THE

ALL INDIA REPORTER

1929

RANGOON SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE **RANGOON HIGH COURT** REPORTED IN

(1) I. L. R. 7 RANGOON
(2) 30 CRIMINAL LAW JOURNAL
(3) 113 to 120 INDIAN CASES
(4) INDIAN RULINGS, 1929 RANGOON
(5) 1929 CRIMINAL CASES
(6) 11&12 ALL INDIA CRIMINAL REPORTS

WITH

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TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

RANGOON HIGH COURT

1929

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THE

ALL INDIA REPORTER

1929 RANGOON

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1929 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, RANGOON SERIES, for the year 1929, with corresponding references of the ALL INDIA REPORTER.

N.B.—Column No. 1 denotes pages of I. L. R. 7 RANGOON.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 7 Rangoon=All India Reporter.

ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.		
1	1929	*R*	147	96	1929	*R*	209	201	1929	*R*	229	310	1929	*R*	269	423	1929	*R*	274
3	”	”	120	98	”	”	196	227	”	*PC*	126	313	”	”	216	425	”	”	311
4	”	*PC*	55	100	”	”	93	231	”	*R*	214	316	”	”	256	431	”	”	368
11	”	*R*	121	104	”	”	62	234	”	*PC*	141	319	”	”	177	441	1930	”	16
14	”	”	150	107	”	”	157	240	”	*R*	155	329	”	”	203	445	1929	”	289
18	”	”	116	110	”	”	161	245	”	”	134	339	”	”	145	451	”	”	307
20	”	”	115	113	”	”	175		”	”	372	345	”	”	97	459	”	”	137
23	”	”	122	119	”	”	117	263	”	”	241	352	”	”	126	463	”	”	297
26	”	”	38	126	”	”	168	266	”	”	254	355	”	”	278	470	”	”	331
28	”	”	65	132	”	”	152	269	”	”	225	358	”	”	279	477	1930	”	27
34	”	”	139	136	”	”	166	271	”	”	280	359	”	”	128	481	1929	”	287
37	”	”	148	140	”	”	179	276	”	”	333	361	”	”	273	487	”	”	303
39	”	”	99	144	”	”	184	281	”	”	102	365	”	”	318	498	”	*PC*	202
61	”	”	140		”	*PC*	189	288	”	”	251	370	1930	”	77	505	1930	*R*	68
70	”	”	164	157	”	”	108	292	”	”	240	374	1929	”	129	514	”	”	20
75	”	”	148	164	”	*R*	211	296	”	”	260	388	”	*PC*	246		”	”	47
80	”	”	162	169	”	”	345	300	”	”	244	398	”	*R*	265	522	1929	”	339
85	”	”	153	187	”	”	105	303	”	”	167	409	”	”	282	526	”	”	343
88	”	”	158	193	”	”	218	306	”	”	226	414	”	”	293				

I. L. R. 7 Rangoon=All India Reporter—(*Concld.*)

ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.
529	1929 *R* 190	581	1930 *R* 37	644	[1929 *R* 245	734	1930 *R* 132	790	1930 *R* 56
533	1930 " 18	592	" " 76		[" " 248	744	" " 72	797	" " 130
538	1929 " 321	595	" " 10	660	1930 " 1	751	1929 " 257	800	" " 140
540	1930 " 21	598	" " 131	669	" " 35	759	1930 " 53	806	1929 " 306
556	1929 " 320	603	" " 143	675	" " 32	766	" " 129	809	1930 " 139
558	" " 310	608	1929 " 193	677	1929 " 354	769	" " 138	811	" " 59
561	" " 221	617	1930 " 29	706	" " 200	771	" " 49	815	1929 " 313
569	" " 365	624	1929 *PC* 279	715	1930 " 136	777	1929 " 341	821	1930 " 114
578	" " 253	635	1930 *R* 4	720	" " 42	785	" " 291	844	" " 124

TABLE No. II

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***For* 11 & 12 All India Criminal Reports=All India Reporter.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Allahabad.**

***For* 30 Criminal Law Journal, 113 to 120 Indian Cases and Indian Rulings, 1929 Rangoon=All India Reporter.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Lahore.**

***For* 1929 Criminal Cases=All India Reporter.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Nagpur.**

Table No. III.

Showing seriatim the pages of ALL INDIA REPORTER, 1929, Rangoon Section, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1929 Rangoon. Column No. 2 denotes corresponding references of other REPORTS & JOURNALS.

A. I. R. 1929 Rangoon=Other Journals.

A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R)	Other Journals
1	6 *Rang* 598	17	116 *I C* 470	55	6 *Rang* 691	75	115 *I C* 664
FB	114 *I C* 296	20	6 *Rang* 594		117 *I C* 52		12 *A I Cr R* 307
5	6 *Rang* 411		114 *I C* 293	59	6 *Rang* 689	76	6 *Rang* 763
	112 *I C* 261	21	6 *Rang* 667		117 *I C* 51		115 *I C* 670
8	6 *Rang* 652		114 *I C* 543	60	6 *Rang* 676	77	6 *Rang* 783
	116 *I C* 479	22	6 *Rang* 623		115 *I C* 903		114 *I C* 540
9	6 *Rang* 590		114 *I C* 513	61	6 *Rang* 680	80	6 *Rang* 744
	114 *I C* 294	30	6 *Rang* 655		115 *I C* 898		115 *I C* 657
11 (1)	6 *Rang* 619		117 *I C* 60	62	7 *Rang* 104	86	6 *Rang* 741
	113 *I C* 73		30 *Cr L J* 709		117 *I C* 63		114 *I C* 676
	30 *Cr L J* 57	31	6 *Rang* 615	63	117 *I C* 62	87	6 *Rang* 672
11 (2)	6 *Rang* 612		114 *I C* 519	64	117 *I C* 64		115 *I C* 899
	114 *I C* 302	33 (1)	6 *Rang* 621	65	7 *Rang* 28		30 *Cr L J* 538
12	6 *Rang* 609		114 *I C* 538		116 *I C* 475		12 *A I CrR* 327
	114 *I C* 522	33 (2)	117 *I C* 563	67	6 *Rang* 775	92	6 *Rang* 669
14 (1)	115 *I C* 900	34	117 *I C* 565		115 *I C* 665		112 *I C* 895
	30 *Cr L J* 539	35	117 *I C* 561	70	6 *Rang* 794	93	7 *Rang* 100
	12 *A I CrR* 342	38	7 *Rang* 26		114 *I C* 687		116 *I C* 478
14 (2)	6 *Rang* 664	**FB**	117 *I C* 564	71	6 *Rang* 771	94	116 *I C* 473
	30 *Cr L J* 345	39	117 *I C* 566		115 *I C* 671	95	116 *I C* 474
	114 *I C* 681	41	6 *Rang* 703	73	6 *Rang* 766	96 (1)	6 *Rang* 743
15	6 *Rang* 657	**FB**	114 *I C* 524		115 *I C* 668		115 *I C* 667
	117 *I C* 60	54	6 *Rang* 682	75	6 *Rang* 791	96 (2)	117 *I C* 61
17	6 *Rana* 643		115 *I C* 909		30 *Cr L J* 509		

A. I. R. 1929 Rangoon=Other Journals—(*Concld.*)

A.I.R.)	Other Journals		
97	7	*Rang*	345
FB	115	*I C*	901
	30	*Cr L J*	540
	12	*AICrR*	350
99	7	*Rang*	39
	115	*I C*	905
102	7	*Rang*	281
FB.	115	*I C*	897
104	115	*I C*	912
105	7	*Rang*	187
	118	*I C*	120
107	118	*I C*	407
109	118	*I C*	401
110	118	*I C*	401
112	118	*I C*	127
113	118	*I C*	403
115	7	*Rang*	20
	117	*I C*	247
116	7	*Rang*	18
	117	*I C*	251
117	7	*Rang*	118
	117	*I C*	530
120	7	*Rang*	3
	117	*I C*	254
	30	*Cr L J*	752
121	7	*Rang*	11
	117	*I C*	248
	30	*Cr L J*	753
122	7	*Rang*	23
	117	*I C*	250
	30	*Cr L J*	754
123	118	*I C*	634
126	118	*I C*	632
	7	*Rang*	352
127	118	*I C*	416
128 (1)	119	*I C*	213
128 (2)	7	*Rang*	359
	118	*I C*	415
129 (1)	118	*I C*	415
129 (2)	7	*Rang*	374
FB	118	*I C*	409
134	7	*Rang*	245
FB	118	*I C*	609
137	7	*Rang*	459
	118	*I C*	404
139	7	*Rang*	34
	117	*I C*	568
140	7	*Rang*	61
	118	*I C*	625
145	7	*Rang*	339
	120	*I C*	899
147	7	*Rang*	1
	117	*I C*	255
	30	*Cr L J*	755
	1929	*Cr C*	60
148 (1)	7	*Rang*	37
	117	*I C*	253
148 (2)	7	*Rang*	75
	117	*I C*	589
150	7	*Rang*	14
	117	*I C*	246
	30	*Cr L J*	750
	1929	*Cr C*	58
152	7	*Rang*	132
	117	*I C*	578
153	7	*Rang*	85

A.I.R.)	Other Journals		
153	117	*I C*	591
155	7	*Rang*	240
	118	*I C*	630
157	7	*Rang*	107
	117	*I C*	252
158	7	*Rang*	88
	117	*I C*	585
161	7	*Rang*	110
	117	*I C*	245
162	7	*Rang*	80
	117	*I C*	587
164	7	*Rang*	70
	117	*I C*	255
166	7	*Rang*	136
	117	*I C*	574
167	7	*Rang*	303
	119	*I C*	740
168	7	*Rang*	126
	117	*I C*	582
170	120	*I C*	662
172	120	*I C*	664
173	120	*I C*	663
175	7	*Rang*	113
	117	*I C*	575
177	7	*Rang*	319
FB	30	*Cr L J*	986
	119	*I C*	209
	1929	*Cr C*	169
179	7	*Rang*	140
	117	*I C*	577
181		...	
182	119	*I C*	223
183	119	*I C*	222
184	7	*Rang*	144
187	119	*I C*	749
189	120	*I C*	129
190	7	*Rang*	529
	119	*I C*	751
191	119	*I C*	751
192	120	*I C*	130
193	7	*Rang*	608
SB	119	*I C*	746
196	7	*Rang*	98
	117	*I C*	253
198	120	*I C*	693
200	7	*Rang*	706
	120	*I C*	689
203	7	*Rang*	329
FB	118	*I C*	637
	30	*Cr L J*	961
	1929	*Cr C*	177
207	120	*I C*	695
209 (1)	120	*I C*	897
209 (2)	7	*Rang*	96
	117	*I C*	244
	30	*Cr L J*	750
	1929	*Cr C*	356
210	120	*I C*	698
211	7	*Rang*	164
	118	*I C*	122
213		...	
214	7	*Rang*	231
	118	*I C*	629
215		...	
216**SB**	7	*Rang*	313

A.I.R.)	Other Journals		
216**SB**	119	*I C*	220
218	7	*Rang*	193
	118	*I C*	124
221	7	*Rang*	561
	121	*I C*	815
223		...	
224		...	
225 (1)		...	
225 (2)	7	*Rang*	269
	119	*I C*	212
226	7	*Rang*	306
	119	*I C*	737
228		...	
229	7	*Rang*	201
	118	*I C*	615
240	7	*Rang*	292
	119	*I C*	738
241	7	*Rang*	263
	119	*I C*	215
243		...	
244	7	*Rang*	300
	119	*I C*	740
245	7	*Rang*	644
248	7	*Rang*	644
FB.			
251	7	*Rang*	288
	119	*I C*	744
253	7	*Rang*	578
	121	*I C*	774
254	7	*Rang*	266
	30	*Cr L J*	990
	119	*I C*	213
	1929	*Cr C*	450
256	7	*Rang*	316
	30	*Cr L J*	990
	119	*I C*	223
	1929	*Cr C*	451
257	7	*Rang*	751
259		...	
260	7	*Rang*	296
	119	*I C*	742
262		...	
263		...	
265	7	*Rang*	398
	120	*I C*	666
269	7	*Rang*	310
	119	*I C*	742
270		...	
271		...	
272		...	
273	7	*Rang*	361
	120	*I C*	131
274	7	*Rang*	423
	120	*I C*	240
275 (1)		...	
275 (2)		...	
277		...	
278	7	*Rang*	355
	120	*I C*	692
	1929	*Cr C*	446
	31	*Cr L J*	174
279	7	*Rang*	358
	1929	*Cr C*	464
	120	*I C*	693
	31	*Cr L J*	175
280	7	*Rang*	271
	119	*I C*	218

A.I.R.)	Other Journals		
282	7	*Rang*	409
	120	*I C*	670
284		...	
285		...	
287	7	*Rang*	481
	120	*I C*	226
289	7	*Rang*	445
	120	*I C*	140
291	7	*Rang*	785
293	7	*Rang*	414
	120	*I C*	232
297	7	*Rang*	466
	120	*I C*	236
298		...	
300	7	*Rang*	487
	120	*I C*	658
304		...	
306	7	*Rang*	806
	121	*I C*	807
307	7	*Rang*	451
	120	*I C*	137
310	7	*Rang*	558
	120	*I C*	910
311	7	*Rang*	425
	120	*I C*	142
313	7	*Rang*	815
	121	*I C*	812
316		...	
318	7	*Rang*	365
	120	*I C*	238
320	7	*Rang*	556
	120	*I C*	911
321	7	*Rang*	538
	1929	*Cr C*	497
	120	*I C*	912
	31	*Cr L J*	186
322	1929	*Cr C*	498
331	1929	*Cr C*	507
	7	*Rang*	470
	30	*Cr L J*	1164
	120	*I C*	230
333	7	*Rang*	276
	119	*I C*	217
335		...	
338		...	
339	7	*Rang*	522
	120	*I C*	897
341	7	*Rang*	777
	121	*I C*	718
343	7	*Rang*	526
	120	*I C*	901
345	7	*Rang*	169
	118	*I C*	113
	30	*Cr L J*	882
	1929	*Cr C*	617
352 (1)	1929	*Cr C*	608
352 (2)		...	
354	7	*Rang*	677
FB	121	*I C*	705
365	7	*Rang*	569
	121	*I C*	778
36[illegible]	7	*Rang*	431
	120	*I C*	132
372	7	*Rang*	245
	118	*I C*	609

Note.—*Cases not bearing parallel references against them are not reported elsewhere.*

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1929 RANGOON

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			"	"	248
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——— v. U Thin Ohn		23	"	"	122
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THE
ALL INDIA REPORTER
1929
RANGOON HIGH COURT

*** * A. I. R. 1929 Rangoon 1**
Full Bench

PRATT, Offg. C. J., CUNLIFFE AND ORMISTON, JJ.

Commissioner of Income-tax, Burma.
v.
Phra Phraison Salarak—Assessee.

Civil Reference No. 2 of 1928, Decided on 20th June 1928.

*** * Income Tax Act, S. 4—Remuneration by Foreign Government paid to its servant for work done in British India is not income accruing or arising in British India.**

Remuneration, not in the nature of commission, paid in Siamese territory by the Siamese Government to the credit of a Siamese Officer, who collects in British India royalties on timber extracted from Siamese forests and floated down to British India, is not income accruing or arising in British India within the meaning of S. 4: *A. I. R.* 1925 *Cal.* 34 and *A. I. R.* 1921 *Bom.* 159, *Cons.*: *Commissioner of Taxation of Kirk,* (1900) *A. C.* 588; 43 *Mad.* 75; and *A.I.R.* 1926 *Rang.* 97 (*F.B.*); *Dist.*: *A. I. R.* 1923 *Mad.* 574 (*F.B.*); *A. I. R.* 1923 *Lah.* 14; and *A. I. R.* 1925 *Pat.* 281; *Ref.* [P 4 C 1]

K. Eggar—for the Crown.
Daniel—for Assessee.

Ormiston, J.—This is a reference under S. 66 (2), Income-tax Act, 1922, on the application of one Phra Phraison Salarak, a forest officer in the service of the Siamese Government, stationed at Moulmein, where he collects the royalty on timber, extracted from forests in Siamese territory, whence it is floated down streams, the earlier of whose courses is in that territory. For his services he receives remuneration which is paid to his credit in Bangkok. He was assessed to income-tax under the head of "salary" for the year 1927-28 in respect of the total amount so paid to his credit and of the value of the rent free quarters enjoyed

by him. He appealed against the assessment on the grounds, first, that the salary paid to him was not "salary" for the purposes of S. 7 of the Act, and secondly, that it was not liable to assessment as it did not arise or accrue in British India. The Assistant Commissioner decided the appeal against him on both points, whereupon he asked the Commissioner to refer to the Court the following questions:

(1) That the income is not salary within the meaning of S. 7 (1) of the Act, since the Siamese Government cannot be regarded as the "Government or as a public body or association or a private employer."

(2) That, in any case, whatever may be the classification of the income for the purposes of S. 6, such income cannot be said to "accrue or arise in British India" within the meaning of S. 4 of the Act.

The Commissioner was of the opinion that the remuneration of the applicant could not be classified as "salaries," and, therefore, referred only the second question.

By S. 4 (1), save as thereinafter provided the Act is to apply to all income profits or gains, described or comprised in S. 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of of the Act to accrue, arise, or to be received in British India. Under S. 6, save as otherwise provided by the Act, six heads of income, profits and gains are to be chargeable to income-tax. The first of these heads is "salaries" and the sixth is "other sources." The Commissioner having held that the remuneration in

question cannot be classified under the first head, classified it under the sixth head.

The question is as to whether the remuneration "accrues, or arises" in British India. The Commissioner is of the opinion that the remuneration accrues or arises in the place where the work is done in respect of which the remuneration is given, and that consequently, the work having been done in British India, the remuneration is attracted by S. 6. The Government Advocate has supported this view. The expression is not defind in the Act, and no authority directly bearing on the point now to be decided has been quoted. Reference, however, has been made to a number of authorities where the expression has been discussed, and it is suggested that as a result it should be interpreted as meaning "earned in" or "derived from."

In *Board of Revenue, Madras* v. *Ramanadhan Chetty* (1), it was held under S. 3 (1) of the Act of 1918, the wording of which is similar to that of S. 4 (1) of the present Act, that a resident in British India is not liable to tax in respect of the income of a business carried on outside British India, where such income is not remitted to British India. The case itself is not in point, and the only passage in the report to which the Government Advocate has directed attention are a discussion by Abdur Rahim, Offg. C. J., (on p. 82) on a possible difference between the phrases "accrues and arises" and "accrues or arises," and quotations by Oldfield, J., (on pp. 84 and 85) from dictionaries as to the meaning of the word "accrue." From these it appears that the primary meanings are "to arise or spring as a natural growth or result," "to come by way of increase" and "to grow or arise"; while as secondary meanings it has "to become a present and enforceable right," and "to become a present right of demand."

Seshagiri Ayyar, J., (at pp. 90 and 91), quotes some further definitions. In Murray's Oxford Dictionary the words "accrue" and "arise" are regarded as synonymous. In the Century Dictionary the word "accrue" is defined to mean "to become a present or enforceable right to demand." Stroud defines "arising in the United Kingdom" as "coming into the person's hands in the United Kingdom."

In *Re Rogers Pyatt Shellac & Co.* v. *Secretary of State* (2), Mukerji, J., after discussing theoretical distinctions between "accruing" and "arising" arrives at the conclusion that the words denote the same idea or ideas very similar, and that both words are used in contradistinction to the word "receive" and indicate a right to receive. They represent, he says, a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate. These definitions do not support the view that income accrues or arises in a particular country by reason of the fact that it is "earned" in that country. On the contrary they go to show that income "accrues" and "arises" in the country where there is a right to demand payment of it, or where, in fact, it is paid. In the case referred the applicant is a Siamese Government servant and there is nothing to indicate that he has a right to demand payment of his income in Moulmein, and, according to the case, it is actually paid in Bangkok.

Commissioner of Taxation v. *Kirk* (3) was a decision of the Privy Council on a New South Wales Act which imposed income-tax on incomes inter alia:

"(1) accruing or arising to any person wheresover residing from any profession, trade, employment or vocation carried on in New South Wales," (2) "derived from lands of the Crown held under lease or license issued by or on behalf of the Crown" and (3) "arising or accruing to any person wheresoever residing from any kind of property"

(with an immaterial exception)

"or from any other source whatsoever in New South Wales not included in the preceding sub-sections."

A company in a part derived its income from the extraction of ore from leasehold lands held from the Crown in that colony and from the conversion in that colony of the crude ore into a merchantable product. It was held that, notwithstanding that the finished products were sold exclusively outside the colony, this income was assessable. Their Lordships said that the real question seemed to be whether any part of the profits of the company were earned or produced in the colony. And, later in the judgment after pointing out that the word "derived" is

(1) [1919] 43 Mad. 75=37 M. L. J. 663=10 M. L. W. 570=53 I. C. 976=(1919) M. W. N. 826 (F.B.).

(2) A. I. R. 1925 Cal. 34=52 Cal. 1.

(3) [1900] A. C. 588=69 L. J. P.C. 87=83 L. T. 4.

synonymous with arising or accruing, they went on to observe that

"there are four processes in the earning or production of this income—(1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-S. (3), and the second or manufacturing process, if not within the meaning of "trade" in sub-S. 1 is certainly included in the words "any other source whatever in sub-S. (4)."

Their Lordships' view, therefore, was that it is the source of the income which has to be considered, and not the place where it is received.

This case was referred to *In re Aurangabad Mills, Ltd.* (4), a decision under S. 3 (1) of the Act of 1918. It was there held that the profits of a company which are made from manufacture carried on beyond British India cannot be said to accrue or arise in British India on account of head office being in Bombay, where also the directors control the business. Macleod, C. J., (at pages 1290 and 1291) after quoting the above cited passage from the judgment of their Lordships remarked that the doubt which might have arisen in *Commissioners of Taxation* v. *Kirk* (3) whether the profits were not derived at a place where the third and fourth processes were carried out, did not arise in the case before him because all the four processes were carried out in Hyderabad. This case was followed in *Board of Revenue* v. *Ripon Press*, (5). In *Commissioner of Income-tax, Burma* v. *Steel Bros. & Co. Ltd.* (6), it was held, applying the principles laid down in *Commissioners of Taxation* v. *Kirk* (3), that in determining whether any income, profits or gains arise or accrue

"we must not be content to look at the last stage of the accrual, but must take into consideration the previous stages as well."

The company was non-resident in British India, but at mills situate in Burma it worked up commodities and raw materials into forms suitable for use and shipped them to the United Kingdom where they were sold. It was held that the profits or gains accruing to the company in respect of this business must be deemed [within S. 42 (1) of the Act] to be income accruing or arising within British India.

Sunder Das v. *Emperor* (7) and *Ali Imam* v. *Emperor* (8) have been cited. These cases deal with the meaning of the expression "received in British India," which is not part of the reference in this case, and need not be discussed.

Reference has been made by the Government Advocate to S. 42 (1) and 18 (2A) Indian Income-tax Act, 1922. S. 42 (1) provides that in the case of a non-resident, all profits or gains accruing to him through or from any business connexion or property in British India is to be deemed to be income accruing or arising within British India. The effect of S. 18 (2A), which was inserted by Act 16 of 1925, is to render subject to income-tax any income chargeable under the head "salaries" which is payable to the assessee out of India by or on behalf of Government. These sections do not appear to be of assistance in the general construction of the words "accruing" and "arising" in S. 4 (1). They seem to be designed to bring within the ambit of the tax special classes of cases which would otherwise escape. I am unable to appreciate the argument to be found in the reference and which is based on the position of a salary earner. It is said that in his case the salary accrues and arises in the place where he does the work, which is in British India, and that it therefore accrues in British India and is taxable. But this argument overlooks the fact that the Commissioner has expressly held that the remuneration of the assessee is not "salary" and has classified it under "other sources."

If the correct principle be that the words accrue and arise when applied to income are to be governed by the source from which the income accrues and arises, it would appear that in the case referred that source is to be found in Bangkok rather than in Moulmein. The assessee is a Forest Officer in the service of the Siamese Government. It is not stated that his remuneration is in the nature of a commission on the amount of revenue collected. On the contrary it is said to be 600 ticals per mensem. The inference to be drawn is that he would get his

(4) 45 Bom. 1286 = A. I. R. 1921 Bom. 159.
(5) A. I. R. 1923 Mad. 574=46 Mad. 706 (F.B.)
(6) A. I. R. 1926 Rang. 97=3 Rang. 612 (F. B.).
(7) A. I. R. 1923 Lah. 14 = 3 Lah. 349.
(8) A. I. R. 1925 Pat. 281 = 4 Pat. 210.

remuneration *qua* Forest Officer, whether he worked in Moulmein collecting royalty, or whether he worked in Siam in that or any other capacity. From this point of view his remuneration accrues and arises in Bangkok where it is payable and is in fact paid. If on the other hand we are to have regard to the definition of the words, the only place where it would seem that there is a present and enforceable right on part of the assessee to demand the remuneration and where it comes into his hand, is also Bangkok.

In conclusion I may refer to the observation of Sir Shadi Lal, C. J., in *Sundardas* v. *Emperor* (7) after citing the rule of interpretation applying to fiscal enactments, that :

"it is a sound principle that the subject is not to be taxed without clear words to that effect ; and that in dubio, you are always to lean against the construction which imposes a burden on the subject."

The Government Advocate expressed the view that the legislature had advisedly refrained from defining the terms accuring and arising. In my view the meaning of the terms, as applied to the facts of case is as above stated and is perfectly plain. If, on the other hand, the meaning is ambiguous, the sound principle enunciated by Sir Shadi Lal is applicable and it ought to be applied.

I would answer the question referred by saying that the income the subject-matter of the reference cannot be said to "accrue or arise in British India" within the meaning of S. 4, Income-tax Act, 1922.

Pratt, Offg. C. J.—I have had the advantage of reading my brother Ormiston's judgment and I concur in his proposed answer to the reference.

We are asked to decide whether salary paid in Bangok by the Siamese Government to the credit of a Siamese Forest Officer, who collected at Moulmein royalties on timber extracted from Siamese forests and floated down to Moulmein, is income accuring or arising in British India within the meaning of S. 4, Income-tax Act.

The officer in question resides in Moulmein, presumably for the purposes of his work of collecting royalties. We are not asked to decide whether the income is "salary" within the meaning of S. 7 (1), of the Act, nor whether the portion of the pay remitted from Bangkok to Mr. Salarak in Moulmein can be said to be "received" within the meaning of S. 4 (1). It has been argued by the Government Advocate that for the purposes of present reference the words "accruing and arising" must be construed as equivalent to "earned".

None of the cases cited is an authority for this contention.

Had the legislature intended to include income earned in British India within the meaning of income "accruing or arising" there, it would have been perfectly simple to say so.

I do not consider that salary paid in Siam to a Siamese official for services rendered in Burma can under the circumstances be regarded as income arising or accruing in British India.

The respondent will be allowed the costs of the reference. Advocate's fee seven gold mohurs.

Cunliffe, J.—I also concur. The scope of this reference has been very much narrowed. The Commissioner has satisfied himself of the answer to the first proposition put forward by the respondent. In that regard the Commissioner holds the view that the respondent's income does not come under the head of "salary" within the meaning of S. 6 of the Act. Nor did the respondent (very wisely, I think) suggest to the Commissioner that he should ask the opinion of the Court as to whether the emolument which he (the respondent) is paid by the Siamese Government is received in British India. All we have to do here is to decide, as my brother Ormiston has pointed out, whether such emolument accrues or arises in British India. It has been held on several occasions that there is no difference between the two words "profits" or "gains" which are used in the section we are considering. I am inclined to think that there is no real difference in law between the words "accruing" and "arising." Some authorities have thought that the word "accrue" suggests a periodical right to money and the word "arise" suggests only a single right or possibly the beginning of a perodical right. But these views seem to me to be refinements and over-refinements of the language of the statute. To my mind, the double expression "accruing and arising" connotes the source from which the right to obtain money springs. Undoubtedly the source here was in the Kingdom of Siam, remu-

neration from the Siamese Government to one of the officers of their forest service. In my view, too, the expression "accruing or arising" is used in contradistinction to the word "received," but as I have pointed out, we are not considering the question of where the money was actually received or to what place it was remitted after its receipt which may be the same thing in law as "received." It was very strongly urged upon us that the real meaning of "accruing" and "arising" as applied to the income of the respondent was to be found in the place where the income was earned; but, for the reason mentioned above, I do not agree with that view.

R.K. *Reference answered.*

A. I. R. 1929 Rangoon 5

DAS AND BAGULEY, JJ.

N. N. Chettyar—Appellants.

v.

Tan Ma Pu and *others*—Respondents.

First Appeals Nos. 199 and 206 of 1926, Decided on 2nd September 1927, from judgment of Dist. Judge, Bassein, in Civil Suit No. 3 of 1925.

(a) Probate and Administration Act, S. 90—Letters of Administration issued under Probate and Administration Act where they should have been issued under Succession Act — Administrator mortgaging property without Court's permission—Letters must be taken to give the powers that they appear to give upon their face until revoked or altered— Mortgage would not bind heirs—Succession Act (1865), S. 259.

Letters of Administration were issued under the Probate and Administration Act. But had the application for the letters properly described the deceased, it would have been necessary to issue the letters under the Succession Act. The Administrator mortgaged the property of the deceased without permission of the Court.

Held: that the Letters of Administration issued under the Probate and Admnistration Act must be regarded as being under that Act and giving only the powers that they could give under the Act unless and until the powers under them were extended by the Letters being altered to Letters under the Succession Act. The mortgage, therefore, being without authority would not bind the heirs: 35 *Cal.* 955, *Rel. on.*: *A. I. R.* 1922 *P. C.* 197, *Dist.* [P 6 C 1, 2]

(b) Probate and Administration Act, S. 90 (3) (a)—Permission to sell property does not ipso facto mean permission to mortgage.

Where Court gives permission to the Administrator to sell property, that permission to sell does not ipso facto give permission to mortgage: 9 *Bur. L. T.* 236, *Foll.* [P 6 C 2]

(c) Debtor and Creditor—Person authorized to deal with property by Letters of Administration and also by powers-of-attorney from heirs—He mortgaging property — Creditor need not enquire into application of money borrowed.

A person had authority to deal with certain property by Letters of Administration and powers-of-attorney from the heirs. He mortgaged the property but the creditor did not enquire with regard to the disposal of the money borrowed.

Held: that there was no need for the creditor to make enquiries with regard to the disposal of money. A man with such authority may be dealt with safely, provided he keeps within limits of the authority. If every man who does business with an attorney had to go beyond the four corners of the power-of-attorney and had to enquire into the destination of the money which he lent and so on, ordinary business would be impossible. The special rules applying to the karta of a joint Hindu family do not apply to people acting under powers-of-attorney. [P 7 C 2]

N. N. Burjorjee—for Appellants.

Zeya—for Respondents.

Baguley, J.—These two appeals arise out of a suit brought by the N. N. Chettyar Firm against six defendants on a series of mortgages. The lower Court gave the plaintiffs a decree for the full amount claimed against defendants, 1, 2 and 5 but against 2, 3 and 6 only gave a decree for the amount admitted.

The claim was on a series of transactions. The property mortgaged was the property of one Ma Twe, who died in 1912. She left some sons and daughters. Tan Po Shwe, the eldest of them, applied for Letters of Administration to her estate in the late Chief Court of Lower Burma in 1917. It was then stated that she left eight children, six of whom are the defendants in the present case; one has died and one has apparently disappeared from the proceedings altogether. Letters of Administration were issued to Tan Po Shwe and he proceeded to deal with the estate. He applied to the Court for permission to sell the immovable property and permission was granted. The estate of the deceased was admittedly encumbered and to pay off the debts due he mortgaged the property now in question for Rs. 40,000 by registered mortgage bond. The liability on this mortgage bond is admitted by all the defendants, but a considerable part of this debt has been paid back. Afterwards a second mortgage over the same property for Rs. 15,000 was executed. The title-deeds of the property had been deposited with the plaintiff firm and afterwards defen-

dant 1 gave a letter of authority to the plaintiffs authorizing them to lend further sums of money on promissory notes to Tan Babu and his clerk, Tan Kya Lu, and it was agreed that the sums so advanced should constitute a further lien on the properties already mortgaged. In this way considerable sums of money were advanced and the plaint shows that the total debt outstanding at the time of filing of the suit was Rs. 1,07,340-6-0.

Various defences are raised, and I will deal with them in order.

In the first place it is argued that, as the Letters of Administration were issued to Tan Po Shwe under the Probate and Administration Act and he never got permission from the Court to mortgage the immovable property of the deceased, these mortgages are bad, except, of course, so far as they are admitted. In reply to this, it is urged that the deceased, Ma Twe, although described in the application for Letters of Administration as a Chinese Buddhist, was, in fact, a Karan Christian, and how she came to be described as a Chinese Buddhist is not explained. It would seem that her husband was a Chinaman, but his religion is doubtful. Be that as it may, however, there can be no doubt that, had Ma Twe been correctly described in the application for Letters of Administration, the Letters would have issued under the Succession Act, and, in that case, the mortgage by the administrator would have been good. It is argued that, as the Letters should have been issued under the Succession Act, the administrator had the powers to mortgage that he would have had, had they been correctly issued. The argument in my opinion, fails. The letters must be taken to give the powers that they appear to give upon their face until they are revoked or altered.

No case directly in point has been quoted, but for the converse there is authority: vide *Debendra Nath Dutt* v. *Administrator General of Bengal* (1). In that case Letters of Administration which were issued owing to the fraud of the applicant and which, therefore, might be considered as bad from the start were nevertheless held to be good until and unless they were revoked. In the same way I hold that Letters issued under the Probate and Administration Act must be regarded as being under that Act and giving only the powers that they could give under that Act until and unless the powers under them are extended by the Letters being altered to Letters under the Succession Act. The case of *Ma Yait* v. *Maung Chit Maung* (2), was quoted as being authority for beginning the administration under the Probate and Administration Act and completing it under the Succession Act. But in that case, no question of the powers of the administrator was gone into. Originally, Letters of Administration were taken out under the Probate and Administration Act, but the Privy Council decided that, as the deceased was a person whose estate had to devolve according to the rules laid down in the Succession Act, the administrator would have to divide the property among the heirs in accordance with the rules of the Succession Act.

It is true that the administrator got permission to sell, but permission to sell does not ipso facto give permission to mortgage: vide *Ram Dhon Dhor* v. *Sharf-ud-din* (3).

Under the Letters of Administration issued, then, I must hold that Tan Po Shwe had not got power to bind the interests of the heirs. The case, however, cannot be disposed of so easily. Various heirs had given Tan Po Shwe direct authority to act on their behalf under powers-of-attorney. Ex. M is a power of attorney given by Tan Lon Dan, defendant 5 to Tan Po Shwe. This authorizes him to do various things in the way of administering the estate and carrying on the family business of Maung Gwan. The power, however, contains a paragraph:

"It is hereby expressly provided that nothing herein contained will authorize the agent to contract debts etc."

It is impossible to say that under this power Tan Lon Dan authorized Tan Po Shwe to mortgage his interest in the family property.

Ex. N is a power-of-attorney given by Tan Ma Pu, Tan Pu Su and Tan Babu to Tan Po Shwe. This also authorizes Tan Po Shwe to deal with the administration of the estate; but being differently worded it does directly give him authority to deal with the estate

"to pay off all debts and encumbrances due to the said estate, by selling mortgaging or in any

(1) [1908] 35 Cal. 955=35 I. A. 109=12 C. W. N. 802=8 C. L. J. 94 (P. C.).

(2) A. I. R. 1922 P. C. 197=49 Cal. 310=48 I. A. 553 (P.C.).

(3) [1916] 9 Bur. L. T. 236=34 I. C. 128.

other way alienating any part of the estate, if necessary etc."

After this power-of-attorney had been given by these three defendants it is impossible for them to say that Tan Po Shwe had not got their direct authority to mortgage and encumber the estate property.

The remaining defendant Tan Kyauk Ho has apparently given no power-of-attorney to Tan Po Shwe. His position then would apparently be that Tan Po Shwe could not bind his interest. It seems, however, that he had no interest to bind at all.

The point was overlooked in the lower Court it would seem, but the record contains a statement repeated more than once by Tan Po Shwe that Tan Kyauk Ho was not the son of Ma Twe. He was the son of Ma Twe's husband by a Chinese wife and Tan Kyauk Ho himself never went to the witness-box to deny this, and the statement is completely unrebutted. I will refer to this later on in the judgment.

Another defence raised on behalf of Ma Pu and Ma Pu Su was that they were insane generally and that their interests could not be bound. I have been through the oral evidence on this point, and the conclusion I have come to is that they are persons liable at times to fits of insanity. The evidence of Dr. San C. Po is really to the effect. He says that Ma Pu Su had attacks of epilepsy which have rendered her unsound and that Ma Pu has been treated out off for years for melancholia, general infirmity of the mind. In cross-examination, it appears that their normal condition is one of sanity. It is only at times that they are of unsound mind, and as they gave Tan Po Shwe authority to apply for Letters of Administration on their behalf and also gave him a power-of-attorney, authorizing him to deal with their interests they must prove to invalidate these acts that at the time they did them they were in one of their insane fits. Of this there is no evidence. The medical evidence is that Ma Pu Su is liable to become uncontrollable under any excitement or even at the sight of new faces. But the proceedings in the late Chief Court of Lower Burma, when Letters of Administration were applied for show that she was able to come to Rangoon, and sign a paper agreeing to the issue of Letters of Administration to Tan Po Shwe in the presence of her Rangoon lawyer. This story suggests that her agoraphobia was not of a very pronounced type. This defence of insanity must, I think, be held of no avail.

Then it is argued that it has not been proved that this money was applied for the benefit of this estate, or for the benefit of the family business. In my opinion, there was no need for the creditor to make enquiries with regard to the disposal of money. He was dealing with a man whose authority to deal with the property lay in his possession by Letters of Administration and powers-of-attorney from the heirs, with whom we are now concerned. A man with this authority may be dealt with safely, provided he keeps within the limits of his authority and to the extent of his authority. If every man who did business with an attorney had to go beyond the four corners of the power-of-attorney and had to enquire into the destination of the money which he lent and so on, ordinary business would be impossible. I can see where the argument comes from. It comes from the various cases of persons who deal with the karta of a joint Hindu family; but the special rules applying to a karta of a Hindu joint family do not apply to people acting under powers-of-attorney.

It was argued that the agreement Ex.O forbids Tan Po Shwe to encumber the estate or incur any loan as administrator. This is quite true, and it is also a fact that the date of this agreement is subsequent to the date of the power-of-attorney Ex.N. As against third parties, however, none of the defendants can claim this to be a revocation of the power-of-attorney Ex. M. It may be good as between the defendants themselves, but with that we are not concerned. If by means of Ex.O any of the remaining defendants wished to alter the terms of Ex. N it was their duty to withdraw Ex. N in order that Tan Po Shwe should not hold it out as an authority in his favour as against third parties.

One further point must be touched on and that is that Lon Dar, defendant 5, the only one of the defendants who took the precaution of expressly forbidding Tan Po Shwe to encumber the estate, admits his liability not only for the money due on original Rs. 40,000 mortgage bond Ex. A but he also admits liability for a further Rs. 6,000 which he received out of the money borrowed from the plaintiff's firm.

As a result, therefore, I would hold that Tan Po Shwe, defendant 1 is responsible personally and as an heir for the whole of the money due. Tan Babu, Tan Ma Pu, and Tan Pu Su are responsible to the full extent of their interests in the estate, and also personally because they authorized Tan Po Shwe to borrow this money. Tan Lon Dan cannot be held responsible for anything more than he admits liability for, because Tan Po Shwe's power to mortgage comes not from the Letters of Administration given to him. Tan Lon Dan admits liability for the remainder of the debt due on Ex. A and for the further sum of Rs. 6,000. It does not seem to be stated which sum of Rs.15,000 provided this Rs. 6,000 for Tan Lon Dan. I must, therefore, say that he is liable for Rs. 6,000 with interest from 17th August 1919.

As regards Kyauk Ho as he is not an heir, I do not see how it is possible to charge him with any liability under any of the mortgages. None of the mortgaged properties belongs to him and he has given Tan Po Shwe no authority to borrow on his behalf.

Turning now to the two appeals that have been filed: with regard to appeal No. 199/26 this in the main is successful, for I am of opinion that Tan Ma Pu and Tan Pu Su are both liable for the money borrowed.

As regards Tan Kyauk Ho, I think the appeal must be said to have failed, because I can place no liability on him, but he will not get any benefit out of this, for I hold that he has no interest in the estate.

As regards appeal No. 206/26, in this appeal the first three appellants are quite unsuccessful. Appellant 4 Tan Lon Dan is successful to a certain extent, for I hold that he is only responsible on Ex. A and for the further sum of Rs.6,000 which he received.

In this appeal Kyauk Ho must be regarded as unsuccessful, I think. As a result the decree of the lower Court will be varied. The plaintiff will get a decree for the full amount claimed against the interest of the first four defendants. He will get a decree against Tan Lon Dan and his interest in the property to the extent of the amount due on Ex. A together with Rs. 6,000 with interest out of the promissory note dated 17th August 1919, which will be a charge on Tan Lon Dan's interests. The interests of these five defendants will be declared as 1/5 each, so that the plaintiff will be entitled to sell the whole interest in the mortgaged property.

As regards Kyauk Ho the claim will be dismissed without costs. The plaintiff-appellant in appeal No. 199/26 will get his costs of the appeal against Tan Ma Pu and Tan Pu Su and in Appeal No. 266/26, the plaintiff-respondent will get one-half of his costs against first three defendant-appellants.

Das, J.—I concur.

S.N./R.K. *Decree varied.*

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* A. I. R. 1929 Rangoon 8

PRATT, OFFG. C. J., AND CUNLIFFE, J.

A. K. A. C. T. V. V. Chettyar—Applicant.

v.

Commissioner of Income-Tax — Opposite Party.

Civil Misc. Appln. No. 26 of 1928, Decided on 16th July 1928.

*** Income-tax Act, S. 30, proviso—Meaning explained—Assessment under S. 23 (4) followed by refusal to make fresh assessment under S. 27 does not come under proviso.**

Assessment under S. 23 (4) and a dismissal of an application under S. 27 for a fresh assessment, is not an assessment made under S.23 (4) read with S. 27 which would preclude an appeal being filed from it under the proviso to S. 30. What the proviso means is that there shall be no appeal against (i) an assessment made under S. 23 (4) and (ii) when the assessment under S. 23 (4) is cancelled and a fresh assessment under S. 27 is made. [P 9 C 2]

Clark and *Venkatram*—for Applicant.

A. Eggar—for the Crown.

Judgment.—This is an application for a mandamus to compel the Commissioner of Income-tax to state a case under S. 66, Income-tax Act. The facts are set forth at length in the application. The A. K. A. Firm of Rangoon, which consisted of two partners the applicant A. K. A. C. T. V. V. Chettyar and A. K. A. C. T. A. L. Alagappa Chettiar, discontinued business in August 1925, the assets were divided between the two partners, who have been since carrying on business as separate joint family firms under the styles of A. K. A. C. T. V. and A. K. C. T. A. L. respectively.

For the financial year 1925-26 notice was served on the then agent of the A. K. A. Firm on 8th April 1925 to make a return for income-tax purposes.

Applicant eventually made a return and claimed the benefit of S. 25 (3), Income-tax Act as the firm had been dissolved. Applicant objected to producing the books of the firm, and to the proposed method of assessment. Ultimately the Income-tax Officer peremptorily settled 31st March 1926, for the production of accounts. The accounts were not produced and the officer made an assessment ex parte against each member of the A. K. A. Firm. Applicant appealed to the Assistant Commissioner who dismissed his appeal, and left him to apply for a fresh assessment under S. 27. An application was made under S. 27 but was refused. An appeal to Commissioner of Income-tax was unsuccessful. The Commissioner was asked but declined to make a reference to this Court, hence the present application under S. 66 (3) for an order to state a case on specified points of law.

A preliminary objection has been taken by the Government Advocate that the application is incomptent since no appeal lies to the Assistant Commissioner from the order refusing to make a fresh assessment under S. 27. It is contended that the proviso to S. 30 that no appeal shall lie in respect of an assessment made under sub-S. (4), S. 23, or under that sub-section read with S. 27 precludes such an appeal, since it must be taken that, the Officer having dismissed the application for a fresh assessment under S. 27, there remains an assessment under sub-S. (4), S. 23, read with S. 27.

The contention is clearly not maintainable. There was an application for a fresh assessment under S. 27, which was refused. The assessment under S. 23 (4) was not cancelled. There was not therefore an assessment under S. 23 (4) read with S. 27 as argued. A refusal to make an assessment is not an assessment. S. 30 definitely provides for an appeal against a refusal of an Income-tax Officer to make a fresh assessment under S. 27. What the proviso clearly means is (1) that there shall be no appeal against an assessment made under S. 23 (4) and (2) that when an assessment under S. 23 (4) has been cancelled under S. 27 and a fresh assessment made there shall also be no appeal: that is to say that if the assessee succeeds in his effort to obtain a fresh assessment under S. 27 he shall be debarred from appealing against that fresh assessment. The assessee in not precluded by the proviso from preferring the appeal against the refusal to make a fresh assessment under S. 27, which is allowed in the body of S. 30.

In his order rejecting the two applications for a reference to this Court under S. 66 (2) on a number of questions the Commissioner of Income-tax took the view that the only questions for decision were of pure fact: viz: whether applicants had a reasonable opportunity of complying with the Income-tax Officer's notice and whether there was an adequate reason for non-production of accounts. There was therefore no question of law to refer. We consider that the only question for determination was whether applicant had sufficient cause for non-compliance with Income-tax Officer's notices. He obviously had not, and we see no reason to think the findings of fact wrong. Applicant and his quondam partner were obviously placing every obstacle in the way of a just assessment and they have only themselves to thank, if the result of their efforts is that they have been assessed in a way and under a section, which they do not like. We do not feel called upon to require the Commissioner to state a case upon any of the points raised before us. The application is dismissed with costs. Advocate's fee five gold mohurs.

M.N./R.K. *Application dismissed.*

* A. I. R. 1929 Rangoon 9

CARR, J.

Ma Nyun—Appellant.

v.

Maung San Mya and *another*—Respondents.

Special Second Appeal No. 52 of 1928, Decided on 18th June 1928, from judgment of Dist. Judge, Tharrawaddy, in Civil Appeal No. 102 of 1927.

* **Stamp Act, S. 36 — Insufficiently stamped promissory note admitted by trial Court—Admissibility of the document cannot be questioned in appeal.**

The trial Court purporting to act under S. 35 but overlooking its proviso (a) admitted an insufficiently stamped promissory note in evidence after recovering penalty.

Held: that the terms of S. 36 are exceedingly wide and they undoubtedly refer to any document which has, in fact, been admitted in evidence, and are sufficient to cover the case of a promissory note or any other document to which proviso (a) to S. 35 is not applicable. So under S. 36 the appellate Court cannot question the admissibility of the docu-

ment. 2 *L. B. R.* 103, *Held wrongly decided*: 14 *Bom.* 102 and 18 *Bom.* 369, *Dist.*: 2 *U. B. R. Stamp* 36 ; 13 *Bom.* 449 (*F.B.*); 3 *Cal.* 787; and 12 *Cal.* 64; *Foll.* [P 10 C 2]

Paw Tun—for Appellant.

Kin U—for Respondents.

Judgment—This was a suit on a promissory-note. Both the Courts below have agreed that the plaintiff proved the execution of the note. The Township Court on that finding gave a decree for the plaintiff, but, on appeal, the District Court reversed that decision on the ground that the promissory-note sued upon was insufficiently stamped. The facts as regards the promissory-note were that it was for Rs. 600 and stamped with one one-anna stamp only. As it should have been stamped with two-annas the Township Judge impounded it and levied the deficient duty of one-anna and a penalty of Rs. 5 purporting to act under S. 35, Stamp Act. He was wrong in his action, having overlooked the fact that proviso (a) to S. 35 does not apply to a promissory-note. However, he did levy the duty and penalty and he did admit the promissory-note in evidence. The District Judge was right in his finding that the note could not properly have been admitted in evidence. He held on the authority of *Maung Ba Kywan* v. *Ma Kyi Kyee* (1) that S. 36 did not apply in this case and, therefore, on his finding that the note was inadmissible he set aside the decree and dismissed the plaintiff's suit.

In the case relied upon by the District Judge, Fox. J. held, that S. 36 Stamp Act, was not applicable to a promissory-note. He said that the Township Court by admitting and acting on the document had acted illegally and that that illegality could be corrected by an appellate Court. He remarked that the cases of *S. A. Ralli* v. *Caramali Fazal* (2) and *Chenbasappa* v. *Lakshman Ramchandra* (3) supported his view. That appears to be the latest reported Lower Burma dicision on this point. There is, however, an Upper Burma case, *Mi Ke* v. *Nga Kan Gyi* (4) in which the Judicial Commissioner, now Sir George Shaw, expressly dissented from Fox, J's. ruling. He said in his judgment that the Bombay cases relied upon in the Lower Burma decision did not deal with the point for determination. I have myself referred to those cases and I entirely agree with his view.

The terms of S. 36, Stamp Act, are exceedingly wide and in their plain ordinary meaning they undoubtedly refer to any document which has, in fact, been admitted in evidence, and are sufficient to cover the case of a promissory-note or of any other document to which proviso (a) to S. 35 is not applicable. There are a number of other cases in which the view taken by Sir George Shaw has been taken. These refer to earlier Stamp Acts but there is no material difference between the relevant provisions of those Acts and those of the Act now in force. In *Devachand* v. *Hirachand Kamaraj* (5), the document in question was a promissory-note but the Judge of the trial Court held that it was a bond and admitted it in evidence on payment of duty and penalty. Later, before the suit had been decided, his successor formed the opinion that the document was a promissory-note and that its admission in evidence was illegal. On that ground, therefore, he dismissed the suit. A Full Bench of three Judges of the Bombay High Court held that the promissory-note having once been admitted in evidence could not afterwards be rejected on the ground that it was not duly stamped. In *Khoob Lall* v. *Jungle Singh* (6), the trial Court held that the document before it was not a promissory-note but a letter of agreement and admitted it in evidence on payment of penalty. Before the High Court it was argued that the document was, in fact, a promissory-note and that it being a promissory-note S. 39 of Act 18 of 1869* was not applicable. The Calcutta High Court held that the admissibility of the document could not be questioned in appeal.

In *Panchanand Dass* v. *Taramoni Chowdrain* (7) the document in question was held by the trial Court to be a bond and it was admitted on payment of duty and penalty. The first appellate Court held that the document was a promissory-note and was not admissible in evidence and therefore reversed the decision.

(1) [1903] 2 L. B. R. 103.
(2) [1890] 14 Bom. 102.
(3) [1894] 18 Bom. 369.
(4) [1907-09] 2 U. B. R. Stamp 36.

* [Stamp Duties Act repealed by Stamp Act 1 of 1879 which in its turn has been repealed by the present Stamp Act 2 of 1899—Ed.]
(5) [1889] 13 Bom. 449 (F.B.).
(6) [1878] 3 Cal. 787=2 C. L. R. 439.
(7) [1886] 12 Cal. 64.

It was held by the High Court that the Subordinate Judge sitting in appeal had no authority to review the question of the admission of the document. It held that the Stamp Act, 1 of 1879, governed the cases and that under proviso of S. 34 of that Act, which was essentially identical with S. 36 of the present Act, the admission of the document could not be questioned in appeal. All these cases are directly relevant to the question now before me and they all support what in my view is the plain meaning of S. 36. In my opinion, therefore, the decision of Fox, J. in *Maung Ba Kywan* v. *Ma Kyi Kyee* (1) was wrong. I therefore allow this appeal, set aside the judgment and decree of the District Court and restore those of the Township Court. The respondents will pay appellant's costs in all Courts.

M.N./R.K. *Appeal allowed.*

* A. I. R. 1929 Rangoon 11(1)

MAUNG BA, J.

Ma Kalay Ma and *another* — Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 686-A of 1928, Decided on 28th June 1928, from order of Township Magistrate, Pyinmana, in Criminal Regular Trial No. 124 of 1928.

*** Railways Act, S. 113—Application under Sub-S.4 is not a criminal prosecution—Court has no power to fine or to order imprisonment in default.**

An application under S. 113 (4) is not a prosecution for criminal offence and on such application the Magistrate has no power to fine the defaulter or to order a sentence of imprisonment in default of such fine. The Magistrate can only direct him to pay the fare and the excess charge under sub-S. (3) and then proceed to recover it as if it were a fine. [P 11 C 1, 2]

Judgment.—The Magistrate was quite correct in considering that S. 112, Railways Act, did not apply to this case and that action could only be taken under sub-S. (2), S. 113, but his procedure under this latter section was entirely misconceived. An application under sub- S. (4), S. 113, Railways Act, is not a prosecution for a criminal offence. It should be registered as a Criminal Miscellaneous Case and not as a Regular Trial. The Magistrate, on an application under this section, has no power to fine the respondent or to order a sentence of imprisonment in default of such fine. All that the Magistrate can do is to direct the respondent to pay the fare and excess charge, referred to in sub-S. (3), S. 113, and then proceed to recover it as if it were a fine. In fact, the Magistrate is compelled to do this and has no authority to enter into the merits of the matter. The Magistrate should study the provisions of S. 113 and S. 132, Railways Act, and also General Letter No. 17 of 1926 of this Court, which sets out the circumstances under which a person proceeded against under S. 113 may be detained in custody.

Consequently in the present case the fines of Rs. 7 each, imposed on the two respondents, and the sentence of ten days' imprisonment passed in default of payment were entirely illegal. All that the Magistrate could do was to order each of the respondents to pay the deficit railway fare of six annas and six pies, plus an excess charge of the same amount. Consequently the amount of deficit fare plus excess charge to be recovered from each respondent was 13 annas. This amount should now be deducted from the amounts of fares and fines deposited by the respondents and the balance should be refunded to them. The amounts so recovered under sub-S. (4), S. 113, must be paid to the railway administration. It is noticed that in regard to the deficit fares of 13 annas already recovered this has not been done.

M.N./R.K. *Order set aside.*

* A. I. R. 1929 Rangoon 11 (2)

BAGULEY, J.

Basudev—Appellant.

v.

Bideshi and *another*—Respondent.

Second Appeal No. 733 of 1927, Decided on 25th June 1928, from judgment of Dist. Judge, Insein, in Civil Appeal No.41 of 1927.

*** Civil P. C., O. 41, R. 17—Rule empowers Court to adjourn a case—For default, appellate Court should not pass order without hearing appellant's advocate.**

Order 41, R. 17, is intended to give the Court power to adjourn a case, if it thinks fit. It seems distinctly unfair that for default, the appellate Court may pass an order without hearing the appellant's advocate or without hearing the appellant, which would entirely preclude him from even afterwards questioning the finding of fact: *A. I. R.* 1923 *Mad.* 13, *Foll.* [P 12 C 2]

N. K. Bhattacharya—for Appellant.

P. B. Sen—for Respondents.

Judgment.—This is an appeal against a decree of the District Court of Insein confirming a decree passed by the Township Court of Insein. The history of the appeal in the lower lower Court is rather peculiar. It was filed on 13th June and admitted the next day after hearing the appellant's advocate. It was adjourned twice and then on 29th July, when advocates for both sides were present, the learned Additional District Judge came to the conclusion that another witness ought to be examined. He cited that witness and examined him. It was then found that some documents were missing and they were sent for. Finally, on 2nd September 1927, the case came up for hearing. The documents apparently had still not been received. The appellant's advocate asked for an adjournment as he was engaged elsewhere. The learned Judge refused the adjournment, but gave him an hour and a half in which to deal with his other work. The hour and a half expired and another half hour and as the appellant's advocate still had not come, the learned Judge stated in the diary that he would pass orders without the help of the advocate. Whether the advocate for the respondent still remained present is not clear from the diary order, but when the matter was argued before me by the same advocates who appeared in the lower appellate Court, no stress was laid on the fact, if it were a fact, that the respondent's advocate was still present. The order of the lower appellate Court when passed dismissed the appeal on the merits and, therefore, the appellant will be debarred from questioning any finding of fact in second appeal.

The question before this Court is whether the lower appellate Court had power to pass an order on the merits without having heard the appellant's advocate in full. There appears to be a case similar to the present one in the Madras ruling: *Muhammad* v. *Manavikrama* (1). In this case, what happened before the lower appellate Court was that there was no appearance on behalf of the appellant and the lower appellate Court passed an order dismissing the appeal on the merits. Both Judges on the appellate Bench passed separate orders in which they came to the conclusion that an order dealing with the merits in the absence of the appellant's advocate was an illegal order. Under the previous Code, there is ample authority for holding that an appeal dismissed under these circumstances must be one dismissed for default, but the wording of O. 41, R. 17 is not quite the same as the wording of old S. 556. The present order runs:

> "Where, on the date fixed . . , . the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed,"

The old section ran: "the appeal shall be dismissed for default." The point for consideration is whether the present wording of the section makes it possible for a Judge to dismiss an appeal on its merits. In the *Madras* case quoted, the Bench were of opinion that consideration of the merits could not be gone into when O. 41, R. 17 applied. There seems to be an absence of authority on the point, this being the only officially reported case. There are two unofficially reported decisions of the Patna High Court, each by a single Judge, but as these two decisions are directly at variance to one another, it is impossible to gain much idea from them.

My own view is that O. 41, R. 17 is intended to give the Court power to adjourn a case if it thinks fit. It seems distinctly unfair that for default the appellate Court may pass an order without hearing the appellant's advocate or without hearing the appellant, which will entirely preclude him from ever afterwards questioning the findings of fact. This being the case and following the Madras ruling, I set aside the order of the learned Additional District Judge as ultra vires and I direct him to restore the appeal to the file and dispose of it according to law. As this trouble has arisen through the default of the appellant, I direct that he do pay the costs of respondent in this Court whatever may be the outcome of the appeal and he will also pay the costs of the respondent already awarded to him in the Court of the Additional District Judge. When the District Court comes to a fresh finding after hearing both sides, it will pass an order for costs independent of its first order.

S.L./R.K. *Order set aside.*

(1) A. I. R. 1923 Mad. 13=45 Mad. 882.

*** A. I. R. 1929 Rangoon 12**

CHARI, J.

Afazuddin—Appellant.

v.

Howell and *others*—Respondents.

Second Appeal No. 47 of 1925, Decided on 23rd June 1928.

*** Civil P C., O. 21, R. 84—Auction-purchaser whose bid is accepted by fall of hammer, can withdraw offer before acceptance by Court without liability of paying deficit on resale.**

An execution sale is not complete until the presiding officer of the Court accepts the bid and declares the bidder to be the purchaser, The highest bid when the hammer falls is merely a conditional bid, which it is open to the Court to accept or not and it must, therefore, equally be open to the purchaser to withdraw his offer before it is accepted by the Court. If he fails to pay the 25 per cent. before Court's acceptance, though after the fall of hammer, he is not liable for difference if the property is resold. *A. I. R.* 1923 *Cal.* 316; *A. I. R.* 1925 *Mad.* 318; and *A. I. R.* 1923 *Pat.* 525; *Foll.* [P 13, C 1, 2]

Tun Aung Gyaw—for Appellant.

Jeejeebhoy—for Respondents.

Judgment.—This case comes before me for disposal on a point raised in my judgment some time ago. As the point was one which was raised by me after the argument had closed, I posted the case for further argument which was heard only to-day on account of some of the parties being dead and their legal representatives having to be brought on the record.

The point now for consideration is whether a person who has not been declared a purchaser of immovable property in a Court auction sale, but whose bid had been accepted by the fall of the hammer and who fails to deposit the 25 per cent. of the amount of his purchase money, can be made liable for the difference in price when the property is sold immediately after.

I have already dealt with the facts of the case in my previous judgment and I have drawn attention to the fact that even the bailiff is not quite sure whether the person withdrew his offer before or after the fall of the hammer. I thought at first it was necessary to remand the case for a finding whether the defaulting bidder had actually been declared to be the purchaser, but it is unnecessary in view of the evidence of the bailiff. In the case to which I refer in my judgment, *Jaibahadur Jha* v. *Matukdhari Jha* (1) it was held that an execution sale is not complete until the presiding officer of the Court has accepted the bid and declared the bidder to be the purchaser under O. 21, R 84. That rule clearly states that the bidder shall pay the 25 per cent. deposit only after such declaration. In the Patna case, it is stated that the presiding officer of the Court to whom an order declaring that a person has purchased the property is submitted for signature should enquire before signing the bid from the persons present in Court whether there is any advance on the highest bid given by the officer who conducted the sale. This shows beyond all doubt that the highest bid at the time when the hammer fell was merely a conditional bid, which it was open to the Court to accept or not. If it is open to the Court to accept the bid or reject it, it must equally be open to the purchaser to withdraw his offer before it is accepted by the Court.

The learned advocate for the respondent wants to draw a distinction between the contract of an ordinary person and a bid at an auction sale. I fail to see any distinction whatever and if a bid can be kept hanging by the Court, it can equally be withdrawn by the bidder. Two cases reported in unauthorized reports, *Fazil Meah* v. *Prosanna Kumar Roy* (2) and *Ratnasami Pillai* v. *Sabapathy Pillai* (3) deal with the same point. In the first case, the Calcutta High Court held that an execution sale is not concluded when property is knocked down to a bidder, even though he had made the necessary deposit of 25 per cent. and the bid had been accepted by the Nazir. In the *Madras* case, where the person conducting the sale was a receiver and not a bailiff, the High Court held that it is the acceptance by the Court that constitutes the contract and that therefore the person who asserts that the Court officer had power to bind the Court by acceptance must prove it. Under the rules of the Civil Courts Manual, the bailiff is undoubtedly the officer of the Court who is authorized to conduct the sale, but this does not imply any power to accept an offer on behalf of the Court or to make a declaration that a bidder has become a purchaser.

I hold, therefore, that it is open to a bidder to withdraw his offer, since his bid is nothing more than an offer, until that offer has been finally accepted by the Court and declaration made that he is the purchaser. His liability to make a deposit of 25 per cent. of the purchase-money only arises after such a declaration is

(1) A. I. R. 1923 Pat. 525 = 2 Pat. 548.

(2) A. I. R. 1923 Cal. 316.

(3) A. I. R. 1925 Mad. 318.

made. As he has withdrawn the offer before the declaration, he cannot be held liable for any deficiency of price on a re-sale. I therefore allow the appeal and set aside the order of the lower Court directing the appellant to pay the deficiency. As the appellant's nephew bought the property, he ought to be satisfied with the property and there will therefore be no order for the costs of the appeal.

S.L./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 14 (1)

BAGULEY, J.

S. Ganguli—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 544-B of 1927, Decided on 21st November 1927, from order of Eastern Sub-Divl. Mag. Rangoon, D/- 23rd August 1927, in Criminal Summary Trial No. 404 of 1927.

(a) Motor Vehicles Act, S. 5—Road sufficient for four cars to pass abreast—Two cars going in one direction at 15 miles an hour—Another car coming from opposite direction —Person driving baby car at 25 miles per hour passing the two cars—He is not guilty of rash or negligent driving.

Two cars were going under 15 miles per hour along the road from South to North, and while another car came in the opposite direction from North to South, *G's* baby car passed the two cars going towards the North. *G* was going about 25 miles per hour. The road was at the place 40 to 50 feet wide as would give ample room for 4 cars to pass abreast with any amount of room to spare. There was no traffic of any kind on the road at the time except the 4 cars. *G* was not shown to be over the wrong side of the road.

Held, that there would be ample room for a very small car like that of *G* to pass without trenching on the right hand side of the road. Even if he did go slightly over the middle line the car coming in the opposite direction had 20 feet in which to swing to its left. *G's* driving could not therefore be assumed to be reckless or negligent; an estimate speed of 25 miles per hour could not be regarded as anything out of the ordinary, on that road. [P 14, C 2]

(b) Criminal P. C., S. 250—Compensation.

Where a case is not wilfully false nor is there perversion or exaggeration of evidence, compensation should not be awarded. [P 14, C 2]

M. A. Rauf—for Applicant.

Order.—All that has been proved in this case is that there were 2 cars going along the road from South to North, and while another car came in the opposite direction from North to South, the applicant passed the two cars going towards the North. The two cars going North, were going at something under 20 miles per hour, the applicant was going about 25 miles per hour, although his car being a Baby Peugeot, it may have seemed to be uninitiated as going faster. The road is wide at the place, 40 to 50 feet, according to P. W. 2, and that would give ample room for 4 cars to pass abreast with any amount of room to spare. There was no traffic of any kind on the road at the time except the 4 cars, in question. Whether the applicant was over the wrong side of the road, is not shown. Cars going at 15 miles per hour are slow traffic for cars, and they should be well over to their left if they were being driven properly, and there would be ample room for a very small car like that of the applicant to pass without trenching on the right hand side of the road. Even if he did go slightly over the middle line, the car coming in the opposite direction had 20 ft. in which to swing to its left, and it might be expected to do so; among decent drivers there must always be certain amount of give and take. On these facts that have been proved I entirely fail to see where reckless or negligent, driving can be assumed. I am unable to feign ignorance of the usual conditions of one of the best known roads in Rangoon, and on that road an estimate speed of 25 miles per hour cannot be regarded as anything out of the ordinary.

I set aside the conviction and sentence, and acquit the applicant. I do not think that it is a case in which compensation should be awarded. There is nothing to show that the case is wilfully false, nor does there seem to have been any perversion or exaggeration of the evidence. I merely do not consider that from the facts as stated by the complainant, and his witness, one is justified in assuming rashness and negligence.

R.K. *Accused acquitted.*

A. I. R. 1929 Rangoon 14 (2)

MAUNG BA, J.

U Mo Gaung—Applicant.

v.

U Po Sin—Opposite Party.

Criminal Revn. No. 214-B of 1928, Decided on 25th July 1928.

(a) Penal Code, Ss. 421 and 424—Magistrate's jurisdiction is not taken away by Presidency Towns Insolvency Act.

The Presidency Towns Insolvency Act does not take away a Magistrate's jurisdiction to

try the insolvent for an offence under Ss. 421 and 424 : 35 *Bom.* 63, *Foll.* [P 15 C 1]

(b) **Criminal P. C., S. 259—Complainant dying before hearing — Offence non-compoundable and non-cognizable—Magistrate can still proceed with the case.**

In a case under Ss. 421 and 424, Penal Code, the complainant died before the date of hearing. The Magistrate proceeded with the trial.

Held : that the offences being non-compoundable, though non-cognizable, he was right in the procedure he adopted. [P 15 C 2]

Judgment.—Applicant U Mo Gaung was a paddy broker. He was adjudicated insolvent by this Court. From the report of the Official Assignee it appears that his house and its site were mortgaged to Messrs. Steel Brothers & Company, Limited. But he never made over the Insurance Policy although the property was insured. The house was destroyed by fire and the agents of the Insurance Company informed the Official Assignee that they had paid the insolvent Rs. 4,925. The insolvent concealed the insurance and the receipt of the assured amount not only from Messrs. Steel Brothers but also from the Official Assignee and he never made over the amount to the Official Assignee. Consequently the Official Assignee in his report expressed an opinion that the insolvent was guilty of an act falling under S. 103 (b) (ii), Presidency Towns Insolvency Act or in other words that he had made away with or concealed part of his property.

U Po Sin, one of the creditors, applied to the Insolvency Court to direct the insolvent's prosecution. The learned Insolvency Judge declined to do so, remarking that such prosecution was not recommended by the Official Assignee and that case was not of importance. From that order an appeal was filed. The learned Judges of the appellate Bench observed that it could not be doubted that there were grounds which prima facie, would justify an enquiry, but they declined to interfere with the exercise of the Insolvency Judge's discretion.

U Po Sin then filed a direct complaint to the District Magistrate charging U Mo Gaung with offences under Ss. 421 and 424, I. P. C. The complaint was in order, because, nothing contained in the Presidency Towns Insolvency Act takes away a Magistrate's jurisdiction to try the insolvent for an offence under those sections. This view was held by a Bench of the Bombay High Court in *Emperor* v. *M.H. Bhat* (1). The complaint was transferred to the Second Additional Magistrate, Rangoon, for disposal. During the trial the Magistrate was transferred and the accused person claimed a de novo trial The case was accordingly adjourned for three weeks to summon witnesses. On the adjourned date the complainant's advocate asked for an adjournment on the ground that he had a case in the High Court. The case was adjourned. When the case was called on due date the complainant was too ill to attend and the case was adjourned for nearly a month. When the case was called again the complainant was reported to have died. The accused's advocate asked the Magistrate to discharge his client under S. 259, Criminal Procedure Code. The Magistrate rejected that application. From the order of rejection this application for revision has been filed.

Section 259 gives a Magistrate discretion to discharge the accused when in the case instituted upon the complaint the complainant is absent on any day fixed for the hearing of the case and when the offence is one which may lawfully be compounded or when it is a non-cognizable offence. The offences under Ss. 421 and 424 are non-cognizable but they are non-compoundable. The complainant has been examined and cross-examined. His evidence can therefore, be used under S. 33, Evidence Act. The learned Magistrate has exercised his discretion and decided to proceed with the trial. I see no sufficient reason to interfere with his exercise of that discretion. I therefore dismiss this application for revision.

M.N./R.K. *Application dismissed.*

(1) [1910] 35 Bom. 63=7 I. C. 963=12 Bom. L. R. 750.

A. I. R. 1929 Rangoon 15

CARR, J.

Dayalal and *Sons*—Appellants.

v.

Ko Lon and *another*—Respondents.

Second Appeal No. 769 of 1927, Decided on 23rd July 1928, from judgment of Dist. Judge, Toungoo, in Civil Appeal No. 123 of 1927.

Evidence Act, S. 116—A tenant is estopped from denying his landlord's title till he surrenders possession.

A tenant who has been let into possession cannot deny his landlord's title however defec-

tive it may be, so long as he has not openly restored possession by surrender to his landlord. [P 16 C 2]

A person entered into possession of a house as a tenant of *A* and obtained legal title to it by a conveyance from *B* the true owner, and sued for a declaration that his landlord *A* had no title to the property.

Held: that he was estopped under S. 116 from denying his landlord's title till be surrenders possession: *A. I. R.* 1915 *P. C.* 96, *Expl.* and *Foll.* [P 16 C 2]

P. B. Sen—for Appellants.

So Nyun—for Respondents.

Judgment. — The house in dispute in this case originally belonged to one U Tun U who appears to have lived in it along with his daughter Ma Dun until he died. It seems that he occupied one floor while the defendant-appellants occupied the other. When U Tun U died Ma Dun left the house leaving the defendants in possession of it. The defendants claim that they had, in fact, bought the property from U Tun U before his death, but had not obtained from him a registered conveyance. The plaintiff came into occupation of the house as tenant of the defendants in 1924. This has been found in the present suit by the Sub-Divisional Court and had previously been found in two suits for rent brought by the defendants against the plaintiff.

After he had entered into occupation of the property as tenant of the defendants, the plaintiff obtained a registered conveyance from Maung Tha Dan as the legal representative of Ma Dun, who by then had died. The plaintiff has remained in occupation of the property ever since he entered into it as tenant of the defendants. He now in this suit prays for a declaration of his ownership, for a declaration that the defendants have no right to the property, and that they have no right to claim rent from him and for an injunction to restrain them from continuing the second suit for rent abovementioned, which has been decided since the institution of the present suit.

The question that arises in this appeal is whether the plaintiff is estopped under S. 116, Evidence Act, from bringing this suit and denying his landlord's title. Both the Courts below have held that he is not estopped. In my opinion, both the decisions are wrong and are based on an entire misconception of the law of estoppel. The Sub-Divisonal Judge held that if the plaintiff could prove that by his conveyance from Tha Dun he acquired the legal title to the property it would show that his tenancy had determined as from the date of that conveyance. He also argued that since the date of that conveyance the plaintiff has been in possession as owner of the property and not as a tenant. The District Judge took very much the same view. He referred to the decision of their Lordships of the Privy Council in the case of *Bilas Kurwar* v. *Desraj Ranjit Singh* (1) in which their Lordships held that:

> "a tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored possession by surrender to his landlords."

The District Judge further held that if the plaintiff was able to prove that by his conveyance he had obtained legal title that would show that the tenancy had determined from the date of that conveyance. I am unable to follow fully the arguments by which the Judge was able to hold that this present case did not come within the ruling of the Privy Council above quoted. In my opinion, it clearly does come within that ruling.

The whole case of the plaintiff depends on the allegation that the defendants, his landlords, never had any title at all and that the property belonged to U Tun U and passed on his death to Ma Dun and on her death to the administrator Tha Dun who, in his turn, conveyed it to the plaintiff. This clearly amounts to a denial of the defendants' title at the time of the commencement of the tenancy, and it also, in my opinion, clearly comes within the very explicit rule laid down by their Lordships of the Privy Council. Admittedly the plaintiff came into possession as tenant of the defendants and he has never surrendered possession to them. He is, therefore, still a tenant, and, even if his lease itself has actually determined, he is still holding on under that lease and is still in possession of it as a tenant. He is very clearly estopped from bringing this suit and will continue to be estopped unless and until he delivers possession of the property to the defendants. I allow this appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiff's suit with costs in all Courts.

M.N./R.K. *Appeal allowed.*

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(1) A. I. R. 1915 P. C. 96=37 All. 557=42 I. A. 202 (P. C.).

A. I. R. 1929 Rangoon 17

BAGULEY, J.

Maung Kyaing and *another*— Appellants.

v.

P. L. T. A. R. Chettyar Firm—Respondents.

Second Appeal No. 722 of 1927, Decided on 11th July 1928, from judgment of Dist. Judge, Pegu, in Civil Appeal No. 123 of 1927.

(a) Civil P. C., S. 100— Second appellate Court is not bound by deductions of lower Courts as to negligence — Whether certain facts constitute negligence is question of law.

Whether certain facts constitute negligence is a deduction from facts and appellate Court, though bound by the findings of fact by the lower Courts is not bound by their deductions from those facts: 18 *Cal.* 23 (*P.C.*) and 20 *Cal.* 93 (*P.C.*), *Rel.on.* 48 *Cal.* 1 *at* 16, *Ref.*[P 18 C 2]

Negligence cannot be imputed to a subsequent purchaser of a lease, who, if he had made ordinary inquiries that an ordinary prudent man would have made in purchasing the lease, would not have come across anything which would have put him on an enquiry of a prior sale of the lease. [P 19 C 2]

(b) Evidence Act, S. 115—Laches—Length of delay and nature of acts done during the interval are material for estoppel.

Where a prior purchaser of a lease had omited (i) to get the original lease-deed from his vendor; (ii) to report the purchase of the lease to the Collector as required ; (iii) to get his name entered as owner of the lease in the Collector's registers and (iv) to give notice to the subsequent purchasers of the lease of his claim to it as soon as he had reason to believe that the subsequent purchasers were building on the land comprised in the lease, on a title which they might reasonably be expected to regard as good.

Held: that the prior purchaser is estopped from asserting his title to the lease as against the subsequent purchasers. [P 19 C 2]

Kya Gaing—for Appellants.

Jeejeebhoy—for Respondents.

Judgment.—The facts of this case are fairly simple. One Ma Gun had a thirty-years lease from Government of a certain holding (No. 48). The lease was in the ordinary form, with power of renewal under the Town and Village Lands Act. She sold this lease by a registered deed to the P. L. T. A. R. Firm. The firm sold the lease again to Ma Thein Yin, and Ma Thein Yin took the precaution of having the lease transferred to her name in the Collector's office—a precaution which the P. L. T. A. R. Firm had never taken. Subsequently, the P. L. T. A. R. Firm bought the lease back again from Ma Thein Yin. The then agent asked her to give them the lease, but she put him off with some excuse and he took no further interest in the matter. The lease was not re-transferred to the P. L. T. A. R. Firm, but the puchase from Ma Thein Yin was by a duly registered deed. Ma Thein Yin being thus left in possession of the lease, proceeded to come to some arrangement with the Collector. She surrendered the lease to Government and received in place of it eight leases for portions of the original holding 48. The new plots were known as holding A 48 to H-48. Part of the land reverted to Government and was used for roads and, presumably, conservancy lanes. The lease of one of these new plots was sold to Maung Kyaing and Ma Mya Khin by a registered sale deed by Ma Thein Yin. They got the new lease of a small plot from Ma Thein Yin and had it transferred to their name in the Collector's records. The P. L. T. A. R. Firm now sue Maung Kyaing and Ma Mya Khin for possession of this holding (No. E-48).

Unfortunately, as is so often the case, the whole matter from end to end has been dealt with as though the parties were the absolute owners of the land. The plaint says in para. 1: "That plaintiff is the absolute owner of a piece of land," and the defendants in para. 4 of their written statement claim that they are the absolute owners of the land. As a matter of fact, all the interests that any of these parties had ever had in the land were only those of a lessee from Government on a certain lease. The trial Court decreed the claim. The issues which it framed were :

(i) Whether the plaintiff was the owner of the land in suit, (i. e. holding E-48)?

(ii) Whether the defendants made a bona fide purchase of the land from the owner, Ma Thein Yin, without the knowledge of the plaintiff's title? and,

(iii) Whether the plaintiff was estopped from disputing the sale between the defendants and Ma Thein Yin by his own act and conduct?

The answers to the issues were as follows :

The first issue was answered in the affirmative, that the plaintiff was the owner of the land. This, of course, was entirely wrong. The owner was Government. The plaintiff may have the right of a lessee, but nothing more than that. Issue 2 the trial Judge answered in the negative, holding that the defendants were not bona fide purchasers. The reason for this is that he was of opinion that Maung Kyaing made no enquiries about the said

land before buying the lease from her, as Ma Thein Yin was a respectable person; and he held that, because Maung Kyaing failed to make a search in the registration office, he could not be considered a bona fide purchaser. As regards issue 3, the trial Court answered this in the negative, saying:

"There is nothing to show that the plaintiffs by their declaration, act or omission intentionally caused the defendants to believe that Ma Thein Yin was the owner of the said plot. This absence of intention on the plaintiffs' part takes the case out of the law of estoppel * * *."

On appeal by Maung Kyaing and Ma Mya Khin, the learned District Judge came to the same conclusion as the trial Court. In his judgment he discusses the question of whether registration is notice or not, finally quoting their Lordships of the Privy Council in *Tilakhari Lal* v. *Khedan Lal* (1) to the effect that notice cannot in all cases be imputed from the fact that a document can be found in the Register, and, therefore, he says that in the present instance it may be correct to say that the defendants did not have notice of the plaintiffs' purchase. After this, however, he proceeds to argue that, when there are two transferees, the second transferee takes the property subject to the claims of the first transferee; and that, because the first transferee in this case had taken the whole interest of Ma Thein Yin, she had nothing to convey to the defendant-appellants. The question of estoppel, the learned Judge does not appear to have touched upon at all in his judgment.

In second appeal I am asked to hold that the plaintiff-respondents were estopped from claiming the land against the defendant-appellants, who were bona fide purchasers for valuable consideration without notice. A preliminary point was raised that, as negligence was a fact and not a matter of law, this could not be raised in second appeal: vide 48 *Calcutta* p. 1 at p. 16, above quoted: "* * * the proposition involved is not one of law but of fact, * * *." With this contention, I am unable to agree. It is true that the lower Courts have both come to certain conclusions on facts. I am bound by the facts which they have found, but I am not, in my opinion, bound by the deductions which they have made from those facts.

There is no such thing as "legal negligence," and "negligence" is, I think, nowhere defined. Whether certain facts constitute negligence is a deduction from those facts, and, although I am bound by the findings of fact by the lower appellate Court, I am not bound by its deductions from those facts. On this point I would refer to *Durga Chowdhrani* v. *Jewahir Singh* (2) and *Ram Gopal* v. *Shameskhaton* (3). The facts, I have to take from the lower appellate Court. The point for consideration is: Of what transactions had Maung Kyaing notice, actual or constructive, at the time he bought his lease of holding E-48? He certainly had before him the lease issued by the Collector or Ma Thein Yin, because she transferred it to him. He bought the lease on 16th August 1925; the date of the lease issued to Ma Thein Yin was 17th April 1925, four months earlier. The lease was, on the face of it, good; it had not been transferred to anybody else. Ma Thein Yin was living on plot No. 48, which had been broken up into these eight sub-plots, and I have little doubt that an ordinary man would have bought that lease without enquiry like Maung Kyaing.

A theoretically prudent man, however, perhaps should have taken more care. He would have to go to the registration office to see that Ma Thein Yin had not parted with her interest in this lease. But I am not quite sure that an ordinary man of ordinary prudence would have gone behind the lease issued by the Collector to Ma Thein Yin. Supposing we take a man of more than ordinary caution, he might have looked into the Collector's proceedings. What he could have found there was that this lease was issued to Ma Thein Yin by the Collector in return for the surrender of a lease of a larger piece of land of which the new holding formed part. That lease, though issued to some body else, had been transferred to Ma Thein Yin's name, and I cannot conceive of any man of ordinary prudence going any further than this. It is argued that the registration office is the place to look, and that without a search in the registration office a man cannot be held to have made the searches which an ordinary man would make. But it must be remembered that these transfers of leases are not

(1) A. I. R. 1921 P. C. 112=48 Cal. 1=47 I.A. 239 (P.C.).

(2) [1890] 18 Cal. 23=17 I. A. 122=5 Sar. 560 (P.C.).

(3) [1892] 20 Cal. 93=19 I. A. 228 (P.C.).

like transfers of ordinary freehold land ; for one thing, the leases themselves issued by the Collector are never registered at all, and, therefore, cannot be found in the registration office.

Another point is that, in accordance with the terms of the lease, all changes have to be reported to the Deputy Commissioner within one calendar month under penalty, and the Collector will only recognize people the transfer to whom has been reported to him ; and, therefore, I hold that any man who satisfied himself of the genuineness of a lease that has been issued in the name of his vendor, or transferred to his vendor by the Collector, and that there has been no dealing with it reported in the registration office from the date of issue up to the date of sale, has done all that any ordinary prudent man could be expected to do. I do not say for a moment that Maung Kyaing did all these things, but had he done so, it is quite clear that he would have found no suggestion that the plaintiff firm had any interest whatsoever in this lease, and, therefore, he can only be held to have notice of what he would have discovered —this is nothing at all.

On the other hand, we have to consider the position of the plaintiff firm. The plaintiff firm by the negligence of their agent had undoubtedly put it in the power of Ma Thein Yin to defraud, and she availed herself of the opportunity. Had the plaintiff firm's agent insisted on her making over the lease itself, she could not have surrendered it to Government. On her saying that she could not find the lease, all that the plaintiff firm had to do was to report the fact that they had bought the interests of Ma Thein Yin to the Collector, and he would no doubt, after enquiry, have entered them as the new lessees. They did not do this. I note that the original lease, which is on the file of the record, though it has twice been bought by this particular firm, has never been transferred to them at all. It is true that it has been laid down that it is not always negligence to fail to secure the title-deeds of land mortgaged to anyone : [vide *Imperial Bank of India* v. *U Rai Gyaw Thu & Co. Ltd.* (4), and *A. L.B.M. Chettyar Firm* v. *L.P.R. Chettyar Firm* (5).] But it must be remembered that in this case it was the purchaser who failed to get his title-deeds from his vendor and not the mortgagee who failed to get his title-deeds from the mortgagor ; and in a case like this, where this title-deed is a Government lease, I should say that to fail to get the lease itself, and also to fail to report the transfer to the Collector, or to get it entered in the Collector's books, is undoubtedly negligence.

My attention has been drawn to Ex. J. This is a certified copy of the sale-deed by Ma Thein Yin to Maung Kyaing of holding E-48. This, the present agent of the firm says, he found when he took over the office from his predecessor. It was issued on 4th November 1925, presumably to the firm. When this copy came into the possession of the firm, they must be held to have had notice of the transfer of the lease of holding E-48 by Ma Thein Yin to Maung Kyaing, and, therefore, they were aware that Ma Thein Yin was swindling Maung Kyaing and themselves. No notice of their claim to this piece of land was given to Maung Kyaing until 17th May 1926, when he was just on the point of finishing the house which he erected on the land. In other words, they allowed him to build the house first throughout the whole working season, and then claimed the land. It is impossible for a plaintiff who does this sort of thing to ask for any equitable relief. I hold, therefore, that the defendant-appellants, had they made ordinary enquiries that an ordinary prudent man would have made in this particular case, would not have come across anything which would have put them on enquiry as regards the plaintiff firm having any interest in this lease.

I hold also that the plaintiff firm is estopped from asserting their title to the lease of holding E-48, because they failed :—(i) to get the original lease-deed of holding E-48 from Ma Thein Yin ; (ii) to report the purchase of the lease of holding E-48 from Ma Thein Yin to the Collector ; (iii) to get themselves entered in the Collector's Registers as the owners of that lease ; and, (iv) to give notice to Maung Kyaing of their claim to the land as soon as they had reason to believe that he was building on the land on a title which he might reasonably be expected to regard as good. I, therefore, allow the appeal, set aside the decrees of

(4) A.I.R. 1923 P.C. 211=1 Rang. 637=51 Cal. 86=50 I.A. 283 (P.C.).

(5) A.I.R. 1926 Rang. 195=4 Rang. 238.

the lower Courts and dismiss the suit with costs in all Courts.

M.N./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 20

DAS AND DOYLE, JJ.

U Po Maung and *others*—Appellants.

v.

U Tun Pe and *others*—Respondents.

Civil Misc. Appeal No. 39 of 1928, Decided on 19th June 1928, from order of Dist. Judge, Thaton, in Civil Misc. No. 56 of 1927.

Civil P. C., S. 92—Scheme — Power to modify or alter a scheme is subject to the conditions under S. 92.

Where a scheme has been framed, any modification or alteration of the scheme is in effect a new scheme and power to frame a new scheme is given only subject to the condition laid down in S. 92. [P 20 C 2]

For the managment of the affairs of a "pagoda" trustees were appointed for life under a scheme which the trustees had no power to vary. On the application of the trustees the lower Court changed the tenure to three years and appointed by election new trustees.

Held: that the appointment of new trustees was illegal under S. 92 which lays down that in order to vary the terms of an express trust; the proper course is for the Advocate-General or two or more persons with his permission to institute a suit to obtain such variation: *A. I. R.* 1927 *Mad.* 1073 (*F.B.*), *Foll*; *A. I. R.* 1928 *Rang.* 168, *Dist.* [P 20 C 2]

Ba Maw—for Appellants.

Thein Maung—for Respondents.

Judgment.—In Civil Regular No. 169 of 1906 of the District Court of Thaton a scheme was settled for the managment of the affairs of the Kyaiktiyo Pagoda and seven trustees were appointed for life, their tenure of office being otherwise terminable only by resignation, misconduct or prolonged absence. R. 26 of the scheme gave the trustees power with the permission of the Thaton District Court to frame rules for the guidance of the public provided that they were not contrary to the formulation of the scheme. R. 26 clearly gave the trustees power only to frame bye-laws within the purview of the scheme and was not intended to give either themselves or the District Court power on mere application to vary the original scheme.

In Civil Misc. Case No. 5 of 1927, the District Court of Thaton on the application of the existing trustees varied the scheme to the extent that the tenure of office of the trustees should be for three years, an election to be held triennially on 1st August it being agreed that the existing trustees should cease to hold office on 1st July 1927. An election was held on 7th August 1927, and the old trustees who stood for election did not secure re-election. Disputes as to handing over the trust property led to an order from the High Court that the existing old trustees should hold office until the result of the election was confirmed by the District Court.

In Civil Misc. Case No. 56 of 1927, the District Court of Thaton, after hearing objections as to the irregularities in the course of the election, confirmed the election of the new trustees. Five old trustees have now applied to this Court in appeal urging that the holding of the new election is invalid since the District Court, Thaton, has no power on mere application to vary the original scheme The situation is somewhat piquant since it was on the application of the five old trustees that the original scheme was varied. This, however, does not operate as an estoppel against them since, if their contention be correct, the whole of the proceedings in connexion with the variation of the scheme were annulled ab initio.

Proceedings in connexion with the variation of a trust such as the Kyaiktiyo Pagoda Trust are governed by S. 92, Civil P. C. On a plain construction of S. 92, it would appear that where it is desired to vary the terms of an express trust the proper course to adopt is for the Advocate-General, or two or more persons with his permission, to institute a suit to obtain such variation. But it has been held in the past that, where such a trust has been constituted by suit, subsequent variation of the trust can be made within that suit itself and that no fresh suit should be filed.

In *Veeraraghavachariar* v. *Advocate-General of Madras* (1), the law on the subject has been discussed at great length by a Full Bench of the Madras High Court which, after reviewing exhaustively the case-law on the subject, has laid down the proposition that where a scheme has been framed, any modification o ralteration of the scheme is in effect a new scheme and power to frame is given only subject to the conditions specified in S. 92 although there may be cases in which the Court reserves to itself the right to allow

(1) A.I.R. 1927 Mad. 1073=51 Mad. 31 (F.B.).

aperson or persons to apply for a relief which will come within S. 92, Civil P. C.

Our attention has been drawn to *U Ba Pe* v. *U Po Sein* (2), a Bench ruling of the Rangoon High Court which contains the following passage :

"It has been repeatedly held that in suits under S. 92 of the Code, which in England would have come before the Courts of Chancery, the Court which framed a scheme has power to vary it."

This judgment was delivered prior to the publication of *Veeraraghavachariar* v. *The Advocate-General of Madras* (1).

The comment quoted is obiter since the point for decision in *U Ba Pe* v. *U Po Sein* (2), was :

"that where a Court reserves to itself the right os confirm elections held under a scheme framed by it under the provisions of S. 92, Civil P. C., and where application for confirmation it made by parties on the one side in the suit and is opposed by parties on the other side, the order is a decree in the suit itself and is, therefore, appealable as a decree under the Code."

It will be seen therefore that the point at issue did not come within the purview of S. 92 and that the decision of the Bench was not in conflict with the decision of the Full Bench just quoted. We are in complete agreement with the conclusions come at in *Veeraraghavachariar* v. *The Advocate-General of Madras* (1) and would merely add that it seems to us only right that where the presence or consent of the Advocate-General was necessary for the purposes of formulating a trust scheme his presence or consent should equally be necessary for varying it particularly in such a case as the present one where the trust affects the interests of the whole community. If it were possible by mere miscellaneous application to vary the trust it would be possible for a small party of local inhabitants to alter the terms of the trust to the detriment of worshippers from remote parts of the province whose interests it would be the duty of the Advocate-General in a regular suit to protect.

We have been asked to hold that the election is valid under the old rules. This we cannot do for two reasons : (1) because the resignation of the old trustees was clearly provisional on the introduction of their proposed scheme and (2) because it cannot be assumed that the electors who would be willing to elect trustees for a term of three years would be equally willing to elect these trustees for life, although the converse proposition might well apply. We, therefore, hold that the whole of the proceedings commencing with Civil Misc. No. 5 of 1927 are void and that the appellants are still in office as trustees of the pagoda.

(2) A. I. R. 1928 Rang. 168=6 Rang. 97.

We may point out in passing that there are two vacancies which should have been filled up under the original scheme which provides for seven trustees. As the present situation has been created entirely by the act of the five appellants they will pay all the costs of the litigation. Advocate's fee in this Court five gold mohurs.

M.N./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 21

DOYLE, J.

U Kyawa Lu and *another*—Applicants.

v.

U Shwe So—Respondent.

Civil Revn. No. 83 of 1928, Decided on 26th July 1928.

(a) Specific Relief Act, S. 9—Suit under —Order under S. 145, Criminal P. C., is no bar.

An order under S. 145, Criminal P. C. is no bar to suit under S. 9, Specific Relief Act, where the dispossession had taken place long before the order confirming the status quo was passed under S. 145, Criminal P. C., 30 *All.* 331, *Foll.* [P 21 C 2, P 22 C 1]

(b) Civil P. C., S. 115—Case not deciding a question of jurisdiction—No revision lies.

The High Court has no power of revision in a case which decides a question of law and not a question of jurisdiction: 11 *Cal.* 6.(*P.C.*), *Foll.* 30 *All.* 331, *Ref.* [P 22 C 1]

McDonnel—for Applicants.

N. M. Cowasjee—for Respondent.

Judgment.—Shwe So sued U Kyaw Lu and Maung Shwe Hpyu for recovery of possession of land under S. 9, Specific Relief Act, alleging that he had been wrongfully dispossessed on 9th May 1927. It was argued that the suit was not maintainable as an order had been passed against Shwe So by the Sub-Divisional Magistrate, Maubin, under S. 145, Criminal P. C. The learned District Judge Maubin, however, decided that the order under S. 145, Criminal P. C., was no bar and decreed the suit. This Court is asked to revise the order on the ground that the conclusion of the learned District Judge that the order under S. 145 is no bar was erroneous. It is clear from the order of the Sub-Divisional Magistrate, in Criminal Misc. No. 57 of 1927 that dispossession took place long before the order of

the Sub-Divisional Magistrate, which merely confirmed the status quo. Under these circumstances, as pointed out in *Jwala* v. *Ganga Prasad* (1), the order under S. 145 of the Code was no bar.

In that case it was furthermore held that as another remedy was open to the applicant interference by way of revision was not called for. I would go further and say that the High Court has no power of revision in the present case since the learned District Judge was deciding a point of law and not of jurisdiction in deciding that a suit lay, and the priciples laid down by the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (2) would apply. For the above reasons this application is rejected with costs.

M.N./R.K. *Application rejected.*

(1) [1908] 30 All. 331=5 A. L. J. 297=(1908) A. W. N. 142.

(2) [1885] 11 Cal. 6=11 I. A. 237 (P.C.).

A. I. R. 1929 Rangoon 22

PRATT, OFFG. C. J. AND CUNLIFFE, J.

Chan Pyu—Appellant.

v.

Saw Sin and *others*—Respondents.

First Appeal No. 87 of 1928, Decided on 4th July 1928, from the judgment of the Original Side in Civil Regular No. 13 of 1927.

(a) Burma Laws Act (1898), S. 13 (1)—Buddhist Law means not Buddhist law prevalent in Burma but law applicable to Buddhist parties—Chinaman residing in Burma is not, therefore, debarred from disposing of property by will.

The Dhammathat is not an exclusive lex loci and the expression "Buddhist Law" is not limited to the Buddhist Law prevalent in Burma. The expression "Buddhist Law" in S. 13 (1) means the law applicable to the Buddhist parties in the case. And although it has been held with regard to the law of marriage, that Buddhist law means Buddhist law prevailing in Burma, and the ruling is binding, yet it cannot be extended to the law of inheritance. A Chinaman domiciled in Burma, therefore, can dispose of his property by will, although such disposition is contrary to Burmese Buddhist Law, because it is the Chinese customary law which governs the succession to the estate of a Chinaman domiciled in Burma : (1881) *L. B. R.* 185 ; 2 *L. B. R.* 95 ; 10 *L. B. R.* 159 ; *A. I. R.* 1923 *Rang.* 180 ; *A. I. R.* 1924 *Rang.* 219 and *A. I. R.* 1926 *Rang.* 172; *Appr; Rutledge C. J, in A. I. R.* 1927 *Rang.* 265, *Doubted.* [P 23 C 2, P 24 C 1, 2 ; P 25 C 1]

(b) Buddhist Law (Chinese)—Chinese domiciled in Burma have custom whereby they can dispose of property by will—They also have customary rules of inheritance which are in conflict with Burmese Buddhist law—These customs ought to govern Chinese Buddhists in Burma.

A custom having the force of law is prevalent among Chinamen in Burma whereby they dispose of their property by will—a custom which is opposed to the provisions of the Burmese Buddhist Law. They also have customary rules of inheritanee which are in conflict with those to be found in the Burmese Buddhists. It is these customs which should govern Chinese Buddhists in Burma : *A. I. R.* 1925 *Rang.* 29 ; 24 *Mad.* 650 ; *Mr. Anwaruddin's* case, (1917) 1 *K. B.* 649 ; *Chetti* v. *Chetti*, (1909) *P. D.* 87 and *A. I. R.* 1915 *P. C.* 86; *Rel. on.* [P 25 C 1]

(c) Buddhist Law (Burmese) — Keittima adoption—Adoptive father having already natural son—Adoptee (plaintiff) not treated as natural children were treated—Plaintiff described as son in adoptive father's will but not given equal share with natural sons—Father giving plaintiff power-of - attorney describing him as son—Power - of-attorney less extensive than one given to natural son—Plaintiff described as son in inscription on tablet in ordination hall built by adoptive father and in tombstone of adoptive parents—Natural son married to plaintiff's neice which would be impossible if they were brothers—Plaintiff had not status of Keittima son but was merely fondling—Description as son in inscription and tombstone did not prove his right to inherit.

Neither ceremoney nor written document is necessary to constitute a keittima adoption ; and fact of adoption can be inferred from a course of conduct which is inconsistent with any other supposition, but there must be proof of the publicity given to the relationship.

The alleged adoptive father had already an eldest son before he adopted plaintiff. Plaintiff received no proper education, did dot receive the same amount of pocket money or kind of clothes, and he slept in the bedroom of the clerks. He was never treated as an equal with the natural children. He was, however, described as son in the power-of - attorney which the adoptive father gave him as also in his will. But the power-of-attorney was less extensive than the power given to the natural son and he received a very minor share in the will. The natural son was married to the neice by marriage of plaintiff which would not be possible if the plaintiff and that son were regarded as brothers. He was described as "son ko Pyu" in the inscription in a tablet in a Thein or ordination hall built by the adoptive father ; and on the tombstone of his adoptive parents he was described as son.

Held : that under these circumstances plaintiff could not be said to have proved that he was adopted by the adoptive father with the intention that he should be an heir to his estate and that he had the status of a Keittima son. Description as son in the incription and on tombstone did not prove his right to inherit. He was, therefore, only a fondling and no better. [P 27 C 2]

Kyaw Din—for Appellant.

Leach—for Respondents.

Pratt, Offg. C. J.—Plaintiff Chan Pyu-alias Chan Kyin Hlyan, sued, on the al-

legation that he was the " keittima " adopted son of Chan Ma Phee deceased, for a declaration that the will of Chan Ma Phee was invalid, for administration of the estate, and for a one-fifth share therein. Chan Ma Phee was a Chinaman from Amoy, who settled down in Burma at the age of 16 or 17. He married a Burmese Buddhist wife by name Ma E Mya. He left a will at his decease in which he bequeathed to plaintiff and his children after him the income of certain property. Plaintiff's case was that Chan Ma Phee being a Buddhist the Burmese Buddhist law was applicable to him and he (i. e. Chan Ma Phee) could not make a will.

As " keittima " adopted son plaintiff claimed under the Burmese Buddhist law a right to succeed on an equality with the natural sons. The defence was that although Chan Ma Phee was a Chinese Buddhist he was governed by Chinese customary law and had the right to make a will. It was denied that plaintiff was adopted with any right of inheritance. The two main points for decision therefore were, whether the deceased was governed by Chinese customary law, and if not, whether it was proved that plaintiff was his " keittima " adopted son under the Burmese Buddhist law. It is not disputed that, if it is held that the succession to Chan Ma Phee's estate is governed by Chinese customary law, plaintiff's case falls to the ground.

The learned Judge on the original side framed as first issue :

" what law governs the succession to Chan Ma Phee's estate : "

but after discussing the authorities on the point, came to no decision on this issue and held that on the assumption that Burmese Buddhist law was applicable plaintiff had failed to prove that the deceased adopted him as his " keittima " son, and had therefore, no claim to inherit. The suit was accordingly dismissed. To my mind under the circumstances the more satisfactory course is to decide first what law applies to the succession to the deceased's estate. It has been the almost invariable practice for the Courts of this province to apply the Chinese customary law, so far as it was known, to the succession to the estate of Chinese resident in Burma. The right of the Chinese to make wills has also been recognized to which fact the insertion in the Burma Courts Manual, and before that in the Lower Burma Courts Manual and the Upper Burma Courts Manual, of an appendix on Chinese wills is eloquent testimony.

It is, however, contended on behalf of plaintiff that in the rule laid down in S. 13 (1), Burma Laws Act (1898) that where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, the Buddhist law shall form the rule of decision in cases where the parties are Buddhists, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law, the words "Buddhist law " must be interpreted to mean the Buddhist law prevailing in Burma.

In *Hong Ku* v. *Ma Thin* (1), it was held by the Special Court of Lower Burma that the Buddhist law as administered in Burma is not usually applicable to Chinese residents. In an exceedingly able and erudite judgment Jardine, J., discussed the construction of S. 4, Burma Courts Act (corresponding to S. 13 of the present Laws Act) where the words used are also :

" the Buddhist law in cases where the parties are Buddhists, "

and observed :

" I know of no authority for the proposition that the Dhammathat or even the general body of Buddhist law is an exclusive lex loci Under S.4, Courts Act it becomes one of several leges fori. "

He also pointed out that in S. 4 of the Courts Act the word Buddhist is not limited by such words as Burmese, religious or written. Towards the end of the judgment he further remarked :

"questions of a similar kind are also liable to arise wherever Chinese communities are settled ; and the Chinamen are found everywhere, especially in the towns."

In the judgment reference was also made to the received opinion of the Judges of the Supreme Court at Hongkong that a Chinaman can make a will, subject to the vague control of the family or clan. Jardine, J.'s Judgment in *Hong Ku's* case (1) was discussed in the Bench ruling of the Lower Burma Chief Court in *Fone Lan* v. *Ma Gyee* (2) by Fox, J., who held that in S. 13, Burma Laws Act the term Buddhist law must be read as meaning the law of succession, marriage etc., applicable to the Buddhist parties to

(1) [1872-92] L.B. R. 135.
(2) [1903] 2 L. B. R. 95.

the case, and that the law of succession applicable to a Chinese Buddhist was customary law wholly unconnected with the Buddhist faith.

This ruling was followed in *Maung Kwai* v. *Yeo Choo Yone* (3), where a Bench of the Lower Burma Chief Court held that the Chinese customary law is the law of succession applicable to Chinese Buddhists and contemplates the disposition of property by will. In *Maung Po Maung* v. *Ma Pyit Ya* (4) where both the parties were Chinese, it was held by a Bench of this Court, after discussing the authorities at length that the law of inheritance applicable is the Chinese customary law. This was applied to the estate of a Chinese Buddhist woman who had taken a Burman for her second husband. In *Ma Sein* v. *Ma Pan Nyun* (5), the Bench went still further and held that, where a Burmese woman married to a Chinese Buddhist attached herself to the Chinese community and adopted her husband's religion, succession to her estate was to be governed by Chinese Buddhist law that is to say Chinese customary law.

In *Man Han* v. *R. M. A. L. Firm* (6) Chari, J., doubted whether Chinese customary law would apply to the property acquired by the wife by her personal exertions.

Recently, however, in *Ma Yin Mya* v. *Tan Yauk Pu* (7), it was held by a Full Bench of this Court (1) that the Burmese Buddhist law regarding marriage is prima facie applicable to Chinese Buddhists as the lex loci contractus (2), that to escape from the application of Burmese Buddhist law regarding marriage a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma and that that custom is opposed to the provisions of Burmese Buddhist law applicable to the case ; and (3) that in case the matter in issue is the marriage of a Buddhist Chinaman with a Burmese Buddhist woman, he must show that the application of the custom having the force of law will not work injustice to the Burmese Buddhist woman.

It has been argued before us with great plausibility that the effect of this ruling is that the Burmese Buddhist law will extend to the case of the inheritance to the estate of a Chinese Buddhist resident in Burma. In the course of his judgment in *Ma Yin Man's* case (7) the learned Chief Justice observes :

" the phrase in S. 13 (1), Burma Laws Act is "the Buddhist law where the parties are Buddhists" and not the Burmese Buddhist law. We know that there are Chinese, Tibetan, Sinhalese and Chittagonian Buddhists. The only Buddhist law, however, in my opinion of which the Courts in this province have ever taken cognisance is Burmese Buddhist law. And for a foreign Buddhist to escape from the application of Burmese Buddhist law he must show that he is subject to a custom having the force of law in this country and that that custom is opposed to the provision of Burmese Buddhist law applicable to the case."

It is clear from this passage that the learned Chief Justice's view was that the expression Buddhist law in S. 13, Burma Laws Act means the Buddhist law prevailing in Burma. His answer to the reference, in which the other Judges concurred, however, was confined strictly to the Buddhist law of marriage, where the important point is the lex loci contractus. There is therefore to my mind no obligation to extend the ruling regarding the law of marriage to the law of inheritance.

The view of the Chief Justice regarding the interpretation of the terms Buddhist Law in S. 13 (1) must be regarded as an expression of his personal opinion, and as such is entitled to great weight, but it was not necessary (to decide the exact connotation of S. 13) in order to answer the question referred. The expression of opinion on this point cannot be taken as of the Bench as a whole, and I do not therefore consider we are bound by it. Personally I incline to the view of Jardine, J., already referred to that there is no authority for the proposition that the Dhammathat is an exclusive lex loci and that the expression Buddhist law is not limited to the Buddhist law prevalent in Burma.

I agree with Fox, J.'s interpretation in *Fone Lan's* case (2) that Buddhist law means the law applicable to the Buddhist parties in the case. I notice that S. 1 (3), Burma Laws Act, lays down that, save in so far as it applies expressly or by necessary implication to particular territory only, it extends to the whole of British India. It would seem a legitimate inference that in S. 13 (a) the words Buddhist law extend at least to the Buddhist law prevailing in parts of India outside

(3) [1919] 10 L. B. R. 159=57 I. C. 900=13 Bur. L. T. 18.
(4) A. I. R. 1923 Rang. 180=1 Rang. 161.
(5) A. I. R. 1924 Rang. 219=2 Rang. 94.
(6) A. I. R. 1926 Rang. 172=4 Rang. 110.
(7) A. I. R. 1927 Rang. 265=5 Rang. 406 (F.B.).

Burma, in the same way that the section comprehends the different schools of Hindu and Mahomedan law in India. I would also observe that strictly speaking the expression Burmese Buddhist law is to my mind a misnomer since it connotes the customary law of Burmese Buddhists, which is of Hindu origin, although it is true that the Vinaya is inter alia a repository of Buddhist ecclesiastical law. It is my considered opinion that it must be regarded as settled law that ordinarily Chinese customary law governs the succession to the estate of a Chinaman domiciled in Burma. If it be held that the words "Buddhist law" in S. 13 mean "Burmese Buddhist law," then I have no hesitation in holding that a custom having the force of law is prevalent amongst Chinamen in Burma whereby they dispose of their property by will, a custom, which is opposed to the provisions of the Burmese Buddhist law applicable.

The evidence of Mr. Taw Sein Ko and the Honourable Mr. Ah Yain is conclusive. They are the two authorities on the subject in the country and to reinforce them we have the consistent practice of the Courts in recognising Chinese wills. It must also be regarded as established that the Chinese Buddhists in Burma have customary rules of inheritance in conflict with those to be found in the Burmese Buddhist law. With reference to the right of tho Chinese Buddhists to dispose of their property by will the Privy Council case of *Maung Dwe* v. *Khoo Haung Shein* (8) is interesting.

This was a case where the husband disposed of his estate by will, and a suit was brought to determine the succession to his wife's estate. The Burmese Buddhist law was applied by consent, although the deceased was the widow of a Chinese Buddhist. Their Lordships at the end of their judgment commented on the peculiar feature that though the whole theory of succession depended upon the strict Buddhist view that intestacy is compulsory, this had so far been impugned upon that a Chinese Buddhist was allowed to test. Assuming, argumenti causa, as the learned trial Judge has done that the Burmese Buddhist law applies, it has to be considered whether plaintiff has proved that he was the keittima adopted son of Chan Ma Phee.

(8) A. I. R. 1925 P.C. 29=3 Rang. 29=52 I.A. 73 (P.C.).

The law on the subject has been very clearly and definitely explained in a succession of judgments of their Lordships of the Privy Council. In *Ma Me Gale* v. *Ma Sa Yi* (9), it was laid down that neither ceremony nor written document is necessary to constitute a keittima adoption. There must be, on the one hand the consent of the natural parents, and on the other the taking of the child by the adoptive parent with the intention and on the footing that the child shall inherit. In *Ma Ywet* v. *Ma Me* (10), it was further ruled that not only is a formal ceremony not necessary to constitute adoption, but the fact of adoption can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct with is inconsistent with any other supposition.

But in either case publicity must be given to the relationship, and the amount of proof of publicity required is greater in cases of the latter category, where no distinct occasion can be appealed to. In the later case of *Ma Than* v. *Ma Pwa Thit* (11) (also dealing with the question of keittima adoption) the facts that the claimant had lived continuously in the house of the deceased from her babyhood for 12 or 13 years, that the deceased was entered on the school register as her parent and had paid the school fees, that the claimant had been given jewellery by the deceased to wear and that her clothes were also paid for by him were held to be strong evidence of the notoriety and publicity of the adoption.

In the present case the main point to be established is that the plaintiff was adopted by Chan Ma Phee with the intention that he should be an heir to his estate. It is not disputed that plaintiff was brought up from the time he was about seven years of age in Chan Ma Phee's household ; but it is alleged by the defence that there was no intention that he should inherit and that he was merely what the Chinese term a fondling adopted son with no rights of inheritance, corresponding to what the Burmese Buddhists call an apathitta or casually adopted son, who can only inherit in the ab-

(9) [1904] 32 Cal. 219=4 L. B. R. 172=8 Sar. 743 (P.C.).

(10) [1909] 36 Cal. 978=3 I. C. 797=36 I. A. 192 (P.C.).

(11) A. I. R. 1923 P. C. 156=1 Rang. 451 (P.C.).

sence of natural or keittima adopted children. (After dealing with oral evidence the judgment proceeded.) It is patent that there was no formal adoption of plaintiff. It has therefore to be considered whether the fact of adoption with rights to inherit can be inferred from the treatment of Chan Pyu by Chan Ma Phee and from the position he occupied in his household. The strongest evidence to prove that plaintiff was adopted as a keittima son is on the face of it the power-of-attorney, Ex. A, given to him by Chan Ma Phee in which plaintiff is described as his son, an inscription on a tablet in a Thein or ordination hall built by Chan Ma Phee and Me E Mya, in which he is described as "son Ko Pyu" and the tombstones of his adoptive parents on which he is described as son. His mention as adopted son in the will is also relied on, although, as I will point out later, the terms of the will, are in my opinion against his claim.

Even if the Burmese Buddhist Law is to be applied, it is impossible under the circumstances to rule out from consideration the fact that the deceased Chan Me Phee was in fact Chinese, observed Chinese customs, and ceremonies, and was a Taoist, a Confucian, and an ancestor worshipper, as well as a Buddhist. As regards the power-of-Attorney, it is to be noted that the natural son Chan Chor Lye was given a much wider power-of-attorney, and that plaintiff never was manager of Chan Ma Phee's business.

There is evidence of experts in Chinese custom, that the Chinese are fond of euphemism, and that a fondling son might well be described as a son in a power-of-attorney. The same remarks would apply to the inscription in the "Thein," but this is of less importance as it was kept under lock and key, and there is no evidence by whom it was erected. It may be observed that it is unlikely that Chan Ma Phee would apply the expression 'elder brother' "Ko" to an adopted son and that the use of the word makes it more difficult to believe that Chan Ma Phee was responsible for the wording of the inscription.

As regards the tombstone inscription, it is clear that they have not the same significance, as they would have, had Chan Ma Phee been a Burmese Buddhist. It should be noted moreover that Ma E Mya herself appears to have adopted Chinese customs, and was given a Chinese funeral with all its ritual and ceremony. It is proved that amongst the Chinese the words used in inscription on tombstones are largely conventional. Moreover the names of children of another adopted son, who admittedly had no status to inherit, appear as mourners before the natural grandchildren. The Minister of Forests stated that his own fondling adoptive brother who was also like plaintiff, Burmese, was given first place in the inscription on the tombstone of his father. It is obvious therefore that the documents and inscriptions under the circumstances are not conclusive evidence that the plaintiff was the keittima adopted son of Chan Ma Phee.

As regards the will, the fact that plaintiff was only given a minor legacy must in view of the size of the estate, be considered proof positive that though Chan Ma Phee called him his adopted son, he did not in fact place him on the same footing as his sons by birth. When the evidence for the defence is examined it must be regarded as proved up to the hilt that plaintiff never had the status of a keittima adopted son. The evidence against his claim is overwhelming. It is proved that Chan Ma Phee's eldest son was born before plaintiff was taken into the household. There was therefore no need for a son to represent Chan Ma Phee before his ancestors. Had there been such a necessity his own brother's son was available, and by Chinese custom would certainly have been selected, if the intention was to adopt a son with full rights. It is abundantly proved that plaintiff was never treated in the family in the same way as the natural sons. He was given no proper education in Burmese and was never taught English. He was not treated so liberally in the matter of pocket money or clothing and he did not sleep in the same bed room with them but with the clerks.

The evidence has been dealt with in extenso by the trial Judge and it is not necessary to refer to the witnesses in detail, but I observe that Ma Shwe Mya's own sister deposed that she had never heard that Nga Nga Pyu had been adopted (that is from a Burmese point of view) by Chan Ma Phee. U Thet She, admittedly a man of great influence in the Delta, and of very considerable wealth, a first cousin of both Ma E Mya and plaintiff's

own mother Ma Le and an intimate friend of Chan Ma Phee's family stated definitely that Chan Ma Phee took Nga Pyu out of pity and brought him up and that he had nothing to do with inheritance (at p. 359). He was not treated as his own son (p. 356) and deposes, 'did not receive the same education. pocket money, or clothes, and had his meals at a different table.' His evidence alone is conclusive. U Thein Maung. another friend of the family, a retired Extra Assistant Commissioner, gave similar evidence. He points out that the plaintiff never came to visit Chan Ma Phee during his illness. It is not disputed that plaintiff did not visit his adopted father for eight months before his death and thereafter never visited Ma E Mya prior to her death.

Another important point is that plaintiff was married under Chan Ma Phee's auspices to a sister of Lim Chin Tsong, but this did not prevent Chan Ma Phee from subsequently marrying his own son to Chin Tsong's daughter, which he would never had done had he regarded plaintiff as on the same footing of his own sons, for he would have been marrying one son to the niece by marriage of another. It is clear from the evidence of Khoo Sein Kho (p. 467, and Taw Sein Kho (p. 419, 420). It is also significant that at the funeral of both parents, the golden flag was carried by Chan Chor Lye and not by plaintiff as he alleged. It is unnecessary to discuss the evidence further. I agree with the trial Judge that it is not proved that plaintiff was adopted by Chan Ma Phee with the intention that he should be an heir to his estate and had not the status of a keittima son. I would dismiss the appeal with costs.

Cunliffe, J.—I am of the same opinion, and have nothing to add on the facts; in deference, however, to the arguments addressed to us by counsel, I desire to state my opinion on the law arising.

Section 13, Burma Laws Act, is in the following terms:

"13. (1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution:

(a) the Buddhist law in cases where the parties are Buddhists;

(b) the Mahomedan law in cases where the parties are Mahomedans; and

(c) the Hindu law in cases where the parties are Hindus; shall form the rule of decision, except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.

(2) Subject to the provisions of sub-S. (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

(3) In cases not provided for by sub-S. (1) or sub-S. (2), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.

(4) This section does not extend to the Shan States."

In the Full Bench case of *In re Ma Yin Mya* v. *Tan Yauk Pu* (7), the meaning of sub-S. (1) above was closely considered. *Ma Yin Mya's* case was one in which a Burmese Buddhist woman had married a Chinese Buddhist resident in Burma. The general conclusion arrived at by the learned Chief Justice, who delivered the leading judgment, with which the other members of the Court agreed, was that the expression

"the Buddhist law in cases where the parties are Buddhists"

means, so far as Burma is concerned, the Burmese Buddhist law in cases concerning any adherents to the Buddhist religion irrespective of whether they are Burmese Buddhists or not. I am exceedingly doubtful (and I only say so with great respect) whether had I been sitting on the Full Bench I should have been able to agree to this interpretation. It appears to me firstly that such a reading introduces by implication into the statute an adjective qualifying the words "Buddhist law," and, secondly, having introduced this adjective the qualification is not again applied to the second use of the term "Buddhists". I incline to the view that once the term "Burmese" is introduced, the interpretation should rather read

"the Burmese Buddhist law in cases where the parties are Burmese Buddhists."

The question whether the qualification should have been introduced at all may perhaps be tested by the application of some adjective to the two other provisions in the section dealing with the Mahomedan and the Hindu law. Would it be possible, for example, to qualify the expressions "Mahomedan law" and Hindu law in some special way and direct that this special law in some particular province in India should apply to all Mahomedans and to all Hindus? It may here

he noted that the preamble to the Burma Laws Act provides that it is an act applicable to the whole of British India unless there is a direct statement to the contrary in any part of it. There is a further difficulty also. Maung Ba, J., who is especiallly fitted to speak on such a subject [he in fact made the Reference to Full Bench in *Ma Yin Mya's* case (7)] appears to be exceedingly doubtful whether the term " Burmese Buddhist law" is an accurate one. In his concurring judgment, he describes it as a misnomer. It certainly seems to be so, if one attempts to put Burmese Buddhist law (so-called) in the same category as Hindu or Mahomedan law. Although there must be thousands of Buddhists in India proper, none of the corresponding statutes applying to the Indian High Courts or the Government of India Act, 1915, mention Buddhist law. In my opinion, the more correct term to be substituted would be the Burmese Common law, for as Maung Ba, J., points out, Buddhism has laid down no law applicable to secular matters. However, though I differ from the interpretation of the learned Chief Justice for the reasons adduced, the Courts of this country are in my opinion bound by his reading of sub-S. (1).

Ma Yin Mya's case (7), however, was one of marriage and to look into the judgment further, we find that on the lines of the rule followed in *Simonin* v. *Mallace* (12) and *Sottomayor* v. *De Barros* (13), the lex loci contractus was held to govern the formal requisites of the marriage. Further, reliance was placed upon the two well-known English decisions of *Chetti* v. *Chetti* (14) and *Mir Anwaruddin's* case (15). These four cases are instances of a resistance on the part of the English Courts to the introduction, or, rather I should say the recognition, of a theory put forward by text-book writers and certain international jurists. The theory amounts to this that personal law governs personal relations and questions involving family transactions have mostly been governed by personal law and not by the local law of the country in which one or other of the parties is residing, or where the transactions actually took place. The reason underlying these efforts on the part of the English Courts is to prevent on equitable principles, in cases of marriage, hardship or injustice being experienced by English women who have ignorantly married husbands who are foreigners in a legal sense. And by "ignorantly", I mean without a full knowledge of their husbands' family customs, personal law or religious disabilities. The learned Chief Justice has applied this principle in terms to the case of a Burmese woman marrying a native of China, who has settled down in Burma and whose family traditions are widely different from those of the Burmese. He has indeed gone even further and has held that dealing with the second part of S. 13, sub-S. (1) Burma Laws Act, no family custom of a foreigner will be recognized unless it is shown that the application of the custom will not work injustice to the native woman. [This is following a dictum of Lord Gorell's in *Chetti* v. *Chetti* (14)].

I have referred to *Ma Yin Mya's* case (7) at such length because it was the basis of the argument relied on behalf of the appellant to support his case as a native of this country dealing with a native of China. It would not be going too far if I say that we are now invited to extend this ruling in relation to marriage to all questions regarding succession, inheritance, caste or any religious usage or institution. The manner in which the case was put for the appellant may be paraphrased thus :

> " I am a Burman. I was adopted by a native of China domiciled in Burma. The law governing my adoption must be the Burmese Buddhist law. In point of fact, my adoptive father went so far as to make a will, in which he did not recognize my adoption as he ought to have done. He put me on a much lower status than a keittima adopted son, as I claim to be. If my adoptive father is governed by Burmese Buddhist Law, he is not entitled in law to make a will at all. There is no such thing as Chinese customary law, but even if there is and it is proved to have the force of law in this county, under the decision in *Ma Yin Mya's* case (7) the application of such a custom on the lines put forward by the respondents will work an injustice to me a Burman."

Bound as we are, therefore, by the Full Bench ruling, as to what Buddhist Law controls Buddhists in Burma, it becomes necessary to test the appellant's arguments from the point of view of customs having the force of law. Have the Chinese Buddhists who were originally

(12) [1860] 29 L. J. Mat. 97=2 Sw. & Tr. 67 =6 Jur. (n.s.) 561=2 L. T. 327.
(13) [1877] 3 P. D. 7.
(14) [1909] P. D. 87.
(15) [1917] 1 K. B. 649.

emigrants into Burma and their descendants, customs of their own in reference to adoption and inheritance? In my opinion having regard to the respondents' evidence there can be no doubt that they do possess distinctive family customs. Their view of adoption is fundamentally at variance with the Burmese Buddhist law. Incidentally it is not derived from Buddhist principles but from Taoism. The Chinese habit of making testamentary disposition of their property is widespread and cannot be seriously disputed. But if this is so, the question then arises—Have these customs the force of law? In the case of *Rama Lakshmi Ammal* v. *Sivanatha Perumal* (16), the Privy Council laid down that the legal recognition of a custom in British India depended upon its antiquity, certainty and uniformity. I have no difficulty in regard to the second and third requirements, but as to the first it is necessary to enquire what amount of antiquity the particular customs of the Chinese Buddhists in Burma have to their credit. It is obviously impossible for a Court of the British Empire to extend its enquiries much beyond its own establishment. Varying terms have been laid down. For example, in Calcutta the year 1773 constitutes the date from which legal memory is reckoned. In the case of *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (17) a Privy Council case, it was held that evidence of unbroken custom for eighty years since the British occupation is sufficient. I am satisfied that having regard to the expert testimony in this case, I am enabled to hold that the length of the prevalence within the province of the customs we are here considering is ample to bring it within the requirements of the term "legal memory."

Moreover a series of legal decisions confirming the customs in dispute is the most cogent and satisfactory evidence that such a custom has the force of law, see the opinions given in *Jianutullah* v. *Romonikant Roy* (18), and *Nala Thambi* v. *Mella Kumara* (19). There are numerous rullings in both Upper and Lower Burma confirming the customs of Chinese settlers. As to the question of hardship to the native Burman, I think adoption and marriage may be clearly distinguished. Some forms of adoption may possibly be contracts between the adoptive parents and the persons handing over the child; but "qua" the child, Burmese adoption is not a contract. It is perhaps difficult to bring adoption within a stereotyped legal category; but it seems to me in law to be a form of declaration of trust. If this view be correct, hardship to the cestui que trust need not be too closely considered.

There remain two further aspects of this appeal to which I desire to refer. The first is that there exists a great scarcity among the Indian High Court Reports of any recognition of customs imported into British India by foreigners. The reported cases of various customs belonging to shifting or peripatetic families and tribes within British India are of course numerous. I have only been able to find one, however, in which a foreigner imported a custom by emigration into India and succeeded in securing the confirmation. This was in the case of *Mailathi Anni* v. *Subbaraya Mudaliar* (20), where a Bench held that migration by the widow of a Hindu subject of French India into British India and the acquisition of a British domicile enabled her to inherit her husband's estate under her own imported customary law. The learned Judges followed the dictum contained in para. 45 of Mayne's Hindu law which it may be noted is prima facie in opposition to *Chetti* v. *Chetti* (14) and *Mir Anwaruddin's* case (15). In other parts of the British Empire the validity of personal law introduced by Indian emigrants who have acquired a domicile has been recognized in principle. See the case of *Abdurahim Haji Ismail Mithu* v. *Halimabai* (21) where members of a sect of Mahomedans known as Memons had migrated to Mombassa and their family customs were adjudicated upon both by the East African Courts and the Privy Council. The Privy Council also in the case of *Bartlett* v. *Bartlett* considered the validity of a will of a British Mahomedan subject domiciled in Egypt made contrary to the provisions of Mahomedan law. Their Lordships con-

(16) [1872] 14 M. I. A. 570=I. A Sup. Vol. 1=17 W. R. 552=3 Sar. 108 (P.C.).
(17) [1901] 23 All. 37=27 I. A. 238 = 7 Sar. 724 (P.C.).
(18) [1887] 15 Cal. 233.
(19) [1873] 7 M. H. C. R. 306.
(20) [1901] 24 Mad. 650=11 M. L. J. 307.
(21) A. I. R. 1915 P. C. 86=43 I. A. 35 (P.C.).

strued S. 90, Ottoman Order, as upholding the Mahomedan personal law.

In conclusion after a consideration of many cases in which customary law has been applied, I cannot help observing that most of the disputes as to whether the personal law of their caste or family shall prevail against the general law of the land have taken place between parties of the same domicile or origin, and nationality. It is rare to find persons of a different race in conflict with reference to custom. Had I not been bound by the Full Bench decision in *Ma Yin Mya's* case (7) as to Burmese Buddhist law controlling all Buddhists, I should undoubtedly have held that the peculiar facts of this case brought it within the legal category of sub-S. (2) or (3) or S. 13 the Burma Laws Act. The case on principle has much affinity with the decision in *Ma Yait* v. *Maung Chit Maung* (22). This was the well-known Kalai case in which the Privy Council held that the testamentary powers of a Hindu Burman were not governed by either Hindu or Buddhist law, but that they were sui generis and, therefore, within the purview of the Indian Succession Act under the second part of S. 13, Burma Laws Act.

For these reasons and as I share my Lord's view of the facts, I agree that this appeal should be dismissed.

S.N./R.K. *Appeal dismissed.*

(22) A. I. R. 1922 P. C. 197=49 Cal. 310 = 48 I. A. 553 (P.C.).

A. I. R. 1929 Rangoon 31

BAGULEY, J.

Emperor

v.

Jan Maistry and *others*—Accused—Non-Applicants.

Criminal Revn. No. 372-B of 1928, Decided on 20th July 1928, from the order of 2nd Addl. Magistrate, Yenangyaung, in Criminal Regular Trial No. 10 of 1928.

Burma Gambling Act (1899), Ss. 11 and 12 —Daing should be punished much more heavily than ordinary gambler.

A comparison of the maximum fines and the maximum sentences of imprisonment under Ss. 11 and 12 clearly shows that the daing under ordinary circumstances should be punished very much more heavily than the ordinary gambler. It is the Daing who makes opportunities for other people to commit offences under S. 11 and not vice versa. [P 31 C 1]

Judgment.—The Second Additional Magistrate of Yenangyaung tried nine men under Ss. 11 and 12, Gambling Act. Some he acquitted, some he fined Rs. 10 each under S. 11, and the other two he found guilty under S, 12, Gambling Act, and fined one of them Rs. 15 and the other Rs. 20.

The accused, Maw Pet Khan, whom he fined Rs. 20 at the time of the commission of the offence, was a police-officer, and the Magistrate was of opinion that he had acted as an agent provocateur and that was the reason for punishing him more severely than the others. He, however, went out of his way to make some sweeping statements against the police in general. He says :

> "It seems to me that the idea of the second accused is to create crime first and detect it afterwards. This bad practice is mostly adopted by some of the subordinate members of the C. I. D. and the police either to get promotion or to justify their existence"

and in another passage of his judgment he says:

> "The increase of crime in Burma will not be checked unless and until the subordinates employed in the C. I. D. and the police department realize the fact that it is not paying to create the crime first and detect it afterwards."

The Inspector General of Police takes exception to these two remarks and asks that these may be expunged from the record. With this view I am in entire agreement.

The man Mawpet Khan was a police recruit of only a few months' service and his services have since been dispensed with, as he was not considered likely to turn out an efficient policeman. Because one new and unsatisfactory recruit went wrong in one instance the Magistrate was not justified in making sweeping statements against the Police force in general and the C. I. D. in particular, the more so as Maw Pet Khan was not employed in the C. I. D.

From the first passage I direct that the words from "This bad practice . . . to justify their existence" be expunged and I also direct that the whole of the second passage be expunged.

As the case is now before me, I may as well make a few remarks for the benefit of the Magistrate who tried the case.

In the course of his judgment, there is a page of quotation from a lecture by Mr. Justice Carr to the students at the Provincial Training College. The lecture

was undoubtedly one containing very good advice to Magistrates; but it is quite unnecessary for a Magistrate to quote a page from it in his judgment. Most Magistrates would not have time to make unnecessary quotations in their judgments and there is no necessity for this long extract.

I would also point out that the sentences passed show a failure to grasp the relative seriousness of offences under Ss. 11 and 12 Gambling Act. The moral turpitude of gambling in itself is regarded by most people as small, and the man who commits an offence against S. 11, Gambling Act merely by going to a waing and having a flutter is not really committing a crime involving serious moral turpitude. The principal portion of his offence is that he is breaking the law of the country. The law has been framed in the way that it is because gambling of a certain kind among certain classes of people is apt to lead to more serious crime and that, I gather, is the main, if not the only reason for which it is forbidden by law. On the other hand, the man who commits an offence under S. 12, Gambling Act, is a man who is breaking the law of the country not merely for the sake of gaining a passing amusement but with the intention of making money. The gambler may win, or he may lose. On the whole, the general body of gamblers lose, because the daing always wins. If there were no daings to run illegal gambling, no one could commit an offence under S. 11, Gambling Act. It is the daing who makes opportunities for other people to commit offences under S. 11 and not vice versa.

A reference to the two sections will show that the law regards the offence of the daing as far greater than the offence of the mere gambler. If the maximum fines which can be inflicted are looked at, it will be seen that the daing can be punished five times as heavily as the gambler. If the maximum sentences of imprisonment are looked at, the daing can be punished three times as heavily as the gambler, and this clearly shows that the daing under ordinary circumstances should be punished very much more heavily than the ordinary gambler.

In this case the Magistrate has fined the ordinary gamblers Rs. 10 each, and the ordinary daing Rs. 15. It would be far more reasonable if the daing had been punished four or five times as heavily as the gambler.

R.K. *Revision allowed.*

A. I. R. 1929 Rangoon 31

BAGULEY, J.

Maung Chan Nyein and *others*—Appellants.

v.

Maung Pwe and *another*—Respondents.

Special Second Appeal No. 707 of 1927, Decided on 25th June 1928, from judgment of the Dist. Judge, Myingyan, in Civil Appeal No. 51 of 1927.

Easements Act Ss. 17 (c) and 18—Act does not apply to Burma—Right of receiving surface water can be acquired by custom in absence of statutory prohibition.

Courts can recognize an easement as acquirable by custom so long as they are not forbidden to do so by express statute. An easement of receiving surface water can be created by custom in Burma, where the Easements Act is not applicable and the custsm is a proper one without which there could be no cultivation in that area where the custom exists: 2 *U. B. R.* 642 and 24 *Cal.* 865, *Dist.* [P 32 C 2]

Maung Ni—for Appellants.
Jagannathan—for Respondents.

Judgment.—In this case the appellants claim the land in dispute. In the first place it seems to have been filed before the Township Court of Taungtha as a suit for an injunction restraining the defendants from entering upon and working the land and directing them to remove the kazins. The claim seems to have been then that the plaintiffs owned certain lands which they cultivated and certain lands which they did not cultivate but from which water ran down on to their cultivable land. The Township Court dismissed the suit and the plaintiffs appealed to the District Court. The District Court passed an order remanding the case for disposal on certain issues, the plaintiff's ground having been changed from that ownership of the land entered upon by the defendants to the fact that they had the right to receive the water flowing down from that land. In fact, they changed their basis from that of ownership of the land occupied by the defendants to that of having an easement to receive water from that land. The case came back to the trial Court and then apparently the whole file was burnt. The

present file has been re-constructed from copies and such like. The issues framed by the District Court when it remanded the suit were:

(1) Has the surface water flowed from the disputed land to the plaintiffs' lands adjoining thereto ?

(2) If so, how long have they enjoyed the right of use of it ?

(3) Are they entitled to continue the right ?

The trial Court proceeded to determine these issues. The learned Judge answered the first issue in the affirmative. He answered the second issue by saying that the right has been enjoyed for more than 25 years and he answered issue 3 in the affirmative also. The defendants appealed to the District Court and in appeal the learned Additional District Judge took up the position that the mere right to receive surface water not flowing in a stream and not permanently settled in a pool or tank or otherwise could not be acquired by easement. He deduced this from S. 17 (c), Easements Act. He therefore, allowed the appeal and dismissed the suit with costs in both Conrts. In doing so he overlooked two points. The first is that the Easements Act does not apply to Burma; and the second is that he has made a main point the fact that there is no evidence that the water flows in a stream or in a definite channel. As a matter of fact, his predecessor had framed no issue on that point and, therefore, it is quite natural that there was no evidence on the point. For all we know the water may have flowded in a stream. I notice that one of the witnesses does refer to the blocking of the "water-course."

It is necessary I think to clear away all idea of the Easements Act which does not apply in this country. This land is apparently in the dry zone and there is ample evidence to show that it is the custom in this part of the world, where the land appears to be undulating, for only the lower ground to be cultivated and for each piece of lower ground to have a kind of catchment area attached to it. This is referred to it in the evidence as "yegya," in some places, which is translated sometimes as a "water-fall." This custom is admitted by the defendant himself for he says in his evidence in cross-examination that in that place people mostly keep

water-falls, the water resources for the fields. The plaintiffs' land enjoyed the water that falls from the land now in dispute and nowhere else."

Further on he says: "We cannot cultivate the place if it is kept as the water resources for the other fields." In other words the defendant himself admits that in this neighbourhood areas of land which are termed "water resources" are recognized and that one cultivator will not encroach upon the water resources of another man's fields. It is quite clear that he has done so. In fact, he admitted it himself.

No doubt in the ordinary way a right merely to receive surface water would not be recognised by the Courts as an easement and if the Indian Easements Act applied, the Courts would be prevented from recognizing such a right. But as the Act does not apply in Burma there is nothing to prevent the Courts recognizing an existing custom which is obviously a proper custom and possibly a custom without which there could be no cultivation in this area at all. I hold that the Courts can recognise an easement as acquirable by custom so long as they are not forbidden to do so by express statute and here there is no statue preventing it. The plaintiffs have had this right for over 25 years. One witness deposes to the right as having existed for as long as 40 years, and in that length of time an easement could be acquired.

I have had quoted by the respondents the case of *Man Hnin Nyo* v. *Maung Kyin Thu* (1). This is a very old ruling by the Judicial Commissioner of Upper Burma in 1892. There was no question in that case of any custom applying to cultivators for the local area and I am unable to follow the learned Judicial Commissioner when he applied the Easements Act, to Burma, the Act not so for having been extended here. The other case quoted before me is *Debi Pershad Singh* v. *Joynath Singh* (2). This was a case between riparian owners and is not applicable to the present case at all. I therefore set aside the judgment and decree of the first appellate Court and restore those of the Township Court. The defendants will pay the costs of the plaintiffs throughout.

M.N./R.K. *Decree set aside.*

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(1) [1892-96] 2 U. B. R. 642.
(2) [1897] 24 Cal. 865=24 I. A. 60=7 Sar. 209 (P.C.).

A. I. R. 1929 Rangoon 33 (1)

DAS AND DOYLE, JJ.

K. V. A. L. Chettyar Firm—Appellant.

v.

M. P. Maricar—Respondent.

Civil Misc. Appeal No. 37 of 1928, Decided on 27th June 1928, from order of Dist. Judge, Insein, in Civil Execution No. 24 of 1926.

Civil P. C., O. 21, R. 90—Auction-purchaser cannot apply to set aside sale under R. 90 but under R. 91 only.

The auction-purchaser's interest comes into effect only after the sale. He is not a person whose interest is affected by the sale within R. 90. The only rule under which he can apply to set aside the sale is O. 21, R. 91. 3 *Pat. L. J.* 516, *Foll.*: *A.I.R.* 1927 *Rang.* 301 and *A. I. R.* 1925 *All.* 459, *Diss. from.* [P 33 C 1, 2]

K. C. Bose—for Appellant.

N. N. Burjorjee—for Respondent.

Judgment. — The respondent, who was the auction-purchaser, applied for the sale to be set aside on the ground of fraud under O. 21, R. 90, Civil P. C. The District Court set aside the sale, and the decree-holder has now appealed against that order. It is contended before us that an auction-purchaser is not a person whose interests are affected by the sale under O. 21, R. 90, Civil P. C. It is admitted that if he is not a person whose interests are affected by the sale he cannot apply under that order to set aside the sale.

We have no hesitation in holding that the words "whose interests are affected by the sale" in the abovementioned order mean persons who have some interest in the property at the time of the sale. The auction-purchaser's interest only comes into effect after the sale, and it cannot be said that his interests are in any way affected by the sale.

Our attention was drawn to a decision of Brown, J., in the case of *S. N. V. R. S. Subramanian Chettyar* v. *N. L. M. Chettyar Firm* (1). In that case Brown, J., following a decision of the Allahabad High Court in the case of *Ravinandan Prasad* v. *Jagarnath Sahu* (2), held that an auction-purchaser is a person whose interest is affected by the sale, and, therefore, could apply under O. 21, R. 90, Civil P. C., to set aside the sale. We must say that we do not agree with this decision of Brown, J. The reasoning of the learned Judges of the Allahabad High Court in the case of *Ravinandan Prasad* v. *Jagarnath Sahu* (2) does not appear to us to be sound. The learned Judges seem to think that the use of the word "interests" instead of "interest" in the rule makes a difference in the meaning of the words in that rule. We must say that we cannot follow this reasoning.

It is quite clear to our mind that the word "interests" mentioned in that rule refers to interest existing at the time of the sale and not to interest created by the sale. The only rule under which an auction-purchaser can apply to set aside the sale is O. 21, R. 91, Civil P. C., and if the legislature had intended to allow an auction-purchaser to apply under O. 21, R. 90, Civil P. C., his name would have been specifically mentioned in that rule.

We are fortified in this opinion by a decision of the Patna High Court in the case of *Khetra Mohan Datta* v. *Dilwar* (3). Brown, J., was mistaken in thinking that the *Patna Law Journal* was not an authorized report. It was the authorized report of the Patna High Court till the Patna series of the *Indian Law Reports* was started. We, therefore, allow this appeal and set aside the order of the District Judge with costs three gold mohurs in both Courts.

S.L./R.K. *Appeal allowed.*

(1) A. I. R. 1927 Rang. 301=5 Rang. 516.

(2) A. I. R. 1925 All. 459=47 All. 479.

(3) [1918] 3 Pat. L. J. 516=46 I. C. 614=5 Pat. L. W. 151.

* A. I. R. 1929 Rangoon 33 (2)

RUTLEDGE, C. J. AND BROWN, J.

Mahomed Hussein Barocha — Appellant.

v.

Ko Maung Gale—Respondent.

First Appeal No. 148 of 1928, Decided on 26th November 1928 from an original side order of Rangoon High Court.

*** Civil P. C., O. 6, R. 17—Defendant grossly careless—Amendment should still be allowed unless Court thinks it to be mala fide.**

However gross the carelessness may be on the part of defendant while giving his written statement, its amendment ought to be allowed unless the Court is satisfied that the object of the defendant was mala fide in that he wanted to defeat and delay the plaintiff's claim. [P 34 C 1]

A. B. Banerjee—for Appellant.

Dantra—for Respondent.

Judgment.—This is an appeal from the original side of this Court, refusing to allow certain amendment of the written statement, in consequence of which judgment and decree were passed in favour of the plaintiff-respondent.

The whole question turns on whether the learned Judge was justified in refusing this amendment. The defendant-appellant sought to amend para. 1 of the written statement by striking out the words "and nine" and subsequently denying certain allegations made by the plaintiff in this paragraph of the plaint. How an advocate and a verifying defendant could come to admit this paragraph, when in fact they intended to deny it, it is difficult to conceive. The learned advocate for the appellants admits that the carelessness is gross and in saying so he is really under-stating the case. But, however gross the carelessness, we are of opinion that an amendment ought to be allowed, unless we are satisfied that in fact the defendant's action was mala fide. If it were a case of mala fide with the object of defeating and delying the plaintiff's claim, we consider that it was so risky and dubious as not likely to commend itself to a litigant. In fact it left the plaintiff's claim undefended, and would be likely to be ineffective if looked on as a written statement merely filed for the purpose of gaining time. The learned advocates have admitted in argument that there was a similar suit arising out of the same fire and the consumption of another party's paddy. In that suit a paragraph similar to para. 8 of the plaint was pleaded, and was in fact denied by the present appellants. We have also taken into consideration the letter dated 21st August 1926, which appellant's advocate addressed to the plaintiff.

Taking all these facts into consideration, we are of opinion that the defendant's admission of para. 9 was a mistake. That being so, the learned Judge ought to have allowed an amendment but only on terms of full and adequate costs being granted to the plaintiff. Leave to amend necessarily involved an adjournment of the case and the costs accordingly must be substantial. All the evidence taken on the original side must not be thrown away, but it is clear that the services of the plaintiff's advocate have been thrown away, and the plaintiff has also been delayed in recovering his claim if in fact his claim in the end turns out to be a valid one.

We are, therefore, prepared to allow the appeal on terms. If the plaintiff pay into Court the sum of Rs. 500 as costs to indemnify the respondent-plaintiff for the loss which he has sustained within 14 days, the appeal will be allowed, and the necessary amendment asked for will be made, and the case will be remitted to the original side for disposal. On the appellants paying the said sum of Rs.500 into Court, the respondent may withdraw the same without security. The order as to stay of execution will continue till the disposal of the suit on the original side, the appellants to be at liberty to apply, on deposit of Rs. 500 into Court, for refund of the Court-fee paid in this appeal.

S.N./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 34

HEALD, J.

R. Vaz—Appellant.

v.

Muni Singh—Respondent.

Spl. Second Appeal No. 393 of 1928, Decided on 2nd January 1929.

Transfer of Property Act, S. 3—In Burma failure to search register warrants imputing notice to transferee of prior mortgage.

In Burma a search of the registration records is particularly necessary and particularly easy, and failure by subsequent purchaser from a mortgagor in possession to make a search is a circumstance which warrants the imputation of notice to him of the previous mortgage : *A. I. R.* 1921 *P. C.* 112, *Expl.* [P 35 C 1]

P. B. Sen—for Appellant.

Judgment. — Appellant sued on a mortgage made in his favour by Abdul Gaffur and his wife Ma Tu and joined as defendants a number of persons, including the present respondent who claimed to have purchased various parts of the mortgaged property from the mortgagors.

The date of the conveyance in respondent's favour was 16th June 1919. The lower appellate Court said that because the mortgagors remained in possession of the property, and the respondent bought without notice of his mortgage his purchase was good as against appellant's prior mortgage, and in support of that view the learned Judge cited the decision of their Lordships of the Privy

Council in *Tilakdhari Lal v. Khedan Lal* (1).

It seems clear that the learned Judge misunderstood the meaning and extended the scope of that ruling. In that case their Lordships were considering the general proposition that registration of deeds is notice of its contents to all the world and the particular proposition that registration of subsequent transfer of property is notice to prior transferrees. It is true that their Lordships said that notice cannot in all cases be imputed from the mere fact that a document is to be found on the Indian register of deeds ; but they went on to say that there may be cases in which omission to search the registers would result in notice being obtained and that the circumstances necessary for this purpose may be very slight.

In a country like Burma, where nearly every mortgagor, who remains in possession of the mortgaged property executes at least one subsequent outright conveyance of the property in fraud of the mortgage which he has made and where under the procedure prescribed for the registration of deeds relating to lands the particulars of every transfer which is registered are reported to the revenue authorities, and under the procedure prescribed for the maintainence of the Land Revenue registers these particulars are recorded in the revenue registers in accordance with that report a search of the registration records is particularly necessary and particularly easy, and I have no hesitation in holding that in this case respondent's admitted failure to make a search was a circumstance which warranted the imputation of notice to him.

I therefore hold that the respondent must be regarded as having taken his conveyance subject to appellant's mortgage and that the land conveyed to him is subject to that mortgage.

The judgments and decree of the lower Courts in so far as they reject appellant's claim that the land conveyed to respondent is subject to appellant's mortgage are set aside, and the mortgage decree will be amended by adding to the schedule the piece of land known as holding No. 17, plot No. 87/25-26 as shown in the map (Ex. 13) filed at p. 40 of the trial Court's exhibit record.

(1) A. I. R. 1921 P. C. 112=48 Cal. 1 (P. C.).

The lower appellate Court's order for costs is set aside and the respondent will bear appellant's costs in the lower appellate Court and on the uncontested scale in this Court.

R.K. *Decree modified.*

A. I. R. 1929 Rangoon 35

RUTLEDGE, C. J., AND BROWN, J.

Official Assignee—Appellant.

v.

Ma Hla Htwe and *others*—Respondents.

First Appeal No. 166 of 1928, Decided on 27th November 1928, from judgment of Chari, J. in Civil Regular No. 17 of 1928.

(a) Mahomedan Law—Marriage—Burmese Buddhist woman cannot marry a Shia unless converted to Islam.

Unless a Burmese Buddhist woman is converted to the faith of Islam prior to her marriage, no marriage can be contracted between her and a Shia Mussalman. [P 37 C 2]

(b) Mahomedan Law—Marriage — Shia—Muta—Period of marriage and dower must be specified.

"Muta" is a very vague and unsatisfactory form of contract for personal relations. There must be definite time during which the relationship is to last and definite sum or thing specified as dower. [P 38 C 1]

Dantra—for Appellant.

Masani for *Administrator-General* —for Respondent 4.

Judgment from which the appeal was preferred was as follows :—

Chari, J.—The plaintiff in this case is a brother of one Mahomed Ali Khorasany, a Shiah Mahomedan, who died at Rangoon on 26th January 1924. He claims to be the sole heir of the deceased, as being his brother, and alleges that defendants 2 and 3, young children who are admittedly the children of Mahomed Ali Khorasany, are illegitimate and therefore not entitled to inherit as sons under the Shia Mahomedan Law to the estate of their father. He asks for a declaration that he is the sole heir.

This suit was filed this year, almost four years after the death of Mahomed Ali Khorasany. This by itself raises no serious presumption against the plaintiff. In Civil Miscellanous Case No. 70 Ma Hla Htwe, who is said to be a Burmese Buddhist, alleging that she was the widow of the deceased Mahomed Ali Khorasany, asked the Court to direct the

Administrator-General to apply for letters of administration to the estate of her husband. She later filed another miscellaneous application to be allowed to sue as a pauper. She never pursued this application, which was dismissed for default. She is alleged to have written a letter on 5th December 1925 to the Administrator-General of Burma that she and her sons gave up their claims in the estate of Mahomed Ali Khorasany in favour of the plaintiff. The letter is not produced by the advocate who appears for the Administrator-General and even if produced would carry no weight whatever, as it was not competent for defendant 1 to give up the claims of her infant children.

The question for determination is whether defendants 2 and 3 are legitimate or illegitimate children of Mahomed Ali Khorasany. The evidence on the point is extremely meagre. It consists only of the statements of the plaintiff himself and a cousin of his, that the deceased was not married to either Ma Hla Htwe or Annie. The cousin merely says that the deceased was not married and that he would have known of the marriage if a marriage had taken place. This may be true of a marriage taking place with formalities before a kazi or in a mosque. but it is quite possible that the deceased was married in a private way to these women and did not want that fact advertised. The presumption of law is always in favour of morality and legitimacy and when it is proved that a man and a woman are living together as husband and wife, and legal presumption is in favour of a legal union and against an illegal union: *Sastry Velaider Aronegary v. Sembecutty Vaigalie* (1). Apart from this presumption, there is sufficient evidence from which I could infer in favour of these innocent children that they were acknowledged by their father, which, under Mahomedan Law will lead to an inference of their legitimacy. Mr. Justice Ameer Ali in his book on Evidence, 8th Edition at p. 798 referring to Mahomedan Law says:

> "Cohabitation and birth with treatment tantamount to acknowledment is sufficient to prove legitimacy, although mere cohabitation alone will not suffice to raise such a legal presumption of marriage as to legitimize the offspring."

(1) [1881] 6 A. C. 364=44 L. T. 895=50 L. J. P.C. 28.

I am glad to note that the plaintiff gave evidence in a very straightforward manner, and admitted that on his death-bed his brother asked him to take care of the children.

One Martinez gave evidence. He is a Christian and says that Annie who is alleged to have been one of the mistresses of Mahomed Ali Khorasany was his daughter. He says that she was not married to Mahomed Ali Khorasany. If by this he means that Mahomed Ali Khorasany was not married in Church or before the Marriage Registrar as would be required by the Indian Christian Marriage Act, he is right, but Annie is a Kitabi with whom a marriage under Mahomedan Law is allowed to a Moslem. The presumption, therefore, would be much stronger of her being the legal wife of Mahomed Ali Khorasany. I cannot accept or act on the evidence of a witness, the tendency of whose evidence is to put a stigma on his own daughter and bastardise his grandchild. Even he admits that the deceased always admitted that these two children were his own children.

In a case of this kind where it is sought to have a declaration the effect of which is to bastardise two innocent children and deprive them of the patrimony of their father, I must have evidence much stronger and more convincing than what has been been adduced by the plaintiff, before I can come to a conclusion adverse to the children. I therefore hold that the plaintiff is not the heir to the estate of his brother and the heirs are defendants 2 and 3 who are his sons. This may seem to imply that defendant 1 is his widow, but as she a major does not defend the suit, and as she has renounced her claim to the Adminstrator General, it is unnecessary to declare her to be entitled to any portion of the estate of Mahomed Ali Khorasany.

The plaintiff's suit is accordingly dismissed.

Judgment.—As the plaintiff-appellant was adjudicated an insolvent last August, and as the Official Assignee in whom the insolvent's estate vested wished to be joined as appellant, and was ready and willing to continue the appeal without any adjournment we substituted him as appellant and heard the appeal.

The plaintiff brought a suit to declare his right as the heir to the estate of his deceased brother, Mahomed Ali Khora-

sany, and according to the plaintiff's evidence, the said deceased cohabited with Ma Hla Htwe, respondent 1, and her neice one Annie and had by them respectively two minor children, respdts. 2 & 3.

The learned Judge on the original side, by means of certain inferences and presumptions has held that these two minor children are the legitimate heirs of the deceased Khorasany. Hence this appeal.

At the trial no appearance was made on behalf of Ma Hla Htwe, or either of the minor children, and the appeal has proceeded ex parte so far as they are concerned.

The Assistant Registrar was appointed guardian ad litem over the two minors inasmuch as their respective mothers did not appear and were not making any claim upon the estate. The Assistant Registrar, however, stated to the Court that he had no funds in his hands to enable him to conduct the suit and on reference being made to the Administrator-General who had obtained letters of administration to the estate, it was found that there were no funds in his hands to enable the Assistant Registrar to take an active part in the proceedings. Mr. Masani on behalf of the Administrator-General, has, however, assisted the Court in urging what he could on behalf of the minor respondents, and asked that the judgment appealed from should not be disburbed.

Certain evidence has been adduced at the trial. The plaintiff has not been shaken in his evidence that his brother had not married either of the women but had maintained them as his mistresses for a certain period up to the time of his death, and that he acknowledged the two minors as being his sons, but not as legitimate sons and had asked the plaintiff to look after them.

No doubt, the plaintiff is an interested witness who requires corroboration. He calls a cousin of the deceased A. H. A Khorasany, who states that the deceased M. A. Khorasany was not married in his lifetime and that he would have known if he had been married to any one. It is not suggested that this witness has any interest. He is a relative and a fairly close one who ought to be in a position to say whether his cousin was married or not. We see no reason for rejecting his evidence which, if accepted, negatives the fact that the deceased at any rate could have been married in any public way, or such as his relatives or the people of his community would know of the fact.

Then there is the evidence of Martinez, the father of Annie, the mother of the second minor. If the learned trial Judge had discarded his evidence because of his demeanour and the impression which his manner of giving evidence had made upon him, we would naturally have refrained from differing with him on a question in which he was in a far better position to judge than we. But he seems to have rejected this witness' evidence because it affects the status of his daughter and the legitimation of his grand child. Neither of these, in our opinion are good grounds for rejecting the evidence. He had been subpoenaed to give evidence, and as such it was his duty to speak the truth, even if this disclosed painful and unpalatable facts. The learned Judge may have thought but he has not said that this Phillipino to have given evidence against the interests of his daughter and grandchild must have been tampered with by the plaintiff. There is no evidence, however, of this, and we see no reason why his evidence should be rejected. If his evidence be accepted it proves that Ma Hla Htwe is a Burmese Buddhist. If that is so then unless she was converted to the faith of Islam prior to the marriage, no marriage could be contracted between her and a Shiah Mussulman.

These Courts have frequently to try cases where women claim to be the wives of Mahomedans and where the Courts find in fact that they are in fact not wives; but we have not observed any tendency on the part of actual wives refraining from putting forward their claim to that status. It is true that in the first place Ma Hla Htwe, respondent 1 did make a claim to be the widow of the deceased and applied to be allowed to sue in forma pauperis, but her application was dismissed for want of prosecution and as already mentioned, she has taken no steps at the trial of the present case to establish her status.

Annie, the other woman concerned, is admittedly her niece. At no stage since the deceased's death has she put forward any claim to be a widow of the deceased. Her father in his evidence does not claim for her a higher status than that of a

mistress. He states that he asked the the deceased to marry his daughter but that the deceased, who had a number of other mistresses, merely asked to wait.

The learned advocate for respondent 4 has drawn our attention to a form of temporary marriage "Muta" which is lawful among Shiah Mahomedans and asked us to presume that such a form had taken place between the deceased and these two women. "Muta" is a very vague and unsatisfactory form of contract for personal relations; but even here there must be definite time during which the relationship is to last and a definite sum or thing specified as dower.

There is no evidence nor circumstances in the present case which would justify us in presuming that such a form of temporary marriage had been arranged between the deceased and either of these women. In the case upon which the learned Judge relies, 6 *Appeal Cases* p. 364, there were various circumstances which fully justify the Courts in drawing the presumption of marriage. In the present case, so far as we can see there is no evidence whatsoever of even living together as husband and wife. On the other hand there is direct evidence that no such status in fact existed and we see no reason to reject this evidence.

The learned advocate for the appellant mentions that Annie had not been made a party to the original suit or to this appeal. This may or may not have been unfortunate, but at this late stage of the proceedings, we do not think that we would be justified in joining her now. She is not consequently formally bound by the result of this appeal.

For the reasons already given, we allow this appeal, and declare the plaintiff to be the sole heir to the estate of the deceased Mahomed Ali Khorasany.

In the cirumstances of the case we do not consider that any order as to costs is necessary.

R.K. *Appeal allowed.*

** A. I. R. 1929 Rangoon 38
Full Bench

RUTLEDGE C. J., BROWN AND CARR, JJ.

Commissioner of Income Tax, Burma—Referee.

v.

R. M. P. Chettyar Firm—Assessee.

Civil Ref. No 10 of 1928, Decided on 3rd January 1929.

**** Income Tax Act (1922), S. 22 (4) — Notice under, can be issued even after return is made.**

Even after an assessee has made a return of his income under S. 22 (2) assessment can be made under S. 23 (4) for non-compliance with the terms of a notice under S. 22 (4). *A. I. R.* 1928 *Pat.* 529 (*F.B.*); *A.I.R.* 1928 *Cal.* 587 (*S.B.*); *A. I. R.* 1928 *All.* 283, *Foll.* 106 *I. C.* 193=*A. I. R.* 1927 *Pat.* 390, *deemed Overruled.*; *A.I.R.* 1928 *Lah.* 219, *not Foll.*

Government Advocate—for the Referee.

Foucar—for the Assessee.

Opinion.—This is a reference made by the Commissioner of Income-tax under S. 66, Income-tax Act (11 of 1922) the question referred being:

"After an assessee has made a return of his income under S. 22 (2) can the assessment be made under S. 23 (4) of the Act for non-compliance with the terms of a notice under S. 22 (4)?"

The essential question raised in the argument before us is whether a notice under S. 22 (4) may or may not be issued by the Income-tax authority after the assessee has made a return of his income as required by a notice under S. 22 (2).

The assessee's contention that a notice under S. 22 (4) can be issued only before a return has been made, receives some support from the case of *Brijraj Ranglal* v. *The Commissioner of Income-tax A. I.R.* 1927 *Pat.* 390 and that of *Kushi Ram Karam Chand* v. *The Commissioner of Income-tax A.I.R.* 1928 *Lah.* 219 neither of which appear in the authorized reports. But the first of these decisions has been expressly overruled by a Full Bench of five Judges of the same Court—the High Court of Patna in *Ram Khelawan Ugan Lal* v. *Commissioner of Income-tax* (1) and the same view was taken by the two other Judges of the Court who referred the question to the Full Bench. Thus seven Judges of that Court are of opinion that the decision in *Brij Raj's* case was wrong. The same question has been considered by the High Court of Calcutta *In the matter of Harmukhrai Dulichand* (2) and by the High Court of Allahabad *In the matter of Chandra Sen Jaini* (3) and both of these Courts are in agreement with the decision in *Ram Khelwan's* case. That being so the weight of authority is very strongly against the contention advanced by the assessee. The question has been very fully discussed in the judgments quoted and we agree with the

(1) A. I. R. 1928 Pat. 529=7 Pat. 852 (F. B.).
(2) A. I. R. 1928 Cal. 587 (S. B.).
(3) A. I. R. 1928 All. 283=50 All. 589.

arguments there set out and with the decision arrived at. We consider it unnecessary, therefore, to enter into further discussion of the questiou.

We answer the question referred in the affirmative. The assessee must pay the costs of this reference, advocates fee five gold mohurs.

R.K. *Reference answered in affirmative.*

A. I. R. 1929 Rangoon 39

CARR AND MYA BU, JJ.

U Tha Maung and *others*—Appellants.

v.

U Aung Myat, Gyaw and *another*—Respondents.

First Appeals Nos. 81 and 82 of 1928, Decided on 9th January 1929 from Dist. Judge of Pyapon.

(a) Deed—Construction—Mortgage or sale—Sale-deed an outright conveyance—Right of redemption expressly refused—Simultaneous agreement to reconvey if certain amount paid regularly as rent for five years—In default of any payment agreement to be void—The two documents constituted sale with right of repurchase and not mortgage.

A conveyed certain land to *B* by deed of sale which was in its terms an outright conveyance and contained a clause expressly renouncing any right of redemption. At the same time *B* executed an agreement referring to the same land, that if *A* would annually pay to *B* certain sum as rent he may repurchase the land at any time within five years by paying the original price. There was also an express provision that default in payment of the ren; would render the agreement of the resale void:

Held: that on the terms of the deeds the relation of debtor and creditor did not exist. *B* could not have sued for the recovery of his money. The two deeds purported to be an outright conveyance with a separate agreement to reconvey on certain conditions, and not to be a mortgage. [P 40 C 2]

(b) Evidence Act, S. 114—Executants, men of experience—Strong proof is necessary to show that the deed was signed without being read over.

An ordinary sane person would have the final terms of a written document read over before accepting the deed and, therefore, when the executants are men of considerable experience it would require very strong evidence to convince a Court that the deed was signed without being read over. [P 40 C 1]

Ba Shin—for Appellants.

Ba Han—for Respondents.

Judgment.—These are appeals from decisions of the District Court of Pyapon in cross-suits, which were heard and decided together. In suit No, 44/26 the appellants were the plaintiffs. They were formerly the owners of some 444.95 acres of paddy land, but on 15th August 1925, they conveyed this to the defendants for Rs. 25,000 by the deed of sale Ex. 5, which was in its terms an outright conveyance and contained a clause expressly renouncing any right of redemption. At the same time, the defendants executed the agreement Ex. 6. This deed is badly drawn and is lacking in precision, but it is common ground that it refers to the land in suit. According to the terms of this agreement if the plaintiffs annually pay to the defendants 4,000 baskets of paddy as rent, they may repurchase the land at anytime within five years by paying the original price of Rs. 25,000 at the same time as the rent of 4000 baskets of paddy. There was also an express provision that default in payment of the rental paddy should render the agreement to resell void.

The appellants in their suit claimed that these two documents together created a mortgage by conditional sale and prayed for a decree for redemption, adding an alternative prayer that if it were held that the transaction was not a mortgage by conditional sale they should be given a decree for specific performance of the agreement.

In their cross-suit, the respondent claimed a declaration of their ownership of the land and asked for a decree for its possession. Both suits were decided in favour of the respondents.

With their plaint, the appellants filed certified copies of Exs. 5 and 6, both of which were registered. They made certain allegations that the agreement between the parties differed from the terms of the document, but so far as their first plaint goes there was no suggestion that the terms of the document differed from those agreed upon at the time by the parties. Nor when the defendants on their written statement set out the terms of Ex. 6 with considerably more precision than in the deed itself was any objection taken. It was only after some months and during the course of argument on the first three issues that the plaintiff-appellants filed a reply to the written statement and asked leave to file an amended plaint. Leave was granted and a new plaint filed. In this it was

alleged that certain terms had been inserted in Ex. 6 which had not been agreed to by them. The plaint itself did not expressly allege fraud, but this allegation had been made in reply to the written statement.

An additional issue was then framed namely:

"Did the plaintiffs know the contents of the registered agreement at the time it was executed."

This was recorded in the diary under date 17th May 1927, and not at the usual place in the record. It is, however, set out in the judgment.

This issue is quite sufficient to raise the question of fraud, and the contention in para. 1 of the memorandum of appeal that the District Court erred in not framing an issue on the question of fraud is without substance.

We think that this issue should first be decided. The District Judge's finding was that the plaintiff did not know the terms of Ex. 6 when it was executed. With that finding we agree. The burden of proving fraud was on the plaintiffs, and that burden was considerably increased by the fact that in their original plaint filed when they must have been fully aware of the terms of the document they made no suggestion that these terms were not those to which they agreed. The circumstances distinctly suggest that this allegation of fraud was only made in order to introduce evidence contradicting the terms of the document itself, when it seemed likely during the argument of issue 2, that otherwise such evidence would be rejected as inadmissible. (Their Lordships then discussed evidence and proceeded). The real point of the evidence for the plaintiffs on this subject is that the agreement was not read over to the parties before being signed. On the other hand there is a considerable amount of evidence to the effect that it was read over. There are of course other discrepancies on both sides but we do not think it necessary to go into them in detail. The parties are not children but men of considerable experience and it would require very much stronger evidence than any that has been given to convince us that this agreement was signed without being read over, when the sale-deed was read, and there had been considerable difference of opinion before agreement was reached as to the terms of the agreement for repurhase. In such circumstances any ordinary sane person would have the final terms, as written down read over before accepting the deed. And all the circumstances suggest that the plaintiffs were fully aware of the terms so written. We find therefore that no fraud has been proved. It follows that no extraneous evidence as to the terms can be admitted and that the parties are bound by the terms as contained in the two documents.

The next question is whether these two documents together created a mortgage by conditional sale. We are clearly of opinion that they did not. It is obvious that on their terms the relation of creditor and debtor did not exist. The defendant could not have sued for the recovery of his money. The two deeds, are in our opinion, merely what they purport to be that is, an outright conveyance with a separate agreement to reconvey on certain conditions. The prayer for redemption cannot therefore be accepted. And to succeed on their prayer for specific performance, it is necessary for the plaintiffs to show that the agreement to reconvey is still in force. And to do that they must show that they have carried out the conditions laid down in the agreement itself. (The judgment then discussed evidence and proceeded). A considerable amount of evidence was led to show that the land in suit was worth very much more than the amount of the purchase price. We do not consider this evidence of any importance in the case. Admittedly there was consideration for the transaction and this evidence could only be relevant to show that the transaction between the parties was something different from that set out in the deeds themselves. Since the plaintiffs cannot be allowed to show this, all this evidence becomes irrelevant whatever view we might be inclined to take it.

We dismiss both these appeals with costs.

R.K. *Appeals dismissed.*

* * A. I. R. 1929 Rangoon 41
Full Bench

PRATT, OFFG. C. J., AND CARR, CUNLIFFE, ORMISTON AND DARWOOD, JJ.

P. K. P. V. E. Chidambaram Chettyar and *another*—Applicants.

v.

N. A. Chettyar Firm—Respondents.

Civil Ref. No. 6 of 1928, Decided on 27th August 1928, from Civil Misc. Appeal No. 183 of 1927.

(a) Practice—Precedents—Stare decisis.

The principle of stare decisis has far less applicability to the law of procedure than to that of substantive law. [P 43 C 2]

* * **(b) Letters Patent (Rangoon), Cl. 13—Finding having effect of allowing suit to proceed is not a judgment within Cl. 13 :** *Rang. Civil App. No.* 153 *of* 1924 ; *Rang. Civ. Misc. No.* 82 *of* 1925 and *A. I. R.* 1928 *Rang.* 20, *Overruled.*

If the effect of an adjudication "is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding the adjudication is a judgment, otherwise not. [P 43 C 1]

The finding that the parties intended to treat a document on which the suit was filed as an inland and not as a foreign instrument, which had the effect of allowing the suit to proceed, does not amount to a judgment within the meaning of Art. 13 : **Rang. Civ. F. A. 153 of 1924 ; Rang. Civil Misc. No. 82 of 1925 and A. I. R. 1928 Rang. 20, Overruled;** 35 *Mad.* 1; *A. I. R.* 1925 *Rang.* 43 and *A. I. R.* 1922 *Lah.* 380, *Rel. on.* (*Case Law discussed.*) [P 42 C 2]

Fay—for Applicant.

Young—for Respondents.

Order of Reference. (*Pratt Offg. C. J.* and *Cunliffe, J.*)—Plaintiff sued on a hundi. Objections were raised that the hundi was improperly stamped and could not be sued upon and that there was no cause of action against defendant 3. The learned Judge on the original side discussed the points raised at some length and recorded findings that the intention was to treat the document as an inland instrument, and that there was therefore no force in the arguments about its being improperly stamped, which were based on its being a foreign instrument. The Court also found that the question of the liability of defendant 3 could not be decided till a later stage of the case. An appeal was filed and on the case coming on for hearing the preliminary objection was taken that the order under appeal does not constitute a judgment within the meaning of Art. 13, Letters Patent. The principles on which the question of what constitutes a judgment under Cl. 13 should be determined, were discussed, and clearly laid down by Robinson, C. J., in *Yeo Eng Byan* v. *Beng Seng & Co.* (1) in the following words :

"I agree that a decision which affects the merits of the question between the parties by determining some right or liability may rightly be held to be a "judgment," and I think that an order which merely paves the way for the determination of the question between the parties cannot be considered to be a "judgment"; nor can a mere formal order merely regulating the procedure in the suit or one which is nothing more than a step towards obtaining a final adjudication. Adopting the principle here laid down it is difficult to see how the finding now under appeal can be held to be a "judgment."

The first part of the finding that the document in dispute is an inland instrument and that there is no force in the contention that it is inadequately or improperly stamped practically amounts to a finding that the suit is maintainable and paves the way for the determination of the main question between the parties. If eventually the suit is decided against defendants they will have the right to challenge this finding on appeal.

The intention of Art. 13 was to allow an appeal in certain cases not allowed by the Civil Procedure Code, where the rights of the parties had been determined, and the absence of a right of appeal might cause an injustice. The position is well put by White, C. J., in *Tuljaram Row* v. *M. K. R. Alagappa Chettiar* (2) :

"The test seems to me to be not what is the form of the adjudication but what its effect is on the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

This view would rule out the present judgment. A broader view has been taken in the Calcutta cases of *Budhu Lal* v. *ChattuGope* (3) and the well-known case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (4), and we are in-

(1) A.I.R. 1925 Rang. 43=2 Rang. 469.
(2) [1910] 35 Mad. 1(7)=21 M.L.J. 1=8 I.C. 340=(1910) M.W.N. 697 (F.B.).
(3) [1916] 44 Cal. 804=25 C.L.J. 193=39 I.C. 465=21 C.W.N. 269.
(4) [1872] 8 Ben. L.R. 433=17 W.R. 364.

clined to think too broad. We prefer Garth, C. J.'s dictum in *Ebrahim* v. *Fuckhrunnissa Begum* (5) that the word "judgment" means a judgment or decree, which decides the case one way or other in its entirety, and that it does not mean a decision or order of an interlocutory character which merely decides some isolated point not affecting the merits or result of the entire suit.

It is obviously undesirable that as soon as a preliminary point of law is decided against defendants they should have a right to appeal and hold up the trial of the suit indefinitely. It is easy to conceive a case with many legal points, which would lend itself to a number of preliminary appeals, and consequently continual postponements and delays, if appeals were allowed from every separate finding on preliminary issues.

It would be most objectionable to have a case tried and appealed piecemeal in this manner. It should be observed that so far as the latter part of the Judge's order, in which he declines to give a decision on the liability of defendant 3 without further materials, is concerned, it is obviously not a judgment even by Calcutta standards.

The ruling of the Bench in the recent case of *Tar Mahomed* v. *Zulaikha Bai* (6) that an appeal lies under the Letters Patent against the finding of the High Court that it has jurisdiction to hear and decide a suit, appears, however, undoubtedly to be support for the view that the present finding that the suit is maintainable (at least that is the real effect of the finding) is a 'judgment' within the meaning of Art. 13.

It is true that the findings are not identical and each case must be considered on its own merits, but under the circumstances we are of opinion that the point should be decided before a Full Bench.

We accordingly refer for the decision of a Full Bench the question whether the finding that the parties intended to treat the document on which the suit was filed as an inland and not a foreign instrument, and that the defendants in consequence cannot now rely upon any defects based upon its being a foreign instrument, a finding which had the effect of allowing the suit to proceed, amounts to a judgment within the meaning of Art. 13, Letters Patent.

(5) [1879] 4 Cal. 531=3 C.L.R. 311.

(6) A.I.R. 1928 Rang. 20=5 Rang. 782.

Opinion

Ormiston, J.—The question referred for decision is :

> "Whether the finding that the parties intended to treat the document on which the suit was filed as an inland and not as a foreign instrument, and that the defendants in consequence cannot now rely upon any defects based upon its being a foreign instrument, a finding which had the effect of allowing the suit to proceed, amounts to a judgment within the meaning of Art. 13, Letters Patent."

This involves the question of what is the meaning of the word "judgment" as used in Cl. 13. The reference arises out of an appeal from a Judge of the original side exercising ordinary original jurisdiction. The clause (which, it may be stated, is placed under the heading of "Civil Jurisdiction of the High Court") so far as material, permits an appeal to the High Court from the judgment of one Judge of the High Court. With this article may be compared Cls. 37 and 38 (placed under the heading of "Appeals to the Privy Council"). Cl. 37, so far as material, permits an appeal to the Privy Council from any final judgment, decree or order of the High Court made on appeal and from any final judgment, decree or order made in the exercise of original jurisdiction from which an appeal does not lie to the High Court under Cl. 13. The Letters Patent apparently contemplate a Bench of two Judges sitting on the original side. Cl. 38 gives jurisdiction to the High Court on the application of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the High Court "in any such proceeding as aforesaid" to grant permission to such party to appeal against the same to the Privy Council. The words "in any such proceeding as aforesaid" must, I think, refer to the proceedings specified in Cl. 37.

It may be suggested that, inasmuch as the expression used in Cl. 38 is "preliminary or interlocutory judgment, decree or order" whereas in Cl. 13 the word "judgment" is used, His Majesty in Cl. 13 must have intended to have allowed an appeal to the High Court only from a final judgment. I am of the opinion that this is not the case, and that Cl. 38 must be read in connexion with

Cl. 37, the expression "preliminary or interlocutory judgment, decree or order" being used in contradistinction to the expression "final judgment, decree or order" employed in Cl. 37. The Letters Patent themselves, treated as a whole, therefore, give little assistance in construing the word "judgment" as used in Cl. 13.

It is apparent from the exceptions made by Cl. 13 to the general right of appeal thereby conferred, that the word "judgment" is intended to cover an order as well as a decree. Three criteria have been suggested as means for determining whether or not an order is appealable within the meaning of the Article. The first is that adopted by the Madras High Court in 1868, where a judgment is stated to have the meaning of

"any decision or determination affecting the rights or the interest of any suitor or applicant."

The second is that adopted by the Calcutta High Court in 1872, and which has on very many occasions been described as classical. According to this view, "judgment" means

"a decision which affects the merits of the question between the parties by determining some right or liability"

and it is immaterial whether it is final, or merely preliminary or interlocutory. It is this view which Mr. Hay presses on us. The third criterion, which is that suggested by Mr. Young, and which may be described in contradistinction to the others as the modern view, being that laid down by the Chief Justice of the Madras High Court in 1910, and adopted by the late Chief Justice of this Court in 1924. According to this view, the test is whether or not the effect of the adjudication

"is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding";

if it has this effect the adjudication is a judgment ; otherwise not.

As is pointed out in the order of reference, it is undersirable that, as soon as a preliminary point of law is decided against a defendant, he should be at liberty to appeal and to hold up a case indefinitely, and in a suit with many legal points there might be many preliminary appeals. Against this view it is urged that the necessity of paying heavy Court-fees might act as a deterrent, although there would be no such necessity in High Courts to which the Court-fees Act is not applicable. It is further urged that the mere fact that an appeal is filed would not of itself prevent the Judge on the original side from going on with the case, although the tendency would undoubtedly be for him to postpone the hearing and thus save himself, possibly, a large amount of useless labour in taking evidence and delivering a judgment on the facts which might be rendered nugatory by the success of the appeal on the legal points. Such a system of preliminary appeals on law might indeed have its conveniences if it were practicable, as it seems to be in England, to obtain a decision of the appellate side within a few days of the delivery of the order on the original side. There can be no question, however, to my mind, but that the balance of convenience preponderates in favour of a narrower construction. While the inconvenience to which a particular construction of the word "judgment" may lead is no reason for not adopting it, if on its plain meaning it must be so construed, yet if the interpretation is doubtful, the circumstance is to be taken into account, for it is a legitimate assumption that His Majesty must be taken to have meant that the operation of the Letters Patent should tend to convenience rather than to inconvenience.

A large number of authorities of this and other High Courts have been cited to us, and these authorities I propose, as briefly as possible to review, taking them Court by Court and in chronological order. The earlier view of the Madras High Court has not found favour and the view which to a large extent, to outward appearance, holds the field is that enunciated by the Calcutta High Court in 1872. It may be urged that it is undesirable to disturb a long current of judicial authority, but in my opinion, the principle of stare decisis has far less applicability to the law of procedure than to that of substantive law, and I think, when the authorities are examined, they will be found to be far less unanimously in favour of the principle contended for by Mr. Hay than, at the outset, we were led to suppose.

The decision to which I have just referred is that of *The Justices of the*

Peace for Calcutta v. *The Oriental Gas Co. Ltd.* (4). At p. 452 of the Report, Couch, C. J., in delivering the judgment of the Court on a preliminary objection that no appeal lay under Cl. 15 of the Letters Patent of 1865 (corresponding to Cl. 13, Rangoon Letters Patent) gave a definition of a judgment which has been very frequently repeated. The definition is as follows :

> "We think that "judgment" in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined. Both classes are provided for in Cls. 39 and 40 (corresponding to Cls. 37 and 38, Rangoon Letters Patent) of the Charter. An order, such as that before us, which only authorizes a proceeding to be taken for the determination of the question between the parties, cannot be considered a judgment."

The order which was before the Court was an order refusing to issue a writ of mandamus to the Justices. It was pointed out that a mandamus if issued would not be peremptory, but merely to do certain things, or to show cause to the contrary ; so that the order of the Judge does not determine any question whatever between the parties : it only initiates the proceedings by which the liability of the Justices to make compensation will be ascertained and determined. Consequently, the order is not a judgment. The interpretation of "judgment" by the High Court of Madras in 1868 is referred to only to be disapproved as being too wide. It would, the learned Chief Justice remarked, put it in the power of a vexatious litigant to appeal against all discretionary orders which the Judge of original jurisdiction may make in the course of the suit, with no result, as such orders would have to be, as a matter of course, confirmed ; and, further, it would give a far more extensive right of appeal against the orders of the Judge of the original side of the High Court than exists against the orders of a Judge of original jurisdiction in the mofussil ; which he did not think it at all probable that Her Majesty intended. Then comes the passage which I have quoted at length. He then proceeds to deal with the contention that the Calcutta High Court had already put a wider construction on Cl. 15 by entertaining appeals in cases where the plaint had been rejected as insufficient, or as showing that the claim is barred by limitation, and also in cases where orders had been made in execution. These in his opinion were within his definition, and he went on to say :

> "There is an obvious difference between an order for the admission of a plaint and an order for its rejection. The former determines nothing, but is merely the first step towards putting the case in a shape for determination. The latter determines finally so far as the Court which makes the order is concerned that the suit, as brought, will not lie. The decision, therefore, is a judgment in the proper sense of the term."

This passage enshrines the third criterion which I have mentioned above, and which was amply sufficient for the determination of the point at issue in the case and which was, I think, the criterion according to which the Court did decide it. Unfortunately, in some subsequent decisions this has been overlooked and stress has been laid on the dictum that the test is that the decision must be one

> "which affects the merits of the question between the parties by determining some right or liability,"

This definition, if stress be laid on the words "some right or liability," is unnecessarily wide ; if all the qualifications are taken into account, it may be too narrow, as excluding orders which, although they relate to procedure, may have the effect of finally deciding the question in issue so far as the Court passing them is concerned.

In *Hubbeeb* v. *Joosub* (7), it was held that an appeal lies from an order granting leave to the plaintiff to institute a suit under Cl. 12, Calcutta Letters Patent. Referring to the Madras decision of 1868, the same learned Chief Justice said that he agreed with the conclusion that the order was appealable, because it was not a mere formal order or an order merely regulating the procedure in the suit, but had the effect of giving a jurisdiction to the Court which it otherwise would not have, and that it did "determine some right" between the parties, namely the right to sue in a particular Court and to compel the defendants who are not within its jurisdiction to come in and defend the suit on pain of having an ex-parte decree passed against them.

(7) [1874] 13 B. L. R. 103

This is an obvious reference to his own previous definition, but he appears to have ignored the qualifications of it which he himself had made. From the point of view of " merits," anything less meritorious than the question whether a litigant shall be allowed to bring his suit in one Court rather than in another it is difficult to conceive, for in theory His Majesty extends equal justice to all his subjects in all his Courts.

Ebrahim v. *Fuckhrunissa Begum* (5) is a case which has a close resemblance to that now under reference. On the settlement of issues the Judge held that a certain hibbanamah was invalid, but raised two issues as to a will. The effect of the decision was to allow the suit to proceed. Garth, C. J., took the preliminary point that an appeal did not lie, the suit not having been dismissed. The matter was argued and it was held by the learned Chief Justice (Markby, J., not dissenting), that the decision of the original side was not a "judgment" and that the appeal did not lie. He held that the word "judgment" means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory nature, which merely decides some isolated point, "not affecting the merits or result of the whole suit." He appears to have regarded "merits" as synonymous with "results of the whole suit." He distinguished the cases of the rejection of a plaint or the admission of a suit as determining whether the plaintiff has or has not a right to sue at all in the particular case, and went on to point out the possibility, if such appeals lay, of having three or four appeals all pending in one cause at the same time, and all proceeding contemporaneously with the trial of the suit in the Court below.

In *Mt. Brij Coomaree* v. *Ramrickdass* (8) it was held that an order refusing to stay the issue of probate and the discharge of the receiver appointed in a probate action is a "judgment" within the meaning of Cl. 15. By the judgment in the action probate had been ordered to issue to the respondent and the receiver ordered to be discharged. The appellant, being about to appeal, asked for a stay which the Judge refused. On appeal, Maclean, C. J., referred to Sir Richard Couch's definition, which he said was becoming classical, and stated that he concurred in it, but that it was not exhaustive. He said that as the result of the appeal from the decree in the action, a new and important question had arisen, whether under the circumstances the respondent ought to be given control of a large estate, which, if answered in the affirmative, might have the possible effect of rendering the appeal from the decree entirely infructuous. I think that, in referring to Sir Richard Couch's definition, he had in mind its qualifications, and was of the opinion that the order appealed from might for all practical purposes finally determine the rights of the parties to the estate, for the reason that when the appeal from the decree came to be decided, there might be no estate left. He thought his decision was consistent with the observations of their Lordships of the Privy Council in *Hurrish Chunder Chowdhry* v. *Kalisundari Debi* (9), when dealing with the interpretation of the word "judgment" in Cl. 15, that "Mr. Pontifex, J., had in fact," exercised a judicial discretion and had come to a decision of great importance which if it remained, would entirely conclude any right of Kalisundari to an execution of this suit. His view, therefore, was that the test to be applied is whether the order is conclusive of the rights of the parties to the suit. Whether he correctly applied the test is another matter.

In *Budhu Lal* v. *Chattu Gope* (3), sanction to prosecute the plaintiff in a suit in the Presidency Small Cause Court was refused by a Judge of that Court. The defendant applied to the original side of the High Court for a reversal of the order and obtained an order of remand to the Small Cause Court Judge. It was held on appeal that the order of remand was a "judgment." The learned Judges appear to have adopted the definition of Sir Richard Couch without its qualification. The decision of Sir Richard Garth was applied in a somewhat technical manner, the learned Chief Justice holding that the decision of the question as to whether the statements were made in a judicial proceeding was one which affected the merits or result of "the entire matter," for if it had been decided one way, viz., in favour of the applicants' contention it would have put an

(8) [1901] 5 C. W. N. 781.

(9) [1882] 9 Cal. 482=10 I. A. 4=12 C. L. R. 511=4 Sar. 407 (P.C.).

end to the proceeding altogether. The "entire matter" was whether there should be another enquiry by the Small Cause Court Judge, which might or might not result in a further enquiry by a Magistrate, which might have one of two results.

In *Sarat Chandra Sarkar* v. *Maihar Stone and Lime Co. Ltd.* (10), an order setting aside an abatement was held to be a "judgment," the reason assigned by Richardson, J., being that it deprived the party in whose favour the abatement operates as a valuable right. An equally good reason would be that an abatement has the practical effect of dismissing the suit and concludes the rights of the parties so far as the Court in which the suit is brought is concerned.

With this may be compared the decision of the same Bench in *Maharaj Kishore Khanna* v. *Kiran Shashi Dasi* (11), that no appeal lies from an order under O. 9, R. 9, Civil P. C., restoring, a suit. There is no discussion of the principle, and the decision seems to be inconsistent with that in *Sarat Chandra Sarkar* v. *Maihar Stone and Lime Co. Ltd.* (10).

I now come to the decisions of the Madras High Court. The earliest is that to which I have already made reference, namely, that in *De Souza* v. *Coles* (12) where it was held by Bittleston, J., that a judgment "cannot be limited to a final judgment in a suit—nor indeed to a judgment in a suit at all—but must be held to have the more general meaning of any decision or determination affecting the rights or the interests of any suitor or applicant."

The learned Judge held that the language of Cl. 15 is so general that it is

"impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from."

The actual decision was that an appeal lies from an order of a Judge exercising original jurisdiction, refusing to give leave to institute a suit on the original side in a case in which the cause of action has arisen in part within the ordinary original jurisdiction of the High Court. It might have been given on grounds less sweeping than the principle adopted. This principle may possibly be a logical deduction from the language of the Letters Patent, but it has not found favour.

(10) A. I. R. 1922 Cal. 335=49 Cal. 62.
(11) A. I. R. 1922 Cal. 407=49 Cal. 616.
(12) [1868] 3 M. H. C. 384.

The next case to which I will refer is *Tuljaram Row* v. *Alagappa Chettiar* (2). The Full Bench, after an exhaustive review of the authorities, held that an order of a single Judge on the original side refusing to frame an issue asked for by one of the parties is not a judgment within Cl. 15. *De Souza* v. *Coles* (12) was commented on the wide interpretation of the expression "judgment" being disapproved, the decision of Garth, C. J., in *Ebrahim* v *Fuckhrunissa Begum* (5) was approved, and no less than four cases in the Madras High Court were either disapproved or dissented from. At p. 7 of the report, Sir Arnold White, C. J., enunciated a test of what is a judgment for the purpose of Cl. 15 in these words:

"The test seems to me to be not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

Applying this principle, he was of the opinion that an order under the Administrator-Generals Act giving the Administrator-General a commission at a fixed rate, an order dismissing an application by the assignee of a plaintiff to be brought on the record, an order dismissing a petition to receive a sum of money as security for costs of an appeal, an order refusing a stay of execution, an adjudication based on a refusal to exercise discretion, if its effect is to dispose of the suit so far as the Court making it is concerned, an order refusing to issue a mandamus [herein differing from *the Justices of the peace for Calcutta* v. *The Oriental Gas Co.* (4),] an order refusing to confirm an award, an order refusing to set aside an award, an order refusing to extend the time for giving security for costs, an order setting aside a judgment and a decree and directing a remand, an order dismissing a Judge's summons to show cause why leave granted under Cl. 12 should not be rescinded, an order under Cl. 12 giving leave

to sue and an order made on an application to revoke a submission to arbitration, are all appealable. On the other hand he held that an order fixing a date for the hearing and an order allowing or refusing a commission fail to satisfy the test. Krishnaswamy Ayyar, J., distinguished between a "preliminary or interlocutory judgment" and an "interlocutory order" and was of the opinion that the latter was not a "judgment," he having previously quoted with approval the definition of an order in Black on Judgments as being :

> "the mandate or determination of the Court upon some subsidiary or collateral matter arising in action, not disposing of the merits but adjudicating a preliminary point or directing some steps in the proceedings."

Discussing *the Justices of the Peace for Calcutta* v *The Oriental Gas Co.* (4), his view was that in one respect the definition of Sir Robert Couch was too narrow, for a decision which determines the cause or proceedings so far as the particular Court is concerned, though it refuses to adjudge the merits, must also be deemed to be a judgment ; for otherwise the rejection of a plaint for defect of form or insufficiency of Court-fee, or its return for want of jurisdiction, would not be a judgment.

In *Kanlal Bhoya* v. *Balaram Paramasukdoss* (13), an order having been passed directing security to be given by the defendant for the amount claimed and not having been appealed against, a subsequent order cancelling the original order and directing the return of the security and that the suit should proceed as an ordinary suit was held to be a "judgment." Sir Walter Schwabe, C. J., was satisfied that the order satisfied all definitions previously attempted. Coutts-Trotter, J., resolved his doubts by holding that the order was a judgment:

> "because it might result in shutting out the defendant from the Court altogether."

If that had been the inevitable result of the order I should have been disposed to agree with him.

In *Sonachallam Pillay* v. *Kumaravelu Chettiar* (14), it was held that an order of a single Judge in the admission Court refusing to stay execution of the decree of a mofussil Court pending the appeal was a judgment. Krishnan, J., professed to follow the dictum of Sir Arnold White, C. J., while Waller, J., was apparently prepared to go so far as to accept the wide interpretation of Bittleston, J., in *De Souza* v. *Coles* (12), that it is impossible to set any limits to the right of appeal founded on the nature of the order or decree appealed against. I think that this case and that last cited show a tendency to try to avoid the implications of the previous Full Bench decision.

The first decision of the Bombay High Court to which we have been referred is that of *Miya Mohamed* v. *Zorabi* (15), where it was held that an order directing the issue of a commission to examine a witness was not a judgment, inasmuch as it merely regulated the procedure for his examination. I need only say that an order of his nature would seem to fail to satisfy any test which has ever been suggested, with the exception of that suggested in *De Souza* v. *Coles* (1).

In *Charandas Chatturbhuj* v. *Chhaganlal Pitambardas* (16), the plaintiff had agreed to sell to the defendant certain goods, which the defendant in turn had agreed to sell to one Alibhoy. The plaintiff having filed a suit against the defendant for breach of contract, the defendant, who claimed a right to be indemnified by Alibhoy, obtained leave, under the third party procedure which had been introduced by rules framed by the Bombay High Court to serve a third party notice on him. Alibhoy having appeared, the defendant sought a direction from the Original Side Judge under R. 130 and 131 that Alibhoy be at liberty to appear at the trial of the suit and the question in issue between him and the defendant be tried simultaneously with the questions in issue between the plaintiff and the defendant. The Judge having by his order refused to give such a direction, it was held on appeal that the order was not a "judgment." The definition of Couch, C. J., in *the Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (4), was quoted as having been consistently approved of by all the High Courts, and the case was held not to come within that definition, the reason being that nothing had been decided which affected the merits of those questions between the defendant and Allibhoy, by determining any right or liability between them. It may be noted that the case would equally

(13) A. I. R. 1923 Mad. 44.
(14) A. I. R. 1924 Mad. 597= 47 Mad. 316.
(15) [1909] 11 Bom. L. R. 241 = 2 I. C. 157.
(16) A. I. R. 1921 Bom. 320 = 45 Bom. 428.

have failed to satisfy the test suggested by Sir Arnold White in *Tuljaram Row* v. *Alagappa Chettiar* (2).

In *Nagindas Motilal* v. *Nilaji Moroba* (17), it was held that an appeal lies uuder Cl. 15, Letters Patent, from an order of a Division Court refusing to excuse delay in filing an application for a certificate of appeal to the Privy Council. Decisions that merely introductory orders on matters of procedure or otherwise are not judgments within the meaning of Cl. 15 are distinguished as being essentially different in that they can in no way be said finally to end or determine the litigation and so do not fulfil the test adopted by the Madras High Court in *Tuljaram Row* v. *Alagappa Chettiar* (2). It is pointed out that the refusal to excuse the delay and the consequent refusal to entertain the petition for the necessary certificate of appeal to the Privy Council amounts to a final decision and put an end to the litigation so far as the High Court is concerned.

In *Goverdhanlalji Maharaj* v. *Chandraprabhavati* (18), it was held that a finding that a suit for increase in the rate of maintenance fixed by a consent decree is maintainable, is not a "judgment" within the meaning of Cl. 15. Sir Norman Macleod, C. J., in delivering the judgment of the Court, observed that Sir Richard Couch's attempt at a definition had not prevented lengthy argument being brought forward in each case as it came up as to whether it was a judgment or not and that for himself he preferred to consider each decision as it came before him and form his own opinion. The succeeding passage is highly relevant to the present reference and I will quote it in full.

"For the purposes of this case to my mind the distinction between decisions and orders thereon which stand by themselves, and decisions on a single issue in a suit, is a very real one. It is not desirable on general principles that a suit should be tried piecemeal, and a decision on an issue to the effect that the trial of the suit should proceed can never to my mind amount to a judgment. If in this case the Judge had decided that the suit was not maintainable and had dismissed the suit, then undoubtedly an appeal would lie against that decision. But in this case the Judge has decided that the suit should proceed. He will then consider the remaining issues in the suit, whether the plaintiff should be granted in the circumstances of the case increased maintenance, or not, and when he has decided that question there will be a judgment, against which all the arguments which are now sought to be raised against the decision on this issue can be placed before the Court. We are not shutting out the defendant from any objection which he may eventually be advised to raise against the final decree in the suit. We are merely pointing out that so far nothing has been decided with regard to the rights and liabilities of the parties, there is only a decision that the suit should proceed and against that decision no appeal lies."

We have not been referred to any decision of the Allahabad High Court. It should be noted that neither this High Court nor the Punjab High Court possess ordinary original civil jurisdiction, and that the Letters Patent Appeals in those Courts to which reference will be made are all appeals from the decision of a Judge exercising appellate jurisdiction.

Before the enactment of the Civil Procedure Code of 1908, that Court had apparently taken the view that notwithstanding Cl. 10 of its Letters Patent, the only appealable orders were those in respect of which the Code had expressly provided for an appeal. And even after the substitution of S. 104 of the Code of 1908 for S. 588 of the Code of 1882, the tendency has been to take a narrow view. Thus in *Ramjas* v. *Mahadeo Prasad* (19), an order granting sanction to prosecute was held not to be a "judgment," the ground being that that order did nothing except arm the applicant with a sanction which he could bring to the Court which was to investigate the alleged offence. And in *Piari Lal* v. *Madan Lal* (20), it was held that no appeal would lie under Cl. 10 from an order of a single Judge of the High Court dismissing an appeal from an order of an execution Court refusing to set aside a sale. The learned Judges held that they were bound by the previous Full Bench decision of the Court in *Muhammad Naim-ullah Khan* v. *Ihsan-ulla Khan* (21), and that the enactment of the new Code did not affect the position.

In *Sadiq Ali* v. *Anwar Ali* (22), it was held that Cl. 10 gave a right of appeal from an order of a single Judge rejecting an application to set aside the abatement of an appeal. The test adopted was that of Sir Arnold White, C. J., in *Tuljaram*

(17) A. I. R. 1924 Bom. 399 = 48 Bom. 442.
(18) A.I.R. 1926 Bom. 136.
(19) [1917] 39 All. 147=36 I.C. 585=14 A.L.J. 1230.
(20) [1917] 39 All. 191=39 I.C. 460=15 A.L.J. 46.
(21) [1892] 14 All. 226=(1892) A.W.N. 14 (F.B.).
(22) A.I.R. 1923 All. 44=45 All. 66.

Row v. *Alagappa Chettiar* (2), and the order of the single Judge was held to be

"a judicial act, and an act which did settle once and for all, if unappealable, the rights of the parties,"

and, therefore, a "judgment" within the meaning of Cl. 10.

But in *Tirmal Singh* v. *Kanhaiya Singh* (23), a Bench differently constituted again followed the previous Full Bench decision of the Court and held that no appeal lay from an order of a single Judge rejecting an application for review of judgment, the case of *Sadiq Ali* v. *Anwar Ali* (22), being held to be distinguishable for reasons which are not given.

We have been referred to two cases in the Lahore High Court. In the earlier, *Gokal Chand* v. *Sanwal Das* (24) the interpretation of the term "judgment" as used in the Letters Patent, was very wide. It was held to include any interlocutory judgment which decides so far as the Court pronouncing it is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit. The view of the Court was that an order on an application to stay execution pending appeal came within the definition.

In the later case, *Ruldu Singh* v. *Sanwal Singh* (25), the earlier case *Gokal Chand* v. *Sanwal Das* (24), was not referred to. The trial Court had dismissed a suit as time barred; the District Judge on appeal held otherwise and remanded the case for trial on the other issues; against this order of remand an appeal was preferred to the High Court and was heard by a single Judge who affirmed the decision of the District Judge and dismissed the appeal. From this decision there was a further appeal under the Letters Patent. The decision of the single Judge was held to be a "judgment" and, therefore, appealable. The authorities were discussed by Sir Shadi Lal, C. J., in delivering the judgment of the Court, and, in his opinion, the definition of Sir Arnold White afforded a better test than that of Sir Richard Couch. If an adjudication put an end to the suit or appeal, of if its effect, if not complied with, was to put an end to the suit or appeal, then it was clearly a judgment. He went on to discuss the position which arose when the adjudication disposed merely of an application made in a suit or appeal, and to adopt Sir Arnold White's differentiation between an application which is nothing more than a step towards obtaining a final adjudication in a suit, which would not be a "judgment," and an application which is an independent proceeding ancillary to the suit and instituted, not as a step towards judgment but with a view to render the judgment effective if obtained, which would be a "judgment." In the former category would be included applications for transfer, summoning witnesses, issue of commission for the examination of witnesses, adjournments, directing a party to produce and give inspection and framing an issue. In the latter category would be included applications for the appointment of a receiver, the issue of on interim injunction and, generally, all orders which are appealable under S. 104 or O. 43, R. 1, Civil P. C. He was of the opinion, however, that in certain applications, such as those for a mandamus and for leave to defend a summary suit on a negotiable instrument, the test adopted by Sir Arnold White was not of practical assistance. He, therefore, thought that it was impossible to lay down any definite rule which would meet the requirements of every case, and that all the Court can do in determining whether an order constitutes a judgment is to take into consideration the nature of the order and its effect upon the civil proceeding in which it was made. The case before the Court was, however, held to present no difficulty, because the decision of the Judge of the High Court undoubtedly put an end to the appeal before him. It seems clear that in his opinion the test most generally applicable is whether or not the order finally puts an end to the suit or proceeding.

I will now refer to the cases in which Cl. 13 of its Letters Patent has been discussed in this Court. The first is *Yeo Eng Byan* v. *Beng Seng & Co.* (1), a decision of Sir Sidney Robinson, C. J., and Brown, J. An order of the Judge on the Original Side, giving directions to a commissioner, appointed under the preliminary decree in a partnership suit, as to what accounts he should and what accounts he should not go into was held

(23) A.I.R. 1923 All. 356=45 All. 535.

(24) [1920] 1 Lah. 348=55 I.C. 933=2 L.L.J. 32.

(25) A.I.R. 1922 Lah. 380=3 Lah. 188.

not to be appealable. After citing the oftquoted definition of Couch, C. J., in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (4) but without the subsequent qualifying words, the further dictum of Couch, C. J., in *Hubbeeb* v. *Joosub* (7) and the definition of Sir Arnold White, C. J., in *Tuljaram Row* v. *Alagappa Chettiar* (2), Robinson, C. J., continued:

"with these dicta I am in general agreement. I agree that a decision which affects the merits of the question between the parties by determining some right or liability may rightly be held to be a "judgment" and I think that an order which merely paves the way for the determination of the question between the parties cannot be considered to be a "judgment" : nor can a mere formal order merely regulating the procedure in the suit, or one which is nothing more than a step towards obtaining a final adjudication."

He went on to say that the order before the Court

"did not decide on the merits of the suit for the dissolution of the partnership, nor does it decide the rights or liabilities of the parties to the suit so far as the partnership is concerned. . . . It cannot be that the framers of the Letters Patent intended to allow appeals which do not arise directly from the suit itself."

Brown, J., laid stress on the fact that the order did

"not purport finally to decide any of the rights between the parties."

We have been referred to the case of *Ma Mi* v. *Kalenthar Ammal* (25-a), a decision of Robinson, C.J., and Baguley, J., as to what is a final order within the meaning of S. 109, Civil P. C. One of the issues was whether the respondent had been divorced. The District Court tried this issue first and held that she had been divorced. This Court reversed the decision and remanded the suit. The applicants applied for leave to appeal to the Privy Council on the ground that the order of remand was a final order. Objection was raised on the ground that this was not so, as it would be open to the applicants to raise the point in appeal to the Privy Council when the whole case was decided. While agreeing that S. 105 (2) of the Code would not debar them from taking this course, Sir Sidney Robinson, C. J., was of the opinion that if the order in question had the effect of deciding finally the cardinal point in the suit (as it would have had in the case before him), it must be held to be a final order for which leave to appeal should be granted. Here he was following the decision of their Lordships of the Privy Council in the case of *Saiyid Muzhar Hossein* v. *Mt. Bodha Bibi* (25-b), where under similar circumstances they granted special leave to appeal. Mr. Hay argues that in the appeal from which this reference arises, the issues decided against him are cardinal points the decision of which in the appellant's favour would decide the suit. I do not, however, consider that decisions on what is a "final order" under S. 109 of the Code are of assistance in construing Cl, 13, Letters Patent.

Another unreported decision is that of Carr and J. A. Maung Gyi, JJ., (*Moolla Goolam Mahomed* v. *Ameena Bee Bee*; Civil First Appeal 153 of 1924). Under a preliminary administration decree, a commissioner had been appointed to take accounts. Three questions arose: (a) and (b) as to a sum of money and jewellery alleged to have belonged to the estate of the deceased and to have come to the hands of the defendant, and (c) a house which the plaintiff claimed as belonging to the estate and which the defendant claimed as her own property. Before the commissioner the parties agreed that a receiver should be appointed to file a suit to determine the ownership of the house, and a receiver was appointed, but no suit was filed. The commissioner recorded evidence on the other two issues, and came to findings thereon. The matter then came before May Oung, J., who passed an order reversing the commissioner's finding as regards one of the issues and modifying it as regards the other. He also commented on the fact that no suit as regards the house had been filed and said that he would fix a day to try the remaining issue, i.e., as to whom the house belonged. The plaintiff appealed from this order, so far as it decided the first two issues. The preliminary objection was taken that no appeal lay, the order not being a "judgment." A number of authorities including *Yeo Eng Byan* v. *Beng Seng & Co.* (1) were cited but not discussed, with the exception that the definition of Couch, C. J., in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (4) was quoted at length (but without its qualifications) and was stated to have been generally accepted. The decision appealed against was held

(25-a) A. I. R. 1925 Rang. 147.

(25b) [1894] 17 All. 112=22 I. A. 1 (P. C.).

to be a "judgment" as it was a determination of the rights of the parties as regards two of three issues,

"final as far as concerns the original side of this Court, and that the Judge or his successor could not in his final judgment reverse the findings already arrived at."

From this conclusion I must respectfully differ.

In *Mobljee Dharsee & Co.* v. *M. E. Moolla* (26) the appellate side, on an application to stay execution of a decree pending appeal therefrom ordered a stay,

"the security already given being accepted, with liberty to the respondent to apply for fresh or further security, if it is decided that the security given is invalid or insufficient."

The Judge on the original side after enquiry accepted the security as valid and sufficient. On appeal from his order it was held by the Bench (Heald and Chari. JJ.), that it did not determine any right or liability which arose between the parties on the original side, and was not, therefore, a "judgment." In discussing "the new classic" case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (4), it was observed that the expression "affects the merits of the case by determining some right or liability" was not intended to cover the determination of every right or liability, as was shown by the succeeding sentence where Couch, C. J., states that a final judgment determines the whole case or suit and a preliminary or interlocutory judgment determines only a part of it. It seems to me clear that the learned Judges would not have held that a finding on a preliminary issue which had the effect of allowing a suit to proceed was a "judgment."

This case was followed, this time by Heald and Lentaigne, JJ., in *Mahomed Hussain* v. *Hoossain Hamadanee & Co.* (27) where they held that an order of dismissal of an application for the examination of a witness on commission is not a judgment, *Tuljaram Rao* v. *Alagappa Chettiar* (2) being cited as showing that a refusal to issue a commission

"is a purely interlocutory order and not a judgment terminating a suit or other proceedings or affecting the merits.":

It was again followed by the same Bench in *Mengau Singh* v. *Sucha Singh* (28) where they held that an order under O. 38, R. 5, Civil P. C., directing the defendant to give security before judgment did not come within Cl. 13, Letters Patent.

In *Sooniram Jeetmul* v. *R. D. Tata & Co.* (unreported Civil Misc. No. 82 of 1925), Sir Guy Rutledge, C. J., and Maung Ba, J., dealt with an appeal from an order of the Judge on the original side giving leave to institute a suit on the ground that part of the cause of action arose in Rangoon. The appeal is stated to have been admitted on the authority of *De Souza* v. *Coles* (12) and *Hubbeeb* v. *Joosub* (5), but there is no discussion.

Arumugam Chettyar v. *Kanappa Chettyar* (29), cited to us, is merely a decision that where an appeal from an order is allowed by the Civil Procedure Code, such an order is to be construed as a "judgment" and is not in point.

In *Hajee Tar Mahomed* v. *Zulaikha Bai* (6) a suit was filed on the original side for the administration of the estate of one Esak Vally Mahomed, the allegation of the plaintiff being that Esak and the defendants were partners in a business carried on in Rangoon and the Shan States. The defendants took the preliminary objection that the original side had no jurisdiction because the business was not carried on in Rangoon. The learned Judge tried as a preliminary issue the question whether or not this Court had jurisdiction, and found that it had, inasmuch as the business was carried on partly in Rangoon. The defendants claimed to be entitled to appeal from this finding, which was a finding on a preliminary issue, on the ground that it was a "judgment" within the meaning of Cl. 13. On the authority of *Sooniram Jeetmul* v. *R. D. Tata & Co.* (unreported; supra) and the two cases therein referred to, it was held by Heald and Darwood, JJ., that an appeal lay. After having pointed out that in *Hubbeeb* v. *Joosub* (7) some doubt had been cast on some of the reasons given for the decision in *De Souza* v. *Coles* (12) and that *De Souza* v. *Coles* (12) was an appeal not from a finding that a Court had jurisdiction but from an order refusing to give leave to institute the suit in the High Court, the learned Judges went on to say:

"It is, however, clearly desirable that an appeal should lie since otherwise much time and money might be wasted in a Court which

(26) A. I. R. 1925 Rang. 225=3 Rang. 255.
(27) A. I. R. 1925 Rang. 290=3 Rang. 293.
(28) A. I. R. 1925 Rang. 267=3 Rang. 307.
(29) A. I. R. 1927 Rang. 139=5 Rang. 99.

might ultimately be found to have no jurisdiction."

The logical corollary of this decision if it is correct, appears to be that the decision on any preliminary issue, if its effect is to allow a suit to proceed, is appealable. But with all respect I am unable to agree with either the decision or the grounds on which it is based. The *argumentum ab inconvenienti* is not in itself conclusive, and, as I have already indicated in my opinion, the balance of convenience is the other way. The reasoning in *Hubbeeb* v. *Joosub* (7) on which the case is really based is not convincing, the right between the parties which it determined being merely the right to compel defendants who are out of the jurisdiction to defend the suit in the High Court rather than to defend it in the Court of the local area where they are resident. If it is to be supported at all, it can, I think, be supported only on the principle adopted by Bittleston, J., in *De Souza* v. *Coles* (12), a principle which has since its enunciation found little favour except in the judgment of Wallis, J., in *Sonachalam Pillai* v. *Kumaravelu Pillai* (14).

In *Abowath* v. *Abowath* (30), the observations before cited of Robinson, C. J., in *Yeo Eng Byan* v. *Beng Seng & Co.* (1), were again quoted and applied by Sir Guy Rutledge, C. J., and Carr, J., and it was held that an order of the Judge sitting on the original side directing the return of an award to the arbitrators to enable them to file it according to the proper procedure was not a "judgment" because the Judge had not purported finally to decide any right between the parties.

The last case cited to us was *Syed Khan* v. *Syed Ebrahim* (31), a decision of Sir Guy Rutledge. C. J., and Brown, J., as to what is a "final order" within the meaning of S. 109, Civil P. C. The plaintiff filed a suit in a District Court claiming a right of pre-emption under Mohamedan law. The District Court dismissed the suit on the ground that such right did not exist in Burma. In October 1925 the High Court on appeal held that the right did exist, and reversing the decision of the District Court, remanded the case for trial. The plaintiff won on the merits and the High Court on appeal confirmed the decision in May 1927. The defendant applied for leave to appeal to His Majesty in Council not only against the profits decided in May 1927, but also against the point decided in October 1925. It was held that the question of the right of pre-emption was a cardinal issue between the parties which was finally decided in October 1925, that it was a "final order" within the meaning of S. 109; that the defendant could have then applied for leave; that the question of pre-emption was not in dispute when the case was finally decided in May 1927; and that the defendant could not again raise the point over again in applying for leave to appeal against the points decided in May 1927. The Court, however, holding that there were two other substantial points of law, gave leave to appeal thereon. Unfortunately, the appeal dropped owing to the defendant failing to give security and the opportunity of obtaining the views of their Lordships of the Privy Council as to the correctness of the decision that leave should not be given in respect of the issue of pre-emption was lost. It may be noted also that the case of *Ma Mi* v. *Kalenthar Ammal* (25a) in which Sir Sidney Robinson, C. J., had expressed a view apparently contrary to that enunciated by Sir Guy Rutledge was not before the Court. However, as I have said before, cases on the meaning of the expression "final order" are of little assistance in the task of interpreting the term "judgment."

(30) A. I. R. 1928 Rang. 110=6 Rang. 25.
(31) A. I. R. 1928 Rang. 132=6 Rang. 169.

From this review, it is clear that the view taken by Bittleston, J., in *De Souza* v. *Coles* (12) that every adjudication is a judgment has been disapproved in the vast majority of the decisions, and it is practically common ground that some test must be adopted. The definition of Sir Richard Couch, C. J., in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (4) pressed upon us by Mr. Hay, if isolated from its context, has been not infrequently cited and treated as conclusive without discussion. Taken with its qualifications it contains the germ of the later doctrine enunciated by Sir Arnold White, C. J., in *Tuljaram Row* v. *Alagappa Chettiar* (2) but has been held to be defective in that it apparently excludes decisions on points of procedure which have the effect of finally deciding questions in issue between the parties to a suit or proceeding so far as the Court deciding them is concerned. On the other hand, the test enunciated by Sir Arnold

White, C. J., and adopted in *Yeo Eng Byan* v. *Beng Seng and Co.* (1), the key-note of which is finality in relation to the Court passing the order, has the merit of simplicity and, as pointed out by Sir Shadi Lal, C. J., in *Ruldu Singh* v. *Sanwal Singh* (24), affords a working rule in respect of the great majority of interlocutory orders. I am of the opinion that in the decision of the question referred to us it should be applied. And, in applying it, I am fortified by the opinion of Sir Richard Garth, C. J., *Ebrahim* v. *Fuckhrunissa Begum* (5), that the decision on an issue which has the effect of allowing a suit to proceed does not

"affect the merits or result of the whole suit"

in that it does not decide the case one way or another, and is, therefore, not a " judgment " Put in another way, it does not " shut out " the defendant.

If the contention pressed on us by Mr. Hay were to succeed, it would seem almost inevitably to follow that if no appeal is preferred from an order deciding a preliminary issue having such effect the party against whom the issue is decided cannot raise the point in an appeal from the decree in the suit. And, so far as I am aware, this has never been held by any Court in India. The question of what is a final order within the meaning of S. 109, Civil P. C., is not, in my opinion, analogous. If it were, I should be inclined to hold that *Syed Khan* v. *Syed Ebrahim* (31) had been wrongly decided.

It is suggested to us that the decision of a preliminary issue is final so far as the Court which decides it is concerned, and this was so held by this Court in *Moolla Goolam Mahomed* v. *Ameena Bee Bee* (unreported ; supra.). That the decision of a Judge on a preliminary issue is not binding on his successor was held by the late chief Court of Lower Burma in *Ma Nyo* v. *Ma Yauk* (32), the soundness of which has never been questioned. If the decision is not binding on his successor, I see no reason why the Judge himself, on a more mature consideration, should not be allowed to change his mind.

The contention of Mr. Hay may be subjected to the touchstone of a practical test. The learned Judge on the Original Side in the case out of which this reference has arisen, might orally have expressed his opinion on the preliminary issues and allowed the case to proceed. In that case there would have been no written order from which an appeal could have been presented. This difficulty might perhaps have been surmounted in some such manner as by filing an affidavit setting out what the learned Judge had said. But the learned Judge might equally well have contented himself by intimating that he would hear the evidence and at the end of the case would deliver a judgment covering all the issues. In this last event the parties would have known perfectly well what was in his mind, but the party against whom it was practically certain that the issue had been decided would have been powerless to appeal. All three possible courses would have been equally legitimate, and it seems incongruous that the question of whether or not an appeal lies in such a case should depend on whether the learned Judge had stated, or even written, his determination on a preliminary issue.

For these reasons my answer to the question referred, is in the negative.

If the view which I have taken is correct, it follows that certain cases in this Court have been wrongly decided, and that they should be overruled. These cases are *Moolla Goolam Mahomed* v. *Ameena Bee Bee* ; *Sooniram Jeetmul* v. *R. D. Tata and Co.* (both unreported ; supra) and *Hajee Yar Mohamed* v. *Zulaikha Bai* (6).

Pratt, Offg. C. J.—In the order of reference I have already given my reasons for holding that the finding of the learned Judge on the Original Side does not amount to a judgment within the meaning of Art. 13. Letters Patent.

I have now had the opportunity of reading my brother Ormiston's answer to the reference, in which I fully concur.

In view of his exhaustive analysis of the authorities on the subject, it seems unnecessary to discuss them at any length.

I would, however, remark that I agree with the observation of Macleod, C. J., in *Goverdhanlalji* v. *Chandraprabhavati* (18) that the distinction between decisions and orders, which stand by themselves, and decisions on a single issue, is a very real one. I am also at one with him, when he says that it is not desirable on general principles that a suit should be tried piecemeal, and a decision on an issue to the effect that the trial of the

(32) [1908] 4 L. B. R. 256.

suit should proceed does not amount to a judgment.

As held by Robinson, C. J., in *Yeo Eng Byan* v. *Beng Seng and Co.* (1) an order which merely paves the way for the determination of the question between the parties cannot be considered to be a judgment. The finding with which we are concerned is one, in effect, which decides that the suit is maintainable, and so paves the way for the determination of the main question between the parties.

It does not finally decide the rights of the parties and will be subject to attack on appeal, if the decree is ultimately against the appellant.

I would point out that the finding which forms the subject of the present reference is in an entirely different category to the order in the recent Bench case of *Ma Hman* v. *The Official Receiver* (33). We there held that an order of the Judge on the Original Side allowing the Official Receiver commission at 5 per cent. on the sale proceeds of certain properties sold by a firm of auctioneers under the orders of the Court was a judgment. Our reason was that the order in question was in effect a decree in favour of the Official Receiver for a large sum of money. On the facts, obviously, had there been no right of appeal a grave injustice would have resulted to appellants.

I would answer the question referred in the negative.

Carr, J.—I agree with the judgment of my learned brother Ormiston and with his answer to the question referred.

In particular I agree that when I said in *Moolla Goolam Mahomed* v. *Ameena Bee Bee* (unreported ; supra) that preliminary findings on certain issues were final and could not be reversed in the final judgment, I was wrong.

Cunliffe, J.—On 1st September 1927, Chari, J., on the Original Side of this Court, passed an order dealing with various contentions raised in a suit before him on a hundi. It is apparent from the learned Judge's order that a number of arguments were raised before him on the question of the legal liability of the defendants 1 and 3. They were of a technical nature and do not appear to have had much merit. At any rate, the order concludes with these words :

"For these reasons no final order is possible either against defendant 1 or against defendant 3 on the arguments raised by the learned advocate on their behalf. The case will therefore, proceed . . . ."

And so it would have proceeded, had there not been some delay in collecting evidence on commission.

Taking advantage of the delay, however, the parties adversely affected, obviously against the intention of the learned Judge who desired to dispose of the whole case as soon as possible in a business like manner, took the opportunity of coming to this Court in appeal.

It is argued that the order passed by Chari, J., is a judgment within Art. 13 of our Letters Patent. In my opinion, it is not a judgment at all. It may be part of a judgment ; but it was certainly never contemplated by the Letters Patent that, at every stage of the final hearing of a case, litigants dissatisfied with the view expressed by the trying Judge should immediately proceed to the Court of appeal. One can imagine the state of affairs where six or seven visits to the Court of appeal on six or seven issues decided against the contentions of one or other of the parties would precede the final disposal of the case. In these circumstances I agree that the question referred to the Full Bench should be answered in the negative.

Darwood, J.—I concur.

R.K. *Reference answered in negative.*

(33) A. I. R. 1928 Rang. 301.

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* A. I. R. 1929 Rangoon 54

PRATT, OFFG. C. J. AND ORMISTON, J.

Ma Kyway—Appellant.

v.

Ma Mi Lay and *another*—Respondents.

First Appeal No. 131 of 1928, Decided on 9th August 1928, from judgment of Original Side in Civil Regular No. 146 of 1928.

*** Provident Funds Act (19 of 1925), S. 5 —Nomination prohibited by personal law is valid—Such nomination, though made before the Act of 1925, and though no fresh nomination was made after that Act is validated by S. 5.**

The effect of S. 5 is that a nomination is valid in spite of any prohibition in the personal law of the person making the nomination and this holds good even if the nomination was made before the passing of the Act of 1925 and no fresh nomination was made after the Act was passed. [P 55 C 1]

Ba Han—for Appellant.

Leong—for Respondent 1.

Judgment—Maung Po Hla, deceased was an employee of the Burma Railways and a subscriber to the Railways Provident Fund. He nominated his sister Ma Kywe as his beneficiary. His wife and sole heir under the Burmese Buddhist law Ma Mi Le sued for recovery of the sum standing in her husband's name at his death and obtained a decree.

In the diary of 11th May 1928 the learned Judge on the original side recorded

"the point for decision is whether the Provident Funds Act overrides the personal law of Maung Po Hla to the extent of enabling him to direct his money to be paid to his sister."

The Judge found that the effect of S. 5, Provident Funds Act, 1925, was that a nomination is valid in spite of any prohibition in the personal law of the person making the nomination. We agree that there can be no doubt of the correctness of this construction.

The provisions of S. 5 are perfectly clear and definite, and on this finding the suit by the wife should have been dismissed. The learned Judge has, however, held that as the nomination of the sister was made by a declaration, dated the 27th September 1924, before the Act came into force, it was invalid. He considered that the Act was not intended to have a retrospective force and a fresh nomination was required.

This was a point not taken in argument and the Court was not justified in coming to a decision on this ground without hearing the advocates on the point.

We find ourselves quite unable to accept the reasoning of the learned trial Judge. The effect of the new Act was clearly to render valid a nomination which was previously invalid as contravening the provisions of the Burmese Buddhist law. It is not a question of retrospective effect since the declarant did not die till after the Act came into force.

No fresh nomination was necessary. The nominee is entitled to the money. We set aside the decree of the original side and direct that the suit be dismissed. Appellant will have costs in the suit and appeal. Advocate's fee three gold mohurs.

S.N./R.K. *Decree set aside.*

A. I. R. 1929 Rangoon 55

PRATT, OFFG C. J. AND ORMISTON, J.

G. Bhandari—Plaintiff—Appellant.

v.

R. Nihalchand and *others*—Defendants—Respondents.

First Appeal No. 100 of 1928, Decided on 21st August 1928, from judgment of original side in Civil Regular No. 102 of 1927.

(a) Landlord and Tenant—Tenant holding over—Conditions of lease continue.

At the expiration of the term of a lease the lessee holding over must be taken to have done so on the conditions of the lease. [P 56 C 1]

(b) Limitation Act, S. 14—Claim for rent allowed without specific issue but disallowed in appeal as S. 12, Rangoon Rent Act, did not apply—Whole period of suit can be deducted in fresh suit for rent.

A plaintiff obtained a decree for rent which was revised in appeal on the ground that provisions of S. 12, Rangoon Rent Act, were not satisfied. In trial Court no specific issue was raised on the point. Plaintiff sued again for the rent.

Held: that the plaintiff was entitled to deduct the whole time required for the previous suit as he was bona fide litigating his claim throughout that period: *A. I. R.* 1916 *P. C.* 96, *Expl.* [P 57 C.2]

(c) Civil P. C., S. 11—Issue of law—Decision on admission due to erroneous conception of law is not res judicata.

A decision based solely on an admission which was based on an erroneous conception of law cannot operate as res judicata. [P 58 C 2]

(d) Rangoon Rent Act, S. 19 (1)—Standard rent not fixed—Collateral agreement to pay fixed rent is not covered by the Act.

There was a contract subsisting between a lessee and a sub-lessee that the sub-lessees should pay to the landlord the daily rent, whatever it was.

Held: in a suit by lessee for reimbursement of rent paid for the sub-lessee, that the agreement, the standard rent not having been fixed by the Controller, was not illegal under S. 19 (1) of the Act, and consequently the contract being merely collateral was not avoided by the Act. [P 59 C 1]

N. N. Burjorjee—for Appellants.

J. K. Munshi—for Respondents.

Judgment.—The plaintiff appellant is a jeweller who occupied a stall in the Suratee Bara Bazaar under a tenancy agreement providing for the payment of a daily rent. Although in theory such a tenancy is merely a daily tenancy, the practice of the bazaar authorities is to allow a tenant to continue to occupy the

stall as long as he continues to pay his rent and does not do or omit to do anything which causes inconvenience in the administration of the bazaar. If circumstances render it desirable, the rent is raised and a new tenancy agreement is entered into at an increased rent, but it seldom, if ever, happens that the rent is raised to a point which induces the tenant to give up his tenancy. Again, while sub-letting without the consent of the authorities is not allowed, so long as the sub-lessee does not cause trouble and the outward aspect of the transaction is that he has merely a license to occupy the stall, no objection appears to be taken.

In 1919 the plaintiff-appellant left Rangoon having entered into an agreement, Ex. A (1), with the defendant-respondents, a joint family carrying on the trade of jewellers through their manager, defendant 1. By this agreement which is in the form of a lease, the plaintiff let to defendant the stall and its furniture a list of which is attached, its value being stated to be Rs. 1,196, for two years from the date on which possesssion would be given:

"paying therefor the monthly rent of Rs. 90 per month and also the daily rent to the company during the said term."

The lessee covenants:

"(1) to pay the said rent on 10th day of each month, (2) to surrender at the end of the term, and (3) to pay also rent to Suratee Bazar Co., Ltd., and observe all the rules and regulations of the said company."

There is a proviso for determination on one month's notice if the lessor comes to Rangoon with intention to resume his own business. The only reasonable construction of this document, having regard to the 3rd covenant, is that the lessee agreed with the lessor to pay the daily rent to the company, not to the lessor. At the time of the execution of the lease the daily rent was Re. 1-4-0 and it remained the same until it was increased under the circumstances hereinafter set out. Possession was given on 23rd October 1919, but at the expiration of the term the defendants held over, and they must be taken to have done so on the conditions of the lease.

The defendants continued to pay the monthly rent to the plaintiff up to 22nd October 1922, as and from which date they ceased to pay it, and on 10th December 1922, by means which need not be particularized, the defendants persuaded the bazaar authorities to determine the plaintiff's tenancy and to give them a tenancy at a daily rent of Rs. 4-4-0, thus ousting the plaintiff.

The plaintiff returned to Rangoon, and, as the result of his representation, on 10th February 1923, the Bazaar Company again recognized him as their tenant at an increased rent of Rs. 4 a day.

On 28th April 1923 the plaintiff gave the defendants notice to vacate by 23rd May 1923 and there having been non-compliance with the notice, on 4th July 1923, he instituted Civil Regular Suit No. 354 of 1923 of this Court. In this suit, as originally framed, he claimed, among other reliefs, possession, Rs. 630 as rent for the period from 23rd October 1922 to 23rd May 1923, thereafter Rs. 90 as compensation for use and occupation for the period from 23rd May 1923 to 23rd June 1923, and further such compensation at the same rate.

On 14th August 1923, he filed an amended plaint in which no claim for rent as such was made, but a claim was made for Rs. 720 (being the aggregate of the sums of Rs. 630 and Rs 90) as mesne profits. On 2nd September 1924, a decree was passed by May Oung, J., in favour of the plaintiff for (inter alia) possession, Rs. 630 as rent from 23rd October 1922 until 23rd May 1923, and compensation for use and occupation at Rs. 90 per mensem from 23rd May 1923, till possession was given. The defendants appealed in Civil First Appeal No. 202 of 1924, and by the decree of the appellate side dated 30th March 1925, the decree of the original side was confirmed, except as to the item of Rs. 630 for rent as to which it was held that no decree for rent could be passed by reason of S. 12, Rangoon Rent Act 1920, which provides that a plaint in a suit for the recovery of rent is not to be accepted unless a certificate certifying the standard rent has been attached thereto. No such certificate had been attached to the plaint in the suit.

On the same date, 30th March 1925, the defendants gave possession to the plaintiff. It should be stated that the defendants paid to the Bazaar Company daily rent at the rate of Rs. 4-4-0 a day from 10th December 1922 to 10th February 1923, the date on which the plaintiff was again recognized by the Bazaar

Company as its tenant. Thereafter they ceased to pay such rent. From 23rd May 1923 to 17th July 1923, the plaintiff paid rent at the rate of Rs. 4 a day, aggregating Rs. 224 to the Bazaar Company although the defendants were actually in occupation. From 18th July 1923 to 30th March 1925 the Bazaar Company refused to accept rent from either party, but after being given possession, the plaintiff, on 19th August 1925. paid to the Bazaar Company the rent which had accrued during this period aggregating Rs. 2,488.

The plaintiff filed the present suit on 26th February 1927, claiming Rs. 3,750 under four heads:

	Rs.
(a) Rent at Rs. 90 month from 23rd October 1922 to 22nd May 1923 ...	630
(b) Amount paid by the plaintiff on account of the defendants' default to the Bazaar Company from 10th February 1923 to 22nd May 1923 at Rs. 4 a day ...	408
(c) Amount paid by the plaintiff for the defendants' use and occupation to the Bazaar Company from 23rd May 1923 to 17th July 1923 at Rs. 4 a day ...	224
(d) Amount paid by the plaintiff to the Bazaar Company on account of the defendants' use and occupation of the stall from 18th July 1923 to 30th March 1925 ...	2,488
Total ...	3,750

The learned Judge on the original side dismissed the suit, holding that the claims under the several heads were barred by limitation, by the provisions of O. 2, R. 2, Civil P. C., or by res judicata, in certain cases by a combination of two of them.

The claim for rent is based on a consideration different in the main to those governing the claims under the other heads. As to this the plaintiff claimed for the purposes of limitation to exclude the period from the institution of the suit to the decision of the appeal from the decree therein. The learned Judge held that, the defendants in their written statement having pointed out that the suit in so far as it was based on a claim for rent by reason of the non-observance of the provisions of S. 12, Rangoon Rent Act, 1920, and the plaintiff having taken no steps to legalize his claim for rent, he could not be held to be prosecuting the previous suit in good faith as regards this claim, and that, therefore, he was not entitled to the benefit of S. 14, Lim. Act. In Civil Regular No. 354 of 1923, there was no issue covering the point, except, perhaps the general issue as to the relief to which the plaintiff was entitled, and the matter could not have been seriously discussed, as May Oung, J., gave a decree for the rent as a matter of course. So long as the decree was in existence, that is to say, until it was in part set aside by the appellate Court, the plaintiff could not file another suit for the rent, and Mr. Munshi concedes that the plaintiff is entitled to deduct the period intervening between the two decrees. But this is not enough to save limitation, and Mr. Burjorjee urges that the period of exemption should begin on the date of the institution of the suit. In support of his argument he cites *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (1) where the decision of the Calcutta High Court in *Lakhan Chandra Sen* v. *Madhusudan Sen* (2) was affirmed by the Privy Council. The decision of the High Court had been that the plaintiffs in the suit should be allowed the period between the date of his decree and the date when it was set aside. But their Lordships laid it down as a general principle that limitation would:

> "without doubt remain in suspense whilst the plaintiffs were bona fide litigating for their rights in a Court of justice."

Having regard to the fact that no specific issue was raised on the point, and that the rent was in fact decreed, we think that it must be held that the plaintiff was bona fide litigating his claim throughout the period of the suit. Mr. Munshi, however, relies on S. 1 (4), Rangoon Rent Act, 1920, which provides that the expiration of the Act shall not render recoverable any rent which during the continuance of the Act was irrecoverable, and argues that notwithstanding that before the institution of the suit the Act had expired, no rent in excess of Re. 1-4-0 a day, the standard rent, is recoverable. But it has to be remembered that the agreed rent of Rs. 90 a month, on any possible construction of Ex. A(1) covered not only the right to occupy the stall but the hire of valuable furniture, and on the materials before us, it is impossible to say that the rent in excess of Rs. 1-4-0 a day exceeded the

(1) A. I. R. 1916 P. C. 96=43 Cal. 660 (P.C.).
(2) [1907] 35 Cal. 209=7 C. L. J. 59=12 C. W. N. 326.

permissible amount. We are of opinion, therefore, that the claim for Rs. 630 rent is not barred by limitation or by S. 1 (4) of the Act.

After the hearing of the appeal, before we had delivered judgment, it came to our notice that at the hearing of Civil First Appeal No. 202 of 1924 Mr. Burjorjee had

"admitted that no decree for rent can be passed, by reason of the provisions of S. 12, Rangoon Rent Act."

The question arises whether, by reason of the admission, the claim for Rs. 630 is not res judicata. Mr. Munshi did not argue the point, and no reference was made to it by either counsel. As, however, the point was raised in the written statement and was covered by the issues, we set down the appeal for further hearing with respect to it.

Mr. Burjorjee argues that the admission was based on an erroneous conception of the law, and that a decision based on that admission cannot operate as res judicata. He cites to us the remarks of their Lordships of the Privy Council in *Ganendromohun Tagore* v. *Juttendro Mohun Tagore* (3) that

"the plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain relief to which, upon a true construction of the law, he may appear to be entitled."

And in *Beni Pershad Koeri* v. *Dudhnath Roy* (4), their Lordships observed:

"The High Court seems to have understood counsel to have admitted that receipt of rent by the Maharajah operated as a confirmation of the pattah, and the only question which remained was the construction of the pattah. In the opinion of their Lordships this admission, if correctly understood, was erroneous in point of law, and does not preclude the counsel for the appellant on this appeal from claiming his client's legal rights."

If the admission before the appellate Bench was in fact erroneous we are unable to hold that a decision based solely on such admission could operate as res judicata. The only reference to the matter in the judgment beyond the recording of the admission, is the statement by their Lordships that they were:

"of opinion that the decree of the Court below, except in regard to the granting of rent, is correct; and with that exception it will be confirmed."

We are unable to accept Mr. Munshi's contention that this was the determination of an issue after independent consideration. It should also be noted that the judgment of the appellate Court was, not that the rent was not due, but that so far as the claim in respect of it was concerned the plaint should not have been accepted, because the Rent Controller's certificate was not attached thereto, and, therefore, the claim could not be entertained.

Mr. Burjorjee contends that the admission was erroneous, because S. 12, Rent Act had no application, the lease being not of a stall, but of a stall with furniture of considerable value. The Rent Act, unlike the English Acts, did not bring within its ambit furnished premises. It should further be noticed that two separate rents were reserved, one of Rs. 90 a month to be paid to the plaintiff and one of Rs. 1-4-0 a day to be paid to the Bazaar Company. It is not an unreasonable construction of Ex. A (1) that the whole of the monthly rent is to be attributed to the furniture. Be this as it may, in our opinion, the admission of law was erroneous and the claim to the Rs. 630 is not barred by res judicata.

Item (b) consists of the daily rent of Rs. 4 a day paid by the plaintiff to the Bazaar Company from 10th February 1923, when he was recognized by the Company as its tenant, to 23rd May 1923, when the defendants' sub-tenancy expired. By reason of Ex. A (1) there was a contract subsisting between the plaintiff and the defendants that the defendants should pay to the Bazaar Company the daily rent, whatever it was. As and from 10th February 1923 it was Rs. 4 a day, having been reduced from Rs. 4-4-0 a day, which was the amount which the defendants had agreed to pay to the Bazaar Company, when on the 10th December 1922, they became its direct tenants. The defendants failed to implement their contract and the plaintiff paid the money. In dealing with this matter, the learned Judge misapprehended Ex. A (1) and held that, under it. the contract was that the defendants should pay to the plaintiff rent at Rs. 90 a month and rent at Rs. 1-4 a day, which latter rent the plaintiff should pass on to the Bazaar Company, whereas, as has been pointed out, the contract, on its true construction, provided nothing of the sort. He accordingly held, first, that during the period in question, the plain-

(3) I. A. Sup. Vol. 47=9 B. L. R. 377=18 W. R. 359=2 Suther 692=3 Sar 82 (P.C.).
(4) [1899] 27 Cal. 156=26 I. A. 216=4 C. W. N. 274=7 Sar. 580 (P.C.).

tiff could not recover more than Rs. 1-4-0 a day, the standard rent, and, secondly, that the plaintiff should have included this claim in his prior suit. As regards the first point, the plaintiff's claim was not for rent, but to be reimbursed a sum of money which in consequence of the defendants' breach of contract, he had been bound to pay to the Bazaar Company. The plaintiff's agreement with the Bazaar Company to pay rent in excess of the standard rent was the direct consequence of the defendant's previous wrongful conduct in procuring himself to be recognised by the Bazaar Company as its immediate tenant. Such an agreement, the standard rent not having been fixed by the Controller, was not illegal under S. 19 (1) of the Act, and consequently the contract, Ex. A (1) in so far as it rendered the defendants liable to the plaintiff to pay to the Bazaar Company the daily rent at whatever sum it might be fixed by the Bazaar Company, being merely collateral, was not avoided by the Act. The same misapprehension caused the learned Judge to hold that the amount being rent, ought to have been claimed in the former suit. It was not rent and did not arise from any cause of action on which the former suit was based. At the time of the institution of the former suit it had not been paid, and it was not, in fact, paid till August 1925.

Item (c) is a claim for Rs. 224 being the amount paid to the Bazaar Company for the defendants' use and occupation at the rate of Rs. 4 a day from 23rd May 1923, when the plaintiff's notice to the defendants determining the sub-tenancy expired, to 17th July 1923 when the Bazaar Company ceased to collect the daily rent. This claim the learned Judge held to be barred by res judicata, as being compensation to the plaintiff in respect of the use and occupation of the defendants, which had already been awarded at Rs. 90 a month, and barred under O. 2, R. 2 because it ought to have been included in the former suit. The claim was, in reality, to be reimbursed money which the plaintiff was obliged to pay owing to the default of the defendants. Mr. Burjorjee, however, admits that the daily rent up to the date of the institution of the former suit had been paid before its institution ; to that extent, the claim should have been included in the former suit and, not having been so included, is now barred. The suit was instituted on 4th July 1923, On this head, therefore, the plaintiff is entitled to receive Rs. 4 a day for 13 days or Rs. 52 only and the claim as to the balance of Rs. 172 fails.

Item (d) is the amount paid by the plaintiff to the Bazaar Company on account of the defendants' use and occupation of the stall from 18th July 1923 to 30th March 1925. It stands on the same footing as the Rs. 52 part of item (c) which has been allowed, and must itself be allowed for the same reasons. The result is that the plaintiff succeeds as to the sum of Rs. 3,578. The decree of the original side will be set aside and in lieu thereof there will be a decree in favour of the plaintiff for Rs. 3,578 and costs on that amount in both Courts. We certify for two counsel on the original side.

M.N./R.K. *Appeal allowed.*

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* A. I. R. 1929 Rangoon 59

PRATT, OFFG. C. J., AND ORMISTON, J.

U Po Hnyin — Appellant.

v.

Official Assignee—Respondent.

First Appeal No. 141 of 1928, Decided on 13th August 1928, from judgment of original side in Civil Regular No. 371 of 1927.

*** Presidency Towns Insolvency Act, S. 52 —Insured goods with commission agent—Goods destroyed —Agent becoming insolvent—Insurance money recovered by Official Assignee can be followed.** (*cf* 5 *Rang.* 73—*Ed.*).

Plaintiff had some corn lying in the godown of defendant on comission sale when the building was burnt down and the corn was destroyed. Agent became insolvent. The corn was covered by a fire insurance policy and the insurance company paid the insurance money to the receiver. The insurance premium was paid by the plaintiff.

Held ; that the insurance money paid to the Official Assignee for goods destroyed by fire could be recovered by the plaintiff-creditor who would have a first claim on it. Even if the trust property had been changed into money, still it could be ear-marked and it could be followed and claimed by the cestui que trust : *In re Hallett's Estate* (1879) 13 *Ch. D.* 696, *Foll.* [P 60 C 1, 2]

N. N. Burjorjee—for Appellant.

Auzam—for Respondent.

Judgment.— It is common ground that plaintiff had 1346 bags of gram

lying in the godown of Syed Kazim on commission sale, when the building was burnt down and the gram destroyed. The gram was covered by a fire insurance policy and the Java Sea and Fire Insurance Company paid the Official Assignee Rs. 5,721 on account of the value of 1000 bags of gram destroyed by fire. It should be explained that Sayed Kazim had died and his estate was administered in insolvency. There is also no reason whatever to doubt the very definite evidence that the insurance premium Rs. 150 was paid by plaintiff. Plaintiff sued to recover the insurance money from the Official Assignee.

The learned Judge on the original side held that the plaintiff would have been entitled to recover the gram had it remained gram at the time of the insolvency, but that, as it has been converted into money, he could not follow and recover the money. To our mind the authorities on which the learned Judge relies do not support his view. He quotes a passage from William's Bankruptcy Practice at p. 230 (Edn. 13) to the effect that according to the ordinary course of business between merchants and their factors, the former voluntarily became the creditors of their factors in respect of the moneys so received, whereby the moneys, although the proceeds of goods received on trust, lose their trust character. But this in no wise justifies a finding that the insurance money for goods belonging to the creditor lose its trust character. On the previous page it is pointed out that property vested in the bankrupt as an agent, such as a factor, etc., will not pass to the trustee of the creditors, so long as it or its proceeds remain distinguishable from the mass of the bankrupt's property.

It is also pointed out shortly after the passage quoted that goods brought by the bankrupt with the proceeds of property deposited with him can be followed by the cestui que trust, if such goods can be identified, even though the purchase of them is breach of trust,

There would seem no reason therefore why the insurance money paid to the trustee for goods destroyed by fire should not be recoverd by the creditor. *In re Hallett's Estate* (1) is clearly good authority for following the proceeds of trust property so long as they are identifiable, and in this case they obviously are. So it is laid down in the Laws of England, Halsbury, in S. 275 (p. 169) that if the trust property is disposed of by a trustee the proceeds of the disposition may be followed and claimed by the cestui que trust, if they can be identified. The same rule applies if the trust property has been changed into money and the money can be ear-marked. We consider that plaintiff had a first claim on the insurance money and his suit should have been decreed. The appeal will be allowed and the suit decreed with costs in both Courts.

(1) [1879] 18 Ch. D. 596=49 L. J. Ch. 415=28 W. R. 732=42 L. T. 421.

M.N./R.K. *Appeal allowed.*

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* A. I. R. 1929 Rangoon 60

PRATT, OFFG. C. J., AND ORMISTON, J.

Official Assignee of Rangoon and *another*—Appellants.

v.

L. Roopjee—Respondent.

Civil Misc. Appeal No. 44 of 1928, Decided on 6th August 1928, from order of the Insolvency Judge., on original side in Ins. Case No. 271 of 1926.

(a) Presidency Towns Insolvency Act, S. 55—Person claiming to be secured creditor must prove good faith and consideration.

The burden of proving good faith and consideration in cases arising under S. 55 is on the person claiming to be a secured creditor: 43 *Mad.* 739, *Foll.* [P 61 C 1]

***(b) Evidence Act, S. 91—Registrable document of contract not being registered—It is inadmissible and no evidence of its terms can be given.**

Where a document, embodying a contract between parties, should have been, but was not registered, the document itself is inadmissible in evidence and further no evidence can be given of its terms under S. 91. [P 61 C 1]

P. B. Sen—for Appellants.

Halker—for Respondent.

Judgment. — Laxmishanker Lalljee was adjudicated an insolvent on 14th December 1926. On 16th October 1926, he being the owner of a half share of a leasehold plot of land with a building thereon, mortgaged it for Rs. 1,500 to the respondent who was the owner of the other half share. Subsequent to the insolvency he applied to the Court for the realization of his security. The claim was referred to the Official Assignee for

enquiry and report. The Official Assignee reported against the claim, and applied under S. 55, Presidency Towns Insolvency Act, 1909, that the mortgage be declared void on the ground that it had been given within two years of the date of the insolvency, not in good faith or for consideration. The learned Judge of the original side in his insolvency jurisdiction held in favour of the respondent, declared him to be a secured creditor and directed that the mortgaged property be sold and that the proceeds, after deducting the Official Assignee's commission, be paid to the respondent to the extent of his debt. It is in respect of this order that the present appeal is filed.

The burden of proving good faith and consideration in cases arising under S. 55 is on the person claiming to be a secured creditor; see *Official Assignee of Madras* v. *C. Sambanda Mudaliar* (1). The learned Judge has based his decision on a finding that a certain transaction which took place between the insolvent and the respondent on 5th August 1926, was a genuine transaction. This transaction is evidenced by a promissory note for Rs. 1,000 executed by the inolvent in favour of the respondent, a document which also contains words which amount to a mortgage or charge over the insolvent's half share in favour of the respondent for the amount of the debt. The document ought therefore to have been, but was not, registered. The short answer to the respondent's case is that the terms of the contract between the parties having been reduced to the form of a document, under S. 91, Evidence Act, no evidence of its terms is admissible except the document, which itself is inadmissible. Therefore, no evidence at all can be given of the transaction of 5th August.

As, however, the learned Judge has come to the conclusion that the transaction of 5th August was genuine and that the later mortgage was merely exchanging a security which, for technical reasons, was invalid for a security which was legally valid, we propose briefly to examine the salient features of the evidence. (Here the judgment discussed evidence and continued). We are satisfied that the respondent has failed to prove that the mortgage was given in good faith and for consideration. We are less reluctant to disturb the finding on a question of fact of the trial Judge for the reason that only a very small fraction of the evidence was given before him.

It follows that the order of the learned Judge of the original side sitting in insolvency must be set aside, and that for it there must be substituted an order that the mortgage in favour of the respondent be declared to be void as against tht Official Assignee and that it be set aside. The respondent will pay the costs of the appellants here and below, advocate's costs in each Court five gold mohurs.

S.N./R.K. *Order set aside.*

(1) [1920] 43 Mad. 739=60 I. C. 205=39 M. L. J. 345.

A. I. R. 1929 Rangoon 61

DOYLE, J.

Mohamed Siddiq—Plaintiff.

v.

Mohamed Ahmed and *another*—Defendants.

Civil Regular No. 121 of 1927, Decided on 6th August 1928.

Letters Patent (Rangoon), Cl.12—Plaintiff not applying for leave though necessary—Defendant submitting to Court's jurisdiction—He cannot subsequently object to Court's jurisdiction.

Where in a suit leave of the High Court, although necessary under Cl. 12, Letters Patent, is not obtained, the defendant must raise the objection as to the jurisdiction of the High Court at the first available opportunity. If he fails to do so, and at first submits to the High Court's jurisdiction, such submission constitutes waiver which cures the defect created by omission to apply for leave : 35 *Cal.* 394 and 17 *C. W. N.* 512, *Foll.*; 4 *Bom.* 482; 20 *Bom.* 764 and 37 *Bom.* 563, *Dist.* [P 62 C 1]

Ray—for Plaintiff.

Auzam—for Defendant 2.

Judgment.—In the case now about to be heard it is objected that, as part of the cause of action arose in Paungde, and as the leave of this Court has not first been obtained under S. 12, Letters Patent, the Court has no jurisdiction and the case should stand dismissed.

Reference is made to the cases of *Jairam Narayan* v. *Atmaram Narayan* (1), *Haribhai Gandabhai* v. *Secretary of State* (2), and *Abdul Kadir* v. *Doolanbibi* (3), where it has been held that leave

(1) [1880] 4 Bom. 482.
(2) [1895] 20 Bom. 764.
(3) [1913] 37 Bom. 563=20 I. C. 530=15 Bom. L. R. 672.

not having first been obtained, the High Court has no jurisdiction. In each of these cases objection to the jurisdiction was raised at the first available opportunity.

There has in the present case been submission on the part of the defendant to the jurisdiction of the Court, since he has filed a written statement and asked for the issue of a commission, and the objection now taken is an afterthought.

It has been pointed out in *A. J. King* v. *Secretary of State* (4), which has been followed in *Saraswati Dassee* v. *Biraj Mohini Dassee* (5), that where there is in the beginning a submission to the jurisdiction of the High Court, such submission constitutes waiver, and that, therefore, where the jurisdiction of the Court is fettered only by the fact that leave to sue must be given by the Court itself, such waiver cures the defect created by omission to apply for leave. The same principle has been affirmed in *Ganesh Narain Sahi Deo* v. *Manik Lal Chandra* (6). It commends itself as based on a sound legal concept as well as on practical common sense. The objection is not upheld; the case proceeds.

S.N./R.K. *Objection not upheld.*

(4) [1908] 35 Cal. 394=7 C. L. J. 441=12 C. W. N. 705.
(5) [1913] 17 C. W. N. 512=18 I. C. 898.
(6) A. I. R. 1923 Pat. 562.

A. I. R. 1929 Rangoon 62

RUTLEDGE, C. J., AND BROWN, J.

Bowrammah—Appellant.

v.

A. N. A. N. Chettiar and *another*—Respondents.

Civil Misc. Appeal No. 114 of 1928 Decided on 18th January 1929.

Limitation Act. S. 18—Mere act of fraud is not sufficient—It must be proved that a person's title or right had been kept from his knowledge by other party's fraud.

It is not sufficient to make S. 18 operative that the cause of action should be based on fraud. It is necessary that the right claimed or the title on which it is founded, should have been kept from the knowledge of the applicant by means of fraud, although it may be that in certain circumstances it could be assumed from the act of fraud itself which gave the cause of action that this act of fraud was fraudulently concealed from the person affected: *A. I. R.* 1922 *Pat.* 507; 17 *Cal.* 769 and 30 *Cal.* 142, *Appr.* [P 63 C 1]

M. C. Naidu—for Appellant.

K. C. Bose—for Respondents.

Judgment.—The respondent Chettyar Firm obtained a mortgage-decree against the appellant Bowrammah and others. In execution of this decree certain property was sold by auction on 3rd March 1928. The sale was confirmed on 4th April 1928. On 5th April one of the defendants Veena Subba Row, filed an application asking to have the sale set aside. He stated that the plaintiffs in collusion with the present appellant had sold the land privately for Rs. 1,250. This application was dismissed on 7th April. On 9th June the present appellant filed an application to set aside the sale. She is the mother of Subba Rao, who made the application on 5th April. She states that she heard about a week before filing her application that Subba Rao had negotiated with the plaintiffs for sale of the property to a Chinaman for 6,000 that the Chettyar then said that they would arrange not to hold the sale if payment was made within three months, and that subsequently the Chettyar fraudulently arranged to prevent the Chinaman from being present at the auction.

The appellant's application was filed under the provisions of O. 21, R. 90, Civil P. C. It was filed three months after the date of the sale sought to be set aside, and was prima facie therefore clearly barred by limitation. The appellant, however, claims that she is saved from the bar by the provisions of S. 18, Lim. Act. The learned trial Judge held that she has not established this claim, and rejected her application as time barred. She has now appealed against this decision.

Three cases have been cited to us, but none of them appears to have any direct bearing on the point at issue.

In the case of *Ramdhari Chowdhuri* v. *Deonandan Prasad Sing* (1), it was held at p. 70 (*of I. L. R.* 2 *Pat.*), in circumstances similar to the present that the application was time barred, unless it could be shown that the respondents' right to set the sale aside was concealed from him by fraud of the appellant.

A similar view was taken in the case of *Mohendro Narain Chaturaj* v. *Gopal Mundul* (2) and in the case of *Golam Ahad Chowdhury* v. *Judhistir Chandra Shaha* (3).

(1) A. I. R. 1922 Pat. 507=2 Pat. 65.
(2) [1890] 17 Cal. 769.
(3) [1903] 30 Cal. 142=7 C. W. N. 305.

These decisions merely set forth the provisions of S. 18, Lim. Act, as applying to cases such as the present.

We have been referred on behalf of the appellant to a passage in the judgment in *Golam Ahad Chowdhury's* case (3) at p. 153.

"But if the right of the appellant to apply under the section was concealed from him by fraud of the respondents he would by the operation of S. 18, Lim. Act, and notwithstanding the confirmation of the sale, have 30 days within which to make his application from the date on which the fraud first became known to him."

It is contended that this is an authority in favour of the appellants' claim in the present case, because the fraud alleged in the present case is a fraud by the respondents. We are unable, however, to see how this helps the appellant.

Section 18, Lim. Act does not say that when the cause of action is based on fraud, time only begins to run from the date when the fraud became known to the applicant. S. 18 says:

"When any person having a right to institute a suit or make an application has by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,* the time limited for instituting a suit or making an application.

(a) against the person guilty of the fraud * * * * * * * * * * * * * * shall be computed from the time when the fraud first became known to the person injuriously affected thereby* * * * * * * *."

It is clearly not sufficient to make this section operative that the cause of action should be based on fraud. It is only necessary that the right claimed or the title on which it is founded should have been kept from the knowledge of the applicant by means of fraud and it does not seem to us that there is any allegation to this effect in the present case.

The appellant does not claim that she took any interest in the sale at the time of the sale, that she was present at the sale or that knowledge of the sale was kept from her. The fraud she complains of was really a fraud practised on Subba Row and it is not alleged that the respondents took any steps either active or passive to conceal this fraud from the appellant.

It may be that in certain circumstances it could be assumed from the act of fraud itself which gave the cause of action that this act of fraud was fraudulently concealed from the person affected. But it does not seem to us that there are any circumstances which would justify such an assumption in the present case.

That being so, we are unable to hold that the provisions of S. 18, Lim. Act, are operative in the present case. The appellant's application was therefore barred by limitation and was rightly rejected. We accordingly dismiss the appeal with costs. Advocate's fee 3 gold mohurs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 63

BROWN, J.

Ye Nam Low—Appellant.

v.

Maung Pe Wun—Respondent.

Spl. Second Appeal No. 415 of 1928, Decided on 2nd January 1929, from the judgment of Dist. Judge, Myaungmya, in Civil Appeal No. 55 of 1928.

Malicious Prosecution—Trial after police investigation—Case not intentionally false—Malice cannot be inferred merely from informant engaging counsel in criminal case or some persons telling him that the person complained of was innocent.

Where the police investigate a case and sends it up for trial, in the absence of proof that the informant intentionally gave false information, it cannot be said that he acted maliciously merely because he was told by some persons that the person complained of was innocent nor because the informant engaged a counsel in the criminal case. [P 64 C 1]

Aung Gyam—for Appellant.

Paw Tun—for Respondent.

Judgment.—The appellant sued the respondent for damages for malicious prosecution. He was successful in the trial Court, but on appeal his case was dismissed by the District Court, and he has now come to this Court in second appeal. Admittedly the appellant was prosecuted for the theft of an electric bulb and this prosecution was instituted as a result of a complaint to the police made by the respondent. Admittedly the appellant was acquitted and it is not suggested now that he was not innocent of the offence. But these facts are not by themselves sufficient to justify the plaintiff's claim for damages. Before he can succeed in the present suit, he must also show that the respondent acted maliciously and without reasonable and probable cause. I am unable to find any evidence in this case of malice or any fact from which malice could be inferred. In his first information report to the police the respondent stated that a clerk of the Electric Supply Company had been told by a bazaar durwan and jamadar that they had seen a

bulb stolen from a street lamp by a Burman and a Chinaman. A search was made in the Chinaman's house and a bulb was found, which was recognized as the respondent's. The respondent has never at any time professed to have any personal knowledge as to who was the thief, and the facts stated by him in the first information report are substantially true. Evidence was given as to the theft by the durwan and the jamadar and admittedly an electric bulb was found in the house of the appellant. The respondent may have been wrong in his identification of the bulb as belonging to the Electric Supply Co., but it appears that even in the criminal case he admitted that the bulb which was found in the possession of the appellant might have been obtained elsewhere. The respondent calls himself a shareholder in the Electric Supply Co. and he appears to have been also a manager. There is nothing whatever to show that he intentionally gave false information to the police and the investigating police officer says that he investigated the case and sent it up for trial and that the respondent never came to him, before he sent up the case. The trial Judge considered it to be evidence of malice that the Chinese elders of the town told the respondent that the appellant was innocent, and yet he did nothing. The respondent does admit that he was told by the elders that the appellant was an honest man, and got the bulb by purchase. But that was after he had made the first information report. By that time the case was out of his hands and there is nothing to show that he took any further action against the appellant. I am quite unable to accept his retaining the services of an advocate in the Magistrate's Court as evidence of malice. He was perfectly entitled to do this, and the filing of the present civil case against him suggests that he was wise in doing so.

It is not suggested that that the parties had had any quarrel before the complaint was made to the police, or that the respondent had any reason whatever for wishing to get the appellant into trouble. I am of opinion that the appellant has entirely failed to prove that the respondent acted with malice.

I therefore dismiss the appeal with costs.

R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 64

HEALD, J.

Maung Ngwe San — Defendant—Appellant.

v.

Ma Gyi—Plaintiff—Respondent.

Special Second Appeal No. 206 of 1928, Decided on 21st December 1928.

(a) Buddhist Law (Burmese)—Divorce.
Where a Burmese Buddhist man slaps his wife though once and cohabits with another woman and gets a child from her, the wife is entitled to divorce. [P 64 C 2]

(b) Evidence Act, S. 114—Marriage.
Presumption of marriage arises from long cohabitation. [P 64 C 2]

So Nyun—for Appellant.

Thein Maung—for Respondent.

Judgment. — Respondent sued appellant for divorce under Burmese Buddhist law on the ground of cruelty. She alleged that the appellant had ill-treated her, and deserted her and had taken another wife without her consent.

Tho Township Court found that respondent proved that appellant had beaten her and had left her and cohabited with another woman by whom he had had a child, but the learned Judge said that "merely slapping by a husband to his wife and once in a blue moon cannot be taken as cruelty and as such good ground for divorce" and that although appellant had lived with the other woman and had had a child by her, his living with her did not amount to taking another wife so as to entitle respondent to a divorce.

The learned Judge was clearly wrong on both points. On the first point he has overlooked the rulings in the cases of *Mg. Po Han* v. *Ma Talok* (1) and *Ma Sat* v. *Mg. Nyi Bu* (2) and on the second he has overlooked the presumption of marriage which arises from long cohabitation.

His judgment was quite rightly set aside by the District Court and it is clear that there are no merits in the appeal.

Respondent was in my opinion entitled to a decree for divorce on the ground of serious misconduct on the part of the husband and the appeal is dismissed with costs, advocate's fee in this Court to be five gold mohurs.

R.K. *Appeal dismissed.*

(1) [1913] 7 L. B. R. 79=20 I.C. 674=6 Bur. L. T. 134.
(2) A. I. R. 1921 U. B. 2=4 U. B. R. 68.

* A. I. R. 1929 Rangoon 65

RUTLEDGE, C. J., AND BROWN, J.

V. E. A. R. M. Chettyar Firm — Appellant.

v.

A. K. R. M. K. Chettyar Firm — Respondent.

First Appeal No. 182 of 1928, Decided on 3rd December 1928.

*** Transfer of Property Act, S. 59—*S* holding two plots with building thereon by sale-deed and also possessing lease-deeds under which his vendor held those plots — *S* depositing sale-deed and one lease-deed with *A* with intention to create mortgage thereon and subsequently other lease-deed with *B*—Lease-deeds bearing endorsements showing sale of the property — Mortgage of whole property was created in *A's* favour—*B* cannot get priority over *A* merely because *A* did not insist on obtaining other lease-deed—Transfer of Propety Act, S. 78.**

All that is required to prove to establish an equitable mortgage is (1) that documents of title were deposited with a creditor and (2) that the intent was to create a security thereon. [P 66 C 1]

One *S* held two plots of land and a building thereon, by virtue of a registered sale-deed. He also possessed with him the original lease-deeds under which the plots were held by his vendor. He deposited the sale-deed and also the lease-deed with regard to one of the plots with *A*, with intention to create a security thereon; and thereafter deposited the other lease-deed with *B* with the same intent. On each of the lease-deeds there was an endorsement that the property was sold to *S*.

Held: that *A* had title-deeds with regard to the whole property deposited with him and an equitable mortgage was created on the whole property in his favour although he did not possess the other lease-deed: *A. I. R. 1916 P. C.* 115, *Dist. Roberts* v. *Croft*, 53 *E. R.* 343, *Rel. on.* [P 66 C 1]

Held further: that the mere fact that *A* did not insist on obtaining the other lease-deed which on the face of it showed that there was a sale of the property effected, did not constitute gross negligence on *A's* part so as to give priority to *B's* mortgage over *A's*: *A.I.R. 1926 Rang.* 195, *Rel. on.* [P 66 C 2]

Ba Maw—for Appellant.

K. C. Bose—for Respondent.

Judgment.—The respondent, A. K. R. M. K. Chettyar Firm sued one Ma Ohn Sein and 3 others on an equitable mortgage, the property claimed to be mortgaged consists of 2 plots of land and a building thereon. The two plots of land are known as lots Nos. 232 & 232-A. They were originally held under a lease from the Rangoon Development Trust by one Ma Pyu who by a registered deed sold the two plots of land and the building thereon to one U Po Gyi. The respondent-plaintiffs claimed that they took an equitable mortgage of the property from U. Po Gyi on 5th December 1924. U. Po Gyi is now dead, and the first three defendants in the case are his legal representatives. They first contested the suit, but finally dropped out of it and the real contest was between the respondent-plaintiffs and the appellants, who were the defendants 4.

The appellant V. E. A. R. M. Firm claimed that they have an equitable mortgage on the property known as lot No. 232A and so much of the building as stands thereon. The learned trial Judge held that the respondents had established their mortgage as regards lot No. 232 and as regards all the buildings on both the pieces of land. The learned Judge, held, however, that the respondents had failed to establish their claim as regards lot No. 232-A and gave a decree in favour of the appellants as regards this site. Otherwise the decree grants the plaintiffs' prayer. The V. E. A. R M. Firm have appealed against this decree and cross-objections have been filed on behalf of the original plaintiffs.

It is contended on behalf of the appellants that the transfer of land of necessity carries with it a transfer of any building on that land, and that the learned trial Judge having found against the respondents that their mortgage on lot No. 232-A failed should have rejected the respondents' claim and refused a mortgage decree, on so much of the building as stands on lot No. 232-A.

The mortgage in favour of the appellants was effected some 16 months after the mortgage in favour of the respondents. The learned trial Judge held that the appellants having obtained the lease-deed as regards lot No. 232-A, that piece of land was under mortgage to them, and not to the respondents. He referred to the case of *Pranjivandas Jagajivandas Mehta* v. *Chan Mah Phee* (1), where it was settled that the scope of the security created by a deposit of title-deeds is the scope of the title covered by those deeds. It does not seem to us, however, that very much help can be derived here from the decision in that case in which the point at issue was not whether an equit-

(1) A. I. R. 1916 P. C. 115=43 Cal. 895 = 43 I. A. 192 (P.C.).

able mortgage could be created although there was not a complete deposit of all the title-deeds. An equitable mortgage is created by deposit with a creditor of documents of title to immovable property with intent to create a security thereon All that is necessary to prove to establish such a mortgage is (1) that documents of title were deposited with a creditor and (2) that the intent was to create a security thereon.

In the case of *Roberts* v. *Croft* (2) the facts were in many ways very similar to the facts in this case. In that case Roberts had deposited with one Miss Wilis documents of title relating to certain property. These documents included all the previous title-deeds to the property but did not include the deed whereby Roberts himself obtained title. Subsequently Roberts deposited the remaining deed with Messrs. Bult. In each case the deposit was made with intent to create an equitable mortgage. It was held that in order to establish an equitable mortgage it was not necessary to prove that the deeds deposited showed a good title in the depositor, and although she received no deed showing any right to the property in her mortgagor, it was nevertheless held that Miss Wilis' mortgage was a perfectly good one. It was further held that the subsequent mortgage to Messrs. Bult by deposit of the remaining deed was also a perfectly good mortgage, but that there had been negligence on the part of Messrs. Bult and that, therefore, Miss Wilis' mortgage must be preferred to theirs. In the present case the documents deposited with the respondent's firm consists of a sale-deed with regard to both the pieces of land, and the house, and the lease-deed with regard to lot No. 232. Title-deeds have, therefore, been deposited with regard to the whole property and in our opinion a valid equitable mortgage has been created on the whole property if it has been shown that was the intention of the parties at the time of the deposit.

The question of intention has not been specifically considered by the learned trial Judge, but we are of opinion that the respondent-plaintiff did establish their case in this connexion. The clerk of the Chettyar firm has given evidence on the point and he is supported in his evidence by one Maung Kan Hla. His explanation with regard to the lease-deed of the property lot 232-A, is that at the time U Po Gyi said he could not find the document. We understand that the bulk of the building affected is on lot 232, but that the building on lot 232 extends into lot 232-A, and it seems to us extremely unlikely that the respondent firm would accept a mortgage of part only of a house. We consider it sufficiently established that the intention was to mortgage both the lots and the building thereon. We therefore hold that a valid mortgage of the whole property was effected in favour of the respondents.

It only remains therefore to consider whether the respondents have by their negligence entitled the appellants to claim any priority over them. It does not seem to us that they have established their case in this particular. Under S 78, T. P. Act, the respondents' mortgage would have to be postponed to the appellants' mortgage if the respondents have been gulity of gross negligence.

It was held in the case of *A. L. R. M. Chettyar Firm* v. *L. P. R. Chettyar Firm* (3) that there was no universal rule to the effect that parting with title-deeds by a mortgagee amounted to gross negligence. In this case the lease-deed which was the only document of title held by appellants bears an endorsement that the property was sold to U Po Gyi by registered deed. The appellants must there-therefore be held to have been aware of the fact that they had not got all the title-deeds relating to the property and there is no explanation as to why they made no enquiries. The respondent firm presumably knew that there was this endorsement on the lease of lot 232-A as there was a similar endorsement on their lease, and the mere fact that they did not insist on obtaining one of the documents of title which on the face of it, must clearly have shown the existence of another important document does not in our opinion amount to such gross negligence as to justify the appellants' mortgage being preferred to theirs.

It has been suggested on behalf of the appellants that the respondents admitted that the appellants' mortgage was taken without notice of their previous mortgage. We cannot, however, find anything on the record to justify their contention. It is true that it is recorded in the depo-

53 E. R. 343.

3) A.I.R. 1926 Rang. 195=4 Rang. 238.

sition of Rathnam Pillay that the learned advocate for the respondents, who had been questioning the witness with a view to establish actual notice did not pursue that line. And the learned trial Judge comments on this matter to the same effect.

It is admitted that the respondents do not allege actual notice by the appellants. What they do allege is that the appellants were put on their enquiry and could have received actual notice had they taken reasonable precautions. One other matter has been raised in appeal and that is as regards costs. It is contended that the actual proof of the respondents' mortgage was necessary only because other respondents in the case denied the mortgage, and that the costs of this part of the case should not have been awarded against the appellants. It is clear, however, that the appellants also though not denying the mortgage did not admit it, and that being so, it became necessary for the respondents to prove their mortgage as against the appellants. We do not think therefore that there is any force in this contention. We dismiss the appeal and allow the cross-objections. We alter the decree of the trial Court and give a mortgage decree in favour of the respondents for the whole of both the plots of land and the building thereon. The appellant-defendants will pay the costs of the respondent-plaintiffs in the trial Court and in this Court; the appellants will pay the respondents' costs both on the appeal and on the cross-objections.

S.N./R.K. *Decree varied.*

A. I. R. 1929 Rangoon 67

PRATT, OFFG. C. J. AND ORMISTON, J.

Ma Kho U and *others*—Appellants.

v.

Maung Ba Sein and *another*—Respondents.

First Appeal No. 93 of 1928, Decided on 7th September 1928, from judgment of Dist. Judge, Pyapon, in Civil Regular No. 34 of 1927.

(a) Civil P. C., S. 10—Subsequent suit for mesne profits accruing subsequent to institution of prior suit is not barred by S. 10.

Where a suit was brought for the recovery of mesne profits which had accrued subsequently to the institution of a prior suit relating to the same property, and although there was one issue common to both the suits, yet they did not embrace the entire subject in controversy between the parties, the subsequent suit for mesne profits does not attract the operation of S. 10: *A. I. R.* 1923 *Cal.* 716 and *A. I. R.* 1925 *Mad.* 574, *Rel. on.* [P 69 C 1]

(b) Civil P. C., S. 10—Applying for or obtaining leave to appeal to His Majesty does not amount to pendency of appeal.

The mere applying for or obtaining leave to appeal to the Privy Council cannot of itself amount to the pendency of an appeal till such appeal is actually filed: 21 *Mad.* 18 *Foll.* [P 69 C 2]

Young—for Appellants.

Paw Tun—for Respondents.

Judgment.—In Civil Regular No. 39 of 1924 of the District Court of Pyapon the plaintiffs (respondents) obtained a decree against U Shwe Dun and defendant 1 (appellant 1) for possession of certain lands. By the decree dated 2nd May 1927, of this Court in Civil First Appeal No 213 *of* 1925 the decree of the District Court was varied and U shwe Dun and defendant 1 were ordered to give to the plaintiffs possession of the following lands:

(a) Holding No. 23 of 1923-24 in Taungbogyi kwin, Yondaung Circle, Kyaiklat Township, measuring about 25·44 acres.

(b) Holding No. 10 of 1923-24 in Kyaungsu kwin, aforesaid, measuring 24·21 acres.

(c) Holding No. 6 of 1923-24 in Kywesa-gyet, Taung kwin, aforesaid, measuring about 22·26 acres.

(d) 50 acres out of holding No. 10 of 1923-24 in Ywathagyi kwin, aforesaid.

(e) Holding No. 5 of 1923-24 in Ywathagyi kwin, aforesaid, measuring about 23 acres.

In Civil Miscellaneous No. 80 of 1927 of this Court U Shwe Dun and defendant 1 on 2nd July 1927, applied for leave to appeal to the Privy Council against the decree of this Court on appeal. On 6th December 1927, a certificate was granted in respect of this and two other cases, the subject matter of Civil Miscellaneous Applications No. 78 and 79 of 1927, that they were fit cases for appeal to the Privy Council. The appeal was admitted on 30th January 1928 and the record was despatched to England on 31st July 1928.

In the meantime the plaintiffs had been put into possession of the suit land and had on 5th September 1927, instituted Civil Regular No. 34 of 1927 of the District Court of Pyapon against defendant 1 (ap-

pellant 1) and the heirs and legal representatives of U Shwe Dun, then deceased (the appellants), claiming mesne profits which had accrued since the institution of Civil Regular No. 39 of 1924. On 24th September 1927 the defendants filed a written statement in which inter alia they pleaded that an appeal to the Privy Council had been "admitted," and asked for a postponement until after the decision of the Privy Council. On that day a single issue was framed namely "are the plaintiffs entitled to mesne profits as claimed? If so to what extent". It should be noted that no issue was asked on the question of whether there should be a stay and that in the written statement the defendants had not pleaded that the District Court was bound to stay the suit. On 4th November 1927 they filed a substantive application asking for stay until after the Privy Council decision. On 10th November 1927, this application was dismissed. Up to that time no certificate had been granted and as the Additional Judge pointed out, there was no certainty that the application for a certificate would be granted, or, if it was granted, that the appeal to the Privy Council would be successful. The case was fixed for hearing on 29th November 1927 and on that day it was postponed to 12th January 1928. The defendants did not appeal on that day and an ex-parte decree was passed in favour of the plaintiffs on 13th January 1928. On 20th January 1928, the defendants filed an application to re-open the case, and with this application they filed a copy of the order of this Court dated 6th December 1927, certifying that the case was a fit one for appeal to the Privy Council. This appears to have been the first intimation to the Court that such an order had been passed. The Additional Judge refused to re-open the case. Two appeals have been filed by the defendants, one from the refusal to re-open the case, which is dealt with in a separate judgment, and one from the decree in the suit.

So far as the decree in the suit is concerned only two grounds have been argued. It is possible to dispose, shortly, of one ground, that the decree should have been against the defendants, not personally, but in their capacity of legal representatives. The persons who had been in possession of the suit lands and who were ordered to give up possession thereof were U Shew Dun and Ma Kho U the (defendant 1). U Shwe Dun died leaving as his heirs and legal representatives the defendants. In Civil Regular No. 34 of 1927 the defendants were sued for mesne profits and it was not stated whether any and if so which of them were sued as legal representatives of U Shwe Dun. The decree was passed against all the defendants personally. Mr. Paw Tun for the respondents concedes that this was erroneous. The decree as regards the mesne profits should have been passed against defendant 1 personally and against all the defendants as heirs and legal representatives of U Shwe Dun deceased. There is no reason why all the defendants, who must be taken to have wrongfully resisted the suit, should not pay the costs in their personal capacities. It should be stated that the ground of appeal covered the case of all the defendants, but defendant (1) was clearly liable in her personal as well as in her representative capacity.

The third ground of appeal is that inasmuch as the plaintiffs based their case on a decree of this Court which is now

"and was at the time of the decision of the present suit the subject of an appeal to His Majesty in Council and could not or should not under such circumstances have been made the grounds for a decision by the trial Court."

If and in so far as the District Court had a discretion to proceed with the trial of the suit, there seems to be no ground for interference with its discretion. So long as the decree of this Court stood the plaintiffs had a right to sue and there was no reason why the proof of their claims and the realization of the amount due to them should be postponed for an indefinite time.

Mr. Young for the appellants relies on S. 10, Civil P. C. That section, so far as material, prohibits a Court from proceeding

"with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending"

before His Majesty in Council.

Mr. Young's argument would appear to be that, inasmuch as the defendants were appealing to the Privy Council, the District Court was bound to stay the suit. His position is, apparently, that the "matter" in issue in the present suit was

directly and substantially in issue in the previous suit inasmuch as the right to recover the mesne profits depends on the title to the land. The authorities cited by him are not helpful to his argument.

In *Wahidunnissa Bibi* v. *Zamin Ali Shah* (1), *Z* and *J* brought a suit against *W* and other heirs of *W's* deceased husband, claiming certain property in virtue of a deed of gift from the mother of the deceased. The suit was decreed and an appeal was filed from the decree. Pending the appeal, *W* brought a suit against *Z* and *J* and another, in which she claimed one-sixth of her dower debt, exempting the other heirs of her late husband. In the second suit the deed of gift in favour of *Z* and *J* was again brought in question, the plaintiff alleging that it was invalid and inoperative. In this suit the Court, at the instance of the defendants made an order under S. 10 staying proceedings until the appeal in the former suit should have been decided. The High Court on revision refused to interfere with this order. Both the learned Judges of the High Court appear to have regarded the matter as one for the exercise of discretion as to whether the second suit should or should not be stayed.

In *Jamini Nath Mallik* v. *Midnapur Zamindary Co.* (2), which was an application for revision, two suits involving claims for certain cesses against the petitioners were decided against them and were pending in appeal, when a rent suit was brought against the petitioners. They applied for stay of the suit under S. 10, inasmuch as it concerned cesses alleged to be due for a subsequent period. Rankin, J., held that although appeals fall within the purview of the section, yet it was not applicable to the case before him, which was a suit for a different debt altogether and for a debt which was not in existence when the last of the previous suits was brought.

In *Kuberan Nambudri* v. *Koman Nair* (3) it was held by Srinivasa Aiyangar, J., that the expression "Matter in issue" in S. 10 has reference to the entire subject in controversy between the parties and the mere fact that one of the issues in two suits is common is not sufficient to attract the operation of S. 10. The common issue in the case before him was whether the plaintiff had been validly adopted.

Applying the two last named cases, which seem to have been well decided, to the matter before us, if we take the chronological test adopted by Rankin, J., the right to mesne profits accrued subsequently to the institution of the prior suit and was not in existence at the date of such institution, while it is manifest that although there is an issue common to the two suits, they do not embrace the entire subject in controversy between the parties.

For these reasons alone the appeal must fail. There are yet other reasons. As is pointed out in *Nainappa Chetty* v. *Chidambaram Chetti* (4),

> "the mere applying for, or obtaining leave to appeal to the Privy Council cannot of itself amount to the pendency of an appeal till such appeal is actually filed, for it may happen that the parties, who obtain such leave, may never appeal at all against such decree or order."

At the time when the defendants applied to stay the suit, the application for a certificate that the case was a fit one for appeal to the Privy Council had not been heard, and it would be to somewhat violently stretch the language of S. 10 to hold that an appeal was pending before the Privy Council. The certificate was granted on 6th December 1927, the defendants took no steps to amend the written statement, and consequently, when the suit came on for ex-parte hearing, it was tried on the single issue which had been previously fixed. As has been said above the certificate was brought to the notice of the Court only after the case had been heard, namely on 20th January 1928, and it was not until 30th January 1928 that the appeal to the Privy Council was admitted. It is not necessary for the decision of this appeal to decide the exact point of time at which an appeal may be said to become pending before the Privy Council, whether it is when it is registered as such in the Privy Council Office, or when it is admitted by the High Court or when the certificate of fitness is given. It is sufficient to say that even if the last mentioned time is taken, the Court was unaware that the certificate had been granted and there was no issue raised as to S. 10, Civil P. C.

Mr. Young has asked us to act under S. 151. If the appellants had been pre-

(1) [1920] 42 All. 290=55 I. C. 89=18 A. L.J. 145.

(2) A. I. R. 1923 Cal. 716.

(3) A. I. R. 1925 Mad. 574.

(4) [1897] 21 Mad. 18.

pared, as was at one time it was suggested might have been the case to deposit the decretal sum in Court, with a view to its ultimate ownership being determined by the result of the appeal to the Privy Council, there might have been ground, which under the existing circumstances is lacking, for the application of that section. The decree of the District Court will be modified by a provision that in so far as it is a decree for 4,200 baskets of paddy or Rs. 8,400 the value thereof, it shall be a decree against defendant 1 personally and against all the defendants as legal representatives of U Shwe Dun. The appellants will pay the costs of this appeal.

S.N./R.K. *Decree modified.*

A. I. R. 1929 Rangoon 70

CARR, J.

Maung Sein Myi and *another*—Applicants.

v.

Maung Tun Pe and *another*—Respondents.

Civil Misc. Appln. No. 81 of 1928, Decided on 18th September 1928, from judgment of Mosely J., in Second Appeal No. 540 of 1927.

(a) Civil P. C., O. 47, R. 1—Mistake or error—Error of law must be obvious.

An error of law is a proper ground for review when that error is apparent on the fact of the record: *A. I. R.* 1924 *Mad.* 98, *Foll.* *A. I. R.* 1928 *Rang.* 12, *Ref.* [P 70 C 2]

(b) Civil P. C., O. 47, R. 1—Ground for review—Illegal delivery of judgment depriving right to appeal—Ground is sufficient for granting review.

Delivery of judgment without previous notice to the parties or their pleaders is illegal, and this illegal action, if it deprives a party of a very important right of obtaining leave to appeal, is a sufficient ground for granting a review : *A.I.R.* 1922 *P.C.* 112, *Ref.* [P 71 C 1]

P. B. Sen—for Applicants.

Paget—for Respondents.

Judgment.—This is an application for review of a judgment of Mosely, J., and comes before me because he is no longer attached to the Court. The first ground of the application is that the decision is wrong in law. It has been urged by the advocate for the applicants that an error of law is a proper ground for review, and in support of this proposition he quotes, among others, the cases of *Ma Hta Yi* v. *Ma Pwa Hnit* (1) and *Murari Rao* v. *Balavanth Dikshit* (2).

I am willing to accept the proposition that an error of law is included within the second category of R. 1, O. 47, Civil P. C., but that error must be one that is apparerent on the face of the record. I agree with the view expressed by the learned Judges in the *Madras* case above quoted, where they say at p. 957 of the report :

> "We are of opinion that each case must be judged by itself and that where the error of law is such that it is clearly apparent on a perusal of the record, there is ground for granting a review."

In the present case I do not think that there is any such error. I do not say that the decision of the learned Judge is correct. It may or may not be correct ; but I am certainly not prepared to say that it is so obviously incorrect that there is an error apparent on the face of the record. The question raised is one that is extremely difficult and controversial. It was, in fact, the question on which the whole appeal turned, and it was decided after full consideration by the learned Judge. This ground, therefore, in my opinion, must fail.

The other ground is different. The facts are that Mosely, J. was officiating as a Judge of this Court up to 29th May 1928, and after that date ceased to be a Judge of the Court. It is admitted that he delivered judgment in this appeal on 29th May 1928, and that he did so without previous notice being given to the parties or their advocates of the date on which judgment would be given. The advocates were informed shortly afterwards that judgment had been given, and Mr. Sen for the applicants says that he endeavoured on the same day to see the Judge in order to obtain from him a certificate for appeal under Cl. 13 of the Letters Patent of this Court. He was unable, however, to find the Judge, and, therefore, could not make that application. He did subsequently make an application ; but this was rejected on the ground that under Cl. 13 of the Letters Patent it is only the Judge who passed the judgment who can declare that the case is a fit one for appeal.

The rules of this Court provide that an application for such a declaration may be made orally at the time of delivery of

(1) A. I. R. 1928 Rang. 12=5 Rang. 610.
(2) A. I. R. 1924 Mad. 98=46 Mad. 955.

judgment, or afterwards, in writing at any time within one month. The fact that the learned Judge ceased to be attached to the Court from the day on which he passed judgment deprived the petitioners of their right to make such an application in writing, and the fact that the Judge delivered judgment without previous notice to the parties deprived them of the opportunity of making the application orally.

Delivery of judgment in this way, without previous notice was illegal and by his illegal action the Judge deprived the petitioners of a very important right. In my view this should be held to be a sufficient reason under R. 1, O. 47, Civil P. C. The case was, in my opinion, a very fit one for grant of a declaration under Cl. 13 of the Letters Patent, and in all probability, had such an application been made to him, the Judge would have granted the declaration.

I do not think that in holding this to be a sufficient cause for review I am departing from the ruling of their Lordships of the Privy Council in *Chhajju Ram* v. *Neki* (3). There was, in my opinion, an error of procedure apparent on the face of the record, and this brings the matter within the view taken by their Lordships that the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified immediately previously.

I, therefore, grant the application for review. The judgment of the learned Judge is set aside and the appeal will be re-heard. The question, as I have already said, is an extremely difficult and controversial one, and I think that the appeal is one that should properly be heard by a Bench. I direct, therefore, that the rehearing of the appeal be before a Bench, or, should the Chief Justice so decide, before a Full Bench. The respondents are in no way to blame for the error committed by the learned Judge. I, therefore, direct that the costs of this application shall be costs in the appeal when reheard ; advocate's fee in this application three gold mohurs.

M.N./R.K. *Order accordingly.*

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(3) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P.C.).

* A. I. R. 1929 Rangoon 71

DAS AND BAGULEY, JJ.

E. H. Joseph—Appellant.

v.

A. P. Joseph—Respondent.

First Appeal No. 132 of 1928, Decided on 4th September 1918, from judgment of Original Side in Civil Regular No. 356 of 1925, *Reported in A. I. R.* 1926 *Rang.* 186.

(a) Mortgagor and mortgagee — English cases not good guides in mortgage suits.

English cases are not necessarily good guides for the decision of mortgage suits in the Indian Courts; 31 *Cal.* 57 and 33 *Cal.* 410, *Foll.* [P 72 C 1]

*** (b) Transfer of Property Act, S. 69—Clause in mortgage-deed giving mortgagee power to sell on certain amount of interest falling in arrears but not power to claim repayment of principal on such default—No suit on mortgage can lie until debt is repayable.**

Where mortgage-deed contains a clause which gives mortgagee power to sell in case certain instalments of interest fall in arrears, but the clause does not provide that on such default mortgagee shall have the right to claim repayment of principal, the mortgagee has no right of suit on the mortgage up to the date on which the mortgage debt is repayable: *Edwards* v. *Martin* (1856) 2 *L. J. Ch.* 284, *Dist.* [P 72 C 2]

Shaffee—for Appellant.

Banerji—for Respondent.

Judgment.—This is a suit upon a mortgage. The mortgage is one covering the mortgagor's life interest in certain immovable property. The parties are Jews. The property is within Rangoon and the mortgage is in the English form with a power of sale, which is the power governed by S. 69, T. P. Act. The date of the mortgage is 16th May 1919 and the date fixed for payment is 15th May 1924. It is agreed that the mortgagor has been in arrears of interest more than once and that the mortgagee has filed suits against him to recover the interest. The last of these suits was filed before the 15th May 1924. The only point for decision in this appeal is whether owing to the filing of these suits the plaintiff is debarred from suing on his mortgage for the recovery of the principal and the interest which subsequently became due.

There is no doubt that at the date of the filing of the last of the suits for interest the principal money had not become due in the ordinary way and that therefore O. 2, R. 2, would not bar his suit. It is claimed, however, that by vir-

tue of the power of sale a right of suit on the mortgage for the payment of the principal money would arise before the 15th May 1924, and if this contention is good then no doubt O. 2, R. 2, would bar the suit. The mortgage is a somewhat complicated one, but I would only give the salient points. First of all, in consideration of the sum of Rs. 10,000 the mortgagor assigned all his life interest to the mortgagee subject to the proviso that he might redeem his interest by repaying the mortgage money on 15th May 1924 together with all arrears of interest at 9 per cent. per annum. It further covenants for payment of interest month by month on or before the 15th day of the month succeeding that for which the interest is due. So far it is clear that the mortgage money had not become due before the 15th May 1924, and it is also clear that there is a separate covenant for payment of it. We then come to the clause giving the power of sale:

"It is hereby agreed and declared that if the said mortgagor shall fail to pay the said sum of Rs. 10,000 with arrears of interest due thereon on the expiration of the period of three months from the serving of a notice on him by the mortgagee calling upon him to pay up the said sum of Rs. 10,000 and interest on the said 15th May 1924 or if at any time during the continuance of this security, interest due hereunder amounting to Rs. 500 at the least shall be in arrear and remain unpaid for three months then and in such case the mortgagee shall be at liberty and shall have the power to sell the said premises hereby assigned either by public auction * * * * ."

It is argued that in this clause default of payment of interest amounting to Rs. 500 for more than three months gives the mortgagee the right to claim his principal money. The appellant relies upon one old English case only, *Edwards* v. *Martin* (1).

It is quite clear that in these cases the rights of the parties and the question of whether any default accelerates the claim on which the principal money can be called in would depend entirely upon the wording of the mortgage in question. It must also be remembered that English cases are not necessarily good guides for the decision of mortgage suits in the Indian Courts, for the Indian cases are governed by the Transfer of Property Act and the Indian Courts know nothing of the refinements between the legal estate and the equitable estate which form the basis of all such decisions in the Court of Chancery: vide *Webb* v. *Macpherson* (2) and *Gokul Dass* v. *Eastern Mortgage and Agency Co.* (3). This particular power of sale is one which is to be exercised by the mortgagee himself personally and not through the agency of the Court, and supposing Rs. 500 interest had been in arrears for more than three months, we entirely fail to see how he could approach the Court with any form of suit on this clause. The Court could merely tell him to go away and sell the property himself, if he was advised that the clause conformed with S. 69, T. P. Act, and that default had arisen. There is no clause in this mortgage stating that if the interest is in arrears to the extent of Rs. 500 for more than three months, the mortgagee shall have the power to call in the principal money mentioned in the deed.

With regard to the case cited, *Edwards* v. *Martin* (1) in this case there was a mortgage of leaseholds upon which interest was payable half-yearly. The mortgagee took possession and asked for foreclosure, although the time or the date fixed for repayment had not arrived. It was admitted that in this case the capital was not due but it was claimed that the right to foreclose had arisen. The circumstances of this case are therefore quite different to the circumstances in the present case. There is no claim to foreclose and the mortgage deed is quite silent with regard to any right to foreclose. In fact the power of sale would appear to negative the idea that any question of foreclosure was contemplated between the parties. It is also to be noted that in this case no reasons are given for the decision but the Court merely followed a dictum in another case for which no reasons have been given.

We are of opinion that as there is no clause providing that on default of payment of interest the mortgagee shall have the right to claim repayment of principal, he had no right of suit on the mortgage before the 15th May 1924. No suit for interest has been filed since that date and therefore O. 2, R. 2 cannot apply. The appeal will be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1856] 25 L. J. Ch. 284=4 W. R. 219.

(2) [1904] 31 Cal. 57=30 I. A. 238=8 C.W.N. 41=8 Sar. 554 (P.C.).

(3) [1906] 33 Cal. 410=4 C. L. J. 102=10 C. W. N. 276.

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DAS AND BAGULEY, JJ.

Chandanam and *another*—Appellants.

v.

A. M. C. P. Samsugany and *others*—Respondents.

First Appeal No. 290 of 1927, Decided on 3rd September 1928, from judgment of Dist. Judge, Hanthawaddy, in Civil Regular No. 4 of 1927.

(a) Civil P. C., O. 17, R. 2 — Burden of proof on defendants—They failing to appear on date fixed by Court on its own motion—Court proceeding with case and passing order — Order purporting to be on merits—Order should not have been on merits — Order must be held to be one ex parte under R. 2.

Court on its own motion fixed a case for hearing on a particular date, but the defendant, on whom the burden of proof lay, failed to appear, and the Court proceeded with the case and passed order which purported to be on merits,

Held: that the order should not have been on merits and the case must be held to have been decided as ex parte under O. 17, R. 2: 37 *All.* 460; *A. I. R.* 1923 *All.* 551; *A. I. R.* 1925 *All.* 182; *A. I. R.* 1923 *Bom.* 27 and 41 *Cal.* 956, *Rel. on*; 41 *All.* 663, *Dist.* [P 74 C 2]

(b) Civil P. C., O. 17, R. 3 — Defendants not appearing on date fixed—Court making order that case would be proceeded with without reference to defendants' witnesses and proceeding to examine plaintiffs' witnesses — Defendants then appearing—Court asking them to cross-examine plaintiffs' witnesses if they so wished — Court's procedure was unjustified.

On the date fixed for evidence the defendants did not appear although burden lay on them. The Court made an order to proceed with the case without further reference to defendants' witnesses and began examination of plaintiffs and their witnesses. The defendants then appeared and the Court asked them to cross-examine the plaintiffs' witnesses if they desired to do so.

Held: that the procedure of Court allowing defendants to cross-examine plaintiffs' witnesses without allowing chance to examine witnesses was unjustified. [P 74 C 2]

Ba Han—for Appellants.

Chowdhury—for Respondents.

Judgment.—In this case the appellants were the main defendants in the lower Court. The suit was filed against them on 10th January 1927, and proceeded on a usual course. Issues were framed on 26th March, and the case was put down for hearing on 17th May. On 17th May it could not go forward and was put down for hearing on 31st May. On that date, the hearing could not be proceeded with, because certain proceedings were necessary which were in the High Court, but no date was fixed. The case was mentioned the next day, and the defence advocate asked for an adjournment to consider his position until 4th June. He was called upon to furnish security for costs and advocate's fees. On 4th June it was stated that an agreement had been come to, and that a compromise petition would be filed. The 7th June was fixed for this. It was next put over to the 8th and then to the 9th and finally to the 10th, on which date the compromise petition was directed to be filed peremptorily. On 10th June it was not so filed, and the case once more went down for peremptory hearing for 22nd and 23rd. On 22nd June some evidence was led, and it was put down for next day, but was not taken up, and further hearing was put down for 21st and 22nd July. The case was apparently never put up on 21st July at all, and the diary does not explain why. It came up, however, on 22nd July, on another point, and was adjourned till 22nd August, and steps were taken to have a handwriting expert examined. On 4th August a commission was ordered to issue, returnable on 1st September. For some reason not apparent in the diary the case was put up on 17th August, and it was then put down for hearing at 10 a.m. sharp the next day, 18th August. On this date the Judge gave the defendants on whom the burden of proof lay eight minutes' grace and, as they did not arrive at 10-8 a. m.. he recorded a diary order :

> "Under the circumstances the case proceeds without further reference to defendants' witnesses."

The plaintiff was examined, and a few minutes later defendants 1 and 2 arrived, followed by their advocate. Meanwhile, the plaintiffs' witnesses were being examined, and the Judge asked the defendants' advocate if they wished to cross-examine; they elected not to do so, and the case was put for orders on 25th August, and orders were finally passed on 5th September. This order purports to have been passed on the merits. Against this order the present appeal has been filed.

It is argued that under these circumstances no order on the merits could possibly be passed. With this contention we are in entire agreement. *Phul Kuar*

v. *Hashmatullah Khan* (1) is authority for holding that under similar circumstances, the case should be decided as though by default :

"When the plaintiff and his pleader are both absent on the day fixed for the hearing of a case and the Court does not intend to give them another opportunity of appearing it ought not to decide the suit on the merits but should dismiss it for default of appearance."

In the present case the burden of proof lay upon the defendants, and, therefore, it should have been decided, as though ex parte, against them.

In another Allahabad case, *Ram Charan Lal* v. *Raghubir Singh* (2), in a similar case, the defendants' advocate was present, but said he had no instructions. One defendant, who was present, asked for an adjournment, but failed to get it. The Subordinate Judge took the evidence produced by the plaintiff, and, as there was no evidence produced on behalf of the defendants, he disposed of the case at once. It was held that the case must be held to have been decided under O. 17, R. 2, Civil P. C.

The same point came up again in the case of *Ram Adhin* v. *Ram Bharose* (3). The headnote of this runs:

"On a date to which the hearing of a suit had been adjourned for the production of the defence evidence the defendant was absent and the Court passed a decree in favour of the plaintiff. No order or rule was mentioned in the judgment."

The High Court in appeal held that the decree must be taken to have been passed ex parte under O. 17, R. 2, Civil P. C.

Ratanbai Bhratar Shivlal v. *Shankar Deochand* (4) is to the same effect. The point also arose in *Enatulla Rasunia* v. *Jiban Mohan Roy* (5). In this case it has been pointed out that there is a definite difference between O. 17, R. 2, and O. 17, R. 3, Civil P. C., and that when O. 17, R. 3, is applied there must have been an adjournment at the instance of a party. In the present case there seems to have been no adjournment at the instance of any party, but the Court merely set the case down for hearing of its own motion.

The only case which has been cited against these is *Sukkhu Koeri* v. *Ram Lotan Koeri* (6). This is a very peculiar case. In it the plaintiff had had his case partly heard, but, then though appearing in Court, he failed to continue with it. His action is given in the judgment:

Here he seems either to have lost his head or to have shown unnecessary obstinacy. It would probably have been better if he had put his witnesses in the box, but he declined either suggestion. He did not in our opinion withdraw the suit, but merely confessed his inability to go on any further."

The facts in this case are obviously quite different to the facts in the present one, and in that case the judgment, which was passed, was stated to have been under O. 17, R. 3, Civil P. C.

We are quite unable to understand the procedure of the learned Judge offering the defendants a chance of going on and cross-examining the plaintiffs' witnesses, although refusing to examine their own witnesses, who are said to have been present in Court . Two courses, in our opinion, were open to him. He could either have refused to hear the defendants any more, which seems to have been his original intention, in which case the suit would be regarded as proceeding ex parte, or, when the defendants put in an appearance a few minutes, after he had begun to examine the plaintiff, he might have cancelled his previous order and allowed the suit to proceed in the ordinary way. To allow the defendants to cross-examine and continue the contest to that extent, while at the same time refusing them permission to examine their witnesses, appears to us quite unjustified.

Following the first ruling quoted above *Phul Kuar* v. *Hashmatullah Khan* (1), we hold that there should have been no decision on the merits, and that the case must be held to have been decided under O. 17, R. 2, Civil P. C., as ex parte. Holding this as we do, the defendants would have their remedy of applying to have the ex-parte decree set aside, if they can show good cause, in the ordinary way for their nonappearance at the time and date fixed. They will be given one month from to-day in which to make application to the District Court ; if they fail to do so in that time, the ex-parte decree will stand in the same way as if they failed to satisfy the Judge of the District Court that they had good reasons for their nonappearance. If they satisfy the Judge

(1) [1915] 37 All. 460=29 I.C. 553=13 A.L.J. 679.
(2) A.I.R. 1923 All. 551=45 All. 618.
(3) A. I. R. 1925 All. 182=47 All. 181.
(4) A. I. R. 1923 Bom. 27=46 Bom. 1026.
(5) [1914] 41 Cal. 956=18 C. W. N. 775=23 I. C. 769=19 C. L. J. 535.
(6) [1919] 41 All. 663=51 I. C. 850=17 A. L. J. 849.

that they had good reasons for their non-appearance, the case will be reopened and be heard in the ordinary way. The costs of this appeal to be costs in the case as ultimately decided.

S.N./R.K. *Order accordingly.*

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MYA BU, J.

Ma Khwet Kyi and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 123-B of 1928 (Mandalay), Decided on 10th September 1928.

Burma Rural Self-Government Act (1921), S. 12—Abetment of breach of bye-laws is not offence under Penal Code, S. 109.

The abetment of a breach of the bye-laws framed by a District Council under the authority of the Burma Rural Self-Government Act is not punishable under S. 109, I. P. C., as it is not an abetment of an offence within the meaning of that section : 23 *P. R.* 1894 *Cr., Rel. on.* [P 75 C 2]

Judgment.—This case is connected with Criminal Revision No. 122-B of 1928 of this Court, which relates to the conviction and sentence passed upon Pongyi U Kalayana for holding a private market within the compound of his monastery at Pale without a license in contravention of S. 7 of the bye-laws framed by the Monywa District Council in exercise of the power conferred by S. 52, sub-S. (2), Cl. (a), Burma Rural Self-Government Act, 1921 (Burma Act 4 of 1921 as amended by Act 9 of 1922). The penal provision for the breach of the bye-laws is contained in S. 12 thereof which enacts, inter alia, that a breach of any of the bye-laws shall be punishable with a fine not exceeding Rs. 50.

The petitioners were some of the persons who exhibited goods for sale at U Kalayana's private market on 30th November 1927, and the prosecution against them was that by exhibiting goods for sale at that market they

"committed an offence punishable under S. 12 of the said bye-laws, read with S. 109, I. P. C."

Section 109, I. P. C., prescribes punishment for the offence of abetment, if the act abetted is committed in consequence of the abetment, and provides that where no express provision is made for punishment of such abetment, the abettor shall be liable to be punished with the punishment provided for the offence abetted. Therefore, in any abetment of an offence, which is an offence itself, the substantive charge against the abettor is the abetment. The prosecution in this case is therefore one under S. 109, I. P. C.

The question for determination is whether the abetment of a breach of the bye-laws framed by a District Council under the authority of the Burma Rural Self-Government Act above referred to is punishable under S. 109, I. P. C.; in other words, whether it is an abetment of an offence within the meaning of S. 109, I. P. C. Under S. 40, I. P. C., the term "offence" employed in S. 109 denotes a thing punishable under the Code, or under any special or local law; and it is clear that the Burma Rural Self-Government Act is a local law within the meaning of S. 42 of the Code. But the Act itself has not declared a breach of a bye-law of a District Council to be an offence ; it merely authorizes the District Council by S. 80 (2) to direct, inter alia, that a breach of the bye-laws of the Council shall be punishable with fine not exceeding Rs. 50. Thus, a breach of S. 7 of the bye-laws under consideration punishable under S. 12 thereof, is not an offence rendered punishable by the Act itself.

I am, therefore, of the opinion that the offence under S. 12 of the bye-laws is not an offence within the meaning of S. 40, and, consequently, of S. 109, I. P. C. I am fortified in this opinion by the decision in *Ganda Shah* v. *Queen-Empress* (1) where it was held, inter alia, that a local law does not necessarily include a rule made under the provisions of a local law. It is conceivable that where a local law declares a breach of the rules made under its authority to be punishable then a breach of such rules might constitute an offence within the meaning of S. 40, I. P. C.

There being no provision either in the Act or in the bye-laws rendering exhibition of goods at a private market punishable, and as such exhibition cannot constitute an offence of abetment punishable under the Indian Penal Code, I feel constrained to set aside the conviction and sentences passed on the petitioners. I therefore allow their application and set aside the conviction and sentences

(1) [1894] 23 P. R. 1894 Cr.

passed on them by the Township Magistrate, Pale, in Criminal Regular No. 130 of 1927, and I direct that the fines paid by them be refunded to them.

M.N./R.K. *Application allowed.*

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PRATT, OFFG. C. J., AND ORMISTON, J.

Motor House Co. Ltd.—Appellant.

v.

Charlie Ba Ket—Respondent.

First appeal 145 of 1928, Decided on 3rd September 1928, from judgment of Original Side in Civil Regular No. 595 of 1925.

*** (a) Tort — Trespass — Unskilled minor driving car with driver's permission — Car being damaged due to accident—Minor's unskilful driving is not trespass nor amounts to negligence.**

Where a minor with the permission of the driver drives a motor car, and owing to his unskilled driving an accident occurs which causes damage to the car, the minor's driving is not a trespass nor does his unskilful driving amount to negligence. [P 76 C 2]

*** (b) Tort—Minor driving car with lack of skill—It does not itself amount to tort.**

Where a minor drives a car, his lack of skill in driving does not itself amount to an independent tort: *Fawcett* v. *Smethurst* (1914) 84 *L. J. K. B.* 473 *Rel. on.* [P 76 C 2]

McDonnell—for Appellant.

Kyaw Din—for Respondent.

Pratt, Offg. C. J.—Lim Po Leong was in possession of a Dodge Car the property of the plaintiff Company under a hire-purchase agreement. The hirer had complete dominion over the car, which was in charge of his driver Maung Po Tin. On 29th April 1925 the car was being used as a private taxi by a film troupe. Some films were taken at the Victoria Lakes and the taxi returned to 64, Prome Road. It was found that a mask had been left behind at the Lakes and, as the driver was having his breakfast, defendant Charlie Ba Ket a lad of 16 drove back with his brother and an actor to fetch it.

In the course of the drive he attempted to pass a car in front of him only to meet a car coming from the opposite direction. He swerved to the left to avoid the car in front and piled his car up on a heap of laterite on the side of the road. Plaintiff's case was that defendant entered and drove the car without the permission of the driver Maung Po Tin and in spite of his protests. It is admitted that, if this were so, defendant committed an independent trespass and would be liable for damages.

The learned trial Judge found on the evidence that the defendant drove the car with the permission and consent of the driver Maung Po Tin, who was at that time in charge of it. On the evidence we are satisfied of the correctness of this finding. The Judge also found that there was no negligence on the part of the defendant, which could render him liable for damages, although he was of opinion that he was careless. The fact seems to be that defendant drove to the best of his ability and was not negligent, but the accident occurred through his inexperience and want of skill.

It has been argued before us that, as defendant was below the legal age to obtain a driving license, and therefore liable to a penalty for driving, a fact which he must have known, his action in driving the car is in itself a trespass. It is urged that, if he drove with less skill than an experienced driver, that itself under the circumstances was negligence, and that negligence constituted a trespass. I am quite unable to accept this argument. The evidence shows that the defendant drove the car with the full consent and concurrence of the driver and of the film actors who had hired the car.

The driver and the actors had apparent dominion over the car, and it is impossible to hold that the action of the boy under the circumstances in driving was a trespass, nor could his merely unskilful driving amount to negligence, because he was not a licensed driver. Neither the hirer from plaintiff, nor the film actors, nor the driver Maung Po Tin are parties to the case, and we are not therefore concerned with their liability. If defendant is to be regarded as a bailee and the suit based on contract, then he can have no liability, because he was not of legal age to contract.

It is to my mind impossible to hold also that defendant's lack of skill in driving, which resulted in the damage to the car, amounts to an independent tort. In the English case of *Fawcett* v. *Smethurst* (1), which has been referred to it was held that where a minor lad hired a

(1) [1914] 84 L. J. K. B. 473=31 T. L. R. 85 =59 S. J. 220=112 L. T. 309.

car and drove it for a longer journey than contemplated by the contract, with the result that the car was damaged without negligence on the part of the defendant, his action did not amount to a trespass. The cases are not parallel but the principle involved is similar. In my opinion on the facts defendant is not liable in tort. I would dismiss the appeal with costs.

Ormiston, J.—I concur.

S.N./R.K. *Appeal dismissed.*

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MYA BU AND BAGULEY, JJ.

U Ahsaya and *another*—Appellants.

v.

U Pyinnya and *another* — Respondents.

Letters Patent Appeal No. 11 of 1928 (Mandalay) Decided on 10th September 1928 from the judgment in Second Appeal No. 105 of 1927.

(a) Civil P. C., S. 100—New plea—Question of jurisdiction not raised in last appeal —Question can be raised in Letters Patent Appeal.

Appellants in a Letters Patent Appeal are not precluded from raising a question of jurisdiction even when they had not raised it in the second appeal: *A. I. R.* 1924 *P. C.* 95, *Foll.* [P 77 C 2]

(b) Civil P. C., S. 9—Dispute in Upper Burma involving ecclesiastical matter within competence of Buddhist ecclesiastical authorities—Civil Courts have no jurisdiction—Buddhist law (Burmese)—Ecclesiastical jurisdiction.

In a suit, the nature and extent of the rights of the monks to use and occupy monastic lands which is religious property invokes a dispute regarding ecclesiastical matter within the competence of the Buddhist ecclesiastical authorities to decide, consequently, the Civil Courts in Upper Burma have no jurisdiction to entertain the dispute: (1897-01) 2 *U. B. R.* 42; (1892-96) 2 *U.B.R.* 59 and (1892-96) 2 *U.B.R.* 72, *Ref.* (1902-03) 2 *U. B. R. Buddhist Law, Ecclesiastical P.* 1, *Rel. on.* [P 78 C 2, P 79 C 1]

Tha Gywe—for Appellants.

Aung Thin—for Respondents.

Mya Bu, J.—This is an appeal made from the judgment in Civil Second Appeal No. 105 of 1927, on a certificate issued under Cl. 13, Letters Patent. The grounds of appeal are numerous; but putting the appellants' case before us in a nutshell, it is that the civil Courts have no jurisdiction to decide the dispute between the parties to the case. The parties are Buddhist monks who occupy the monasteries shown on the map (Ex. A), at Pakokku, in Upper Burma, and the dispute between them is concerning monastic land. The question for determination is whether the dispute is of the nature cognizable by the civil Courts.

The appellants before us were the appellants in the Second Appeal, in which it appears that they did not make a point of assailing the judgment of the Court of first appeal on the ground of want of jurisdiction. In view of the ruling of their Lordships of the Privy Council in *Ram Lal Hargopal* v. *Kishanchand* (1), however, the appellants are not precluded from raising this question now.

The Court of first instance, the Court of first appeal and this Court in second appeal, all have regarded the plaintiff-respondents' suit as one for enforcement of an arbitration award. The plaint in the case is somewhat vague in its indication as to the nature of the suit; the heading shows that it was a suit for setting up stone-pillars along the red dotted line shown in the map annexed to the plaint. It is set out in the plaint that the plaintiffs (respondents) and the defendant U Ahsaya (appellant 1), had a dispute over the boundary line of their monasteries and had in consequence appeared before the *Thamuti Gaingok Pondawgyi* U Kyi, who with the consent of the plaintiffs and the defendant demarcated the boundary on 1st October 1923 by setting up stone-pillars and writing a memorandum to that effect; and that, however, in *Tabaung* 1286 B.E. (February and March 1925), the two defendants (the appellants) removed the stone-pillars, with the result that the parties had to approach *Sayadaw* U Pyinnya of Mahawithutarama Taik in *Wazo* 1288 B.E., who declared the demarcation made by U Kyi as correct, but the defendants would not abide by the decision and prohibited the plaintiffs from setting up stone-pillars and defendant 1 also wrote to the plaintiffs protesting against the setting up of stone-pillars. The plaintiffs, therefore, prayed that the suit be decreed with costs

"allowing the setting up of stone-pillars along the red dotted line as shown in the map according to the decision of the pongyis."

The defendants in their written statement denied having agreed to submit

(1) A. I. R. 1924 P. C. 95=51 Cal. 361=51 I. A. 72 (P.C.).

themselves to the authority either of U Kyi or U Pyinnya or that either of them made the decisions alleged by the plaintiffs. They also pointed out that they objected to the plaintiffs setting up stone-pillars in their (defendants') kyaung compound; that the land in dispute belonged to them and not to the plaintiffs, and that as the case was between monks it should be referred for decision to the Thathanabaing. Thus, even in their written statements the appellants did raise the question of jurisdiction of the civil Courts to decide the matter in dispute in the suit. But the Court of first instance framed only three issues:

(1) Whether the suit is maintainable for the enforcement of the award without agreement for reference.

(2) Whether the alleged decision was arrived at by Pongyi U Pyinnya; and

(3) If so, is the award valid or not?

The learned Judge of the Court of first instance held on the first issue that the plaintiffs failed to prove that both parties agreed to refer the matter in dispute to U Pyinnya for decision, and also held on the issue 3 that the award was invalid as not having been duly stamped, and dismissed the suit accordingly.

The plaintiff-respondents then appealed to the District Court, pointing out in the memorandum of appeal, that the issue as to whether the award was enforceable or not was misconceived that they had only mentioned that the reverend ecclesiastics to whom the matter was referred with the consent of the parties set up the demarcation posts, but that the trial Court had wrongly framed and determined the case as if it were one for enforcement of the award. It was further stated in the memorandum, that the reference in the plaint to the decision of U Pyinnya was made merely to show that the latter had made the decision as an ecclesiastical authority; and that, therefore the question of whether the award was enforceable or not was irrelevant. These are the materials from which the nature of the dispute is to be ascertained.

Somehow or other, the Court of first appeal considered that what was relied on as the award was the decision of U Kyi and not the decision of U Pyinnya, and accordingly framed certain issues which were considered necessary for the determination of the question as the validity of the award of U Kyi and remanded the case to the Court of first instance for evidence on those issues. The trial Court having, in obedience of the order of remand, given its findings on such issues, the District Court confirmed them and the plaintiff-respondents' suit was decreed. Thus arose the second appeal from which the present one has arisen.

It appears to me that the suit was not one for enforcement of an award, and it was not one of a mere boundary dispute between the pongyis holding adjacent plots of monastic land. It is quite evident that the land occupied or claimed by the two respondents on the one hand and by appellant 1 on the other formed one monastic compound and was held as one piece of monastic property commonly known as a kyaungtaik; and that recently, the plaintiff-respondents and defendant-appellants 1 tried to break up this kyaungtaik, to have separate holdings, with the result that the dispute arose as to the extent of land to which each party was entitled to occupy, and, therefore, when the plaintiff-respondents attempted to set up boundary pillars, the defendant-appellants objected. In my opinion, therefore, the suit relates to the nature and extent of the rights of the monks in question to use and occupy monastic land which is religious property and that, consequently, the dispute involved in the suit is purely an ecclesiastical matter.

In the sanad granted to the Thathanabaing, it is provided that the civil Courts will, within the limits of their jurisdiction, give effect to the orders of the Thathanabaing and of the Gainggyoks, Gaingoks, Gaindauks and other ecclesiastical authorities duly appointed by him, in so far as those orders relate to matters which are within the competence of those authorities: see U Tha Gywe's Treatise on Buddhist Law, Vol. I, p. 234, at 235. In *U Thatdama* v. *U Meda* (2), where the plaintiffs sued for a declaration of their right to the ownership of a monastery and certain land appertaining to it, and it was found that the Thathanabaing had declared the monastery to be theinghika property and had forbidden the plaintiffs to interfere with it, it was held that the dismissal of the suit without a decision on the merits of the case was correct: reliance was placed on the earlier rulings in *U Teza* v. *U Pyin-*

(2) [1897-01] 2 U.B.R. 42.

ya (3) and *U Te Zeinda* v. *U Teza* (4), which laid down that the orders and proceedings of the Buddhist ecclesiastical authorities so long as they keep within their jurisdiction and do nothing contrary to law, cannot be questioned by the civil Courts. In *U Wayama* v. *U Ahsaya* (5), which arose out of a suit for full control by one of the appellants, in trust for the other appellants and respondent, of certain property consisting of tari trees situated in the premises of a kyaungtaik, on the ground of appellant 1's superior ecclesiastical position, it was held that the question in dispute was purely an ecclesiastical matter and the civil Courts are bound by the decisions of the Buddhist ecclesiastical authorities in matters within their competence; and also that civil Courts should abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction.

To my mind, the question in dispute in the present case is purely an ecclesiastical matter, and, therefore, is a matter within the competence of the Buddhist ecclesiastical authorities to decide: consequently, the civil Courts have no jurisdiction to entertain the dispute; for, if the civil Courts also exercised jurisdiction while the Buddhist ecclesiastical authorities have jurisdiction to deal with the matter, there is bound to be a clashing of jurisdiction and a grave deadlock will be the inevitable result. In the result, I hold that the plaintiff-respondents' suit should have been dismissed for want of jurisdiction. I would allow this appeal, and direct that the suit be dismissed.

Since the appellants did not raise this question of jurisdiction in their original appeal in this Court, I would direct that each party bear their own costs in this Court. But the plaintiff-respondents should pay the defendant-appellants' costs in the Court of first instance and in the Court of first appeal.

Baguley, J.—I agree with my learned brother, Mya Bu, J., that the civil Courts in this case have no jurisdiction, but would like to add a few remarks. In the first place I would emphasize that this decision applies to Upper Burma only. There is no Thathanabaing in Lower Burma and in consequence disputes of this nature if brought before the civil Courts would have to be settled by them in Lower Burma, there being no ecclesiastical authority having power to decide them.

The question of jurisdiction has to be settled in the first instance on the plaint. In the terms of translation of the plaint we find it headed

"Suit for setting up stone-pillars along the red dotted lines shown in the annexed map."

The trial Court on the statements given in the plaint looked upon the case as one for enforcement of an award and this view was persisted in by the Courts right up to the second appeal in the High Court, but it must be remembered that the original plaint was filed by U Pyinnya and U Thagayya and, when they lost their case in the trial Court, they came on appeal to the District Court of Pakokku in Civil Appeal No. 40 and in their grounds of appeal emphasized the fact that they were not suing to enforce an award at all. The first ground of appeal contains the passage:

"But the lower Court wrongly framed an issue as to whether the award is enforceable or not."

The third ground of appeal contains the passage:

"But the lower Court wrongly framed an alternative issue that if the case was one for enforcement of award;"

and the fourth ground of appeal contains the passage:

"Therefore the question whether the award is enforceable or not is irrelevant."

It is therefore quite clear that the plaintiffs themselves were not basing their case on the award, but if they were not basing their case on the award I can see nothing upon which they could base their case, except their right to partition the land which forms the original kyaungtaik. There are no rules of civil law by which a kyaungtaik could be partitioned. The pongyis inhabiting the kyaungtaik are not co-owners or coparceners or tenants-in-common or any other form of owner known to the ordinary civil law. Their rights inter se are entirely governed by ecclesiastical law which must be decided by the ecclesiastical authorities where there are ecclesiastical authorities in a position to do so. The argument put forward on behalf of the appellants went so far as to claim that every case between Pongyis concerning religious property is only to be decided by the Thathanabaing. I would not myself accept this statement in toto but I

(3) [1892-96] 2 U.B.R. 59.
(4) [1892-96] 2 U.B.R. 72.
(5) [1902-03] 2 U.B.R., Buddhist Law, Ecclesiastical, P. 1.

agree that in the present case, as the original plaintiffs stressed the fact that they were not basing their claim on an award, the civil Court must be held to have no jurisdiction.

M.N./R.K. *Appeal allowed.*

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PRATT, OFFG. C. J., ORMISTON AND CARR. JJ.

Wor Moh Lone & Co.—Appellants.

v.

Japan Cotton Trading Co. Ltd.—Respondents.

First Appeal No. 157 of 1928, Decided on 28th August 1928, from judgment of Original Side in Civil Regular No. 96 of 1927.

(a) Contract—Construction—(*Per Pratt, C. J.,* and *Carr, J,*)—Sellor agreeing to sell goods from his or other mills—No intention to supply from particular mill given nor milling notice issued—Seller's mill burnt—Seller is liable under contract—(*Ormiston, J.,* contra).

Vendors contracted to sell a certain quantity of rice. The wording of sale-note did not justify the inference that the parties intended or contemplated, even primarily, the sale by the vendors of the produce of their own mill, nor was there any express statement to this effect. It was found that the contract gave vendors an option of delivery from their own mill if they chose, and that, if they did not so choose, they could deliver from any of the other mills specified in the contract. No intimation of intention to deliver from a particular mill was given and no milling notice was issued. Vendors' mill was burnt down.

Held: that the burning down of the mill did not absolve vendors from liability to perform the contract: 11 *Bur. L. T.* 63, *Dist.* [P 80 C 2]

(b) Contract—Construction—Construction of contract should not be dependent on convenience only.

Convenience is not the only thing to be considered, and it should not be permitted to persuade a Court to place a construction on a contract which it cannot legitimately bear. [P 84 C 2]

Clark—for Appellants.

N. M. Cowasjee—for Respondents.

Pratt, Offg. C. J.—Plaintiffs the Japan Cotton Trading Co., Ltd. sued the defendants Wor Moh Lone & Co. for damages for breach of a contract to supply 2,000 bags of rice on or before the 20th September 1927. The contract was embodied in a printed Rice Sale Note, Ex. A, in the form commonly used in similar transactions. It contains provisions regarding gunnies, twine, day and night milling of seller's option, delivery ex-hopper, right of sellers to require a deposit in case of a fall in price, payment in cash before removal, etc. Cl. 16 runs "accident to machinery, strikes or sickness of mill hands or coolies always excepted."

The final Cl. 19 gives a long list of firms whose milling the defendants have the option of delivery.

Defendants' case was that on a true construction of the contract and on the intention of the parties, the contract was one for the supply of rice from defendants' own mill, that Cl. 19 merely gives the sellers the option of supplying rice from the other mills specified, but that the contract was primarily for the sale of rice of defendants' own milling. It was contended therefore that as defendant's mill was burnt down they were absolved from performance of the contract.

The learned Judge who heard the case was unable to accept this contention. He held that the contract was generally for sale of a certain quantity of rice of a specified quality, that taking the wording of the sale-note as it stood there was nothing to justify the inference that the parties intended or contemplated, even primarily, the sale by the defendants of the produce of their own mill, nor was there any express statement to this effect. He came to the conclusion that the contract gave sellers an option of delivery from their own mill if they chose, and that, if they did not so choose, they could deliver from any of the other mills specified in the final clause. As no intimation of intention to deliver from a particular mill had been given and no milling notice issued, the Court was of opinion that the burning down of defendant's mill did not absolve them from liability to perform the contract. Plaintiffs were accordingly granted a decree for damages.

On appeal it has been argued before us that, taking the sale-note as it stands, apart from the last clause, it must be construed as a contract by a miller to deliver rice milled in his own mill, Cl. 19 giving him an added option, at his discretion, of supplying rice from other specified mills. The contract being therefore primarily for delivery of rice from defendants' own mill, when their mill was burnt down, it was op-

tional with them to terminate the contract or deliver rice from any of the mills specified in Cl. 19, but they were not bound to perform their contract by delivering rice from other mills.

I agree with the learned Judge on the Original Side that the contract will not bear this construction. The form of note used (Ex. A) may have been originally intended for sales by millers of rice from their own mills. The wording is suitable and was probably designed in the first instance for such transaction. There is, however, no doubt that the form has become the standard form for bought and sold notes for rice contracts as my learned brother points out in he judgment. Though the wording in the earlier clauses is more especially applicable to the circumstances of sales by a miller of the produce of his mill, yet, as pointed out by the trial Judge, it is not incompatible with the sale of rice from other mills.

It is obvious that too much stress cannot be laid on the exact terms of the earlier clauses, as applying to determine from the seller's own mill, since the last clause gives the option of supplying from any of a long list of mills. It may or may not have been understood that the defendants were at liberty to supply rice of their own milling, but the contract is silent on the point. I am quite unable to read the note, as it stands, as a contract by the seller to sell rice of his own milling. He is given the choice of delivering rice milled by a large number of specified firms.

Defendants had not elected to supply rice from their own mill or issued any milling notice. This fact differentiates the case from that of the *Arracan, Co. Ltd.* v. *H. Hamadanee & Co.* (1), in that in the case cited the sellers had issued a milling notice and commenced delivery from their own mill before it was burnt down. It is not alleged that there was anything to prevent sellers from milling rice of contract quality from one of the mills specified in Cl. 19 of the contract.

In the present instance the defendants had not given notice of intention to deliver rice from their own mill, nor does the contract show that they intended to do so. Cl. 16, on which stress has been laid, will refer to the mill from which delivery is to be taken, as pointed out by the Bench in the case already cited. There is no reason to confine its application to defendant's mill, which is not mentioned in the contract. Defendants do not allege that they gave notice of their intention to rescind the contract or of their inability to perform it, when their mill was burnt down. It is clear that the burning of the mill did not render the contract impossible of performance, and the presumption is that the real reason of non-performance was the unfavourable state of the market. I agree with the trial Judge that defendants were not absolved from performance of their contract. I would dismiss the appeal with costs.

Ormiston, J.—This is an appeal of the defendants from a decree of the Original Side awarding damages to the plaintiffs for the breach by the defendants of a contract to sell rice. The issues were:

(1) Are the defendants exempted from delivery of rice according to the contract by the terms of Cls. (16) and (19) of the sold note or by any local usage? (2) Assuming that the defendants are, by reason stated above, exempted from performing that contract, had they by subsequent conduct waived that claim? (3) To what damges, if any, are the plaintiffs entitled?

The learned Judge having answered ths first issue in the negative, the second issue did not arise, and he adjourned the hearing for evidence on the third issue. At the adjourned hearing the defendants did not contest the issue of damages and a decree was passed in favour of the plaintiffs for the amount claimed. If the appeal is successful the case will have to be remanded to the original side to take evidence on issue 2. As regards issue 1, two of the grounds of appeal are directed to the finding that the defendants were exempted by reason of a local usage, but no part of the argument has been directed to these grounds.

The contract, which was entered into on 15th January 1927, was that the defendants should sell and the plaintiffs should buy 2,000 bags of rice of a particular quality at an agreed rate, delivery to be taken on or before 20th February 1927. The defendants are rice-millers whose mill was burnt down on 27th January 1927. No milling notice of their own or any other mill was issued by the defendants to the plaintiffs, and

(1) [1918] 11 Bur. L. T. 63=47 I. C. 541.

no paddy was delivered on or before 20th February 1927. The contract was embodied in what has for many years been the standard form of bought and sold notes for rice contracts. Its material provisions it will be convenient first to summarize.

By Cl. 3 the rice is to be Ngatsain $\frac{\text{and}}{\text{or}}$ Ngakyauk, at sellers' option, usual S. Q. Quality cleaned rice. The grain to be fair average of quality procurable at the time of milling. Cl. 4 provides that the buyer is to supply gunnies and twine. If owing to late arrival at mill of his gunnies or other causes, the sellers' gunnies are used, the rate to be paid is prescribed, as is also the rate for the use of his twine. Cls. 5 and 6 prescribe rates for bagging, sewing and shipping, and for landing and receiving gunnies at mill. Under Cl. 7 the rice is to be milled by day $\frac{\text{and}}{\text{or}}$ night at sellers' option. Cl. 8 stipulates that delivery is to be taken ex-hopper on or before 20th February 1927, date at seller's option and payment is to be made in cash before any rice is removed, but not in any case later than immediately after milling. Payment is to be made in cash on completion of each 1,000 bags if required. Cl. 10 gives the seller the right of disposing of any rice milled against the contract by private or public sale on buyer's account. By reason of Cl. 13 the buyer cannot claim the right of leaving the rice in the sellers' godown after the 15 days allowed for removal have elapsed. Cl. 15 gives the seller, on the expiry of the 15 days, the right of removing the rice to other than mill godowns at the risk and expense of buyer after 24 hours' notice has been given. Cl 16 is: "Accidents to machinery, strikes or sickness of mill hands always excepted." Cl. 19 provides that "sellers have the right of delivering under this contract the milling of" some twenty named mills, in which the mill of the defendants is not included.

This form of rice contract provided the subject matter of a decision of a Bench of the late Chief Court of lower Burma in *Arracan Co. Ltd.* v. *H. Hamodanee & Co.* (1). The defendant-appellants agreed to sell to the plaintiff-respondents 10,000 bags of rice, delivery to be taken ex-hopper in April 1916, and gave to them a milling notice on its own mill. The plaintiffs took delivery of 6,442 bags from the defendants' mill up to 26th April when the mill was burnt down and deliveries under the contract ceased. Cl. 18 (corresponding to Cl. 19 of the form before us) gave the seller the right to deliver under the contract the milling of seven specified firms, the defendant's mill not being therein included. The plaintiffs sued for damages and the defendant relied on Cl. 16 (the clause exempting accident to machinery) The lower Court held that Cl. 18 applied, not only to the defendants' mill, but to the other mills mentioned therein as well, and that the defendant was bound to deliver from those other mills if it could not deliver from its own mills. The appellate Court pointed out that the Judge of the lower Court was

> "in error in construing Cl. 18, which is clearly inserted for the benefit of the seller, as if it imposed an obligation upon the seller to deliver, in certain circumstances, from all the mills. Cl. 16 clearly refers to the mill from which delivery is to be taken, or is being taken; and means that if that mill breaks down, the seller is absolved from giving or completing delivery of so much rice as the buyer would have had to take from that mill, if it had not broken down. The clause absolves the seller from anticipating and providing against a breakdown in the mill from which delivery is to be given."

Consequently, as the defendant under the contract was entitled to say that it would give delivery from one mill only, and had said so by giving a milling notice on its own mill. Cl. 16 applied to a breakdown in the defendants' mill which actually occurred, and the defendant was absolved from any further delivery.

In the case before us the circumstances are different, inasmuch as the defendant have given no milling notice on their own or any other mill. The learned Judge on the original side said that if he could have accepted the defendants' contention that the sale contemplated by the contract was primarily the sale of the produce of their own mill, though an option is given to supply the produce of any one of other specified mills, they were bound to succeed. He was, however, unable to accept that contention. Nor was he able to accept the contention of the plaintiff that the defendants were bound to supply rice of the milling of one of the mills specified in Cl. 19, and not from their own mill. In his opinion, the clause gave the defendants an option to deliver

from their own mill if they choose to do so, and, if they did not so choose, to deliver from any of the other mills specified. As he put it,

"the defendants' mill is, by implication, one of the mills from which they can, if they choose, deliver rice."

He distinguished the *Arracan* case (1) on the ground that, in the present case, no milling notice had been issued and no election had been made by the seller, and Cl. 16 could not begin to operate till such election was made. Consequently, he held that the burning of their mill did not, under Cl. 16, absolve the defendants from liability to perform the contract.

Mr. Clark's argument is that, on its construction, the contract is one by a miller to deliver rice which is the product of his own mill; that if his own mill is disabled, Cl. 16 applies and he is excused; and that Cl 19 is merely a superadded option, capable of exercise by the seller only, to deliver rice which is the product of other mills. Consequently, when the defendants' mill was put out of action, they were at liberty, either to take up the position that they need deliver no rice, or if they chose, to deliver rice from one of the specified mills.

Looking at the contract as a whole, in my view it is cast in a form singularly inappropriate for use by one merchant selling rice to another. On the other hand it is entirely appropriate to the case of a miller selling rice the product of his own mill. The prescription of charges for the sellers' gunnies if they have to be used owing to the late arrival at the mill of the buyer's gunnies, and of charges for landing gunnies at the mill, the option given to the seller of disposing of rice milled against the contract on the buyer's account, the right given to the seller of removing the rice into other than mill godowns, all point in this direction. I do not think that it is a reasonable construction of the clauses to which I have made reference that they include not only the seller but the miller whom the seller substitutes in his place; for in the case of a sale by a merchant they can have no application. Cls. 7, 8 and 16 point even more strongly in the direction which I have indicated. What is the use of giving to a seller who is not a miller an option to mill by day or by night? How can such a seller deliver ex hopper? And what is the use of his stipulating for payment on completion of each 1,000 bags? If this were a contract by a merchant, one would have expected, in place of Cl. 16, a proviso exempting him from liability, if, after he had given a notice specifying a particular mill, an accident occurred. For these reasons, in disagreement with the learned Judge on the original side, I would hold that apart from Cl. 19, the contract before us is by necessary implication a contract by a miller to sell rice the product of his own mill.

Does then the insertion of Cl. 19 make any difference? Mr. Clark's argument is that this clause merely confers an option exercisable by the seller alone, of electing not to give delivery of the rice which by the remainder of the contract he had contracted to deliver, but, in lieu thereof, to deliver the production of the specified mills. If the clause were intended to be an integral part of the primary contract, one would have expected it to be worded somewhat as follows:

"In the performance of the contract, the seller shall have the option of delivering his own rice, or of one or another of the following mills."

But in point of fact the defendants' mill is not amongst those specified. The learned Judge, holding, as I think, correctly, that the seller is not precluded from selling his own rice, but holding, as I think, incorrectly, that the primary contract is not to sell his own rice, holds further that the sellers' mill is by necessary implication included in Cl. 19. As I have pointed out it would have been a perfectly simple matter expressly to have included it in Cl. 19. And, on the view I take, the contract being for the sale of the defendant's own rice, there is no necessity for any implication that their mill is to be included amongst those specified in the clause.

There is, to my mind, no tenable construction of the contract intermediate between that adopted by Mr Clark and that adopted by Mr. Cowasjee. Mr. Cowasjee accepts the finding of the learned Judge, but does not accept the reasoning on which it is based. Mr. Cowasjee's main contention is that, under the contract, the seller must deliver rice the product of one of the mills specified in Cl. 19. Reading as I do, the contract as primarily one for the delivery of rice the

product of the defendants' mill, with a proviso that the seller may deliver rice the product of the specified mills. I am unable to accept this contention. It involves the startling conclusion that the whole of the specified mills must have been disabled before Cl. 16 can come into operation.

Mr. Cowasjee's secondary contention is based on the *Arracan* case (1). That case decides that if a seller elects to deliver from a particular mill and to that end gives a milling notice, whether on his own mill or on one of the specified mills, he is absolved from liability if there is a breakdown of the mill in respect of which notice has been given. Consequently he argues, inasmuch as in the case before us, no milling notice at all has been issued, and therefore, no election has been made, Cl. 16 cannot come into operation. Herein he adopts the reasoning of the learned Judge on the original side. I agree that a decision of a Bench of the Chief Court is not lightly to be set aside but it does not necessarily follow that the same considerations apply to deductions from such a decision. Although the deduction which Mr. Cowasjee and the learned Judge drew from the decision may seem to be its logical corollary, it has to be remembered that the case before us was not the case before the Court which decided the *Arracan* case (1). The *Arracan* case (1) could quite well have been decided on the narrower construction of the contract which I have adopted. The circumstances of that case were more strongly in favour of the seller than those of the present case, and it was not necessary to put forward the interpretation which I consider to be correct. Nor had the Court to consider what the consequences would be, if, subsequent to the delivery of a milling notice on a mill included in Cl. 18, the mill had been burnt down.

I do not consider it to be a necessary implication from the view I take that, as the learned Judge says, it would be:

"open to the seller to say, if any of the 26 mills is burnt down, that that particular mill is the one from which he intended to deliver his rice."

For, on my view, the only mill to which Cl. 16 applies is the sellers' own mill. If the decision in the *Arracan* case (1) is to be taken to be correct, and it proceeded on a construction of the contract with which I do not agree, it by no means follows that the sellers would be entitled to adopt the fraudulent contention imagined by the learned Judge; for I think it must be taken that an intention to elect to deliver from a particular mill is quite a different thing from an expression of that intention. It follows from the construction of the contract which I adopt, that the performance of the primary contract having been excused by the destruction of the defendants' mill and there having been no election on their part to deliver from any other mill, they were under no liability to deliver rice to the plaintiff on or before the prescribed date.

I am, of course, aware that a somewhat unreal atmosphere has surrounded the discussion of this case. It is quite possible that all that the parties in effect intended to do was to buy and sell, or purport to buy and sell, rice and that from that point of view, nearly the the whole of the printed form was surplusage. Nevertheless in the construction of the contract such a consideration should not be allowed to have weight. I am also aware that the construction put upon the contract by the learned Judge is in some respect convenient. But convenience is not the only thing to be considered, and it should not be permitted to persuade a Court to place a construction on a contract which it cannot legitimately bear. In my opinion the construction of the learned Judge does not fulfil the condition precedent. The decision at which I have arrived will cause me the less regret, if it should result in the substitution of a new form of rice contract for one which is utterly unsuited to the conditions of modern business in Rangoon. (His Lordship being of opinion that the appeal should be allowed the case was referred to a third Judge under Cl. 34, Letters Patent).

Carr, J.—The facts of this case appear sufficiently in the judgments of the learned Judges whose difference of opinion has been referred to me. The question before me is whether upon its proper construction the contract in the suit is a contract for sale and delivery of rice from the defendants' own mill only with the addition of an option to the seller only to deliver from other mills specified in Cl. 19 but without any obligation upon

him to do so in the event of it being impossible for him to deliver from his own mill, or whether it is merely a contract for the sale and delivery of rice which may be delivered from any one or more of the mills so specified and which it is incumbent upon the defendant to deliver from some one or more of such mills so long as it is possible for him to do so.

The learned Judge on the Original Side arrived at a construction intermediate between the two above stated, holding that the contract was merely one for the sale of rice which might, at the sellers' option, be delivered either from any of the specified mills or from the sellers' own mill. He thought that the seller's own mill, though nowhere mentioned in the contract, was by implication included among the mills from which delivery might be given. I do not think that the question of the correctness of this construction comes before me on this reference, but in any case it is unnecessary to decide upon it, for unless the construction first set out above, which is that put forward by the defendant-appellants (the sellers), can be accepted the appeal must necessarily fail.

The case of the *Arracan Co., Ltd.* v. *H. Hamadanee & Co.* (1) has been referred to. I have referred to the original records and find that in all matters material to the present question the contract in that case was identical with the one now in dispute. But I do not think that that decision is of any assistance in the present case. There was no interpretation of the contract in respect of the question now arising. The parties had in fact so far interpreted it for themselves ; the seller had given a milling notice for his own mill, which had been accepted by the buyer and delivery was in progress when that particular mill was burnt down. What the learned Judges said on this subject was merely :

"In the present case the plaintiff accepted a milling notice on the defendants' mill. It must be taken therefore that the parties had agreed that the defendants should be at liberty to give delivery under the contract from their own mill. . . ."

The contract before me contains no mention whatever of the sellers' own mill but the contention for the defendants is that its terms are such as necessarily to imply a primary intention that the rice should be delivered from their mill. In supporting this contention Mr. Clark has strongly urged that the contract must be construed strictly upon its own terms, without reference to extrinsic circumstances. But he has at the same time emphasized the fact that the defendants are (or at that time were) millers, and had a mill of their own. In this he is somewhat inconsistent for that itself is a circumstance extrinsic to the contract.

Looking to its terms alone the contract in my opinion is simply one for the sale of rice which is to be delivered from a mill immediately after milling. Apart from Cl. 19 the seller could satisfy this contract by delivery from any mill, so long as he complied with the other terms of the contract. In my view of it Cl. 19 not only gives the seller the option of delivering from any of the mills named but also debars him from delivering from any other mill.

The defendants claimed that the terms of the contract are such that they can only mean that the rice is to be delivered from the seller's own mill. They rely particularly on the references to milling in Cls. 3, 7, 8, 9, 10 and 12. None of these seem to me to justify the importing into the contract of words which it does not contain. The contract is clearly one for rice which is to be milled and to be delivered immediately after milling, but I can see no reason why we should imply from this that the rice is to be milled by the seller himself. The seller has undertaken to deliver rice on those terms and whether he himself has or has not a mill it is incumbent on him so to deliver the rice.

The clauses which seem to me to lend most support to the appellant's contention are Nos. 12, 13 and 14. Cl. 12 provides that the buyer will be charged godown rent should he fail to remove the rice within 15 days after milling ; Cl. 13 that the buyer cannot claim the right of leaving the rice in the seller's godown after the 15 days and Cl. 14 that on the expiry of the 15 days the seller has the right of removing the rice to other than mill godowns. Here the use of the words seller's godown in Cl. 13 and of mill godowns in Cl. 14 certainly does suggest that the two godowns are the same and that the contract contemplates that the mill referred to is the seller's mill. But I do not think that this alone is sufficient to justify the interpretation put forward. We must read the contract as a whole

and if it can be said that these clauses are inconsistent with any other interpretation than that put forward then we must equally say that they are inconsistent with Cl. 19.

Reliance has been placed also on Cl. 4, which provides:

"gunnies and twine to be supplied by buyer or if seller's gunnies are used owing to late arrival at mill of buyer's gunnies or other causes"

they will be charged for at a certain rate. This seems to me to lend only the flimsiest support to the appellants' contention. It does, perhaps, presuppose that the sellers' gunnies will be available at the mill at any time and so suggest that the mill is to be the sellers.' But I do not think that this inference is inevitable. If the buyer can send gunnies to some other person's mill it is equally open to the seller to do so, or to arrange for them to be available there. And should he exercise his option under Cl. 19 he would necessarily have to do so.

My learned brother Ormiston has referred to Cl. 10 as supporting the appellants' interpretation of the contract. This clause reads:

"sellers have the right of disposing of any rice milled against this contract, by private or public sale on buyers' account, should he fail to pay for it within 24 hours of the presentation of the bill. . . ."

I can see nothing in this to support the appellants in any way. It is provided in Cl. 8 that the buyer is to pay for the rice in cash not later than immediately after milling, and if he fails to do so the seller will have the resale under S. 107, Contract Act. The principal effect of Cl. 10 seems to be to modify Cl. 8 by allowing the buyer 24 hours grace for payment. Possibly also it may to some extent modify the operation of S. 107. But I can see nothing in it which would not be entirely appropriate had the contract been one for the sale of rice already milled and stored in a godown (except of course the use of the words "milled under this contract," which in the present connexion are not material).

My brother Ormiston also says:

"Looking at the contract as a whole in my view it is cast in a form entirely inappropriate for use by one merchant selling rice to another. On the other hand it is entirely appropriate to the case of a miller selling rice the produce of his own mill."

and his decision seems to have been largely influenced by that consideration. I am not prepared entirely to agree with his view. The form of the contract would, of course, be entirely inappropriate for the sale of rice which a merchant already had stored in his godown, or which he proposed to buy from some other person who had it so stored. But a merchant might equally well be reselling rice which he had already agreed to buy from a miller (or which he proposed so to buy) and which had not yet been delivered. If then he had bought on a contract similar to that in question it would obviously be in his best interests to require his buyer to accept the same terms. If he did not do so he might very probably find himself involved in very considerable difficulties. For example, if he allowed his buyer the option of fixing the date of delivery he might find himself called upon to deliver before his seller was ready to do so. Similar difficulties might arise out of almost every clause of the contract. On the other hand if the terms of the two contracts are the same as soon as his seller exercises any of his rights of election the merchant can himself exercise his own right in the same sense against his buyer.

In my view of the contract it is simply one for the sale of rice, which would be carried out by the delivery of rice from any one or more of the mills named in Cl. 19. There are in its terms a few expressions which slightly suggest that the contract was intended to be one for the sale of rice from the sellers' own mill. But those suggestions are not, in my opinion, so strong that it must be held to follow as a necessary implication that there was that intention. On that construction the appeal must fail. No other question arises but I wish to add that I am not entirely satisfied that the appeal could succeed even if the appellants' contention that the contract was one primarily for the sale of rice from their own mill were accepted. The appeal is dismissed with costs.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 86

PRATT, OFFG. C. J. AND ORMISTON, J.

A. Malakyi — Appellant.

v.

Ko Po Nyein and *others* — Respondents.

First Appeal No 297 of 1927, Decided on 20th August 1928, from judgment of Dist. Judge, Pyapon, in Civil Regular No. 29 of 1926.

Evidence Act S. 92—Person selling land but continuing in possession under oral agreement to repurchase—Vendee selling property to third person—Original vendor can prove against the subsequent purchaser, oral agreement to repurchase and fraudulent nature of subsequent purchase.

Section 92 does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed belonged to a third person, who was not a party to the conveyance. [P 87 C 1]

Where a person conveys property to another but continues in possession under an oral agreement of repurchase such person can prove against his vendee's purchaser that the sale by the vendee was in fraud of his agreement of repurchase: *A. I. R.* 1917 *P. C.* 207, *Foll.*; 3 *L. B. R.* 100 (*F.B.*), *not Foll.* [P 87 C 1, 2]

A. B. Bannerji—for Appellant.

Hay—for Respondents.

Judgment.—Respondents 1 to 3, defendants in the trial Court have filed a cross-objection to the action of the Court in refusing to allow them to prove their case with respect to the holdings other than No. 17-N, which forms the subject of plaintiff's appeal. Plaintiff based his title to the holdings in dispute on a conveyance from the P. L. A. V. N. K. firm. Defendants' case was that although they had given the P. L. A. V. N. K. firm a conveyance of these lands, there was an oral contract of resale in pursuance of which they were in possession, and that the sale by P. L. A. V. N. K. to plaintiff, who was fully aware that his vendor had no right to sell, was fraudulent. The trial Court held that defendants were precluded by S. 92, Evidence Act, from giving evidence of the oral agreement for repurchase, relying on the ruling in *Maung Bin* v. *Ma Hlaing* (1). The lower Court has overlooked the ruling of their Lordships of the Privy Council in *Maung Kyin* v. *Ma Shwe La* (2).

It was then pointed out (at pp. 142 and 137) that S. 92 is applicable to an instrument as between the parties to such an instrument or their representatives-in-interest, but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person, who was not a party to the conveyance.

We consider in view of this ruling that defendants were clearly entitled as against plaintiff to prove that his vendee has not an absolute title, and that they are in possession under an agreement of repurchase. They are also entitled to prove that the sale by the Chettyar firm to plaintiff was in fraud of them.

We would point out that as no question of specific performance of contract is involved, S. 21, Specific Relief, Act has no application. We set aside the finding and decree of the trial Court so far as holdings Nos. 26 and 27 and the house are concerned and remand the suit for trial on the merits. Defendants will have the costs on their objection in this Court. Costs in the trial Court to follow final disposal.

M.N./R.K. *Suit remanded.*

(1) [1905] 3 L. B. R. 100 (F.B.).

(2) A. I. R. 1917 P. C. 207=45 Cal. 320=44 I. A. 236 (P.C.)=[1917] 9 L. B. R. 114.

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* A. I. R. 1929 Rangoon 87

DARWOOD, J.

Sulaiman Mohamed Bholat—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 696 of 1928, Decided on 6th August 1928, from order of Dist. Mag., Rangoon, in Criminal Regular Trial No. 63 of 1928.

***(a) Criminal P. C. (1923), S. 162—Statement made by prosecution witness written in police diary—At accused's request Court must refer to it and must furnish him with copies.**

When the statement of a prosecution witness has been reduced into writing whether in a police diary or otherwise, the accused, under the new Code, is entitled to ask the Court to refer to it and to be furnished with a copy of it: 33 *Cal.* 1023, *Dist.* [P 88 C 1]

(b) Criminal P. C., S. 162—Police officers taking statements of witnesses should not extract and enter in diaries as much as is relevant and destroy original.

Police officers who are charged with the duty of investigating crimes should not be in a position to take the statements of witnesses, extract as much as they think is relevant or important for entry in their diaries and then destroy the original statement. The practice is illegal in so far as it deprives the accused of an important right and it may result in the destruction of valuable evidence in favour of an accused. [P 88 C 2]

McDonnell—for Appellant.

Byu—for the Crown.

Judgment.—(*6th August* 1928)—The facts of this case have been set out at length in the judgment of the learned District Magistrate and are not really in dispute save in one respect. It is alleged by the prosecution that the appellant was the person who used a knife upon the complainant. This alle-

gation is strenuously denied. The appellant has produced evidence to prove that at the time the fracas began in the complainant's flat he was in his shop which is below the flat. The case really resolves itself into a question of the credibility of evidence.

Before deciding this, it is necessary to consider a point raised by Mr. McDonnel, for the appellant. He states, correctly, that he asked the District Magistrate to be allowed to have copies of the statements made by some of the witnesses to the police, in order to cross-examine them on those statements. It appears from the evidence of the investigating officer that he took down notes of what each witness knew and saw. From these notes he compiled his diary and then he thinks he destroyed the notes. This, he says, is the standing practice. If this is true, it looks very much as if the practice were a deliberate attempt to defeat the provisions of S. 162, Criminal P. C. and to deprive the accused of the very valuable right to be supplied with a copy of such statements in order to contradict the witnesses in the manner provided by S. 145, Evidence Act. The learned District Magistrate refused Mr. McDonnell's request on the ground that he could not claim to see the case diaries. It is quite true that the accused is not entitled to see the police diaries, but his counsel's request was not to see the diaries but for copies of the statements of the witnesses, and in my opinion he was entitled to have these copies in spite of the fact that the statements were recorded in a police diary. S 162, Criminal P. C. says that no

"such statement or any record thereof, whether in a police diary or otherwise or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial . . . ."

Under the proviso when any witness is called for the prosecution in any such enquiry or trial, whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, for the purpose of contradicting the witness.

It is clear from the language of the section that when the statement of a prosecution witness has been reduced into writing, whether in a police diary or otherwise, the accused is entitled to ask the Court to refer to it and to be furnished with a copy of it.

The learned District Magisrate was therefore wrong in refusing to allow the accused to have copies of the statements he required. What effect this refusal has had upon the trial cannot be gauged unless this Court examines the police diaries and also examines the investigating officer to make sure whether he has actually destroyed the original statements. If he has, and his evidence certainly indicates this or he would have been in possesssion of the original statements, his procedure cannot be too strongly condemned. It is obviously not in the interests of public justice that police officers who are charged with the duty of investigating crimes should be in a position to tako the statements of witnesses, extract as much as they think is relevant or important for entry in their diaries and then destroy the original statement. If such a practice as the investigating officer speaks of really exists it should be stopped at once. It is illegal in so far as it deprives the accused of an important right and it may result in the destruction of valuable evidence in favour of an accused person.

I have been asked by the Assistant Government Advocate to adopt the procedure which was followed in the case of *Dadan Gazi* v. *Emperor* (1) and to satisfy myself whether there is anything in the statements of the prosecution witnesses recorded by the investigating officer, which would justify their being cross-examined on those statements.

That case was decided before S. 164, Criminal P. C., was amended by Act 18 of 1923 and under the then existing law it was only if the Court deemed it expedient in the interests of justice that it directed the accused to be furnished with a copy of the statements referred to.

Under the present law the Court is bound to refer to such a statement at the request of the accused and is bound to furnish him wlth a copy thereof provided that, if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the enquiry or trial, or that its disclosure to the accused is not essential in the interests of justice, it shall record such opinion and shall exclude such part from the copy of the statement furnished to the

(1) [1906] 33 Cal. 1023=10 C. W. N. 890.

accused. The conditions therefore are not the same as they were when *Dadan Gazi's* case was decided.

In my view the appellant had an unquestionable right to test the credibility of the prosecution witnesses by reference to their statements to the police. It is impossible to say how far he has been prejudiced by being deprived of that right.

I therefore direct that appellant or his counsel be furnished with copies of the statements recorded by the police, which were asked for at the trial. As soon as these have been furnished, appellant's counsel will inform this Court whether or not he wishes to cross-examine the witnesses on them.

Judgment.—(28*th August* 1928)—The facts of the case may be summarized as follows:

There are two flats on the first floor of 15, Sparks Street. At the time this incident occurred one of these was occupied by Dr. Banerjee and his family and the other by the appellant, Sulaiman Mahomed Bholat.

About 3 p. m. on 13th April 1928, a quarrel broke out at Dr. Banerjee's door, between one Bechai, a servant of Dr. Banerjee and 3 boy servants of the appellant, who accused Bechai of spitting on the appellant's door. That evening about dusk two ladies visited Dr. Banerjee's family. He himself came in about 7-30 p. m. and on being informed about the quarrel said he would speak to Bholat about it. He then went into an inner room to change his clothes. There was a knock at the front door and Dr. Banerjee thinking it was a patient asked the ladies to withdraw. They went to the entrance of the bed room furthest from the hall door. When Dr. Banerjee opened the door he found the appellant, who asked him to produce Bechai. The latter was called, and asked if he had spat on appellant's door; he denied it. Appellant asked Dr. Banerjee to hand Bechai over; he refused. Appellant moved as if to enter the flat, but the doctor put his hand and warned him against trespassing. Appellant then knocked the doctor down with a blow on his nose. His followers then entered the flat, and assaulted the doctor; he says with kicks and sticks. He got up and defended himself but was driven towards the balcony overlooking the street. At this stage he says he saw the appellant aiming a blow at him with a knife. In a frantic effort to avoid this he fell on the balcony and was at once stabbed on the back. He was also beaten with sticks. He does not remember being brought back into the room, but recollects Sergeant Pascal asking him who stabbed him, and he says that he pointed out the appellant, who was then standing just outside the door. He is not corroborated on this point by any other witness. The evidence generally is to the effect, that the appellant had gone before Sergeant Pascal entered the flat. It may be that the shock sustained by Dr. Banerjee, has played a trick on his memory on this point. The ladies who witnessed the assault are five in number, Prabhati Devi, sister of Dr Banerjee, Sadha Hansi Devi, his wife, Santa Lota Devi, his sister-in-law, Sudha Lata Ghose, the wife of Dr. Ghose, and Hemlata Mazumdar, his sister. Of these Prabhati Devi gives a full account of the incident. She rushed to her brother's assistance and received a scratch on the hand. She states inter alia, that she saw the appellant stab her brother on the back, with a pen-knife.

Santa Lota Devi, deposes to witnessing the blow with which appellant knocked Dr. Banerjee down, the attack made upon him by the appellant's followers and the stabbing of the doctor by the appellant.

Sadha Hansi Devi, Dr. Banerjee's wife, gives a similar evidence. Mrs. Ghose, one of the visitors, saw Dr. Banerjee fall, and several men enter the room and assault him. Dr. Banerjee resisted, but was carried along towards the verandah where he fell face downwards. The witness saw a man between him with something. She thinks that the appellant was the striker. She identified him as the leader of the attack.

Hemlata Mazumdar, the sister-in-law of Mrs. Ghose, confirms the story told by the other ladies. She saw Dr. Banerjee driven towards the balcony his fall there, and saw the appellant strike him with something, but she did not know what it was. The other intruders pressed upon Dr. Banerjee and some of them beat him with sticks. Then as whistle blew from outside the assailants left the room.

The lady states that the appellant owned a black topee which was subsequently found in the room. Presumably she meant, that he was wearing it, when she first saw him in the room. It may

appear strange that neither of the visitors actually saw the knife, which appellant is said to have used whereas the ladies of the house did so, but it is in evidence that Prabhat Devi, and Santa Lota Devi rushed to aid the doctor, and they at least were much closer to him, when he was stabbed, and, therefore probably in a better position to see the weapon. In fact Prabhati Devi states that she was actually holding her brother, when he was stabbed. The evidence of these ladies is unanimous, that the doctor was struck or stabbed by the appellant, after his fall on the verandah. There is, however, a witness D'Silva a telegraphist, who saw something of the affair, from the street. He says he saw women and two men come out to the verandah. The men were fighting and while they were doing so, a third man came, and hit one of the others on the back. The man hit fell forward. This is not quite the same, as is told by Dr. Banerjee and the ladies, but the discrepancy may be due to various causes, and it is not so serious as to affect the credibility of the testimony given by the ladies.

This evidence was quite sufficient to establish a strong prima facie case against the appellant, of having caused hurt with a dangerous weapon.

The defence was that he was in his shop, immediately below his flat, when this incident first started, and when the commotion began he went upstairs, and entered his flat.

With regard to this, it is noticeable that Sergeant Pascal who was early on the scene, saw a man disappear into appellant's flat; Marshall who was with him, says that the man darted out of Dr. Benerjee's flat, and entered appellant's.

Sergent Pascal found a crowd of men in the hall, some of them armed with sticks. He cleared the crowd, and entered Dr. Banerjee's flat. He found Dr. Banerjee sitting on the floor, with blood all over him, and the women weeping. They told him that the man who had assaulted Dr. Banerjee with a knife had disappeared into the flat opposite. He knocked and banged at the door for 10 minutes, and when it was opened by the appellant, the women with one accord said, "This is the man." So he took him in charge. The appellant admits that he took time to open the door as he was undressing. If his story is true, his conduct cannot but be regarded as extremely strange. Having heard the fracas, which was going on just outside his flat, he went up presumably, to find out what was happening. Instead of doing this, however, he locks himself up, in his flat, and proceeds to undress. Even on the arrival of the police, he did not admit them at once. This is certainly not the conduct of an innocent man, and it adds to the strength of the case against him. It suggests that he was trying to rid his appearance of the signs of conflict before facing the police.

The evidence called to prove that the appellant was in his office when the row began, upstairs, must now be considered. E. E. Dawoodjee, a hardware merchant of substance, says that on the night in question, he was looking at the foundation of a new building he was erecting opposite appellant's shop, and he noticed the appellant, his own nephew E. I. Dawoodjee, one Dursot, and Renderia, in appellant's shop. Then he heard some row upstairs, and females crying. The appellant went upstairs, followed by two others, whom he failed to identify. He went away after this. This witness is a friend of appellant's father, and went to the police station that night to see if appellant could be bailed out. He may not have known all the circumstances of the charge brought against appellant but it is rather difficult to believe that interested as he was in the release of the appellant, he would not have found out that his evidence was of vital value to him.

E. I. Dawoodjee, the nephew of the last witness, testifies to appellant talking to him, Renderia, and Dursot, when he heard women crying upstairs. Appellant and Dursot went up he says, and he himself went home. One would have thought, that it would have been natural for appellant, to have asked his friends to come up, and see what was happening upstairs, since he lived there himself.

Rendaria gives similar evidence. He too very discreetly left after appellant, Dursot went upstairs. E. S. Dursot, another hardware merchant, whom appellant in his examination calls "one of my men" corroborates the other two. On hearing the crying upstairs, he says that he followed the appellant up the steps, but half way up, he met one Ismail, appellant's servant, who told him that he had

had a row with Dr. Banerjee who had hit him, and he had retaliated, and Dr. Banerjee had fallen.

In cross-examination, this witness contradicted himself badly, and the impression left in my mind is that he is not a truthful witness.

One J. M. Judah, who occupies the flat above Dr. Banerjee's, says that on hearing cries of women coming from below, he ran down. When he got to the landing he saw appellant run up the stairs, and another man run down the stairs. He then went up to his flat. A curious piece of evidence brought in to prove that appellant was not in Dr. Banerjee's room when the prosecution witnesses say, he was there.

This brings up to the crux of the case. The appellant denies being in doctor's flat at all, yet we have seven people who depose to his presence in that flat, that night, the doctor, five ladies and the servant Bechai. Two at least of the ladies were merely friends of the doctor's family and were utter strangers to the appellant, in fact they may all be said to have been strangers to him. They have given an account of the incident which is reasonable, and consistent with the admitted facts. Very strong grounds would therefore have been made out before their evidence can be rejected. To some extent, their evidence is corroborated by the independent evidence of Sergeant Pascal, and Marshall, who saw a man, step into appellant's flat, from the doctor's flat, according to Marshall. Who was this man if not the appellant?

When he opened his door, what must in the circumstances of the case, be regarded as suspicious delay, the ladies at once denounced him as the doctor's assailant. Yet, if his story is true, this emphatic and unanimous denunciation, was a piece of wanton wickedness. The only explanation of all this is that it is true that the appellant did enter the doctor's flat that afternoon.

As regards the prosecution story, what had the defence to offer? An obviously untrue version of the affair, which did not account for the presence of 2 fezzes, in the doctor's room, of the incident seen by D'Silva, or of the stab wound sustained by Dr. Banerjee, and an alibi, which as the learned District Magistrate remarked, separates appellant from the scene of the assault only by a flight of stairs.

On the ground of respectability there is no reason to discriminate between the witnesses for the prosecution, and the defence, but the appellant's witnesses have a much more powerful motive for saying that the appellant was in his shop when the row began, than the prosecution have for saying that he was the person who stabbed Dr. Banerjee. If he was in the row from its commencement then the defence evidence is not true. I cannot find any reason for disbelieving the prosecution story corroborated as it is by the immediate denunciation of the appellant, and his suspicious behaviour in locking himself in his rooms after this occurrence.

Had his story really been true, I think it would have been natural to have expected some of his respectable witnesses to have gone upstairs with him to find out what was happening, instead of departing unobstrusively and leaving him to his fate.

I am forced to the conclusion that the District Magistrate was right in convicting appellant under S. 324, I. P. C.

The proper sentence raises a question of some difficulty. The District Magistrate considered a term of imprisonment essential. The appellant does not belong to the class of people, who are usually free with the use of the knife, and in his community he is of good social standing. Imprisonment to a man of this class is not only a degrading punishment to himself but it brands the whole family with a stigma, which it has not deserved and is a lasting disgrace.

The offence is compoundable with the permission of the Court, and imprisonment is not compulsory.

The injury sustained by Dr. Banerjee was 11/10″ long, ½″ broad, and 12/5″ deep obliquely in the right infra scapular region, not a very serious one therefore.

Where a suitable alternative can be found, it does not appear to me, that this is a case in which imprisonment should be the primary penalty to be inflicted. In place, therefore, of the sentence passed by the District Magistrate, I direct that the appellant do pay a fine of Rs. 4,000 or do suffer 4 months' rigorous imprisonment in default. Rs. 1,000 of the fine will be paid to Dr. Banerjee as compensation.

S.N./R.K. *Sentence altered.*

A. I. R. 1929 Rangoon 92

PRATT, OFFG. C. J. AND CUNLIFFE, J.

Municipal Corporation, Rangoon—Appellant.

v.

E. E. Dawoodjee & Sons—Respondents.

Civil Misc. Appeal No. 350 of 1928, Decided on 31st July 1928, from judgment of Small Cause Court Judge, Rangoon, in Municipal Appeal No. 2 of 1928.

Rangoon City Municipal Act (Bur. 6 of 1922), S. 80—Principle of valuation of hereditament is its hypothetical value to any hypothetical tenant — Interpretation of statutes.

It is a canon of Rating Law that the principle of valuation of any given hereditament is the hypothetical value of the hereditament as it stands to any hypothetical tenant. It is not appropriate to take as a guide the actual rents paid for other and widely dissimilar buildings occupied on different terms of tenancy. [P 92 C 2]

N. M. Cowasjee—for Appellant.

Clark—for Respondents.

Cunliffe, J.— This appeal must be dismissed. It arises in the following circumstances. No. 486, Merchant Street, was previously rated at Rs. 1,265 per month. The assessor to the Municipal Corporation recently increased this valuation at Rs. 2,950 per month. The assessee who is the owner of the premises appealed to the Commissioner who confirmed the assessment. The assessee then preferred an appeal to the Chief Judge of the Small Cause Court. He reversed the order of the Commissioner. The Corporation now come to this Court in further appeal.

No. 486, Merchant Street, is in the occupation of the Rangoon Times Press under a lease for a term of years. The reasons adduced to support the enhancement of the valuation were a general advance in the value of house property in the neighbourhood and the fact that occupiers of nearby buildings were paying much higher rents than the rent paid by the Rangoon Times Press to the assessee. Elaborate calculations of floor space and so on were set out in the report of the assessor. Before the Commissioner the assessee gave evidence that No. 486, Merchant Street, were difficult premises to let and by no means suitable for ordinary business purposes or for tenement dwellings. The building was not new.

It is a canon of Rating Law that the principle of the valuation of any given hereditament is the hypothetical value of the hereditament as it stands to any hypothetical tenant. It seems to us not to be appropriate in such a case as this to take as a guide the actual rents paid for other and widely dissimilar buildings occupied on different terms of tenancy. This is exactly what the Commissioner has done. In our opinion the only evidence in relation to the proper valuation before him was the evidence of the assessee himself. To rebut such evidence it would have been necessary to consider the value of a similar building, devoted to a similar business. It is for these reasons that we agree with the learned Judge of the Small Cause Court and dismiss this appeal, with advocate's costs ten gold mohurs.

Pratt, Offg. C. J.—I add that it is unnecesssry under the circumctances to discuss the many authorities, which have been cited on the subject of the principles, which should determine the assessment of the building in question. The principles are not disputed, the difficulty is the application of the principles.

It is common ground that the assessment should be on the basis of the rent, which a hypothetical tenant would be prepared to pay for the building as it stands, to be used for the purposes of a printing and newspaper press. The assessor and the Commissioner considered that the correct way to obtain the rent, which the hypothetical tenant would be willing to pay, was to be obtained by a mathematical calculation based on the rents paid for buildings in the immediate vicinity.

The objection to this method is that three of the buildings are of a superior character used for different purposes, and the fourth is the ground floor only of a four storeyed building also used as a press. The learned Chief Judge of the Small Cause Court did not consider the buildings or the conditions similar, and therefore this fact vitiated the conclusion arrived at. He took into consideration the fact that it was not disputed that the building was so constructed that it could not be let in parts to tenants and was not new, and that it was consequently difficult to obtain a trustworthy tenant paying an adequate rent. He did not consider that an allowance of 25 per cent.

on the rent calculated from the average of the adjoining buildings rendered the assessment equal to the hypothetical rent.

The Judge was of opinion that the actual rent paid was more truly representative of the hypothetical rent and was prima facie evidence of the rental value of the building. He has given his reasons in a lucid and convincing judgment and I consider no sufficient reason has been adduced to justify our differing from his conclusion.

S.L./R.K. *Appeal dismissed.*

* A. I. R. 1929 Rangoon 93

BROWN, J.

Mg. Po Lwin—Appellant.

v.

Mg. Sein Han—Respondent.

Second Appeal No. 489 of 1928, Decided on 14th January 1929.

(a) Landlord and Tenant — Landlord's claim on produce for rent is not lien.

The claim of the landlord on the produce of the tenant for his rent is not strictly speaking a lien, because the produce is not in landlord's possession : *A. I. R.* 1925 *Rang.* 366, *not Appr.* [P 93 C 2]

*** (b) Landlord and Tenant—Third person taking produce from tenant with full notice of landlord's claim for rent—Landlord can enforce his claim against him under Specific Relief Act, S. 27 (b).**

Where a third person takes the produce from the tenant with full notice of the landlord's claim for rent, the landlord can enforce his claim against such third person because his claim is analogous to one for specific performance under S. 27 (b), Specific Relief Act : *A. I. R.* 1925 *Rang.* 366, *Rel. on.* [P 94 C 1]

E. Maung—for Appellant.

Tun Aung—for Respondent.

Judgment.—The plaintiff-respondent, Maung Sein Han sued one Maung Shwe Hmyin and the appellant, Maung Po Lwin for 375 baskets of paddy valued at Rs. 712-8-0, claimed as rent due for paddy land. He was given a decree against both defendants for 255 baskets or their value Rs. 484-8-0. The land was admittedly leased out to Maung Shwe Hmyin, and Maung Shwe Hmyin did not appeal against the decision of the trial Court. Po Lwin was made a defendant on the ground that the landlord had a lien or charge on the crops for his rent and that with full knowledge of this, Po Lwin had taken from the produce of the land 400 baskets. Po Lwin appealed to the District Court without success, and has now come to this Court in second appeal.

The appeal is argued on two grounds : firstly it is contended that no cause of action has been made out against Po Lwin, and secondly, it is contended that there is no evidence on the record from which the lower Court could find that 400 baskets of paddy had been taken away by Po Lwin.

On the first point, reference has been made to the case of *Maung Han* v. *Ko Ho* (1). In that case the landlord sued his tenant, and a third party jointly for rent. The third party was impleaded on the ground that he received half the outturn of the land from the defendant with full knowledge of the plaintiff's lien on the crops. It was held that he was liable jointly with the tenant. It was pointed out in that case that it is the usual practice in this country for the landlords to have a lien for rent over the paddy reaped by the tenant for their rent. In the present case, the contract of lease was by written agreement, and in that agreement, the tenant, Maung Shwe Hmyin bound himself not to sell, to move or dispose of the outturn of paddy in the paddy field or fields in any way whatsoever before paying up the full rent to the landlord.

I do not think it is strictly speaking correct to speak of the landlords having a lien in these circumstances. A lien denotes that the property over which it is claimed is in the possession of the person claiming it and the paddy in this case was admittedly not in the possession of the plaintiff. But there is clearly here a personal obligation on Shwe Hmyin not to dispose of the crops in any way without first paying up the rent in full. A third person would not of course ordinarily be bound by this contract, but in view of the custom of the country referred to in *Maung Han's* case, I think the tenant may in a case such as the present, be looked on as holding the property in trust subject to this promise and that anyone who takes the property with knowledge of this promise would be liable to make it good.

Under S. 27 (b), Specific Relief Act, specific performance of a contract may be enforced against any person claiming under a party by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract and it seems to me that

(1) A.I.R. 1925 Rang. 366.

the claim in the present case is somewhat analogous to a claim for specific performance under this section. It has been found in the present case that Po Lwin had full notice of the landlord's claim and in the circumstances I am not satisfied that there is sufficient reason for departing from the principles followed in *Maung Han's* case. I do not think therefore there is sufficient reason for interference with the decision of the lower Courts on this point.

There does, however, seem to be some force in the second contention made on behalf of the appellant. Plaintiff in his plaint states that the appellant received 400 baskets of paddy from Shwe Hmyin but he has not given evidence on that point and does not seem to have any personal knowledge on the point. There is evidence as to the abortive attempt at an agreement whereby Po Lwin would take all the paddy and pay all Shwe Hmyin's debts but that agreement fell through and I can find no real evidence of any kind that 400 baskets were given by Shwe Hmyin to Po Lwin. The witness Kha Kha states:

"I went and visited Shwe Hmyin's talin. I saw 500 odd baskets sold. These 500 baskets were given to U Po Lwin, who was present. I did not see Po Lwin carrying them away."

Witness does not state to whom they were sold and he does not state that Po Lwin took the paddy away. I do not see how this can be held to prove Po Lwin to have received 400 baskets. On the other hand there is evidence of Shwe Hmyin that 150 baskets only were taken by Po Lwin and this figure is admitted by Po Lwin himself.

I alter the decree of the trial Court by directing that so far as Po Lwin is concerned the amount payable is 150 baskets of paddy or their value Rs. 285. The decrees of the lower Courts directing Po Lwin to pay cost are also set aside; the parties will bear their own costs in this appeal.

S.N./R.K. *Decree modified.*

A. I. R. 1929 Rangoon 94

MYA BU, J.

Maung Ba Kin — Appellant.

v.

Ma Pwa Thin — Respondent.

Special Second Appeal No 483 of 1928, Decided on 6th February 1929.

(a) Civil P. C., O. 38, R. 5 — Application to restrain person temporarily from withdrawing amount at his credit and Court's order thereof are really for attachment before judgment.

An application praying for a temporary injunction restraining a person from withdrawing certain amount standing at his credit, and the order of Court issued thereon are, in spite of their wording, really for attachment before judgment. [P 94 C 2]

(b) Civil P. C., O. 38, R. 9 — Liability of bond executed under R. 9, ceases as soon as suit is dismissed.

Liability on a bond executed in pursuance of the provisions of O. 38 R. 9, ceases as soon as the suit is dismissed by trial Court: *A.I.R.* 1927 *Rang.* 310, *Appl.* [P 94 C 2]

L. Choon Foung — for Appellant.

Judgment. — The bond in question was executed to enable the defendant in suits Nos. 221 and 249 of 1926 of the Township Court of Thaton to withdraw Rs. 1,500 which was lying to her credit in the Sub-Divisional Court of Thaton, over which the Township Court in the two cases had issued so-called injunctions restraining Ma Kyu Yin from withdrawing the amount on account of the applications made by the respective plaintiffs in the two suits in the Township Court. The application in suit No 221 prayed that an attachment before judgment might be made for Rs. 800 out of the aforesaid Rs. 1,500 whereas the application in suit No. 249 prayed for a temporary injunction restraining the defendant from withdrawing a sum of Rs. 700 out of the aforesaid Rs. 1,500.

In spite of the wording of the prayer and the wording of the order issued by the Township Court to the Sub-Divisional Court, on these applications, the applications and the orders were in reality for attachment before judgment of the sum of Rs. 800 and 700 respectively which were claimed against the defendant in the two suits in the Township Court. The orders were clearly made under the provisions of O. 38, Civil P. C, and not under O. 39. The bond executed by the appellant, Maung Ba Kin therefore was one executed in pursuance of the provisions of R. 9, O. 38. The ruling in *Manackjee* v. *Chettyar Firm* (1) is applicable to the case and the appellant's liability on the bond ceased as soon as the suit was dismissed by the trial Court. The order of the lower appellate Court is set aside, and that of the Township Court is restored with costs, advocate's fee in this Court to be two gold mohurs.

S.N./R.K. *Order set aside.*

(1) A.I.R. 1927 Rang. 310=5 Rang. 492.

A. I. R. 1929 Rangoon 95

PRATT AND OTTER, JJ.

C. K. R. M. Kathirasan Chettyar—Appellant.

v.

Ma Hta—Respondent.

Misc. Appeal No. 21 of 1923, Decided on 17th December 1928, against order of Dist. Judge, Mandalay.

Limitation Act, Art. 182 (5) — Decree-holder applying to Court which passed decree to issue notice to judgment-debtor who was then outside that Court's jurisdiction—Application made bona fide for executing decree — Application is to proper Court and legal—It is step-in-aid of execution—Civil P. C. O. 21, R. 10 and S. 38.

Application made by decree-holder merely to issue notice to the judgment-debtor to pay the decretal amount, to the Court which passed the decree is not illegal or to an improper Court, although the judgment-debtor at the time was residing outside that Court's jurisdiction. And if such application is made in good faith for the purpose of executing the decree, it will be a step-in-aid within the meaning of Art. 182 (5) : *A. I. R.* 1926 *All.* 95 ; *A. I. R.* 1922 *Cal.* 44 and 25 *Cal.* 594, *Rel. on.* [P 95 C 2]

Ko Ko Gyi and *Sanyal*—for Appellant.

Razak—for Respondent.

Pratt, J.—In Civil Suit No. 224 of 1923 of the District Court of Mandalay. Maung Cho obtained a decree against C. K. R. M. Chetty on 19th April 1924. In Execution Case No. 65 of 1927, Ma Hta, successor of the decree-holder, applied to the District Court, Mandalay, on 4th April 1927 for notice to issue to judgment-debtor who was then resident in the Katha District, calling upon him to pay the decretal amount and costs.

A notice to show cause against execution of the decree was posted at the house of the judgment-debtor, while he was temporarily absent on 13th April 6 days before the decree was due to become time barred. The judgment-debtor did not attend Court or show cause and the execution proceedings were closed on 17th May 1927.

It was objected that a later application for execution was barred, it being contended that the proceedings in case No. 65 of 1927 were not bona fide. The District Court held that the application in case No. 65 was according to law and bona fide and held that the later application was not barred by limitation. Against that order the present appeal was filed. It is contended before us that the application in case No. 65 was not competent, that the correct course would have been to apply for transfer of the proceeding to the Katha Court in whose jurisdiction the judgment-debtor resided, since he had no property in the Mandalay District. The decree-holder did not, however, apply for execution against the property or person of the judgment-debtor, but merely for issue of a notice to the judgment-debtor to pay up the amount due on the decree with costs.

She had only obtained a succession certificate and may well have thought issue of a notice, as a preliminary step, might be productive, since the judgment-debtor was a banker in business as such. No authority has been cited for the illegality of issue of such a notice through another Court to a judgment-debtor, who has ceased to reside within the jurisdiction of the Court which granted the decree, and we are not prepared to say the notice was not competent. Until the decree-holder desired execution by arrest or attachment of property there was no necessity for transfer of the execution proceedings to the Katha Court.

We are of opinion it is impossible to hold that under the circumstances the application was merely colourable and made for the sole purpose of keeping the decree alive or with no intention of taking out execution or a step-in-aid. The criterion in such cases as pointed out in the Allahabad Case of *Sheo Prasad* v. *Naraini Bai* (1) is whether the application was made in good faith to secure execution, or to take a step-in-aid of execution, or was merely colourable with a view to give a fresh starting point for the period of limitation.

We consider the application for issue of notice was, as the District Court held, made in good faith, and, if it was not an application for execution, must yet be considered to have been a step-in-aid within the meaning of Art. 182, Cl. 5 of the schedule to the Limitation Act. The appeal is dismissed with costs. Advocate-fees 3 gold mohurs.

Otter, J.—I agree. There is some authority for holding that an application such as was made in the present case may be an effective step-in-aid to save limitation: see *Satya Chandra* v. *Paresh Nath* (2) and *Gopal Chandra* v. *Gosain Das* (3), I see no reason to think that an applica-

(1) A. I. R. [illegible] All. [illegible]

(2) A. I. R. 1922 Cal. 44.

(3) [1898] 25 Cal. 594=3 C. W. N. 556

tion for notice to issue which (as it turned out) had to be executed through another Court was not made in accordance with law and to the proper Court.

But (apparently) we must be satisfied that the application was made bona fide for the purpose of obtaining execution: see *Sheo Prasad* v. *Naraini Bai* (1) and cases cited. I think it was so made in this case. A succession certificate had to be obtained, and further application was made within a short time.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 96 (1)

CAR AND MAUNG BA, JJ.

Ma Dan—Appellant.

v.

Tan Chong San and *others*—Respdts.

Civil Misc. Appeal No. 5 of 1928, Decided on 23rd August 1928.

Limitation Act, S. 12—Extension of time —Limitation Act S. 4.

Where the time for filing an appeal expires during vacation and the appellant applies for copies on the day the Court re-opens, an appeal filed on the day next after the issuing of the copies is within time: 19 *All.* 342 and 25 *Bom.* 584, *Foll.* [P 96 C 1]

K. C. Bose—for Appellant.

Choon Fong—for Respondent 1.

Facts.—An order was made against the appellant on 7th December 1927 by the original side Judge. The period of 20 days for filing the appeal expired during the Xmas vacation when the Court was closed. No application had been made till then for copies of the judgment and the decree. On 3rd January i. e. the day the Court reopened an application was made for copies of the judgment and decree and the appeal was filed on the day next after obtaining copies. The question was whether the appellant could claim the benefit of S. 12, Lim. Act. It being found convenient to dispose of the preliminary question first, the case was posted for 23rd August 1928 on which the Court passed the following order.

Order.—Bose for appellant. Choon Fong for respondent Tan Chaung San. Others absent. On the question of limitation we think, following the cases reported in *Siyadalunnissa* v. *Muhammad Mahmud* (1) and *Tukaram Gopal* v. *Pandurang* (2) that the appeal was in time. Appeal admitted.

D.D. *Appeal admitted.*

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(1) [1897] 19 All. 342=(1897) A. W. N. 76.
(2) [1901] 25 Bom. 584=3 Bom. L. R. 143.

A. I. R. 1929 Rangoon 96 (2)

MAUNG BA, J.

Maung Pan Gaing and *another*—Appellants.

v.

Maung Mo and *another*—Respondents.

Special Second Appeal No. 401 of 1928, Decided on 18th February 1929, against decree of Addl. Dist. Judge.

Civil P. C., O. 2, R. 2—Scope—Interest.

Covenant to pay interest unless distinct from and independent of claim for principal cannot be basis of suit. [P 96 C 2]

S. Ganguli—for Appellants.

Ba So—for Respondents.

Judgment.—Respondents brought a suit for recovery of the amount due on a promissory-note. As the promissory-note was not duly stamped they were allowed to fall back upon the original cause of action. Part of the consideration of the promissory-note was a sum of Rs. 210 due as arrears of interest on a mortgage-bond. Township Judge was of opinion that the fact of the said arrears of interest being due should be proved by the respondents and holding that they had failed to prove the same disallowed that claim.

The Additional District Judge thought that the other party should prove that they had paid the said arrears of interest and holding that they had failed to do so decreed that claim.

The learned Additional District Judge has failed to ascertain whether the original mortgage-deed contains a covenant to pay interest which is distinct from and independent of the claim of the mortgagees to recover the principal sum, so that a non-payment of interest may give rise to a separate cause of action. On referring to the mortgage-deed, I find that it does not contain such a covenant. The deed simply states that Rs. 500 was borrowed at 2 p. c. p. m., on the security of a house and its site that the principal and interest should be paid on demand, and before such payment is made the secured property should not be alienated.

As there was no distinct cause of action in respect of interest the District Court was wrong in giving a decree for the arrears of interest. The appeal is accepted and the decree of the District Court is set aside with costs throughout.

V.V. *Appeal allowed.*

*** * A. I. R. 1929 Rangoon 97**

Full Bench

Rutledge, C. J., Maung Ba and Brown, JJ.

U Po Hla—Applicant.

v.

Ko Po Shein—Respondent.

Criminal Ref. No. 1 of 1929, Decided on 6th March 1929 in Criminal Revn. No. 607-B of 1928, D/- 12th January 1929 against order of Dist. Magistrate, Pyapon.

*** * Criminal P. C., S. 520—Accused acquitted—Both District Magistrate and Sessions Judge can interfere with trial Court's order under S. 517—Accused convicted by First Class Magistrate—No appeal to Sessions—District Magistrate can interfere with his order under S. 517** : 6 *Rang.* 259=*A. I. R.* 1928 *Rang.* 240=111 *I. C.* 878, *Overruled.*

In the case of an acquittal by the trial Court, both the Sessions Judge and District Magistrate as a Court of revision have power, under S. 520, to interfere with the order of the trial Court passed under S. 517 regarding disposal of property in respect of which the offence was committed and in the case of a conviction by a First Class Magistrate the District Magistrate has, in the absence of an appeal to the Sessions Court, power to interfere with an order passed under S. 517 by the trial Court: **6 Rang. 259=A. I. R. 1928 Rang. 240=111 I. C. 878, Overruled**; *A. I. R.* 1923 *Rang.* 227; 3 *Cal.* 379 and 9 *Mad.* 448, *Approved.* [P 97 C 2; P 99 C 1]

Ba Thaung—for Applicant.

Order of Reference

Maung Ba, J.—In Criminal Regular Trial No. 79 of 1928 of the Sub-Divisional Magistrate of Kyaiklat, the accused Ma Su was convicted of an offence under S. 406, I. P. C. and the Magistrate, further under S. 517 (1), Criminal P. C. ordered the exhibit property which consisted of certain loose diamonds to be returned to the complainant, one Maung Po Shein. The property was seized from the possession of three persons, Maung Hla Bu, Maung Po Hla, and Ma Ma Gale, and the two latter filed appeals against the order of the trying Magistrate, directing the return of the property to Maung Po Shein, before the District Magistrate, under S. 520, Criminal P. C. The District Magistrate in his order has upheld the order of the trying Magistrate.

Maung Po Hla has now applied to this Court for revision of the order of the District Magistrate and the question arises as to whether the District Magistrate had jurisdiction to pass the order complained of. The Sub-Divisional Magistrate was a First Class Magistrate and in the case of *Emperor* v. *Nga Po Chit* (1), it was held by a Bench of this Court that in the absence of an appeal to the Sessions Court from a conviction by a First Class Magistrate, the District Magistrate had jurisdiction as a Court of revision to interfere with an order passed by the trial Court under S. 517, Criminal P. C. On the other hand, in the case of *Maung Mra Tun* v. *Maung Kra Zoe Pru* (2), Das, J., has held that when the trial Court acquitted the accused on a charge of criminal misappropriation and passed an order under S. 517, Criminal P. C. for the disposal of the exhibit property, the Sessions Judge had no jurisdiction to interfere with the order passed by the trial Court under S. 517. These two decisions appear to be conflicting and in order to dispose of the matter now before me I consider that the following questions should be referred to a Full Bench for decision:

"(1) Whether, in the case of an acquittal by the trial Court, the Sessions Judge or District Magistrate as a Court of revision has power under S. 520, Criminal P. C. to interfere with the order of the trial Court passed under S. 517, Criminal P. C., regarding the disposal of the property in respect of which offence was committed; and (2) Whether, in the case of a conviction by a First Class Magistrate the District Magistrate has, in the absence of an appeal to the Sessions Court, power to interfere with an order passed under S. 517, Criminal P. C. by the trial Court."

Opinion

Two questions have been referred to us in this reference: (The questions referred quoted as above). There are two conflicting decisions of this Court bearing on this point. In the case of *Maung Mra Tun* v. *Ma Kra Zoe Pru* (2) the trial Court had acquitted an accused on a charge of criminal misappropriation of a pair of diamond nagats, and ordered the nagats to be returned to the complainant. Das, J., held that, as the trial Court has acquitted the accused there could be no appeal to the Sessions Court and, therefore, the Sessions Court had no jurisdiction to interfere with the order passed by the trial Court, nor had it any revisional power in the matter.

The decision of a Bench of this Court in *Emperor* v. *Nga Po Chit* (1), does not appear to have been brought to the notice

(1) A.I.R. 1923 Rang. 227=1 Rang. 190.
(2) A.I.R. 1928 Rang. 240=6 Rang. 259.

of the learned Judge in *Maung Mra Tun's* case. In that case Nga Po Chit had been convicted of criminal breach of trust in respect of three sewing machines by a First Class Magistrate. Nga Po Chit did not appeal, but on application by the complainant the District Magistrate revised the order of the trial Magistrate as to the disposal of the sewing machines. It was held that the District Magistrate had jurisdiction to pass the order, although there had been no appeal and in any case no appeal would have lain to him.

Section 520, Criminal P. C., lays down that:

"any Court of appeal, confirmation, reference or revision may direct any order under S. 517, S. 518, or S. 519 passed by a Court subordinate thereto to be stayed pending consideration by the former Court, and may modify, alter, or annul such order and make any further orders that may be just."

Sections 517, 518 and 519 deal with orders as to the disposal of property before a criminal Court, or regarding which an offence appears to have been committed. The meaning of S. 520 was considered by a Bench of the Bombay High Court in *In Re Khema Rukhad* (3). In that case a First Class Magistrate had acquitted certain accused who were charged with theft of cattle and had directed the cattle to be given back to accused 1. On application, the Sessions Judge had modified the order as to the disposal of the cattle. It was held that the Court of Sessions was not a Court of appeal within the meaning of S. 520, as an appeal from the order of acquittal would have lain in the High Court, and that it was not a Court of revision, as the Court of revision was also the High Court. This decision was followed by a single Judge of the High Court of Allahabad in the case of *Emperor* v. *Debi Ram* (4) and Das, J., followed these two rulings in *Maung Mra Tun's* case (2).

A different view of the law, however, been taken by the High Court of Allahabad in the earlier case of *Empress of India* v. *Nilambar Babu* (5). Judgment in that case was delivered in 1879 when the present Code of Criminal Procedure was not in force. It was held under the old Code that when a Magistrate had discharged an accused person and passed orders as to the disposal of the property, the Sessions Judge was a Court of appeal and any one aggrieved by the order should have applied to him. This decision was followed by the High Court of Madras in the case of *Queen Empress* v. *Ahmed* (6). In that case the accused had been acquitted and Brandt, J., observed in his judgment:

". . . . It seems to me that the wording of the section is sufficient to show that the Sessions Court, as the Court to which appeals ordinarily lie from the decisions of the First Class Magistrate by whom this case was tried, had power to dispose of the question."

The Calcutta High Court took a similar view of the law in the case of *Emperor* v. *Joggeshu Mochi* (7). The section corresponding to S. 520 of the Present Code, and the Code then in force was S. 419, and Anslie, J., remarked:

"The words "Court of appeal" in that section are not necessarily limited to a Court before which an appeal is at the moment pending. It may very often happen, as in this case, that the question of the propriety of an order under S. 418 for the disposal of any property produced before the Court may in no way concern the convicted person, and we think it unreasonable to put such a construction on S. 419 as shall make the power of the Judge to modify, alter or annul a Magistrate's order affecting one, contingent on the accident whether person has or has not chosen to appeal."

It appears therefore, that the narrow interpretation of the terms of S. 520 adopted in the recent rulings of the High Courts of Bombay and Allahabad is not the view that has been taken by the High Courts of Madras and Calcutta and that the decision of a Bench of this Court in *Nga Po Chit's* case (1) is supported by previous judicial decisions. We agree generally with the reasoning of the late Ma Oung, J., in *Nga Po Chit's* case (1). We see nothing in the terms of S. 520 of the Code justifying the view that the words "Court of appeal" in that section mean only a Court to which either of the parties to the criminal case has appealed or could appeal. Without the section, when a party to a criminal case has appealed, the Court of appeal would have ample power to pass the necessary orders under S. 423 of the Code. Similarly it seems to us that the words "Court of revision" cannot be interpreted in the narrow sense suggested. The High Court in dealing with cases in revision has am-

(3) [1918] 42 Bom. 664=45 I.C. 501=20 Bom. L.R. 395.

(4) A.I.R. 1924 All. 675=46 All. 623.

(5) [1879] 2 All. 276.

(6) [1886] 9 Mad. 448.

(7) [1877] 3 Cal. 379.

ple power under the provisions of S. 439 to pass orders as to the disposal of property in cases which may come before it in revision and the provisions of S. 520 are unnecessary to give it this power.

All First Class Magistrates are subordinate to the District Magistrate of the District, and either the Sessions Judge or the District Magistrate can under S. 435 call for any proceedings of any inferior criminal Court in revision. The Sessions Judge and the District Magistrate are therefore both "Courts of revision" with regard to the proceedings of a First Class Magistrate within their terretorial iurisdiction. Their jurisdiction is a concurrent one as it is in the case of revisional powers generally, and it does not seem to us that their jurisdiction in the matter is in any way dependent on the question whether an appeal has been filed or could be filed, against the original order of acquittal or conviction in the case concerned. We therefore, answer both the questions referred in the affirmative.

D.D. *Questions answered.*

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* A. I. R. 1929 Rangoon 99

RUTLEDGE, C. J., AND BROWN, J.

T. R. Gopalaswamy Pillay—Appellant.

v.

F. R. Meenakshi Ammal and *another*—Respondents.

Civil Misc. Appeal No. 69 of 1928, Decided on 4th January 1929.

*** Succession Act (1925), S. 218—Member of joint Hindu family is not as such entitled under S. 218 to administration of estate of its deceased member—S. 250 has no application—Succession Act (1925), S. 250.**

A member of an undivided Hindu family during his life is entitled to the beneficial interest in the family estate, but on his death that interest immediately ceases, and the whole beneficial interest in the estate belongs to the other members of the family. A member of a joint undivided Hindu family therefore is not as such a person entitled under S. 218 to an administration of the estate of a deceased member of the family: *A. I. R.* 1923 *Pat.* 96; 56 *P. R.* 1919 and *A. I. R.* 1924 *Rang.* 329, *Rel. on*; S. 250 has also no application in such a case. [P 102 C 1, 2]

Aiyangar and *Tambi*—for Appellant.
Hay and *Sastri*—for Respondents.

Judgment.—The property in dispute in the present case is the estate of one Tanjore Ramaswamy Massilamany Pillai, deceased. The appellant Tanjore Ramaswamy Gopalswamy Pillai applied on the original side of this Court for Letters of Administration to the estate of the deceased on the ground that he was the brother of the deceased, that they formed between them a joint undivided family under the Hindu law and that he was therefore the only heir and legal representative of the deceased. The deceased left surviving a wife, Meenakshi Ammal the first respondent and a daughter Padamabhai, the second respondent. The two respondents opposed the application for Letters. They denied that the appellant and his brother formed a joint undivided Hindu family.

Issues were framed, and a large amount of evidence was recorded but the case was decided on a point of law. By consent of the parties a preliminary issue of law was fixed:

"Can Letters of Administration be granted to the surviving member of a joint Hindu family in respect of the property of that family"?

The learned trial Judge was of opinion that under the Mitakshara School of Hindu law, to which the parties belong, the property of a joint Hindu family passed on the death of one of the members not by succession, but by survivorship and that the surviving member of a family was not an heir to the deceased, and was therefore not a person to whom Letters of Administration could be granted.

The learned Judge did not deal in his judgment with special cases in which the general rule as to the grant of Letters is not followed. His finding was merely to the effect that in such a case, the surviving member of a joint family was not a person to whom Letters could be granted, under the provisions of S. 218, Succession Act. The section lays down that:

"If the deceased has died intestate, administration of his estate may be granted to any person who according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate."

A large number of decided cases have been cited to us on the subject. The majority of these cases deal with the question of Court-fees payable on the grant of Probate or Letters of Administration and are not therefore directly applicable to the point at issue in the present case.

In *In the goods of Pokurmall Augurwallah* (1), an application was made for probate of the will of a Hindu who was governed by the Mitakshara law. During his life, the testator had purchased certain property out of the income of the ancestral estate. It was held that, although the property vested in the members of the joint family as tenants-in-common it vested in them as trustees for all the coparceners and that all the property surviving in the estate of the deceased was property held by him in trust and therefore not liable to duty. *In the matter of Dasu Manavala Chetty* (2) a different view as to the payment of Court-fees was taken. In that case the deceased died intestate and Letters of Administration was applied for. It was held that Court-fees must be paid on the share which the deceased was entitled to claim by survivorship. In the case of *Kashinath Parsharam* v. *Gouravabai* (3), an application was made for the will of a joint Hindu family and it was claimed that Court-fees were not payable. It was held that what had to be looked at in such cases was the estate actually specified in the will and not the estate which could legally be disposed of by the will. It was therefore held that the full Court-fees were payable. In *Keshavlal Punjalal* v. *Collector of Ahmedabad* (4) the question was whether Court-fees were payable on an application for Letters of Administration. In that case it was held that where an estate consists of a share of a Hindu joint family property no Court-fees were payable.

In all these cases the sole question for decision by the Court was as to whether Court-fees were or were not payable. In no case had there been any opposition to the grant of Probate or Letters of Administration. *In the matter of Dasu Manavala Chetty* (2) Miller, J., did state in his judgment:

"I have no doubt that the appellant is a person to whom Letters of Administration may be granted under S. 23, Probate and Administration Act."

But this point was not really a point for decision in the case and was dealt with very shortly.

We have been referred to the dictum of the Privy Council in the case of *Brij Narain* v. *Mangla Prasad* (5). At p. 103 (*of 46 All.*) of the judgment in that case their Lordships averred:

"It is true that the point was not actually taken so far as appears in any of these cases but when a long series of cases extending over a long period of time, when parties were represented by eminent counsel are decided in a way, where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad."

It is suggested that, as in all these cases, which were decided under the Court-fees Act, Probate or Letters of Administration were actually granted and no objection was raised to their grant, the cases are all in favour of the view that the grant of Probate or Letters could legally be made. We do not think that there is very much force in this suggestion. In none of these cases cited, does it appear to us that there was any one interested in opposing the grant of Probate or Letters. In no case were the parties represented by eminent counsel, whose cases would have served by raising a plea that the grant of Letters or Probate could not be made. We do not therefore think that these cases are of very much assistance to us for the decision of the present case.

A case which appears to us to be more relevant is that of the *Bank of Bombay* v. *Ambalal Sarabhai* (6). In that case a suit was filed by the son of a deceased Hindu, with whom he was joint and undivided against the Bank of Bombay to have certain shares in the Bank transferred to his name, from that of his father as the sole surviving coparcener. Under S. 23, Presidency Banks Act 1876, when by the death of any proprietor or shareholder his stock or shares shall devolve on his legal representative, the Bank shall not be bound to recognize any legal representative of such proprietor or shareholder, other than a person who has taken out from a Court having jurisdiction in this behalf probate of the will or Letters of Administration to the estate of the deceased. It was contended on behalf of the Bank that under his

(1) [1896] 23 Cal. 980=1 C. W. N. 31.
(2) [1910] 33 Mad. 93=4 I. C. 1064=19 M. L. J. 591.
(3) [1915] 39 Bom. 245=28 I.C. 473=17 Bom. L.R. 169.
(4) A. I. R. 1924 Bom. 228=48 Bom. 75 (F.B.).

(5) A. I. R. 1924 P.C. 50=46 All. 95 =51 I. A. 129 (P.C.).
(6) [1900] 24 Bom. 350=2 Bom. L. R. 367.

section they were not bound to recognize the plaintiff, unless he took out Letters of Administration. The trial Judge held that the property of a joint undivided Hindu family did not on the death of a member of that family devolve on his legal representative, and that this section was therefore no bar to the bringing of the suit. But on appeal this view of the law was held to be incorrect. In the course of the judgment in the appeal Court which was delivered by Jenkins, C. J., the following passage occurs :

"It is said that inasmuch as the beneficial interest in the share passed by survivorship, the share would not according to the words of the section, vest in the executor or administrator. But this argument is founded on an obvious fallacy, it confuses the legal title and the beneficial interest, and assumes that because the beneficial interest has survived, the legal title must follow suit. But as I have pointed out, it is with the legal title alone that we are concerned, and that has not survived. We have not at present to consider in what way representation should be taken out or what duty should be paid ; it is sufficient to hold, as in my opinion we should, that the present is a case in which S. 23, Presidency Banks Act, applies, and that, if the Bank so requires, Probate or Letters of Administration must be produced."

There is no direct finding here on the question of law now before us. although difficulties might well arise out of this decision in the case of a joint Hindu undivided family, if the surviving members of the family were not competent to take out Letters of Administration. The difference here is pointed out between the legal title and the beneficial interest and it may be argued on behalf of the appellant that, although the beneficial interest in the property passes by survorship, the legal title vests in the legal representative of the deceased. It does not seem to us, however, that this would help the appellant in the present case. It may be a good argument in favour of the view that Letters of Administration can be taken out in respect of an undivided joint Hindu family estate, But it by no means necessarily follows that a surviving member of that joint family is one of the persons entitled to Letters.

Three cases have been cited to us, which directly supports the view of law taken by the trial Judge. In the case of *Kali Kumar* v. *Mt. Munabati Kumari* (7) it was held that a member of a joint Hindu family could not apply for Letters of Administration to the estate of the deceased member of that family. The judgment of the Court in that case is very short and it does not seem to have been reported in an official report of the Court. A similar view was, however, taken by the original side of this Court in *Ramagiri Guruvaya Naidu* v. *Govindammah* (8). In the course of his judgment in that case Beasley, J remarks,

"In this case, according to Mr. Naidu the property is the property of the joint Hindu family and he is not claiming therefore any property of the deceased but is disputing his right to deal with his property as his own. He has not therefore such an interest in the estate of the deceased as entitles him either to oppose a grant of Letters of Administration to the alleged son or himself to ask for Letters of Administration."

And a similar view was taken by the Chief Court of the Punjab in the case of *Mt. Uttam Debi* v. *Dina Nath* (9). It appears therefore that such direct authority as there is on the point before us for decision supports the view taken by the learned trial Judge.

The only person entitled to the grant of Letters under S. 218, Succession Act, is one, who according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of the such deceased's estate and the question is whether the surviving member of a joint undivided Hindu family is entitled to any part of the estate of a deceased member of that family. The view taken by the Chief Court of the Punjab, and by Beasley, J of this Court in the two cases to which we have referred was that the surviving member would not be entitled to the whole or any part of the deceased's estate, because on the death of the deceased no estate in the joint family property remained in him at all, such estate as he had previously held passed at once to his survivors on his death.

The general principles applicable in Hindu Law in such cases are explained in Mayne's Hindu Law, S. 246 :

"There is no such thing as succession properly so-called, in an undivided Hindu family. The whole body of such family consisting of males and females, constitute a sort of corporation, some of the members of which a. coparceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance. In Malabar and Canara, where partition is not

(7) A. I. R. 1923 Pat. 96.

(8) A. I. R. 1924 Rang. 329.

(9) [1919] 56 P. R. 1919=51 I. C. 651.

allowed, the idea of heirship would never present itself to the mind of any member of the family. Each person is simply entitled to reside and be maintained in the family house, and to enjoy that amount of affluence and consideration which arise from his belonging to a family possessed of greater or less wealth. As he dies out his claim ceases, and as others are born their claim arises. But the claims of each spring from the mere fact of their entrance into the family, not from their taking the place of any particular individual; deaths may enlarge the beneficial interest of the survivors, by diminishing the number who have a claim upon the common fund, just as births may diminish their interest by increasing the number of claimants. But although the fact that *A* is the child of *B* introduces him into the family, it does not give him any definite share of the property, for *B* himself has none. Nor upon the death of *B* does he succeed to anything, for *B* has left nothing behind to succeed to. Now in every part of India where Mitakshara prevails the position of an undivided family is exactly the same, except that within certain limits each male member has a right te claim partition, if he likes. But until they elect to do so, the property continues to devolve upon the members of the family for the time being by survivorship and not by succession."

We do not understand the correctness of these principles to be questioned. A member of an undivided Hindu family during his life is entitled to the beneficial interest in the family estate, but on his death that interest immediately ceases, and the whole beneficial interest in the estate belongs to the other members of the family. There is no succession to the deceased's estate, because he has left nothing to succeed to. No part of the joint family estate is therefore the deceased's estate within the meaning of S. 218, Succession Act, and it therefore seems to us to follow that a member of a joint undivided Hindu family is not as such a person entitled under S. 218 to an administration of the estate of a deceased member of the family. It may be as suggested by the judgment of Jenkins, C. J., in the case of *Bank of Bombay* v. *Ambalal Sarabhai* (6) that there is no certain legal title of the deceased which remains in existence after his death and vests in his legal representatives. But if that is so, it is not a member of the family estate who obtains that title as such but his heir, and we do not understand it to be disputed that for the purposes of the Succession Act the heir in the present case is the widow or his daughter and not the appellant. If therefore there is a legal title still surviving, that is not property to which the appellant as a member of the joint undivided family is entitled, we are therefore of opinion that the general question has been correctly answered by the learned trial Judge.

It has been suggested that even though we hold that the appellant is not entitled to Letters under S. 218, his claim should nevertheless be considered under S. 250 or 254. S. 250 hardly seems to us to be applicable to a case of the present kind. It may be that the appellant could have made out a case for the grant of Letters of administration under S. 254. It is pointed out to us on behalf of the respondents what the appellant really wants to claim is entirely opposed to the interests of the estate of the deceased. He claims that the property is his and does not belong to the estate at all. If that be so, there are obvious objections to his being made the legal representative of the deceased. It is possible that circumstances might arise in which it would be necessary to override these objections and grant of Letters of Administration to the survivor of a joint family, but it does not seem that these questions properly arise in the present case.

The application for Letters was clearly filed under the provision of S. 218, Succession Act. The appellant claimed to be entitled to administration of the estate as of right. He did not claim that such special circumstances existed that the ordinary rule should not be followed and that S. 254 should be applied. The case in the trial Court appears to have been decided by consent on the issue of law, which was framed, and we do not think that the appellant should be allowed to make out a fresh case for himself now.

The result is that we see no sufficient reason to interfere with the orders passed by the trial Court and we dismiss the appeal with costs.

R.K. *Appeal dismissed.*

** A. I. R. 1929 Rangoon 102
Full Bench

ROUTLEDGE, C. J., CARR AND BROWN, JJ.

Commissioner of Income-tax

v.

Chan Lo Chwan—Assessee.

Civil Misc. Application No. 13 of 1928, Decided on 18th February 1929.

(a) Income-tax Act, (11 of 1922), S. 66—High Court cannot interfere with finding of

fact regarding completeness or genuineness of statement.

Whether a statement given by the accused is incomplete and fraudulent or not, is a question of fact for the determination of the Income-tax authorities and not a question on which High Court can interfere. [P 103 C 1,2]

** (b) Income-tax Act (11 of 1922), S. 13 —Assessee not making honest statement—Random assessment can be made.**

If an assessee does not choose to make an honest statement of account, so that the amounts of profits may be strictly determined, he cannot complain if a random assessment is made upon him: *Macpherson* v. *Moore*, 6 *Tax Cases at* pp. 114, 115 *Rel. on.* [P 103 C 2]

** (c) Income-Tax Act, (11 of 1922), S. 23 (2)—Income-tax officer not satisfied that statement is genuine or complete—Notice stating particulars and grounds of objections should ordinarily issue—Assessee persistently making false returns—Such notice is not obligatory.**

In an ordinary case, particulars in respect of which and the ground on which the Income-tax officer thinks that the statement was either not genuine or complete ought to be given in a notice, especially in cases where the objection is that the accounts are incomplete. But where the finding is that the accounts of the assessee in previous years as well as in the current year were not genuine but merely cooked for Income-tax purposes, the Income-tax officer is under no obligation either in law or in common fairness to set out all the reasons which led him to come to such a conclusion. [P 104 C 1]

Govt. Advocate—for Commissioner.

Cowasjee & Daniel—for Assessee.

Judgment.—In compliance with an order of this Bench, in Civil Miscellaneous Case No. 13 of 1928, the Commissioner of Income-Tax, Burma has stated a case on the following points of law:

Can an Income-Tax Officer having rejected the accounts of an assessee as not being genuine proceed to make an assessment (1) on insufficint material and (2) without giving notice of his dissatisfaction to the assessee under S. 23 (2) of the Act?

In his statement of the case, the Commissioner reviews the circumstances attending the assessment of the present respondent, since the year 1922-23. From this, it appears that the accounts at any rate since the year 1924-25 have been rejected as incomplete and fraudulent and merely made up for Income-Tax purposes. The Commissioner sets out the grounds on which the Income-Tax authorities were satisfied that the statement of account was incomplete and fraudulent and we consider that they had good grounds for forming such an opinion. Whether the statement is incomplete and fraudulent or not is a question of fact for the determination of the Income-Tax authorities and not a question on which this bench can interfere and indeed from the wording of the reference this seems to be taken for granted as it assumes that the Income-Tax Officer was within his rights in rejecting the accounts as not being genuine.

The first question then is: Can he proceed to make an assessment on insufficient material? We think on this point the quotations which the Commissioner has made from the case of *Macpherson & Co.* v. *Moore* (1) are very much to the point. In that case, no doubt MacPherson & Co., had failed to make any return but we quite fail to see why a party who has made a false return should be in a better position than one who has failed to make any return. Mr. Cowasjee urges that S. 13 only applies to the method and does not empower the Income-tax authority in any way. We cannot see any such limitation in the words of the proviso, which runs as follows:

"Provided that if no method of accounting has been regularly employed, or if the method employed is such that in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be detected therefrom, then the computation shall be made on such basis and in such manner as the Income-tax Officer may determine."

In this case the Income-tax Officer clearly considered that the income, profits and gains could not properly be detected from the respondent's statement, since he decided that that statement was not genuine. He was consequently entitled to adopt whatever method he thought best. Adapting the words of the Lord President in *Macpherson's* case already alluded to:

"If Chan Lo Chwan does not choose to make an honest statement of account, so that the amounts of profits may be strictly determined, he cannot complain if a random assessment is made upon him by the Crown."

For years, according to the Commissioner the firm has made defective and dishonest returns for the purpose of income-tax, and it is to be hoped that it will at last dawn upon them that honesty is the best policy and that this Court will not aid them in reducing the administration of the Income-tax law to a nullity.

The second question in the reference is: "Can the Income-tax Officer make an assessment without giving notice of his dissatisfaction to the assessee under S. 23 (2) of the Act?"

(1) [1913-16] 6 Tax Cases at pp. 114 & 115.

On this point the Commissioner states that two notices were issued under S. 23 (2) and also an informal notice requiring the assessee's attendance. The assessee was examined on two occasions and his statements were recorded. He admits that the assessee was not questioned on the specific points which form the grounds for the officer rejecting the accounts. The controversy on this point seems to come to this : For the assessee it is urged that the Income-tax Officer should give him particulars in respect of which and the grounds on which he thinks that the statement was not genuine, or on which it is incomplete. We may say that there is no such provision in the Act, and that the Government Advocate's observation that it was a matter for the legislature rather than the Court seems to be justified. In an ordinary case, we have no hesitation in saying that such particulars ought to be given in a notice, especially in cases where the objection is that the accounts are incomplete. Here, however where the finding is that the accounts of the assessee in previous years as well as in this year were not genuine but merely cooked for Income-tax purposes, we do not consider that the Income-tax Officer was under any obligation either in law or in common fairness to set out all the reasons which led him to come to such a conclusion. We accordingly agree with the answers given by the Commissioner in respect of both questions and we order the respondent to pay the Commissioner's costs seven gold mohurs.

M.N./R.K. *Reference answered.*

A. I. R. 1929 Rangoon 104

MAUNG BA, J.

Ma Than Yin and *another*—Appellants.

v.

Sena Mahomed—Respondent.

Special Second Appeal No. 412 of 1928, Decided on 20th February 1929.

Civil P. C., O. 21, R. 63—After applying for removal of attachment, O. 21, R. 63 applies for declaratory suit, and not Specific Relief Act, S. 42.

Where a party has applied for removal of attachment from his share, the only remedy left is to file a declaratory suit under O. 21, R. 63 and not a suit under Specific Relief Act, S. 42: *A. I. R.* 1924 *Rang.* 42 and *A. I. R.* 1926 *Rang.* 124, *Foll.* [P 104 C 2]

S. T. Leong—for Appellants.

P. S. Sen—for Respondents.

Judgment.—Appellant Ma Than Yin is the daughter of U. Tha Aung by his first wife Ma Yin Kywe, and appellant Ma Than Shwe is the daughter of U. Tha Aung by his second wife Ma Thaing Chon married Ko Po Min.

Respondent Sena Mahomed obtained a decree against Ma Thaing Chon and her second husband Ko Po Min, and in execution of that decree attached a house and site. Appellants claimed that the said house and site was the *hnapazone* of U Tha Aung and his first wife Ma Yin Kywe and in Civil Misc. Nos. 18 and 19 of 1926 applied for the releasing of their shares in that property from attachment. For Sena Mahomed it was contended that questions of title could not be gone into in such cases, but that the claimant's proper remedy was to file a declaratory suit. By consent the applications were accordingly dismissed without costs on 26th July 1926. The two appellants did not file their declaratory suit (13 of 1928) till the 27th January 1928. No consequential relief was asked for. An objection was raised on two grounds: (1) that the suit was time barred under Art. 11, Lim. Act and (2) that the suit was not maintainable, as no consequential relief was asked for. The Township Judge overruled both the objections. The Additional District Judge took a different view. He held that the suit must be treated as one under O. 21, R. 63 Civil P. C., and not one under S. 42, Specific Relief Act, and that Art. 11, Lim. Act should be applied.

Had appellants not applied for removal of attachment from their shares, they would have been at liberty to bring a suit under S. 42, Specific Relief Act, as they would then be claiming a declaration of their own right to property. Since there had been a claim under O. 21, R. 58, Civil P. C. the only remedy left was to file a declaratory suit under R. 63, of that order. This view is supported by *Pya On Mg* v *Ma Hla Kyu* (1) and *K. R. N. A. Firm* v. *Po Thein* (2).

The decision of the District Court was correct and this appeal is accordingly dismissed with costs.

P.D./R.K. *Appeal dismissed.*

(1) A. I. R. 1924 Rang. 42=1 Rang. 481.
(2) A. I. R. 1926 Rang. 124=4 Rang. 22

*** A. I. R. 1929 Rangoon 105**

BROWN, J.

Lan Tin Ngan—Applicant.

v.

Ma Mya Kyin—Respondent.

Civil Revn. No. 152 of 1928, Decided on 6th February 1929, against order of Dist. Judge.

*** (a) Civil P. C., O. 43 (1) (w)—Appeal must be confined to grounds allowed under R. 7, O. 47.**

Although an appeal lies against an order granting a review application that appeal can only be entertained on one of the grounds set forth in R. 7, O. 47: *A. I. R.* 1927 *Lah.* 435; 41 *Cal.* 746; *A. I. R.* 1928 *Rang.* 177, *Foll.* [P 106 C 1]

(b) Civil P. C., O. 47, R. 7—Scope—Allowing appeal on any other ground is acting without jurisdiction and is liable to be set aside in revision.

The contention that if the Court wrongly applies the provisions of R. 1, the Court has acted in contravention of the provisions of R. 4 cannot be upheld if after bearing in mind provisions of R. 1 the Court is of opinion that the application should be granted, the granting of the application is not in contravention of the provisions of R. 4 even though the Court has taken a wrong view as to the meaning of R. 1. Order allowing appeal on any other ground is acting without jurisdiction and is liable to be set aside in revision. [P 106 C 2 ; P 107 C 1]

P. B. Sen—for Applicant.

B. K. B. Naidu—for Respondent.

Judgment.—The petitioner Lan Tin Ngan brought a suit against the respondent as legal representative of her deceased husband Maung Po Tu for possession of certain property. The suit was dismissed by the trial Court, and the petitioner then filed an application for review of judgment. This application was allowed by the trial Court. The respondent appealed to the District Court and that Court holding that no sufficient cause for review had been established set aside the order granting the review. The petitioner now seeks to have the District Judge's order set aside in revision, and the main ground taken is that the order was passed without jurisdiction.

Under the provisions of R. 1 (w), O. 43, Civil P. C., an appeal lies from an order under R. 4, O. 47 granting an application for review. But O. 47, R. 7 provides that an order granting an application may be objected to on the ground that the application was :

"(a) in contravention of the provisions of R. 2;

(b) in contravention of the provisions of R. 4, or

(c) after the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

It is contended on behalf of the petitioner that O. 43, R. 1 (w), must be read with R. 7, O. 47, and that an appeal against an order granting an application for review only lies on one of the grounds set forth in R. 7. The authorities are not unanimous on this point. But with the exception of the High Court of Bombay, the general consensus of opinion appears to be in favour of the view now urged on behalf of the petitioner.

A number of cases have been cited to me, but the case in which the matter has been most fully discussed is perhaps the case of *Sikandar Khan* v. *Baland Khan* (1). It was there pointed out that if an unrestricted right of appeal lay under O. 43, the provisions of R. 7, as to the grounds on which an order granting a review could be objected to were unnecessary, and it was held that if the two rules were read together there was no necessary inconsistency. R. 7 lays down that the objections referred to therein may be taken either in an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit, and the presumption to be drawn from these provisions is that the legislature intended that in any case where such objection was not taken the order granting the review should be final. In the Code of 1882, there was no section corresponding to R. 1 (w), O. 43 and had the legislature intended by the new Code of 1908, to modify the law as previously laid down in R. 4, O. 47, they could easily have done so, by amendment of that rule. The earlier rule in the present Code allows an appeal against an order granting the review, but the latter rule while still allowing an appeal lays down that in that appeal certain specific grounds may be taken. It does not seem to me that there is necessarily any inconsistency between these two rules. The restriction on the right of appeal contained in R. 7 applies not only to an appeal from the order granting the review application, but also to an appeal from the final decree or order

(1) A. I. R. 1927 Lah. 435=8 Lah. 617.

passed or made in the suit, and the effect of the rule is that subject to the specific grounds which may be taken by way of appeal under that rule the order granting the review application is final. The appeal which is allowed in the earlier O. 43 must be treated as subject to this specific provision of this rule.

The same view of the law was taken by the High Court of Calcutta, in the case of *Hari Charan Saha* v. *Baran Khan* (2) and a number of other authorities to the same effect are quoted in *Sikandar Khan's* case (1). The High Courts of Madras, Allahabad, and Patna have decided in the same way and the decision of the Bombay High Court to the contrary does not appear to have been published in the official reports of that Court. My brother Carr expressed himself in favour of this view of the law in the case of *A. T. K. P. L. M. Muthu Pillay* v. *Lakshiminarayan* (3). I am of opinion that the contention of the petitioner on this point must be upheld, and that although an appeal lies against an order granting a review application that appeal can only be entertained on one of the grounds set forth in R. 7, O. 47, Civil P. C.

It is suggested on behalf of the respondent that even if this view of the law be accepted, nevertheless the words in R. 7 "in contravention of the provisions of R. 4" are sufficiently wide to cover any objection taken under the provisions of R. 1. I find myself unable to accept this suggestion. No authority has been cited in favour of it, and it appears to me to be against the clear wording of the rule. R. 4 (1) need not be considered, that merely deals with the rejection of an application. R 4 (2) lays down that:

"where the Court is of opinion that the application for review should be granted, it shall grant the same, provided that

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear, and be heard in support of the decree or order, a review of which is applied for and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

The suggestion is that, if the High Court wrongly applies the provisions of R. 1, the Court has acted in contravention of the provisions of R. 4. But I am unable to see how this contention can be upheld. Under R. 4 (2) if the Court is of opinion that the application for review should be granted, it is bound to grant the same. In deciding whether the review should be granted, the Court must bear in mind the proviso of R. 1. But if after bearing in mind these provisions the Court is of opinion that the application should be granted, the granting of the application is not in contravention of the provisions of R. 4, even though the Court has taken a wrong view as to the meaning of R. 1. There can be no doubt in the present case, that the trial Court was of opinion that the application for review should be granted. There was therefore no contravention of the first part of Cl. 2, R. 4, and the only way in which the provisions of this rule could have been contravened would be by contravention of the provisions specificially laid down in the proviso to the rule.

The other grounds under which objection may be taken are:

(a) that the application was in contravention of the provisions of R. 2,

that is to say, that if the application was made to a Judge other than the Judge who passed the order sought to be reviewed, it can be made only on certain restricted grounds. The application in the present case was made to the Judge, who heard the case, and an objection on this ground could not have been taken, nor was there any suggestion that the application for review was made after the expiration of the period of limitation prescribed therefor. The District Judge had therefore jurisdiction to entertain the appeal only on the ground that one of the provisions of R. 4 had been contravened.

It is not suggested that proviso (a) has been contravened, or that the opposite party was not served with a notice of the application, nor was the application for review granted on the ground of discovery of new matter or evidence. One of the grounds on which review was asked for was that the applicant had been unable to produce a certain sale-deed at the hearing, but it was not on that ground that the application was granted. The learned Judge held that he had been in error in deciding the suit without considering the admission in argument on behalf of the defendant that the land had been adjudged in other litigation to be-

(2) [1914] 41 Cal. 746=25 I. C. 903.
(3) A. I. R. 1928 Rang. 177=6 Rang. 254.

long to the plaintiff. The learned Judge finally says :

"A review of judgment may be granted for the ends of justice, where there is an error of law on the face of the judgment, or whenever the Court considers that it is necessary to correct an evident error or omission whether on any ground urged at the original hearing of the suit or not. In the present case I do not think the applicant was given a fair chance to prove his case and in order to meet the ends of justice, I am of opinion that the application for review of judgment should be granted."

This may not have disclosed sufficient reason for granting a review under R. 1, but it is clear that it was not on the ground of discovary of new matter or evidence which the applicant alleged could not have been adduced by him when the original decree was passed, that the application was allowed. The District Court set aside the order granting the review, because it held that the reason for which the review was granted was not sufficient reason within the meaning of O. 47, R. 1. In dealing with the appeal that Court was not considering any objection that could have been taken raised under the provisions of R. 7 and the Court was therefore in my opinion acting without jurisdiction in setting aside the order granting the review.

I therefore set aside the decree of the lower appellate Court, and restore those of the trial Court granting the review. The respondent, Ma Mya Kyin, will pay the costs of the petitioner, Lan Tin Ngan in this Court and in the District Court. Advocate's fee in this Court to be two gold mohurs.

V.V. *Revision allowed.*

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* A. I. R. 1929 Rangoon 107

CHARI, J.

V. M. R. V. Chettyar Firm—Plaintiff.

v.

Asha Bibi and *others*—Defendants.

Civil Suit No. 356 of 1928, Decided on 25th January 1929.

(a) Mahomedan Law—Heirs in possession only mortgaging deceased's property—Debts beneficial to estate—Mortgage would bind all heirs.

The heirs of a deceased Mahomedan actually in possession of his property can create a valid mortgage of the property which would bind all the heirs, if the money is borrowed for purposes necessary or beneficial to the estate. [P 107 C 2]

*** (b) Transfer of Property Act, S. 59—Title-deeds already in creditor's possession continuing to be held as security for further loan—Equitable mortgage is created by constructive delivery.**

Where title-deeds already in the possession of the creditor are agreed to be held by him as security for further advance, there was constructive delivery of the title-deeds which would be sufficient to create a valid equitable mortgage : 25 *Cal.* 611 and *Ex parte Kensington*, (1813) 2 *V. & B.* 83, *Rel. on.* [P 108 C 2]

Aiyanger—for Plaintiff.

Rauf and *Ganguli*—for Defendants.

Judgment.—This is a suit by the plaintiff Chettyar firm to enforce an equitable mortgage alleged to have been created by four persons one of whom is personally a party and the others, represented by their direct or indirect legal representatives of the persons who had executed the note, are Shaik Ali Mahomed, a paternal uncle of one Shaik Ismail, Ameerana Bibi, the mother of the said Ismail, Sahara Bibi, a widow of the said Ismail and Shaik Ahmed, another paternal uncle of the same person. These four persons are undoubtedly heirs of Ismail and entitled to a fairly large share in his estate.

Ismail died on 6th May 1923. On 2nd June 1923 all these persons executed a promissory note for Rs. 1,000 in favour of the Chettyar. The promissory note recites, what I have no doubt is, the fact that the amount was borrowed for the funeral and only the 40th day feeding expenses of Shaik Ismail.

It is alleged that there are certain other heirs who have not been made parties to the suit. There are rulings both of this Court and of the Indian High Courts, which show that the heirs of a deceased Mahomedan actually in possession of his property could create a valid mortgage of the property, which would bind all the heirs, if the money was borrowed for purposes necessary or beneficial to the estate. If, therefore, the money had been borrowed for that purpose, the transaction would bind the other heirs ; but unfortunately they have not been made parties to this suit, and the learned advocate for the plaintiff does not want leave to amend the plaint or make them parties so as to bind their interest. Their interest, whatever it might be, will, therefore, not be bound by the decree which will be passed in this suit.

The suit is defended by defendant 1, a daughter of Ameerana Bibi,

Abdul Rashid, son of Sabiran Bibi, Hajee Munshi Abdul Aziz, husband of the same lady. Abdul Rahman, the 2nd husband of Sahara Bibi, the widow of Ismail and Amina Bibi, minor daughter of the said Sahara Bibi. All the persons defending the suit are thus not persons who had executed the promissory note, but they are legal representatives. The parties were at issue on many points which were not correctly represented by the issues I had raised.

The execution of the promissory note and the creation of the equitable mortgage were not admitted. The validity of the creation of an equitable mortgage was also denied and a question was also raised as to whether a sum of Rs. 15 was paid on 21st April 1926, as alleged by the plaintiff. The significance of the last point is that I had raised an issue as to whether the plaintiff would be entitled to a money decree if I hold that there was no valid equitable mortgage. A question was also raised as to, if I held that there was a valid equitable mortgage and if the security was found to be insufficient to discharge the debt what reliefs the plaintiff would be entitled to.

As regards the first point, I am satisfied that these four persons did execute the promissory note. The evidence of Raman Chettyar, who was the agent of the firm at that time, is quite clear and I accept his evidence on this point ; and coupled as it is with the inherent probability I have no doubt that these four persons did execute the promissory note. It will also be noticed that Shaik Ali Mohamed, one of the actual executant of the note had not defended the suit ; nor has he given any evidence.

As regards the creation of the equitable mortgage, there has been no deposit of title-deeds. The title-deeds had already been deposited by Shaik Ismail in respect of a debt contracted by him. It is alleged by Raman Chettyar that these four persons agreed he should hold the title-deeds already deposited by Shaik Ismail as security for the sum of Rs. 1,000, which was then being advanced. There can be no doubt that such an agreement was entered into. The entry in the Chattyar's books of that day's transaction in question clearly shows that he advanced them the money on the agreement that the title-deeds already deposited by Shaik Ismail should also be held as security for this further advance. I, therefore, hold that the four executants of the promissory note as a matter of fact agreed that the plaintiff should hold the title-deeds deposited by Shaik Ismail as security for the new debt.

The real point for the consideration and about which there is some difficulty is as to the legal effect of such an agreement. There has not been any actual deposit of title-deeds. The English cases which proceed on the theory that a deposit is a part performance of an agreement to mortgage are not very helpful in a case of this kind where there is a clear provision in the Act itself. S. 59, T. P. Act, enacts that nothing in that section shall be deemed to render invalid mortgages made in certain towns by delivery to a creditor or to his agent of documents of title to immovable property, with intent to create a security therein. Three things are therefore, essential. There must be : (a) a delivery to a creditor ; (b) of documents of title, and (c) with intent to create a security. If the word "delivery" is construed strictly, there has been no actual physical delivery in this case. But this is not necessary, because there may be constructive delivery. In the case of *Girendro Coormar Dutt* v. *Kumud Kumari Dasi* (1) where a mortgagor, who had executed a registered mortgage, agreed with the mortgagee that he should hold the title-deeds already handed to him as security for a further advance, Mr. Justice Sale, after citing the English case of *ex-parte Kensington* (2), held that such an agreement would create a vaid equitable mortgage. In such cases it may be assumed that the parties agreed to treat the title-deed as having been handed back to the mortgagor and re-handed to the mortgagee. It will be idle to go through purely a form when the agreement itself is quite clear. I see no objection therefore to treat such an agreement as a constructive delivery of the title-deeds to the creditor. The documents of title in this case however, are not the documents relating to the title of actual mortgagor but documents showing the title of their ancestor.

(1) [1898] 25 Cal. 611=2 C. W. N. 356.
(2) [1813] 2 V & B 83.

I had some difficulty as to whether a delivery of documents of title which do not show the title of the mortgagor could be deemed to create an equitable mortgage; but in this case it is quite clear that the parties actually intended to create an equitable mortgage, which should affect the estate of Shaik Ismail. The money was borrowed as is stated in the promissory note itself for his funeral expenses and their intention clearly was to create a mortgage which would be binding on the whole estate, so that though the document deposited is document showing the title of the deceased Shaik Ismail, it was within the competence of his legal representative to re-deposit it constructively by entering into an agreement to create a security therein. The intention to create a security is perfectly clear from the entry in the Chettyar's book itself.

The decree in the present suit cannot bind the interest of the heirs who are not parties, but as the transaction undoubtedly was intended to bind the shares of the actual executants of the promissory note along with the shares of the others, a decree can be made which will bind their share in the property.

As regards the payment of the sum of Rs. 15 the question does not directly arise now and will be only relevant when after the property having been sold it is found that the proceeds are insufficient to pay the decretal amount. But as all the evidence has been before me, I shall shortly give my finding on that point also.

It is alleged that on 21st April 1926 a sum of Rs. 15 was paid towards the promissory note. The plaint is vague. It does not say who paid this amount but in answer to the interrogatories administered, it is stated that Sabiran Bibi and Asha Bibi made the payment. It is alleged that the payment made to the Chettyar are entered in a small book and that this sum of Rs. 15 does not appear in that book. But that opens with payments of Rs. 68 made towards the debt of Ismail and was apparently confined to payments of that debt. The absence of any entry in that book in respect of this debt does not in any way derogate from the statement of the plaintiff that this sum was received. Asha Bibi has given evidence to the effect that she has not made any payment of Rs. 15 directly or indirectly. She admits, however, that her son used to go and make payments and that her son might have paid this amount on her behalf. If the payment was not actually made by Sabiran Bibi and Asha Bibi and if the Chettyar wanted to set up a false claim, he could easily have stated that the legal representatives of the other executants and the surviving executant also made the payment. The sum of Rs. 15 is entered in the day book of the Chettyar firm. It is a matter of common knowledge that it is impossible to interpolate in the account books of the Chettyar firm except by re-writing the whole account books. If therefore this entry were made with fraudulent intention of saving limitation, it must have been made three years before the Chettyar firm actually filed the suit with an eye to the future. There is no reason to suppose that the Chettyar firm anticipated at that time that it might have to file a suit after the period of limitation.

The reasonable assumption is that the Chettyar firm waited to file the suit for some time because there was a payment which saved limitation. I therefore hold that the sum of Rs. 15 was paid towards interest by Sabiran Bibi and Asha Bibi. (The judgment here discusses evidence and holds that the sum of Rs. 15 was paid towards interest by Sabiran Bibi and Asha Bibi. It then proceeds.) The point whether this payment will bind the other executants or not need not be considered at this stage and can be disposed of when an application is made for a personal decree after the sale of the mortgaged property. There will therefore be the usual mortgage decree in favour of the plaintiff Chettyar firm with interest and costs. Six month's time is allowed for redemption.

S.N./R.K. *Suit decreed.*

A. I. R. 1929 Rangoon 109

Otter and Pratt, JJ.

U Po Hnit and *another*—Appellants.

v.

Mg. Bo Gyi and *others*—Respondents.

Civil Misc. Appeal No. 37 of 1928, Decided on 7th January 1929, against order of Dist. Judge, Lower Chindwin, D/- 23rd June 1928.

Succession Act (39 of 1925), Ss. 299 and 292—Orders passed by District Judge under Succession Act (e.g. one under S. 292) are appealable—Civil P. C., S. 104.

Orders passed by the District Judge under the Succession Act (e.g. order under S. 292) are appealable to the High Court and such appeals are governed in procedure by the provisions of the Civil P. C. relating to appeals: 39 *Cal.* 563, *Doubted* and *Dist.*; *A.I.R.* 1924 *Rang.* 237, *Cons.* [P 110 C 1]

Sanyal—for Appellants.

Gyaw—for Respondents.

Judgment.—This is an appeal against the order of the District Court, Monywa, assigning a security bond under S. 292, Succession Act. A preliminary objection has been taken that no appeal lies, relying on the Calcutta ruling in *Kulimuddin* v. *Meharui* (1), to the effect that no appeal lies against an order by a District Judge, assigning an administration bond under S. 79, Probate and Administration Act. This ruling was not accepted by this Court in *Haji Pu* v. *Tin Tin* (2) where it was held that an appeal lay from an order of a District Judge granting permission to an administrator to sell immovable property.

Even accepting the construction placed upon S. 86, Probate and Administration Act in *Kulimuddin* v. *Meharui* (1), that the words

"under the Rules contained in the Code of Civil Procedure applicable to appeal"

mean that only such appeals lie as are provided for in the rules under the Civil Procedure Code, it has to be remembered that the wording of S. 299, Succession Act, is different. In that section it is laid down that every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provision of the Code of the Civil Procedure Code, 1908, applicable to appeals.

The clear meaning of this section is that appeals shall lie from the orders of District Judge passed under the Succession Act and that such appeals shall be governed in the procedure to be observed by the provisions of Civil Procedure Code. S. 104 of the Code provides that an appeal shall lie from the orders set forth and from no others save as expressly provided in the body of the Code or by any law for the time being in force. The Succession Act is a law in force and, therefore, appeals provided for under S. 299 are recognized by the Civil Procedure Code. There can be no question that the appeal lies. We overrule the preliminary objections. (Here the judgment discussed facts and concluded.) We are of opinion that the bond had ceased to be operative and that the order for assignment was under the circumstances wrong. The appeal will be allowed and the order set aside with costs in both Courts. Advocate's-fee in this Court five gold mohurs.

(1) [1912] 39 Cal. 563=16 C.W.N. 662=13 I.C. 690=15 C.L.J. 332.

(2) A.I.R. 1924 Rang. 237=2 Rang. 117.

S.N./R.K. *Order set aside.*

A. I. R. 1929 Rangoon 110

HEALD, J.

R. M. Subhia Pillay—Appellant.

v.

K. R. V. R. K. R. Subramonian Chettyar—Respondent.

Special Civil Second Appeal No. 455 of 1928, Decided on 12th February 1929.

Provincial Insolvency Act (1920), S. 54—Moveables sold to one creditor in preference to another—Others not injuriously affected—Sale cnnnot be set aside except under S. 54—Transfer of Property Act, S. 53.

So far as moveable property is concerned mere preference of one creditor at the expense of another if he is not injuriously affected will not make the transaction void or voidable under any law except Insolvency law: 30 *Mad.* 6, *Expl.* [P 111 C 1]

Ba Thin—for Appellant.

Kale—for Respondent.

Judgment.—On 3rd December 1926, in Suit No. 223 of 1926 of the Township Court of Thaton, respondent obtained a simple money decree against one Rajama, and in Execution Case No. 325 of 1926 of the same Court he attached a house and its site and a plot of paddy land belonging to Rajama together with the crops standing on that land in execution of that decree. Appellant applied for removal of the attachment on the crops on the ground that he had bought them from Rajama on 29th November 1926 and he succeeded in getting the attachment removed. Respondent then filed a suit under the provisions of O. 21, R. 63, to establish his right to attach the crops. He alleged that the sale to appellant was fraudulent, was intended to delay or defeat his claim as a creditor, was collusive and without consideration, and was void by reason of the provisions of S. 53, T. P. Act. The trial Court held that the sale was good, and dismissed the respondent's suit. Respondent appealed and the

lower appellate Court found that Rajama's intention in selling the crops to appellant was to delay or defeat respondent's claim, and that apppellant was a party to that intention. It held accordingly that no title to the crops passed by the sale and it declared that respondent had a right to attach the crops as belonging to Rajama, his judgment-debtor. Appellant appeals on the ground that his purchase of the crops was made in good faith and for consideration.

It is clear that the provisions of S. 53, T. P. Act, do not apply to the case, since those provisions apply only to transfers of immovable property and under S. 3 of that Act, immovable property does not include standing crops. But the lower appellate Court said that although S. 53 did not apply nevertheless the principles laid down in that section in respect of immovable property are a useful guide to the Courts in dealing with the transfer of moveable property. The learned Judge was presumably following the decision of the High Court of Madras, in the case of *Chidambaram* v. *Sami Aiyar* (1) but assuming that the decision in that case is good law, I do not think that it warrants the learned Judge's decision in this case. In the Madras case it was said that there is nothing in S. 53, T. P. Act "to prevent a creditor (sic) giving a preference, provided nothing more is done by the transaction either with reference to the transferrer or transferee so as to injuriously affect the creditors of the former."

So far as moveable property is concerned there is nothing to prevent preference of one creditor at the expense of another, unless the provisions of the Insolvency law apply to the case, and creditors are left to protect themselves by means of the provisions of law for attachment before judgment. In the present case, there was clearly preference of appellant as a creditor, but mere preference is not sufficient to make the transaction void or voidable. On the question whether or not the transaction between appellant and Rajama affected respandent injuriously, otherwise than as being a preference of appellant, it may be noted that on appellant's own showing the property which he applied to attach for a debt which was ultimately found to be Rs. 373-6-0 consisted of a house, and its site which he himself valued at Rs. 1,000 and a holding of paddy land which he valued at Rs. 3,500 as well as crops in dispute which he valued at Rs. 950. It may be that these properties are subject of other charges, but respondent does not say so, and prima facie, it would appear that the sale of the crops to appellant did not prejudice his chances of recovering his debt of Rs. 373-6-0. Appellant's case was that Rajama owed him Rs. 678 on a promissory note and that he paid Rajama in cash the sum of Rs. 322 which was the balance of the sum of Rs. 1,000 for which he bought the crops, which are now in dispute, as well as four bullocks which he had himself sold to Rajama for Rs. 300, two other bullocks belonging to Rajama, and two carts valued at Rs. 40 or 50 each. Rajama herself said that she paid Rs. 35 for one of the bullocks belonging to her and Rs. 15 for the other and that the four bullocks which she returned to appellant were very thin when she returned them, the suggestion being of course that they were then worth less than Rs. 300 for which she had bought them. The lower appellate Court said that appellant got for the Rs. 1,000 which he was alleged to have paid to Rajama property which was worth at least Rs. 1,660 and that this fact was sufficient to show that the transaction between appellant and Rajama was fraudulent. But even if appellant did obtain from Rajama more than value for his money, and if the decision in the case cited be correct, respondent could not get the transaction set aside unless he could show that he had been injuriously affected by it, and I am not satisfied that he showed that he was so affected. If he had any reason to believe that Rajama's immovable properties were insufficient to satisfy his claim he would naturally have applied for attachment of her moveable properties before judgment. He did not apply to attach them before judgment and so he left Rajama free to dispose of them to her other creditors or otherwise.

I see no reason to think that he is entitled to avoid the transfer of the crops to appellant, and therefore I set aside the judgment and decree of the lower appellate Court and restore the decree of the trial Court dismissing the suit. Respondent will pay appellant's costs in all the Courts. Advocate's fee in this Court to be 5 gold mohurs.

P.D./R.K. *Decree set aside.*

(1) [1907] 20 Mad. (=16 M. L. J. 427.

A. I. R. 1929 Rangoon 112

MAUNG BA, J.

Maung Shwe Hta—Appellant.

v.

Maung An and *others*—Respondents.

Second Appeal No. 189 of 1928, Decided on 20th February 1929.

(a) Buddhist Law (Burmese)—Husband and Wife—Neither can alienate joint property without other's consent.

In the case of Burmese Buddhists so long as marriage subsists the husband or wife cannot alienate their joint property without the consent of the other: (1891) *S. J.* 578 and *A. I. R.* 1927 *Rang* 209, *Foll.* [P 112 C 2]

(b) Transfer of Property Act S. 41—Burmese husband and wife mortgaging joint property by registered deed—Husband sentenced to transporation—Within one month of his departure wife alone selling property for inadequate consideration — Vendee on his part mortgaging it to *S*—Husband on his return getting possession — *S* suing and having in execution himself purchased it taking out delivery-warrant against husband — Husband bringing present suit—*S* was not transferee without notice and there was no estoppel against husband—Evidence Act S. 115.

Property jointly belonging to Burmese husband and wife was mortgaged by them by means of a registered mortgage-deed. The husband thereafter was sentenced to transporation for 10 years and within a month of his departure the wife alone sold the property to the mortgagee for an inadequate consideration. The mortgagee vendee then mortgaged it to *S*. When the husband returned he somehow got possession of the property. *S* then sued on his mortgage, purchased the property in execution, and then took out delivery warrant against the husband who brought the present suit.

Held: that *S* could not be said to be transferee without notice. [P 113 C 1]

Held further: that as the husband was in possession there was no estoppel against him. [P 113 C 1]

Guha—for Appellant.

S. Ganguli and *N. N. Burjorjee*—for Respondents.

Judgment.—This suit paddy land was the joint property of appellant, Maung Shwe Hta and his wife Ma Sin. On 28th March 1908, they mortgaged it without possession for Rs. 600 by a registered deed to Daw Hmo, her son-in-law Maung, Tha Hlaing, and her daughter, Ma Se Mi. On 6th April 1911, Maung Shwe Hta was convicted of dacoity and sentenced to ten years' transporatation. On 1st may 1911 his wife was persuaded to transfer the land to Maung Tha Hlaing by a registered deed. In 1916, Daw Hmo, Maung Tha Hlaing and Ma Se Mi martgaged the said land along with other properties to respondent 9 U Min Din. In 1919 Shwe Hta returned from the Andamans. Somehow he has got back possession of his land and has been working it since. In 1923 U Min Din brought a mortgage suit on his mortgage to which Shwe Hta was not a party against the legal representatives of Daw Hmo, Tha Hlaing and Ma Se Mi as they were no longer alive and he obtained a decree. In due course the suit land was put up to auction, and U Min Din himself bought it on 7th November 1925. On 8th February 1926, U Min Din took out a delivery warrant. On 26th March 1926, Shwe Hta brought the present suit out of which this appeal has arisen.

U Min Din's title depends upon the title of Maung Tha Hlaing. Both the Sub-Divisional Judge and the District Judge have held that the sale of the suit land effected by Shwe Hta's wife alone after his transportation in favour of Maung Tha Hlaing was valid. In my opinion this view is incorrect. Shwe Hta and Ma Sin are Burmese Buddists, and so long as marriage subsists the husband or wife cannot alienate their joint property without the consent of the other This principle was adopted as far back as 1891 in *Ma The* v. *Ma Bu* (1) and again affirmed in *Ma Paing* v. *Maung Shwe Hpaw* (2). It was recited in the sale-deed that Ma Sin being in need of money to meet expenses in Shwe Ta's case and to pay off license-fees raised Rs. 280 by selling the property. Her sister's husband Tun Nyein, who also executed that sale-deed gave evidence supporting that recital; Ma Sin has not given evidence, but in her written statement she supports her husband's version. That version is that the consideration of Rs. 280 simply represents the balance still due on the mortgage of 1908. But this dispute regarding the nature of the consideration seems to be immaterial. As propounded in *Ma Paing's* case (2) the joint property could only be made liable for the debt no matter whether it was an old debt or a new debt, but it could not be alienated by the husband or wife without the consent of the other. It therefore follows that the sale by Ma Sin to Tha

(1) [1891] S. J. 578.

(2) A. I. R. 1927 Rang. 209=5 Rang. 296 (F.B.).

Hlaing was invalid. Tha Hlaing thus acquired no title. Were U Min Din and Ma Sin transferees in good faith without notice? The answer must be in the negative. There was a registered mortgage-deed in 1908. It would show that the land did not belong to Ma Sin alone, but that it belonged to her husband Shwe Ta also. Without much trouble it could be found out that Shwe Ta was transported and that Ma Sin executed the sale-deed within a month for an inadequate consideration.

It is significant that as soon as Shwe Ta returned from the Andamans 8 years later, he worked the land and has continued to work it till now. There is a conflict in the evidence as to how he came to re-occupy his land but the fact remains that he re-occupied it immediately after his return and has occupied it since. It is also significant that both the original mortgage-deed of 1908 as well as the sale-deed of 1911 have got back into the hands of Shwe Ta. There can be no question of estoppel. Shwe Ta had not slept over his rights. He got back the land from Tha Hlaing and also filed his suit promptly after U Min Din had taken out a delivery warrant against his property.

The appeal is allowed, the decree of the District Court is set aside and in its place a decree is now passed declaring that the mortgage decrees in C. Reg. Nos. 11 & 12 of 1923 of the District Court of Yemathin and the sale in execution of those decrees do not affect the suit land. Appellant is entitled to get his costs from respondents 9 and 10 in all Courts.

S.N./R.K. *Decree set aside.*

A. I. R. 1929 Rangoon 113

Ormiston, J.

U Po Nyan—Applicant.

v.

Maung Kyan—Opposite Party.

Civil Revn. No. 199 of 1928, Decided on 15th August 1928.

(a) Burma Co-operative Society's Act (1927), S. 47 (2) (b)—Order under—Civil P. C., S. 115.

An order passed by a civil Court, enforcing on application the order made by a liquidator under S. 47 (2) (b) is not revisable. [P 113 C 2]

(b) Burma Co operative Society's Act (1927), S. 47 (2) (b)—Amendment suggested.

Suggestion is made to the Local Government to provide for an appeal from the liquidator's order under S. 47 (2) (b) either to the civil Court or if that is not expedient to the Registrar of the Co-operative Societies. [P 114 C 2]

Hla Tun Pru—for Applicant.

Order.— The Paungde Co-operative Town Bank, Limited, which is a Co-operative Society governed by the Burma Co-operative Society's Act, 1927, having being ordered to be wound up the liquidator found the sum of Rs. 5,362-8-0 to be due to the Bank by Kyaw Yan (deceased), U Sein Po and U. Po Nyan, and made an order under S. 47 (2) (b) of the Act, that three named legal representatives of U Kyaw Yan, and U Sein and U Po Nyan should pay that sum together with Rs. 402-3-0 (being liquidation fee) making in all Rs. 5,764-11-0. Compliance not having been made with that order the liquidator applied to the District Court of Prome for its execution by the arrest of U Po Nyan. U Po Nyan filed objections stating that he was about to appeal from the order, claiming that under the instructions issued under the Act, he should have been granted eight months' time within which to pay and urging that his property should be attached rather than that he should be sent to jail. The District Court decided against him and issued a warrant for his arrest. U Po Nyan has applied to this Court for revision of the order of the District Judge.

It is quite clear that revision does not lie. By S. 47 (5) of the Act, an order made by a liquidator under S. 47 (2) (b) shall on application be enforced by any civil Court having local jurisdiction in the same manner as a decree of such Court. The Court is precluded from making an enquiry into the merits or demerits of the order and has no option but to enforce it. It is impossible for me to hold that in acting as it did, the Court either exercised a jurisdiction not vested in it by law, or failed to exercise a jurisdiction so vested, or acted in the exercise of its jurisdiction illegally or with material irregularity. Revision does not lie and the application must be dismissed.

The case, however, discloses such a curious state of affairs that I do not consider that I should be justified in dismissing the application without some further

observations. The applicant has filed an affidavit in this Court, in which he states that U Kyaw Yan borrowed Rs. 3,000 from the bank, he and Maung Po Sein Po standing as his sureties for the repayment of the loan, that U Kyaw Yan died about two years ago without paying principal or interest, that the debt had become barred by limitation two years ago, that no legal steps were ever taken to recover the amount either from U Kyaw Yan in his lifetime or after his death; and that the liquidator had made the order without a pretence of an enquiry or investigation into his case.

If the facts are as stated, the liquidator was seeking to recover a debt which at the date of the winding up was already timebarred and therefore not legally recoverable by ordinary civil procedure. It was only by making an order behind which the Court would not go that the liquidator was able to compel the Court to enforce payment of a debt which was not due.

By sub-S. 4, S. 47, it is enacted that where an appeal from an order made by a liquidator under section is provided for by the rules, it shall lie to the District Judge. S. 50 empowers the Local Government to make rules inter alia by sub-Cl. (r) to determine in what cases an appeal shall lie from the order of the Registrar. Consequently unless an appeal is provided for by the rules, no appeal can lie and the order of the liquidator under S. 47 (2) (b) is final so far as civil Courts are concerned. No rules of any description have as yet been made under the present Act, but rules were made by the Financial Commissioner's Notification No. 22, dated 10th February 1916, under S. 43. Co-operative Societies' Act, 1912 (now repealed) which contained provisions similar to those in the present Act to which I have referred. If they are in force, there is no provision for appeals to a civil Court from orders of a liquidator.

If Civil Regular No. 8-P of 1928 of the District Court of Prome (filed on 20th April 1928) the applicant and U Po Sein sued the liquidator for an injunction to restrain him from taking any action to recover the amount, the subject-matter of his order and for a declaration that the order was ultra vires. In the plaint, the case of the applicant and U Po Sein was set out fully. The liquidator contented himself with a bare denial of the facts alleged, and rested his defence on legal grounds. The District Judge held that he had no jurisdiction to entertain the suit. He did not cite it, but no doubt he had in his mind S. 49 of the Act, under which save as in the Act expressly provided no civil Court is to have any jurisdiction in respect of any matter connected with the winding up of a Co-operative Society. If the decision is correct, a person against whom a liquidator has made an order under S. 47 (2) (b) has no remedy in a civil Court, no matter how inequitous the order may be.

Nor would he appear to have any other remedy. Under the revenue law elaborate provision is made for a series of appeals ending with the possibility of revison by the Financial Commissioner, under which a person aggrieved by an order of a subordinate authority can be pretty certain of obtaining a decision which if not necessarily based on the principles of law as administered by a civil Court is yet likely to be in accordance with substantial justice. Under the Burma Co-operative Societies' Act, 1927 and under the rules passed under the Co-operative Societies' Act, 1912, on the other hand there is no provision for appeals from an order passed by a liquidator, or indeed of any sort of control over him. Consequently every liquidator of society is a law unto himself and every member thereof is subject to his uncovenanted mercies.

I cannot help thinking that such a state of affairs has arisen from an oversight and am of opinion that the attention of the Local Government ought to be directed to it, with the view of providing an appeal from such an order of a liquidator as I have before me, 'either to the civil Court or if that be deemed inexpedient to the Registrar of Co-operative Societies.

With reference to the case before me if the facts are as the applicant states, it is obvious that he has suffered a very substantial injustice, and I venture to express a hope, that if they are so found to be, the Local Government will take such steps as possible to remedy it.

Where the truth lies it would be improper for me to express an opinion. I would only point out that the applicant is a second grade pleader of 26 years standing and that the liquidator's reply

to the applicant's clearly expressed contention in the suit that the debt was time barred at the time of the order was merely that it was not barred because the order was made under S. 47 (2) (b) of the Act. There is no provision in that Act or elsewhere which attributes to such an order the effect of reviving a debt which is already barred by time. I have no sufficient materials before me to say that the debt was barrred by limitation. The applicant, however, appears to have made out a prima facie case, that it was so barred.

A copy of this order will be sent to the Registrar of Co-operative Societies, Burma, for his information.

S.N./R.K. *Revision dismissed.*

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* A. I. R. 1929 Rangoon 115

PRATT AND OTTER, JJ.

Mandalay Municipal Committee—Appellants.

v.

Maung It—Respondent.

Civil Misc. Appeal No. 40 of 1928, Decided on 20th December 1928.

*** Land Acquisition Act, S. 20—Person for whom property is acquired is not "person interested"—No notice to him under S. 20 is necessary, although he can appear and adduce evidence.**

"Persons interested" in sub-S. (b) means person's interested by reason of their interest in the land acquired as owners, tenants and the like, and not persons interested as acquiring the land through the Secretary of State. Such a person is not entitled to separate notice under S. 20, though he has the right to appear and adduce evidence. [P 115 C 2]

A. C. Mukerjee—for Appellants.

Judgment.—A piece of land belonging to Maung It was acquired by the Collector under the Land Acquisition Act, on behalf of the Mandalay Municipal Committee.

Maung It did not accept the Collector's award and claimed a reference to the civil Court under S. 18, Land Acquisition Act,

The Collector made a reference and the Court, after issue of notice to the claimant and the Collector, took evidence, and passed orders enhancing the compensation awarded to Maung It.

The Municipal Committee was not represented at the proceedings before the Court, and applied to the Court to set aside the award made ex parte and reopen the proceedings in order to give the Committee an opportunity of contesting Maung It's claim.

The Court held that the Municipal Committee was not a necessary party to the proceedings, and that their application to have the order set aside and to contest Maung It's claim on reference was not maintainable.

The appeal has been argued before us almost entirely on the basis that the Committee is a person interested in the objection within the meaning of S. 20 (b) of the Act.

No direct authority has been cited on the point in dispute and we have been able to find none.

It is common ground that no notice was issued to the Committee under S. 20.

Under that section the Court is bound to issue notice of the day, on which it proposes to determine the objection, and to direct the appearance of:

(a) the applicant.

(b) "all persons interested in the objection, except such (if any) of them as have consented without protest to receive payment of the compensation awarded,"

and

(c) if the objection is in regard to the area or to the amount of the compensation—the Collector.

Reading sub-S. (b) as it stands the natural construction is that "persons interested" in sub-S. (b) means persons interested by reason of their interest in the land acquired as owners, tenants, and the like, and not persons interested as acquiring the land through the Secretary of State.

This interpretation is confirmed by the definition in S. 3, where it is laid down that the expression:

"person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act, and a person shall be deemed to be interested in land, if he is interested in an easement affecting the land."

It is apparent that this definition does not contemplate the case of the person in whose interest the property is acquired.

Had this been the intention, it would have been perfectly simple to include such persons in the definition.

Moreover it is provided in S. 50 that no local authority or company, at whose cost the Act is put in motion, is entitled to demand a reference under S. 18, although the local authority or company is allowed to appear and adduce evidence,

for the purpose of determining the amount of compensation.

As the Judge of the District Court pointed out, the Municipal Committee is not a necessary party to the proceedings before the Court, though it has the right to appear and adduce evidence.

In such a case the Municipality is represented by the Collector, who has acquired the property on its behalf, and if it is represented otherwise in Court, is there to assist the Collector.

The Municipal Committee is not entitled to separate notice, and if it wishes (in case reference to the Court is made under S. 19) to contest the claim, must make its own arrangements to ascertain, if a claim is made, and when the objection is fixed for hearing, in case the Collector fails to keep it *au fail* with events in Court subsequent to his award.

The appeal is dismissed.

R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 116

BROWN, J.

Maung Po Kyaw—Applicant.

v.

Ma Lay and *others*—Opposite Party.

Civil Misc. Appln. No. 174 of 1928, Decided on 17th December 1928, for permission to appeal in forma pauperis.

(a) Limitation Act, S. 12—Date of judgment is date of decree—Time does not stop till decree is actually signed.

The date of a decree for the purposes of the Limitation Act is the date of the judgment and time can only be allowed as time requisite for obtaining copies if the applicant or appellant has actually made an application for a copy. The time requisite for obtaining the copy cannot stop to run until the decree is actually signed : 3 *L. B. R.* 62 (*F. B.*) *Rel. on.* [P 116 C 2]

✲ **(b) Limitation Act, S. 5—Pleader accepting Court clerk's statement that application for copy cannot be accepted until decree is signed—Mistake is not bona fide and time cannot be excused.**

No doubt a bona fide mistake on the part of a pleader is sufficient cause for admitting an appeal after time, but no mistake is bona fide unless made in spite of due care and attention. Time cannot be excused under S. 5 on the ground that the pleader accepted the statement of the clerk of the Court that an application for copy would not be accepted until decree was signed : 8 *L. B. R.* 566, *Rel. on.* [P 116 C 2, P 117 C 1]

Judgment.—The applicant, Maung Po Kyaw has applied for permission to appeal in forma pauperis. He wishes to appeal against the decree of the District Court, Tharrawaddy, and the judgment on which that decree is based is dated 11th October 1928. The period allowed for filing his application is 30 days after that date, or allowing eight days, the time he took to obtain a copy of the judgment and decree, 38 days. The application was not filed until 4th December, 16 days after it was barred by limitation. I have been asked to excuse the delay for reasons given in an affidavit of the pleader of the petitioner. The pleader states that about three days after the judgment he applied for a copy of the judgment and decree but was told by the clerk of the Court that the application could not be accepted as the decree had not been drawn up. He made enquiries from time to time as to whether the decree was drawn up but was told that it was not. The decree was actually signed on 7th November and the application for the copy was made on the 8th. The affidavit goes on to state that the pleader advised his client that for purposes of limitation time would be computed from the date of the decree.

It was held by a Full Bench of the Chief Court of Lower Burma in 1905 in the case of *Maung Kin* v. *Maung Sa* (1), that the date of a decree for the purposes of the Limitation Act is the date of the judgment, and that time can only be allowed as time requisite for obtaining copies if the applicant or appellant has actually made an application for a copy. Now in this affidavit the pleader says that he applied for the copy, but it would appear from his affidavit that he accepted the statement of the clerk of the Court that such an application would not be accepted until the decree was signed. It does not seem to me that this was an effective application for the copy and the time requisite for obtaining the copy cannot begin to run until 8th November with the result that the application is actually barred by 16 days; nor am I satisfied that sufficient reason has been made out for accepting this application under S. 5, Lim. Act.

It was held in the case of *Ma Mai Gale* v. *Tun Win* (2), that a bona fide mistake on the part of a pleader may be sufficient

(1) [1905] 3 L. B. R. 62=11 Bur. L. R. 220 (F.B.).

(2) [1916] 8 L. B. R. 566=37 I. C. 815=10 Bur. L. T. 221.

cause for admitting an appeal after time, but that no mistake is bona fide unless made in spite of due care and attention. I cannot find anything here to justify the view that the pleader's advice to his client that limitation would be computed from the date of the decree was made with due care and attention. There is no explanation offered as to why the pleader was not aware of the law as laid down in *Maung Kin's* case (1), which has ever since been followed by the Courts in this Province. Copies were actually obtained on 15th November and there is no explanation, besides this incorrect legal advice, as to why there was a further delay of 19 days after filing the application. In the application the applicant does mention his illness but it is only a vague mention and there is no affidavit in support of this allegation. I am not satisfied that the applicant had made out a case under the provisions of S. 5, Lim. Act, and I must therefore hold that the present application is barred by limitation. It is accordingly rejected.

R.K. *Application rejected.*

A. I. R. 1929 Rangoon 117

RUTLEDGE, C. J. AND BROWN, J.

K. V Galliara—Appellant.

v.

U. Thet—Respondent.

First Appeal No. 204 of 1928, Decided on 30th January 1929, from judgment of High Court, Rangoon, original side, under Cl. 13 of Letters Patent.

(a) Transfer of Property Act, S. 41—Mortgagee not giving proper description of properties situate in Rangoon in accordance with provisions of Ss. 21 and 22—Properties not properly indexed in Registration office—Subsequent purchaser making ordinary search but not discovering mortgage—As failure to make proper entry in index was due to negligence of mortgagee, subsequent purchaser would be preferred to him—Registration Act, Ss. 21 and 22.

In a mortgage-deed presented for registration several different properties situate in Rangoon Town were given only one small description and the requirements of Ss. 21 and 22 were not complied with. The result was that the properties in question were not properly indexed; and as the index was not properly written up, the subsequent purchaser while making search in the ordinary way could not discover the mortgage.

Held: that as the failure to make a proper index in the registration office was primarily due to the negligence in giving proper description of the properties on the part of the mortgagee, the subsequent purchaser would be preferred to him. [P 119 C 2, P 120 C 1]

(b) Registration Act, S. 22 (3)—Description of property given in mortgage-deed not in compliance with terms of Ss. 21 and 22 but from careful study of document property could be indentified—Document is not disentitled for registration.

Where the description given of the mortgaged properties in the mortgage-deed is inadequately meagre and not in compliance with the terms of Ss. 21 and 22, the document can nevertheless be admitted for registration if the description given is not misleading and if from a very careful study of the document it would be possible to discover the property mortgaged: 18 *Cal.* 556 (*F.B.*), *Dist.* [P 118 C 1, P 119 C 1]

S. S. Patkar—for Appellant.

E. W. Lambert—for Respondent.

Judgment.—The respondent U Thet, brought a suit on a mortgage document against one U Tin and joined the appellant as a subsequent transferee. There were various properties set forth as mortgaged in the mortgage-deed, but we are concerned in this appeal with only one of these properties, the property known as Lot No. 51, Block No. 10-I/2 in the Town of Rangoon.

The mortgage sued on is dated 25th June 1924 and the appellant bases his claim on a registered sale-deed, dated 9th February 1925. He claims that his title should be preferred to the title of the respondent, under the mortgage-deed, on the ground of gross negligence on the part of the respondent, whereby he was bona fide led to believe that the land was free from incumbrances, when he made his purchase. The learned trial Judge has decided that the appellant has not established gross negligence on the part of U Thet, and has given a mortgage-decree against this property as well as against the other properties mortgaged. The appellant claims that the decree so far as this property is concerned is not justified. He raises a number of grounds in appeal, but the main ground is that the respondent U Thet was guilty of gross negligence and was therefore estopped from denying the validity of the appellant's title.

The body of the mortgage-deed simply sets forth the general terms of the mortgage and leaves the description of the properties mortgaged entirely to the schedule. In the schedule the properties are described serially:

Serial No. 1 is described as:

A piece of paddy land being holding No. 315 of 1922-23, situate in Kyaikasan Bautaw Kwin, Kambe Circle, Insein Township, Insein District, and measuring 13 acres.

Serial No. 2.

A piece of garden land being holding No. 316, 1922-23, measuring 4.28 acres. and situate in Kyaikasan Bautaw Kwin, Kambe Circle, Insein Township, Insein District.

Serial No. 3.

Leasehold land in Pazundaung Circle, in Blocks 9-K/2, 10. I, 10. I/2 being second class Lots Nos. 16, 17, 78 and 51 of the Rangoon Development Trust.

Serial No. 4.

All buildings, fixtures, trees and plants standing thereon.

Ths first two items consist of comparatively small properties, and are each of them described in great detail. Item No. 3, however, which contains no less than three entirely different pieces of property in Rangoon Town, contains one short description of all these pieces of property. The first piece of property mentioned therein is situate in Block No. K/2, whereas the other two pieces are in Blocks I, and I/2 respectively and the description does not show which lot number refers to which block numbers.

It appears that registered documents in Rangoon are indexed in accordance with the Block numbers of the properties, to which they relate. Thus all properties in Block K/2 can ordinarily be traced in the index by referring to the entries in the Register under K/2 and similarly properties in Block I and I/2 can be traced by referring to entries under I, and I/2. But when the document in suit was registered no entry whatever was made in this index under Blocks I, and I/2. This omission was clearly due to the manner in which the schedule of the document was drawn up. A copy of the schedule taken from the copy of the document in the registration office makes that clear. There the property is shown as Blocks 9. K/2. 10-I and 10-I/2, second class Lots Nos. 16, 17, 78. and 51. "This clearly does not show any of the properties to be in Block I, or I/2 and the figure "1" having in each case been substituted for the letter "I." It is stated on behalf of the appellant that search was made in the index, before the appellant purchased the property and that the index did not disclose the present mortgage. This fact is not disputed, nor is it suggested that the appellant was in any way negligent in not making a further search.

It is admitted, that the method employed in searching the registration records in the case was the method ordinarily employed by advocates and pleaders in Rangoon. It is true that there is another index which could have been searched, the personal index, but in view of the similarity of Burmese names, that would admittedly have been a very laborious process and is not the procedure which is ordinarily followed. Had the index been properly written up, it is clear that the appellant would have discovered existence of this mortgage before purchasing the property.

The learned trial Judge has found this to be the case, and he has also found that there has been negligence, but he holds the negligence to have been on the part of the office or clerks of the Registration office and not on the part of U. Tin, the defendant, or his pleader.

Under S. 21, Registration Act, no testamentary document relating to immovable property shall be accepted for registration, unless it contains a description of such property sufficient to identify the same and

"houses in towns shall be described as situate on the North or other side of the street or road (which should be specified) to which they front and by their existing and former occupancies and by their numbers if the houses in such street or road are numbered."

By rules issued by the Local Government under S. 22 of the Act, the description of lands in towns must include the block, division and the holding number of the block.

So far as the description of the house is concerned in the present case, it is clear that the requirements of S. 21, Registration Act, have not been complied with. The numbers of the blocks were all classed together in one short description and all the buildings were given one comprehensive description as "buildings, fixtures, trees, and plants, standing thereon." It seems clear therefore that the requirements of the Registration Act were not properly complied with. This is not in itself sufficient to disentitle the document to be registered, as S. 22 provides that if the document is sufficient to iden-

tify the property the failure to comply with the provisions of Ss. 21 & 22 will not disentitle the document to be registered. Although the description given in the Schedule to the document is exceedingly meagre, from a very careful study of the document it would have been possible to discover that the property now in suit was mortgaged.

It has been urged on behalf of the appellant that on account of the faulty description we should hold that there has not really been any registration at all with regard to this property and that the mortgage as regards this property is therefore invalid, and we have been referred to the case of *Baij Nath Tewari* v. *Sheo Sahoy Bhagu* (1). In that case it was held that the registration of the document was invalid, but the facts of that case are not similar to the facts of the present case. It was not there merely a question of misdescription. The description given in the document in that case was directly misleading. We are not satisfied that the misdescription in the present case was so complete as to disentitle the document to be registered. It does not seem to us, however, that this certainly concludes the matter. There can be no doubt that the description of the property given in the document is not such a description as it is reasonable to expect in such documents, and it is also clear that the failure to give a more satisfactory description is responsible for the failure to enter the mortgage of this particular piece of land in the index under Block I-2. The description in schedule shows Four Second Class Lots Nos. I6, 17, 78, & 51, as being situate in Blocks 9-K/2 10-I/2 & 10-I/2 The learned trial Judge points out that the mistake was due in part to the fact that the letter "I" is used for denoting blocks in Rangoon, and that the letter "I" is exceedingly liable to be mistaken for the figure "1" as has actually happened in this case. But it is clear that the use of the letter "I" would have led to no mistake whatever, had the proper description been given in the schedule and had the word "Block" been used in front of "10-I/2", and of "10-I/2". The manner in which the schedule is drawn up suggests strongly that all the items of property shown in Serial No. 3 comprised one piece of property, and no satisfactory explanation has been given as to why each of these pieces of property was not separately and fully described as was done in the case of Serial Nos. 1 & 2. It appears that at the time the mortgage document was executed, the mortgagor was in custody on a charge of murder, and it is suggested that that was why the document was drawn up in such an unsatisfactory fashion. The pleader who acted for the mortgagor, has given evidence, and admits that no title-deed was given to him, no explanation is offered as to why the title-deeds were not produced. We can see no reason why, even though the mortgagor was in custody it should have been impossible to draw up a description of the property in proper detail. In fact it is alleged on behalf of the respondent that all the information required as to the property is actually in the document itself, and the fact that the mortgagor himself was in custody cannot explain away the negligence of the lawyer in not using the information at this command in such a way, as to make the matter intelligible to the ordinary reader of the document. The clerks in the registration office are not trained lawyers, and it is no part of their duty to study documents presented to them carefully for the purpose of considering what their legal meaning may be. It seems to us, that with a description such as is given in the schedule in the present case, mistakes such as have occured in the registration office, were only to be expected and in our opinion the failure to make a proper entry in the registration index was primarily due to the grossly careless way in which the deed was drawn up, and the property described.

It must be borne in mind that at the time this document was drawn up, the mortgagor produced no title-deeds whatsoever. At the time of their mortgage the deeds in question were with a previous mortgagee and it has been contended on behalf of the respondent that, however careless the plaintiff may have been in not requiring the production of title-deeds before accepting the mortgage, the title-deeds could not have been procured, even if they had been enquired after. That may be so, but in the absence of the taking of the ordinary precaution of seeing the possession of title-deeds when taking a mortgage of property it was obvi-

(1) [1891] 18 Cal. 556 (F.B.).

ously all the more incumbent on the mortgagee to see that the registered mortgage deed was properly drawn up in such a way that a third person making a search in the registration office for any transactions with regard to the property could not be misled. In the circumstances of the case, we are of opinion that the manner of drawing up the registered deed amounted to a gross negligence and that by this negligence on the part of the mortgagee, the mortgagor was enabled to hold himself out to the appellant as the ostensible owner of the property mortgaged.

It has not been suggested that the purchase by the appellant was not in good faith ; nor is it suggested that the appellant did not take reasonable care before making the purchase to satisfy himself as to the vendor's title. We are, therefore, of opinion that the principles laid down in S. 41, T. P. Act, apply to this case, and the transfer of the property to the appellant was a valid transfer and was not affected by the mortgage in favour of the respondent.

It is claimed on behalf of the appellant that in actual fact the money with which he bought the property was utilized for the purpose of redeeming a previous mortgage, and it is claimed that he would, in any case, be entitled to keep this mortgage alive for his protection. The chief difficulty in the way of this contention is that these facts were never pleaded in the trial Court. In view, however, of the conclusion we have come to on the main ground of appeal, it is not necessary to consider this point any further. We allow this appeal and alter the decree of the trial Judge, by omitting Lot No. 51, in Block 10-I/2 from the properties included in the mortgage decree, the respondent will pay the costs of the appellant in both Courts.

S.N./R.K. *Decree altered.*

A. I. R. 1929 Rangoon 120

CARR, J.

Emperor

v.

Aung Shan and *others*—Accused—Opponents.

Criminal Revn. Nos. 1031-A, 1033-A and 1037-A of 1928, Decided on 15th November 1928, against decision of Township Magistrate, Salin.

Burma Excise Act (5 of 1917), Ss. 30 and 5—Scope.

To prove an offence under the Act it is necessary to show that the place of possession or sale of tari is within five miles of a licensed tari shop. [P 102 C 2]

Judgment.—Two of these cases were tried by the Township Magistrate, Salin, and in them the accused were convicted of illicit possession of tari. The third case was tried by the Additional Magistrate of Pwinbyu, and in it the accused was convicted of illicit sale of tari. This case was carelessly tried and the evidence was inadequate.

In all three cases there is the serious defect that no offence has been either proved or admitted. By para. 1 (4) of Financial Department Notification No.72, dated 18th September 1917 (1), tari is exempted from all provisions of the Excise Act throughout Upper Burma, except in places within five miles of a licensed tari shop. It follows that except within such limits neither the possession nor the sale of tari is an offence. To prove an offence it is necessary to show that the place of possession or sale is within five miles of a licensed tari shop. No attempt was made to prove this in any of the three cases, nor was it in any of them stated in the particulars of the offence to which the accused was required to plead. All the convictions are therefore bad.

I set aside the convictions and sentences in all three cases and direct that each of the accused persons be acquitted and that the fine paid by him be refunded to him.

R.K. *Convictions set aside.*

A. I. R. 1929 Rangoon 121

MAUNG BA, J.

Shwe Kyo and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 1432, 1439 and 1450 of 1928, Decided on 3rd December 1928 against order of 1st Addl. Magistrate, Rangoon.

Opium Act, S. 9 (c)—Knowledge and control of opium must be conclusively proved.

The term "possession" implies knowledge on the part of the alleged possessor, and before the accused person is required to account for opium there must be proof that such opium has been in his possession or under his control: (1872-92) *L. B. R.* 573, *Foll.* [P 121 C 2]

Judgment.—Five persons were convicted of illegal possession of opium under S. 9 (c), Opium Act and sentenced to various terms of imprisonment. In the case of two of them, a sentence of fine was added.

The facts, as held proved by the prosecution, were briefly as follows: U Ko Ko, Court Prosecuting Officer of the First Additional Magistrate's Court, Rangoon, acting on information, went and waited in front of Kamayut Police-Station with two witnesses, Maung Kya Nyun and Maung Po Hmyin, at about 10 a. m. on 30th September 1928. A Dodge Car, No. RA8423, was then seen coming from Rangoon, and he stopped the car and made a search. He found a ball of opium in each pocket of the waterproof coat, which was folded. The waterproof coat was in the pit in front of the rear seat. The appellant, Ba Kyin, was driving the car, and the appellant, Maung Han, sat next to him. The appellant, Swee Kyo, the appellant, Chan Mya, and one Lwang, were seated on the rear seat. The two balls of opium weighed 58 ticals, and Ko Ko states that the opium balls were effectively concealed in the pockets of the waterproof. The raincoat fitted Lwang, and Lwang admitted that it belonged to him, but he pleaded that he did not know to whom the exhibit opium belonged. All the four appellants also denied knowledge of the opium.

The driver, Maung Ba Kyin, stated that, as the two Chinamen told his friend, Maung Han, that they wanted to go to Hmawbi, he was taking them there. Chan Mya, the Burman, who was one of the three seated on the back seat, said that he was in the car because his friend, Ba Kyin, invited him in. Swee Kyo, who is 55, said that, while he was at a teashop, Lwang came in a car and invited him for a drive, so he got in and did not know anything about the opium. Lwang, who is 22 and who has not appealed, as already pointed out, denied knowledge of the opium, though he admitted to be the owner of the waterproof. The car was not a taxi, and the record does not disclose who the owner was. Among the appellants, only Swee Kyo examined two witnesses to support his defence. The learned Magistrate rejected their evidence and convicted all the five persons, holding that the three Burmans were helping the two Chinamen in removing the opium out of Rangoon.

The law laid down by Mr. Fulton in *Queen-Empress* v. *Chit Aung* (1), is still good law. The term "possession" implies knowledge on the part of the alleged possessor, and before an accused person is required to account for opium there must be proof that such opium has been in his possession or under his control. Mr. Fulton quoted the following remarks of Cave, J., in *Reg* v. *Ashwell* (2). His Lordship said:

"If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not the possession of that of the existence of which he is unaware. A man cannot, without his consent, be made to incur the responsibilities towards the real owner which arise from the simple possession of a chattel without further title, and if a chattel has, without his knowledge, been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel and has assented to the possession of it."

The question is whether the four occupants of the car, besides Lwang in whose waterproof the opium balls were concealed, could be said to have knowledge of the existence of the opium. Has there been any proof that such opium was in their possession or under their control? It might be that Lwang was the owner of the opium, and that the others were simply helping him in taking it out of Rangoon, or it might be that Lwang concealed the existence of the opium from the knowledge of the other occupants and simply took them with him to avert suspicion.

(1) [1872-92] L. B. R. 573.
(2) [1886] 16 Q.B.D. 190=55 L.J.M.C. 65=50 J.P. 181=16 Cox.C.C. 1=34 W.R. 297=53 L.T. 773.

In the absence of circumstances from which it could be conclusively inferred that the four appellants had knowledge of the presence of the opium, and that such opium was under their control, it would not be safe to punish them on mere suspicion.

I am constrained to hold that the case against these four appellants is not free from reasonable doubt. They are accordingly acquitted. Bail bonds are cancelled.

R.K. *Accused acquitted.*

A. I. R. 1929 Rangoon 122

CARR, J.

Emperor

v.

U Thin Ohn and *others* — Accused — Respondents.

Criminal Appeals No. 1064 to 1096 of 1928, Decided on 21st December 1928, against order of 6th Addl. Magistrate, Rangoon.

Rangoon City Municipal Act (1922), S. 214 —To offence under S. 125 though continuing one if committed for more than six months, S. 214 applies.

Although the offence of keeping open a private market without a license, is a continuing offence, which is freshly committed every day, still if the offenders are committing the same for more than six months to the knowledge of the Municipality, S. 214 (2) is a valid defence. [P 122 C 2]

N. M. Cowasjee—for the Crown.

Judgment.—These are appeals by the Local Government against the acquittal of the respondents by the Sixth Additional Magistrate of Rangoon.

The facts in all the cases are the same, and the point for decision is the same.

The Corporation of Rangoon some time in 1926 sold certain premises to the Commissioners for the Port of Rangoon. It appears that the Port Commissioners let stalls in these premises to the various accused and collected rent from them.

In June 1927, the Commissioner of the Rangoon Corporation took exception to this and entered into correspondence with the Chairman of the Port Commissioners. The final result of the negotiations was that the Port Commissioners agreed to remove the tenants from their stalls by the end of December 1927, and the Commissioner of the Corporation agreed to take no action until then.

It appears that the Port Commissioners gave notice to the respondents to leave their stalls by 31st December. The respondents did not comply with that notice and have continued occupying their stalls and selling at them. Thereupon the Rangoon Corporation instituted these prosecutions under S. 125, City of Rangoon Municipal Act 1922, for keeping open a private market without a license All the respondents were finally acquitted by the Magistrate on the ground that the prosecution was barred under S. 214 (1) (b) of the same Act because the complaint had not been filed within three months of the date on which the commission of the offence was first brought to the notice of the Corporation. It is contended in these appeals that that decision is wrong.

In my opinion the decision is quite correct. The argument put forward by Mr. Cowasjee for the Corporation is that the offence in question is one which is freshly committed every day; that he has not sought to prosecute the respondents for anything done prior to January 1928; and that, as these prosecutions were instituted in that month, the bar provided by S. 214 does not apply.

I am unable to accept this contention. It is admitted by Mr. Cowasjee that licenses for private markets are issued, and that in the normal course such licenses are issued, for the Municipal year from 1st April to 31st March in the following year. He says also that licenses issued at any intermediate date would have effect only up to 31st March.

It seems to me, therefore, quite clear that the offence complained of in this case is one which comes within the scope of S. 214 (2) of the Act, which provides that:

"failure to take out a license under this Act shall be deemed, for the purpose of sub-S. (1), to be a continuing offence until the expiration of the period for which the license ought to have been taken out."

The respondents were committing the offence in June 1927. They continued to do so right up to the time when these prosecutions were instituted, and, since the Commissioner of the Corporation admittedly knew that they were committing the offence in June 1927, S. 214 (1) (b) clearly applies and prevents the Court from taking cognizance of the offence.

Mr. Cowasjee argues that the offence complained of is a continuing offence, which is freshly committed every day. I

agree with him on this point ; but it seems to me that that is not in his favour, and that the effect of S. 214 (2) is to prevent of the Corporation from raising such an argument as this, and saying that they were not prosecuting for the offence committed in June but for an entirely fresh offence committed in January. If that is not the effect and the intention of sub-S. (2), S. 214, I am unable to find any meaning in it whatever.

I find, therefore, that the judgment of the Magistrate is correct, and I dismiss these appeals.

R.K. *Appeals dismissed.*

* A. I. R. 1929 Rangoon 123

MYA BU, J.

Maung Tun Hlaing—Appellant.

v.

U Tha Kha and *another*—Respondents.

Special Second Appeal No. 536 of 1928, Decided on 21st March 1929, against decree of Township Court, Yedashe, in Civil Regular Suit No. 136 of 1927.

*** Civil P. C., O. 21, Rr. 60 and 63—Order to be in favour of claim under R. 60 must be result of investigation unless investigation unnecessary—Claim preferred under R. 58 but notice not issued to attaching decree-holder—Decree-holder not appearing—Execution proceedings as also claim application closed—Neither order closing execution proceedings, nor that closing claim application, nor also their combined effect, is order under R. 60 or order against decree-holder within R. 63.**

An order under R. 60 in favour of a claim must be the result of an investigation arising on a claim being preferred under R. 58 except in cases where the investigation is unnecessary. [P 124 C 2]

In an execution proceeding, a claim was preferred under R. 58 but no notice of the claim application was given to the attaching decree-holder. On the day of hearing the execution proceeding itself was closed owing to the decree-holder's default of appearance and at the same time the claimant's application for removal of attachment was ordered to be closed.

Held: that as no notice of the claimant's application was given to the decree-holder, neither the order closing the execution proceedings, nor the order closing the claimant's application, nor even the combined effect of them both read together can be an order under R. 60 or an order against the decree-holder within the meaning of R. 63: *A. I. R.* 1924 *Rang.* 42 ; 41 *Mad.* 985 (*F.B.*); 45 *Cal.* 785; 41 *All.* 623, *Dist.*; *A. I. R.* 1923 *Mad.* 76, *Cons.* [P 125 C 2]

P. B. Sen—for Appellant.

S. Ganguli—for Respondents.

Judgment.—This appeal has arisen out of Civil Regular Suit No. 136 of 1927 of the Township Court of Yedashe, which was a suit for partition and possession of a quarter share in a piece of paddy land known as holdings Nos. 5 and 6 of 1926-27 of Kyetthay-Ahtay Kwin, Thagya Circle, Yedashe Township.

The plaintiff-respondents based their claim on a purchase of that share from Mahomed Moosa who has purchased the right, title and interest of Maung Tun Aung (the brother of the defendant-appellant, and one of the four children of Ma Kha, deceased) in the land in the Court sale held in Civil Execution No. 12 of 1924 of the Township Court of Yedashi. This execution case was proceeding in which one U Min Din, who had obtained a decree against Maung Tun Aung in Civil Regular No. 272 of 1917 of the Township Court of Pyinmana, had the decree executed and the right, title and interest of Maung Tun Aung in the land attached and sold.

It is common ground that the land was originally the property of Ma Kha during her lifetime, and that Ma Kha died leaving four children, two of whom are appellant Maung Tun Hlaing and the above named Maung Tun Aung. But the appellant's case was that he had obtained and received possession of the whole land from Ma Kha before her death by virtue of an oral sale by her in consideration of a sum of money paid by him to her. Before the Civil Execution No. 12 of 1924, he had taken out execution of the same decree in Civil Execution Case No. 224 of 1923 of the Township Court of Yedashe, in which the same land was attached, which led to the filing of an application for removal of attachment by the appellant on 2nd January 1924. This case, however, ended in a dismissal for default of the decree-holder's appearance on the day for the return of the warrant of attachment, namely 7th January 1924 and in a withdrawal of the attachment. In view of the withdrawal of the attachment the appellant's application for removal of attachment, being Civil Misc. No. 2 of 1924 was ordered to be closed at the same time. Two days thereafter the decree-holder filed his application in Civil Execution No. 12 of 1924, it should be noted that no notice was issued to the attaching decree-holder in Civil Misc. No. 2 of 1924.

It is not disputed that the plaint land was put up for sale in Civil Execution No. 12 of 1924, that Mahomed Moosa became the purchaser of the judgment-debtor's right, title and interest, and the sale was confirmed on 30th May 1924, and that the plaintiff-respondents have purchased the same right, title and interest from Mahomed Moosa.

On the facts, the applicant's defence was mainly that the whole land had become his own property on account of Ma Kha's oral sale to him with the consent of all the other heirs in consideration of his payment of Rs. 800 and his having received possession of the land in pursuance of that sale.

The appellant also raised some legal defences to the effect that the plaintiffs, or their alleged predecessor-in-title, were not, and had never become the owners of the plaint land or any portion thereof, inasmuch as the alleged purchase by Mahomed Moosa of Tun Aung's alleged share in Civil Execution Case No. 12/24 did not pass any title in the suit land, the proceedings in the said execution case being void ab initio owing to the dismissal of the previous execution proceedings and the removal of attachment in that proceedings.

Both the Courts below have come to concurrent findings against the appellant on his defence on the facts, and I see no sufficient reason to disagree with them. This appeal has been laid under S. 11, Burma Courts Act, merely because the lower appellate Court modified the decree of the trial Court. The trial Court passed a decree as prayed for in the plaint, viz., for partition and for possession of one-fourth share of the land in suit in the plaintiff's favour; but the lower appellate Court refused to order partition and merely gave declaration of the plaintiff's title to a certain portion of the land.

The main legal question raised on appellant's behalf lies in the contention that the orders passed in Civil Execution No. 224 of 1923 and Civil Misc. No. 2 of 1924 on 7th January 1924, should be read together, and were tantamount to an order directing removal of attachment, under O. 21, R. 60, Civil P. C., which was conclusive, subject only to the result of a suit under O. 21, R. 63, and consequently barred the fresh application for attachment in Civil Execution No. 12/24 which was therefore illegal and void.

A claim proceedings like the one in Civil Miscellaneous No. 2/24 falls within the scope of O. 21, R. 58, which enacts that the Court shall proceed to investigate a claim unless it considers that it was designedly or unnecessarily delayed, whereupon such investigation the Court is satisfied of circumstances mentioned in R. 60, it shall make an order releasing the property wholly or to such extent as it thinks fit from attachment. To my mind, a comparison of these rules shows that an order under R. 60 in favour of a claim must be the result of an investigation arising on a claim being preferred under R. 58, except in cases where the investigation is deemed unnecessary as for instance, where the attaching decree-holder declines to oppose the claim or consents to its being granted. Now the order passed in Civil Execution No. 224/23 was passed in consequence of the decree-holder's default of appearance to prosecute that proceedings and it was in these terms:

> "Called, warrant returned duly executed. Neither the decree-holder nor his agent present. Dismissed for default. Attachment withdrawn."

This order would have been passed all the same, even if there was no application for removal of attachment. It was therefore, not an order passed in consequence of or as a result of the appellant's application for removal of attachment, because the Court had not even ordered the issue of notice of the appellants' application to the decree-holder, there is nothing to show that the decree-holder was even aware of the appellant's application, and it cannot be said that the decree-holder absented himself to evade an investigation. There is thus no ground for reading the orders in the two cases together as if they are interdependent. The order for withdrawal of attachment in Civil Execution No. 224/23 cannot in these circumstances be regarded as one under O. 21, R. 60, while the order closing the case in Civil Miscellaneous No. 2/24 in veiw of the dismissal of the execution proceedings and the withdrawal of attachment is by no means such an order or an order against the decree-holder within the meaning of O. 21, R. 63. In my opinion the contention is untenable.

The learned advocate for the appellant cites *Maung Pya* v. *Ma Hla Kyu* (1) in which Duckworth and Po Han, JJ., following the rulings in *Venkatratnam* v. *Ranganayakamma* (2); *Nogendra Lal* v. *Fani Bhusan* (3) and *Gulab* v. *Mutsaddi Lal* (4), held that an order on a removal of attachment application after no investigation of the claim comes within the category of an order made against that party in such a way as to render that order conclusive and thereby prohibit the institution of a suit to establish the same rights after the period of one year allowed by Art. 11, Sch 1, Lim. Act, has expired. All these cases are distinguishable from the present case.

In estimating whether an order made on a removal of attachment application without investigation is of the description mentioned in R. 63, it is, in my opinion essential to distinguish an order against the applicant in a claim proceedings from an order against an attaching decree-holder, for, against a claimant an order may be made refusing to investigate the claim on the gronnd that the claim or objection was designedly or unnecessarily delayed, and the claim may also be dismissed on account of the claimant's default of appearance, or on account of non-prosecution, while it is inconceivable that an order should be made against an attaching decree-holder without having him before the Court except where the case is to be dealt with ex parte against him. The order which was considered in *Maung Pya's* case (1) was an order dismissing the application for removal of attachment for want of prosecution, on the applicant's proposing to the Court that his application should be dismissed without costs.

In the Full Bench case of *Venkataratnam* v. *Ranganayakamma* (2) it was held that an order refusing to investigate a claim to attached property on the ground that there was delay in filing it is an order passed against the claimant within O. 21, R. 63, and that an order on a claim petition merely stating that as it was filed late it will be notified to the bidders is in effect an order rejecting the claim to which O. 21, R. 63 will apply. This ruling was considered by Schwabe, C. J., in *Abdul Kader* v. *U. T. M. Somasundaram Chettyar* (5), where a claim petition put in having heen dismissed on the ground that the sale had taken place and that the Munsif had no power to pass an order as it was filed after one year from the date of the order, it was held that O. 21, R. 63 had no application. The learned Chief Justice was inclined to treat the decision in *Venkatratnam's* case (2) as being confined to the facts of that particular case and to cases where the claim was dismissed as too late under the proviso to R. 58.

In the case of *Nogendra Lal* v. *Fanis Bhusan* (3) it was held that the party against whom the order was made on a claim either allowing or rejecting the claim preferred under O. 21, R. 58, Civil P. C., may irrespective of whether any investigation took place or not bring a suit to establish his right under O. 21, R. 63. The order under consideration was an order dismissing the claim "for default on the ground of delay." The case of *Gulab* v. *Mutsaddi Lal* (4), was one where a petition made to the attachment of property under R. 58 was disallowed because the objector did not appear on the date fixed. The case before me is quite distinguishable from *Maung Pya's* (1), and the cases which it followed. In my opinion the order closing the case in Civil Misc. Case No. 2 of 1924 cannot be deemed to be an order against the attaching decree-holder and I do not think that the order in Civil Execution No. 224/23 should be read as an order made in a proceedings under R. 58. Even if the two orders are read together they cannot in my opinion be deemed to be an order made under R. 60.

For all these reasons, I overrule the appellant's learned advocate's contention. There is no ground for interference with the judgment of the lower appellate Court, except where it refused to order partition. The decree of the lower appellate Court is, however, bad on account of this refusal. I, therefore, set it aside and restore the decree of the Court of the first instance, but I consider that the appellant should pay the respondent's costs throughout.

S.N./R.K. *Decree modified.*

(1) A. I. R. 1924 Rang. 42=1 Rang. 481.

(2) [1918] 41 Mad. 985=35 M. L. J. 335=8 M. L. W. 292=48 I. C. 270=(1918) M.W. N. 599 (F.B.).

(3) [1918] 45 Cal. 785=44 I. C. 265=23 C. W. N. 375,

(4) [1919] 41 All. 623=50 I.C. 748=17 A.L.J. 674,

(5) A. I. R. 1923 Mad. 76=45 Mad. 827.

A. I. R. 1929 Rangoon 126

MYA BU AND HEALD, JJ.

Daw Ohn Bwin—Appellant.

v.

U. Bah and *another*—Respondents.

First Appeal No. 146 of 1929, Decided on 11th March 1929, against decree of Dist. Judge, Pyapon.

Civil P. C., S. 145—Remedy against immovable property given as security under a registered bond can be enforced without recourse to a suit.

In a case where a surety has offered certain specified properties as security for his obligations under the bond, and where because these properties are immovable properties it has been necessary to have the bond registered to make the security effective, the bond can be enforced against the properties without bringing a regular suit: *A. I. R.* 1924 *All.* 105; 41 *Mad.* 327, *Foll.* [P 126 C 2, P 127 C 1]

Tha Kin—for Appellant.

E. Maung—for Respondents.

Judgment.—In suit No. 9 of 1926 of the District Court of Pyapon the present respondent sued Ma Seik Kaung for possession of certain property including a mill, on the strength of a registered conveyance of the properties given to them by Ma Seik Kaung. In connexion with that suit they applied for the appointment of a receiver of the properties and it was ordered that Ma Seik Kaung should be allowed to remain in possession of the mill on payment of a rent of Rs. 1,000 a month and on giving security for Rs. 7,000. The present appellant accordingly executed a security bond for Rs. 7,000. Subsequently further security of Rs. 3,000 was demanded by the Court and appellant executed a registered bond for Rs. 10,000 in favour of the Judge of the Court giving certain immovable properties belonging to her as security for Ma Seik Kaung's duly performing and satisfying any order which might be made against her.

Ma Seik Kaung failed to pay the rent which she had undertaken to pay and for the payment of which appellant had stood surety, and after respondents had obtained a decree in the suit they applied to the Court for the recovery of the arrears of rent from appellant as surety under the provisions of S. 145 (c), Civil P. C.

The Court found that appellant was liable on the bond to the extent of Rs. 10,000 in respect of the arrears of payable by Ma Seik Kaung and held that respondents were entitled to bring the properties which she had given as security to sale without filing a suit on the bond.

Appellant contends in appeal that the lower Court was wrong in holding that the properties could be sold without a suit on the bond and she says that there was no personal liability under the bond.

A reference to the terms of the bond shows that there is no basis for the latter of these grounds, and the only question which arises in the appeal is whether in a case where a surety has offered certain specified properties as security for her obligations under the bond, and where because these properties are immovable properties it has been necessary to have the bond registered to make the security effective, the bond can be enforced against the properties without bringing a regular suit.

In form the bond in the case did not effect a mortgage of the properties although it was admittedly intended to do so. It was to the following effect:

"I, Ma On Bwin, am hereby bound to the Judge of the District Court in the sum of Rs, 10,000 in the following circumstances. It has been ordered by the Court that Ma Seik Kaung shall be allowed to continue to work the rice mill in suit, on giving security and I have consented to be surety for Ma Seik Kaung for the due performance and satisfaction of any order which may be made against her. Now the condition of the obligation of this bond is that if Ma Seik Kaung shall duly perform and satisfy any order which may be made against her then there shall be no obligation under this bond, but in case of any default by Ma Seik Kaung I shall pay to the Judge of the District Court Rs. 10,000 or such sum as the said Judge shall order in or towards satisfaction of such order."

To that document is annexed a list of the properties which Ma On Bwin had in fact agreed to offer as security for her obligation under the bond, but there is no statement in the bond itself that those properties were offered as security or that they were mortgaged by Ma On Bwin.

It is not, however, the case of either side that the document did not in fact effect a mortgage of the properties mentioned therein, and we shall therefore deal with the matter on the assumption that there was such a mortgage.

The question whether the remedy against immovable property given as security under a registered bond can be enforced without recourse to a suit was considered in the case of *Subramanain Chettyar* v. *Raja of Ramnad* (1) where it was decided that such property can be sold by order of the Court without recourse to a suit. There is a similar decision in the case of *Mahalakshimi Bai* v. *Badan Singh* (2) and we see no reason to doubt that these decisions are in accordance with the intention of the legislature embodied in S. 145 of the Code.

No question of the amount of arrears of rent has been raised in the appeal and therefore we assume that the arrears amount to at least Rs. 10,000.

We are of opinion that the lower Court's finding that the property could be brought to sale without a suit on the mortgage bond was correct and we dismiss the appeal with costs, Advocate's fee in this Court to be five gold mohurs.

P.R./R.K. *Appeal dismissed.*

(1) [1917] 41 Mad. 327=34 M. L. J. 84=6 M. L. W. 762=43 I. C. 187=(1917) M. W. N. 872.

(2) A. I. R. 1924 All. 105=45 All. 649.

A. I. R. 1929 Rangoon 127

HEALD AND OTTER, JJ.

S. A. S. Chettiar Firm—Appellants.

v.

U. Min Din and *others*—Respondents.

First Appeal No. 199 of 1928, Decided on 19th March 1929.

(a) Civil P. C., S. 104—Scope—Civil P. C. S. 115.

Order granting mortgagee interest on mortgage money for the time during which sale proceeds of mortgage property are lying in Court, is not appealable but is revisable. [P 127 C 2]

(b) Mortgage—Sale proceeds lying in Court—Mortgagees cannot get interest on sale proceeds—Interest.

The mortgagees are not entitled to any interest on the mortgage money after the mortgaged properties have been sold and the mortgage has come to an end and they cannot be allowed interest on the sale proceeds of the mortgaged properties while they are lying in the Court. [P 127 C 2]

Venkatram—for Appellants.

Soorma for *Burjorjee* and *Basu*—for Respondents.

Judgment.—The first and second respondents, who are said to be brother and sister, obtained a number of mortgage decrees against the rest of the respondents, and under those decrees brought the mortgage properties to sale. The sale proceeds were more than sufficient to satisfy the mortgage debts and appellants, who had obtained a money decree for a very large amount against the same judgment-debtors claimed to execute their decree against the sale proceeds. The first and second respondents claimed that they were entitled to interest on the mortgage money not only up to the time when the mortgaged properties were sold but also for the time during which the sale proceeds were lying in Court before payment out to them, and the Judge made an order for such interest.

Applicants filed an appeal against that order, but asked that if it should be found that no appeal lay, their memorandum of appeal should be treated as an application for revision. We are of opinion that no appeal lies in such a case, but we have no doubt that we have power to deal with the case in revision.

Respondents' learned advocates cannot support the lower Court's order. All that they say is that interest is always in the discretion of the Court, which is of course not true. We see no reason to believe that the mortgagees, that is, respondents 1 and 2 were entitled to any interest on the mortgage money after the mortgaged properties had been sold and the mortgage had come to an end, or that there was any reason why they should be allowed interest on the sale proceeds of the mortgaged properties while they were lying in the Court.

We, therefore, set aside the lower Court's order for payment of interest on the mortgage money after the date of the sale of the mortgaged properties and we direct the Court to make the necessary consequential alterations in its subsequent orders. Respondents 1 and 2 will pay applicant's costs in this Court, advocate's fee to be 5 gold mohurs.

S.N./R.K. *Order set aside*

A. I. R. 1929 Rangoon 128 (1)

OTTER, J.

Maung Tha Dun—Appellant.

v.

Ma Mai Ein and *another*—Respondents.

Second Appeal No. 523 of 1928, Decided on 6th March 1929, against decree of Dist. Judge, Thayetmyo, in Civil Appeal No. 41-T of 1928.

Civil P. C., O. 21, R. 63—Application for removal of attachment being unsuccessful—Applicants bringing regular suit praying for costs in application and for declaration that property was theirs—They can get decree for such costs.

Persons, who, having been unsuccessful in their application for removal of attachment levied on certain property bring a regular suit claiming costs paid by them in respect of such application and also a declaration that the property was theirs, can get a decree for costs on the previous application if they are successful in their suit: *A. I. R.* 1925 *Mad.* 233, *not Foll.*; 16 *Bom.* 608; (1904-06) 2 *U. B. R.* 4, *Rel. on*; [*see also A. I. R.* 1928 *Rang.* 248, *Ed.*] [P 128 C 1]

Maung Tin—for Appellant.
Ba Thaung—for Respondents.

Judgment.—In this case the respondents made an unsuccessful application for removal of an attachment levied by the appellant upon certain property. This application was dismissed with costs. They brought a regular suit under the provisions of O. 21, R. 63 claiming the costs paid by them in respect of this application for removal of attachment, and also a declaration that the property was theirs. In that case, they were successful, and got a decree for costs and got the declaration asked for. This decision was upheld in the lower appellate Court.

Before me the suggestion is that as a matter of law, no decree for the costs of the respondents' application for removal of attachment could have been granted. The wording of O. 21, R. 63 is relied on, and the case of *Nambi Veettel Tarwad* v. *Athi Karath Valappil Tarwad* (1) is relied on for the appellant.

Two cases are relied on for the respondents viz. *Sadu* v. *Ram* (2) and *Palaneappa Chetty* v. *Maung Shwe Ge* (3) In the former of the two cases, it was said that the Court ought to lean strongly against multiplicity of suits and the result of withholding consequential relief was pointed out. It is true this case and the case in the Upper Burma Rulings conflict with the Madras case relied on by the appellant, but it seems to me that the reasoning underlying the Bombay High Court is irresistible. Moreover in my view there is nothing in the actual wording of O. 21, R. 63 which precludes the award of consequential relief in such a case. The appeal therefore must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1925 Mad. 233.
(2) [1892] 16 Bom. 608.
(3) [1904-06] 2 U. B. R. 4.

A. I. R. 1929 Rangoon 128 (2)

MAUNG BA, J.

(Maung) Pe Kye—Applicant.

v.

(Maung) Shwe Zin—Respondent.

Civil Revn. No. 281 of 1928, Decided on 14th March 1929, against judgment of Dist. Court, Bassein, in Civil Misc. Case No. 74 of 1928.

Civil P. C., O. 33, R. 5 (a) — Value for Court-fee wrongly calculated—Application must be dismissed—(*Obiter*) Right of fresh application may subsist.

Where an applicant has not calculated the Court-fee value in accordance with S. 7 (v) (b), Court-fees Act, his application for leave to sue as a pauper must be rejected. (*Obiter*) applicant appears to have still a right to present a fresh application. [P 129 C 1]

S. C. Das—for Applicant.
N. N. Burjorjee—for Respondent.

Judgment. — Appellant's application for permission to sue as a pauper was rejected by the District Judge of Bassein on the ground that the value for the purposes of Court-fees had been wrongly calculated.

Appellant claims the entire estate of U Tha Ko. According to the schedule filed, the estate consists largely of paddy holdings. There can be no doubt that the values of such holdings should have been calculated at five times the land revenue under Cl. (v) (b), S. 7, Court-fees Act. So the valuation in the application is incorrect.

The question is whether such a wrong calculation offends Cl. (a), R. (5), O. 33, Civil P. C. A Court shall reject an application for permission to sue as a pauper where it is not framed in the manner prescribed by R. 2. That rule lays down that such applications shall contain the particulars required in re-

gard to plaints in suits. R. (1), O. 7, enumerates such particulars and one of them is a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and Court-fees so far as the case admits. S. 7, Court-fees Act precribes the mode of computing Court-fee value. In the present case applicant has not calculated the Court-fee value in accordance with that section when such a defect occurs in an application for leave to sue as a pauper. R. 5, O. 33, leaves the Court no discretion, but it must reject the application. The District Court's order was justified. Applicant appears to have still a right to present a fresh application.

The present application for revision is accordingly dismissed with costs, two gold mohurs.

M.N./R.K. *Application dismissed.*

A. I. R. 1929 Rangoon 129 (1)

RUTLEDGE, C. J.

Maung Ba Thein—Appellant.

v.

Ma Than Kin—Respondent.

Civil Misc. Appeal No. 15 of 1929, Decided on 20th March 1929, against order of Dist. Judge, Henzada.

Guardians and Wards Act, S. 25—Scope —Guardian and wards Act, S. 4(5).

An application under S. 25 must be made to the Court where the minor ordinarily resides. [P 129 C 2]

P. K. Basu for *J. R. Chowdhury*—for Appellant.

F. S. Doctor—for Respondent.

Judgment.—This is an appeal from an order of the District Court of Henzada refusing to issue a warrant for the arrest of a minor. It appears that the appellant and the respondent were husband and wife at the time that the minor, a female child was born, about 7 years ago. A month or so after the birth the parties were divorced by mutual consent, and the minor has been living with her mother ever since, either at Mandalay or Sagaing. The appellant it seems paid maintainance for the minor up to sometime last year when he applied to the District Court of Henzada under S. 25, Guardian and Wards Act, for possession of the minor. The mother did not appear in person in Henzada or give evidence and an ex parte order was passed in the appellant's favour. The present is an application to execute that order by issuing a warrant of arrest of the minor. This, the District Court has refused to do, on the ground that it has no jurisdiction. The objection in our opinion is well founded, and the appellant was not entitled in law to make this application originally in the District Court of Henzada at all.

The words of S. 4 (5), Guardian and Wards Act, are in our opinion clear "the Court" means

"in any matter relating to the person of the ward, the District Court having jurisdiction in the place where the ward for the time being ordinarily resides."

An application under S. 25 accordingly must be made to the Court where the minor ordinarily resides. This according to the evidence before us, would have been either the District Court of Mandalay or the District Court of Sagaing, but certainly not the District Court of Henzada. The District Court of Henzada accordingly had no jurisdiction to pass an ex parte order and it is accordingly a nullity and of no effect. For these reasons the appeal fails and must be dismissed with costs. 5 gold mohurs advocates' fee.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Rangoon 129 (2)

Full Bench

RUTLEDGE, C. J., AND PRATT, OTTER, MAUNG BA, BROWN, HEALD, AND MYA BU, JJ.

U Po O and *another*—Appellant.

v.

Ma Tok Gyi—Respondent.

Civil Ref. No. 1 of 1929, Decided on 8th April 1929, from decree of Dist. Judge, lower Chindwin in Civil Reg. No. 1 of 1928, D/- 17th May 1928.

*** Buddhist Law (Burmese)—Gift of marriage joint property by husband without wife's consent is wholly void.**

A deed of gift executed by a Burmes Buddhist husband without his wife's consent, express or implied, with reference to lands forming part of the joint property of the marriage is not valid even to the extent of his interest in the property, but is wholly void : 3 *L. B. R.* 66 ; (1893-1909) *L. B. R.* 403, *Held overruled*, *A. I. R.* 1927 *Rang.* 209 ; *A. I. R.* 1927 *Rang.* 274, *Rel. on.* [P 133 C 1]

S. Ganguli for *A. C. Mukerjee*—for Appellants

Ko Ko Gyi Thein Mg. and *Ba Thaung*—for Respondent.

Order of Reference

Pratt, J.—Plaintiff Ma Tok Gyi sued her husband U. Po O, Myothugyi of Monywa and Ma Ngwe Shin for cancellation of two deeds of gift of landed property by defendant 1 in favour of defendant 2, and was granted a decree.

The defence was that there had been a divorce between plaintiff and defendant 1, that the suit was not maintainable in its present form and should have been for partition.

The District Judge held that there had been no divorce. It is perfectly clear that there was no formal divorce, and having regard to the social position of the parties it is obvious that a divorce would have been effected with some formality in the presence of witnesses.

We are also satisfied that there had been no desertion which would operate automatically as a divorce.

It is true that defendant 1 entered into an intrigue with defendant 2 and ended by living with her in a separate house some 12 years ago; but it is admitted by him that the income of the joint property was shared. by him with the plaintiff and revenue on the land paid by each in turn in alternate years.

Defendant used, to visit his wife's house each year on the occasion of annual pagoda festival and stay some four days. He kept his gun, his official dah and his appointment orders in his wife's house.

The fact that his wife did not speak to him from the time he left her house to live with defendant 2 only means that she was incensed with him. It cannot constitute desertion by the husband. It is also admitted that she occasionally sent him food, and it is clear that they must have communicated, through a third person or otherwise.

In the written statement there is no mention of desertion but defendant 1 alleged a divorce by mutual consent 12 years or so ago.

The conditions laid down in *Ma Nyun v. Maung San Thin* (1) as requisite for a divorce by desertion and lapse of time have obviously not been fulfilled.

The property covered by the deed of gift is joint, and the interest of defendant 1 therein is not determinable It is contended, however, on behalf of the defendant-appellants that the deeds are valid at least to the extent of defendant 1's interest in the property covered thereby and should not be set aside. Reliance is placed on the Full Bench Ruling of the Lower Burma Chief Court in *Ma Shwe U* v. *Ma Kyu* (2), which lays down categorically that a sale by a Burmese Buddhist of hnapazone property of himself and his wife made without her consent constitutes a valid transfer of his share and interest in the property sold.

If this ruling remains sound law then it is good authority for the proposition that a gift of joint property would be valid to the extent of the donor's interest.

In the Privy Council case of *Ma Thaung* v *Ma Than* (3) it was observed (at p. 178 *of* 5 *Rang.*) that in the Burmese social and legal system the wife is, to all intents and purposes a partner.

In *Ma Paing* v. *Maung Shwe Hpaw* (4), by a Full Bench of this Court the doctrine of partnership as extended to a Burmese husband and wife was definitely formulated. It was held that husband and wife were partners and all the property of the marriage, whether payin or lettetpwa is partnership property. It was held that where the interest of a Burmese Buddhist husband in property which was either payin, brought, by him to the marriage or was jointly acquired, lettetpwa, is during the subsistence of the marriage sold in execution of a decree for a debt incurred by him in business carried on by him while he was living with his wife, the buyer of that interest does not acquire the right to have the property partitioned and to obtain possession of part of the property as representing the husband's interest in it. It was held also that there is presumption that a suit brought against either of the partners is a suit against the partnership and that in such a suit a partner, who is not joined as a party is represented by the partner who is joined as a party, and a decree against either partner can ordinarily be executed against any partnership property. provided the decree was obtained against that spouse as representing the partnership.

The ruling in *Ma Shwe U* v. *Ma Kyu* (2) was not expressly dissented from.

(1) A. I. R. 1927 Rang. 294=5 Rang. 537 (F.B.).

(2) 3 L. B. R. 66 (F. B.).

(3) A. I. R. 1924 P. C. 88=5 Rang. 175=51 Cal. 274=51 I. A. 1 (P.C.)

(4) A.I.R. 1927 Rang. 209=5 Rang. 296(F.B.).

If the position remained where it was left by the Full Bench ruling, there would be no difficulty in holding that the gifts are good to the extent of the donor's interest in the property, subject to the reservation that the donee cannot claim partition or possession during the subsistence of the marriage between U Po O and Ma Tok Gyi. It is common ground that the property covered by the gift was joint, being partly acquired by inheritance and partly by the joint efforts of the partners.

Although the parties to the marriage are partners it is obvious that the partnership can only be applied with limitations. Under the partnership law an assignment by a partner of his share without the consent of the other partners is not wholly inoperative. It entitles the assignee to receive a share of the profits to which the assigning partner would otherwise be entitled, and, in case of dissolution of partnership, the share of the partnership assets to which the assigning partner is entitled (Lindely on Partnership, Edn. 8, pp. 423-28). A partner is at liberty to dispose of his interest in limine which is regarded as real property without reference to his co-owners.

In the present instance therefore the donee whilst having no interest or claim against the wife during the subsistence of the marriage with respect of the parnership property might conceivably be entitled to claim the income of his interest in the property from the donor.

In *Ma Paing* v *Maung Shwe Hpan* (5) however, in applying the Full Bench ruling on the reference, the Bench held that the sale of the husband's interest in the joint property was void and set it aside.

It seems to me, the correctness of this conclusion is open to grave doubt, but, if it is correct, it would seem to follow that a gift of joint property by a husband or wife without the other's consent would be void as held by the District Court. I consider the point is one which should be determined by a Full Bench.

I would, therefore, refer to a Full Bench the question whether a deed of gift executed by a husband, without his wife's consent, with reference to lands forming part of the joint property of the marriage is valid to the extent of his interest in the property or is wholly void.

(5) A. I. R. 1927 *Rang.* 274=5 *Rang.* 478.

Otter, J.—I concur, and I would observe that the sale of a share in partnership property may be subject to considerations different from those applicable to the facts of the present case. I would further point out that the law relating to a sale of such a share appears to be the same in India as it is in England: see *Jaggut Chandra Dutt* v. *Radha Nath Dhur* (6).

Opinion

Maung Ba, J— The following question has been referred to a Full Bench :

"Whether a deed of gift executed by a husband, without his wife's consent with reference to lands, forming part of the joint property of the marriage is valid to the extent of his interest in the property or is wholly void."

This reference arose out of a suit brought by a Burmese Buddhist wife against her husband for the cancellation of two deeds of gift whereby the latter had given away valuable lands forming part of their joint property to a servant girl, who had become his lesser wife. The old gentleman is Myothugyi at Monywa and the recipient of double decorations, K. I. H. and A. T. M. He is now 77, while his wife is 82, and they have been married nearly 60 years. The girl was the daughter of their syce and was employed in the house as a cook. Some years ago, improper intimacy between her and the old thugyi started and the thugyi's wife drove her out of the house. That measure failed to stop the intrigue. The thugyi bought a small house and went and lived there with the girl and some time later made these gifts to her.

The suit was decreed, and it has been contended that at least the gifts should be held good to the extent of the old thugyi's share and interest. The ruling in *Ma Shwe U* v. *Ma Kyu* (2) if it can be considered as still good law, would support that argument. There it was held that though a Burmese Buddhist husband cannot sell or alienate the hnapazone of himself and his wife without her consent or against her will, yet such a sale constitutes a valid transfer of the share of the husband or wife, which is partible even during the subsistence of marriage and is therefore saleable in execution of a decree. This view was dissented from in the later case of *Ma Paing* v. *Maung Shwe Hpaw* (4) where it was held that at Burmese Buddist

(6) [1884] 10 Cal. 669.

Law, a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether payin or lettetpwa is impartible and indeterminate so long as marriage subsists and is therefore not saleable in execution of a decree. This decision was based upon the principles laid down in the Full Bench case of *Ma Paing* v. *Maung Shwe Hpaw* (4) where it was held that at Burmese Buddhist law, a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether payin or lettetpwa is partnership property, that neither partner is entitled to separate possession of any share of the parnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce.

The learned Judge who made this reference was, however, of opinion that the ruling in *Ma Shwe U* v. *Ma Kyu* (2) had not been expressly dissented from by the Full Bench and that the correctness of the decision in the latter case of *Ma Paing* v. *Maung Shwe Hpaw* (4) was open to grave doubt. With great respect to that learned Judge, I venture to think that the Full Bench has overruled the ruling in *Ma Shwe U's* case (2). Heald, J. made a reference to that Full Bench because he considered the ruling in *Ma Shwe U's* case (2) to be incorrect. In the course of his order of reference he observed:

"Most of the cases mentioned above were considered by a Full Bench of the Chief Court in the case of *Ma Shwe U* v. *Ma Kyu* (2) where it was held a Burmese Buddhist husband cannot sell or alienate the hnapazone (attetpa) property of himself and his wife without the consent of the wife, express or implied, or against her will, but that a sale by a Burmese Buddhist husband of such property without the consent of his wife constitutes a valid sale of his share and interest in the property sold. These two findings seem to be inconsistent and with all respect I venture to suggest that the latter part of this decision was mistaken."

In my judgment in the Full Bench case it is true that I did not quote *Ma Shwe U's* case (2) but I quoted an earlier case, viz. *Maung Po Sein* v. *Ma Pwa* (7) which had enunciated a similar principle. In the course of my judgment I observed:

"Where one of the Buddhist couple dealt with the joint property singly it has been held that, in the absence of express or implied consent of the other party, the alienation is not wholly void but is still valid so far as the alienator's share is concerned. Such a decision is to be found in *Maung Po Sein* v. *Ma Pwa* (7) decided by the learned Judicial Commissioner of Lower Burma in 1897, .. That property is lettetpwa and he has not been able to cite any authority from any of the Dhammathats for that view. He has evidently overlooked the main principle of Burmese Buddhist Law, that while marriage subsists neither husband nor wife is entitled to alienate or claim separate possession of any property of the marriage.

I have also observed:

"If either husband or wife can dispose of his or her share without the consent of the other, it will no doubt undermine the foundation upon which joint property system of Burmese Buddhist couple has grown up."

Chari, J., in the course of his judgment observed:

"It is settled law that no partner can alienate even his own interst in any individual partnership property. This follows from the liability of the whole of the partnership property for the partnership debts. Similarly, in the case of a Burmese Buddhist couple it is not open to either the husband or the wife to alienate his or her own interest in any particular property. To allow him or her to do so will be to throw the burden of the joint debts on to the party who has not disposed of his interest."

I think the above extracts would suffice to show that the previous law in *Ma Shwe U's* case (2) that a Burmese Buddhist husband or wife can alienate his or her own interest on their joint property without the consent of the other has as a matter of fact been overuled. This may dispose of the reference. However, I should like to note that the partnership under the Burmese Buddhist Law is not exactly the same as an ordinary partnership founded upon contract. In the case of an ordinary partnership the assignment of a partner's share without the consent of the other partners brings about immediate dissolution. It cannot for a moment be conceded that such a consequence must follow if a Burmese Buddhist husband or wife, without the consent of the other assigns his or her share in joint property. The partnership under Burmese Buddhist law terminates only on the death of a partner or on divorce. Again under ordinary partnership law, the assignment is not wholly inoperative, but when dissolution results upon assignment without consent, the assignee has a right to sue not as a partner but as an assignee for an account and also for a distinct share. It has therefore been urged that in the case of a partnership under Buddhist law why

(7) [1893-1909] L. B. R. 403.

should not such a right be suspended till dissolution takes place and why should not the assignment be held good for that purpose. In my opinion it would be extremely dangerous and also against public policy to make such a concession. There would be great temptation to the third party to try and bring about death or divorce as the case might be. Besides the assignment of such a nature appears to be obnoxious to the provisions of Cl. (b), S. 6, T. P. Act, which says that the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.

For these reasons my answer to the question referred will be :

"A deed of gift executed by a Burmese Buddhist husband without the wife's consent, with reference to lands forming part of the joint property of the marriage is wholly void."

Rutledge, C. J. — I will like to add one thing to the judgment of my brother Maung Ba, with whom I am in full agreement, so that it may not be misinterpreted to require in all cases, the consent of the other party in express terms to be proved. As was observed in *Ma Paing* v. *Maung Shwe Hpaw* (4) at *p.* 334 *of* 5 *Rang.*

"the partnership assets are liable in respect of all partnership debts and either partner can bind his co-partner in respect of any contract or agreement necessary for or usually done in connexion with such a partnership."

In the transactions before us it cannot be suggested that they were in the interest of the partnership.

I agree that the case of *Ma Shwe U* v. *Ma Kyu* (2) has in fact been overruled by *Ma Paing's* case above mentioned.

Brown, J. — I agree that in view of the decision of the Full Bench and the general principles approved in *Ma Paing's* case (4) the answer to the question referred must be that the deeds of gift are wholly void. The principles accepted in *Ma Paing's* case as I understand them, are that during the subsistence of the marriage, a Burmese Buddhist husband and wife have a joint interest in the whole estate of the marriage, but that neither party has a separate interest in any part of the estate. Whilst therefore in the present case the husband has a joint interest with his wife in the whole of the property of the marriage he has no separate interest in the particular part of the estate which he has attempted to transfer by way of gifts. To say that the gifts are valid to the extent of his share is meaningless, because that share is incapable of valuation. He has no definite claim to these particular pieces of properties, and on division he might not obtain any of these properties as his share. The property remains liable to all partnership debts. Even though the whole estate becomes his on the death of his wife, the particular property still remains liable for the debts of the partnership, and there is no guarantee that even in that eventuality he will obtain any rights in the properties. The analogy of the assignment of a share in a partnership by a partner under the ordinary partnership law does not seem to me sound. What a partner assigns is not his share in a definite portion of the partnership property, but his share or a part of his share in the whole partnership. It is obvious that the consent of the wife cannnot be implied to the gifts in the present case. In fact it is clear that the gifts were against her wishes and that they were not made in the interests of or on behalf of the partnership. I therefore agree in the answer proposed.

Heald, J. — I am of opinion that on the basis of the decision of the Full Bench in *Ma Paing's* case (4) we are bound to hold that the gift in this case, which was a gift of the property of the marriage made by the husband to a "lesser wife" or mistress without the consent and against the will of the wife was invalid.

It must be admitted that this decision is not in accordance with a passage in Book VIII, S. 3 of the Manugye. That passage says :

"If the husband without the knowledge of his wife made a gift of property which belongs to both he and his wife, and the person to whom the property is given be not the wife or lesser wife or a bought woman or a mistress, the person who receives the gift shall keep it according as it is given. The wife shall not say : "It is the property of both. I do not know of the gift. "The reason for this rule is that the husband is lord of the wife. But if the gift is given with the intention of making the person to whom it is given a lesser wife, a bought woman, or a mistress, then when the wife comes to know of the gift, if in fact it was made without the wife's knowledge half of the property given shall be restored to the wife. As for the other half, it is the share belonging to the husband. If the gift is the gift of property which the wife brought to the

marriage there is no right to give in any case whatever. The wife must have the whole of such property because she has to pay the debts which she brought to the marriage. But if the property which is given is property which the husband brought to marriage, the person to whom the property is given shall have the property according as it is given. The wife shall not have the right to say: "I did not know of the gift", because the husband has to pay the debts which he brought to the married. If the wife make a gift to a person, even a person who is not her paramour, without her husband's knowledge, she shall have no right to make the gift without her husband's knowledge. This is said of property which belongs equally to both. If the case arises between a married couple, who have been married before, and the wife without her husband's knowledge give property, which she brought to the marriage, to a person who is not her paramour, let her have the right to give it and let her husband not take it back. As for the penalty for a wife's giving without her husband's knowledge and without telling him, let the husband have the right to punish the wife. But even if the property given, if the property brought to the marriage by the wife, if the gift be to a paramour or to a person whom the husband suspects, let the wife not say: "It is property which I brought to the marriage. Since it is property given without knowledge of the husband, the wife has no right to give it. Let the husband get it all back."

It seems clear that the rules given in that passage belong to a period before the rights of the husband and wife in the property which the other brought to the marriage was recognized and since the section of Manugye in which these rules appear contains also rules for gifts to wives and children into slavery and gifts for lust, which apparently was not reprobated, if the woman to whom they were given were below the age of puberty or over the age of child bearing, it is clearly archaic and cannot be regarded as having force in the present state of civilisation. The adoption of the rules contained in that section regarding gifts by a husband would clearly defeat what we regard as a basic principle of the Burmese Buddhist Law namely that the property of the marriage of a Burmese Buddhist couple is impartible, except on death or divorce, since it would enable a husband by means of a gift of all the property of the marriage to his mistress to effect what was in fact a partition of the property as against the wife. Our judgment in *Ma Paing's* case (4) was an attempt to lay down the general principles of Burmese Buddhist law as to ownership of property by a Burmese husband and wife, now in force, and although there may be difficulty in applying the law to particular cases, e. g., to the cases of a fine inflicted on a husband for a criminal offence or damages given against a husband for a tort, or a husband's gambling losses or to cases where there are several wives, I see no difficulty in its application in the present case, and I have no hesitation in holding that the gift in this case should be regarded as invalid. Buddhist law does not of course apply to gifts as such, since gifts, as such, are not matters regarding succession, inheritance, marriage, or caste or any religious usage or institution and the particular gift in this case is certainly not such a matter. It is not the gift as such that is invalid. Its invalidity consists on the fact that the subject matter is something that the giver had no power to give. The defect is not in the gift itself, but in the capacity or title of the giver. We have held that a husband has no power to alienate property which is property of the marriage, without the wife's consent, express or implied, and in the present case no such consent can be imputed. I would therefore concur in the answer proposed to be given in respect of the question referred namely that the deeds of gift in question conveyed no title to the donee in respect of the property which they purported to convey.

Mya Bu, J.—I agree in the answer proposed and have nothing to add to the judgments of my learned brothers.

S.N./R.K. *Reference answered.*

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* A. I. R. 1929 Rangoon 134
Full Bench

RUTLEDGE, C. J, AND CARR, MAUNG BA, MYA BU AND BROWN, JJ.

U Pyinnya and *another* — Appellants.

v.

U Dipa—Respondent.

Civil Ref. No. 2 of 1929, Decided on 18th March 1929.

*** Court-fees Act, Sch. 2, Art. 17 (vi)—In suits for possession of Phongyi Kyaung, Court-fees are payable under Art. 17 (vi) and not ad valorem Court-fees on market value.**

In a suit for possession of a Phongyi Kyaung and its site, Court-fees payable are not ad valorem Court-fees on the market value of the Kyaung and the site, but they are payable under Art. 17 (vi) because the property having been dedicated in perpetuity to religion, it cannot be said to have any market

value: 25 *Cal.* 194(*P.C.*); *A. I. R.* 1924 *Mad.* 19, 13 *Bur. L. T.* 40 (1893-1900) *L. B. R.* 614, *Rel. on.*; 3 *U. B. R.* 236, *Diss. from.* [P 136 C 2]

Maung Kun—for Appellants.
Maung Mya Gaing—for Respondent.

Order of Reference

Rutledge, C. J. and Brown, J.—The parties to this appeal are Burmese Buddhist monks. The appellant are trustees of the Thayettaw Kyaundaik in Rangoon, under a scheme settled by the late Chief Court of Lower Burma. They brought a suit for ejectment of the defendant from the Kyaundaik and for possession of the Hmanzin Kyaung. In para. 19 of their plaint they stated:

"that being religious property, the kyaung in suit has nas no market value, and the plaintiffs pay a Court-fee of Rs. 10.

This valuation was accepted by the officer whose duty was to see that the Court-fee was paid within the meaning of S. 5, Court-fees Act, and summons was issued to the respondent. In the written statement the respondent stated that the Kyaung and its site were worth at least Rs. 15,000 and that Court-fee should have been paid on that amount.

It was finally agreed between the parties that, if Court-fees had to be paid on the value of the property, the value would be accepted as Rs. 5,000.

The learned trial Judge following a decision of the late Judicial Commissioner of Upper Burma, held that Court-fees had to be paid ad volorem and the appellants have contested the correctness of this finding on this appeal.

As no difference arose in the trial Court, between the officer whose duty it was to see that any fee was paid and the plaintiff, the provisions of S. 5, Court-fees Act, do not apply and we therefore think that the learned trial Judge had jurisdiction to pass the order which he did.

The question raised is of some importance and has been the subject of conflicting judicial decisions. In the Upper Burma case, which was followed by the learned trial Judge [the case of *Maung Meik* v. *U Kumara* (1),] it was held

"that the provisions of S. 7 (v) (c) Court-fees Act apply to the valuation of religions land and that its value must be deemed to be the amount at which the Court estimates it with reference to the value of similar "non-religious" lands in the neighbourhood."

A contrary view was taken by Regg, J., in *U Konma* v. *U Einda* (2). The question of the valuation of a Hindu temple was considered by a Full Bench of the High Court of Madras in the case of *Rajagopala Naidu* v. *Ramasubramania Ayyar* (3). It was held that a temple had to be dealt with as a matter not otherwise provided for in Sch. 2, Art. 17, Court-fees Act. This decision had reference to temple only, there was no decision by the Full Bench on the question of religious land, nor does it necessarily follow from their decision that a Phongyi Kyaung, which is not a temple but a building used for the residence of monks has no market value. But it is a matter for consideration how far the principles approved in that case would apply to the present case.

The matter is of some importance, and in view of the conflicting authorities, we think it desirable that the question should be referred to the decision of a Full Bench.

We, therefore, refer the following question:

"In a suit for possession of a Phongyi Kyaung and its site, are Court-fees payable ad volorem on the market value of the Kyaung and the site or are they payable under Art. 17 (vi), Sch. 2, Court-fees Act."

Opinion

Rutledge, C. J.—The following reference has been made for decision of this Full Bench:

"In a suit for possession of a Phongyi Kyaung and its site, are Court-fees payable ad valorem on the market value of the Kyaung and the site or are they payable under Art. 17 (vi), Sch. 2. Court-fees Act ?"

The reference arose in the following circumstances: The appellants, the trustees of the Thayettan Kyaungdaik in Civil Regular No. 225 of 1927 (original side, High Court) sued the respondent to evict them from a Kyaung in the said Kyaungdaik, and paid a Court-fee of Rs. 10 under Art. 17, Cl. (vi), Sch. 2, Court-fees Act. The plaint was accepted by the Deputy Registrar so that no difference arose which could be referred under S. 5 for the decision of the Taxing Officer. But the defendant challenged the adequacy of the Court-fee and alleged that the plaint ought to be stamped under S. 7 (v) (c). The trial Judge (Ormiston, J.), following a decision of Heald, J., (then Judicial Commissioner, Upper Burma) in *Maung Meik* v. *U Ku-*

(1) 3 U. B. R. 236.

(2) [1920] 13 Bur. L. T. 40=57 I. C. 953.

(3) A. I. R. 1924 Mad. 19=46 Mad. 782 (F.B).

mara (1) upheld the defendant's contention and the plaint accordingly had to be stamped on an ad volorem basis. Heald, J., in the last mentioned case observes:

"The present case is clearly a suit for possession of land. In such suits the plaint must be stamped according to the value of the subject-matter, and where the subject-matter is land which pays no revenue and has produced no profits during the year next before the date of presenting the plaint, the value must be deemed to be the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood. The learned advocate argues that no other land in the neighbourhood can be similar to religious land, and that therefore S. 7 cannot apply. I cannot accept this argument. The difference between the land in suit and other land in the neighbourhood is merely a difference of ownership and that difference is merely accidental and not essential."

I am unable to accept the learned Judge's reasoning on this point, which seems to offend the principle laid down by their Lordships of the Privy Council in *Manmatha Nath Mitter* v. *Secy. of State* (4). In that case the claimants claimed compensation in respect of the subsoil of roadways which for a period of years had been dedicated to the public. Lord Hobhouse observes:

"By Ss. 13 and 24 (that is of the Land Acquisition Act) the market value of the land at the time of awarding compensation is to be taken into consideration. It is not suggested that there is any market value of these lands as roadways. Mr. Graham argues that when compensation was awarded in this case, the roads had been broken up, and therefore the Subordinate Judge rightly valued the land as belonging absolutely to the plaintiffs free from the burden of the roads, and capable of being used for any purpose. In their Lordships' opinion that would be a very unreasonable construction of the Act . . . . The time of awarding compensation must be construed as meaning the time of compensation, the time at which the right to compensation attaches. At that time these plots of lands were roadways, and the plaintiffs are claiming for a supposed loss of value which had no existence when the ownership of land was changed."

In other words the Court, in order to ascertain the market value has to take the land as it is, and not what it may become in future. There is no question in the case before us, that the land has been dedicated to religious uses in perpetuity and so long as the Buddhist religion continues to be a religion of the Burmese people, is it imaginable that it would pass into secular ownership and so come under the operation of market value? By reason of its dedication at some indefinite period in the past to religous uses, it has, to use a phrase familiar in rating authorities, been "struck with sterility" to my mind, just as definitely as if a macadam road had been laid upon it and dedicated to public use.

(4) [1898] 25 Cal. 194=24 I. A. 177=1 C. W. N. 698 (P.C.).

In Civil Regular No. 299 of 1919, [*U Konma* v. *U Einda* (2)] not reported in authorized Law Reports, Rigg, J., observes:

"The property in dispute is a poggalika Kyaung, and the Phongyi to whom the dedication is made has a life-interest in the Kyaung entitling him to occupy as long as he remains a Phongyi, and entitling him also to put another Phongyi in possession of the Kyaung. He is now, however, entitled to dispose of the Kyaung by sale or by mortgage or by gift to any layman. It was held in *Maung On Gaing* v. *U. Pandisa* (5) that a gift made with a view to a future existence, whether Poggalika or Sangika always retains its religious character and cannot be claimed back for secular uses . . . . If therefore the Kyaung cannot be transferred by a sale or by a mortgage or by a gift it is difficult to see in what way it can have any market value in the ordinary acceptance of that term."

A Full Bench of the Madras High Court in *Rajagopala Naidu* v. *Ramasubramania Ayyar* (3), applying the principle laid down in *Manmatha Nath Mitter's* case (4) above referred to that things have to be taken as they stand at the time in determining the market value of the property held that a temple which is devoted absolutely and in perpetuity to religious purposes can have no market value. I am unable, for the purposes of the present case, to distinguish between the case of a Hindu temple and a Phongyi Kyaung. Both have been dedicated in perpetuity to religious uses and the Full Bench in the *Madras* case (4) refrained from deciding whether the Hindu temple was or was not a house. For these reasons I consider the decision in *Naung Meik's* case (1) erroneous, and would answer the reference that in the suit for possession of a Phongyi Kyaung and its site, Court-fees are payable under Art. 17 (vi), Sch. 2, Court-fees Act.

Carr, Maung Ba and Mya Bu, JJ. — We concur.

Brown, J.—I agree with the answer proposed. So far as the Phongyi Kyaung is concerned, this directly followed from the decision of their Lordships of the Privy Council in the case of *Manmatha*

(5) [1893-1900] L. B. R. 614.

Nath Mitter v. *Secy. of State* (4). If S. 7, Court-fees Act, could be applied the computation of value would under S. 7 (v) have to be according to the market value of the Kyaung, and that cannot be estimated.

As regards the site, if the suit were governed by S. 7, Court-fees Act, the Court-fees would under S. 7 (v) (c) have to be computed at the value estimated with reference to the value of similar land in the neighbourhood. The test here is not the market value of the site in suit, but the market value of similar land in the neighbourhood. The question then is whether the site of a Phongyi Kyaung can be considered as being similar to the other land in the neighbourhood of secular nature. I agree with the learned Chief Justice that by virtue of its dedication to religious purposes the land must be held to have been "struck with sterility" so far as maket value is concerned, and that the difference between it and other land in the neighbourhood is not merely a difference of ownership. It is therefore impossible to estimate the market value of the site for the purpose of S. 7, Court-fees Act.

S.N./R.K. *Reference answered.*

A. I. R. 1929 Rangoon 137

HEALD AND OTTER, JJ.

(Maung) Mya Din—Appellant.

v.

Maung Paik San—Respondent.

Civil Misc. Appeal No. 113 of 1928, Decided on 2nd April 1929.

Buddhist Law, Burmese—Inheritance.

Under the Burmese Buddhist Law a step-grandchild excludes a nephew from inheritance in respect of the estate of the step-grandmother and the fact that he had received from his step-grandmother the share of inheritance to which he became entitled on his grandfather's death does not debar him from being his step-grandmother's heir: 2 *U. B. R.* 66 ; *A. I. R.* 1925 *P. C.* 29 ; *Rang. F. A. No.* 106 *of* 1925, *Rel. on*; *A.I.R.* 1924 *P.C.* 88, *Dist.* [P 138 C 2]

Ba Thaung—for Appellant.
S. Ganguli—for Respondent.

Heald, J.—Respondent who was a nephew of Ma. Ngwe Bwin, deceased, and claims to be one of her heirs, applied for Letters of Administration in respect of her estate. He mentioned in his application that Ma Ngwe Bwin had left an elder sister, and a younger brother still surviving as well as a niece and another nephew.

Appellant a grandson of Ma Ngwe Bwin's husband Chit Tun, who predeceased her, opposed respondent's application for letters on the ground that he was Ma Ngwe Bwin's sole heir, but he did not himself apply for letters.

The lower Court held that respondent was the nearest relative of Ngwe Bwin, and appellant had no right or title to the estate and granted letters to respondent.

Appellant appeals on the ground that in Burmese Buddhist Law a step-grandchild excludes a nephew from inheritance in respect of the estate of the step-grandmother, and that therefore respondent, not being an heir was not entitled to letters.

Since *Ma Gun Bon* v. *Mg Po Kywe* (1) was decided over 30 years ago, it has been regarded as settled law, that step-children or step-grandchildren exclude collateral relatives as heirs of the step-grandparent, and this view of the law was affirmed by their Lordships of the Privy Council in *Maung Dwe* v. *Khoo Haung Sein* (2). But it is contended in the present case that the fact that appellant made a claim against Ma Hnin Bwin, when his grandfather Chit Tun died debars him from being recognized as an heir of Ma Hnin Bwin. It is sought to found this contention on the decision of the Privy Council in the case of *Ma Thaung* v. *Ma Than* (3), but that was a case in which children who by reason of the death of their mother and in view of their father's remarriage had a right as against their father to claim a share of the property of the marriage of their parents and had exercised that right and received their share of the property, claimed again as against their step-mother on their father's death and the decision in that case is based on an express provision of the Buddhist Law which says that children who have claimed and taken their shares of inherit-

(1) [1897—01] 2 U. B. R. 66.
(2) A. I. R. 1925 P. C. 29=3 Rang. 29=52 I. A. 73 (P. C.).
(3) A. I. R. 1924 P. C. 88=5 Rang. 175=51 Cal. 374=51 I. A. 1 (P. C.).

ance from the surviving parent in that parent's remarriage cannot on the death of that parent claim from the step-parent a share in the property of the second marriage. It is contended that this decision establishes a general rule that acceptance of a share of inheritance is in every case a bar to a subsequent claim to inherit, but it seems to me clear that it does not establish any such rule, because what is a bar to a claim as against the step-parent to a share of inheritance as heir of the deceased parent is not necessarily a bar to a claim to inherit as heir of the step-parent himself.

A similar question to that which arises in the present case was considered by a Bench of this Court in the case of *Po Saw* v *Ma Gyi* (4) where the question was whether step-children who have received from their step-mother the share of inheritance to which they became entitled as against her by reason of the death of their father are entitled, as against the step-mother's nephews to inherit the step-mother's estate, in a case where there are no children or descendants of children of the marriage of their father with the step-mother. That case is exactly similar to the present case, except that in this case the claimant is a step-grandchild instead of a step-child or step-children, a difference which in view of the decision in *Ma Gun Bon's* case (1) is immaterial. The contention in that case was the same as that in the present case, namely, the fact that the claimants had already received a share of inheritance barred any subsequent claim to inheritance on their part, and it was supported by the same reference to the Privy Council case of *Ma Thaung* v. *Ma Than* (3) but the Bench decided that the step-children excluded the nephews. I know of no subsequent ruling which throws any doubt on the decision of that case and in further consideration of question in this case, I see no reason to believe that that decision was mistaken. It follows that if appellant in this case received from Ma Ngwe Bwin a share of inheritance to which he became entitled on the death of his grandfather that fact would not debar him from being his step grandmother's heir, and therefore it is necessary to consider whether or not in fact he did become entitled to a share as against his step grandmother on the death of his grandfather. He admittedly claimed and received certain property from Ma Ngwe Bwin, and although if at that time, he had in fact no right of inheritance as against her, the transfer of that property would be rather of the nature of gift than a transfer of property to which he had a right of inheritance, nevertheless even if it was a transfer of inheritance, it would not debar him from being Ma Ngwe Bwin's heir and from claiming inheritance as such heir, and since he is such an heir and as such heir excludes respondent from inheritance, respondent cannot be an heir, and has no right to Letters of Administration.

I would therefore set aside the order of the lower Court granting Letters of Administration to respondent and would direct that the Letters issued to him be withdrawn, and cancelled.

I would also direct respondent to bear appellant's costs throughout.

Otter, J.—The respondent is the nephew of one Ma Ngwe Bwin deceased, and, appellant is her step-grandson. The former obtained Letters of Administration to Ma Ngwe Bwin's estate, and the latter appeals against that order.

There is no dispute upon the facts and the question is purely as to the respective rights of the parties under the Burmese Buddhist Law. The law upon the question under review may be regarded as settled and it is necessary to refer to 2 decisions where the facts were almost indentical with those in the present case viz, *Ma Gun Bon* v. *Maung Po Kywe* (1) *Maung Dwe* v. *Khoo Haung Shein* (2). The latter case is a decision of the Privy Council and this Court is of course bound by it. It may be convenient, however, to set out the head note in the first of these two cases, for down to the year 1923 where it was explicitly approved by their Lordships of the Privy Council that case was regarded as the leading authority upon the matter. The facts were identical with those in the present case and the material portion of the head note are as follows :—

"Held after an examination of all the available texts of Buddhist Law on the subject that collateral blood relations or ascendants can succeed to an inheritance only when there are no possible heirs in the descending line ; that step-children are treated as entitled to

(4) Rang. First Appeal No. 106 of 1925.

some share of inheritance, like descendants by blood ; and that in the absence of natural descendants, step descendants are classed as heirs entitled to succeed, the bond of blood yeilding to the more important consideration of having a descendant heir and representative."

Held further that :

"where there are no children, but only grandchildren surviving, the latter succeed on the same footing as children, although their parent had died without reaching the inheritance or obtaining a vested interest, the principle of Buddhist Law on this point apparently being that this rule is requisite only where a distinction has to be made between the claims of different classes of heirs, and its application unnecessary when the nearest heirs all stand in the same degree of relationship to the deceased owner of the estate to be divided."

In approving of this decision the Privy Council says at p. 33 of the report of Maung Dwe's case :

"Once it is determined, that step-children are descendants they necessarily oust collaterals, for by Buddhist Law the property never ascends as long as it can descend. The learned appeal Judge in this case says :

"The point of view of the Buddhist Law is undoubtedly based on the community of interest between husband and wife. So strong is the bond between them that, in the absence of natural children the husband's or wife's children, as the case may be, rank as the children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations."

"Their Lordships agree with this statement."

One further point may briefly be referred to. The appellants are the step-grandchildren of the deceased. Their natural grandfather Ko Chit Tun died before his wife Ma Ngwe Bwin. There was evidence that during the last illness of the latter there was a partition of Ko Chit Tun's properties and that the deceased made over 35/- "3 baskets of seedling sown land" to the appellant. The latter admits this, but it is not clear whether all Ko Chit Tun's property was partitioned. It is said that some such partition took place, the appellant lost any right he may have had to inherit the property of Ma Ngwe Bwin.

The case of *Ma Thaung* v. *Ma Than* (3) is relied on by the respondent. In that case the Privy Council (upon the authority of one Dhammathat) held that where after the death of the wife husband partitioned the property and marries again; the children by the former marriage cannot claim to inherit.

The reasoning underlying this claim was that as upon a second marriage, which he was about to contract, all his property would become the joint family property of himself and his proposed wife, it was natural that the husband should provide for his then children during his lifetime. It is only necessary to say that even assuming there was a partition of all Ko Chi Tun's property, the facts of the present case are different. Ma Ngwe Bwin did not marry again, nor is there any evidence that she ever contemplated doing so. The evidence rather is that she was a sick woman. The fact that there may have been some sort of partition is immaterial. I am satisfied on the other hand that under the Burmese Buddhist Law the respondent was not an heir of Ma Ngwe Bwin.

The letters granted to him must be withdrawn and the order granting letters to him is set aside with costs both hear and below.

K.N./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 139

RUTLEDGE, C. J., AND BROWN, J.

I. E. Moolla and *another*—Appellants.

v.

Official Liquidator—Respondent.

Civil Misc. Appeal No. 57 of 1928, Decided on 4th December 1928, against order on the original side in Civil Misc. No. 78 of 1927.

Companies Act, S. 235—Unsuccessful appeal by directors in winding-up proceeding—No order as to costs — Still directors can claim reasonable costs bona fide incurred for company and are not to that extent bound to make up company's amount in their hands.

When an order winding up a company is made, the petitioner and the company will ordinarily have their costs out of the estate, and the mere fact that no order was passed while dismissing company's appeal by the Court as to the costs incurred by the company, is not by itself necessarily an obstacle in the way of reasonable claim put forward by the directors for money bona fide expended by them in the interests of the company especially when they are not asking any sum from Official Liquidator but only claiming set off out of the money in their hands. [P 140 C 1, 2]

N. M. Cowasjee—for Appellants.

Clark—for Official Liquidator.

Judgment.—This appeal arises out of the liquidation proceedings of M. E. Moolla & Sons, Ltd. An order was passed directing the winding up of the company under the Indian Companies Act on 21st

June 1927. The company appealed against this order and pending the hearing of the appeal asked for stay of the proceedings. At that time it appears that the directors of the company had in their hands a sum of something over a lakh of rupees belonging to the company. By consent an order was passed that the directors should pay over the sum of a lakh of rupees to the Official Liquidator and should give security for the payment of the balance of about eight thousand rupees, if the appeal failed, and the Court held that the company or its directors were not entitled to retain for use this sum for law costs in connexion with the liquidation. The appeal was subsequently dismissed and no orders were passed by the appellate Court as to the costs incurred by the company in the appeal. The total amount retained by the directors was Rs. 9,158-0-9. The Official Liquidator called on the directors to refund this amount. The directors claimed that they had spent the whole of the amount in expenses of litigation. The Official Liquidator then applied to the Court for an order under S. 235, Companies Act, calling upon the directors to refund the amount. The matter was heard ex parte so far as the directors were concerned and an order was passed directing them to refund. It is against this order that the present appeal is filed.

It is contended on behalf of the appellants that in a case such as the present the company is entitled to its costs in the liquidation proceedings out of the estate, and we have been referred to the case of *In re Humber Ironworks Co.* (1). It was there held that, when an order winding up a company is made, the petitioner and the company will ordinarily have their costs out of the estate. In his original order directing the company to be wound up the learned Judge of the trial Court passed orders directing that the costs of the advocates of the company would come out of the estate. No such order was passed by the appellate Court, and it is contended on behalf of the respondent that it is not open to the directors now to make any claim in this connexion. We are not satisfied that this by itself is necessarily an obstacle in the way of the claim now put forward. The directors are not now asking that the Official Liquidator should make over any sum out of the estate. They are claiming that certain sums of money have been bona fide expended by them in the interests of the estate and that they are not liable to pay those sums to the estate. The matter was not considered by the appellate Court at all, and we think it was open to the Official Liquidator under the directions of the Court to allow the payments claimed, if satisfied that they were made bona fide in the interests of the company. The company lost in appeal, and the appeal must therefore be held not in fact to have been in the interests of the company. But it is difficult to hold that the directors did not bona fide at the time believe that they were acting in the interests of the company and we are therefore of opinion that a reasonable amount might have been allowed to them for their costs. We are quite unable to hold that the claim made by them was a reasonable one. The claim included sum of Rs. 2,000 or over for each of no less than four different advocates, and we are unable to hold that so large an expenditure of money was justified. We do not, however, think that the learned trial Judge should have rejected the claim of the directors in its entirety. We think that the directors might reasonably have been allowed one set of costs as taxed by the Taxing Master. We therefore set aside the order of the trial Judge, and direct that the directors shall be allowed to deduct from the amount payable by them their costs of appeal in Civil Miscellaneous Appeal No. 127 of 1927, the costs to be taxed by the Taxing Master as between advocate and client. We pass no order as to the costs of this appeal.

R.K. *Order modified.*

(1) [1886] 2 Eq. 15=35 Beav. 346=14 L.T. 216=12 Jur. (n.s.) 265.

A. I. R. 1929 Rangoon 140

RUTLEDGE, C. J., AND BROWN, J.

Official Assignee, Rangoon — Appellant

v.

R. M. P. V. M. Firm—Respondents.

First Appeal No. 222 of 1928, Decided on 4th January 1929, against judgment on original side in Civil Regular No. 478 of 1927.

Contract Act. S. 216—*A* mortgaging his Cinema theatre on a leasehold from *G* to *C*—Subsequent mortgage with power to sale in favour of *G*—*A* again mortgaging the property to *E* for one lac—*C* given management of Cinema with power to utilize profits in lieu of principal and interest—*G* selling the property in pursuance of his power of sale—*C* purchasing it and getting renewal of lease of Cinema site—*C* also getting assignment of *E*'s mortgage of one lac for 15 thousand—*A* was held not entitled to benefit of purchase by *C* or of the assignment from *E* by him.

In June 1919 *A* took a lease of certain land from *G* for ten years and built a Cinema Theatre. In September 1922 *A* mortgaged the Cinema to *G* for Rs. 45,000 out of which Rs. 15,000 were the balance due on a mortgage of January 1921. This Cinema, however, with other property was already mortgaged in June 1922 to *C*. In April 1923 *A* executed a further mortgage for one lac to one *E*, the property mortgaged being the one mortgaged to *C* and some other property. In September 1923 *A* under a deed handed over the management of the Cinema to *C* with power to utilize the profits for payment of principal,and interest due to him : *G* then served notice on *A* to pay up the amount under his mortgage of September 1922 failing which he threatened to exercise his power of sale under the mortgage. The property was accordingly sold and purchased by *C* in June 1924. *C* in July 1924 obtained a new lease of the Cinema site for 16 years. In the same month *C* also got an assignment of the mortgage of one lac in favour of *E* for a sum of Rs. 15,000 only. *A* brought a suit claiming that *C* should be treated as his agent and that as such *A* was entitled to the benefit of the purchase of the Cinema and the subsequent lease and of the assignment of his mortgage by *E*.

Held : that *C*'s possession as mortgagee did not give him any peculiar means or facilities for making the purchase of the property brought to sale under a subsequent mortgage with which he had nothing whatever to do. In making the purchase *C* was in no way acting or purporting to act under his power as agent. The sale was effected not by *A* and not by *C* but by *G* who had acquired this power of sale long before *C* had been appointed agent. The principles of S. 216 did not apply to the case and *A* could not claim the advantages of the sale on behalf of the estate of *A*. *C* was also entitled to the full benefit of its purchase from *G* of the debt due to him. The general rule being that if one person buys the debts of another for less than their face value, he is entitled to claim for the whole debt.

[P 143 C 1, 2 ; P 144 C 1]

Leach—for Appellant.
Paget—for Respondents.

Judgment.—The appellant the Official Assignee brought a suit against the respondents, the R. M. P. V. M. Chettyar Firm, for a declaration that the insolvent's estate which the appellant represents is entitled to the benefit of certain transactions entered into by the defendants. The insolvent is one Ahmed Ismail Hashim Atchia. On 1st June 1919 he took a lease of certain land from the Goolam Ariff Estate Coy., Ltd , for a term of ten years, one condition in the lease being that he should erect thereon a substantial building costing not less than Rs. 50,000 to 75,000. Atchia erected buildings on the land at a cost of Rs. 1,31,000 and used the same for the purposes of a cinema known as "The Royal Cinema." In January 1921 Atchia mortgaged the Royal Cinema and his interests under the lease to the company for the sum of Rs. 60,000. He subsequently repaid Rs. 45,000 of this debt, but on 9th September 1922 he executed a further mortgage for the balance of Rs. 15,000 due on the earlier mortgage and for a further sum of Rs 30,000. Meanwhile on 13th June 1922 Atchia had executed a mortgage in favour of the Chettyar Firm. The property then mortgaged included the Royal Cinema, which had been previously mortgaged to the Company, and also the Cinema de Paris, another property of Atchia's.

On 20th April 1923 Atchia executed a further mortgage for Rs. 1,00,000. This mortgage was in favour of his brother-in-law, Ebrahim Ismail Ghanchee and included the Royal Cinema, the Cinema de Paris and other assets of the film agency business and a printing press. On 27th September 1923 Atchia executed a deed whereby he handed over the management of the Royal Cinema to the Chettyar Firm. Ghanchee was a party to this deed. The Chettyar Firm was empowered to utilize the profits, first for the payment of interest due to them by Atchia, and secondly for payment of the principal sum due. It gave the Chettyar Firm a general power to collect moneys due to Atchia and in the event of the bioscope shows not being profitable it gave the Chettyar Firm power to sell the same. On the same date a deed was executed whereby Ghanchee agreed to treat the Chettyar Firm as co-mortgagees on his mortgage for Rs. 1,00,000 to secure Rs. 50,000 of the sum of Rs. 70,000 due by Atchia to the Firm on unsecured debts. Atchia then left Rangoon about December 1923 for the Andaman Islands and save for one short interval did not return until July 1924

The management of the Royal Cinema was left entirely in the hands of the Firm. Before Atchia left for the Andamans he received a notice from the Goolam Ariff Estate Company calling upon him to pay up the principal sum of Rs. 45,000 due on the mortgage of 9th September 1922, failing payment of which the company would take steps to recover the amount. Atchia asked for further time but this was refused, the company stating that unless the money was paid they would take immediate steps to realize their securities. The company appear to have taken no further steps until about May 1924 when they advertised the properties for sale under the power given in their mortgage-deed of September 1922.

The Chettyar Firm advised Atchia both by letter and by telegram that the company were pressing for their money, urging him to come to Rangoon at once, or if that were impossible to empower some one to act on his behalf. Atchia did not come to Rangoon till the beginning of July or empower any one to act for him. In the meantime the Royal Cinema was sold by auction under the power of sale in the mortgage-deed on 21st June 1924 and purchased by the defendant firm for Rs. 65,000. Rs. 45,000 of this sum was paid to the company in settlement of their debts, and the balance after allowing for the costs of the sale was utilized towards the mortgage debt due to the Chettyar Firm.

On 17th July the Chettyar Firm obtained a new lease of the site of the Royal Cinema for a period of 16 years from the Company, and on 25th July they leased the Cinema to Madan Theatres, Ltd., at a monthly rental of Rs. 2,150. Meanwhile on 2nd July 1924 Ghanchee assigned to the defendant firm the whole of the debt of Rs. 1,00,000 due to him on his mortgage-deed for the sum of Rs. 15,000.

The plaintiff claims that in these circumstances the Chettyar Firm must be treated as Atchia's agents and that Atchia is entitled to the benefit both of the purchase of the Royal Cinema and of the assignment of his mortgage by Ghanchee. The claim is based in part on the fact that the Chettyar Firm were mortgagees in possession and in part on the fact that they were the agents of Atchia. The learned trial Judge held that the plaintiff had not established his case, and except with regard to a sum of Rs. 2,500 given by Atchia as a deposit on taking the lease from the Goolam Ariff Estate Co. in 1919 as to which there was no real dispute, he has dismissed the plaintiff's suit. The plaintiff has now appealed against his decision.

We have been referred to a number of English cases in which the acts of mortgagees in possession or of agents have been held to have been performed on behalf of their principal and to be acts for the benefit of which they were bound to account to their mortgagor or principal. In the case of *Hobday* v. *Peters* (1), a solicitor's clerk had been giving a client his advice and with the help of the knowledge obtained by him in connexion with this advice he purchased the mortgage granted by the client for less than half the amount. It was held with regard to this purchase that he was a trustee for the benefit for the mortgagor. In the case of *White* v. *City of London Brewery Co.* (2), the mortgagees in possession of a public house let the premises with a restriction that the tenant should take beer of their brewing and none other. It was held that they must account for such additional rent as might have been got if the premises had been let without restriction. In the case of *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan* (3), the mortgagee had purchased after his mortgage certain encumbrances on the property mortgaged. It was held in the circumstances of that case that the mortgagor was entitled to redeem the whole estate on paying the original mortgage money plus the money used for the purchase of the encumbrances. The circumstances of that case were somewhat peculiar and not analogous to those of the case now before us. The principle followed appears to have been that in that case the mortgagee by virtue of his possession had acquired a peculiar means of making the purchase, and in the course of their judgment their Lordships referred to cases in which purchases made by the mortgagee in possession might not be

(1) 34 E. R. 400.
(2) [1888] 39 Ch. D. 559=58 L.J.Ch. 98=36 W.R. 881=60 L.T. 19.
(3) [1880] 5 Cal. 198=6 I.A. 145=5 C.L.R. 213=4 Sar. 17 (P.C.).

held to be advantageous to the mortgagor. On p. 153 of their judgment they remark:

"In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit."

In the case of *Mollet* v. *Robinson* (4), Willes, J., remarks at p. 655 of the judgment:

"It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal."

This general rule was approved in the case of *Bentley* v. *Craven* (5). At p. 30 the Master of the Rolls remarked with regard to this rule:

"It is founded on this principle, that an agent will not be allowed to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal, and it is the plain duty of every agent to do the best he can for his principal."

In the case of *Dally* v. *Wonham* (6) the purchase by an agent for inadequate price was set aside. In that case the purchaser resided on the spot and was fully acquainted with the value of the property, whereas the vendor lived at a distance and had not seen the property for 20 years. In the case of *Hesse* v. *Briant* (7), specific performance was refused of an agreement entered into to sell a property between two persons, where the same solicitor acted for both parties. In the case of *Barker* v. *Harrison* (8), an agent who had purchased lands of his principal, and who, previously to contract, had entered into a secret negotiation for a resale of part of the property at a profit, was declared a trustee for his principal to the extent of that profit.

None of these cases seems to us to be very similar to the case which we have to decide. The Chettyar Firm were in possession of the property which they purchased as mortgagees. But it seems to us impossible to hold that their possession as mortgagees gave them any peculiar means or facilities for making the purchase of the property brought to sale under a subsequent mortgage with which they had nothing whatever to do. They had, it is true, special means of knowing the nature of the property, but it does not appear that there were encumbrances on the property which any stranger with due diligence and due searching at the Registration Office might not have known. In informing Atchia of the intention of the Goolam Ariff Estate Company the Chettyar Firm said nothing whatever about the sale of the property under the power of sale in the mortgage-deed. But they did quite clearly urge Atchia to come to Rangoon without delay, and before he left for the Andamans Atchia had received full notice that the company were likely to exercise their power. The sale of the property took place at a public auction, and presumably if the Chettyar Firm had not purchased it would have been purchased by somebody else at a still lower price.

The deed by which the company executed the conveyance in favour of the Chettyar Firm is a somewhat curious one. The sale was under the power of sale in the mortgage-deed subsequent to the date of the Chettyar's mortgage. Quite clearly, therefore, the sale could not affect the Chettyar's mortgage in any way and what was in fact sold was the equity of redemption of this mortgage from the Chettyar. Nevertheless the sale-deed says that Rs. 20,000 should be utilized towards the settlement of this mortgage. Be that as it may, we do not think it can be held that in making the purchase under the power of sale the Chettyar Firm were making an unfair and special use of the knowledge acquired by them as mortgagees in possession. In actual fact they purchased only the equity of redemption of their own mortgage amounting to Rs. 50,000 and Rs. 65,000 was not so inadequate a price as it might at first sight appear. The deed giving management of the Cinema to the Chettyar Firm not only put them as mortgagees in possession, but also empowered them as agents. It gave them power in certain circumstances to sell the property. But we do not think that the cases cited to us are authorities for the contention that in these circumstances a sale by them must be held to have been for the benefit of their principal. The sales in all the cases cited were sales by or to the agent

(4) 5 P.C.C. 646.
(5) 52 E.R. 29.
(6) 55 E.R. 326.
(7) 43 E.R. 1375.
(8) 63 E.R. 854.

when he was clearly exercising the power of his agency. In the present case it is perfectly clear that on making the purchase the Chettyar Firm was in no way acting or purporting to act under their power as agents. The sale was effected not by Atchia and not by the Chettyar Firm, but by the Goolam Ariff Estate Company which had acquired this power of sale long before the Chettyar Firm had been appointed agents.

The principles of the English law on this subject are incorporated in Ss. 215 and 216, Contract Act. S. 216 lays down that if an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction. It seems to us impossible in the present case to hold that the Chettyar Firm in purchasing at a sale held under the power given to the Goolam Ariff Estate Company long before the firm became the agent was dealing in the business of the agency at all. As agents they had no power either to make the sale under the power in the mortgage-deed or to stop it. It seems to us, therefore, that the principles of this section do not apply to the present case and that the appellant cannot claim the advantages of the sale on behalf of the estate of Atchia. Nor can we see sufficient reason for holding that the Chettyar Firm is not entitled to the full benefit of its purchase from Ghanchee of the debt due to him. It is true that the Chettyar Firm was in a fiduciary position in regard to a part of the property to which the mortgage for Rs. 1,00,000 referred. But it does not seem to us that in purchasing this debt the Firm made any special use of the knowledge obtained thereon in such capacity. The general rule undoubtedly is that if one person buys the debts of another for less than their face value, he is entitled to claim for the whole debt. We are unable to see any sufficient circumstance in the present case to bring it outside the ordinary rule.

There are undoubtedly in this case many circumstances which strongly suggest collusion between the Chettyar Firm and the Goolam Ariff Estate Company. But, as pointed out by the learned trial Judge, there is no reference to collusion in the plaint, and we are not prepared in the circumstances to differ from his view that collusion is not established. The trial Court whilst dismissing the main part of the plaintiff's claim passed a decree in his favour for the sum of Rs. 2,400. This was the sum originally deposited with the Goolam Ariff Estate Company by Atchia when taking out his original lease in 1919. By taking a fresh lease in their favour the Chettyar Firm obtained the advantage of this deposit and they are admittedly bound to account to the Official Assignee for this sum. No complaint can, therefore, be made as to the decree of the trial Court in favour of the plaintiff for this sum. The defendants, however, have filed a cross-objection on the matter of costs. The trial Judge directed that the parties should respectively pay their own costs on the ground that the plaintiff had succeeded in part and failed in part. On this point it is urged that the amount of Rs. 2,400 for which a decree was passed in favour of the plaintiff was a small sum compared with the Rs. 20,000 at which he valued his main claim; and further that there never really was any dispute as regards this Rs. 2,400 and that, therefore, no litigation with regard to it was ever necessary. There is some force in this contention; but we are nevertheless not satisfied that there is sufficient ground for interfering with the discretion of the trial Court in the matter of costs. We have held that the Official Assignee has not established the main part of his case. But the actions of the Chettyar Firm in dealing with the property and the debts have been of such a nature as necessarily to arouse doubt and suspicion in the mind of the Official Assignee, and we are of opinion that the Chettyar Firm must be held largely responsible for the bringing of this action. The result is that we dismiss both the appeal and the cross-objection with costs.

R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 145

OTTER, J.

Fut Chong—Applicant

v.

Maung Po Cho—Respondent.

Civil Revn. No. 296 of 1928, Decided on 6th March 1929, against decree of Dist. Court, Prome.

(a) Civil P. C., S. 115—On failure to take into account some legal proposition or material fact the Court's decision may be reversed.

Where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then although its decision may be erroneous, the error cannot be corrected in revision, but if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be reversed: 2 *L. B. R.* 333, *Foll.* [P 146 C 1]

(b) Contract Act, S. 152—Pawn-broker issued pawn ticket containing clause exempting pawn-broker from liability in certain situation—Bailee could plead the contract as exempting him from liability.

Where a pawn broker issued a pawn ticket on certain jewellery being deposited with him, and the pawn ticket contained a clause exempting the pawn broker from all liability in case of destruction of property under certain circumstances, on a suit being brought by the owner for the recovery of price,

Held: a bailee can contract himself out of liability. It is not clearly deducible from the terms of S. 152 that a bailee may only make a special contract increasing his responsibility and that he cannot make a special contract reducing it: 32 *Mad.* 95 *Dist.*; 10 *L. B. R.* 292, *Foll.* [P 146 C 2, P 147 C 1]

Rafi—for Applicant.
Maung Ni—for Respondent.

Judgment.—The case raises a somewhat interesting point. The matter comes before the Court by way of an appeal from a judgment and decree of the District Court of Prome. Mr. Rafi, however, on behalf of the appellant agrees that no appeal lies to this Court for it is a small cause matter of the value of less than 500. He asked me, however, to treat the case as arising by way of revision and in the circumstances, I may do so. In this connexion I would point out that the course should only be taken in exceptional circumstances and where it is apparent that injustice might be done by refusing. The facts are simple. The applicant is a licensed pawn shop keeper and with him was deposited certain jewellery by the respondent. A pawn ticket was issued to which reference must later be made. Subsequently a robbery took place at the pawn shop and the property deposited together with other articles was stolen. The pawn ticket in question upon which appears the thumb impression of the respondent contains a clause exempting the pawn shop keeper from liability in the event of destruction of the property by the "five kinds of enemies, insects and mice." At the foot of the ticket appears a note:

"The following is regarded as acts of providence: destruction of vermin, rats, water, fire or robbery or theft."

There is no dispute between the parties that the respondent is prima facie bound by the terms of the pawn ticket and also that the contract purported to exempt the pawn shop keeper from liability in the case of robbery or theft. The respondent brought a suit in the Township Court of Paungde claiming the property or its value. The learned Township Judge decreed the suit in his favour being of opinion that the applicant was not protected by the terms of the contract. He took the view that bailees such as the applicant are protected only by Ss. 151 and 152, Contract Act, 1872, and that the liability therein provided for cannot be avoided by any special contract between the parties It should be stated that this question was clearly raised upon the pleadings and there is no doubt that the point was both argued before and considered by the Judge of the Township Court. On appeal, however, to the District Court of Prome, the learned Additional District Judge makes no mention at all of this matter. He deals only with the question from the point of view of the liability imposed by the sections of Indian Contract Act, to which I have just referred and agrees with the view taken by the Township Judge, which was that the applicant did not take the amount of care laid down in S. 151 of the Act, and dismissed the appeal. So far as I can see from his order, the learned Additional District Judge did not apply his mind to what was the real point in issue.

The first question, therefore, for me is whether in the circumstances the applicant may be said to have brought himself within the provisions of S. 115, Civil P. C. It is suggested here that

the learned Additional District Judge acted in the exercise of his jurisdiction illegally or with material irregularity in that he omitted to decide what was the real question in the case. It should be observed that the question of the present case is one of law.

From among the numerous cases decided in the various Courts of India upon the point three were cited before me. They are *Venka Bai* v. *Lakshman Venkoba* (1), *Zeya* v. *Mi On Kra Zan* (2) *Kaliyaparama Padiyachi* v. *C. V. A. R. Chetty* (3). The second of these cases was decided by a Bench of the late Chief Court of this province and it will be convenient for me to set out a portion of the head note which is as follows :

"After consideration of the ruling of the Privy Council in the light of subsequent decisions of the High Courts that where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then although its decision may be erroneous, the error cannot be corrected on revision, but that if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be reversed."

A very large body of authority was examined by the learned Judges in this case and after this full consideration their decision is well summarized in the portion of the head note set out above. Accepting this statement of the law as correct it is evident that this is a case where this Court could exercise its power of revision. The question next arising is whether the applicant is protected from liability by the terms of the clause in the pawn ticket. Apart from the provisions of Ss. 151 and 152, Contract Act, no ground was suggested and I know of none why he is not in this position. S. 151 is as follows :

"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

And S. 152 provides :

"that the bailee in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it as in S. 151."

The suggestion before me was that the special contract referred to in the latter section can in law increase but cannot decrease, the amount of liability of a bailee. Upon the face of it the argument lacks conviction, for if such had been the intention of the legislature it would have been a simple matter to give expression to it. Mr. Maung Ni who appeared for the respondent relies on a Full Bench decision of *Mahomed Rawthar* v. *The British India Steam Navigation Co. Ltd.* (4). In that case a bill of lading containing a clause exempting the Steamship Co. from liability in certain circumstances was under consideration and one of the majority members of the Court was of opinion that the carriers in India cannot exempt themselves by express contract from liability. It is to be observed that this case may be distinguished from the present case upon the facts. I need not, however, deal further with this authority, for the matter has been the subject of decision by a Full Bench of the late Chief Court of this province in the case of *B. I. S. N. Co. Ltd.* v. *Ali Bhai Mahomed* (5). In that case the question was whether a common carrier by sea can by the law of India, contract himself out of liability for neglect, and it was held that he can. It will be sufficient for the purposes of the present case to quote two passages from the judgment of the members of the Court. At p. 299 of the report, Mr. Justice Robinson, as he then was said this :

"Lastly I am quite unable to agree that a bailee canot limit his liability under S. 152 of the Act. That he can do so by making a special contract was pointed out in *Mooihora Kant Shaw's* case. S. 151 lays down the ordinary duty of a bailee in all cases of bailment and S. 152 enacts that that degree of care is to be exacted from him in the absence of a special contract. To read it otherwise than as allowing him to reduce his liability is to hold that the legislature enacted an unnecessary provision and to give a forced mening to the language used.

At p. 306 Twomey, C. J., said :

"It is not clearly deducible from the terms of S. 152 that a bailee may only make a special contract increasing his responsibility, and that he cannot make a special contract reducing it. This is a proposition curtailing the ordinary right of freedom of contract and we must hesitate to give effect to such a proposition on the strength of a mere inference and in the absence of express enactment."

(1) [1888] 12 Bom. 617.
(2) 2 L. B. R. 333.
(3) [1917] 11 Bur. L. T. 73=39 I. C. 154=9 L. B. R. 1.
(4) [1909] 32 Mad. 95=1 I. C. 977=18 M. L. J. 497.
(5) [1920] 10 L. B. R. 292=62 I. C. 378 (F. B.).

So far as I know the authority of the last mentioned case has not been questioned in this province. It is agreed on all hands that the only question for me is whether as a matter of law, the applicant cannot avail himself of the protection provided for in the pawn ticket. I must hold, therefore, in view of the case I have just referred to and in view of what I think is the meaning of the sections of the Contract Act in discussion that he can. The application must, therefore, be allowed.

As I have already stated the matter came before me by way of appeal. I am of opinion therefore that although this application is successful, the applicant ought not to receive his costs in this Court. The application must be allowed without costs in this Court but the respondent will pay the applicant his costs in the two lower Courts.

P.R./R.K. *Application allowed.*

A. I. R. 1929 Rangoon 147

BAGULEY, J.

Emperor

v.

Maung Po Sein—Non-Applicant.

Criminal Revn. No. 351-B of 1928, Decided on 11th July 1928.

Burma Habitual Offenders Restriction Act, S. 18 (1)—Scope—Burma Gambling Act, S. 17.

The Habitual Offenders Restriction Act does not apply to persons proceeded against under S. 17, Gambling Act: *A. I. R.* 1926 *Rang.* 182 and *A. I. R.* 1927 *Rang.* 98, *Rel. on.* [P 147 C 2]

The facts are clear from the following report of the District Magistrate of Prome.

REPORT

Subject:— Validity of an order of restriction passed after prosecution under S. 17, Burma Gambling Act.

Under S. 438, Criminal P. C., I submit herewith Criminal Misc. No. 69 of 1926 of the Head Quarters Magistrate, Prome and Criminal Reg. Trial No. 121 of 1928 of the Township Magistrate, Thegon, for the orders of the Hon'ble Judges.

The facts are as follows:

On 1st March 1926 Nga Po Sein was prosecuted under S. 17, Burma Gambling Act in the Court of the Head Quarters Magistrate, Prome. An order under S. 7, Burma Habitual Offenders Restriction Act was finally passed on him, restricting his movements to a village tract in Padaung Township for a term of three years. His restriction area has since been changed for reasons which are not on the record, but probably to give him a better opportunity to earn his own living.

In view of *I. L. R.* 4 *Rang.* 123 and 4 *Rang.* 455 it appears more than doubtful whether an order of restriction could legally be passed in a prosecution under S. 17, Burma Gambling Act, but the order did not evoke any comment at the time or when the ruling was published and there is no doubt that rightly or wrongly such orders were passed on several occasions in this district in 1926 and 1927, during a period when a large number of habitual thieves and other offenders were being dealt with under the preventive sections.

Nga Po Sein recently violated his restriction order and absented himself for nearly a month. He was prosecuted under S. 18 (1) (a), Habitual Offenders Restriction Act, before the Township Magistrate, Thegon, who has reported the case for orders. I am of opinion that the original order was ultra vires and will now have to be set aside and that no action can be taken against Nga Po Sein for his breach of the order. It will also, in the event, be necessary to scrutinize the records of the large number of restricted offenders in the district to see if similar orders have been passed under S. 17, Burma Gambling Act. Nga Po Sein is on bail for the time being.

Judgment.—It has already been held in *Emperor* v. *Kyaw Hla* (1) that the Habitual Offenders Restriction Act does not apply to persons proceeded against under S. 3, Opium Law Amendment Act, and in *Nga Pa* v. *Emperor* (2) that it does not apply to persons proceeded against under S. 64-A, Burma Excise Act. There seems to be, as yet, no recorded case stating whether or not it applies to persons proceeded against under S. 17, Gambling Act.

In my opinion it does not. The wording of the relevant sections is, mutatis mutandis, exactly the same, and probably S. 17, Gambling Act, as the oldest of the

(1) A. I. R. 1926 Rang. 182=4 Rang. 123.
(2) A. I. R. 1927 Rang. 98=4 Rang. 455.

three, is the one from which the other two were copied.

There is no need for me to pass any orders in this case. The District Magistrate has powers under the Habitual Offenders Restriction Act to vary or cancel any order passed under it. As regards the case from the Court of the Township Magistrate, Thegon, which started this matter, it appears to be in suspense, no orders have been passed under it, and probably the simplest way of dealing with it would be for the learned District Magistrate to arrange with the Public Prosecutor to have it withdrawn. Let the records be returned.

R.K. *Order accordingly.*

A. I. R. 1929 Rangoon 148 (1)

HEALD, J.

Maung Pe Sein and *others*—Appellants.

v.

Ma Thin Mya—Respondent.

Special Second Appeal No. 391 of 1928, Decided on 3rd January 1929, against order of Dist. Court, Thaton, in Civil Misc. Appeal No. 169 of 1927.

Civil P. C., O. 21, R. 92—Order under—No second appeal lies—Provisions of S. 104, Civil P.C., are not affected by Burma Courts Act, S. 11.

The provisions of S. 11, Burma Courts Act, do not affect those of S. 104, Civil P. C., and no second appeal lies from an order setting aside sale under O. 21, R. 92. [P. 148 C 2]

Po Aye—for Appellants.

Judgment.—In Suit No. 106 of 1926, of the Township Court of Bilin the present respondent obtained a decree against Po Kyaw, now represented by the appellants, for partition and possession of a house and its site or for Rs. 650, as representing the value of her half share of the property.

In Execution Case No. 179 of 1926 of the same Court respondent applied for execution of that decree, and by consent the whole property was sold by Court auction, each party to be allowed to bid at the auction and the costs to be recovered from Po Kyaw's half share of the sale proceeds.

The property was brought in by respondent for Rs. 870.

Po Kyaw applied for the sale to be set aside under the provisions of O. 21, R. 89 on his paying into Court Rs. 870, the price paid for the property at the auction.

The Judge ordered that the sale should be set aside on Po Kyaw's depositing Rs. 43-8-0 as being five per cent. of the purchase money, together with Rs. 438, as being half the purchase money, only a half share of the property having in effect been sold, and Rs. 193-12-0 on account of costs. A sum of Rs. 672-4-0 was accordingly deposited by Po Kyaw and the sale was set aside.

Respondent appealed against the order setting aside the sale, and the lower appellate Court set aside that order.

Appellant comes to this Court in second appeal but it seems clear that no second appeal lies.

An appeal from an order under O. 21, R. 92, lies under O. 43, R. 1 (j), and under S. 104 (2) of the Code no further appeal lies from any order passed in such appeal. In my view the provisions of S. 11, Burma Courts Act, do not affect those of S. 104 of the Code.

I, therefore, hold that the present appeal does not lie and I dismiss it.

R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 148 (2)

PRATT AND OTTER, JJ.

Ma On Myaing—Appellant.

v.

Ma Me San—Respondent.

First Appeal No. 12 of 1928, Decided on 7th January 1929, against the judgment of the Dist. Court, Lower Chindwin, in Civil Regular No. 2 of 1927.

Buddhist Law (Burmese) — Succession — Minor dying joint with his mother and sister — Mother inherits in preference to sister.

On the death of a minor Burmese Buddhist, living jointly with his parent (mother) and sister, a parent (mother) is not debarred from inheriting his son's property by the fact that his sister (and her daughter) is alive. The rights of his mother in respect of any property belonging to him would have stood upon a different footing from any such rights had he attained his majority and separated himself from the parental roof : *A. I. R.* 1914 *P. C.* 97, *Dist.*; 8 *L. B. R.* 197, *Rel. on.* [P 150 C 1]

J. C. Day—for Appellant.

Ko Ko Gyi—for Respondent.

Judgment.—In this case the short facts are that in the year 1910-11 a man called U Tha Htu died leaving as descendants two grandchildren, who were then minors and of whom one is the plaintiff, and their mother, his daughter-in-law, Ma On Myaing the first and only defendant who need be considered.

The plaintiff claims the whole of her grandfather's property, her brother having died in 1921-22.

The defendant has all along been in possession of and looking after the property, and there was some suggestion that her claim was time barred. As, however, she is only twenty-three years of age now this cannot well be; and moreover, as the lower Court rightly held, defendant 1's possession has been adverse only since she refused to give up the property.

The other points taken in the lower Court were quite rightly not argued in this Court, for upon the facts that Court seems to have come to a correct decision, and indeed no such gift or promise on the part of U Tha Htu as was suggested could have the force of law.

It was said, however, that plaintiff must fail as to her brother's share in the inherited property; for as to that, by the Burmese Buddhist Law of Succession, since he was living with his mother at his death, the latter and not the plaintiff would inherit his share.

Reliance was placed upon three cases *Maung Shwe Bo* v. *Maung Pyo* (1), *Ma Po Hmon* v. *Maung Kan* (2) and *Ma Hnin Bwin* v. *U Shwe Gon* (3), the last being a case decided by the Privy Council. It will be observed that the first two cases of these were decided apparently mainly upon the authority of *Maung Chit Kywe* v. *Maung Pyo* (4). In the first of these three cases, the following extract from *Chit Kywe's* case (4) was approved by the Court: see p. 527 of *Maung Shwe's* case:

> "The Buddhist law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and failing them, to the first line of collaterals, and, in the absence of heirs in that degree, to the grandfather and grandmother and the next line of collaterals."

(1) [1898-1900] L. B. R. 524.
(2) [1897-1901] 2 U. B. R. 157.
(3) A. I. R. 1914 P. C. 97=41 Cal. 887=41 I. A. 121, (P.C.).
(4) [1892-96] 2 U. B. R. 184.

Now, it is perfectly true that in the case of *Ma Hnin Bwin* v. *U Shwe Gon* (3), their Lordships of the Privy Council expressed themselves as not satisfied with the reasons apparently underlying the decision in *Chit Kywe's* case (4). Indeed, they expressed themselves as satisfied with the authoritative character of the Dhammathats and in particular they at p. 12 of the report, quoted with approval a dictum of the Manukye, which is as follows:

> "The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters his parents become his sole heirs."

The question in the case before the Committee was as to the respective rights of a sister on the one hand, and the father on the other, to the property of two deceased ladies who were respectively sisters and daughters of the rival claimants. These three ladies had lived apart from their father for many years, and it was, as we understand the case, for this reason that their Lordships of the Privy Council decided the matter at issue in their favour. At p. 4 of the report, their Lordships state:

> "that the present case should not be held as dealing with or affecting parental rights in cases where the family continues to live together."

Their Lordships go on to lay stress on the important rights of parents in Burma so far as their children are concerned.

In the present case it is admitted that the two minors lived in the house of their mother up till the time of the death of the respondent's brother. Respondent herself also lived on under her mother's roof until her marriage some five years ago. The case therefore upon the facts is different from the Privy Council case. So far as we know there is no reported authority exactly upon the point.

An examination, however, of May Oung's "Leading Cases on Buddhist Law," second edition, pp. 302—308, makes it clear that it was the view of the learned author that in such a case a parent would succeed to the estate of his or her child in preference to a brother or sister of that child. He says at p. 308:

> "The exclusion of parents by brothers and sisters when the family have ceased to live

together must be taken as an exception to the rules relating to nearness of relationship."

In this connexion it is evident that a mother stands in relationship nearer to her son than does her daughter by the same father. We find, moreover, that the view contended for by the appellant receives the support of the learned author (U Tha Gywe) of "A Conflict sf Authority in Buddhist Law." After a discussion of the matter he says, at p. 326, that the rule laid down by thair Lordships of the Privy Council does not apply in a case where the family continues to live together. In support of his conclusion he cites the case of *Ma Ein* v. *Tin Nga* (5). In that case a Bench of the then Chief Court said:

"The ordinary rule of inheritance under the Buddhist Law is that the husband is sole heir to the wife and the wife sole heir to the husband, whether there be issue of the marriage or not. The texts cited above show that in certain cases the surviving parent of a childless son or daughter is allowed to share with the surviving wife or husband, while brothers and sisters do not come in at all."

It is true that the facts of this case and those dealt with by the text referred to were somewhat different from those in the present case. It appears to us, however, that the position is an analogous one; and although it is also true that the extract from the Dhammathats relied upon by their Lordships of the Privy Council in *Ma Hnin Bwin's* case (3) is entirely unqualified as it stands, yet we feel bound to hold that upon the facts of the present case, a parent is not debarred from inheriting her son's property by the fact that his sister (and her daughter) is alive.

In this view we are strengthened by what appears to have been in the minds of their Lordships when dealing with the rights of children living apart from their parents. It must be borne in mind that the respondent's brother was apparently a minor and certainly quite young at his death. The rights therefore, of his mother in respect of any property belonging to him, may well be said to stand upon a different footing from any such right had he attained his majority and separated himself from the parental roof.

It may be that, in some cases it would be difficult to decide whether such separation as would deprive a parent of interest had taken place. In the present case, however, it is clear there was no separation.

In all the circumstances, therefore, we feel bound to hold that the appellant is entitled to a half share in the property in dispute.

There was no dispute as to the identity of the property in suit. The decree of the lower Court must be modified, and a decree for a half only of the suit property substituted (with the exception of item No. 8) and for Rs. 300 by way of mesne profits.

In view of the fact that the point upon which we have decided this appeal is an entirely new point and was not argued in the lower Court, we do not propose to award costs to the appellant.

The appeal is therefore allowed but without costs, and the order of the lower Court as to costs is confirmed.

R.K. *Appeal allowed.*

(5) [1914] 8 L. B. R. 197=30 I. C. 594=8 Bur. L. T. 145.

A. I. R. 1929 Rangoon 150

CARR, J.

Emperor

v

Maung Ba Win and *others*—Accused.

Criminal Revns. Nos. 1160-A to 1177-A of 1928, Decided on 12th December 1928, against orders of First and Second Addl. Mag. Moulmeingyun.

Burma Vaccination Act (1 of 1909), Ss. 4 and 13—Child above six months—Parent refusing to allow child to be vaccinated—Conviction under S. 13 is unsustainable—Procedure must be followed as laid down in Vaccination Act (13 of 1880), Ss. 17, 18 and 22.

In Burma Act I of 1909, S. 4 is the only provision under which vaccination of a child can be ordered and that section applies only if the child is under six months of age and has been exposed to infection. There is nothing in Burma Act 1 of 1909 to authorize any officer to require the parent of a child over six months of age to have it vaccinated. In such cases S. 9, Vaccination Act (13 of 1880), would apply and then the procedure prescribed in Ss. 17, 18 and 22 must be followed. Conviction of a person under S. 13 (1), Burma Vaccination Act, for refusing to allow his child to be vaccinated cannot be sustained. [P 151 C 2]

Judgment. — One judgment will suffice to dispose of Criminal Revisions Nos. 1160-A to 1177-A inclusive. They are concerned, respectively, with Criminal Regular Trials Nos. 128, 134, 135, 129, 133, 130, 132, 148, 149, 150, 153,

155 and 157 of the First Additional Magistrate, Moulmeingyun, and Nos. 75, 76, 84, 85 and 86 of the Second Additional Magistrate, Moulmeingyun. In all these cases the accused were prosecuted by a vaccinator of the name of Maung Han for an offence alleged to be under S. 13 (1), Burma Vaccination Law (Amendment) Act, 1 of 1909, and the accused have all been convicted of an offence under that section of that Act, and fines of Rs. 2 have been inflicted in the cases of each of sixteen accused, Rs. 3, in one case, and Rs 5 in the remaining case. The complaints filed by Maung Han were all on a printed form in Burmese. The form states that the complaint is laid under S. 13 (1), Burma Act 1 of 1909, and alleges that the accused without cause refused to allow his child to be vaccinated by the vaccinator. In some cases Maung Han laid complaints against both parents, in others against one parent only. In one case No. 75 of the Second Additional Magistrate, Maung Han actually prosecuted both parents and also the child, aged four years of age. The complaint against the child was exactly the same as that against her parents, namely, that she refused to allow her child to be vaccinated. This child was actually summoned to appear before the Court as an accused. The attention of the Magistrate is called to S. 82, I. P. C I am glad to note that the child was not convicted. Although in some cases Maung Han instituted proceedings against both parents, in every case the Magistrate was satisfied with inflicting punishment on one parent, and acquitted the other without giving any valid grounds for his acquittal.

The First Additional Magistrate in his cases stated particulars of the offence as follows :

"Without any reason refused to allow his child to be vaccinated when asked by the complainant vaccinator, and thereby committed an offence punishable under S. 13 (1), Burma Vaccination Act."

The Second Additional Magistrate in his cases stated particulars of offence as follows :

"That you...... failed to submit your children to the vaccinator for vaccination when summoned, and thereby committed an offence punishable under S. 13 (1) Burma Act 1 of 1909."

With one exception all the accused pleaded guilty, but it is obvious that they were pleading guilty to the fact that they had refused to allow their children to be vaccinated, and not to an offence under S. 13 (1), Burma Act 1 of 1909.

It is quite obvious that the Magistrate never referred to S. 13 (1), Burma Act 1 of 1909, before accepting these complaints and convicting the accused. S. 13 (1) in the plainest terms relates to the refusal of a person to be vaccinated himself, and has nothing whatever to do with the refusal of parents to allow their children to be vaccinated. The law relating to vaccination in Burma is contained in the Indian Vaccination Act, 13 of 1880, the Burma Vaccination Law (Amendment) Act, 1 of 1909, and S. 49, Burma Rural Self-Government Act, 4 of 1921. The provisions of the two former Acts have, under S. 49 of the latter Act, been extended to the Myaungmya District by Department of Public Health Notifications Nos. 112 and 113, dated 10th September 1924.

In Burma Act 1 of 1909, S. 4 is the only provision under which vaccination of a child can be ordered and that section applies only if the child is under six months of age and has been exposed to infection. It is not alleged, much less proved, in any of these cases that either of these conditions existed. There is nothing in Burma Act 1 of 1909 to authorize any officer to require the parent of a child over six months of age to have it vaccinated, and for such a provision it is necessary to turn to S. 9, Act 13 of 1880, which requires the parent or guardian of a child who has attained the age of six months to have it vaccinated. S. 9, Act 13 of 1880, would therefore seem to apply in the present case. But the proper procedure to be adopted in enforcing S. 9 is laid down in Ss. 17 and 18 of that Act. Under S. 17 a notice must be served on the parent, requiring him to attend at a time and place to be specified in the notice to have the child vaccinated, and then under S. 18, if that notice is not complied with, the Superintendent of Vaccination must report the matter to a Magistrate duly appointed in that behalf, who shall summon the parent and demand his explanation, and if such explanation is not satisfactory, make an order directing the parent to comply with the notice before a date

to be specified. It is only on the failure of the parent to obey the order of the Magistrate that he can be convicted of an offence, which offence will fall under S. 22 of the Act. This procedure was not adopted in any of the present cases, and consequently, the convictions are all unsustainable. The convictions in all these 18 cases are set aside, and the fines must be refunded to the accused.

It is not known from what source the vaccinator, Maung Han obtained the printed forms of complaint which he filed in these cases. These printed forms do not set out any offence whatever under the Vaccination Law, and they are entirely illegal. The District Magistrate, Myaungmya, should take steps to see that complaints of this type are not in future received by any Magistrate in his district. It is obvious that in the present cases all these complaints ought to have been dismissed under S. 203, Criminal P. C. It is most deplorable that ignorant villagers should be harassed by illegal complaints of this kind made against them by public authorities.

R.K. *Convictions set aside.*

A. I. R. 1929 Rangoon 152

BROWN, J.

S. S. Somasundaram Chettyar — Applicant.

v.

Ma Shwe Thit and *others* — Respondents.

Civil Revn. No. 211 of 1928, Decided on 30th January 1929, against order of Sub-Divisional Court, Magwe, in Civil Misc. No. 7 of 1928.

(a) Civil P. C., O. 21, R. 59 — No enquiry as to decree-holder's right to execute decree can be made under R. 59.

It does not come within the scope of the enquiry under R. 59 to decide whether the attaching creditor had the right to execute the decree. The objectors should not be granted an order removing the attachment merely because the application in execution was time barred. [P 152 C 2, P 153 C 1]

(b) Limitation Act, Art. 182—Applications in execution need not necessarily be in writing—Time begins to run not from opening of execution proceedings but from applications or steps-in-aid-of execution.

The opening of execution proceedings is not the same thing as the making of an application in execution, or the taking of some step-in-aid of execution and time begins to run not from the opening of execution proceedings but from the applications or steps-in-aid in execution. [P 153 C 2]

An application in execution was made on 25th January 1923, the second application was not made until 18th September 1926. But during the first execution proceedings on the 21st July and 3rd December applications were made for arrest of the judgment-debtor and attachment of his property the latter of which was granted but could not be effected.

Held: that the application dated 18th September 1926 was within time as further applications in execution which need not have been necessarily in writing were made, and that limitation was thereby saved: 10 *L. B. R.* 34, *Rel. on.* [P 153 C 1, 2]

Venketram—for Applicant.

Khin Maung Gyee—for Respondents.

Judgment.—The petitioner obtained a decree, and in execution of that decree attached certain property. The respondents, who were not parties to the decree, filed an application for removal of attachment, and one of the grounds taken by them was that the application for attachment was barred by limitation. The trial Court, without coming to any decision on the merits, held that this contention was correct and removed the attachment. The attaching creditor has now come to this Court in revision. Two main objections have been taken to the order passed by the trial Court. The first is that the respondents not being parties to the original decree were not entitled to question the right of the Chettyar Firm to attach under that decree, and the second objection is that the finding on the point of limitation is wrong.

The procedure to be followed when applications for removal of attachment are made is laid down in R. 58 and the following rules of O. 21, Civil P. C. Under R. 59:

> "The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached;"

and under R. 61:

> "Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim."

It does not come within the scope of the enquiry to decide whether the attaching creditor had the right to execute the decree, and there is considerable force in

the contention that the respondents should not have been granted the order they asked for merely because the application in execution was time barred. But apart from this, it seems to me clear, on the face of the record, that the application in execution was not time barred at all. The trial Judge found that it was time barred because the first application in execution was made on 25th January 1923, and, according to him the second application was not made until 18th September 1926. He seems, however, entirely to have overlooked the fact that, although execution proceedings were opened on 25th January 1923, and no fresh proceedings were opened until September 1926, there were several applications made in the course of the earlier proceedings. The first attempt in those proceedings appears to have been infructuous.

On the 21st July a fresh application was made for arrest of the judgment-debtor. This arrest does not seem to have been effected, and on 26th November 1923, the diary of the proceedings shows that the decree-holder's advocate was heard as to whether the judgment-debtor should be arrested. On 3rd December 1923, the diary shows that the decree-holder again applied for arrest of the judgment-debtor and for attachment of certain property. The Judge refused to arrest the first judgment-debtor but issued a warrant of attachment against the property of the second judgment-debtor. On 26th January 1924, a sale proclamation was issued but the sale did not take place, as an application was made for removal of attachment.

Under the provisions of Art. 182 (5), Lim. Act, the period of three years runs:

"where the application next hereinafter mentioned has been made, from the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order."

This article does not prescribe that the application must of necessity be in writing.

On 3rd December 1923, the decree-holder applied for the arrest of defendant 1 and for attachment of the house of defendant 2. The application was considered on its merits and was actually granted as regards the second prayer. It seems to me that this is a sufficient application within the meaning of the article.

In the case of *A. A. Adimuthu Pillai* v. *Adiappa* (1), it was held:

"that, even where there is no actual application on the record, such an application may be presumed in cases where the order made in execution is of such a nature that the Court would not have made it except upon an application for that purpose."

In this case the record shows clearly that an application was made, and I am of opinion that limitation was thereby saved.

It is only in rare cases that this Court will interfere in revision with orders passed on applications made for removal of attachment. The applicant is ordinarily referred to the remedy provided for him by R. 63, O. 21, Civil P. C. But there are special circumstances here which justify a departure from the ordinary rule. The Court has refused to adjudicate on the claim as to whether the property was attachable under the provisions of O. 21, R. 58 and the following rules, and in coming to its decision on ths point of limitation, the Court has not really considered the law that is applicable. It has entirely overlooked that the opening of execution proceedings is not the same thing as the making of an application in execution, or the taking of some step-in-aid of execution, and has erroneously refused to exercise a jurisdiction vested in it by law. The petitioner will in the circumstances be put to quite unjustifiable hardship if he is compelled to resort to a regular suit. He is, in fact, being denied his right to have the matter adjudicated on by the executing Court. I, therefore, set aside the orders passed by the trial Court and direct that the application for removal of attachment be dealt with on its merits. The respondents will pay the costs of the petitioner in this Court.

M.N./R.K. *Order set aside.*

(1) [1918] 10 L. B. R. 34=52 I. C. 656=12 Bur. L. T. 113.

A. I. R. 1929 Rangoon 153

BROWN, J.

U Maung Gyi—Appellant.

v.

Maung On Bwin and *another* — Respondents.

Special Second Appeal No. 529 of 1928, Decided on 11th January 1929, against judgment of District Court, Amherst, in Civil Appeal No. 139-A of 1928.

Limitation Act, Arts. 142 and 144—In suit under Art. 142 burden of proof lies on plaintiff and in suit under Art. 144 it lies on defendants — Suit for possession of land—But defendants proved to be owner at one time—Plaintiff in possession for last 15 or 20 years—Plaintiff claiming that defendant obtained possession from him — Suit falls under Art. 142 and so if defendant's possession is not proved to be permissive, plaintiff must prove that he was in possession within twelve years of suit.

Ordinarily in a suit under Art. 142 the burden of proof lies on the plaintiff and in a suit under Art. 144 it lies on the defendants. [P 154 C 2]

Where in a suit for possession of land what is proved is that the plaintiff was at one time the owner but that for the last 15 or 20 years the defendants have been in possession, and the plaintiff claims that they obtained possession from him, the suit is one under Art. 142 and if the plaintiff fails to prove the permissive nature of the occupation, the burden would lie on the plaintiff to show that he had been in possession within 12 years of bringing the suit: 16 *Cal.* 473, (*P. C.*), *Rel. on.* [P 154 C 2, P 155 C 1]

Eunoose—for Appellant.

Kirkwood—for Respondents.

Judgment. — The plaintiff-appellant sued the defendant-respondents for possession of a certain piece of land. The plaintiff's case was that the land originally belonged to him and that about ten years ago he allowed the defendants to occupy the land temporarily. The defendants denied the plaintiff's title and denied that they came into possession with his leave or license. They said that they entered on the land 21 years ago and that they had been in peaceful and uninterrupted possession ever since. It has been found as a fact that the plaintiff did acquire title to the land in the year 1894 by the purchase at a Court auction sale, but that the defendants had been in possession for 15 years or more before the suit was brought, and that the plaintiff has failed to show that they entered into possession with his permission. On these facts the District Court held that the burden of proving that the defendants' possession was permissive and not adverse rested on the plaintiff and that as the plaintiff had failed to discharge that burden the suit must fail. The plaintiff has appealed on the ground that the burden has been wrongly placed.

It is urged that the suit is under Art. 144, Lim. Act, and that under that article the burden is on the defendants to prove that their possession was adverse. Both the lower Courts have discussed a number of authorities on the question of burden of proof in such cases. Ordinarily in a suit under Art. 142 the burden of proof would lie on the plaintiff and in a suit under Art. 144 it would lie on the defendants. It is contended on behalf of the appellant that this is not a suit under Art. 142 because the plaintiff was never in possession. It seems to me, however, that this contention is contradicted by the plaintiff's evidence.

The plaintiff quite clearly says that the defendants requested him to allow them to occupy the land and that he gave them permission. That seems to me tantamount to a statement that it was the plaintiff who put the defendants in possession and that the plaintiff was at that time at least in constructive possession of the land. In fact according to the plaint his possession continued through the defendants until recently when they set up an adverse claim on their own behalf.

In the case of *Mohima Chunder* v. *Mohesh Chunder* (1) their Lordships of the Privy Council observe:

"This is in reality what in England would be called an action for ejectment and in all actions for ejectment where the defendants are admittedly in possession, and a fortiori where as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit, namely, for the two or three years prior to the year 1875 or 1874 and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed."

If, in the present case, the plaintiff had proved the permissive occupation by the defendants, the burden would then clearly have rested on the defendants to show that they had acquired title by twelve years' adverse possession. But it has been found as a fact that the plaintiff has failed to prove this permissive occupation. All that has been proved is that the plaintiff was at

(1) [1888] 16 Cal. 473=16 I. A. 23=5 Sar. 321 (P. C.).

one time the owner, but that for the last 15 or 20 years the defendants have been in possession and it seems to me that the plaintiff's claim is that the defendants obtained possession from him. That being so, the suit was a suit under Art. 142, and on his failing to prove the permissive nature of the occupation the plaintiff could not succeed without at first showing that he had been in possession within twelve years of bringing the suit. For these reasons I am of opinion that this case was rightly decided by the District Court and I dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Rangoon 155

RUTLEDGE, C. J., AND CARR, J.

Ma Shwe Yu and *others*—Appellants.

v.

Ma Kin Nyun and *others* — Respondents.

First Appeal No. 254 of 1927, Decided on 11th March 1928, against judgment in Civil Misc. Appln. No. 54 of 1928.

(a) Buddhist Law (Burmese) — Partition—Father remarrying—Children entitled to half estate by partition.

Where a widower remarries his children by the first wife at once acquire a right to partition of the estate, and the share of the children collectively is one half, while the father takes one half : *A. I. R.* 1926 *Rang.* 211, *Foll.* [P 155 C 2]

*** (b) Buddhist Law (Burmese)—Partition—Death of either parent, surviving parent remarrying—Children are entitled to partition of property at the time of remarriage.**

When, after the death of one parent, the surviving parent remarries the children of the first marriage are entitled to partition of the estate held by surviving parent at the time of remarriage, unless of course there has already been a partition between the surviving parent and the children : *A. I. R.* 1926 *Rang.* 23 ; *A. I. R.* 1924 *P.C.* 88, *Rel. on*: 8 *L. B. R.* 501 ; *A. I. R.* 1927 *Rang.* 143, *Doubted.* [P 157 C 1]

Zeya, Tha Kin and *Po Aye*—for Appellants.

Thein Maung and *Ba Thaung*—for Respondents.

Judgment.—Throughout the hearing of this appeal it has been accepted as settled law that where a widower remarries his children by the first wife at once acquire a right to partition of the estate, and that the share of the children collectively is one half, while the father takes one half. That is the effect of the decision of a Bench of this Court in *Maung Po Kin* v. *Maung Tun Yin* (1) and we see no reason to question the correctness of that judgment in this respect. It is true that in our former judgment in this appeal we did not accept that judgment in its entirety but our doubt was only whether the eldest son as such is individually entitled to a fourth share even though he may not have attained the status of orasa. That question, as we said before, is not of practical importance in this case.

In our former judgment we assumed without discussing the question that the estate to be divided was the joint estate of the parents of the appellants, that is the estate as it was at the time of the death of the mother. The question now before us is whether it should not instead be held that the estate in which the children are entitled to share is the actual estate of the father at the time of his remarriage.

We have been referred to a number of passages in the Dhammathats but after a careful consideration of these we are unable to find any very definite guidance in them. In no case does any Dhammathats say expressly what estate is to be divided and such indications as are to be found are in our opinion much too vague to form a safe foundation for any definite finding either way. We think, therefore, that the question should be decided on considerations of equity having regard to such rules of law of inheritance as can definitely be laid down.

In *Ma Sein Tun* v. *Ma Son* (2), it was ruled by a Full Bench of the late Chief Court of Lower Burma that :

> " Subject to any claim by the Orasa .... a Burmese Buddhist widow has an absolute right of disposal of the whole of the joint property of herself and her late husband as against the children of their marriage."

The same rule of course is applicable to the widower. This is now definitely settled law, but it is subject to the qualification that the rule applies only as long as the widow or widower does not remarry, and that on remarriage the children of the first marriage, become entitled to one half of the estate as laid down in *Maung Po Kin's* case (1).

(1) A. I. R. 1926 Rang. 211=4 Rang. 207.
(2) [1915] 8 L. B. R. 501 = 30 I. C. 538 = 8 Bur. L. T. 203.

On the analogy of the Privy Council judgment in *Tun Tha* v. *Ma Thii* (3), it must, we think be held that this right to partition vests in the children from the moment of remarriage of the parent.

Having regard to these rules, there seems to us to be a very strong case for holding that the estate to be divided is that existing at the time of the remarriage, that is, at the time of the vesting of the right to partition. The opposite view clearly brings the rules laid down in *Ma Sein Tun's* case (2) and *Maung Po Kin's* case (1) into conflict, for it is very possible that in the interval between the death of the first spouse and the remarriage the surving spouse may, in exercise of his absolute right of disposal have alienated some of the properties forming the joint estate of the first marriage. But such alienation must, we think, be held to be entirely valid and not contestable by the children of the first marriage. If, therefore, these children are bound by such alienation, it is also equitable that they should be entitled to share in any acquisition made by the surviving parent after the death of his first spouse and before his remarriage.

A case which is relied upon as supporting this view is *Maung Po San* v. *Maung Po Thet* (4) in which it was laid down that:

> "What the Burmese Buddhist Law regards in its rules for partition is the family rather than individuals and so long as the family subsists all who are members of it are regarded as being entitled to partition on its dissolution. On the surviving parent's remarriage, either the old family might be regarded as continuing or a new family might be regarded as being instituted."

On this principle which we accept, the proper conception would be that on the death of one parent the surviving parent and the children remain one family and the property is family property although its management is vested in the parent and the children cannot claim partition. A stepparent introduced into the family is a disintegrating element, whose influence may be detrimental to the interests of the children, and for that reason the right of claiming partition on remarriage of the parent is given.

The Privy Council judgment in *Ma Thaung* v. *Ma Than* (5) lends support to this view. It lays down that where there has been a partition on the remarriage of the parent, the children have no further claim to inherit on the death of the parent. In other words, from the time of the partition the family is broken up, and the parent and the stepparent form a new family. This conception is further exemplified in the accepted rule that when there has been no partition on remarriage, the children of the first marriage are entitled to divide the estate with the stepparent on the death of their own parent, but that even then if they do not claim partition they have a further right to inherit on the death of the stepparent. Having regard to all these rules, we think that on equitable considerations the estate to be divided is the estate as it is at the time of remarriage of the surviving parent.

There seems to be no strong grounds for holding this view to be wrong. It is true that in *Ma Sein Tun's* case (2) the learned Judges speak of the "joint estate of the parents" are liable to partition, thus implying that it is the estate as it stood at the death of the first parent that is so liable. But this does not appear to be a considered decision on the question now before us, which in fact did not arise in that case. And in *Maung Kyaw Za* v. *U DeBi* (6) in which one Judge remarked that the share of the children on remarriage of the surviving parent is confined to property in question in that case was property acquired during the second marriage. And this also was quite evidently not a considered decision of the question before us.

It has also been urged that what the children take on the remarriage of the surviving parent is merely their deceased parent's share in the hnapazone estate, and that, therefore, it is that hnapazone estate that is to be partitioned. We are not satisfied of the correctness of this proposition. If it were a question merely of the disposal of the interest of deceased parent, there seems to be no reason why the surviving parent should not receive a share. And there seems to be no reason, why on that basis the children

(3) A. I. R. 1916 P. C. 145 = 44 Cal. 379 = 44 I. A. 42 (P.C.).
(4) A. I. R. 1926 Rang. 23=3 Rang. 438.
(5) A. I. R. 1924 P. C. 88 = 5 Rang. 175=51 Cal. 374=51 I. A. 1 (P.C.).
(6) A. I. R. 1927 Rang. 143=5 Rang. 125.

should have no further right to a share on the death of the surviving parent. We think that the more correct view of the matter is that the family is broken up and that it is the family estate that is partitioned. We hold, therefore, that when, after the death of one parent, the surviving parent remarries the children of the first marriage are entitled to partition of the estate held by the surviving parent at the time of remarriage, unless of course there has already been a partition between the surviving parent and the children.

On this view of the law it will be necessary to return the case for further evidence. The issue framed in the District Court related to debts of Maung Kya Yin and his first wife Ma On, at the time of the latter's death. He must now ascertain what were Kya Yin's debts at the time of his marriage to Ma E Hwi. The proceedings are returned to the District Court for a trial of and the finding on the fresh issue :

"What were Maung Kya Yin's debts at the time of his marriage to Ma E Hwi."

This issue should be tried and the finding returned without delay.

M.N./R.K. *Case remanded.*

A. I. R. 1929 Rangoon 157

PRATT, J.

Ban Gyi Maung—Appellant.

v.

Ma Ngwe Bon—Respondent.

Second Appeal No. 122 of 1928, Decided on 23rd January 1929, against order of the Dist. Judge, Sagaing, in Civil Appeal No. 32 of 1928.

Civil P. C., S. 144—Decree-holder auction purchaser—Sale cannot stand if decree reversed or modified and judgment-debtor pays amount finally decreed.

Where the decree-holder himself is the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside or modified because the purchase is subject to the final result of litigation between the parties. The judgment-debtor seeking to get rid of the sale should have relief only on condition that he paid up what was due under the ultimate decree and the decree-holder would have a charge on the property for the amount ultimately found due by the appellate Court on payment of which the judgment-debtor would be entitled under S. 144 to have the property restored to him on his depositing the decretal amount in Court: 27 *Mad.* 98, *Rel. on.* 27 *Cal.* 810 ; 10 *All.* 166 (*P.C.*), *Ref.*

[P 157 C 2, P 158 C 1]

Ko Ko Gyi—for Appellant.

Dey—for Respondent.

Judgment.—Ma Ngwe Bon obtained a decree for Rs. 550, which was confirmed in the District Court, against Maung Ban Gyi. In execution of her decree she attached land belonging to the judgment-debtor, which was sold by Court auction on 8th January 1927, the purchaser being the decree-holder herself. The sale was confirmed on 8th February 1927. On 28th March following the High Court modified the decree and reduced the amount decreed to Rs. 110. The judgment-debtor paid Rs. 115 into Court and demanded to be placed in possession of his property under S. 144, Civil P. C. Both Courts held that there was no ground for setting asid the sale.

In *Set Umedmal* v *Srinath Roy* (1) a Bench of the Calcutta High Court pointed out that the Privy Council case of *Zainul-ab-din Khan* v. *Muhammad Asghar Ali Khan* (2), is clear authority for the proposition that where the decree-holder himself is the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside. It is true that in the present instance the decree was not set aside, but only modified. The principle, however, remains the same. The rule as laid down in *Syed Nathadu Sahib* v. *Nallu Mudalay* (3), covers cases in which the decree is modified as well as reversed.

It is, that in the case of decree-holders purchasing at execution sales the purchase is subject to the final result of the litigation between them and their judgment-debtors. I have no doubt as to the correctness of this statement of the law on the subject. The object of the rule is explained as being, so far as it relates to judgment-creditors, to prevent the interests of judgment-debtor suffering by sales of their property before their liability is finally determined, and to avoid judgment-creditors profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal.

It was pointed out further that in cases where the decree is not reversed but modified the view most favourable to a decree-holder purchaser in similar cir-

(1) [1900] 27 Cal. 810=4 C. W. N. 692.

(2) [1887] 10 All. 166=15 I. A. 12=5 Sar. 129 (P.C.).

(3) [1903] 27 Mad. 98.

cumstances would be that deducible from the case of *Baboo Gawree Boyjonath Pershad* v. *Jodha Singh* (4) that a judgment-debtor seeking as plaintiff to get rid of the sale should have relief only on condition that he paid up what was due under the ultimate decree.

In other words the result would be that in the present instance the decree-holder would have a charge on the property for the amount ultimately found due by the High Court. On this view the judgment-debtor was obviously entitled under S. 144 to have the land restored to him on his depositing the decretal amount in Court. There is no injustice to the decree-holder, who did not pay the purchase money into Court but set it off against the decree. The appeal must be allowed, the orders of the District and Township Courts set aside, and the judgment-debtor given the relief sought with costs throughout. Advocate's fee five gold mohurs.

M.N./R.K. *Appeal allowed.*

(4) 19 W. R. 416.

A. I. R. 1929 Rangoon 158

RUTLEDGE, C. J., AND BROWN, J.

C. T. A. M. Chettyar Firm — Appellants.

v.

Ko Yin Gyi and *another* — Respondents.

First Appeal No. 234 of 1925, Decided on 1st January 1929, against decree of Dist. Court, Tharrawaddy, in Civil Regular No. 24 of 1920.

Civil P. C., Ss. 151 and 152 — District Judge's decree by mistake making defendant against whom relief was not claimed, liable for decretal amount—On plaintiff's appeal High Court increasing decretal amount but not referring to question as to who were bound by decree—Defendant, wrongly made liable, applying for amendment of decree—As even in plaintiff's appeal High Court could have altered decree in favour of applicants under O. 41, R. 33, decree of District Judge merged in that of High Court and so High Court was proper Court to amend decree—It was necessary to order amendment in this case — To prevent abuse of Court's process it was necessary to refund Court-fee paid on review application although this case would not come under Court-fees Act, S. 15.

A decree of the District Judge, by an accidental mistake, made those defendants also against whom no relief was claimed, liable for the decretal amount. On plaintiff's appeal to the High Court, the decretal amount was increased but the question, as to who were bound by the decree, was not referred to in the judgment. Thereafter the defendants whose names were wrongly included in the decree applied to the High Court for the amendment of the decree.

Held: that as the High Court even in plaintiff's appeal could have under O. 41, R. 33, altered the decree and omitted the names of the applicants, the decrée of the District Judge must be held to have merged in the decree of the High Court, and so the High Court was the only Court to grant the relief claimed. [P 159 C 2]

Held further: that the High Court had power to interfere either under Ss. 151 or 152, and that it was necessary to meet the ends of justice to order the amendment of the decree.

Held further: that although S. 15, Court-fees Act, was not applicable to this case, as it could not be said that on the rehearing the Court reversed or modified its former decision on the ground of mistake of law or fact, still the Court-fee paid on the review application ought to be refunded for the ends of justice and to prevent the abuse of the process of the Court. [P 160 C 1]

K. C. Bose—for Appellants.

Anklesaria—for Respondents.

Order.—This application arises out of a suit filed by Ma Thet Pon, now deceased, in the District Court of Tharrawaddy in the year 1920. In that suit, she sued for possession of certain land and for mesne profits. The land had been in the possession of U Bauk and Ma Mwe Me, deceased, and the first two defendants were Ma Kyi Oh and Ma Ohn Kin, administrators of the estate of U Bauk and Ma Mwe Me. The present petitioners were joined as defendants because the land in dispute had been mortgaged to them by U Bauk and Ma Mwe Me. There were five other defendants joined for various reasons. In the plaint as finally amended the plaint asked for possession of the land and for mesne profits as against the estate of U Bauk and Ma Mwe Me alone. The suit went to trial and was finally dismissed by the District Court. Ma Thet Pon appealed to this Court and in September 1923 her appeal was allowed and a decree for possession passed in her favour. This decree has subsequently been confirmed on further appeal to the Privy Council.

The decree of this Court directed that the respondent-defendants should make over possession of the land in dispute to Ma Thet Pon, and it then proceeded to say:

"And it is further ordered that as to the rents claimed the case be remanded to the District

Court of Tharrawaddy for disposal on the following issues, and that the said District Court of Tharrawaddy do then pass a final decree for the amount due to the appellant-plaintiff :

(1) What quantity of paddy was received as rent by Ma Mwe Me and the administrators after U Bauk's death ?

(2) What was the market value of the paddy at the time of the harvest ?

(3) What sums were paid as land revenue ?"

As a result of this decree, the District Court held an enquiry on the question of mesne profits and passed final orders on 5th May 1925. In this enquiry, the administrators of the estate of U Bauk and Ma Mwe Me were the only contesting parties. The District Judge in his judgment found :

"The amount the plaintiff is entitled to receive from the defendants is therefore Rs. 9,808-7-7. There will be a decree with costs accordingly in favour of the plaintiff."

A decree was then drawn up and that decree includes all the original defendants as defendants and directs that the defendants jointly do pay the amount found due. Against this decree Ma Thet Pon filed an appeal in this Court claiming that she should have been allowed a larger sum. This appeal was decided by us in June 1927. We found that a small sum of Rs. 372 should have been allowed in excess of the amount decreed and the final order we passed was as follows :

"We direct that Rs. 372 be added to the sum decreed as mesne profits by the District Court with proportionate costs, and for the rest we dismiss this appeal."

The question as to who were to be bound by the decree was not before us and was not referred to by us at all in our judgment. A decree was then drawn up which so far as the parties were concerned followed the decree of the District Court and directed that

"the decree of the District Court of Tharrawaddy be and the same is hereby modified by directing that respondents-defendants do pay to the appellant-plaintiff the sum of Rs. 10,180-7-7, being the amount of the mesne profits."

The date of our judgment was 14th June 1927. The application now before us is an application for amendment of this decree and is dated 4th May 1928. The delay in filing the application is explained in an affidavit filed by the petitioners. In that affidavit, Thiruvenkatam Pillay, clerk and sub-agent of the C. T. A. M. Firm, deposes that they engaged an advocate, Mr. Krishnaswami, to represent them in the appeal before us and that on our judgment being pronounced the Chettyar firm was informed by Mr. Krishnaswami that the appeal against them had been dismissed and a decree for the further sum of Rs. 375 had been passed against respondents 1 and 2, and it was only on 16th April 1928, that the firm knew that there was any decree against them when they received notice to pay up the decretal amount. It is urged on behalf of the petitioners that it is quite clear that it was never the intention of any Court to pass a decree against them for mesne profits, that the inclusion of their names in the decree was entirely accidental and that this is a proper case for the interference by this Court under the provisions of S. 152, Civil P. C.

The decree in the first instance was a decree of the District Court and against this decree the petitioners never appealed. It is, however, contended on their behalf that although they did not appeal, it was open to this Court on the appeal of Ma Thet Pon to alter the decree in their favour under the provisions of R. 33, O. 41, Civil P. C. In these circumstances, although the original decree was that of the District Court that decree must now be held to be merged in the decree of this Court and this Court is therefore the only Court which can grant the relief now claimed.

We are of opinion that this contention is correct. There can in our opinion be no question whatever as to the merits of the present application. The respondent in her final plaint made no claim whatsoever against the applicants for mesne profits and it seems to us perfectly clear that the decree against the applicants on this point was entirely due to accident and that it was never the intention of the District Court or of any Court to direct the petitioners to pay the sum decreed. The only point which requires consideration is whether we have the power to interfere now. Mr. Anklesaria contends that the error can be traced back to the decree of this Court of September 1923. We are, however, unable to agree with this contention. That decree does direct all the defendants to deliver up possession, but it contains no order at all as to who is to pay the mesne profits and no order on that point was necessary as no claim on the point had ever been made except against the

first two defendants. In our opinion, it was not until the decree of the District Court of May 1925 that there was any order at all against the petitioners for payment of mesne profits. As we have already said, that decree, in our opinion, now merges in the decree of this Court and that decree so far as it directs anyone but the first two defendants to pay mesne profits was clearly never in accordance with the intention of the judgment of the District Court, and it was certainly not in accordance with our intention when the case came before us on appeal. It would be a gross injustice to allow a decree for so large an amount to stand when based on no legal claim of any kind whatsoever, the decree being due entirely to a mistake on the part of the Court. We are of opinion that we have power to interfere either under the provisions of S. 152 or under the provisions of S. 151, Civil P. C. The order we propose to make is quite clearly one which is necessary for the ends of justice and to prevent abuse of the process of the Court. The application before us has been made by the Chettyar defendants only, but it is clear that there has been a similar mistake as regards all the other defendants except the first and second.

We direct that the decree of this Court in Civil Appeal No. 234 of 1925 be amended into a decree directing that the first two respondent-defendants, the legal representatives of the estate of U Bauk and Ma Mwe Me, deceased, alone be directed to pay the appellant-plaintiff the sum of Rs. 10,180-7-7, being the amount of the mesne profits. There will be a similar modification of the decree as regards the payment of costs of the enquiry in the District Court. These costs will be borne by the first two defendants alone. The respondents will pay the costs of the petitioners in this application, advocate's fee seven gold mohurs.

(Mr. Bose, the appellants advocate, having applied for a refund of the Court-fee paid in the review application, the judgment proceeded). We have given Mr. Bose an opportunity to show that the Court has power to order a refund of the stamp duty payable upon the review application in this case, and he relies upon S. 15, Court-fees Act. We are not satisfied, however, that S. 15 by itself would give us power to make such an order in the present case. It is true that the application for review of judgment was admitted in the case, but it is not accurate that on the re-hearing the Court reversed or modified its former decision on the ground of mistake of law or fact. It granted, however, all the reliefs which the applicants asked for in a concurrent proceeding for the amendment of the decree under O. 41, R. 33, Civil P. C.

On the facts of the case, however, we consider that this is a case where it is necessary, for the ends of justice or to prevent the abuse of the process of the Court, that we should apply the inherent powers of the Court referred to in S. 151, Civil P. C. It is no doubt only in rare and exceptional circumstances that this power can be invoked, but we consider that this is one of those exceptional cases.

The error referred to in our judgment in this case delivered yesterday shows that the error was one of the Court's in not specifying that it was only the contesting defendants-respondents who were liable for the mesne profits. In these circumstances an injustice was done to the applicants and an amount was decreed against them which had never been claimed.

In these circumstances they were quite justified in making alternate applications for relief, as it was difficult on the complicated proceedings to state which was their proper remedy. We are confirmed in the view we take by a decision of a Bench of the Patna High Court, of which the late Chief Justice was a member, in the case of *Chandradhari Singh* v. *Tippan Prasad Singh* (1), and also by a recent order of this Court in the case of *Ma Thein* v. *Ma Mya* (2). We accordingly direct that the Court-fees paid on this application to review be refunded to the applicants.

S.N./R.K. *Decree amended.*

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(1) [1918] 3 Pat. L.J. 452=46 I.C. 271=(1918) P.H.C.C. 273.
(2) F. A. No. 147 of 1928.

A. I. R. 1929 Rangoon 161

PRATT, J.

Ramdas—Appellant.

v.

Kannamal—Respondent.

Second Appeal No. 99 of 1928, and Civil Revn No. 142 of 1928, Decided on 24th January 1929, against order of Dist. Judge, Mandalay, in Civil Appeal No. 68 of 1928.

(a) Civil P. C., O. 21, R. 22—Execution after one year—Notice to judgment-debtor essential unless reasons for not issuing notice are recorded—Failure to record reasons renders proceedings void.

When execution is taken out after one year from the date of the decree it is compulsory under O. 21, R. 22, to issue a notice to show cause to the judgment-debtor before ordering his arrest. If no such notice is issued, under Sub-S. (2) Court can issue process, for reasons to be recorded, if it considers issue of notice would cause unreasonable delay or defeat the ends of justice. But if Judge records no reasons for issuing process and overlooks the provisions of R. 22, the failure to issue notice to the judgment-debtor is not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction: 44 *Cal.* 954, *Foll.* [P 161 C 2]

(b) Civil P. C., S. 47—Order of committal to jail passed without jurisdiction—Objection to its legality not taken—No appeal lies—Civil P. C., S. 51.

An order committing a judgment-debtor to jail was passed without jurisdiction. But no objection was made to the committal to jail and the question of its legality was not then raised:

Held: that the order was not under S. 47 and, therefore, not appealable. [P 161 C 2]

(c) Civil P. C., S. 115—Non-appealable order in execution without jurisdiction likely to cause judgment-debtor irremediable injury—High Court should interfere under S. 115—Civil P. C., S. 151.

Where the existence of a non-appealable order on execution, from which an appeal was filed may do the judgment-debtor an irremediable injury, since he was never given any opportunity of showing cause against execution and the whole of the proceedings were without jurisdiction the case is one where the unusual course of interfering under the revisional powers conferred by S. 115 should be taken. [P 162 C 1]

Sanyal—for Appellant.
Tha Kyaw—for Respondent.

Judgment.—In Civil Execution Case No. 37 of 1928, of the Township Court, Amarapura, orders were passed on 26th March 1928, committing the judgment-debtor to jail. Execution was taken out over one year from the date of the decree and it was, therefore, compulsory under O. 21, R. 22 to issue a notice to show cause to the judgment-debtor before ordering his arrest. It is common ground that no such notice was issued.

The District Court on appeal held that the failure to issue notice was merely an irregularity which did not vitiate the subsequent arrest. Sub-S. (2) allows the Court to issue process for reasons to be recorded without first issuing notice, if it considers issue of notice would cause unreasonable delay or defeat the ends of justice. The Judge recorded no reasons for issuing process and obviously overlooked the provisions of R. 22, O. 21. Under the circumstances the failure to issue notice to the judgment-debtor was not a mere irregularity, but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction as was laid down in *Shayam Mandal* v. *Satinath Banerjee* (1). There is a consensus of opinion on this point in the High Courts. There can be no doubt that the order for arrest of the judgment-debtor and all the proceedings in execution were void in consequence of the initial failure to issue notice.

For the decree-holder in this Court, however, the objection has been taken that no appeal lies against the order in question, which was passed under S. 51 and cannot be considered as a question arising between the parties to the suit in which the decree was passed relating to the execution or satisfaction of the decree. It is contended accordingly that no appeal lies. This contention must prevail. No question arose between the the parties for determination. No objection was made to the committal to jail and the question of its legality was not then raised.

Had the judgment-debtor at the time challenged the jurisdiction of the Judge to pass orders in execution, then the order deciding the question of jurisdiction would have been an order under S. 47 and would have been appealable. I hold, therefore, that no appeal lies and the appeal is dismissed, but as the point should have been taken in the District Court there will be no order for costs. It is conceivable, however, that the exis-

(1) [1917] 44 Cal. 954=24 C. L. J. 523=38 I. C. 493=21 C. W. N. 776.

tence of the order on execution may do the judgment-debtor an irremediable injury, since he was never given any opportunity of showing cause against execution. As the whole of the proceedings were without jurisdiction the case is one where I feel bound to take the unusual course of interfering under the revisional powers conferred by S. 115. The order appealed against is, therefore, set aside. I notice, the decretal amount was subsequently paid into Court. By consent it will remain there for a reasonable time, say one month from receipt of this order, to enable the decree-holder to take fresh proceedings by way of execution, if he wishes to do so.

M.N./R.K. *Order set aside.*

A. I. R. 1929 Rangoon 162

BROWN, J.

Ma Shin—Appellant.

v.

Maung Han and *others*—Respondents.

Second Appeal No. 532 of 1928, Decided on 8th January 1929, against judgment of Dist. Court, Bassein, in Civil Appeal No. 78 of 1928.

Civil P. C., S. 11, Expln. iv—Plaintiff and defendant in present suit being co-defendants in former suit—Plaintiff in former suit claiming partition on basis of agreement—Present plaintiff admitting his claim but suit dismissed on ground that other defendants in that suit treated land as their own and that agreement for partition was not proved—Plaintiff in present suit alleging that land was jointly owned by her husband and defendant 1 who transferred it with condition to repurchase—Defendant 1 repurchasing it — Plaintiff claiming half share on payment of half purchase money—Present suit was not barred by res judicata.

The plaintiff as well as defendants in the present suit was co-defendants in a former suit, in which the plaintiff sued for partition of land on the basis of an agreement to that effect. The plaintiff in the present suit admitted the claim of the plaintiff in that suit but the suit was eventually dismissed on the ground that the other defendants were dealing with the land as their own and that the contract of partition was not proved. The present plaintiff alleged in the present suit that the land really belonged to her husband and present defendant 1 but was transferred by them with a condition to purchase and claimed that as defendant 1 had purchased it, she was entitled to half share on payment of proportionate price money. The defendants contended that as this ground of defence was not raised by the plaintiff in the former suit, the present suit was barred by res judicata.

Held : that as the relief claimed by the plaintiff in the former suit was entirely independent of the present claim, the raising of which in the former suit could have made no difference to the decision in the former suit, and as also it was not necessary to decide in the former suit the question raised in the present suit, the present suit would not be barred by the principle of res judicata : *A. I. R.* 1925 *Rang.* 228, *Rel. on.*; and *A. I. R.* 1923 *Rang.* 239, *Expl.* [P 163 C 2]

S. C. Das—for Appellant.

Thein Maung—for Respondents.

Judgment.—In Civil Regular No. 42 of 1927 of the Sub-Divisional Court of Kyonpyaw one Maung Aung Ban and two others sued the parties to the present appeal and one other for specific performance of a contract. Their allegation was that the land in suit had originally belonged to the parents of the plaintiffs and of all but one of the defendants. About 1914, the present respondent, Maung Han, and Maung Nge, the husband of the present appellant, Ma Shin, of on behalf of all the heirs made over the land in satisfaction of a mortgage debt, reserving the right of repurchase. About four years later, with the consent of all the heirs, Maung Han and Maung Nge repurchased the land on behalf of all these heirs, and it was agreed amongst the heirs, that, when the purchase money was repaid to Maung Han and Maung Nge the land would be divided amongst all the heirs. They, therefore, asked for a partition of the land on payment of their proportionate shares.

The present appellant, Ma Shin, admitted the plaintiffs' claim in that suit, but the suit was contested by the present respondents, Maung Han, Maung Myan and Po Hla. The suit was eventually dismissed. It was held that Maung Han and Maung Myan had been dealing with the land as their own. As regards the alleged promise to partition the land at the time of repurchase, the finding was somewhat vague; but apparently it was held that the contract was not proved. In the present case Ma Shin has sued the three respondents with regard to the same piece of land. She now says that the land in question was purchased by her husband, Maung Nge, and Maung Han from a Chettyar firm; and that, in 1914, Maung Nge and Maung Han mortgaged the land to Po Hla. Later on they transferred

the land outright to Po Hla with an option of repurchase.

In the year 1919 this option of repurchase was exercised by defendant 1, Maung Han. Maung Nge has since died and Ma Shin claims that Maung Han must be held to have repurchased for himself and for Maung Nge and she asks for half of the land on payment of half the purchase money Rs. 920.

The suit is contested by Maung Han and Maung Myan and has been dismissed on a preliminary point. The trial Court has held that the suit is barred by the principle of res judicata on account of Civil Regular No. 42 of 1927, and this decision has been upheld on appeal by the District Court. It is against this decision that the present appeal has been filed.

The learned District Judge was of opinion that the case now set up by the appellant was a case which ought to have been set up as a ground of defence in the earlier suit. It is difficult to see how the present case would have been a good defence to the earlier suit. The question in that suit was whether the plaintiffs had the right to obtain a share in the land by virtue of a contract entered into by them and the other heirs. Ma Shin's present case is that the land actually belonged to her husband and to Maung Han, and it is on that ground that she is now claiming a share. But this case is not necessarily inconsistent with the case set up by the plaintiffs in the former suit. Even if the land were actually owned by Maung Nge and Maung Han only that fact would not necessarily negative the possibility of a contract whereby they agreed to partition the land on payment of the proportionate shares by the other heirs. Further, the District Judge does not seem to have given sufficient attention to the fact that in the former suit the contesting parties were Maung Aung Ban and two others on one side and all the present defendants on the other:

The conditions requisite for an adjudication to be res judicata as between co-defendants were discussed in the case of *Ma Tok* v. *Ma Yin* (1). It was there laid down that the following conditions should be fulfilled before the principle of res judicata could apply:

(i) that there should be a conflict of interest between the co-defendants;

(ii) that it should be necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit, and

(iii) that the judgment should contain a decision of the question raised as between the co-defendants.

Now, there is a conflict in the present case between the persons who were co-defendants in the earlier suit; but in that suit the relief claimed by the plaintiffs was based on an alleged contract which is entirely independent of the claim now put forward by Ma Shin. Their success depended on whether they could prove that contract. A decision on the points now raised by Ma Shin could have been of no avail whatsoever to them in that suit, and the raising of the present claim by Ma Shin could have made no difference whatsoever to the decision of the earlier case. It was not necessary to decide this point in the earlier suit; nor can the judgment either directly or impliedly be held to contain a decision of the question now raised.

I have been referred on behalf of the respondents to the case of *Maung No* v. *Maung Po Thein* (2). In that case the following observations by a Bench of the Calcutta High Court in an earlier case were quoted with approval with reference to Expln. 4, S. 11, Civil P. C.:

A matter which ought to be raised but which as matter of fact is not raised in a suit cannot be decided in specific terms in that suit. But this fact cannot be fatal to the plea of res judicata, for in that case it is obvious that Expln. 2 (of S. 13 of the former Code) would be meaningless. We must take it therefore that if the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised, that defence must under S. 13 be deemed to have been finally decided against the person who ought to have raised it."

With these remarks I entirely agree. But they do not seem to me to be of any assistance to the respondents in the present case. The decision in the former suit was to the effect that the plaintiffs in that suit had failed to prove their rights as heirs on a contract to a share in the land. It is quite impossible to hold that this decision is necessarily inconsistent with the case now put forward by Ma Shin. It is true that when the claim

(1) A. I. R. 1925 Rang. 228=3 Rang. 77.

(2) A. I. R. 1923 Rang. 239=1 Rang. 363.

of res judicata is based on Expln. 4, S. 11 it is not necessary that there should have been any express decision on the 'matter which ought to have been made a ground of defence or attack. But for the provisions of the sections to be operative at all, the issue, or the matter in issue, must have been heard and finally decided in the earlier case; that is to say, the decision in the earlier case must have been such as to imply an adverse finding on the matter which ought to have been made a ground of defence or attack. These conditions are not fulfilled in the present case; and, in my opinion, the present suit is not barred as res judicata.

It has been suggested by the learned advocate that when Ma Shin was examined as a witness in the earlier case her statements were not entirely consistent with the case she now puts forward; but I am not now concerned with the merits of her present case. The sole question for decision at present is whether the suit is barred as res judicata, and on that point I must hold that the appellant is entitled to succeed. I, therefore, set aside the judgments and decrees of the lower Courts and direct that the suit be reopened and and tried on its merits by the trial Court. The appellant will be entitled to a refund of the Court-fees paid by her in this Court and in the District Court. The balance of her costs in the District Court and in this Court will be paid by the respondents.

S.N./R.K. *Suit remanded.*

A. I. R. 1929 Rangoon 164

RUTLEDGE, C. J., AND BROWN, J.

E. M. Joseph and *others*—Appellants.

v.

Samsunder and *others*—Respondents.

First Appeals Nos. 207 to 209 of 1928, Decided on 4th January 1929, against judgment of original side in Civil Regular Nos. 353, 398 and 399 of 1927.

Registration Act, S. 17 (2) (v)—Landlord's letter to tenant informing him "As long as you occupy room we shall not ask you to vacate it" does not amount to lease or agreement to lease and is exempt from registration —Registration Act, S. 2.

In a suit for specific performance on the basis of an oral agreement to lease, the plaintiff filed a letter written to him by the landlord. The letter recited "This is to inform you that as long as you occupy the room. . . . . we shall not ask you to vacate the "said room the rent of which will be Rs. 5 per day."

Held: that the letter did not operate as a lease or an agreement to lease. It was a unilateral letter which at the most gave right to obtain another document, the formal lease. It was therefore exempt from registration under S. 17 (2) (v), and so could be admitted in evidence though unregistered; *A. I. R.* 1927 *Rang.* 169; and *A.I.R.* 1925 *Cal.* 1087, *Dist.* [P 165 C 1]

Banerji—for Appellants.

Paget—for Respondents.

Judgment.—The property in dispute in these three appeals consists of three rooms, Nos. 3, 4 and 5 of house No. 68, Fraser Street, Rangoon. The house in question is part of an estate of which the beneficial owners are the four appellants. The four appellants are brothers and appellant 1, E. M. Joseph, is trustee for the management of the estate. The rooms in question have for some years been occupied by the respondents as tenants. The respondent, Dwarka Prasad has occupied room No. 3, Samsunder and Dwarka Prasad have occupied room No. 4 and Samsunder has occupied room No. 5. Appellant 1 as trustee of the estate brought three ejectment suits in the Small Cause Court against the respondents.

It is alleged by the respondents that during the pendency of these suits an agreement was come to whereby they were to be permitted to continue in occupation for the rest of their lives on the payment of Rs. 5 per day rent and of a lump sum of Rs. 1,000 salami for each room This agreement was never reduced to the form of a legal document, and the respondents sued for specific performance of the agreement. As a result the ejectment suits in the Small Cause Court were dismissed.

The appellants, whilst admitting that there was some discussion as to a settlement and admitting that the salami of Rs. 1,000 for each room was actually paid to them, deny that there was ever any definite agreement as to a lease. The trial Court has granted a decree for specific performance in each case and it is against these decrees that these three appeals are filed.

The first question for consideration in these appeals has reference to certain letters written by three out of the four appellants. That these three appellants signed those letters is admitted; but it is argued on their behalf that the letters contain on the face of them an agreement to lease, that they are, therefore, compul-

sorily registrable under the Registration Act and that as they have not been registered they cannot be accepted in evidence. The letter to Dwarka Prasad reads as follows:

"Sir, This is to inform you that as long as you occupy room No. 3 of house No. 68, Fraser Street, Rangoon, we shall not ask you to vacate the said room the rent of which will be Rs. 5 per day from 1st February 1927. You are not to sub-let the premises."

The letter to Samsunder with regard to room No. 5 is couched in similar terms and the letters to Dwarka Prasad and Samsunder jointly with regard to room No. 4 is also similarly worded 'except that the last sentence "You are not to sublet the premises,' is omitted.

In accordance with the definition given in S. 2 (vii), Registration Act, the term "lease" includes an agreement to lease, and under S. 17 of the Act a lease of immovable property for any term exceeding one year requires registration. The letters in question state the amount of rent and also declare that the appellants do not propose to evict the respondents.

We have been referred on behalf of the appellants to the case of *Ramjoo Mahomad* v. *Haridas Mullick* (1). In that case the defendant had written to the plaintiff a letter in which he said that he agreed to take a certain house on lease and set forth the terms under which he agreed to accept the lease and the plaintiff in reply wrote a letter to the defendant in which he said that he confirmed the defendant's letter. As a result of these two letters the plaintiff occupied the premises and paid the rent agreed on. Some 18 months later a notice was served on him to quit and he then brought a suit for specific performance. It was held that the letters in question amounted to a present demise of the premises and were compulsorily registrable. We do not, however, think that that case is analogous to the case before us. In one letter in that case there was a definite statement of an agreement to take the premises on lease subject to definite terms set forth in the letter and in the letter in reply there was a definite acceptance of the offer and the parties had acted on the letters as creating a lease for 18 months after the letters were written. The letters in the present case do not show any mutual agreement. They do not on the face of them contain any agreement at all. The three plaintiffs merely state in them that they will not ask the respondents to vacate the rooms. There is no mention whatever in the letters of the payments of salami and the letters are entirely unilateral letters. It seems to us clear that the letters were never really intended in themselves to operate as a lease or an agreement to lease, but that they contemplated execution of a formal agreement at a late stage. Formal assent to a proposal is clearly required before there can be any binding agreement. That assent is not contained in the letters at all and if these letters can be said to create a right at all, it seems to us, that was merely a right to obtain another document which would, when executed, create a lessee's interest in the property and that, therefore, the letters were exempted from registration under the provisions of S. 17 (2) (v), Registration Act.

We have been referred also to a case of this Court *Maung Ba Sein* v. *Maung Htoon Shwe* (2). but there again the document which was held to be compulsorily registrable was a formal document which set forth definite agreements by both landlord and tenant. We are of opinion that the letters in question have rightly been admitted in evidence by the trial Judge. It remains then to be considered whether the plaintiffs did in fact establish that a definite contract to enter into a lease was made. (Here the judgment discussed evidence and concluded as below). The learned trial Judge appears to have given the decree in somewhat too vague terms but we consider that he was right in granting a decree for specific performance and the orders we are passing are substantially in favour of the respondents. They must therefore be allowed their costs. We alter the decree of the trial Judge in each case to a decree that the defendants or defendant 1 on their behalf shall execute a lease in favour of the several plaintiffs, the conditions of the lease to be that a rent of Rs. 5 a day be paid, that the lease shall continue for the lives of the plaintiffs, that the plaintiffs shall have no power to sublet the premises. The defendant-appellants shall pay the costs of the respondents in both Courts in all the 3 cases.

S.N./R.K. *Decree altered.*

(1) A. I. R. 1925 Cal 1037=52 Cal. 1695.

(2) A. I. R. 1927 Rang. 169=5 Rang. 95.

A. I. R. 1929 Rangoon 166

BROWN, J.

Gunnu Meah—Appellant.

v.

A. Rahman—Respondent.

Second Appeal No. 434 of 1928, Decided on 30th January 1929, against judgment of Dist. Judge, Insein, in Civil Appeal No. 22 of 1928.

(a) Civil P. C., S. 100—Suit for enforcement of award praying also that award be filed — Second appeal lies — Civil P. C., Sch. 2, Para. 20.

Where a plaint was headed " Suit valued at Rs. 86 for enforcing an award " and ad valorem Court-fees had been paid accordingly, though at the conclusion of the plaint there was a prayer that the award may be ordered to be filed, but the prayer further asked that a decree be passed in accordance with its terms.

Held : that there was a suit for the enforcement of the award and not an application to file an award before the trial Judge and that a second appeal did therefore lie : 7 *Bur. L. T.* 279, *Ref.* [P 166 C 2]

(b) Arbitration—Suit for enforcement of award—Signature of party may not estop him from disputing correctness—Civil P. C., Sch. 2, Para. 15.

The mere signature by a party to an award does not necessarily in all cases estop him from afterwards disputing the correctness of the ward: *A.I.R.* 1923 *Rang.* 187, *Dist.* [P 167 C 1]

N. N. Sen—for Appellant.

Bhattacharyya—for Respondent.

Judgment.—The appellant, Gunnu Meah, filed a suit in the Township Court of Insein for the enforcement of the terms of an award directing the defendant to convey a certain house to the plaintiff. The plaint set forth that the matter was referred to an arbitration consisting of Mahomedan elders of Insein and that an award was made by them on 25th August 1927. The defendant, while not denying that the matter had been referred to arbitration, pleaded that the award was invalid as it had not been signed by all the arbitrators and also that the award was bad on the ground of misconduct and corruption of the arbitrators. The written statement did not specify what the misconduct and corruption complained of were. Evidence was called to show that the arbitrators refused to examine two of the witnesses named by the defendant.

The trial Court held that the arbitrators to whom the matter was referred consisted of some 30 persons and that only 12 of these persons signed the award. The Court, further, held that the arbitrators had refused to examine witnesses named by the defendant. The suit was therefore dismissed. The findings of fact by the trial Court were accepted by the lower appellate Court, which dismissed the appeal ; and the present appeal has been filed under the provisions of S. 100, Civil P. C.

A preliminary objection has been taken on the part of the respondent to the effect that no further appeal lies. It is contended that there was no suit to enforce an award but that in fact the matter before the Court was an application to file an award under the provisions of para. 20, Sch. 2, Civil P. C. If that contention is correct, then no second appeal would lie ; but I do not think that the contention can be upheld. The distinction between an application to file an award and a suit to enforce an award is pointed out in the case of *Nga Hla Gyaw* v. *Mi Ya Po* (1). In the present case the plaint is headed " Suit valued at Rs. 86 for enforcing an award " and ad valorem Court-fees have been paid accordingly. It is true that at the conclusion of the plaint there is a prayer that the award may be ordered to be filed ; but the prayer goes on to ask that a decree be passed in accordance with its terms for the conveyance of the said house to the plaintiff. The plaint was accepted as a plaint in a suit and appears to have been treated as such throughout.

I am of opinion that there was a suit for the enforcement of the award before the trial Judge and that a second appeal does therefore lie. But in this second appeal questions of fact cannot be raised and it has not been contended before me that the findings that only some of the arbitrators signed the award and that the witnesses were not all examined can be challenged. The only point argued on behalf of the appellant is that the respondent signed the award himself and is therefore now estopped from challenging its validity.

I have been referred on behalf of the appellant to the case of *U Gunawa* v. *U Pyinnyadipa* (2). In that case there had been a reference to arbitration and there had been an irregularity in the proceedings in that at one of the sittings of

(1) [1914] 2 U. B. R. 26=27 I.C. 31=7 Bur. L. T. 279.

(2) A. I. R. 1923 Rang. 187=1 Rang. 15.

the arbitrators when witnesses were examined one of the arbitrators was absent. This was the second of the three sittings and no objection was taken at the time, nor was it raised in the pleadings of the case. It was held that by continuing the proceedings without objection to this irregularity, the parties must be held to have condoned the irregularity and could not seek to set aside the award on the ground of that irregularity. I do not think that that decision is very relevant to the present case.

The whole arbitration in the present case was conducted at one sitting. There was no evidence to show that the respondent condoned any irregularity during the course of the arbitration proceedings. It was when proceedings were all concluded and the award had been delivered, that his signature was appended to the award. It was stated in *U Gunawa's* case (2)

"a party having knowledge of an irregularity cannot lie by without objection and take his chance of an award in his favour and then, when he finds that the award has gone against him, seek to set it aside on the ground of the irregularity to which he failed to object."

The signature of the respondent in the present case was appended when the terms of the award were known to him and there was no question therefore of his taking a chance that the award would be in his favour. His case is that he was practically compelled to sign the award. I am not satisfied that his mere signature of the award necessarily removes all objection to the irregularity in the award. The chief difficulty in the way of the plaintiff seems to me to be this, that there is no mention in the pleadings of the defendant having signed the award at all. The suit is based on the award itself and not on any agreement by the parties whereby they mutually accepted the award. The question therefore of the acceptance of the award by the defendant was not in issue. If both parties to the award signed the award after it was delivered it may be that a suit could be filed to enforce the terms of the award on the ground that there was a definite contract by the parties by virtue of their signatures; but this was not the case for the plaintiff here and I am not prepared to hold that the mere signature by a party to an award necessarily in all cases estops him from afterwards disputing the correctness of the award. In all the circumstances of the case I am not satisfied that there is sufficient ground for interference. I therefore dismiss this appeal with costs.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 167

OTTER AND HEALD, JJ.

Thein Pe and *others*—Appellants.

v.

J. P. De Souza and *another*—Respondents.

Letters Patent Appeal No 111 of 1928, Decided on 25th February 1929, against Judgment of Doyle, J., in Special Second Appeal No. 95 of 1928.

Contract Act, S. 73—Person engaged as teacher by month—No provision for notice to leave—Contract can be terminated by one month's notice.

Where a person is engaged as a teacher by the month and there is nothing in the agreement, providing for notice to leave on either side, the contract would be terminated by a reasonable notice and one month's notice is reasonable: *Allen: In the matter of*, (1910) *K. B.* 397; 13 *Bur. L. T.* 168, *Rel. on.* [P 168 C 1]

E. Maung—for Appellants.

Ba Thein—for Respondents.

Judgment.—This is an appeal under the Letters Patent which arises under the following circumstances. The plaintiff who is a school master brought a suit against the members of the National School Committee of Einme, claiming damages for wrongful dismissal. The learned Sub-Divisional Judge was of opinion that the plaintiff had been engaged on a month to month contract and awarded him one month's salary by way of damages. The District Judge, however seems to have agreed that the plaintiff was engaged upon a monthly basis, but he was of opinion that six months' salary would be a reasonable compensation for his dismissal. Upon appeal to this Court, the learned Judge appears to have agreed with the finding of the two lower Courts as to the terms upon which the plaintiff was engaged but he said that he was not prepared to disagree with the "opinion of the lower appellate Court that six months' salary in lieu of notice is not excessive." He subsequently granted a certificate enabling an appeal to be made to a Bench of this Court. The respondent entered into the service of the appellants

on or about 26th July 1926. On 15th October of that year, he received a letter terminating his employment, "within one month" from his date and offering to pay the sum of 225/- being as we understand it 150/- by way of salary for that month and the balance 75/- being in respect of fifteen days in October. The respondent refused to accept this offer and wrote on 22nd October claiming 3757/- and included in this sum was 3600/- as damages consequent upon his dismissal. The first question to be determined is: What was the agreement for the hiring of the respondent? We need say no more than that we agree that he was employed by the month at a salary of 150/- per month. It is clear that there was nothing in the agreement (which was a verbal one) provided for notice to leave on either side, nor was there any evidence at the trial of the existence of any custom in such a case. As had been laid down, therefore, in a number of cases, the contract would be terminated by a reasonable notice. Upon this point, we need only refer to the case of *In the matter of the African Association, Ltd.* and *Allen* (1) *A David* v. *St. Anthony's High School* (2) a decision of the Chief Court of Lower Burma, apparently upon a somewhat similar facts. In the latter case [following *M. E. Moola* v. *K. C. Bose* (3)] the learned Judge thought that thirty days wages was sufficient. In the present case, the respondent was engaged by the month, and in the absence of special agreement, it seems to us reasonable that he should be given one month's notice. We observe he was not turned out forthwith. He had an opportunity while still keeping his appointment to look for other work. We have no doubt that the committee have acted reasonably and the appeal is therefore allowed. As the appellants have been all along willing to pay 225/- mentioned in their notice respondent must pay the costs of the appellants in all Courts.

P.N./R.K. *Appeal allowed.*

(1) [1910] 1 K. B. 397=79 L. J. K. B. 259=26 T. L. R. 234=102 L. T. 129.
(2) [1920] 13 Bur. L. T. 168.
(3) [1916] 8 L. B. R. 420=33 I. C. 981=9 Bur. L. T. 63.

A. I. R. 1929 Rangoon 168

HEALD, AND MYA BU, JJ.

K. P. S. P. P. L. Firm—Appellants.

v.

C. A. P. C. Firm—Respondents.

Civil Misc. Appeal No. 55 of 1928, Decided on 30th January 1929, against order of Dist. Court, Tharrawaddy, in Civil Misc. No. 99 of 1926.

(a) Provincial Insolvency Act (5 of 1920), S. 61—Discharge of insolvent does not affect Court's power of distributing assets.

The insolvency Court undoubtedly has power to give directions as to the distribution of the assets among the creditors who have proved in the insolvency. The discharge of the insolvent does not put an end to the Court's power to give such directions: *A.I.R.* 1925 *Rang.* 105, *Rel. on.* [P 169 C 2]

(b) Provincial Insolvency Act (5 of 1920), S. 41—Proceedings do not necessarily end.

An order under S. 41 does not necessarily put an end to the proceedings in the insolvency: *A. I. R.* 1925 *Rang.* 105, *Foll.* [P 169 C 2]

(c) Provincial Insolvency Act (5 of 1920), S. 56 (2) b—No commission on realization by sale of mortgage money—Burma Courts Manual, Para. 307 (A) I.

In Burma the receiver is not entitled to commission on the amount of the mortgage money realized by the sale of the mortgaged property: *A. I. R.* 1928 *Rang.* 23, *Foll.* [P 170 C 1]

B. K. B. Naidu—for Appellants.

Venkatram—for Respondents.

Judgment.—The present parties are creditors of one Kyin Sein, who was adjudicated insolvent on his own petition in Civil Misc. Case No. 99 of 1926 of the District Court of Tharrawaddy. The insolvent possessed only the following properties:

(1) A house at Tharrawaddy.

(2) Two holdings of paddy land said to be Nos. 33 and 35 of 1925-26 of Thanatpyit kwin, measuring together 37-67 acres.

(3) Two holdings of paddy land said to be Nos. 33 and 35 of 1925-26 of Tawyagon kwin, measuring together 22 99 acres.

(4) Two holdings of paddy land said to be Nos. 52 and 53 of 1925-26 of Ashe kwin, measuring together 29·00 acres.

The M. T. T. K. M. M. S. M. A. R. Chettyar Firm proved in respect of a first mortgage over the house for Rs. 8,152-15. The K. P. S. P. P. L. Firm, who are the present appellants, proved in respect of a second mortgage on the house and the lands in Thanatpyit kwin for Rs. 7,917. The M. L. M. R. M. Firm proved in res-

pect of a first mortgage on the lands in Thanatpyit kwin and a first mortgage on holding No. 52 in Ashe kwin for Rs. 7,307-4. The C. A. P. C. Firm, who are the present respondents, proved in respect of an only mortgage on the lands in Tawyagon kwin and on holding No. 52 in Ashe kwin, and a second mortgage on holding No. 52 in Ashe kwin for Rs. 6,557-8. There were other creditors whose debts were unsecured. By an oversight the C. A. P. C. Firm, that is the present respondents, were omitted from the schedule of creditors. The receiver sold all the properties free of mortgage, as shown below :

	Rs. a.p.
(1) The house for	8,635 0 0
(2) ,, Thanatpyit paddy lands for	10,900 0 0
(3) ,, Tawyagan ,, ,, ,,	620 0 0
(4) ,, Ashe kwin ,, ,, ,,	1,150 0 0
	21,305 0 0

From this amount the receiver deducted Rs. 1,065-4 as his commission, leaving for distribution Rs. 20,239-12. That amount was divided among the creditors as follows :

	Rs. a.p.
To the M.T.T.K.M.M.S.M.A.R. Firm	8,203 4 0
,, K.P.S.P.P.L. ,,	4,439 4 0
,, M.L.M.R.M. ,,	7,597 4 0
	20,239 12 0

The C. A. P. C. Firm, who received nothing, naturally complained and the Court said that because the lands which were mortgaged to them and were not mortgaged to any of the other creditors had been sold for Rs. 1,770, they were entitled to recover that amount from the K. P. S. P. P. L. Firm who had taken the money out of Court. The K. P. S. P. P. L. Firm appeals against that finding on grounds that the insolvency Court had no jurisdiction to decide in insolvency proceedings such a question as that arising between them and the C. A. P. C. Firm, that if it had such jurisdiction generally, it had no such jurisdiction at the time when the order was made because an order for the discharge of the insolvent had already been made, that the application of the C. A. P. C. Firm was res judicata by reason of the rejection of similar applications made at earlier stages of the proceedings and that on the merits the C. A. P. C. Firm was not entitled to recover the sum of Rs.1770 from them.

There is clearly no force in the first of these grounds because the insolvency Court undoubtedly has power to give directions as to the distribution of the assets among the creditors who have proved in the insolvency. Similarly, there is no force in the ground that the discharge of the insolvent put an and to the Court's power to give such directions. It was said in the case of *Rowe and Co. Ltd.* v. *Tan Thean Taik* (1) that :

> "One of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors and it must often occur that valuable assets are still in the hands of the Official Assignee and in process of realisation for that purpose at the date when the insolvent applies for his final discharge,"

and we agree with the conclusion of the learned Judge in that case that an order under S. 41 of the Act does not necessarily put an end to tee proceedings in the insolvency. We have no doubt that in this case the Court still had power to make the order against which appellants appeal. There is clearly no question of res judicata. It is true that respondents had made various prior applications for the proceeds of the sale of the properties mortgaged to him, but there was no final order adjudicating on their claim before the order which is under appeal. As for the merits, it is clear that appellants' case has no merits of any sort. The sum of Rs. 1,770 mentioned in the lower Court's order represents the sale proceeds of the Tawyagon lands aud of both the holdings in Ashe kwin. The Tawyagon lands were mortgaged only to respondents and as the sale proceeds of those lands were insufficient to satisfy respondents' mortgage respondents were clearly entitled to the whole of those sale proceeds, none of the other creditors having any interest of any sort in them. The amount of those sale proceeds was Rs. 620. As for the Ashe kwin lands respondents held a first mortgage over holding No. 53 and a second mortgage over holding No. 52, the M. L. M. R. M. Firm having a prior mortgage over holding No. 52. The M. L. M. R. M. Firm's first mortgage over holding No. 52 was satisfied by the sale of the Thanatpyit lands, which were also included in their mortgage, without recourse to the sale proceeds of holding No. 52. and therefore the sale proceeds of

(1) A. I. R. 1925 Rang. 105=2 Rang. 643.
(2) A. I. R. 1923 Rang. 23=5 Rang. 623.

holding No. 52 as well as those of holding No.53 were wholly available for satisfaction of respondents' mortgage debt. Appellants held no mortgage over any of the lands which were mortgaged to respondents and in respect of which respondents claim the sale proceeds, and since those sale proceeds were insufficient to satisfy respondents' mortgage debt, neither appellant nor any other creditor had any rights in respect of them.

The only matter in which the lower Court's order was mistaken is that it ordered appellants to pay the gross sale proceeds to respondents, disregarding the fact that the receiver had already taken his commission out of them. The order must therefore be varied by deducting from the sum of Rs. 1,770 the amount of the receiver's commission on the sale of these properties. That commission amounted to Rs. 88-8 and therefore the sum payable by appellants to respondents is Rs. 1,681-8.

The receiver had, however, no right to any commission : vide the ruling of this Court in the case of *R. M. M. Chettyar Firm* v. *U Hla Bu* (2) and the rules contained in para. 307a (1) of the Burma Courts Manual, and therefore he must refund to respondents the sum of Rs 88-8 which he has wrongly taken. On application by any of the other creditors who are interested in the matter he should be made to refund the balance of his commission so far as such commission was not paid in respect of the surplus of sale proceeds over the mortgage debt due on the particular lands sold.

We note that the conduct of the insolvency proceedings in the lower Court reflects no credit on either the Court or the receiver. The Court clearly framed the schedule of creditors carelessly, since it omitted to notice that respondents had proved their mortgage debt and it failed to enter them in the schedule, and both the Court and the receiver seem to have been entirely ignorant of the provisions of S. 47, Insolvency Act, and of the fact that the receiver is not entitled to commission on the amount of the mortgaged money realized by the sale of the mortgaged property.

In the result the order of the lower Court is varied by the substitution of the amount Rs. 1,681-8 for Rs. 1,770 as payable by appellants to respondents and by the addition of an order for the payment of Rs. 88-8 by the receiver to respondents. In view of the fact that the grounds for the alteration of the order were not mentioned by appellants in the appeal, appellants will pay respondents' costs in this Court, advocate's fee to be five gold mohurs.

The respondents have filed a cross-objection claiming that the Court ought to have allowed them interest on the amount awarded. The learned Judge in the lower Court considered respondents' claim to interest and rejected it, and we are of opinion that in refusing interest he exercised a right discretion, because respondents were negligent in not seeing that they were brought on to the schedule of creditors. They were present at the sale and raised no objection to the sale of the properties, which were mortgaged to them, free of their mortgage. We therefore dismiss the cross-objection without orders for costs.

M.N./R.K. *Order varied.*

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* A. I. R. 1929 Rangoon 170

CHARI, J.

(Maung) Ba Than and *another*—Appellants.

v.

(Maung) Sein Win and *another*—Respondents.

Special Second Appeal No. 548 of 1928, Decided on 25th April 1929.

(a) Adverse Possession—Defendant in possession of plot of land for nearly 15 years prior to its purchase by plaintiff—It will be assumed, in suit brought to eject defendant, that his possession was adverse till date of conveyance to plaintiff in absence of evidence that such possession was permissive.

Where the defendant was in possession of a plot of land for nearly 15 years prior to the purchase of the land including the plot by the plaintiff and where there was no evidence that the possession of the defendant was permissive, in a suit brought by the plaintiff after purchase to eject the defendant, it will be assumed that possession of the defendant was adverse till the date of the conveyance to the plaintiff : *Special Second Appeal No.* 121 *of* 1916, *Rel. on.* [P 171 C 2]

*** (b) Evidence Act, S. 116—Rights of vendors of plaintiff extinguished by adverse possession by defendant—Defendant, after purchase of land by plaintiff taking his permission to occupy land—He is not estopped from pleading acquisition of title by adverse possession.**

Where the rights of the vendors of the plaintiff had become extinguished by adverse pos-

session of plot of land by defendant for more than 12 years, the defendant will not be estopped from pleading acquisition of title by adverse possession and denying plaintiff's title to plot even though the defendant, after purchase of the plot by the plaintiff had obtained his permission to occupy the plot. [P 172 C 1]

E. Villa—for Appellants.

S. Ganguli—for Respondents.

Judgment.—The plaintiffs in the original suit sued to eject the defendants from a small portion of land, measuring. ·04 acre, forming part of a larger plot of land which they had purchased from Po Kyaw and Daw Hnit. The map shows that this portion of the land is abutting on the creek and is presumably used by the defendants as a dwelling site. The trial Judge gave a decree in favour of the plaintiffs in the suit, whose case was that after he had purchased the land, the defendants obtained their permission to occupy this land. The learned Township Judge believed the evidence on this point and though he was of opinion that the defendants had been living in the suit land for over 15 years, since it had been proved beyond all reasonable doubt that the defendants asked the plaintiff's permission, their subsequent possession would not be adverse to the plaintiffs, however long the defendants may be in possession. He therefore held that the defendants could not claim adverse possession, even if they had been occupying the land for over 12 years. I am not sure what the learned Judge means exactly by these remarks, but in the result he gave a decree in favour of the plaintiffs, as I have stated above. The matter was taken up in appeal to the District Judge, who held that the defendants had been in possession of the land for over 15 years and that they could claim to have been in adverse possession, and, therefore the plaintiff's suit must fail. He therefore allowed the appeal and dismissed the plaintiff's suit. The plaintiffs come up to this Court in second appeal. Their evidence is not of a very high quality that the defendants did ask for permission from the plaintiffs to occupy the land. What really happened possibly is that the plaintiffs having bought the land told the defendants that they had become the owners of the land and wanted to remove their house, and the defendants possibly had replied that they would do so next year or so. I have doubts whether anything more transpired, but assuming that the evidence on this point is as found by the Township Judge, the question still remains whether the possession of the defendants is on that account permissive and whether their seeking permission of the plaintiffs estops them in denying the plaintiff's title and asserting their own title to the land. There is ample evidence and I am on this point in agreement with the District Judge that the defendants had been in possession of the land for nearly 18 years. That is for nearly 15 years prior to the purchase of the land by the plaintiffs. It is not alleged that their possession originally started permissively. Though the presumption of law is that every possession starts legally, where a plaintiff wants to establish that the defendant's original possession was permissive it is for him to prove this allegation and if he fails to do so, it will be presumed that the possession was adverse: see *Maung Gri* v. *U Shwe Gyo* (1). It must be therefore assmumed in the absence of any evidence to the contrary that the possession of the defendants was adverse till the date of the conveyance in favour of the plaintiffs. Ma Hnit, one of the persons who conveyed the land, states that the defendants built the house because the land was their own. This is possibly an error because the land clearly forms part of the holding sold by her and her husband to the plaintiffs, but the defendants themselves state what is probably true that they never asked anybody's permission when they built the house on the land.

It is in accordance with probability because in places like the place in question where the land is very cheap, no one ever thinks of asking anybody's permission when he builds a house on a portion of the land. If an objecting landlord takes steps to eject him from the land, he would be thought to be very unneighbourly. If the defendants had been in possession of the land prior to the purchase of the land by the plaintiffs for over 12 years, then the rights of the vendors of the plaintiffs whatever they were had become extinguished by operation of S. 28, Limitation Act. The result would be that at the time of the date of the sale, the vendors of the plaintiffs had no right, title or interest in the

(1) Special Second Appeal No. 121 of 1916, Decided by Maung Kin, J.

land. Any statement by the defendants, therefore must have been made based upon a mistake and misconception of the legal rights of the plaintiffs, and such an admission could not operate as an estoppel, nor could the permission if any by the plaintiffs to the defendants estop them under S. 116, Evidence Act, from denying the plaintiff's title. They would undoubtedly be licensees but they sought the license under a mistake. Therefore even assuming that the plaintiff's evidence on this point is true, it is still open to the defendants to plead that they acquired title by adverse possession, and on the evidence it must be held as the District Judge held that they had so acquired title to the land. The appeal is therefore dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 172

BROWN, J.

Ko Maung Nge—Appellant.

v.

Lalmaw—Respondent.

Special Second Appeal No. 585 of 1928, Decided on 8th May 1929.

Civil P. C., S. 11—Decree-holder applying for execution of preliminary mortgage-decree—Judgment-debtor not objecting to executability of decree and allowing it to be satisfied to certain extent—Judgment-debtor cannot be said to admit that decree could be executed to any larger extent.

Although orders in execution proceedings operate as res judicata, nevertheless the fact that execution has been ordered as regards a certain sum does not operate as res judicata with regard to the amount due under the decree. [P 173 C 1]

Where a decree-holder applied for execution of a preliminary mortgage decree for a certain amount and the judgment-debtor did not raise objection that the decree was not executable at all and allowed it to be satisfied to a certain extent, it cannot be said that the judgment-debtor admitted that the decree could be executed to any larger amount so as to hold that the executability of the whole decree had been adjudicated upon. [P 173 C 1]

P. K. Basu—for Appellant.

S. Ganguli—for Respondent.

Judgment.—In Suit No. 196 of 1925 of the Township Court of Toungoone U. Tha Maung sued for a decree for Rs. 572-8-0 with costs and interest against the respondent, Lalmaw. He set forth in his plaint that his debt was secured by a mortgage but that the mortgaged property had already been sold for default of payment of fishery revenue. He asked not for a mortgaged decree but for simple money decree. A written admission was filed on behalf of the defendant, and the Judge passed judgment to the effect that

> "There will be a preliminary mortgage decree for Rs. 572-8-0 with costs and interest at the stipulated rate from the date of the suit till the date of payment, payable within six months from this date against the defendants."

An ordinary preliminary mortgage decree was drawn up. The amount payable under that decree was shown to be Rs. 500 as principal, Rs. 162-8-0 as interest and Rs. 63 as costs, and the total was stated to be Rs. 825-8-0. The date of the decree was 17th June 1925. On 19th June 1925 U Tha Maung filed an application for execution. In his application he stated the amount of the decree was Rs. 572 8-0 and the costs were Rs. 56-4-0. As a result of his application he realized a sum of Rs. 450 on 30th July 1925. Nothing further seems to have happened for over two years until on 10th September 1927, the present appellant Maung Nge filed an application for execution as transferee of the decree from U Tha Maung. In his application, he showed the amount due under the decree to be the same as on the previous application of U Tha Maung. This application was ultimately infructuous owing to the failure of both sides to appear on a day on which the case was fixed for hearing. On 3rd November 1927, the transferee of U Tha Maung filed another application for execution and in that application he showed the amount due as Rs. 662-8-0 for principal and interest and Rs. 63 costs. The judgment-debtor contended that the decree had been satisfied in full. The trial Court at first held in favour of the transferee. The judgment-debtor appealed to the District Court and that Court ordered further enquiry to be held. The Court held further enquiry and again passed orders that the decree had not been fully satisfied and was executable. The judgment-debtor appealed again to the District Court and the learned Judge of that Court then for the first time discovered that the actual decree was not one which could be executed at all. That he was correct in this view, there can be no doubt.

The decree is not a decree for the payment of money, but merely an ordinary preliminary mortgage decree. It is clear

that it is incapable of execution. In view of this finding the District Court set aside the order of the trial Court directing execution against the judgment-debtor. Against this order the present appeal has been filed. It is not contended that the decree is in fact capable of execution but it is contended that in view of the previous proceedings and in accordance with the general principles of res judicata, the judgment-debtor cannot now raise this question. The provisions of S. 11, Civil P. C., do not specifically apply to execution proceedings, but it is settled law that the general principles of res judicata must be followed in dealing with such proceedings. The contention before me is that in the execution proceedings of 1925, the judgment-debtor might have opposed the execution on the ground that the decree was not executable at all, and that as he did not raise this contention and as the decree was actually executed it must be held that it had been finally decided by that Court that the decree was capable of execution. The difficulty in upholding this contention seems to me to lie in the interpretation of the effect of the previous order for execution. In the 1925 proceedings the application shows that there was a money decree for Rs 634-4-0. But it is clear that the decree-holder himself has not claimed that the Court decided that that was the amount to be executed. He himself now claims that the decree was for Rs. 725-8-0 and in the circumstances I do not see how it can be held that the effect of the previous decision was that the decree was executable for any specific amount. It was not in fact executable at all. The judgment-debtor by his action allowed it to be satisfied to the extent of Rs. 450; but it cannot be contended as a result of that that he admitted that it could be executed to any larger amount. If the principle of res judicata were applied at all, I think it is clear that the plaintiff would be limited to claiming Rs. 634-4-0 less the amount already executed.

There is authority for the view that although orders passed in execution operate as res judicata nevertheless the fact that execution has been ordered as regards a certain sum does not operate as res judicata with regard to the amount due under the decree, and the amount actually due under the decree in the present case is precisely nil. It does not seem to me that the previous proceedings really decided as between the parties anything more than that the sum of Rs. 450 could be realized under that decree. That being so, the question as to whether the decree is further executable has not been adjudicated either directly or impliedly, and I do not think that the principle of res judicata can be applied in this case. The appellant's remedy, if any, would appear to be to take steps to have a proper decree drawn up. I dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 173

RUTLEDGE, C. J., AND BROWN, J.

Ma On Kyi and *another*—Appellants.

v.

Ma Thaung May and *another* — Respondents.

First Appeals Nos. 160 and 162 of 1928, Decided on 22nd May 1929.

(a) Buddhist Law (Burmese) — Adoption—Monk.

A Burmese Budhist monk cannot adopt. [P 174 C 1]

(b) Buddhist Law (Burmese)—Adoption.

A mutual adoption by persons who have no bond either by relationship or in any other way is impossible. [P 174 C 1]

Zeya—for Appellants.

Ba Maw—for Respondent.

Judgment.—These are two appeals from a judgment of the Additional District Judge at Pyapon dismissing the plaintiff-appellants' suits. The plaintiffs minors claim certain property as theirs by reason of the fact that they were adopted with the right to inherit by one U Zawtipala, a rahan and Ma Thaik, deceased, by adoption deed. Appellants' advocate admits that the adoption of young children by a Burmese Buddhist monk is invalid but contends that the joint adoption by Ma Thaik is quite legal. The adoption deed (Ex. A) in the case of Ma On Kyi runs as follows:

"When monk U Wizaya of Rangoon said to monk U Zawtipala, resident of Bhamo Ywa Kyaung: It is very difficult for me alone to bring up the girl Ma On Kyi, whom I have in turn obtained outright and brought up I wish you to bring her up, jointly with Dayakamagyi Ma Thike, resident of Bhamo village, mutually adopt Ma On Kyi to inherit both good and bad inheritance and execute

the deed in the house of Ma Thike at Bhamo village."

(Sd.) U. Wizaya.

The other deed (Ex. B) runs as follows :

"This deed is executed on a Zayat in the compound of Obo Kyaung Thayettaw Taik, Rangoon in respect of a girl on the 8th Waning, Pyathe 1284, as follows : The surviving mother Ma Mai Mya after the death of her husband Maung Hmyin, says to Ko Po Kyin, the husband and Ma Hmen, the wife, residents of No. 57, 11th Street, Rangoon : "As it is too burdensome for me, who am a woman to bring up my natural daughter, please bring up the said child for good as your daughter. Having undertaken that hereafter there shall be nobody who will claim to take back the child : the child was delivered in the presence of local elder, Saya Ba and witnesses Ma Kwe Ma, Daw Ii, Ko Ba Thaw, Ko Po Myin, and Ma Hmon, those who had asked for the child for good, delivered the child to U Zawtipala, resident of Bhamo Ywa Kyaung, Moulmeingyun Town, Myaungmya District and Ma Thike resident of the same village, with consent for adoption with the right of inheriting : writer U. Zawtipala.

The monk U. Zawtipala gave evidence at the trial. It appears that he had adopted a number of children, mostly females but they had died before reaching maturity. Ma Thaik was no relation of his but was a supporter and is referred to as a "Soon-ama." According to the evidence on behalf of the plaintiff U Zawtipala, though a Phongyi had inherited his share of family property, which was undivided and he was paid by other members of the family his share of the income of the property and at any rate in the latter years either brought paddy land in Ma Thaik's name on behalf of the minors or gave money to Ma Thaik with which to purchase land for the minors. We have already mentioned that Mr. Zeya admitted that it is impossible for a Burmese monk to adopt children. We agree that, bound as a monk is by the Vinaya, such a proceeding is quite impossible. It is admitted that the two minor children were entrusted to Ma Thaik's care and lived with her. The adoption deeds have never been signed by Ma Thaik and the plaintiff's evidence represented her as having no property of her own and being maintained by U Zawptipala. The adoption from the deeds on the face of it looks as if it were a mutual adoption, but such a one would be impossible since there seems to have been no bond either by relationship or any other way between U Zawtipala and Ma Thaik. In fact, Ma Thaik seems to have been used by the Phongyi as an agent or servant. He could not keep the female children in his kyaung, or kyangdaik and according to his own statement he employed Ma Thaik and supported her as his agent or employee in looking after the two little girls. There is no evidence before us that Ma Thaik of her own volition ever wished to adopt the two girls as her daughters with a view to inherit. In fact we have never come across a case, where two persons unconnected with each other either by relationship or marriage purported to adopt and became the parents of minor children. The only question argued before us was that of the adoption of the two minor appellants by the late Ma Thaik. An issue was framed namely : "was Ma Thaik a trustee or benamidar of the plaintiff?" This was not argued probably for the reasons given on p. 3 of the judgment appealed from, which shows that the appellants' advocate in the trial Court abandoned the plea that the properties in dispute belong to the minor appellants absolutely in their own right and that Ma Thaik was only their trustee or benamidar. The learned Judge goes on to say :

"He prays only for a declaration that the properties belong to the plaintiffs as the sole heirs of the deceased Ma Thaik, being her adoptive daughters. There is therefore no necessity for us now to give a decision on the fourth issue."

The position then is that the plaintiffs have failed to establish that they were adopted with a right to inherit by Ma Thaik. It is also clear that while U Zawtipala purported to adopt them, in fact he could do nothing of the kind. That being the case, their suit was rightly dismissed by the trial Court. These appeals are dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 175

RUTLEDGE, C. J., AND BROWN, J.

Abdur Rauf Chowdry—Appellant.

v

N. P. L. S. P. Chettyar Firm—Respondents.

First Appeal No. 236 of 1928, Decided on 30th January 1929, against the judgment of original side in Civil Regular No. 364 of 1926.

Rangoon Municipal Act (6 of 1922), S. 192—Mortgage not notified to corporation—Property sold for default in payment of property tax—Purchaser even after institution of suit on mortgage gets it free from mortgage—Lis pendens does not apply—Burma Land and Revenue Act (2 of 1876), S. 47—Transfer of Property Act, S. 52.

A mortgagee who had given no notice of his mortgage to the municipal corporation filed a suit on his mortgage. In the meanwhile the property was sold under Burma Land and Revenue Act, S. 47 by the corporation after due notice to the mortgagor, for non-payment of property taxes. Mortgagee joined the auction purchaser as defendant.

Held: that the property was sold free from the mortgage because the tax in respect of which the default was made was a property tax and the corporation were entitled to put into force the summary method given in the Lower Burma Land and Revenue Act against the immovable property itself, which was quite independent of any remedy against the defaulter personally: *A. I. R.* 1927 *Rang.* 289, *Appr.* [P 176 C 1]

Held further: that the doctrine of lis pendens does not apply to this case at all, as it would indeed be a dangerous extension of the doctrine to h ld that neither Government nor a local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors. [P 176 C 1]

K. C. Bose—for Appellant.

S. C. Das—for Respondents.

Judgment.—This is an appeal from the judgment and decree of the original side of this Court. The facts are as follows:

By a registered deed (Ex. B), dated 7th December 1922, one Ma Aye Nu alias Fatima Bi Bi mortgaged to the respondent firm for Rs. 3,000, premises known as No. 190, F Street, Tatmye Quarter, Rangoon. The mortgagee did not give any notice of his mortgage to the Rangoon Corporation. The mortgagor made default in paying the property-taxes from the second quarter of 1925 to the fourth quarter of 1926. After due notice to the mortgagor, the premises were proclaimed for sale by Ex. 2, dated 9th April 1927, which stated that the sale would take place on the spot on the morning of 26th April 1927. The proclamation is stated to be under S. 47, R. 95, Direction 175 of the Lower Burma Land and Revenue Act, 1876. The proclamation further stated that

> "the right offered for sale will be free from all encumbrances created over it, and from all subordinate interests derived from it, except such as may be expressly reserved by me at the time of sale."

The bailiff of the corporation conducted the sale, which was knocked down to the appellant for Rs. 700 on 26th April.

We may here note that the respondent filed his mortgage suit against the mortgagor and her husband on 22nd July 1926. If he had made any enquiry he would have found that the taxes had not been paid on the mortgaged premises for over a year, and, by not having given notice of his mortgage to the corporation, the latter had no means of giving him notice of the mortgagor's default. After the sale the respondent amended his plaint, joined the auction-purchaser and pleaded fraud and collusion, while the auction-purchaser became the benamidar of the mortgagor.

The learned trial Judge makes an initial mistake in the beginning of his judgment by saying that the appellant "was the purchaser of the property at a Court auction sale." If this had been an ordinary Court auction sale, all that could be sold in execution was the right, title and interest of the judgment-debtor. On the face of the record, this was not a Court auction sale at all, but a sale under S. 47, Lower Burma Land and Revenue Act, which provides a summary method of proceeding against the land itself where the revenue officer finds that there exists any permanent, heritable, and transferable right of use and occupancy by selling it at a public auction. By S. 194 (1), Rangoon Municipal Act, 1922

> "any arrears of tax or any fee or other money claimable by the corporation under this Act may be recovered as if they were arrears of land revenue."

Cases have arisen in which the Courts have refused to construe similar words as giving a local body or the income-tax authorities the right to resort to the summary method by the sale of immov-

able property for the recovery of dues of a personal nature.

On this question we have been referred to a lucid judgment of Chari, J., in the case of *R. M. V. V. M. Chettyar Firm* v. *M. Subramaniam* (1). On p. 466 (*of* 5 *Rang.*) the learned Judge after reviewing a number of cases, observes:

"I am, therefore, of opinion that, so far as "property-taxes," as defined in S. 80, City of Rangoon Municipal Act, are concerned, it is open to the properly authorized officer of the municipality to direct the recovery of arrears in the manner prescribed by Ss. 46 and 47, Burma Land and Revenue Act, and that, to a sale held under these sections the provisions of S. 48 of the Act will apply. I am strengthened in the conclusion I have arrived at by the fact, to which my attention has been drawn by the learned advocate for defendant 2, that the provisions of the Burma Municipal Act and the Burma Town and Village Lands Act whereby lands paying municipal taxes are exempted from land tax, in lieu of the capitation tax, show that the municipal "property-taxes" were meant as a kind of substitute for land tax, and that the legislature intended to put the municipal "property-taxes" in the same position as land taxes."

We are of opinion that the view is correct. The learned trial Judge bases his judgment in the main on the doctrine of lis pendens. We do not consider that the doctrine applies to this case at all. It would, indeed, be a dangerous extension of the doctrine to hold that neither Government nor a Local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors. For the reasons already given we are of opinion that when as in this case the tax in respect of which the default is made is a property tax the corporation are entitled to put into force the summary method given in the Lower Burma Land and Revenue Act against the immovable property itself, which is quite independent of any remedy against the defaulter personally.

The only question remaining is: Has the respondent established fraud and collusion on the part of the auction-purchaser and the mortgagor? In our opinion he has completely failed. The only witness called on his behalf is his clerk, Shanmugam. In examination-in-chief he says:

"I think she, (the mortgagor), had purchased it in the name of defendant 4. I say this because defendant 4 is related to defendant 1."

(1) A. I. R. 1927 Rang. 289=5 Rang. 458.

In cross-examination he admits that he does not know personally how defendants 1 and 4 are related; that he has no personal knowledge about the sale of the house by the corporation; and that he has no witnesses to show that the house was purchased by defendant 1 in the name of defendant 4. The appellant denies that he is in any way related to the mortgagor or her husband. He admits that she occupies one of the rooms of the building and pays him Rs. 15 a month as tenant. The corporation bailiff, Maung Aung Hla, who held the auction sale, states that the house was an old house, worth about Rs. 1,000. Accepting this as the value of the house, Rs. 700, at an auction sale for non-payment of rates, seems to be a very fair price.

The appellant states that he went to Pazundaung on the morning of the auction casually and there saw a man beating a gaung. This is not very likely; and, if the respondent had had any evidence connecting the appellant with the mortgagor, this would be of some weight. But in the absence of any such evidence, and in view of a reasonable price having been paid, this admission is quite inadequate to base a finding of fraud and collusion. There is no reason whatever for thinking that there had been collusion on the part of the officers of the corporation. They had been more than usually forbearing in respect of their unpaid taxes. The respondent's clerk admits that in other cases his firm had given the corporation notice of their mortgages, and, in our opinion, they have only themselves to blame for not doing so in this case and for not making any enquiry as to whether the rates were being paid. We accordingly allow the appeal and dismiss the suit, so far as the appellant is concerned, with costs in both Courts.

M.N./R.K. *Appeal allowed.*

** A. I. R. 1929 Rangoon 177
Full Bench

RUTLEDGE, C. J., AND MAUNG BA AND HEALD, JJ.

Emperor

v.

Chit Pon and *another*—Accused.

Criminal Revns. Nos. 334-A and 335-A of 1929, and Criminal Ref. No. 38 of 1929, Decided on 12th June 1929, against order of Sub-Divisional Mag. Taik Kyi, D/- 13th December 1928.

**** Criminal P. C., S. 423 (1) (b)—Substitution of 30 stripes for 3 months' rigorous imprisonment is enhancement—Burma Act 8 of 1927.**

Substitution of a sentence of 30 stripes for a sentence of one year's rigorous imprisonment or more or a substitution of a sentence of 25 stripes for a sentence of nine months' rigorous imprisonment or more or a substitution of a sentence of 20 stripes for a sentence of six months' imprisonment or more is not ordinarily an enhancement of sentence within the meaning of S. 423 (1) (b) and in the case of a person under 16 years of age the substitution of a sentence of 15 stripes for a sentence of imprisonment for six months or more or a substitution of a sentence of 10 stripes for a sentence of imprisonment for three months or more is not ordinarily an enhancement of sentence.

But the substitution of a sentence of 30 stripes for a sentence of three months' rigorous imprisonment is an enhancement and therefore an illegal sentence under S. 423 (1) (b) ; 2 *Weir* 437 ; 6 *B L. R. Ap.* 95 ; *not Foll. Rat. Un. Cr. C.* 131 ; 17 *All.* 67; 23 *Bom.* 439: 27 *Cal.* 175 ; 30 *Mad.* 103 (*F.B.*) ; 36 *All.* 485, *Ref.* [P 179 C 1, 2]

Govt. Advocate—Amicus Curiæ.

Opinion.—In Cr. Trial No. 155 of 1928 the Sub-Divisional Magistrate of Taik Kyi sentenced an offender to one year's rigorous imprisonment under S. 326, I. P. C., and on appeal the Sessions Judge altered the sentence to one of nine months' rigorous imprisonment and 30 stripes under the Whipping (Burma Amendment) Act of 1927. In Criminal Trial No. 179 of 1928 the same Magistrate sentenced an offender to one year's rigorous imprisonment under S. 324, I. P. C. and on appeal the Sessions Judge altered the sentence to one of nine months' rigorous imprisonment and 30 stripes under the said Act. Both the cases came before this Court in revision, and the learned Judge before whom they came raised the question whether the alteration of the sentences by the Sessions Judge amounted to an enhancement of the sentences within the meaning of S. 423 (1) (b) of the Code. That section empowers an appellate Court in an appeal from a conviction to alter the nature of the sentence "but . . . . . . not so as to enhance the same."

The learned Judge referred the following questions :

(1) When an offence is punishable by whipping in addition to imprisonment can an appellate Court in face of the provisions of S. 423, Criminal P. C., that a sentence, if altered must not be enhanced, commute the whole or any portion of a sentence of imprisonment into whipping?

(2) If it does so commute a portion of the imprisonment how many months' rigorous imprisonment shall be regarded as equivalent to 30 lashes?

The actual question which arises on the two cases is not quite so general as the questions referred, since it is only whether or not, a substitution of 30 stripes for three months' rigorous imprisonment amounts to an enhancement of the sentence. There is nothing in the Code of the Criminal Procedure or in the Whipping Act to show how many stripes are to be regarded as equivalent to a particular period of imprisonment, but S. 395 of the Code says that if a sentence of Whipping is wholly or partially prevented from being carried out, because the accused person is medically certified to be unfit to undergo the sentence or the remainder of the sentence of Whipping, the Court which passed the sentence may sentence the offender in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding 12 months in addition to any other punishment to which he may have been sentenced for the same offence. This provision of law suggests that the legislature regarded a sentence of 12 months' imprisonment as the maximum sentence of imprisonment which could be substituted for whipping.

In 1871 in the case of *Queen* v. *Banda Ali* (1) where an offender had been sentenced by a Magistrate to 6 months' rigorous imprisonment and to 20 stripes and the appellate Court finding that the sentence of whipping was illegal, substituted for it a sentence of 3 months' rigorous imprisonment in addition to the sentence of six months' rigorous impri-

(1) 6 Beng. L. R. Ap. 95.

sonment, a Bench of the High Court of Calcutta held that the alteration of the sentence of Whipping to a sentence of three months R. I. was illegal. A perusal of the Judgment shows that so far as the learned Judge who gave the reasons for the decision was concerned the ratio decidendi was not merely that the substitution of any sentence of imprisonment for a sentence of Whipping amounts to an enhancement of the sentence, but also that because the sentence of whipping passed in that particular case was illegal and was therefore in the opinion of the learned Judge "an absolute nullity," no sentence of any kind could be substituted for it without enhancing the original sentence. On the question whether the substitution of imprisonment for a legal sentence of whipping amounted to an enhancement of sentence the learned Judge said that whipping and imprisonment are things dissimilar in nature and that things dissimilar in nature do not admit of any direct comparison with one another, and that if there is no fixed scale or standard by which the comparison can be made, the task must be given up as hopeless, and that because the legislature has not supplied us with any data from which the comparative severity of the two sentences can be determined it is impossible to say how many strokes of the cat-o'-nine tails would be equivalent to a sentence of rigorous imprisonment for a given period of time, so that it is impossible to say that the substitution of imprisonment for whipping is not an enhancement of sentence.

The next case cited *Queen Empress* v. *Tharekhan* (2) was decided in 1897. In that case the offender was sentenced to a fine of Rs. 50 with 45 days' R. I. in default. He appealed and the appellate Court sentenced him to 50 lashes in lieu of the remainder of the term of imprisonment which he was undergoing for default in payment of the fine. S. 280 of the Act 10 of 1872, which was the Criminal Procedure Code, then in force allowed the appellate Court to enhance the sentence in an appeal from a conviction, and therefore the question whether the substitution of whipping for imprisonment involved an enhancement of the sentence does not arise. The Bench of the High Court of Bombay which dealt with the case said

> "The prisoner by appealing subjected himself to the risk . . . . to an alteration of the sentence under S. 279, even though that alteration should involve an enhanced punishment. . . . But in altering the sentence the District Magistrate was bound to substitute the whipping for the fine . . . . He could not legally award whipping in lieu of the remaining term of imprisonment, which itself was to be suffered only in default of payment of fine, thus becoming the liability of the punishment to a levy of the fine, which would constitute a double punishment."

That decision is of no help in deciding the present reference.

The only other case cited in the text books or before us is the case of *Appu* (3), which was before the High Court of Madras in 1897. In that case the appellate Court had set aside part of the sentence of imprisonment passed by the Magistrate, had then substituted a sentence of whipping for the part of the sentence of imprisonment which it set aside, and had subsequently passed a sentence of one week's imprisonment in lieu of whipping presumably because the offender was medically certified to be unfit to be whipped. The bench which dealt with the case said

> "The sentence of whipping is clearly illegal as it amounts to an enhancement of sentence. It follows that the imprisonment for a week in lieu of the whipping is also illegal. The sentences are accordingly set aside."

That was the whole of the Judgment and it suggests that a sentence of whipping passed by an appellate Court as such in substitution for a sentence of imprisonment always involves enhancement of the sentence. If that case and *Banda Ali's* case (1) were both rightly decided it would seem to follow that both the substitutions of whipping for imprisonment involve an enhancement of sentence. It would follow also that the power to alter the nature of the sentence, expressly given in general terms by S. 423 of the Code is so restricted that it cannot in any case be ever so as to alter a sentence of whipping to one of imprisonment or a sentence of imprisonment to one of whipping.

There is a large number of decisions whether the substitution of a sentence of fine for part of a sentence of imprisonment amounts to an enhancement of the original sentence but an examination of

(2) Rat. Un. Cr. C. 131.

(3) 2 Weir 487.

those cases e. g. *Queen Empress* v. *Ishri* (4), *Queen Empress* v. *Chagan Jagannath* (5), *Rakhal Raja* v. *Khirode Prosad Dutt* (6), *Bhakthavatsalu Naidu* v. *Emperor* (7), *Emperor* v. *Mehar Chand* (8) seems to throw little light on the subject of the present reference. The learned Judges who decided *Appu's* case gave no reasons for their decision, and the only reasons given in *Banda Ali's* case (1) were that it is impossible to compare the severity of sentences of whipping and imprisonment and that because the legislature has not supplied any data for such comparison, the substitution of any sentence of imprisonment for any sentence of whipping must be regarded as an enhancement of the original sentence.

There is no express provision of law which prohibits an appellate Court from passing a sentence of whipping in appeal. There is nothing in the Whipping Act or in the Code apart from the provision against enhancement of sentence, which forbids it. It was said in *Chagan Jagannath's* case (5) that a sentence of fine is always considered lighter than a sentence of imprisonment and if it is possible to compare the severity of fine as a punishment with imprisonment as a punishment, and it may be noted most Magistrates make that comparison almost daily, there seems to be no reason why it should not be possible to compare the severity of whipping with that of imprisonment. The foundations of the reasonings in *Banda Ali's* case (1) would disappear if there were some scale or standard by which the comparison could be made. The only standard which the Legislature has provided is that given in S. 395 of the Code, which says that a sentence of more than one year's imprisonment must not be substituted for a sentence of 30 stripes. But there is no reason, why we, as a Full Bench of the High Court, should not follow the analogy of that standard, and say for the information of the Judges of this Court and of the lower appellate Courts that in the case of adults we do not regard the substitution of a sentence of 30 stripes for a sentence of one year's rigorous imprisonment or more, or a substitution of a sentence of 25 stripes for a sentence of nine months' rigorous imprisonment or more, or a substitution of a sentence of 20 stripes for a sentence of six months' imprisonment or more, as being ordinarily an enhancement of sentence, within the meaning of S. 423 (1) (b), Criminal P. C., and that in the case of a person under 16 years of age we do not regard the substitution of a sentence of 15 stripes for a sentence of imprisonment for six months or more, or the substitution of a sentence of 10 stripes for a sentence of imprisonment for three months or more, as being ordinarily an enhancement of the sentence. We do not consider it necessary to deal with sentences of less than 20 stripes in the case of adults, because the Court has already said that experience has shown that in this province the minimum sentence which is likely to be effective in the case of an adult is 20 stripes. We accordingly answer the question which arises on the reference by saying that we regard the substitution of a sentence of 30 stripes for a sentence of three months' rigorous imprisonment as an enhancement and therefore as an illegal sentence under S. 423 (1) (b) of the Code.

P.N./R.K. *Reference answered.*

(4) [1894] 17 All. 67=(1894) A.W.N. 202.
(5) [1899] 23 Bom. 439.
(6) [1900] 27 Cal. 175.
(7) [1907] 30 Mad. 103 (F.B.).
(8) [1914] 36 All. 465=24 I.C. 607=12 A.L.J. 827.

A. I. R. 1929 Rangoon 179

HEALD, J.

Ma Thaing and *others*—Appellants.

v.

Maung Chit On and *others* — Respondents

Special Second Appeal No. 266 of 1928, Decided on 4th February 1929, against judgment and decree of Dist. Judge, Magwe.

(a) Transfer of Property Act, Ss 59 and 60 —Suit for redemption must fail if mortgage cannot be proved being unregistered— Registration Act S. 49.

The basis of suit for redemption of a mortgage is the mortgage alleged and if by reason of some provision of law the mortgage cannot be proved the suit must fail.

Where it was clear that the mortgage which was alleged to be possessory could not be proved because there was no registered instrument, but the mortgagee who never obtained possession and had no interest in the property admitted it.

Held: that the mortgagor's suit for redemption of a possessory mortgage and for posses-

sion of the mortgaged property on the footing of redemption of that mortgage was bound to fail because they could not prove the mortgage. The admission of the mortgagee could not bind the other claimants and it was no admission of the alleged possessory mortgage: 8 *L. B. R.* 334, *Rel. on.* [P 180 C 2, P 181 C 1]

(b) Civil P. C., O. 6, R. 17—Substitution of one cause of action for another is not allowed.

No power has yet been given to enable one distinct cause of action to be substituted for another by amendment of a plaint: *A. I. R.* 1922 *P. C.*, 249, *Foll.* [P 181 C 1]

Kyaw Din—for Appellants.

Judgment.— Appellants, as mortgagors of a piece of land, sued to redeem that land on an allegation that they had mortgaged it to respondent 1 for Rs. 143 on 28th May 1923. They said that the mortgage was possessory and that they put respondent 1 into possession of the land under the mortgage. They joined respondents 2 and 3 who seem to be husband and wife, as being persons to whom respondent 1 had sub-mortgaged the land by possessory mortgage, and they also joined respondent 4 as being a person to whom respondents 2 and 3 had similarly sub-mortgaged the land. They claimed to be entitled to redeem the land from the respondents for Rs. 143.

Respondent 1 admitted that appellants had mortgaged the land to him for Rupees 143 but said that he had never been put into possession of the land, and that at the time of the mortgage it was in the possession of respondent 2. Respondent 2 said that the land did not belong to appellants at all but belonged to one Ma Ngwe and her daughter Ma Sein who mortgaged to his parents for Rs. 143-8-0 on 12th February 1880 by a registered deed which he produced. He said further that he and his mother Ma Min Thon mortgaged the land to respondent 4 for Rs. 200 about 1921. Respondent 4 said that he received the land on mortgage with possession for Rs. 200 from respondents 2 and 3 and Ma Min Thon on 15th June 1921, but he does not seem to have produced any mortgage deed or documentary evidence of the mortgage or to have taken any further part in the litigation.

The trial Court said that because respondent 1 admitted appellant's mortgage it was unnecessary for appellant's to prove the mortgage and that it could be recognized by the Court in spite of the fact that the deed by which it was supposed to be effected was unregistered. The learned Judge found that the land in suit belonged to persons whom the appellants represented, that it was mortgaged by them to respondent 2 and his mother Ma Min Thon, that that mortgage was redeemed and on redemption, by reason of a partition of the estate to which it belonged, the land passed to the appellant Ma Le as owner, that Ma Le then remortgaged it to respondent 2 for Rs. 143 that two years later Ma Le redeemed it from respondent 2 and mortgaged it to the respondent 1 for Rs. 143 and that appellants were entitled to redeem it from the respondents and to recover possession of it from them for Rs. 143.

Respondents 2 and 3 appealed against that decision on the grounds that the lower Court ought not to have recognized appellant's mortgage which was admittedly not effected by registered deed, that the admission of the mortgage by respondent 1, who had admittedly never been in possession of the property, could not bind them or prejudice their rights, that there was no issue and no evidence that the land came to their possession from respondent 1 and that the evidence did not account for their having remained continuously in possession of the land for about 50 years. The lower appellate Court said that in view of the fact that respondent 1 had never been in possession of the land although the mortgage to him was alleged to be possessory, his admission of the mortgage could not bind the other respondents, and that as against those other respondents-appellants could not be allowed to prove their mortgage because it was not registered, and accordingly dismissed appellant's suit.

Appellants appeal on grounds that the lower appellate Court was wrong in holding that they could not sue to redeem an unregistered mortgage and ought to have held that in equity they were entitled to redeem. The case is similar to the Full Bench case of *Ma Twe* v. *Maung Lun* (1) where the learned Chief Judge said:

> "The basis of suit for redemption of a mortgage is the mortgage alleged and if by reason of some provision of law the mortgage cannot be proved it appears to me that the suit must fail."

In this case it is clear that the mortgage cannot be proved because there was no registered instrument. The admission of respondent 1, who has now no interest in the property, cannot bind the other

(1) [1916] 8 L. B. R. 334=33 I. C. 163=9 Bur. L. T. 114.

respondents, and in any case it was not an admission of the mortgage on which appellants sued since it is not an admission of a possessory mortgage The appellant's suit for redemption of a possessory mortgage and for possession of the mortgaged property on the footing of redemption of that mortgage was bound to fail because they could not prove the mortgage, and was rightly dismissed.

When the ruling mentioned above was brought to the notice of appellant's learned advocate, he claimed that he still ought even on second appeal, to be allowed to amend his plaint so as to convert his suit into a suit for possession on the strength of his legal title. The decision of their Lordships of the Privy Council in the case of *Ma Shewe Mya* v. *Mo Hnaung* (2) that

"no power has yet been given to enable one distinct cause of action to be substituted for another"

is sufficient answer to this claim. The appeal is dismissed.

M.N/.R.K. *Appeal dismissed.*

(2) A. I. R. 1922 P. C. 249=48 Cal. 832=48 I. A. 214.

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* A. I. R. 1929 Rangoon 181

CHARI AND MYA BU, JJ.

Ma Ngwe Hmon and *others*—Appellants.

v.

Maung San Yauk and *others*—Respondents.

Civil Misc. Appeal No. 141 of 1929, Decided on 23rd April 1929, against decision of Dist. Court, Toungoo, in Civil Appeal No. 36 of 1928.

***(a) Evidence Act, S. 63—Transaction in nature of relinquishment—Agreement to relinquish unregistered but enforceable under the doctrine of part performance—Secondary evidence of its contents may be given if it is lost.**

Where the transaction is in the nature of a relinquishment and where it may be regarded as an agreement to relinquish on certain conditions by application of principles of part performance the document containing the transaction although unregistered is admissible in evidence to prove the agreement and the possession given under it and so when it is lost secondary evidence of its contents may be proved for the purpose : *A. I. R.* 1924 *Rang.* 214, *Ref.* [P 181 C 2]

(b) Part performance—Invalid agreement.

Where there is no valid and binding agreement, principles of part performance are of no avail. [P 181 C 2]

P. B. Sen—for Appellants.

Lambert—for Respondents.

Judgment.—There is one point on which I do not agree with the learned District Judge and that is where he observed that the document, the terms of which defendants sought to prove and which was said to have been lost or destroyed by white ants being unregistered, its terms could not be proved by oral evidence. The transaction alleged is in the nature of a relinquishment and it was compulsorily registrable. But the principles of part performance propounded in *Myat Tha Zan* v. *Ma Dun* (1) are applicable, and the transaction may be regarded as an agreement to relinquish on certain conditions. The document would be admissible to prove the agreement and the nature of the defendant's possession, and where the document is proved to have been lost or it cannot be found, secondary evidence of its contents may be proved for the purpose. Save and except this, I think the decision of the learned District Judge appears to be correct. According to Ma Ngwe Hmon those who relinquished were San Yauk, Po Ma, Po Byu, Hla Ma and Po Kyu. San Yauk and Po Ma are two of the plaintiffs. Hla Ma is the mother of the first three plaintiffs, while Po Byu and Po Kyu and the defendants. The agreement was of the most perfunctory nature Hla Ma was not an heir herself, and the learned advocate for the appellants admitted that the alleged transaction could not be binding on the first three plaintiffs, who are said to be minors at the time. There is no reason why Po U should have been left out of consideration except that he happened to be Po Kyu's elder brother. There was no consideration for the benefits received by the defendants Po Ku and Po Byu, so in this case the principle of part performance could be of no avail. Further I agree with the learned District Judge that San Yauk and Po Ma were not consenting parties. In all the circumstances of the case, it is impossible to believe that there was a valid and binding agreement on the plaintiff's part.

What the defendants could in law rely on was an agreement to relinquish. None of the plaintiffs ever admitted

(1) A. I. R. 1924 Rang. 214=2 Rang. 285.

that there was a relinquishment or agreement to relinquish. The fact that they sued shows that the plaintiffs would not acknowledge the existence of any agreement to relinquish or any relinquishment. There is nothing from which any admission on the part of any of the plaintiffs may be inferred either before or after the framing of issue. The trial Court was wrong in applying the provisions of S. 58, Evidence Act. There was nothing to relieve the defendants from the burden of proving the relinquishment or agreement to relinquish, till they called San Yauk and Po Ma as their witnesses, and even then San Yauk and Po Ma did not say that there was a valid agreement or relinquishment. The mere admission of their having signed the document is not an admission that there was in fact a relinquishment or agreement to relinquish. I see no sufficient reason to interfere with the order under appeal. I therefore dismiss the appeal with costs Advocate's fee 3 Gold Mohurs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 182

BROWN, J.

A. R. S. Subramanin Chettyar—Appellant.

v.

K. Moses—Respondent.

First Appeal No. 66 of 1929, Decided on 6th May 1929, against judgment of of Sm. C. C. Judge, Rangoon, in Civil Suit No. 4144 of 1927.

(a) Civil P. C., S. 11—Decree-holder making application for execution of decree for certain sum—That sum paid up—It is inequitable to allow him to make another application asking for further sum—In application made for execution of decree, interest inserted and scored out and deletion accepted by decree-holder—He is not entitled to make another application to execute decree for interest—Civil P. C., O. 21, R. 11 (2).

It is inequitable that a decree-holder should be able to put in an application stating that a certain sum was due under a decree and asking for the arrest of a judgment-debtor under that application and when that amount is paid up to put in another application for a further sum.

Where in an application made for the execution of a decree, interest was inserted and then scored out and the deletion was accepted by the decree-holder, that amounts to waiver of the claim to interest and the decree-holder is not entitled to make another application to execute decree for interest. [P 183 C 1]

(b) Civil P. C., S. 11—Res judicata.

General Principle of res judicata applies to execution proceedings, apart from the provisions of S. 11. [P 183 C 1]

C. K. Tambe—for Appellant.

P. B. Sen—for Respondent.

Judgment.—On 2nd September 1927, the appellant Chettyar obtained a decree against the respondent for the sum of Rs. 1,704-8-0 with costs. He received towards satisfaction of this decree a sum of 1800 by instalments paid out of Court. On 13th December 1928, he filed an application in execution for the arrest and imprisonment of the judgment-debtor. According to the statement of claim in that application filed by him, the amount still due under the decree was Rs. 165 8-0. This sum was paid into Court by the judgment-debtor, and the case was closed on 8th January. On 17th January, the appellant filed a further application again asking for the arrest and imprisonment of the judgment-debtor. In this application he claimed that a sum of Rs. 101-6-3 was due under the decree as interest accrued since the date of the decree. The trial Judge noted on this application :

> "In former application, interest inserted and then scored out. That amounted to waiver. Judgment-debtor satisfied the full claim in that application. This application is dismissed. Let full satisfaction be entered up."

The appellant then filed a review application in the Small Cause Court, in which he stated that the scoring out of the interest was done by a clerk of the Court. This application was rejected and he then came to this Court on appeal. He has filed an affidavit to the effect that when he filed the first application in execution he did ask the advocate's clerk to enter interest in the application. The clerk of the Small Cause Court, however, suggested that interest would not be allowed without a detailed statement and scored out the figures Rs. 101-6-3 put against interest. There was originally an entry of this interest on first application, but that was scored out and as finally presented the application showed the amounts decreed and costs. The whole of this was entered as Rs. 1,965-8-0. The decree was shown to have been satisfied in part to the extent of Rs. 1,800 and 165-8-0 was shown as the balance. It is admitted before me that when the application was filed, the figures for the total were entered. That

being so it is quite clear that the person, who drew up the statement finally, did not intend that interest should be entered therein, as the corrected figures do not allow anything for interest. It may or may not be the case that the claim for intetest was deleted at the suggestion of the Court clerk, but deleted it was, and the deletion was accepted by the petitioner. In accordance with the provisions of O. 21, R. 11, Cl. (2), Civil P.C. an application for the execution of a decree must show amongst other things the interest due under the decree. The application is supposed to be a complete application. It would quite clearly be very inequitable that a decree-holder should be able to put in an application stating that a certain sum was due under a decree and asking for the arrest of the judgment-debtor, under that application and when that amount is paid up, put in another application asking for a further sum. The general principle of res judicata applies to execution proceedings, apart from the provisions of S. 11, Civil P. C. If the decrre-holder wished to claim interest he clearly could have done so, in his first application. By failing to do so, he must be deemed to have waived his claim to interest. It is not his claim now that he did not know interest was due at the time. What he says now merely amounts to this :

"I did know the interest was due, but I had not immediately before me material for calculating it and I therefore preferred to file an application with the interest omitted."

This is an entirely unsatisfactory explanation. The calculation of interest was a simple matter, which could be done very quickly, and certainly need not have taken the month which elapsed between the filing of the first application and the second application. I am of opinion that the application to execute the decree for interest has been rightly refused. I dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 183

CHARI, J.

Ma Saw Tint and *others*—Appellants.

v.

Abdul Bari and *others*—Respondents.

Second Appeal No. 538 of 1928, Decided on 1st May 1929.

(a) Civil P. C., S. 11 — Findings on mortgage suit may be said to be binding on auction-purchaser though he is not part to mortgage suit—(Obiter).

Findings in a mortgage suit may be said to be binding on the auction purchaser purchasing property in execution of the mortgage decree though he is not a party to the mortgage suit as he in a sense represents the mortgagor and the mortgagee and so claims under the judgment-debtor : *A. I. R.* 1922 *Pat.* 63, *Rel. on.* [P 183 C 2]

(b) Evidence Act, S. 101 — Onus immaterial.

After all the evidence has been taken, no question of burden of proof remains. [P 184 C 1]

J. N. Surety—for Appellants.

S. Ganguli—for Respondents.

Judgment.—This is a second appeal from a suit in which appellants sought declaration that their house was not the house in respect of which there was a mortgage executed by one Abdul Bari in favour of Nilambar. The appellants were the purchasers of a house from Abdul Bari. The mortgagee Nilambar filed a suit on his mortgage and in that suit he made the purchasers defendants. In the written statement not a word was said about the property being different and the suit was defended on the assumption that the house purchased by the defendants was the house mortgaged to Nilambar. The first question which the learned Judge of the trial Court and the learned Judge of the lower appellate Court had to consider was whether the findings in the mortgage suit were res judicata in the present suit. The trial Judge held that there was no question of res judicata. The auction purchaser was not a party to the mortgage suit. The soundness of this finding was accepted by the learned Judge of the lower appellate Court. The decision is open to doubt, because the auction purchaser in a sense represents the mortgagee and the mortgagor. It may, therefore, be argued that he is claiming under the judgment-debtor, and that the decision in the previous case bound him in that capacity just as it binds the others who were personally parties to the suit. The question did arise between an auction-purchaser in execution of a money decree and the landlord of a holding, and it has been held that such an auction-purchaser claimed under the judgment-debtor for the purpose of S. 11, Civil P. C., and that a finding between the judgment-debtor and another person as to the

area of the land is binding on the auction purchaser, see: *Kali Dayal* v. *Umesh Pershad* (1). Whether the finding of the lower Courts on the question of res judicata is right or wrong there can be no doubt that this appeal does not lie. There are concurrent findings of fact and the only point of law urged by the learned advocate for the appellants is that the burden of proof was wrongly placed. This ground was also urged before the lower appellate Court and the learned Judge of that Court rightly pointed out, that after all the evidence had been taken no question of burden remained. The other point urged is that the difference between the two houses is obvious on the face of the document. It may or may not be so, but the difference may be explainable by the fact that the persons whose names were given as the owners of the adjacent properties may be successors in title to the persons whose names are given in the other document and that the road on the Eastern side might have been made after the description was given. It is, however, unnecessary to consider all these points, because I have no doubt that on the materials before them both the lower Courts have come to the correct decision and as the decision is not contrary to law or any usage having the force of law the appeal is bound to fail. I, therefore, dismiss the appeal with costs in favour of respondents 2 and 3. The advocate for respondent 1 has withdrawn and even if he had not done so, respondent 1 would not be entitled to any costs.

P.N./R.K. *Appeal dismissed.*

(1) A.I.R. 1922 Pat. 63=1 Pat. 174.

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* A. I. R. 1929 Rangoon 184

RUTLEDGE, C. J., AND MAUNG BA, J.

Russa Engineering Works Ltd. and *others*—Plaintiffs—Appellants.

v.

Wearne Brothers Ltd.—Defendant 1—Respondents.

First Appeal No. 86 of 1925, Decided on 22nd March 1926, against decree in Civil Regular Suit No. 405 of 1923, D/- 13th February 1925.

* (a) **Company—Agreement when Company not formed—Company is not bound by it.**

A company, not in existence when an agreement for it is entered into, cannot be bound by it. [P 185 C 1]

(b) **Landlord and Tenant—Agreement to lease—Lessee assigning rights before taking possession or paying rent — Assignee not attorning to lessee but paying rent direct to lessor — Relation of landlord and tenant is not created between assignee and lessee.**

Where a person makes an agreement to take a lease and assigns his rights to a third person before paying any rent or taking possession and the third person instead of paying rent to his assignor or attorning to him pays rent direct to the owner (original lessor) the relation of landlord and tenant cannot be said to have been created between the third person and his assignor. [P 185 C 2]

* (c) **Transfer of Property Act, S. 3 — Right to get lease executed is moveable property — Lessee becoming self-constituted trustee — Trust is valid — Trusts Act, Ss. 5 and 6.**

The right to call upon the owner to execute a lease and on his failure to do so the right to sue him for specific performance is a chose in action and as such moveable property. The benefits of such an agreement can be subject of valid trust when the lessee becomes self constituted trustee. [P 185 C 2]

Ormiston—for Appellants.

Paget—for Respondents.

Judgment.—This is an appeal from the judgment and decree of this Court on the original side dismissing the plaintiff-appellant company's suit.

As the facts of the case are somewhat complicated, it seems desirable to set out in some detail the circumstances leading up to the present suit as we do not find ourselves in agreement with the learned trial Judge in the legal inferences which he draws from those facts.

Dodge and Seymour (India), Limited, of which Mr. J. L. Chidsey was the Managing Director, were the distributing agents of Ford Motors (Canada) Limited, for India, Burma and Ceylon.

In May 1920, a Calcutta firm named Kilburn and Company (the Managing Agents of the plaintiff-appellant company) entered into an agreement with Mr. Chidsey, whereby the selling agency for Burma was secured, and in pursuance of this agreement Kilburn and company caused a new private company called Ford Motors (Burma) Limited, to be incorporated of which Kilburn and company were the Managing Agents and held one share, all the other shares being held by the plaintiff-appellant company. Ford Motors (Burma) Limited were registered at Rangoon on 10th July 1920. As we have seen, it was the property of, and

completely controlled by, the plaintiff-appellant company through their Managing Agents Kilburn and Company. Prior to this, on 20th April 1920, the plaintiff-appellant company obtained an agreement for a lease for 20 years from Mr. N. M. Cowasjee of Rangoon of certain premises in Judah Ezekiel Street, Rangoon, and in consideration of an agreed rent, Mr. Cowasjee agreed to erect a building suitable for the motor business upon the premises.

Mr. Whitby of Kilburn and Company and Mr. Chidsey depose that it was a term of the agreement whereby the Burma Agency for the sale of Ford Motors was secured, that the Judah Ezekiel Street premises should be handed over to the new company, Ford Motors (Burma) Limited, for the purpose of their business, that the building when completed was handed over to the Ford Motors (Burma) Limited, who entered into possession in September 1920, paid the rent direct to Mr. Cowasjee, made extensive alterations in the building and remained in occupation of the premises till November 1923; and that by an oversight no assignment of the agreement for lease was ever made by the plaintiff-appellant company to the second respondents, Ford Motors (Burma) Limited. But the plaintiff-appellant company contend that they held the agreement as trustees for the second respondents. The oversight is easily understood as at this time the interests of the plaintiff-appellant company and second respondents were identical, both being artificial persons controlled by the same hand, namely, Kilburn and Company.

The learned trial Judge has, we consider, rightly held that as the company were not in existence in May 1920 when an agreement was entered into between the plaintiff-appellant company and Mr. Chidsey, they could not be bound by it, and that he could not presume subsequent ratification of the contract by the second respondents from their conduct. The learned trial Judge infers from the above facts that the plaintiff-appellant company could not in law be trustees for the second respondents and that the second respondents must be held to be monthly tenants of the plaintiff-appellant company by reason of S. 106, T. P. Act.

We can find nothing in the circumstances already set out to justify us in presuming that the relation of landlord and tenant was ever established between the plaintiff-appellant company and the second respondents and without such relationship the Court cannot presume that the second respondents are monthly tenants.

According to the evidence the plaintiff-appellant company never paid rent for the premises and never entered into possession of them. The second respondents never attorned tenants to the plaintiff-appellant company and never paid them rent. They entered into possession of the premises as soon as they were completed. They had them altered to their satisfaction and they paid the rent to the owner, Mr. Cowasjee, direct. It seems clear that the relation of landlord and tenant never subsisted between the plaintiff-appellant company and the second respondents.

With regard to the question whether the plaintiff-appellant company in law could be regarded as bare trustees on behalf of the second respondents, it cannot be suggested that the subject of the alleged trust was the Judah Ezekiel Street premises as the plaintiff-appellant company had no legal interest in these premises as they had no lease. All that they had got under their agreement was the right to call upon the owner to execute a lease and on his failure to do so the right to sue him for specific performance. This right was a chose in action and as such moveable property. This moveable property became vested in the plaintiff-appellant company as soon as the agreement with Mr. Cowasjee was signed on 20th April 1920 and was so vested when it became the self-constituted trustee. We are therefore of opinion that there is nothing in S. 5, Trusts Act, which would prevent the plaintiff-appellant company from holding the benefits of the agreement of 20th April 1920, in trust for the second respondents, and with respect to the agreement whereby the Ford Motors Agency for Burma was obtained in May 1920, we consider ourselves justified in holding that a trust was created within the meaning of S. 6, Trust Act.

We shall now consider the first respondents' position in the matter. They are a company incorporated and carrying on business at Sengapore. For the reasons set out in Mr. Chidsey's letter of

27th July 1921 the first respondents entered into negotiations with Kilburn and Company to take over the Burma Agency of Ford Motors from the plaintiff-appellant company. And Mr. T. J. B. Wearne, Managing Director of the first respondent company, after visiting Rangoon went to Calcutta to negotiate the transfer. On 27th August 1921, it appears from Ex. K that Mr. Smith, plaintiff-appellant company's manager, sent along with that letter certain enclosures amongst others "copies of two leases," and from Mr. Wearne's letter (Ex. B) of the same date it would seem that these copies, wrongly termed leases, must have been the agreement for a lease of the Merchant Street properties which appears last in the file of the plaintiff-appellant company's exhibits, and Ex. J., the agreement with Mr. Cowasjee dated 20th April 1920. In Ex. B, Mr. Wearne states that :

> "We are prepared to take over Ford Motors (Burma) Limited, Rangoon, as a going concern on the following terms,"

and he sets out 15 heads. The seventh head is Merchant Street property and the eighth head is Judah Ezekiel Street property. From the copy supplied Mr. Wearne must be taken to have known at the time when he wrote this letter or shortly after that the agreement for leaae of the Judah Ezekiel Street propety was in the name of the plaintiff-appellant company and not in the name of the second respondents. Mr. Wearne left Calcutta shortly after this and appointed Mr. Chidsey by a power of attorney to act for him. The plaintiff-appellant company's answer to Ex. B is dated 2nd September 1921 (Ex. C). In it the plaintiff-appellant company states :

> "It is necessary in the first place to record that the proposal is one to take over from the Russa Engineering Works, Limited, and from our firm the whole of the shares of the Private limited company Ford Motors (Burma) Limited, of which, in the event of the proposal being accepted, Messrs. Wearne Brothers, Limited, would then be the sole proprietors. The various terms enumerated constitute the method by which the value of such shares is to be ascertained,
>
> "Messrs. Kilburn and Co. in the event of the deal going through, resign the Managing Agency of Ford Motors (Burma) Limited."
>
> "It is understood that the entity of Ford Motors (Burma) Limited, as a company will not be affected."

Of the various 15 heads set out in Mr. Wearne's letter (Ex. B), a large number including No. 8 the head referring to the Judah Ezekiel Street premises, has been confirmed, that is to say, in respect of these heads the parties had come to a definite agreement. With regard to other heads, negotiations went on for a considerable time ; but none of the subsequent correspondence indicates any attempt on the part of either party to resile from the position that the Merchant Street property and the Judah Ezekiel Street property were both to be items which were to pass from the management and control of the plaintiff-appellant company to the management and control of the first respondent company. (See the first respondent company's letter dated 17th September 1921, Ex. R). On considering the position of both parties at the end of August 1921, no other course was possible. The plaintiff-appellant company were anxious to sell their Burma Agency carried on through the second respondents ; and it would be in the last degree unlikely that while parting with the agency they would still retain their liability in respect of premises not occupied by themselves or of any use to them in their business ; and it is also in the last degree unlikely that the first respondent company would take over the Burma Agency while the Merchant Street premises were still unbuilt, leaving it possible for the plaintiff-appellant company to turn them out at a short notice and so bring their business operations to a standstill.

A point of some importance is that Ex. J. the agreement for lease of the premises in question, was in the first respondent's hands at the time when the dispute arose between the parties in 1923 and must have been handed over to them when Kilburn and Company relinquished the Managing Agency of the second respondents.

In these circumstances we cannot accept the evidence on the first respondents' behalf alleging that they thought that Ex. J. was in the second respondents' name. From the copy of the agreement sent to Mr. Wearne on 27th August 1921, the first respondents must have known that the agreement was in the plaintiff-appellant company's name, but they must have satisfied themselves that the plaintiff-appellant company held the benefits of that agreement in trust for the second respondents.

A further point to be considered is whether S. 130, T. P. Act, renders this transfer of the rights and liabilities under Ex. J. invalid. In our opinion there has been a valid assignment within the meaning of this section by Ex. C read with Ex. B and by the delivery of Ex. J to the transferee, which is a clear indication that a transfer was intended.

For the purpose of our present decision we need only deal with 4th and 5th issues fixed by the learned trial Judge. We would answer the 4th issue in the affirmative.

In answer to the 5th issue we consider that Exs. B and C constitute an agreement whereby the first respondents agree with the plaintiff-appellant company to take over the burden and benefit of the agreement for lease, Ex. J, and that in doing so they were not acting in the belief or on the representation of the plaintiff-appellant company that the second respondents were lessees of the premises in suit. We consider that the first respondents are bound by that agreement.

In these circumstances we allow the appeal and set aside the judgment and decree appealed from. There will accordingly be a declaration that the first respondent-company should cause the plaintiff-appellant company to be indemnified against all liabilities under the agreement for lease. There will be a decree for the payment by the first respondents to the plaintiff-appellant company of Rs. 3,000 being rent paid for April, May and June 1923, and a declaration that the first respondents are liable to reimburse the plaintiff-appellant company all sums which the plaintiff-appellant company may thereafter have paid, or shall pay to the landlord Mr. N. M. Cowasjee under the agreement for lease or any lease entered into pursuant to the terms thereof. The plaintiff-appellant company are entitled to costs, both in this Court and in the trial Court against first respondent-company only. We allow 20 gold mohurs additional costs. Failing agreement appellants' costs of the Calcutta commission to be taxed.

R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 187

HEALD, J.

Ma Kwi—Applicant.

v.

Ma On May and *another*—Respondents.

Civil Revn. No. 27 of 1929, Decided on 23rd May 1929.

(a) Contract Act, S. 137—*K* supplying goods to *M*'s employees and *M* being surety for employees—*K* making statement that he did not intend to file suit against employees—Such statement does not amount to waiver of his claim against them so as to discharge *M* from liability.

Where *K* supplied goods to employees of *M* being so authorized by him and *M* was a surety for his employees a statement by *K* that he did not intend to file a suit against the employees, does not amount to waiver of his claim against them so as to discharge *M* from liability nor does it take the case out of the provisions of S. 137 : 2 *U. B. R.* 308; 6 *Bur. L. T.* 62, *Dist.* [P 189 C 1]

(b) Civil P. C., S. 115—Revision does not lie only because Court made error in law.

The fact that the Court makes a mistake in law is not sufficient to warrant High Court's interference in revision. [P 188 C 2]

Maung Myint—for Applicant.

Wellington—for Respondents.

Judgment.—Applicant sued respondents to recover the price of goods sold and delivered. Her case was that respondents, who are husband and wife and were working a rice mill at Hlaingbwe asked applicant who was a shop keeper at Hlaingbwe to supply food stuffs to them, and to the employees at their mill and promised to pay for goods so supplied, and that she supplied certain goods accordingly, that accounts of the goods supplied were settled between her and the respondents in the presence of the employees and that at the settlement respondents agreed to pay the amount then found due. Respondents' defence was that they never authorized applicant to supply goods to their employees or promised to pay for goods so supplied, that they never bought any goods from applicant themselves, that there was no settlement of accounts, that applicant ought to sue the persons who took the goods and that the claim as against them was false.

The trial Court found on the evidence that respondents did direct applicant to supply goods on credit to their employees and undertook to pay any debt "due to them" (sic) and holding that

applicant's claim was proved gave her a decree against them for the full amount claimed. Respondents appealed on the ground that they were merely sureties for payments of the amounts due by their employees and that because applicant had waived her claim against the employees, they were discharged from liability. The point was not raised in the pleadings in the trial Court, but it was considered by the trial Judge who referred to the provisions of S. 137, Contract Act, which says that:

"mere forbearance on the part of the creditor to sue the principal debtor or to enforce any remedy against him does not in the absence of any provision in the guarantee to the contrary, discharge the surety."

The lower appellate Court said that because applicant had not only forborne from suing the principal debtor but had actually waived her claim against them, respondents as sureties were discharged from liability. In support of this decision the learned Judge cited the case of *Ah Pwin* v. *See Shong Foo* (1) and *Williams* v. *King* (2), and on the strength of these rulings dismissed applicant's suit. No second appeal lies because the suit is of the nature cognizable by Courts of Small Causes, and the amount or value of the subject-matter does not exceed Rs. 500, but applicant asks this Court to interfere in revision on the ground that the appellate Court made out for respondents a case which they had not pleaded or put in issue and that the matter was not one of suretyship at all. At the hearing in this Court applicant's learned advocate says that even on the view taken by the appellate Court the contract would be one of indemnity rather than guarantee, meaning presumably that there was no promise to pay and no liability on the part of the respondent's employees who took the goods. I have read the record and heard the learned advocates on both sides and I have no doubt that the decision of the appellate Court was mistaken.

The case of *Ah Pwin* v. *See Shong Foo* (1) was a suit on documents, which the Court hold to be promissory notes, and the learned Judicial Commissioner dismissed the suit on the ground that the claim on the notes was timebarred. There was no application of the provisions of S. 137, Contract Act, but it was said that failure to sue the principal debtor within the period of limitation would ordinarily discharge the surety under S. 134 of the Act. That case was therefore no authority for the appellate Court's decision. The case of *William* v. *King* (2) was not officially reported and the report of it to which the Judge in the appellate Court referred was incorrect. It was Civil 1 Appeal No. 3 of 1911 of the Chief Court of Lower Burma. In that case suit was actually instituted against the principal and his sureties and the plaintiff's advocate in the course of the proceedings said that he would waive the claim against the principal debtor because he could not be found. It was contended that that waiver operated to discharge the sureties under S. 134, Contract Act. The learned Judge who wrote the judgment in that cases said

"The real point to be considered is whether the case should be deemed to come under the provisions of 137, Contract Act, and I am in accord with the decision given in the case of *Ranjit Singh* v. *Nanbat* (3). I do not think that the mere forbearance contemplated in S. 137 extends to actual waiver. It must mean something short of that, as actual waiver has the effect, the legal consequence of which is the discharge of the principal debtor, where as in this case, the claim was waived against him."

The learned Judge accordingly held that the case fell within the purview of S. 134, so that the sureties were discharged. Neither of the cases to which the appellate Court referred is at all like the present case, but the fact that the Judge made a mistake in law would not be sufficient to warrant interference in revision. I think however in the present case the Judge was not only wrong on the facts and the law, but was also wrong in overlooking the fact that certain of the goods were alleged to be supplied to respondents themselves, so that so far as these goods were concerned there was no question of suretyship. On the evidence I have no doubt that respondent 1 did authorize applicant to supply goods to the employees at respondents' mill and that respondents also took goods from applicant themselves. I think it probable that respondent 1 agreed to pay for goods so supplied to mill employees but even if respondents were in fact only sureties for these employees, I do not think that ap-

(1) [1892-96] 2 U. B. R. 303.
(2) 6 Bur. L. T. 62.
(3) [1902] 24 All. 504=(1902) A. W. N. 166.

plicant's statement that she did not intend to file a suit against the employees would amount to a waiver of her claim against them so as to discharge the respondents from liability or would take the case out of the provisions of S. 137, Contract Act. I, therefore, set aside the judgment and decree of the trial Court and restore the decree of the trial Court with costs for applicant throughout.

P.N./R.K. *Revision allowed.*

A. I. R. 1929 Rangoon 189

CHARI AND MYA BU, JJ.

Ashia Khatoon—Appellant.

v.

Abdul Hakim Maistry—Respondent.

Special Second Appeal No. 513 of 1928, Decided on 23rd April 1929.

(a) Mahomedan law—Suit for restitution of conjugal rights cannot be dismissed on mere plea of non-payment of prompt dower.

The suit for restitution of conjugal rights brought by the husband cannot be dismissed on the mere plea of non-payment of prompt dower: 8 *All.* 149; 17 *Cal.* 670; 11 *Mad.* 327; 30 *Bom.* 122, *Rel. on.* [P 189 C 2; P 190 C 1]

(b) Mahomedan law—Text—Difference in opinion between Abu Hanifa and Abu Mahomed.

If Abu Hanifa does not agree with Mahomed, the opinion supported by Abu Usuf should prevail. [P 190 C 1]

M. A. Rauf—for Appellant.

S. J. Ali—for Respondent.

Judgment.—This is an appeal against the judgment and decree of the lower appellate Court reversing the judgment and decree of the Court of the first instance, which dismissed the respondent's suit for restitution of conjugal rights against the appellant. The parties who are Mahomedans became man and wife according to Mahomedan rights about seven years before the suit. At the marriage a marriage agreement was drawn up setting out certain mutual obligations. One of the terms of the agreement was for payment by the husband to the wife of prompt dowry to the value of Rs. 1,100 of which jewellery worth Rs. 600 was paid then and there and another was that if the wife's jewellery was broken or lost, the husband was to make good the damages or loss. The wife filed a suit for divorce, and resisted the husband's suit on various grounds. The pleadings gave rise to seven issues in all, of which one and two were mentioned for the purpose of this case, for except as to the question of law relating to relief the two Courts below arrived at concurrent findings of fact which are not challenged in this appeal. The fourth ground mentioned in the memorandum of appeal not being pressed, the two issues I refer to are the issue 2 and issue 6 in the list of issues, namely, whether the plaintiff failed to give the defendant her lost jewelleries and whether the defendant was entitled to refuse conjugal rights to the plaintiff until she was paid Rs. 500. The trial Court dismissed the plaintiff's suit on the ground that he was not entitled to restitution of conjugal rights as he had not paid the balance Rs. 500 of the prompt dower mentioned in the marriage agreement. The trial Court found other issues of fact in the plaintiff's favour. On the issue as to whether the plaintiff failed to give the defendant her lost jewelleries the trial Court found in the plaintiff's favour because the defendant admitted having received the sum of Rs. 400. This sum of Rs. 400 according to the plaintiff was one of the two payments towards the balance of prompt dower, the other payment being of a sum of Rs. 100.

As pointed out by the learned Additional District Judge there is not a tittle of evidence to prove that the jewelleries mentioned in the marriage agreement were lost. From this it necessarily follows that the payment of Rs. 400 could not have been for lost jewelleries, but must have been for the balance of prompt dower as alleged by the plaintiff. The learned counsel for the appellant contended that issue 6, implied an admission, on the part of the plaintiff that he had not paid the balance of dower. It is true that the wording of the issue is unsatisfactory, but I can find nothing on the record by which the plaintiff could be said to have admitted the alleged default. Because of the unsatisfactory nature of the issue, the learned counsel urged that the suit be remanded for trial on the issue as to whether the balance had been paid or not. He contends that the authorities relied on by the lower appellate Court to the effect that under the Mahomedan law the suit for restitution of conjugal rights brought by the husband cannot be dismissed on the mere plea of non-payment of prompt dowry are not sound. They are the cases of

Abdul Kadir v. *Salima* (1), *Hamidunnissa Bibi* v. *Zehiruddin Sheik* (2), *Kuchi* v. *Moidin* (3), *Bai Hansa* v. *Abdulla Mustafa* (4). *Abdul Kadir's* case was a decision by a Full Bench of the Allahabad High Court and the other later cases followed it. The authority of *Abdul Kadir's* case is challenged on various grounds, one of them being the reference by Mahmood, J. to Abu Hanifa and his two disciples as the three masters, and his statement that in the case of difference of opinion among the three, majority should prevail. Abu Hanifa's two disciples were Mahomed and Abu Usuf. In my opinion after consulting the various works of the learned commentators on the subject the general principle appears to be that if Abdul Hanifa did not agree with Mahomed, the opinion supported by Abu Usuf should prevail. Therefore it seems to me no substantial difference between the general statement made by Mahmood, J. and the real basis upon which difference of opinion between two of the three should be settled. If the rulings in the cases relied on by the learned Additional District Judge be correct, there could be no doubt that the defendant had no defence, and I see no sufficient ground for not adopting the rulings quoted above. In my opinion the appeal fails, and it is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1886] 8 All. 149=(1886) A. W. N. 53.
(2) [1890] 17 Cal.670.
(3) [1888] 11 Mad. 327.
(4) [1906] 30 Bom. 122=7 Bom. L. R. 681.

A. I. R. 1929 Rangoon 190

HEALD AND MAUNG BA, JJ.

Madan Mohan and *another*—Applicants.

v.

Secretary of State and *another*—Respondents.

Civil Revn. No. 157 of 1928, Decided on 6th May 1929, against decree of Second Judge of Small Causes, Rangoon.

(a) Rangoon Small Cause Courts Act (1920), S. 35—Applicability.

Section 35 does not apply where the charge levelled against the bailiff is that he caused loss by neglecting to satisfy himself regarding the sufficiency of the security offered. [P 191 C 1]

(b) Rangoon Small Cause Courts Act, S. 14 (c)—So long as act done by bailiff is done under or by virtue of order of Court it is done in pursuance thereof though it is not in strict conformity of such order.

Where the Court intending to take a bond for restoration of certain amount sought to be withdrawn by one person ordered the bailiff to report as to the sufficiency of the security offered and where the bailiff took a wrong bond for appearance of the person, a suit brought against the bailiff and the Secretary of State for loss caused owing to neglect of bailiff to satisfy himself as to the sufficiency of the security falls under S. 14 (c) for though the act of the bailiff is not in strict compliance with the order of the Court, it is not an independent act of the bailiff but done in his capacity as bailiff and under or by virtue of the order of the Court. [P 191 C 2]

S. M. Bose—for Applicants.

Gaunt—for Respondents.

Judgment.— This is an application to revise the decree of the Second Judge of the Court of Small Causes, Rangoon, dismissing applicant's suit against the Secretary of State for India in Council and the bailiff of that Court. Applicants sued one Gouri Sanker Tewari on a promissory note in the Small Cause Court and attached before judgment a sum of 464/4/- which was lying in deposit to Tewari's credit in Civil Regular Suit No. 8775 of 1924. Tewari then applied to the Court to allow him to withdraw the amount on furnishing security. He offered one Misser as security. On that application the Court wrote this order: "Bailiff for report as to the sufficiency of security." The bailiff then wrote his report on the same application. The report reads "Security furnished. Bond accepted. Paper with bond are herewith returned." The Court then passed this order "Granted". The bond was taken for appearance and not for satisfaction of the decree, nor for restitution of the amount withdrawn. About four months later applicants obtained a decree, but both Tewari and his security absconded. Several attempts were made to recover the decretal amount by execution but without success. Consequently applicants sued the Secretary of State and the bailiff for 456-6-3 alleging

"that the bailiff knowing that the defendant and his surety had no property in Rangoon, accepted their security and allowed the amount to be withdrawn."

The learned Judge of the Small Cause Court was of opinion that S. 35 of the Rangoon Small Cause Court, 1920 provides a special remedy and bars such suit. That view is incorrect. That Section reads :

"If any bailiff, clerk or other inferior ministerial officer of the Court who is employed as such in the execution of any order or warrant loses, by neglect, connivance or omission, an opportunity of executing such order or warrant, he shall be liable, by order of the Chief Judge to pay to the person injured by such neglect, connivance or omission, such sum not exceeding in any case the sum for which the said order or warrant was issued, as, in the opinion of the Chief Judge, appears reasonable."

That section would apply only where the bailiff or other inferior ministerial officer of the Court, who is employed as such in the execution of any order or warrant loses, by neglect, connivance, or omission an opportunity of executing an order or warrant. Here the charge levelled against the bailiff was that he had caused loss by neglecting to satisfy himself regarding the sufficiency of the security offered. The learned Judge has failed to notice that the suit is one excepted from the cognizance of the Small Cause Court under Cl. (c), S. 14, Rangoon Small Cause Courts Act. That clause relates to

"Suits concerning any act ordered or done by any Judge or Judicial Officer in the execution of his office or by any person in pursuance of any judgment or order of any Court or any such Judge or Judicial Officer."

The appellants' advocate contends that the Court intended to take a bond for restoration of the amount which Tewari wanted to withdraw but that the bailiff took a wrong bond for appearance of Tewari and that consequently the act of the bailiff in paying out the amount to Tewari on a wrong bond could not be treated as an act done in pursuance of the order of the Court. In his opinion unless an act is done in strict compliance with an order the act cannot be considered to be one done in pursuance thereof. We are unable to accept this argument. So long as the act is done "under or by virtue of" the order it is done in pursuance thereof. These words "under or by virtue of" are used ejusdem generis with the words "in pursuance of" in Stroud's Judicial Dictionary as well as in Maxwell's Interpretation of Statutes. In the New Oxford Dictionary the chief current sense of "pursuance" is given as "prosecution, following out, carrying out." The act complained of in the present case was not an independent act of the Bailiff. It was done in his capacity as Bailiff, and under or by virtue of the order of the Court. The legislature does not intend Small Cause Courts, where procedure is summary, to try suits involving complicated questions of law, and so it has excluded many suits involving such questions from the jurisdiction of Small Cause Courts. The present question involves complicated questions of law e. g., (1) Whether the bailiff could claim protection under the Indian Officers Protection Act (18 of 1850) and (2) Whether the Secretary of State can be held liable for the neglect of the bailiff We have no doubt that the present suit falls under Cl. (c), S. 14, Rangoon Small Cause Courts Act and that it has been decided without jurisdiction. We confirm the dismissal of the suit but on different grounds and dismiss the present application for revision, with costs.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Rangoon 191

BROWN, J.

U Shwe Yone—Applicant.

v.

Ma Yhal Ma and *another* — Respondents.

Civil Revn. No. 64 of 1929, Decided on 27th May 1929, against the judgment of Dist. Judge, Thaton, in Civil Appeal No. 82 of 1928.

Civil P. C., O. 20, R. 11 (2)—Order under R. 11 (2) is appealable being one under Civil P. C. S. 47.

Order passed by the Court, on application made under the provisions of O. 20, R. 11 (2) directing that the decretal amount should be paid by instalments, is appealable being one under S. 47: *A.I.R.* 1926 *R.* 192, *Rel.* [P 192 C 1]

Kin U—for Applicant.

S. G. Chowdhury—for Respondents.

Judgment.—The respondents obtained a decree against the petitioner and applied for execution of that decree. The petitioner applied to the trial Court for an order directing that the decree should be payable by instalments, under the provisions of O. 20, R. 11 (2). The trial Judge passed order directing that the decretal amount should be paid by instalment of Rs. 60 a month. The respondents appealed to the District Court, and that Court set aside the trial Court's order. The petitioner has now come to this Court on the ground that the District Court had no power to pass the order it did, as no appeal lay from the orders of the trial Court. It is pointed out that an order under R. 11 is not appealable either under S. 104, Civil P. C. or under the provisions of

O. 43 of the Code. That is no doubt the case, but the question remains whether the order comes under the provisions of S. 47 of the Code, and is therefore appealable, as a decree. It was decided definitely in the case of *Saya Hattie* v. *Ma Hwa Sa* (1) that such an order was appealable, and I see no reason for doubting the correctness of that decision. That being so, the appeal to the District Court lay, and this application must fail. I dismiss the application with costs.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1926 Rang. 192=4 Rang. 247.

A. I. R. 1929 Rangoon 192

MAUNG BA, J.

U Tha Me and *others*—Appellants.

v.

Paungde Co-operative Town Bank—Respondent.

Second Appeals Nos. 650 to 652 of 1928, Decided on 29th April 1929.

Burma Co-operative Societies Act (6 of 1927), Ss. 47 (4) and 49—Orders of Liquidator under S. 49 are final in absence of rules made under S. 50 (2) (s)—Liquidator purporting to act under S. 47 and issuing order to pay certain sums—It being alleged in some cases that debts were time barred and in one much less sum was due—Civil Court has no jurisdiction.

In the absence of rules made under S. 50 (2) (s), orders of a Liquidator under S. 49 are final and no appeal lies to the District Judge. [P 192 C 2]

Where a certain Co-operative Society had been ordered to be wound up and a Liquidator appointed, purporting to act under S. 47, issued orders to pay certain sums, and it was alleged in some cases that the debts were time barred and in one that much less sum was due, civil Court has no jurisdiction, orders of the Liquidator being within the powers conferred upon him by the Act: 44 *Bom.* 582; 40 *All.* 89, *Rel. on.* [P 192 C 2]

Thein Maung—for Appellants.

Leach—for Respondent.

Judgment.—All three appeals arise out of suits for a declaration that the orders of Liquidator appointed under the Burma Co-operative Societies Act are ultra vires. Even at the outset it may be stated that no appeal lay either to the District Court nor a second appeal to this Court. Sub-S. 4 of S. 47 of the Act 6 of 1927, lays down that where an appeal from any of the orders made by a Liquidator under this section is provided by the rules, it shall lie to the Court of District Judge. S. 50 (2) (s) empowers the Local Government to make rules prescribing the cases in which an appeal shall lie from the orders of the Liquidator. Such rules have not been framed yet, and the absence of such rules means that no appeal lay, and under S. 49 orders of a Liquidator are final and no civil Court has jurisdiction so long as the orders arise out of matters connected with the dissolution or winding up of a Co-operative Society.

The facts are that the Paungde Co-operative Society has been ordered to be wound up. The Liquidator appointed, purporting to act under S. 47, issued orders to appellants to pay up certain amounts. In three cases it was alleged that the debts had become time barred, and in the fourth case it was alleged that much less sum was due. Mr. Thein Maung for the appellants has urged that in the first place those appeals depend upon a correct interpretation of S. 49. It reads:

> "Save in so far as is here-in-before expressly provided no civil Court shall have any jurisdiction in respect of any matter connected with the dissolution or winding up of a co-operative society under this Act."

In my humble opinion there is no difficulty in interpreting this section. The legislature could hardly have expressed themselves with greater clearness. It is only necessary to see whether the orders in question were outside the powers conferred by the Act upon the Liquidator. If they were within such powers, the civil Court would have no jurisdiction. In this view I have the support of the Bench of the Bombay High Court in *Ganpat Ramrao* v. *Krishnadas Padmanabh* (1) and that of the Allahabad High Court in *Mathura Persad* v. *Shiobalak Ram* (2). The orders in question were made by the Liquidator within the powers conferred upon him by the Act. It follows that the civil Courts have no jurisdiction. As the law now stands there appears to be no remedy and that the liquidator is a law to himself until such time as the Local Government may make rules under S. 50 (2) (s). This being my view of the law, it is needless to consider the grounds of appeal in detail. The appeals fail and are accordingly dismissed with costs.

P.N/R.K. *Appeal dismissed.*

(1) [1920] 44 Bom. 582=57 I. C. 423=22 Bom. L. R. 732.

(2) [1918] 40 All. 89=42 I. C. 968=15 A. L. J. 863.

* A. I. R. 1929 Rangoon 193

Special Bench

RUTLEDGE C. J. AND BROWN AND CHARI, JJ.

Commissioner of Income-tax—Applicant.

v.

Burma Corporation Ltd. — Respondent.

Civil Ref. No. 5 of 1929, Decided on 13th June 1929.

*** Income-tax Act (1922), S. 10 (2) (ix)—Provident Fund started by company—Part contributed by deductions of employee's salary—Part contributed by company—Provident Fund subsequently transferred to trustees—There was no obligation on the company to make periodical payments to the trustees—Deductions from salaries or contributions by company not actually paid to trustees — Trustees having power to call on the company to make up shortage of its liabilities—Company held not entitled to deduct from their income sums merely carried forward as a book liability in favour of employees or trustees—Cash payments however could be deducted—Actual payment to employee was not necessary—Actual payment to trustees so as to lose proprietary right of control was sufficient.**

A company started a Provident Fund for their employees. According to the rules of the Fund certain percentage from the monthly salaries was to be deducted and credited to the account of the Fund. The corporation also agreed to contribute a bonus equal to the amount deducted from the salary and sums were credited to a separate account. The company subsequently started in respect of the provident Fund. Three persons were made trustees and Government Securities equal to the amounts payable to the members were made over to them. There was no obligation on the company to make periodical payment of any sum whatever to the trustees. The deductions out of the salaries were not paid to them nor were the contributions of the company. The trustees however had power to call on the company whenever any security in the hands of the trustees was short of the liability of the company to supply that deficiency either by cash payment or by furnishing further security. It was contended on behalf of the company that the contributions of the company to the Provident Fund for a particular year were not assessable to Income-tax.

Held : that the object of the trust was not to create a fund in cash vested in trustees, over which the company had lost all control and proprietary rights but to create a body which would be able to secure for the members, satisfaction of the liability of the company.

Held further : that the company was entitled to deduct from the amount assessable to income-tax the actual cash payments made to the trustees. The company was not however entitled to any deductions in respect of the sums merely carried forward in the account as the mere creation of a book liability whether in favour of employees or trustees. It was not necessary that the amount payable to the employees had been paid to them. The company was entitled to deduct, if it had actually paid the amount or its yearly contributions to the trustees in such a way as to lose the proprietary right in and control over them.

[P 195 C 2 ; P 196 C 1]

Government Advocate—for Applicant.
Clifton—for Respondent.

Judgment.—This is a reference by the Commissioner of Income-tax under S. 66 (2), Income-tax Act. The circumstances under which the reference is made are that the Burma Corporation Ltd., had started a Provident Fund for their employees. By the term of the rules of the Provident Fund which is controlled by the Directors of the Corporation it is provided that, in respect of the employees, who are divided into two classes, an amount equal to eight one-third per cent of the salary in the case of Class 1, and five per cent in the case of Class 2 should be debited monthly from the salary of the employees. This amount was credited to an account which is called the "A" account, and the Corporation agreed to pay interest at the rate of five per cent per annum on the amouut so credited, which was added to the principal once every six months. The Corporation contributed a bonus equal to the amount deducted from his salary and this amount is credited in a separate account, called the "B" account, and interest was added to this sum in the same manner as in respect of the sums under the "A" account. There was also a "C" account which was another bonus credited to the employee proportioned on the dividend paid by the Corporation, and the amount of the salary of the employee.

It will thus be seen that while the money in "A" account was the employee's own money, the moneys in "B" and "C" accounts were the contributions made by the Corporation. Rule 13, Provident Fund Rules, provided that if any member was dismissed, he was entitled only to the amount standing to his credit in "A" account, and the interest which had accrued thereon, and that all the money credited to his "B" and "C" accounts should remain the property of the Corporation and R. 14 specifically provided that no member

acquired any right in or to the money standing to his credit in "B" and "C" accounts.

In November 1925 the Corporation started a trust in respect of the Provident Fund to the terms of which we shall refer more in detail later. On 31st December 1925 the liability of the Corporation in respect of the Provident Fund amounts to accounts payable to the members amounted to Rs. 12,58,782-4-11. By the Trust deed three persons mentioned therein were made Trustees and Government Securities of the nominal value of Rs. 14,25,000 and the actual value at market rate of Rs. 12,61,125 were made over to them. It will be seen that no money was entrusted to the trustees, but the transfer of the Securities to the trustees may be considered as a payment of the equivalent of the money to them in cash, and taken back by the Corporation as a loan on the Security of the Government Promissory notes.

The point for consideration on this reference is whether the contributions of the Burma Corporation to the Provident Fund for the year ending with June 1927 are assessable to income-tax and super-tax. The learned Commissioner in his reference, makes a statement with which we are in entire agreement that it is not clear whether the contributions for the year in question were actually paid to the trustees, but in order not to complicate matters, he is willing to assume that the sum representing the contribution of the Corporation was actually paid over to the Trustees. In making this concession, the Commissioner practically concedes the whole case, because in our opinion, the non-liability of the Corporation to assessment or otherwise depends entirely on whether the Corporation has or has not parted with the money. Fortunately the form of the question enables us to answer it, in such a way as to enable the Commissioner to make enquiries on this point, and adopt the course consonent with the result of his, enquiries.

The contention of the Corporation seems to be that when the amounts are credited to the Trustees it is entitled to a deduction of this amount from the amount for which it is assessable to income-tax and super-tax. The Commissioner admits that the contributions to the Provident Fund under an irrevocable trust are not allowable except under S. 10 (2) (ix), Income-tax Act, and he contends that this section would apply only when there is an irrevocable trust and when the employer has finally parted with his contributions. He is of opinion on a construction of the trust deed that there is no question of any irrevocable trust, since there are many contingencies dependent on the will of the Corporation on the happening of any of which the Corporation can reduce their liability and recover their contribution. The Corporation, on the other hand, contends that the trust is none-the-less an irrevocable trust, simply because in certain contingencies the Corporation will be able to get back its contributions. In this contention, the learned advocate for the Corporation is in the right. Even without any express provision in the trust deed where the purposes, for which the trust is created have been fulfilled or failed there will be a resulting trust in favour of the author of the trust of any undisposed amount in the hands of the trustees. This does not however dispose of the matter, because the real point is a different one.

We shall now refer to a case which has been cited before us. In the *British Insulated and Helsby Cables Ltd.* v. *Atherton* (1), the facts were somewhat similar to the facts of the present case. There a pension fund was created and was constituted by a trust deed. The company contributed a sum of £ 31,784 to form the nucleus of the fund and to provide for payment in respect of the past years of service of the employees. It was practically admitted in that case that this money must be deemed to have been wholly and exclusively laid out for the purpose of the trade and therefore deductible under the provisions of the English Income-tax Act, corresponding to those in our own Act, but it was contended that it was in the nature of a capital expenditure, and therefore the Company was not entitled to any deduction. The point actually decided was only in respect of the sum of £ 31,784, it being conceded that yearly payments by the Company equivalent to the deductions out of the salary of the members would be entitled to be deducted from the current year's income. It is not, for the purposes of the case before us, necessary

(1) [1926] A. C. 205.

to refer to more in this judgment than a significant passage in the judgment of Lord Atkinson.

At p. 219 of the report he gives a summary of the terms of the trust deed created by the British Insulated and Helsby Cables. After setting out the important provisions of the deed he concludes as follows :

> " The trust deed contains many other provisions supporting the conclusion that the company have once and for all parted with all proprietary rights in and all powers over this donation of £ 31,784. "

This ruling was relied upon by the learned advocate for the Corporation, as an authority which shows that payment to the Trustees of a Fund would enable a Company to claim deduction of the amount so paid in the same way as a payment to the employee direct but the concluding passage cited above clearly shows that the real test is whether the Corporation actually pays the money to the trustees and loses all its proprietary right in and all powers over the sum so paid. The mere fact that in some cases it may be entitled to get back a portion of the amount paid out makes no difference in the legal position.

Turning now to the trust deed before us, the powers of the trustees are contained in Cl. 2 of the Trust deed. They are six in number.

Clause (a) makes it obligatory on the trustees to realise any portion of the Provident Fund represented by any security if the Corporation desire it to be so realised.

Clause (b) makes it obligatory on the trustees to re-invest the amount so realised in such other securities as the Corporation may direct

Clause (c) provides that whatever sum there may be in the hands of the trustees in excess of the liability of the corporation shall be held by them in trust for the Corporation, who may from time to time, recover such excess.

Clause (d) which is the most important clause, provides that the trustess shall stand possessed of the corpus and income of the Provident Fund on trust for the members for the time being of the Provident Fund and upon a winding up of Provident Fund or of the undertaking of the Corporation, upon trust to apply all monies in their hands in satisfaction of the claim arising under the rules and secondly in payment of the entire balance to the Corporation.

Clause (e) provides that the income of the Provident Fund if any, is subject to the trusts declared by sub-para. (8) payable to the Corporation.

Clause (f) provides that if the trustees shall at any time be unable lawfully to apply the Provident Trust Fund and the income thereof or any part of such Fund, then the trusts hereby created shall determine and the Provident Fund and the income thereof shall forthwith be made over to the Corporation.

Paragraph 3 provides that whenever on any of the accounting days it shall be ascertained that owing to market depreciation of the securities the corpus of the Provident Fund is less than the amount of the liability of the Corporation then the Corporation will pay to the Trustees a further such sum as will be necessary to make good the difference in cash or some security or securities, authorised by the law of British India for the investment of the trust funds or partly by one or partly by the other.

The noticeable feature of this trust deed is that there is no obligation on the Corporation to make periodical payments of any sum whatever to the trustees. The deductions out of the salary carried in "A" account is not paid to them, nor are the contributions of the Corporation carried on the "B" and "C" accounts.

It is true that the trustees have the power whenever any security they may have in their hands is short of the liability of the Corporation to call on the Corporation to supply that deficiency either by cash payment or by furnishing further security, but till the trustees think fit to act on this clause there is no obligation on the Corporation to make any payment. The credit in the accounts in favour of the employees or the trustees makes no difference. The object of the trust, as far as one can see, is not to create a fund in cash vested in the trustees, over which the corporation have lost all control and proprietary rights, but to create a body which would be able to secure for the members satisfaction of the liability of the Corporation. As is seen from the remarks in Lord Atkinson's judgment, the real ground on which the Corporation can claim exemption from payment of the Income-tax is that they have actually parted with the money.

The transfer of a book debt, even assuming that as from the date of the trust deed, the trustees are the persons credited in the "A," "B," and "C" accounts on behalf of the members does not mean that the Corporation have either parted with the money or lost control over it.

In our opinion, therefore, the Corporation will be entitled to deduct from the amount assessable to income-tax the actual cash payments made to the trustees, either for the purpose of meeting liabilities of the retiring or deceased members as they arise or for the purpose of supplying any deficiency as contemplated by para. 3 of the trust deed. They are not entitled to any deduction in respect of the sums merely carried forward in the account as the mere creation of a book liability whether in favour of the employees or trustees as it is not equivalent to a payment.

The difference between the Corporation and the Commissioner was merely as to the point of time when the Corporation becomes entitled to a deduction for these amounts. The Commissioner in view of the provisions of the trust deed was of opinion that the Corporation is entitled to a deduction only when the amount payable to the employee has been paid to him. In this, he is wrong, because the Corporation notwithstanding the provisions of the deed, would be entitled to deducation if it has actually paid the amount of its yearly contributions to the trustees in such a way as to have lost the proprietary right in and control over them. The trustees will hold the money primarily as trustees for the employees though in certain cases, a portion of the money may become repayable to the Corporation. When the moneys are so repaid they will be an additional income of that year and as such assessable. The contention of the Corporation is not quite clear. If the position of the learned advocate of the Corporation is that by a mere credit in favour of the trustees, instead of the employees and a creation of a liability to the trustees for the payment of these contributions, the Corporation can deduct the amounts so credited from the assessable sum, notwithstanding they have full control over and unlimited use of the money represented by the credit, we cannot accept his contention.

Our answer to the reference therefore is that the contributions of the Burma Corporation Ltd. to its staff Provident Fund are not assessable to income-tax, if the money had actually been paid to the trustees and the Corporation has lost the control over and the use of the money.

In the circumstances we make no order as to costs.

R.K. *Reference answered.*

A. I. R. 1929 Rangoon 196

HEALD, J.

Ma Me Hla—Appellant.

v.

Maung Po Thon—Respondent.

Special Second Appeal No. 402 of 1928 Decided on 3rd January 1929, against the Judgment of Dist. Court, Tharrawaddy, in Civil Appeal No. 51 of 1928.

Buddhist Law (Burmese)—Divorce—Marriage subsists unless dissolved by Court or by mutual consent in presence of elders or by desertion for certain period—Dismissal of wife for adultery cannot constitute divorce—Partition following upon divorce by mutual consent cannot be objected to on ground of misconduct.

Adultery on the part of the wife ipso facto does not put an end to the marriage. The Courts recognise the validity of a divorce by mutual consent effected in the presence of elders, and desertion for a certain period ipso facto puts an end to a marriage but the husband's mere dismissal of the wife for adultery cannot constitute a valid divorce. The marriage subsists until it is dissolved by the Court, except in the above mentioned two cases and if a divorce by mutual consent is established it is not open to either party to object to the partition, which such a divorce involves on the ground of misconduct of the other party. [P 197 C 1]

So Nyun—for Appellant.

S. C. Das—for Respondent.

Judgment.—Appellant sued respondent for partition of property on the footing of a divorce by mutual consent already effected between them in the presence of elders. Respondent denied the alleged divorce by mutual consent and said that he had divorced appellant and was entitled to retain all the property by reason of her adultery with a servant of theirs. He also disputed the correctness of the lists of property in respect of which appellant claimed partition. The trial Court found that a divorce by mutual consent was proved and that the misconduct which respondent alleged was not proved, and accor-

dingly gave appellant a decree for partition.

Respondent appealed on the grounds that the divorce by mutual consent was not proved, that on a divorce for misconduct there is no right to partition, and that the decision of the trial Court as to the value of the properties to be divided was mistaken. The lower appellate Court found that adultery on appellant's part was proved, that there was a divorce for misconduct from the moment when respondent discarded appellant for that misconduct, and that appellant was not entitled to partition of the property. Appellant comes to this Court in second appeal on the ground that adultery was not proved.

I may say at once that I know of no authority for the lower appellate Court's view that adultery on the part of the wife ipso facto puts an end to the marriage. The Courts recognize the validity of a divorce by mutual consent effected in the presence of elders, and this Court has recently said that desertion for a certain period ipso facto puts an end to a marriage, but so far as I know it has not yet been held that the husband's mere dismissal of the wife for adultery constitutes a valid divorce. Adultery on the part of the wife is of course a ground for divorce, but I doubt whether proof of such adultery sufficient to satisfy village elders entitles those elders to effect divorce against the will of the wife. I think that as the law at present stands the marriage subsists until it is dissolved by the Court except in the two cases, mentioned above, in which the Courts have recognised the validity of a divorce effected otherwise than by the decree of a Court. I think further that if a divorce by mutual consent is established, it is not open to either party to object to the partition, which such a divorce involves on the ground of misconduct of the other party.

In the present case I am of opinion that a divorce by mutual consent was proved. Respondent's own witness U. Pe Hlaw said that he attended before the elder U Sin because respondent had told him that his matter with appellant would be settled and respondent himself says that he told the elders to note that he had discarded appellant for misconduct and that from that day they would regard themselves as divorced. If there was a divorce at all at that time, it must, in my view of the law, have been a divorce by mutural consent, and such a divorce involves an equal division of property. But even if respondent can be regarded as having agreed to a divorce at that time under the misapprehension that he was still entitled to resist partition on the ground of his wife's misconduct, that is to say if the divorce before the elders can be regarded as a divorce which leaves open the question whether it is a divorce by mutual censent or a divorce for misconduct, and therefore leaves open the question of the right to partition as a result of that divorce. I think that respondent's defence would fail because I do not think that the evidence which he called was sufficient to establish the adultery which he alleged. He called the man with whom appellant was said to have committed adultery, but that man was a relation of his as well as his servant and it seems unlikely that if he believed that man had seduced his wife he would have kept him as his servant, and would have maintained friendly relations with him as he admittedly did.

The other evidence to prove the alleged adultery was equally worthless. The adultery is said to have taken place during respondent's absence in Mandalay when repondent's three children by an earlier wife as well as a relation of respondent's were sleeping in the same hut with appellant and the servant with whom oppellant is said to have committed adultery. The relation of respondent's a girl of 13, who had been invited to the house evidently to "play propriety" during respondent's absence, swore that the servant committed adultery with appellant while appellant was sleeping by her side. This story does not sound probable on the face of it, and when it is remembered that the girl is a relation of the respondent's to whom respondent had offered presents shortly before she gave evidence and that she is a daughter of another of respondent's witnesses Po Kyaing, who is a man of no substance, it is clear that her evidence carries little if any weight. Similar considerations affect the evidence of Po Kyaing who said that he once saw appellant and the servant disappear together among the growing paddy, while the evidence of Po Shin, who admits that

until recently he was an opium smoker, and that he owns no property of any sort is equally open to suspicion.

I agree with the Judge in the trial Court that the alleged adultery was not proved. I have no doubt that respondent suspected appellant of adultery, and that he was willing to agree to a divorce for that reason, but I do not think that he has proved that adultery so as to entitle him to resist her claim to partition, supposing that he is entitled to resist it on that ground.

I hold, therefore, that appellant was entitled to a ½ share of the property of the marriage.

It, therefore, thus becomes necessary to consider what that property was. Appellant alleged that the kanwin property consisted of 2 buffaloes valued at 150,3 pairs of gold bangles valued at 100, a set of gold buttons valued at 15,2 boxes valued at 20, crockery valued at 2/2 a looking glass valued at 5 bedding including a mosquito net, valued at 39 and clothes valued at 23-8. Respondent said in his written statement that 2 buffaloes were not kanwin property, but in his evidence he said that he did not know whether they were or not, and that at the time of the negotiations for the marriage he agreed that they might be regarded as kanwin, if the elders thought that they ought to be. I think, therefore, that the judgment in the trial Court was right in regarding them as kanwin. Respondent said that the gold bangles and the buttons had been pledged with a Chettyar for a debt for which he and appellant would both be liable and he called the Chettyar's clerk to prove this. I hold, therefore, that the gold bangles and buttons should be disregarded. As for the rest of the things, which appellant alleged to be kanwins respondent said that they were old and were over-valued in the plaint and this is clearly probable, since, it is unlikely that a cane box would be worth 10 or 5 cotton blankets would be worth 25. I think that if the value of these articles be taken at half the amount mentioned in the plaint justice will probably be done. I hold, therefore, that so far as the kanwin properties are concerned appellant is entitled to ½ the value of the buffaloes, that is to say 75 and ½ the value of the other properties excluding the gold bangles and buttons, that is to say to 244.

As for the properties acquired during the marriage I disregard the value of the paddy, which I am satisfied was paid in satisfaction of debts, and I allow appellant only ½ the value of the 150 baskets, which respondent admittedly retained. The value of this paddy at the rate claimed by appellant namely 180 per 100 baskets would be 270 and appellant's share would be 135. As for the clothing said to have been acquired during the marriage I think it fair to deal with it in the same way as the kanwin clothing and on this account I hold that appellant is entitled to 132.

I, therefore, set aside the judgments and decrees of the lower Court and give judgment for appellant for 247-6 with costs on that amount in all Courts. Appellant will pay the respondent the difference between the Court-fees and advocate's fees on 900 and these fees on 247-6 in the lower appellate Court.

M.N./R.K. *Appeal allowed.*

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* A. I. R. 1929 Rangoon 198

HEALD, J.

M. T. T. K. M. M. N. Chettyar Firm —Appellants.

v.

K. P. A. N. M. Firm and *others*—Respondents.

Civil Revn. No. 39 of 1929, Decided on 23rd May 1929, against judgment of Dist. Judge, Tharrawaddy, in Civil Misc. Appeal No. 164 of 1928.

(a) Civil P. C., S. 73—Scope.

Where each of the 3 decree holders of the same judgment-debtor took out execution of his decrees in the execution cases of the Sub-Divisional Court and also in execution cases of the Township Court and where one of them in execution case of the Sub-Divisional Court attached and brought to sale certain properties belonging to the common judgment-debtor and where the other decree-holders claimed rateable distribution in the Sub-Divisional Court the decree-holders are entitled to rateable distribution in respect of the decrees for which they had taken out execution in the Township Court as well as those for which they had taken out execution in the Sub-Divisional Court : *A. I. R.* 1928 *Rang.* 157, *Rel. on.* [P 199 C 2]

(b) Civil P. C., S. 96—Meaning.

It does not follow that because an appeal lies under the Letters Patent there is similar appeal in the Code. The right of appeal is

a right conferred only by express provision and in cases under the Code, unless the right is given by the Code, there can be no appeal. [P 199 C 2]

***(c) Civil P. C., S. 115—Appellate Court deciding correctly but without jurisdiction —High Court will not interfere in revision.**

Where the appellate Court has decided correctly but has decided without jurisdiction by holding that appeal lay where appeal did not lie, High Court will not interfere in revision. [P 200 C 1]

(d) Civil P. C., S. 73—Order under S. 73 is order in execution proceedings but is not decree within meaning of S. 47 and is not appealable.

An order under S. 73 is an order in execution proceedings but is not a decree unless all the conditions enumerated in S. 47 are present, and a question arising between rival decree-holders which does not affect or interest the judgment-debtor is not a question which arises between the parties to the suit in which the decree under execution was passed and so the decision of such question is not appealable: 42 *Cal.* 1, *Rel. on.*[P 200 C 1]

M. C. Naidu—for Appellants.

Bhattacharya—for Respondents.

Judgment.—All the present parties who are Chettyar firms hold decrees against one Tun Maung, and have taken out execution of his decree in Civil Execution 121 of 1928 in the Sub-Divisional Court, Tharrawaddy on 13th October 1928. Respondent 1 took out execution of his decree in Execution cases 87 and 93 of 1928 of the Sub-Divisional Court on 20th and 25th July 1928 respectively, and in execution case 188/28 of the Township Court on 14th July 1928. Respondent 2 took out execution of his decrees in Execution cases 101 and 111 of 1928 of the Sub-Divisional Court of 11th August 28 and 11th September 1928 respectively and in Execution case 276/28 of the Township Court on 20th September 1928. Respondent 3 took out execution of his decrees in Execution cases 92 and 106 of 1928, on 25th July 28, and 29th August 1928 respectively and in execution cases 259, 260, and 261 of 1928 of the Township Court on 8th September 1928. In execution case 93 of 1928 of the Sub-Divisional Court, Respondent 1 attached and brought to sale certain properties belonging to the common judgment-debtor Tun Maung, the sale being held on 29th October 1928.

The other parties claimed rateable distribution in the Sub-Divisional Court but the learned Judge following the decision of a single Judge of this Court in the case *Chettyar C. R. M. A. V. K. R. S.* v. *Chettyar* (1) held that rateable distribution could be had only in respect of decrees execution of which had been taken out in the Sub-Divisional Court. The learned Judge's attention was drawn to the decision of a bench of this Court in the case of *Kwai Tong Kee* v. *Lim Chaung Ghee* (2) but he said that in his opinion that decision neither overruled nor distinguished the earlier case and that it related merely to the procedure between the High Court and the Small Cause Court, Rangoon. Respondents appealed on the ground that the *C.R.M A.* case (1) was overruled by the decision in *Kwai Tong Kee's* case (2). Applicant objected that no appeal lay but the appellate Court overruled that objection on the ground that the decision in *Kwai Tong Kee's* case (2) was a judgment of this Court in an appeal. The learned Judge following the decision in *Kwai Tong Kee's* case (2) held that respondents were entitled to rateable distribution in respect of the decrees for which they had taken out execution in the Township Court as well as those for which they had taken out execution in the Sub-Divisional Court. Applicant applies for revision of that order on the ground that no appeal lay to the lower appellate Court, and that the holders of decrees which were being executed in Township Court were not entitled to rateable distribution.

As for the latter of those 2 grounds the decision in *Kwai Tong Kee's* case (2) is conclusive, and there is no room for doubt that the decision of the appellate Court on this point is correct.

On the question whether or not an appeal lay, the appellate Court over looked the fact that *Kwai Tong Kee's* case (2) was an appeal under the Letters Patent in which there is no provision for revision, and not under the Code and that it does not follow that because an appeal lies under the Letters Patent, there is similar appeal under the Code. The right of appeal is a right conferred only by express provision of law, and in cases under the Code, unless the right is given by the Code, there can be no appeal. In the case of *Balmer Lawries & Co.* v. *Jadunath* (3), a bench of the

(1) A. I. R. 1928 Rang. 96=5 Rang. 757.
(2) A. I. R. 1928 Rang. 157=3 Rang. 131.
(3) [1915] 42 Cal. 1 = 27 I. C. 644 = 19 C.W.N. 1202.

High Court of Calcutta said that an order made under S. 73 of the Code is an order in execution proceedings but is not a decree unless all the conditions enumerated in S. 47, are present, that a question arising between rival decree-holders, which did not affect or interest the judgment-debtor is not a question which arises between the parties to the suit in which the decree under execution was passed and that, therefore, the decision of such a question is not appealable. That decision was accepted by a bench of the High Court of Madras in the case of *Venkataperumal* v. *Venkata Reddi* (4) and I have no doubt that it is good law.

The question then arises whether in a case where the appellate Court has decided correctly, but has decided without jurisdiction, this Court ought to interfere in revision. Interference in revision is always a matter of discretion, since as S. 115 of the Code says that "the High Court may make such order in the case as it thinks fit." In this case since the effect of the District Court's order was to direct the doing of what according to law ought to be done, I see no reason to interfere in revision and I dismiss the application. In the circumstances of the case the parties will bear their own costs in this Court.

P.N./R.K. *Revision dismissed.*

(4) [1915] 39 Mad. 570=29 M. L. J. 96 = 29 I. C. 231=(1915) M. W. N. 334.

A. I. R. 1929 Rangoon 200

HEALD AND MAUNG BA, JJ.

Ma Mon Tha and *others*—Applicants.

v.

Ma San and *others*—Respondents.

Civil Revn. No. 316 of 1928, Decided on 17th May 1929, against decision of Dist. Judge, Myingzan, in Civil Appeal No. 39 of 1928.

Provincial Small Cause Courts Act, Art. 4 — Growing palm tree is immovable property—Burma General Clauses Act.

The definition of immovable property given in the Burma General Clauses Act applies to the Provincial Small Cause Courts Act and as growing palm tree is immovable property for the purposes of the former Act, it is also immovable property for the purposes of the latter Act: 24 *Bom.* 31; 23 *All.* 291; *A. I. R.* 1927 *Pat.* 1; *A. I. R.* 1928 *Pat.* 652; 38 *Mad.* 883; *A. I. R.* 1927 *Rang.* 94; *Cons.* and *Dist.* 19 *Bom.* 207; 3 *M. H. C.* 237, *Con.* [P 203 C 1]

S. Gunguli—for Applicants.

P. K. Basu—for Respondents.

Heald, J.—The parties to this litigation are descendants of a common ancestor, Shwe Ban, applicants being the widow and children of Maung Tun, a son of Shwe Pan's son Tha Dun Aung, while respondents are Tha Dung Aung's half-brothers and sisters, being children of Shwe Pan by a wife other than Tha Dun Aung's mother. They are litigating about a poddy palm grove valued at Rs. 300. Applicants are in possession of the grove and they allege that it belonged to Tha Dun Aung who gave it to his son Maung Tun from whom they inherited it. Respondents on the other hand say that they received it as their share of the estate of Shwe Pan, as a result of arbitration proceedings between them, and Tha Dun Aung's widow Ma Pyu, and that applicants are merely tenants of Ma Pyu. It is to be noted that the litigation relates only to the growing trees and not to the lands on which they stand, the separate ownership of growing palm trees and the land on which they stand being recognized in this province where such trees and land are separately assessed to revenue. The trial Court dismissed respondent's suit, but the District Court on appeal gave them a decree for possession of the trees. Applicants have now filed an application in revision against the decision of the District Court, but under S. 115 of the Code, no revision lies if the decree is appealable. The decree is appealable under S. 100 of the Code if the suit is not of the nature cognizable by Courts of Small Causes, and it is appealable under S. 11, Burma Courts Act if it is not a suit of the nature cognizable by a Court of Small Causes, under the Provincial Small Cause Courts Act, but is a suit relating to immovable property or to any right or interest in immovable property or is a suit in which it is necessary to decide any question relating to succession, or inheritance. So far as both the Code and the Act are concerned, the question whether the suit is one of the nature cognizable by Courts of the Small Causes arises, and so far as the Act is concerned the further question might arise as to whether or not it is a suit in which it is necessary to decide a question relating to succession or inheritance. It is not suggested that that

further question arises in this case but it has been assumed that the suit is one of the nature cognizable by Courts of Small Causes on the ground that growing palm trees are not immovable property and therefore a suit for possession of them is not within the purview of Art. 4 of the Sch. 2 to the Provincial Small Cause Courts Act.

In Upper Burma suits for possession of palm groves or growing palm trees have for many years been regarded as suits for immovable property probably on the strength of the ruling in the case of *Po Thein* v. *Maung To* (1), where it was held that growing palm trees are not "standing timber" within the meaning of these words in S. 3 of the Upper Burma Registration Regulation so as to be excluded from the definition of immovable property for the purpose of that Regulation. But in the case of *Maung Kywe* v. *Maung Kala* (2) a learned Judge of this Court, following the case of *Natesa* v. *Tengavelu* (3) held that a lease of growing palm trees was not a lease of immovable property within the meaning of definition of immovable property given in the Transfer of Property Act, and that the rent reserved by such a lease did not fall within the definition of rent given in that Act, and that therefore a suit for such rent was not a suit for "rent" within the meaning of Art. 8, Sch. 2, Provincial Small Cause Courts Act, but was a suit of the nature cognizable by Courts of Small Causes. In support of the view that growing trees are immovable property the following cases have been cited namely *Kishnarao* v. *Babaji* (4), *Muhammad Sadiq* v. *Laute Ram* (5), *Bodha Gandheri* v. *Ashleke Singh* (6) and *Lalaji Singh* v. *Nawab Chowdhury* (7). On the other side besides the Rangoon case, only the case of *Natesa* v. *Tangavelu* (3) mentioned therein has been cited. The decision in *Kishnarao* v. *Babaji* (4) related to the question, whether a growing mango tree was immovable property far the purpose of S. 3, Registration Act of 1866, which like the present Registration Act excluded a "standing timber" from the definition of immovable property and the learned Judges said that "timber" meant properly such trees only as are fit to be used on building and repairing houses and that a mango tree, which is primarily a fruit tree might not always come within the term. They decided, however, on the strength of the statement of the Judge in the trial Court that a mango tree though a fruit bearing one, may be classed as a timber tree, especially in this part of the country (Ratnagiri) where its wood is often used for building houses," that the tree in that case should be regarded as moveable property for the purposes of the Registration Act. The case of *Mahomed Sidiq* v. *Laute Ram* (5) did not really raise or decide the question whether or not growing trees are immovable property. The question raised in that case was whether on partition by a Revenue Court, which had statutory jurisdiction to partition "land," the trees growing on the land passed by such partition and it was held that they did pass as being part of the land.

The case of *Bodhi Gandheri* v. *Ashleke Singh* (6) was a suit for possession of growing mango trees which was alleged to have been transferred by an unregistered deed of gift. The question was raised whether growing mango trees were "standing timber" within the meaning of S. 3, present Transfer of Property Act, which like the Registration Act excludes "standing timber" from the definition of immovable property. The learned Judges expressed an opinion that in the peculiar circumstances of that case and having regard to the fact that the tree in suit was not intended to be used as timber but was intended and was in fact used for the purpose of enjoying the fruits from it, the tree must be regarded as "immovable property" and not moveable property for the purpose of the Transfer of Property Act. The case of *Lalji Singh* v. *Nawab Chowdry* (7) related to the definition of "immovable property" in the Registration Act and the following passage occures in the Judgment:

> "The question, therefore, is whether fruit trees such as mango trees are to be regarded as standing timber or not. In my opinion they clearly are not standing timbers. They are not intended for use as timber at all, they

(1) [1902-03] 2 U. B. R. 1.
(2) A. I. R. 1927 Rang. 94=4 Rang. 503.
(3) [1914] 38 Mad. 883=23 I. C. 102=(1914) M. W. N. 327.
(4) [1899] 24 Bom. 31=1 Bom. L. R. 489.
(5) [1909] 23 All. 291=(1901) A. W. N. 86 (F.B.).
(6) A. I. R. 1927 Pat. 1=5 Pat. 765.
(7) A. I. R. 1928 Pat. 652=7 Pat. 646.

are in the ordinary course used merely as fruit trees, that is to say, they are there for the purpose of yielding fruit and not for the purpose of being cut down in order to be converted into furniture or parts of houses or for any other purpose for which timber is ordinarily used. It may be that occasionally mango wood is used for the same purpose as ordinary timber, but if so it must be very exceptional. The wood of the mango tree is not in my experience of such a nature that it can be said to be used generally as timber. In the result the learned Judges held that for the purpose of the Registration Act growing mango trees are not "standing timber" and are therefore "immovable property."

In the Case of *Natesa* v. *Tangavelu* (3) a written lease of certain palm trees had been given, and the question arose whether that lease needed to be registered. The learned Judge found that the interest conveyed by the document which was the right to take toddy and fruit from the trees for two years was not for the purposes of the Registration Act an interest in immovable property since it proceeded to some extent on a consideration of the fact that fruit upon and juice in trees are moveable properties. It will have to be noticed that in all these cases in so far as they dealt with the question whether or not growing trees are to be regarded as immovable properties dealt with that question in relation to either the Transfer of Property Act or the Registration Act. But the definitions of "immovable property" given in those Acts do not apply to the Code or to the Burma Courts Act, or to the Provincial Small Causes Courts Act.

The definition of "immovable property" which applies to the Code is that given in the General Clauses Act 1897, which says that in all of the Governor General in Council Acts and Regulations made after the commencement of that Act, unless there is anything repugnant in subject of contexts "immovable property" shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth but so far as the Code is concerned that definition is modified by the statement in the Code itself that moveable property includes growing crops. The definition which applies to the Burma Courts Act is that given in the Burma General Clauses Act, which is the same as that given in the General Clauses Act of 1897. There is no definition of immovable property which by law applies to the Provincial Small Cause Courts Act, because that Act was passed before the General Clauses Act of 1897 came into force and the earlier General Clauses Act contained no definition of immovable property, but I think that in the absence of anything repugnant in the subject or context the definition given in the General Clauses Act which is the same as that given in the General Clauses Act 1897, certainly applies to the Provincial Small Cause Courts Act. There seems to be little case law on the Subject of the meaning of immovable property in the Code, but in the case of *Sakharam* v. *Vishram* (8) the High Court of Bombay held that a suit for possession of a growing Jack fruit tree was a suit for immovable property.

As for the Small Cause Courts Act, the High Court of Madras in the case of *Shanti* v. *Vepa* (9) which does not seem to have been officially reported said that a Small Cause Court cannot entertain a suit for possession of a growing Jack fruit tree, which is certainly immovable property.

If growing palm or fruit trees are immovable properties for the purpose of the Transfer of Property Act and the Registration Act, which exclude "standing timber" from the definition of "immovable property" then a fortiori they would be immovable property for the purposes of the General Clauses Acts which say that immovable property included things "attached to the earth," the words "attached to the earth" having already been defined in the Transfer of Property Act as meaning among other things "rooted in the earth as immovable properties in the cases of trees and shrubs" In the Upper Burma case already cited, reference is made to the definition of timber given in Wharton's Law Lexicon, and Strued's Judicial Dictionary and it may be useful to refer to the definition given in the New English Dictionary. There "timber" is said to be building material generally wood, used for the building of houses ships, etc., for the use of carpenter, joiner, or other artisan, wood in general as a material especially after it has been suitably trimmed and squared into logs or further adapted to constructive uses.

(8) [1895] 19 Bom. 207.
(9) 3 M. H. C. 237.

The word is said to be applied to the wood of growing trees capable of being used for structural purposes and hence collectively to the trees themselves as a "Standing timber" and in English law to embrace generally the oak, ash, and elm of the age of 20 years or more and in the particular districts by local custom including other trees such as birch, in the county of York and beech in the county of Buckingham. The Dictionary cites Blackstone as saying that Oak, Ash and Elm are timber in all places, and in some particular Counties by local custom where other trees are generally used for building, they are therefore considered as timber. It is probable that the framers of the Transfer of Property Act and the Registration Act were familiar with the meaning of the word "timber" in England and used this word instead of the word "trees" intending to include only trees ordinarily used as material for buildings, ships, furniture and the like, and to exclude trees, not so used. The view that "standing timber" on the Registration Act means trees "intended for early conversion into timber" has been adopted by Government of Burma in Direction 24 of the Burma Registration of deeds, Directions, and it is clear that there is judicial authority for that view. I think therefore that growing toddy palm trees are ordinarily immovable property under the Transfer of Property Act, the Registration Act, and that there are certainly immovable properties within the definition of the General Clauses Acts and are therefore "immovable properties" for the purposes of the Code, and the Burma Courts Act, and I see no reason to believe that they are not immovable properties for the purposes of the Small Cause Courts Act. I would therefore hold that the present suit being a suit for possession of immovable property is not a suit of the nature cognizable by Courts of Small Causes, and that therefore a second appeal lies, and that the application for revision is incompetent.

Maung Ba, J.—I concur.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Rangoon 203

Full Bench

RUTLEDGE, C. J., AND MAUNG BA AND HEALD, JJ.

Emperor—Applicant.

v.

Maung Pu Kai and *another*—Accused.

Criminal Revn. No. 319-A of 1929 and Criminal Ref. 39 of 1929, Decided on 12th June 1929, against order of Special Power Magistrate of Yamethin, D/- 17th December 1928.

(a) Penal Code, S. 114—Person punishable under particular section of Code read with S. 114 is punishable as principal and is guilty of substantive offence.

A person, who is punishable under the particular section of the Code read with S. 114, is punishable not as an abetter but as a principal and is guilty of the substantive offence and not merely of abet ment of that offence: 10 *Bom. L. R.* 26 *Discussed* and *Doubted.* [P 206 C 2]

(b) Penal Code, S. 114—If person is convicted of offence under particular section of Code read with S. 114 and if that offence renders him liable to whipping in lieu of or in addition to other punishment either under Whipping Act or Burma (Amendment) Act 18 of 1927, he is so punishable.

If a person is convicted of an offence under a particular section of the Code read with S. 114 and if the offence under the particular section of the Code renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma (Amendment) Act (8 of 1927), the person so convicted is punishable with whipping in lieu of or in addition to any other punishment; 7 *L. B. R.* 63, *Appr.* and *Dist.* [P 207 C 1]

(c) Penal Code, S. 109—Court is not justified in saying that words 'punishment provided for offence' in S. 109 mean punishment for offence either in Penal Code or in some special or local law—Interpretation of Statutes. (*Per Baguley, J. In the order of Reference*).

Although a Penal law must be interpreted as far as possible in favour of the subject still the Court is not justified in adding at the end of the section a qualifying or explanatory phrase which is not to be found in the section itself. That being so the Court is not justified in saying that the words "punishment provided for the offence" in S. 109 mean punishment provided for the offence either in the Penal Code or in some special or local law: 7 *L. B. R.* 63, *Discussed* and *not Appr.* [P 204 C 2]

(d) Penal Code, S. 40—Scope.

(*Per Baguley, J.—In the order of reference*).—S. 40 refers to the definition of the word "offence" and it in no way refers to the punishment of the offence. [P 205 C 1]

Order of Reference.

Baguley, J.—One of the accused in this case, Maung Hmen, alias, Hmon Gyi has been convicted under S. 326,

I. P. C., read with S. 114 and sentenced to two and half years rigorous imprisonment and 30 lashes. He appealed to the Sessions Judge, Yamethin, but the appeal was dismissed. The case has been sent for by this Court to consider the legality of the sentence of whipping in addition to imprisonment in the case of a conviction under Penal Code, S. 326 read with S. 114. It appears from a perusal of the judgment that the offence really was punishable under S. 326, I. P. C., read with S. 109. The legality of sentences of whipping in cases of abetments is not very clear and there seems to have been some divergence of opinion in this Court as to whether abetment of an offence mentioned in S. 3, Burma Act 8 of 1927 can be punished with whipping in lieu of or in addition to any other punishment to which the offender may be liable under the Penal Code. In view of this divergence of opinion and of the importance of the point (for at present moment Magistrates are being urged on the one hand to pass sentences of whipping, whenever they can be legally passed and appear suitable, and on the other hand are being severally dealt with when they pass illegal sentences of whipping) I refer the matter to a Bench or a Full Bench as may commend itself to the Honorable Chief Justice. The only recorded case that I can find on this point is a ruling of the late Chief Judge of the Chief Court of Lower Burma, then Twemey, J., recorded as *King Emperor* v. *Po Han* (1). The head-note of this ruling is:

"Persons (other than juvenile offenders) convicted of abetment of theft (or of any other offence specified in S. 3, Whipping Act 1909) cannot be punished with whipping under the provisions of that section."

This case was apparently not argued in Court and the gist of the judgment is as follows:

"The words punishment provided for the offence in S. 109, I. P. C. mean the punishment provided for the offence either in the Penal Code or in some special or local law: (see Ss. 40 and 41)."

The Judge then goes on to point out that the Whipping Act is not a Special or a local law within the meaning of Ss. 40 or 41 and that therefore the offence of abetment of an offence mentioned in S. 3, Whipping Act, 1909 cannot be punished with whipping. S. 109 is quite clear in its phraseology. It runs as follows:

(1) [1914] 7 L. B. R. 63=22 I. C. 147=7 Bur. L. T. 99.

"Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence."

The addition made by Twemey, J., of the words "either in the Penal Code or in some special or local law" do not appear in S. 109 and I see no ground for supposing they were ever intended to be there. Words when perfectly plain and clear must be given their natural meaning and although I fully recognize that a Penal law must be interpreted as far as possible in favour of the subject, I do not think that a Court is justified in adding at the end of a section a qualifying or explanatory phrase, which is not to be found in the section itself. It appears to me that one reason why this clause has been added and has found favour in the eyes of some Judges is that the Whipping Act of 1909 in certain cases mentions abetments in relation to certain offences, but does not mention the word "abetments" in relation to other offences. For instance S. 4 (a) makes whipping specially applicable to the offences of abetment, commission or attempt to commit rape, while in S. 5 which relates to juvenile offenders, abetments, commission, and attempts at commission of certain offences are made punishable by whipping. In my opinion, however, the fact that abetments are mentioned in some places and not in others is not a conclusive proof that it was the intention of the legislature to make all other abetments not punishable with whipping. The offence of abetment is punishable in various ways, according to the form in which the abetment takes place. S. 109 makes one form of abetment, which has certain results punishable with the same punishment provided for the offence itself. S. 110 relates to another form of abetment with other consequences. S. 111 is the same, so are Ss. 112, 113, 115, 116 and 117. When abetment of a certain offence is specially made punishable with whipping I take it that abetment of that offence coming under any section from S. 109 to 117 would be punishable with whipping, but at the moment I am only concerned with abetments punishable under Ss. 109 and 114. With regard to abetments punishable under S. 114 it seems to me personally that there can be no possible doubt. S. 114 says that a per-

son who is punishable under that section read with some substantive section

" shall be deemed to have committed such act or offence, that is, the act or offence mentioned in the substantial section."

When a man is deemed to have committed an offence, I take it that that means that in the eyes of the law he is to be treated as though he had committed the offence and is liable to all the pains and penalties which the commission of the offence may bring upon him. If the commission of an offence makes the man, who commits it liable to whipping, he must also be regarded as liable to whipping if he is deemed to have committed the offence, for in the eyes of law he has committed the offence and is liable to all the consequences entailed thereby.

With regard to S. 109, the Code says that the man who abets an offence for which he is liable under S. 109 read with some substantive section shall be punished with the punishment provided for the offence mentioned in the substantive section and does not specify in what way the punishment may be prescribed. The reference to S. 40 is in my opinion inapt. S. 40 refers to the definition of the word "offence" and it in no way refers to the punishment for the offence. The offence contemplated in this order of reference are offences under the Indian Penal Code which are punishable either under the Code or under another Act. When the Code says that they shall be punished with the punishment provided for the offence, I see no limit in the words which would restrict the punishment to the punishment prescribed under the Indian Penal Code.

I would therefore refer the following questions :

(1) If a person is convicted of abetment of an offence under the Indian Penal Code for which he is liable to punishment under S. 114 read with the section of the Indian Penal Code applicable to the offence and if the offence under that section renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act 8 of 1927, is the person so convicted punishable with whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act 8 of 1927 and is the person so convicted punishable with whipping in lieu of or in addition to any other punish ment ?

(2) If a person is convicted of abetment of an offence under the Indian Penal Code for which he is liable to punishment under S. 109 read with the section of the Indian Penal Code applicable to the offence and if the offence under that section renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act 8 of 1927, is the person so convicted punishable with whipping in lieu of or in addition to any other punishment ?

Heald, J.—In his Criminal Reg. Trial No. 83 of. 1928, the Special Power Magistrate, Yamethin, convicted an offender under S. 326 read with S. 114, I. P. C., and sentenced him to 2½ years rigorous imprisonment and 30 stripes whipping under S. 326 of the Code and S. 3 of the Whipping (Burma Amendment) Act 1927.

The learned Judge of this Court before whom the case came in revision suggested that S. 109 should have been applied to the case instead of S. 114 and raised the question of the legality of a sentence of whipping in a case to which either S. 114 or S. 109 applies. He has accordingly referred the following questions :

(1) If a person convicted of abatement......... other punishment ?

(2) If a person is convicted.........to any other punishment ?

It is clear that on the case only the former of these 2 questions arises. S. 3, Whipping (Burma Act 1927), renders

" any person who commits an offence under S. 326, I. P. C. punishable with whipping in lieu of or in addition to any other punishment. under S. 4, Whipping Act."

Section 4, Whipping Act says that whoever abets, commits or attempts to commit rape or "commits" certain other offences may be punished with whipping in lieu of or in addition to any other punishment to which he may for such offence, abetment or attempt be liable under the Indian Penal Code. S. 114, I. P. C. says that whenever any person, who if absent would be liable to be punished as an abetter, is present when the act or offence for which he would be punishable in consequence of the abetment is committed he "shall be deemed" to have committed such act or offence, while S. 109 of the same Code says that whoever abets an offence shall, if the offence is committed in consequence and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence. There is so far as I know no case law bearing directly on the question whether or not a person who under S. 114 of the Code "is deemed to have committed" an offence is punishable whith whipping under Ss. 3 or 4,

Whipping Act, if the offence is one of those mentioned in these sections other than rape, the abetment of which is spe^ifically mentioned in S. 4 Whipping Act.

In the case of *Emperor* v. *Kashia Antoo* (2) which was decided by a single Judge of the High Court of Bombay, an offender was convicted of theft under S. 379 read with S. 114 of the Code, and the question was raised whether or not the provisions of S. 75 of the Code could be applied to the case, that is to say, whether or not he was guilty of the offence of theft. The learned Judge said

"It seems to me that nothing could have been easier for the legislature, had it intended the abetment of an offence ············ to be included under S. 75 than to have said so."

He went on to say that S. 114 of the Code does not say

"he shall have committed such act or offence but he shall be deemed to have committed such act or offence."

In other words he is to be treated in the same way as if he had committed the offence. That is not the same thing to my mind as saying he has committed the offence . . . . Mr. J. Chandavarker has recently put a construction under the words "shall be deemed" when used by the legislature as follows

"when one thing is not the same as another thing, but the legislature says that it shall be deemed to be

the same thing, it creates a legal fiction, and in that case,

"the Court is entitled and bound to ascertain for what purposes and between what persons the statutory function is to be resorted to, per James, L. J. in *Ex parte Walton* (3). And fictions creted by law shall never be contradicted so as to defeat the ends for which they are invented, though for every other purp ose they may be contradicted. *Mostyn* v. *Fabrigas* (4), *Emperor* v. *Atmaram* (5). It appears to me that this is the a correct construction to be put upon these words. The effect of S. 114, therefore, is that if a man is present at a commission of an offence he is to be deemed to have committed it not that he has committed it."

With all respect for the opinion of the learned Judge, I suggest that the legal fiction in this case was created by the legislature between the Court and the offender for the purpose of enabling the Court to punish the offender for the substantive offence, and that as the learned Judge says, for that purpose he is to be treated in the same way as if he had committed the offence, that is to say, he must be regarded by the Court as having committed the offence. In my opinion a person who is convicted of an offence under a particular section of the Indian. Penal. Code read with S. 114 of that Code is not convicted of abetment ,but is convicted of the substantive offence. S. 114 deals expressly with " a person who if absent would be liable to punishment as an abetter," and provides that such person if present when the offence for which he would be punishable " in consequence of the abetment" is committed, he shall be deemed to have committed the offence. I cannot read that section otherwise than as meaning that such a person is more than an abetter, and that he is in fact what is called in English law a principal in the second degree. It is true that that section is included in the chapter of the Code which deals with "abetment" but that chapter deals in Ss. 118, 119, and 120 with matters which it does not call 'abetment' and which in particular cases might possibly not fall within the definition of abetment and it was obviously a matter of convenience to include in the chapter which deals with abetment, a section which deals with the circumstances in which a person, who has in fact abetted an offence, and who even as as an abetter might be punished for the offence committed, is to be regarded as more than an abetter and is " to be deemed to have committed the offence."

For these reasons I am of opinion that the decision of the learned Judge who decided *Kashia Antoo's* case (2) was mistaken, and I would hold that a person, who is punishable under a particular section of the Indian Penal Code read with S. 114, is punishable not as an abetter but as a principal and is guilty of the substantive offence and not merely of abetment of that offence. I entirely agree with the view taken by learned Judge of the Chief Court of lower Burma in the case of *Emperor* v. *Po Han* (1), that the wording of the Whipping Act is inconsistent with the view that abetment of the offences which are mentioned in that Act (or to which that Act is made applicable by the Whipping (Burma Amendment Act 1927), is punishable with whipping except in cases where abetment is expressly made so punishable, but I regard cases in which S. 114

(2) [1908] 10 Bom. L. R. 26.
(3) [1881] 17 Ch. D. 746.
(4) [1774] 1 Cowp. 161, 177.
(5) [1907] 31 Bom. 480=9 Bom. L. R. 661.

is applied not as cases of abetment, but as cases where the offender is punishable for the substantive offence as principal. I would accordingly answer the question which arises on the reference as follows :

"If a person is convicted of an offence under a particular section of the Indian Penal Code read with S. 114 of that Code, and if the offence under the particular section of the Code renders the offender liable to whipping in lieu of or addition to any other punishment either under the Whipping Act, or under Burma Amendment Act (8 of 1927) the person so convicted is punishable with whipping in lieu of or in addition to any other punishment."

Maung Ba, J.—I concur.

Rutledge, C. J.—I concur.

P.N./R.K. *Reference answered.*

A. I. R. 1929 Rangoon 207

CUNLIFFE, J.

J. R. Baroni—Plaintiff.

v.

Secy. of State—Defendant.

Original Civil Regular Case No. 75 of 1929, Decided on 6th May 1929.

Government of India Act (1919), S. 96-B—Rules under R. 14—Person occupying position of Extra Assistant Commissioner dismissed—He bringing suit against Crown in damages for wrongful dismissal on ground that provisions of R. 14 and Circular G. No. 18 of 1926 issued by Government of Burma were not followed—Though he cannot rely on alleged breach of procedure in Circular G. No. 18, he is not precluded from bringing suit and decision of case will depend on alleged breach of formalities in R. 14.

Where a person, who occupied the position of E. A. C. was dismissed from his appointment and he brought a suit against the Secretary for State for India in Council in damages for wrongful dismissal on the ground that the provisions of R. 14 and the Circular G. No. 18 of 28th April 1926 issued by the Government of Burma, Central Department were not followed, though he cannot rely on the alleged breach of the procedure laid down in Circular G. No. 18 as such order is purely an executive one, he is not precluded from bringing his action and decision of the case will depend on the consideration of the alleged breach of the formalities laid down in R. 14. *Gould* v. *Stewart*, (1896) *A. C.* 575, *Appl. A.I.R.* 1927 *Cal.* 311, *Rel. on.* [P 208 C 2]

Plaintiff in person.

Govt. Advocate—for Defendant.

Judgment.—The plaintiff in this action is one J. R. Baroni, who formerly occupied the position of Extra Assistant Commissioner in the Burma Civil Service. His plaint alleges that on 9th January 1927, he was suspended from office, and on 30th April 1927, he was dismissed from his appointment by the order of the Local Government. He now sues the Secretary of State for India in Council in damages for wrongful dismissal. The suit is brought in forma pauperis. The reply of the Crown is in the form of a demurrer. It is contended on behalf of the Secretary of State that in the circumstances no action lies. S. 96-B. Government of India Act 1919, in its particulars, material to this case, runs as follows:

(1) Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State for India in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

If any such person thus appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a Governor's province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may without prejudice to any other right of redress, complain to the Governor of the province in order to obtain justice and the Governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed delegate the power of making rules to the Governor-General in Council or to Local Governments, or authorize the Indian legislatures to make laws regulating the public services.

Under this subsection rules were made regarding the Civil Services of India by the Secretary of State. R. 14 is in these terms:

"Without prejudice to the provisions of the public Servants Inquiries Act, 1850 in all cases in which the dismissal removal or reduction of any officer is ordered, the order shall except when it is based on facts or conclusions established at a Judicial trial, or when the officer concerned has absconded with the accusation hanging over him, be proceeded by a properly recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused the evidence in support of it and any evidence

which he may adduce in his defence shall be recorded in his presence, and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded in each charge."

On 28th April 1926, the Government of Burma, general department issued a Circular G No. 18 of 1926. This circular dealt exhaustively with departmental enquiries, particularly those which involved the dismissal or removal of public servants. Elaborate directions were given as to conduct of those enquiries and any appeals which might be preferred against orders passed in relation to removal or dismissal. The plaintiff alleges inter alia that the provisions of R. 14 and Circular G No. 18 have not been followed in his case. S. 32, Government of India Act (on which some reliance was also placed by the plaintiff) as far as sub-S. (1) and (2) are concerned is in this form:

"(1) The Secretary of State in Council may sue and be sued upon by the name of the Secretary in Council as a body corporate."

(2) Every person shall have the same remedies against the Secretary of State in Council, as he might have had against the East India Company, if the Government of India Act 1858, and this Act had not been passed."

I may say at once that S. 75 of 3 and 4 William 4 Chap. 85. lays down that:

"Nothing in this Act shall take away the power of the said Court of directors to remove or dismiss any of the officers or servants of the said company, but that the said Court shall and may at all times have full liberty to remove or dismiss any such officer or servants at their will and pleasure."

I have been unable to discover any later statute dealing with the same power of the Court of Directors of the Old East India Company, and therefore am of opinion that as far as S. 32, Government of India Act is concerned this section does not assist the plaintiff's claim. It is now well established law that, apart from some special statutory safe-guard, no action will lie against the Crown for the wrongful dismissal of a servant of Government. This rule of law is based upon public policy and a prerogative right of the Sovereign. In certain cases however, it has been held that a statute dealing with Governmental employment has by its provisions qualified and restricted the right of the Crown in this regard. Such was the view held by the Privy Council in *Gould* v. *Stewart* (1). There the construction of a New South Wales Statute, the Civil Service Act of 1884 was under consideration. Apparently the Act in question did not contain the words during his Majesty's pleasure or any similar words referring to the prerogative of the Crown. It was contended however, that such words must be implied or imported into any Act of this nature. The Privy Council were of opinion that that was so, in all ordinary cases, following the decisions on *Dunn* v. *Reg* (2) and *De Doshe* v. *Reg* (3), but they held that this particular Act of Parliament in Part 3 thereof contain special provisions for the protection of Government servants, which restricted the unlimited power of the Crown to dismiss them. In principle I am unable to distinguish the case before me now, from the decision in *Gould* v. *Stewart* (1). To my mind, the meaning of the words.

"Subject to the provisions of the Act, and of the rules made thereunder, every person in the civil service of the Crown in India, holds office during His Majesty's pleasure "

read together with R. 14, is quite clear. They indicate that certain formalities must be observed before a civil servant can be dismissed, and so far as these formalities are alleged not to have been followed, the plaintiff is not precluded from bringing his action. I am fortified in my opinion by a similar view expressed by Buckland, J. in the very analogous case of *Satis Chandra Das* v. *Secretary of State* (4). I do not consider however that any alleged breach of the procedure laid down in Circular G No. 18 of 1926, can be relied on by the plaintiff as I regard this order as purely executive one, and not flowing directly from the Statute. The plea of demurrer is therefore dismissed. The case will therefore proceed in the restricted line I have indicated, and will be confined to a decision on the alleged breach of the formalities laid down in R. 14. Costs will be in the cause.

P.N./R.K. *Order accordingly.*

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(1) [1896] A. C. 575=65 L. J. P. C. 82=75 L. T. 110.

(2) [1896] 1 Q. B. 116=65 L. J. Q. B. 279=60 J. P. 117=44 W. R. 243=73 L. T. 695.

(3) [1896] 1 Q.B. 117.

(4) A. I. R. 1927 Cal. 311=54 Cal. 44.

A. I. R. 1929 Rangoon 209 (1)

CHARI, J.

U. Mauug Gyi—Applicant.

v.

Naungbo Co-operative Credit Society—Respondent.

Civil Revn. No. 47 of 1929, Decided on 8th May 1929, for leave to sue in forma pauperis.

Civil P. C., O. 33, R. 5—Court cannot dismiss application for leave to sue as pauper by going beyond allegations therein.

Where the allegations made in the application for leave to sue as a pauper show a cause of action, the Court cannot dismiss the application by going beyond the allegations and taking into consideration the evidence of the defendant to the suit. [P 209 C 2]

A. Loo Nee—for Respondent.

Judgment.—The petitioner in this Court U Maung Gyi filed an application for leave to sue in forma pauperis. He alleged that he cultivated his land measuring 120 acres forming part of the Naungbo Athin land, that the paddy the produce of the land valued at about Rs. 7,000 was taken away by the respondent society the Naungbo Co-operative Credit Society by its chairman U. Aung Myat and that the petitioner U. Maung Gyi asked for the return of his paddy or its value and not having got either the one or the other the petitioner filed the present suit. He has filed a schedule showing the property of which he is now possessed, which according to him is of the value of Rs. 58-10-0. The learned Additional District Judge on the application for leave to sue in forma pauperis stated that he doubted the claim, and that he would like to examine the applicant under O. 33, Civil P. C. R. 4, O. 33, allows such a procedure. The petitioner was examined presumably under the power given in O. 33, R. 4, but the Additional District Judge did not stop there and went further and examined U. Aung Myat, the defendant, who naturally denied plaintiff's claim. U. Aung Myat is a Karen Christian, who was made to swear on the Kyanza* and, his evidence must, therefore, be rejected as not having been taken in accordance with the provisions of law. But even if it had been properly taken it should not be taken into consideration in passing an order under O. 33, R. 5.

So far as the record goes there is nothing to show that the statement of U Maung Gyi is false, and that of U Aung Myat is true. The learned Judge of District Court dismissed the application purporting to do so under O. 33, R. 5, Cl. (d). That clause provides that where the allegations do not show a cause of action the application for permission to sue as a pauper shall be rejected. The allegations in the petition do show a cause of action and it is by going beyond the allegations and considering the statement of U. Aung Myat which the Additional District Judge has no business to do that the Judge concluded that the statement of claim in the petition is not true. The procedure of the Additional District Judge is misconceived and his order is wrong. There has been no enquiry into the pauperism of the partitioner. The order of the District Judge is set aside and the matter is remanded for enquiry into pauperism and disposal according to law. There will be no order as to costs since neither party is responsible for the order of the District Judge.

P N./R.K. *Case remanded.*

* "Kyanza" is a book of imprecation on which oaths are generally administered to Burman Buddhists (for its test see p. 57. Burma Courts Manual Vol. 1—Ed.)

A. I. R. 1929 Rangoon 209 (2)

MAUNG BA, J.

Emperor

v.

Po Thin Gyi—Accused.

Criminal Revn. No. 1281-A of 1928, Decided on 3rd December 1928.

Criminal P. C., S. 236—Alternative charges cannot be combined under one charge—S. 236 applies when the law applicable and not facts are in doubt—Conviction in the alternative is bad when distinct finding as to facts is not arrived at.

Alternative charges under two sections cannot be combined together in one head of charge. If the Magistrate desires to charge the accused in the alternative he must frame two separate alternative charges. Section 236 does not apply where there is any doubt as to the facts, but applies where there is a doubt as to the law applicable to a certain set of facts which have been proved. While the facts are in doubt there is no objection to the Magistrate framing alternative charges, but at the conclusion of the case he is not entitled to compromise his doubts as to the true facts of the case by convicting in the alternative. He is bound to come to a distinct finding as to the facts, and then only if the law applicable to the facts which he considers to have

been proved is doubtful, he may convict in the alternative. [P 210 C 1]

Judgment.—The accused in this case has been convicted, in the alternative, either of having committed the offence of theft of two cart wheels, under S. 379, I. P. C., or of having committed the offence of having taken a gratification of Rs. 5 for the restoration of the said cart wheels without taking any steps to cause the thief to be apprehended, under S. 215, I. P. C. The case has been very badly tried. Alternative charges under two sections cannot be combined together in one head of charge. If the Magistrate desires to charge the accused in the alternative, he must frame two separate alternative charges. Moreover, the facts stated in the charge do not comprise the essential ingredients of an offence under S. 215. Furthermore the conviction in the alternative is bad. Section 236, Criminal P. C., does not apply where there is any doubt as to the facts, but applies where there is a doubt as to the law applicable to a certain set of facts which have been proved. While the facts are in doubt there is no objection to the Magistrate framing alternative charges, but at the conclusion of the case he is not entitled to compromise his doubts as to the true facts of the case by convicting in the alternative. He is bound to come to a distinct finding as to the facts, and then only if the law applicable to the facts which he considers to have been proved is doubtful, he may convict in the alternative.

In the present case there was no doubt whatever as to the facts, or as to the law applicable thereto. There was no evidence whatever to connect the accused with the theft of the cart wheels, and the facts proved were that the accused obtained a gratification of Rs. 5 to restore the stolen cart wheels, and then took no steps either to recover the wheels or to cause the apprehension of the theft. The offence committed by the accused was undoubtedly one under S. 215. The alternative conviction is therefore set aside, and the accused is convicted of an offence under S. 215, I. P. C. In view of the previous convictions proved against the accused the sentence of 18 months' rigorous imprisonment was suitable and will stand.

M.N./R.K. *Order accordingly.*

A. I. R. 1929 Rangoon 210

BROWN, J.

U San Win—Applicant.

v.

U Yan Nyein—Respondent.

Civil Revn. No. 74 of 1929, Decided on 28th May 1929, against judgment and decree of Dist. Judge, Pyapon, in Civil Appeal No. 100 of 1928.

(a) Burma Rural Self-Government Act, S. 28 (1) (c)—Scope.

The District Council has no power to give authority to a lessee to collect fees which are not authorized by legislative authority. [P 211 C 1]

(b) Burma Rural Self-Government Act, Ss. 28 (1) (c) and 52 — Court interpreting words "on roads or streets within half mile of public or private market" in Ss. 28 and 52 as not necessarily meaning edge of either side of or part of roads or streets—High Court will interfere in revision—Civil P. C., S. 115.

Where the Court interpreted the words "on roads or streets within half a mile of a public or private market" appearing in Ss. 28 and 52 as not necessarily meaning the edge of either side of, or part of roads or streets, the error of the Court is more than an error in law for he has overlooked the canon of interpretation that any statutory provision in the nature of a taxation clause should be interpreted literally in favour of the subject and so the High Court will interfere in revision. [P 211 C 1, 2]

Wellington—for Applicant.

Zeya—for Respondent.

Judgment.— The facts of the case are admitted. The respondent U Yan Nyein has purchased from the District Council of Begale the right to collect fees from the day and night bazaar at Begale for a period of one year. The petitioner U San Win is occupying a piece of land and keeps thereon bamboos, and myaws for sale. The respondent claims that as licensee he is entitled to demand fees from the petitioner, and he has brought a suit in the Township Court for the amount he claims to be due. The Township Court has dismissed his suit but on appeal to the District Court, he has been given a decree, and the petitioner has now come to this Court in revision. According to the license he obtained from the District Council the respondent is entitled to levy fees

"from those persons who expose goods of any kind for sale outside residential building within half a mile from the main bazaar buildings X X X X From the sellers of earthern jars, bamboos, myaws, posts, along the bank the lessee shall levy Rs. 0-4-0 a day."

It is admitted that the place where the petitioner is selling bamboos and myaws is, within half a mile of the main bazaar buildings and it is apparently outside any residential buildings. The respondent's claim therefore is clearly covered by his license, but the District Council have no power to give authority to a lessee to collect fees which are not authorized by legislative authority. The section of the Burma Rural Self-Government Act 1921 which deals with these powers, is S. 28, read with S. 52, and it is not contended that any part of S. 28, except Cl. (1) (c) or any other section of this or any other Act, gives them the power claimed. S. 28 (1) (c) reads as follows:

"With the previous sanction of the Commissioner a District Council may levy a toll or fee for the right to expose goods or live stock for sale on roads or streets within half a mile of a public or private market within the area over which its jurisdiction extends."

Section 52 so far as it is applicable to the present case is similarly worded. The land on which petitioner sells his goods, is apparently Government waste land which at one time petitioner occupied under a license from the Deputy Commissioner which he has since continued to occupy without such license. The place where the goods are exposed for sale is said to be 80 feet from the Strand Road. The learned District Judge in his judgment says:

"The words "on roads or streets within half a mile of a public or private market" which appear in Ss. 28 and 52 of the Act do not necessarily mean the edge of either side of or part of roads or streets."

I do not know what his authority for this statement is. The meaning of the words seems to me to be plain.

It is not contended that the goods in this case were exposed for sale on a road or street. It is a well known cannon of interpretation that any statutory provision in the nature of a taxation clause should be interpreted literally in favour of the subject. The learned District Judge in the present case has entirely overlooked this rule, and has read into the provisions of Ss. 28 and 52 a meaning which the plain meaning of these sections cannot to my mind possibly bear. I am clearly of opinion that the trial Judge was right and the District Judge was wrong in his findings in this case. The matter is before me in revision only. But I think the error of the District Judge is more than a mere error in law. He has entirely overlooked the elementary principle of interpretation of statutes and has interpreted certain words in the Burma Rural Self-Government Act in an entirely arbitrary manner giving them a meaning which they cannot possibly bear. I am of opinion that the facts in this case justify an interference in revision. I set aside the decree of the District Court and restore that of the trial Court, dismissing the plaintiff's suit. The plaintiff-respondent will pay the costs of the defendant-applicant in all three Courts.

P.N./R.K. *Revision allowed.*

A. I. R. 1929 Rangoon 211

PRATT, J.

Ma Fatima and *others*—Appellants.

v.

Momin Bibi and *others*—Respondents.

Special Second Appeal No. 69 of 1928. Decided on 4th February 1929, against judgment of Dist. Court, Mandalay, in Civil Appeal No. 122 of 1927.

(a) Suits Valuation Act (7 of 1887), S. 8—Partition Suit—Plaintiffs' share determines jurisdiction and court-fee—Court-fees Act, S. 7 (iv) f.

In partition suit valuation both for the purpose of court-fee and jurisdiction is the amount at which the plaintiff values his share and not the value of the entire partible estate: *A. I. R* 1925 *Cal.* 320; *A. I. R.* 1923 *Pat.* 342, *Dist.*, 20 *Mad.* 289, *Ref.*; 24 *All.* 381, *Foll.* [P 212 C 2]

(b) Civil P. C., O. 13, R. 4—Document admitted by Commissioner—No endorsement by trial Court—Document is admissible in evidence and forms part of the record.

A document, which is duly proved and accepted by the commissioners appointed to take evidence, is duly endorsed, initialled and dated by the commissioner and is received by the Court without endorsement and without any objection by a party, becomes part of the record and is evidence notwithstanding the fact that the trial Court did not endorse it as required by O. 13, R. 4: *A. I. R.* 1916 *P. C.* 27, *Ref.* [P 213 C 1]

Sanyal and *S. Mukerjee*—for Appellants.

A. C. Mukerjee and *Lutter*—for Respondents.

Judgment.—Plaintiff Mariam Bibi sued for partition, accounts, and her share of the estate of her deceased grandfather Khoda Bux Khan. The suit was valued at Rs. 2,000 for the purposes of

court-fees, being the estimated value of her share, but for purposes of jurisdiction at Rs. 22,000 being the value of the whole estate.

The District Judge, to whom the plaint was presented, returned it for presentation to the Sub-Divisional Court, and the suit was tried in that Court.

It is now contended that the Subdivisional Court had no jurisdiction and that the value for the purposes of jurisdiction is the value of the whole estate.

Reliance is placed upon the Calcutta case of *Rajani Kanta Bag* v. *Rajabala Dasi* (1), where it is definitely laid down that ordinarily a suit for partition is triable by the Court which is competent to try a suit valued at the entire value of the property and not the subject-matter of the share, which is to be partitioned.

This ruling, however, was referring to partition suits by Hindus, who are entitled to joint possession, as is clear from the sentence :

"But it seems to us that in the present case the plaintiff had to establish his title and had to establish his right to joint possession, which was denied, before he could seek partition of the property in suit."

The parties in the present appeal are Mahomedans and the suit is not strictly a suit for partition of an undivided family estate, but in reality is a suit for a share of inheritance.

I would also remark that an important part of the Calcutta ruling dealing with the case shown by the vakil showing cause is apparently incorrectly reported and I find it unintelligible.

The Patna case of *Ranjit Sahi* v. *Muhammad Qasim* (2) cited by the advocate for appellants is against his contention, for it is there laid down, that there is a distinction between suits for partition pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, and suit where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the latter case it is the plaintiff's share, which will determine the jurisdiction of the Court and not the value of the entire property.

In *Velu Goundan* v. *Kumaravelu Goundan* (3), a Bench of the Madras High Court took the view that in a suit by a member of a joint Hindu family praying for a partition of the family property and for the delivery to the plaintiff of his share the value of the suit for purposes of jurisdiction is the amount at which the plaintiff values his share.

A similar view was taken by a Bench of the Allahabad High Court in *Wajih-ud-din* v. *Waliullah* (4).

Section 8, Suits Valuation Act, provides that wheren in suits other than those referred to in the Court-fees Act, 1870, S. 7, para. 5, 6 and 9 and para. 10, Cl. (d), Court-fees are payable ad valorem under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction shall be the same.

In the present suit court-fees are payable ad valorem and the suit is not of any of the classes referred to in the paragraphs of S. 7, Court-fees Act, mentioned.

The value of the suit for purposes of jurisdiction must therefore be taken to be Rs. 2,000 and the suit was rightly instituted in the Sub-Divisional Court.

On the merits it is argued that the District Court's finding that the children's claim to the masonry building was not barred by limitation, was wrong, that the mortgage-deed executed by Khoda Bux and Rahamat Bibi in favour of Mr. Chatterjee was not legally admitted as an exhibit and should not have been treated as evidence, and that the Court was not justified in holding that the building in question belonged to Rahamat Bibi, wife of Khoda Bux.

Both Courts have relied upon the recital in the mortgage deed referred to (filed at p. 105 of the trial record and marked Ex. I) as proving that the building belonged to Rahamat Bibi.

The particulars required by O. 13, R. 4 have not been endorsed on the document in question and it has not been signed or initialled by the Judge.

It is contended accordingly on the authority of *Sadik Husain Khan* v. *Hashim Ali Khan* (5) that this Court ought to refuse to read the document or allow it to be treated as evidence.

(1) A. I. R. 1925 Cal. 320=52 Cal. 128.
(2) A. I. R. 1923 Pat. 342=2 Pat. 432.
(3) [1896] 20 Mad. 289=7 M. L. J. 30.
(4) [1902] 24 All. 381=(1902) A.W.N. 88.
(5) A. I. R. 1916 P. C. 27=38 All. 627=43 I. A. 212 (P.C.).

In the case cited their Lordships of the Privy Council laid down that in future, in order to prevent injustice, they would be obliged on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required.

Apart from the obvious comment that their Lordships were laying down a rule of procedure to be observed in appeals before them, it has been overlooked entirely that the mortgage-deed in question was put in as an exhibit before the commissioner appointed to take the evidence of Mr. Chatterjee, that Mr. Chatterjee proved the document and that it was endorsed by the commissioner as Ex. I, initialled and dated by him on the date on which Mr. Chatterjee was examined.

Under O. 26, R. 7, when a commission has been duly executed and returned, the commission and the return thereto and the evidence taken under it "shall" form part of the record of the suit.

The document was not objected to before the commissioner and apparently not at all in either of the Courts below. It is therefore part of the record of the suit rightly and, having been duly proved, is evidence.

The mere fact that the trial Judge omitted to have the endorsement required by O. 13, R. 4 made cannot in the circumstances render a document proved before the commissioner, marked by him as an exhibit, initialled and dated, inadmissible as evidence.

The document clearly proves that Rahamat Bibi was the owner of the building in dispute.

The trial Court held that, as Khoda Bux had the building in his possession for 20 years after his first wife's death, and there was no evidence to show that he held it on behalf of the co-heirs, the claim of the other heirs to shares was barred by limitation.

On appeal the learned District Judge, in an able and lucid judgment, held that there was nothing to indicate that Khoda Bux's possession of the building was adverse to his children by Rahamat Bibi and that the natural presumption was that he was in possession on their behalf as well as his own.

I have no doubt that the case of *Hari Pru* v. *Mi Aung Kraw Zan* (6) remains sound law and that where a co-owner is in possession of undivided property under the circumstances in evidence there is a presumption that he is in possession on behalf of all the co-heirs.

(6) [1919] 10 L. B. R. 45=52 I. C. 629=12 Bur. L. T. 129.

Consequently it would be necessary to prove an overt claim to exclusive ownership by Khoda Bux more than 12 years prior to the suit in order to escape from the effects of the presumption. No such claim was proved.

The District Court was on this view right in holding that the claim to the building was not barred by limitation.

The appeal therefore fails and will be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 213

BROWN, J.

(Maung) Aung Ban and *others*—Defendants—Appellants.

v.

Maung Nge and *others*—Plaintiffs—Respondents.

Special Second Appeal No. 25 of 1929, Decided on 21st June 1929, from judgment of Dist. Judge, Thaton, in Civil Appeal No. 96 of 1928.

(a) Burmese Law (Buddhist) — Burmese wife transferring property inherited from parents by contract of sale under such circumstances as to raise strong presumption that she was acting on behalf of marriage partnership—Such transfer is binding both on husband and wife though husband is not active party.

Where a person obtained possession under a contract of sale made by a Burmese wife of property inherited from her parents and she disposed of the property under such circumstances as to raise a strong presumption that she was acting on behalf of the marriage partnership, the transfer is a good transfer binding both husband and wife, though the husband may not be an active party to the transfer: *A. I. R.* 1927 *Rang.* 209, *Rel. on.* [P 214 C 1,2]

(b) Civil P. C., S. 100—Finding of facts not questioned in first appeal cannot be raised in second appeal.

If finding of fact by the trial Court is not questioned in the first appeal, no objection can be allowed to be raised against it on second appeal to the High Court. [P 214 C 2]

P. K Basu—for Appellants.

Ba Thein (2)—for Respondents.

Judgment. — Respondents 1 and 5 brought a suit against the appellants and respondent 6 in the Sub-Divisional

Court of Pa-an for possession of certain land. Respondent 1 Maung Nge was married to one Nan Pun and respondents 2 to 5 are his children by Nan Pun. The plaint sets forth that the land in suit was the property of Maung Nge and Nan Pun, and that the defendants are in wrongful possession thereof. It does not state how the defendants came into possession. The defendants pleaded that possession of the land was given by Nan Pun during her lifetime under a contract of sale, and that the sum of 900 was paid as consideration. Plaintiff 1 when examined stated that he did not know of his own knowledge about this alleged transaction, but that his wife told him that she had mortgaged the land to the respondents, Aung Ban and Ma Tun.

The defendants called evidence to prove that they obtained possession under a contract of sale, and their evidence on this point was believed by the trial Judge. Maung Nge himself was admittedly not an active party to the transfer but in accordance with the principle approved in the case of *Ma Paing* v. *Maung Shwe Hpaw* (1), the trial Court held that the transfer by Ma Nan Pun was a good transfer, binding both husband and wife. The plaintiff's suit was therefore dismissed.

The plaintiffs appealed and the District Court modified the decree by directing that one-third of the land be given to the plaintiffs Against this decree the defendants have appealed, and the plaintiffs have filed cross-objections. The land in question was admittedly inherited by Ma Nan Pun from her parents, and in my opinion the trial Court was right in following the principles laid down in *Ma Paing's* case. The District Judge appears to have thought that those principles would not be applicable because the transfer had taken place before the decision in *Ma Paing's* case. But there is nothing in the judgment in that case to justify any such interpretation of its meaning. In so far as the finding in that case differs from earlier decisions, it interpreted the law in a different manner from previous interpretations, but no Court has the power to make a fresh law, nor did the Full Bench which decided *Ma Paing's* case purport to do so. The principles approved in that case were held to be principles underlying Burmese Buddhist Law, and if the decision is correct, they were applicable in 1917 no less than in 1927.

(1) A. I. R. 1927 Rang. 209=5 Rang. 296 (F.B.).

In the present case, it is admitted that the money which Ma Nan Pun obtained was used to pay off the family debts. The property had been inherited by her, and the circumstances are such as to raise a strong presumption that in disposing of the property she was acting on behalf of the marriage partnership. The District Judge was therefore in my opinion in error in holding that the plaintiffs were entitled to a third share in the land. In the cross-objection one of the grounds is that there is no satisfactory oral evidence as to the alleged transfer. On this point, there was a definite finding by the trial Judge against the respondents, and although the respondents appealed against the trial Court's judgment they did not in their appeal to the District Court question the correctness of the trial Court's finding of fact. They cannot therefore be allowed to raise this point now. In my opinion the case was rightly decided by the trial Court. I set aside the decree of the District Court and restore that of the trial Court dismissing the suit of the plaintiff-respondents. The plaintiff-respondents will pay the costs of the defendant-appellants in all three Courts.

P.N./R.K. *Decree set aside.*

A. I. R. 1929 Rangoon 214

RUTLEDGE, C. J., AND BROWN, J.

Daw Phaw—Plaintiff—Appellant.

v.

Ma Tin Nu and *another*—Defendants—Respondents.

First Appeal No. 215 of 1928, Decided on 18th February 1929, from judgment of Original Side in Civil Regular No. 237 of 1927.

Religious Endowments — Shwe Dagon Pagoda—Under scheme framed by late Court of Recorder of Rangoon in Civil Regular Suit No. 139 of 1884 property within precincts of Pagoda grant is vested in trustees and they have sole right to repair buildings such as Zayats.

Under a scheme framed by the late Court of the Recorder of Rangoon in the Civil Regular Suit No. 139 of 1884, the property within the precincts of the Pagoda grant is vested in the

trustees and they have the sole right to repair buildings such as zayats, and although bye-law of the trustees mentions that a register shall be kept by them for the purpose of requesting the original donor and his representatives and descendants to undertake the repairs, the maintaining of such register is purely a matter of grace on the part of the trustees and the High Court has no power to act as a Court of appeal or revision from any decision which the trustees might make as to what name should be entered in the register. [P 215 C 2]

Halkar—for Appellant.

E. Maung—for Respondents

Judgment.—This is an appeal from a judgment of the Original Side of this Court, dismissing the plaintiff-appellant's suit, which was for a declaration that she had the sole right to do repairs to the zayat situated at the southern slope of the Shwe Dagon Pagoda now registered wrongly in the name of Daw Kyin as against the defendant-respondents. The defence set up in para. 10 of the written statement stated:

"That the zayat, being property subject to a charitable trust under a scheme framed by the late Court of the Recorder of Rangoon in Civil Regular Suit No. 139 of 1884, the trustees of the Shwe Dagon Pagoda appointed under the said scheme have full legal title to and control over the zayat in suit, and that the plaintiff is not entitled to maintain this suit against the defendants."

A reference to the scheme shows that amongst the duties of the trustees are enumerated the following :

"(i) They shall, out of the trust funds, keep in repair the said pagoda, and the pagoda, zayats, and other buildings connected therewith, and the platform thereof, and the steps leading thereto.

(ii) They shall control the erection of new pagodas, zayats, spiral sheds, altars, idols, flag-poles, and bells on the above * * *.

They shall have control over all offerings made at the said pagoda and all other property held in trust for the purposes of the said pagoda."

Though, in the scheme, no paragraph specifically vests the property in the trustees, the decree in the said suit—Civil Regular No. 139 of 1884—has the following paragraph :

"And it is further ordered and decreed that all the funds and property now held for the purposes of the said decree shall be, and the same is, hereby vested in the abovementioned persons as trustees of the same for the purposes of the said pagoda."

We are satisfied that the property within the precincts of the Pagoda grant is vested in the trustees, and that they —and they only—have the right to repair buildings, such as zayats. This has not been disputed by the appellant and the trustees have not been joined as parties to the present suit.

The Rules and Regulations of the Shwe Dagon Pagoda Trust (Ex. A), set out this very clearly :

"* * * All the kuthodaws built and standing on the Sacred Hill shall be repaired, decorated and maintained only by the pagoda trustees according to their will and pleasure * * *."

The trustees in the exercise of their will and pleasure may request the original donor or his or her representative or descendants to undertake the repairs, and their bye-law goes on to mention that for this purpose a register shall be kept by them, and the names of such descendants may be changed as may be necessary through death or migration elsewhere. But the reading of this bye-law as a whole makes it clear that the maintaining of such a register is purely an act of grace on the part of the trustees, and entries on such register are matters with which they (the trustees), are only concerned.

In effect the appellant is asking this Court to act as a Court of appeal or revision from the acts of the trustees. Our simple answer is that we have no such power. From any decision which the trustees might make as to what name should be entered on this register, there is no appeal to this Court. They are in a much better position to come to a right decision than we are, and it is clear that they were acting within their powers. The appeal accordingly fails and must be dismissed with costs, seven gold mohurs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 215

CHARI AND BROWN, JJ.

Maung Ba Thein and *another*—Defendants—Appellants.

v.

U Po Min—Plaintiff—Respondent.

First Appeal No. 6 of 1929, Decided on 19th June 1929, from a decree of Dist. Judge, Yamathin.

Civil P. C., O. 17, R. 1 (1)—On day fixed for hearing, case not called until 2 p.m.—Six witnesses for plaintiff examined and 40 witnesses for defendant present — Defendant's advocate appearing in other Court and defendant applying for adjournment but Court

refusing—Though defendant has not shown sufficient cause for not being ready with his case, Court should use its discretion in allowing adjournment.

On the day fixed for hearing the case was not called until 2 p. m., and 6 witnesses for the plaintiff were examined and 40 witnesses for the defendant were present. The defendant asked for adjournment on the ground that his advocate was appearing in some other suit and the Court refused the application.

Held: that although the defendant had not shown sufficient cause for not being ready with his case, the Court should exercise its discretion in allowing an adjournment for even if the defendant's advocate had been present it would have been impossible to proceed very far with the defence case on the day. [P 216 C 2]

Aiyangar—for Appellants.

Po Aye—for Respondent.

Judgment.—The respondent brought a suit in the District Court of Yamethin for possession of 146.67 acres of land. The case was originally fixed for hearing of witnesses on 2nd and 3rd November 1928. On 3rd November 1928, the plaintiff was examined and an adjournment was then allowed owing to the absence of certain maps. The case was then fixed for hearing on 14th November 1928. The diary entry of that date reads as follows:

"Called. Plaintiff and defendants present. Pleader for plaintiff present. Defendant 1 says he and his witnesses will be examined when his pleader appears. Six prosecution witnesses examined. Plaintiff closes his case. Defendant 1 states he will not examine his witnesses as his pleader is absent. Judgment on 17th November 1928, parties warned. All defence witnesses present."

On 28th November 1928, an application supported by affidavit was filed asking that the defendants might be allowed to examine their witnesses before judgment was delivered. The Judge passed orders on this application, the next day refusing to allow it, and delivered judgment the same day. The present appeal is filed on the ground that the defendants should under the circumstances have been given an opportunity of examining their witnesses. Affidavits have been filed in which it is stated that the case was not called on 14th until 2 p. m. and that when the defendants asked for an adjournment on the ground that their advocate was appearing in the Sessions Court at Pyinmana, the application was refused.

No counter affidavits have been filed, and we may accept these statements as correct. Six witnesses were examined for the plaintiff on 14th November 1928, and it must, therefore, have been getting very late in the afternoon when the plaintiff closed his case. It appears that some 40 witnesses for the defendants were present. The defendant had not perhaps shown sufficient reason for not being ready with their case; but in the special circumstances we think that the trial Court should have exercised his discretion in allowing an adjournment on the payment of costs. Even had the defendant's advocate been there, it would have been impossible to proceed very far with the defence case on 14th November 1928. We accordingly set aside the decree of the trial Court and remand the case to that Court for the defendants to be allowed to produce their evidence on their first paying to the plaintiff the costs of the adjournment, advocate's fee, 3 gold mohurs. Appellants will be entitled to a refund of the court-fees paid in this appeal, but will pay the respondent, his costs in this appeal 2 gold mohurs.

P.N./R.K. *Case remanded.*

** A. I. R. 1929 Rangoon 216

Special Bench

RUTLEDGE, C J. AND MAUNG BA AND BROWN, JJ.

E. W. Blackmore

v.

Blackmore Nora and *another*.

Civil Ref. No. 8 of 1928, Decided on 5th March 1929 for confirmation of a decree passed by Dist Judge, Mandalay.

**** Divorce Act, S. 14—Condonation of past matrimonial offences is impliedly conditioned upon future good behaviour of offending spouse and so if after condonation offences are repeated, right to make condoned offence ground for divorce revives—Wife committing adultery—Then husband and wife living together for some months—Wife again deserting husband—Subsequent desertion is sufficient ground for making previous adultery ground for divorce and husband is entitled to decree for divorce.**

Condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse and so if after condonation, the offences are repeated, the right to make the condoned offences a ground for divorce revives; to constitute revival of the condoned offence, the offending spouse need not be guilty of offences of the same character as that condoned: any mis-

conduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied. [P 218 C 1]

N and *K* were married and had three children. *K* then committed adultery and had a child. After this again both *N* and *K* lived together for some months when *K* left *N* taking her children with her.

Held: that though there was condonation of the matrimonial offences, the subsequent desertion was a sufficient ground for making the previous adultery a ground for divorce and *N* was entitled to a decree for divorce: 47 *Cal.* 1068, *Rel. on.* [P 218 C 1]

(b) Divorce Act, S. 2—Domicile illustrated.

Husband and wife were residing in India since their marriage in 1918. Husband said that he was domiciled in India and had no intention of returning to England. Wife also said that she intended settling in India and did not mean to go back to England.

Held: that there was no reason not to accept their statements that they had made India their domicile. [P 217 C 1]

Judgment. — The District Judge, Mandalay, has passed a decree for dissolution of marriage in favour of one Earnest Walker Blackmore against Mrs. Nora Blackmore, and has referred the proceedings to this Court for confirmation. The proceedings were taken under the Divorce Act and by S. 2 of that Act as amended by Act 25 of 1926 the District Court only has jurisdiction in cases where the parties to the marriage are domiciled in India at the time when the petition is presented. Of the parties to the marriage in this case, the petitioner was born in England and the respondent at Allahabad. The petitioner says that he has been with the Indian Army since 1913, that is, for some 15 years, that he is domiciled in India and that he has no intention of returning to England, and the respondent also says that she intends settling in India and does not mean to go back to Ireland or Britain. The parties have certainly been residing in India ever since their marriage in the year 1918, and we see no reason why we should not accept their statements that they have made India their domicile. The District Court therefore had jurisdiction in the matter.

The petition filed by the petitioner sets forth that the parties were married in 1918 and have three children. A fourth child was born to the respondent but the paternity of that child is denied by the petitioner. In December 1927 the respondent left the petitioner who was then in Rangoon and went to Mandalay. She has admitted committing adultory there with a person unnamed. Later on the petitioner was transferred to Mandalay and the parties lived together again from 19th April 1928. They remained under the same roof until the 8th July when the respondent left the petitioner taking her children with her. The petition further sets forth that the petitioner has reason to suspect the respondent's relations with the co-respondent, but he makes no definite allegation of adultery with him.

The respondent in her written statement denies the charge of adultery. She has since, however, admitted that the fourth child is not by her husband. The District Judge has held that adultery with the co-respondent has not been proved but that it is clear that she had previously committed adultery with others in India and that she has subsequently been unfaithful in Mandalay. Although there was a temporary condonation of these matrimonial offences, the subsequent desertion revived the offences and he therefore gave a decree for divorce.

The learned District Judge has dealt with the facts at some length in his judgment and we agree with him generally thereon. There is certainly no proof of adultery with the co-respondent. It is admitted, however, that the fourth child who was born in Bombay in about June 1927 is not the petitioner's child and in a letter, Ex. H, dated 16th April 1928 the respondent wrote:

> "Since leaving you on the 24th December I have been unfaithful to you, having committed adultery with a certain person. This took place in January, while living at the Grand Hotel."

The petitioner has also given oral evidence as to alleged admission by the respondent to him. The respondent says that she wrote this letter because at that time she wished him to divorce her, and that the statement in it as to her committing adultery is not true, But this does not sound very convincing and we accept the District Judge's conclusion that adultery with some persons unknown in Mandalay was proved.

The respondent left the petitioner four days before he filed his petition and has lived apart from him ever since. This does not seem to have been with the consent of the petitioner. In the

case of *Constance Catherine Moreuo* v. *Henry William Bunn Moreno* (1), at p. 1075 Mukerji, J., remarks :

"We may then treat it as well settled that condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation, the offences are repeated, the right to make the condoned offences a ground for divorce revives : to constitute revival of the condoned offences, the offending spouse need not, however, be guilty of offences of the same character as that condoned : any misconduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied."

We agree that in the present case the desertion was a sufficient ground for making the previous allegation of adultery a ground for making the previous allegation of adultery a ground for divorce. Neither of these adulterers has been joined as co-respondents in the case, but with regard to the offence in Mandalay, it is clear that the name of the adulterer is unknown to the petitioner, and cannot be found out by him. That being so, the petitioner has a good ground for being excused by the Court under S. 11 of the Act from naming this adulterer. There is no suggestion of collusion in this case and we think the decree for divorce is justified. We accordingly confirm the decree.

P.N./R.K. *Decree confirmed.*

(1) [1920] 47 Cal. 1068=57 I. C. 216=31 C. L. J. 435.

A. I. R. 1929 Rangoon 218

RUTLEDGE, C. J., AND BROWN, J.

Ma Thein—Appellant.

v.

Ma Mya and *another*—Respondents.

First Appeal No. 147 of 1928, Decided on 13th February 1929, from judgment of Original Side in Civil Regular No. 408 of 1923.

(a) Burmese Law (Buddhist) — Kanitha children.

Kanitha children can sue for partition after the death of one parent on the remarriage of the surviving parent : *A. I. R.* 1926 *Rang.* 211 and 2 *L. B. R.* 255, *Rel. on* ; *A. I. R.* 1921 *L. B* 68, *Cons.* 2 *U. B. R.* 46, *not Foll, A. I. R.* 1914 *P. C.* 97, *Ref.* [P 220 C 1]

(b) Burmese Law (Buddhist)—Right of kanitha child to claim partition after death of one parent on the remarriage of survivor can be claimed by keiktima child.

A keiktima child is in all ordinary circumstances entitled to equal partition of inheritance with the natural children. That being so, the right of kanitha child to claim partition after the death of one parent on the remarriage of the survivor can be claimed by a keiktima child ; *A. I. R.* 1926 *Rang.* 148, *Rel. on.* [P 220 C 2]

K. C. Bose—for Appellant.

Hay—for Respondents.

Judgment.—The appellant in this case, Ma Thein, claims to be the adopted daughter of U Maung Maung and his wife, Ma Pwa, deceased. After the death of Ma Pwa, U Maung Maung married Ma Mya, the respondent, who is a sister of Ma Pwa, and the appellant claims that she was again adopted by U Maung Maung and Ma Mya. U Maung Maung died in 1914, and in 1918 Ma Mya married one Ba Than. The appellant claims partition of property on the ground that her surviving adoptive parent has married again. The suit has been dismissed on the preliminary ground that such a suit does not lie. Two questions arose for decision. It was contended in the first instance that under Burmese Buddhist Law, when one parent died and the surviving parent remarried, the kanitha children of the first marriage had no right to claim partition of property as against the surviving parent, and, secondly, it was claimed that, even if the kanitha children were entitled to claim, an adopted child would have no such right.

On the first point the learned trial Judge held that he was bound by the ruling of a Bench of this Court in the case of *Maung Po Kin* v. *Maung Tun Yin* (1). But on the second point he held in favour of the defendants, and, therefore, dismissed the suit. The appellant, while, of course, supporting the finding of the trial Judge on the first point contends that he was wrong on the second point, and that an adopted child has the same right as natural children to claim partition on remarriage of the surviving parent. That a keiktima child is not in every respect, so far as inheritance is concerned, in the same position as natural children was decided in the case of *Maung Po An* v. *Ma Dwe* (2), where it was held that a keiktima adopted son could not claim from the adoptive mother her auratha son's quarter share of the estate on the death

(1) A. I. R. 1926 Rang. 211=4 Rang. 207.
(2) A. I. R. 1926 Rang. 148=4 Rang. 184 (F.B.).

of the adoptive father, and the learned trial Judge has held that on the same analogy an adopted child cannot claim partition on remarriage.

We think that it will be more convenient in this appeal to deal with the first question raised before the trial Court first. It is argued before us on behalf of the respondents that, while the trial Court was perfectly right in holding that the adopted child cannot claim partition on remarriage, the decision in *Maung Po Kin's* case (1) was wrong. If we agree with him on this point, the second question raised does not arise; and, if we do not agree with the contention on this point, it will still be necessary to consider the principles on which *Maung Po Kin's* case (1) was decided to enable us to come to a decision as to whether the general rights of kanitha children in this respect is a right shared also by adopted children. Before *Maung Po Kin's* case (1) was decided there were two directly contrary decisions bearing on this point. In the case of *Ma Thin* v. *Ma Wa Yon* (3) it was held that a daughter, being an only child, is entitled to claim a one-fourth share of her parents' joint estate from her mother, when the latter remarries after the father's death. The question then decided had reference only to the case of an eldest daughter, but the learned Judges who decided the case were clearly of opinion that the children generally were entitled to claim partition on remarriage

A directly contrary view of the law was taken in Upper Burma in the case of *Mi The O* v. *Mi Swe* (4). In that case the late Mr. McColl held that on the remarriage of her mother, the eldest daughter could not make a general claim on the estate; and, if he is right in this contention, clearly the kanitha children could make no such claim. There is no direct reference to *Mi The O's* case (4) in the judgment in the case of *Maung Po Kin* (1). There is, however, a reference to an earlier case, that of *Maung Shwe Ywet* v. *Maung Tun Shein* (5) in which *Mi The O's* case was referred to. The correctness of the decision in *Mi The O's* case (4) was not then directly in question, but Heald, J. in his judgment expressed a doubt as to whether the decision was good law. The Bench decision of this Court in *Maung Po Kin's* case (1) is admittedly not founded on any texts in the Manugye Dhammathat and admittedly the Manugye Dhammathat is binding on us if its provisions are clear on the point. That was definitely decided by their Lordships of the Privy Council in the case of *Ma Hnin Bwin* v. *U Shwe Gon* (6). It is to be noted that *Mi The O's* case (4) appears to have been decided before the decision of the Privy Council in *Ma Hnin Bwin's* case (6) but Mr. McColl nevertheless based his decision in that case in part on the Manugye. He does not, however, deal with the provisions of the Manugye Dhammathat on the point in any detail.

In *Ma Thin's* case (3), from the decision in which he was dissenting, Birks, J., remarked:

"* * * the Manugye, Manu, Amwebon seem to say that the eldest daughter is merely entitled to a one-fourth share of the father's clothes and ornaments."

The provisions of the Manugye Dhammathat were exhaustively discussed by Heald, J., in *Maung Shwe Ywet's* case (5) and he came to the definite conclusion that the provisions of this Dhammathat on the question whether an eldest child other than the auratha, can claim partition on the remarriage of the surviving parent were by no means clear. That view was impliedly adopted by a Bench of this Court in *Maung Po Kin's* case (1), which was only a development of *Maung Shwe Ywet's* case (5). Admittedly the point is one on which the Dhammathats themselves are in conflict and it is possible to cite texts from them in support of either view.

After a consideration of the case, a Bench of this Court has definitely held that, on the remarriage of the surviving parent, the eldest child, if he or she has not already taken a quarter share in the joint estate as auratha, becomes entitled to a quarter share in the estate; and also that the children, other than the eldest child, become entitled to a quarter share of the joint estate. On a point on which the Dhammathats are so divided in opinion, we are not prepared to differ from this finding. We accept the decision in *Maung Po Kin's* case

(3) [1903-04] 2 L. B. R. 255.

(4) [1914] 2 U. B. R. 46=28 I. C. 821.

(5) A. I. R. 1921 L. B. 63=11 L. B. R. 199.

(6) A. I. R. 1914 P. C. 97=41 Cal. 887=41 I. A. 121 (P.C.).

that kanitha children can sue for partition after the death of one parent on the remarriage of the surviving parent.

That being so, it remains for us to decide whether this right to claim partition can be exercised by the keiktima child. The learned trial Judge has answered this question in the negative. It was held by a Full Bench of this Court in the case of *Maung Po An* v. *Ma Dwe* (2), that a keiktima adopted son is not entitled to claim from the adoptive mother on the death of the adoptive father, the auratha son's quarter share of the estate of the adoptive parents. The learned Judge was unable to see the distinction between the case of a keiktima child claiming patition on the death of the parent on the strength of his being auratha, and that of a keiktima child claiming partition on the remarriage of the surviving parent. Heald, J., who referred the question in *Maung Po An's* case (2) for reference to the Full Bench, remarks in his referring judgment at p. 195 as follows :

"But even if the obscure passage cited above from Ch. 26th of the 10th Book of Manugye be read as meaning that the keiktima child takes its place according to its age among the own children of his adoptive parents, then, although under the modern rule it would share equally with the other children, it does not seem to me to follow that if it was the eldest child of the family it would necessarily acquire the special rights of the auratha or eldest-born child either on the death of one parent or on the remarriage of the survivor. On the contrary I am strongly of opinion, as I have suggested above, that any Burman jurist who was familiar with the Dhammathats and with the constant opposition in meaning between auratha and keiktima, would have regarded the proposition that the keiktima could ever be auratha as a contradiction in terms."

The Full Bench answered the reference as follows :

"A keiktima adopted son is not entitled to claim from an adoptive mother on the death of the adoptive father the auratha son's quarter share of the estate of the adoptive parents."

And at p. 200 of their judgment, the following passage occurs :

"We are satisfied that according to the Dhammathats the position of the keiktima child in respect of inheritance was inferior to that of own children, but in view of the judicial decisions which for many years have recognized the right of the keiktima child to share equally with the own children we are of opinion that that right should not now be questioned. But, apart from the recent case of *Ma Thein* v. *Ma Mya* (7), mentioned in the order of reference, there seems to be no case in which it has been expressly decided that an only or eldest keiktima child can be auratha or that if it fulfils the conditions which would entitle an own child to be auratha, it can on the death of one parent claim from the surviving parent the auratha child's share of the jointly-acquired property of the parents. . . . . . The special right of the auratha is an exception to the general rule of equal partition among children which is now settled law and in the absence of any authority in the Dhammathats or of any long course of judicial decisions extending that right to the keiktima child, we are of opinion that it should not be so extended."

It is clear, therefore, that it must now be regarded as settled law that a keiktima child is in all ordinary circumstances entitled to equal partition of inheritance with the natural children. That being so, we are unable to see how the right of a natural child to claim inheritance after one parent has died on the remarriage of the surviving parent can be denied to a keiktima child. The rights of an auratha are very special rights that are not shared by the younger children, and the refusal to recognize the claims of a keiktima to these special rights in no way conflicts with his rights to equal partition with the other children. The learned trial Judge speaks of the right to partition in this eventuality as a special right to which the ordinary rules do not apply. But, if a natural born child can claim his rights and the keiktima child cannot, it does not seem to us that the rights of partition are equal. The ordinary children are given the right of severing themselves from the family of their natural parent on his or her remarriage and claiming their share in the family property. They are not bound to make that claim, and, if they do not do so, they can then claim a different share on the death of the surviving parent.

In the case of a natural child, the disadvantages in awaiting the death of the surviving parent are at least no greater than in the case of a keiktima child. It is obvious that the longer a keiktima child awaits to make his claim, the more difficult it will be for him to establish it ; and it is at least as likely that a natural child would elect to continue in the family of his natural parent after remarriage as that a keiktima child would elect to live with his adoptive

(7) A. I. R. 1926 Rang. 146.

parent on a change of circumstances. In the case before us, there are no natural children, but, if the decision of the trial Judge is correct, the same rule applies if there are both keiktima children and natural children. And we should then have the anomalous position that of different children, who all have precisely the same rights of partition, some could claim to exercise that right while the others would be debarred from doing so.

Whatever may have been the intention of the ancient law givers, we are of opinion that it is impossible, consistently with the principles of equal partition definitely accepted in *Maung Po An's* case, to hold that the right of a kanitha child to claim partition after the death of one parent on the remarriage of the survivor cannot be claimed by a keiktima child. We are of opinion that the learned trial Judge was wrong in rejecting her claim on the preliminary point. We, therefore, set aside the decision of the trial Judge and remand the case to the trial Court for a decision on the merits. The respondents will pay the costs of the appellant in this appeal, advocate's fee five gold mohurs.

P.N./R.K. *Case remanded.*

A. I. R. 1929 Rangoon 221

HEALD AND MAUNG BA, JJ.

D. R. Saklat and *others*—Appellants.

v.

J. Hormusjee—Respondent.

First Appeals Nos. 95 and 96 of 1929, Decided on 12th June 1929.

(a) Civil P. C., S. 100—Scope—Matter of discretion.

An appellate Court is always reluctant to interfere with the decision in a matter of discretion. [P 222 C 1]

(b) Religious Endowments — Intention of scheme framed by Chief Court of Lower Burma in Civil Miscellaneous Case No. 186 of 1919 indicated.

Scheme framed by Chief Court of Lower Burma in Civil Misc. Case No. 186 of 1919 provides for the filing of affidavits of the Parsi inhabitants who desire to support a particular candidate for appointment as trustee and so it is the intention of the scheme that the information conveyed by those affidavits should be part of the material used by the Court in deciding which candidate to appoint. [P 222 C 2]

(c) Religious Endowments—Unless there is cogent reason to contrary, person having support from majority of community ought to be appointed as trustee for Parsi Fire Temple in preference to one having no such support and fact that trustees ought not to be related to each other is not sufficient to disregard such wishes.

In the case of an appointment of a trustee for the Parsi Fire Temple, the wishes of the community ought to be considered unless there is some cogent reason to the contrary, the person who has the support of the majority of the community ought to be appointed in preference to one who has no support from the community and the fact that the trustees ought not to be related to each other is not sufficient to warrant disregarding the wishes of the community. [P 223 C 1]

Leach and *Doctor*—for Appellants.

Vakheria—for Respondent.

Heald, J.—Mr. B Cowasjee, who was a life trustee of the Parsi Fire temple at Rangoon, under a scheme framed by the Chief Court of Lower Burma in Civil Miscellaneous Case No. 186 of 1919, died about the 2nd February last and under Cl. 26 of the scheme it was the duty of the remaining trustees or either of them within one month to apply to this Court on its original side to appoint a person or persons to fill the vacancy. Neither of the trustees applied to the Court within the month, possibly because they did not agree as to whom they should nominate, but on 11th March a number of members of the Parsi community, who are the appellants in one of the two appeals, with which this order deals, namely C. I. appeal No. 95 of 1929, filed an application to the Court, submitting the name of Mr. A. B. Mehta, who is the appellant in the other appeal, with which this order deals, as the name of a person considered suitable to fill the vacancy. Next day, Mr. N. M. Cowasjee, one of the two remaining trustees filed an application setting out the name of Dr. J. Hormasjee, the respondent in these appeals, as that of a person considered suitable to fill the vacancy. On 15th March, Mr. N. N. Burjorjee, the other trustee, filed an application again setting out the name of Mr. A. B. Mehta. The Court fixed 8th April for the hearing of the applications and gave public notice of the date so fixed. On 6th April Dr. N. N. Parekh, one of the present appellants, filed an application supporting the recommendation of Mr. A. B. Mehta as suitable for the vacancy and stating that Mr. Mehta had the support of 92 out of the 117 male adult members of the Parsi community in Rangoon.

On 8th April, that is the day fixed for hearing of the applications, affidavits supporting the recommendation of Mr. A. B. Mehta were filed by Messrs. B. N. Burjorjee, J. C Batlivala, D. R. Saklat, Manchershah Manekjee, Lt. Col. Tarapore, Messrs. Manek Manekjee, D. J. Contractor, S. B. Nariman, N. B. Behramferam, P. H. Judge, K. M. Setna, A. Hirjee, D. Hormasjee, and D. J. Kolapore. A number of other applications supporting Mr. Mehta's candidature and containing the signatures of about 100 members of the Parsi community verified by affidavits were also filed. No affidavits accompanied or were filed in support of Mr. Cowasjee's nomination of Dr. Hormasjee. When the matter came before the Court on 8th April, the supporters of Mr. Mehta applied for an adjournment, but the learned advocate who appeared on the other side opposed it, and it was refused.

After hearing the parties, the learned Judge made an order which is now under appeal. He said that Mr. Cowasjee had nominated Dr. Hormasjee and Mr. Burjoriee had nominated Mr. Mehta, that the original 3 trustees were related to each other. Mr. N. M. Cowasjee, being a nephew of Mr. B. Cowasjee, and a cousin of Mr. Burjorjee, that Mr. Mehta was a brother-in-law of Mr. Burjorjee, that he did not think it desirable that the trustees should be related to each other, that it was necessary in the interest of the community that the new trustee should be a stranger to the families of the present trustees, and that for that reason he appointed Dr. Hormasjee to be the third trustee in the place of Mr. B. Cowasjee. Mr. Mehta and his supporters appeal against that decision on grounds that the learned Judge's exercise of the discretion given by the scheme was arbitrary and not judicial, that there was no good reason for disregarding the wishes of a majority of the community, and that there was nothing on the record to support the learned Judge's opinion that it was necessary in the interests of the Parsi community that the new trustee should not be related to either of the present trustees. An appellate Court is always reluctant to interfere with the decision in a matter of discretion, but it is difficult to see how we can refuse to interfere in this case.

It was said by Lord Halsbury, L. C. in the case of *Sharp* v. *Wakefield* (1) to which we have been referred, that :

> "discretion means, when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour. It is to be no arbitrary, vague, and fanciful, but legal and regular."

In this case the learned Judge undoubtedly had a discretion, since under the scheme he was entitled to appoint such person as he deemed fit. But the scheme itself provides for the filing of affidavits of the Parsi inhabitants of Rangoon who desire to support a particular candidate for appointment, and it was obviously the intention of the scheme that the information conveyed by these affidavits should be part of the material used by the Court in deciding which candidate to appoint.

In his judgment in this case, the learned Judge made no reference to the fact that the recommendation of one candidate was supported by a large number of affidavits and that the other by none and he made no reference to the contents of the affidavits. The sole reason which the learned Judge gave for his decision was his personal opinion that all the trustees ought not to be related to each other, and that it was necessary in the interest of the community that a stranger should be appointed trustee. There is no affidavit suggesting or supporting that view, and although it was doubtless pressed at the hearing and the learned Judge was entitled to consider it, it seems to us to be an insufficient reason for rejecting what was clearly the opinion of a considerable majority of the members of the community and for appointing a candidate whose candidature was not supported by any affidavits rather than a candidate whose recommendation was supported by a large number.

Respondent's learned advocate asked us to admit at the hearing of the appeal affidavits in support of his candidature, but we are of opinion that such affidavits should have been filed before the date fixed for hearing on the original side of the Court, and that in view of the fact that respondent opposed the adjourn-

(1) [1891] A. C. 173=60 L. J. M. C. 73=55 J. P. 197=39 W. R. 551=64 L. T. 180.

ment which would have given him and his friends a further opportunity for the filing of such affidavits, sufficient reason for the admission of such further evidence at the hearing of the appeal has not been shown. We have accordingly refused to admit any further affidavits.

It is not seriously suggested that respondent is personally otherwise than suitable to fill the vacancy, and we dispose of the matter on the assumption that personally both candidates are equally suitable. We are of opinion that in the case of such an appointment, the wishes of the community ought to be considered and that unless there is some cogent reason to the contrary the person who has the support of the majority of the community ought to be appointed. We do not consider that the learned Judge's opinion that the trustees ought to not to be related to each other was sufficient in the circumstances of this case to warrant his disregarding the wishes of the community, for the explanation of expression of which the scheme itself provides.

We are therefore constrained to set aside the order of the learned Judge appointing respondent to be trustee and we appoint Mr. A. B. Mehta to be trustee in the vacancy caused by the death of Mr. B. Cowasjee.

We see no reason why either the trust or the respondent should be made liable for the costs of these precoedings and accordingly we direct that the parties do bear their own costs.

P.N./R.K. *Order set aside.*

A. I. R. 1929 Rangoon 223

CHARI, J.

Maung San—Appellant.

v.

Ma Kha and *others*—Respondents.

Special Second Appeal No. 661 of 1928, Decided on 16th May 1929, against judgment of Dist. Judge, Henzada, in Civil Appeal No. 73 of 1928.

Buddhist Law (Burmese)—Husband and wife are liable for debts contracted during coverture but decree passed against one after divorce cannot bind other unless made party to it.

So long as a Burmese Buddhist couple remains as husband and wife, a decree passed against the husband alone or the wife alone during the coverture may be held to be binding on both, on analogy of a partnership, but after divorce the right of the husband or the wife to represent the other in a suit has terminated and though the original debt may be binding on both, a decree against one without making the other a party cannot be binding on the person who has not been made a party. A decree passed against the husband is held to bind a wife so as to enable the decree-holder to proceed against the joint property on a presumption that the husband in effect represented the wife in the suit. Such a presumption can be made only when the husband could represent wife in the suit. If his authority to represent the wife has determined, as by divorce, no such presumption can be made and the wife can be bound by decree only when she is actually a party in suit. [P 224 C 1]

E. Maung—for Appellant.

P. K. Basu—for Respondents.

Judgment.—Ma Kha and Maung Aung Baw, the first and second respondents in this appeal were husband and wife. They divorced in 1922, and it has been found by the lower appellate Court that there was a partition of property at the divorce. The finding of that Court is not challenged by the learned advocate for the appellant. A decree was obtained by the appellant in this suit in which Maung Aung Baw only was a party. The suit was instituted after the divorce but it is alleged and it may be held established though it was denied by Ma Kha, that the debt in respect of which the suit was filed was a debt contracted during the coverture, which would have bound both the husband and wife.

It is alleged by the learned advocate for the appellant that the decree passed in these circumstances binds the wife and her share in the property and he relies upon the ruling in *V. R. M. A. L. Chettyar Firm* v. *Man Han* (1). In that case there was a money decree. As single appellate Judge, I, for reasons given in my judgment held that Ma Han's share was not bound. A Bench following the ruling in *Ma Paing* v. *Maung Shwe Hpaw* (2), held that the share was bound and the part of the judgment which applies is at p. 447, where the learned Judge says:

> "The conclusion which I draw from the judgments in that case is that ordinarily a decree against either husband or wife who are subject to the Burmese Buddhist law of marriage, and are consequently partners, can be executed against any part of the partnership property, that is, the property of the marriage."

It will thus be seen that though in that case as a matter of fact the suit was

(1) A. I. R. 1927 Rang. 299=5 Rang. 443.
(2) A. I. R. 1927 Rang. 209=5 Rang. 296 (F.B.).

instituted after the divorce, the particular point was hot considered by the learned Judge on the analogy of a partnership after the dissolution no partner has a right in a suit to represent any other partner, and even though the debt may be a partnership debt, and binding on all the partners, a decree passed against some of them only will not bind the other partners. The simple reason for this is that after dissolution, the right of a partner to represent another partner in a suit has terminated. So long as a Burmese Buddhist couple remains as husband and wife, a decree passed against the husband alone or the wife alone during the coverture may be held to be binding on both, on the analogy of a partnership, but after divorce the right of the husband or the wife to represent the other in a suit has terminated and though the original debt may be binding on both, a decree against one, without making the other a party cannot be binding on the person who has not been made a party. A decree passed against a husband is held to bind the wife so as to enable the decree-holder to proceed against the joint property on a presumption that the husband in effect represented the wife in the suit. Such a presumption can be made only when the husband could represent the wife in the suit. If his authority to represent the wife, had determined, as by divorce, no such presumption can be made or inference drawn, and the wife can be bound by a decree only when she is actually a party in the suit. It is an elementary proposition that no one can be bound by a decree unless he was actually a party to the suit or effectively represented therein. Any other conclusion would lead to anamolous results, and I am sure that my brother Heald never intended to decide that a decree obtained against one of the couple after divorce, could bind the other.

As this is the only point argued in the appeal, the appeal is dismissed with costs

After the judgment is dictated, Mr. E. Maung for the appellant applies for leave to file a Letters Patent appeal. As the point involved fs a point of law, and the case a fit one, I grant leave to appeal against my judgment.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Rangoon 224

MAUNG BA, J.

S. K. S. Krishnappa Chettyar—Plaintiff—Applicant.

v.

Jhanda and *another*—Defendants—Respondents.

Civil Revn. No. 138 of 1929, Decided on 25th June 1929.

* **(a) Civil P. C., O. 9, R. 9—"Sufficient cause."**

Where a party's agent attended Court and after disposing of some work went away under a bona fide belief that he had no more cases in the Court and where his suit was dismissed for non-appearance, such bona fide mistake would amount to "sufficient cause." [P 224 C 2]

(b) Civil P. C., O. 9, R. 9—Person alleging false cause for non-appearance—Court can refuse to restore his suit.

If a person alleges a cause for his non-appearance which is false, the Court is justified in refusing to restore his suit for a person cannot expect to obtain justice on perjury. [P 224 C 2]

S. Ganguli—for Applicant.

Judgment. — S. K. S. Krishnappa Chettyar brought a mortgage suit against Jhanda and another in the Township Court of Myingyan. When the case was called for settlement of issues the plaintiff was absent but the defendants were present and pleaded limitation. The suit was accordingly dismissed with costs. The plaintiff then applied to have the suit restored but the application was dismissed. He appealed to the District Court of Myingyan and there again his appeal was dismissed. So he has come up in revision. The evidence shows that his agent did attend the Township Court on that day, that after his execution cases had been disposed of he went away under a bona fide belief that he had no more cases in that Court.

Under O. 9, R. 9, Civil P. C., the Chetty is precluded from bringing a fresh suit but he can have the case restored by satisfying the Court that there was sufficient cause for his non-appearance. In my opinion the bona fide mistake would amount to "sufficient cause." But the chettyar foolishly alleged a cause which was false. Though it may prove hard I am constrained to hold that in these circumstances the Courts below were justified in refusing to restore the suit. The applicant cannot expect to obtain justice on perjury. The present application for revision is therefore dismissed.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Rangoon 225 (1)

BROWN, J.

Maung Po Maung—Applicant.

v.

Maung Jha and *others*—Respondents.

Civil Revn. No. 19 of 1929, Decided on 22nd May 1929, against decree of Dist. Judge, Yamethin, in Civil Appeal No. 41-A of 1928.

Civil P. C., S. 115—*M* agreeing to give property to *G* on *M's* marriage with *G's* daughter— *M* marrying *G's* daughter and possession given to *G*—*M* suing *G* for possession of property—Gift to *G* being complete High Court will not interfere in revision.

M sued *G* for possession of a cart and two bullocks. He had agreed to give this property to *G* on his agreeing to *M's* marriage with his daughter. He had married the daughter and the possession of the property was with *G*. *M* contended that the agreement to give the property was void as being in the nature of a marriage brocage contract :

Held : that there was no sufficient ground to interfere in revision as the matter had gone beyond the agreement stage and the gift to *G* was complete. [P 525 C 1, 2]

P. K. Basu—for Applicant.

Zeya—for Respondents.

Judgment.—The petitioner Maung Po Maung sued the four respondents and one Maung Thin for possession of a cart and two bullocks. His suit was decreed by the trial Court, but was dismissed by the District Court an appeal. No further appeal lies, and the petitioner has come to this Court in revision on two grounds. The first ground is that the defendants are relying on a void contract. According to the plaint, the property was first made over to Maung Thin to be hired out, and later the plaintiff agreed that defendants 2 and 3 should take over the property temporarily. Defendants 4 and 5 Maung Paw I and Ma Shin are joined because they are said to be in possession of the property.

The defence was that the plaintiff agreed to give the properties in dispute to defendants 4 and 5 on their agreeing to his marriage with their daughter. The District Court has found this defence to be proved. It is contended on behalf of the petitioner that the agreement to give the property is void as being in the nature of a marriage brocage contract. Whether that contention is well-founded or not, the matter has gone beyond the agreement stage. The gift of the properties to the defendants is complete and possession is with the defendants. The defendants are not suing on the contract, but relying on a completed gift. It is admitted that the petitioner has married the daughter of the respondents, Maung Paw I and Ma Shin. I do not think that there is any good ground for interference in revision here. The next ground taken is that the District Court was not justified in interfering with the orders of the trial Court without the defendant Maung Thin being added as a party to the appeal. I have been referred to the case of *Chokalingum Chetty* v. *Singaram Chetty* (1). The circumstances of that case are entirely different from the circumstances of the present case. It is not anybody's case here that Maung Thin has or had any title to the property. The respondents merely asked the District Court to set aside a decree which had been passed against them in favour of the present petitioner. They did not ask for any order prejudicial to Maung Thin. I can see no force in this objection. I dismiss the application with costs.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1925 Rang. 108=2 Rang. 541.

A. I. R. 1929 Rangoon 225 (2)

OTTER AND BROWN, JJ.

Maung Tun Lin and *another* — Appellants.

v.

Maung Tun Win—Respondents.

Civil Misc. Appeal No. 166 of 1928, Decided on 12th February 1929, against order of Dist. Court, Pyapon, in Civil Regular No. 27 of 1927.

Civil P. C., Sch. 2, Para. 16—Two chosen arbitrators enlisting services of two additional arbitrators, they having no such powers under terms of reference— Award made and signed by two chosen arbitrators alone—Decree in consequence of such award is not appealable.

Two chosen arbitrators enlisted the services of two additional arbitrators, though under the terms of reference they had no power to do this. But the award was made and signed only by the two arbitrators originally referred to. These gentlemen were given very wide powers :

Held : even if they called in two other persons to assist them, their award could not be attacked on the ground that it was no award at all, and the case was subject to the ordinary rule, which is that a decree in conse-

quence of an award, to which para. 16, Sch. 2 applies, is not appealable: *A. I. R.* 1923 *P. C.* 66, *Rel. on.* 18 *All.* 422 (*F.B.*), *Dist.* [P 226 C 1]

Leong—for Appellants.

Judgment.—We think no appeal lies in this case. The judgment and decree were passed according to an award made in arbitration proceedings to which para. 16, Sch. 2, Civil P. C. apply. The wording of the two sub-paragraphs of this paragraph is plain, and as was pointed out by the Judicial Committee of the Privy Council in the case of *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (1), they preclude any appeal. We were referred to *Ibrahim Ali* v. *Mohsin Ali* (2). It is true that in that case the Court expressed the opinion that there were certain exceptions to the rule that decrees upon such awards are not appealable. One such was said to be where the award was not an award at all. It was said that in the present case the two chosen arbitrators enlisted the services of two additional arbitrators, and that as under the terms of reference they had no power to do this, their award was no award in law. But it was admitted that the award was made and signed only by the two arbitrators originally referred to. These gentlemen were given very wide powers, and even if they called in two other persons to assist them, their award could not be attacked on the ground that it was no award at all. This case therefore differs from that contemplated by the Allahabad High Court, and is subject to the ordinary rule, which is that a decree in consequence of an award, to which the above quoted paragraph to Sch. 2, Civil P. C. applies, is not appealable. The appeal is therefore dismissed under O. 41, R. 11.

R.K. *Appeal dismissed.*

(1) A. I. R. 1923 P. C. 66=47 Bom. 578=50 I. A. 324 (P.C.).

(2) [1896] 18 All. 422=(1896) A. W. N. 137 (F.B.).

* A. I. R. 1929 Rangoon 226

BROWN, J.

Ma Yin Hu and *another*— Appellants.

v

Ma Chit May and *others* — Respondents.

Second Appeal No. 607 of 1928, Decided on 26th February 1929.

*** Transfer of Property Act, S. 126—Person executing deed of gift— On same day donee executing another registered deed agreeing not to transfer the property without donor's consent and in case he did so he would return property to donor — The case comes within the provisions of S. 126 and such agreement does not contravene provisions of S. 10—T. P. Act, S. 10.**

A person executed a deed of gift in favour of another and on the same day the donee executed another registered deed by which he agreed not to make a gift or transfer, sell or mortgage the property without the knowledge, consent and permission of the donor and that if he did so, he would return the property to the donor.

Held: that though the gift and promise were made on separate documents, they must be treated as forming part of one transaction as they were made at the same time and that the gift of the property was consideration for the promise made. [P 227 C 1]

Held further: that the case fell within the provisions of S. 126 as at the time of making the gift it was agreed by the donee that gift would be revoked on the donee's transferring or mortgaging the property without the donor's consent, that is, on the happening of any specified event which did not depend on the will of the donor and that the agreement did not contravene the provisions of S. 10 inasmuch as there was promise to the donor personally and it was only the donor in his lifetime who could revoke the gift: 7 *All.* 516; *A. I. R.* 1923 *All.* 514, *Dist.*; 4 *A. L. J.* 708, *Appr.* [P 228 C 1]

Thein Maung—for Appellants.

Ba Thein—for Respondents.

Judgment.—U Chan Nyein, now deceased, brought a suit against the appellant Ma Yin Hu and Limma and one S. T. Chokalingam Chettyar for cancellation of a deed of gift and possession of a certain house and its site. The plaintiff's case was that on 3rd December 1923 he had executed an outright deed of gift in favour of appellant 1 who was his sister, but that on the same day appellant 1 executed another registered deed whereby she undertook not to make a gift of, transfer, sell or mortgage the property without the knowledge, consent and permission of the donor, and that, if she did so, she would transfer and return the property to the donor. On 10th July 1925, the appellants executed a mortgage of the property in favour of defendant 3, Chokalingam Chettyar, for Rs. 1,000. The plaintiff claimed that this mortgage was effected without his consent and that he was therefore entitled under the terms of the agreement to have the property reconveyed to him. As against Chokalingam Chettyar the case has been dismissed

and the validity of the mortgage so far as he is concerned is not now in question as there is no appeal aganist this order of dismissal. The trial Court, however, gave a decree in favour of the plaintiff against the two appellants. This decree was confirmed on appeal to the District Court and the appellants now come in second appeal to this Court.

Certain allegations were made as to undue influence at the time the gift was made and it was also contended that U Chan Nyein had given his consent to the mortgage, but on these points the decision of the two lower Courts is against the appellants and they have not been urged in this appeal. U Chan Nyein died during the pendency of the suit in the trial Court and is now represented by his widow Ma Chit May.

The contention now put forward on behalf of the appellants is that the promise not to transfer without the donor's consent is void. It is contended that, if the gift and the promise be considered as forming one transaction, then the provisions of S. 10, T. P. Act, are operative, and that if the promise is treated as a separate transaction, then it must be held to be void as being opposed to public policy and without consideration. I do not think the claim as to consideration can be substantiated. It is clear that two registered documents were executed on the same day, and that the gift of the property was consideration for the promise made. The gift and the promise were made on separate registered documents but it is clear that they were made at the same time and it seems to me that they must be treated as forming part of one transaction. S. 10, T. P. Act, lays down that where property is transferred subject to a condition or limitation, absolutely restraining the transferee or any person claiming under him from parting with, or disposing of, his interest in the property, the condition or limitation is void. I have been referred to two Allahabad cases on this subject.

In the case of *Bhairo* v. *Parmeshri Dayal* (1), by a compromise between the parties it was agreed that one of the parties should hold possession of certain property generation by generation and would not alienate the property. It was held that this condition restraining the power of alienation was void as contravening the provisions of S. 10, T. P. Act. Apart from the provisions of S. 126, T. P. Act, which I shall refer to later, *Bhairo's* case differs considerably from the present case. In that case the transferee was to hold possession generation by generation and the condition restraining the powers of alienation was apparently to be in force for ever. In the present case there is no absolute condition that is to last for ever. As regards the property here the condition merely is that the donee will not transfer it without the consent of the donor. There is no provision in the deed restraining the power of transfer after the donor's death.

Another case referred to on behalf of the appellants is the case of *Gopi Ram* v. *Jeot Ram* (2), In that case there was a covenant in a deed of sale that, if the vendee, his heirs or representatives desired to sell the house purchased, they should in such a case first ask the executant, his heirs or representatives for the time being, to purchase it. It was held that this condition was void as offending against the law of perpetuities. But here again the condition was applicable not only to the parties but to their heirs and representatives.

These are the only two official reports to which I have been referred on behalf of the appellants. The trial Judge in his judgment referred to the case of *Makund Prasad* v. *Rajrup Singh* (3). This is an unauthorised report and therefore cannot be cited as an authority. But it seems to me that the arguments in that case are sound. In that case as here there was a gift of certain immovable property subject to a condition that the land would be taken back in the event of the donee transferring it.

It was pointed out that S. 126, T. P. Act, recognizes the validity of a power of revocation. That section lays down that the donor and donee may agree that, on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked. That appears to me to be the effect of the two documents in the present case when read together. At the time of the gift it was agreed by the donee that the gift would be revoked on the donee's transferring or mortgaging the property without the donor's consent, that is to

(1) [1884] 7 All. 516=(1885) A.W.N. 138.

(2) A. I. R. 1923 All. 514=45 All. 478.

(3) [1907] 4 A.L.J. 708=(1907) A. W. N. 278.

say, on the happening of any specified event which does not depend on the will of the donor. Looked at in this light the agreement does not seem to me contravene the provisions of S. 10. There is only a promise to the donor personally and it is only the donor, during his lifetime who could revoke the gift. There is no absolute restraint on the transferee or any person claiming under him from alienating the property. I am of opinion therefore that the provisions of S. 10, T. P. Act do not apply to the present case and that the promise made by appellant is not void as being opposed to public policy. The appellants are bound by their promise and their appeal must therefore fail. I dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 228

BROWN, J.

V. S. Aiyar—Appellant.

v.

Maung Nyun and *another*—Respondents.

Second Appeal No. 649 of 1928, Decided on 29th May 1929, against judgment of Dist. Court, Magwe, in C. A. No 16 of 1928.

(a) Civil P. C., O. 21, R. 63—Orders made against person applying for removal of attachment—Under O. 21, R. 63 he can sue though attachment is subsequently withdrawn.

Where orders have been passed against a person on his application for removal of attachment O. 21, R. 63 gives him a right to file a suit even though the attachment is withdrawn by the decree-holder: 9 *L. B. R.* 47, *Dist.* [P 228 C 2]

(b) Jurisdiction—Objection once decided—Second objection cannot be entertained.

Where, after question of jurisdiction has been already dealt with and decided, objection is taken to it, the Court is justified in refusing to go into it again. [P 229 C 1]

(c) Suits Valuation Act, S. 11 (2)—Scope.

Under S. 11 (2) even if objection to jurisdiction was taken at an early stage in the trial Court, the appellate Court is required to dispose of the appeal as if there had been no defect of jurisdiction, unless it is satisfied that the over-valuation or under-valuation has prejudicially affected the disposal of the suit or appeal on its merits. [P 229 C 2]

B. K. B. Naidu—for Appellant.

S. Ganguli—for Respondent 1.

Judgment.—The respondent Maung Nyun brought a suit in the Township Court, Magwe, against the appellant Mr. V. S. Aiyar, and respondent 2 Maung Po Sein. The suit was in regard to a certain piece of land which Maung Nyun claimed to be his. This land had been attached by the appellant in execution of a decree he had obtained against the respondent Po Sein. Maung Nyun made an unsuccessful application for removal of attachment. He then brought the suit out of which this appeal has arisen. He has joined the appellant and defendant 2, respondent, as defendants. So far as the appellant is concerned, he required a declaration under the provisions of R. 63, O. 21, Civil P. C. Against Po Sein he sued for possession, alleging that Po Sein had since the attachment trespassed upon the land which was in his possession.

It seems to me open to doubt whether even supposing the provisions of R. 3, O. 7 were sufficiently wide to make it permissible to join the two causes of action in the one suit, it would not have been more satisfactory if the claim against the two defendants had not been made in separate suits. But no objections have been raised now to the decision of the lower Courts on this score. The trial Court held that the plaintiff had proved his claim and gave him a declaratory decree and a decree for possession of the land. The order of the Township Court was confirmed by the District Court on appeal. Maung Po Sein has not appealed against the order of the District Court. This appeal has been filed by the other defendant Mr. Aiyar.

The first contention on his behalf laid before me is that he had withdrawn the attachment and therefore no suit against him lay. The provisions of R. 63, O. 21 are quite clear. It is admitted that orders had been passed against the plaintiff in the miscellaneous proceedings on his application for removal of attachment. R. 63, therefore, gave him a clear right to file a suit. The case of *Raman Chetty* v. *Ma Hmu* (1) has been cited on behalf of the appellant, but it does not seem to me to help. In that case it was held that a judgment creditor could not bring a declaratory suit when the judgment-debtor had become insolvent as he then no longer has a right to attach the judgment-debtor's

(1) [1917] 9 L. B. R. 47=37 I. C. 803=10 Bur. L. T. 116.

property. I do not understand the appellant's claim to be that he had no longer the right to attach the judgment-debtor's property. In my opinion there is no force at all in this objection.

The other objection which had been taken in this appeal is that the trial Court had no jurisdiction to try the suit. It is somewhat difficult to unravel from the mass of plaints and written statements in the trial proceedings what exactly was the course of the litigation in that Court. The present appellant at any rate does not seem to have raised the question of jurisdiction although Po Sein did raise the point, but when issues were framed it was agreed that before deciding the case on the merits the Court should try the first four issues. There are various issues connected with the framing of the suit and include an issue whether the Court had jurisdiction to entertain the suit. On this issue the Court held that as the suit was then framed it had no jurisdiction because in addition to the other reliefs the plaintiff asked for his costs in the miscellaneous proceedings This defect was rectified by the plaintiff amending his plaint and waiving his costs and so far as can be found from the record it was only then that the defendants seriously raised the question as to the value of the property being more than 1,000 and before the decision of the preliminary issue no evidence was adduced by either side to show that this valuation was wrong. It is subsequently to the passing of orders on the preliminary issue that question of the valuation of the property was definitely raised. In view of the fact that the jurisdiction question had already been dealt with and decided I think the trial Court was justified in refusing to go into it any further. Rs. 1,000 was the actual price according to the sale deed for which the land was brought by the plaintiff.

Another objection on the ground of jurisdiction has been raised and that is that there were two distinct causes of action, one against the defendant Po Sein for possession and the other against the appellant Aiyar for a declaration and that for this reason the total value of the suit for purposes of jurisdiction is over 1,000. Reliance is placed on O. 2 R. 3, Cl. (2), Civil P. C. That rule refers primarily to cases of joinder of causes of action against different defendants and it seems to me very doubtful whether it can be maintained that the value of the aggregate subject-matter of the causes of action in the present case is more than the value of the land. But however this may be, I am of opinion that the case is sufficiently covered by the provisions of S. 11, Suits Valuation Act. Under Cl. (2) of that section even if objection to jurisdiction was taken at an early stage in the trial Court, the appellate Court is required to dispose of the appeal as if there had been no defect of jurisdiction, unless it is satisfied that the over-valuation or undervaluation has prejudicially affected the disposal of the suit or appeal on its merits The District Court was of opinion that if there were an under-valuation, it had no prejudicial effect on the disposal of the suit on its merits. The evidence was recorded at considerable length and a careful judgment was written by the Judge of the trial Court. If the suit had been beyond the jurisdiction of the Township Court, it would have been triable by the Sub-Divisional Court, and the appeal from that Court would also have gone to the District Court. I see no reason for supposing that any undervaluation that may have been made has prejudicially affected the disposal of the suit on its merits. I am not therefore satisfied that there is sufficient reason for interference on this ground. It has been suggested in argument that full costs of this suit should not have been awarded against the appellant. This ground is not raised in the memorandum of appeal, and I am not satisfied that there is any ground for interference on question of costs alone. The appellant undoubtedly contested the suit on the merits. and denied the plaintiff's title I dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Rangoon 229

ORMISTON, J.

In the matter of L. W. Nasse, an insolvent Mansuklal Dolatchand & Co.— Applicants.

Insolvency Case No. 70 of 1923, Decided on 4th May 1928.

(a) Presidency Towns Insolvency Act, S. 8 (1)—S. 8(1) gives Court unlimited power

to review, rescind or vary and S. 90 (1) cannot act to limit it—Presidency Towns Insolvency Act, S. 90 (1).

Section 8 (1) gives the Court an unlimited power to review, rescind or vary and S. 90 (1) of Act cannot act to limit that power by importing the provisions of Civil P. C., O. 47, R. 1. [P 232 C 1]

(b) Limitation Act, Art. 162—Review of judgment in Art. 162 refers to review under Civil P. C., O. 47, R. 1.

The review of judgment referred to in Art. 162 is the review of judgment mentioned in O. 47, R. 1, Civil P. C. [P 232 C 1]

(c) Limitation Act, Art. 162—Application under insolvency jurisdiction is not governed by Art. 162—Presidency Towns Insolvency Act, S. 8 (1).

An application to a High Court for a review of a judgment passed by it in its insolvency jurisdiction is not governed by Art. 162. [P 232 C 2]

(d) Limitation Act, Art. 173—Scope.

Article 173 is restricted to applications for review under Civil P. C. [P 232 C 2]

(e) Presidency Towns Insolvency Act, S. 17 Proviso—Person by agreement with his creditors authorizing them to withdraw money to his credit—He adjudicated insolvent and on next day creditors suing him on strength of agreement to have lien on money to insolvent's credit and obtaining decree—Suit instituted without leave of Court—Leave being necessary decree obtained is not binding on Official Assignee or estate of insolvent.

The words of the proviso to S. 17 can be amply satisfied by confining its operation to cases where the mortgagee can realize his security without the institution of the suit. [P 233 C 2]

A person by an agreement with his creditors authorized them to withdraw all sums then and thereafter to his credit and for the purpose gave them a general power of attorney. The person was adjudicated insolvent and on the next day the creditors brought a suit against him on the strength of the agreement to have a lien on money to his credit. No leave to institute the suit was obtained. The creditors got decrees declaring that they had lien on sums of money lying at the credit of insolvent.

Held : that leave of the Court was necessary and no leave having been obtained the decree was not binding on the Official Assignee or the estate of the insolvent : 38 *Bom.* 359, *not Foll.* : *White* v. *Simmons,* (1871) 6 *Ch.* 555, *Expl.* [P 233 C 2]

(f) Presidency Towns Insolvency Act, S. 17 —Unless Official Assignee is party to suit decreeing lien on estate of insolvent, he is not bound by it.

Unless the Official Assignee is a party to the suit by creditors in which a decree is passed declaring a lien against the estate of an insolvent, he is not bound by it and he cannot be deemed to be party merely because he is given an opportunity to defend the suit and he elects not to do so : *A. I. R.* 1927 *P. C.* 108, *Rel. on.* [P 234 C 1]

(g) Civil P. C., S. 64—Assignment of debt involves transfer of interest in it.

It cannot be held that an assignment of a debt or fund, equitable or legal, does not involve a transfer of an interest in that debt or fund : *Rodick* v. *Gandell* 42 *Ch.* 749, *Rel. on.* [P 234 C 2]

(h) Civil P. C., S. 64—If attachment is validly withdrawn though under misapprehension subsequent attachment does not relate back to date of 1st attachment and cannot have such effect against person taking transfer during interval.

Where an attachment is validly withdrawn, though under misapprehension, the second attachment does not relate back to the date of the first attachment and does not have such effect as against a person taking transfer from the judgment-debtor in the interval. The Court does not have power to pass such an order having retrospective effect although if fraud and collusion is alleged and proved between a judgment-debtor and transferee, a transfer obtained in the interval can be set aside : 23 *Cal.* 829 ; *A. I. R.* 1924 *Cal.* 744, 34 *All.* 490, *Dist.* ; 42 *All.* 39, *Dist.* and *Discussed.* [P 237 C 2]

*** (i) Presidency Towns Insolvency Act, S. 56 (1)—Charge on estate few days prior to insolvency if created in due course of business is not fraudulent.**

Although a charge is created on the estate by a person a few days before he becomes insolvent, creation of such charge cannot be held to be fraudulent if it is shown that it was created in the ordinary course of business and with the object of carrying it on and passing safely through the period of danger : *In re Cohen* (1894) 2 *Ch.* 505 *Rel. on.* [P 239 C 1]

Janab Ali, *Tambe* and *Joseph*—for Creditors Nos. 2, 8 and 9.

Judgment.—(*4th May* 1928)—This is an application under S. 8, Presidency Towns Insolvency Act, 1909, to review an order passed by Otter, J., on 2nd June 1927. The learned Judge, after admitting the application, went on leave, and I have been directed to dispose of the matter. The application is opposed by creditors 2, 7 and 9. L. W. Nasse had a contract with the Public Works Department under which he would in the ordinary course be due to receive a considerable sum of money and he was also in debt to the applicants. On 28th February 1923, he entered into an agreement with them which is on the file of C. R. No. 158 of 1923 of this Court. The agreement after reciting that he was indebted to the applicants to the extent of about Rs. 60,000, and that :

"he has now and will hereafter have sums to his credit on bills in the hands of the Executive Engineer, Mingaladon Cantonment Division and elsewhere in the Public Works Department,"

goes on to provide :

"The said L. W. Nasse hereby agrees and authorizes the said firm of Mansuklal Dolat-

chand & Co. to withdraw all such sums now to his credit or may hereafter be to his credit from the Public Works Department till all the debts due to them are fully satisfied. That for such purpose he has this day granted them a general power of attorney. Should the said L. W. Nasse after this agreement either withdraw the said sums himself or prevent in any way the firm of Mansuklal Dolatchand & Co. from withdrawing the same, then the said L. W. Nasse will be liable to either civil or criminal action as the firm of Mansuklal Dolatchand may think fit."

The power-of-attorney to which reference is made is dated 2nd March 1923, and is in the same record. After giving the applicants authority to withdraw moneys from the Public Works Department in language similar to that employed in the agreement, Nasse gave them specific authority to give receipts therefor and to institute suits in respect thereof. On 28th March 1923, Nasse was adjudicated insolvent. On 29th March 1923, the applicants, apparently being unaware of the adjudication, instituted two suits Civil Regular Nos. 158 and 159 of 1923 of this Court against the insolvent for the recovery of sums of money aggregating about Rs. 66,000, in which they claimed, on the strength of the agreement above set out, to have a lien on sums of money lying to the credit of defendant 1 in the office of the Executive Engineer, Mingaladon Cantonment Divisin and elsewhere in the Public Works Department and asked for a declaration to that effect.

On 8th April 1923, the Court was informed on the fact of the insolvency. Subsequently notice was issued to the Official Assignee to report to the Court whether he would defend the suit. He summoned a meeting of creditors to ascertain their views on the subject and on 10th July 1923, he filed his report. From this report, it appears that the creditors, before making up their minds wished to find out what moneys were due to the insolvent, and therefore, it had been arranged that on the 13th July the Official Assignee and the insolvent should meet the Executive Engineer, Mingaladon Circle. Further time was asked for until the 31st July. On that date the Official Assignee by his advocate informed the Court that he would not defend the suit on behalf of the insolvent. And on 10th August 1923 decrees were passed in favour of the applicants in C. R. 158 for Rs. 50,000, interest and costs, and in C. R. 159 for Rs. 12,500, interest and costs. In each case it was declared that the applicants had a lien on sums of money lying to the credit of the insolvent in the office of the Executive Engineer, Mingaladon Cantonment Division, Rangoon, and elsewhere in the Public Works Department.

The differences between the estate of the insolvent and the Public Works Department as to the amount due to the estate were referred to arbitration, and the arbitrator whose award is filed in C. M. No. 131 of 1925, found that Rs. 33,752-5-3 was due to the insolvent's estate. This sum was paid to the Official Assignee and the applicants applied that it be paid to them claiming that they had a lien, first on the ground that the lien had been declared by the decress in C. R. suits 158 and 159 of 1923, and, secondly, that, independently of those decrees, they had a lien of virtue of the documents to which reference has been made above. Otter, J., by his order of 2nd June 1927, held that the Official Assignee was not bound by the decrees in the suits because the suits were filed after the insolvency without the sanction of the Court and that the documents were inoperative to confer a lien. It is this order which I am asked to review.

I will first deal with two preliminary points which were raised. The present application is under S. 8 (1), Presidency Towns Insolvency Act, which gives the Court power to "review, rescind or vary an order made by it under its insolvency jurisdiction." It was urged by the objecting creditors that sitting as a Judge in insolvency my powers are no greater than if application were made to me for review of judgment under O. 47, R. (1), Civil P. C. and Mr. Burjorjee conceded that, if the provisions of that rule were applicable, he would be out of Court. S. 90 (1) of the Act is recited to me in support of this contention The subsection enacts that in proceedings under the Act, the Court is to have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction. But there is a proviso that the subsection is not in anyway to limit the jurisdiction conferred on the Court by the Act. S. 8 (1) gives the Court an unlimited

power to review, rescind or vary and S. 90 (1) cannot operate to limit that power by importing the provisions of O. 47, R. (1) of the Code. Moreover, what I am in substance asked to do is to vary the order of 2nd June 1927, by holding that the applicants have a lien and if I am of the opinion that the order was wrong I am bound to vary it.

It is next urged that the application is out of time, because the period of limitation for an application for review of an order under S. 8 (1) is Art. 162, Sch. A, Lim. Act, 1908 or in the alternative Art. 173. Mr. Burjorjee concedes that if either of these articles is applicable, his application is time-barred, but says that the case is governed by Art. 181, which provides for applications for which no period of limitation is provided elsewhere in the schedule or by S. 48, Civil P. C. Art. 162 provides in the case of a review of judgment by the High Court in the exercise of its original jurisdiction a period of 20 days from the date of the decree or order. As a matter of construction I should hold that the review of judgment referred to in the article was the review of judgment mentioned in O. 47, R. (1), Civil P. C. Mr. Tambe, however, contends that "original jurisdiction includes insolvency jurisdiction" and cites a note in Rustomji's Law of Limitation (edn. 1927) at p. 901, to this effect. The case cited by the learned author, namely, the decision of the Privy Council in *In the matter of Candas Narrondas* v. *C. A. Turner* (1) by no means bears out this sweeping generalisation. In that case judgment had been entered up under S. 86 of Statutes 11 and 12 Victoria Cap. 81 (which at the time governed insolvency in British India) in favour of the Official Assignee against the insolvent for the amount of his scheduled debts. Eighteen years later the Official Assignee sought to execute the judgment. Under Art. 180, Sch. 2, Lim. Act, 1877, the period of limitation for an application to enforce a judgment of a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction was 12 years from the time when a present right to enforce the judgment accrued to some person capable of releasing the right. It was held that although a Court under the provisions of Statute 11 and 12 Vic. Cap. 21 determines the substance of questions relating to the insolvent's estate, the proceedings in execution and the judgment are the High Court's. Consequently, the judgment which was entered up was a judgment of the High Court in its ordinary original civil jurisdiction. The case is not, therefore, an authority for the proposition that an application to a High Court for a review of a judgment passed by it in its insolvency jurisdiction is governed by Art. 162 of the present Lim Act.

Article 173 deals with a review of judgment except in the cases provided for by Arts. 161 and 162, and provides a period of 90 days from the date of the decree or order. Mr. Tambe contends that this article is not restricted to applications for review under the Civil Procedure Code, and cites in support of his contention a passage on p. 921 of the same learned author, based on a decision reported in 3 *Mysore Law Journal* 124. I disagree with his contention. In my view, therefore, the present application is not barred by limitation.

Mr. Burjorjee then dealt with the two points on which Otter, J., had held against him. At the conclusion of his argument, counsel for the opposing creditors admitted that the agreement on which Mr. Burjorjee relied was effectual to create a charge, but contended that the matter was not concluded by the decrees passed in C. R. Suits 158 and 159 of 1923, and submitted that the charge purporting to be thereby created was void, first because at the time it was created the debt was under attachment, and secondly, because it amounted to a fraudulent preference. They further urged that the applicants had other securities for their debts and that these should be exhausted before recourse was had to the property in respect of which they claimed a charge. Mr. Burjorjee agreed that the applicants would first realize their other securities and give credit for the net amount realized before seeking to enforce their charge.

I heard counsel first on the question whether the matter was concluded by the decrees in question. Under S. 17, Presidency Towns Insolvency Act, on the making of an order of adjudication, the property of the insolvent vests in the Official Assignee and becomes divisible

(1) [1889] 13 Bom. 520=16 I. A. 156 (P. C.).

amongst his creditors, and thereafter except as directed by the Act no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall

"have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose."

There is a proviso that the section is not to affect the powers of any secured creditor to realize or otherwise deal with his security in the same manner as if the section had not been passed. In the present instance the suits were instituted the day after the adjudication and leave to institute them was not previously obtained. Mr. Burjorjee conceded that, if S. 17 applies, and the case is not within the proviso, leave must be granted before the institution of the suit. But he argued that a mortgagee in instituting a suit to realize his security is within the proviso; in other words, that he is free to realize his security either without the intervention of the Court, as by sale, or by the institution of a suit. In support of this proposition he cited *Lang* v. *Haptullabhai* (2), a decision of a Bench of the Bombay High Court, which was cited, but not discussed in *Ramchand* v. *Bank of Upper India, Limited, Delhi* (3), a case dealing with an entirely different point. In the Bombay case the Official Assignee was in the position of a mortgagor and the mortgagee brought a suit against him to realize his security. It was held affirming the judgment of Beaman, J., and differing from a decision of Davar, J., set out in a footnote to the report, that no leave was necessary, inasmuch as the proviso to S. 17 covered a suit by a mortgagee to realize his security, the principle being that a suit is one of the recognized methods of realization of mortgage securities, and that if S. 17 had not been passed, the mortgagee could have realized his security in the ordinary way by means of a suit. Reliance was placed on a passage in the judgment in *White* v. *Simmons* (4), where Lord Hatherlay declined to hold that where was

"an express reservation of all rights, a mortgagee should be precluded from proceeding in equity to enforce his security."

The learned Judges say that Lord Hatherlay was dealing with a proviso in the same words as the proviso to S. 17, Presidency Towns Insolvency Act. The proviso with which Lord Hatherlay was dealing was the proviso to S. 12, Bankruptcy Act, 1869. But S. 13 merely enacts that

"where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt except in manner directed by this Act."

It will be noted that there is no provision forbidding the institution of a suit without leave. This provision appears in S. 9, Bankruptcy Act, 1883 and in S. 7 (1), Bankruptcy Act 1914, which are similar to S. 17, Presidency Towns Insolvency Act. No English authority since the Act of 1883 came into force was cited in the Bombay cases, and none has been cited to me. I am of the opinion that the English cases decided under the Act of 1869 are not authorities for holding that under S. 17 the leave of the Court is not required for the institution of a suit by a mortgagee to realize his security. I am further of the opinion that the law was deliberately changed by the Act of 1883 with the object of closing the loop hole which those cases had left open. The words of the proviso can be amply satisfied by confining its operation to cases where the mortgagee can realize his security without the institution of a suit. I hold, therefore, that the leave of the Court was necessary for the institution of C. R. Suits 158 and 159 of 1923, and that that leave not having been obtained, the decrees in those suits were not binding on the Official Assignee or the estate of the insolvent. This concludes the matter. On the assumption that the view I hold is erroneous, and that leave was not necessary, unless the Official Assignee was a party to the suit he could not be bound by the decrees passed in them. This was so held by the Privy Council in *Kala Chand Banerjee* v. *Jagannath Marwari* (5). That was a decision under S. 16, Provincial Insolvency Act, 1907, the provisions of which, so far as material are similar to those of S. 17, Presidency

(2) [1914] 38 Bom. 359=21 I.C. 714=15 Bom. L.R. 939.

(3) A.I.R. 1922 Lah. 281=3 Lah. 59.

(4) [1871] 6 Ch. 555=19 W.R. 939=40 L.J. Ch. 689.

(5) A. I. R. 1927 P. C. 108=54 Cal. 595=54 I. A. 190 (P. C.).

Towns Insolvency Act. Mr. Burjorjee argued that the Official Assignee must be deemed to have been a party because he was given an opportunity to defend the suits and elected not to do so. The procedure which was followed in the suits would have been correct if the insolvency had supervened after the institution of the suits. But at the date of their institution Nasse had been adjudicated and the equity of redemption in the debt had devolved on the Official Assignee. He was a necessary party, and should have been sued in the first instance; not having been sued in the first instance he should have been placed on the record as a defendant. The case is analogous to that of a suit brought against a man who was dead at the time of its institution. In such a case it would be incumbent on the plaintiff not merely to write to the legal representatives enquiring whether they wished to defend the suit, but to place them on the record. In the case to which reference was last made *Kala Chand* v. *Jagannath* (5), a contention somewhat similar to that made by Mr. Burjorjee was put forward and rejected by their Lordships of the Privy Council. On this ground also I hold that the Official Assignee is not bound by the decrees in C. R. Suits Nos. 158 and 159 of 1923.

The next question is whether the charge purporting to be created was void because at the time it was created the debt was under attachment. The point is one of considerable importance and was not taken in the objections of the opposing creditors which were before Otter, J. I, therefore, allowed an adjournment so that the matter might be fully argued. Under S. 64, Civil P. C. when an attachment has been made, any private transfer or delivery of property attached, or of any interest therein, is void as against all claims enforceable under the attachment. I may first refer to a suggestion made by Mr. Burjoree, that the charge on which he relies was made by an agreement, and that it did not involve a transfer of an interest in property within the meaning of the section. In *Rodick* v. *Gandell* (6), at p. 754 Lord Truro, L. C., says that

> "an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers."

And it seems impossible to hold that an assignment of a debt or fund, equitable or legal, does not involve a transfer of an interest in that debt or fund.

I will now narrate briefly the facts relevant to this portion of the argument.

Civil Regular No. 39 of 1923 of this Court was a suit instituted on 20th January 1923, by V. S. R. M. Chettiar (creditor No. 2 in these proceedings) against Nasse and others for the recovery of Rs. 20,000 and interest due on a promissory note. On 27th January 1923, on an application by creditor No. 2 for an attachment before judgment of the debts due to Nasse by the Executive Engineer, P. W. D. Cantonment Division, Rutledge, J. (as he then was) directed a prohibitory order to issue, and it was served on 30th January. On 2nd February Nasse filed an application, supported by an affidavit asking that his personal security might be accepted and the attachment removed. It should be noted that in the affidavit he emphasized the fact that it was his personal security which he was offering. On the same day Rutledge, J., passed the following order :

> "On defendant giving security to the satisfaction of the bailiff for the amount of claim and costs prohibitory order to be withdrawn."

On this, on the same day, the Deputy Registrar asked the bailiff to report and the bailiff endorsed on the petition "Petitioner Mr. L. W. Nasse is good for Rs. 21,560." The bailiff had originally written "surety" but scratched it out and substituted "petitioner." On the same day the Deputy Registrar endorsed on the petition "Let the surety be accepted," and there is a note in the diary:

> "On the defendant's application dated 2nd February 1923 tendering his personal security, order passed as prayed."

Under this are initials, not apparently those of the Deputy Registrar. On 3rd February, Nasse executed in the presence of the Deputy Registrar a bond giving personal security. On 5th February there is an entry in the diary, followed by what appears to be the same initials:

> "Security bond having been filed 3rd February 1923, attachment is removed."

(6) 42 Ch. 749.

On the same day a notice was served on the Executive Engineer informing him that the attachment had been removed. On or about 17th February creditor No. 2 filed an application (dated 13th February) complaining that O. 38, R. 5 (b) of the Code, under which the order of 2nd February had been made, did not contemplate or authorize the acceptance of personal security, and asking for cancellation of the order "accepting the surety" and that Nasse be ordered to furnish proper and sufficient security in terms of the Court's order and on failure to do so

"that he be ordered to pay into Court all moneys withdrawn by him to the extent of Rs. 21,500 from the P. W. D. and for such purpose all necessary orders may be given."

Notice was ordered to issue to Nasse and was served on him on 21st, on which date he was given time to file objections until 26th. On 26th he was given further time for this purpose until 2nd March. On 3rd March he filed objections and the matter was directed to be placed before the Court on 5th March. Meanwhile Nasse had executed his charge in favour of the present applicants on 28th February and given them the power of attorney to collect the moneys from the P. W. D. on 2nd March. The matter came before the Court on 5th March and Rutledge, J., said that his order of 2nd February never contemplated that the bailiff should be satisfied with Nasse's personal security and had he meant merely personal security, he would have so stated. He continued:

"Such being the case, the prohibitory order must be re-issued and it will only be withdrawn on the defendant furnishing adequate and independent security to the satisfaction of the bailiff."

On 8th March it is stated that the attachment was re-issued. The actual prohibitory order, which was issued on that date, and served on 12th March, says nothing about a re-issue and is in form an entirely fresh prohibitory order. On 22nd March a decree was passed in favour of creditor No. 2. As I have said before, Nasse was adjudicated insolvent on 28th March, and the applicants filed their suits to establish their security on the next day.

It is Mr. Burjorjee's case that on the date on which the charge was created, there was no subsisting attachment. To this Mr. Janab Ali replied that, inasmuch as the attachment was removed under a misapprehension by the Deputy Registrar and was immediately restored by the Judge, the attachment ordered to issue on 5th March related back to the date when the prior attachment was first issued, and that the charge must be deemed to have been given while the attachment was subsisting and is therefore void. I may say that before the argument proceeded the record of C. R. 39 of 1923 was carefully inspected by counsel on both sides, my attention was not drawn to the peculiarities in the endorsement of the petition of 2nd February and in the diary entries of 2nd and 5th March which I have indicated, and Mr. Janab Ali was satisfied that the order removing the attachment was the order of the Deputy Registrar and conceded that he had power to make such an order. In support of his contention Mr. Janab Ali cited a number of authorities all of which with two exceptions, are cases of removal of attachment followed by a declaratory suit in which the attaching creditor established his claim. Mr. Burjorjee says that this class of cases is distinguishable and that, of the exceptions, one has no bearing and the other was erroneously decided. I will now deal with the authorities.

In *Bonomali Rai* v. *Prosuno Narain Chowdhury* (7), a decree-holder attached the property of certain of the defendants who then obtained an order of release under S. 280 of the Code of 1882 (corresponding to O. 21, R. 60 of the present Code), and subsequently mortgaged the property. The attaching creditor thereupon sued for and obtained under S. 283 (corresponding to O. 21, R. 63), a declaration that the mortgaged property was nevertheless liable to be sold under his attachment. A few days after obtaining the decree he again attached the judgment-debtor's property. The mortgagees then sued on their mortgage and obtained a decree for sale. The sale in execution of the attaching creditor's decree and that ordered by the decree in favour of the mortgagees were both advertised for the same day. The plaintiff purchased at the sale under the attaching creditor's decree and then sued for a declaration that the property was not liable to be sold in execution of the mortgage decree, the reason being that the judgment-creditor's at-

(7) [1896] 23 Cal. 829.

tachment was restored by the decree under S. 283 of the Code, and that the mortgage executed by the judgment-debtors was invalid as against the plaintiff, the purchaser at the execution sale. It was held that the plaintiff was entitled to the decree sought. The ground of the decision was that the order for release at the instance of the claimant:

"was not final but provisional, as S. 283 declares it to be subject to the result of any suit which the attaching creditor may bring to establish the right which he claims to the property in dispute. That right was to do what he had already done "viz., attach it and to do what he wanted to do, but was prevented by the order from doing, to sell it in pursuance of his attachment. The only remedy given to the attaching creditor is by a suit which must be brought within one year from the date of the order, and the object of the suit is to maintain the attachment and get rid of the order. Although, therefore, an order under S. 280 operates to prevent the attaching creditor from proceeding to sell the attached property, it does not operate so as at once to remove the attachment and leave the judgment-debtors free to deal with the property as they like. If they do deal with it, they and those with whom they deal do so subject to the result of the suit as to the attachment being maintained. Any other construction of the section would in very many cases defeat the object of the suit and render the decree infructuous."

The case, therefore, depends on the peculiar remedy given to the attaching creditor by S. 283 of the old Code, and is not an authority for the broad proposition that whenever an attachment is removed under a misapprehension and a fresh attachment is made, an intervening charge is subject to the disabilities specified in S 64 of the present Code. This case was followed on the same ground in *Ram Chandra Marwari* v. *Mudeshwar Singh* (8) and *Ali Ahmed Khan* v. *Bansidar* (9). Reliance is placed by Mr. Aiyangar on the remarks of Rankin, J., in *Najimunisa Bibi* v. *Nacharuddin Sardar* (10), (*at p.* 556 *of* 51 *Cal.*). That was a case relating to attachments under decrees and a declaratory suit, but no question actually arose under S. 64. Rankin, J., said:

"It is quite plain that, if an attachment comes to an end validly, then upon a second attachment no Court can refuse to recognize an interest validly created in the meanwhile. It is also plain that if an attachment is wrongly released, and the right to attach is subsequently established according to law either by appeal or otherwise the attachment will relate back to the time when it was made."

From the context it would appear that he was discussing the position in relation to O. 21, Rr. 60 and 63 of the Code. If his remarks were intended to have any wider application they were obiter dicta.

In *Aziz Bakhsh* v. *Kaniz Fatima Bibi* (11), the assignee of a decree attached two properties one of which was burdened with a mortgage in favour of the assignor and the other of which was not so mortgaged. The judgment-debtor objected that the mortgaged property could not be sold in execution without a suit being brought on the mortgage. On 2nd June 1909, the Court dismissed the application for execution in toto.

On 10th August 1909, the decree-holder applied for review of judgment, on the ground that the order dismissing the application with regard to the non-mortgaged property was erroneous, and on 13th June 1910, the review was accepted and the execution as regards the non-mortgaged property ordered to proceed. Between these last two dates the judgment-debtor sold the non-mortgaged property to a third party. After the 13th June 1910, the decree-holder applied to go on with the execution proceedings and to sell the non-mortgaged property. The judgment-debtor (not his transferee) objected on the ground that under O. 21, R. 57, the previous attachment had ceased to exist, and that a fresh attachment was necessary and the property could not be sold, as he had already sold it to another person. O. 21, R. 57 provides that when property has been attached but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it may dismiss it and thereupon the attachment is to cease. But in the case under discussion there was no default and no order of dismissal for default, and it was held that the attachment still subsisted and it was valid as against the purchaser. All that the case holds is that the attachment never had been removed. It is not an authority for the general proposition that if the first attachment is actually removed, albeit under a misapprehension, a second attachment relates back to the

(8) [1906] 33 Cal. 1158=10 C. W. N. 978.

(9) [1909] 31 All. 367=1 I. C. 951=6 A. L. J. 434.

(10) A. I. R. 1924 Cal. 744=51 Cal. 743.

(11) [1912] 34 All. 490=15 I. C. 49=10 A.L.J. 48.

date of the first attachment. The case on which Mr. Janab Ali most strongly relies is that of *Gopal Prasad* v. *Kashi Nath* (12). In that case there were two suits pending against the same defendants by different plaintiffs, one in the Aligarh Court in which Kashi Nath was the plaintiff, and the other in the Mainpuri Court in which another person was the plaintiff. On 9th August 1909, the defendants applied to the High Court to transfer the Mainpuri case to Aligarh in order that both cases might be tried together, and on the same date obtained an order "Let notice go; stay meantime." On 14th August 1909, Kashi Nath attached before judgment certain properties of the defendants. On 27th August 1909, the Aligarh Court, on the application of the defendants, withdrew the attachment on the ground that the order of the High Court must be taken as a stay of proceedings in both Courts, and not of those in the Mainpuri Court only, and that, therefore, the attachment being a proceeding subsequent to the order, was illegal. Kashi Nath appealed to the High Court which held that the stay order of 9th August 1909, related only to the proceedings in the Mainpuri Court :

"and by its order of the 16th March 1910, directed that the parties be restored to the position they occupied on 9th August 1909, and that all orders which had followed from the wrong interpretation of the stay order be set aside."

In the interval between 27th August 1909 and 16th March 1910, however, when as a matter of fact, there was no order in existence attaching the properties the defendants sold them to four different transferees. Kashi Nath obtained a decree in his suit, and took out execution proceedings for sale of the properties on the strength of the attachment before judgment. The transferees having made unsuccessful objections in the execution department, brought four separate suits for declarations that the transfers were good and that the properties were not saleable in execution of Kashi Nath's decee. The suits were dismissed and four appeals were filed, three of which were heard and dismissed by various Benches, and then Gopal Prasad's appeal was heard, apparently by a different Bench. There was no finding that Gopal Prasad had been in collusion with the defendants, and the Court assumed that he was a bona fide purchaser of property which he knew was not at the time of his purchase under attachment. It was held, however, that the order of 16th March 1910, had retrospective effect and that, consequently, the sale to Gopal Prasad effected between 9th August 1909 and 16th March 1910, when there was no subsisting attachment was invalidated. The decision was based on two grounds. First, the Calcutta decisions which I have cited were without discussion treated as authorities for the broad proposition laid down and secondly the Court held that that it was bound by the previous unreported decisions of the Benches in the cases of the appeals of two of the three transferees.

It appears to me that this case is distinguishable from the one which I have to decide. The order of the Allahabad High Court of 16th March 1910, distinctly stated that it was to relate back to 9th August 1906. The order of Rutledge, J., of 5th March 1923, directed in terms an entirely fresh attachment and I do not think it can be implied that he meant it to have retrospective effect ; if he had so meant, he would have so stated just as he had stated that if by his earlier order of 2nd February 1909, he had meant that personal security should be accepted, he would have so stated. Further, I think, that the decision of the Allahabad High Court was not justified by the Calcutta decisions which I have cited and on which it professed to rest. Those decisions, as I have pointed out, are based on the peculiar remedy given to an attaching creditor by O. 21, R. 63, and are no authority in any other class of case. Even if the order of Rutledge, J., is to be deemed to have been passed with the intention that it should have retrospective effect I am of the opinion that the first attachment having been validly withdrawn, no subsequent attachment could have such an effect as against a person taking a transfer form the judgment-debtor in the interval. There is nothing in the Code, or so far as I know, elsewhere, which confers such a power on the Court. I do not say that in properly constituted proceeding, if fraud and collusion were alleged and proved between the judgment-debtor and a transferee'a transfer obtained under such circumstances

(12) [1919] 42 All. 89=52 I. C. 343=17 A.L.J. 901.

as exist in the present case could not be set aside. But in the objections of creditor No. 2, filed on 31st March 1927, there is no allegation that the charge was obtained either by fraud or collusion, and the objection, raised by Mr. Janab Ali for the first time before me, is simply, that the charge is void by reason of S. 64, Civil P. C. I hold that it was not for that reason void.

The only remaining objection pressed is that, inasmuch as the charge was given on 28th February 1923, and Nasse was adjudicated an insolvent on 28th March 1923, the charge is void as being a fraudulent preference. This is a matter which was not gone into before Otter, J., and one on which I must hear evidence. The circumstances under which the charge was obtained may or may not have a bearing on that issue. As to that, at present, I express no opinion.

I think it desirable here to make a few remarks as to the time which the hearing of the review has already taken. A whole day was occupied by a discussion of preliminary objections to the review which failed, and by Mr. Burjorjee's arguments on the two points in issue before Otter, J., on one of which he succeeded, and another half day was occupied by arguments on a point taken before Otter, J., where I have held that Mr. Burjrajee has failed. A further half-day was occupied on an objection not alleged before Otter, J., on which I have held that Mr. Burjorjee has succeeded.

Order.—(25*th June* 1928) This order should be read in continuation of my order of 4th May 1928. I should first state that the objecting creditors are V. S. R. M. Chettyar (No. 2), Watson and Son Ltd. (No. 8) and D (or O) M. Sonai Muthia Pillay (No. 9). In the heading of my previous order by a clerical error V. S. R. M Chettyar is described as creditor No. 2. In the body "Watson and Son Ltd., was declared as No. 7. It was so described in its objections. When I delivered that order, as it appeared possible that the evidence might be lengthy I directed that the case should come into the daily list in a week's time. The intervention of a long case has been the cause of the delay in the completion of the hearing. In this part of the case Mr. Joseph did not appear Mr. Tambe was present all the time, but was content to adopt the arguments of Mr. Janab Ali.

The question for decision is whether the transaction evidenced by the charge of 28th February 1923, and the power of attorney of 2nd March 1923, in view of the fact that the adjudication took place less than three months of its date, is a fraudulent preference within S. 56 (1) of the Presidency Towns Insolvency Act, 1909. Mr. Burjorjee said that he did not dispute that Nasse was at the time unable to pay his debts as they became due from his own money, and the only question I have to decide is whether the charge was created by him in favour of the applicants "with a view of giving" them a preference over the other creditors. The law applicable is not in dispute, counsel agree that the view of preferring need not be the whole view, but that it must be the dominant view. As was observed as long ago as 1883 by Baggalay, L. J., in *Ex-parte Hill* (13) at p. 701 in relation to the corresponding section of the Bankruptcy Act, 1869 :

> All that S. 92 says is that the conveyance must be made "with a view of giving such creditors a preference :" it does not say with the sole view. I understand it to mean that the substantial object or view must be the giving the creditor a preference, and that the mere fact that besides that view there may have been also some view of an advantage to be gained by the person who makes the preference does not alter the case, or prevent the application of S. 92."

Nor is it in dispute that the onus of showing that there is a fraudulent preference is, at any rate in the first instance, on those who assert it. Mr. Janab Ali argues that if a prima facie case is made out that a transaction amounts to a fraudulent preference, the onus shifts. Mr. Burjorjee does not contest this proposition. Reference is made to *In re, Cohen* (14). It was there held by a majority of the Court of Appeal that where a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor with the result of giving him a preference in fact, and the reason for such payment is unexplained, there is a prima facie case of fraudulent preference. Consequently, it being held that the trustee had proved a prima facie case of fraudulent preference, and there being no evidence to the contrary,

(13) [1883] 23 Ch. D. 695.
(14) [1894] 2 Ch. 505.

the truestee was entitled to suceed on his application that the payment was a fraudulent preference. Warrington, L. J., however, (at p. 539) observed :

> "The case is a peculiar one, and it must not be supposed that it will be any authority for questioning the validity of a payment of a debt made in the ordinary course of business by a man who knows he is at the time insolvent, but who may well make such payments in the hope of keeping his business on foot for a time and perhaps even of passing safely through the period of danger. Such payments have been held not to be fraudulent within the meaning of the section, and I desire to throw no doubt on the correctness of such decisions."

Sargant, L. J., who delivered a concurring judgment, said (at p. 543) that there was :

> "a general current of authority that, when a preference in fact has been given in anticipation of bankruptcy such preference in fact requires justification by the establishment of some other sufficient dominant intention."

He went on to say (at p. 544) that the Court was not dealing with a case :

> "where a debtor who knew himself to be insolvent made a payment to a creditor in the course of his business, and with the object of being able to carry his business on."

The position, therefore, is that it is for those who assert that there is a fraudulent preference to make out a prima facie case. If such a case is made out, it can be rebutted by proof that the explanation of the preference is that there was a dominant intention in the mind of the insolvent other than a desire to prefer a particular creditor. If there is such a dominant intention, the prima facie case is rebutted.

Mr. Janab Ali, accepting the preliminary onus, stated that he relied on the records of C. R. No. 39 of 1923 (the suit by creditor No. 2 in which attachment before judgment was effected) and of C. R. Nos. 158 and 159 of 1923 (in which the applicants sought to establish their charge) taking the view that a prima facie case had been made out, he adduced no further evidence and closed his case. Mr. Burjorjee called two material witnesses namely, Vithaldas (a partner of the applicants) and the insolvent himself, to show that the charge was created by the insolvent in the ordinary course of his business and with the object of carrying it on.

I have already dealt at length with Civil Regular Suits Nos. 39, 158, and 159 of 1923 and for the purposes of the issue I have now to decide it is only necessary to make brief reference to them in the light of the evidence which has now been given. (After discussing evidence, his Lordship proceeded.) After giving my best consideration to the evidence, I have arrived at the conclusion that the dominant intention of Nasse was not to give a preference. As has been said the onus of proving a fraudulent preference is on those who assert it. I do not think that the records on which Mr. Janab Ali relies are sufficient to establish a prima facie case. The omission of the applicants to include their other securities in their suits, to my mind, has no bearing at all on the case. The proceedings in relation to the removal of attachment of the debt have a suspicious appearance, but suspicion is not equivalent to proof. Of evidence of collusion in the matter between the applicants and Nasse there is no proof whatever. Vithaldas says that he knew nothing about creditor No. 2's suit or the attachment proceedings, and Nasse says that he told Vithaldas nothing about them. If he was expecting to get further advances by giving security, he would not be likely to inform the prospective lender of the risky nature of the proposed security. As to his motive for desiring to get the attachment removed, his evidence is that he believed that he had a defence to the suit of creditor No. 2. He also thought that the persons who had been financing the Kokine brickfield had a right to the moneys accruing due in respect of it superior to that of creditor No. 2. And Mr. Burjorjee contends that there is some legal justification for his view inasmuch as if insolvency had supervened before the attachment was removed, the applicants (who were creditors of Nasse alone), would have had the right to be paid before creditor No. 2. who was creditor of a partnership consisting of Nasse and A. K. N. Mohamed Ebrahim.

However this may be, I do not think that Nasse's evidence on this point is sufficient to prove that in executing Ex. F he did so with a view of giving them a preference in the sense in which the expression is used in S. 56 (1) of the Act. I lay no stress on his having stated that he executed it "voluntarily." He was obviously using the word in contradistinction to "under pressure" as that

term is usually used in this class of cases.

Even if a prima facie case could be held to have been made out by the opposing creditors, I am of the opinion that it has been rebutted. The applicants had been advancing large sums to Nasse to finance his Kokine brickfield contract. The work was nearing completion, and, so far as the evidence goes, there was at the time every prospect, once it was completed and the inevitable obstacles in the way of getting prompt payment surmounted, of a large sum being received in respect thereof. According to Zaveri, the other witness of the applicants, the claim subsequently made on behalf of the insolvent's estate was for over Rs. 1,20,000. The only difficulty was that Nasse was in embarrassed circumstances and could not pay his sub-contractors and coolies. If he could be helped over the last lap, there was a reasonable prospect of the applicants' recovering their money. The security which the applicants had was insufficient, and they might reasonably expect as a condition of their advancing further sums that they should receive further security. The same considerations apply, as I think, with even greater force, to Nasse. If he could manage to hang on and complete his contract, he had a reasonable prospect of paying off the applicants and of making enough to enable him to continue his business. And this is how, according to the evidence, the charge came to be created. Nasse gave the charge in order that he might receive the further advances which would enable him to carry on his business. I am of the opinion, therefore, that the charge was given in the ordinary course of business and was not a fraudulent preference. It follows that the present application for review succeeds; and that I must rescind the order of 2nd June 1927, dismissing the applicants' application of 27th January 1924. The applicants are entitled to the order for which they then seek subject to one qualification. As will be seen on p. 6 of my previous order, Mr. Burjorjee undertook that the applicants would first realize the other securities for their debt and give credit for the net amount realized before seeking to enforce their charge. The order which I propose to make is that after the applicants have realized all their other securities for the debt due to them by the insolvent and have given credit for the net amount realized, the Official Assignee be directed to pay to them so much of the sum of Rs. 33,752-5-2 in his hands as may be necessary to satisfy the balance of such debt.

Creditors 2, 8 and 9 must pay the applicants' costs of the application for review. The case involves a large sum of money and important and difficult questions of law arose. The hearing was also protracted. I have noted in my previous order the time occupied up to its date. The trial of the issue of fraudulent preference has occupied the equivalent of a full day. I allow as advocate's costs Rs. 340, and special costs at Rs. 170 a day for three days.

S.N./R.K. *Application granted.*

A. I. R. 1929 Rangoon 240

OTTER, J.

Abdullakin—Appellant.

v.

Maung Ne Dun and *another*—Respondents.

Special Second Appeal No. 428 of 1928, Decided on 18th February 1929, against judgment of Dist. Judge, Benzada, in Civil Appeal No. 24 of 1928.

(a) Evidence Act, S. 92—Oral evidence as to real character of consideration is not barred.

Section 92 does not debar a party from showing by oral evidence the real character of the consideration fixed between the parties. What is not allowed is to contradict the terms of the document : 11 *Cal.* 519; 5 *Mad.* 6; 11 *Mad.* 213; 33 *Mad.* 159, *Ref.* [P 241 C 2]

(b) Contract Act, S. 25—Part of consideration referring to past debt—Debt must be definitely specified.

Where part of consideration refers to a past debt and not the liability arising under the contract, it must be definitely specified. [P 240 C 2]

Ray—for Appellant.

R. M. Sen—for Respondents.

Judgment.—In this case the plaintiff sued the defendants upon a deed leasing to defendant 1 certain paddy lands. Defendant 2 was impleaded as a guarantor for payment of rent in accordance with the covenants of the lease. The lease was granted in 1288-89 (1926-27) and the rent stated in the lease (Ex. A) was 670

baskets of paddy. The amount claimed by the plaintiff was 448 baskets of paddy or their value, the receipt by him of 222 baskets being admitted. The defence was that the land was leased to them for 250 baskets only, and, among other suggestions by way of defence fraud was alleged against the plaintiff.

It was the case for the plaintiff that of the total sum of 670 baskets mentioned in the deed of lease the amount of 420 baskets represented a debt due to the plaintiff by defendant 1 in respect of rent of other land. This debt was, it is agreed, time barred when a deed of lease was executed.

The defendant's case upon the question of the amount was that the rent of 670 baskets of paddy was originally fixed in respect of the two parcels of land, but that later the plaintiff refused to lease one of the parcels to them, the rent for the remaining parcels actually being 250 baskets.

It is unnecessary to deal with the various points argued in the two lower Courts for it was conceded by R. M. Sen on behalf of the respondents that upon the facts the plaintiff was bound to succeed. That this is so is evident from an examination of the statements of the witnesses which in my view disclose an overwhelming case in support of the contentions of the plaintiff.

The only serious suggestion made on behalf of the defendant before me was that this is a case to which S. 25, Contract Act of 1872, must apply and as there is no direct reference in Ex. A to the previous time barred debt the amount claimed upon this footing is not recoverable. Furthermore, it was said that as the terms of the Contract Act were reduced to the form of a written document oral evidence to prove the true nature of the consideration was inadmissible. Now it is perfectly true that the document makes no mention of the previous debt. Indeed its terms stated clearly that the rent reserved was in respect of the leased land. The case of *Appa Rao* v. *Suryanarayana* (1), is relied upon and supports the first part of Mr. Sen's argument.

The case of *Gunpathy Moodelly* v. *Munisawmi Moodelly* (2), is relied upon by Mr. Ray for the plaintiff. In that case there was a clear reference to an existing debt in the document and I am of opinion that the present case must stand upon a different footing. It is clear, however, that S. 92, Evidence Act, forbids only the

"contradicting, varying, adding to or subtracting from the terms of the contract."

The consideration in the present case according to the plaintiff is the exact amount stated in the document. It has been decided that S. 92, Evidence Act, does not prevent a party to a contract from showing by oral evidence that the consideration is different from that described in the contract. What is not allowed by the section is to contradict the terms of the document. The question therefore is whether to show that a part of the consideration is in respect of a previous debt, and is not in respect of the amount due under the lease is a contradiction of the terms of the contract. Four cases are of importance upon this point, viz.: *Lal Mahomed* v. *Kallanus* (3), *Vasudeva Bhatlu* v. *Narasamma* (4), *Kumara* v. *Srinivasa* (5) and *Ganpathy Moodelly* v. *Munisawmi Moodelly* (2).

In all these cases the Courts have held the view that a party is not debarred by anything in the Evidence Act from showing the real character of the consideration fixed between the parties. In the present case the amount of the consideration is correctly stated, and it seems to me that the plaintiff brought himself within the principle I have referred to, when he adduced evidence to show that part of the consideration represented a past debt for rent and not a future liability arising under the contract. For these reasons the appeal must be allowed with costs in all Courts.

V.B./R.K. *Appeal allowed.*

(1) [1899] 23 Mad. 94.
(2) [1909] 33 Mad. 159=5 I. C. 754=7 M. L. T. 81.
(3) [1885] 11 Cal. 519.
(4) [1882] 5 Mad. 6.
(5) [1887] 11 Mad. 213.

A. I. R. 1929 Rangoon 241

CHARI, J.

W. Banvard—Plaintiff.

v.

M. M. Moolla—Defendant.

Civil Regular No. 455 of 1928, Decided on 30th November 1928.

Contract Act, S. 30—*K* owing money to *N* on betting transaction—*N* demanding it and on *K*'s refusal threatening to post him—*K*

giving cheque to *N* but requesting not to present it and promising to make payment on certain date—*N* not posting *K*—There is good consideration for passing of cheque in *N's* refraining from posting *K* and under S. 30 promise based on such consideration is not illegal.

The sections of the Contract Act make a wagering contract void to the extent that no Court will enforce such a contract but they are not illegal. [P 242 C 2]

K owed money to *N* in respect of betting transaction. *N* demanded the money and on *K's* refusal threatened to post him under Rangoon Turf Act. *K* then gave *N* a cheque post dated and requested him not to present it and promised to make the payment on a certain date. *N* did not post *K* as he could have done.

Held: that there had been good consideration for the passing of the cheque in the fact that *N* refrained from posting *K* and that there was nothing in S. 30 which made a promise based on such consideration illegal: *A. I. R.* 1923 *Cal.* 445; *Hyams* v. *Stuart King*, (1908) 2 *K. B.* 696, *Rel. on.* [P 242 C 1,2]

Doctor—for Plaintiff.

E. Maung—for Defendant.

Judgment.—The facts of this case are perfectly clear. The defendant owed money to the plaintiff in respect of certain betting transactions which apparently took place at the end of November 1927. Some time in December the defendant having made default in payment of the amount due, except a sum of Rs. 600, the plaintiff began pressing him for payment and sent two of his assistants to get the money from the defendant. They apparently did not succeed, in getting anything from him, and some time about the third week of December, Abraham, one of the assistants of the plaintiff, went and told the defendant that unless he paid up his master the plaintiff threatened to post him. The defendant pretends that he does not know the rules of the Turf Club in this respect, but I have not the least doubt that he knows everything about them. The defendant thereupon gave a cheque post dated to 15th January. On that day or on the next day he wrote to the plaintiff asking him not to present the cheque and promising to make payment of Rs 1,000 on the succeeding Friday and the balance in the succeeding month. The plaintiff did not post the defendant as he could have done, and I am satisfied that the consideration for the passing of the cheque is the plaintiff's act in refraining from posting him before the Turf Club and bringing him on the list of defaulters of the Turf Club, which is the punishment inflicted in such cases.

The next question for consideration is the legal question whether the plaintiff is entitled to recover on the cheque in these circumstances. It is alleged that the consideration for the cheque was an illegal consideration. The cheque was given for a collateral purpose, namely to induce the plaintiff to refrain from posting the defendant, and there is nothing in S. 30, Contract Act, which makes a promise based on such a consideration illegal. In the case of *Leicester and Co.* v. *S. P. Mullick* (1), the facts were somewhat similar to the facts in this case. There a hundi was passed and the person in whose favour the hundi was passed had already reported to the Turf Club, but agreed in consideration of the passing of the hundi to withdraw his name and prevent him from being posted as a defaultter. In *Hyams* v. *Stuart King* (2), the facts were exactly similar to those in the present case, the consideration there being a promise to refrain from declaring the giver of the cheque a defaulter. This was held to be a good consideration. The case in 27 *Calcutta Weekly notes* therefore practically disposes of the defendant's contention, but Mr. E. Maung, who appears for him, argues that the Calcutta case proceeded more or less on the English decisions which themselves were based upon a different Act. Some of the provisions of the English Gaming Act are undoubtedly different from the Indian Act, but the principles applied are the same both in England and in this country. As a matter of fact at p. 447 (of 27 *C. W. N*) in *Leicester's* case (1) the Calcutta High Court disposes of an argument based upon S. 30, Contract Act, that that Act makes agreements by way of wager illegal. The learned Judges of the High Court pointed out that the sections of the Contract Act make a wagering contract void to the extent that no Court will enforce such a contract and not illegal. The collateral agreement therefore based upon a transaction which was originally a wagering transaction is not on that account illegal. I am therefore satisfied that there has been good consideration for the passing of the cheque in that the

(1) A. I. R. 1923 Cal. 445.

(2) [1908] 2 K. B. 696=24 T. L. R. 675=99 L. T. 424=77 L. J. K. B. 794=52 S. J. 551.

plaintiff refrained from making any report against the defendant to the Rangoon Turf Club. There will therefore be a decree for Rs. 2,200 and costs.

P.N./R.K. *Suit decreed.*

A. I. R. 1929 Rangoon 243

BROWN AND CHARI, JJ.

Ma Pwa Sein—Appellant.

v.

Maung Ba Saw and *others*—Respondents.

First Appeal No. 2 of 1929, Decided on 1st July 1929.

(a) Administration — Part of property partitioned—Suit for administration of unpartitioned portion lies.

A division of a portion of the estate does not preclude any of the heirs from filing an administration suit in respect of the undivided portion. [P 243 C 2]

(b) Buddhist Law (Burmese)—Gift.

Death bed gift is not within competence of Burmese Buddhist. [P 244 C 1]

(c) Buddhist Law (Burmese) — Gift by sister without joining her husband—Validity is doubtful.

Whether as a release or as a gift, it is very doubtful if a Burmese woman can without being joined by her husband, transfer her interest to her sister or relinquish the same in her favour. [P 244 C 1]

Eunoose—for Appellant.

T. S. V. Chari—for Respondents.

Judgment.—The facts of the case out of which this appeal arises are that the defendant Ma Pwa Sein and Ma Thin Hline (deceased) were sisters, being the daughters of U Po Ku from whom they had inherited certain properties. Ma Thin Hline died on 8th July 1927 and 11 days before her death, namely on 29th June 1927 she executed what purports to be a release of her rights in the share or interest to which she was entitled in the estate of her father, U Po Ku. After Ma Thin Hline's death, her husband Maung Ba Saw and her two children, plaintiffs 2 and 3, instituted the present suit for administration of U Po Ku's estate. As regards the deed of release executed by Ma Thin Hline, they alleged that it was executed on the death bed of Ma Thin Hline, and that it was obtained by the defendant by undue influence at a time when Ma Thin Hline was enfeebled by illness. The defendant Ma Pwa Sein pleaded that the release deed was for consideration and was executed by Ma Thin Hline when she was in a sound state of mind. She also alleged that there was a prior partition and that the suit for administration did not therefore lie. The trial Judge found against the defendant on all the issues and gave a decree in favour of the plaintiffs. The defendant now appeals. As regards the question of prior partition, the evidence of Maung Tun Pe, one of the lugyis who admittedly effected the partition shows that the sisters divided only the moveable properties leaving immovable properties undivided. A division therefore of a portion of the estate does not preclude any of the heirs from filing an administration suit in respect of the undivided portion.

As regards the other defence, the trial Judge held that the deed was in effect a transfer by way of gift and having been made on Ma Thin Hline's death bed was invalid. The Burmese doctors who were examined as witnesses state that Ma Thin Hline was suffering from a lingering disease of which she died. They and U Po Hla, the Sub-Registrar, who went to the house, all state that her mind was not in any way clouded, when the deed was executed. This may or may not be so, but there is no doubt that Ma Thin Hline was ill at the time of the execution of the deed and died of the illness. She must have known that she was going to die. If the deed is a death bed gift no question of the donor's mental state arises. The deed itself, though not very happily worded shows clearly that it was intended to be a release of Ma Thin Hline's rights in her father's estate. The consideration is stated to be the necessaries supplied to Ma Thin Hline and her children by the donee, Ma Pwa Sein, for over 5 or 6 years and the necessaries supplied during Ma Thin Hline's sickness. It is fairly clear that this is a very illusory consideration. Both the sisters had an interest in the paddy lands, the two houses and house sites, which form part of the estate of U Po Kin, and if the defendant did support her sister or sister's children it may reasonably be presumed that she did so out of the proceeds of their father's estate. The learned trial Judge was perfectly right in the conclusion he arrived at that the consideration was illusory and that the document if it could take effect

at all could only take effect as a death bed gift is not within the competence of a Burmese Buddhist. The appeal must therefore fail. We may also note that whether as a release or as a gift, it is very doubtful if Ma Thin Hline could without being joined by her husband, transfer her interest to her sister or relinquish the same in her favour. For these reasons we dismiss the appeal without costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 244

BROWN, J.

Maung Po Htaik—Applicant.

v.

Bramadin and *others*—Respondents.

Civil Revn. No. 244 of 1928, Decided on 21st February 1929, from judgment of Dist. Judge, Thayetmyo, in Civil Appeal No. 217 of 1928.

(a) Contract Act, S. 30—If as result of wagering contract, principal proves that agent received money on his behalf, agent is liable to account to principal for the money and onus is on principal to prove that agent so received money—Evidence Act S. 101.

A suit cannot be brought in which the cause of action is based directly on the wagering contract, but if, as a result of a wagering contract, an agent has received money on his principal's behalf, he is then liable to account to the principal for that money and the onus lies on the principal to prove affirmatively that the agent actually received the money on his behalf. 25 *All.* 639, *Rel. on.* [*P* 244 C 2]

(b) Civil P. C., S. 115—Scope.

If the lower Court's method of arriving at the conclusion is irregular and if it entirely misconceives the point at issue there is sufficient ground for High Court's interference in revision. [P 245 C 1]

Halker—for Applicant.

Ba Soe—for Respondents.

Judgment.— The respondents brought a suit againts the petitioner, Maung Po Htaik, for the recovery of Rs. 141. Their case was that money was collected for a confederacy to buy tickets for the Rangoon St. Leger Sweep from Mandalay. The confederacy to purchase the tickets consisted of certain officials in the Thayetmyo District. The petitioner was collecting one rupee contributions and obtained Re. 1 for this purpose from the respondents. The confederacy finally won a prize as a result of the race and each subscriber of Re. 1 obtained as his share of the prize Rs. 141. The respondents claimed a similar sum from the appellant. The trial Court dismissed the suit, but the suit was decreed by the District Court on appeal and the petitioner has now come to this Court in revision.

Section 30, Contract Act provides that

"agreements by way of wager are void and that no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made."

It is clear, therefore, that the respondents could not possibly succeed merely on the strength of their agreement with the petitioner. The second clause of S. 30 which the trial Judge discusses obviously has no application to the present case.

The District Court referred to an unofficial report of a case decided by the late Chief Court of Lower Burma. The question decided there was also decided in *Bholanath* v. *Mulchand* (1). If, as a result of a wagering contract, an agent has received money on his principal's behalf, he is then liable to account to the principal for that money, but a suit cannot be brought in which the cause of action is based directly on the wagering contract. The plaintiffs in the present case clearly could not succeed merely on the strength of their contract with the petitioner. They must prove that the petitioner has received the prize money and is holding it on their behalf. The plaint on this point is vaguely worded, but assuming that it does allege that the petitioner did receive the money, it seems to me quite impossible to hold that that allegation has been proved. There is no evidence whatsoever on that point. The prize money was received by the confederacy, but the evidence on the record is to the effect that the respondent's names were never entered in the books of the confederacy as having contributed towards the stake money. The learned District Judge remarks:

"Defendant on the other hand admits having received Re. 1 from the plaintiffs for the Office Society Confederacy and for the Mandalay Sweep and he also admits that a prize has been won and that each share amounted to Rs. 141, but he avers that as Maung Ma who kept the list of subscribers had

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(1) [1903] 25 All. 639=(1903) A. W. N. 161.

told him that the list had been closed, he had added to the Re. 1 given by the plaintiffs another Re. 1 and purchased a share in another sweep, the list of subscribers in that confederacy being held by one Maung Po Nyo and he submits that he informed the plaintiffs of this fact. The point for decision, therefore, is: Did the defendant inform the plaintiffs that the Office Society list had been closed and that their Re. 1 had been deposited with Maung Po Nyo for another sweep, and if so, did the plaintiffs agree? The onus of proof lies on the defendant, who has not been able to produce a tittle of evidence to prove this point."

It seems to me that the District Judge has entirely misconceived the question he had to decide. The plaintiffs could not sue on their wagering contract and could not claim from the petitioner because he had failed to carry out its terms. They have to prove affirmatively that he had actually received the prize money on their behalf. There was no evidence whatsoever on this point nor can I see how any presumption can be drawn that the petitioner did receive the money. In my opinion, the respondents entirely failed to prove a cause of action on which they could sue. The case is before me in revision, but I think there is sufficient ground for interference. It seems to me that the District Court's method of arriving at its conclusion was irregular and that the Court entirely misconceived the point at issue. I set aside the decree of the District Court and restore that of the trial Court dismissing the suit of the plaintiff-respondents. The plaintiff-respondents will pay the costs of the petitioner throughout.

P.N./R.K. *Revision allowed.*

A. I. R. 1929 Rangoon 245

HEALD AND OTTER, JJ.

C. T. V. S. Chettyar Firm—Applicants.

v.

Commissioner of Income-tax—Respondent.

Civil Misc. Appln. No. 129 of 1928, Decided on 25th March 1929.

(a) Income-tax Act, S. 66 (3)—In particular year assessment made on actual income—Objection that sum already assessed in previous years was included in assessment—Assistant Commissioner finding that assessment in those years being on best data, there was no conclusive proof that sum was already assessed—Question of law arises from such order viz., whether assessee is entitled to show sum is included in estimate in previous years and Commissioner must refer case.

In a particular year an assessment was made on actual receipts. It was objected by the assessee that a certain sum already assessed in previous years was included in the receipts. Assistant Commissioner in appeal found that as the estimate of income in those years was not assessment strictly on accrued basis but merely on best available data, there was no conclusive proof that such sum had already been included in the assessment of the previous years.

Held: that a question of law arose from the order whether or not the assessee was entitled to show that the actual receipts had in fact been included in the estimates of the previous years and the Commissioner must state and refer the case on the question. [P 246 C 1, 2]

(b) Income-tax Act, S. 33—Question whether pending application under S. 66 (2) is bar to proceedings under S. 33 is question of law.

Per Otter, J.—Where an application is pending under S. 66 (2) question whether or not such application is a bar to proceedings under S. 33 is a question of law and Commissioner must state a case on such a question. [P 248 C 1]

Venkat Ram—for Applicants.

C. Grant, Offg. Govt. Advocate—for Respondent.

Heald, J.—Applicants, who are the C. T. V. S. Chettyar Firm were assessed for income-tax on an estimated income of Rs. 19,030 for the year 1924-25. For the year 1926-27 they submitted a return showing a loss of over Rs. 45,000. They said that the actual income from their business for the two years 1924-25 and 1925-26 was Rs. 10,250 and that in view of the fact that for those two years they had paid on an estimated income of Rs. 56,138, they had already paid on an excess of more than Rs. 45,000 over their actual income. They produced certain accounts and a statement which showed their actual income for 1925-26 as Rs. 1,795 and another statement which showed their loss as Rs. 3,877-10-0. The Income-tax Officer rejected these statements on the doubtful ground that although an assessee can file a revised return he cannot file revised statements. On an examination of the accounts for the year 1925-26 the Income-tax Officer found that appellant's income for that year was Rs. 36,654. That assessment was based on a calculation of interest which had actually accrued due during that year in the case of transactions with other Chettyars and interest which had

been actually received in that year in the case of transactions with customers other than Chettyars. Applicants objected that part of the sum which on that method of calculation represented the actual interest received from non-Chettyar customers during the year 1925-26 had already been assessed to income-tax in that year and in the previous year, because in those years the amount entered on account of interest from non-Chettyar creditors was based on an estimate and not on actuals, and that estimate included interest earned, but not yet received in the year of assessment. The Income-tax Officer rejected this contention and assessed applicants on Rs. 36,654 for 1926-27.

Applicants appealed to the Assistant Commissioner of Income-tax who said that it was obvious that so much of the interest receipts from non-Chettyars as accrued in the previous years must have been taxed already in those years and that to include those receipts in the present assessment would be tantamount to double taxation. He accordingly returned the proceedings to the Income-tax Officer for enquiry and report as to the amount of interest from non-Chettyars which accrued in the previous years and which was included in the assessment for 1926-27. The Income-tax Officer reported that the amount of interest from non-Chettyars which accrued in the previous year was actually received in 1925-26 was Rs. 34,876 but the Assistant Commissioner said that on further consideration he found that the estimates made for the two years 1924-25 and 1925-26 were not strictly assessments on what is known as the "accrued" basis but mere assessment on the best data available and that therefore there wrs no conclusive proof that the sum of Rs. 34,876 had been included in the assessment for the previous years. He accordingly dismissed the appeal. Applicants then applied to the Commissioner of Income-tax to state the case and refer it to this Court under the provisions of S. 66 (2), Income-tax Act. The Commissioner refused to state and refer the case and at the same time he passed an order dealing in review with the Assistant Commissioner's orders. Applicants now ask us for an order under S. 66 (3) of the Act requiring the Commissioner to state and refer the case to this Court. The only question which is at present before us is whether a question of law arises out of the Assistant Commissoner's order.

It seems to me clear that a question of law does arise, that question being whether in a case where an assessment has been made not on actual receipts but on estimated receipts during the previous two years and the basis of assessment for the third year is charged to a basis on actual receipts, the assessee is entitled to show that the actuals which are taken as the basis of the assessment for the third year that is, in the present case the year 1926-27, include sums which were included in the estimates for the earlier year or years, on which income-tax was paid for those years. It seems clear that if the income-tax has in an earlier year already been paid on amounts actually received in a later year, income-tax cannot be charged on those receipts in the later year, and it does not seem to me to matter whether the income-tax authorities choose to call the assessment for the year or years in which the tax was actually paid on those amounts an assessment on the "accrued basis" or an estimate on the best data available. In either case, the basis of of the assessment is admittedly an estimate and the question of law seems to me to be whether or not the assessee is entitled to show that receipts for the latter year have in fact been included in the estimate or estimates for the earlier year or years. I would therefore require the Commissioner to state and refer the case under the provisions of S. 66 (3), Income-tax Act. The cost of the present application should abide the orders of this Court on the reference.

Otter, J.—This is an application under S. 66 (3), Income-tax Act, 1922, asking this Court to require the Commissioner to state a case upon a question of law for reference to this Court. The short history of the matter is that, on 29th January 1927, by an order of the Income-tax Officer, Maubin, the applicant firm was assessed to income-tax for the year 1926-27 on the sum of Rs. 36,654 in respect of income for that year. The assessment for that year was made so far as non-Chettyar customers were concerned upon the basis of cash receipts from them during that year. The figure arrived at by the Income-tax Officer for

such receipts was Rs. 79,716. It was objected by the applicants that included in that sum was an amount of about Rs 39,000 which had already been assessed to income-tax in the two preceding years. In these years, viz., 1924-25 and 1925-26, the assessment was said to have been made on what is known as the "accrued basis." For the year 1926-27 the basis of calculation was altered and as I have said, the applicant firm was assessed for non-Chettyar receipts upon a cash basis. Upon an appeal to the Assistant Commissioner the latter by an

"interim order dated 23rd March 1927, returned the proceedings to the Income-tax Officer for enquiry and report "as to the amount of interest from non-Chettyars which accrued in previous years and which had been included in the sum of Rs. 79,716."

and adjourned the appeal. The Income-tax Officer reported the correct figure to be Rs. 34,876, on 27th April 1927; the Assistant Commissioner passed final orders dismissing the appeal. In the course of that order he stated that he found that the accountant's description of the previous assessment on "accrued basis" was not strictly correct. It should be stated that it is said that an assessment on "accrued basis" means an assessment upon amounts due but not necessarily paid during the period in question. The Assistant Commissioner went on to say that after a return by the applicants had been filed (for the year 1924-25) the firm's books were called for and after extracting certain figures from the books certain calculations were made according to the system then in vogue, it was reported that the assessable income was Rs. 19,630. This figure was accepted by the Income-tax Officer and assessment was made accordingly. According to the Assistant Commissioner this method was in reality an estimate on the best data available. For the following year according to him, after the return had been filed by the applicant firm certain figures were again extracted from the account books, and after making certain calculations according to the same system as in the previous year, the accountant reported the assessable income as Rs. 37,188 and assessment was made accordingly on this figure. Here also, according to the Assistant Commissioner it was an estimate on the best available data." This officer went on to say that:

"It could not rightly be called the accrued basis. It follows therefore that there is no conclusive proof that the amount Rs. 34,876 had been taxed in the previous years."

He, therefore, was unable to exclude this amount from the assessment for 1926-27.

On 26th May 1927, the applicant's firm applied under S. 66 (2) of the Act to the Commissioner of Income-tax praying that certain questions of law arising out of the appellate order of the Assistant Commissioner should be referred to this Court. On 19th August and 16th September 1927 respectively, notices were issued by the Commissioner of Income-tax to the assessee under S. 33, Income-tax Act, calling upon them (apparently) to make any representation they wished to make in respect of a proposed revision of their assessment. On 5th March 1928, the Commissioner modified the orders of the Assistant Commissioner, dated 23rd March 1927 and 27th April 1927 by passing an order rejecting the appeal of the assessees dated 26th February 1927 on the ground:

"that the assessments for the previous years having been computed on a method of averages, the sum in question viz., Rs. 39,000 . . . . . has not been subject to double assesssment."

In other words he held that as the method adopted was not "accrued basis" but a basis he called a "method of averages" as a matter of fact, the Rs. 39,000 was not and could not have been doubly assessed. He seems also to have thought that the Assistant Comissioner would be bound by his conclusion contained in the adjournment order of 23rd March 1927 and he therefore "modified" this order and that of 27th April 1927. On 7th March 1928 the Commissioner of Income-tax passed orders upon the application preferred by the applicant firm on 26th May 1927 and said that none of the questions he was asked to refer could be said to arise and refused to state a case for this Court.

I observe that the applicant firm had objected to the revision proceedings initiated by the Commissioner but these objections were overruled in the order which is not before the Court. The Commissioner deals with these objections at length. He also says (as I understand at the end of para. 6, of his

order) that as the figures for 1924-25 and 1925-26 were taken from assessee's books which were kept on a cash basis (and not on accrued basis) no double taxation took place. Later he makes a statement that I cannot follow viz:

"as regards the first objection, I do not think that it can be contended seriously that the question whether or not the assessment in the previous years was made in the "accrued" basis is a question of fact."

He may not have meant to say this, but if of course this is a question of law it should be stated for this Court.

It seems to me however, that the matter should be put differently viz., as a matter of law, cannot the assessee be allowed to show not necessarily that his assessment was made on one basis or another but that in fact from figures he has been doubly assessed. In other words is the applicant not to be allowed to show (if he can) that the total of the estimated income of the firm for 1924-25 and 1925-26 plus the actual income for 1926-27 in fact exceeded the total actual income for those 3 years. The Commissioner then deals with the objection that revision preceedings cannot be opened by the Commissioner in a case where an application is pending under S. 66 (2) of the Act He decides that such an application is no bar to proceedings under S. 33. But surely this is a question of law. He can only pass orders subject to the provisions of the Act. (sub-S. 2) and it might be argued that when the Act provides a remedy for an assessee, action should not be taken by the Commissioner until it is decided whether such remedy is available or not. It is true that the proviso to sub-section of S. 66 may provide an answer. But it might also be argued that action by a Commissioner under S. 33 which cannot (apparently) be called in question by this Court might shut out an assessee from his remedy under S. 66 (2).

I think, therefore, that the Commissioner must state a case for our decision upon the following questions of law :

(1). Is the applicant firm entitled to show that the income upon which he was assessed for the 3 years in question exceeded the income actually received in those 3 years ?

(2). Can the Commissioner during the pendency of an application under S. 66, sub-Ss. 2 and 3, Income-tax Act, take up under S. 33 of the Act proceedings which are the subject of the said application ?

P.N./R.K. *Ordered accordingly.*

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* A. I. R. 1929 Rangoon 248
Full Bench

HEALD, OFFG. C. J., CHARI AND ORMISTON, JJ.

Commissioner of Income-tax — Applicant.

v.

C. T. V. S. Chettyar Firm — Respondents.

Civil Ref. No. 9 of 1929, Decided on 19th August 1929, made by Commissioner of Income-tax, Burma.

***(a) Income-tax Act, S. 13— Computation of income, profits under S. 13 —Assessee is entitled to show that income included in assessment for subsequent year was included in that computation.**

Where the computation of income, profits and gains for a particular year has been made under the provisions of S. 13 upon such basis and in such manner as the Income-tax Officer may determine the assessee is entitled to show that income, profits and gains included in the assessment for a subsequent year were included in that computation and it is a question of fact, to be decided on the evidence in each particular case: *K. T. S. K. S. Chettyar (Misc. Appln. No. 17 of 1927): Commissioner of Income-tax v. Muthu Sarvarayadu, Income-tax Cases* 208, *Expl.* and *Dist.* [P 251 C 2]

***(b) Income-tax Act, S. 33—Power of review.**

During the pendency of an application under S. 66 (2) the Commissioner can exercise his power of review under S. 33. [P 249 C 2]

Government Advocate—for Applicant.

Bose, Venkatram and *De*—for Respondents.

Opinion.—On Civil Miscellaneous Application No. 129 of 1928, the Commissioner of Income-tax was required to state the case of the assessment of the C. T. V. S. Chettyar Firm for the year 1926-1927 and to refer it to this Court: His statement of the case shows that for the assessment for the year 1924-1925 the firm produced its account books, and that after an examination of these books its income was computed at Rs. 19,030 and that for the following years its income was similarly computed to be Rs. 37,188, the computation for both years being made not according to the income shown in the account books, but by a determination of the total capital of the firm and a calcu-

lation of the interest which might reasonably be expected to be earned by that capital, after deduction in respect of borrowed capital and expenses. For the year 1926-1927 a different method of assessment was adopted, the assessment being based on actual receipts of interest in respect of transactions with non-Chettyars, that is as the Commissioner says with "the vast majority of the persons to whom loans are made" and on interest accrued due, but not necessarily received in respect of transactions with Chettyars. On that basis, the assessment for the year 1926-1927 was Rs. 36,654. The firm appealed to the Assistant Commissioner against this assessment on the ground that, so far as transactions with non-Chettyars are concerned it included actual receipts of interest amounting to 39,000 which had accrued due in the previous years, and according to the method of assessment adopted in these years had been included in the assessment for those years.

The Assistant Commissioner accepted that view and sent the case to the Income tax Officer for a report as to what part of the receipts included in the assessment for 1926-1927 represents interest which had accrued in the previous years. The Income-tax Officer reported this sum to be 34,876. The Assistant Commissioner then changed his mind, and found that because the assessments for the previous years were not based directly on the firm's accounts, this sum of 34,876 could not be regarded as having been included in the assessments for these years. He accordingly rejected the claim to have that amount excluded from the assessment. The firm thereupon applied to the Commissioner to refer to this Court certain questions or alleged questions of law. Before disposing of the application for a reference to this Court the Commissioner reviewed the Assistant Commissioner's orders and substituted for them an order rejecting the appeal to the Assistant Commissioner on the ground that the assessment for the previous years having been computed on a method of averages, the sum which the firm claimed to exclude from the assessment for 1926-1927 had not been subject to double assessment. On the footing of his finding that the basis of the assessment for the two previous years was not technically an assessment on what is known as the "accrued basis" but was "a method of averages". and of his having set aside these parts of the Assistant Commissioner's order which were in question he held that none of the questions which he was asked to refer arose.

The firm then applied to this Court under the provisions of S. 66 (3) of the Act, and a Bench of the Court required the Commissioner to state the case, and refer it under that section. Of the two Judges who dealt with the application under S. 66 (3) one was of opinion that the question of law which arose on the facts was whether in a case where the assessment for the two previous years had been made on a basis not of actual income but of income established at a certain rate per cent on the capital of the business, and where for the third year the basis of assessment is changed to a basis of actual income the assessee is entitled to show that the actual income which is taken as the basis of assessment for the third year, includes sums which formed part of the estimated income for the previous years and which had therefore been included in the assessment for those years on which tax had already been paid. The other learned Judge put the same question in a more practical form namely:

> "Is the applicant firm entitled to show that the income on which he was assessed for the three years in question exceeded the income actually received in these three years?"

He also added a question whether during the pendency of an application under S. 66 (2) of the Act the Commissioner can exercise his power of review under S 33. As an answer to the latter question I would say merely that proviso to S. 66 (2) of the Act shows that the Commissioner can exercise that power.

In his order of reference the Commissioner says that :

> "It is for the applicant firm to show that the estimates of its income made by the Income-tax Officer in those two assessments (for 1924-25, and 1925-26) included the disputed amount."

He thus admits the right of an assessee to show that there has been a double assessment, and that right cannot be questioned. If in fact there has been a double assessment it is clear that in law, there is no warrant for such double assessment, and that income on which tax has already been paid must be excluded from the assessment. But the Commissioner goes on to say that if the assess-

ment for a particular year was based on an estimate and not on actual figures, then the assessee "cannot show" that income included in a subsequent assessment was included in the assessment based on that estimate. If as seems probable this statement was intended to be a statement of fact, and to mean that it is impossible to show that income subsequently assessed was included in the computation on which an earlier assessment was based or in the assessment based on that computation, then it is a statement based entirely on the Commissioner's opinion and not on the facts of the case. If on the other hand it was intended to be a statement of the law, namely that where an assessment has been based on a computation under the proviso to S. 13 of the Act, an assessee is not entitled to show that income included in a subsequent assessment was included in the computation and in the assessment based on the computation, then it raises a clear question of law which it is for this Court to decide.

As supporting his statement, whether it is a statement of fact or law the Commissioner relies on the decision of a Bench of this Court in the case of *K. T. S. K. A. S. Chettyar* (1), but in that case the Court was clearly of opinion that the inclusion of income in the assessment for one year which had in fact been included in the assessment on which tax had been paid for a previous year would warrant the exclusion of such income from the assessment for the subsequent year, and the basis of the decision was that because the assessment for the previous year was an assessment made by the Income-tax Officer "to the best of his judgment" under S. 23 (4) of the Act, and because it was the inclusion of the disputed income in the assessment for that year which was alleged to be mistaken, that alleged mistake could not be allowed to be proved because no appeal lies against an assessment under S. 23 (4), so that the applicants who by their own default had precluded themselves from appealing against the inclusion of that income in the assessment for the previous year, could not in the following year be allowed to claim that the mistake should be corrected by the exclusion of that income from the assessment based on the receipt of the year in which it was actually received.

Whether that decision was right or wrong, and it seems probable that as a general statement of law it was wrong, it is no authority for the proposition that where income has been assessed for one year under the proviso to S. 13 [and not under S. 23 (4)] the assessee cannot whether in fact or in law show that the same income has been included in the assessment for the following year.

A case which was in some respects similar to the present case was decided by a Special Bench of the High Court of Madras in the *Commissioner of Income-tax* v. *Muthu Sarvarayadu* (2) where the question referred was :

"where computation of the income, profits and gains for the particular year is made as directed in the proviso to S. 13, Income-tax Act of 1922, are any income, profits or gains which accrued during that year, but are received subsequently liable to be assessed as income for the year during which they are received ?"

The Bench said that if the wording of the question was intended to propound the question whether, if a man has been taxed in respect of book debts owing to him in one year, which he has not actually received he can again be taxed on the same sums of money when they are actually received in cash in a later year of assessment, the answer must obviously be "No." But in that particular case the Commissioner had recorded, as a finding of fact based on the evidence in the case, that the sums which the assessee claimed to deduct from his assessment for the subsequent year had not been included in assessment from the previous years, and by reason of that finding the learned Judges said that the question referred could not really arise out of the findings of fact which were binding on them, namely, that the man had not been taxed at all on the sums in question until he was sought to be taxed in the year of assessment, which was under consideration in that case:

In the present case there is no finding of fact that the sums in question were not included in the assessments for the previous years. On the contrary the only finding of fact on this subject is that of the Income-tax Officer that Rs. 34,876 had been so included. The findings on the footing of which the Assistant Commissioner and the Commissioner

(1) Civ. Misc. Appln. No. 19 of 1927.

(2) 2 Income-tax Cases 208.

rejected the claims were either findings of fact based on evidence or findings of law, since they were that the assessee could not prove that the sums in question were included in the "computation" which was made under the proviso to to S. 13. The Commissioner said that his finding on this point was a finding of fact and he put into the form of a finding of fact when he said that there had not been a double assessment, but the reason which he gave for that finding, namely, that the assessment for the previous years had been computed on a method of averages and that the assessee could not prove that the disputed income had been included in these assessments shows that his answer begged the question of law and as a finding of fact was not based on any relevent evidence.

The facts of the case are that the assessments for 1924-25 and 1925-26 were based on a computation of income, profits and gains under the proviso to S. 13 of the Act ; that that computation included all interest earned or "accrued" whether it had been received or not, that for the year 1926-27, so far as interest from non-Chettyar customers was concerned the basis of the assessment was changed from a basis of computation of accrued interest to a basis of interest actually received ; that by reason of that change the question arose whether interest actually received in the year, on the income of which the assessment for 1926-27 was based, had accrued and had therefore been included in the computation and assessments for the previous years, and that the Income-tax Officer found that a sum of Rs. 34,876 which was received in the year on the income of which the assessment for 1926-27 was based and was therefore included in the assessment for 1926-27, had in fact accrued and had therefore been taxed in the previous years. On these facts it seems clear that there had been a double assessment and that the assessee was entitled to relief unless the Commissioner was right in holding that because the assessments for 1924-25 and 1926-27 were made under the proviso to S. 13, the assessee could not prove that income included in the assessment for 1926-27 had already been included in the assessments for 1924-25 and 1925-26.

I know of no authority in the Act or elsewhere for the view that the fact that

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P.N./R.K. *Ref*

A. I. R. 1929 R

RUTLEDGE, C. J. A

Maung Po Kywe a
lants.

v.

Maung Po Tin a
dents.

Letters Patent Appe
Decided on 18th Feb
judgment of High Cou
Appeal No. 372 of 192

Transfer of Property
tract of sale—Specific p
by limitation—Still de
oral agreement on paym
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Part performance.

To a suit by the owner
of immovable property of
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an oral contract of sale a
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barred by limitation: *A.*
(F. B.), Appl. ; *A. I. R.* 1
1924 *Mad.* 271 and *A. I. R*
on ; *A. I. R.* 1927 *Cal.* 365

Ba Han—for Appellants.

E. Maung—for Respondents.

Brown, J.—The plaintiff-appellants sued the defendant-respondents for possession of certain land. The defence was that the defendants had been put into possession under an oral contract of sale by the predecessor-in-interest of the plaintiffs. The trial Court found that the defendants did obtain possession in this way and that the plaintiffs had obtained the purchase money, and the suit was accordingly dismissed. The District Court on appeal concurred with the trial Court in its finding on the facts and dismissed the appeal. The appellants then came to this Court in second appeal, and it was urged that the defendants were not entitled to rely on their possession under the contract in view of the fact that at the time the suit was brought a suit by the vendees for specific performance of the contract of sale was barred by limitation. The appeal was heard by a single Judge of this Court who decided against the contention put forward by the appellants but who subsequently granted a certificate under S. 13 of the Letters Patent for further appeal on the ground that the point had not previously been decided specifically by this Court.

In the case of *Maung Myat Tha Zan* v. *Ma Dun* (1), it was held by a Full Bench of this Court that to a suit by the legal owner for possession of immovable property of a value of Rs. 100 or upwards it was a valid defence that the defendant was given possession of the property by the legal owner under a contract for sale as defined in S. 54, T. P. Act. It has not been suggested that we are not bound by this decision. But it is contended that the decision had reference only to cases in which a suit by the person in possession for specific performance of a contract of sale was not barred by limitation. Although the answer to the reference in that case was made in general terms, it is clear that in making that answer two at least of the Judges of the Bench had in mind the fact that in that particular case a suit for specific performance was not barred. I agree therefore with the contention put forward by the appellants that *Maung Myat Tha Zan's* case (1) does not decide definitely the point now at issue between the parties. I am, however, of opinion that the principle approved in *Maung Myat Tha Zan's* case (1) must be held to be applicable whether a suit for specific performance of a contract of sale is or is not barred by limitation.

I dealt precisely with this point as an Additional Judge of the late Judicial Commissioner's Court, Mandalay, in the case of *Maung Po Tha* v. *Maung Ba Din* (2). The view I took in that case was that although the provisions of the Limitation Act would prevent the defendant from suing for specific performance of a contract, they did not debar him from setting up his contract in defence to a suit for possession by the plaintiff. At the time I wrote that judgment there were conflicting decisions on the point, and the view of the High Court of Madras was that unless there was a registered document in the circumstances to which S. 54, T. P. Act applied, the person in possession under a contract of sale could not resist a suit for possession brought by the owner. But the previous decisions to that effect have since been overruled by a Full Bench of that Court in the case of *Vizagapatam Sugar Development Co.* v. *Muthuramareddi* (3). In that case the plaintiff had agreed to sell all lands worth more than Rs. 100 to the defendant, had received consideration and had put the defendant in possession but had not executed a conveyance. It was held by the Full Bench that part performance by way of delivery of possession and an enforceable right on the defendant's part to specific performance were each a good defence to the action; and when the same case came up for decision on a further point before a Bench of two Judges, that Bench held that the plea of part performance was not limited to cases where the right to sue for specific performance was not barred on the date of the subsequent suit. A similar view of the law has been taken by the High Court of Bombay in the case of *Sandu Walji* v. *Bhikchand Surajmal* (4).

We have been referred on behalf of the appellants to the case of *Kalipada Basu* v. *Fort Gloster Jute Manufacturing Co.*

(1) A. I. R. 1924 Rang. 214=2 Rang. 285 (F.B).

(2) A. I. R. 1921 U. B. 10.

(3) A. I. R. 1924 Mad. 271=46 Mad. 919 (F.B.).

(4) A. I. R. 1923 Bom. 473=47 Bom. 621.

Ltd. (5). It is suggested that this is an authority for holding that the defence raised in this case cannot be put forward when the claim for specific performance would be barred by limitation. I notice, however, that in the Calcutta case it was the plaintiff who was seeking to recover title on the strength of his possession and the present question was not therefore directly in issue.

I referred to and followed the Allahabad case of *Salamatuzzamin Begam* v. *Masha Allah Khan* (6) in my judgment in *Maung Po Tha's* case (2). I see no reason for altering the opinion I expressed in that case, and for the reasons set forth therein I hold that the defence that the defendant has been put into possession under a contract of sale after paying the purchase money can be raised in a suit to recover possession by the original owner, even though the right to sue for specific performance of the contract of sale may be barred by limitation.

It is contended that the ordinary rule should not be followed in this case because it is in evidence that the defendants knew at the time of the contract that a registered document was necessary in order to convey a valid title. But we are unable to see how these facts can affect the principle applicable. It is suggested that the defendants deliberately refrained from obtaining a registered deed in order to save stamp duty and thereby defraud the revenue. This argument appears to me to be somewhat farfetched, and if there were any fraud at all it was not against the plaintiffs. I am of opinion that this appeal should be dismissed with costs.

Rutledge, C. J.—I agree that this appeal must be dismissed with costs. While *Maung* Myat *Tha Zan's* case (1) does not expressly decide the point at issue in the present case, I am also of opinion that the principles therein approved must be held applicable irrespective of a suit for specific performance lying or not. The cases cited by my brother Brown show that a large preponderance of Indian judicial opinion is in favour of the view we take.

P.N./R.K. *Appeal dismissed.*

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(5) A. I. R. 1927 Cal. 365.
(6) [1917] 40 All. 137=43 I. C. 645=16 A. L. J. 98.

A. I. R. 1929 R

HEALD AND MA

Ma Sai Da—Appell
v.
Ma Nwe—Responde

First Appeals Nos.
Decided on 24th June

**(a) Buddhist Law (B
to payin property enunc**

Where a person after
wife inherits property an
tutes payin of the pers
second time, the child of
entitled to three-fourths
to one-fourth in such p
110, *Expl.* and *Dist.*

**(b) Buddhist Law (B
to Manukya payin inclu
ed during two marriage**

According to Manukya
ted to the property acq
marriage but also include
the two marriages.

(c) Buddhist Law (Bu

Where Manukya is
Dhammathats need not
1914 *P. C.* 97, *Foll.*

Krishnaswamy—for
Tun Tin—for Resp

Judgment.—These
out of an administrati
District Court of Ha
Ma Nwe who claims t
daughter of the late U
wife Ma Ngwe Sa agai
Ma Sai Da. Ma Nv
fourth share valued at
status of her mother
nied, and it was cont
Nwe was entitled to a
not be three-fourths.
should be has not b
written statement. T
Judge held that Ma N
legitimate child, and p
her favour giving a
payin property of he
eighth share in the h
of the last marriage.
because she considers
to three-fourths share
perty. Ma Sai Da als
Ma Nwe has been hel
mate child of U Tu
Lordship discussing
question whether Ma
mate child of U Tun I
there was no reason to
of the learned Judge o
Now we come to the q

The estate appears to be made up of the payin property brought to the last marriage by the deceased as well as of the hnapazone of that marriage. The major portion was inherited after the death of Ma Nwe's mother and before the marriage with Ma Sai Da. Tun Lin's father U Ein Ga died in 1273 (1911). A month or two after U Ein Ga's death there was a partition of his estate between Tun Lin and his step mother Ma Yon. Ma Sai Da was married about three years later. The inherited property no doubt constituted the payin of Tun Lin when he married Ma Sai Da. The learned Judge followed the division made in a similar case of *Ma Leik* v. *Maung Nwe* (1) by Moore, J., in which Hartnoll, J., concurred, namely half to the step-child and half to the stepparent. Moore, J., after referring to the Dhammathats in S. 229 of Kinun Mingyi's Digest observes :

"There is thus a fairly general consensus of authority for the proposition that of the property taken by the father to the second marriage, the children of the first marriage shall receive three-fourths and their stepmother one-fourth. I think it is clear from the above quotation that the property referred to is the property of the first marriage, and that the children of the first marriage are awarded a larger share in this property because it was their parents' property at the commencement of their union."

Out of the 25 Dhammathats quoted in S. 229 about seven seem to support that view. They refer to the payin brought to the second marriage as the property of the former marriage. But it is very strange that Manukye has not been quoted in S. 229 at all. The Privy Council has given that Dhammathat a commanding position among all the Dhammathats and in the case of *Ma Hnin Bwin* v. *U Shwe Gon* (2) their Lordships have laid down that where Manukye is not ambiguous other Dhammathats do not require to be referred to.

Section 8 of Book X of the Manukye gives the rule of partition between the stepparent and the step-child, regarding the payin taken to the second marriage and the hnapazone of that marriage. As regards payin it gives three-fourths to the stepchild and one-fourth to the step-parent. This division is the same as laid down by the majority of the Dhammathats quoted in S. 229 of the Digest. But Manukye does not appear to restrict the payin to the property acquired during the former marriage. It seems to include also the property acquired during the two marriages. The expression " Maya dwin shithamya oksa" (all the property possessed by the wife) is wide enough to include such property. The above rule of partition given in the Manukye is in no way ambiguous. If the property was inherited before the last marriage, the stepparent is entitled to only a quarter share, but if the property was inherited during the last marriage, the stepparent is entitled to half. We therefore cannot accept the rule of division laid down in *Ma Leik's* case (1). As regards the hnapazone of the last marriage, the division made by the lower Court is correct and is in accordance with the rule of partition laid down in the Full Bench case of *Ma Nyein* v. *Maung Maung* (3).

We accordingly modify the decree of the lower Court by increasing Ma Nwe's share in the inherited property of her father from one half to three-fourths. She is entitled to her costs on the value of the quarter share in this Court and on the value of the three-fourths share in the Court below. Ma Sai Da's cross-objection is dismissed with costs.

P.N./R.K. *Decree modified.*

(1) [1908] 4 L.B.R. 110.

(2) A.I.R. 1914 P.C. 97=41 Cal. 887=41 I.A. 121 (P.C.).

(3) A.I.R. 1925 Rang. 340=3 Rang. 549 (F.B.).

A. I. R. 1929 Rangoon 254

CARR, J.

Emperor—Referee.

v.

Nga Po Sein Gyi—Opposite Party.

Criminal Ref. No. 131 of 1928, Decided on 7th February 1929, made by Dist. Mag., Bassein.

(a) Burma Expulsion of Offenders Act, S. 2 (B) (3) and (4) — Under S. 2-B (3) and (4) person may become offender not by reason of conviction of offence.

Under S. 2-B (3) (4) a person may become an offender not by reason of conviction of an offence, for it is well recognised law that orders under S. 118, Criminal P. C., or under S. 7, Burma Habitual Offenders Restriction Act are not convictions of offences. [P 255 C 2]

(b) Burma Expulsion of Offenders Act, S. 4 (1) — Wording of S. 4 (1) restricts its application to offender under S. 2-B (1) (2).

Wording of S. 4 (1) restricts the application of the section to persons who are offenders under S. 2-B (1) (2) and the section can have no application to a person who is an offender under S. 2-B (3) (4). [P 255 C 2]

(c) Burma Expulsion of Offenders Act, S. 4 — Neither District Magistrate nor High Court has jurisdiction to deal with person against whom order of restriction is passed under Burma Habitual offender's Restriction Act S. 7.

Although a person against whom an order of restriction is passed under S. 7 is an offender and is liable under S. 3 to be expelled, the Act provides no machinery for the enforcement of the liability and so neither the District Magistrate nor the High Court has any jurisdiction to deal with the matter under S. 4. [P 255 C 2]

Gaunt—for Referee.

Judgment.—This is a reference made by the District Magistrate of Bassein under S. 4 (4), Burma Expulsion of Offenders Act, 1926. The respondent is a Bengali Mahomedan by birth and has apparently lived in Burma for some 13 to 15 years. He has married a wife, who, on the mother's side, is partly of Burmese blood, and has apparently several children by her. Thus, by birth, he is a non-Burman, but it may be that he has acquired a domicile in Burma; and, if that is so, he would not be a non-Burman within the definition in S. 2 (A) of the Act referred to.

Before the District Magistrate the respondent admitted that he was a non-Burman, and the District Magistrate seems to have acted on this. But I am not prepared to accept such an admission as conclusive in a case of this kind. Being a non-Burman by birth, an ignorant person, such as the respondent, might very well admit that he was a non-Burman without knowing that any question of domicile is involved. On this question, therefore, I should have been obliged to return the proceedings for further enquiry, but for certain other considerations with which I will now deal.

The respondent, in 1926, was convicted of an offence of theft under S. 379, I.P.C. and was imprisoned for six months. But, for the purposes of the present case, that conviction is immaterial. He has not since been convicted of any offence, but, on 11th October 1928, an order of restriction was passed against him under S. 7, Burma Habitual Offenders Restriction Act, and it is this order which is the basis of the present proceedings and of the District Magistrate's recommendation that the respondent be expelled from Burma.

Section 2 (B), Expulsion of Offenders Act, contains the definition of an "offender" for the purposes
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certain convictions o
(iii) deals with orders
110, Criminal P. C., a
laws. Cl. (iv) deals
restriction under the
Offenders Act, and it i
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Section 3 of the Act
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expelled from Burma.
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In my view, the
District Magistrate,
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therefore, for me to d
under sub-S. (4) S.

may be returned to the District Magistrate with a copy of this order.

P.N./R.K. *Order accordingly.*

A. I. R. 1929 Rangoon 256

HEALD, J.

Emperor

v.

Nga Po Seik—Non-Applicant.

Criminal Revision No. 389-A of 1929, Decided on 3rd May 1929, against order of Township Magistrate of Myanaung, in Criminal Regular Trial No. 114 of 1928.

(a) Burma Excise Act, S. 30 (a)—" Country liquor " explained — Particular kind must be specified.

" Country liquor " is a generic term which can be equally applied to tari, country spirit, and country alcoholic liquor other than spirit, i. e., country fermented liquor. In Excise cases, it is always necessary to distinguish between these different kinds of country liquor and specify which particular kind is involved in the case, as the quantities of each of these different kinds of alcoholic liquor which may be possessed without a license differ. [P 256 C 2]

(b) Burma Excise Act, S. 30 (a)—Person cannot be convicted for possession of less than one quart of country spirit or country alcoholic liquor other than spirit.

A person cannot be convicted under S. 30 (a) for mere possession of less than one quart of country spirit or country alcoholic liquor other than spirit, the quantity being within the limits for possession prescribed for either of the kinds of liquor in the Excise Department Notification No. 61 of 14th June 1928. [P 256 C 2]

(c) Burma Excise Act, S. 37—Proof of offence under—Guilty knowledge must be proved.

In order to establish an offence under S. 37 it is necessary that the guilty knowledge or belief, which is an essential ingredient of the offence should be included in the particulars of the offence stated to the accused and proved at the trial. [P 256 C 2]

(d) Burma Excise Act, Ss. 30 (a) and 37—Alteration of offence under S. 30 (a) to one under S. 37—Criminal P. C., S. 227.

An illegal conviction under S. 30 (a) cannot be altered to a conviction under S. 37 if the accused is not called upon to answer a charge under the latter section. [P 256 C 2]

Judgment.—In this case, the accused has been convicted of an offence under S. 30 (a), Burma Excise Act, for the possession of half a quart of " country liquor " and an empty bottle with the smell of " country liquor."

" Country liquor " is a generic term which can be equally applied to tari, country spirit, and country alcoholic liquor other than spirit, i. e., country fermented liquor. In Excise cases, it is always necessary to distinguish between these different kinds of country liquor and specify which particular kind is involved in the case, as the quantities of each of these different kinds of alcoholic liquor which may be possessed without a license differ: vide Excise Department Notification No. 61, dated 14th June 1928, reproduced as as item 261 of the correction pamphlet to the Burma Excise Manual.

In this case the accused admitted possession of the liquor seized and pleaded that he had kept it for the purpose of a propitiatory offering to the nats according to the Karen custom. As almost invariably country spirit is used for this purpose, the liquor involved in this case may be presumed to have been of that variety. But whether the liquor involved was actually country spirit or country alcoholic liquor other than spirit, the quantity seized which was less than one quart, was within the limits for possession prescribed for either of those kinds of liquor in the Excise Department Notification mentioned above. Hence no conviction under S. 30 (a), Excise Act, could be had in respect of it.

But if the accused was in possession knowing or having reason to believe that the liquor was obtained from an illicit source, he would thereby commit an offence under S. 37 of the Act. In order to establish an offence under S. 37 it is necessary that the guilty knowledge or belief, which is an essential ingredient of the offence should be included in the particulars of the offence stated to the accused and proved at the trial. On this point the Magistrate is referred to para. 783-A, Burma Courts Manual, added by item 19 of Circular No. 5. This guilty knowledge or belief was not; however, alleged in the particulars of the offence stated to the accused, nor proved at the trial in this case. The conviction under S. 30 (a) was obviously illegal. It cannot be altered to a conviction under S. 37 as the accused was not called upon to answer a charge under that section. The conviction and sentence are therefore set aside and the fine paid must be refunded to the accused.

P.N./R.K. *Conviction set aside*

A. I. R. 1929 Rangoon 257

CHARI, J.

Ma Sa—Defendant—Appellant.

v.

Ma Sein Nu and *another*—Plaintiffs—Respondents.

Second Appeal No. 99 of 1929, Decided on 18th July 1929, from judgment of Dist., Judge of Thaton in Civ. App. No. 126 of 1928.

(a) Civil P. C., S. 100—When Court arrives at finding there being no evidence there is error of law—High Court can consider whole case.

Where the lower Courts arrive at a finding when there is no evidence on the point, there is an obvious error of law which vitiates the judgment. The High Court can admit an appeal and is not confined to a consideration of the particular error which vitiates the judgment but the whole case is open for consideration. [P 258 C 1]

(b) Buddhist Law (Burmese)—Person paying consideration but purchasing property in wife's or son's name has to show the object with which the property was purchased.

A Burman husband or father purchasing property in the name of his wife or child does not stand in the position of a Hindu or Mahomedan in whose cases the law raises a presumption of benami. He has to show further with what particular object or motive he purchased the land before the Court can decide whether the property purchased was a benami transaction or not: *Rang. First App. No.* 36 *of* 1925 and *A. I. R.* 1926 *P.C.* 77, *Rel.*; on *A.I.R.* 1928 *Rang.* 220, *Expl.*

[P 258 C 2, P 259 C 1]

Tun Aung—for Appellant.

Ko Ko—for Respondents.

Judgment.—The plaintiff in this case, who is the respondent in this Court filed a suit against the defendant Ma Sa for declaration and recovery of possession of a piece of paddy land and for cancellation of a registered deed of sale in the following circumstances:

The plaintiff Ma Sein Nu was the wife of Maung Pan Byu (now deceased). Maung Pan Byu was the son of Ma Sa and U Khe. U Khe is dead. When Maung Pan Byu was 14 or 15 years old, the old couple Ma Sa and her husband U Khe bought a piece of paddy land, which is now in dispute, in the name of their son Maung Pan Byu. They had at the time other children also. The land was being assessed in the name of Maung Pan Byu until 1925-26. In the year 1925 when U Khe was alive, Maung Pan Byu purported to convey the land to his parents for an alleged consideration of 500. It is admitted that no considera-

tion was paid to Ma
the defendant's case
was originally purch
Maung Pan Byu wit
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of the property and
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The question theref
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Under S. 100, Civil
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(1) [1916] 102 P. R. 191
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it were necessary, I would have accepted because the question of a man's state of mind is a question of fact, but in this case, it is unnecessary to decide this particular question, because there is an obvious error of law which vitiates the judgment. Both the Courts have held that the transfer by Maung Pan Byu of the property to his parents for an ostensible consideration of 500 was made with intent to defeat the rights of his wife. There is absolutely no evidence on this point and it was merely an inference from the admitted fact that no consideration was paid.

The Courts assumed that Maung Pan Byu was the absolute owner and since he had transferred the property to his parent and taken no money for it, they came to the conclusion that the transfer was made with the intent to defeat the wife's right. They failed to see that even assuming Maung Pan Byu to be the owner of the property, there was nothing to prevent a son making a gift to his parents and that very often gifts are made in the form of conveyance for consideration, but no consideration is paid.

It is true that the finding of the lower Courts about the validity of the transfer may be supported on the Full Bench ruling in *Ma Paing's* v. *Mg Shwe Hpan* (2), because a husband has no power to make a gift of property without his wife's consent: see *U Po U* v. *Ma Tek Gyi* (3). The lower Courts did not decide the case on this point, and on the point on which they did decide, they were wrong, and I have jurisdiction to entertain this appeal. When there is an error of law, which vitiates the judgment the High Court is not confined to a consideration of the particular error which vitiates the judgment, but the whole case is open for consideration.

Turning to the question as to whether the transaction was benami or an advancement, it is necessary to consider a recent ruling by a Bench of this Court reported as *Fyaw Pe* v. *Maung Kyi* (4). The summary of the ruling in the headnote that if a Burman had property in the name of his child, a presumption of advancement of the benefit would arise, does not exactly reproduce the effect of that ruling. To consider what that ruling actually decided a little explanation is necessary.

It was held in *Ma On Pe* v. *Ma Nyien Kin* (5), that the burden of showing that a transaction which on the face of it is operative as a transfer of property was not intended so to operate is on the person alleging it, that is, the plaintiff in this case, if he challenges the transaction.

This is the view of the burden of proof which was taken by their Lordships of the Privy Council in the case of *Maung Po Kin* v. *Maung Po Shein* (6). This question of burden of proof is not affected by the prevalence or otherwise of benami transactions in a country. Where once, however, the person who alleged that a transaction is benami proves that he paid the purchase money, the law so far as Hindus and Mahomedans are concerned raises a presumption that a purchase in the name of a son or wife raises a contrary presumption, namely that it was intended as a provision for the wife or child. These presumptions are not due to any peculiarity of the laws of the country, but are merely a judicial recognition of the well known usage of the people. In India, it is quite common for a person to buy property in the name of his child or wife without any particular object or motive. In England on the other hand, when a person buys property in the name of his child or wife, in the vast majority of cases it is because he intends to make provision for his wife or child. That this is the ground of the presumption is quite clear from the fact that even in English law property purchased in the name of a stranger raises no such presumption and the person in whose name the property is purchased holds in trust for the person who advanced the purchase money. In Burma on the other hand, as pointed out in the ruling referred to and certain other rulings there is no prevalent usage of purchase of property without any rhyme or reason in the name of the wife or child, but there are many occasions where property is purchased in the name of a wife or child with some particular object or motive. When therefore a Burman husband or father who had purchased property in the name of his wife and child produces no evidence that he

(2) A. I R. 1927 Rang. 209=5 Rang. 296.
(3) A. I. R. 1929 Rang. 123=7 Rang. 374.
(4) A. I. R. 1928 Rang. 220=6 Rang. 203.
(5) First Appeal No. 36 of 1925.
(6) A.I.R. 1926 P. C. 77=4 Rang. 518.

advanced the purchase money, he does not stand in the position of a Hindu or Mahomedan, in whose cases the law raises a presumption of benami. He has to show further with what particular object or motive he purchased the land, before the Court can decide, whether the property purchased was a benami transaction or not. This is all that was intended to be laid down in that ruling. This is clear from the last paragraph of the judgment which appears in p. 212 of the report.

Turning to the facts of this case, when the property was purchased, the person in whose name it was purchased was a boy at the time. He admittedly did not advance the money which was actually advanced by his parents. A presumption of advancement in his favour is countered by the fact that there were a number of other children for whom no provision was made by the parents. The question then for consideration is whether the course taken by the parents referred to in the judgment supports any presumption that the purchase in Maung Pan Byu's name was intended as an advancement for him.

The evidence on this point is that Maung Pan Byu was cultivating the land for a long time. This is quite consistent with the ownership of the parents because he is working the paddy fields of his parents. Moreover, he also cultivated paddy fields of his parents other than the one in dispute.

The next point is that tax was being paid in Maung Pan Byu's name right through. This is nothing whatever, because since the property is in Maung Pan Byu's name, his parents would naturally pay the tax in his name. There is some evidence that at Maung Pan Byu's marriage, his parents stated that he (Maung Pan Byu) was the owner of a piece of land. It is unnecessary to discuss the evidence at any length which to my mind is not very convincing, but assuming that Maung Pan Byu's parents who made such a statement, namely that he was the owner of a piece of paddy land, it cannot be read as an implied recognition of Maung Pan Byu's ownership of this piece of land. Such a declaration is too weak to raise any inference that the boy was intended to be a beneficial owner of the piece of land. These are the points against the case of the defen-

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R.M./R.K.

A. I. R. 1929 R

MAUNG

Ma Kyan—Appella
v.
Maung Min Din (
pondents.

Second Appeal No. 1
ded on 6th August 19
of Dist. Judge, Yamet
peal No. 2-A of 1929.

Transfer of Property
The sale of immovable p
of less than Rs. 100 ca
delivery of property. Bu
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gistered no legal title pas

Po Aye—for Appella
Wellington—for Res

Judgment.—The suit land originally belonged to Ma E. Appellant is her granddaughter. She is now in possession after having obtained it by a suit under S. 9, Specific Relief Act. The respondent sought to oust her from such possession, relying upon their title derived from Ma E's son-in-law Aung Baw under an unregistered sale-deed, Ex. B, dated 28th December 1927. He was given a decree for possession. Both the Courts below have overlooked the law governing the case. Though the value of the property sold is less than 100 the sale deed requires to be registered under S. 54, T. P. Act. Of course the sale could have been effected without any deed and by mere delivery of the property. Since a deed was executed, it must be registered and since it was not registered no legal title passes under it. The claim based upon such deed must fail. The decrees of the Courts below are set aside and the suit dismissed with costs thoughout.

P.N./R.K. *Suit dismissed.*

A. I. R. 1929 Rangoon 260

OTTER, J.

Maung Tha Nyo and *Co.* — Appellant.

v.

Ma Un Ma Pru and *others*—Respondents.

Special Second Appeal No. 364 of 1928, Decided on 18th February 1929, from Dist. Judge, Akyab, in Civil Appeal No. 26 of 1928.

(a) Burma Registration of Business Names Act (1920), S. 3 Proviso—Proviso refers to S. 3 (c).

The proviso refers back to S. 3 (c) for in it is found the only reference to a change or addition to a name. [P 261 C 1]

(b) Burma Registration of Business Names Act (1920), S. 3 (b) and S. 5 (1) — Arkanese carrying on money lending business in his own name — After his death his widow carrying on same business under old name with "and Co." added — Mortgage entered in business name — Registration effected but widow's children shown as partners when they were not — Suit on mortgage by widow—Case falls under S. 3 (b) and as plaintiff widow was under disability provided in S. 5 (1) her suit must fail.

One Maung Tha Nyo carried on a money lending business in his own name. After his death his widow carried own the same business under the style of Maung Tha Nyo & Co. She entered into a mortgage and the mortgagees were described as Maung Tha Nyo & Co. Tnen a registration was effected but the names of parties were shown as the name of the widow together with her children though the children were not partners. She brought a suit on the mortgage.

Held: that S. 3 (proviso) did not apply to the case as it fell under S. 3 (b) and as the business was not carried on in the true name and that as the plaintiff widow was under the disability provided by S. 5 (1) her suit must fail. [P 261 C 2]

Held further; that she might bring fresh suit after registering in accordance with the Act. [P 261C 2]

Lambert—for Appellant.

Sein Tun Aung—for Respondents.

Judgment.—This is an unfortunate case. This suit is upon a mortgage. The only point of apparent substance taken on behalf of the defendants has been that in consequence of provisions of the Burma Registration of Business Names Act of 1920 the plaintiff firm is unable to enforce their claim against the defendants. This point was not taken in terms in the written statement but it was argued in both lower Courts unsuccessfully in the Sub-Divisional Court but with success in the District Court. The short facts are that a man called Maung Tha Nyo carried on a money-lending business in his own name till he died on 8th February 1921. Since his death the widow Ma Hla Ma Khine has carried on and still carries on the same business under the style of Maung Tha Nyo & Co. On 10th May 1924 the mortgage in suit was entered into, the mortgagees being described as Maung Tha Nyo & Co. The Act in question had come into force on 1st June 1923. I may observe at once that the drafting of the Act leaves much to be desired. It is described in the preamble (which of course does not form part of the Act) as an Act to make provision for the Compulsory Registration of Business Names:

Section 3 of the Act is as follows:

Subject to provisions of this Act:

(a) "Every firm having a place of business in any area to which this Act extends and carrying on business therein under a business name which does not consist of the true names of all partners who are individuals and the corporate names of all partners who are corporations;

(b) every individual having a place of business in any area to which this Act extends and carrying on business therein under a business name which does not consist of his true name;

(c) Every individual or firm having a place of business in any area to which this Act extends, who or a member of which has either before or after the passing of this Act changed or added to his name except in the case of a woman in consequence of marriage shall be registered in accordance with the provisions of this Act."

And the following proviso is then enacted: Provided that:

"(1) Where the change or the addition merely indicates that the business is carried on in succession to a former owner of the business, that change or addition shall not of itself render registration necessary."

It is said that S. 3 (b) and perhaps S. 3 (a) have been infringed for when on 3rd June 1924 a registration was effected by a mistake the names of parties were shown as Ma Hla Ma Khine together with each of her ten children. It should be said that the family is an Arkanese family and the business is carried on in Akyab. There is no doubt of course that a technical breach of S. 3 (b) occurred if that section applies to the case.

It is said by the plaintiff, however, that the proviso (1) applies, and that registration is unnecessary. It is not easy to see exactly what the proviso is intended to mean. It is clear, however, that whatever its meaning it only refers back to sub-S. (c), S. 3, for in it is found the only reference to a change or addition to a name. There are more than one point of difficulty with regard to the wording of the subsection, e. g., it is not clear how far the subsection is intended to be retrospective. But in the present case I cannot see that the "change or addition" contemplated took place. The only "change" was in name of the "business." Ma Hla Ma Khine did not change her name and the word "firm" is defined as meaning an unincorporate body (a) of two or more individuals or (b) one or more individuals and one or more corporations who have entered into partnership with one another with a view to carrying on business for profit. Thus I think S. 3 (b) must apply without qualification for there is no doubt Ma Hla Ma Khine carried business under a name which did not consist of her true name.

It becomes necessary therefore to see what the Act says is to be the effect of these matters. S. 5 is as follows:

"Where any firm, corporation or individual by this Act required to furnish a statement of particulars or of any change in particulars shall have made defau rights of that defaulter of any contract made o on behalf of such defau business in respect to which particulars were nished at any time whi not be enforceable by su either in the business n

I would observe th Act is there any pro firm etc., to furnis particulars. All th "registration in ac provisions of this there is a penalty lai in the case of a pe particulars which he son to believe are fa neither says "parti furnished, nor of co lars are to be furnish words "default" o not defined.

It is said by the has done all that she viz., she has furnis But these "particula for the children are although there is no quiring particulars o that such are require from Ss. 3 (a) and 6 (That being so the pl material times und provided for by S. 5 (upon purely technical was correctly dismiss able to judge, how Khine acted honestl with a genuine end with the Registratio that she did apply to for a remand of the c she might apply to th I observe also that th refused. I do not und the reason for this learned Judge merely no reason to remand t suit will not be barre view of the learned Ju best course for the pl ter in accordance wit I am told she has do fresh suit. Her appea reasons I have have gi missed but in the spec of this case the ap without costs.

P.N./R.K. A

A. I. R. 1929 Rangoon 262

MYA BU, J.

Po Naw and *another*—Appellants.

v.

Maung Ba Chit—Respondent.

Special Second Appeal No. 241 of 1929, Decided on 26th July 1929, from decree in Civil Regular No. 96 of 1926.

Evidence Act, S. 92—Surety bond—Wording not supporting that surety was not liable for decretal amount—Surety told that he was for appearance only—Application for surety supporting him—Release order vague—Evidence held admissible to prove that execution was under mistake.

The wording of the surety bond did not support a person's contention that he did not sign a bond for payment of the amount but for his appearance and payment of the amount only on failure to produce him. The evidence showed that though the bond was read out to the person, he was told that he was surety for the appearance. The person had offered himself to be a surety by an application in which he stated that as the judgment-debtor would be produced he placed the properties mentioned therein as security. The order for the release of the judgment-debtor was vague.

Held: that though ordinarily the wording of the bond could not be allowed to be contradicted there was ample ground for holding that the bond happened to be executed under a mistake as to its real purport. [P-262 C 2]

Janabali—for Appellants.

Kyaw Zan—for Respondent.

Judgment.—The respondent, Maung Ba Chit, obtained a money-decree against one Maung Tha Hto in Civil Regular No. 96 of 1926 of the Township Court of Paan and made a verbal application for the execution of the decree under O. 21, R. 11, Civil P. C., by arrest and imprisonment of the judgment-debtor. The judgment-debtor then expressed a desire to prefer an appeal and to be released to enable him to have an opportunity of doing so. The Court ordered that he might be released if he furnished sufficient security. The present appellants offered themselves to be sureties by a petition in which they stated that, as the judgment-debtor would be produced before the Court on the date fixed, they placed the properties mentioned therein as security. Their suretyship was accepted and they executed a security bond and it is in this security bond that the respondent seeks to require the payment of the decretal amount from the appellants, because, although they were able to produce the judgment-debtor in Court when required, the latter was unable to pay the amount.

The appellant's case is that they never signed a bond for payment of the decretal amount on the judgment-debtor's failure to pay the same, but that they executed a bond for the appearance of the judgment-debtor in Court, whenever he was required by the Court, and for payment of the decretal amount in the event of their failure to produce the judgment-debtor when the latter's appearance was required by the Court. The wording of the bond does not support the appellant's case, but it is clear from the statement in their petition offering security and the evidence of the Head Clerk and Bench Clerk of the Township Court, that the appellant executed the bond in the belief that it was a bond for the production of the judgment-debtor whenever they were required to do so, and to be liable to pay the decretal amount in the event of their failure to produce the judgment-debtor.

The evidence of the Head Clerk and the Bench Clerk clearly shows that although the bond was read out to them, the appellants were told that they were sureties for the appearance of the judgment-debtor. Ordinarily it would be difficult to give any substantial weight to such evidence and allow the wording of the bond itself, which was before the parties to be contradicted. But in this case, judging from the vagueness of the order for the release of the judgment-debtor on furnishing security, which appears to me to have in fact been written after the bond was executed, and the definite offer made in the application for the production of the judgment-debtor on the date fixed by the Court, there is ample ground for believing in the truth of the story that the bond happened to be executed under a mistake as to its real purport.

The clerks of the Court should not have made use of the form on which this bond was printed, but from the mere fact that they did make use of this form, it is not sufficient to say that their evidence in the present proceedings is false, for it might most probably be due to their ignorance of the proper terms in which the sureties' undertakings should have been couched, or, in other words, their incompetency or neglect. The case appears to me to fall within the proviso

to S. 92, Evidence Act. The appellants cannot be called upon to pay the decretal amount unless and until they failed to discharge their obligation to produce the judgment-debtor when required by the Court. This obligation appears to have been fulfilled, because, when execution was taken out, it was taken out both against the judgment-debtor and against the sureties, the judgment-debtor duly appeared in Court. For these reasons, I allow this appeal, set aside the order of the District Court, and restore that of the Township Court. U Kyaw Zan for the respondent pleads that he should not be saddled with costs, because everything was due to the mistake made by the officer of the Court. I make no order as to the costs of this appeal.

P.N./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 263

OTTER, J.

Fontyne & Co.—Appellants.

v.

S. C. Appanna—Respondent.

Second Appeal No. 530 of 1928, Decided on 20th June 1929, from decree of Dist. Judge, Amherst, D/- 5th September 1928.

Evidence Act, S. 101—Plaintiffs suing defendants for sum of money said to be due to him in respect of labour supplied to them and producing document signed by partner in defendants' firm saying balance claimed was due to him—Onus is on defendants to show that document which amounted to admission was obtained under circumstances not legally binding.

Plaintiff sued defendants for recovery of a sum of money said to be due to him in respect of labour supplied to them. He alleged that accounts of labour supplied were settled and the sum of money was found due to him and produced a document signed by a partner in defendants' business saying the balance claimed in respect of labour was due to plaintiff:

Held: that it was an admission and it was for the defendants to prove that such an admission was obtained from them under circumstances which would prevent its being legally binding upon them: *A. I. R.* 1927 *Rang.* 318, *Cons.* and *Dist.*; *A. I. R.* 1925 *Lah.* 471, *Rel. on.* [P 264 C 2]

A. B. Banerjee—for Appellants.

M. M. Rafi—for Respondent.

Judgment.—This is an appeal against a judgment and decree of 5th September 1928 passed by the District Court of

Amherst, setting asi[illegible]
decree of the Sub-[illegible]
Moulmein. The pl[illegible]
sued the defendants ([illegible]
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(1) Was the sum [illegible]
to the plaintiff ?

(2) If not, did Mr.
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It is clear from [illegible]
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"agreed that case be dec[illegible]
as they cannot agree on

proof lies. 2 P. Ws. and 2 D. Ws. .... are waived and discharged."

The matter was then apparently "left entirely in the hands of the Court." The learned Sub-Divisional Judge was of opinion that, as the burden of proof was upon the plaintiff upon the first issue and as the defendants denied that anything was due, the plaintiff had failed to discharge the onus, which was upon him. In the District Court, however, to which the plaintiff respondent appealed, the learned District Judge in a careful order reversed the order of the lower Court and passed a decree in favour of the plaintiff for the amount claimed with costs.

In that Court, as also before me, the only question was whether the plaintiff was entitled to succeed upon the ground that in view of the admission by the defendants that the acknowledgment (Ex. A) had been signed on their behalf, the onus of proof was shifted to them, and that as they called no evidence, the plaintiff was entitled to judgment upon the prima facie case set up upon the pleadings. It is conceded I think, that if Ex. (A) may be regarded as an admission of liability by the defendants, the order of the District Court was correct. It is said, however, that as the case for the plaintiff was based upon a settlement of accounts between the parties, it was incumbent upon him to prove such settlement, and it was also suggested that Ex. A, partly because it was said to have been given as a result of such a settlement, and partly I think from its terms, cannot be regarded as such an admission of liability as would in law place upon the defendants the onus of disproving liability.

The case of *Hoe Moh* v. *I. M. Seedat* (1) is relied upon on behalf of the defendants. That was a suit on promissory-note, and the defendant, though admitting his signature denied that the amount claimed was due and stated that he had signed a blank note upon which figures denoting a lesser amount appeared. It was held that as the defendants had specifically denied a promise to pay the sum named, the burden of proving the loan rested upon the plaintiff. It seems to me that this case may be distinguished from the present case, for if Ex. (A) can be construed as an admission of liability (or a promise to pay) it clearly covers the whole amount claimed by the plaintiff. From a perusal of the judgment in *Hoe Moh's* case (1), it seems to me that had the defendant there in addition to admitting signing the promissory note admitted that the figures representing the amount claimed appeared upon it, the decision would have been otherwise.

The Full Bench decision in the case of *Ram Chand* v. *Chhunnumal* (2) was relied upon by the plaintiff. In that case the alleged admission was an admission regarding receipt of consideration and not a direct admission of liability. The example given at p. 473 (*of* 6 *Lah.*) of the report seems to me to bear upon the present case. The learned Chief Justice said :

> "If *A* sues *B* for money due on a document, the burden of proving the existence of facts, upon which the legal liability of *B* depends lies on *A*. When *A* has proved the execution of the document by *B*, x x x x x and the document contains an acknowledgment of the receipt of consideration, it is the duty of *B* to show that what he himself admitted .... was as a matter of fact false and that he did not receive the consideration."

At p. 475 (*of* 6 *Lah.*) of the report, the learned Chief Justice also said :

> "Nor is there any valid reason in principle for drawing a distinction between an admission in a registered deed and that contained in an unregistered document, in so far as the question of onus probandi is concerned. In both cases the person denying consideration is confronted with his own admission, and it is for him to prove that it was falsely made."

In the present case, therefore, it seems to me that it may well be successfully argued that the person denying liability is confronted with his own admission of liability and it follows, therefore, that it is for him to prove that such an admission was obtained from him under circumstances which would prevent its being legally binding upon him. If I am right in my view on these authorities, the only question then on this part of the case is whether Ex. (A) can be construed as a plain admission of liability. Upon its wording I have no doubt it can, and for the amount claimed. The matter does not quite rest here, however, for, as I have previously indicated, Mr. Banerjee on behalf of the defendants (appellants) argued that, as the decision of the case rests upon the settlement of

(1) A. I. R. 1927 Rang. 319=5 Rang. 527.

(2) A. I. R. 1925 Lah. 471=6 Lah. 470 (F.B.).

accounts and that as Ex. A. is only alleged to have been given as a result of such settlement, it was incumbent upon the plaintiff-respondent to prove by other evidence that a settlement in fact was come to.

It is clear that Ex. A is in itself not an admission that a settlement of accounts had taken place. On the other hand it is by no means clear to me that the present suit could be described as one upon a settlement of accounts, or in other words according to English procedure, as an action upon an account stated. It does not appear that it is necessary to decide this point, however, for upon the pleadings the suit may, in my view, be properly described and I think was, a suit for money due in respect of labour supplied. It is possible that it may also be a suit upon a settlement, but I think it makes no difference. If I am right in this, there can be no doubt at all that if Ex. A is an admission of liability, as I hold it is, it is an admission that the amount claimed is due in respect of labour supplied. That being so, I cannot help coming to the conclusion that the decision of the District Court that a prima facie case had been established in the lower Court by the plaintiff is correct.

Being of that opinion the next question is whether the judgment in favour of the plaintiff should be allowed to stand or whether I should send the case back to the lower Court in order that the defendants may have an opportunity of establishing their case. I was at first inclined to take this latter course upon the ground that it would appear from the diary order I have quoted, that it was by agreement between the advocates concerned that no evidence was called on either side. This may have been so, though from the judgment of the Sub-Divisional Court this may not be quite so clear. I observe, however, that on behalf of the defendants two witnesses were in fact present, but they were discharged. This of course was done before the Sub-Divisional Judge passed his order, which he seems to have done later in the day. There was no obligation, however, upon either advocate to come to the agreement I have referred to, or to discharge his witnesses. In my view the ordinary procedure ought to have been followed and the Judge should have been asked to d
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P.N./R.K.

A. I. R. 1929 F

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Ma On Thin—Appe
v.
Ma Ngwe Yin and
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First Appeal No. 2
on 25th April 1929
District Court, Hantl
Regular No. 56 of 192

**(a) Civil P. C., O. 41,
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R. 1927 *P. C.* 252, *Dist.*

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Ba Thein (1)—for A
Hay—for Responde

Heald and Mya Bu, JJ.—The learned counsel for the respondents has raised a preliminary objection contending that the appeal is incompetent for non-joinder of a necessary party and should therefore be dismissed The appeal is against the preliminary decree in an administration suit filed on behalf of a minor plaintiff named Ma Htwe Sein (now deceased) against the appellant, Ma On Thin, and the respondents, Ma Ngwe Yin and Ma Nyun, for administration of the estate of U Mya, deceased. The respondents are the issue of U Mya's first marriage. After the death of their mother Ma Thaw, U Mya gave them half of the properties of the first marriage. He then married his second wife Ma The Myit and the plaintiff Ma Htwe Sein was born to them. Ma The Myit also predeceased U Mya. Thereafter U Mya married the appellant and died a few months later on 5th July 1927, leaving the appellant enciente and she subsequently gave birth to a son.

In the lower Court there was no dispute as to the heirship of the parties. The only issue was :

"To what shares are the parties respectively entitled in the estate of U Mya deceased ?"

In view of the partition between U Mya and the respondents of the properties of the first marriagb, tho Court held on the authority of the rulings in the cases of *Ma Toke* v. *Ma U Le* (1) and *Ma Htay* v. *U Tha Hline* (2), that the respondents were not entitled to any share either in the remaining properties of the first marriage or in the joint properties of the second and third marriages. The Court went on to fix the shares of the plaintiff and the appellant respectively in these properties ; and in the absence of any dispute and practically in accordance with the unanimous opinion of the Court and the counsel appearing for the respective parties, the Court found that the three parties as representing three families were entitled to one-third each in the properties inherited by U Mya after the death of his first wife.

The preliminary decree made in accordance with the judgment declared:

(1) that the plaintiff was entitled to three-fourths share in the properties of the first and second marriages, one-eighth, share in the properties, if any, of the third marriage and one-third share in the inherited properties of U Mya ;

(2) that Ma On Thin, defendant 1 (now appellant) was entitled to one-fourth share in the properties of the first and second marriages, seven-eighths share in the property, if any, of the third marriage and one third share in the properties inherited by U Mya ; and

(3) that Ma Ngwe Yin and Ma Nyun, defendants 2 and 3 (now respondents) were entitled to one-third share in the properties inherited by U Mya. It was ordered that a commissioner be appointed to find out inter alia what the inherited properties were and what the properties of the first, second and third marriages respectively were. This decree bears date 30th June 1928.

The appellant filed the present appeal on 12th September 1928 only as against the respondents merely objecting to the declaration in the preliminary decree in the latter's favour, valuing the appeal at Rs. 2,000 "being one-third share in the inherited property" but without joining the plaintiff either as an appellant or as a respondent. It may be pointed out that the minor plaintiff, Ma Htwe Sein, died on 1st August 1928, that is after the preliminary decree and before the filing of the appeal.

In support of his contention, the learned counsel for the respondents urges that the legal representatives of Ma Htwe Sein were necessary parties to this appeal and should have beer joined as such, that the appeallant's omission to join Ma Htwe Sein's legal representatives has deprived his clients of their right to take, if they chose, cross-objection adversely affecting the interest of Ma Htwe Sein or her legal representatives; that the time limited for an appeal against Ma Htwe Sein having expired neither she nor her legal representatives can now be joined ; and that the whole appeal has for these reasons become incompetent.

The learned counsel quotes the rulings in the cases of *V. P. R. V. Chokalingam Chetty* v *Singaram Chetty* (3) and *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha* (4). They refer to the same case, the former being a decision of a Bench of this Court and the latter being a deci-

(1) A. I. R. 1924 Rang. 71=1 Rang. 487.
(2) A. I. R. 1925 Rang. 184=2 Rang. 649.
(3) A. I. R. 1925 Rang. 108=2 Rang. 541.
(4) A. I. R. 1927 P. C. 252=6 Rang. 29=55 I. A. 7 (P.C.).

sion of the Privy Council on appeal arising out of the same case. In that case the plaintiff having bought from the Official Assignee property which had belonged to the insolvent sued several defendants for recovery of the property alleging that the transfer by the insolvent to the first defendant and transfers by defendant 1 and other defendants to one another successively were all invalid. When the suit was dismissed, the plaintiff appealed against the dismissal without joining defendant 1 as a respondent; at the time of the hearing of the appeal, which took place after the expiry of the period of limitation for such appeal, the plaintiff applied to join defendant 1 in whose absence the appeal could not succeed. The application was refused on the ground that as defendant 1 held a decree against which an appeal was barred so far as he was concerned, he was not interested in the result of the appeal within the meaning of O. 41, R. 20. It was also pointed out that under O. 41, R. 33 an appellate Court could add a defendant as respondent for the purpose of making a decree against him.

In the present case the position of the plaintiff who has not been joined as a party to this appeal is quite different from that of defendant 1 mentioned in the above rulings. Neither the appellant nor the respondents derived their claim in respect of the dispute in this appeal from the plaintiff as the respondents in those appeals did from defendant 1. From the nature of the appeal itself, it is quite evident that either the success or failure of the appeal will in no way injure the interest acquired by the plaintiff under the preliminary decree and that therefore any such order as this Court may pass in this appeal may be passed without adversely or injuriously affecting the interest held by the plaintiff. For these reasons the plaintiff cannot in our opinion be said to be a necessary party to this appeal.

We have not been shown any authority for the view that it was incumbent on an appellant to join in an appeal a party who is unnecessary for the purpose of the appeal itself, in order to enable the respondent or respondents to take cross-objection which may affect the interest of such party. The objection raised on behalf of the respondent does not appear to us to possess any

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(5) A. I. R. 1921 All. 36

the first marriage to which they became entitled by reason of their father's second marriage, were entitled to one-third of the inherited property only.

Neither of the parties to this appeal contests the correctness of the shares allotted to Ma Twe Sein, the daughter of the second marriage, but appellant says that respondents ought not to have been given any share in the inherited property, and that the share allotted to them ought to have been allotted to her, that is to say, she ought to have been given two-thirds of that property and respondents ought not to have been given any share of it. It is common ground that the properties in dispute were inherited by Maung Mya after the death of his first wife Ma Thaw who was respondent's mother, but it does not appear whether they were inherited before or after the date of the second marriage. It is, however, said to have been agreed in the lower Court that it should be assumed that they were inherited in the interval after the death of the first wife and before the marriage with the second.

The learned Judge in the trial Court said that the learned advocates who appeared for the parties were of opinion that each of the three sets of heirs, that is the children of the first marriage, the child of the second marriage, and the surviving third wife, should each be entitled to a one-third share of those properties, and he gave judgment accordingly.

Appellant now says that the opinion of the learned advocates was mistaken, and that under Burmese Buddhist Law the children of the first marriage who had taken their shares of inheritance on the occasion of the second marriage have no claim to inheritance in respect of property inherited by their father after the first marriage had come to an end.

There is so far as I know no judicial authority directly on the point, the nearest approach to a decision on the matter being the case of *Ma Thaung* v. *Ma Thun* (6), which was not cited to us by either side. In that case their Lordships of the Privy Council quoted a passage from Dhamathatkyaw as saying:—

"After the death of the husband, the wife partitions the property with her children and marries again. On her death the children of her former marriage cannot claim from their stepfather any property which she took to the second marriage, because they have already obtained their shares. The same rule applies when after the death of the wife the husband marries again after having given the children their respective shares."

Their Lordships accepted that rule and applied it to a case, where before the second marriage the father had made a partition of the properties of the first marriage and after the second marriage had carried on the family business, which was the subject matter of the partition, in partnership with the children of first marriage so far as concerned the shares which the children of that marriage received at the partition. Their Lordships said that although there was no definite separation between the father and the children of the first marriage, the new menage was carried on quite independently and separately from them. A verbal translation of the passage cited by their Lordships runs as follows:

"If after the death of the husband the wife divides the properties that there are into son's share and daughter's share and taking her own share marries another husband and then dies, and if the children say we ought to get the properties which went with our mother, let them not say so. The later husband and children should have them because they (the children of the first marriage) have already been given their own shares. If the mother die, and the father give (their shares) to the children and take a second wife and die in the time of the second wife, in the same way the children of the first marriage shall not be entitled to the property which went with their father."

That passage, which as I have said, was accepted by their Lordships of the Privy Council as a rule of Burmese Buddhist Law, would seem to settle the matter in controversy in the present appeal, since on the assumption that the property in dispute was inherited by the father after the mother died and before the second marriage, that property would clearly be property which "went with the father" to the second marriage, while if in fact the property was inherited after the second marriage, it would be lettetpwa property of that marriage in which the children of the first marriage could have no share.

But it is sought to distinguish the present case on the ground that the children of the first marriage did not separate from their father, but lived with him and their stepmother. There is no allegation

(6) A.I.R. 1924 P.C. 88=5 Rang. 175=51 Cal. 374=51 I.A. 1 (P.C.).

to that effect in the pleadings on which, apparently by consent, the preliminary decree was passed, but even if it were established that the children of the first marriage did continue to live with their father after the second marriage, I do not think that that fact would be sufficient to distinguish the case from *Ma Thaung's* case (6), where, as I have said, their Lordships pointed out that there was no definite separation between the father and the children of the first marriage.

Reliance is placed on an obiter dictum of mine in the case of *Po San* v. *Po Thet* (7) (at p. 441 *of* 3 *Rang.*) where I said :

"I have no doubt that under the old law joint living, that is a continuance in the family, was necessary for a continuance of rights in the family property, and that a child who took his share and separated himself from the family was regarded as having no further interest in the family property. Manussika and Dyajja in dealing with the right to partition between children and the stepparent on the death of the parent make the right of the children of the first marriage to share in the property of the second marriage dependent on their having assisted in the acquisition of that property, that is not having left the family, and Vannana says that if the children of the first marriage have taken their share on their parent's remarriage they have no interest in the property of the second marriage, while the Dhammathats cited in S. 214 of the Digest enunciate a similar principle. But it has been held in many cases and very recently by the Privy Council in *Maung Dwe* v. *Khoo Haung Shein* (8), that the requirement of joint-living is now relaxed and that in the absence of actual separation from the family the right of inheritance subsists. It would seem to follow that even if the auratha has taken his share on the death of a parent or on the remarriage of the surviving parent, he is still entitled to claim a share on the death of the surviving parent or on the death of the stepparent unless separation is proved or is to be presumed."

Those remarks it will be noted applied to the share of the auratha son, in whose case no question of separation from the family arose under the old law since he took the father's place in the family, and they would not apply with equal force to children who have taken their share of inheritance on the surviving parent's remarriage, since in the case of such children there is some initial presumption of an intention to separate and not to regard themselves as members of the family of the second marriage, and in any case such an obiter dictum carries no weight

(7) A.I.R. 1926 Rang. 23=3 Rang. 438.
(8) A.I.R. 1925 P.C. 29=3 Rang. 29=52 I.A. 73 (P.C.).

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Otter, J.—I concur.

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(9) A.I.R. 1921 L.B. 68=

*** A. I. R. 1929 R**

BROWN,

A. K. R. M. M. C T.
Appellants.

v.

Maung Tha Din and
pondents.

Civil Misc. Appeal No
cided on 1st March 1929
ment of Dist. Court, Pyi
Appeal No. 39 of 1928.

*** Civil P. C., S. 47 — Judgment-debtor paying certain amount towards satisfaction of decree—Decree-holder not certifying payment and executing whole amount due under decree—Judgment-debtor bringing suit to recover amount paid— Such suit is maintainable—Civil P. C., O. 21, R. 2.**

Where a judgment-debtor paid a certain amount towards the satisfaction of a decree to the decree-holder but the decree-holder did not certify or recognize the payment and took out execution of the whole amount due under the decree and where the judgment-debtor brought a suit to recover the amount paid, such suit is maintainable and S. 47 does not bar such suit as it is based on an alleged failure of the decree-holder to carry out his promise of crediting the amount to his decree which though bearing on question as to satisfaction of decree is not directly a question relating to such satisfaction: *A.I. R.* 1923 *Rang.* 88, *Rel. on.* [P 270 C 2]

Venkatram—for Appellants.

Basu—for Respondents.

Judgment.—The respondents brought a suit against the appellants for the recovery of a sum of Rs. 604 together with interest thereon. Their case was that in December 1924 they paid the sum of Rs. 500 to the appellants towards satisfaction of a decree the appellants held against them. The appellants have since that date taken out execution for the whole amount due under the decree and have not certified or recognized this payment of Rs. 500. They further stated in their plaint that the actual amount overdrawn in the executing Court by the appellants was Rs. 604, and the amount they actually claimed is this sum of Rs. 604. It is quite clear, however, that so far as the case is based merely on an overdrawal in the executing Court, the present suit cannot lie and this is admitted by the learned advocate for the respondent. The question for decision now is whether a suit can be brought for recovery of the Rs. 500.

The trial Court held that it could not and dismissed the suit. The District Court in appeal held that such a suit could be brought and remanded the case for a decision on the merits. The case of *Maung Myo* v. *Maung Kha* (1), is clearly in favour of the view taken by the District Judge. The District Judge appeared to have thought that the decision in *Maung Myo's* case (1) was difficult to reconcile with the wording S. 47, Civil P. C. Under that section questions arising between the parties to the suit in which the decree was passed and relating to the satisfaction of the decree must be determined by the Court executing the decree and not by a separate suit. But the question that arises in this case is the alleged failure of the appellants to carry out their promise of crediting the amount to this decree. It has of course a bearing on questions as to the satisfaction of the decree, but it is not directly a question relating to such satisfaction. I see no good reason for dissenting from the decision in *Maung Myo's* case (1). It has been suggested that the present suit must fail because of the wording of the receipt given for the payment of the money. That point has not yet been considered by the trial Court and it is sufficient to say that I am not satisfied at this stage that it is shown that this objection is fatal to the suit. The question of limitation which has also been mentioned must also be left for decision in the first instance by the trial Judge. I am of opinion that the suit as regards the Rs. 500 with possibly interest thereon is maintainable. I therefore dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1923 Rang. 88=11 L. B. R. 429.

A. I. R. 1929 Rangoon 270

MYA BU, J.

Tun Hlaing—Applicant.

v.

Ma Kha Bu—Respondent.

Civil Revn. No. 158 of 1929, Decided on 13th August 1929, from preliminary order of Township Judge, Zigon, in Civil Regular Suit No. 120 of 1928.

(a) Stamp Act, S. 12 (10-b) and (2)—One of two anna stamps on promissory note uncancelled—Such note under S. 12 (2) is unstamped so far uncancelled stamp is concerned.

If one of the two anna stamps on a promissory note is not duly cancelled and the one anna stamp alone is not sufficient for such note, it cannot be held that the promissory note is sufficiently stamped for under S. 12 (2), the note is to be deemed unstamped so far as the uncancelled stamp is concerned. [P 271 C 1]

(b) Civil P. C., S. 115—Scope.

An erroneous decision on an issue is no ground for revision during the pendency of the suit. [P 271 C 1]

P. K. Basu—for Respondent.

Judgment.—This is an application for revision of the findings of the Township Court of Zigon on certain preliminary issues, namely: (1). Whether the

promissory note in suit was sufficiently stamped, and (2) if not, whether it was admissible in evidence. The Township Court held that the promissory note was sufficiently stamped and that, therefore, the second issue did not arise. It is clear that this view is erroneous. One of the two one anna stamps on the promissory note was not duly cancelled, as required by S. 12 (1) (b), Stamp Act, and under Cl. (2) of the same section the promissory note was to be deemed unstamped so far as the uncancelled stamp was concerned. One one-anna stamp alone was insufficient for the promissory note in suit. Be that as it may, an erroneous decision on these issues is no ground for revision during the pendency of the suit. An error in the decision of these issues could be made a ground of appeal from the decree passed in the suit. Moreover the amended plaint filed before the determination by the Township Judge of these issues bases the claim on alternative causes of action, namely the promissory-note, or in the event of the promissory note being held inadmissible in evidence on the original cause of action, the loan itself. The issues in question, are not such as are sufficient to dispose of the suit, whether they are found in the affirmative or in the negative. In any case there are no grounds for revision and I dismiss this application with costs, advocate's fee 2 gold mohurs.

P.N/R.K. *Revision dismissed.*

A. I. R. 1929 Rangoon 271

CHARI, J.

Maung Po Thet and *others* — Appellants.

v.

Daw Shwe Myin—Respondent.

Special Second Appeal No. 148 of 1929, Decided on 9th August 1929, against decree of Dist. Judge, Thayetmyo in Civil Appeal No. 86 of 1928.

Transfer of Property Act, S. 84—Liability of usufructuary mortgagee to account for mesne profits arises only when money is actually tendered to him—Transfer of Property Act, S. 76.

The liability of the usufructuary mortgagee to account for the mesne profits arises only when money is tendered to him. The money must actually be tendered and a notice sent by the mortgagor asking the mortgagee to come to his place and take the money cannot be a tender of money anc mortgagee arises to accou the land : 36 *All.* 139; 42 62, *Rel, on.*; 9 *L. B. R.* 1[illegible]

So Nyun—for Appe

Lun Thi—for Resp

Judgment. — The case sued to redeem a [illegible] admitted. She also [illegible] fits for last year on th offered to redeem the allowed to do so. The a mere redemption dec[illegible] the claim for mesne [illegible] the learned District plaintiff's claim for [illegible] He purported to follow late Chief Court of Lo[illegible] case of *Po Tun* v. *E K* about which there is n[illegible] the mortgagor did ask redeem orally and al[illegible] offering to redeem and gagees to bring the [illegible] place when they wou money two days after n

The mortgage in this ctuary one, and in th gages, the mortgagee [illegible] sion realizing the prof lieu of interest. S. 84, that interest on the ceases from the date w tendered to the mortga[illegible] cation of that principl[illegible] the usufructuary mort[illegible] for the mesne profits when money is tendere[illegible] been held in a numb money must actually b[illegible] in *Chetan Das* v. *Govi* was held that an offer the money due on a m good tender. In a late[illegible] High Court in *Mahom Khan* v. *Banke Lal* (3), was sent to the mort pay him a certain sum held, that, as no actual duced, there was not [illegible] the sum due under the [illegible]

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(1) [1916] 9 L. B. R. 18= L. T. 117.

(2) [1914] 36 All. 139=2[illegible] J. 111.

(3) [1920] 42 All. 420=55 J. 440.

the tender must be made at the mortgagee's place: *Makadaji* v. *Pairia* (4). The notice, therefore, sent by the mortgagor asking the mortgagees to come to her place, and take the money cannot be a tender of the money and no liabilities of the mortgagees can possibly arise to account for the profits of the land.

The learned District Judge followed the case of *Po Tun* v. *E Kha* (1). If that ruling was intended to lay down broadly that a production of money was not necessary to validate an offer of redemption in all cases, I cannot accept it. But in that case, the mortgagee denied the mortgage, and obviously there was no use in tendering money to a mortgagee, who did not even accept the position of a mortgagee. That case is, therefore, distinguishable from the present one. For these reasons, I set aside the judgment of the lower appellate Court and restore that of the trial Court. There will be no order as to costs either in this Court or in the District Court. The order as to costs in the trial Court will stand.

P.N./R.K. *Decree set aside.*

(4) [1906] 2 N. L. R. 62.

A. I. R. 1929 Rangoon 272

CHARI, J.

Maung Thu—Appellant.

v.

Maung Shwe Hla and *others*—Respondents.

Special Second Appeal No. 161 of 1929, Decided on 9th August 1929.

(a) Buddhist Law (Burmese)—If Burmese Buddhist directs one of coheirs to discharge his liabilities which are a great deal less than value of his property, transaction is to be regarded as gift of excess of property over debt and principle of part performance does not apply to such case—Part Performance.

When a Burmese Buddhist directs one of the heirs to discharge his liabilities which are a good deal less than the value of his properties, and take over his properties, the transaction is equivalent to a gift of the excess of the property over the debt, or a will of that excess, it may be a death-bed gift of that excess. The principle, therefore, of part performance, which applies to a purchaser of the property for consideration has no application to such a case and if such heir discharges the liabilities by selling a portion of the property, he holds the other property on behalf of other heirs. [P 273 C 1]

(b) Buddhist Law (Burmese)—Admission by one heir—Evidence Act, S. 18.

Admission by a person that one of the heirs has absolute right to the property to which the person along with others is an heir, cannot affect the other heirs. [P 272 C 2]

(c) Decree—Form of.

Giving of money decree for immovable property is wrong. [P 272 C 2]

P. K. Basu—for Appellant.

S. S. Halkar—for Respondents.

Judgment.—The plaintiff in this suit claimed as the stepson of one Ma Ye to recover a house and site from the defendants. The house admittedly formed part of the estate of one Ko Maung, whose niece Ma Ye was. Ma Ye was one of the eight nieces and nephews, and it is admitted that Ma Ye would have been entitled to a one-eighth share, if there were no circumstances showing that she had obtained the whole of this property. Her case was that Ko Maung at his death asked her to take his properties and discharge his liabilities and that she did so. She had been paying the taxes on the house and remained in possession of the house till she died. These are the circumstances relied upon by the learned advocate for the appellant as showing that Ma Ye had become the owner of the house. He also relies upon the reply sent by one of the heirs, Maung Shwe Hla, to a notice sent on behalf of the appellant. The position taken up by Maung Shwe Hla will not, as a matter of fact affect the other heirs, even if the letter could be deemed to be an admission of the rights of Ma Ye to the property. The trial Judge accepted the plaintiff's contention and gave him a decree as prayed. This was varied by the lower appellate Court which held that the plaintiff was entitled to a 1/12th share in the property as Ma Ye's son and gave him a money decree for 41-10-8. This giving of money decree for immovable property is wrong, but no objection is taken by the learned advocate in respect of this part of the decree, and I do not propose to interfere with it, if I am in favour of the respondents in other respects.

The decision of the case depends upon exactly what happened when Ko Maung died and the construction to be put upon that transaction. The evidence obviously is not quite clear, and the circumstances in which Ma Ye paid the debt and remained in possession of the pro-

perty are ambiguous and are capable of being construed that she as one of the co-heirs was acting on behalf of herself and other co-heirs and not necessarily that she was acting as carrying out the directions of Ko Maung it is highly probable as the lower appellate Court has held and it has not been shown that it was wrong in so holding that Ma Ye sold a portion of the property, discharged the Chettyar's liability and remained in possession of the unsold property. The learned trial Judges viewed the transaction as an inchoate sale and applying the principles of part performance, held that Ma Ye was entitled to the property, though there was no registered conveyance. But the transaction is capable of being viewed in a different light. When a Burmese Buddhist directs one of the heirs to discharge his liabilities, which are a good deal less than the value of his properties, and take over his properties the transaction is equivalent to a gift of the excess of the property over the debt, or a will of that excess, or it may be a death-bed gift of the excess. The principles, therefore, which would apply to a purchaser of the property for consideration have no application to a case of this nature. Even, therefore, on the assumption that this part of Ma Ye's case was true, in my opinion she would be holding this property on behalf of all her co-heirs, having sold a portion and discharged the liabilities of the deceased. In this view the judgment of the lower appellate Court is right, and I therefore dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 273

RUTLEDGE, C. J., AND BROWN, J.

Ma Shopjambi—Applicant.

v.

Mubarak Ali and *others*—Respondents.

Civil Revn. No. 236 of 1927, Decided on 18th March 1929, from order of Dist. Judge, Akyab, in Civil Misc. Case No. 88 of 1926.

Civil P. C., O. 33, R. 5 (d)—Court examining only applicant and taking into consideration his examination as well as his petition —It also taking judicial notice of certain proceedings in which applicant was party—Court's action is proper—Civil P. C. O. 33, R. 7.

It is open to the Court to consider not only the statements made in the plaint but also the statements ma
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cannot examine other
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correct : 46 *Cal.* 651, *Rel.*

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(1) [1918] 46 Cal. 651=

into consideration her examination as well as her petition which if admitted constitutes her plaint. The Court has also taken judicial notice of certain proceedings in Court in which the petitioner was party and in which she made certain applications. In so doing the Court's action was, in our opinion, perfectly correct.

The learned trial Judge has set out very clearly from the 5th page of his judgment beginning with the words :

"The first ground of objection is that the plaint discloses no subsisting cause of action and that applicant's claim is barred by limitation"

down to the middle of the 7th page ending with the words :

" and I do not think any such trust can be inferred from the circumstances of the present case"

his reasons for holding that the petitioner's present claim is on the face of it barred by limitation. We are in full agreement with his finding and do not consider it necessary to add any further reasons. The application is dismissed with costs

P.N /R.K. *Revision dismissed.*

A. I. R. 1929 Rangoon 274

RUTLEDGE, C. J., AND BROWN, J.

U Dun Htaw and *another* — Appellants.

v.

Maung Aw and *others*—Respondents.

Letters Patent Appeal No. 134 of 1928, Decided on 25th March 1929, from judgment of Rangoon High Court in Second Appeal No. 254 of 1928.

(a) Contract Act, S. 40 — Illustrations (a) and (b)—Specific performance can be asked against legal representative in respect of contract for purchase of immovable property.

In view of S. 40 and its illustrations which indicate the class of contracts which the legal representative of a person must perform and those which one cannot ask him to perform, the specific performance can be asked against a legal representative in respect of a contract for purchase of immovable property and the remedy does not die with the party who agrees to purchase. [P 274 C 2]

(b) Specific Relief Act, S. 27 (b)—Scope.

The words "any other person claiming under him by a title arising subsequently to the contract." include the heirs and legal representatives of a deceased party to a contract. [P 274 C 2]

Thet Tun—for Appellants.

Halkar—for Respondents.

Judgment.— This is an appeal by special leave from a judgment on second appeal by Das, J., reversing the decision of the Sub-Divisional Court, confirmed on first appeal by the District Court of Amherst, on the ground that specific performance could not be asked in respect of a contract for the purchase of immovable property, the remedy apparently in the opinion of the learned Judge, dying with the party who agreed to purchase. This decision seems to be irreconcilable with S. 40, Contract Act and its illustrations, namely:

"(a) *A* promises to pay *B* a sum of money. *A* may perform this promise either by personally paying the money to *B* or by causing it to be paid to *B* by another: and, if *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally,"

These illustrations seem to indicate the class of contracts which one cannot ask the legal representatives of a dead man to perform such as the painting of a picture, and the class of contracts which the legal representatives must perform such as the payment of the balance of purchase money, as in the present case. The learned Judge seems to have misconstrued the terms of S. 27, Cl. (b), Specific Relief Act. The words:

"any other person claiming under him by a title arising subsequently to the contract,"

in our opinion clearly include the heirs and legal representatives of a deceased party to a contract. The test is not whether they repudiate and wish not to be bound by the contract, which their predecessor-in-title had entered into, but it is whether they are, in fact, the heirs and legal representatives of such deceased party. If they are, the estate of the deceased is vested in them and that vesting of title arose subsequently, namely, on death, to the contract in suit. They claim under him by operation of law, being his heirs and legal representatives. If the estate is unable to meet the legal obligations of the deceased, the law does not require them to do the impossible. No personal liability devolves upon them but the estate which has come into their hands is answerable for the liabilities of its deceased owner, and, as representatives of the latter, they must defray these liabilities so far as that estate will enable them to do so. The the points

raised in the memorandum of appeal before Das, J., do not seem to have been proved before him and do not require discussion here. For these reasons we reverse the decision of this Court and restore the order of the District Court. The plaintiff-appellants to have costs throughout.

P.N./R.K. *Decision reversed.*

A. I. R. 1929 Rangoon 275 (1)

MAUNG BA AND BROWN, JJ.

U Lu Gale and *another*—Appellants

v.

M. Mahomed Habi—Respondent.

First Appeal No. 185 of 1929, Decided on 28th August 1929.

(a) Civil P. C., S. 60—Application.

Section 60 does not apply to executions under a mortgage decree. [P 275 C 1]

(b) Civil P.C., S. 47—Correctness of decree cannot be called in question in execution.

A judgment-debtor cannot raise an objection that he has no saleable interest in the property ordered to be sold in execution of a mortgage-decree. The proper time to raise such objection is at the hearing of the suit and before the decree ordering the sale is passed: *A.I.R* 1926 *Pat.* 202; 34 *All.* 25, *Rel. on.* [P 275 C 1]

S Ganguli—for Appellants.

Judgment.—The District Court of Pegu has ordered the sale of certain properties in execution of a mortgage-decree. We are asked to set aside that order on the ground that the judgment-debtors have no saleable interest in the property and that S. 60, Civil P. C., thereforo, applies. The property in question apparently consists of land which forms part of a Government estate, and for which the appellants are lessees or licensees of Government. It is stated that the appellants' license has not been renewed for the current year. We are unable to see how it is possible to pass the order desired. The property is not being sold in execution of an ordinary money decree, but in execution of a mortgage-decree. No attachment is necessary and the provisions of S. 60, Civil P. C., do not apply. Further if the provisions of the section did apply the proper time to raise the objection was at the hearing of the suit and before the decree ordering the sale was passed. The correctness of that decree cannot now be called in question in execution. The sale will not of course pass anything more than the right, of the parties in th ties, but the decre the decree the righ if he so desires. T ing is that taken by Patna in the case of *Jagat Chandra Tha* majority of the Full Court of Allahabad i *nath* v. *Mt Kishor* this appeal under O. 41, R. 11, Civil P.

P.N./R K

(1) A. I. R. 1926 Pat.
(2) [1912] 34 All. 25 A. L. J. 1045.

A. I. R. 1929 R

RUTLEDGE C. J.,

Ma Bibi and *other*

v.

Abdul Hamead 1 Respondents.

First Appeal No. 2 on 13th June 1929, f Judge, Tharrawaddy, No. 8-A of 1928.

Limitation Act, Art.

It cannot be said that of their nature, which must be governed by A *Bom.* 389; *A.I.R.* 1925 I *A. I. R.* 1923 *Rang.* 1(*Lah.* 71, *Ref.*

Auzan—for Appell

E. Maung—for Res

Judgment.—The Abdul Hamead Kh against the appellan respondents for posse an estate. The pro the estate of Nahiru Sunni Mahomedans, in the year 1914. T daughters. The plain ried one of the daugh who died on 9th No had two daughters by both since died, an under the Mahomed titled to an 11/12th Bibi's share in the e as originally filed se year 1920, the quest the estate between t red to one U Nyein, v

Under that award, certain lands were apportioned to Marian Bibi but she never in fact got possession of those lands. A house was also awarded to her, and she did get possession of that house, but since her death the plaintiff-respondent has handed the house back to the defendant appellant 1, Ma Bibi. The plaintiff subsequently filed an amended plaint. In that plaint, he again sets forth the award. He gave further details about the house and as regards the paddy land said that Ma Bibi had paid to Marian Bibi the rents and profits of the paddy land awarded to her. It is not disputed that the plaintiff did represent his deceased wife Marian Bibi to the extent of an 11/12th share of her estate. The award by U Nyein was denied and it was contended that the estate was partitioned a year or two before the suit was filed. The defence claims that about a year and half before the filing of the suit there had been a final partition of the estate and that the plaintiff was a consenting party to this partition. It became quite clear, however, in evidence that at this so called partition, the plaintiff was not awarded any share. He has since married another daughter of the deceased, but the share claimed by her is quite distinct from that claimed by the plaintiff as heir of Marian Bibi.

The trial Court found that the so-called award by U Nyein in 1920 had been proved, but that, for some reason which the learned Judge does not make very clear, it was abortive. He held, however, that the plaintiff was entitled to claim his share in the estate irrespective of the award and gave him a decree accordingly. The present appeal has been filed on a number of grounds, but only one ground has been pressed before us, and that is that the suit was barred by limitation. The contention is that the suit was one for enforcing an award, that the article of the Limitation Act applicable to such suits is Art. 120, and that as the award is dated more than 6 years before the filing of the suit, the suit is barred by limitation.

We have been referred to certain rulings, which it is contended to support the view that the suit to enforce an award must for the purposes of limitation be held to be governed by Art. 120. In the case of *Rajmal Girdharlal* v. *Maruti Shivram* (1), a suit was brought to enforce an award. It had been contended that the article of Limitation applicable to such a suit was Art. 113 and that for this reason the suit was barred by limitation. The Court overruled this contention and the learned Chief Justice in his judgment stated that the period allowed was 6 years under Art. 120. He dealt with the matter in these words :

> "It seems to be settled now that a suit to enforce an award is a suit not provided by any other article of the Limitation Act. Then the time is 6 years under Art. 120."

There is no discussion of authorities and no further reason given for this decision. The report of the case does not show what was the nature of the award, and the effect of the judgment was that Art. 113 did not apply and that the suit was not barred by limitation. It does not seem to us that this is an authority for the contention that in every case suits which are based on an award must be governed by Art. 120. In a later Bombay case *Nanalal Lallubhai* v. *Chottalal Narsidas* (2) the decision in *Rajmal Girdharlal's* case (1) was followed. In this latter case, the award was for the payment of money and the effect of the decision was that the plaintiff was allowed 6 years within which to file his suit instead of the ordinary 3 years that would have been allowed in a suit for recovery of money due. Here again there was no discussion of the principles underlying the decision.

On the other hand the High Court of Calcutta in the case of *Bhajahari Saha Banikya* v. *Behary Lal Basak* (3) held that in a suit brought on an award by an arbitrator declaring the plaintiff's right to land, suit being for the recovery of possession of land was a suit under Art. 142 or 144, Lim. Act. This case was followed in the Upper Burma case of *Maung Ne Dun* v. *Maung Cho* (4). Another case which has been cited for the appellants that of *Kartar Singh* v. *Bhagat Singh* (5), is not of much assistance, and it was admitted that in that case Art. 120 was the article applicable.

Now the present case, though as framed it was in part based on an award,

(1) A. I. R. 1921 Bom. 389=45 Bom. 329.
(2) A. I. R. 1925 Bom. 519=49 Bom. 693.
(3) [1906] 33 Cal. 881=4 C. L. J. 162.
(4) A. I. R. 1923 Rang. 108.
(5) A. I. R. 1921 Lah. 71=2 Lah. 320.

was in substance a suit for a share in the estate of a deceased person. If the award was treated as a valid award, it would have the effect of vesting certain rights in immovable property in Marian Bibi and the suit would be one for possession of that immovable property. There is no specific article of the Limitation Act applying to suits for the enforcement of an award. It may be that in many such suits, it would be impossible to say that the suits can be classified under any other article, and, therefore, that Art. 120 applies. But had the legislature intended that in all suits to enforce an award, entirely irrespective of their nature, the period of limitation applicable should be 6 years it is extremely unlikely that a specific article dealing with such suits would not have been inserted in the schedule. Actually the decree as framed is not directly based on the award at all. The trial Court has held the award to be abortive and has merely passed a preliminary decree declaring the plaintiff to be entitled to 11/12th of the share of the deceased wife Marian Bibi in the estate of her parents. And regarded as a suit for a share in this estate, we agree with the learned trial Judge that the suit was not barred by limitation, the finding being to the effect that until quite recently the estate or at any rate Marian Bibi's share of it has been expressly held by Ma Bibi on behalf of the other heirs. We are, therefore, of opinion that the trial Judge was right in holding that the suit was not barred by limitation. No other point has been pressed before us on behalf of the appellants, and we must, therefore, dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 277

MYA BU, J.

Ma Yin and *another*—Appellants.

v.

Ma Bok and *others*—Respondents.

Special Second Appeal No. 89 of 1929, Decided on 15th August 1929, from decree of Dist. Judge, Amherst, in Civil Appeal No. 153 of 1928.

Registration Act, S. 57 (5) — S. 57, Registration Act only shows that when secondary evidence has in any way been introduced as by loss o copy certified by Regis prove contents of orig S. 65 (f).

Section 57, Registrati that when secondary way been introduced as of the original documen the Registrar shall be a pose of proving the con that is, it shall be ad proof than the Registra correctness of the copy a true copy. But that d copy a document which dence without other evi

E Maung—for Ap

Darwood—for Resp

Judgment.—The the question as to th the document Ex. 1 w copy of a registered d to have been execut Ma Lauk, both deceas first appellant and fa appellant, on 7th Ma Courts below have he that the appellants f alleged loss of the de a pure question of out in the memora untenable and has no plaintiff respondents' Bok and Ma Lauk ma only 1/3 of the land San Lun by registered dant appellants claim the land was given to

The appeal has be lines indicated in gr appeal. The provis Evidence Act, and of S. 57 (5), Registratic relied on in support The general rule as to cuments declared in S is that the documents by primary evidence, t tion of the documen S. 65 deals with the rule. In *Krishna L Lal* (1), their Lords Council held that sec the contents of a do admitted without the the original being firs as to bring it within cases provided in S. Thus the learned auth

(1) [1887] 14 Cal. 486= (P.C.).

Evidence applicable to British India, Sir John Woodroffe and Mr. Amir Ali pointed out at p. 508 of the eighth edition, that although there are cases in which secondary evidence is admissible even though the original is in existence and produceable as in the case of Cls. (e) (f) (b) and (g), S. 65, ordinarily, it must be shown that the document is not produceable in the natural sense of the word for this is the general ground upon which secondary evidence is admitted.

With reference particularly to the operation of S. 57 (5), Registration Act or S. 65 (f), Evidence Act, I think it is safe to accept the view expressed in the case of *Harishchunder Mullick* v. *Prosunno Coomer Banerjee* (2), which is to the effect that S. 57, Registration Act, only shows that when secondary evidence has in any way been introduced as by proof of the loss of the original document a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original, that is, it shall be admitted without other proof than the Registrar's certificate of the correctness of the copy and shall be taken as a true copy. But that does not make such a copy a document which may be given in evidence without other evidence to introduce it. I see no reason to interfere with the judgment and decree of the Courts below. The appeal is dismissed with costs

P.N./R.K. *Appeal dismissed.*

(2) 22 W. R. 303.

A. I. R. 1929 Rangoon 278

CARR, J.

Nga Po Ngwe—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 87-B of 1929 Decided on 12th March 1929, from order of Addl. Mag., Taungdwingyi, in Criminal Regular No. 164 of 1928.

(a) Penal Code, S. 227—In case under S. 227 conviction of accused, its date of sentence and fact that accused was granted remission of punishment and the conditions on which remission was granted must be proved by documentary evidence.

In a case under S. 227 the conviction of the accused, its date and the sentence passed should be proved by documentary evidence. Further the facts that the accused person was granted a remission of punishment and that the conditions on which the remission was granted must also be proved by documentary evidence. But the fact that the accused is the person convicted, sentenced and granted remission and that he has committed a breach of a condition of remission may be proved by oral evidence. The Magistrate should not overlook the requirements of documentary evidence and the accused should not be questioned at all until proper evidence is on the record. [P 278 C 2]

(b) Burma Act (3 of 1928), S. 2—Scope—Penal provision has no retrospective effect—Interpretation of Statutes.

Section 2 has no retrospective effect. On the ordinary principles of penal legislation a penal provision does not have retrospective effect. [P 279 C 1]

Judgment.—The respondent, Nga Po Ngwe, has been convicted under S. 227, I. P. C., of a breach of a condition of remission of punishment, and has been sentenced under that section and S. 2, Burma Act 3 of 1928, to nine months' rigorous imprisonment. The unexpired portion of his original sentence was found to be four months and 26 days.

In a case under S. 227, Penal Code, it is necessary to prove the following :

1. That the accused person has been convicted and sentenced. The conviction and its date and the sentence passed should under Chap. 5, Evidence Act, be proved by documentary evidence, that is by the judgment in the case. The judgment being a public document it may, under S. 65 (e), Evidence Act, be proved by a certified copy. But oral evidence to prove it is not admissible.

2. That the accused person was granted a remission of punishment. This again must be proved by documentary evidence that is, by the order granting the remission. Here also a certified copy of the order is admissible, but no other form of secondary evidence.

3. The conditions on which the remission was granted. This again is provable only as above, i.e., by a certified copy of the order of remission. The bond executed by the accused should also be put in, or a certified copy of it.

4. The fact that the accused is the person convicted, sentenced and granted remission must be proved, and for this oral evidence is admissible.

5 The fact that the accused has committed a breach of a condition of the remission. This may also be proved by oral evidence, but obviously no breach can be proved until the condition itself has been proved as set out in head 3 above.

The trying Magistrate has overlooked all the requirements of documentary evi-

dence and allowed everything to be proved by oral evidence. But as the accused admitted all the facts I think it would be hypercritical to interfere on this ground, though properly the accused should not have been questioned at all until proper evidence of the facts was on the record. A further point arises in the case. The alleged breach of condition was committed before Burma Act 3 of 1928 was passed. It was contended by the accused that therefore he could not be sentenced under that Act but the Magistrate overruled that contention, though he gave no good reason for doing so. On the ordinary principles of penal legislation a penal provision does not have retrospective effect. The wording of S. 2, Burma Act 3 of 1928 is somewhat peculiar. It reads :

> "Whoever is convicted of absconding in violation of a condition of a remission of punishment under S. 227, Penal Code, shall in addition to the punishment prescribed by that section, be punished by the convicting Magistrate with rigorous imprisonment for a term which may extend to one year."

This suggests that it is incumbent on the Magistrate to add some term of imprisonment to that prescribed by S. 227, though the length of the term to be added is within his discretion. This point, however, is not of importance in the present case.

If the section were worded in the ordinary way that is, if it began: "Whoever absconds in violation of a condition . . . . . ." I think there can be no doubt that it would not have retrospective effect, and that the additional sentence passed on the accused in this case was illegal. But the wording "Whoever is convicted of absconding . . . . . ." makes it arguable that S. 2, Act 3, applies to anyone convicted before the Act came into force and not only to an offence committed after that date. This interpretation, however, is so contrary to the accepted principles of penal legislation that I think it would be unsafe to accept it on grounds no stronger than are to be found in the section. I am not prepared, therefore, to hold that the section has retrospective effect. I therefore reduce the sentence passed on Nga Po Ngwe to one of rigorous imprisonment for 4 months and 26 days.

P.N./R.K. *Sentence reduced.*

CAR

Nga Mya—Applic

Emperor—Oppos

Criminal Revn. N cided on 12th March order of 3rd Addl. M dwingyi, in Crim of 1928.

Penal Code, S. 227 1928), S. 2—Magistra convicted under S. 2 S. 2, Burma Act, for powers—Such sentenc

There is nothing in Code or Burma Act to e to pass a sentence ir he is empowered under pass. Thus if a Magis son, convicted under S under S. 2, Burma Act, in excess of his power,

Judgment.— Th Mya has been convi Penal Code and s section and S. 2, B to rigorous imprison eight months and six trate who passed ordinary 1st class pc mum term of impriso impose for one off The sentence is, There is nothing in e Code or Burma Act 3 any Magistrate to pa cess of that which under the Criminal pass. The convict passed on Nga Mya a is ordered that he be petent Magistrate.

This case is sim Magistrate's Criminal 1928 in that o wrongly been admitte and particulars of the tion and the fact and grant of a remission o explained in my o *Ngwe* v. *Emperor* (view of that case, the dence required in ca I. P. C. The Magis this case should see t is produced. He shou sentence, if the accuse into consideration t

(1) A. I. R, 1929 Rang.

suffered by the accused under the sentence that is now set aside.

P.N./R.K. *Conviction set aside.*

A. I. R. 1929 Rangoon 280

HEALD AND MYA BU, JJ.

Maung Shwe An—Applicant.

v.

Ma The Nu and *others*—Respondents.

Civil Misc. Appln. No. 66 of 1928, Decided on 13th February 1929, from a judgment of a Rangoon Bench in First Appeal No. 210 of 1927.

(a) Transfer of Property Act, S. 54 — Mortgagor transferring mortgaged property by report, to revenue authorities, of sale—No registered conveyance—Mortgagee can successfully defend suit for redemption—Part performance — Mortgagor and Mortgagee.

A person's admission that he is a party to the transaction which is proved by a report to the revenue authorities but not by a registered document to have been an outright transfer in satisfaction of a mortgage debt debars him from alleging that he is not bound by the transaction and though the transaction does not convey a good title to the mortgagee the transfer not being effected by registered deed as required by S. 54, still it is a good defence to the suit to redeem the property: *A. I. R.* 1924 *Rang.* 214 (*F. B.*); *A. I. R.* 1923 *Rang.* 125; *A. I. R.* 1927 *Rang.* 33; *A. I. R.* 1925 *Rang.* 119 and *A. I. R.* 1926 *Rang.* 81, *Rel. on.* [P 281 C 1, 2]

(b) Civil P. C., S. 110 — "Material question of law" explained.

Where a law on a particular point does not seem to have ever been laid down by the Privy Council, the question does not cease to be a material question of law merely because cases involving somewhat similar points have been dealt with by the Privy Council so as to disentitle a party to leave appeal to Privy Council: *A. I. R.* 1928 *All.* 61, *Dist.*; 24 *Mad.* 377; *A. I. R.* 1914 *P. C.* 27; *A. I. R.* 1916 *P. C.* 139 and *A. I. R.* 1924 *Rang.* 214 (*F. B.*), *Ref.* [P 281 C 2, P 282 C 1]

Ba Thein (2)—for Applicant.

Anklesaria—for Respondents.

Judgment.— Petitioner applies for leave to appeal to His Majesty in Council against a judgment of a Bench of this Court which on appeal from a decree of the District Court of Amherst dismissing petitioner's suit affirmed the decision of the District Court. Petitioner valued the property which is the subject-matter of the suit at Rs. 10,000 when he first filed the suit and at Rs. 13,000 when he gave evidence, and it is not suggested by the respondents that the value of the subject-matter in dispute in the suit and in the appeal to this Court and in the proposed appeal to His Majesty in Council is less than Rs. 10,000. Petitioner claims that the proposed appeal involves a substantial question of law because, as he alleges, the judgment of this Court recognized as valid an oral transfer of immovable property and such recognition contravenes the provisions of S. 54, T. P. Act, which provides that a sale of immovable property worth Rs. 100 or more can be made only by registered instrument.

In his original plaint, a copy of which (Ex. 12) is on the District Court's record petitioner alleged that in 1909 by registered deed he made a simple mortgage of the lands in suit in favour of one Ma Son and her two sons San Ye and Tun Hlaing, that in 1917 he put the mortgagees into possession of the lands on an agreement that the rents and profits should be taken by them in lieu of interest and that he was entitled to recover the lands from the mortgagees or their heirs and legal representatives on payment of the original mortgage money without interest. The defence was that the transaction of 1917 was not as petitioner alleged, a conversion of a simple mortgage into a possessory mortgage but was an outright transfer of the mortgaged properties to the mortgagees in satisfaction of the mortgage debt.

Petitioner admitted that profits of the lands were only sufficient or barely sufficient to pay the interest due on the mortgage and the Government revenue and that he allowed his brother Kya Baw to work the lands taking nothing from Kya Baw by way of rent or profits. It appeared from the official land records registers that about 1915 a report of a transfer of the lands by petitioner to Kya Baw was made to the revenue authorities and that in the registers for the year 1915-16 the lands were transferred from petitioner's name to Kya Baw's name as owner. It appeared also from the official registers that in 1917 the lands were transferred outright by Kya Baw to San Ye and Tun Hlaing for Rs. 4,000 the transaction being reported to the revenue authorities as a sale, that being the usual form of report in this country when mortgaged properties are transferred to

the mortgagees in satisfaction of the mortgage debt. There was some evidence that the petitioner himself took part in this transaction, and although the trial Court rejected that evidence it must be remembered that in his original plaint petitioner himself said that it was he who transferred the lands to the mortgagees. It seems clear therefore that petitioner took part in the transaction of 1917 and that that transaction instead of being, as he alleged, a mere putting of the mortgagees into possession under an agreement that they should take the rents and profits in lieu of interest was in fact intended to be an outright transfer of the lands to the mortgagees in satisfaction of the mortgage debt. The only difference between this case and many similar cases which come before this Court is that the person who made the transfer to the mortgagees in this case, as shown by the entry in the land records registers, was petitioner's brother Kya Baw and not petitioner himself.' But petitioner had admittedly allowed his brother to deal with the lands as owner and had allowed them to stand in his brother's name as owner for several years, and on his own statement in the plaint he was a party to the transaction of 1917. In these circumstances the trial Court found that petitioner could not be allowed to repudiate the transaction of 1917 which was proved to be in intention though not in law an outright transfer of the lands to the mortgagees in satisfaction of the mortgage debt. Petitioner appealed to this Court on the ground that the lower Court should not have recognized the transfers of the lands by him to Kya Baw and by Kya Baw to San Ye and Tun Hlaing because those transfers were not effected by registered deed.

This Court said that petitioner's admission that he was a party to the transaction of 1917, which was proved to have been an outright transfer in satisfaction of the mortgage debt, debarred him from alleging that he was not bound by that transaction, and that although that transaction did not convey a good title to San Ye and Tun Hlaing, nevertheless it was a good defence to petitioner's suit to redeem the property. That decision was based on a long line of decisions of this Court

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Ok Kyi v. *Ma Pu* (2) a
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Hmon v. *Tha Byaw* (3)
Maung Tun (4) and *Tun*
Kya (5).

Petitioner's learned a
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v. *Jagdeo Singh* (6) as l
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their Lordships of the
There are certain cases
Lordships have dealt
similar points, namely
Immudipattan v. *Peria*
Mahomed Musa v. *Agho*
guli (8), and *Sheo*

(1) A. I. R. 1924 Rang. (F. B.).
(2) A. I. R. 1927 Rang. (F. B.).
(3) A. I. R. 1923 Rang. 12
(4) A. I. R. 1925 Rang. 11
(5) A. I. R. 1926 Rang. 81
(6) A. I. R. 1928 All. 61=
(7) [1900] 24 Mad. 377=2
811 (P. C.).
(8) A. I. R. 1914 P. C. 27
I. A. 1 (P. C.).

In (9)., but in thoe cases, as was pointed out in the case of *Myat Tha Zan* v. *Ma Dun* (1) the question of precise effect of the provisions of S 54, T. P. Act, was not material to the decision. In these circumstances we are unable to hold that the decision in *Mathura Kurmi's* case (6) applies to the facts of the present case.

The question whether the cases in this Court mentioned above and similar cases decided in the other High Courts of India were rightly decided is clearly a question of law and in view of the number of such cases occurring in this country and the importance of the legal principles involved it seems to us to be a material question of law. We therefore grant a certificate that as regards amount or value and nature the case fulfils the requirements of S. 110 of the Code. Costs in respect of this application will abide the final desision of the appeal, advocate's fee in this Court to be five gold mohurs.

P. N./R.K. *Application granted.*

(9) A. I. R. 1916 P. C. 139=44 Cal. 542=44 I. A. 15 (P.C.).

A. I. R. 1929 Rangoon 282

HEALD AND MYA BU, JJ.

Maung Po Mya —Appellant.

v.

Ma Hla and *others*—Respondents.

First Appeal No. 273 of 1928, Decided on 29th April 1929, from judgment of Dist. Judge, Hanthawaddy, in Civil Regular Suit No. 34 of 1928.

(a) Buddhist Law (Burmese)—Succession —Orasa son taking his share on father's death—He cannot inherit in remainder on death of surviving parent when she leaves children.

Where there is a child of the family surviving the last dying spouse, the orasa who has taken a quarter share of the parental estate from the surviving parent on the death of the parent of the same sex does not retain any right to a further share in the partition of the remainder of the estate on the death of the surviving parent ; 1 *L. B. R.* 50, *Affirmed* ; 8 *L. B. R.* 501 ; *A. I. R.* 1924 *Rang.* 71 and *A. I. R.* 1926 *Rang.* 23, *Ref.* [P 284 C 1]

(b) Buddhist Law (Burmese) — Text — Manugye.

Where Manugye is not ambiguous, other Dhammathats need not be referred to : *A. I. R.* 1914 *P. C.* 97, *Foll.* [P 283 C 1]

Ba Maw—for Appellant.

Po Han and *On Thwin*—for Respondents.

Mya Bu, J.—Appellant Maung Po Mya was the eldest born child of a Burman Buddhist couple U Pu and Ma Gyi who had two younger children Ma Hla, respondent 1, and Maung Than, the father of respondents 2 and 3. U Pu died in 1920 and Po Mya claimed and obtained his quarter share in the estate of the parents as the orasa son. Maung Than died in 1923. In 1928 Ma Gyi died. Maung Po Mya now sues for administration and partition of the estate of Ma Gyi, claiming 11/24ths share of the estate as against his sister and the children of his deceased brother. The estate left behind by Ma Gyi consists entirely of the joint property of herself and U Pyu. The defence is that as the appellant took his quarter share as orasa son on the death of U Pu he is not entitled to claim any share in the estate left by Ma Gyi.

The question for decision is whether an orasa son after taking his quarter share on the death of the father retains any right to inherit in the remainder of the estate on the death of the mother. The case of *Maung Hmu* v. *Maung Po Thin* (1), is an authority showing that the orasa son in such a case retains no further right, and if it still remains good law, then the question must be answered in the negative. The decision in that case was to the effect that the orasa son after having taken his quarter share of the estate of his deceased father retained no right to any further future partition of, or any right in, the remainder of the estate. This decision was based on the Dhammathats collected in S. 30 of Kin Wun Mingyi's Digest and on the ruling in *Ma On* v. *Ko Shwe O* (2), where it was held inter alia that on the death of one of the parents the eldest son or daughter may claim his or her share and the remainder of the property vests in the surviving parent for himself or herself and the remaining children. *Ma On's* case (2), has now been overruled by a Full Bench of the Chief Court of Lower Burma in *Ma Sein Ton* v. *Ma Son* (3),

(1) [1900] 1 L. B. R. 50.
(2) [1872-1892] L. B. R. 378.
(3) [1915] 8 L. B. R. 501=30 I. C. 598=8 Bur. L. T. 903 (F.B.).

which, however, does not deal with the question as to whether an orasa son after having taken his quarter share on the death of his father is entitled to claim a further share in the joint property on the death of the mother, but simply strengthens the widow's right of disposal over the remaining three-quarter share.

In the case of *Ma Toke* v. *Ma U Le* (4), in which the question was whether partition having been effected between the surviving parent and the children on the remarriage of the surviving parent, the children of the first marriage could claim any further share in the lettetpwa property of the surviving parent and his second spouse, the ruling in *Maung Hmu's* case (1), was referred to. One of the texts collected in S. 30 of Kin Wun Mingyi's Digest is an extract from the Manugye which corresponds to Manugye —Book 10—S. 5, which deals with the partition between the mother and sons on the death of the father and states after detailing the personal belongings of the father which go to the eldest son and those of the mother which go to her:

"Let the residue be divided into four parts of which let the eldest son have one, and the mother and younger children three."

This clearly indicates that after the orasa's claim to a quarter share has been satisfied the only other persons having an interest in the remainder are the mother and children other than the orasa although the interests of such children, according to settled law, are not vested until the death of the mother.

Their Lordships of the Privy Council have laid down in *Ma Hnin Bwin* v. *U Shwe Gon* (5), that where the Manugye is not ambiguous other Dhammathats do not require to be referred to, and I do not think that it is necessary for the purpose of the present case to refer to the other Dhammathats in S. 30 of the Digest which I may, however, say do not introduce anything inconsistent with the rule enunciated by Manugye, Book 10, S. 5 Further support to the view that the orasa son having taken his quarter share on the death of the father is not entitled to a further share on the death of the mother, is gained from S. 155, of the Attasankhepa Vannana Dhammathat compiled by the Kinwun Mingyi who was also the

(4) A. I. R. 1924 Rang. 71=1 Rang. 47.

(5) A. I. R. 1914 P. C. 97=41 Cal. 887=41 I. A. 121 (P. C.).

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Maung Ye Nan O v. *Aun*

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San v. *Maung Po Thet*
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(6) [1915] 8 L. B. R. 46
Bur. L. T. 167.

(7) A. I. R. 1926 Rang. 23=

me to be quite untenable. The learned counsel points out that according to the texts mentioned in S. 149 and the allied sections of the Digest, the orasa child has a right to participate in the inheritance along with other children on the death of the surviving parent. But there is nothing to show and it does not appear that the references to the orasa in the text relate to the orasa child who has taken a quarter share on the death of one of the parents.

It is possible that in spite of the fact that an orasa child has obtained a quarter share of the parental estate from the surviving parent on the death of the parent of the same sex, he or she may be allowed to inherit on the death of the surviving parent where no other child survives. But it is in my opinion clear that where there is a child of the family surviving the last dying spouse the orasa who has taken a share of the parental estate from the surviving parent on the death of the parent of the same sex, does not retain any right to a further share in the partition of the remainder of the estate on the death of the surviving parent. For these reasons I would dismiss the appeal with costs.

Heald, J.—I concur.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 284

HEALD, OFFG., C. J. AND MYA BU, J.

Ma Zaw May—Appellant.

v.

Maung Ba U—Respondent.

Misc. Appeal No. 103 of 1929, Decided on 6th September 1929, against order of Dist. Judge, Thaton in Misc. Case No. 19 of 1929.

Buddhist Law (Burmese) — Guardian and Ward.

A mother's sister is a preferential guardian to a putative father or stepfather when the estate belonged to the minor's deceased father. [P 284 C 2]

Janab Ali—for Appellant.

Shwe Thwin—for Respondent.

Judgment.—Shwe Ya and Ma Ngwe U were husband and wife They lived together for many years, but had no children. Some 10 years or more ago, Shwe Ya, who must have been well over 70 years of age, married Ma Wut, a girl of about 20 who had been living with them as a servant. Not long afterwards, the present respondent Ba U came to live in their house as a clerk. Ma Wut conceived four times, while she was married to Shwe Ya. One conception was abortive, and two of the children died soon after birth, but the last child, a girl Ma Thu was born five months and 13 days after Shwe Ya's death, and is still alive. There is a strong presumption that this child was conceived while Shwe Ya was alive and that it was his child. Shwe Ya died in July 1924, and thereafter his widow, Ma Wut and the clerk Ba U lived together as husband and wife. They had no children. Shwe Ya's estate was admittedly worth of Rs. 1,00,000 or more, and the minor Ma Thu as his daughter would be entitled to claim partition by reason of her mother's remarriage, and would also be entitled to claim a share of inheritance from Ba U, if he was her stepfather.

The appellant Ma Zaw May is Ma Wut's own sister, and she claims to be appointed guardian of the person and property of her minor niece Ma Thu. Her object is doubtless to file a suit on behalf of the minor against Ba U. Ba U objects to her appointment as guardian on the ground that he is in fact Ma Thu's father, having had adulterous intercourse with her mother Ma Wut during Shwe Ya's lifetime. The learned Judge in th lower Court said that he was inclined to hold that Ma Thu was not begotten by Shwe Ya, but was begotten by Ba U. For this reason he dismissed appellant's application to be appointed guardian.

It seems to us that it is unnecessary for the purposes of these proceedings to decide whether or not Ba U is in fact the father of Ma Thu because even if he was her father that fact would in the circumstances of the case give him no right to be guardian of either her person or her property. It is quite clear that his interests are adverse to hers, and we are of opinion that appellant who is admittedly the sister of the minor's mother ought to have been appointed guardian of the minor's person and property. Respondent's learned advocate suggests that her antecedents are such as to disqualify her from appointment, but respondent's own antecedents are none of the best and in view of the appellant's admitted relationship to the minor, we think that she

may reasonably be appointed, provided of course, that she gives security for the full value of the property, which she may be expected to recover on the minor's behalf. We therefore set aside the order of the lower Court and direct that appellant be appointed guardian of the person and property of her minor niece Ma Thu on giving such security as may be fixed by the lower Court. The respondent will pay appellant's costs in both Courts. Advocate's fees in this Court to be five gold mohurs.

P.N./R.K. *Order set aside.*

A. I. R. 1929 Rangoon 285

HEALD, OFFG., C. J. AND CHARI, J.

U Oh—Appellant.

v.

U Shwe Thaung—Respondent.

Letters Patent Appeal No. 96 of 1929, Decided on 26th August 1929, from decree of Rangoon High Court in Second Appeal No. 492 of 1928.

(a) Civil P. C., O. 2, R. 2—O. 2, R. 2, is no bar if cause of action in subsequent suit is different from one in earlier suit.

In an earlier suit the claim was based on the conveyance and the cause of action was the discrepancy between the area of the land as mentioned in the conveyance and the actual area of the land. In the subsequent suit the cause of action was an alleged failure to convey the land agreed to be conveyed, the land being land different from the one mentioned in the conveyance and the claim was based not on the conveyance but on the agreement to convey.

Held: that such subsequent suit could not be barred by operation of O. 2, R. 2. [P 287 C 1]

(b) Buddhist Law (Burmese)—Agreement by husband to convey land jointly belonging to him and his wife—Consent of wife not obtained—Claim for specific performance cannot succeed—Specific Relief Act, S. 28.

If a Burmese Buddhist agrees to convey land jointly belonging to him and his wife without obtaining her consent, suit for specific performance of such agreement cannot be obtained as the husband is not competent to alienate land without obtaining wife's consent. [P 287 C 1]

F. S. Doctor—for Appellant.

E. A. Villa—for Respondent.

Judgment.—Respondent who is a man of between 70 and 80 years of age, had a number of children by his first wife, and appellant who is nearly 50 himself is one of those children. About 1925, respondent married a young wife and the children by the first wife claimed parti-

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father and the new wife as a separate new holding namely holding No. 4 of 1927-28 of 10.38 acres. It does not appear when that holding was first assessed to revenue, but it seems probable that it was at about the time of the conveyance of the 26.82 acres holding to appellant. Appellant claimed that although that holding was not included in the conveyance it was intended that he should receive it along with the 26.82 acre holding, and he attempted to take possession of it, with the result that the new wife prosecuted him for criminal trespass. He replied by prosecuting his father for cheating and his father and the new wife together for mischief.

The basis of the charge of cheating, which it may be noted was made on 23rd June 1926, the date of the conveyance being the 24th April 1926, was that his father had fraudulently and dishonestly induced him to buy the 26.82 acre holding by representing that the adjoining extension which the father had cleared and prepared for cultivation during the previous year but which according to his father had not yet been assessed to revenue, would pass to him along with the 26.82 acre holding. He said that the reason for his paying so much as 350 per acre for the holding mentioned in the conveyance was that it was agreed that he should get also the adjoining holding of 10.38 acres thrown in at the same price. The basis of the charge of mischief, which was made on 9th July 1926, was that his father and the new wife had damaged the growing paddy planted by him on the 10.38 acre holding. All these criminal proceedings were abortive, appellant's charge of cheating being classified as false, and his complaint of mischief being dismissed without trial. Appellant's suit for the recovery of the two acres of land or Rs. 700 which was instituted on 3rd September 1927 having been dismissed on 5th December 1927, he instituted the present suit on 16th January 1928.

In his plaint in this suit he alleged that his father agreed to sell him both the 28.82 acre holding and the 10.38 acre holding for 10,000 agreeing to convey the former holding forthwith and the latter after it had been assessed to revenue, that the former holding was duly conveyed to him, the whole consideration for the sale of the two holdings being entered in the conveyance as the consideration for that holding, that his father had failed to convey the latter holding, and that he was entitled to a decree for a conveyance of it and for mesne profits, which he assessed at 600. The father denied that he ever agreed to sell the 10.38 acre holding and said that if he had agreed to sell it there was no reason why it should not have been included in the conveyance, because it had actually been assessed to revenue and the tax ticket for it had issued before the conveyance was executed. He pleaded that the suit was barred by reason of the former suit in which the appellant had claimed either the two acres of land or its value. He also pleaded that appellant could not be allowed to vary the terms of the conveyance by oral evidence to show that although only the 26.82 acre holding was mentioned in the conveyance, the 10.38 acre holding was also intended to be conveyed.

The trial Court found that the respondent did agree to sell both the holdings for 10,000, that no conveyance of the 10.38 acre holding was executed because respondent's rights in it were those of a mere "squatter" and land alienated by a squatter is liable to be resumed by Government, and that S. 92, Evidence Act, did not prevent appellant from proving that the 10.38 acre holding was included in the agreement for sale. The learned Judge regarded the pleading that the present suit was barred by the previous suit as being a pleading of res judicata, and finding that the subject matter of the present suit was not res judicata by reason of the earlier suit, gave appellant a decree for a conveyance of the 10.38 acre holding and for mesne profits. Respondents appealed but the lower appellate Court accepted the findings of the trial Court and dismissed his appeal with costs.

Respondent then came to this Court in second appeal, and the learned Judge who dealt with this case was of opinion that the present suit was barred by the operation of O. 2, R. 2, on the ground that the present claim ought to have been made in the earlier suit. The matter now comes before us as an appeal under S. 13 of the Letters Patent on a declaration of the Judge who passed the judgment that the case is a fit one for appeal. It seems

to us clear that the decision of the learned Judge was mistaken, because the cause of action in the earlier case was the discrepancy between the area of the land as mentioned in the conveyance and the actual area of the land, the claim being based on the conveyance itself, whereas in the present case the cause of action is an alleged failure to convey the land agreed to be conveyed, that land being land different from the land mentioned in the conveyance and the claim is based not on the conveyance but on the agreement to convey.

What appellant claims in the present suit is specific performance of an agreement to convey the 10.38 acre holding to him, but that claim cannot succeed because it is clear from appellant's own admissions that that land was acquired by his father after his marriage to his present wife, so that it belongs to the father and the stepmother jointly, and the father could not alienate it without the consent of the stepmother. It is clear that the stepmother did not consent to the alienation, since she prosecuted appellant for trespass as soon as he attempted to enter into possession of the land. The case is therefore not one in which the Court would decree specific performance, and appellant must be left to such other remedies as may be open to him. In this connexion we may note that in our opinion appellant would be well advised to let matter rest where it is, and not to embark on any further litigation which it is certain to be costly and likely to be infructuous. The appeal is dismissed, and in the circumstances of the case the parties will bear their own costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 287

RUTLEDGE, C. J., AND BROWN, J.

Ah Kway—Appellant.

v.

Administrator-General, Burma, and *another*—Respondents.

Civil Misc. Appeal No. 51 of 1929, Decided on 8th April 1929, from order of Original Side in Civil Regular No. 663 of 1928.

Arbitration Act, S. 19—Order refusing to stay proceedings under S. 19 is not appealable not being judgme[nt] Patent (Rangoon), Art. 13

If an application is made [under] the provisions of S. 19 [and after] hearing the parties on the [application] an order refusing to sta[y] ... order is not a judgment w[ithin the meaning] of Art. 13, Letters Paten[t and is not appeal]able : *C. M.* 82 *of* 1925, *C*... *Foll.* ; *A. I. R.* 1929 *Rang.* ...

N. M. Cowasjee—for ...
K. C. Bose and *P.* ... [res]pondents.

Judgment.—The res[pondent in this] appeal is the Adminis[trator-General,] Burma as administrator [of the estate of] one Lee Woot Hong, [who] brought a suit on the [Original Side of] this Court against the [appellant Ah] Kway for a declaration ... to which Lee Woot Hon[g was en]titled in a partnership [carried] on with the appellant, f[or] accounts and for the w[inding up of the] partnership. Subsequer[tly respon]dent 2, Lee Way Pein ... defendant to the suit ... that he was a subsisti[ng] ... Kway did not file a w[ritten statement] but made an applicati[on] under the provisions of S[. 19] ... Act, asking for a stay ... After hearing the partie[s on the appli]cation, the trial Judge [passed an order re]fusing to stay proceeding[s] ... has now filed an appeal a[gainst] ...

It is contended on [behalf of res]pondent 1 that no appea[l lies. Reli]ance is placed on the F[ull Bench decision] of this Court in the cas[e of] *E. Chidambaram Chetty*[...] *tyar Firm* (1). It ha[s been argued] on behalf of the appellan[t that we should] not follow this Full Ben[ch decision be]cause a different view [has been] taken by their Lordshi[ps of the Privy] Council in the case of *So*... v. *R. D. Tata & Co.* (2). ... suit was brought on the ... this Court and an obje[ction was taken] that the suit was not w[ithin the] jurisdiction of the Co[urt] ... Court overruled the ob[jection and pro]ceeded to deal with t[he] ... merits. An appeal agai[nst] ... was filed before a Bench ... and the Bench held th...

(1) A. I. R. 1929 Rang. ... (F.B.).

(2) C. M. No. 82 of 1925.

lie, but, eventually, dismissed the appeal on the merits. The defendants then applied to the Privy Council for special leave to appeal against the order of the Bench and special leave was given. The order granting special leave to appeal records that counsel had been heard in support of the application and in opposition thereto. If no appeal had lain in the first instance to a Bench of this Court that would have been a complete answer to the application for special leave to appeal to the Privy Council. It is contended therefore that the order of their Lordships admitting the appeal involved a finding that an appeal from the trial Judge to the appellate Bench did lie. We are unable, however, to accept this contention. In the order admitting the appeal there is no reference whatsoever to the question whether an appeal had lain in the first instance from the order of the trial Judge. The Privy Council finally decided the case against the appellants. Their judgment is reported [*Soni Ram* v. *Tata & Co., Ltd.* (3)]. There is no reference in their judgment to the question whether an appeal lay in the first instance from the order of the trial Judge. The appeal was dismissed on the merits and the respondents were not called on for a reply. It is quite clear, therefore, that at the hearing of the appeal the question whether an appeal had lain from the trial Judge was not considered. The order admitting the appeal did not involve any finding on any question in dispute. The final result of the appeal was against the appellants and we are unable to hold that the order of their Lordships of the Privy Council involved any finding on the question whether an appeal did lie in the first instance from the order of the trial Judge.

Reference has also been made on behalf of the appellant to the case of *Joylall & Co.* v. *Gopiram Bhotica* (4). In that case a Bench of the Calcutta High Court did decide that an appeal would lie from an order refusing to stay proceedings under S. 19, Arbitration Act. That is clearly an authority in favour of the view that the present appeal lies but it appears to us to be in conflict with the decision in the Full Bench case of *Chidambaram Chettiar* (1). In that case Ormiston, J., wrote a long judgment in which he discussed exhaustively the previous authorities on the point. The question referred for the decision of the Full Bench was:

"whether the finding that the parties intended to treat the document on which the suit was filed as an inland and not as a foreign instrument, and that the defendants in consequence cannot now rely upon any defects based upon its being a foreign instrument, a finding which had the effect of allowing the suit to proceed, amounts to a judgment within the meaning of Art. 13, Letters Patent."

The five Judges who composed the Bench were unanimously of opinion that the question referred should be answered in the negative.

At pp. 709 and 710 in his judgment, Ormiston, J., sets forth three criteria which had been suggested as means for determining whether or not an order is appealable within the meaning of Cl. 13. On p. 710, he states as follows:

"The first is that adopted by the Madras High Court in 1868, where a judgment is stated to have the meaning of 'any decision or determination affecting the rights or the interest of any suitor or applicant': The second is that adopted by the Calcutta High Court in 1872, and which on very many occasions has been described as classical. According to this view, 'judgment' means 'a decision which affects the merits of the question between the parties by determining some right or liability' and it is immaterial whether it is final, or merely preliminary or interlocutory . . . The third criterion . . . which may be described in contradistinction to the others as the modern view, being that laid down by the Chief Justice of the Madras High Court in 1910, and adopted by the late Chief Justice of this Court in 1924. According to this view, the test is whether or not the effect of the adjudication is to put an end to the suit or proceedings so far as the Court before which the suit or proceedings is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding; if it has this effect the adjudication is a judgment; otherwise not.'"

After discussing the case law on the subject, the learned Judge came to the conclusion that this last test was the proper test to be applied. The order which was appealed against in that case was merely an order on one issue in the case and its effect was not to put an end to the trial of the suit or proceeding, but to allow it to continue. The Officiating Chief Justice in a concurring judgment remarks, at p. 738:

"The finding with which we are concerned is one, in effect, which decides"

that the suit is maintainable, and s

(3) A. I. R. 1927 P. C. 156=5 Rang. 451=54 I. A. 265 (P.C.).

(4) [1920] 47 Cal. 611=58 I. C. 755=24 C. W. N. 612.

paves the way for the determination of the main question between the parties. It does not finally decide the rights of the parties and will be subject to attack on appeal, if the decree is ultimately against the appellant.

It is quite clear that according to the principles approved in that case the finding on a single issue in the trial of a case which does not finally determine the rights of the parties is not a judgment within the meaning of Cl. 13, Letters Patent, and previous rulings of this Court to the effect that a preliminary finding whether the trial Court had jurisdiction to try the case is appealable were expressly dissented from. We are bound by this decision and we find ourselves unable to distinguish the question involved in the present appeal. The trial Court has decided to proceed with the trial of the case but it has not come to any decision on the merits of the dispute between the parties, and the effect of the order is not to put an end to the suit or proceeding. It cannot by its nature be an order which, if not complied with, would put an end to the suit or proceeding. When the trial Court has proceeded to try the suit on its merits and passed its final judgment thereon, an appeal will then lie and it will then be open to the appellant, if aggrieved by the final order, to raise the point that an adjournment should have been allowed under S. 19, Arbitration Act. The effect of the order may be temporarily to deny the appellant the right to have the matter referred to arbitration, but it is not a final order on the point. It is true that the order appealed against is not a decision on an issue in the case, but its effect is the same as if it were an order on an issue as to jurisdiction. It was expressly held in *Chidambaram Chettyar's* case (1) that a preliminary order deciding that the Court had jurisdiction on an issue was not appealable, and it seems to us necessary to follow that the order appealed against here is also not appealable. We are, therefore, of opinion that the present appeal does not lie. The appeal is therefore dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 R

HEALD AND M

Li Tone Koke and c

v.

S. A. R. M. Firm
pondents.

Application No. 186
on 28th March 1929,
Appeal from judgment
in Civil Regular No. 2

**Civil P. C., O. 41, R.
to give security under O.
to furnish it within t
knowledge of order for s
tion made for extension
time to give security re
jected — No order to re
made.**

An appellant was dir
under O. 41, R. 10 (1) and
tion for security was d
With knowledge of the o
failed to give security wit
by the Court and applied
that time, for extension.
refused on the ground tha
the expiration of the tim
no security was given u
hearing of the applicati
rejected under O. 41, R. 1
struck off the file :

Held : that no order t
could be made : 8 *All.* 31
(*P. C.*) ; 17 *Cal.* 512 (*P.*
Cons. and *Dist.*

Foucar—for Appella

Heald, J.—On 11th
order under O. 41,
against applicants and
to give the necessary
fere 15th January. T
the required security
ary they applied for an
month. The opposite
asked that the appeal
under O. 41, R. 10 (
fixed for hearing the t
13th February and
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March ask us to re
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security.

Their learned advocate has referred us to a decision of their Lordships of the Privy Council in the case of *Balwant Singh* v. *Daulat Singh* (1), but the facts of that case seem to be different from those of the case which is before us. In that case the order for security was made without notice to the appellant. Three days before the date by which security was to be given the appellant filed a petition showing cause why he should not be ordered to give security, but nine days later, that is six days after the date fixed for giving security, the Court ordered the appeal to be struck off the file on the ground that security had not been given within the time prescribed by the Court. Subsequently the appellant filed a petition in which he brought to the notice of the Court the fact that he had received no notice of the application for security and applied for the appeal to be restored. On that application the Court seems to have granted him further time to give security, but when he tendered the security the Court said that the appeal was not dismissed under S. 556 or 557 of the Code and that the petition was not entertainable under S. 558 and was inapplicable to an order made under S. 549. The references were of course to the old Code of Civil Procedure and the appellate Court's order was in effect that because the appeal had not been dismissed for default under the provisions of law which are now Rr. 17 and 18, O. 41, but had been struck off under provisions corresponding to those of O. 41, R. 10, no application under what is now O. 41, R. 19 would lie. Their Lordships of the Privy Council said that there was some difficulty in saying what in substance was the proper course to be taken in these circumstances, but assuming that after the appeal had been ordered to be struck off the file, the Court had allowed the appellant further time to give security they held that he should be allowed to give security and that on his giving security his appeal should be restored to the files of the Court.

It is clear that that decision is no authority for the proposition that there is a general discretion to restore an appeal which has been rejected under O. 41, R. 10 (2), or that there is such a discretion in a case where notice of the application for security has been duly served on the appellant, where with knowledge of the order for security he has failed to give security within the time ordered by the Court, where he has subsequently applied for further time which has been refused for reasons given in the order, and where the appeal has been rejected as directed by the Code and not merely struck off the file.

Applicant's learned advocate has, however, referred us to another Privy Council case, namely *Rajab Ali* v. *Amir Hossein* (2). In that case an appellant was ordered to furnish security under S. 549 (now O. 41, R. 10) to the satisfaction of the Judge of the trial Court before a certain date. Security was tendered before that date but the Judge found it to be insufficient and refused to allow other security to be given on the ground that the time allowed by the appellate Court had by that time expired. The appellant appealed against the order refusing to allow him to give other security, but the appellate Court said that he took the risk of furnishing security which was found to be insufficient and that therefore he could not be allowed the opportunity, after the expiry of the prescribed period, of furnishing fresh security. The appeal in respect of which security had been ordered to be furnished was accordingly rejected. Their Lordships did not in fact interfere with the decision of the appellate Court but they pointed out that that Court had a discretion to enlarge the time allowed for finding security or to accept fresh security. The law as to enlargement of time as laid down by their Lordships is now embodied in S. 148 of the Code, and since their Lordships' dictum is merely a statement of that law, it does not help applicants so far as the present case is concerned.

The learned advocate has referred us also to the case of *Badri Narain* v. *Sheo Koer* (3), in which the High Court had held that it had no power to grant an extension of time after the expiry of the time fixed. In that case their Lordships said that the application to the Court to enlarge the time for giving security may be made either before or after the expir-

(1) [1886] 8 All. 315=13 I.A. 57=4 Sar. 707 (P.C.).

(2) [1890] 17 Cal. 1=5 Sar. 389 (P.C.).

(3) [1890] 17 Cal. 512=17 I.A. 1=5 Sar. 493 (P.C.).

ation of the time within which the security has been ordered to be furnished and the Court may therefore enlarge the time according to any necessity which may arise where it is just and proper that they should do so. That decision similarly does not go beyond the provisions of the present S. 148.

The only other case cited was that of *Sundar* v. *Habib Chik* (4). In that case the appellants were ordered to give the necessary security within a week. On the last day of the week allowed they filed an objection to the order calling on them to give security, but apparently they neither tendered security nor applied for an extension of time. Their appeal was rejected, but two days later they applied for a reconsideration of the matter and they were granted an extension of time, their appeal being restored to the file. The opposite party applied to the High Court against the extension of time and the restoration of the appeal, and the High Court purporting to follow the ratio decidendi in *Balwant Singh's* case (1), said that the Court was entitled to reconsider on cause subsequently shown an order rejecting an appeal under O. 41, R. 10 (2), and accordingly, regarding the application before them as an application for revision and the order of the lower Court as an order passed in review, refused to interfere. All that need be said about that case is that it seems possible that the view which the learned Judges took as to the effect of the decision in *Balwant Singh's* case (1) was not warranted by the facts of that case and that in any case the facts there were different from those of the present case.

In this case more than a month was allowed for furnishing the security, and the appeal was not rejected until applicants had been heard on their application for an enlargement of time. After due consideration of the time granted in the first instance, of the fact that applicants had not tendered any security within that time, of applicants' delay in applying for an enlargement of time, and of the grounds shown by them for the enlargement for which they asked, the Bench decided to refuse to extend the time and rejected the appeal. We are not asked to deal with that order in review and this Bench as now constituted could not do so. We are merely asked to

(4) [1920] 42 All. 626=18 A.L.J. 838.

restore the appeal and t[...] time on the footing of a [...] based on the judgment [...] Council in *Balwant Sing*[...] that case is no authority [...] of such a right in a case [...] On the analogy of the rej[...] there would be no such [...] no reason to believe that [...] exists. I would theref[...] application.

Mya Bu, J.—I concu[...]

P.N./R.K. *Applicat*[...]

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* A. I. R. 1929 Ra[...]

HELAD, OFFG. C. J. A[...]

L. C. T. R. M. Sathap[...] *another*—Appellants.

v.

A. S. Chettyar Firm a[...] pondents.

Civil Misc. Appeal No. [...] cided on 12th August 19[...]

*** Provincial Insolvency [...] ginal petition validly pres[...] not proceeding with due [...] can substitute in his place [...] petitioners during penden[...] proceedings and they will [...] ginal petitioner ab initio– [...] insolvency is necessary.**

If the original petition b[...] a debtor adjudicated insolv[...] sented and the case is one [...] tioner does not proceed wit[...] his petition it is open to per[...] creditors at any time wh[...] proceedings are pending and [...] Court to substitute them as [...] original petitioner; the effec[...] tution would be that they [...] the first petitioner ab initio [...] to prosecute the original pe[...] their own petition so that n[...] necessity for a fresh act of [...] arise: *In re, Maund,* (1895), 1[...] *In re, Mangham,* (1888), 21 [...]

F. S. Doctor—for App[...] *Eunoose* and *Banerjee* [...] dents.

Heald, Offg. C. J.—[...] ber 1927, the present re[...] are A. S. Chettyar Firm, [...] petition under S. 9, Prov[...] the present respondents [...] are mother, son-in-law, a[...] who according to the [...] jointly indebted to resp[...] pect of certain promissor[...] they had executed jointl[...]

cated insolvents. The acts of insolvency which they alleged were that the alleged insolvents had on 20th September 1927 that is within three months before the date of the petition made two transfers of their properties in favour of the T. A. Chettyar Firm, which transfers would under S. 54 of the Act be void as being a fraudulent preference, if the 5th, 6th and 7th were adjudicated insolvents.

On 10th February 1928, the present respondents 4 who are the M. V. R. Chettyar Firm, applied to be joined petitioning creditor on the ground that the alleged insolvents and the T. A. Chettyar Firm were trying to induce respondents 1 to withdraw their petition in fraud of the rights of the other creditors. They relied on the acts of insolvency mentioned in respondents 1's petition. Respondents 1 and the alleged insolvents stated that they had no objection to their being joined as petitioning creditors, and they were so joined by consent. On 27th March and 11th August 1928, the present respondents 2 and 3 respectively also applied to be joined as petitioning creditors, alleged the same acts of insolvency. On 10th October 1928, before orders had been passed on the applications of respondents 2 and 3, these respondents applied to be allowed to withdraw their applications and respondents 1 and 4 applied to be allowed to withdraw the petition.

On the same date, the present appellants namely the L. C. T. R. M. and T. S. T. Chettyar Firms applied to be joined as petitioning creditors. They alleged that respondent 1, that is the original petitioning creditor and some of the other creditors had fraudulently and collusively come to an arrangement with the alleged insolvents out of Court to their own advantage and to the detriment of the general body of creditors and they prayed that leave to withdraw the petition should not be granted and that the insolvency proceedings should be continued by adding or substituting them as petitioning creditors, if necessary under the provision of S. 16 of the Act. On 26th November 1928 the Court directed the first four respondents to file statements of the terms on which they asked to be allowed to withdraw. They filed petitions in which they denied that they had come to any arrangement with the alleged insolvents and said that the ground for their withdrawal was that they were satisfied that the alleged act of insolvency could not be proved. The Court then allowed the withdrawal of the original petition and of the applications of respondents 2 and 3 to be joined as petitioning creditors, and directed that the appellants should be substituted as petitioning creditors and should file new petitions on their own behalf.

Appellants appeal against the order allowing the withdrawal of the petition and directing them to file a new petition on the ground that that order prevents them from taking advantage of the act of insolvency mentioned in the original petition, since that act took place more than three months before the date on which new petitions can be presented. The first four respondents, that is, the creditors who applied to be allowed to withdraw, admit that the lower Court's order has the effect of preventing appellants from prosecuting the insolvency proceedings on the footing of the act of insolvency originally alleged, but say that in law the Court could not allow the appellants, whose application to be made petitioning creditors was made more than three months after the alleged act of insolvency to be joined as petitioning creditors so as to rely on that act of insolvency. The alleged insolvents support the contention and say that in order to succeed appellants must prove a new act of insolvency committed within three months of their application.

All the respondents rely on the decision in the case of *In re, Maund* (1). In that case certain creditors filed a petition on 16th May 1894, alleging that an act of bankruptcy had been committed on 5th March 1894. On 15th June an application to add the names of two other persons as petitioning creditors was made, the reason for that application being that there was a doubt whether the amount of the debts due to the creditors who had filed the petition was sufficient to entitle them to present the petition. The English Bankruptcy Act of 1883, contained in S. 107 a provision similar to that of S. 16, Provl. Insol. Act, which gives the Court power in cases where the petitioner does not proceed with due diligence on his petition, to substitute as petitioner any other credi-

(1) [1895] 1 Q. B. 194=64 L. J. Q. B. 183=43 W. R. 207=72 L. T. 58.

tor to whom the debtor may be indebted in the amount required by the Act in the case of a petitioning creditor; but the learned Judge said that:

"the power ought not to be exercised after the lapse of three months from the date of the act of bankruptcy."

The decision was doubtless right on the facts of the particular case in which it was given, since in that case it was desired by the exercise of the power to remedy a defect, which might invalidate the filing of the petition itself, but it has no application to a case like the present where the petition was validly filed ab initio or to a case where fraud and collusion between the alleged insolvents and the petitioning creditors is pleaded since in the very case on which that decision was based and in which it may be noted the expression of opinion which it followed was clearly obiter namely the case of *In re, Mangham* (2), it was expressly said that if on an application for substitution fraud was alleged the Court would strain its jurisdiction to the utmost. In the present case, there is no need to strain the jurisdiction. The original petition was validly presented and could not be withdrawn without the leave of the Court. The case was clearly one in which the petitioner did not proceed with due diligence on his petition and was further one in which fraud and collusion were alleged. It was open to the appellants to come in as creditors at any time while the insolvency proceedings were pending and it was open to the Court to substitute them as petitioners for respondents 1.

The effect of such substitution would be that they took the place of respondents 1 ab initio and that they were entitled to prosecute the original petition as if it were their own petition so that no question of the necessity for a fresh act of insolvency could arise. I would therefore set aside the lower Court's order allowing the original petition to be withdrawn and directing the appellants to file a new petition and under the provisions of S. 16 of the Act I would substitute appellants as petitioners for the respondents 1. The respondents should bear the appellants' costs in this Court, Advocate's fee to be five gold mohurs and the cost of the lower Court would abide

(2) [1888] 21 Q. B. D. 21.

the final order for costs
proceedings.

Mya Bu, J.—I conc

P.N./R.K.

A. I. R. 1929 Ra

RUTLEDGE, C. J., A

Maung Tun Pe and
lants.

v.

Maung Sein Myi an
pondents.

Second Appeal No. 54
ded on 25th March 192
of Dist. Judge, Tavoy,
No. 20 of 1927.

(a) Transfer of Propert session under oral con registered deed—Such p defence to suit for pos formance.

In a suit for possession o defence that the person obtained possession under of sale, although no regis has been executed and, th sale has taken place: *A.* 214 (*F. B.*), *Rel. on.*

(b) Evidence Act, S. 91- to contract for sale is no missible by document whi terms of contract for sale

The document that was a document recording the t tract for sale, but it merely land had been sold for a ce further recorded an agre chase by the heirs of the v

Held: that oral evidence for sale was not rendered i document that was execute

(c) Registration Act, Ss tract for sale unregistere preclude it from being giv prove terms of contract S. 91.

Section 49, Registration together with S. 17 of t Evidence Act, and a fai S. 49 does not preclude an ment which is required by from being given in eviden of the contract for sale: 297, *Appr.*; *A. I. R.* 1923 35 *Mad.* 63 (*F.B.*), *not Foll.* and *A. I. R.* 1919 *P. C.* 4

Paget—for Appellant
P. B. Sen—for Respo

Judgment.—The a case sued for partition a third share of certai pellant Tun Pe, respond

and one Ma Mya Nwe who was a defendant in the trial Court, were joint heirs of the land in question. At the time of filing the suit, the land was in the possession of Ma Mya Nwe and Ma E Thwe. Ma Mya Nwe did not contest the suit and we are concerned now only with the land in possession of Ma E Thwe. Her defence was that in the year 1921 Tun Pe entered into a contract for the sale of his share to the defendants and put the defendants into possession under the contract. Admittedly a document was drawn up at the time of the transaction and that document has not been registered. The lower Courts have held that that document is inadmissible in evidence, but that oral evidence of the contract of sale is nevertheless admissible. They have found that this oral evidence establishes the case of the defendants and have dismissed the suit of Tun Pe. Tun Pe's appeal to this Court was originally heard by a single Judge, who was of opinion that the existence of the document precluded the bringing of oral evidence and gave the plaintiffs a decree. An order has been passed granting an application to review this judgment and the appeal is now again before us for decision.

It may now be regarded as settled law that in a suit for possession of land, it is a good defence that the person in possession has obtained possession under an oral agreement of sale although no registered deed of sale has been executed and, therefore, no actual sale has taken place. All the Indian High Courts are now agreed on this point, the leading case of this Court on the subject is the case of *Maung Myat Tha Zan* v. *Ma Dun* (1). It is, however, contended on behalf of the appellants that the same rule cannot be applied when a document has been executed by the parties. If the document in question were merely one recording the terms of a contract for sale, the contention that oral evidence could not be adduced to prove the terms of the contract would no doubt be correct. Such evidence would be precluded by the terms of S. 91, Evidence Act. No practical difficulty would, however, arise in such a case, because such a document would not require registration (S. 2, Act 2 of 1927) and would, therefore, itself be admissible in evidence. In the present case, the document that was drawn up is clearly not a document recording the terms of a contract for sale. It first of all recites that the land has been sold for Rs. 400 and then goes on to record the agreement as to repurchase by the heirs of Tun Pe. It is suggested that it is not a document of sale at all and that it does not require registration. However that may be, we are not satisfied that the existence of this document precludes the bringing of oral evidence as to the alleged contract of sale. Mosley, J., who dealt with this appeal in the first instance, held that the agreement to sell was superseded by and merged in the document for sale. It does not appear that the actual document was ever before him or that he was aware of its terms. In *Maung Mayat Tha Zan's* case (1) Robinson, C. J., remarks at p. 304 (*of* 2 *Rang.*) of the judgment :

> "As regards S. 91, Evidence Act, it appears to me that it does not apply in this case at all. It deals with cases where the terms of a contract have been reduced to the form of a document, and to cases in which any matter is required by law to be reduced to the form of a document. If we were dealing with a deed of a sale that was in existence, or with a contract for sale which was required by law to be reduced to the form of a document, some such question might arise; but we are dealing here with a contract for sale which the law does not require to be reduced to the form of a document. An agreement to sell may be an oral agreement, and no question, therefore, of the admissibility of the evidence, I think, arises. It is not the transaction of sale that it is in question, but the agreement to sell, which must, and always does, precede the execution of the contract for sale. By Expln. 3 to the section, even if a statement was made in a document of sale, which was not registered, of the prior oral agreement to sell, evidence as to that prior oral agreement is excluded from the provisions of the sections."

A distinction here is no doubt drawn between a case where the transaction is wholly oral and a case in which a document has been drawn up, but it seems to us that the existence of the document in the present case has no effect on the general principles to be applied. Under S. 91, Evidence Act :

> "when the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a docu-

(1) A. I. R. 1924 Rang. 214=2 Rang. 285 (F.B.).

ment, no evidence shall be given in proof of the terms of such a contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Oral evidence is excluded equally when a document does exist and when the law requires the matter to be reduced to the form of a document. So far, therefore, as the sale itself is concerned, the existence of an unregistered document makes no difference Whether a document exists or not, no oral evidence of the sale can be given. But a contract of sale is not a matter which is required by law to be reduced to the form of a document, and it has been clearly held in *Mayat Tha Zan's* case (1), that the contract which preceedes the sale can be separated and distinguished from the sale itself. In this case there is a document, but whatever that document may be, it is not a document which records the terms of a contract for sale. The terms of that contract have not been reduced to the form of a document. The intention of the parties may have been to go beyond a mere contract and to record in the document an actual sale. But that does not, in our opinion, convert the contract into a sale in such a way as to preclude the defendants from relying on the contract independently of the actual sale. We do not think that in the present case oral evidence as to a contract for sale was rendered inadmissible by the document that was executed.

That is perhaps sufficient for the disposal of this appeal, but we would go further than this and say that whilst oral evidence as to the contract for sale is admissible, the document itself is also admissible in so far as it throws light on the terms of the contract in dispute between the parties. It is contended, as we have said, on behalf of the respondents that the document is not a document which requires registration at all. We are of opinion that whether it requires registration or not, the document would be admissible in evidence as to the terms of the contract which preceded its execution. Under S. 49, Registration Act :

"No document required by S. 17 to be registered shall (a) affect any immovable property comprised therein; or (b) confer any power to adopt; or (c) be received as evidence of any transaction aff[...] conferring such pow[...] registered."

An unregistered [...] course, does not [...] property described t[...] tion here is not whe[...] property, but wheth[...] as evidence of a [...] namely, the previo[...] and that depends on [...] of the words " any [...] such property." [...] number of judicial [...] meaning of these [...] of *Ulfatunissa* v. [...] it was held by [...] five Judges of [...] of Calcutta that [...] "shall be received [...] transaction so far [...] The question then [...] ther a contract for [...] land. In one sense, [...] it imposes personal [...] contracting parties [...] land. But, under th[...] T. P. Act, a contract [...] itself create any in[...] on such property. [...] a contract has on la[...] direct only, and the [...] the provisions of S[...] Act, were meant to [...] direct affecting.

In the case of *N[...] Subbayya Servai* [...] the phrase must be i[...] sense. On page 73 [...] ment, the following [...]

" Mr. S. Srinivasa A[...] argument drawn our [...] visions of S. 40, T. P. [...] Act. The first of these [...] obligation arising out [...] nexed to the owners[...] perty but not amountin[...] or easement thereon be[...] a transferee with notic[...] feree of the property a[...] shows that a contract t[...] to lease immovable pr[...] which affects the prope[...] therefore, S. 49, Registr[...] a document compuls[...] remaining unregistered [...] in evidence of a tran[...] property' or, as put [...] Court, 'of a transactio[...] such property, it woul[...] lature meant to indicat[...] should not be received [...] the transactions soug[...]

(2) [1883] 9 Cal. 520=[...]

not amount to a transfer of interest in immovable property but only created an obligation to transfer the property."

If this judgment is good law then a document for sale which was unregistered clearly could not be admitted as evidence of the terms of the previous contract of sale, but this judgment was delivered before the decision of their Lordships of the Privy Council in the case of *Varada Pillai* v. *Jeevarathnammal* (4), and a different view of the interpretation of S. 49 has subsequently been taken by the same Court. In *Varada Pillai's* case (4), the persons in possession of certain property claimed that the property had been given to them. No document had been drawn up, but it was held that certain petitions to the Collector with regard to the land and changes of names made in his registers were admissible to prove the nature of the possession of the defendants. The documents held so admissible were not documents which were required by law to be registered and this decision has, therefore, no direct bearing on the point before us. It does, however, suggest that the laws of evidence in such a case should not be interpreted in too rigid a sense. In the case of *Saraswatamma* v. *Paddayya* (5), a view of the meaning of S. 49 was taken entirely different from the view taken in *Narayanan Chetty's* case (3). At p. 359 of the judgment, Spencer, J., remarks :

"I have the highest respect for the opinion of Sadasiva Ayyar, J., but I think he stretched too widely the meaning of the verb "affect" in S. 49, Registration Act. All sorts of transactions may remotely affect immovable property. S. 49, Registration Act has to be read in the light of S. 17 of the same Act and S. 91, Evidence Act. If this is done, the word 'affect' will be seen to be only a compendious term for expressing the longer phrase of 'purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent to.' "

In the case of *Qadar Bakhsh* v. *Mangha Mal* (6), it was held that a document although inadmissible for want of registration to prove title may be referred to in order to ascertain the nature of the possession sought to be disturbed. The provisions of S. 49, Registration Act are not discussed in this judgment, but the finding is clearly an authority in favour of the admissibility of such a document for the purpose of proving a contract of sale. If the interpretation in *Saraswatamma's* case (5) be adopted, then it is quite clear that the contract of sale is not a transaction affecting property within the meaning of S. 49. The object of S. 49 is clearly to prevent the law as to compulsory registration of certain documents from being nugatory and to supplement the law of evidence. It has now been definitely held that oral evidence can be accepted as to contracts for sale when no documents have been drawn up. It would obviously be an entirely unsatisfacrory state of affairs if parties should be in a worse position when they had drawn up a document but failed to have it registered than if they had drawn up no document at all. And it would be still more unsatisfactory if in such circumstances parties were allowed to give oral evidence but were not allowed to give evidence of the document itself. Such a state of affairs would involve an entire negation of the principles underlying S. 91, and the following sections of the Evidence Act, but it would be the result of our adopting the wide interpretation of S. 49, Registration Act. We agree with the remarks in *Saraswatamma's* case (5).

We are of opinion that S. 49, Registration Act must be read together with S. 17 of that Act and S. 91, Evidence Act and that a fair interpretation of S. 49 does not preclude an unregistered document, which is required by law to be registered, from being given in evidence as to the terms of the contract for sale. Even, therefore, if the document in the present case is required by law to be registered, we are of opinion that it was admissible in evidence for the purpose of proving the original contract of sale. The document was not admitted by either of the lower Courts, but we do not think it is necessary to remand the case now for further consideration. The document does not recite the terms of the contract for sale at all, but it does recite that there has been an outright sale and it contains an agreement that the children of Tun Pe claiming as his heirs may get the land back on payment of the purchase price plus interest. That clearly does not help

(3) [1910] 35 Mad. 63=21 M. L. J. 44 = 8 I. C. 520=(1910) M. W. N. 743 (F.B.).
(4) A. I. R. 1919 P. C. 44=43 Mad. 244 = 46 I. A. 285 (P.C.).
(5) A. I. R. 1923 Mad. 297=46 Mad. 343.
(6) A. I. R. 1923 Lah. 495=4 Lah. 249.

Tun Pe and in no way contradicts the oral evidence as to the agreement, so far as Tun Pe is concerned, being to sell outright. We are, therefore, of opinion that the case has rightly been decided by the lower Courts and we dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 297

HEALD AND OTTER, JJ.

S. R. M. M. A. Firm—Appellants.

v.

Maung Po Saung and *others*—Respondents.

First Appeal No. 159 of 1928, Decided on 3rd April 1929, from judgment of Dist Judge, Magwe, in Civil Regular No. 23 of 1928.

(a) Limitation Act, S. 14 — Proceeding contrary to clearly expressed provision of law is not prosecuting another civil proceeding in good faith.

Proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in gocd faith in the sense in which the words "good faith" are defined in the Act. [P 298 C 1]

Thus if a person, against whom an order is made under O. 21, R. 63, Civil P. C., instead of bringing a suit applies for revision of the order, and brings a suit when his application for revision is dismissed, he is not entitled to the exclusion of the period for which he was prosecuting his application for revision : 8 *L. B. R.* 146, *Rel. on.* [P 298 C 1]

(b) Civil P. C., S. 115—High Court does not ordinrrily interfere in revision with orders passed under O. 21, R. 63.

High Court does not ordinarily interfere in revision with orders made under O. 21, R. 63, because such orders are by the rule itself declared to be conclusive and the rule itself provides a remedy by way of suit for the person against whom such an order is made: 3 *U. B. R.* 13 and *A. I. R.* 1917 *P. C.* 71, *Ref.* [P 298 C 1]

Anklesaria—for Appellants.

Thein Maung—for Respondents.

Judgment.—In Suit No. 9 of 1924 of the District Court of Magwe the present appellant obtained a money decree against the present respondents Po Saung and Ma Twe, and in execution of that decree he attached certain oil well sites. The respondents Po Maung and Ma E applied for removal of the attachments on the ground that they were in possession of the said sites under a possessory mortgage, and the Court r moving the attachmen

Instead of filing a su visions of O. 21, R. 63, to this Court for revisi moving the attachment was dismissed. Appe suit under O. 21, R. 63 of his right to attach t

The date of the or attachment was 22nd under Art. 11, Sch Act, the suit under (set aside that order been filed within on date. Appellant's sui until 17th Septembe lower Court held that i limitation and dismiss appeals on the ground Lim. Act, he was entit period between 15th J January 1927, during v tion for revision wa Court.

The same question this appeal was decid the late Chief Court of the case of *Tun U* v. *Chettyar Firm* (1). I learned Chief Judge sa

"Subsection 1, S. 14 c in computing the period cribed for any suit, the t the plaintiff has been p diligence another civil p in a Court of first instan appeal, against the defe cluded, where the procee on the same cause of acti in good faith in a Court of jurisdiction or other c is unable to entertain it.

The course which the pursued is very clearly ir 21, Civil P. C., which say or an objection is preferr the party against whom a institute a suit to establi he claims to the property ject to the result of suc order shall be conclusive. gives one year from the c the institution of such sui

With such plain provis the face it was sheer cul the part of the advocate w for the plaintiff to incur t tiff losing all remedy by t the application for revisio is bound by the acts of hi for exclusion of time unde made out, because proce

(1) [1915] 8 L.B.R. 146 L.T. 93.

clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith in the sense in which the words 'good faith' are defined in the Act, viz., done with due care and attention."

In the Upper Burma case of *San Ba* v. *Lun Bye* (2), the question whether the High Court even has power to interfere in revision with orders made under O. 21, R. 63, was considered and it was said that the High Court will interfere only where the extrinsic conditions of the lower Court's legal activities have been plainly infringed, but where the alleged or apparent error consists in a misappreciation of evidence or misconstruction of the law intrinsic to the enquiry and decision it will respect the finality intended by the wording of O. 21, R. 63 and will intervene only when it is manifest that by the ordinary and prescribed method an adequate remedy or the intended remedy cannot be had. In this connexion reference may be made to the case of *Balakrishna Udaya* v. *Vasudeva Aiyar* (3), where their Lordships of the Privy Council said that S. 115 of the Code, which is the section which confers on the High Court power to revise the decisions of subordinate Courts :

"applies to jurisdiction alone, the irregular exercise or non-exercise of it on the illegal assumption of it, The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

The High Court in both Upper and Lower Burma has repeatedly said that it does not ordinarily interfere in revision with orders made under O. 21, R. 63 because such orders are by the rule itself declared to be conclusive and the rule itself provides a remedy by way of suit for the person against whom such an order is made. Appellant's learned advocate has referred us to the case of *Phomon Singh* v. *Wells* (4), where a Judge of this Court said that where an investigation has been refused or an order has been passed without investigation or where the order passed is not a proper order passed in accordance with O. 21, Rr. 59—63, the High Court would interfere. That statement may or may not be a correct statement of the law, but it is clear that it did not overrule the decision in *Tun U's* case, and as we are in entire agreement with that decision we dismiss the appea with costs, advocate's fee to be five gol mohurs.

P.N./R.K. *Appeal dismissed.*

(2) [1917] 3 U.B.R. 13=42 I.C. 74=11 Bur. L.T. 123.

(3) A.I.R. 1917 P.C. 71=40 Mad. 793=44 I. A. 261 (P.C.).

(4) A.I.R. 1923 Rang. 195=1 Rang. 276.

A. I. R. 1929 Rangoon 298

CHARI, J.

Ba Hlaing—Appellant.

v.

Sit Hauk and *others*—Respondents.

Special Second Appeal No. 131 o 1929, Decided on 31st July 1929.

(a) Transfer of Property Act, S. 101—Sur advanced on first mortgage included in cor sideration of second charge created by firs mortgage is available against intermediat mortgagee.

A charge created by a mortgage of propert in favour of a person does not extinguis and is available against an intermediat mortgagee even though the amount advance on the first mortgage is included in the con sideration of the second mortgage effecte in favour of the same person: 16 *Cal.* 523 3 *Cal.* 307 and *Tenison* v. *Sweene*, 1 *Jo. & Ho* 717 *Rel. on.* [P 299 C 2

(b) Transfer of Property Act, S. 78 – Scope.

A puisne mortgagee cannot get rid of th priority of the earlier mortgagee except b proving that the prior mortgagee was guilt of fraud or gross negligence. [P 300 C 1

Ba Thaung—for Appellant.

S. Ganguli and *Wellington*—for Respondents.

Judgment.—The plaintiff Ba Hlaing filed a suit in the Sub-Divisional Cour of Tavoy on a mortgage dated 8th February 1927, executed by Maung Ba and Ma Bok. The mortgage covers certai immovable property and four buffaloes Prior to this mortgage, Maung Aung Ba and Ma Bok had executed a mortgage in favour of Tan Sit Hauk, who was defendant 3 in the suit, on 4th March 1924 for Rs. 300 the property mortgaged being a piece of paddy land, two male buffaloes, and three female buffaloes, total five buffaloes, Whether the two male buffaloes included on the subsequent deed are two out of five included in the earlier deed, we have no means of knowing, as no evidence was directed on the point. The learned advocates think that it would be safe for me to leave out of consideration the buffaloes entirely, and I would do so except for the purpose of construing the second mortgage-deed in favour of Sit Hauk.

On 7th March 1927, the same mortgagors executed a mortgage in favour Tan Sit Hauk for Rs. 1,000 but in this mortgage deed no mention is made of any buffaloes. This last transaction had been held to be a mortgage by way of conditional sale, and this finding has not been challenged.

In the trial Court, the plaintiff obtained a decree for the sum of Rs. 1,000 and Rs. 260 which sum is claimed by way of compensation, because the mortgage does not mention any interest and is to the effect that if the mortgagors deliver the two hundred baskets of paddy to the mortgagee for 10 years the mortgagee shall be deemed to have been discharged. The mortgage in favour of Tan Sit Hauk is also to a similar effect. In the trial Court, the learned Judge did not keep in mind the points in issue between the parties clearly, and raised only one issue namely whether defendants 3 and 4, that is Sit Hauk and his wife knew of the mortgage to the plaintiff by defendants 1 and 2, and agreed to settle defendant's libilities to the plaintiff at the time that the mortgaged land was sold to them by a registered sale deed. This issue was raised on the defence of the original mortgagors, that as defendants 3 and 4 had agreed to discharge the mortgage, they were no more liable on it. The learned Judge did not raise any issue as to how far the mortgage was operative against Tan Sit Hauk, who had subsequent to his mortgage become the purchaser of the property. The learned Judge therefore contented himself with answering the first issue in the affirmative, that is Sit Hauk had knowledge of Ba Hlaing's mortgage and agreed to pay the amount due on the mortgage to Ba Hlaing. The evidence shows that he did have knowledge of Ba Hlaing's mortgage, but it does not show that he agreed to pay the amount to Ba Hlaing either with Aung Ba the mortgagor or with Ma Bok.

On appeal, the learned District Judge modified the decree to this extent. He held that it was proved that the sum of Rs. 300 due to Sit Hauk in respect of the first mortgage was included in the sum of Rs. 1,000 which was the consideration for the mortgage of 7th March 1927. I have no doubt that this is a correct finding, and that it is entirely in accordance with the probabilities of the case. He therefore gave a d Ba Hlaing subject t Rs. 300 in respect of t to Sit Hauk and hi Hlaing and Sit Hauk this Court. On behal is contended that the his mortgage to the due to Sit Hauk on is wrong In the argu that, on the evidence Sit Hauk gave up the gage deed or destroyed intention that that m discharged and exting gued on Sit Hauk's l it is to his benefit t earlier mortgage, it m have been kept alive a as a shield against the gagee Ba Hlaing.

It is unnecessary authorities on this poi fore refer to two cases. *dra Sreemany* v. *I Haldar* (1), the facts the present case. The included in a new one, properties were also curity, and the questi the old mortgage to the extent of not against an intermedi The learnad Judges was done was merely with fresh security i but they added that not so, and if the c paid by the new trans not necessarily dest They cited a number o of which I shall refer of case *Goluknath Mis Lal* (2). In that case, a creditor holding a lands of his debtor do surrender that mortga in any way impair its a subsequent mortgag same lands for the sam of the judgment they English case *Tenison* where Lord Leonards contention that the forn merged in the new, l mortgage included the

(1) [1899] 16 Cal. 523.
(2) [1877] 3 Cal. 307.
(3) [1844] 1 Jo. & Hot. 7

the old, was a novel view of the operation of deeds, and held that the former mortgage remained untouched and operative, and that the effect of the new mortgage was merely to let in the further advances as security on the property.

It is therefore clear that the learned Judge's order in giving Sit Hauk priority in respect of Rs. 300 is correct. A memorandum of cross objection has been filed by Sit Hauk and he claims priority over Ba Hlaing's for the whole of his amount and not merely for Rs. 300. The contention is clearly untenable. He is a puisne mortgagee and he cannot get rid of the priority of the earlier mortgagee except by proving that the prior mortgagee was guilty of fraud or gross negligence. The learned advocate for Sit Hauk referred to parts of the evidence but there is nothing in it to show that Ba Hlaing, the earlier mortgagee, was negligent or fraudulent so as to lose his right of priority. In the result the appeal is dismissed with costs in favour of respondents 1 and 2. The memorandum of cross objection is also dismissed in favour of the appellant, the mortgagors being merely formal parties are not entitled to any costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 300

HEALD AND MYA BU, JJ.

Maung Pwe and *another*—Appellants.

v.

Maung Chan Nyein and *others*—Respondents.

Letters Patent Appeal No. 97 of 1928, Decided on 9th April 1929, against judgment of High Court in Special Second Appeal No. 707 of 1927, reported as *A. I. R.* 1929 *Rang.* 31.

(a) Limitation Act, S. 26—Right of user is defeated when suit is not brought within two years of last user.

Where a suit for asserting a prescriptive right is not brought within two years of the termination of the user, the right of user is lost. [P 301 C 2]

(b) Easement—Right to surface water cannot be claimed even apart from provisions of Easements Act.

Even quite apart from the provisions of the Easements Act it is safe to hold as a general principle of law that no claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course but which should be regarded as surface water or surface drainage: 37 *Mad.* 304; *Rawstron* v. *Taylor* (1855), 11 *Ex.* 369; *A. I. R.* 1923 *Pat* 65, *Ref.* [P 302 C 1]

(c) Custom—Essentials—Custom that only ground on lower level is to be cultivated and that each piece of ground is to have catchment area is unreasonable as it deprives Government of right to dispose of State lands on higher level: *A I.R.* 1929 *Rang.* 31=6 *Rang.* 615, *Reversed.*

A custom must be peaceable and acquiesced in; reasonable, certain and definite, compulsory and not optional. Where these factors are not established by evidence the custom cannot be accepted. [P 302 C 2]

A custom to the effect that only ground on the lower level is to be cultivated and that each piece of such ground is to have a catchment area is unreasonable because any person by cultivating a piece of land in the lower part of a slope in the locality in question can successfully deprive the Government of the right of disposal of State lands in the higher part of the slope for the purposes of cultivation : 14 *M. I. A.* 570 (*P.C.*); 17 *All.* 87; *A.I.R.* 1923 *Lah.* 448, *Ref* : **A.I.R. 1929 Rang. 31=6 Rang. 615, Reversed.** [P 303 C 2]

Kale—for Appellants.

Ba So—for Respondents.

Mya Bu, J.—This is an appeal preferred under Cl. 13, Letters Patent from the judgment in Special Civil Second Appeal No. 707 of 1927, which set aside the judgment of the Court of first appeal and restored that of the Court of first instance. [*Mg. Chan Nyein* v. *Mg. Pwe* (1).]

Three pieces of culturable land known as holding Nos. 10, 3 and 8 in Kongyaung Kwin, Pettaw Circle, Taungtha Township, Myingyan District, belong respectively to the respondents Chan Nyein, Thu Daw and Po Kyaw. These three pieces together measure 12·69 acres. On the west of these lies holding No. 8/219 of the same kwin measuring 13·50 acres which is State land worked by the appellants under a permit granted by the Deputy Commissioner of Myingyan District in October 1922. They are situate in a locality of undulating land and are apparently on the same side of a rising ground, the part occupied by holding No. 8/219 being higher than that occupied by holding Nos. 10, 3 and 8.

The respondents sued for an injunction restraining the appellants from entering upon and working the holding No. 8/219 and directing them to remove the kazins which the latter had constructed thereon, alleging that they (the respondents) were the owners both of holdings Nos. 13, 3

(1) A. I. R. 1929 Rang. 31=6 Rang. 615.

and 8 which they cultivated and of holding No. 8/219 which they did not cultivate but from which water ran down to the former three holdings.

In view of the fact that holding No. 8/219 was State land at the disposal of the Government and that the appellants worked it with the permission of the Deputy Commissioner who undoubtedly has authority to grant the permission, the respondents' assertion of ownership thereto could obviously have possessed no strength. The respondents could not prove the alleged ownership and the Township Court dismissed their suit on 9th June 1926.

The respondents then appealed to the District Court accepting the adverse finding of the Township Court on the question of ownership but changing their ground to one of right to receive the water flowing down from holding No. 8/219 to their lands. The Additional District Judge observed to the effect that the respondents claimed an easement in respect of surface water flowing from holding No. 8/219 to their lands, and remanded the suit to the Township Court for trial on the following issues:

(1) Has the surface water flowed from the disputed land to the plaintiffs' lands adjoining thereto ?

(2) If so, how long have they enjoyed the right to use it ?

(3) Are they entitled to continue the right ?

This order of remand was made on 21st August 1926.

It is important to note that it was in respect of surface water that the respondents claimed the right and their case was not based on any assertion that the water flowed in a defined channel either natural or artificial.

When the case got back to the Township Court the whole record was lost in a fire to the Court house. The present record of the suit has been reconstructed from copies and such like and does not contain any copy of the depositions of the previous trial. After recording fresh evidence the trial Court answered issue 1 in the affirmative. It found on issue 2 that the respondents had enjoyed the right of use of the water for more than 25 years, and on issue 3 that the respondents on account of uninterrupted use of the water flowing from holding No. 8/219 for more than 20 years had ac-

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not be ascertained from the materials before us but there can be no doubt that the suit was instituted in the early part of 1926. Thus the suit was filed after a lapse of more than two years from the time when the user must have ceased.

Further, although the learned Judge emphasised the fact that the Indian Easements Act did not apply in this province, nevertheless he stated that in the ordinary way a right merely to receive surface water would not be recognized by the Courts as an easement. This statement is undoubtedly correct; for no claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage: see *V. Adinarayanna* v. *P. Ramudu* (2).

This principle is taken from the English case of *Rawstron* v. *Taylor* (3), where it was held that the plaintiff who claimed the right of easement by prescription had no right to surface water which had no defined course, for the plaintiff had no right to water in alieno solo. At p.383, Platt, B., very pertinently observed:

"The plaintiff could not insist upon the defendant maintaining his fields as a mere watertable."

The same principle underlies the ruling in *Mt. Sarban* v. *Fhudo Sahu* (4), which as pointed out at p. 117 (of 2 *Pat.*), relates to a case to which the Indian Easements Act does not apply and where it is held that every land-owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire.

Therefore even quite apart from the provisions of the Indian Easements Act it is safe to hold as a general principle of law that no claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course but which should be regarded as surface water or surface drainage.

Turning now to the question of the respondents' contention of having acquired the easement in virtue of custom it is desirable to bear in mind the ordinary definition of an easement which according to the English Law is a right which a person has in respect of land belonging to him to utilize certain land belonging to another in a particular manner not involving the taking of any part of the natural produce of the latter or of any part of its soil, or to prevent the owner of the latter from utilizing his land in a particular manner. This is deducible from the digest of the case law set out in paras. 470 and 489 of Halsbury's Laws of England, Vol. 2. While the Indian Easements Act declares that an easement may be acquired in virtue of a local custom, such easements being called customary easements the English Law also recognizes easements existing by custom: see para. 492 of Halsbury's Law of England, Vol. 2.

Evidence of such custom is relevant under S. 13, Evidence Act. The learned author of the Law of Evidence, Sir John Woodroffe, points out at pp. 167 and 168 of the 8th Edn. of his work that "custom" as used in the sense of a rule which in a particular district, class, or family has from long usage, obtained the force of law, must be peaceable and acquiesced in; reasonable, certain and definite; compulsory and not optional to every person to follow or not.

In the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (5), which was a case relating to a special family custom their Lordships of the Privy Council held that it was essential that special usages modifying the ordinary law of succession should be established to be so by clear and unambiguous evidence, observing that it was only by means of such evidence that the Courts should be assured of their existence.

In *Kuar Sen* v. *Mamman* (6), it was observed as follows:

"A local custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, mohalla or village, or at the particular place, in respect of the

(2) [1914] 37 Mad. 304=17 I. C. 648=24 M. L. J. 17.

(3) [1855] 11 Ex. 369=25 L. J. Ex. 33.

(4) A. I. R. 1923 Pat. 65=2 Pat. 110.

(5) [1870] 14 M. I. A. 570=17 W. R. 552=I. A. Sup. Vol. 1=12 B. L. R. 396=3 Sar. 108 (P.C.).

(6) [1895] 17 All. 87=(1895) A. W. N. 10.

persons and things which it concerns. Where it is sought to establish a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them, acts which if there was no such custom, would be acts of trespass the custom must be proved by reliable evidence of such repeated acts openly done, which have been assented and submitted to as leads to the conclusion that the usage has by agreement or otherwise become local law of the place in respect of the person or things which it concerns. In order to establish a customary right to do acts which would otherwise be acts of trespass on the property of another the enjoyment must have been as of right, and neither by violence nor by stealth, nor by leave asked from time to time."

In *Mt. Diyan* v. *Hira Nand* (7), a Bench of High Court of Lahore emphasized the necessity to endeavour to ascertain the existence or nature of the custom in cases where the custom is alleged.

The question which now remains for consideration is whether the evidence establishes a local custom which is reasonable and certain and leading to the conclusion that it has become the local law of the place by virtue of which the respondents derived the right of use of the water flowing from holding No. 8/219 into their lands. The evidence is to the effect that where the land is undulating only the lower lands are cultivated and almost all such lands have some higher lands as their water resources called in Burmese "yegya" which apparently are lands regarded as catchment areas.

The appellant Maung Pwe went as far as to say "we cannot cultivate the place if it is kept as the water resources for fields." This statement, however, is quite insufficient to warrant the belief that all unoccupied lands on higher level from which water runs down to the lower cultivated lands are recognized as having been reserved as catchment areas or water resources. The uncultivated lands on the higher levels are apparently Government waste lands as was the holding No. 8/219 before the appellants' occupation.

Looking at the relative advantages to be gained by lands in higher and lower levels of an undulating area in the dry zone, it is evident that cultivators would prefer to occupy the lower lands and not the higher ones and it would not be strange to find that m
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(7) A. I. R. 1923 Lah. 448=4 Lah. 202.

does it appear that they expressly pleaded the existence of such a custom at any stage before the case reached this Court on second appeal.

In my opinion the respondents' suit failed. I would allow this appeal and direct that the suit be dismissed with costs throughout.

Heald, J.—Respondents sued for an injunction to restrain appellants from working a certain holding of land. Their case was that appellants' working that holding caused a diminution of the water-supply to their lands, and that therefore they were entitled to prevent appellants from working it.

Respondents' lands adjoin that holding but are on a lower level. Until 1922, when appellants obtained permission from the revenue auohorities to work that holding the surface water from the higher land of which that holding consists flowed down to respondents' lands and naturally improved their fertility, the rain-fall in this neighbourhood, which is known as the dry zone of Burma, being precarious.

The lands which are comprised in appellants' holding are State lands and until permission was given to appellants to occupy them were State lands.

Unless respondents could establish that they had a right to the use of the surface water as an easement they would not be entitled to the injunction which they sought. To establish the easement which they claimed they would have to prove enjoyment as of right and without interruption for a period of 60 years ending within two years next before the institution of the suit. Their suit was instituted in 1926, so that they could not succeed if their enjoyment was interrupted before 1924 or if the interruption had been submitted to or acquiesced in for one year after they had notice of it. Since appellants obtained permission to work the land in 1922, it is probable that respondents' enjoyment of the right to the water which they claim was interrupted not later than 1923, and that on this ground, even if they established that they had enjoyed the right for 60 years, which in fact they did not establish, their suit was bound to fail.

There is also another obstacle in the way of their success, and that is that there can be no easement in respect of the use of surface water. My learned brother has considered the law on this subject and I agree with his conclusions.

Respondents doubtless had an opportunity of objecting to appellants' application to the revenue authorities for permission to work the land and an appeal to the discretion of those authorities was in my opinion the only way in which they could attempt to prevent the lands being worked. It is not suggested that they took that course, and as I do not think that they have any rights which a civil Court can enforce, I concur with my learned brother in setting aside the judgment and decree of this Court in Special Civil Appeal No. 707 of 1927, and in dismissing respondents' suit with costs for appellants throughout.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 304

BROWN, J.

Maung Saw and *others*—Applicants.

v.

Ma Shin and *others*—Respondents.

Civil Revn. No. 75 of 1929, Decided on 2nd September 1929, from order of Dist. Judge, Magwe, in Civil Misc. Appeal No. 89 of 1929.

(a) Limitation Act, Art. 181—Application for execution made beyond time—Application to be regarded as application for extension of time governed by Art. 181.

An application to execute a decree for redemption beyond time is to be regarded as an application for extension of time and is governed by the provisions of Art. 181 and the period of limitation begins to run at the latest on the last date fixed in the original decree for payment : 43 *Bom.* 689, *Foll.* [P 305 C 2]

(b) Civil P. C., S. 115—Lower Court overlooking question of limitation—High Court can interfere.

Where the order of the lower appellate Court overlooks the question of limitation entirely in deciding the appeal, the High Court can interfere in revision. [P306 C 1]

S. Ganguli—for Applicants.

S. S. Halkar—for Respondents.

Judgment.—On 20th November 1923, the respondents obtained a decree for redemption of a usufructuary mortgage. The preliminary decree directed that if the mortgage money be paid by the 20th May possession of the land would be made over. On 20th May the decree-holder asked for execution of this decree by delivery of possession. The

amount due under the decree was apparently not deposited until 19th June. On that date, the decree-holder's advocate asked that the case might be closed as the final decree had not yet been passed. The case was closed accordingly and the money in deposit was withdrawn by the decree-holders on 25th September 1924. Nothing further was done until the 23rd July 1927; on that date a final decree was drawn up apparently on a petition filed by the decree-holder, on 5th July 1927. By a curious mistake the trial Court passed a final decree declaring the plaintiffs to be absolutely debarred from all rights to redeem the property. Since a decree in any case could not have been passed in a suit for redemption of a usufructuary mortgage, it was clearly not a decree which the plaintiffs wanted. On 28th July the plaintiff applied for execution of the decree of November 1923. Notice was issued, and when the respondents appeared they asked for time, and again it appears that a long period elapsed during which nothing was done by either party. On 26th March 1928, the decree-holders asked for an order for the delivery of the land. It appears that on 1st August 1927, they had deposited the amount, they were ordered to pay under the decree. Orders were passed for the delivery of the land, without the issue of notice on the judgment-debtors, and the delivery order was returned as duly executed. On 13th April 1928, the decree-holder made a further application saying that the judgment-debtors were resisting their attempts to obtain possession and asking for an order under R. 97, O. 21, Civil P. C. The judgment-debtors objected and orders on this application were finally passed on 16th August. The trial Court dismissed the application on the ground that the time limit for execution of the decree had been exceeded. Against this order the decree-holders appealed to the District Court. The District Court set aside the order and directed that redemption should be allowed. Against this order the judgment-debtors have come to this Court in revision.

The time within which the redemption money could be paid under the original decree expired on 20th April 1924. The application for redemption made on 28th July 1927 could only have been granted under this decree if the time allowed in the decree v was held by the Bom in the case of *Vasud* that when an applica a decree for redemptio years after the passing application was barre It was held that the ap considered as an applica ment of time and would the provisions of Art That would also be th redemption could not h to the decree-holders v of time and the decree- have succeeded unless were considered as or time to which Art. 181, apply.

It was held in the the period of limitatic must begin to run at last date fixed in the ori payment. I see no reas ing this to be a correct law, and the right to ap of time in the present c barred by limitation at 20th May 1927. By Ju cree-holders by efflux their right to redeem ur decree. Even if the regarded strictly as ar execution of the original still be time barred. T was closed on 19th July drawal of the amount decree-holders on 25th could not possibly be cor in aid of the execution, right to apply for execut was barred by limita therefore, see how th could possibly succeed case. The final decree v up was clearly incorrec cation before the Cour cute that decree. I am fore, that the trial Ju refusing to allow execut and the District Court w ting aside the trial Cou order passed would ap under S. 47, Civil P. C., appeal would lie. But e tioners are correct in co Court by way of revisi

(1) [1919] 43 Bom. 689= Bom. L. R. 687.

is sufficient reason for interference. The District Court in passing orders appears to have everlooked entirely the question of limitation. I set aside the order of the Disrict Court and restore that of the trial Court dismissing the decree-holder's application for execution. Costs in the District Court and in this Court will be borne by the decree-holders, the first three respondents in this application, advocate's fee in this Court two gold mohurs.

V.B./R.K. *Application allowed.*

A. I. R. 1929 Rangoon 306

CHARI, J.

Daw Ywet—Applicant.

v.

Ko That Hlut—Respondent.

Civil Revn. No. 231 of 1929, Decided on 28th August 1929, from decree of Sm. C. C. Judge., Rangoon, in Sm. C. S. No. 3471 of 1929.

Buddhist Law (Burmese)—Husband and wife—Burmese Buddhist husband and wife are partners and so Buddhist wife can sue in respect of partnership asset in her capacity as suriving partner—Contract Act S. 45.

A Burmese Buddhist husband and wife are regarded as partners and as such a Buddhist wife can maintain suit in respect of a partnership asset in her capacity as surviving partner without any reference to her succession to the interest of her husband in the asset or debt due to them jointly : *A. I. R. 1927 Rang.* 209 and 4 *L. B. R.* 99, *Rel. on*; 2 *U. B. R.* 204, *not Foll.* [P 306 C 2; P 307 C 1]

Dangali—for Applicant.

Judgment.—The plaintiff in the suit in the Small Cause Court is the survivor of Burmese couple She claimed to recover a debt due to her deceased husband in which she presumably had a half interest as the wife. The defendant objected to the suit on the ground that the plaintiff could not file a suit without first obtaining letters of administration or a succession certificate. The learned Judge of the Small Cause Court held that he was bound by the previous practice, which was to insist upon the production of a succession certificate or letters of administration by a Burmese Buddhist wife or husband when a suit was filed in respect of a debt jointly due to them. In some of the old rulings of the late Chief Court of Lower Burma, and of the Judicial Commissioner of Upper Burma, it was assumed that one of the Buddhist couple got the whole estate not by survivorship but by succession, so far as one half of the estate is concerned and therefore it was necessary for him or her to get a succession certificate or Letters of Administration in respect of the debt.

The position of a Buddhist couple as regards their proprietary rights has been considered in the Full Bench case of *Ma Paing* v. *Maung Shwe Hpaw* (1), In that case it was held that their position was analogous to that of a partnership, and that all the incidents of a partnership, which were not obviously inapplicable to them because their relationship was not a contractual one, but a result of status, might be applied in consideration of their rights, proprietary or otherwise. If this is so it follows that standing in the position of a surviving partner, the widow could maintain a suit in respect of an asset of the partnership, irrespective of the question whether the share of the deceased partner belonged to the surviving partner or somebody else. In these cases, what the law recognizes is the right of the surviving partner to realize the assets of the partnership. O. 30, R. 49, Civil P. C. makes this clear, but even before this provision of law, it had been held by the late Chief Court of Lower Burma, that a partner could maintain a suit in his or her own name in respect of a partnership asset without joining the legal representatives of the deceased partner in the suit: *K. L. P. L. Perianeh Chetty* v. *Armuga Pather* (2). In that case Sir Charles Fox dissented from the Calcutta ruling which took a contrary view and agreed with the rulings of Madras and Bombay. This position is made clear in an Upper Burma case *U Guna* v. *U Kyw* (3). The Judicial Commissioner of Upper Burma there recognized the position that the union of a husband and wife among Burmese Buddhists should be treated as a partnership, but held that because of the provisions of S. 45, Contract Act, the wife could not sue in her personal capacity alone and must therefore obtain succession certificate in respect of the share of the other partner. But a different view of the applicability of

(1) A. I. R. 1927 Rang. 209=5 Rang 296 (F. B.).
(2) [1908] 4 L. B. R. 99.
(3) [1892-96] 2 U. B. R. 204.

S. 45, Contract Act was taken in Lower Burma in the case I have cited above, where it was held that nothwithstanding the provisions of S. 45, Contract Act, surviving partners could file a suit in respect of a debt due to the partnership without joining the legal representatives of the deceased partner. It therefore follows that a Buddhist wife can maintain a suit in respect of a partnership asset in her capacity as surviving partner without any reference to her succession to the interest of her husband in the asset or debt due to them jointly. As this is the sole point on which the learned Judge of the Small Cause Judge Court dismissed the case, I set aside his decree and remand the case for disposal on the merits.

P.N./R.K. *Case remanded.*

A. I. R. 1929 Rangoon 307

HEALD AND OTTER, JJ.

Ma Thein Nwe—Appellant.

v.

Maung Kha—Respondent.

First Appeal No. 175 of 1928, Decided on 2nd April 1929, from judgment of Dist. Judge, Tharrawaddy, in Civil Regular No. 13-A of 1927.

(a) Buddhist Law (Burmese)—Divorce—Mere adultery by husband is not by itself sufficient to entitle wife to divorce.

Ordinary grounds for divorce are adultery and cruelty on the part of the husband and adultery on the part of the wife; and mere adultery on the part of the husband is not by itself a sufficient ground to entitle the wife to divorce: 5 *L.B.R.* 87, *Rel. on*; 9 *L.B.R.* 191, *Ref.* [P 308 C 1, 2]

(b) Buddhist Law (Burmese)—Marriage—Husband's misconduct disentitles him to decree for restitution of conjugal rights.

If a Burmese Buddhist husband misconducts himself with his wife and treats her extremely badly, the case is not in which restitution of conjugal rights can be ordered to him: (1909) *U. B. R. 1st Qr. Buddhist Law* 2; (1904) *U. B. R. 4th Qr. Buddhist Law* 5, *Ref.* [P 308 C 2]

(c) Buddhist Law (Burmese) — Texts — Dhammathats are merely directory.

Per Otter, J.—The Dhammathats can only be regarded as directory and not as statements of the law which are necessarily binding in law. [P 309 C 1]

Kyaw Din—for Appellant.

Lhein Maung—for Respondent.

Heald, J.—In suit No. 13-A of 1927 of the District Court of Tharrawaddy appellant sued respondent for divorce as by mutual consent on the ground of respondent's repeated acts of adultery, and she also claimed partition of the property of the marriage. In
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It is hardly necessary to say that even if these two passages are read together, and there is no reason why they should be, they do not go far towards establishing the proposition that the husband's adultery by itself is a ground for divorce in a suit brought by the wife. The learned advocate has, however, referred us also to two passages from the Dhammathats which are cited in S. 230 of the Digest. The first of these is an extract from Kaingsa which runs as follows :

"If a wife say to her husband you have violated another man's house and belongings, you are suffering from a loathsome disease, I do not want to live together with you, she shall not be blamed."

The second is a passage from Dhamma which says that a wife may discard a husband who is a drunkard and a gambler and who seduces other men's wives, if he continues in his misconduct in spite of having promised the wise men three times in writing to give up his evil ways. He has referred us further to a passage in Dhammathatkyaw cited in S. 256 of the Digest which says that if the wife is guilty of adultery, she is to have her head shaved in four patches and to be sold into slavery, and that if the husband keeps a paramour he is to leave the house with only the clothes he is wearing. The last of these passages is the only one which goes any way towards supporting appellant's argument that a wife may divorce a husband for mere adultery, and it can hardly be contended that the Courts are bound to enforce that law at the present day.

As a matter of fact the distinction between wife and husband in the matter of adultery as a ground for divorce is clearly shown in the passage from Manugye (V, 24) which is reproduced in S. 302 of the Digest immediately after the verse from Myingun mentioned above. That passage says that where one party to a marriage behaves like an animal it shall be no defence to a suit for divorce brought by the other party for the husband, if the suit is brought by the wife, to say that he has not been guilty of cruelty and has not taken a lesser wife, or for the wife if the suit has been brought by the husband, to say that she has not taken a paramour. This passage supports the view that the ordinary grounds for divorce are cruelty and adultery on the part of the husband and adultery on the part of the wife.

That is the view of the law which has hitherto been taken by the Courts : vide the case of *Ma Ein* v. *Te Maung* (1), and we are not convinced by the reasoning of the appellant's learned advocate or by the passages in the Dhammathats which he has cited that we ought to hold that mere adultery on the part of the husband is by itself a sufficient ground for divorce. It follows that, since appellant bases her case merely on adultery, her appeal should be dismissed.

As for respondent's cross-objection, it clearly does not arise in respect of appellant's suit and appeal but supposing that it could be regarded as an appeal against the decree in respondent's suit, all that need be said about it is that in view of respondent's misconduct, which I would hold proved, the case is not one in which restitution of conjugal rights ought to be ordered. The cross-objection should in my opinion be dismissed. In the circumstances, each party should bear its own costs in this Court.

Otter, J.—This is an appeal against a judgment of the District Court of Tharrawadddy refusing to grant a decree for divorce at the instance of the appellant. The suit was heard together with a cross-suit in which the respondent asked for a decree for restitution of conjugal rights. He was refused this decree. He now files a cross-objection to the appeal of the appellant asking that the decree of the lower Court should be modified by granting him restitution of conjugal rights. The only ground relied on by the appellant in her appeal is that the respondent was guilty of adultery. No allegation of cruelty was put forward and there is no suggestion that the respondent took to himself a second wife. The parties are Burmese Buddhists. The first question therefore is whether, according to the Burmese Buddhist Law, a divorce can be granted to a wife against her husband upon the sole ground of adultery.

Mr. Kyaw Din who appeared for the appellant referred us to a large number of extracts from the Dhammathats, and I would say at once that with the possible exception of an extract from the Kaingza appearing in S 230 of U Gaung's Digest of the Burmese Buddhist Law, all the passages referred to appear to us to point to a conclusion contrary to that con-

(1) [1909] 5 L. B. R. 87=3 I. C. 715.

tended for by him. It is necessary to point out that the Dhammathats can only be regarded as directory and not as statements of the law which are necessarily binding in law. Moreover there is authority, which in my view shows that it is not and never has been the law, that a Burmese Buddhist woman can divorce her husband on the sole ground that he has had sexual intercourse with a woman not his wife. The extract from the Kaingza appearing in S. 230 of the Digest, to which I have referred, says that the wife has the right of refusing to cohabit with her husband who is adulterous, or is suffering from some repugnant disease. In my view this expression of opinion, though perhaps then in accordance with the usages of Burmese Buddhist , does not amount to a statement that under such circumstances a divorce even by mutual consent could be obtained.

Turning to the decided cases upon the point the case of *Ma Ein* v. *Maung* (1), (decided by a Bench of the late Chief Court) lays down that in the case of Burman Buddhist married couple, adultery on the part of the husband does not alone or even accompanied by a single act of cruelty, entitle the wife to a divorce. In that case the Court expressed the opinion that it appears from the Dhammathats that adultery on the part of the husband does not alone, or even accompanied by a single act of cruelty, entitle the wife to a divorce. A wife is, however, entitled to a divorce as by mutual consent, if her husband takes a lesser wife without her approval. This was decided after examination of a mass of conflicting authorities by a Full Bench of the late Chief Court in the well known case of *In re, Maung* v. *Hwe Ma Sein* (2). But the act of adultery, quite apart from that of taking another woman to wife, is different, and on this point no authority was cited in support of the appellant's contention. Thus the proposition that adultery alone does not entitle a wife to divorce her husband has been established and there is no case where the correctness of this view has since been questioned.

Upon this part of the case I need mention one further point only. There was some evidence that adultery took place during the temporary absence of the ap-

(2) [1918] 9 L. B. R. 191=45 I. C. 953=11 Bur. L. T. 236.

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(3) [1909] U. B. R. 1s
(4) [1904] U. B. R. 4th

pondent to excessive drinking. The respondent finally left his wife saying he would obtain a divorce, and some preparation was made to have a deed drawn up. While a discussion about this was going on, the two brothers of the respondent arrived, and after a conversation between them and the respondent the two brothers violently abused the appellant. It was said on his behalf that the final quarrel was entirely due to resentment by the appellant on account of this abuse. It seems impossible to hold that this was so. It is true that in a letter (Ex. 3) written by the appellant to the respondent after the separation there are many statements which show her resentment at the conduct of the appellant's family. It is equally clear, however, that the respondent was in the habit of abusing the appellant to members of his family, and there can be no doubt that they took his part against her.

It is unnecessary for us to deal more in detail with the evidence, for I agree with the conclusion arrived at by the learned District Judge. From the whole of the evidence it is plain that the respondent has treated the appellant extremely badly and he is not a man whom the Court will assist by ordering his wife to return. The appeal and the cross-objection thereto must, therefore, be dismissed. Neither party is successful, and we, therefore, order that each party will bear their own costs of this appeal and the order of the lower Court as to costs will stand.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Rangoon 310

BROWN AND CHARI, JJ.

Maung Shwe Htein and *another*—Appellants.

v.

Ma Lon Ma Gale—Respondent.

First Appeal No. 31 of 1929, Decided on 1st July 1929, against decision of Dist. Judge, Henzada, in Civil Regular Suit No. 10 of 1928.

***(a) Civil P. C., O. 30, R. 4—All that O. 30, R. 4 contemplates is existence of partnership.**

All that O. 30, R. 4 contemplates is the existence of partnership and so it is competent for a surviving partner to file a suit in respect of partnership debts without joining the legal representatives of the deceased partner though the partners cannot sue in a firm name they having no firm name: 4 *L. B. R.* 99, *Rel. on.*; 18 *Cal.* 86; 2 *U. B. R.* 204, *not Foll.* [P 311 C 1]

(b) Burmese Law (Buddhist) — Husband and wife—Presumption.

The fact that the money borrowed on a promissory note purports to have been taken for the husband and his sister is no sufficient reason for not drawing ordinary presumption that the husband in executing the promissory note was acting on behalf of his wife as well as himself. [P 311 C 1]

A. H. Darwood—for Appellants.

P. K. Basu—for Respondent.

Judgment.—The facts of the case are very simple. The suit was instituted by Ma Lon Ma Gale against the defendants, who are husband and wife. It is alleged in the plaint that the husband borrowed the sum of money for which the promissory note was executed for the family purposes, and benefit of himself and his wife. The promissory note was in favour of two persons, namely Ma Lon Ma Gale, and Ma Mya Bu. These two were sisters and carried on a money lending business in partnership. The trial Court gave a decree for the amount claimed, and the defendants now appeal.

The sole ground argued in the appeal is that no decree can be passed in favour of Ma Lon Ma Gale alone unless the legal representatives of Ma Mya Bu, the deceased partner are also added as parties to the suit. Reliance is placed for this argument on a ruling in *U Guna* v. *U Kyaw Gaung* (1), in which the Judicial Commissioner of Upper Burma followed an Indian ruling and held that a suit by the surviving partner was not competent without joining the legal representatives of the deceased partner. The majority of the Indian High Courts have taken a contrary view. In *K. V. P. L. Perinian Chetty* v. *Armuga Pather* (2), Sir Charles Fox, C. J., of the late Chief Court of Lower Burma, followed the decisions of the other Indian High Courts and dissented from the Calcutta ruling in *Ram Narain Nursing Dass* v. *Ram Chunder Jankee Lall* (3). In the present Civil Procedure Code O. 30, R. 4 enacts that where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be neces-

(1) [1892-96] 2 U. B. R. 204.
(2) [1908] 4 L. B. R. 99.
(3) [1891] 18 Cal. 86.

sary to join the legal representatives of the deceased as a party to the suit. In cases of partnership, it is competent for the surviving partner to file a suit in respect of partnership debts, without joining the legal representatives of the deceased partner.

The learned advocate for the appellants argues that it is only when the suit is instituted in the name of a firm that O. 30, R. 4 applies. O. 30, R. 4, does not say so in terms, and merely provides that when two or more persons may sue and be sued in the name of a firm the provisions of that order applies. In this case the two Burmese ladies had no firm name, though undoubtedly they carried on business in partnership. Since they cannot sue in a firm's name, it is argued that the legal representatives of the deceased person are a necessary party. We cannot accept this contention. All that O. 30 R. 4 contemplates is the existence of a partnership. Even if O. 30, R. 4 were not applicable, the previous rulings certainly are. We are therefore of opinion that it was competent for Ma Lon Ma Gale to maintain the suit and it was properly decreed.

The only other point taken before us is, that the promissory note having been signed by Maung Shwe Htein alone, his wife appellant 2, Ma Bu Ma, is not bound by it. It is suggested that the presumption that Maung Shwe Htein was acting on behalf of his wife as well as himself cannot be drawn in this case, because the money purports to have been taken for Maung Shewe Htein and his sister. That does not seem to us to be sufficient reason for not drawing the ordinary presumption in such cases. We dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 311

RUTLEDGE, C. J. AND BROWN, J.

Maung Ohn Tin—Appellant.

v.

P. R. M. P. S. R. M. Chettyar Firm and *others*—Respondents.

Civil Misc. Appeal No. 119 of 1928, Decided on 25th March 1929, from order of original side in Civil Execution No. 605 of 1927.

(a) Civil P. C., O. 21, R. 90—Official Receiver not in possession nor party—Absence of notice of auction to him does not amount to material irregularity.

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(1) [1910] 5 L. B. R. 2
L. T. 89.

"The status of a receiver is merely that of an officer of the Court. He is sometimes referred to as the "hand of the Court" He acquires no proprietary rights or interest in the property of which he is appointed receiver. Having no title to the property he cannot convey or assign any title to it to any other person "

"A receiver has no proprietary rights or interest whatever. Notwithstanding his appointment the proprietary rights in the estate remain in the persons who are by law entitled to the estate. The receiver's possession is not a possession by any personal right. It is the possession of the Court and he is totally devoid of any interest in the property." (Woodroffe on Receivers, 3rd Edn., p. 4.)

The heirs and legal representatives of U Maung Gyi, deceased, in whom the legal title to the estate is vested, were parties to the proceedings. The Official Receiver was not a party and never applied to be made a party. We have not been referred to any provision of the Civil Procedure Code requiring notice to issue to a receiver of an estate, who has an interest in the property in question but who is not himself in possession of such property. In the absence of such provision, we are unable to agree that the absence of notice to the Official Receiver was material irregularity or fraud in publishing or conducting the sale. Reliance has been placed on what the learned trial Judge calls, "a grossly inadequate price" which the mill and its premises fetched to satisfy the proviso to R. 90, O. 21, Civil P. C., and it is mentioned that the mill was mortgaged for a lakh of rupees in 1921. The mortgage, however, is dated 1921, and the evidence of Mr. David shows that the mill was in a very bad condition and would require an expenditure of something like Rs. 31,000 and odd to put it in proper condition. In a climate such as Rangoon, rice mill machinery deteriorates very rapidly if not properly looked after, and there is nothing intrinsically improbable in a mill which, though it might be worth a lakh of rupees in 1921, at an auction sale would not fetch more than Rs. 21,000, after several years of neglect.

The decree-holders, respondents 1 and 2, had leave to bid and were present at the auction sale, and we must presume that they would have exercised their power if they were satisfied that the property was going to be sold for a grossly inadequate price. We are not satisfied and cannot accept the explanation that they were so persuaded that the auction was going to be postponed through paucity of would be buyers, that they did not pay due attention to the auction. But, if Mr. David's estimate is at all near the mark, namely, that Rs. 31,000 and odd would have to be spent on the mill, we can understand the Chettyar's reluctance to bid any higher price for it.

Reliance was placed on the decision of a single Judge in the case of *Fraser* v. *Krishnaswami Aiyer* (2), but that decision, even if correct is easily distinguishable from the present. There the receiver was in actual possession of the whole partnership property and had applied to be made a party. Mr. N. N. Sen states that there is a further objection in that his client, Ba U, had not been served with notice. It is true that Ba U was not personally served, but the notice was affixed to his house and we find a diary entry in the execution record dated 23rd March 1928, which the Deputy Registrar held to be good notice. The objection does not seem to have been strenuously urged in the trial Court, and the learned Judge makes no mention of it. We see no reason for differing with the Deputy Registrar, and hold that the service on Maung Ba U was good.

A further point has been raised before us on behalf of the respondent. It is contended that when the applications for setting aside the sale were before the trial Judge, the trial Judge had not accepted the highest bid at the auction or declared the bidder to be the purchaser and that therefore the bid had not been accepted. It was therefore open to the trial Judge to refuse to accept the bid whether there were grounds for setting aside the sale under R. 90, O. 21 or not. The contention is based on the judgment of a single Judge of this Court in the case of *Afazuddin* v. *Howell* (3). It was there held that the highest bidder at a Court sale of immovable property becomes the purchaser thereof not when the bid is accepted by the fall of the hammer, but when the presiding officer of the Court has accepted the bid and declared the bidder to be the purchaser. Reliance was placed on the case of *Jaibahadur Jha* v. *Matukdhari Jha* (4). In that case the properties had been sold in execution by the nazir of the Court. The

(2) A. I. R. 1923 Mad. 144=47 Mad. 47.
(3) A. I. R. 1929 Rang. 12=6 Rang. 609.
(4) A. I. R. 1923 Pat. 525=2 Pat. 548.

bidsheet was sent to the Munsif who wrote: "Close against the last offer," but never signed the declaration that the property had been knocked down in favour of the bidder. It was held that in the circumstances the Munsif had the power to refuse to accept the bid and to order property to be resold. It would appear, however, from the judgment that the practice in carrying out such Court sales was for the nazir only to conduct the sale and record the bids, but for acceptance of the bid to be with the Munsif

There has been no such practice in the Courts of this Province. Under R. 65, O. 21, Civil P C., every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed. Under R. 258 of the rules of this Court published at p. 126 of the High Court Rules and Orders sales of immovable property in execution of a decree for money are to be conducted by the bailiff under the direct supervision of a Registrar. There is no provision in the Rules which requires a Judge to accept a bid. Under R. 259 if the highest bid be equal to or higher than the reserved price (if any), the bailiff shall make an entry in the sale book to the following effect :

"I declare . . . . . . to have been the highest bidder for the purchase of the property above set forth (or of lot No.) for the sum of Rs. . . . ."

And under R. 260 an application for an order confirming a sale of immovable property is not necessary. If no application to set aside the sale is made within the period allowed therefor a Registrar may pass an order confirming the sale. It is quite clear therefore that the rules of procedure on the original side of this Court do not contemplate the highest bid at an auction sale being placed before the presiding Judge for acceptance, nor does it seem to us that the provisions of O. 21, Civil P. C., require a bid to be accepted by a Judge before the contract of sale can be held to be complete.

Rule 84, O 21 provides that on every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase money to the officer or other person conducting the sale,

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Presidency Towns Insol
and 12 (1) (c)—Under S.

vency becomes complete at conclusion of 21 days and application to get person adjudicated insolvent must be made within three months from conclusion of 21 days.

Section 9 (e) merely lays down that if the property has been attached for 21 days or more there has been an act of bankruptcy. The act becomes complete at the conclusion of 21 days. Thus a creditor is not entitled to present a petition to adjudicate a person insolvent beyond three months after the person's property is attached for 21 days though the property is under attachment at the time of the presentation of the petition: *In re, Beaston*, (1899); 1 *Q. B.* 626 and *A. I. R.* 1927 *Bom.* 633, *Rel. on.* [P 315 C 2]

N. M. Cowasjee—for Appellant.

Venkatram—for Respondent.

Judgment. — The appellants have been adjudicated insolvents on the application of the respondents. The acts of insolvency on which the respondent relied in their application for adjudication were that certain properperties of the appellants had been under attachment for not less than 21 days. They claimed that a rice mill had been attached on 23rd August 1928, that other properties of the appellants had been attached on 6th November 1928, and that in both cases the attachments were still in force when the application for adjudication was filed. The application for adjudication was filed on 20th June 1929, and the contention on behalf of the appellants is that the acts of insolvency alleged were committed more than three months before the application for adjudication, and that the adjudication should not therefore have been allowed. In the case of each attachment it is clear that a period of 21 days had elapsed for more than three months before the presentation of the petition. Under S. 12 (1) (c), Presidency Towns Insolvency Act, a creditor is not entitled to present an insolvency petition unless the act of insolvency on which the petition is grounded has accrued within three months before the presentation of the petition. The contention of the appellants in this case is that the act of insolvency alleged accrued on the expiry of the 21 days and that therefore the respondents were not entitled to present the petition under S. 12.

The learned trial Judge held that the attachments were continuing acts of insolvency and that, as they were still in force at the time of the application, the application was within time. That this is not the law in England is made quite clear in the case of *In re, Beeston* (1). The relevant section of the English Bankruptcy Act, reads as follows:

"A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, and the goods have been either sold or held by the sheriff for 21 days."

In the case of *In re, Beeston* (1) the goods had been seized by the sheriff and had remained in his possession for over a year before the application for ajudication had been made. It was held by the Court that the act of bankruptcy was complete 21 days after the sheriff had entered on possession, and that there was therefore no act of bankruptcy within three months of the receiving order being made. On this point Lindley, M. R., remarks at p. 631:

"Now, is it possible to fairly construe that section so as to make continued possession for more than 21 days either a continued act of bankruptcy or if it should be a succession of periods of 21 days, a succession of acts of bankruptcy? I do not think that it is consistent with the language. We know perfectly well that acts of bankruptcy have to be regarded critically and carefully. There is no such thing as an act of bankruptcy except that which the statute declares to be one, and when the statute says an act of bankruptcy is committed if an execution has been levied by seizure and the goods have been held by the sheriff for 21 days, that means that the seizure and holding for 21 days together are essential for the consideration of whether there is an act of bankruptcy or not. It seems to me it would be straining this section beyond all reason to say that there was a succession of acts of bankruptcy at the expiration of every period of 21 days or that there has been one continued act of bankruptcy running over a year and a half."

In a concurrent judgment Vaughan Williams, L. J., remarks at p. 633:

"I have only one word to add, and that is a word about whether the bankrupt here by the seiznre and the possession for 21 days has committed either a continuous act of bankruptcy for the whole term of possession or an act of bankruptcy which will be repeated each time that there is a fresh period of 21 days of possession. I have no doubt myself that it is one act of bankruptcy that it is not a continued act of bankruptcy, and it is not a repeated act of bankruptcy, on the happening of each fresh period of 21 days.

"I entirely agree with all that has been said by the Master of Rolls as to the words of the section, but I wish to add one observation. Until the recent legislature there was no such act of bankruptcy, as this act of bankruptcy constituted by seizure and remaining in possession for 21 days or any other time. The act

(1) [1899] 1 Q. B. 626=68 L. J. Q. B. 344=47 W. R. 475=6 Manson 27=80 L. T. 66.

of bankruptcy was by execution for a certain amount followed by sale, and it is that which has been extended. One finds here in this section two things together, and I have no doubt myself that if, as the legislature intended, the act of bankruptcy defined in respect of the seizure and sale be one act done at the instance of the execution-creditor for the purpose of the realization of his security—a security gained by the seizure—so in respect of the continuing in possession the act of bankruptcy is an act of bankruptcy which takes its origin at the seizure and whether the seizure be followed by sale or whether the seizure be followed by possession for 21 days there is only one act of bankruptcy and if there is no fresh sizure, there is no fresh act of bankruptcy."

This decision was followed by the High Court of Bombay in the case of *In re Hyderbhai Husseinbhai* (2). The learned Judge in that case considered the difference between the wordings of the English Act and the Presidency Towns Insolvency Act and held that the view of the law taken in *In re, Beeston* (1) was the correct view to take in construing S. 9 (e), Presidency Towns Insolvency Act. S. 9 (e), Presidency Towns Insolvency Act, reads:

"If any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any payment of money."

It is contended on behalf of the respondents that the law laid down in *In re, Beeston* (1) cannot be followed in India, because of the difference in the wording of the Acts applicable. The English Bankruptcy Act provides that the sheriff shall hold the property for 21 days. In the Presidency Towns Insolvency Act the words used are "for a period of not less than 21 days."

The argument, as we understand it, is that under the Indian Act, at the conclusion of any period of 21 days or more there is a definite act of bankruptcy on which the creditor is entitled to rely for the purposes of S. 12 (1) (c), Presidency Towns Insolvency Act. We are unable to accept this view. The Presidency Towns Insolvency Act was enacted after the delivery of the judgment in *In re, Beeston* (1). In its general terms it follows the English Law, as regards this particular act of insolvency. If the legislature had intended to introduce such a change in law from the English law as suggested here, it seems to us that they would have done so clearly and unequivocally. The section as drafted

(2) A. I. R. 1927 Bom. 633=52 Bom. 126.

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aside the order of the trial Judge adjudicating the appellants as insolvents, and direct that the application of the respondent be dismissed. The respondent will pay the costs of the appellants in each Court, advocate's fees in each Court 5 gold mohurs.

P.N./R.K. *Order set aside.*

A. I. R. 1929 Rangoon 316

CHARI, J.

Maung Hla Maung and *others*—Defendants—Appellants.

v.

Maung Po Htai and *others*—Plaintiffs—Respondents.

Special Second Appeal No. 526 of 1928, Decided on 1st May 1929.

Transfer of Property Act, S. 123—Doctrine of part performance has no application in the case of donee—Part performance,

The doctrine of part performance on which it is held that a vendee in possession who has paid consideration but has not obtained a registered conveyance cannot be ousted by the vendor or a person claiming under the vendor has no application to the case of the donee : *A. I. R.* 1924 *Rang.* 200 and *A. I. R.* 1924 *Rang.* 102, *Cons.* [P 317 C 1,2]

Lambert—for Appellants.

A. B. Banerjee—for Respondents.

Judgment.—The plaintiffs in this suit, who are the respondents in this appeal, filed a suit for a declaration of their rights to, and possession of a piece of land in the following circumstances :

The eleven plaintiffs are the children and grandchildren of an old couple U Soe and Daw The Hmon, who originally owned this land, defendant 1 in the suit, Maung Hla Maung is a grandson of the same old couple to whom Daw The Hmon is alleged to have gifted the land. Saw Yoe Tha, defendant 2, is a person to whom Maung Hla Maung sold this land. It is alleged that Maung Hla Maung was a minor at the time of the transfer, but the question really does not arise. A Chettyar attached this land as belonging to Saw Yoe Tha and had it sold in execution of a decree of his, and Maung San U, defendant 3, was the purchaser at the Court auction sale. The trial Court found that there was a gift. The gift was not effected by a registered instrument as required by S. 123, T. P. Act, but by a report to the revenue surveyor and entry of that report in a pyatpaing This fact itself was denied, but it has been found by the trial Court that such a report had been made, and I accept its finding that Daw The Hmon did report the transfer by gift of this land. The learned trial Judge also held that, as the matter was one of inheritance, the provision of the Transfer of Property Act did not apply to the transaction and that therefore there was no need to have a registered gift for this purpose. This view of the law was not accepted by the lower appellate Court, and the learned advocate for the appellants in this Court does not seek to support it. The lower appellate Court then referred to the case of *M. L. M. P. Chetty* v. *Ma Ngwe Sin* (1) and distinguished that case from the present one, and holding that a registered document was necessary to effect a gift held that there was no valid and operative gift in favour of Maung Hla Maung. It will be noticed that the sole question for decision is the question of the validity of this gift. If the gift is valid, the plaintiff's suit is bound to fail, irrespective of whether the property still remains the property of Maung Hla Maung or has become the property of Saw Yoe Tha. The lower appellate Court having taken this view decreed the case in favour of the plaintiffs, and the defendants in the suit now come up in appeal. The facts being more or less admitted the sole question for me to consider is whether the ruling in *M. L. M. P. Chetty* v. *Ma Ngwe Sin* (1) applies and whether the distinction drawn by the learned Judge of the lower appellate Court is a sound one.

He distinguishes that case from the present one on the ground that there was no evidence of Maung Hla Maung's possession or enjoyment of the property and that all that could be said in favour of Maung Hla Maung was that his father So Maung worked the land for about two years. Po Kyaing was admittedly in possession of the land after Soe Maung's death, and he says he was so in possession with the consent of the heirs. The learned Judge therefore held that there was no valid gift and no such possession as would make the ruling in 1 *Rangoon* applicable. There is another case reported in 1 *Rangoon*, dealing

(1) A. I. R. 1924 Rang. 200=1 Rang. 665.

with gifts unperfected by registered instrument and I shall shortly refer to both the cases. The first *Ma Shin* v. *Maung Hmna* (2) is a judgment of my brother Heald, where there was a gift of immovable property made as in this case by a report to the revenue surveyor. There is, however, this distinction between that case and the present one, that all the other heirs of the donor signed the report as witnesses to the transaction and of possession being given to the donee. The learned Judge held that in the circumstances the heirs were estopped from denying the donee's title. It will be noticed that that decision is an application of the doctrine of estoppel.

In the other case of *M. P. L. M. P. Chetty* v. *Ma Ngwe Sin* (1) also the gift was purported to have been made by a report to the revenue authorities. The gift was made by the grandmother of the donee. After the death of the grandfather who had also joined in the report, the property was being managed by the father of the minor donee Maung Ba Shewe, who, as the learned Judge deciding the case found, collusively transferred the land as orasa son, with the concurrence of his mother Ma Le Ywa, one of the donors, to the Chettyar firm. On these facts the learned Judge held that the minor donee having attained majority and being in possession of the property it was not open to the transferee of the land to claim possession If the reasonings of this case is that Maung Ba Shwe being in effect also party to the gift, the Chettyar firm who claimed under him was, as in the earlier case decided by my brother Heald estopped from denying the validity of the gift, the ruling may be considered as an application merely of the doctrine of estoppel. But if that ruling is intended to lay down a general principle that in all cases of gift where the gift is not effected by a registered instrument but the donee happens to be in possession for a fairly long time, it is open to the donee, on the analogy of a person buying property for valuable consideration who has been let in possession of it, to resist the claim of the legal owner, then I must express my dissent from that ruling. The doctrine of part performance on which the Indian High Courts have

(2) A. I. R. 1924 Rang. 102=1 Rang. 351.

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conveyance and the equitable maxim and the doctrine of part performance based on it becomes inapplicable in the case of a mere donee. As I am in a sense dissenting from that ruling, I would, if it were necessary, have placed the matter before the Chief Justice for the purpose of referring the question to a Full Bench, but as my judgment is open to a Letters Patent appeal leave to file which I shall certainly grant if an application is made for that purpose, it is unnecessary to follow that course.

It is thus not necessary to decide the question of possession which was argued by Mr. Lambert for the appellants. He contended that possession was with his client as long as it was possible and argued that on the evidence, Po Kyaing must be deemed to have worked the land on agreeing to pay rent to Maung Hla Maung. In the view I have taken, it is unnecessary to decide this point, and if the Bench by which the appeal is likely to be heard takes a different view of the ruling cited, the point of possession may then be argued before that Bench. I therefore dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 318

RUTLEDGE, C. J., AND BROWN, J.

S. R. A. S. Sidambaram Nadar and *others*—Appellants.

v.

D. R. Maganlall Brothers—Respondents.

First Appeal No. 257 of 1928, Decided on 19th March 1929, from judgment of Original Side in Civil Regular No. 377 of 1927.

(a) Transfer of Property Act, S. 130—Scope.

Transfers of an actionable claim, whether outright transfers or by way of security, are governed by S. 130 : 37 *Bom.* 198 (*P.C.*), *Foll.* [P 319 C 1]

(b) Transfer of Property Act, S. 130—Debtor by letter authorizing his creditor to draw money due to him (debtor) and depositing securities with him (creditor)—No charge or lien on money is created.

A charge or lien on actionable claim can only be created by a written assignment under the provisions of S. 130. [P 319 C 2]

A debtor by a letter authorized his creditor to draw the money that may be due to him and declared that he had deposited with him (creditor) certain securities.

Held : that no charge or lien was created on the money : 37 *Bom.* 198 (*P.C.*), *Rel. on.* [P 319 C 2]

Hay—for Appellants.

Doctor—for Respondents.

Judgment.—The respondents, D. [illegible] Maganlall Brothers, carrying on busine[ss] in partnership, by their partner, Maga[n]lall Popetbhai, filed a suit on the origin[al] side of this Court against one Maung P[o] Nyan, Abdul Gunny and four other[s]. They claimed that Po Nyan had execute[d] in their favour four promissory notes o[n] which at the time of suit the sum o[f] Rs. 11,285-13-0 was due. They furthe[r] claimed that on 23rd June 1927, P[o] Nyan had by a deed created in thei[r] favour a lien or first charge on all sum[s] due by the Public Works Department t[o] Po Nyan. In the suit as originall[y] framed, Po Nyan and Abdul Gunny alon[e] were the defendants, and Abdul Gunn[y] was joined on the ground that he ha[d] obtained an order of attachment befo[re] judgment on the moneys lying to the cre[dit] of Po Nyan in the Public Work[s] Department. The other four defendant[s] were added subsequently on the groun[d] that they also had attached the sam[e] moneys.

The plaintiffs asked for a decree fo[r] the amount due against defendant [1] and for a declaration as against the othe[r] defendants that the plaintiffs had a firs[t] lien or charge on all sums due by th[e] Public Works Department to defendan[t] 1. The plaintiffs were given a decre[e] in accordance with the prayer in th[e] plaint by the trial Court. The presen[t] appeal against this decree has been file[d] only by defendants 4, 5 and 6, A. [illegible] Nagoor Meera, N. N. Chettyar Firm an[d] S. R. A. S. Sidambaram Nadar.

The first ground in the memorandu[m] of appeal is to the effect that the deb[t] alleged to be due by Maung Po Nyan t[o] the plaintiffs have not been established but this ground has not been presse[d] before us. The promissory notes wer[e] produced and were sworn to by Maganlal Popetbhai and Po Nyan has not denie[d] executing them. We see no reaso[n] therefore, for interfering with the decre[e] for the payment of money by Po Nya[n]. It has, however, strongly been urge[d] before us that the declaration in favou[r] of the respondents of the lien on th[e] moneys in question was not justified. O[n] this point it has been urged that th[e] plaintiffs did not obtain the execution o[f] the document on which they rely ; tha[t] in any case they have not proved that

was executed before the attachment by Abdul Gunny; and, finally, that, even if the document was executed, as alleged, no lien or charge has been established.

Each one of these contentions has been disputed on behalf ot the respondents, but we are of opinion that this appeal can be decided by a consideration of the third contention only. On 17th June 1927, Po Nyan executed a power-of-attorney in favour of Maganlall Popetbhai, and on 23rd June he is alleged to have written the document on which the respondents chiefly rely. This document reads as follows:

Rangoon 23rd June 1927.

"Maganlall Popetbhai, Esq.,
No. 81 in 28th Street,
Rangoon.

Dear Sirs,

With reference to the loans received by me the undersigned on pronotes hereunder mentioned and marked 'A' I have deposited with you the security deposit receipts hereunder mentioned marked 'B'—as collateral security and authorize you to draw the same when the work is completed and for which I have executed a power-of-attorney in the name of Maganlall Popetbhai dated 17th June 1927 and recorded as No. 1381 of 1927 of the office of the Sub-Registrar of Rangoon and I hereby declare that I have given as security all bills that I have to draw from the Executive Engineer, Public Works Department Rangoon, in connexion with my contract for construction of clerks' quarters at Pauktaw now and in the future and also authorized Mr. Maganlall Popetbhai to draw the same bills and credit the same to my account with Popetbhai Dayabhai and Sons and D. R. Maganlall Brothers of No. 81 in 28th Street Rangoon.

Yours faithfully,
(Sd.) Po Nyan,
23rd June 1927.
No. 18, Obo Street, Kemmendine."

The Schedule "A," attached to the letter contains a list of five promissory notes and the Schedule "B," contains a list of three items, namely one challan, one receipt and a deposit with the Executive Engineer, Rangoon Division. It was held by their Lordships of the Privy Council in the case of *Mulraj Khatan* v. *Vishwanath Prabhuram* (1), that transfers of an actionable claim, whether outright transfers, or by way of security, were governed by the provisions of S. 130, T. P. Act. In that case a debtor held certain insurances on his life. He deposited the policy with regard to one of these insurances with the plaintiff in the case to secure moneys due by him to the plaintiff, and subseque formal deed of assignm to the defendant.

(1) [1912] 37 Bom. 198=17 I. C. 627=40 I. A. 24 (P.C.).

It was held that, in sions of S. 130, T. P. A to the plaintiff was of ing a charge. At p. 21 ment, their Lordships

"In the present case th his claim on a deposit of under a written transfe this creates a charge or section specifically enac ceeding shall not have an a charge can only be c document. It follows th acquired no right whatever proceeds by reason of the

Under the definitio T. P. Act, "actionable a claim to any debt ot secured by mortgage o perty, or by hypothecati moveable property. I the respondents claim a the money due by th Department, that is to lien on an actionable cla sion in *Mulraj Khat* clearly to the effect that lien can only be effe assignment under the pr T. P. Act.

We are unable to rea on which the respond case as being a documen It is merely a letter which he authorizes not but Maganlall Popetbha pondents, to draw the n be due to him from t Department, and decla deposited with him ce Mr. Maganlall Popetbh to credit the sums he dr bhai Dayabhai and Sc defendants. But the d does not assign the debt to the respondents, Ma and the Privy Council c is clear authority for deposit of the document or lien at all on the d in effect makes Mag solely responsible for these debts, but it do debts due to him or to a

We have been referred respondents to a number but it was remarked by of the Privy Council in *l*

case (1) that in India Courts are bound by the provisions of S 130, T. P. Act. Towards the conclusion of their judgment, their Lordships observe:

"The decision of the Court below was therefore erroneous. The error arose from the learned Judges not having appreciated that the positive language of the section precluded the application in India of the principles of English law on which they based their decision."

For these reasons we are of opinion that the respondents did not establish that they had any charge or lien on the debts in question. We, therefore, modify the decree of the trial Court by deleting therefrom the declaration of a lien or charge in favour of the respondents. The appellants are entitled to their costs in this appeal. In the trial Court, defendant 1, Po Nyan, will pay the plaintiffs' costs, and for the rest the parties will bear their own costs.

P.N./R.K. *Decree modified.*

A. I. R. 1929 Rangoon 320

HEALD AND MAUNG BA, JJ.

S. A. L. S. Chettyar Firm — Appellant.

v.

Daw Saw and *another*—Respondents.

First Appeal No. 99 of 1929, Decided on 22nd May 1929, from judgment of original side in Civil Regular No. 532 1928.

Contract Act, S. 178—*K* obtaining jewellery from lawful owner by fraudulent pretence that he has prospective purchaser but with dishonest intention of raising money on it himself—Jewellery pledged by *K*—Jewellery is obtained by fraud and pledge is invalid.

If *K* obtains jewellery from the owner by means of a fraudulent pretence that he has a prospective purchaser and with the dishonest intention of raising money on it himself *K* obtains the jewellery by fraud and if he pledges it with a person, the pledge is invalid and the person cannot retain the jewellery: *A. I. R.* 1922 *L. B.* 17, *Ref.* [P 320 C 2]

Aiyangar—for Appellant.

Judgment.—The main facts of this case are not now disputed and it is only the legal effect of those facts which is in question Respondent 2 Ma Ma Gyi went to respondent 1 and induced her to hand over certain articles of jewellery on a pretence that she had a prospective purchaser who desired to have inspection of the jewellery. Respondent 1 handed the jewellery to respondent 2, who in fact had no prospective purchaser, and respondent 2 pledged the jewellery next day to appellant. Respondent 2 was prosecuted and convicted of criminal breach of trust. Respondent 2 then sued appellant for the return of the jewellery, and a decree has been passed in her favour.

Appellant appeals on grounds that a person who is in possession of goods of any sort can make a valid pledge of such goods provided that the person who accepts the pledge acts in good faith and that the goods have not been obtained from the awner by means of an offence or by fraud. He suggests that because respondent 2 was convicted of criminal breach of trust and not of cheating, the Magistrate must have found that she did not obtain possession of the jewellery by means of an offence. He cites the case of *Annamalai Chetty* v. *Mrs. Basch* (1), in which a goldsmith to whom jewellery was entrusted for sale, pledged the jewellery and it was held that because the person who accepted the pledge acted in good faith he was entitled to retain the jewels in spite of the fact that the goldsmith was convicted of criminal breach of trust.

One of the questions to be decided in such cases is whether or not the goods were obtained from the owner by means of a criminal offence or fraud. If they were so obtained the pledge is invalid and the person who has accepted the pledge must return the goods to the true owner. It may be true, as appellant suggests, that such a provision of law is likely to cause serious loss and dislocation of business to money-lenders who act in good faith and with no suspicion that the person making the pledge has obtained the goods by means of an offence or fraud, but it is what S. 178, Contract Act says, and it is therefore the law. In this case we are satisfied that respondent 2 obtained the jewellery from respondent 1 by means of a fraudulent pretence that she actually had a prospective purchaser and with the dishonest intention of raising money on it for herself, and that therefore she obtained the jewellery by fraud. It follows that the pledge was invalid and that appellant cannot retain the jewellery. We therefore dismiss the appeal.

P.N./R.K. *Appeal dismissed.*

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(1) A.I.R. 1922 L.B. 17=11 L.B.R. 217.

A. I. R. 1929 Rangoon 321

BAGULEY, J.

Ma Nyen—Complainant—Applicant.

v.

Maung Chit Hpu—Accused—Opposite Party.

Criminal Revn. No. 64-B of 1929, Decided on 13th May 1929, from order of Spl. Power Mag., Shwebo, in Criminal Trial No. 118 of 1928.

Criminal P. C., S. 439 (4)—Accused acquitted—No erroneous recording or omission of evidence—High Court cannot direct retrial by holding that on evidence as it is accused ought not to have been acquitted.

High Court interfering in revision may set aside an order of acquittal and direct a retrial owing to non-recording of evidence or improper recording of inadmissible evidence but where there is no question of evidence having been erroneously omitted or of evidence having been erroneously recorded and the High Court is asked to hold that on the evidence the accused ought not to have been acquitted no order directing a retrial can be made: *A. I. R.* 1928 *P. C.* 254, *Rel. on; A. I. R.* 1929 *Pat.* 139, *not Foll.* [P 321 C 1]

Sanyal—for Applicant.

Judgment.—The respondent, Maung Chit Hpu, has been tried and acquitted by the Special Power Magistrate, Shwebo, of an offence under Ss. 376-511, I. P. C. The present application has been filed by the complainant, Ma Nyein in revision of this order of acquittal. I do not see how this application can be entertained. There is no question of evidence having been erroneously omitted or of evidence having been erroneously recorded. The evidence is there and I am asked to hold that on that evidence and no other the respondent ought not to have been acquitted. This seems to me to go very near to saying that he ought to have been convicted and that is a thing which I hold I have no power to do in a revision application. The point has been dealt with by the Privy Council in a very recent case, namely, *Kishen Singh* v. *Emperor* (1). In that case a man was charged with murder (S. 302, I. P. C.); he was convicted under S. 304, and an application for revision was made asking the High Court to find him guilty of murder. In this case the High Court of Allahabad did so, and their Lordships of the Privy Council regarded the case as one which justified them in interfering even though it was a criminal pointed out S. 439 forbids the altering o a conviction in a revis

Were I to say that to be retried on the should be definitely evidence the man sho acquitted," and there between saying that a ought to have been co Magistrates would be accused on the same e dictum staring them sufficient independenc the man an unbiase nature must be taken t My attention has been of *Wazir Kunjra* v. this case a two Juc Patna High Court too the case of a man w quitted, and altered th a conviction. They di 439 (4), Criminal P. C. ment and appear to h entirely.

I can well understan occur in which, owing of evidence, or impr inadmissible evidence terfering in revision an order of acquitta re-trial, which the M whom the case ca with in a perfectly i In the present case no erroneous recordi of evidence, should I d would be for all practi same thing as sendi Magistrate with dire and this I do not see m applicant has still got move the Local Govern peal against the acquitt fit, and this in my opin remedy if she is diss acquittal. I dismiss for revision.

P.N./R.K. *Revi*

(1) A. I. R. 1928 P. C. 254=50 All. 722=55 I. A. 390 (P. C.).

(2) A. I. R. 1929 Pat. 139

* A. I. R. 1929 Rangoon 322

OTTER, J.

P. A. Pakir Mahomed—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1192 of 1926, Decided on 3rd December 1926, from order of Dist. Magistrate, Rangoon, D/- 9th August 1926, in Criminal Regular No. 84 of 1926.

* **(a) Penal Code, S. 480—Ingredients enunciated—Prosecution need not prove intent to defraud—But accused proving want of such intention is entitled to acquittal.**

In order to establish a case under S. 480 the prosecution must prove that the accused marked goods, that he did so in a manner reasonably calculated to cause it to be believed that the goods so marked were the manufacture or merchandise of some other person and that such goods are not the manufacture or merchandise of such person. It is unnecessary for the prosecution to prove that an accused in such a case had acted with intent to defraud; should the latter, however, prove that he acted without intent to defraud, he is entitled to be acquitted [P 322 C 2, P 323 C 1]

(b) Trade mark—Trade mark cannot be registered but may be acquired by user.

In India there is no method by which a trade-mark may be registered, but property in or right in respect of a mark may be acquired by user. [P 323 C 2]

(c) Penal Code, S. 482—Person not necessarily manufacturer acquiring rights in respect of the mark can prosecute.

A person, not necessarily a manufacturer, who uses a mark for the purpose of his trade, may acquire rights to and in respect of that mark. Where in the course of a user extending over a large number of years, goods are sold by a firm bearing a certain mark which had been known to purchasers by that mark, a prosecution would also lie at the instance of the firm: 37 *Cal.* 204, *Rel. on.* [P 324 C 1]

(d) Penal Code, S. 482—Corporate body may be prosecuted.

A body corporate such as a firm may be prosecuted for an offence under Ss. 480 and 482: 7 *L. B. R.* 306, *Ref.* [P 324 C 2]

(e) Penal Code, S. 482—Want of proof that purchasers were deceived does not prove want of intention to defraud—State of mind of accused should be established to discharge onus of proving want of intention to defraud.

Even though no cases of purchasers having been deceived by the use of false trade-mark are proved, this fact standing alone is insufficient to justify the contention that the accused acted without intent to defraud. The state of mind of the persons responsible for he introduction of the trade-mark is a most relevant fact which can be established by evidence. In the absence of such evidence, the accused cannot be held to have discharged the onus of proving want of intention which was upon him. [P 330 C 2]

* **(f) Penal Code, Ss. 480 and 482—Even trader with some claim to mark cannot adopt it if it causes infringement of other's mark—Actual physical resemblance not sole consideration — If mark bears particular name in market, another mark bearing same name cannot be used.**

A trader even with some claim to the mark or name cannot adopt a trade-mark which causes his goods to bear the same name in the market as those of a rival trader. If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. The actual physical resemblance of the two marks is not to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used become known in the market by a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device: *Seix* v. *Provezende,* (1866) 1 *Ch.* 192, *Foll. Case Law discussed.* [P 324 C 2, 325 C 1]

O. De Glanville—for Appellant.

Mac Donnell—for the Crown.

Judgment.—The appellants are the firm of R. E. Mahomed Cassim and are represented by their Manager, P. A. Pakir Mahomed. This firm was convicted upon a prosecution entered into at the instance of a firm called The Trading Co. (late Hegt & Co.) for using a false trade-mark under S. 480 read with S. 482, I. P. C., and were fined the sum of Rs. 800 or three months rigorous imprisonment. The material portion of these two sections are as follows:

Section 480. "Whoever marks any goods .... in a manner reasonably calculated to cause it to be believed that the goods so marked .... are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade-mark."

Section 482. "Whoever uses any false trade-mark .... shall, unless he proves that he acted without intent to defraud, be punished with imprisonment .... for a term which may extend to one year or with a fine or with both."

It is clear, therefore, that in order to establish a case, the prosecution must prove: (1) that the accused marked goods; (2) that he did so in a manner reasonably calculated to cause it to be believed that the goods so marked were the manufacture or merchandise of some

other person; (3) that such goods are not the manufacture or merchandise of such person.

It is to be observed that it is unnecessary for the prosecution to prove that an accused in such a case had acted with interest to defraud; should the latter, however, prove that he acted without intent to defraud, he is entitled to be acquitted.

It may be stated generally that the law relating to criminal prosecutions in this country does not differ from that relating to civil proceedings, except that in a civil case it is necessary for the plaintiff to prove that the defendant acted with a fraudulent intention.

The prosecutors are a firm of importers of blankets and other similar goods who have carried on business in Rangoon for a large number of years. One particular line of cotton blanket imported by them in considerable quantities from Holland bears a mark stamped upon it consisting of a crown surrounded by an inscription, the letters of which are within two lines which encircle the crown in the shape of an oval. The size of the oval is something slightly less than three inches from side to side and something less than two inches from top to bottom. Exs. 1 and 4 show this mark.

The appellants also carry on business in Rangoon and it is, I think, common ground that some time about the month of July of this year they put on the market a line of cotton blanket said to be somewhat inferior quality but of similar appearance, make and weight to the respondents' blanket.

Stamped upon this blanket is a mark of similar shape to that I have described and consisting of an impression of a Fez surrounded by an inscription delineated precisely in the manner I have described as appearing on the mark of the prosecutors. The size of the appellant' mark is something over three inches from side to side and something over two inches from top to bottom. The inscription on the prosecutor's mark consists in their name at the top "Van Hegt & Co.," at the bottom "Emschede." The inscription on the appellants' mark consists in the word "R. E. Mahomed & Co." and at the bottom the word "Rangoon."

It was contended on behalf of the prosecutors' firm, viz., the respondents in

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satisfy the Court that by user their goods have become known by the name of that particular mark. It is true that the respondents are not the manufacturers of the blankets in question, but the case of *Jwala Prasad* v. *Munna Lal* (1) is I think sufficient authority for the proposition that a person, not necessarily a manufacturer, who uses a mark for the purpose of his trade, may acquire rights to and in respect of that mark. In the present case I am quite satisfied upon the evidence that in the course of a user extending over a large number of years, blankets manufactured by Hegt & Co. and sold by the respondents and bearing the mark shown on Exs. 1 and 4 had been known to purchasers by those marks. A prosecution would, therefore, also lie at the instance of the respondent firm.

In this connexion I think it is also clear that as a general rule persons dealing in blankets or purchasing them for their own use refer to them by their marks. This practice is common in the East in the case of many other articles besides blankets I need only mention such well known marks as those representing for example a dagger or an elephant.

It is also clear on the evidence that the appellants' blankets have a very large sale all over Burma not only in the towns but in the country districts. They are sent out from the larger dealers in Rangoon and are distributed through various small dealers in the province until they reach the hands of the ultimate purchasers. The latter are generally speaking persons in somewhat humble circumstances.

On an inspection of the two marks under review, it is apparent that in ordinary or colloquial English the mark of the respondents would be correctly described as a "crown," in or with an oval or simply a "crown." Similarly the appellants' mark would be described as a "Fez" or "Turkish Cap." In Urdu the word for a crown is "Taj" and in Burmese "Tharapu." In Platt's Urdu Classical Hindi and English Dictionary, Taj is translated inter alia as a crown diadem, tiara, a highly crowned cap, crest, tuft plume. The suggestion on behalf of the respondents is that their mark has by long custom been termed "topi mark" or "topi marka." It is not said on their behalf that the word "topi" is a correct and comprehensive word indicating a Crown, but what is suggested is that in this province where so many languages are spoken and so many bastard types of languages have sprung up, the word "topi" has been applied generally to the appellant's mark. On referring to the same dictionary, it will be seen that the word "topi" is translated as a hat, cap . . . . . . cover or cap (as of a telescope); head or top (of a thing). Thus from a purely etymological point of view, there is some slight support for the suggestion that a "taj" (or crown) which may be correctly translated or described as a high crown cap, might become known as a cap or even turkish cap. There is also no doubt that a body corporated such as the appellant firm may be prosecuted for an offence under Ss. 480 and 482, I. P. C.: see *Seena M. Haniff & Co.* v. *Liptons Ltd.* (2).

The case for the respondents is that they have brought themselves within the principles laid down in the well known case of *Seixo* v. *Prevezende* (3), which have been followed among others in the more recent cases of *In re, Worthington & Co's. trade-mark* (4) and *In re, the application of Pomril Ltd.*, (5). The principles I have referred to are correctly summarized in the headnote to *Seixo* v. *Provezende* (3) as follows:

"Nor can a trader even with some claim to the mark or name adopt a trade-mark which causes his goods to bear the same name in the market as those of a rival trader."

The learned Magistrate who tried this case quoted the following passage from the judgment of Lord Cranworth, L. C., which appears to be as good law to-day as it was in the year 1866 when it was delivered. The passage begins at p. 196 of the report as follows:

"If a purchaser looking at the article offerred to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it, in that belief the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the ac-

(1) [1910] 37 Cal. 204=5 I. C. 1000.

(2) [1914] 7 L. B. R. 303=23 I. C. 689=7 Bur. L. T. 116.

(3) [1866] 1 Ch. 192=14 W. R. 357=12 Jur. (n.s.) 215=14 L. T. 314.

(4) [1880] 14 Ch. D. 8=49 L. J. Ch. 646=28 W. R. 747=42 L. T. 563.

(5) [1901] 18 Rep. Pat. Cas. 181=17 T. L. R. 279.

tual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device."

The first question therefore for me to consider appears to be as to whether the blankets in question have become known in the market as the "topi" blanket or "topi mark" blanket.

The second question is whether the adoption by the appellant firm of this mark will reasonably cause their goods to bear the same name in the market and thus cause it to be believed that the goods so marked are those of the respondent's firm.

In this connexion I have been referred to the well known case of *Orr Erving & Co.* v. *Johstone & Co.* (6) where the judgment of Fry, J., (as he then was) was affirmed by the House of Lords. At p. 447 of the nisi prious report, Fry, J., cited with approval the judgment of Lord O' Hagan in *Singer Machine Manufacturers* v. *Wilson* (7) and went on to say :

"It appears to me, therefore, that I ought to hold that if one man will appropriate to himself a material and substantial part of the ticket which another man has used for the purpose of indicating his goods, he ought so to appropriate it, and with such precautions as that the reasonable probability of error should be avoided."

It is true that there was some evidence of fraud in that case but the passage I have quoted seems to me to be of general application. I would point out that Fry, J., had already come to the conclusion that the one mark :

"would not be taken for the other by dealers or purchasers of ordinary prudence."

If I come to the conclusion that both the questions I have indicated must be answered in the affirmative, it will then be necessary to consider whether the appellant firm have acted at all material time without an intent to defraud.

On behalf of the respondent firm a mass of evidence is given both oral and documentary.

I do not propose to deal in detail with the evidence but it will be sufficient to say that some 13 or 14 Rangoon traders

(6) [1879] 13 Ch. D. 434 on appeal (1881) 7 A. C. 219.

(7) [1878] 3 A. C. 376=26 W. R. 664=47 L.J. Ch. 481=38 L. T. 303.

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(8) [1893] 17 Bom. 584.

(9) [1907] 34 Cal. 495=11

(10) [1917] 41 Bom. 49=34 L. R. 206.

(11) [1907] 36 Ch. D. 1= L. T. 583.

the way purchaser. There is also a certain amount of evidence that actual purchasers in Rangoon described the respondents' blankets as "topi" mark blankets This testimony was, however, somewhat vague and open to criticism.

There was, therefore, called on behalf of the respondent firm, evidence, which, if believed, and if it stood alone, would justify a Court in coming to the conclusion that the first question should be answered in the affirmative. With regard to the second question there was no evidence at all called on behalf of the respondent firm to show that the purchaser of dealers have in fact been deceived by the mark of the appellants' firm into purchasing goods of the latter in the belief that they were purchasing the respondent's goods. It seems to me, however, that when once there is evidence that the mark of the respondents' firm is generally known as the "topi" mark, it will not be difficult also to come to the conclusion that confusion may arise owing to the appellants' mark. The point was dealt with by Lord Watson in the *Orr Erving* case (6). At p. 231 of the House of Lords' report he says:

"When a prominent and substantial part of a long and well known trade-mark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of the new trade-mark of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade-mark belongs."

It is said and was urged with some force that looked at side by side, no purchaser could be decieved. That I think is clearly proved with regard to dealers and others from India connected with the trade. It is also, I think, proved that a consumer of education and experience who exercises care and skill in his or her purchases might well not be deceived. But blankets of different marks are not always looked at side by side nor are the majority of purchasers persons of skill or intelligence.

Mr. DeGlanville, however, relied on this fact as assisting his contention that the mark of his client's firm ought not to be held reasonably calculated to decieve. Upon this part of the case I would again refer to the judgment of Fry, J., (at p. 448 of the nisi prius report). The learned Judge in considering whether the defendents had appropriated with due precautions to prevent mistake, and he says:

"In considering and answering that question, it strikes one at first that they have thought fit to print the name of their firm upon their ticket in a language which can be read, undoubtedly, by the original purchasers of their goods, but which cannot be read by the ultimate purchasers in the Indian markets, and therefore the protection which would be given by a name capable of being read, wherever the goods go is not afforded by their ticket. According to the evidence before me when the goods reach Bombay, they pass generally into the hands of merchants dealing in a wholesale way, they are then distributed through the intervention of a series of middlemen, who it appears, form a numerous class, employed in the distribution of the goods over the country. In my judgment, the first class of purchasers would probably not be deceived. But, upon the whole of the evidence before me, I think that there is a strong probability that the ultimate purchasers, the weavers who buy the goods in the country villages, and probably also the retail dealers who sell to them would be deceived by the defendant's ticket. One of the witnesses, who is a dealer in English yarn in Bombay, said that, in his opinion the native buyers would be deceived, because, they "would ask for 'Bhe Hathi' and there," (that is, as I understand him, on the defendant's ticket) are Bhe Hathe."

Furthermore the present case is a criminal prosecution and intent to defraud is not an ingredient in the offence.

On this part of the case, so far as the evidence for the prosecution is concerned it seems to me that there was evidence, if believed, upon which I could come to the conclusion that the effect of the trade-mark of the appellant's firm is reasonably calculated to deceive. On behalf of the appellants a large body of evidence was also called, and there is no doubt that the witnesses were drawn from both retail and wholesale merchants and brokers. Some of these witnesses say substantially that the respondents' mark is known as the "taj" mark. It is also in evidence that the appellants' mark was also known as "topi" or "Turkish cap" mark, and further a number of exhibits were produced bearing the marks similar to those in dispute, as to which witnesses said that no confusion in fact arose. I will deal with this contention later. Evidence on the latter point was stronger and more definite than that called to establish the fact that the respondent's mark was known as something other than the "topi" mark.

I would refer to the evidence of some of the most important of these witnesses.

A man called Kassim Ismail (D. W. 1) a dealer in piecegoods in Surti Bazar, who sells the appellants' blankets, said that he also knew the mark on Ex. 4, but that he had never sold them (viz. respondents' firms blankets). He stated that Exs. 1 and 4 are known as "taj" mark and that Ex. 2 is known as "topi" mark.

A man called Eusoof (D. W. 6) stated that he called Ex. 4 "tarapu" in Burmese and "taj" in Hindusthani. He added that he sold it to the jungle people who asked for tarapu tazeik" (or crown mark).

A man called Mutu Garlan Ahmed (D. W. 9) a partner in the firm of Malim Brothers and a merchant in the Surti Bazar said that he knew Ex. 4 and that it was called "taj" mark and added that he had known it since 1899 and had always known it as "taj" mark. He said that he had never heard it called "topi" mark. This was perhaps the strongest piece of evidence on behalf of the appellant firm. Several witnesses for the appellants said that they called the respondents' mark "crown" or "taj" or "tarapu" but did not go so far as to say what the mark was generally to purchasers or traders.

Another witness called Aga Ahmed Shirazee (D. W. 10) says that he had never heard of topi mark blankets. He said in cross-examination, however, that he dealt with considerably higher class of persons than those who would be likely to buy the blankets of the respondents' firm.

A man called Dada Saheb (D. W. 11), general merchant, who had dealt in the respondents' blankets said that he had never heard of the topi mark blanket.

A great point was made on behalf of the appellants that other similar marks caused no confusion. Exs. A, B and C are such. So also are Exs. 6 and 7, two pieces of velvet one with obvious crown upon it and the other with a Turkish Fez. Exs. 8 and 9, two pieces of serge, one having a coloured crown upon the card pattern cover, and the other having a Fez, stamped upon it called a golden cap; Exs. 11 and 12 samples of long cloth, one with a number of crowns stamped upon it, and the other with highly coloured and large label showing a blue Fez.

It was said that no confusion had arisen with regard to these respective

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It is obvious of course, that such evidence would be the most material upon the question of the intent to defraud to which I must refer at a later stage. In balancing the evidence given on behalf of the respective parties, I have been assisted by the examination of a large number of authorities and also by the arguments of the learned advocate on both sides. I propose only to deal here with those cases which seem to me to have the most bearing upon the matter. In doing so I will endeavour to take the various points relied upon by the learned advocate for the appellant firm and discuss them in the light of some of the reported cases.

It will be seen that nearly all the reported authorities relate to civil suits. There are, however, one or two reports of criminal prosecution. It was not suggested by either of the learned advocates appearing in the case that the law in this country differs substantially from that as laid down in England and after considerations of a number of authorities it seems to me that this is so. The different conditions of life and habit in the East, no doubt have to be borne in mind in considering the facts of this case, but the main principles are the same. One of the difficulties in such a case as this is that reports of other cases are of less assistance than many other branches of law. Each case must depend upon its own particular facts, and although it is necessary to consider and apply the general principles enunciated by the Courts from time to time, yet it is in the nature of things impossible to find a decided case, the facts of which resemble closely those of any particular case under review.

The case of *West End Watch Co.* v. *Burma Watch Co.* (12) among others was relied upon by the respondents' firm as showing that similar principles to those enunciated in the case of *Seixo* v. *Provezende* (3) have been laid down in this country. In the course of the judgment of Scott, C. J., in that case the following passage occurs:

"The importer who by advertising and pushing the sale of goods under a particular mark secures a wide opportunity for the mark in relation to the goods sold by him is entitled to the protection of the Court for that mark in the country of importation even against the producer of the goods."

This has been recognized by the Madras High Court in the case of *Lavergne* v. *Hooper* (13). The case of *Seixo* v. *Provezende* (3) was also considered in the case of *Emperor* v. *Bakaullah Mallik* (14). This case was relied upon by the appellant firm. It was a criminal case and the short facts of that case were that the prosecutors had been selling fish hooks with labels showing a design of two fish crossed with their heads and tails pointing upwards. These hooks were known in Calcutta generally as "Mach Marka" or fish mark, and commanded a large sale. The defendant firm also had been selling fish hooks with a similar label containing one fish with head and tail turned upwards, and were convicted of using false trademark under S. 482, I. P. C. On appeal the conviction was set aside, and the Court distinguished the case of *Seixo* v. *Provezende* (3) upon the facts. I cannot find the principles laid down in the latter case dissented from at all, and while distinguishing the facts, the Court appeared to be of opinion that when a name suggested by the trade is applied as a trade-mark the matter assumes an aspect different from that existing in the present case: where a "crown" or "topi" has been adopted as a trade mark of a blanket. It seems to be the opinion of the Court that a fish was too common a feature and too fit for application to a trade-mark to be afforded protection by the Courts. How far this doctrine is of general application it is unnecessary for me to consider, but it seems to me that the case of *Emperor* v. *Bakaullah Mallik* (14) already referred to does not assist the case for the appellants.

It will be convenient now to deal with the various contentions put forward on behalf of the appellant firm. They were substantially as follows. (1) That no evidence had been adduced by the prosecution to show that any one was deceived. I have mentioned this contention before, and apart from the defence of want of intent to defraud the matter is not in my view of great importance. It is true that this fact may

(12) [1911] 35 Bom. 425=10 I. C. 805=13 Bom. L. R. 242.

(13) [1884] 8 Mad. 149.

(14) [1904] 31 Cal. 411.

and should be taken into consideration in dealing with the question whether the appellants' mark is calculated to deceive purchasers, yet as I have already pointed out it is unnecessary for the prosecution to establish an intent to defraud on the part of the appellants' firm. In this connexion I would quote a part of the head note in the case of *Madavaji Dharmasee Manufacturing Co Ltd.* v. *Central India Spinning, Weaving and Manufacturing Co. Ltd.* (10). It runs as follows:

"It was not necessary for the plaintiffs to prove cases of actual deception, if the defendants had put into the hands of middle-men a means whereby ultimate purchasers were likely to be defrauded."

This, says Mr. McDonnell on behalf of the respondent firm, is exactly what the appellants did. Mr. deGlanville relied here on the case of *Cope* v. *Evans* (15). This was a civil suit and it was dismissed because there was no evidence of actual deception and no such limitation of the plaintiffs' trade-mark as in the opinion of the Court made deception probable. A passage in the judgment of Hall, V. C., occurring at p. 150 was relied on among others by the appellants. The learned Vice-Chancellor had been considering *Seixo* v. *Provezende* (3) and asks himself the questions:

"Have the plaintiffs in the present case shown that the defendant's user of the mark will cause their goods to be taken for the plaintiffs'? Will it be the inevitable consequence of the use by the defendants of their mark that purchasers in purchasing the defendants cigars will believe that they are purchasing the plaintiffs'? It is true the defendants' mark cannot fail to attribute to their goods the same name as is used by the plaintiffs?

and answers them all in the negative. Now it may be that those questions are fit to be asked in a civil case but the present case is a criminal prosecution and the question is a different one and depends on the wording of the statute.

Again Mr. deGlanville quoted "*the Society of Motor Manufacturers & Traders Ltd.* v. *Motor Manufacturers and Traders' Mutual Insurance Co. Ltd.* (16).

I cannot attach much importance to this authority in the present case. It is not a trade-mark case and it turned only on the right by a company to use certain descriptive words as part of its name.

The real question was one as between the parties concerned, and the rights of the public were only indirectly material. Here the position of the purchaser is vital.

Mr. deGlanville also said that there was no direct evidence as to who the actual users of these blankets were. This is to some extent true but it plainly appears I think from the evidence of the prosecution, both oral and documentary that the respondents' blanket were and are largely bought by persons in a humble position in life both in the towns and in the country districts of Burma.

It was said that the witnesses for the prosecution were practically all dealers viz., trading companies and that therefore, their evidence is untrustworthy. I have already referred to this point, and it is an important point. It would have been of great assistance to me had better evidence in this connexion been available. As I have already pointed out, however, there were quite independent witnesses called whose evidence was one of the plainest possible character. Furthermore, as I have also pointed out this was exactly the kind of evidence called for the prosecution in the case of *The Madavji Dharmasee Manufacturing Co. Ltd.* (10). The above contentions, it will be seen, were directed against the case put forward on behalf of the prosecution.

Mr. deGlanville went on to argue that even were I satisfied that upon the evidence of the prosecution a prima facie case has been made out, yet looking at all the evidence I ought to allow the appeal. He also argued that, after considering the evidence for the defence I ought to come to the conclusion that the mark of the respondent firm is not known outside the ambit of blanket dealers as the "topi" mark blankets, but rather is known generally to the public as the "taj" mark blankets.

No doubt there were categorical statements made on behalf of the appellants' firm directly contradicting the evidence for the respondent. I have already referred to certain of these. I, however, cannot help being much impressed by the apparent position and experience of

(15) [1874] 18 Eq. 138=22 W. R. 450=30 L. T. 292.

(16) [1925] 1 Ch. 675.

the witnesses who testified on behalf of the respondents' firm. Furthermore four of these witnesses were in my view quite independent. Also I cannot lose sight of the mass of documentary evidence put in on behalf of the respondent firm. Some of this no doubt is open to objection. Certain orders were produced without the writers of these being called as witnesses or without their handwriting being identified. Mr. McDonnell contends that under S. 32, sub-S. 2, Evidence Act, such evidence is admissible. I am in doubt as to this. It is unnecessary for, me however, to decide the point for in many cases evidence of handwriting was forthcoming, which would, I think, being country orders such as were produced, be directly within the provisions of the Evidence Act I have quoted. Again, account and other books kept in the ordinary course of business were also produced. In substance, the effect of this evidence seems to me to lend very strong support to the case for the respondents' firm. It is true that the evidence for the defendant contains certain categorical statements to the contrary. But upon careful examination of that evidence as a whole it seems to me that it falls short of establishing the contention that the respondents' mark did not and does not bear the significance contended for. The witnesses were much more inclined to state that in their opinion the "crown" would and should be translated by them by the word "taj" or "tarapu."

A further strong point was made by Mr. deGlanville to which I have already referred. He said that after weighing the evidence as to Exs. 6, 7, 8 and 9 I must be of opinion that the crown mark was not calculated to deceive. I have dealt with this argument and need only add this that, if for example in the case of Ex. 6 there was evidence that it was generally known in the market as the "topi" mark I should not find it difficult to come to the conclusion that the "Fez or Turkish Topi" on Ex. 7 might well be calculated to deceive. Upon the whole I have come to the conclusion that the 2 questions I have indicated must be answered in the affirmative. The only question remaining then is whether the appellants have succeeded in satisfying me that they acted without intent to defraud. In the absence of any evidence at all as to how their mark came to be used, it is somewhat difficult to hold, that the appellants have discharged the onus which is upon them. I need not elaborate the sort of evidence which I should have expected to find, but an indication that legal advice had been taken/or careful enquiries made among traders before the mark was displayed would have been of the highest importance. It is perfectly true that no cases of purchasers having been deceived have been proved, but in my view this fact standing alone is insufficient to justify the contention that the appellant firm acted without intent to defraud. The state of mind of the persons responsible on behalf of the appellants firm for the introduction of their trade-mark is a most relevant fact which could have been established by evidence. As I have already stated, no such evidence is before me. Therefore, in all the circumstances I have come to the conclusion that the appellants' firm has not discharged the onus which is upon it

For the reasons I have given I must hold that the conviction by the learned District Magistrate was right. Further it appears to me that no serious criticizm can be directed against the sentence that was passed. The fine of Rs. 800 does not appear to me to be excessive in a case of this kind, where a very large business in the goods in question is done throughout the province. In coming to this conclusion I am fully aware that no attempt was made to show that the appellant firm adopted their trade-mark either for the purpose of deceiving purchasers or for causing damage to the business of the respondents. Believing, however, as I do, that the act of the appellant firm was in fact reasonably calculated to cause persons to be deceived, a somewhat substantial penalty seems to be required. The appeal against both conviction and sentence therefore must be dismissed.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 331

CARR, J.

K. M. Subbaya Naidu—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 221 of 1929, Decided on 3rd April 1929, from order of Dist. Magistrate, Rangoon, in Criminal Regular Trial No 148 of 1928.

Criminal P. C., S. 342 — Under S. 342 after examination of fresh witnesses for Crown and recall and cross-examination of prosecution witnesses, accused should be examined, but violation of provisions of S. 342 is mere irregularity curable under S. 537 if it does not involve prejudice to accused—Criminal P. C., S. 537.

A number of witnesses for the prosecution were examined and then the accused himself was examined. At the next hearing two witnesses for the Crown, who had not previously been examined, were examined and after that a considerable number of the other prosecution witnesses were recalled and cross-examined. Subsequently the defence witnesses were examined but the accused was not examined again and a judgment was passed against him.

Held: that the provisions of S. 342 were not obeyed as that section would require the accused to be re-examined when the prosecution witnesses had been recalled and cross-examined and to be further examined after two fresh Crown witnesses had been examined. [P 332 C 1]

Held further: that such violation if it did not lead to a failure of justice would not vitiate the proceedings and is a mere irregularity which could be cured under S. 537: *A. I. R.* 1922 *Mad.* 512; *A. I. R.* 1923 *Cal.* 196; *A. I. R.* 1923 *Cal.* 668; *A. I. R* 1923 *Cal.* 470; *A. I. R.* 1924 *Cal.* 975, *Diss. from.*; *A. I. R.* 1924 *Lah.* 84; *A. I. R.* 1925 *Pat.* 414; *A. I. R.* 1923 *All.* 81; *A. I. R.* 1925 *Rang.* 258; *A. I. R* 1927 *P. C.* 44, *Rel. on.*; 25 *Mad.* 61 (*P. C.*) and *A.I.R.* 1923 *Mad.* 609 (*F.B.*), *Ref.* [P 333 C 2]

Villa—for Appellant.

Tun Byu—for the Crown.

Judgment.—On or about 20th January 1928, a leaflet headed "Are we dogs" was distributed at various places on the railway line between Rangoon and Mandalay from a passing train and also at Mandalay itself where at that time a meeting of the Hindu Sabha was being held. On 10th March 1928 the Commissioner of Police, Rangoon, under the orders of the Local Government filed a complaint under S. 124-A, Penal Code against the present appellant K. N. Subbaya Naidu, the editor of a newspaper called "The Desopakari" and Chellan Pillay, the Assistant Manager of that paper. At that time the appellant was not to be found and Chellan Pillay alone was tried. He was convicted by the District Magistrate of Rangoon but on appeal was acquitted by this Court on 15th August 1928. On 22nd October 1928 the appellant surrendered himself to the District Magistrate in Rangoon, who then proceeded to try him for the offence and has convicted him and sentenced him to three years' rigorous imprisonment. Against that conviction he appeals.

The petition of appeal is lengthy and verbose. It contains contentions that the District Magistrate had no jurisdiction to try the case and that the leaflet was not seditious and the rest of it may be summed up into the contention that the evidence in the case was not sufficient to prove the publication of the leaflet by the appellant. At the hearing of this appeal Mr. Villa, who appeared for the appellant, has dropped the contention that the District Magistrate had no jurisdiction. I may say also that that contention was really unsustainable. Part of the evidence against the appellant is to the effect that he had this leaflet set up in type in his own press at Rangoon and if that fact is proved, then clearly the District Magistrate of Rangoon could try the case. Other evidence is to the effect that the appellant distributed the leaflet at various stations on the Rangoon Mandalay Line, while he was travelling from Rangoon to Mandalay and if that fact is proved, under S. 183, Criminal P. C., the District Magistrate had jurisdiction. Mr. Villa has also dropped the contention that the leaflet was not seditious. Obviously it was almost seditious and inflammatory composition containing direct incitement to murder every Englishman in Burma, referring, in particular, to the collection of the thathameda tax. Mr. Villa has, however, raised a further contention of law that the trial is invalid by reason of the District Magistrate's failure to observe the provisions of S. 342, Criminal P. C.

The facts relevant to this contention are that up to 28th November 1928, 25 witnesses for the prosecution had been examined. The accused himself was then examined. His examination was very brief; but he said at its close that he had prepared a statement which would be translated and filed in Court. He did in fact put in a lengthy statement occupying four pages of type. This is dated

14th December 1928. When it was actually filed, does not appear on the record ; but it seems probable that it was filed on 17th December, which was the date of the next hearing after 28th November. Probably it was put in at the beginning of that hearing. At that hearing two witnesses for the Crown, who had not previously been examined, were examined and after that a considerable number of the other prosecution witnesses were recalled and cross-examined on 17th and 18th December. On 8th January 1929, the defence witnesses were examined and finally judgment was passed on 4th February 1929. After his examination on 28th November the appellant was not examined. There can be no doubt that here the District Magistrate did disobey the provisions of S. 342 of the Code. That section lays down that the Court shall examine the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. I have no doubt that this, applied to the present case, would require the accused to be re-examined when the prosecution witnesses had been recalled and cross-examined after he was finally charged and there is equally no doubt that, after two fresh prosecution witnesses had been examined after the framing of the charge, the section requires that the accused should be further examined.

The question is whether this is merely an irregularity which, if no prejudice has been caused thereby to the accused, is curable under S. 537 of the Code or whether it is an illegality which vitiates the trial altogether. Before discussing this question fully, I would say that in my opinion the irregularity or illegality whichever it may be has not in any way prejudiced the appellant. The evidence of the two additional witnesses called after his examination though relevant added nothing of any very material importance to the case as it stood before that ; nor did there emerge from the cross-examination of the other prosecution witnesses anything which required further explanation by the accused.

On the question now to be decided, there is a very considerable difference of opinion among the High Courts in India. In the case of *Re, Maruda Muthu Vannian* (1), a Bench of the Madras High Court held that the failure to examine an accused person after the prosecution witnesses had been recalled and cross-examined after the framing of the charge was not a mere irregularity curable under S. 537 but an illegality which vitiated the trial. This case, however, was overruled in part at any rate by *Varisai Rowther* v. *Emperor* (2), in which four out of the Full Bench of five Judges held that when an accused person had once been examined after the prosecution had finished calling evidence it was not obligatory on the Court to question him again after the cross-examination and re-examination of the prosecution witnesses recalled at the instance of the accused under S. 256 of the Code. The Full Bench further held that, if the prosecution called fresh evidence after the charge was framed, the accused must be questioned generally on the case after this further examination of the prosecution witnesses. The Calcutta High Court has in several cases taken the view set out in *In re, Maruda Muthu Vannian* (1). These cases are *Mazahar Ali* v. *Emperor* (3); *Jummon Christian* v. *Emperor* (4); *Pramatha Nath Mukerjee* v. *Emperor* (5) and *Legal Remembrancer, Bengal* v. *Satish Chandra Roy* (6).

On the other hand in *Byrne* v. *Emperor* (7), one Judge of the Lahore High Court held that when the witnesses for the prosecution had been examined and cross-examined at considerable length before the framing of the charge and the accused had at that stage been examined, the failure to re-examine the accused after the further cross-examination of the witnesses after the framing of the charge was a mere irregularity and no ground for setting aside the findings of the trial Court unless it had occasioned a failure of justice. A considerably stronger case than this is *Mohiuddin* v. *Emperor* (8), in which a Bench of the Patna High Court held :

"In every case in which the legality of a trial is challenged on the ground that the provisions of S. 342, Criminal P. C., 1898, have not been complied with, the test is whether there has been prejudice to the accused by reason of the absence of judicial questions

(1) A.I.R. 1922 Mad. 512=45 Mad. 820.

(2) A. I. R. 1923 Mad. 609=46 Mad. 449 (F.B.).

(3) A. I. R. 1923 Cal. 196=50 Cal. 223.

(4) A. I. R. 1923 Cal. 668=50 Cal. 308.

(5) A. I. R. 1923 Cal. 470=50 Cal. 518.

(6) A. I. R. 1924 Cal. 975=51 Cal. 924.

(7) A. I. R. 1924 Lah. 84=4 Lah. 61.

(8) A. I. R. 1925 Pat. 414=4 Pat. 488.

and whether the defect is cured by S. 537 of the Code."

Another case is *Emperor* v. *Bechu Chaube* (9), which was before one Judge of the Allahabad High Court. In that case a fresh witness for the prosecution had been examined after the cross-examination of the accused, who was not further examined on his evidence. That witness, however, did not add materially to the evidence which had been already given for the prosecution and which the accused had an opportunity of explaining. It was held that, though there was an error, it did not in the circumstances vitiate the proceedings. This case was followed by my learned brother Brown in *Nga Hla U* v. *Emperor* (10). In that case no fresh witnesses for the prosecution had been examined after the examination of the accused and the question before the Court was whether the failure to examine the accused further after the prosecution witnesses previously examined had been recalled and cross-examined was a mere irregularity or illegality which vitiated the trial, it was held that it was a mere irregularity.

Considering the judgments in the cases above-mentioned it seems to me that the Calcutta and Madras High Courts have taken a very highly technical view of the question while the other High Courts have dealt with it in relation to the merits of the cases before them. The view that the omission again to examine the accused is an irregularity curable under S. 537, Criminal P. C., and not an illegality which vitiates the trial in my opinion, receives very considerable support from the judgment of their Lordships of the Privy Council in *Abdul Rahman* v. *Emperor* (11). The question before their Lordships in that case was the effect of a failure properly to carry out the provisions of S. 360, Criminal P. C., in regard to the reading over to witnesses of their depositions. Their Lordships drew a distinction between that question and the question which arose in *Subrahmania Ayyar* v. *Emperor* (12), where the procedure adopted was one which the Code positively prohibited. The concluding paragraph in their Lordships' judgment runs as follows :

"To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccomponied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which on their Lordships' view, may be supported by the curative provisions of Ss. 535 and 537. Their Lordships will humbly advise His Majesty that this appeal should be dismissed."

These remarks, in my opinion, apply with equal force to the undoubted error which has occurred in this case, and in my view they render strong support to the view taken by my learned brother Brown in the case above mentioned. As I have already said that the omission which occurred in this case has not in any way prejudiced the appellant nor was there anything about it which could lead to a failure of justice being occasioned by it, I hold that the District Magistrate's error does not vitiate the proceedings and is a mere irregularity which is cured by the provisions of S. 537, Criminal P. C. (His Lordship then discussed evidence as regards emanation of the leaflet and of its distribution on the Railway line and at Mandalay and proceeded). His defence is of little or of no value and is certainly not sufficient to rebut the prosecution case, if that is believed. After a careful consideration of the evidence I think that although the case was not in some respects as well handled as it might have been, the District Magistrate was right in holding the guilt of the appellant to be true. The appeal is therefore dismissed.

P.N./R.K. *Appeal dismissed.*

(9) A. I. R. 1923 All. 81=45 All. 124.
(10) A. I. R. 1925 Rang. 248=3 Rang. 139.
(11) A. I. R. 1927 P. C. 44=5 Rang. 53=54 I. A. 96 (P.C.).
(12) [1902] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P.C.).

A. I. R. 1929 Rangoon 333

HEALD AND MYA BU, JJ.

P. L. T. A. R. Chettyar Firm — Appellant.

v.

Maung Kyaing and *another*—Respondents.

Letters Patent Appeal No. 108 of 1928, Decided on 18th February 1929, from judgment of High Court, reported in *A. I. R.* 1929 *Rang.* 17.

Transfer of Property Act, S. 41—*K*, lessee of Government land, transferring lease to *N* by registered deed—*N* not getting his name entered in rolls as transferee and not taking steps to obtain possession and further allowing document of lease to remain in *K's* possession—*N* acts negligently and *K's* position as ostensible owner must be implied.

from his neglect and it being *N's* duty to see to mutation of names he cannot throw blame on registering or revenue officers—*K* then surrendering lease of land to Government and instead receiving new leases of house sites into which part of land covered by original lease was divided and transferring lease of one of house sites to *M*—In suit brought by *N* on the strength of transfer of original lease for possession of house site, if *M* looks merely at lease issued by Government and at his transferrer's possession of land, he is entitled to rights under S. 41—Lower Burma Town and Village Lands Act, Ss. 29 and 34.

Where *K*, lessee of Government land, transferred the lease to *N* by registered deed but where *N* did not apply to get his name entered in the rolls as transferee, and did not also take steps to obtain possession of the land and further allowed the documsnt of lease to remain in possession of *K*, *N* acts negligently and his consent to *K's* position as ostensible owner must be implied from his acquiescence and failure to take reasonable precautions and as it is the transferee's business to see to the mutations of names he cannot shift the responsibility on to the registering or the revenue officers and where *K* surrendered the land to Government as it wanted to divide it into house sites and laying out roads and received instead new lease for house sites into which part of land covered by the original lease was divided and where *K* transferred the lease of one of the house sites by registered deed to *M* who got his name entered in the rolls as transferee and where *N* sued *M* for possession of the house site on the strength of the transfer of the original lease, such transferee, if he looks merely at the lease issued by the Government and at his transferer's possession of the land, is not guilty of any default as would deprive him of the rights given by S. 41: *A. I. R.* 1929 *Rang.* 17, *Confirmed*
[P 335 C 1, 2]

Clark—for Appellant.

Kya Gaing—for Respondents.

Judgment.—This is an appeal from the judgment of a single Judge of this Court in Second Appeal No. 722 of 1927, the Judge who passed the judgment having declared that the case is a fit one for appeal under the provisions of Cl. 13, Letters Patent, constituting this Court. The short facts are as follows:

One Ma Gun held from Government a lease of a holding of town land in Pegu town and transferred her lease of that land to the present appellants by registered deed but appellants never took any steps to have their names entered in the roll of town lands as transferees of the lease, which remained in the rolls in the name of Ma Gun. Appellants then transferred the lease to one Ma Thein Yin and Ma Thein Yin got her name entered in the rolls as transferee of the lease. In the year 1923 Ma Thein Yin transferred the lease back to appellants by registered deed but appellants did not obtain possession of the document of lease and did not get their names entered in the rolls as transferees. Subsequently Government decided to divide the lands in that part of the town into house sites and to lay out roads, and Ma Thein Yin, as being the registered lessee, was approached and agreed to surrender the lease and to receive instead new leases for eight separate house sites into which part of the land covered by the original lease was divided, the remainder of that land being reserved by Government for roads. Ma Thein Yin then transferred the lease of one of the house sites to the present respondents, Maung Kyaing and Ma Mya Kin, by registered deed, and respondents got their names entered in the rolls as transferees of the lease. Appellants on the strength of the transfer of the original lease by Ma Thein Yin to them sued respondents for possession of the house site.

This Court found that appellants were estopped from asserting their title to the lease in favour of respondents because they failed to obtain the original lease from Ma Thein Yin or to get their names entered in the town lands rolls as transferees of that lease, and because they stood by and allowed respondents to build a house on the land when they had notice that a lease in derogation from their rights had been made by Government and had been transferred to respondents. *Mg. Kyaing* v. *P. L. T. A. R. Chettyar Firm* (1).

Appellants appeal from that decision on grounds that respondents were negligent in failing to enquire into Ma Thein Yin's title, that in view of that failure respondents could not be in the position of bona fide transferees for consideration without notice from an ostensible owner, that there was no estoppel against them, that respondents had notice, actual or constructive, of their title, that if respondents had made proper enquiry they would have found that the land covered by the lease transferred to them formed part of the land covered by the earlier lease which was in Ma Thein Yin's name and that they ought to have enquired how Ma Thein Yin came to obtain the subsequent leases of the house sites, that

(1) A. I. R. 1929 Rang. 17=6 Rang. 643

Ma Thein Yin was not in fact an ostensible owner of the property and that the fact that Ma Thein Yin was entered in the rolls as lessee of the lands was not due to their negligence.

It is clear that if respondents had enquired they would have found that the lease which Ma Thein Yin transferred to them was a lease recently made by Government to Ma Thein Yin, and that if they had gone further they would have found that Ma Thein Yin was the registered lessee under the original lease which covered those lands. There can, in our opinion, be no doubt that Ma Thein Yin was an "ostensible owner" of the property, but appellants' main contention is that she was not an ostensible owner with their consent, express or implied, or by reason of any default on their part. They say that the default was on the part of the registering officer or the revenue officer in charge of town lands because under S. 29, Town Lands Act, it was the duty of the registering officer who registered the transfer of the lease by Ma Thein Yin to them to send to the revenue officer a true copy of the entries in the indexes of the registration registers relating to the transfer. It is true that there was probably some default on the part of the registering officer or the revenue officer, but the fact remains that appellants have allowed the lands to remain in Ma Thein Yin's name since 1923. They could have applied at any time for mutation of names and the Act contains provision in S. 34 for such mutation. Further in addition to allowing the lands to stand in Ma Thein Yin's name, they allowed the title deed in the shape of the document of lease to remain in Ma Thein Yin's possession and they allowed Ma Thein Yin to remain in occupation of the land. It seems clear therefore that Ma Thein Yin was ostensible owner of the property by reason of their neglect to take the ordinary precautions which a transferee of a lease of town lands ought to take and that their consent to Ma Thein Yin's position as ostensible owner must be implied from their acquiescence and from their failure to take reasonable precautions.

We are not satisfied that in the circumstances of this particular case where the land had recently been laid out into house sites by Government and leases had been issued by Government it would be reasonable to expect a transferee of one of the leases so issued to look beyond the lease itself, and in a case like the present, where if he had made further enquiries, he would have found that his transferrer who was in possession of the property at the time of the transfer, had prior to the issue of the lease transferred been in possession of the property under an earlier lease, that his transferee was the registered lessee under that earlier lease and that she had actually remained in possession of the document evidencing that earlier lease until the issue of the new leases, the transferee who looked merely at the lease recently issued by Government and at his transferrer's possession of the land was guilty of any default such as would deprive him of the rights given by S. 41, T. P. Act. We therefore see no reason to interfere and we dismiss the appeal with costs, advocate's fee for this appeal to be ten gold mohurs.

P.N./R.K. *Appeal dismissed*

A. I. R 1929 Rangoon 335

BROWN AND CHARI, JJ.

Tafuzzal Ahmad—Appellant.

v.

Maung Shwe Kyi and *others*—Respondents.

First Appeal No. 14 of 1929, Decided on 26th July 1929, from decree of Addl. Dist. Judge, Tavoy, in Civil Reg. Suit No. 6 of 1928.

(a) Buddhist Law (Burmese)—*N* few days before his death telling his children by first wife to give *K* his second wife certain property in lieu of her share—*K* consenting to this and accepting it few days after *N's* death—Property little more than nominal consideration—No specific performance of such contract can be ordered and doctrine of part performance also is inapplicable and *K* is not bound by such contract—Part performance—Specific Relief Act S. 28—Contract Act S. 4.

N, 9 or 10 days before his death told his children by first wife to give certain property to her second wife *K* in lieu of her share in the estate. *K* expressed her consent to this and accepted the property from the children 2 or 3 days after *N's* death allowing it to be understood that she would not make any further claim to the estate. The property that *K* received was a little more than a nominal consideration having regard to her share in the estate. The children relied on the release and contended that *K* was not entitled to claim anything.

Held: that K's consent to the contract was largely influenced by her disturbed state of mind and could hardly be called free consent.

Held further: that the contract was so inequitable that no Court would pass a decree for specific performance thereof in favour of children, nor could the doctrine of part performance or any of the equities arising therefrom could be applied in their favour and K could not be bound by the contract. [P 337 C 1]

(b) Family arrangement—Agreement as to division of family property—Heir giving up his undoubted rights to it without consideration and without professional advice—No fraud or undue-influence—Still agreement can be set aside.

An agreement as to division of the family property can be set aside where the heir gives up property to which he had undoubted rights without consideration or where he was ignorant or without professional assistance, even though there was no evidence of fraud or undue influence: *A. I. R.* 1924 *Pat.* 49, *Foll.* [P 338 C 1]

Thein Maung—for Appellant.
Maung Kun—for Respondents.

Judgment.—The appellant Tafuzzal Ahmed filed a suit against the respondents for partition of the estate of one U Su Tha (deceased). U Su Tha first married one Ma Tun, and the respondents are his children and grandchildren by her. After her death he married Ma Po, with whom he lived as husband and wife for some 9 or 10 years. U Su Tha died in about September 1927. The appellant claims that since U Su Tha's death Ma Po has sold to him by registered deed her share in the estate. He claims that she has never yet been given her share and sues the other heirs for partition. The defendants do not admit the validity of the transfer by Ma Po to the appellant, and they claim further that Ma Po was given and accepted certain property in full satisfaction of all her claim against the estate, and that she is not therefore any longer entitled to claim anything. It appears that about 9 or 10 days before his death when he knew that he was about to die, U Su Tha called together his children and his wife, and a number of elders. He then stated in the presence of the elders that he was going to give his wife Ma Po Rs. 200, 50 baskets of paddy, ten annas weight of gold and a piece of garden, and that if Ma Po agreed to take this, it would be understood that she would have no more interest in the remaining estate. To this it is said, that Ma Po agreed. The defendants go on to say that after U Su Tha's death, they made over the property to her in accordance with the directions of the deceased, and that she accepted in full satisfaction of her claim. Ma Po admits that U Su Tha spoke about her getting this property, before his death, but she denies that she agreed to accept it. She does not admit accepting the properties after his death.

As to what took place, before the death of U Su Tha, the defendants have established their case satisfactorily. Not only the two defendants Maung Shwe Yi and Maung Shwe Kyi give evidence on this point, but they are corroborated by independent witnesses Maung Dwe, Kya Yan, and Aung Tun. We see no reason for not accepting the evidence of these witnesses. There is no rebutting evidence on the point, except that of Ma Po herself. As to what took place after U Su Tha's death, Maung Dwe, Kya Yan, Aung Tun, Shwe Thi, and Po Mya all give evidence as well as two defendants Shwe Yi and Shwe Kyi. U Dwe says that two days after the death, Shwe Yi and Shwe Kyi called him to the house and he went there, and in his presence Ma Po was given Rs. 200, 50 baskets of paddy, and as. 10 weight of gold. Four days later Shwe Kyi gave Rs. 8 to Ma Po in lieu of 50 baskets of paddy. He says that Po Mya asked Ma Po whether she had received all the property arranged to be given her by U Su Tha before his death, and she admitted that she had received the same. Kya Yan gives similar evidence. Aung Tun deposes to Ma Po admitting having received the property. U Shwe Thi says that at the feeding of the Phongyi after the death of U Su Tha, Shwe Yi asked Ma Po whether she would abide by the direction of his father, and she agreed. He did not see the actual payment. Po Mya also says that Ma Po told Shwe Yi she would abide by the directions of his father, and that Shwe Yi on being asked mentioned what the property was. Po Mya, however, contradicts U Dwe's statement that he, Po Mya, questioned Ma Po as to whether she had received the property and was told by her that she did.

We think that this evidence sufficiently shows that Ma Po did accept the property after U Shwe Tha's death. The appellant values the estate at considerably over Rs. 10,000. The defendants claim

* A. I. R. 1929 Rangoon 345

CARR, J.

A. M. Malumiar & Co.—Appellants.

v.

Finlay Fleming & Co.—Respondents.

Criminal Appeal No. 163 of 1928, Decided on 6th February 1929, from order of Western Sub-Divl. Magistrate, Rangoon, in Criminal Regular Trial No. 442 of 1927.

*** (a) Penal Code, S. 482—Test for determining infringement of trade-mark — No person shown to be misled—Prominent and substantial portion of both marks not same —Trade-marks called by same name by same only—No offence held to be committed.**

The proper test in case of an infringement of a trade-mark is whether the "get up" of the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiff's "get up" but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed and the Court must also have regard to the class of purchaser by whom the goods would normally be bought: 8 *L. B. R.* 561, *Rel. on.* [P 351 C 1]

In a prosecution under S. 482, looking at the two marks together, it could be most emphatically said not only that no person seeing the two side by side would confuse the one with the other, but also that no person, who had seen one of the marks and retained the slightest recollection of what it looked like, could by any possibility mistake the other for it, nor was it suggested that there was anything in the appearance of the two marks to lead to confusion. There was no evidence to show that any person had in fact been deceived and had been led to purchase the goods of the accused believing them to be the merchandise of the complainant. Any prominent and substantial part of the complainant's trade-mark did not appear as a prominent and substantial part of the accused's trade-mark. The evidence though perhaps sufficient to show that some people may call the accused's trade-mark by the same name as that of the complainant, was not sufficient to show that every one wonld do so nor that the mark of accused must inevitably lead to the attribution to their goods the same name as that of the complainant's.

Held: that the complainants had not made out a good case for protection and the accused must be acquitted: (*English Cases, Referred*). [P 349 C 2]

(b) Penal Code, S. 482—Intent to defraud is necessary ingredient—Intention is presumed when trade-mark false—Burden of proving absence of intention is upon accused—Burden whether discharged depends upon consideration of whole evidence.

On the wording of S. 482 an intent to defraud is an ingredient of the offence, but, when it has been proved that a trade-mark is a false trade-mark, then, it is to be presumed that the accused person had that intent unless and until he rebuts the presumption when the accused person is entitled to an acquittal. The burden of proving the absence of such intent is upon the accused, but the question whether that burden has been discharged must be answered on a consideration of the whole of the evidence in the case: *A. I. R.* 1929 *Rang.* 322, *Diss. from.* [P 351 C 2]

Patker—for Appellants.

McDonnell—for Respondents.

Judgment.—The appellant has been convicted under S. 482, I. P. C. of using a false trade-mark, and has been fined Rs. 750. Before dealing with the facts of the present case, I think it is desirable to refer to an earlier case in which the Manager of R. E. Mohammad Kassim & Co., was convicted under the same section by the District Magistrate of Rangoon on the complaint of The Trading Co., (late Hegt & Co.). The conviction in that case was upheld by Otter, J., in *Pakir Mahomed* v. *Emperor* (1).

In that case the complainants had for many years been using a trade-mark on blankets, consisting of a crown enclosed in a double oval. The accused had recently put on the market blankets of a somewhat similar kind bearing a trade-mark representing a Fez. The original trade-marks are not now to be found on the trial record of that case, but have been shown to me by Mr. McDonnell who appeared for the complainants both in that case and in this. There was to my mind a fair degree of similarity in the get up of the marks in that case. Both were in black: in both cases the central device was enclosed in a double oval, and the only essential difference was in the device itself.

It was found, on the evidence in that case, that Hegt & Co.'s mark, which was, in fact, a Crown, was known in the market in Hindustani as the "topee" mark, and in Burmese as the "oktok" mark. The natural consequence of the introduction of the accused's mark would be that it would be called by its proper name, that is, in Hindustani "topee," and in Burmese "oktok." The trying Magistrate came to the conclusion that the result of this was that the accused's mark was reasonably calculated to cause it to be believed that the accused's blankets were, in fact, the merchandise of Hegt & Co.

(1) A. I. R. 1929 Rang. 322=1929 Cr. C. 498.

Coming now to the present case, it is desirable to look first at the two marks in question. In this case the merchandise dealt in by both parties is cotton longyis of a cheap quality. Those of the complainants are machine woven and those of the accused are hand woven. There are certain external similarities between the two marks now in question. Both are rectangular in shape: both have a margin round the inner rectangle in which there is lettering, and both represent articles which are, or may be, worn on the head. There, so far as I can see, the resemblance ceases.

The complainant's mark is one of the class of highly coloured and glazed trade-marks which are very common. It has an outer margin of pink. The inner margin has decorations at the corners. The lettering in it is black. At the top and bottom are the name of the firm. "Finlay, Fleming & Co.," and the word "Rangoon." On one side there is black lettering in Burmese and on other side there is black lettering in what I take to be Urdu and Chinese. The inner rectangle has floral decorations at the corners. Its ground work is dark red on which is represented a "fez" in gold. On the side of the "fez" are a star and crescent in white.

The appellant's mark is very dissimilar. It has no ground colour at all,. The lettering in the margin between the inner and outer rectangles is in red and is all in English. It merely gives the name of the firm with the word "Rangoon" at the bottom. On the right-hand side is the address of the firm "312-13 S.B. Bazaar;". and on the left the words "best quality." In the centre is a neat representation of a Crown in gold, with straight lines radiating from the lower half of it. There are two stars in the body of the Crown, which is surmounted by a similar third star.

It has not throughout the case been suggested that the presence of a star or stars in each of the two marks gives any cause for complaint. I may add, although the "fez" in the one case and the "Crown" in the other are both represented in gold, yet, the gold in the two cases is very different in appearance, Looking at the two marks together, it can be most emphatically said not only that no person seeing the two side by side would confuse the one with the other, but also that no person, who had seen one of the marks and retained the slightest recollection of what it looked like, could by any possibility mistake the other one for it. It has not, in fact, been suggested that there is anything in the appearance of the two marks to lead to confusion.

The complainant's case is that his mark is known as the "topee" or "oktok" mark, and that the appellant's mark, although it does not, in fact, represent either a "topee" or an "oktok," is likely to be known by those names in the market, and has, in fact, become known by those marks. The prosecution is, in fact, based on *R. E. Mohammad Kassim's* case (1), which I have alread mentioned. Coming now to the evidence, I will first say what evidence there is not.

There is the evidence of Mr. Forrester of the complainant firm that his firm has been using his mark not only on these quality longyis but on piecegoods generally for a long period of years. He does not know, in fact, when the accused's mark was first introduced into the market. He does not himself say nor does any other witness, that the complainant's longyis sold under this mark have attained any considerable reputation for quality; nor is there any evidence that the use of the appellant's mark on longyis has led to any decrease in the complainant's business. There is no evidence, indeed, no attempt to produce evidence, to show that any person has, in fact, been deceived, and has been led to purchase the appellant's longyis believing them to be the merchandise of the complainant. The complainant examined altogether seventeen witnesses, the main effect of whose evidence is that, in the case of Hegt & Co.'s "Crown" mark on blankets and one or two other marks, the marks are, in fact, known by dealers in the bazaar as the "topee" or "oktok" mark.

There is also a certain amount of evidence that the accused's mark is also known by those names. Perhaps witness 8, Maung Po Thaw, may be referred to in a little more detail. He says that once the witness, Moosa, came to him with the witness, Sultan Sahib, and asked if he had any longyis with the "oktok tazeik," He had some with the appellant's mark (Ex. 1), and showed these longyis to them. He is supported

in this by Moosa but not by Sultan Sahib, who says nothing on this subject at all, and it is to be noted that Moosa is the Bazaar Clerk of the complainant firm and has admittedlly been seeking for evidence for them in this case. Maung Po Thaw himself says that, if people asked for "taraphu" (that is the correct Burmese word for "Crown"), he would show them Ex. 1, but he adds that no one has asked for it. He says also that, if people asked for the "oktok" mark, he would show Ex. 1, also. He does not now sell the complainant's goods, but formerly he used to do so and, if, when he was doing so, anyone had asked for the "oktok" mark, he would have shown them the complainant's longyis and not the appellant's. In other words, not stocking what is properly known as the "oktok" mark, he would show them longyis bearing the "Crown" mark, which he actually had in stock. That, I think, is what one would expect any shop-keeper to do. Not having what the customer asked for, he would naturally try to get the customer to buy what he had. The witness, however, does not give any concrete case in which he showed the appellant's longyis to a customer except that of Moosa.

For the defence there are some fifteen witnesses, most of whom are dealers in different kinds of goods which are sold with a trade-mark depicting a Crown.

The first witness speaks of woollen goods, others of ready made shirts, of voile, of face powder, of aluminium goods, of nails and corrugated iron, of soap, of butter, of lace and of cloth, all sold with "Crown" trade marks. They say that these marks are known in Hindustani as "taj" and in Burmese as "taraphu," and in one or two cases that occasionally the marks might be referred to by the words "topee" or "oktok."

Defence witness 6 is a Chinese trader of Thaton. He says that he sells longyis with both the complainant's and the appellant's mark, and that the complainant's mark is known in Burmese as "oktok" and in Hindustani as "topee," while the appellant's mark is called "taraphu" by Burmese customers and "taj" by Indian customers. Witness 8, Ba O, is a trader at Moulmeingyun, who sells longyis with the appellant's marks. This witness perhaps is not very reliable.

Witness 9, Maung Ba Tin, is also a trader at Moulmeingyun. He says that he sells longyis with the mark Ex. 1, which is known as "taraphu" mark. The total effect of the evidence seems to me to be that, although the appellant's mark would properly be known in Hindustani as the "taj" mark and in Burmese as the "Taraphu," there are some people who would refer to it as, in Hindustani the "topee" mark and and in Burmese the "oktok" mark. But I think that the defence does succeed in showing that there are very many "Crown" marks in use, which are generally called by their proper name.

The whole question is whether, on this evidence, it can be held that the use of the appellant's mark is reasonably calculated to cause it to be believed that his goods are, in fact, the merchandise of the complainant's : and, in view of the extreme difference between the two marks, as already described this question if it is to be answered in the affirmative, can be so answered only on the finding that purchasers are likely to be deceived by the mark being though quite incorrectly, referred to by the same name name as the complainant's mark. I have been referred to a very large number of reported cases, all of which I have examined, but I do not propose to refer to all of them. I think we can at once rule out of consideration all cases in which it was held that there was such similarity between the two marks that purchasers would reasonably be deceived.

The first case quoted, and the one on which the complainants mostly rely, is the case of *Seixo* v. *Provezende* (2). In view of the fact that such great reliance is placed on this case, I think it desirable to give somewhat lengthy extracts from it. In his judgment the Lord Chancellor, Lord Cranworth, said : (pp. 196-197).

"It is obvious that, in these cases, questions of considerable nicety may arise as to whether the mark adopted by one trader is or is not the same as that previously used by another trader complaining of its illegal use, and it is hardly necessary to say that in order to entitle a party to relief, it is by

(2) [1866] 1 Ch. 192=14 W. R. 357=14 L. T. 314=12 Jur. (n. s.) 215.

no means necessary that there should be absolute identity. What degree of resemblance is necessary from the nature of things is a matter incapable of definition a priori. All that Courts of Justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use.

If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used, become known in the market by a particular name I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device. It is mainly on this ground that I have come to the conclusion that the decision of the Vice-Chancellor in the present case was correct.

Ever since the year 1848, the plaintiff Baron Seixo, had caused his casks to be stamped with his coronet and the word "seixo," and the evidence shows that his wines had thus acquired in the market the name of "Crown Seixo wine." When, therefore, the defendants, in the year 1862, adopted as their device a coronet, with the words "Seixo de Cima", meaning 'Upper Seixo,' below it, the consequence was almost inevitable that persons with only the ordinary knowledge of the usages of the wine trade from Oporto would suppose that, in purchasing a cask of wine so marked, they were purchasing what was generally known in the market as 'Crown Seixo wine.' The present case is thus brought distinctly within the principle on which all these cases rest. The plaintiff had adopted a device or trade-mark which had caused his wines to obtain celebrity under a name descriptive of that trade-mark. The defendants have adopted a trade-mark which could not fail to lead purchasers to attribute to the wines so marked the same name as that under which the plaintiff's wines were known, and so to believe that in purchasing them they would be purchasing the wines of the plaintiff. Against the use of such a trade-mark the plaintiff has, I think, a right to have the injunction of this Court."

The parts of this judgment that are mainly relied upon are where the Lord Chancellor said :

"I do not consider the actual physical resemblance of the two marks to be the sole uestion for consideration,"

and where in the next following sentence he said :

" * * * that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device * * *."

I wish to lay stress on these two sentences and on the words "sole" and "may be." It is quite obvious that the Lord Chancellor did not go so far as to lay down the proposition that the physical resemblance between the two marks was not to be taken into consideration at all, nor did he lay down the proposition that the fact that one mark might in the market be known under the same name as another necessarily was a violation of the rights of the owner of the first mark. It seems to me quite clear that there is a very great distinction between that case and the one now before me. The whole of that case, as reported in the judgment, really turned on the use of the word "seixo," which had been used by the plaintiff for many years as descriptive of his wines and apparently had not, in England at any rate, been used as descriptive of anyone else's wines until the defendant used it for his. That, of course, was not an English word and, therefore, not in common use, and I think that it would be an unwarrantable extension of the principle laid down in this judgment to apply it to the use of names of common articles, such as hats, or of articles which, in pictorial representation at any rate, are exceedingly common, such as "Crowns."

I wish also to quote the concluding portion of the Lord Chancellor's judgment (pp. 198-199) :

"The defendants rested their argument in part on the case of *Leather Cloth Co.* v. *American Leather Cloth Co.* (3), But the facts of that case bear no resemblance to the present. There, both parties, plaintiffs and defendants, were manufacturing and dealing in the same article, known in the market as American Leather Cloth ; neither party had an exclusive right to that name, and the plaintiffs had not acquired any particular name for their American Cloth, unless indeed the name of Crockett & Co., the persons from whom they had purchased their business, could be so considered. But no one, looking at the defendants' trade-mark, could be led to suppose he was purchasing goods from what was originally Crockett's manufactory. Unless a purchaser could be deceived by the similarity of the

(3) [1865] 11 H.L.C. 523=11 Jur. (n.s.) 513=6 N.R. 209=13 W.R. 873=35 L.J. Ch. 53=12 L.T. 742.

that this is an overvaluation, but the defendant Shwe Yi admits in his cross-examination that according to their estimate the whole estate is worth nearly Rs. 10,000. He further admits that the property received by Ma Po would be worth Rs. 300 to 400 only. The appellant claims that some of the property of the estate was the lettetpwa property of Ma Po and the deceased. The defendants dispute this, except as to a comparatively insignificant portion of the property. Assuming that the whole of the estate was the atetpwa property of Su Tha, Ma Po's quarter share in that property would still amount on Shwe Yi's admission to about Rs. 2,500. It is quite clear therefore, that what Ma Po got bears no relation whatsoever to what she as an heir was entitled to get under Buddhist Law, and this fact is admitted by the defendants. Maung Shwe Kyi says :

"I never enquired to find out the share of Ma Po in the estate of my father. I myself do not know what that share is" and Shwe Yi says "I do not know what share Ma Po is entitled to legally. I have never tried to enquire. We never consulted with the elders as to the value of the estate in giving Ma Po as directed by our father, but our father consulted with the Phongyis and the elders and then made his directions, and Ma Po agreed."

And of the elders called, U Dwe says :

"I do not know why Ma Po was given only this paltry share in the large estate."

In these circumstances, very clear evidence is required to establish the fact that Ma Po did definitely of her own free will agree to accept this property in lieu of all her claims as an heir. Gwan Shein, a witness for the defence, does say that after U Su Tha's death Shwe Yi and Shwe Kyi asked her whether she would abide by the decision of their father about the property and she replied that she would agree and that she was quite satisfied and would not claim any more of the estate. He adds that at the same time she said that she had received the property. There is no obvious reason for disbelieving this witness and we may perhaps accept it as proved that she did make some such statement, but this occurred only within a few days of her husband's death We think we can safely assume that her consent to U Su Tha's request in his illness was largely influenced by her desire not to disturb him in his last moments and two or three days after his death she would still be so affected by his death that an assent to this death-bed request of his can hardly be treated as a free consent. We hold it proved that Ma Po did express her consent to Su Tha himself before his death and that after his death she did accept the property specified by him and did then allow it to be understood that she would not make any further claim to the estate. But can it be said that on these findings of facts she forfeited all her rights to the estate? A partition of a family estate amongst the heirs can be made orally and does not require any document to make it valid, but it is impossible to hold that the transaction the defendants rely on in this case was a partition of the estate. It was quite clearly not a partition. It was quite clear that no one had in mind at all the extent of Ma Po's claim as an heir. It is quite clear that all they wished to do was to carry out the desire of U Su Tha expressed before his death that Ma Po should give up her claim as an heir altogether on receiving what was little more than a nominal consideration. It is true that family arrangements for the distribution of ancestral property can be and often are validly made. In the judgment in the case of *Ram Bahadur Sen* v. *Ganesh Bhagat* (1) the following passage occurs :

"Halsbury's Laws of England Vol. 19, p. 542 in dealing with what family arrangements can and cannot be supported, points out that an agreement dividing up family property, though entered into under a misapprehension of the legal rights of the parties, provided such misapprehension is not induced by any party to the agreement is entitled to support even where the fact that misapprehension existed has been established by subsequent legal decision. On the other hand at page 54, he points out that an agreement as to division of the property can be set aside where the heir gives up property to which he had undoubted rights without consideration or where he was ignorant or without professional assistance ; even though there was no evidence of fraud or undue influence."

It is doubtful whether in the present case it can be held that there was any real family arrangement. As we have said Ma Po did not partition the estate with the children, she waived her claim as an heir for what was practically a nominal sum, and if this could be called a family arrangement at all, she gave up undoubted rights for entirely inadequate consideration and without any professional assistance. Ma Po as an heir was entitled to a substantial share in landed property, admittedly worth some Rs.

(1) A.I.R. 1924 Pat. 49=2 Pat. 554.

10,000. Under the provisions of the Transfer of Property Act she could not transfer this property by way of sale or gift save by a registered deed. It is impossible, in our opinion, to hold that there was any partition of the estate between her and the other heirs, and the release given by Ma Po on which the respondents rely is in fact a transfer by sale or by way of gift. There was no deed drawn up and therefore the transfer was invalid, and her title to her share in the estate still vests in Ma Po. Nor is this a case where the doctrine of part performance or any of the equities arising therefrom can be applied in favour of the defendants. It may be that Ma Po did enter into a contract to make over her share in the estate but it is quite clearly a contract of so inequitable a nature that no Court would pass a decree for specific performance thereof in favour of the defendants. We are therefore of opinion that Ma Po was not bound by this contract and that she retained her rights as an heir to the estate. We see no reason to doubt that she has transferred her rights to the plaintiff. A registered deed has been produced and she as well as the plaintiff have deposed to the signing of the document. The document is curiously worded. In the recital it shows that she is entitled to a one-seventh share in the estate, but from the operative part of the document it is clear that what she intended to sell was her whole share in the estate, whatever that might be. We are therefore of opinion that the appellant did establish his claim to partition, to the estate and the possession of Ma Po's share after allowing for what she was given after her husband's death.

Ma Po's share admittedly was one-fourth of the payin property of U Su Tha and a five-sixth share of lettetpwa property of her marriage with him. We allow the appeal, set aside the decree of the trial Court, and pass a preliminary decree declaring that the appellant is entitled to Ma Po's share in the estate after deducting what she has already received and directing that a final decree for partition be passed after such further enquiry as may be necessary. The respondents will pay the costs of the appeal. Costs in the trial Court will follow the final result.

P.N./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 338

HEALD, OFFG. C.J., AND CHARI, J.

Ko Maung Gyi and *another*—Appellants.

v.

P. L. M. Chettyar Firm—Respondents.

Civil Misc. Appeal No. 56 of 1929 Decided on 17th September 1929, from order of Dist. Judge, Bassein, D/- 10th January 1929, in Misc. Case No. 79 of 1928.

Provincial Insolvency Act, S. 21—Insolvency proceedings pending—Deposit by debtor—Petitioning creditor is not entitled to withdraw it during continuance of proceedings.

Where money is deposited in Court by the debtor during the pendency of insolvency proceedings against him, it ought to be kept in Court and the petitioning creditor should not be allowed to withdraw it during continuance of insolvency proceedings. [P 339 C 1]

P. K. Basu—for Appellants.

Venkatram—for Respondents.

Judgment.—The P. L. M. Chettyar firm of Neikban, Henzada District, applied to the District Court of Bassein for the adjudication of Ko Maung Giy and his wife Ma Chein as insolvents. The application alleged four acts of insolvency. No order either of adjudication or otherwise has been passed on that application. In the application the firm prayed for the appointment of an ad interim receiver, and on 16th November 1928, it was apparently agreed between the pleaders of the parties that the debtors should have a month's time in which to arrange to settle the debts without any receiver being appointed. On 18th December 1928 the learned pleader for the debtors applied for 10 days' time within which to pay 3000 into Court, and he also had it noted that he paid the amount under protest, that there was no reason for filing the application and that he would later file a suit for damages.

On 2nd January 1929 the debtors deposited 3000 in Court and offered security for the deposit of the balance of the firm's debts. On 10th January 1929 the firm was allowed to withdraw the sum of 3000 from the Court On 20th February a bond was executed by the sureties but up to 20th March 1929, the debtors had not deposited the balance of the debt, and on that day a notice was ordered to be issued to the sureties to

show cause why they should not deposit the money. With the proceedings initiated or contemplated against the sureties we are not at present concerned. The debtors appeal to this Court against the order for payment of the sum of 3000 to the firm. On 18th February 1929, the debtors, when asking for 2 months' time to deposit the balance of the money also prayed for an order to call on the firm to refund the sum of 3000 withdrawn by it. No order apparently was passed on this prayer. It is urged on this appeal that the firm had no right to withdraw this money from the Court and that the debtors paid the sum of 3000 into Court merely as a practical demonstration of their ability to pay their debts.

Under S. 14, Provl. Insol. Act, a creditor's petition for adjudication cannot be withdrawn without leave of the Court. It has been the practice of the Courts not to allow a creditor's application to be withdrawn solely on the ground that the debts of that creditor have been paid. It is a matter of common knowledge that creditors frequently file insolvency applications merely for the purpose of putting pressure upon their debtors to settle their claims. It is an abuse of the process of the insolvency Court, and it is in our opinion a wholesome practice never to allow any creditor to withdraw his application on the ground that his debts have been satisfied. If the claims of all the creditors are satisfied the matter is of course different.

Ordinarily if money is deposited in Court by the debtor during the pendency of insolvency proceedings it ought to be kept in Court. If the debtor is adjudicated insolvent the money will be available for the benefit of the whole body of creditors.

If on the other hand the application is dismissed the money may be paid to a particular creditor with the consent of the debtors or the creditor may file a suit and get an attachment of the money before it is paid out to the debtor. In any event the firm in this case had no present right to withdraw the money. We, therefore, hold that the P. L. M. firm is bound to re-deposit this money in Court and we direct the District Judge to issue an order to it for that purpose and to take steps to compel it to do so. This order does not affect the proceedings against the sureties contemplated in the diary order of the learned District Judge. These proceedings may go on and the matter should be disposed of in due course. The appellants will be entitled to their costs of this appeal from the respondent : advocate's fee two gold mohurs.

P.N./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 339

BAGULEY, J.

U Ba Gyi—Applicant.

v.

U Than Kyauk—Respondent.

Civil Revn. No. 26 of 1929, Decided on 24th April 1929, from judgment of Sm. C. C. Judge, Mandalay, in Suit No. 768 of 1928.

Limitation Act, S. 20—Under S. 20 debtor must make payment of interest definitely as interest to start fresh period of limitation.

The creditor is entitled if the debtor makes no stipulation at the time he makes the payment to credit the payment in such a way as would be most profitable to himself. He has a right to appropriate a payment made in a general manner towards interest due to him. But the creditor cannot by his own action and without any act of volition on the part of the debtor start a fresh period of limitation. Under S. 20 the debtor must make the payment of interest definitely as interest and it is the act of the debtor which gives limitation a fresh starting point : 31 *All.* 495 ; 24 *Bom.* 493 and 2 *U. B.R.* 80, *Rel. on.* ; *A.I.R.* 1922 *P.C.*, 26 and 44 and *A.I.R.* 1922 *P.C.* 233, *Ref.* [P 340 C 1,2]

Sanyal—for Applicant.

Ko Ko Gyi—for Respondent.

Judgment.—This revision arises from a Small Cause Court suit. In that suit U Ba Gyi sued Ko Than Kyauk and Ko Ba Sein on a pro-note. The pro-note on the face of it was barred by limitation, having been executed on 29th September 1924, while the suit was not filed until 21st September 1928. The plaintiff however, alleged payment of Rs. 50 towards interest on 3rd March 1927, which, if proved, would of course save limitation. The trial Court found that the payment has not been made by either defendant "as interest" and therefore limitation has not been saved.

It is admitted now that so far as Ba Sein is concerned the case is hopeless. But it is still contended that limitation has been saved as against Than Kyauk. In my opinion this contention is not good. As regards the facts I am prepared

to take them as found by the trial Court. The pro-note was executed by Than Kyauk and Ba Sein. On 3rd March 1927, Amale was sent by Than Kyauk to pay Rs. 50 to the plaintiff and she did so, endorsing the payment on the back of the pro-note. The endorsement simply states that Amale pays Rs. 50 to Daw Su (Daw Su being the daughter of the plaintiff Ba Gyi.)

It is argued for the applicant that the plaintiff had a right to appropriate an unspecified payment made in this way towards interest. That he had this right is undoubted: vide *Nemi Chand* v. *Radha Kishen* (1) and *Meka Venkatadri Appa Raw* v. *Parthasarathi Appa Raw* (2).

There can be no question but that for account purposes the plaintiff would have had a perfect right to appropriate this payment towards interest. The question remains, however, whether this payment made in this general manner was a "payment towards interest as such." I have been referred to *Nga Twe* v. *Nga Ba* (3), in which it is held that to save limitation :

> "there must be an intention on the debtor's part that the money should be paid on account of interest and something to indicate that intention."

The authority given in that ruling is *Muhammad Abdulla Khan* v. *Bank Instalment Co. Ltd.* (4). The headnote of this runs:

> "Under S. 20, Lim. Act, the payment of interest will save limitation when the payment is made as such, that is to say, that the debtor has paid the amount with the intention that it should be paid towards interest, and there must be something to indicate that intention. The mere appropriation by the creditor of these payments to interest is not such an indication."

Again in *Kariyappa* v. *Rachappa* (5), I find at p. 499 :

> "While the forms of payment may differ, the section provides that it must be a payment made as interest by the debtor to the creditor. Mere crediting by the debtor in his own account books of interest is not enough to satisfy the statute. It must be interest paid as interest and distinctly stated to be so at the time of payment, or there must be evidence from which payment as interest may be distinctly inferred."

It has been argued before me that the two later Privy Council rulings to which I have referred must be held to override the earlier Bombay and Allahabad rulings just quoted. In my opinion there is nothing in these Privy Council rulings to overrule the earlier ones. The point before the Privy Council was mainly one of accounting. The creditor was entitled, if the debtor made no stipulation at the time he made the payment, to credit the payment in such a way as would be most profitable to himself. If the debtor wished the payments to be credited in a way more in his own favour it was for him to stipulate that this should be done, and if the creditor refused he was at liberty to refuse to make the payment. This, however, is quite a different matter from holding that when a debtor makes a payment, the creditor may by his own action and without any act of volition on the part of the debtor, start a fresh period for limitation. The Limitation Act says that the debtor must make the payment of interest as such and it is the act of the debtor which gives limitation a fresh starting point. It is impossible for a creditor to make a fresh starting point for limitation. Time runs against him unless the debtor does something, and one thing which a debtor may do is to make a payment of interest definitely as interest. In the present case there is nothing to show that the payment was made definitely as interest. Plaintiff himself was not present when Amale came and paid the money. Ma Su in cross-examination definitely says that nothing was said as to whether the Rs. 50 was the principal or interest. Ma E Kin says that Amale and Ma Saing came and paid Rs. 50 towards the loan. They did not say anything definite as to how the payment should be appropriated. Amale denies making the payment. The rest of the evidence is with regard to the execution of the pro-note. I am of opinion, thererefore, that there having been no definite payment of interest as such, the suit was barred by limitation as against both defendants, and the lower Court was quite correct in dismissing it. I therefore dismiss this application for revision. The applicant to pay the respondent's costs in this Court.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1922 P. C. 26=48 Cal. 839 (P.C.).
(2) A. I. R. 1922 P. C. 233=44 Mad. 570=48 I. A. 150 (P.C.).
(3) [1915] 2 U. B. R. 80=31 I. C. 101.
(4) [1909] 31 All. 495=2 I. C. 379=6 A.L.J. 611.
(5) [1900] 24 Bom. 493=2 Bom. L. R. 378.

A. I. R. 1929 Rangoon 341

BROWN, J.

Maung Kyi and others—Appellants.

v.

Ma Shwe Baw—Respondent.

Special Second Appeals Nos. 85 to 87 of 1929, Decided on 7th August 1929, from decree of the Dist. Judge, Thaywtmye, in Civil Appeal No. 97 of 1928.

(a) Mahomedan Law—Marriage—If there is evidence of cohabitation and repute, burden is on person denying marriage to prove that it did not take place—Evidence Act, S. 114.

Where a man and woman are living together as husband and wife for a large number of years and have always treated each other as husband and wife have always been looked on as husband and wife, and there is no obstacle to the marriage, the burden is on the person who denies the marriage to prove that it did not take place: 3 *M. I. A.* 295 (*P. C.*); *A. I. R.* 1922 *P. C.* 159; *A. I. R.* 1918 *P. C.* 11 and 31 *Cal.* 849, *Rel. on.* [P 342 C 2]

(b) Practice—New plea.

Case not set up in the lower Courts cannot ordinarily be allowed to be raised in second appeal. [P 343 C 1, 2]

E. Maung—for Appellants.

Rafi—for Respondent.

Judgment.—The main question in issue in these appeals is whether the appellant Ma Chit May was legally married to Dawood, the deceased. According to Ma Chit May, Dawood first eloped with her, and then took her to the house of his mother Ma Shwe Baw. Ma Chit May herself was a Burman, and had hitherto been a Buddhist. But when she reached Ma Shwe Baw's house, a Moulvi was called in and she was first of all converted to Mahomedanism, and was then formally married to Dawood, according to Mahomedan Law. After that, she and Dawood lived together as husband and wife until his death. She now has two children by him, one aged about eight and the other about five. Most of the facts alleged by Ma Chit May are admitted. It is admitted that Ma Chit May and Dawood lived together as husband and wife. Ma Saw Ki, the daughter and agent of the respondent Ma Shwe Baw says that Ma Chit May and Dawood were living as man and wife for about nine years and during that period there was nothing against her character. She also says:

> "I have treated the children of Dawood as my nephew and niece."

Ma Shwe Baw herself giving evidence, says:

> "They were living as husband and wife in my house.........They were living as man and wife for about nine years. The two children are the son and daughter of Dawood. Ma Chit May performed the formalities of the Mahomedan custom as I have done now. I treated her as my daughter-in-law, during her coverture with Dawood and I consider his children as my gandchildren, my son Dawood treated Ma Chit May as his wife and her children as his children."

It is also admitted by the respondent that the ceremony of conversion to Mahomedanism did take place.

The only dispute is as to whether the formalities required by Mahomedan Law for a valid marriage were observed. According to the principles of Mahomedan Law by D. F. Mulla, Ninth Edition, para. 196, it is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male, or one male and two female witnesses, who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. It is admitted that no religious ceremony is necessary at all, and although it may be customary to call in a Moulvi for the purpose of celebration, it is not necessary to do so for the purpose of a valid marriage. In the case of *Khajah Hidayut Collah* v. *Rai Jan Khanam* (1) the following passages from the work of Mr. Macnaughten on Mahomedan Law are cited and apparently approved:

> "The Mahomedan lawyers carry this distinction (that is against bastardizing) much further; they consider it the legitimate reasoning to infer the existence of marriage from the proof of cohabitation. None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father. The evidence of persons who would in other cases, be considered incompetent witnesses is admitted to prove wedlock, and in short, where by any possibility a marriage must be presumed, the law will rather do so than bastardize the issue, and whether a marriage be simply voidable or void ab-initio the offspring of it will be deemed legitimate."

It had not been proved in that case that a ceremony of marriage had been gone through, but it is nevertheless held that there had been a legal marriage.

(1) [1841-46] 3 M.I.A. 295=6 W.R. 52 (P.C.).

In the case *Habibur Rahman* v. *Altaf Ali* (2) their Lordships of the Privy Council remark, with reference to Mahomedan Law :

"the term "wife" necessarily connotes marriage, but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice."

Their Lordships proceeded to point out that the presumption to be drawn from such indirect proof may be rebutted, but that unless and until it is rebutted, the presumption must prevail. The question of Mahomedan Law of marriage was also considered by their Lordships of the Privy Council in the case of *Imambandi* v. *Mutsaddi* (3). In that case their Lordships found that the oral testimony regarding the solemnization of marriage was unsatisfactory, but that the marriage was nevertheless proved by the subsequent acknowledgment by the husband of the legitimacy of his children, At p. 889 (of 45 *Cal.*) of the report the following passage occurs :

"In the absence of any statutory provision making compulsory the registration of Mahomedan marriages, the Indian Courts, in case of a dispute as to the factum of a marriage, are usually left to discover or attempt to discover the truth from a mass of conflicting and often very unsatisfactory evidence of witnesses."

There are a number of other cases in which the principle has been followed, that marriage between a husband and wife can be presumed from a long course of cohabitation and living together as husband and wife and from acknowledgment of the children as the legal children. In the case of *Aklamannessa Bibi* v. *Mahomed Hatem* (4), the High Court of Calcutta held that as pointed out in Wilson's Digest of Anglo-Mahomedan Law, although neither writing nor any religious ceremony is necessary to the validity of a marriage contract :

"words of proposal and acceptance must be uttered by the contracting parties or their agents in each other's presence and hearing and in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Moslems, and the whole transaction must be completed at one meeting."

(2) A. I. R. 1922 P. C. 159=48 Cal. 856=48 I. A. 114 (P.C.).
(3) A. I. R. (1918) P. C. 11=45 Cal. 878=45 I. A, 73 (P.C.).
(4) [1904] 31 Cal. 849=8 C. W. N. 705.

But the question as to the necessity for insisting on these requirements when there was strong evidence of subsequent living together as man and wife was not discussed. Nor have I been able to find any case in which it has been held that although a man and woman have been living together as husband and wife for a large nnmber of years and have always treated each other as husband and wife and have always been looked on as husband and wife the marriage is invalid, if in fact the proposal and its acceptance has not taken place in a formal manner.

It is at any rate quite clear from the ruling that once proof has been given, such as has been given in this case as to cohabitation and repute, the burden is on the person who denies the marriage, to prove that it did not take place. In the present case there was no obstacle to the marriage. Can it therefore be held as proved on the evidence that the requirements of the Mahomedan Law as to offer and acceptance did not take place ? Ma Chit May herself says in this point that when the Moulvi came to the house Ma Shwe Baw and Ko Eusoof requested the Moulvi to convert her and then perform the marriage ceremony, according to Mahomedan Law :

"Then I was converted by the Moulvi. He also asked me if I agreed to marry Dawood. Dawood and I had to reply thrice saying that I agreed to marry Dawood. He (Dawood) was also asked if he agree to marry me and he had also to reply thrice that he agreed to marry me. Then the Moulvi gave me a cup of Sherbat saying that it was "thetsaye.""

The Moulvi Ferozorali himself has been called. He says that he converted Ma Chit May but denies that Dawood and Ma Chit May were legally married. He does not say what he means by saying that they were not legally married nor has he definitely denied that they formally agreed to the marriage in the presence of witnesses and it may be that by a ceremony of marriage he had in mind some special rite such as would ordinarily be followed in such cases. It is difficult to imagine a case in which the evidence of cohabitation and repute could be stronger than in this case. Ma Chit May came to the house, and was formally converted to Mahomedanism. She was accepted by her mother-in-law and has admittedly been treated by her mother-in-law as the legally married wife of

Dawood ever since, she and Dawood lived together as husband and wife for nine years. It is admitted by the very relatives, who now challange the legitimacy of the marriage that she behaved in every way as a wife that she was looked on as a wife by them, that her children were treated as Dawood's children, and that they had no complaint whatsoever to make as to her conduct as a wife. Her children are quite clearly treated as Dawood's children, and the evidence to rebut the presumption arising on the circumstances would have to be very strong indeed, before the Court could come to a conclusion "bastardizing" the issue.

It must be remembered that the marriage is alleged to have taken place some nine or ten years before the witnesses gave evidence and the production of oral evidence as to what took place would be a matter of great difficulty. In the circumstances I am not satisfied that it has been proved substantially that the requirements of the Mahomedan Law as to proposal and acceptance were not satisfied in the present case. I therefore hold that Ma Chit May was legally married to Dawood, and that her children are legitimate. It is suggested on behalf of the respondent that even if this be so, Ma Shwe Baw is nevertheless an heir under the Mahomedan Law. That would appear to be correct, but in none of the cases has Ma Shwe Baw's claim ever been based on her right as one of the several heirs. In the first case, she has sued to have a deed of sale by Ma Chit May of property which belonged to Dawood, set aside. Her case as set forth in her plaint was that Ma Chit May was not married to Dawood, and had no right whatsoever to transfer the property. It may be that Ma Cit May had no power to transfer the rights of her minor children and it may also be that the transfer would be subject to the claims of Ma Shwe Baw as one of the heirs of the estate. But these were points which were not raised in the lower Courts. Ma Shwe Baw's suit was dismissed by the trial Court. Although there was appeal in the District Court, the appeal was not taken on those grounds. That Ma Shwe Baw was not entitled to a cancellation of the registered deed is clear. The suit was based on the claim that Ma Chit May was not entitled to deal with the property at all and that the deed was wholly void. I am not satisfied that there is sufficient reason for allowing Ma Shwe Baw to raise a fresh case in this appeal.

As regards the other two cases, in one of them, Ma Shwe Baw sues for possession of certain jewellery. This claim of hers must obviously fail on the finding that Ma Chit May was the wife of Dawood. The third case is a suit by Ma Chit May and her children against Ma Shwe Baw for recovery of household furniture and clothings. Those properties were apparently in the possession of Ma Chit May and her children after her husband's death, and have since reached the possession of Ma Shwe Baw because Ma Chit May went into her house to live and took the properties with her. She and her children are merely suing for properties which they allege have been wrongfully taken from their possession by Ma Shwe Baw. In this case also it was never suggested in either of the lower Courts that even if Ma Chit May were the wife of Dawood, the suit must fail because Ma Shwe Baw was also an heir, and here too, I do not see sufficient reason for allowing a fresh case to be made in this Court. The result is I allow all these appeals and I set aside the decree of the District Court in each case, and restore that of the trial Court in each case. The respondent will pay the costs of the appellants in all three Courts.

P.N./R.K. *Order accordingly.*

A. I. R. 1929 Rangoon 343

MAUNG BA, J.

Ma Hpan and *others*—Appellants.

v.

Ma Ngwe Sa and *another* — Respondents.

Special Second Appeal No. 265 of 1928, Decided on 1st May 1929.

Buddhist Law (Burmese) — Succession — Person marrying second wife on death of first—But divorcing second and marrying third—He had children by first and third wives only—He had also divorced third wife —Suit after person's death by children by third wife against children by first wife for share in first wife's inherited property —Children by first wife are entitled to 3/4th and children by third to 1/4th share.

If a person has more wives than one, property inherited by one of the wives during marriage, if still in existence at the death of the husband and wife, descends to the children by that wife and the children by

the other wives can lay no claim to succeed to it. But this rule does not apply where a person marries wives in succession after death or divorce of his former wife.

On the death of his first wife a person married a second wife. He divorced his second wife and married third. He had children by his first and third wives and no children by his second wife. He divorced the third wife also but her children lived with him. After the person's death the children by third wife sued children by first wife for a share in the inherited property of the first wife.

Held : that the rule of partition to be applied was the ordinary rule applicable to partition between children of different wives and that the children by the first wife were entitled to 3/4th share and the children by third wife to 1/4th share : *A. I. R.* 1921 *U. B.* 23, *Ref.* [P 344 C 2]

Chari—for Appellants.

K. C. Bose—for Respondents.

Judgment.—U Teik Lon, a Burman Buddhist, married three wives in succession. His first wife was Ma Pa and by her he had four children (present appellants). On her death he married Ma Kyaing but he divorced her and married Ma Paw U. He had no children by the second wife but he had two children (present respondents) by the third wife. He divorced Ma Paw U also but her children remained behind with their father. About 13 years afterwards he died leaving children by the first and third wives. A piece of paddy land was acquired during the first marriage. Respondents claimed a half share in that property. The Sub-Divisional Judge of Pyinmana gave them two-fifths and the District Judge of Pyinmana on appeal reduced it to one-third. Appellants now contend that respondents are not entitled to any share in that property as it was the property inherited by their mother during her converture with U Teik Lon. Both the lower Courts have referred to the property simply as the property acquired during the first marriage but they have not considered how it was acquired. Appellants in their written statement clearly stated that it was the inherited property of their mother. I find that appellants also tendered evidence to that effect. That evidence has in no way been rebutted. I will, therefore, hold that it was the inherited property of the first wife who was the mother of the appellants.

In an Upper Burma case *Ma Kin* v. *Kin Kin* (1), Mr. Brown as Judicial Commissioner held that where a Burman Buddhist husband has had more wives than one, property inherited by one of the wives during marriage if still in existence at the death of the husband and wife, descends to the children by that wife, and the children by other wives can lay no claim to succeed to it.

That rule of law applies to a case where a Burman Buddhist husband has more than one wife at the same time An extract from the Manugye in S. 207, of Kinwun Mingyi's Digest reads :

"The rule of partition among several wives who live in the same house and eat out of the same dish with the husband shall apply, mutatis mutandis to partition among their sons. So says Rishi Manu."

As regards the rule of partition among such wives extract in S. 286 of the same Digest reads :

"Several wives live together in the same house and eat out of the same dish with the husband. Each of them shall retain the property brought by her to the marriage or the property acquired by inheritance from her parents subsequent to the marriage or the property given her by the husband as a marriage portion."

In the present case the second wife was married after the death of the first and the third was married after the divorce of the second. The deceased did not have the three wives at the same time. When the appellants' mother died, their father became her heir subject to the claim of an orasa daughter, if any. There appears to have been no such orasa daughter. On his remarriage the atet children became entitled to their mother's share. It would be two-thirds. That right lapsed after 12 years. When the father died a fresh cause of action arose and the rule of partition to be applied is the ordinary rule applicable to partition between children of different marriages. S. 7 Book 10 of Manugye says :

"If the father had property at the time of his marriage and the second wife none and if none has been acquired during their marriage, let the property be divided into four shares ; let the son of the first marriage have three, and the son of the second one share",

It follows that appellants should get three-fourths and respondents one-fourth. The decree of the District Court will be modified by reducing respondents' share to one-fourth. Each party to bear its own costs.

P.N./R.K. *Decree modified.*

(1) A. I. R. 1921 U. B. 23=4 U. B. R. 11.

trade-marks, he could not be deceived, at all, and the House of Lords thought that the two trade-marks were so different that no one could suppose them the same. This case, therefore, affords no support to the defendants. In order to assimilate that case to the present we must suppose that the plaintiffs there had so marked their goods with the name of 'Crockett' as to have obtained for it in the market the name of 'Crockets' 'American Leather Cloth,' and then that the defendants had adopted a device which would lead purchasers to suppose that their cloth was not merely American Leather Cloth, which it was, but Crockett's American Leather Cloth, which it was not."

It seems to me that the case referred to in this extract is much more similar to the present case than is the case of *Seixo* v. *Provezende* (2) itself. The next case is that of *Cope* v. *Evans* (4). In that case it was found that the defendant's trade-mark was not such an imitation of the plaintiff's trade-mark as, in the opinion of the Court, made deception probable. It is evident from the report that the two marks in question were certainly much less different than those in question in the case before me.

In the following passage from the learned Vice-Chancellor's judgment it would seem that, if the two trade-marks in dispute are not so similar that the Court considers the difference unsubstantial, the plaintiff must prove to the satisfaction of the Court that its intervention is required to protect the plaintiff from the defendant's goods being taken for his (p. 141) :

"In cases where it appears that defendants have adopted a plaintiff's trade-mark, and it is proved that defendants' object in doing so was to pass off their own goods as those of the plaintiff, the Court will, without further inquiry, restrain the defendants, and it will also do so where there has been such adoption, although proof of the defendants' object be wanting, if it appear that any one has in fact been thereby induced to buy the defendants' goods as being the goods of the plaintiff. In the absence of proof of such object and of such deception, if the two trade-marks are not to the eye of the Court either altogether identical, or so similar that the Court considers the difference unsubstantial, the plaintiff must make out to the satisfaction of the Court that its intervention is required to protect the plaintiff from the defendants' goods being taken for his (plaintiff's). For the plaintiff to say that his name or mark is to be found on the defendants' goods is not sufficient. Thus, in the case of *Bradbury* v. *Evans*, in which the proprietors of Punch sought unsuccessfully to restrain the sale of a weekly publication which had adopted the name of Punch and Judy, the Court, looking at the two publications, and considering that the later publication would not be taken by purchasers for the earlier one, refused to interfere. The two were so dissimilar in appearance, that, whether the two publications were seen side by side or were seen separately the one would not be taken for the other."

Applying that test to the present case, I find it exceedingly difficult to hold that the complainants in the present case have made out a good case for protection. The Vice-Chancellor in his judgment discussed the case of *Seixo* v. *Provezende* (2), and said p. 150 :

"Lord Cranworth here says that if the rival trader adopts a mark which will cause his goods to bear the same name in the market, this may be a violation. He then proceeds to examine the case before him, and says that, the mark being adopted, the consequence was almost inevitable that persons would suppose that in purchasing a cask of the defendant's wine they were purchasing that of the plaintiff; that the defendant's mark could not fail to lead purchasers to attribute to the wines so marked the same name as that under which the plaintiff's wines were known. Have the plaintiffs in the present case shown that the defendant's user of their mark will cause their goods to be taken for the plaintiffs'? Will it be the inevitable consequence of the use by the defendants of their mark that purchasers in purchasing the defendants' cigars will believe that they are purchasing the plaintiffs'? Is it true that the defendants' mark cannot fail to attribute to their goods the same name as is used by the plaintiffs'? Upon the evidence in this case I answer all these questions in the negative."

Putting to oneself the questions which the Vice-Chancellor there set out, it seems to me that, on the facts of the present case, it is very difficult to answer either of them in the affirmative. The evidence is perhaps sufficient to show that some people may call the appellant's trade-mark by the same name as that of the complainant, but I am certainly not satisfied that every one would do so, or that the use of the appellant's mark cannot fail to have this effect.

The next case quoted is that of *R. Johnston & Co.* v. *Archibald Orr Ewing & Co.* (5). I do not think it is necessary to discuss this case, the facts of which are so entirely different from those of the case before me as to make it useless as an authority. I would, however, quote the following extract from Lord Blackburn's judgment (pp. 228 and 229) :

"I think the true guide is given by Lord Kingsdown in the *Leather Cloth Co. Ltd.* v. *American Leather Cloth Co.* (3), at 538 where he says: 'The fundamental rule is that one

(4) [1874] 18 Eq. 138=22 W.R. 450=30 L.T. 292.

(5) [1881] 7 A. C. 219.

man has no right to put off his goods for sale as the goods of a rival trader; and he cannot therefore, in the language of Lord Langdale in the case of *Perry* v. *Truefit* (6), be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. Then he proceeds to say what he thinks any person is at perfect liberty to do, and adds, speaking of the particular case *Leather Cloth Co. Ltd.* v. *American Leather Cloth Co. Ltd.* (3) at p. 539 : On the other hand they had no right directly or indirectly to represent that the article which they sold was manufactured by Crocketts or by any person to whom Crocketts had assigned their business or their rights. They had no right to do this either by positive statement or by adopting the trade-mark of Crocketts & Co., or of the plaintiffs to whom Crocketts had assigned it, or by using a trade-mark so nearly resembling that of the plaintiffs as to be calculated to mislead incautious purchasers. These being, as I conceive, the rights of the defendants and the limit of those rights, what is it that they have actually done and in what respect have they infringed the rights of the plaintiffs? That depends upon the question how far the defendants' trade-mark bears such a rasemblance to that of the plaintiffs' as to be calculated to mislead incautious purchasers. That, I apprehend, is precisely the question which is to be asked here. In the case from which I have been citing that qnestion was answered in favour of the defendants, in the present case I think it must be answered in favour of the plaintiffs."

And the following from the judgment of Lord Watson (p. 231):

"When a prominent and a substantial part of a long and well known trade-mark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade-mark belongs."

I give this latter extract because it is quoted by the Magistrate in his judgment in this case; but it seems to me that it is not relevant to the present case at all. It is impossible to say in this case that any prominent and substantial part of the complainant's trade-mark appears as a prominent and substantial part of the appellant's trade-mark.

The next case to which I wish to refer is that of *Payton & Co. Ltd.* v. *Snelling Lawpard & Co., Ltd.* (7) and, in particular I wish to refer to the following passage in the judgment of Lord Justice Romer (p. 57, Lines 19—29):

"It seems to be a sort of popular notion of some witnesses that in considering whether customers are likely to be deceived, you are to consider the case of an ignorant customer who knows nothing about, or very little about the subject of the action. That is a great mistake. The kind of customer that the Courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff's goods, those characteristics which distinguish his goods from other goods on the market so far as relates to general characteristics. The customer must be one knowing who, what is fairly common to the trade, knows of the plaintiff's goods by reason of these distinguishing characteristics. If he does not know that, he is not a customer whose views can properly, or will be, regarded by this Court."

This judgment of Romer, L. J., was expressly approved by Lord Macnaghten in the House of Lords at p. 635 of the report of the appeal (in the same Volume of the *R. P. C.*), and it was also quoted with approval by Kekewich, J., in *Alaska Packers' Association* v. *Crocke & Co.* (8).

In the case of *Tatem & Co., Ltd.* v. *Gaumant Co., Ltd.* (9) it was held by the Court of Appeal that the defendant's trade-mark was not an infringement of that of the plaintiff, although both contained representations of a black cat and were applied to the same kind of goods. Obviously, there was a much greater resemblance between the trade-marks in that case than in the one now before me. In the case of *Wilkinson* v. *Griffith* (10), it is evident that there was considerable evidence of actual intent to defraud, and the similarity between the marks in question was at any rate sufficient to put it in a different class from the present case.

A number of Indian cases have also been cited, but I do not think that any of them is of any assistance, except perhaps *Emperor* v. *Bakarullah Malik* (11) which was a criminal case coming under the same section as the present case, and in which the Court held, on what seems to me a very much stronger case than the present one, that the conviction could not be upheld. I come now to certain Burma cases: *Emperor* v. *Po Saing* (12). That was a case in which the accused had been selling kerosine oil in tins of the Burma Oil Company, and it was held that it had been sufficiently indi-

(6) [1842] 6 Beav. 66.
(7) [1901] 17 R. P. C. 48 and 628=(1901) A. C. 308=70 L. J. Ch. 644=85 L. T. 287.
(8) [1901] 18 R. P. C. 129.
(9) [1917] 34 R P. C. 181.
(10) [1891] 8 R. P. C. 370.
(11) [1904] 31 Cal. 411.
(12) [1907] 4 L. B. R. 192.

cated on the tins that the oil sold was the Burma Oil Company's oil, and, therefore, fell within the section. This case seems to me of very little help. The same remark applies to *Abdul Majid* v. *Emperor* (13), in which it is clear from the judgment that there was at any rate a certain degree of similarity between the two marks, and that both could properly be called in Burmese by the name "bawlon taseik." This case also does not seem to me to be any authority for the present conviction.

Byramjee Cowasjee v. *Vera Somabhai* (14), was a civil case relating to butter in tins. I am told that in fact it related to one of the marks produced in evidence by the defence in this case. In this case the late Sir Charles Fox said (p. 65) :

"The proper test is whether the "get up" of the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiff's "get up" but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed and the Court must also have regard to the class of purchaser by whom the goods would normally be bought : 27 *Halsbury's Laws of England* 766."

That seems to me to be a correct statement of the test and it is a test which, to my mind, is not satisfied by the facts of the present case.

I am left now only with the case of *R.E. Mohammed Kassim & Co.* (1), which I mentioned at the beginning of this judgment. It is urged for the complainants that that case is ample authority for the present conviction, and that, if I feel inclined to differ from the judgment of my learned brother, Otter, it is most desirable that I should make a reference to a Bench or Full Bench. In my opinion there is a considerable difference between the two cases sufficient to make it unnecessary for me to say either that I agree with my learned brother, or that I differ from him.

As I said before, the complainants' mark in that case was a "Crown," but it was, in fact, known as the "topee" mark, and consequently the introduction of the accused's mark, which, in fact, represented what would properly be called a "topee," inevitably led to the result that the accused's blankets were described by the same mark name as those of the complainant, and, thus, there were certainly much stronger grounds for holding that his mark fell within the mischief of S. 480, I. P. C., than there are in the present case.

I do, however, differ from my brother, Otter, but it is on a minor point of not very great importance. At the bottom of p. 11 of his judgment he remarked :

"* * * the present case is a criminal prosecution and intent to defraud is not an ingredient in the offence."

In my opinion on the wording of S. 482, an intent to defraud is an ingredient of the offence, but, when it has been proved that a trade-mark is a false trade-mark, then, it is to be presumed that the accused person had that intent unless and until he rebuts the presumption, when the accused person is entitled to an acquittal. When he is entitled to an acquittal if he can prove the absence of a certain intent, it seems to me obvious that that intent is an essential ingredient of the offence.

On the two trade-marks in question themselves, and on the evidence in the case, the only conclusion that seems to me possible in the present case is that the appellant's use of his trade-mark is not reasonably calculated to cause it to be believed that his goods are, in fact, the merchandise of the complainants, and, on that ground, I think that the conviction cannot stand. But I would say further that, even if I am not correct in that view, I still think that the appellant is entitled to an acquittal on the ground that he had no intent to defraud. The burden of proving the absence of such intent is indeed up on him, but the question whether that burden has been discharged must be answered on a consideration of the whole of the evidence in the case ; and, in my opinion, the facts of this case are such that it would be quite impossible to hold with any semblance of reason that the appellant in making use of the mark complained of, had any intent to defraud. On this ground also I should acquit him. I allow this appeal, set aside the conviction and sentence passed upon the appellant, and direct that the fine be refunded to him.

P.N./R.K. *Conviction set aside.*

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(13) [1916] 9 L. B. R. 31=36 I. C. 168=10 Bur. L. T. 19.

(14) [1916] 8 L. B. R. 561=36 I. C. 965=10 Bur. L. T. 63.

A. R. I. 1929 Rangoon 352(1)

BROWN AND MAUNG BA, JJ.

G, a pleader, In the matter of.

Civil Misc. Appln. No. 78 of 1929, Decided on 28th August 1929.

(a) Legal Practitioners Act, S. 12—Conviction under Gambling Act is not sufficient for disciplinary action.

The conviction of a pleader under the Gambling Act can hardly be looked upon by itself as sufficient reason for disciplinary action. [P 352 C 2]

(b) Legal Practitioners Act, Ss. 12 and 13—Conviction of pleader for intimidating and assaulting woman does not by itself amount to defect in character and is not sufficient for suspending him from practice.

A pleader was convicted under Penal Code for intimidating and assaulting a woman in a most reprehensible manner. It was the first occasion on which disciplinary action was called against him :

Held : that the conviction was not by itself sufficient to show defect of character which unfits him to be a pleader within the meaning of S. 12,

Held further : that though the words "any other reasonable cause in S. 13 seem to be wide enough to include the case, still the conduct was not such as to justify suspending him from practice. [P 352 C 2]

A. J. Darwood—for Respondent.

Judgment.—*G*, a lower grade pleader at Einme in the Myaungmya District has been called on to answer certain charges framed against him, under the provisions of S. 14, Legal Practitioners Act. The third charge is with reference to Criminal Regular Trial No. 220 of 1928 of the Fourth Additional Magistrate, Myaungmya. In that case one Maung Ba Th was sentenced to six months' rigorous imprisonment for causing grevious hurt. The District Magistrate, who has reported the matter to this Court states :

"If the evidence of Maung Maung (P. W. 2) in this case be believed, Mr. Stanley might have been assaulted by Ba Tha at the instigation of the pleader.

The assault apparently was the outcome of a drunken brawl, and the Sessions Judge in his judgment on appeal remarked that the case reflected no credit whatsoever, on all the parties concerned. There is nothing, however, in the judgments implicating *G.* in the assault, nor can we read the evidence of U Maung Maung as implicating him. There does not seem to be anything in this charge, which we can consider against the respondent.

There remain for consideration the other two charges. The first of these charges is that he was convicted under S. 11, Burma Gambling Act and sentenced to pay a fine of Rs. 25 and the second charge is of insulting the modesty of a woman. He was convicted under Ss. 506 and 509, I. P. C., and sentenced to pay a fine of Rs. 50. The conviction under the Gambling Act could hardly be looked on by itself as sufficient reason for disciplinary action. The other case is more serious. According to the judgments in that case, the respondent and others intimidated a woman and assaulted her in a most reprehensible manner. Such conduct certainly reflects no credit on the persons concerned and is not conduct such as is to be expected from a pleader in the Courts. We are unable, however, to say that from this conviction by itself we can infer a defect of character which unfits the respondent to be a pleader within the meaning of S. 12, Legal Practitioners Act. Under S. 13 of the Act, disciplinary action can under Cl. (f) be taken for "any other reasonable cause." The words seem to be wide enough to cover the present case. We regard the conduct of the respondent as most reprehensible, but we are not satisfied that it is such as to justify us in suspending him from practice. The respondent has been a third grade pleader for about 22 years, and this appears to be the first occasion in which disciplinary action has been called for against him. We direct that the respondent be warned and that we consider his conduct as disclosed in Criminal Regular Trial No. 99/28 was most reprehensible, and that a repetition of such conduct may make it necessary to take severe disciplinary action against him.

P.N./R.K. *Order accordingly.*

A. I. R. 1929 Rangoon 352(2)

CHARI, J.

U San Hmway—Applicant.

v.

U Ohn Pe—Respondent.

Civil Revn. No. 187 of 1929, Decided on 17th September 1929, from order of Dist. Judge, Teungoo, D/- 23rd May 1929, in Civil Misc. No. 45 of 1929.

Burma Rural Self Government Act (4 of 1921), Rr. 34, 36 and 39—District Judge acting under R. 34, or Assistant Judge nominated by him to hear petition challenging election is persona designata and no revision lies to High Court against their order.

The provisions of R. 36 which enables the District Judge to delegate his power to an Assistant Judge and the direction that petition challenging an election shall be tried in open Court do not show that the District Court through the District Judge functions in the disposal of the application. The words "in open Court" in R. 34 mean only that the matter should not be disposed of in camera. Therefore the District Judge functioning under R. 34 is a persona designata and an Assistant Judge who is directed by him to dispose of the petition is also a persona designata and so no revision lies to the High Court against their order : *A. I. R.* 1926 *Rang.* 25 (*F.B.*) and *A. I. R.* 1927 *Mad.* 93, *Rel. on.* [P 354 C 1]

Paget—for Applicant.

Judgment.—This is a revision application against the order of the District Judge of Toungoo in the following circumstances: One U San Hmway was elected a member of the District Council by the Tantabin Circle Board. U Ohn Pe filed an application in the District Court challenging the election on certain grounds. The application of U Ohn Pe was not accompanied by a deposit of Rs. 100 according to the rules, but this sum was paid in later. The learned District Judge acting presumably under S. 36 of the Rules made by the Local Government to which I shall refer later directed that the petition be tried by Assistant Judge, U Aung Tun Gyaw. Before the said Assistant Judge the respondent filed objections, and one of the objections filed by him was that, as there was no previous deposit of Rs. 100 as required by R. 35, the Court had no jurisdiction to entertain the petition. The learned Assistant Judge U Aung Tha Gyaw, on 29th April disposed of this objection, and he in effect held that the deposit of Rs. 100 was not a condition precedent to the vesting of the jurisdiction in the Court; that that sum could be paid at any time within the limitation period; and that he had power to extend the time for payment. Against this order an application for review was made and disposed of by the District Judge himself and an appeal was also preferred against the order to the District Judge.

It is very doubtful if the application for review lies, but it is unnecessary to consider the point, as the District Judge agreed with the conclusion arrived at by the Assistant Judge and dismissed both the application and the appeal.

The application for revision to this Court is against these orders, and the first point for consideration is whether a revision lies to this Court. If the ruling in the *Municipal Corporation of Rangoon* v. *M. A. Shakur* (1) applies to this case, then the High Court is precluded from entertaining the revision application. In that case it was held by a Full Bench of this Court that the Chief Judge of the Court of Small Causes in disposing of petitions regarding elections to the Corporation of Rangoon acts as a persona designata aad that, therefore, no revision lies to this Court. It is urged by the learned advocate for the petitioner that that ruling does not apply to the facts of this case because the provisions of the rules show that the District Judge in these matters is acting not as a parsona designata but as the presiding officer of the District Court. It will be convenient to refer to the relevant provisions of the rules at this stage.

Rule 34 enacts that the validity of an election may be questioned by petition to the District Judge on certain grounds. R. 35 is to the following the effect:

"No petition shall be admitted without a deposit of Rs. 100 and after 15 clear days (excluding judicial holidays) have elapsed from the date on which the result of the election was published (under R. 23) or declared (under R. 31)."

Rule 36 enacts that if after such enquiry as may be necessary the District Judge considers that there are not sufficient grounds for trying the petition, he shall make an order dismissing it and that order shall be final. If he considers that the petition ought to be tried he is empowered to make an order directing its trial either by himself or by such Assistant Judge as he may appoint. R. 37 provides for the trial of petitions in open Court and R. 39 gives a right of appeal against the finding or order of an Assistant Judge to the District Judge whose orders on the appeal shall be final. Reliance is placed by the learned advocate for the petitioner on the provisions which enable the District Judge to delegate his power to an Assistant Judge and to the direction that the petition shall be tried in open Court as indicating that the

(1) A. I. R. 1926 Rang. 25=3 Rang. 560 (F.B.).

intention of the rule making power that the District Court through the District Judge functions in the disposal of these petitions. I cannot accept this contention.

The District Judge is undoubtedly a persona designata in respect of the functions exercised by him under R. 34. The power given to him as District Judge to delegate his jurisdiction to an Assistant Judge does not show that the District Judge is not a persona designata. The Assistant Judge to whom he delegates the power may be person entirely unconnected with his Court. The use of the word "in open Court" in R. 37 in my opinion means nothing more than this that the matter is not to be disposed of in camera and are used for the purpose of ensuring an open trial in the Court house. The words "in open Court" are used in contradistinction to "in camera."

I am fortified in this opinion by a decision of the Madras High Court in *O. A. O. K. Lakshmanan Chetty* v. *J. S. Kannappar* (2) where a somewhat similar argument was raised. In that case the Chief Judge of the Small Cause Court of Madras was the person to whom a petition for revision was allowed in the case of an objection to the nomination of a councillor. It was urged in argument that accordiag to the rules of the High Court the Chief Judge was empowered to direct that any petition should be heard by a Bench consisting of two or more Judges of his Court. The Madras High Court held that notwithstanding this rule the Chief Judge of the Small Cause Court was a persona designata and that no revision application lay to it from his decision. I am, therefore, of opinion that the District Judge when functioning under R. 34 of the rules is a persona designata and that an Assistant Judge who is directed by him to dispose of the application is also a persona designata and that therefore this revision application against their order is incompetent. I, therefore, dismiss the application, but there will be no order as to costs as the respcndent has not appeared.

P.N./R.K. *Revision dismissed.*

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(2) A. I. R. 1927 Mad. 93=50 Mad. 121.

* * A. I. R. 1929 Rangoon 354

Full Bench

HEALD, Offg., C. J., CHARI, MYA BU, ORMISTON AND DAS, JJ.

on equal division between

RUTLEDGE, C. J., MAUNG BA BROWN AND CARR, JJ.

U Pyinnya and *others*—Appellants.

v.

Maung Law and *another*—Respondents.

Civil Ref. No. 9 of 1928, Decided on 6th September 1929, made by Carr, J., on 25th October 1928, in Second Appeal No. 24 of 1928.

* * **(a) Burma Laws Act (1898), S. 13 (1)—Buddhist Law—"Laws" defined—Rules of conduct in Vinaya cannot be law except when enforced by Burma Laws Act, S. 13 (1)—Sale is not a question regarding any religious usage—Buddhist monk is not disqualified from contracting within Contract Act, S. 11**—(1915). 2 *U. B. R.* 61; 29 *I.C.* 613 and 5 *Rang.* 626=*A. I. R.* 1928 *Rang.* 3=106 *I. C.* 201, *Overruled.*

Per Full Bench.—The definition of the word "laws" in its juridical sense is that "laws" are rules of civil conduct enforced by the State. From this it follows that the rules of conduct as laid in Vinaya for the guidance of Buddhist monks cannot be deemed to be "laws" unless they are enforced by the State. According to S. 13 (1), Burma Laws Act, they are not enforced by the State except in cases in which questions regarding any religious usage or institution arise. A sale being a pure matter of contract is not "a question regarding any religious usage or institution." A Buddhist monk, therefore, is not disqualified from contracting by law within the meaning of S. 11, Contract Act: **(1915) 2 U. B. R. 61; 29 I. C. 613 and 5 Rang. 626=A. I. R. 1928 Rang. 3=106 I. C. 201, Overruled.**

[P 358 C 2; P 362 C 1, 2]

* * **(b) Contract Act, S. 23—Sale to Buddhist monk is not immoral.**

Neither the object nor the consideration of a sale to a Buddhist monk is immoral within the meaning of S. 23: 9 *L. B. R.* 220, *Ref.*

[P 363 C 2]

* * **(c) Transfer of Property Act, S. 6 (h) (3)—Buddhist monk may be a transferee.**

A Buddhist monk may hold property such as paddy land and may be a transferee of such property within the meaning of S. 6 (h) (3):

[P 360 C 1]

(d) Evidence Act S. 115—Vendor is not estopped from suing to recover possession of property on ground of vendee's incapacity to contract.

(Per *Rutledge, C. J.* and *Maung Ba, J.*) Where the buyer of immovable property, is under disability tobuy there can hardly be any question of his being induced to buy by misrepresentation that he was under no such disability. The vendor, therefore, is not estop-

ped from suing to recover possession of the property on the ground of vendee's incapacity to contract. [P 358 C 2]

Ba Thein—for Appellants.

Ba Thin—for Respondents.

Order of Reference

Carr, J.—U Shwe Gon before his death disposed of the bulk of his estate by deeds of gift in favour of his children, but reserved some 22·69 acres of paddy land for his maintenance until his death. One of the beneficiaries under the deed of gift was his eldest son U Pyinnya who was at that time, and still is, a Burmese Buddhist Monk. Another was another son, Maung Byaw, father of the plaintiff-respondents in the present appeal, in which U Pyinnya is the principal appellant. After U Shwe Gon's death his children, including U Pyinnya, raised money by mortgaging the 22·69 acres of land, together with the land that had been given to U Pyinnya. Later the other children including Maung Byaw, sold the 22·69 acres and a piece of garden land to U Pyinnya by a registered deed for a nominal consideration of Rs. 2,000. The actual consideration was that U Pyinnya took over liability for the debts incurred and paid only Rs. 50 cash.

Maung Byaw has since died and his children, the plaintiff-respondents have brought this suit to administer U Shwe Gon's estate, claiming among other things that the 22·69 acres of paddy land is a part of that estate.

A number of questions arise in the appeal, but the only one on which I feel any difficulty is the question whether the sale to U Pyinnya is valid or not. Both the lower Courts have found that it is not valid, under the authority of *U Tilawka* v. *Shwe Kan* (1). There is also a decision of one Judge of this Court in *U Teza* v. *Ma E Gywe* (2), which supports their findings.

I feel considerable doubt of the correctness of both these decisions. In the first of them Mr. MacColl, J. C., suggested that if the Contract Act had applied to the transaction before him that transaction would have been void under S. 23 of that Act as defeating the personal law of the phongyi concerned. In the second case Maung Ba, J. held that the transaction was immoral and therefore void. I am strongly inclined to doubt the correctness of both propositions. They are based on the proposition that a Buddhist monk is prohibited by the rule of his order, as contained in the Vinaya, from engaging in such pecuniary transactions. That proposition I do not contest, but it seems to me at least doubtful whether the rules of the Vinaya form a part of the personal law of a Buddhist monk so as to bring the case within S. 23, Contract Act. And I doubt also whether on that ground it can be said that either the object or the consideration of the agreement can be said to be immoral. The object was to transfer ownership of land, the consideration was in part, payment of money, and in part, an undertaking to pay money; both are in themselves perfectly lawful and moral. The only immoral part of the transaction was U Pyinnya's disregard of the rules of the religious order to which he belongs, which seems to me a matter between himself and his conscience and the heads of his order and not within the scope of the Contract Act.

Again it seems to me doubtful whether there is any question of a religious usage or institution "within the meaning of the Burma Laws Act, S. 13."

Another question is whether on the facts set out the plaintiffs are not estopped from questioning the validity of the sale by their father whose successors in interest they are. In *U Tilawkas'* case (1), Mr. MacColl remarked that even if the plaintiff had no title the defendant might be estopped from denying his title. But he did not go further into this question, saying that the question was "a broader one than a mere question of title or estoppel". I do not think that this was a sufficient reason for shutting out the question of estoppel.

In the present case, the plaintiffs can claim only as heirs of Maung Byaw and if Maung Byaw would have been estopped from questioning the title of his vendee U Pyinnya, on the ground of the latter's incapacity to contract, the plaintiffs also must be estopped.

I refer the two following questions for decision by a Full Bench:

(1) Is the sale of immovable property to a Burman Buddhist monk void on the ground that a monk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions?

(1) [1915] 2 U. B. R. 61=29 I. C. 613.

(2) A.I.R. 1928 Rang. 3=5 Rang. 626.

(2) If such a sale is void is the vendor estopped from suing to recover possession of the property on the ground of the vendee's incapacity to contract?

Opinion of First Full Bench

Rutledge, C. J.—I have had the advantage of reading the judgment of my brother Maung Ba, and I agree with the conclusions which he has reached in this case.

Section 11, Contract Act, 1872 says:

"Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

Then arise the following questions (a) Is the Vinaya a law within the meaning of this section? (b) Are Burmese Buddhist monks subject to the Vinaya? (c) Does observance of the provisions of the Vinaya render it impossible for Burmese Buddhist monks to enter into contracts for purely secular purposes?

Probably the most important of these questions is the first. The question is asked: in what way are the provisions of the Vinaya more in the position of the law of the land than the provisions of the great monastic orders of the Christendom such as the Benedictines or Dominicans. The analogy at first seems plausible to minds formed under the Western modern systems of jurisprudence which do not recognise any personal laws as exceptions to the universal law of the land applying to all the inhabitants of a nation. But it was not always so in the West. If the question had arisen in the Middle ages it would in all probability have come before an Ecclesistical Court and the regulations of the particular order would have been given the force of law. S. 11 clearly on the question of capacity to contract throws up back upon the personal laws governing the parties. The Court has to consider :is one of the parties disqualified from contracting under his personal law. As pointed out by a Full Bench of five Judges of the late Chief Court in *Shwe Ton* v. *Tun Lin* (3):

"The Vinaya and its commentaries form part of the Buddhist Law and where the devolution of the property of a phongyi is concerned, it seems right that this branch of the law should govern the decision."

There are many other cases where the Courts for a long series of years have treated the Vinaya as the part of Burmese Buddhist Law which governs the monkhood, but as this Full Bench ruling is so specific I do not think it necessary to refer to them.

I would consequently answer (a) and (b) in the affirmative. With regard to (c) from the quotations in the judgment of my brother Maung Ba and of the late Mr. McColl in *U Tilawka* v. *Nga Shwe Kan*(1), the Vinaya not only forbids monks from entering into contracts unconnected with the religious life, but contemplates that they are utterly incapable of so doing having died a civil death.

My brother Carr considers that the reference raises merely a question of contract and not a question regarding any religious usage or institution, and if it is not, S.13, Burma Laws Act 1898 abrogates all rules of Buddhist Law relating to contract, I am unable to agree with him on this point. It will not be denied, I think, by any one that the fraternity of yellow robe is a religious institution. Usage is as nearly as possible a synonym for custom. The provisions of the Vinaya are the religious usage governing the religious institution of the Buddhist monkhood. The question then, whether the religious usages governing a monk render him incompetent to enter into a contract for secular purposes must in my opinion be considered by the Court by virtue of S. 13, Burma Laws Act. It is consequently a part of the Buddhist Law enforced by the State and these religious usages must be examined for the purpose of ascertaining whether the monk is

"disqualified from contracting by any law to which he is subject. S. 11, Contract Act."

As I have already said in my opinion the Vinaya considers that a monk is utterly incapable of entering into contracts unconnected with the religious life and I accordingly answer (c) in the affirmative and in my opinion, he is equally disqualified whether he purports to be a transferrer or a transferee.

Throughout this judgment I have taken the reference to be limited to transactions for a secular or personal and not for a religious purpose. It has been pointed out to me that the question referred does not so limit the reference. In my opinion it ought to be so limited. The judgments of the late McColl and Mya Bu, J. from which Carr, J. dissents does not question that a monk

(3) [1919] 9 L. B. R. 220=49 I. C. 317=11 Bur. L. T. 161 (F.B.).

was competent to contract for a purely religious object and so there is no controversy with regard to such contracts. If we turn to S. 23, Contract Act, we find that this deals with the lawfulness of the consideration or object of the agreement. While I think that the question naturally comes under the head of capacity to contract, it may be considered also as the offering of any consideration by a monk of a wordly nature not connected with the religious life or the object of which is to cause wordly gain of a personal and not a religious nature to accrue to a monk. Thus stated it is forbidden by the Vinaya and is of such a nature that if permitted it would defeat the provisions of the Vinaya and a Court applying the principles by the Vinaya would be justified in regarding it as immoral.

I accordingly answer the first question in the affirmative. For the reasons given my brother Maung Ba, I answer the second question in the negative.

Maung Ba, **J.**—Carr, J., has referred the two following questions for decision by a Full Bench :

(1) Is the sale of immovable property to a Burman Buddhist monk void on the ground that a monk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions ?

(2) If such a sale is void, is the vendor estopped from suing to recover possession of the property on the ground of the vendee's incapacity to contract ?

He has made the reference because he doubted the correctness of the propositions laid down in the case of *U Tilawka* v. *Shwe Kan* (1) and in that of *U Teza* v. *Ma E Gywe* (2).

In *U Tilawka's* case (1), a Buddhist monk sought to redeem a mortgage effected by him. The question considered in that case was whether a Buddhist monk was capable of entering into a valid contract such as mortgage for his own personal profit. McColl, J. C., answered the question in the negative.

In *U Teza's* case (2) another Buddhist monk sought to recover possession of a house bought by him with borrowed money. I held that the monk could not succeed in his suit.

Both the decisions were based upon the principle that the transactions in both cases offended the personal law of Buddhist monks viz., Vinaya, a code of disciplinary rules laid down by Lord Buddha for the Sangha.

Section 11, Contract Act, deals with competency to contract and it mentions three disqualifications, namely: (1) infancy, (2) insanity, (3) special disqualifications by personal law. S. 23 of the same Act deals with unlawful considerations. A consideration which the Court regards as immoral or opposed to public policy is unlawful. So also is a consideration which is forbidden by law and is of such a nature that if permitted would defeat the provisions of any law. Carr, J., has expressed doubt whether the rules of Vinaya form a part of the personal law of a Buddhist monk so as to bring a case within S. 23, Contract Act, and also whether on that ground it can be said that either the object or the consideration of an agreement is immoral. It cannot be disputed that an agreement that would defeat the provisions of Hindu Law or Mahomedan Law or Buddhist Law would be unlawful within the meaning of S. 23. A contract to give a son in adoption in consideration of an annual allowance to the natural parents would defeat the provisions of Hindu Law and a suit would not lie to recover any allowance on such a contract. Upon the same principle an agreement between a Mahomedan husband and his wife for a future separation is void. So also is a contract between a Buddhist husband and his first wife not to give the second wife of equal status any share in the lettetpwa property.

In the case of *Shwe Tun* v. *Tun Lin* (3) the Thathanabaing has clearly stated that a matter concerning rahans which involves a dispute about property either between monks themselves or between monks on the one hand and laymen on the other would be decided according to the five books of Vinaya, and that the authority of the Dhammathats is not recognized. Of course the commentaries viz., Attakathas, Tikas, and Ganhandana are consulted for help in the interpretation of texts in the Vinaya.

The Vinaya contains rules promulgated by Lord Buddha from time to time as occasion arose. One of the rules prohibits a monk from having sexual intercourse. It follows that a monk cannot enter into a valid contract of marriage why, because it will defeat the provi-

sions of his Vinaya. If a monk contracts with a woman that he will marry her as a rahan and live with her as man and wife without leaving the order and breaks his contract, can the woman sue him in damages for breach of contract? Certainly not, as the contract is unlawful. It may be argued that the contract is unlawful because it is immoral, why immoral? It is immoral because Vinaya prohibits sexual intercourse in the case of a rahan. Marriage in itself is not immoral for in some religions ministers of religion can marry.

Since Dhammathats are not applicable to rahans, and since Vinaya applies to them, it follows that the latter is their personal law. The rules of Vinaya may even be viewed in the light of customary law or customs having the force of law. Now what does the Vinaya say about buying and selling? In the first book of Vinaya namely Parajkam, there is a rule dealing with "Kayaweikkaya" (buying and selling). It is said that while Buddha was residing at the Zetawun monastery in Thawutti, a rahan and a parabaik exchanged robes. This was reported to Buddha. He condemned the transaction and made this rule: "A rahan who does buying and selling is guilty of Nissagi pacittayam." The rahan can escape from the consequences of this sin only by confession and discarding the thing. Buddha applied this rule to all things from Kyaungs down to the most insignificant things such as soap powder, and tooth pick.

A layman entering the order "dies a civil death." He severs himself from the world and is divested of all he possessed in the world. Can such a man who has taken the vows to lead a holy life in accordance with Vinaya employ himself as a layman while he is still a rahan and transact business for his personal benefit in violation of Vinaya, his personal law, and be permitted to enforce or to reap the benefits of contracts which would defeat that law? I would certainly say, No. Such conduct on the part of the rahans is immoral from the point of view of Buddhist, and morality is but a relative term. What appears to be moral according to one religion may not be so according to another. For the Buddhists, a rahan who violates his Vinaya is an "alijji" and his conduct in violation of Vinaya is immoral.

I hold that Vinaya is the personal law of a Buddhist monk within the meaning of S. 13, Burma Laws Act, so as to bring a case within S. 23, Contract Act, and that his buying and selling for his own benefit offends that law and is immoral. So I would, therefore, answer the first question in the negative. I wish to make it clear that this answer is to be restricted to transactions of a purely secular nature unconnected with religion. A monk may accept a religious gift in accordance with Vinaya. Of course the party dealing with him is protected by the provisions of S. 65, Contract Act. If the rahan received any advantage under such a contract, he is bound to restore it or to make compensation for it to the person from whom he received it.

As regards the second question about estoppel the answer depends upon whether the rahan is the buyer or whether he is the seller. If he is the buyer, as in the present case, he being the party under disability to buy there can hardly be any question of his being induced to buy by misrepresentation that he was under no such disability. But if he is the seller and if he has induced the other party to buy under the belief that he was under no disability to sell he would certainly be estopped from denying his capacity to sell. I would, therefore, answer this question in the negative.

Carr, J.—The first question referred is:

"Is the sale of immovable property to a Burman Buddhist monk void on the ground that a monk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions?"

The question implies that the rules of the Vinaya do prohibit a monk from entering into such pecuniary transactions and it may further be admitted that a Burmese Buddhist monk is subject to those rules in that they are rules of conduct by which he, as a member of the Sangha should be guided. The real question in issue is whether those rules are "laws."

The best definition that I know of the word "laws" in its juridical sense is that "laws" are rules of civil conduct enforced by the "State."

Accepting that definition, a rule of conduct is not a "law" unless it is also enforced by the State, and the rules of conduct prescribed in the Vinaya are, therefore, laws only if they are enforced

by the State. To determine whether they are so enforced one must turn to S. 13, Burma Laws Act (13 of 1898) which reads:

"(1) Where in any suit or other proceedings in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution :

(a) The Buddhist Law in cases where the parties are Buddhists. . . . . shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

(2) Subject to the provisions of sub-S. (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

(3) In cases not provided for by sub-S. (1) or sub S. (2) or by any other enactment for the time being in force the decision shall be according to justice, equity and good conscience."

My view of the effect of that section is that from the time of the enactment the rules of Buddhist Law regarding the subject specified in sub-S. (1) were adopted by the State as the law which it would enforce as between Buddhists but all other rules of Buddhist Law were abrogated and ceased to be law in the proper juridical sense of the word, because the State by necessary implication from the terms of the section declared that it would not enforce them.

Turning now to S. 23, Contract Act, I am of opinion that it cannot be said that either the consideration or the object of the sale of the property in question in this case was immoral. The object was the sale of land ; the consideration was the payment of money, both are in themselves perfectly moral. The disregard by U Pyinnya of the rules of the Vinaya by which as a member of the monastic order, he should be guided was no doubt in a sense immoral. But that had nothing to do with either the object or the consideration of the agreement. Admittedly a monk may hold property and may receive it as a gift. The object was to transfer land to him, and since he may hold land there was nothing in that object that was immoral. Nor can it be said that it is forbidden by law or if permitted would defeat the provisions of any law. In my opinion, therefore there is nothing to make the transfer void under this section.

In S. 11, Contract Act, we find that :

"Every person is competent to contract who is not disqualified from contracting by any law to which he is subject."

Under this section if a monk is disqualified by law from contracting, any contract entered into by him is void : see *Mohori Bibi* v. *Dharmo Das Ghose* (5).

If the rule of the Vinaya under discussion is law, I think it would have to be held that a monk is disqualified from contracting, but if it is not law there is no such disqualification.

In order to find that the rule is law it would be necessary to find :

(1) that it was a rule of Buddhist law, that is, that it was a rule enforced by the State even before the enactment of the Burma Laws Act, and

(2) that it is one of the rules of the Buddhist Law which by S. 13 of that Act, the State has declared that it will enforce.

As regards the first point I am not altogether satisfied that this rule ever was law in the juridical sense, I do not, however, think it necessary to go into this question, which would involve a very long and difficult research.

In my opinion the rule is not law because it does not come within S. 13 of the Act. The question before us is whether a Buddhist monk is competent to contract or not, and in my view that it is not "a question regarding any religious usage or institution." It is a question regarding contract and the effect of S. 13, Burma Laws Act is, as I have said before, to abrogate all rules of Buddhist Law relating to contract.

In my opinion therefore a Buddhist monk is not incompetent to contract.

I would say further that even if he were held to be incompetent to contract, it would be necessary to find further that he is legally disqualified to be a transferee within the meaning of S. 6 (h) (3) T. P. Act.

The following cases : *Ulfat Rai* v. *Gauri Shanker* (5), *Narain Das* v. *Mt. Dhania* (6), *Munni Konwer* v. *Madan*

(4) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=8 Sar. 374 (P. C.).
(5) [1911] 33 All. 657=11 I. C. 20=8 A. L. J. 670.
(6) [1916] 38 All. 62=31 I. C. 792=13 A.L.J. 1084.

Gopal (7), *Munia Konan* v. *Perumal Konan* (8), *Raghava Chariar* v. *Srinivasa Raghava Chariar* (9), furnish ample authority for the proposition that a competent sale to a minor is valid in spite of his incompetence to contract.

The sale would therefore be void only if we could find that a monk is legally disqualified to be a transferee. Now it is admitted that a monk may hold property such as paddy land and that he may be transferee of such property ; it cannot therefore be held that the rule in question even if it be law, disqualifies him from being a transferee.

I would therefore answer the first question referred in the negative.

On that answer the second question does not arise, but I am satisfied that if the first question were answered in the affirmative there would be no estoppel.

Brown, J.—I concur with the judgment of my brother Carr. (On equal division between the four Judges the case was referred to another Full Bench of five Judges who gave the following opinion.)

Opinion.

Heald, Offg. C.J.—The relevant facts of this case are shortly as follows :

Shwe Gon had several children and before his death he executed certain deeds of gift by which he distributed his estate among his children reserving only 22'69 acres of paddy land for his own maintenance during life and for the expenses of his funeral when he died. This area of 22'69 acres was part of a holding of 46'69 the other part of which had been given by registered deed of gift to his eldest son U Pyinnya, a Buddhist monk. When Shwe Gon died his children including U Pyinnya mortgaged the whole of that holding in order to raise money for the funeral and not long afterwards the rest of the children sold to U Pyinnya by registered deed whatsoever interest they still had in the 22'69 acres.

Now the children of one of Shwe Gon's sons Mg Byaw who has since died, claim administration of Shwe Gon's estate by the Court and this suit raises questions of the validity of the gift of 24 acres to U Pyinnya and of the validity of U Pyinnya's purchase of the rights of the other heirs in the 22'69 acres.

The learned Judge of this Court who dealt with the case on appeal came to the conclusion that the gift to U Pyinna was valid, and with his decision on that point we are not now concerned.

On the question of the validity of U Pyinnaya's purchase of the rights of the other children the learned Judge said that he felt some difficulty. Both the lower Courts had found that the purchase was invalid on the authority of the cases of *U. Tilawka* v. *Shwe Kan* (1) and *U. Teza* v. *Ma E Gywe* (2) but the learned Judge said that he felt considerable doubt of the correctness of those decisions. He accordingly referred the following two questions for decision by a Full Bench.

(1) Is the sale of immovable property to a Burmese Buddhist monk void on the ground that a monk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions ?

(2) If such a sale is void is the vendor estopped from suing to recover possession of the property on the ground of the vendee's incapacity to contract,

The reference came before a Bench of four Judges, including the learned Judge who had decided *U Teza's* case (2) and the Bench was equally divided in opinion.

The reference has therefore been heard before a Full Bench of five other Judges.

The provisions of law, which seem to be necessary to consider in connexion with the first of the second questions referred are S. **11**, Contract Act, which says that every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject. S. 23, Contract Act, which says that the consideration or object of an agreement is lawful unless it is forbidden by any law or is of such a nature that if permitted it would defeat the provisions of any law or . . . . the Court regards it as immoral or opposed to public policy, that in these cases the consideration or object of an agreement is said to be unlawful and that every agreement of which the object or consideration is unlawful is void : S. 13, Burma Laws Act, which says that

(7) [1916] 38 All. 154=35 I. C. 23=14 A.L.J. 65.
(8) [1914] 37 Mad. 390=26 I. C. 195.
(9) [1917] 40 Mad. 308=31 M. L. J. 515=33 I. C. 721=(1916) 2 M. W. N. 369 (F.B.).

where any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution the Buddhist Law in case where the parties are Buddhists shall form the rule of decision except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.

The cases to which it is necessary to refer in addition to those already mentioned are the following, namely *Ma Pwe* v. *Myat Tha* (10) and *Shwe Ton* v. *Tun Lin* (3).

The earlier of these two cases is important because it introduced for the first time in Burmese Buddhist law the idea that a Buddhist monk is civiliter mortuus, and that idea which I consider to be mistaken has in my opinion been the cause of much of the subsequent misunderstanding. The question for decision in that case was whether a Buddhist monk has power to make a gift of property which he owned before he became a monk and it was held that when a monk enters the order he divests himself of all his property except of course the "Arhites" which a monk is permitted to possess and that therefore the monk in that case was no longer owner of the property of which he purported to make a gift. The latter case is important because it has been relied on for the position that the Vinaya and its commentaries form part of the Buddhist Law and that where the devolution of the property of a monk is concerned it seems right that this branch of the law should govern the decision. All that need be said about that case is that it was a case of succession or inheritance in respect of which under S. 13, Burma Laws Act, Burmese Buddhist Law is the law which is to be applied and that it had no connexion with contract.

In the case of *U Tilawka* (1), a Buddhist monk sued to redeem certain property which he had joined in mortgaging and the defence was raised that being a monk he could not be owner of the land. The Court said that the question raised was a broader one than a mere question of title or estoppel and was whether a Buddhist monk is capable of entering into a valid contract such as a mortgage for his personal profit. The mortgage in that case was made at a time when the Indian Contract Act was not in force in Upper Burma, but the learned Judicial Commissioner said that if the Contract Act had been in force at the time, the alleged mortgage would have been void so far as the monk was concerned under S. 23 as defeating his personal law, and that although Contract Act could not be applied, as the question for decision was one regarding religious usages, the Buddhist Law must form the rule for decision and it must be held that a Buddhist monk could not contract a valid marriage or sue for restitution of conjugal rights so long as he remained in the priesthood. The propositions in that judgment which seem to me to be open to doubt are the statements that the making or redemption of a mortgage by a monk is a matter of religious usage, and the suggestion that such a transaction would defeat the provisions of law.

In *U Teza's* case (2), a Buddhist monk sued to recover immovable property which had been conveyed to him by way of sale and a defence was raised that, being a monk, he could not own secular property. The learned Judge who decided the case said :

"It is needless to say that it has generally been accepted that a Buddhist layman embracing religious life dies a civil death,"

and in support of that statement he cited the case of *Ma Pwe* v. *Myat Tha* (10). As I have already said I do not accept that view. He also cited with approval the decision in *U Tilawka's* case (1), which I have dealt with above, and he held that because by the rules of his order a Buddhist monk is prohibited from engaging in wordly transactions the monk's purchase of the house which was the subject of that suit was void by reason of the provisions of S. 23, Contract Act, relating to agreements the consideration or object of which is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law or is regarded by the Court as immoral or opposed to public policy.

The learned Judge adhered to that view in dealing with the present reference, and said that he held that the Vinaya is the personal law of a Buddhist monk within the meaning of S. 13, Burma Laws Act, so as to bring the

(10) [1897-1901] 2 U. B. R. 54.

case within S. 23, Contract Act, and that his buying and selling for his own benefit is immoral.

The contrary view was taken by Carr, J., and I accept his view and have little to add to it. It seems to me that matters of contract cannot be regarded as matters of religious usage, and that therefore Burmese Buddhist Law does not apply to them by reason of the provisions of S. 13, Burma Laws Act. I do not think that the rules of conduct applicable to Burmese Buddhist monks are "law" to which a monk is subject in respect of matters of contract because they are not the law which is to be enforced by the Courts. For similar reasons, I do not think that the object or consideration of such an agreement as that with which the present reference is concerned is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law or ought to be regarded by the Courts as immoral or opposed to public policy. To put the matter shortly I would say that I do not regard the Vinaya or its commentaries as "law" except to the extent that they are recognized as law by S, 13, Burma Laws Act, that is, in cases where the Court has to decide any question of any religious usage or institution and that because I hold that in a suit regarding the validity of a sale to a monk the Court has not to decide any question of religious usage or institution I do not regard the Vinaya or its commentaries as the "law" applicable in such a suit.

I would therefore answer the 1st question in the negative and on that answer the second question does not arise.

I would direct the respondents Mg. Law and Mg Myaing to pay the costs of this reference. Advocate's fee to be 10 gold mohurs.

Chari, J.—I concur in the reasoning of Carr, J. and the answers given by him and have nothing to add to what he has said in his judgment. I agree to the proposed order for costs.

Das, J.—I agree with the judgment delivered by Carr, J. and have nothing further to add, I also agree with the proposed order for costs.

Mya Bu, J.—The idea of the Buddhist monk entering into pecuniary transactions such as buying and selling for secular purposes is opposed to rules of conduct, promulgated by Buddha by which Buddhist monks profess to be governed, and which are contained in the Buddhist sacred literature called the Vinaya, and the first question in this reference recognize that such rules prohibit Buddhist monks from entering into such transactions.

The rules in question are contained in Ss. 18, 19 and 20 of Patimokkha Nissaggiya Pakittiya, and run as follows:

"(1) Whatsoever Bhikku shall receive gold or silver or get some one to receive it for him or allow it to be kept in deposit for him that is Pakittiya offence involving forfeiture.

(2) Whatsoever Bhikku shall engage in any one of the various transactions in which silver is used that is a Pakittiya offence involving forfeiture.

(3) Whatsoever Bhikhu shall engage in any one of the various kinds of buying and selling that is a Pakittya offence involving forfeiture.

A monk who infringes any of these rules is guilty of Nissaggiya Apat, and he may be pardoned for it, if he confesses to it and discards the property acquired by the transaction.

The first point for consideration is whether in view of the provisions of S. 13 (1), Burma Laws Act, the Vinaya forms the rule of decision of the first question in this reference, and resolves itself into whether the question as to the validity of a sale of immovable property to a Buddhist monk for secular purposes is a question regarding a religious usage or institution.

If the question for decision be as to the effect of a sale to a Buddhist monk or his membership of the order as to the penalties to which he is liable as such member or as to whether the property acquired by him is capable of being held by him for his personal enjoyment or for the benefit of the religious order, it may then be said to be a question regarding a religious usage or institution. No such analogous question is raised by this reference.

A sale is a pure matter of contract, and I fail to see that this reference gives rise to a question regarding a religious usage or institution.

The provisions of law with reference to which the question is to be decided are contained in Ss. 11 and 23, Contract Act, 1872. In my opinion the correctness of the definition of the term "laws" adopted by Carr, J. is not open to question. From this it follows that the rules of conduct in question cannot be deemed

to be "laws" unless they are enforced by the State. According to S. 13 (1), Burma Laws Act, they are not enforced by the State except in cases in which questions regarding any religious usage or institution arise. A sale being a pure matter of contract, the rules in question cannot be said to be enforced by the State since the enactment of S. 13, Burma Laws Act, and it appears from the fact that the Dhammathats collected in S. 409 of the Kin Wun Mingyi's Digest lay down certain rules regarding the disposal of property acquired, by a monk by agriculture, or trade or by usury. that these rules were not enforced by the State except in cases of a purely ecclesiastical nature, even before the passing of the Burma Laws Act. For these reasons, I hold that a Buddhist monk is not disqualified from contracting by law within the meaning of S. 11, Contract Act.

The questions which arise with reference to S. 23 are whether the consideration or object of the sale under consideration is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is immoral.

The foregoing remarks show that neither the consideration nor the object of the sale can be deemed to be forbidden by law or is of such a nature that it would defeat the provisions of any law.

It remains to consider whether it is immoral. The mere fact that an act is sinful does not show that it is immoral. The offences falling within the class of Nissaggiya Pakittiya are not the heaviest of the offences under the Vinaya. The heaviest offences are the Paragika, consisting of 4 offences by the commission of which a monk becomes ipso facto excluded from the order. They are:

(1) Murder, (2) Theft, (3) Sexual intercourse, (4) False profession of attainment of Arahatship.

The direct result of the commission of any of these four offences is that the offender ceases to be a monk and is no longer eligible for ordination. It is true that a Buddhist monk who has taken the vows of poverty and who professes to have abandoned the pleasures of the world taking part in wordly transactions such as buying and selling is not an edifying spectacle. On the other hand it is equally true that for very many years the Burmese Buddhist monk's vows of poverty sit lightly on him. Nissaggiya Apat is not an unpardonable sin.

I agree with the following remarks of Twomey, J. in *U Shwe Ton* v. *Tun Lin* (3):

> "We find individual monks infringing the Vinaya rules by holding paddy lands and the Burmese Buddhist law books recognize the practice."

The Full Bench in that case very pertinetly remarked:

> "that the rigid monastic rule contemplated in the canonical text has long since become only a pious memory and a counsel of perfection."

In all these circumstances I see no good ground for holding that either the object or the consideration of a sale to a Buddhist monk is immoral within the meaning of S. 23, Contract Act.

For the above reasons, I would answer the first question in the negative. As a Burmese Buddhist I would loath to see Buddhist monks indulge in wordly transactions and would have liked to preserve the rulings in *U Tilawka* v, *Nga Shwe Kan* (1) and *U Teza* v. *Ma E Gywe* (2). If individual monks take advantage of the non-interference by the civil laws of the state in their practice of taking part in wordly transactions they will lose not only the veneration of the laymen, but also the brotherly regard of their puritan brothers, and also lower the tone of purity and reverence of the Buddhist monkhood in the estimation of the public. However since this Court has to administer the law as it stands, I am constrained to dissent from the rulings in these cases, and to give the first question in this reference the answer which I have proposed.

As pointed out by the Full Bench of the late Chief Court in *U Shwe Ton's* case (3) at p. 244:

> "If reform is desirable it must come from within the order itself and must be brought about by pressure of lay Buddhist opinion."

Since my answer to the first question in this reference is in the negative, the second question does not call for an answer.

I agree with the proposed order in respect of the costs of this referenee.

Ormiston, J.—Two questions were referred by Carr, J., for decision by Full Bench:

> (1) Is the sale of immovable property to a Burman Buddhist monk void on the ground that a monk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions?

(2) If such a sale is void in the vendor estopped from suing to recover possession of the property on the ground of the vendee's incapacity to contract?

Carr, J., with whom Brown, J., concurring answered the first question in the negative, and if necessary would have been prepared to hold that there was no estoppel. Maung Ba, J., with whom Rutledge, C. J., agreed in a separate concurring judgment, answered the first question in the affirmative, but agreed with Carr and Brown, JJ., in holding that the answer to the second question should be in the negative. The Court being equally divided on the first question, the reference was further heard by a Full Bench differently constituted.

The facts so far as material are set out with sufficient particularity in the order of reference of Carr, J., whose reasoning in the answer to the first question is so cogent that I have little to add to what he has said. As pointed out by the learned Chief Justice, it is not questioned that a monk has capacity to contract for a purely religious object, and the reference should be taken as limited to transactions for a secular or personal and not for a religious purpose.

The answer to the first question appears to depend on the construction to be placed on S. 13 (1), Burma Laws Act (13 of 1898) which provides that in regard to any question regarding succession, inheritance, marriage or caste or religious usage or institution

"the Buddhist Law in cases where the parties are Buddhists shall form the rule of decision"

The section clearly contemplates that unless the question does fall within the category, the Buddhist Law is not to form the rule of decision. It is immaterial, therefore, whether by the rules of the Vinaya, a monk is prohibited from entering into the transactions or whether prior to the passing of the Act, those rules would, in such a case, have been enforced as laid by a civil Court. They may be binding on a monk, in fore conscientiae, but unless they fall within the ambit of the subsection, they are not to be enforced as law by a civil Court. The only ground on which it can be suggested that a sale of immovable property to a Buddhist monk is covered by the subsection is that it is a question relating to a religious usage or institution. I agree with my brother Carr in holding that the reference involves merely a question of contract and does not involve a question relating to a religious institution or usage. It is to my mind immaterial that a monk is a member of a religious institution, whose rules forbid him to enter into a particular contract. The question before us is not in regard to institution itself, but whether a member of it may contract. To describe a rule whereby he is forbidden to enter into a particular class of contracts as a religious usage is to give a strained and unnatural meaning to that expression.

Section 11, Contract Act, ommitting immaterial portions, enacts that every person is competent to contract who is not disqualified from contracting by any law to which he is subject. If it be the case, as I have held that by the rule of the Vinaya under which a monk may not enter into a contract for a secular purpose is not a rule to be enforced by a civil Court, it is not a law to which he is subject. So far as this section is concerned, therefore, a monk is not disqualified from entering into a contract, and a sale of land to him is not void.

The application of S. 23, Contract Act, rendering void an agreement of which the consideration and object is unlawful remains to be considered. It follows from what I have said that a contract entered into for a secular purpose by a monk is not in itself forbidden by law or of such a nature, that, if permitted, it would defeat the provisions of any law. It is suggested that it is immoral or opposed to public policy. In my view it is neither. It can only be immoral on the ground that the monk in entering into it violates an obligation which is binding on his conscience. If this be so, every contract entered into by a man against the dictates of his conscience would be immoral. To so hold would be to reduce the law to an absurdity. On the question of public policy, I would say that it is the policy of the law to promote rather than to restrict freedom of contract.

I would answer the first question in the negative. The second question does not arise, and in my opinion, should not be answered.

The decision of the Court of the Judicial Commissioner in *U Tilawka* v. *Nga Shwe Kan* (1), that a Buddhist monk is

prohibited by his personal law from engaging in any monetary transactions and of this Court in *U Teza* v. *Ma E Gywe* (2), that a purchase of property by a Buddhist monk is contrary to his personal law and is immoral within the meaning of S. 23, Contract Act, should in my view be overruled.

The respondents will pay the costs of the reference, advocate's-fees 10 gold mohurs.

V.S./R.K. *Reference answered.*

A. I. R. 1929 Rangoon 365

RUTLEDGE, C. J., AND BROWN, J.

Ma Aye Yin and *others*—Appellants.

v.

Ma Mi Mi and *others*—Respondents.

First Appeal No. 249 of 1928, Decided on 13th June 1929, from judgment of Dist. Judge, Amherst, in Civil Regular No. 11 of 1928.

Buddhist Law (Burmese) — Eldest born daughter dying in infancy—Second child son dying at 40—He living separately from his parents with their consent and never failing them in any family crisis—He is entitled to status of orasa even though he does not live with his parents and does not actively assist them in their business.

Where an eldest born daughter dies in infancy and the second child who is a son dies at the age of 40 and where he lives separately from his parents in accordance with their wishes and never fails them in any way in any family crisis, the mere fact of his not living with his parents and not having actively assisted in their business is no sufficient reason for depriving him of the status of orasa : *A. I. R.* 1924 *P. C.* 238 *Expl.*; 2 *L. B. R.* 292 and *A. I. R.* 1923 *Rang.* 271, *Rel. on.*; 6 *L. B. R.* 77, *not Foll.* [[P 368 C 1]

Anklesaria—for Appellants.

Htoon Aung Gyaw—for Respondents.

Judgment.—The property in dispute in this case is the estate of one U Aung Min deceased. U Aung Min married one Daw Ma Ma and they had in all 10 children. The eldest child was a girl Ma May, who died at the age of four. The second child was Maung Kin Maung, the father of the respondents in this case. Maung Kin Maung predeceased U Aung Min. The appellants are the five surviving children of U Aung Min. The respondents brought a suit for the administration of the estate claiming that Maung Kin Maung was the orasa child, and that they were, therefore, entitled to share equally with the surviving sons and daughters. They claimed, therefore, an one-sixth share in the estate. It is admitted that, if Maung Kin Maung had the status of orasa, they are entitled to this one-sixth share, and that if he had not, they are entitled only to a 1/24th share. The trial Judge has found the plaintiffs established the orasa status of their father, and has passed a decree, declaring them entitled to a one-sixth share in his estate. Against this decree the defendants have appealed.

The appellants claim that Maung Kin Maung could not be the orasa child, because he was not the first born child, even if he did acquire the status of orasa his children have forfeited the right to base their claim on that status by reason of the fact that he did not live with his parents or helped in the acquisition of the family estate. The question of the rights of an orasa was dealt with at very great length by a Full Bench of the late Chief Court of Lower Burma and subsequently by their Lordships of the Privy Council in the case of *Kirkwood* v. *Maung Sin* (1). It is pointed out in that case that the rights of an orasa have to be considered in two different aspects. There are first of all the rights of a son claiming a quarter share of the estate on his mother's death or of a daughter claiming a similar share on the death of the father. There are secondly the rights of the children of an orasa, who predeceased the parents, claiming a share in the inheritance equal to that of the younger brothers and sisters. *Kirkwood's* case (1) dealt with the claims of an orasa in the latter aspect. The finding was that the orasa must be the eldest born child capable of undertaking the responsibilities of the deceased parents, and that that status should be attained during the lifetime of both parents by a son, if he was the eldest born child, and by a daughter, if she was the eldest born. Once the status has been attained either by the son or the daughter, no one else can claim that status

It was suggested in argument before us in the present case that, as U Aung Min was predeceased by his wife, it would be a daughter, and not a son, who

(1) A. I. R. 1924 P. C. 238=2 Rang. 693=51 I. A. 334 (P.C.).

could claim as orasa. This contention was in our opinion disposed of in *Kirkwood's* case (1). Maung Kin Maung attained the age of majority during the lifetime of both his parents, and was capable, therefore, of attaining the status of an orasa, If he did attain that status, then it makes no difference to his status that it was his mother, and not his father, who died first. On his mother's death he would not be entitled to claim a quarter share of the estate, but his status so far as the claims of the children are concerned would not be affected. It is further contended, however, that Maung Kin Maung never did attain the status of orasa, and that he could not do so, as he was not the eldest born child. In the case of *Tun Myaing* v. *Ba Tun* (2), at p. 294 the following principles were enunciated :

" The eldest born son is the orasa by right; but he does not attain the complete status as such till he attains his majority, and becomes fit to assume his father's duties and responsibilities and to assist in the acquisition or management of the family estate. If he dies before he attains his majority, or if he is incompetent to fulfil the above conditions, then his next younger brother, subject to the same conditions, succeeds to his position as orasa. If, however, the eldest son attains his majority and fulfils the prescribed conditions, and then dies before his parents, his position as orasa remains unfilled and the next brother does not succeed to it."

If this enunciation of the law is correct, then it is clear that for the status of orasa to be attained it is not in all cases necessary for the child, for whom that status is claimed, to have been the eldest born if the eldest born died in infancy.

It is contended, however, that this decision and any other decision of a like nature were overruled by the the decision of the Privy Council in *Kirkwood's* case (1). In their discussion of the relevant passages from the Dhammathats in their judgment in that case their Lordships pointed out the insistence on the orasa child being the eldest born child of the wedded pair. Thus at p. 783 (of 2 *Rang.*) they remark :

" The Vilasa declares that on the death of the father the rule of partition between mother and son is as follows. It specifically states : " If the son is the eldest born," and " if he helped the parents in the acquisition of the family property, he shall get his father's elephant, etc. The remainder of the estate shall be divided into four shares the mother shall get three shares and the son one share" and to the question. "Why should the eldest born child get a fourth share ?" The answer is ; " The parents obtained the child at the commencement of their wedded life by their earnest prayer and acquired the property with his or her assistance," What can all this mean, except that " the eldest son " referred to in all this Dhammathats is the eldest born child of the wedded pair,"

In the case before them their Lordships had not for consideration a case in which the eldest born child had died in infancy, and we do not think that their decision directly or impliedly involved a finding that, if the eldest born child died in infancy, no other child could ever attain the status of an orasa. It is true that in summing up the decision, their Lordships remark at p. 786 (of 2 *Rang.*) :

" The status does not depend on the decease of the father, where the child is a son; or of the mother, where it is a daughter; it comes into existence on the fulfilment of three conditions, viz. : (1) that he or she is the first-born child; (2) that it attains majority; and (3) helps either in the acquisition of the family property and the discharge of the father's responsibilities; or, if a daughter, helps the mother in the care of the property and the control and management of the household, which lie particularly within the mother's duties."

But as we have said there is no question in that case of the first born child having died in infancy, nor did their Lordships in any part of their judgment deal with such a case. In their final conclusion their Lordships expressed general assent with the observations of the Judges of the Chief Court, and on this point Heald, J., expressed his opinion clearly in the course of his judgment. At p. 746 he remarks :

" The question then arises whether if the eldest child dies in infancy, the next child succeeds as auratha. The Dhammathats, so far as I know, give no answer to this question though as I have said the Attasankhepa considers the possibility of a case in which there is no auratha but only younger children. I think from my experience of cases under Burmese Buddhist Law for more than 20 years, that there can be no doubt that children who do not grow up are always disregarded and that the eldest child who reaches an age at which he or she would be able to take the place of the father or mother in case of death would always be regarded as auratha."

Again at p. 759 (of 2 *Rang.*) of his judgment he remarks:

"The case of *Ma Ein Thu* v. *Maung Hla Dun* (3), was one in which the question of the rights of grandchildren arose and it was held

(2) [1906] 2 L. B. R. 292.

(3) [1912] 5 Bur. L. T. 73=15 I. C. 360.

that where the eldest child was a son who died in infancy, the son of the next eldest child, who was a daughter and who grew up, was entitled to share equally with his mother's younger sister. That decision was in my opinion correct, but the judgment seems to suggest that if there had been a son surviving instead of two daughters, the son might possibly have been auratha to the exclusion of the elder sister, and that view, I think, would be mistaken. The ruling was not, however, officially reported."

He then proceeded to quote the case of *Ma Su* v. *Ma Tin* (4), in which the same view as to the effect of the eldest born child dying in infancy was considered. Certain remarks of Duckworth, J., suggest that he might have taken a contrary view. He states at pp. 770 and 771 (of 2 *Rang.*) :

"The point is that, if a son is not the first born child, he can never be auratha, unless the eldest child dies before reaching majority or competency, and then only when the eldest child is a male. It is very doubtful whether, according to the Dhammathats, another can become auratha in place of the deceased eldest daughter."

But he cites no authority in support of his view. The tendency of judicial decisions of recent years has been to place the sexes on a status of absolute equality with regard to their claims of inheritance in the estate of their deceased parents, and we know of no authority in the Dhammathats for the view that, if the eldest born child is a daughter and dies in infancy, no other child can attain the status of an orasa. The views of Heald, J., on this point are generally in accord with previous decisions in Burma and we agree in those views. The result is that Maung Kin Maung, who did not die apparently till he was over 40 years of age, did attain the status of orasa, and that he retained that status until his death unless it be held that he failed to fulfil certain other requisite conditions besides that of being the eldest child. We have already referred to the passage in their judgment in *Kirkwood's* case (1), where their Lordships set forth the three conditions necessary for the coming into existence of the status of orasa by a son or daughter : (1) that he or she is the first born child; (2) that it attains majority; and (3) helps in the acquisition of the family property and the discharge of the father's responsibilities if a son. In our view of the reasons we have already given, the first two requisities are satisfied in this case, and in stating the third requisite we do not think that their Lordships intended to lay down a definite rule which must be rigorously followed in every case.

In deciding on the applicability of these remarks to the present case, it must be remembered that in the case before their Lordships there was no question of the orasa not having helped in the acquisition of the family property, and on this point the remarks of their Lordships amount to little more than that these requisites are set forth in the Kyetyo Dhammathat. The remarks on the point are a summary of the result of extracts from the Dhammathats and cannot in our opinion be interpreted as intended to lay down any definite law on this point. There are certain passages in the Dhammathats which suggest that a child loses its rights of inheritance on failure to live with its parents, and it is contended that this rule has still greater force when the rights claimed are the special rights of the orasa. In the case of *Ma Hla U* v. *Maung Shwe Yin* (5), the eldest daughter on the death of the mother claimed a quarter share in the joint estate. It was held that the mere fact that she had lived separately from her father and that she had never assumed the duties of her deceased mother in the family was not sufficient reason for denying her rights.

In the present case U Aung Min was a goldsmith. He sent his son Kin Maung to an English school and after leaving the school Kin Maung first became a clerk in a lawyer's office. Subsequently he became a teacher and then a clerk in the Deputy Commissioner's office, Thaton. He was subsequently transferred to Pa-an as Sub-Accountant and later joined the establishment of the Divisional and Sessions Judge, Moulmein. He was then appointed a Myook. It is quite clear from his training and his subsequent occupation that he could not well assist his father in his business as a goldsmith, and indeed that his father never expected him to do so. There is no evidence that his relations with his parents were other than normal. In the course of his work he had been transferred away from Moulmein where his parents lived. But he never ceased to maintain filial

(4) [1912] 6 L. B. R. 77=18 I. C. 466=5 Bur. L. T. 291 (F.B.).

(5) A. I. R. 1923 Rang. 271=1 Rang. 370.

relations with them, and there is evidence to the effect that he did at times help them with presents of money. Certain remarks by Heald, J., in *Kirkwood's* case (1), on this point at pp. 746 and 747 (of 2 *Rang.*), have been cited by the trial Judge:

"There can, I think be no doubt that the Dhammathats which give a special share to the eldest child who is competent to take the place of father or mother contemplate a family in which the auratha is living in the family house and does actually take the place of the parent. Indeed I doubt whether the Dhammathats contemplated the auratha's taking away the special share unless he or she was ousted from the position of head of the family by the surviving parents marrying again. Some of the Dhammathats would deprive a son or daughter, who does not live with the family and take the father's or mother's place of the auratha child's share: vide the texts cited in Ss. 36, 37, 40, 41 and 62 of the Digest, but I think that in this case, as in certain other cases, e. g., the cases of adopted and stepchildren, the necessity for joint living may now be considered as archaic and obsolete and may be disregarded."

With these remarks we agree. There is nothing to show that Kin Maung's special help was ever asked for by his father or refused by him. His working first as a clerk in a lawyer's office and later on as a clerk in the Government service was apparently in accordance with the wishes of his parents. There is nothing to show that he ever failed his parents in any way in any family crisis and that being so, we do not consider that the mere fact of his not living with his parents and not having actively assisted in their business is sufficient reason for depriving him of the status of orasa. We are, therefore, of opinion that the case has been rightly decided by the trial Court, and that the respondents collectively are entitled to share equally in the estate of U Aung Min with the five appellants. We accordingly dismiss this appeal. The trial Court directed the costs in that Court to come out of the estate, and we think that, in the circumstances, a similar order might fairly be passed here. We, therefore, direct that the costs of this appeal be awarded out of the estate.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 368

BROWN, J.

Maung Ba Oh—Appellant.

v.

Motor House Co. Ltd.—Respondent.

Special First Appeal No. 128 of 1928, Decided on 26th March 1929, from judgment of Small Cause Court, Judge, Rangoon, in Civil Regular No. 6659 of 1927.

Contract Act, S. 74—Contract by *M* for purchase of Motor truck from *D*—Truck delivered to *M*—Part of purchase money paid and with regard to balance *M* entering into hire purchase agreement about truck in which *M* was described as hirer and *D* as owner—Under agreement balance was to be paid in instalments and on payment of whole sum *M* had option to purchase truck by paying one rupee—Agreement containing clause that on failure by *M* of any instalment as it became due *D* could seize car and credit its value as against amount due by *M* but *M* was not to be credited with more sum than then due—Agreement though in form of hire, object of parties in drawing it up was to enter into contract for sale—Stipulation that *M* was not to be credited with more sum than then due was by way of penalty which Court can and ought to relieve against under S. 74.

M entered into a contract with *D* for purchase of a motor truck for a certain sum. The truck was delivered to *M*. *M* paid only part of the sum and entered into a hire purchase agreement about truck in which *M* was described as hirer and *D* was described as owner for the sum still due. Under the agreement *M* was to pay the balance by instalments and on payment of the whole sum had the option of purchasing the truck for one rupee. The agreement contained a clause to the effect that on failure by *M* of any instalment as it became due *D* was entitled to seize the car and credit its value as against the amount due but subject to a condition that in no case should he credit *M* with more than the amount still due on the contract.

Held: that though the agreement was in form one of hire, the object of the parties in drawing up the agreement was to enter into a contract for sale providing at the same time security to the seller for due payment of the purchase money. [P 371 C 1]

Held further: that the stipulation in the agreement that *D* could seize the car and keep it without making any payment to *M* even though the value of the car might be greatly in excess of the amount due under the agreement was a stipulation by way of penalty which the Court could and ought to relieve against under S. 74: 5 *L. B. R.* 201, *Dist.*; 2 *U. B. R.* 291, *Rel. on.* [P 371 C 2]

Dantra—for Appellant.

Dhar—for Respondent.

Judgment.—In April 1926 the appellant Maung Ba Oh entered into a contract with the defendant company for the

purchase by him of a Graham Brothers' Motor Truck for the sum of Rs. 3,850. The truck was delivered to the appellant on 30th April on his paying Rs. 1,000 as a first instalment towards the price. At the same time he wrote a letter to the defendant company agreeing to pay the balance within three months by instalments. On 7th June 1926, Maung Ba Oh paid the defendant-company a further sum of Rs. 800. He claims that he made another payment of Rs. 165 at the close of June but this payment is not admitted. No other payment was made before October. On 12th October the respondent company wrote to the appellant pointing out that payments were overdue and saying that unless payments were made by 20th, legal action for the recovery of what was due would have to be taken. On 28th October the appellant went to the Motor House Company and talked to them about the matter. He had Rs. 127 with him and he paid that sum towards the amount due. The next day he again visited the office of the company and on that day he signed a hire purchase agreement with reference to the truck. The document is filed as Ex. K. It is an ordinary hire purchase agreement in which the Motor House Company are described as the owners of the truck and the appellant is described as the hirer. A total sum of Rs. 2,143 was to be paid in nine months in instalments of Rs. 238 on 29th day of each month beginning on 29th November. On failure on the part of Maung Ba Oh to pay any instalment as it became due, the respondents were entitled to seize the car and credit its value as against the amount due but subject to a condition that in no case should they credit the appellant with more than the amount still due on the contract.

Since that date the appellant has paid one instalment of Rs. 238 only and in the month of February 1927 the defendant company seized the truck. They subsequently sold it to one Binjraj for Rs. 2,750. The appellant filed a suit against the Motor House Company in which he claimed that they had no right to seize the car. He stated that the value of the car when seized was Rs. 3,500 and that at that time there was a sum of Rs. 1,520 only due from him towards the purchase money. He asked for a decree for the difference between these two sums, Rs. 1,980. The defendant company denied that they were in any way liable to the plaintiff. They pleaded that under the agreement Ex. K they were entitled to seize the car and that the plaintiff was not entitled to claim anything from them. The trial Judge dismissed the plaintiff's suit and the plaintiff has now appealed.

The document Ex. K, as I have said, is an ordinary one of hire purchase agreement. The plaintiff, however, pleads that when he signed it he did not understand what he was signing. It was represented to him by the defendant company that he was merely signing an agreement to pay the balance of the purchase money due on the car by monthly instalments of Rs. 200. It is admitted that the appellant made two visits to the office of the Motor House Company, one on 28th October and, one on 29th. The plaintiff says that his visit on 29th was not made in order to come to terms about the car but merely in order to have something done to the carburettor. Whilst he was there the document (Ex. K) was given to him without the blanks being filled in and at the defendant's request he signed it.

He has called two witnesses to support his version of what occurred, Maung Than Sein and his motor driver Maung Tha Byaw. Than Sein says that at the time he was reading a document which was blank, and whilst he was doing so the plaintiff came in. He gave the document up to a "bo," presumably the Manager of the Company or one of the Assistants, and the "bo" gave it to the plaintiff who thereupon signed it. Tha Byaw says he saw the "bo" hand a paper to the plaintiff and the plaintiff write on it. But he admits that he was some distance off. The trial Judge has not accepted this evidence and it does not seem to me to be very convincing. It is extremely unlikely that the appellant, a business man, would blindly sign a document of this sort. Mr. Bertie, the Manager of the Motor House Company and Mr. Morley, his Assistant, both say that the terms of the document were explained to the appellant before he signed it, and that the blanks in it were filled up. I agree with the learned trial Judge that it is extremely unlikely that the Motor House Company would in the

circumstances have agreed not to take any further action for the recovery of what was due on the car in return for the plaintiff's merely signing an agreement to pay what he was already bound to pay. It is prima facie unlikely that the appellant would have signed a blank document and I think that the evidence of Mr. Bertie and Mr. Morley that the document was not blank when it was signed may be accepted.

Two alterations have been made in the document. In the first clause the period of hire was first of all written down as 12 months; this was subsequently altered to nine, and the date for the payment of instalment was first of all entered as the 15th of each month, but this figure was subsequently altered to the 29th. Mr. Morley says that both these alterations were made before the agreement was accepted by Mr. Bertie. Mr. Bertie says the alterations from 12 to 9 were not then made. The trial Judge has accepted Mr. Morley's statement on this point. The total sum due on the document was shown as Rs. 2,143 and the monthly instalment shown as Rs. 238. These figures were clearly entered in the first instance. Nine times Rs. 238 amounts to Rs. 2,142 and it is clear therefore that the document originally contemplated a period of nine months, and, whenever the alteration to nine months was made, it clearly represents the original intention of the parties. I am of opinion that the document (Ex. K) was signed by the plaintiff of his own free will, that he must be presumed to have understood what he was signing and that it does represent the terms of the contract agreed on between the parties.

As regards the amounts which have been already paid towards the price of the car, I also agree with the finding of the trial Judge. The plaintiff claims to have paid the sum of Rs. 165. The defendant says that this payment was made not towards the price of the car but towards the insurance premium thereon. The plaintiff admits that Rs. 165 was paid towards insurance and he has failed to prove that he made more than one payment of that amount. The amount that was due therefore under the original contract at the time of the execution of Ex. K was the sum of Rs. 3,850 less the three instalments of Rs. 1,000, 800 and 127, or a total of Rs. 1,927. The defendant says that the Rs. 220 was by consent added to this sum to represent interest. The interest would work out at a somewhat high rate but not at a rate unusually high for such agreements. Between the purchase and the Ex. K the plaintiff claims that he spent Rs. 557 in having a body made for the car. That he did spend some money for this has been proved, but I agree with the trial Judge that he has not proved that the value of the truck was increased by the whole amount of the money he spent on this body. If the terms of the contract, Ex. K, are to be enforced in their entirety, then it seems to me that the suit was rightly dismissed. But the question remains whether the terms of the contract should be enforced in full. Exhibit K is headed:

"Memorandum of Agreement between Messrs. The Motor House Co. Ltd., called the owners and Maung Ba Oh, called the Hirer."

Clause 1 of the agreement reads:

"The owners agree to let, and the hirer agrees to hire a truck and accessories as described on the back hereof for the term of nine months, for the sum of Rs. 2,143 payable down and the balance in monthly instalments of Rs. 238 on 29th day of each month at Rangoon, the first instalment to be paid on 29th November next 1926."

Clause 2, amongst other things, recites that

"it is agreed that the truck shall remain the property of the owners until and unless the hirer exercises the option. contained in Cl. 9"

Clause 3 reads:

"Should the hirer make default in any monthly payment as agreed, or commit any breach of any provision of this agreement or should he die or have a receiver order made against him or make any arrangement or composition with his creditors, or should the said truck be seized under execution or legal process, the whole sum then remaining unpaid of the full amount of Rs. 2,143 shall become due and payable forthwith, and the owners shall have the right at any time to retake possession of the said truck and accessories, and to credit the account of the hirer (as against the balance of the said full amount) with an amount representing the fair market value of the machine and accessories in their then condition but such amount shall not be greater than the whole sum then owing by the hirer to the owner."

Clause 6 says:

"The hirer shall be at liberty at any time during the continuance of the agreement to return the said truck and accessories to the owners, carriage paid, and upon the same being safely received by the owners, they shall be credited to the hirer's account in the same manner and with the same effect as is provided in para. 3 hereof, provided that the owners shall not be compelled to allow for

the said truck and accessories a greater sum than the balance of the whole sum owing by the hirer to the owners. It is the intention of this agreement that on the determination of the hiring under this clause the hirer shall at once pay the balance of the full amount named in Cl. 1, less an allowance for the fair market value as aforesaid.

And the agreement concludes with Cl. 9 :

"It is further agreed that if and when the full amount firstly above named shall have been paid to the owners, the hirer shall have the option of purchasing the said truck and accessories for the sum of one rupee, but no such option shall arise in case of termination of hiring under Cls. 3 or 6 hereof.

The construction of a hire purchase agreement with reference to a sewing machine was discussed in the case of *Musa Mia* v. *Dorabjee* (1) ; and also in the Upper Burma case of *Singer Manufacturing Co.* v. *Elahi Khan* (2). In each of those two cases the claim made was for hire long after the period when if the amount payable had been paid on the dates due, the machine would have become the property of the hirer. The two cases are not, therefore, analogous to the present case. But in the *Upper Burma* case, it was held that the circumstances of the case appeared to bring it within the intended application of S. 74, Contract Act, and I think the same view may be taken as regards the present case.

Section 74, Contract Act provides :

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for."

Now the agreement in the present case is on the face of it an agreement to hire with an option of purchase, but, as pointed out in the Upper Burma case of *Singer Manufacturing Company* (2) at p. 294 :

"In construing a contract it is, of course, the duty of the Courts to look not merely at the surface and form, but also into the heart of the matter and to ascertain its true meaning and the actual intention of the parties."

Although the agreement is in form one of hire the object of the parties in drawing up the agreement was to enter into a contract for sale providing at the same time security to the seller for due payment of the purchase price.

Clause 9 provides that on the whole Rs. 2,142 being paid the hirer shall be entitled to purchase it on paying another one rupee ; that is to say, he would become the purchaser for 2,143 In Cl. 1 the hirer undertakes to pay the instalments of Rs. 238 a month on the 29th of each month, Cl. 3, under which the defendant-company has acted in this case, contains the penalty for failure to carry out this promise of paying the instalments as they fall due. Under that clause the owners can seize the car and keep it without making any payment to the plaintiff even though the value of the car may be very greatly in excess of the amount due under the agreement. It seems to me that this is clearly a stipulation by way of penalty, and, further, that it is a stipulation which if strictly enforced might have the most inequitable results.

Mr. Bertie, the Manager of the Motor House Company admits that if a party had to pay Rs. 4,000 under a hire purchase agreement and only Rs. 5 was left unpaid, strictly speaking, they could seize the car and make any profit they like over it, that is to say, in such circumstances the would-be purchaser who had paid practically the whole of the car would merely have had the use of it as a hirer for a period of months. If both parties to the agreement, Ex. K, performed their part of the contract, the agreement would be fair enough. But the penalty provided in case of default by the purchaser is clearly in the highest degree inequitable. In my opinion, the provisions of Cl. 3 amount to a stipulation by way of penalty which the Courts can and ought to relieve against under the provisions of S. 74, Contract Act.

The sum of Rs. 2,143 shown in Ex. K is not the amount actually due at the time the agreement was drawn up, but in view of the failure of the plaintiff to make payment under the original contract the defendant company could fairly claim interest on their money, and I am not satisfied that in the amount fixed, Rs. 2,143, the rate of interest allowed is so unreasonably high as to be exorbitant. But having allowed this sum it is not necessary to allow anything further for interest as in calc-

(1) [1910] 5 L. B. R. 201=8 I. C. 969.
(2) [1892-96] 2 U. B. R. 291.

ulating this amount interest was clearly allowed for up to the expiry of the nine months. Of this sum of Rs. 2,143, Rs. 238 has been paid leaving a balance of Rs. 1905. The respondent-company has sold the truck for Rs. 2,750 so that they have obtained Rs. 845 more than was due to them for the truck. The sale took place on 5th March, several months before the instalments under agreement were due. As far as interest is concerned, the defendant company was therefore amply compensated by fixing the value of the car in the agreement at Rs. 2,143. I think, they might reasonably claim something above this for costs incurred in getting the car back and selling it. But Rs. 45 should be a sufficient allowance for this, I am of opinion that the part of Cl. 3 of the agreement which says that :

"the amount to the credit of the hirer shall not be greater than the whole sum then owing by the hirer."

should not be enforced and that the defendant company may be reasonably compensated for the breach by the plaintiff of his agreement, by allowing them the money they have received for the truck, less the sum of Rs. 800. On points of fact the defendant company have been successful in both Courts and the greater part of the cost of litigation should be borne by the plaintiff. I set aside the decree of the trial Court and pass a decree for the payment by the defendants to the plaintiff of Rs. 800. The plaintiff will pay the defendants half their costs in both Courts.

P.N./R.K. *Decree set aside.*

A. I. R. 1929 Rangoon 372

RUTLEDGE, C. J., AND BROWN, J.

U Pyinnya and *another*—Plaintiffs—Appellants.

v.

V. Dipa—Defendant—Respondent.

First Appeal No. 176 of 1928, Decided on 19th March 1929, from judgment of High Court on original side in Civil Regular Suit No. 225 of 1927.

(a) Buddhist Law (Burmese)—Thinghika property dedicated to rahans of Kyaungdaik is vested in head of monastery as trustees.

Where thinghika property is dedicated to the rahans of kyaungdaik and, not to the whole monkhood throughout the world, the property is vested in the head or heads of the monastery as trustees. [P 373 C 1]

(b) Buddhist Law (Burmese)—Scheme giving power to trustees to settle or decide disputes relating to possession of kyaung—Power to appoint successor to head of kyaung vests in trustees.

Where a scheme regarding land granted by Government for religious purposes is settled, giving to the trustees all powers of control to settle disputes relating to the possession of kyaungs and to decide who should be in possession of the same, then on the death of a monk holding the kyaungs, the trustees and trustees alone have the power to appoint his successor and that though ordinarily in making such appointment, they should consider whether the deceased occupant has nominated a successor who was his senior pupil and well qualified to teach the Buddhist scriptures, the trustees' choice is not narrowed down to such an individual, and they are justified in asking him to acknowledge the scheme settled for the management of the kyaungdaik and on his refusal to acknowledge it, are justified in appointing other monks to take possession of kyaung: (1892-1896) 2 *U. B. R.* 78 and (1892-1896) 2 *U. B. R.* 72, *Ref.* [P 374 C 2]

Maung Kun—for Appellants.

Maung Mya Gaing—for Respondent.

Rutledge, C. J. — This is an appeal from the Original Side of this Court dismissing the plaintiff-appellants' suit for possession of a kyaung in the Thayettaw Kyaungdaik, Rangoon, of which the defendant-respondent is at present in possession. Disputes from time to time had arisen in connexion with this kyaungdaik and at the suggestion of the Court application was made to the late Chief Court for the settlement of a scheme for the management of the kyaungdaik in 1912. An appeal, First Civil Appeal No. 129 of 1913, was preferred against the scheme settled by the Original Side and the appellate Court, consisting of the late Sir Charles Fox, Chief Judge, and Sir Henry Hartnoll, gave the scheme their very careful consideration and referred it to the Mahasangharaja the Thathanabaing, who gave his opinion after consultation with the Sayadaws present at the Soodima Convocation.

We may mention that the several parties in the kyaungdaik profess to belong to the body of monks who acknowledge the Thathanabaing as their religious head. The scheme was accordingly settled by the appellate Bench of the Chief Court in accordance with the advice of the highest ecclesiastical authority acknowledged by the several monks of the kyaungdaik. This, however, did not prevent a considerable number of monks in the kyaungdaik refusing to acknowledge the scheme and in particular the appel-

lants, who in pursuance of the scheme were elected as trustees of the kyaungdaik with a council of five. U Kethaya, the monk in charge of the Hmangin kyaung was one of those who refused to acknowledge the scheme, and it is on record that the appellants, the present trustees, sued U Kethaya for ejectment in the late Chief Court in Civil Regular No. 218 of 1918, alleging disobedience and harbouring a considerable number of monks hostile to the trustees. In those proceedings, it was not disputed that U Kethaya was in lawful possession of the kyaung. In such circumstances, a strong case would have to be made out to justify ejectment by the trustees, and the suit was dismissed by consent as not disclosing sufficient cause of action. U Kethaya died early in 1926 and the defendant, who seems to have been his senior disciple, claims to be in lawful possession of the kyaung as his successor. The learned trial Judge has held that the defendant is in lawful possession of the kyaung and after a full discussion of the breaches of the bye-laws alleged by the plaintiffs has held that they are insufficient to justify eviction and so has dismissed the suit.

If we were able to share the learned Judge's finding that defendant was in lawful possession of the kyaung as successor to the late U Kethaya, we would not be disposed to differ with his findings as regards the sufficiency of the alleged breaches to justify eviction, but, for reasons which we hereafter set out, we are not satisfied. If it had been established that the kyaung was poggalika property, the learned Judge's findings might well be correct, but it is common ground that the kyaung in fact is thinghika property. No doubt thinghika property varies in character according to its original dedication. It may be dedicated to the rahans of the four quarters of the earth, i. e., to the whole monkhood throughout the world, or, as is more usually the case to the rahans of the particular kyaungdaik in which the kyaung is situated. There is no evidence on the record as to the particular form of the dedication, but we consider ourselves justified in presuming that the more usual form was followed in this case and that the dedication was to the rahans of the kyaungdaik. In such cases, the property is vested in the head or heads of the monastery, no doubt as trustees : see the Manugye Dhammathat : Book 8 (Richardson), para. 3, 236 :

"Of these six, as regards the gift having reference to a future state of existence, they are of two kinds, poggalika and thingheika. In poggalika gifts, the person to whom the offering is made has a right to keep it. In thingheika gifts, it becomes the property of the chief of the assembly of priests : see *Maung Talok* v. *Mo Kun* (1)."

The land on which the kyaungdaik is situated was granted by Government for religious purposes to trustees and the present trustees' names have been inserted in this grant, which is in their possession. This fact is mentioned by the first plaintiff in his evidence. The scheme does not vest the land in the trustees, but by its terms seems to take for granted that this has already been done. Had it been otherwise, it would be difficult to explain the very extensive powers given to the trustees by S. 8, Cls. (a) to (f). By Cl. (a) they are given all the powers of control which the head of a monastery has by Burmese Ecclesiastical Law—to settle disputes relating to the possession of kyaungs, rayats or religious buildings and to decide who should be in possession (of kyaungs). As I read this clause, they have not merely the power to decide disputes between lawful claimants to a kyaung, but they are given expressly the power to decide who should be in possession of any thinghika kyaung. This power is probably given to them as heads of the kyaungdaik by Burmese Ecclesiastical Law, but it is expressly given to them by the scheme as settled by the Chief Court on the advice of the Thathanabaing.

The position taken up by the defendant throughout was that he was not bound by the scheme and would not obey its provisions. The learned trial Judge has held that the defendant, as well as all other monks in the kyaungdaik are bound by this scheme. I am in full agreement with this finding, but I do not think that the learned Judge correctly appreciated the consequences of this finding and he seems to have been led away from the main issue by other matters raised by the pleadings such as breaches of bye-laws and the committing of dupassa. From the evidence it seems clear that the trustees had no objection to the defendant if he acknoweledged himself bound by the scheme and recog-

(1) [1892-1896] 2 U.B.R. 78.

nized the trustees as the heads of the kyaungdaik, and it is perfectly clear that the defendant refused to acknowledge the scheme or the trustees as the heads of the kyaungdaik.

It has been contended that the trustees and council had no option but to recognize the defendant as the lawful successor of the late U Kethaya as custodian of the Hmangin kyaung as he was his senior disciple, was well qualified to teach the Buddhist scriptures and had been nominated by U Kethaya. No doubt these are qualifications which in ordinary circumstances would lead the heads of the kyaungdaik to appoint a candidate so well qualified, but I cannot read them as taking away the discretion of the trustees. The very object of the scheme was to promote harmony in the kyaungdaik and not to continue indefinitely the strife and bickerings of one faction with another, which is most inimical to the Buddhist religion, and the requirements of the trustees that the defendant should ackowledge the scheme as a condition precedent to their entrusting him with the charge of the Hmangin kyaung seems to me to be perfectly reasonable. It is clear from the record that the trustees asked him for such acknowledgment and it is clear that the defendant declined to give it. Instead of acknowledging the trustees, the defendant called in D. W. No. 1, U Kothanla, referred to as the Aletawya Sayadaw. The learned advocates agree that his kyaungdaik is on boundary road in a different part of the city, and he himself was forced to admit that he had no connexion whatever with Thayettaw kyaungdaik. The defendant states that he entrusted the arrangements for U Kethaya's pongyibyan to this monk, but it is also clear that he presided at the meeting, the Hmangin kyaung, which the defendant alleges appointed him the lawful custodian of the kyaung. The record does not show how many of the rahans present at that meeting were strangers to the kyaungdaik like the presiding monk, nor does it really matter. The scheme did not entrust U Kothanla or a gathering of defendant's sympathisers with the power to decide who should be in possession of the Hmangin kyaung. This power was given to the trustees by S. 8, Cl. (d) of the scheme. The learned trial Judge seems to have been much impressed by the demeanour of U Kothanla. We have not had the advantage of the learned Judge on this point, but the impression seems to have been so favourable that he does not seem to have noticed that this monk was actively mixing himself up in the concerns of a kyaungdaik with which he was not connected, and not as a peacemaker but as a partisan, and that he was backing up the defendant in his disregard for the scheme which the learned Judge himself has found to be binding upon him, the defendants, as well as the other monks of the kyaungdaik.

To put the matter shortly, I am satisfied that on the death of U Kethaya the trustees and the trustees alone had the power to appoint his successor and that though ordinarily in making such appointment, they should consider whether the deceased occupant had nominated a successor who was his senior pupil and well qualified to teach the Buddhist scriptures, the trustees' choice was not narrowed down to such an individual, and they were justified in asking him to acknowledge the scheme settled for the management of the kyaungdaik and on his refusal to acknowledge it were justified in appointing other monks to take possession of the kyaung.

I have very little further to add in connexion with the case. The trustees appointed two disciples of the late U Kethaya: namely U Zatila and U Tezeniya to take charge of the kyaung as they agreed to acknowledge the scheme. This was done about May 1926. These monks ran away from the kyaung some time later and neither of them gave evidence at the trial. The defendant, however, filed a copy of U Zatila's evidence in Criminal Regular Trial No. 336 of 1926 before the Eastern Sub-Divisional Magistrate, Rangoon, relying on the admission in cross-examination that the defendant was senior to him and had a right to take the deceased U Kethaya's place. In the earlier part of U Zatila's evidence, he states that on the day that they were given the custody of the kyaung, four Zerbadis abused them and attempted to stab another monk, while the defendant and his twenty discriples refused to leave the kyaung. From these circumstances, the reasons for the flight of U Zatila and his companion are not far to seek. The learned Judge has

decided that certain of the bye-laws made under the scheme are ultra vires. As I do not base my judgment on any question arising on these bye-laws, it is not necessary for me to express any opinion.

For these reasons, I would allow the appeal and set aside the judgment and decree appealed from, and would grant a decree that the defendant yield up possession of the Hmangin kyaung and premises to the plaintiffs within fourteen days, failing which he will be evicted therefrom. As there is no layman associated with the defendant-respondent on the record in this appeal, I would make no order as to costs.

Brown, J.—I agree that the decision in this case must depend on the answer to the question whether under a reasonable construction of the scheme for the management of the kyaungdaik as framed the trustees have the right to fill any vacancy occurring in the headship of the kyaung by death of the previous head. On this point the learned trial Judge remarked :

"In the present case, it is not alleged that the defendant has set up such a claim, and the trustees and the council appear to take up the position that they are invested in all cases with the right of nominating the successor of a deceased head pongyi. Such a right appears to be opposed to the well recognised methods of appointing such a successor and, therefore, to be opposed to the rules of Vinaya with which the scheme is intended to be consistent."

He then goes on to cite a passage from the deposition of the plaintiff U Pyinnya himself. U Pyinnya stated in the course of his cross-examination :

"usually the head of a gaing in consultation with the members of the gaing selects as to who should succeed to a deceased presiding monk."

But when further questioned by the Court on the point he added :

"We the sanghas being in charge of the kyaung will be the proper persons to select a successor."

The learned Judge also relies on the evidence of the Aletawya Sayadaw, U Kothanla, for the defence. This witness states in one part of the examination :

"On the death of presiding monk of a sanghika kyaung and if the deceased monk had confidence in his disciple that he could take charge of the kyaung and that he would be able to control the other disciples, and if he (the junior) monk is replete with aforesaid qualification he becomes the successor of the deceased presiding monk. If he has not been so enstrusted, a successor is elected by the sanghas of the kyaung who have been associating with one onother, i. e., the sanghas who are of the same mind and who had associated with the deceased presiding monk."

But later on in his cross-examination he states :

"It is true that in the case of a kyaung (Tinghika kyaung) like the Hmangin kyaung the trustees of the kyaungdaik could nominate a successor if the said kyaung is situated within the compound of the said kyaungdaik and if situated outside the kyaungdaik solitarily by itself the deceased presiding monk could nominate a successor. The first answer is true provided there is no monk in the kyaung competent to succeed the deceased."

This answer is somewhat confused, but I do not think it can be held to be established that the general recognised custom is that only the rahans of a particular kyaung in a kyaungdaik have the power of selecting a successor.

In Manugye, Vol. 8, S. 3, it is laid down that in poggalika gifts, the person to whom the offering is made has a right to keep it. In sanghika gifts, it becomes the property of the chief of the assembly of priests. The property here is sanghika property and, therefore, may be held to be the property of the chief of the assembly of priests. This by itself does not carry us very far, as it leaves open the question of what exactly is meant by "assembly of priests". In the case of *U Te Zeinda* v. *U Teze* (2), it was held that in Upper Burma a monk or rahan with the knowledge and authority of the Thathanabaing ecclesilastical authorities under him or a Taikok had the power to evict the resident rahan from a kyaung. The following passage occurs in the judgment on p. 75:

"But, besides this, they claim to be the ecclesiastical heads of a sort of abbey or priory called a kyaungdaik, in which the defendant is one of the monks. There are separate buildings, but all are within the same precincts and constitute a monastery of which the plaintiffs are Taikok and Taikkyat."

It was held that the plaintiffs had the power of eviction. This ruling has of course no direct bearing in the present case, dealing with a kyaungdaik in Rangoon where there are no Taikoks and other ecclesiastical members of the Buddhist hierarchy subordinate to the Thathanabaing. But it does suggest that in accordance with the ordinary rules of the Buddhist Ecclesiastical Law

(2) (1892-96) 2 U. B. R. 72.

the head of a kyaungdaik would have the power claimed on behalf of the trustees in the present case.

Rule 8 (a) of the scheme lays down that the trustees shall control the behaviour of all persons in the kyaungdaik and shall have all the powers, for enforcing such control, as are allowed to the head of a monastery by the Buddhist Ecclesiastical Law; and sub-Cl. (d) lays down that they shall settle disputes relating to the possession of kyaungs or zayats or religious buildings and decide who should be in possession. This sub-clause appears to suggest that before they can exercise their power under it there must be a dispute relating to possession. In the scheme as framed in the decree of the late Chief Court it might be posible to construe the words "decide who should be in possession" as referring to any case in which a vacancy occurred. But from the Burmese version of the scheme it would appear that the sub-clause refers entirely to the question of disputes. The intention of the scheme under R. 8, sub-Cl. (a), appears to be that the trustees should have the general powers that would vest in the Taikok, and if the decision in *U Te Zeinda's* case (7) is correct, that would appear to include the power to decide as to the possession of the kyaung.

It is quite clear in this case that a vacancy did occur in the headship of this particular kyaung on the death of U Kethaya and that very shortly after his death the trustees named two pongyis to succeed him. The kyaung is a sanghika property and it is therefore for the sanghas to decide as to possession. The difficulty is as to who is to represent the sangha. No doubt in many cases the rahan chosen by the deceased takes his place without any opposition. There does not seem to be any established rule of law by which the deceased has any power to elect his successor, and it appears clear that that is not really claimed by either party in this case. It is clear, however, that a vacancy has occurred in the management of the kyaung, and it is not clear that the defendant has the right to fill the vacancy. That being so, we are of opinion that in accordance with the general principles of the Ecclesiastical Law and of the scheme as framed, the provisions of R. 8, sub-Cl. (d) must apply and that the trustees must decide who is to fill the vacancy. That being so, they were clearly justified in evicting the defendant from the kyaung, the defendant having refused to acknowledge their authority in the matter. The plaintiffs ask in their plaint that the defendant may be evicted from the whole kyaungdaik, but it does not seem to me that they have established any good case for such an order. I, therefore, agree with the order proposed and that a decree should be passed evicting the defendant from the kyaung in dispute. I also agree that no order should be passed as to costs in this appeal.

V.S./R.K. *Appeal allowed*

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