur. For these reasons I set aside the Magistrate's order and direct that the amount awarded, Rs. 252, be refunded to the applicant.

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Criminal Revision No. 248 of 1902 May 6th.

Before H. Adamson, Esq.

MA NYEIN MÉ *vs.* MAUNG KYAW.

Held—that, in proceedings under Chapter XXXVI, Criminal Procedure Code, a Magistrate has no authority to determine who is the lawful guardian of a child. A woman's refusal to surrender a child is no ground for stopping an allowance previously ordered.

References:—

1, U. B. R., 1892—96, page 67.
I. L. R., 4 Cal., page 374.

THE respondent was ordered to pay Rs. 12 a month to applicant, his lesser wife, as maintenance for his three children. Respondent after some time made a further application, alleging that the children were not being educated, and asking for the custody of the two elder children, daughters aged eight and six, in order to support them in his own house. Applicant declined to give them up. The Magistrate found that applicant was wrongly refusing to live with her husband, the respondent, and that respondent in consequence of his offer to support the children was no longer guilty of neglect or refusal to maintain them, and cancelled the order of maintenance so far as these two children were concerned, namely, to the extent of Rs. 8. It is quite clear, however, that respondent has no desire that applicant should live with him, and the effect of the Magistrate's order is simply to deprive applicant of the maintenance of her children, unless she chooses to give them up to respondent.

Against this order applicant has come up in revision.

In support of his action the Magistrate has referred to *Maung Pwe* v. *Mi Nyun*.* There was no final order in that case, which was merely remitted for further inquiry. But Burgess, J., remarked: "If "the father is willing to support the child in his own home, why should "he be obliged to pay so large a sum for keeping it elsewhere against "his will, and if he is so willing to maintain it, and is not permitted to "do so because the mother will not part with it and yet will not live "with her husband, is he liable for either neglect or refusal on account "of the child any more than on account of the mother."

I think that these remarks suggest an erroneous conception of the law. Section 488, Criminal Procedure Code, provides for the case of the wife who refuses to live with her husband, but contains no obligation to give up the children to the father. If the father has the right to the custody of the children, it must be determined elsewhere than in the Magistrate's Court. A Magistrate has no authority to determine the question who is the lawful guardian of a child. This is the ruling

* 1, U. B. R., 1892—96, page 67.

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in *Lal Das* v. *Nekunjo Bhaishiani*,* where it was also held that the woman's refusal to surrender a child was no ground for stopping an allowance previously ordered.

In the present case the children are females of tender years, and even if the Magistrate had the discretion of determining the guardian it would be improper to take them away from the mother. But the Magistrate, as I have said, has no such authority under the Code.

The Magistrate's order stopping the allowance for the maintenance of the two children is set aside, and respondent will have to pay for each of them Rs. 4 a month in accordance with the original order.

* I. L. R., 4 Cal.—page 374.

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Criminal Procedure—417.

Before H. Adamson, Esq.

Criminal Appeal No. 73 of 1902. October 13th.

KING-EMPEROR *v.* { NGA NAING, NGA MO E, NGA E.

Mr. *Lütter*, Government Prosecutor,—for the Crown. | Mr. *C. G. S. Pillay*—for the accused.

Held—that in an appeal from an acquittal, the fact that fresh evidence against the accused has been discovered subsequent to the acquittal, is not a sufficient reason for setting aside the acquittal or ordering a retrial.

References:—

L. G. Criminal Miscellaneous Circular No. 63 of 1899

Stephen's Commentaries on the Laws of England, Vol. IV, page 524.

Russell on Crimes and Misdemeanours, Vol. I, page 42.

THIS is an appeal from the acquittal of the three accused by the Sessions Judge of Minbu on a charge under section 302, Indian Penal Code, of having murdered Maung Aung Baw. It is not alleged that the Sessions Judge failed to sufficiently weigh and consider the evidence produced before him, or that, in acquitting the accused, he took an unreasonable view of the evidence.

But the ground of appeal is that fresh and credible evidence has been discovered after the acquittal which, if it had been produced at the trial, would probably have led to the conviction of the accused.

The evidence which has been discovered is a dying declaration made by Maung Aung Baw to the Headquarters Magistrate, Minbu, which, however, was not taken in the presence of the accused. The judgment of the Sessions Judge shows that he was influenced by the fact that there was no reliable statement by the deceased as to the cause of his death and as to the circumstances of the transaction that resulted in his death. A statement of the deceased purporting to have been taken by the investigating Police sergeant was poduced, but it was not dated, and the Judge thought that there was reason to believe that it was a production of a later date than that alleged. It therefore appears to be not improbable that, if the dying declaration which was subsequently discovered, had been produced at the trial and supported by the evidence of the Headquarters Magistrate, the Judge might have taken a different view as to the guilt of the accused.

And it is also perfectly clear that the non-production of the dying declaration was due to the grossest negligence on the part of those concerned in the prosecution. Maung Aung Baw did not die till ten days after he was assaulted, and it was obviously the duty of the investigating Police officer to see that his deposition was taken by a Magistrate in the presence of the accused, which was never done.

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The Headquarters Magistrate, apparently on his own initiative, took the satement of the deceased but made no use of it, and owing to his negligence it was not produced before the Committing Magistrate or at the Sessions trial. By the exercise of due diligence on the part of the prosecution, a dying declaration made in the presence of the accused, which itself would have been evidence, might have been produced at the trial, and by the exercise of similar diligence the statement which was subsequently discovered might have been available at the trial.

The question then arises whether, in an appeal from an acquittal, the discovery of fresh evidence after the acquittal, which by due diligence on the part of the prosecution might have been discovered before the trial, affords a sufficient reason for setting aside the acquittal and ordering a new trial.

The Government Prosecutor urges that the appeal should be admitted in the interests of justice, but he is unable to indicate a single instance in which an acquittal has been set aside and a new trial ordered by any Indian High Court on the ground of the subsequent discovery of fresh evidence. He refers to Criminal Miscellaneous Circular No. 63 of 1899 of the Local Government, in which the production of fresh and credible evidence after an acquittal is instanced as a special ground for exercising the right of appeal under section 417, Criminal Procedure Code. An executive circular is of course not binding on the Courts, but it is entitled to respect and it is reasonable to suppose that it must have been framed on a well-founded belief that it was in accordance with the law. I accordingly allowed an adjournment in order to admit of the Government Prosecutor consulting the Government Advocate, through whom he received instructions to present this appeal. The following were the points reserved for further argument:—

(1) In an appeal from an accquittal, is the fact that fresh evidence has been discovered after the acquittal a ground for setting aside the acquittal and directing a new trial?

(2) If by due diligence on the part of the prosecution this evidence could have been discovered before the trial, would its subsequent discovery be a ground for setting aside the acquittal?

The Government Prosecutor, after consulting the Government Advocate, has not been able to advance matters. The Government Advocate, as I understand from the Government Prosecutor, is of opinion that the Executive Circular is not binding on the Courts, which is, of course, obvious. He is unable to indicate any provision of law under which a High Court can set aside an acquittal and order a new trial on account of the discovery of fresh evidence after the acquittal, and he adds that he would be surprised if any ruling to that effect could be

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found. In an appeal at the instance of the Crown from an order of acquittal, it is the duty of the law officers of the Crown to show that the action which they ask the Court to adopt is sanctioned by law, and this in the present case they have failed to do.

In English law an acquittal is a bar to any subsequent prosecution for the same offence. In Stephen's Commentaries* is the following passage:—

"In many instances where, contrary to evidence, the Jury have found the prisoner guilty, their verdict hath mercifully been set aside and a new trial granted by the Court Queen's Bench. But there hath yet been no instance of granting a new trial where the prisoner was found not guilty on the first. If the Jury, therefore, find the prisoner not guilty, he is then for ever quit and discharged of the accusation."

And in Russell, on Crimes and Misdemeanours†:—

"If a prisoner could have been legally convicted upon an indictment upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment, and it is immaterial whether the proper evidence was adduced at the first trial or not."

In Indian law it is different, and there is an appeal from an order of acquittal. But Indian Criminal law is founded on English Criminal law, and the very fact that there is this difference renders it proper that in an appeal from an acquittal the law should be construed strictly in favour of the accused. The appeal contemplated whether, from an acquittal or a conviction, is an appeal on the merits, that is, an appeal on the ground that there has been an error in law, or that the Judge has not properly weighed or considered the evidence, or that he has wrongly admitted evidence or has failed to take evidence that appears from the record to be material. I can find no authority for holding that in an appeal the Appellate Court is entitled to go outside the record. It is true that an Appellate Court under the provisions of section 428, Criminal Procedure Code, can admit additional evidence, but the necessity for taking such additional evidence must be apparent from something on the reocord, and cannot be derived from external information. And though I would not be inclined to hold that if the case were reversed and if fresh evidence tending to show that a convicted person was innocent were discovered in the interval between a conviction and an appeal an Appellate Court would be wrong in admitting it, yet I think that its action in doing so would not be in strict accordance with law, but it might be justified on the same principle as the Court of Queen's Bench applied in the extract from Stephen's Commentaries, which has been quoted above. But where the new evidence discovered is against the accused, the principle that a penal statute must be construed strictly applies, and no relaxation of procedure can be allowed. If the legislature had intended that the

* Volume IV, page 524. † Volume I, page 42.

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discovery of fresh evidence should be a ground for appeal, it is reasonable to suppose that there would be special provision to that effect in the code. In the Civil Procedure Code there is provision for the discovery of fresh evidence in review, but even there it is restricted to evidence which, with the exercise of due diligence, could not have been produced before. There is no corresponding provision in criminal law.

I am therefore, even at the risk in the present case of a possible failure of justice constrained to hold that the discovery of fresh evidence after an acquittal is not sufficient reason for setting aside the acquittal, and *à fortiori*, that it would be still less a sufficient reason where, by the exercise of due diligence on the part of the prosecution, the evidence might have been produced at the original trial.

The appeal must, therefore, be dismissed and the accused will be released from custody.

Criminal Procedure—164, 364, 533.

Before H. Adamson, Esq., C.S.I.

MA ÔN NYUN
MAUNG TUN SIN } *v.* KING-EMPEROR.

Criminal Appeal No. 133 of 1902. January 26th.

Mr. *Tha Gywe*—for second appellant. | Mr. *H. M. Lütter*—for the Crown

Held—that where B is indicted for murdering C and A is indicted for aiding and abetting B, A must be shown to have known that it was B's intent to murder C; and it is not enough to show that A helped B in what he did.

Held also—that when a confession has been taken by a Magistrate under section 164, Criminal Procedure Code, and the Magistrate has omitted the question the person making it, as required by section 164 (3), in order to ascertain whether the confession is voluntarily made, and the confession is subsequently retracted, it is inadmissible in evidence, and cannot be cured under the provisions of section 533, Criminal Procedure Code, by the evidence of the Magistrate that he believes that the confession was voluntarily made.

References:—

10 Bom., H. C. R., 175.	23 Bom., 221.
17 Cal., 862.	25 Bom., 543.
21 Bom., 495.	2 C. W. N., 702.

1 U. B. R. 1897—1901, page 247.

THE second appellant has been convicted of the murder of Maung Pe Maung, and the first appellant of the abetment thereof. Maung Pe Maung was murdered on the night of 23rd October. His head was almost severed from his body.

The conviction of the first appellant is founded chiefly on her statements to the Magistrate. It has first to be seen whether these statements amount really to a confession of abetment of murder. They are Exhibits D and E and her statements to the committing Magistrate and the Sessions Judge. Her statement, Exhibit D, is to the effect that she had a quarrel with her husband the second appellant because he had heard of her infidelity with Maung Pe Maung. They went to bed and made up the quarrel, and then he said to her, "If you love me will you follow my plan." She had to say that she would. He then said, "Call Maung Pe Maung. He will come at your call" and she agreed. They then got up and went together to Maung Pe Maung's house, he carrying a *dama*. She called Maung Pe Maung, who came out. Second appellant pretended to be a go-between. She and Maung Pe Maung went away together, the second appellant following. When they arrived at the European cemetery, second appellant told her to go away, and then he killed Maung Pe Maung with the *da*. Then she and second appellant went home, and she put the *longyi* he was wearing and the *dah* in a latrine. In Exhibit E she merely identifies a *da*, which the police had found, and which was not a *dama* but a *dashe*, as the one with which the murder was committed. In her examination by the committing Magistrate she merely admits that the statements already made by her are true. In her examination

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by the Sessions Judge she goes no further but adds that some of the statements made by her to the police were made at random.

Do these statements amount to a confession of abetment of murder? She did not admit that she knew that her husband intended to murder Maung Pe Maung. She merely admitted that she said that she would follow his plan and she did not say that he told her that his plan was to murder. It is consistent with the statements that she may have believed that her husband intended to beat Maung Pe Maung, or to inflict some injury on him short of death. All that can be assumed from the statements is that she had reason to believe that her husband intended to have it out in some way with Pe Maung.

The statements must be interpreted strictly in favour of the accused. It is obviously improper to read into them that she knew that the design was murder when she has not said so. It is not even likely on the probabilities of the case that she would have conspired to murder Pe Maung. She had a husband and Pe Maung had a wife. She and Pe Maung where lovers. They had had no quarrel. She had seen Pe Maung and his wife together on that day, and that was the only motive that she could have for enmity to him. This does not appear to be a very adequate motive for conspiring to kill him.

Mi Ngwe Nyun v. *Queen-Empress** is in some respects similar to this case. A number of women were fighting. One of them called for a knife. A bystander gave her a knife and she stabbed her opponent and killed her. It was held that the bystander could not be convicted of abetment of culpable homicide, but only of abetment of causing hurt with a dangerous weapon. The law applicable was quoted as that contained in Sir J. Fitzjames Stephen's Digest of the Criminal Law of England, illustration (*z*) to Article 39, which is:—

"B is indicted for inflicting on C an injury dangerous to life with intent to murder. A is indicted for aiding and abetting B. A must be shown to have known that it was B's intent to muder C, and it is not enough to show that A helped B in what he did."

Ma Ôn Nyun, according to her statements, was present when Pe Maung was murdered. But it is reasonably certain from the nature of the injuries that they could not have been infliced by a woman. It is possible that the murder was an unexpected surprise to her. Her statements cannot reasonably be held to be more than an admission of having concealed the evidence of the crime by disposing of the *longyi* and the *da*, which would be an offence under section 201, Indian Penal Code, but in this respect they are not corroborated but in fact are contradicted by the circumstantial evidence in the case.

There is no other evidence against Ma Ôn Nyun, except the evidence of the witnesses that prove that she went to Pe Maung's house, a fact which she herself admits.

The utmost that Ma Ôn Nyun could be convicted of on her statements, is abetment of causing hurt and I doubt whether the statements

* 1. U. B. R., 1897—1901, Penal Code page 247.

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even include that. But I have no doubt whatever, that they do not afford ground for conviction for abetment of murder, and therefore the conviction and sentence in her case must be set aside.

Next as regards the appellant Maung Tun Sin. The so-called confession of Ma Ôn Nyun cannot be considered as against him, because it does not implicate herself and is not sufficient in itself to justify her conviction.

Maung Tun Sin himself made a confession, which is Exhibit B, and which he retracted before the committing Magistrate and the Sessions Judge. The confession was recorded under the provisions of section 164, Criminal Procedure Code. That section provides that no Magistrate shall record a confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. As the Sessions Judge doubted, on the face of the confession, whether this provision had been complied with, he examined the Eastern Subdivisional Magistrate who recorded it under the provisions of section 533, Criminal Procedure Code. The Magistrate stated that he was called to the police-station to inquire about a *da* which was connected with this case and had been found in a well. The accused Ma Ôn Nyun was examined about the *da* in Maung Tun Sin's presence. She made the statement, Exhibit E, in which she said that the *da* was the one with which Maung Tun Sin had committed the murder. Then Maung Tun Sin was examined. His examination is Exhibit C. He admitted that the *da* was his and that he had bought it two years ago. The Magistrate then asked him if he killed the deceased, which was a very improper question, and on his saying that he did not, the Magistrate closed the examination and directed him to be taken away. When he had gone a few paces he turned round and said that he would make a statement. The Magistrate then again very improperly asked whether he killed the deceased and he said that he did. The Magistrate then recorded the confession, which is Exhibit B. The Magistrate states that he did not question the accused as required by section 164 to ascertain whether he was making the confession voluntarily.

The question whether this omission, on the part of the Magistrate to comply with the provisions of section 164 (*3*), entirely vitiates the confession has been argued at length. The Government Prosecutor urges that the words of the section "unless, upon questioning the person making it, he has reason to believe that it was made voluntarily" do not necessarily require the Magistrate to put questions to the accused as to whether or not the confession is made voluntarily, but that they are complied with if the Magistrate on questioning the accused regarding the alleged crime, is of opinion that he is confessing voluntarily. I cannot accept this view of the plaint, and to my mind unmistakable meaning of the words. The corresponding words in section 122 of the Code of 1872 were "unless, upon inquiry, he has reason to believe that it was made voluntarily." And in *Reg.* v. *Bai*

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*Ratan** it was held that the inquiry is not an inquiry into the case but simply into the question whether the confession is voluntarily made. This point need not be further discussed. I hold that the words are free from ambiguity, and that they clearly mean that the accused must be asked whether he is confessing voluntarily.

It having then been found that the provisions of section 164 have not been complied with, the question arises whether the defect is cured by the Magistrate's evidence under the provisions of section 533. Many rulings have been quoted by the learned advocates on either side, but none of them is exactly similar to the present case. I need refer to only a few of those cited. In *Jai Narayan Rai* v *Queen-Empress*† it was held that the provisions of section 164 read with section 364 are imperative as to the language in which a confession is to be recorded, and that section 533 does not contemplate or provide for any non-compliance with the law in this respect. That ruling was dissented from in *Queen-Empress* v. *Visram Babaji*,‡ in which it was held that a neglect to record the examination in the prisoner's own language would be cured by evidence that the prisoner had not been injured as to his defence on the merits. *Queen-Empress* v. *Raghu* § gives some assistance. In that case a confession made before the committing Magistrate was tendered. The Sessions Judge rejected it as it did not bear the mark or signature of the accused, holding that this defect was not curable by section 533 on the ground that the reason why the accused is required to sign a confession is that the law gives him *locuss penitentiæ*, a final opportunity before the completion of the record of showing that the confession was not voluntary, or that it is not accurately recorded, and that this omission may have injured the accused as to his defence on the merits. It was held that the failure to sign the confession did not affect the admissibility of it in evidence if it did not prejudice the accused, that the question whether the omission injured the accused as to his defence on the merits was one to be determined on the merits of each particular case, and that there was no room for presuming that the accused might have changed his mind. In *Queen-Empress* v. *Bhairab Chunder* ‖ it was held that section 533 means only this, that where a confession is duly made, that is, made in accordance with the provisions of the law, but in recording it these provisions have not been fully complied with, oral evidence is admissible to prove that the confession was duly made, or in other words, when the defect in recording the confession is one not of substance but of form only, as for instance, when the Magistrate, through inadvertence, omitted to sign the certificate, oral evidence may be taken to remedy the defect. In that judgment there is an observation by Mr. Justice Banerjee, which is applicable to the circumstances

* 10 Bom. H. C. R., 175.
† 17 Cal., 862.
‡ 21 Bom., 495.
§ 23 Bom., 221.
‖ 2C. M. N., 707.

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of the present case: "If these statements are treated as confessions "they are clearly inadmissible under section 164, * * * "there being nothing to show that they were voluntarily made or that "the Magistrate inquired whether they were so made." And finally, in *Queen-Empress* v. *Narayan*,* I quote the following remarks of Mr. Justice Candy which are applicable to the present case, and which show how a confession under section 164 must be dealt with when the Magistrate has omitted to question the accused as to the voluntary nature of the confession:

"It is much to be regretted that there is nothing on the record showing in what way the Magistrate at Kumta carried out the provisions of section 164 (3), Criminal Procedure Code, which forbid a Magistrate to record a confession, unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. No doubt there is the usual certificate at the foot of the record; but in a case like this, in which the confessing accused has been for ten days in detention by the police, obviously the first question which a Magistrate should put, in order to satisfy himself that the confession will be a voluntary one, is, how long has the accused been in the custody of the police? Possibly, in this case, the Magistrate did question the accused before recording the confession, though he did not write down such questions and answers. But considering that there was no record of the questioning, it was the duty of the Sessions Judge, before holding the confession to be relevant under section 24 of the Evidence Act, to have sent for the Magistrate and satisfied himself on the point."

In the present case the Sessions Judge did send for the Magistrate, and the Magistrate's evidence shows that he did not question the accused before recording the confession, as required by section 164 (3). Under these circumstances I do not think that it can be doubted that the confession is inadmissible. I am unable to see that section 533 can possibly cure such a defect. The evidence that the Magistrate has to give under that section is that the accused duly made the statement recorded. It cannot be said that he duly made it when he made it without the preliminary safeguard that the law imposes, and without which, as the law directs, no confession may be recorded. The defect is one of substance and not of mere form. It is also clear that under the terms of section 533 the omission has injured the accused as to his defence on the merits. The defence is that the confession was not voluntarily made, that it was made because the Inspector and the Sergeant read out of a law book that he must admit the crime whether guilty or not, otherwise he would be hanged, and that if he admitted the crime he would not be hanged. If the Magistrate had questioned the accused as to whether he was confessing voluntarily, that answer might have been given and the result would have been that no confession could be recorded. The Sessions Judge regards it as highly probable that pressure was put on the accused to confess. The other prisoner in the case was brought up twice before a Magistrate to confess, before she actually confessed, and she said that the police had promised that she would get off if she confessed. These were circumstances which should have made the Magistrate particularly careful in ascertaining that the confession

* 25 Bom., 543.

Criminal Procedure—164, 364, 533.

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was voluntary. The accused had been in police custody for six days. He was examined in the police-station and not in the Magistrate's Court. Statements implicating him had been made in his presence by the other prisoner. The investigating police officers were present, as appears from the evidence of the sergeant Maung Tun.

On these grounds it must be held that the confession of the appellant Maung Tun Sin is inadmissible as evidence.

After rejecting the confessions the only evidence against the appellant Maung Tun Sin is the fact that he had discovered his wife's infidelity on the day of the murder, and therefore had a motive of ill-will towards the deceased. The *da* was not discovered on account of the confessions, and there is no evidence to connect the *da* with the murder.

Without the confessions there is not sufficient evidence to support a conviction, and the conviction and sentence of the appellant Maung Tun Sin must also be set aside.

This case has been mismanaged, and justice has possibly been defeated. The responsibility lies with the Eastern Subdivisional Magistrate, who, after his long experience as a Magistrate, should surely have been capable of legally recording a confession.

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Criminal Procedure—35—397.

Before H. Adamson, Esq., C.S.I.

NGA TOK GYI *v.* KING-EMPEROR.

Criminal Appeal No. 43 of 1903. May 12th.

Held—that, it is only in the case of conviction of several offences at one trial that a Court under the provisions of section 35, Criminal Procedure Code, can direct that the punishment shall run concurrently.

Section 397, Criminal Procedure Code, provides that a sentence of imprisonment on an offender already sentenced to imprisonment for another offence shall commence at the expiration of the imprisonment to which he has been previously sentenced.

The appeal has been transferred to this Court because the facts on which appellant was convicted are the same as those on which he was convicted in another trial, from which there was an appeal to this Court.

As regards appellant's guilt there is no room for doubt. But the Magistrate holding that he had been sufficiently punished in the previous case sentenced him to six months' rigorous imprisonment to run concurrently with the sentence in the previous case.

The Magistrate committed an error in law. It is only in the case of conviction of several offences at one trial that a Court, under the provisions of section 35, Criminal Procedure Code, can direct that the punishments shall run concurrently. Section 397, Criminal Procedure Code, provides that a sentence of imprisonment on an offender already sentenced to imprisonment for another offence shall commence at the expiration of the imprisonment to which he has been previously sentenced.

The sentence is reduced to rigorous imprisonment for one day to take effect after the sentence in criminal case No. 7 of 1903 of the District Magistrate, Yamèthin.

Criminal Procedure 190(1) (c), 191, 556.

Before H. Adamson, Esq., C.S.I.

NGA BA *v.* KING-EMPEROR.

Mr. *J. N. Basu*—for applicant.

Criminal Revision No. 600 of 1903. September 10th.

An *Akunwun* submitted a report to the Deputy Commissioner with a view to action being taken under the Criminal Procedure Code, alleging that on an enquiry held by him a *primâ facie* case had been made out against a thugyi of collecting Revenue in excess of the authorized amount, by means of falsified receipts made by him, and of thus committing offences under sections 417 and 477A, Indian Penal Code.

Held,—that the report was a complaint as defined in section 4(*h*) Criminal Procedure Code, and that the Deputy Commissioner, who is also the District Magistrate, was entitled to accept the report as a complaint in his capacity as a Magistrate, and to take action thereon under the provisions of the Criminal Procedure Code.

Held also,—that the District Magistrate having taken action as aforesaid, took cognizance of the case under clause (*a*) and not under clause (*c*) of section 190 (1) Criminal Procedure Code.

Held also,—that the District Magistrate having taken no part in his capacity as Collector in the initiation of proceedings except that he directed the *Akunwun* to hold an enquiry and having taken no part in collecting evidence against the accused, was not disqualified by the provisions of section 556, Criminal Procedure Code, from trying the case.

Reference:—U. B. Rulings, 1900, Criminal Procedure, page 113.

The applicant, a thugyi, has been convicted by the District Magistrate, Lower Chindwin, of falsification of accounts under section 477A, Indian Penal Code. The facts of the case have been dealt with by the District Magistrate and by the Sessions Judge, and I am not concerned with them in this application.

Revision is sought on two grounds.

(1) That the District Magistrate took cognizance of the case under section 190 (1) (*c*), Criminal Procedure Code, and omitted as required by section 191 to inform the applicant that he was entitled to be tried by another Court.

(2) That the District Magistrate directed the prosecution and was therefore debarred from himself trying the case under the provisions of section 556, Criminal Procedure Code.

On the 20th April 1903 the Superintendent of Land Records made a short report to the Deputy Commissioner stating that tax tickets had been tampered with and that an inquiry was necessary. The Deputy Commissioner directed the *Akunwun* to make an inquiry. On 9th April the *Akunwun* submitted a report stating that there was a *primâ facie* case against the applicant showing that he had collected

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Criminal Procedure—190 (1)(c), 191, 556.

NGA BA
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KING-EMPEROR.

revenue in excess of the authorized amount by means of falsified receipts made by him, and had committed offences under sections 417 and 477A, Indian Penal Code. It is a matter of indifference whether the *Akunwun* submitted this report to the Deputy Commissioner in his capacity as Collector or in his capacity as District Magistrate. The Deputy Commissioner is the District Magistrate and he cannot divest himself of his functions as a Magistrate. The Deputy Commissioner took up the report in his capacity as a Magistrate which he was quite entitled to do, and issued a warrant against the applicant under section 477A, Indian Penal Code. Here the District Magistrate's procedure was not correct. He should have examined the *Akunwun* on oath before issuing a warrant. But this omission is an error in procedure, and cannot vitiate a concluded trial.

It has been held by my predecessor in this Court in *Nga Paing* v. *Queen-Empress* * that the terms of section 191, Criminal Procedure Code, are imperative, and that disregard of them is a material defect which invalidates the proceedings. Whether in view of section XV of the schedule of the Criminal Justice Regulation this ruling is correct with reference to Upper Burma, need not be discussed in the present case, because it cannot be held that the District Magistrate took cognizance of the case under section 190(1) (*c*), Criminal Procedure Code. A complaint as defined in section 4(*h*), Criminal Procedure Code, is an allegation made orally or in writing to a Magistrate that some person has committed an offence, with a view to his taking action under the Code. The report of the *Akunwun* was a complaint, and the action taken by the District Magistrate was taken under clause (*a*) and not under clause (*c*) of section 190(1). The first ground of the application for revision must therefore fail.

The second ground must also fail. Under the provisions of section 556, Criminal Procedure Code, a Magistrate is not deemed to be a party to, or personally interested in a case by reason only that he is concerned therein in a public capacity. The fact that the District Magistrate is also the Collector would not bar him from trying the case. He would certainly have been disqualified if he had initiated the proceedings or taken an active part in collecting evidence against the applicant. But it appears that he did nothing of the kind. The only connection that he had with the proceedings as Deputy Commissioner or Collector was that he ordered the *Akunwun* to make an inquiry, and the only sense in which he may be said to have initiated the proceedings, was in his issuing a warrant when a complaint was made to him as a Magistrate.

I may add that neither of the grounds of the present application was put forward in the original trial or in the appeal. The application is dismissed.

* Upper Burma Rulings, 1900, Criminal Procedure Code, page 113.

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Criminal Procedure—342, 310(*b*), (*c*).

Before A. M. B. Irwin, Esq., I.C.S.

NGA TE v KING-EMPEROR.

Criminal Appeal No. 185 of 1903. December 10th.

When an accused person is examined under section 342, Code of Criminal Procedure, at the close of the case for the prosecution, he should not be asked whether he has previously been convicted unless legal evidence of a previous conviction has been put in and read.

Charges of previous convictions must be based on legal evidence.

Charges of previous convictions should be tried with the same formalities as substantive charges.

The appeal is dismissed summarily.

One question the Magistrate put to the accused is, "Do you admit the convictions read out to you?" There is nothing to show what was read out to him. There is a certificate signed by a Sergeant on the process record. If this is the document that was read out I have to remark that as it is not admissible in evidence accused ought not to have been asked any question about the previous convictions in his examination. The nature of the questions which may be put is clearly indicated in section 342, Code of Criminal Procedure, namely, to explain any circumstances appearing in the evidence against him.

Apart from this, legal evidence of the previous convictions ought to have been obtained before the part of the charge relating to them was framed. Either after recording the plea to the substantive charge or after the conclusion of the trial of the substantive charge the accused's pleas on the previous convictions ought to have been distinctly and separately recorded. An admission made before the charge was framed is not a sufficient substitute for such record, any more than a confession of the substantive offence would be a sufficient substitute for a formal plea to the substantive charge. Although section 310, Code of Criminal Procedure, does not apply to Magistrates' Courts, yet clauses (*b*) and (*c*) of that section indicate in general terms the preciseness with which charges relating to previous convictions should be tried.

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Evidence—114—133.

Before H. Adamson, Esq., C.S.I.

Criminal Appeal No. 58 of 1903. June 8th.

1. NGA WA GYI
2. NGA SHWE CHON
3. NGA U
4. NGA PO HMIN
5. NGA SHWE YIN
6. NGA PI
7. NGA PO SO
8. NGA SHWE THWE
9. NGA PEIN
10. NGA PO HLAING
11. NGA KYI BON
12. NGA SHWE BIN
13. NGA TUN HLA
14. NGA KYWET
15. NGA THA TU
16. NGA PO

v. KING-EMPEROR.

Mr. *C. G. S. Pillay*—for appellants. | Mr *H. M. Lütter*—Government prosecutor for the Crown.

Held—that the substantive rule of law is that a conviction is not illegal merely because it proceeds, upon the uncorroborated testimony of an accomplice. But the approved rule of practice is that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. It is only where there are special grounds applicable to the particular case, for rebutting this presumption, that a conviction can be sustained on the uncorroborated evidence of accomplices.

The appellants have been convicted of committing dacoity. The evidence against them is almost entirely that of accomplices, namely, Po Chon, who took an active part in arranging the dacoity, and soon after its commission made a clean breast of it to the police, Ye Ban, an approver, who has been pardoned, and San Myin and Nga Saw, who took part in the dacoity and have already been tried and convicted.

Ma Sein, an inmate of the house that was attacked, identified the second appellant Shwe Chon. He was the torch bearer and he particularly concerned himself with her. The circumstances of the identification have been fully disclosed in the evidence, and I agree with the District Magistrate that it is reliable.

Maung Chin, who was in an adjacent house identified the second appellant Shwe Chon and the 14th Nga Kywet. The sergeant Ba Tin, before the identification parade in the jail gave the jailor a coat to be worn by Shwe Chon. It was put by mistake on Nga Kywet, whom this witness identified. I am surprised that the District Magistrate did not examine the sergeant more closely about his reasons for such extraordinary conduct. It is highly suspicious and the District Magistrate should not allow it to rest without further investigation. Maung Chin's identification must be altogether discarded.

The 3rd appellant Nga U had a wound on his foot. There is a suspicion that it was caused during the dacoity, but he has given a

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reasonable explanation and there is no reliable evidence connecting it with the dacoity. This appellant bought a bullock two days after the dacoity and paid for it partly in small change. Some small change was taken in the dacoity. The inference is of little value.

The *gaung* of Kin village states that the 6th, 7th, 9th, 10th, and 13th appellants were absent from the village on the night of the dacoity, and a villager Wet Gyi states that the 1st, 6th, 7th, 8th, 9th, 10th, 11th, 13th and 15th appellants were absent. This evidence if reliable would be of some value in view of the defence of these appellants that they were in the village, but the witnesses did not visit the houses of these appellants on the night in question and give no satisfactory and convincing reasons for their belief.

The defence of all the appellants is an *alibi*. It is not in any case satisfactorily established. The witnesses called are ignorant of dates of the most common events in their lives. They bring out glibly the date of the dacoity in their evidence but give no satisfactory reason why they should have particularly remembered that date.

With the exception of the second appellant Shwe Chon, therefore, the convictions rest solely on the evidence of accomplices. The District Magistrate does not regard the witness Po Chon as an accomplice, but according to his own statement he assisted in planning the dacoity and there can be no doubt that he is an accomplice.

The substantive rule of law is (section 133, Evidence Act) that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But the approved rule of practice is that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars [section 114, Evidence Act, Illustration (*b*)]. The initial presumption therefore is that the evidence of the accomplices is unworthy of credit, and it is necessary to examine it in order to see whether there are any special circumstances that rebut this presumption, and leave no reasonable doubt that the evidence of the accomplices is worthy of belief.

The accomplice witnesses are Po Chon, Ye Ban, San Myin, and Nga Saw. Of these Po Chon and Ye Ban are in a different category from San Myin and Nga Saw. Accomplice evidence is held untrustworthy for three reasons (1) because an accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because he gives his evidence under the promise of a pardon, which hope would lead him to favour the prosecution; and (3) because an accomplice is a participator in crime and consequently an immoral person likely to disregard the sanction of an oath. These three reasons apply fully to Po Chon and Ye Ban, who are accomplices pure and simple, and have every temptation to favour the prosecution. But as regards San Myin and Nga Saw the third reason is the only one that detracts from the credit of their evidence, for they have already been convicted and sentenced and they can have no interest in shifting the guilt from themselves and they can expect to gain nothing by giving false evidence against innocent persons.

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Evidence—114—133.

The dacoity was committed on the night of 6th January. The first clue obtained by the Head Constable was on 11th January, when Po Chon gave him information. On the same day San Myin was arrested, and on that very day confessed to the Township Magistrate. Nga Saw was arrested next day and confessed on 17th January. On the 12th and 13th January all of the sixteen appellants were arrested. On the 13th January Ye Ban admitted his guilt, and he was pardoned and made an approver.

San Myin confessed so soon after his arrest and confessed so fully that it is impossible to believe that he could have been tutored. His confession bears the stamp of truth so far as concerns the incidents of arranging and committing the dacoity. He adhered to it when he was tried, and his evidence in this case corresponds with his confession, and with the evidence of the non-accomplice witnesses who describe the incidents of the dacoity and the subsequent pursuit of the dacoits. The only question so far as his evidence is concerned, is whether it is reliable as to the persons who committed the dacoity. In his confession he stated that seventeen or more were concerned, and he specified the names of those that he knew namely the 1st, 2nd, 4th, 5th, 9th, 10th, 12th, 14th and 16th appellants. He was tried and convicted and sentenced, and subsequently was examined as a witness in the present case. He in no way added to his previous account and took nothing from it, but in addition to the nine that he had previously specified by name, he picked out three more of the appellants, the 8th, 11th and 15th, whose names he did not know, and identified them as participators in the dacoity. It is not alleged that this witness has any cause of enmity against any of the appellants, or that he has any personal interest in implicating any of them. The objection to crediting his evidence, is as I have said, not the ordinary full and complete ground for discrediting accomplice evidence, but is limited to the fact that as a dacoit he must be regarded as an immoral person. The fact of his immediate confession after arrest, and of his adhering to his account without exaggerating it or detracting from it when examined as a witness after conviction, the inherent probability of his evidence, and the absence of motive for inculpating innocent persons, are all factors which rebut the limited presumption that arises against him as an accomplice, and after a full consideration of everything that has occurred during the investigation and trial, I feel myself obliged to agree with the District Magistrate, that San Myin's evidence though that of an accomplice, is credible.

Maung Saw, as an accomplice, is in the same category as San Myin. But his evidence is not so strong or reliable, because Maung Saw did not confess until a few days after his arrest. He states that he confessed because Po Chon, Ye Ban, and San Myin had confessed and he felt that the game was up. In his evidence he implicated the 1st, 2nd, 4th, 5th, 7th, 11th and 13th appellants, and he had previouly implicated all of them in his confession except the 13th. But in his confession he implicated many more that he did not mention in his

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evidence. In his case there is not the same reasonable certainty as there is in San Myin's that his evidence is not tutored, and there is not the same correspondence between his statements at different times. I am not prepared to say that in his case the circumstances are sufficient to rebut the presumption that arises against accomplice evidence.

The approver Ye Ban implicates all of the appellants. The accomplice Po Chon implicates the 1st, 4th, 5th, 9th, 10th, 12th, 14th and 16th. Of their evidence I need say nothing more than that it is accomplice evidence of the ordinary kind that must be corroborated before it can be accepted.

On the whole case, for the reasons stated, I think that Maung San Myin's evidence is credible and reliable, and that regard being had to the approved rule of practice with regard to the treatment of accomplice evidence, the convictions can be sustained only in the cases where the approver's and the accomplices' evidence are corroborated as regards the identity of the appellants by San Myin. In these cases I think that the convictions are not open to reasonable doubt.

The result is that the convictions of the 3rd appellant Nga U, the 6th Nga Pi, the 7th Po So, and 13th Tun Hla must be reversed, and in the case of the others that the convictions must be confirmed.

The first appellant was sentenced to seven years' rigorous imprisonment and a fine, the second to seven years' rigorous imprisonment, and the others to five years' rigorous imprisonment. The Public Prosecutor has moved for an enhancement of sentence and the Appellants by their Advocate have had an opportunity of showing cause against it. There were no unusual circumstances of cruelty in the commission of the dacoity, but from the number of persons engaged, the large amount of property taken and the determined nature of the attack, the dacoity must be regarded as one of a very serious type, and it is of a kind that recalls the old annexation days, and that is happily not often seen now-a-days in Upper Burma. The Public Prosecutor has also mentioned the fact that there has been much violent crime in the Pakôkku district during the past season, a fact which I have observed from the appeals that have been brought before this Court. These are all good reasons why an exemplary punishment should have been inflicted in a case like the present. I regard the sentences as insufficient, and I enhance them as follows :—

No. (1) Nga Wa Gyi to transportation for ten years and fine of Rs 500 or in default rigorous imprisonment for a futher period of one year.

No. (2) Shwe Chon, (4) Po Hmin, (5) Shwe Yin, (8) Shwe Thwe (9) Nga Pein, (10) Po Hlaing, (11) Kyi Bon, (12) Shwe Bin, (14) Nga Kywet, (15) Tha Tu, (16) Nga Po, to transportation for ten years.

The convictions and sentences are reversed in the cases of No. (3) Nga U, (6) Nga Pi, (7) Po So, (13) Tun Hla.

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Excise—49, 52.

Criminal Revision No. 128 of 1902. March 14th.

Before H. Adamson, Esq.

ABDOOL *v.* KING-EMPEROR.

Mr. *H. M. Lütter*, Government Prosecutor—for the Crown.

Held—that though it is a condition of Excise License Form VIII (License for retail vend within the bar of a refreshment-room at a railway-station) that the licensee shall not sell or dispose of liquor to a European soldier, it is not a breach of the license to sell liquor to a European soldier in the manner and to the extent permitted by Army Regulations, India, Volume X, Articles 542 and 543.

Reference:—

Army Regulations, India, Volume X, Articles 542, 543.

THE accused is the barman of the railway refreshment-room at Yamèthin. A party of 15 European soldiers under an officer were proceeding from Shwebo to Rangoon by mail train. They had refreshments at Yamèthin. The officer went to the first class refreshment-room and the soldiers to the second. The officer authorized the barman to supply liquor to the soldiers with their refreshments. Seven bottles of beer and five pegs of whisky were supplied, not a large quantity for so many.

It is a condition of the license, which is in Form VIII under the Excise Rules, that the licensee shall not knowingly sell or dispose of malt liquor, spirit or fermented liquor to any European soldiers, either directly or indirectly, under cover of the license.

The accused was convicted under section 49, Excise Act, for having sold liquor to European soldiers and was sentenced to a fine of Rs. 50 or in default, one month's rigorous imprisonment. The offence, if any, was under section 52, Excise Act, breach of the condition of a license.

Article 542 of the Army Regulations, India, Volume X, provides that when troops are travelling under command of an officer, his sanction must be obtained before they can be supplied with liquor from railway refreshment-rooms. And Article 543 provides that soldiers travelling alone or in small parties, not under the command of an officer, will on application at second class railway refreshment-rooms, and provided the men are in uniform and are sober, be supplied on payment with certain refreshments including one pint of beer for each man. In that article is given the tariff for refreshments on railways in Burma.

The question is whether the condition of the license specified above is to be held to override these provisions of the Army Regulations. I think not. The condition has been inserted not with a view to any benefit to the excise, but solely in the interests of the army and with the object of preventing the unauthorized sale of liquor to soldiers.

It is unreasonable to suppose that it was intended to deprive soldiers of any privilege that they possess under their own regulations. Unless the condition of the license and the provisions of the Army Regulations are to be read together, it might be that officers and soldiers would find

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themselves liable for abetment of an offence for doing what they are permitted to do under the Army Regulations. I hold, therefore, that to supply liquor to European soldiers travelling under the command of an officer, as provided in Article 542, or to soldiers travelling alone or in small parties without an officer, as provided in Article 543, Army Regulations, India, Volume X, up to the amount allowed in that article, is not a breach of the condition of License Form VIII by which the sale of liquor to European soldiers is forbidden.

The conviction is set aside and the fine will be refunded.

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Forests—63.

Before A. M. B. Irwin, Esq., I.C.S.

KING-EMPEROR *v.* SADU SINGH.

Criminal Revision No. 871 of 1903. December 3rd.

Held,—that section 63 of the Burma Forest Act, 1902, does not apply to a conviction for burning firewood without first paying the royalty.

The Magistrate has neglected to state in his finding the precise act which constitutes an offence under rules 17 and 75 (3), but from the previous part of the judgment and the opening proceeding it seems that the offence was utilizing the firewood without previously paying royalty. I think the only clause of Section 36 (*2*) of the Forest Regulation or Section 33 (*2*) of the Forest Act under which rule 17 could be framed is clause (*c*). The rule regulates the cutting, converting and removal of timber for use as firewood. If the rule is framed under clause (*c*) the penalty is prescribed by sub-section (*2*), not (*3*) of rule 75.

The Magistrate awarded compensation under Section 67 of the Regulation. The Regulation was repealed on 27th March 1902 by the Burma Forest Act, 1902. Section 63 of the Act is nearly identical with Section 67 of the obsolete Regulation. I do not think this section is applicable to the present case for two reasons. First the accused was not convicted of felling, cutting, girdling, marking, lopping or tapping any tree or timber, nor of injuring them. The felling was not an offence. The accused's acts were all legal until he utilized the firewood without first paying the royalty. Secondly the compensation may be awarded at the rate of 10 rupees per tree or log in respect of which the offence was committed. The Magistrate has not found in respect of how many trees the offence was committed, and it does not seem to be practicable to arrive at such a finding in case of an offence of this nature. For both these reasons then it appears that Section 63 cannot apply, and was never intended to apply, to a case of burning firewood without first paying the royalty. The royalty can be recovered under Section 71.

I therefore set aside the order which purports to be made under Section 67 of the Forest Regulation.

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Municipal—142 (f) 180.

Before H. Adamson, Esq., C.S.I.

Criminal Revision, No. 942 of 1902. February 26th.

KING-EMPEROR *v.* NGA BA.

Mr. *H. M. Lütter* and Mr. *H. N. Hirjee* —for the Crown. | Mr. *C. G. S. Pillay*—for the accused.

Held—that the word "market" has not been defined in the Burma Municipal Act, and determining whether a new market has been established in contravention of byelaws framed under section 142 (*f*) the test may be applied whether there has been a disturbance of market rights.

Reference:—

Indian Law Reports 11, Bombay 106.

THE accused is a trustee of the Shwe Kyimyin Pagoda, and he has assumed responsibility for the other trustees in this case. He has been convicted under section 180, Burma Municipal Act, of establishing a market without sanction in contravention of a byelaw of the Mandalay Municipality framed under section 142 (*f*) of the Act.

The case has been submitted in revision by the Sessions Judge who has doubts as to the correctness of the conviction.

The facts are that a few petty sellers have plied their trade within the limits of the pagoda for many years, that at present they are about three in number but formerly were about six, that the trustees have collected small fees from them for about five years, that recently the trustees built a *zayat* within the pagoda limits, divided off this *zayat* into stalls, and reserved it for the accommodation of the sellers, and that the sellers assemble there and sell their goods, and pay five pice a day each to the trustees as fees.

The Magistrate held that this constituted a market; his assumption being that a market is established when a site or stall is leased for purposes of sales. The term "market" is not defined in the Burma Municipal Act.

In Queen-Empress v. *Majan Hargivan** the question was whether a place had been used as a market. In the act that applied, the word "market" was not defined. English cases were consulted, and the test applied was whether the use of the place constituted a disturbance of market rights. That test may be properly applied in the present case where the question is whether the accused established a market.

I think there can be no doubt that when a *zayat* is partitioned off into stalls, and the public are allowed to come there and occupy stalls for daily fees for the purpose of sale of goods, that constitutes a disturbance of the market rights of the Municipality. It does not matter whether the number of the sellers is three or thirty. If three can do so without question there is no reason why thirty should not do the same. The only difference is that the disturbance of market rights is more apparent in one case than in the other.

* I. L. R., 11 Bom., 106.

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Municipal—142 (f), 180.

KING-EMPEROR
v.
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The Sessions Judge doubted the correctness of the conviction because section 142 (*f*), Burma Municipal Act, only empowers the Municipal Committee to make byelaws for rendering licenses necessary for the establishment of a new market, whereas it is proved that there had been sellers within the limits of the pagoda for many years, and that fees had actually been levied since 1897. He, however, is mistaken in saying that the Municipal Act of 1884 was then in force, which contains no provision corresponding to section 142 (*f*). The law in force was the Upper Burma Municipal Regulation, 1887, which contains a similar provision in section 12 (*1*) (*c*), and under which there was a rule similar to that framed under the present Act. But I have no doubt that the converting of the *zayat* into stalls, and the leasing out of these to sellers, must be held to amount to be establishment of a new market. The fact that a few persons sold in an undemonstrative way within pagoda limits, and that fees were collected from them may not have been known to the Municipal Committee, or may not have been deemed of sufficient importance to be regarded as a market. And certainly no rights could have been acquired thereby in contravention of the Upper Burma Municipal Regulation, 1887. When, however, the trustees abandoned the obscurity of the former arrangements, and built a *zayat*, and divided it into stalls, and leased them out for purposes of sales, they plainly and unmistakeably established a market, and the Municipal Committee are clearly entitled to treat it as a new market, established without sanction, in disturbance of their market rights, and to invoke the authority of the Magistrate to protect their interests.

On these grounds I hold that the conviction is correct and that there is no ground for interferenee in revision.

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Municipal—180.

Before A. M. B. Irwin, Esq., I.C.S.

KING-EMPEROR v. ABDUL GANI NAIKWAYA.

Criminal Revision No. 914 of 1903. December 24th.

On a prosecution under section 180, Burma Municipal Act, for disobeying a notice issued under Chapter VI of that Act, the notice should be proved and put in evidence.

A Magistrate has no authority to give an order directing the accused to obey a notice issued by a Municipal Committee under Chapter VI.

The complaint is loosely and carelessly worded, and ought not to have been entertained by the Subdivisional Magistrate without amendment. Summons was asked for, "under rule 114 of the rules framed by the Municipal Committee under section 180 (1)," which is altogether meaningless. What the prosecution really meant was that accused had committed an offence under section 180 (1) by disobeying a notice in writing lawfully issued under section 114 of the Act. Again the complaint states that the notice was served on 16th August, but it does not state what time was allowed by the terms of the notice for compliance with the order contained therein.

It is not apparent why the words "Prosecution sanctioned" are printed on the form used for complaints. The Act does not require any sanction. The Secretary's signature cannot add any force to the authority given to the Nuisance Inspector to prosecute, and if it could it would be quite futile to have the Secretary's name impressed by a rubber stamp. No Court ought to recognize any such impression as a signature. The complaint was presented by Mr. Nanabhoy who is duly authorized by the Committee to prosecute for this class of offences, by a resloution under section 195.

The examination of the complainant under section 200, Code of Criminal Procedure, was very perfunctory. He stated that the accused had not provided water pipes to his house, but did not state that any notice to provide such pipes had been served. I asked the District Magistrate why the notice had not been put in evidence. His reply is "Because the accused did not deny receipt of notice." Accused's examination is as follows: "I did not receive the notice. Not repaired yet. The house is only in course of building. Not finished yet." The Nuisance Inspector said that he had served the notice on accused's son. The duplicate notice ought to have been attached to the application for summons, and before issuing summons the Magistrates ought to have ascertained that the period specified in the notice had expired. The offence complained of and the offence proved, though required by Section 263 to be entered, are not entered. The section (180) is entered as offence proved, but the Magistrates passed

Municipal—180.

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no sentence, and their final order is that accused do pay one Rupee costs and provide the water pipe within ten days, because he had not been personally served with the notice and because the house was not yet finished. When the Magistrates convict they are bound to pass sentence (section 245) but in this case the final order seems to mean "Not guilty, but don't do it again." If accused were not convicted the order to pay costs would be illegal.

The order to provide pipes within ten days is *ultra vires*, and in any case it could add no force to the Committee's notice. It is not an order which could be made under section 180 (2) because it contemplates the prevention of mischief, not the remedying of mischief already done, and it is not alleged that any mischief was done. I set aside this order.

As there is no legal evidence of the terms of the notice and no evidence at all of the period allowed by the notice for complying with it, I set aside the conviction and the order for costs. The costs if paid by the accused will be refunded to him by the Committee.

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Penal Code—304—304A.

Before H. Adamson, Esq., I.C.S.

NGA PO KYAW
NGA PO MYIT
NGA AUNG BWIN
NGA NGÈ BU
} *v.* KING-EMPEROR.

Criminal Appeal No 87 of 1902. September 29th, 1902.

Messrs. *Swinhoe & Broadbent*—for appellants.

Mr. *H. M. Lütter*—for the Crown.

Beating inflicted with the object of curing an illness by casting out an evil spirit resulting in death—what offence committed—measure of punishment.

The accused under the genuine belief that they were acting for the benefit of a young woman, and with the consent of her and her relatives, inflicted a severe beating with the object of curing her of an illness by casting out an evil spirit. As they acted without due care and attention the woman died.

Held,—that there was neither the intention nor the knowledge that death would be the result, requisite to bring the act within the definition of culpable homicide, and that the offence committed was one under section 304A of the Indian Penal Code.

References:—

Taylor's Medical Jurisprudence, Volume I, page 90.
Criminal Appeal No. 64 of 1893.

NGA PO KYAN and Nga Po Myit have been convicted of culpable homicide not amounting to murder, and have been sentenced to rigorous imprisonment for five and three years respectively. Nga Aung Bwin and Nga Ngè Bu have been convicted of voluntarily causing hurt and have been sentenced to rigorous imprisonment for six months. The first two have appealed, and the last two have applied for rivision.

The case is fortunately not of a common type, but it is not unprecedented in the criminal records of this Court.

Ma Kalama was a girl of eighteen, who was believed by herself and by her relatives to be possessed of an evil spirit. The chief symptoms were constriction of the chest, and inability to breathe owing to the rising of a lump in the throat. She had suffered for three years. The real complaint was probably hysteria, but there can be no doubt that among her own people she was universally believed to be under the domination of an evil spirit that had located itself in her body.

It appears that the accepted method of casting out an evil spirit, is to beat the person possessed. It is believed that the spirit suffers and is obliged to relinquish his abode. The girl was taken to the house of accused Nga Po Kyaw, who practices as a doctor, for the purpose of being cured. The evidence leaves no doubt that the girl's mother and her relatives, contemplated that she would be beaten and that the girl herself voluntarily submitted to that treatment. Every one concerned had a genuine belief that beating was the proper and the necessary remedy.

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The accused Nga Po Kyaw and Nga Po Myit took the principal part in the beating. The other two accused were present and occasionally assisted. The beating went on at intervals all night. The girl was beaten on the back, legs, and thighs. When she called out to stop the beating it was stopped for a time and then resumed. The evil spirit was occasionally questioned. It replied through the mouth of the girl: "I have come from Tawindaing;" "I trouble her because I love her;" "I won't come again;" "I am afraid," and so forth. One witness estimates the total number of strokes at 30, and another at 60. The beating was inflicted with two ordinary light riding canes. In the early morning the girl collapsed, and when she was examined she was found to be dead.

The Civil Surgeon who examined the body four days after death says that there were marks of over 100 strokes. None of the strokes cut the skin. From this it may be inferred that the beating was not inflicted on the bare skin, though curiously enough no witness was examined on this point. He thinks that no single injury was sufficient to cause death, but that all combined produced exhaustion and death and he thinks that the beating was such as would have killed an ordinary healthy girl.

It is suggested that the Civil Surgeon may have mistaken marks on the corpse due to lividity for marks of flogging. It is said in Taylor's Medical Jurisprudence, Volume I, page 90, that these marks have sometimes this appearance. The Civil Surgeon is experienced in such matters, and the theory that he has been thus misled appears to me to be untenable. It must be accepted that there were the marks of over 100 strokes on the corpse.

I agree with the Sessions Judges that the accused are not entitled to the benefit of sections 88 or 92, Indian Penal Code, because the beating was not carried out in good faith as defined in section 52, *i.e.*, with due care and attention.

But I am unable to hold with the Sessions Judge that the offence amounts to culpable homicide. There was neither the intention nor the knowledge that death would be the result, requisite to bring it within the definition of that offence. The accused were doing an act which was not unlawful, and which if they had done it with proper care and attention would have been protected under section 88, Indian Penal Code, but they did it without proper care and attention, and in consequence death was the result. The offence falls within section 304A, Indian Penal Code.

As regards the accused Nga Aung Bwin and Nga Ngè Bu, their offence differs in degree but not in kind, from that of the others, and it was hardly consistent on the part of the Sessions Judge to convict them of voluntarily causing hurt after holding that the deceased had voluntarily submitted to being beaten.

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Penal Code—304—304A.

NGA PO KYAW v. KING-EMPEROR.

The sentences are unnecessarily severe. Criminal Appeal No. 64 of 1893* of this Court was a case exactly similar to the present.

It was if anything a worse case, for the girl was beaten with a stick an inch in diameter. The Sessions Judge of Sagaing sentenced the accused to two years' rigorous imprisonment. In reducing the sentence to six months' rigorous imprisonment my learned predecessor Mr. Burgess made the following remarks:—

"The beating was administered there is no reason to doubt, in perfect good faith, for the purpose of delivering the deceased from the effects of witchcraft or the possession of an evil spirit, but it was carried out to excess and no precautions were taken to guard against misadventure. The belief in witchcraft and evil spirits is almost universal in the country . . . . . The appellants were acting under what may be an ignorant, but was certainly a genuine, belief prevalent among the people of the country.

"The Sessions Judge has made some allowance for this state of things, and the question now is whether he has punished the appellants beyond what is necessary in the circumstances.

"After consideration of the matter I am of opinion that the severity of the sentences is unnecessarily great. There is no reason for punishing ignorance as ignorance. The only object is to remove it and to prevent harm being done another time through its existence. This can, I think, be as effectively done by a moderate sentence as by a heavy one. It is not the severity of the punishment, but the certainty that the practice will be punished if it is repeated, that will have the effect desired."

These remarks apply with equal force to the present case, and I therefore am of opinion that a very considerable reduction of sentence may safely and properly be made.

In the cases of all four accused the convictions are altered to section 304A, Indian Penal Code. The sentences on Nga Po Kyaw and Nga Po Myit are reduced to rigorous imprisonment for six months and those on Nga Aung Bwin and Nga Ngè Bu to rigorous imprisonment for two months.

*Not published.

Penal Code—302.

Before H. Adamson, Esq., C.S.I.

Criminal Appeal No. 133 of 1902. January 26th.

MA ÔN NYUN
MAUNG TUN SIN } *v.* KING-EMPEROR.

Mr. *Tha Gywe*—for second appellant. | Mr. *H. M. Lütter*—for the Crown.

B is indicted for murdering C. A is indicted for aiding and abetting B. A must be shown to have known that it was B's intent to murder C, and it is not enough to show that A helped B in what he did.

See Criminal Procedure, page 13.

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Penal Code—285.

Before H. Adamson, Esq., C.S.I.

KING-EMPEROR *v.* (1) NGA KA, (2) MI KIN.

Criminal Revision No. 389 of 1903. May 22nd.

Held—that in a prosecution under section 285, Indian Penal Code, it is necessary to prove negligent conduct with respect to fire.

The trial was a summary one and the proceedings are very meagre. I gather from the Magistrate's remarks that he held that the accused took no proper precautions after discovering the fire. There is nothing in the proceedings to show that they could have done anything more than they did. I have supplemented the proceedings by reading the evidence of witnesses recorded by the police. In it I can find no suggestion of criminal negligence. The police have followed their usual unintelligent custom in this case. One seldom goes round a Burman village after dark without seeing cases in which there might well be a prosecution for negligent dealing with fire. But the police do not trouble themselves with such cases. They wait till there is a destructive fire, and then think that they must find a victim, and the victim selected is generally one who has lost his all, and the evidence against him is generally as inconclusive as it is in the present case.

I can find no evidence of criminal negligence. The convictions and sentences must be set aside.

Penal Code—409, 424.

Before H. Adamson, Esq., C. S. I.

Criminal Appeal No. 109 of 1903. September 7th.

KO SET SHWIN *v*, KING-EMPEROR,

Messrs. *Eardley Norton and VanSomeren*, —for appellant. | Mr. *H. M. Lütter*,—Government Prosecutor, for the Crown.

The accused, a trader, being in embarrassed circumstances, entered into an agreement with his creditors by which they gave him time, and he continued to carry on his business and undertook to pay his debts in quarterly instalments, and to devote the proceeds from the sale of his merchandise in the first place to the payment of the instalments. He failed to pay any instalment, and absconded having dishonestly removed or concealed his account books and valuable securities to the extent of three lakhs of rupees. He was convicted of Criminal Breach of Trust as a merchant.

Held,—that the conviction was bad because there had been no assignment of accused's property to the creditors, and therefore no entrusting of property, or dominion over property, to the accused.

Held also,—that on the facts the accused should have been convicted of dishonestly concealing or removing property under section 424, Indian Penal Code.

Held also,—that if the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting the accused for an offence other than that for which he should have been properly charged, and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the Appellate Court exercises a proper discretion in altering the finding and convicting the accused for an offence which these acts properly constitute, provided that the accused has not been prejudiced by the alteration of the finding.

References:—

I. L. R. 8, All. 120.
I. L. R. 26, Cal 863.

Appellant was a trader in Mandalay, and in June 1901 was in embarrassed circumstances and owed his creditors, who were Chetties, over six lakhs of rupees. He represented to them that though he was unable to pay his debts immediately, he had a large amount of merchandise and outstandings due to him, which they believed. On the 25th of June 1901 he entered into an agreement with his creditors, which is Exhibit A. That agreement assumed that the appellant should continue to carry on his business as before. He undertook on his part to pay the debts in twelve equal quarterly instalments, the first instalment to fall due on 25th September 1901, and to devote the proceeds from the sale of his merchandise in the first place to the payment of the instalments. The creditors on their part agreed to give him time as aforesaid, and apparently in the interim not to charge interest on the scheduled debts. A further condition of the agreement was that if any instalment remained overdue, any creditor might at once take legal steps to recover the whole of his debt.

A day or two before the first instalment fell due appellant represented to some of his creditors that he was unable to pay it in full They demurred, but no fresh arrangement was entered into. On 25th

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September 1901, the date on which the instalment was due, it was discovered that appellant had disappeared, and there can be no doubt that he fled precipitately to China.

Steps were immediately taken both Civil and Criminal by the creditors, but except immoveable property they could lay their hands on little that was valuable.

The Criminal complaint, which was presented on 27th September 1901, alleged that the appellant by fraudulent promises, which he had no intention of performing, had induced the complainants to enter into the agreement Exhibit A, that by Exhibit **A** he constituted himself a trustee for the complainants with regard to the property mentioned therein and its proceeds, that he had alienated the property in his possession, and that he had thereby committed the offences of cheating and criminal breach of trust.

In 1903, it was discovered that appellant was again in Burma. He was arrested under a warrant and brought before the Court of the District Magistrate, Mandalay, on 23rd March 1903, and the trial on the complaint proceeded.

The following is a brief summary of the evidence adduced: Arnachellum Chetty, V. V. R. Chetty, and the two arbitrators Ko Yin Det and Ko Set Yi who arranged the agreement Exhibit A between the parties, prove the circumstances that led to the agreement, and the agreement, as stated in the beginning of this judgment, appellant's statement that he was unable to meet the first instalment in full, and his disappearance on the day that that instalment was due. Arnachellum Chetty also relates the result of the creditors' action against appellant's assets after his disappearance. About Rs. 60,000 was realized, partly from tea, partly from immoveable property, and only about Rs. 3,000 from promissory notes.

A clerk of the firm Maung Sin states that he received from appellant a few days before his disappearance promissory notes amounting to about Rs. 10,000 for collection. He collected about Rs. 6,000 and brought back the remainder of the notes, and it was from them that the Rs. 3,000 referred to above was realized.

Ko Kyow Ye, a Chinese clerk of the appellant, states that he kept the account books in Chinese, and made over the account books and some promissory notes to appellant on the day before he disappeared. Maung Ta, a Burmese clerk, states that his duty was to keep abstracts of the accounts in Burmese, taken from the Chinese accounts, for the benefit of a Burman partner of the firm, Ko Po Nwe. He has produced his account books. It is urged for the defence that these account books being only copies of the original Chinese books are not admissible in evidence, which is a strange contention in face of the facts that the original account books were in the possession of appellant at the time of his disappearance, and that he has not produced them. This witness proves from the account books that during the six months subsequent to the agreement and up to the date of appellant's disappearance, the

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Penal Code—409, 424.

receipts exceeded the expenditure by over Rs. 50,000, and that there were three to four lakhs of outstandings secured by promissory notes at the date of appellant's disappearance.

The bailiff proves that he searched appellant's business premises under a warrant ten days after his disappearance and found Rs. 800 in cash and nothing else of any value.

The appellant in his examination admits that he was in possession of the Chinese account books and states that he left them behind. He cannot now produce them. He went to China to raise money to pay his debts. He admits that he held promissory notes for three lakhs of rupees, and states that he left them behind in his place of business, and does not know where they have disappeared to.

For the defence a few of the prosecution witnesses were cross-examined, and some further evidence adduced, which is of no importance, One of the defence witnesses, however, Aw Yaw, a clerk in appellant's business, states that the promissory notes were kept in a box which was brought to the office by appellant daily, and taken away by him on his return.

On this evidence the District Magistrate held as a fact that appellant had taken away or disposed of his account books, and the outstanding promissory notes of three lakhs or more in value. No other conclusion could in my opinion have been arrived at on the evidence. Appellant was in possession of valuable securities to the extent of three lakhs of rupees when he fled from his creditors. These have disappeared, and he asks us to believe that he simply left them in his place of business and that somebody else must have taken them. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of human conduct. The Court will certainly under these circumstances presume that appellant has removed or concealed these valuable assets.

The District Magistrate has rightly acquitted appellant on the charge of cheating. A conviction under this charge could not be supported unless it were proved that at the time of executing the agreement the appellant did not intend to carry it out.

The District Magistrate has convicted appellant of criminal breach of trust under section 409, Indian Penal Code. Much time has been expended in arguing the question whether appellant's conduct in view of the terms of the agreement Exhibit A amounts to criminal breach of trust. I may say that it is a point on which I have never had any doubt. There can be no criminal breach of trust unless one person is entrusted with the property or dominion over the property of another.

One cannot commit criminal breach of trust with reference to one's own property unless it has been assigned to another. In Exhibit A there is no assignment of appellant's property to his creditors. It remains his throughout but he promises to use it in a certain way. If a person being pressed by a tradesman agrees to pay the bill out of his next month's salary, and fails to do so, it surely cannot be seriously

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argued that he has committed criminal breach of trust. The case is identically the same as the present one. It is unnecessary to pursue the argument further.

Though the conviction under section 409 is unsustainable, I think it is very clear that on the facts proved appellant could have been convicted of dishonestly or fraudulently concealing or removing his property an offence punishable under section 424, Indian Penal Code. As I have already said the evidence that he did conceal or remove his account books and promissory notes to the value of three lakhs, is conclusive and considering the circumstances of the case, namely, the fact that he was largely indebted to his creditors and that he absconded on that account, it is as conclusive that he removed or concealed that property dishonestly, *i.e.*, with the intention of causing wrongful loss to his creditors.

But it is urged that this Court would exercise a wrong discretion in altering the finding to one under section 424, Indian Penal Code, that appellant has had ~~no opportunity of defence to~~ a charge under that section, and that the proper course is to acquit the appellant on the charge under section 409 and leave it to the prosecution to bring a further charge under section 424 in a new trial if considered desirable. It is pointed out that this was done by the Allahabad High Court in *Queen-Empress* v. *Imdad Khan** where after an acquittal on appeal on a charge under section 409, the Court refused to alter the finding to one under section 161. But an offence under section 161 is one of an entirely different nature from one under section 409, and the present case is clearly distinguishable from the Allahabad case. Moreover it may be doubted whether in view of the provisions of section 403 (*1*), Criminal Procedure Code, a new trial on the same facts on a charge under section 424 would be permissible. But a parallel case will be found in *Lala Ojha* v. *Queen-Empress* † where it was held that if the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person, for an offence other than that for which he should have been properly charged, and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the Appellate Court may alter the charge or finding, and convict him for an offence which those acts properly constitute, provided that the accused be not prejudiced by the alteration in the finding. These are exactly the circumstances of the present case.

Appellant had to meet the accusation of the commission of exactly the same acts whether he was charged under section 409 or 424, and has not been in any way prejudiced, but the District Magistrate has misapplied the law by wrongly holding that a trust was created by the agreement Exhibit A and has consequently charged the appellant

* I. L. R. 8, All. 120. † I. L. R. 26, Cal., 863.

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Penal Code—409, 424.

KO SET SHWIN v. KING-EMPEROR.

under the wrong section. I therefore alter the conviction to one under section 424, Indian Penal Code.

As regards the sentence, appellant has committed a gigantic swindle, and is fully deserving of the maximum penalty under section 424.

I set aside the conviction and sentence under section 409 and instead convict the appellant of an offence under section 424, Indian Penal Code, and sentence him to rigorous imprisonment for two years and a fine of ten thousand rupees (10,000) or in default rigorous imprisonment for a further period of six months. The fine, if recovered, will be paid to the complainants as compensation.

Penal Code—363, 366.

Before H. Adamson, Esq., C.S.I.

KING-EMPEROR *v.* NGA NI TA.

Criminal Revision No. 823 of 1903. November 4th.

Held,—that when a man kidnaps a minor girl from lawful guardianship and thereafter cohabits with her without marriage he has subsequent to the kidnapping seduced her to illicit intercourse, and he has kidnapped her in order that she may be seduced to illicit intercourse, or knowing it to be likely that she will be seduced to illicit intercourse, and he has committed an offence under section 366, Indian Penal Code, quite independent of any intention or consent on the part of the minor girl and quite independent of any question as to whether she had surrendered her chastity before the act of kidnapping.

Held also,—that this proposition is not modified in any way by the personal law of a Burmese Buddhist.

References:—

1 Upper Burma Rulings, 1897—1901, page 328.
Selected Judgments, Lower Burma, page 202.
Crown *v.* Nga Chan Mya.
(Lower Burma Rulings, Volume I, page 297) dissented from.

In this case a Burmese Buddhist girl under 16 years of age left her parents' house and went away with her lover the accused, against the will and without the consent of her parents, and lived with him for sixteen days, until on the complaint of the parents the accused was arrested. The accused has been convicted of kidnapping from lawful guardianship under section 363, Indian Penal Code. The Sessions Judge has submitted the proceedings to this Court on the ground that the Magistrate should have followed the ruling of this Court in *King-Emperor* v. *Nga Po Saw* * and convicted accused of an offence under section 366, Indian Penal Code.

Magistrates in Upper Burma are of course bound to follow the rulings of their own High Court. As, however, there has been a subsequent ruling of the Full Bench of the Chief Court of Lower Burma, *Crown* v. *Nga Chan Mya* † that the offence committed under such circumstances is one under section 363, and not under section 366, Indian Penal Code, it is fitting to take this opportunity of re-examining the question.

The Upper Burma Ruling quoted merely followed the decision of the Special Court of Lower Burma in *Queen-Empress* v. *Ne U* ‡. In the Chief Court Ruling quoted that decision was overruled. Three propositions were assented to, the first two by two Judges of the Chief Court, and the third by the Full Bench. These propositions are as follows:—

(1) A Burmese Buddhist minor girl can under certain circumstances contract a valid marriage without the consent of her guardian.

* U. B. R., 1897—1901, page 328.
† L. B. R., Volume I, 297.
‡ S. J. L. B., 202.

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(2) If a Burmese Buddhist girl under 16 years of age elope with a lover of her own free will, intending to cohabit wit him, the resulting sexual intercourse is not necessaril illicit.

(3) Section 366, Indian Penal Code, does not apply to a case i which a minor girl, at the time of the kidnapping from law ful guardianship, intends to cohabit of her own free wil with the kidnapper.

The first two propositions involve questions of Buddhist Law. Th third applies generally whatever the personal law or religion may be.

I will first examine the third proposition. I agree with the Chie Court that an intention to seduce subsequent to elopement is an es sential part of an offence under section 366, Indian Penal Code. Bu I think that when the elopement as in the present case is followed b living together for sixteen days, the circumstances afford conclusiv evidence that there was an intention to seduce, and an actual seduc tion subsequent to the elopement. I am unable to hold that the word in section 366 "seduced to illicit intercourse" refer only to the firs act of seduction or the surrender of chastity. To "seduce," as define in Webster's Dictionary ~~is to draw~~ aside from ~~the path~~ of rectitude an duty in any manner, to entice to evil, to lead astray, to tempt and lea to iniquity. I think that it would be a monstrous proposition, and on that would strike at the very roots of social and moral rectitude t hold, that because a man had induced a girl while in the custody o her parents to surrender her chastity, he committed no further act o seducing to illicit intercourse, when he persuaded her to live with hin in a condition of concubinage not sanctioned by marriage. In the Judgment of the Chief Court it is remarked that there is no law whic prevents a girl over twelve years of age from legally consenting t sexual intercourse. That appears to me to be beside the question. I is not a question of illegal intercourse but of illicit intercourse, which means, not intercourse that is in itself contrary to any law, but inter-course that is without the moral sanction of marriage. I must there-fore dissent from the Chief Court with regard to the third proposition quoted, and hold that when a man kidnaps a minor girl from lawful guardianship and thereafter cohabits with her without marriage he has subsequent to the kidnapping, seduced her to illicit intercourse, and he has kidnapped her in order that she may be seduced to illicit inter-course, or knowing it to be likely that she will be seduced to illicit intercourse, and he has committed an offence under section 366, Indian Penal Code, quite independent of any intention or consent on the part of the minor girl, and quite independent of any question as to whether she had surrendered her chastity before the act of kidnapping.

It remains further to be considered whether in the case of a Bur-mese Buddhist minor girl, the proposition thus stated, is modified by the Buddhist Law of marriage. It resolves itself simply into the ques-tion whether when a Burmese Buddhist minor girl elopes with the man

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of her choice, that elopement constitutes a marriage. If it does the subsequent intercourse is not illicit, and the kidnapper cannot come within the provisions of section 366, Indian Penal Code. It appears to be the opinion of two of the honourable Judges of the Chief Court that the test is the real intention of the parties, and that if the intention is to marry, the marriage is an accomplished fact from the date of elopement. I cannot but think that this interpretation of the law would appear to be rather startling to Buddhist parents, and I doubt whether any would be found who would admit it. If when a minor Burmese girl eloped with her lover and the parents went to claim her, the lovers said "We eloped with the intention of marriage, and therefore our marriage is an accomplished fact, and you have no longer any right to take your daughter back," I fancy that the argument would not command much attention. Chan Toon in his principles of Buddhist Law referring to the form of marriage when a young woman without the consent of her parents elopes three times, states that it is quite clear that this method would not receive countenance at the present day. And it must be noted that the reason given for it in the Manukyè has nothing whatever to do with the intention of the man. The reason given is that the girl by eloping three times has shown that the parents are unable to control her. Assuming that a marriage by this method would be recognized at the present day, which in view of the opinion of so able an authority as Chan Toon, may be doubtful, it appears to me to be beyond doubt that the marriage is not constituted by the first elopement, and that the method is in fact one by which a condition of illicit intercourse is subsequently converted into a marriage, just as, to seek an analogy from the Law of Scotland, which with regard to marriage somewhat resembles Buddhist Law, a subsequent marriage has the effect of legitimating children not born in wedlock. On this view the first elopement must be followed by illicit intercourse, and the intention of the kidnapper must be to seduce to illicit intercourse in the first place, notwithstanding that there may be an ultimate intention of defying the authority of the parents, and converting the illicit intercourse into a marriage. I am therefore of opinion that as regards section 366, Indian Penal Code, there is no difference between Buddhists and races who are subject to another personal law.

The conviction in the present case should therefore have been under section 366, Indian Penal Code, but the accused has been sufficiently dealt with under section 363 and the case does not call for further interference.

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Police—26.

Before H. Adamson, Esq., C.S.I.

MAUNG PO KYWIN *v.* KING-EMPEROR.

Criminal Revision No. 792 of 1903. October 21st.

Held,—that the finder of goods has a right against the whole world except the real owner.

A necklace was found by one Ma So Me on a public road. She handed it over to the Pagan Myoôk. By order of the District Magistrate it was proclaimed for six months, under the provisio is of section 26, Police Act. The owner did not appear. It was then sold and the net proceeds Rs. 23 were credited to Government.

The necklace was believed to be gold and was sold as such. The purchaser, Maung Po Kywin, however, found that it was brass, and returned it, and requested a refund of the purchase-money, which was refused by the District Magistrate. The Sessions Judge recommends that the balance of the sale proceeds be refunded.

The order of sale was improper. The finder of goods has a right against the whole world except the real owner. After the infructuous proclamation the necklace should have been returned to the finder Ma So Me.

The sale is set aside. The balance of the purchase-money will be refunded to Maung Po Kywin, and the necklace will be returned to the finder Ma So Me.

Ruby Regulations—6 (1), 8 (1).

Before H. Adamson, Esq., C.S.I.

KING-EMPEROR v. NGA NYUN.

Criminal Revision No. 471 of 1903. June 12th.

Held—(1) That in a stone tract it is an offence under section 6 (1), Upper Burma Ruby Regulation, for a man to dig for or raise precious stones without a license in a heap of rejected earth;

(2) That it is under similar circumstances an offence to raise precious stones which are exposed to view whether on rejected earth or otherwise on the surface of the ground;

(3) That it is under certain circumstances not an offence for a woman to dig for or raise precious stones from rejected earth;

(4) That a Magistrate can confiscate only precious stones in respect of which an offence under section 6 of the Regulation has been committed.

References:—

Revenue Department Notification No. 361, dated 27th October 1897.
Precious Stones Manual, page 88.

In Criminal Case No. 21 of 1903 of the Headquarters Magistrate, Mogôk, the two accused were sent up for trial for an offence under section 6 (1) of the Upper Burma Ruby Regulation, and were discharged. In passing the order of discharge the Magistrate directed that the sapphire which was an exhibit in the case, and with regard to which he found that no offence had been committed, should be confiscated, on the general ground that it was ownerless property found, and that it should have been given up to Government. There is no obligation on any one who finds an article of value to give it up to Government, and the reasons given by the Magistrate were not a sufficient ground for confiscating the stone. In revision the then District Magistrate, Mr. Twomey, directed that the stone should be returned to the person from whose possession it was taken.

The present District Magistrate, Mr. Carey, thinks that his predecessor's order was wrong because under the provisions of section 31 (1) of the Upper Burma Land and Revenue Regulation, the right to all precious stones shall be deemed to belong to Government. He submitted the proceedings to the Sessions Judge, who, though not agreeing with the views of the District Magistrate, thought that the matter was not free from doubt, and submitted the proceedings for revision by this Court.

It appears to me that section 31 (1) of the Upper Burma Land and Revenue Regulation need not have been imported, and does not concern the case. Mr. Twomey's order merely followed the general principle that when there has been an inquiry or trial, and the accused is discharged or acquitted, the Court shall restore the property into the possession of the person from whom it was taken, unless the Court is of opinion that an offence has been committed regarding it, and as such the order is unobjectionable. Moreover it follows section 8 (1) of the Upper Burma Ruby Regulation, which provides that it is only a stone in respect of which an offence under section 6 has been committed that can be confiscated by a Magistrate.

Ruby Regulations—6 (1), 8 (1).

KING-EMPEROR v. NGA NYUN.

The error as it appears to me lay in discharging the accused. They stated that the stone was picked up from a heap of *byôn*, or earth rejected by a person who had raised it under a license. Now it is an offence under section 6 to dig for or raise a stone from a heap of rejected earth just as much as it is to do it from any other kind of earth. There is no distinction made between the two in the Regulation. This view is confirmed by the fact that a special rule has been made under the Regulation, by Revenue Department Notification No. 361,* dated 27th October 1897, that women under certain circumstances are permitted without restriction to wash rejected earth for rubies. But no such permission is conferred on men. Another question here arises as to the meaning of the word "raise." It is not defined in the Regulation, but its ordinary meaning is to lift or to take up. If a precious stone is by rain or other action of nature exposed to view on a heap of *byôn* or otherwise on the surface of the earth, is it an offence under section 6 to raise it? I think there can be no doubt that it is. Section 3 provides that no one shall dig for or raise any precious stone in a stone tract, except as permitted in the rules and section 6 provides the penalty. The words of the Regulation are not "dig for and raise" but "dig for or raise." Therefore "raising" is itself an offence. I think that this view is reasonable, because it surely cannot have been intended by the legislature that in a stone tract any one is at liberty to appropriate a precious stone that happens by the action of the weather or other process of nature to be exposed to view. It would thus appear that the accused might have been convicted on their own statements of an offence under section 6 (1), in which case the stone could have been confiscated by the Magistrate under section 8.

The honest man who in a stone tract sees a precious stone exposed to view on a heap of *byôn* or otherwise on the surface of the earth will do well to cover it up with a pinch of sand, so as to prevent other passers by from being tempted to commit crime, and to proceed with all convenient haste to take out a license to dig for and raise precious stones on the spot. This is the only way by which he will be able to obtain lawful possession of the coveted treasure.

My answers to the questions which have arisen in the case, and which from the report of the Sessions Judge appear to be in doubt, are, that it is an offence to raise precious stones from rejected earth in a stone tract, whether on the surface or in the interior, if committed by a man, but that such action by a woman in the circumstances specified in the notification which has been quoted, is no offence, and that a Magistrate can confiscate only stones with respect to which an offence under section 6 has been committed.

The District Magistrate thinks that it is unnecessary now to interfere in the case under revision, and I therefore merely direct that the proceedings be returned.

* Precious Stones Manual, page 88.

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Upper Burma Village Regulation, 8.

Before H. Adamson, Esq.

Criminal Revision No. 192 of 1902. June 2nd.

KING-EMPEROR *v.* NGA MAUNG.

Held—that it must be proved to support a conviction under section 8, Village Regulation, that the headman made a certain requisition to the accused and that the accused refused or neglected to comply with it.

THE essence of an offence under section 8, Village Regulation, is refusal or neglect to comply with the requisition of a headman. Certain rules have been issued by competent authority prescribing the duties of headmen. But they cannot be treated as a penal code, for the breach of which any villager can be convicted. It must be proved to support a conviction under section 8, Village Regulation, that the headman made a certain requisition to the accused and that the accused refused or neglected to comply with it.

The conviction is set aside and the fine must be refunded.

Upper Burma Village Regulation, 8.

Before A. M. B. Irwin, Esq., I.C.S.

Criminal Revision No. 839 of 1903. December 21st.

KING-EMPEROR *v.* { Nga Pu / Nga Yein.

Slaughtering cattle without a license within an area within which the headman is directed by a rule under section 5 (1) of the Upper Burma Village Regulation not to allow such slaughter is not necessarily an offence under section 8 (2) of that Regulation.

Accused were convicted of slaughtering or selling beef within three miles of a slaughter house. Throughout the proceedings the prohibition to slaughter and sell within that area is treated as created by the license, and the conviction is based on the terms of the license. To justify any such finding it is obvious that the license ought to have been put in evidence, and either it or a certified copy of it ought to be on the record now. It is not on the record, and there is nothing to show that it was ever produced in Court.

But apart from this, it is not apparent how a legal prohibition to the public could be contained in a slaughter house license. The Township Magistrate found the offence to be one under section 188, Penal Code, but the District Magistrate in appeal altered the conviction to one under section 8, Village Regulation, and "dismissed the appeal." These two orders are mutually incompatible. By "dismissing the appeal" I presume the Magistrate meant that he confirmed the sentence, which is quite a different thing. The material part of his judgment is as follows:

"The Headman is ordered to refrain from giving permission to slaughter cattle in a radius of three miles from a properly appointed slaughter house. The accused having omitted to assist the Headman in carrying out his duty are liable to punishment under section 8 (1), Upper Burma Village Regulation."

The order to the Headman must be that contained in the Commissioner's Notification No. 2, dated 23rd January 1899, though the District Magistrate does not refer to it. He does not appear to have looked at the terms of section 8. The act made punishable by clause (2), not clause (1), of that section is refusing or neglecting to comply with a requisition of the Headman to assist him in the execution of his public duties. In this case it is not alleged that the Headman made any such requisition. This point was set forth very clearly by Mr. Adamson in the case of *King-Emperor* v. *Nga Maung* (1).

I set aside the convictions and sentences of Maung Pu and Maung Yein.

(1) U. B. R., 1903, Village Regulation, page 1.

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Workman's Breach of Contract Act, XIII of 1859, section 2.

Before H. Adamson, Esq., C.S.I.

PHOOL SINGH *v.* NGA SAN HLA.

Mr. *S. Mukerjee*—for respondent.

Criminal Revision No. 585 of 1902. September 29th, 1902.

Held,—that the procedure of summary trials should not be adopted in enquiries under section 2 of the Workman's Breach of Contract Act, XIII of 1859. The evidence of each witness should be recorded.

References:—
I. L. R., 11, All., 262.
——— 27, Cal., 131.
——— 4, Mad., 234.

THIS is an application for revision of an order passed under section 2 of the Workman's Breach of Contract Act, XIII of 1859.

The applicant asks that he be awarded the full amount which he claimed, and not the amount which the respondent admitted. But as he was not able to prove his documents, his case has no merits.

The Magistrate should not have passed an order in the alternative directing the respondent either to finish the work, or to repay the advance. Under section 2 the Magistrate should have ascertained from the complainant which of these orders he desired, and should have passed that order. The complainant has the option.

There are conflicting decisions as to whether an inquiry under section 2 of the Act can be tried summarily. In *Queen-Empress* v. *Indarjit* * it was held that offences under section 2 are triable summarily under section 260, Criminal Procedure Code. But in *Pollard* v *Mothial* † it was held that an inquiry under section 2 is not an inquiry into an offence which may be tried summarily, and in the latest ruling, *Averam Das Mochi* v *Abdul Rahim* ‡ it was held that a proceeding under the first clause of section 2 is not a trial of an offence. It follows, therefore, that there is no authority for adopting the procedure for trying offences in a summary trial.

The legislature has not prescribed any procedure for the trial of inquiries under section 2 of the Act. The inquiry is of a special character, which in some cases may require to be conducted with much care and patience. Especially in Upper Burma, where the Act has recently been brought into force, is it necessary that the inquiry should be sufficiently full to enable a superior Court to form a clear opinion on the merits of the case. In future, therefore, in such cases the evidence should be recorded in the manner prescribed for summons cases.

The application is dismissed.

* 11, All., 262. | † 4, Mad., 234. | ‡ 27, Cal., 131.

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Workman's Breach of Contract Act, XIII of 1859—2.

Criminal Revision No. 790 of 1903. November 16th.

Before H. Adamson, Esq., C.S.I.

ASGAR ALI v. SWAMI AND KING-EMPEROR.

A person who was not himself a labourer, but a contractor for labour, received an advance, and contracted to get certain earthwork done, and committed a breach of contract.

Held,—that as he was not himself an artificer, workman or labourer, Act XIII of 1859 did not apply.

Reference, I. L. R. 7, Mad. 100.

The applicant has been convicted of criminal breach of contract under Act XIII of 1859 and directed to refund a sum of money.

The case has been submitted for revision by the Sessions Judge, on the ground that the Act is not applicable, because applicant is not an artificer, workman, or labourer. The applicant is described in the Magistrate's proceedings as a cooly *gaung*, and it appears that he undertook to provide coolies to do earthwork for which he received an advance of Rs. 75. It was admitted in the Sessions Court by the Respondent that applicant was not himself a labourer, but merely a provider of labourers.

The Act applies to cases in which the workman has undertaken to get work performed, as well as to cases in which he undertakes personally to perform it, so that there may be cases in which a contractor is liable to proceedings under the Act. But in such cases the contractor must be himself a workman. The Act does not apply to a contract which is made by a person who is not himself an artificer, workman, or labourer.

In the present case it appears that the applicant is not a labourer, but merely a contractor, and therefore the Act is not applicable.

This case is very similar to *Gilby* v. *Subbu Pillai*.*

I set aside the Magistrate's order for repayment of Rs. 48-2-0 and costs Rs. 6-8-0.

* I. L. R. 7, Mad. 100.

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APPENDIX I.

COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

Circular Memorandum No. 1.

Dated Mandalay, the 1st June 1903.

The attention of Judges and Magistrates is drawn to the alterations made by the Repealing and Amending Act, 1903 (published as Part IIIA of the *Burma Gazette* of 21st March 1903). The amendments, of which a list is given below, should be written up in manuscript in the volumes of the Acts concerned:—

Year.	Number.	Subject or short title.	Amendments.
1	2	3	4
1861	V	The Police Act, 1861..	In section 34, *after* "imprisonment" *insert* "with or without hard labour."
1872	XV	The Indian Christian Marriage Act, 1872.	In section 82, *for* "certificates of marriages" and also *for* "marriage certificates," *substitute* "certificates for marriage." In Schedule II, *after* "declaration" *insert* "or oath."
1879	XIV	The Hackney Carriage Act, 1879.	In section 3, *for* "the Lieutenant-Governors of the North-Western Provinces and the Punjab and the Chief Commissioners of Oudh, the Central Provinces, British Burma," *substitute* "the Lieutenant-Governors of the United Provinces of Agra and Oudh, the Punjab and Burma, and the Chief Commissioner of the Central Provinces."
1889	XIII	The Cantonments Act, 1889.	In section 6, sub-section (1), *for* "in the case of a Cantonment for which such a committee has not been constituted," *substitute* "where a Cantonment Committee has not been constituted, or has in pursuance of an order of the Local Government ceased to exist, or for any reason cannot be convened, then, subject to any rules made under section 26, clause (5)."
1897	X	The General Clauses Act, 1897.	In section 3, clauses (5), (6), (30), and (35), *after* "under", *insert* "the Indian Councils Act, 1861," or In section 3, *after* "clause (8)," *insert* the following :— "(8*a*) 'Burma Act' shall mean an Act made by the Lieutenant-Governor of Burma in Council under the Indian Councils Acts, 1861 and 1892."
1898	V	The Code of Criminal Procedure, 1898.	In section 260, sub-section (1), clause (i), *after* "451" *insert* "453, 454." In section 555, *for* "553" *substitute* "554." In the second schedule, column 5, against section 195, *for* "Bailable" *substitute* "Not bailable." In the second schedule, column 8 against section 506, *for* "Ditto" *substitute* "Presidency Magistrate or Magistrate of the first or second class." In the heading to the fifth schedule *for* "554" *substitute* "555."

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Year.	Number.	Subject or short title.	Amendments.
1	2	3	4
			In the fifth schedule, Form IV, *for* "within days from this date" *substitute* "on the day of ."
			In the fifth schedule Forms XIII and XIV, *for* the passage from "comply" where it occurs for the second time to "released," *substitute* "be lawfully ordered to be released."
1900	III	The Prisoners Act, 1900	*For* "section 29" *substitute* the following :—
			29. (1) The Governor-General in Council may, by general or special order, provide for the removal of any prisoner confined in a prison :— (*a*) under sentence of death, or (*b*) under, or in lieu of, a sentence or imprisonment or transportation, or (*c*) in default of payment of a fine, or (*d*) in default of giving security for keeping the peace or for maintaining good behaviour, to any other prison in British India.
			Removal of prisoners.
			"(2) The Local Government, and (subject to its orders and under its control) the Inspector-General of Prisons may, in like manner, provide for the removal of any prisoner confined as aforesaid in a prison in the Province to any other prison in the Province."
1898	...	The Burma General Clauses Act, 1898.	In section 20, *before* the word "order," in each of the places in which it occurs, *insert* "notification."
			In section 21, *for* "make" *substitute* "issue notifications" between the words "any" and "orders" *insert* "notifications," and *for* "made" *substitute* "issued."
			In section 24, *before* the word "order," in each of the places in which it occurs, *insert* "appointment, notification"; and *before* the word "issued," in each of the places in which it occurs, *insert* "made or."

R. B SMART,
Registrar.

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APPENDIX II.

Circular Memorandum No. 2 of 1903.

FROM

THE REGISTRAR,

JUDICIAL COMMISSIONER'S COURT,

UPPER BURMA,

To

ALL SESSIONS JUDGES AND DISTRICT MAGISTRATES,

UPPER BURMA.

Dated Mandalay, the 13th July 1903.

The attention of Sessions Judges and District Magistrates is invited to the following points in connection with the Report on the Administration of Criminal Justice for the year 1902.

Dismissal of complaints under section 203, Criminal Procedure Code.

1. The Judicial Commissioner is glad to observe that the necessity for carefully examining complaints before issue of process has continued to be impressed on Magistrates, but some Courts are still reported to be backward in this respect, and every opportunity should be taken to remind Magistrates that the examination of a complainant under section 200, Criminal Procedure Code, should not be a mere form, but an intelligent enquiry into the subject-matter of the complaint and the evidence producible in support of it, carried far enough to enable the Magistrate to determine whether there is or is not sufficient ground for proceeding.

Nature of process to be issued.

2. It is noticed that warrants are frequently issued where a summons would suffice. Although Schedule II of the Code of Criminal Procedure distinguishes, in column 4, the offences for which a summons and those for which a warrant should *ordinarily* issue in the first instance, it is left to the discretion of the Magistrate to issue a summons instead of a warrant when he sees fit. In exercising this discretion Magistrates must be guided by the circumstances of each individual case, the main point for consideration being, whether having regard to the nature of the offence charged and the age, sex, position, &c., of the accused, his appearance can be secured or not without his arrest.

Classification of cases.

3. The Judicial Commissioner regrets to notice that some Magistrates still do not properly understand the rules regarding the classification of cases. A common error is to enter a case as mistaken because the wrong

person has been brought to trial. The orders contained in paragraph 792, Upper Burma Courts Manual, are clear and Magistrates should be invited to study them.

Hurt cases.

4. The special attention of Magistrates should be drawn to paragraphs 140-A and 140-B, Upper Burma Courts Manual. Several cases have come before the Judicial Commissioner in which the sentences were wholly inadequate. Attention should also be drawn to the instructions for compounding offences contained in paragraphs 305 to 308, Upper Burma Courts Manual, which are frequently not observed.

Criminal trespass.

5. In several district reports the tendency to use the Criminal Courts, by instituting prosecutions under section 447. Indian Penal Code, to get possession of land has been referred to Magistrates should be reminded that this section is intended to protect against trespassers, persons who are in peaceful possession of property and not for the purpose of determining the title to property. The important point is possession, and where, as frequently happens, a person who may *bonâ fide* think that he has a right in land, forcibly assumes immediate possession, his object being to shift the burden of proof in the civil proceedings that will probably follow, it is the duty of the Magistrate to protect those in possession by means of the criminal law.

Gambling Act.

6. Cases under the Gambling Act continue to increase. Several cases have, however, come before the Judicial Commissioner which show that Magistrates do not always bear in mind that it is not *per se* an offence for any man to allow gambling to be carried on in his house. Magistrates would do well to read carefully the meaning of the term "Common gaming house" in section 3 of the Act.

Durations.

7. The prompt disposal of criminal cases is a matter of importance. Cases have come before the Judicial Commissioner which have been adjourned from day to day for want of time. If a case is adjourned for want of time, it should invariably be put on the top of the cause list for the day to which it is adjourned. A tendency to unpunctuality and disregard of the convenience of the people is a bad trait in a Magistrate, and should be discouraged whenever noticed.

Whipping.

8. Although there has been a slight improvement in the number of whippings awarded, the Judicial Commissioner is of opinion that much more use can be made of this form of punishment. Magistrates who are competent to pass sentences of whipping, as a rule, inflict this form of punishment whenever desirable, but Magistrates who are not so empowered seem to be reluctant to submit the cases to the Subdivisional or District Magistrate under section 349, Criminal Procedure Code. The Judicial Commissioner trusts that there will be an improvement during the current year.

Solitary confinement.

9. More resort was had to this form of punishment in most districts, but Burman Magistrates appear to be reluctant to inflict solitary confinement. Its suitability in certain cases should be pointed out.

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10. The Judicial Commissioner is pleased to notice that this provision has been more freely used, but the bulk of the cases occurred in the Mandalay, Ruby Mines, Sagaing, and Pakôkku districts. The section should again be brought to the notice of Magistrates.

Section 562, Criminal Procedure Code.

11. Fines are now fairly well regulated to the means of the offenders, but glaring instances of excessive fines, especially in opium cases, still come to light, the object apparently being to strike at the real owner through the person in possession. Any such attempt is illegal, and Magistrates should be warned against it.

Fines.

12. There has been a regrettable decline under both these heads. In four districts section 250, Criminal Procedure Code, was not used at all. Compensation under section 545, Criminal Procedure Code, should be freely and liberally given when called for by the circumstances of the case. Some Magistrates are reported to be afraid to use the provisions of section 250 because of difficulties in the method of recovery in default. Their attention should be drawn to the ruling in the case of *Queen-Empress* v. *Nga Myit* (Upper Burma Rulings, 1899, Criminal Procedure, page 99).

Compensation awarded to complainants under section 545, C.P.C., and to accused under section 250, C.P.C.

13. Many cases have come to notice in which previous convictions have been taken into account against accused persons, but there has been nothing on the record to show how these previous convictions have been proved. The attention of Magistrates should be drawn to paragraphs 409 to 411, Upper Burma Courts Manual, regarding the mode of proving previous convictions.

Previous convictions.

14. There has been some improvement in the upkeep of the witness register, but inspections show that many attendances of witnesses are still not entered at all. Magistrates should be warned to be careful to check the entries before initialling the register.

Witnesses.

15. Finally, the Judicial Commissioner desires to direct the attention of Magistrates to a very important subject, in which he has noticed much remissness, namely, the recording of confessions under section 164, Criminal Procedure Code. That section provides that no Magistrate shall record a confession unless upon questioning the person making it, he has reason to believe that it was made voluntarily. It is surprising how often this provision is neglected. The result is that the confession is altogether inadmissible, and the defect cannot be cured under the provisions of section 533. The Magistrate should before recording the confession satisfy himself that the accused has come to make it voluntarily. In view of the fact that many confessions are subsequently retracted, and that there is a well-founded suspicion that many of them are obtained by illtreatment or improper inducement on the part of the police, it is desirable that Magistrates should act with deliberation in questioning the accused as to the voluntary nature of the confession. It is not ordinarily sufficient merely to ask

Confessions.

an accused person whether he comes voluntarily to make confession The Magistrate should endeavour to ascertain by pertinent question whether the accused has been illtreated in order to make him confess and whether any inducement of pardon or of lenient treatment ha been held out to him, and should satisfy himself that the impressio made by any such inducement has been fully removed before record ing the confession. The record should show the questions and an swers by which the Magistrate satisfies himself that the confession i voluntary. The Magistrate should further, in recording a confession bear in mind the desirability of ascertaining as far as possible whethe the confession is true. Before recording it he should read the polic diaries, and make himself thoroughly acquainted with the case. H should without asking leading questions endeavour to obtain from th accused as detailed a statement as possible. He should ascertai whether there are any unexplained facts, which, on the hypothesis o the accused's guilt, would appear to be within his cognizance, an question the accused regarding them. The answers to such question may be of great assistance in determining whether the confession i a true one. If the confession is related in detail and is not extracte by leading questions, it is unlikely to be a tutored one, but where confession merely follows the line of police discovery, and is drawn ou by leading questions, it is generally of little value, as there is no safe guard against the suspicion that it has been tutored.

The certificate at the end of the confession is entirely apart fro the questions put before the confession is taken as to its voluntar nature, and before signing it the Magistrate should satisfy himself, no merely from the declaration of the accused, but from an attentive ob servation of his demeanour, that the confession is voluntary. Whe a confession taken under section 164 is retracted at the trial, on th ground of illtreatment or inducement, it is the duty of the Session Judge or Magistrate to ascertain by all practical means whether it ha been so obtained, and the enquiry should form part of the record o the trial.

By order,

R. B. SMART,

Registrar.

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Circular Memorandum No. 7 of 1903.

FROM

THE REGISTRAR,

JUDICIAL COMMISS ONER'S COURT, UPPER BURMA,

TO

SESSIONS JUDGES AND DISTRICT MAGISTRATES,

UPPER BURMA

Dated Mandalay, the 23rd December 1903

The Judicial Commissioner has noticed that many Magistrates habitually fail to comply with the provisions of section 367 (2), Code of Criminal Procedure. The finding at the end of the judgment specifies the section under which the Magistrate considers the offence to be punishable, but does not specify the offence.

The procedure prescribed by law must be followed, whether the Magistrate considers it necessary or not, but apart from this, it is easy to show the importance of strictly adhering to the law. More than one case has lately come before the Judicial Commissioner, in revision, in which a perusal of the whole judgment showed that the Magistrate found an offence proved which was really punishable under a section different from the section under which the sentence was nominally passed.

Section 367 (2) requires three particulars to be specified, namely, the offence, the law and the punishment. The offence should be described in the finding with the same precision as in the charge so far as clauses (2) and (3) of section 221 are concerned. Some Magistrates seem to think it sufficient to specify the offence as, *e.g.*, "theft, under section 380." This is incorrect. Theft is punishable under section 379 not 380, and to support a sentence under section 380, it is necessary to specify the offence as "theft in a dwelling house" or "theft in a paddy-godown," or "theft in a boat used as a human dwelling," or as the case may be.

The same principles apply to every case in which the law draws a distinction between a simple offence and the same offence attended with aggravating or extenuating circumstances.

By order,

R. B. SMART,

Registrar.

G. B. C. P. O.—No. 15, J. C. U. B., 25-8-1914—1,000—R. A. P.

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