THE INDIAN LAW REPORTS

RANGOON SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT RANGOON AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT (INCLUDING THE LATE CHIEF COURT OF LOWER BURMA AND THE LATE COURT OF THE JUDICIAL COMMISSIONER OF UPPER BURMA).

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Errata et Corrigenda.

Page 12.—Between lines 23 and 24 *insert* the following.—

"And in laying his objections, Dr. Gour had dealt exhaustively with all the points in the evidence that supported his case."

Page 48.—*For* third paragraph of the headnote, *read* "*Held* also that in respect of offences set out in Section 195 (1), Criminal Procedure Code, the Court has jurisdiction to file a complaint only against parties to the suit."

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THE INDIAN LAW REPORTS

Rangoon Series.

APPELLATE CIVIL.

Before Mr. Justice Young and Mr. Justice Carr

1924

Aug. 25.

A. RAHIM AND ONE
v.
H. V. LOW & Co.*

Accounts stated—Principal and Agent—Errors and overcharges, not shown to be fraudulent—Overcharge knowingly paid by principal without protest—Surcharge and falsify, when Court will permit—Opening of the account when permissible—Fraudulent error.

Where an error of importance has been proved in an account stated (though such error may not be important enough to justify the opening of the settled accounts), the Court should permit the accounts to be surcharged and falsified generally.

Where an overcharge has been paid by the principal with knowledge of the overcharge and without protest, he cannot be permitted to question such payment after accounts have been settled.

The Court will grant permission to surcharge, falsify or re-open an account that has been settled for errors less considerable than usual where the parties stand in a fiduciary relationship.

Where the errors proved in an agent's settled accounts amounted to an overcharge in the conversion of sterling into Indian money, an excess payment of carriage unauthorised by the principal and an excessive rate of brokerage paid without principal's instructions, but one of such errors were proved to be fraudulent, *held* that the errors instanced were not sufficient in number and importance to require the accounts to be re-opened altogether but the principal should be allowed to surcharge and falsify all the accounts stated between the parties.

Held also, that where a single fraudulent error is discovered in settled accounts, the proper order for the Court to make is for the re-opening of the whole account.

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* Civil First Appeal Nos. 201 and 202 of 1923.

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A. RAHIM AND ONE v. H. V. LOW & CO.

Gething v. Keighley, L.R. 9 Ch.D., 547 ; *Puran Mal v. Ford McDonald & Co.*, 41 All., 635 ; *Williamson v. Barbour*, L.R. 9 Ch.D., 529—*followed*.

Vertannes—for the Appellants.

Foucar—for the Respondents.

YOUNG AND CARR, JJ.—These are two appeals from two suits brought respectively by H. V. Low & Co., Ltd. against A. Rahim and A. Razak, and by the same two persons against H. V. Low & Co. The suit by the Company was for the balance due on certain pro-notes ; for services rendered, and monies paid on appellants' behalf, in all amounting to Rs. 14,000.

The suit by A. Rahim was for an account as they alleged either in their plaint in the one suit, or in their written statement in the other that the respondents were their agents and averred that the pro-notes relied upon by the respondents were signed by them in reliance upon the respondents' representations that the amounts were due and that they were overcharges. They denied the correctness of the amounts claimed for services rendered and monies paid on their behalf, and claimed an account averring that they had been overcharged in respect of exchange, interest and transport charges and other incidental expenses.

The learned Judge allowed the defendants only to surcharge in respect of certain charges for interest, amounting to a sum which the parties agreed upon as amounting to Rs. 1,501-15-9, and allowed the respondents' claim in other respects to the extent of the balance, *viz.*, Rs. 12,499-0-3, and dismissed the present appellants' suit.

From this decision Messrs. Rahim and Razak appeal.

Their first contention is that the learned Judge failed to decide Issues 1—5.

These issues were as follows :—

(1) Where the plaintiffs (Messrs. Low & Co.), the agents of the defendants ?

(2) If so, what were the terms of the agency ?

(3) To what accounts were the defendants' entitled ?

(4) Were the accounts between the parties stated before action was brought ?

(5) Are the defendants entitled to have the accounts re-opened by reason of any of the allegations contained in paragraph 15 of Messrs. Rahim's and Razak's written statements ?

With regard to the first issue, it seems to us that the opening words of Exhibit 1, written by appellants to the respondent firm: "We are desirous of placing our orders through your goodself . . . It is mutually agreed between your Mr. Hosie and ourselves that you shall undertake to bring up on our account and at our risk hardware goods and machinery" is nothing more or less than a proposal to constitute the respondents as their agents. The proposal was accepted by the respondents subject to the following terms :—

(*a*) that the appellants did not cancel their indents when the same had once been accepted by the manufacturer ;

(*b*) that if the goods or any portion of them were prevented (*sic*) by accident or unforeseen cause, the contract should lapse for the portion not shipped or short-landed :

(*c*) it is understood that every delivery is to be considered as a separate contract.

These terms were accepted by the appellants on the 28th April and the whole agreement seems to us to imply that respondents were to be appellants'

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agents for each indent placed with them and that they could at any moment discontinue the agency as regards any goods not already under order. The other terms were—

(1) that respondents should be allowed 5 per cent. on delivered costs which I take to mean 5 per cent. commission on invoice cost *plus* river dues and delivery charges ;

(2) that appellants should bear cable and other incidental charges ;

(3) that respondents should give two months' credit on all goods supplied as per appellants' indents in consideration of which appellants would allow current bank interest from the date of invoice up to the date when payments were made to them from time to time.

Originally as each delivery was made the respondents presented their bills for the amount due by converting the invoice cost into rupees, by charging interest from the date of the invoice which they also converted into rupees and we find practically invariably, so long as the practice (which was changed later) of converting the Invoice cost into rupees continued, that they converted sterling into rupees at a slightly lower rate than the current rate, so as to benefit themselves. This was admittedly done because the respondents who paid London by bills at ninety days' sight found themselves losing on a falling exchange. Hosie, an assistant in the respondents' firm, says, "We came to find out we were losing, and, as the exchange market was falling in adopting a rate in the pro-note, we allowed ourselves a small margin. That margin was provided so as to cover ourselves against any loss that would result from the fall of the exchange."

Razak says, "When the rates of exchange were given me I first had no doubts of their correctness,

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but after receiving three or four indents my clerk pointed out the rates of exchange charged and, I began to have suspicions. I spoke to Hosie and asked him to charge correct rates of exchange. He replied that I was his friend and that he would not charge me more and that if there was any difference he would make it good."

On this evidence we must hold that the appellants knew of these overcharges and did not really object to them. It is all very well for Razak to say now that he protested verbally, but why did he go on paying them without making a protest in writing. We must hold that he acquiesced in them, and that a principal who, with his eyes open, pays an overcharge cannot be heard to object later.

The respondents found themselves still losing and the next thing that we find is that they persuaded the appellants to consent to have their pro-notes made out in sterling with a proviso at the foot that exchange was to be calculated at the rate of the day of payment. This, on a falling market, threw the whole of the loss on to the appellants, but they agreed to it. They now say that they agreed because they were told it would be profitable to them, but we cannot believe that this was the case. We think at most that they accepted the risks of the exchange, hoping that it would become stable, when they would make no loss, or even rise, when they would make a profit.

Later on again these sterling notes were merged into one pro-note for Rs 1,54,560-12-0 at a rate of 1*sh*. 3¼*d*., instead of 1*sh*. 3⅝*d*., which was the rate of the day resulting again in an unfair profit to the respondents to which we are unable to find that the appellants assented, or were aware of. This last charge we hold was an error in their accounts.

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Another charge that the appellants claim to be improper was that in certain instances manufacturers have demanded part payment in advance, or on the placing of the order (*vide* Exhibits 18, 21, 22) which had been paid by respondents' Home Agents without their being consulted and that then they had been debited with interest on these charges though their agreement expressly stipulated that they should be liable for interest only from the date of the invoice.

Razak says (p. 5), "I pointed out to Hosie that it was not my business to pay interest to these people." Hosie says no objection was ever taken to these charges. The appellants admit having noticed these charges. It is not disputed that they paid them. No trace of any objection is to be found, except their present statement which is disputed. They must be taken to have paid them with their eyes open and without demur. With the exception of the over-charge on the conversion of the sterling notes into the pro-note for Rs. 1,54,560-12-0, we see no ground so far either for re-opening the accounts or even for falsifying them.

Stuart, J., in *Puran Mal* v. *Ford McDonald & Co.* (1) remarked, "The opening of the account cannot be justified. I should have doubts, even if these instances had been better established than they were whether they would be of sufficient importance to justify the re-opening of an account which had been closed in view of the fact that the members had every opportunity of ascertaining the accuracy or inaccuracy of the entries." This case is stronger so far as regards these items, with the possible exception of this last. We regard the payments of each pro-note as an indication of a settled account with regard to the particular transaction represented by it, *vide*

(1) (1919) I.L.R., 41 All., 635.

the stipulation that each delivery was to be regarded as a separate contract, and in this settled account, the appellants chose to pay the charges now objected to with their eyes open, and consented to him. There was no mistake. We cannot accept as proved, the statement that Hosie said all would be put right in the end.

Another item that the appellants claim to be improperly debited was a charge of £ 102-2-3 for carriage of a boiler from Falmouth to Birkenhead. The appellants state and prove that they had contracted to buy it for £400, carriage paid, to wharf or quay. That must mean carriage paid to the wharf or quay from which the boiler would be despatched to Rangoon. The agent, therefore, had no right without consultation with his principals to buy it carriage unpaid, especially when the charge was so large. Appellants objected to this charge and we hold that they paid it under protest. It is an item that must be considered either as a ground for falsification or for opening the account.

Another item which their counsel instances is a charge of Rs. 500 for brokerage on the sale of a planing machine by the respondents on their behalf for Rs. 9,000. This they say was a fraudulent charge, as they dispute the fact that a broker was ever employed. The onus of proving fraud rests on them. To prove it they call the Manager of the South Indian Trading Company, which firm was the purchaser, and who says that they dealt with Low & Co. directly and that, so far as he knew, there was no necessity for a broker to intervene. The words "so far as he knew" are important. It appears that he was not even the manager at the time the machine was bought. He says as follows: "The Manager who was working before me was the person who bought

the machine from Low & Co. His name was S. Pandi. C. S. Sami, another partner, knew of the purchase of this machine. I don't know if the other partners knew of it too. S. Pandi and Sami went to Low & Co. together, but I never went there about the matter. I am here as a witness, because I am the manager and have the papers of the Company." In other words he has no first-hand knowledge of the matter at all and S. Pendi and C. S. Sami who had, are not called. Such evidence is quite insufficient to form the basis of such a serious charge as fraud and it is the only item complained of as fraudulent. The question is important because the cases of *Williamson* v. *Barbour* (2) and *Gething* v. *Keighley* (3) show that where a single fraudulent error is discovered in settled accounts as we hold these to be, the proper order to make is for the re-opening of the whole account. Lord Jessel, M.R., observed in the former case, "When the fiduciary relation exists (as we hold it existed in the present case) and one or more fraudulent omissions or insertions in the account are shewn, then the Court opens the account and does not merely surcharge and falsify" and again in the latter case the same learned Judge remarked, "It was decided by Lord Cottenham in *Allfrey* v. *Allfrey* (4) and I stated in the recent case my intention of adhering to that principle to its full extent that where a single item complained of was a fraudulent item the proper order to make was to open the accounts altogether, but where the item complained of is not a fraudulent item and the accounts are of some years' standing, I should say that the proper order was only to give leave to surcharge and falsify." Here we should say that the item complained

(2) (1878) L.R. 9 Ch. D., 529. (3) (1878) L.R. 9 Ch. D. 547.
(4) (1849) 1 Mac. & G., 87

of, though not fraudulent in the sense that it was never incurred at all, was an overcharge which the respondents themselves should not have paid. It was a charge of well over 5 per cent. The Court however does not order an account to be surcharged and falsified much less re-opened, for a single error, however unimportant, unless it is fraudulent, but as Lord Jessel says in *Gething* v. *Keighley*, p. 550 " where there is a single important error alleged and proved it is sufficient to entitle the Court to open the account, if it thinks fit to do so either by opening it altogether or be surcharging and falsifying . . . The Court sees from the nature and amount of the error that the accounts could not have been properly taken and therefore that they cannot stand . . . . The rule is clearly laid down in *Davies* v. *Spurling* (5) by Sir John Leach who says this: In order to induce the Court to make a decree that the plaintiffs are to be at liberty to surcharge and falsify accounts, it is necessary that there should be established some one mistake with respect to an item in the accounts. It is not necessary for that purpose to establish more than one mistake, it being in the view of the Court a reasonable inference that if there be no one mistake there may be many mistakes, and the plaintiff therefore ought to have the liberty of entering fully into those accounts with a view to proving other mistakes. The same point exactly came before Lord St. Leonards, when Lord Chancellor of Ireland, in the case of *Lawless* v. *Mansfield* (6) where he says, in ordinary cases the rule seems to be that the establishment of one mistake is sufficient to induce the Court to give a decree entitling the party to surcharge and falsify an account, per Lord Jessel, M.R., in *Gething* v. *Keighley*, pp. 550, 551."

(5) (1829) Taml. 199, 211. (6) (1 D. & Warr., 557, 603.

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We therefore think the Trial Court was in error when it refused to do more than allow the appellants to correct the mistakes arising from the objection that the plaintiffs have admittedly charged interest for a period longer than that specified in the agreement between the parties. It was an error of importance and the Court should have considered that where there was one mistake there might be many, and have given leave to surcharge and falsify the accounts in general. The question is whether having regard to its importance and the other errors that have been brought to light in this Court, we should not go further and allow the accounts to be re-opened altogether. It is a case of principal and agent, persons standing in a fiduciary relation; and therefore the number of errors to justify the Court in opening the account altogether has to be less considerable than where the parties stand in no such relation, but on the whole we do not think that the errors instanced before this Court (there may of course be others) are sufficient in number and importance to require the accounts to be re-opened altogether, and, therefore, we only make the order that the appellants be allowed to surcharge and falsify all the accounts that have been stated between the parties as principal and agent. The appeals must, therefore, be allowed with costs and the decrees of the Lower Court set aside save as to the Rs. 1,501-15-9, and the appellants be allowed to surcharge and falsify, the items already falsified being excluded from the computation.

APPELLATE CRIMINAL.

Before Mr. Justice Baguley.

A. V. JOSEPH
v.
KING-EMPEROR.*

1924
Aug. 28.

Accused person, whether a competent witness, when not being tried jointly with co-accused—Failure of the police to do its duty under section 170, Code of Criminal Procedure—Non-issue of process against persons, other than the accused, shown to be implicated—Evidence of accused's pecuniary embarrassment and previous attempts to pass off inferior goods, relevant as evidence of motive—Evidence Act (I of 1872), sections 8 and 11—Conviction by Appellate Court for abetment where accused charged with the substantive offence—Code of Criminal Procedure (V of 1898), sections 236, 237—Penal Code (XLV of 1860), sections 29, 468 and 471—Hammer for marking logs, whether a document.

An accomplice, though not pardoned, acquitted or convicted when not jointly tried with the accused, is a competent witness either for or against the accused.

Failure on the part of the Police to do its duty under section 170, Code of Criminal Procedure, and the failure on the part of the Magistrate to issue process against persons, other than the accused, who are implicated in the offence and thus permitting the calling of these persons as witnesses, does not vitiate the trial.

In a trial for the offence of cheating, the facts that the accused was financially embarrassed and had attempted to cheat on other occasions are relevant to prove motive under section 8 of the Evidence Act.

Held, that where the accused is charged with the substantive offence, the Appellate Court may alter the charge to one of abetment only.

Held also, that a hammer for marking sleepers is a document within the meaning of sections 29, 468, 471, Indian Penal Code.

Subramania Ayyar v. *King-Emperor*, 25 Mad., 61—*referred to.*

Govinda Sambhuji Mali v. *Emperor*, 58 I.C., 449; *Reg.* v. *Hanmanta*, 1 Bom., 610; *Reg.* v. *R. V. Collin*, 27 L.J., 54—*distinguished.*

Empress of India v. *Asghar Ali*, 11 All., 760; *Govinda Sambhuji Mali* v. *Emperor*, 58 I.C., 449; *Queen-Empress* v. *Dala Jiva*, 10 Bom., 191—*dissented from.*

Akhoy Kumar Mookerjee v. *Emperor*, 45 Cal., 720; *Banu Singh* v. *Emperor*, 40 Cal., 1353; *Empress* v. *Durant*, 23 Bom., 213; *Kher Singh* v. *Emperor*, 59 I.C., 913; *Lala Ojha* v. *Queen-Empress*, 26 Cal., 863; *Mohesh Chunder Kopali* v. *Mohesh Chunder Dass*, 10 C.L.R., 553; *Queen-Empress* v. *Mona Puna*, 16 Bom., 661; *Yeditha Subbaya* v. *Emperor* 15 I.C., 85—*followed.*

Gour's Penal Law; *Mayne's Criminal Law of India*—*referred to.*

* Criminal Appeal No. 890 of 1924 from the judgment of the Western Subdivisional Magistrate, Rangoon, in Criminal Regular Trial 1563 of 1923.

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Dr. Gour and *S. S. Patker*—for the Appellant.

McDonnell—for the Crown.

This was an appeal to the High Court against the judgment and sentence of the Western Subdivisional Magistrate of Rangoon (G. N. Martin, Esq., I.C.S.), the appellant having been convicted under section 471, read with section 468, of the Indian Penal Code. The appellant, who was a timber trader doing business in Rangoon on a very extensive scale, had entered into contracts with the Bengal-Nagpur Railway for the supply of railway sleepers to the extent of over a crore of rupees in value. The charge against him was that of having forged a hammer and having placed upon sleepers of inferior quality forged hammer marks for the purpose of passing them off as sleepers which the Railway Company's Examining Officer had duly passed and actually marked with his own genuine hammer. The case for the prosecution had rested in the trial Court practically on the evidence of two accomplices and at the hearing of the appeal, Dr. Gour for the appellant had taken various legal objections, the chief of them being against such evidence, the accomplices in question having been neither convicted nor legally pardoned for their complicity in the commission of the offence. In reply it was contended by Mr. McDonnell for the Crown that in the case of *Po Chit* v. *King-Emperor*, 6 Lower Burma Rulings, 4, it was ruled beyond dispute that a conviction based entirely on the evidence of an accomplice was not illegal. On these legal objections the learned Judge held against the appellant but on the merits on which he was addressed by Mr. Patker, he acquitted the appellant upon the ground that accomplice evidence being receivable with caution, and the prosecution, having produced in

evidence neither the forged hammer nor a sleeper bearing the forged hammer mark, had failed to prove that the appellant had procured or had caused to be procured, a forged hammer and then used it or caused to be used. The portion of the judgment dealing with the legal objections being the object of this report is given below.

BAGULEY, J.—The appellant, A. V. Joseph, has been tried and convicted by the Western Subdivisional Magistrate of Rangoon on a charge of fraudulently and dishonestly using a forged document under section 471, read with section 468, of the Indian Penal Code, and sentenced to nine months' rigorous imprisonment and a fine of Rs. 1,000, or, in default, a further six months' rigorous imprisonment.

The appellant is a timber trader on a large scale, and has been supplying sleepers to the Bengal-Nagpur Railway Company, Limited, for some years. He has had several contracts, and the particular contract which is now in question is one known as "No. 4" for 11¾ lakhs of sleepers.

The Railway Company appointed a special officer, Mr. Lamond, for passing sleepers. The procedure was as follows :—

The appellant, or his sub-contractors, got a large number of sleepers ready for inspection, laying them out in rows. On Mr. Lamond's arrival, he would walk up one row and, as he passed each sleeper, it was turned over in his presence, so that he could see both faces of it. Having got to the end of the row, he would walk down, examining the butt ends of the sleepers on one side, and then return from the other side of the row, examining the opposite butt ends of the sleepers. Any sleeper which he refused to pass was originally marked on its face in the middle with a hammer mark,

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"R.E.J."; but later, in deference to the objections raised by the appellant, the use of the "R.E.J." hammer was discontinued, and the sleepers refused were simply marked with chalk. When inspection of the row was complete, all those sleepers that he had passed were marked with a particular passing hammer, which was varied from time to time; and, it would appear that, while this was being done by the coolies, he would be examining the next row. It does not appear in evidence that he stood over the coolies while they used the hammers.

Before Mr. Lamond's appointment, sleepers supplied by Joseph to the Bengal-Nagpur Railway were passed by various passing officers, who appear to have been engineers in the employ of the Burma Railways, and various passing hammers were used. From the time Mr. Lamond began his work, he used a hammer for passing sleepers, bearing the letters

He says that there were three hammers made of this description, of which two were issued to, and used by, him. What happened to the remaining hammer does not appear from the record. It seems to have been left in the possession of the Burma Railways.

Mr. Lamond started his duties on the 1st of September 1921, and he used these two hammers from the beginning. About June, 1922, he got a fresh hammer or hammers made, bearing the letters "C.B.R." only, without a triangle, and the two hammers he had previously used were thrown into deep water in the Ma-ubin River. They have, of course, not been produced in Court.

Under the terms of the contract, sleepers were to have been of four kinds of timber, namely, *pyinkado*, *taukkyan*, *ingyin* and *thitya* only. It

would appear that, when the shipments of sleepers were received in India by the Bengal-Nagpur Railway, they failed to give satisfaction ; they were reported, or some of them were, to have been warped, waved, split, and as timber not mentioned in the contract. Eventually, information was given to the Railway authorities that Joseph was cheating over his contracts, and that he was somehow getting sleepers marked with what purported to be Mr. Lamond's hammer, but which were not so marked. Investigations were set on foot, and, eventually, Mr. Lamond made a report to the Police, charging Joseph under section 420, Indian Penal Code, and stating that "a large number of sleepers were marked by, or under, A.V. Joseph's instructions with a false hammer mark manufactured in imitation of the mark used by me in marking sleepers passed by me."

The case was tried by the Western Subdivisional Magistrate, Rangoon, and it would seem that the idea originally was that the charge, on the facts proved, should be one under section 420, Indian Penal Code, but, for some reason which has not been explained, when the charge was actually framed, it was under section 471, read with section 468, Indian Penal Code. I mention this, because, I think, this would explain why the evidence has come up in the form in which it has.

When the case came to be tried, after the evidence of Mr. Lamond, who had no personal knowledge of Joseph's malpractices, beyond the fact that sleepers which, he contended, had never been passed by him, had been received by the Bengal-Nagpur Railway, the main evidence was found to be that of two witnesses named Hormasji and Chit Maung. Hormasji is a man who used to be a mill-manager under Joseph. He has parted with Joseph on what are clearly, unfriendly terms, and, since, he left his

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employment, there has been a Civil suit between them with regard to his pay and Provident Fund, Chit Maung is Hormasji's wife's nephew, and he would appear to be more or less a hanger-on of Hormasji.

Hormasji's statement, so far as the forgery is concerned, is that, on Joseph's instructions, he got Chit Maung to make a hammer, which was an exact imitation of the one used by Mr. Lamond to mark passed sleepers with. Chit Maung corroborates his statement. It was stated by Hormasji that the way in which the false hammer was used was as follows :—

The sleepers, which were to be passed by Mr. Lamond, were cut a few inches longer than necessary; they were then put up to Mr. Lamond, and he passed them. Subsequently, after he had departed, an inch or so was cut off each end of the sleepers, or some of them, which he had passed, thereby removing his hammer marks. In place of the sleepers so treated, a false hammer mark was put on the sleepers which Mr. Lamond had either rejected, or not seen, and which may or may not have been of the prescribed kind of timber. These were shipped in place of the ones which Mr. Lamond had passed, and then the sleepers from which the genuine marks had been removed were put up again for Mr. Lamond to pass on his next visit.

It is quite patent that, without the evidence of Hormasji and Chit Maung, the case would have to fall, and the first legal point, which was argued before me in this appeal, was that Hormasji and Chit Maung were wrongly examined as witnesses, and that their statements on oath should not have been recorded by the Magistrate and must be excluded from the consideration of the Court.

I will deal with this point first.

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The argument, which was placed before me, has a certain amount of support from several old rulings, and one new one. As I have said, the original complaint was made by Mr. Lamond to the Police, and only one accused person was mentioned in it, namely, A. V. Joseph, the present appellant. He was also the only accused person sent up for trial before the Magistrate. Hormasji and Chit Maung, if their statements are believed, were undoubtedly accomplices in the offence charged, for both of them knew of the use to which the hammer was intended to be put. They have not been tendered pardons for the simple reason that no pardon could legally have been tendered to them, for the offence charged was one triable by a Magistrate. They have not been sent up for trial before any Court, and, consequently, they have not been convicted, acquitted or discharged.

The argument put forward on behalf of the appellant is that, as soon as the Police began their investigation, it was their bounden duty, under section 170, Criminal Procedure Code, to have taken steps against both Hormasji and Chit Maung, and that the Police have disobeyed an imperative direction of the Criminal Procedure Code in not sending them up as accused persons before a Magistrate, despite the fact that they were not mentioned in Mr. Lamond's complaint. It is argued that they really come under the category of "accused persons," and that, consequently, no oath could have been administered to them unless they were made approvers, which they could not be made in view of the section under which the complant was made.

For authority on this point, the first case to be quoted is that of *Reg.* v. *Hanmanta* (1). In that

(1) (1876) 1 Bom. 610.

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case several accused were sent up for trial on charges of theft and kindred sections, and two persons, who, according to their statements, were accomplices in the alleged fraud, were brought before the Magistrate under a warrant issued by him. The Magistrate gave each of them a certificate of pardon, purporting to be under section 347, Criminal Procedure Code. They were then examined as witnesses. After their examination was complete, they were informed that their pardon was invalid, and they were asked whether they adhered to their statements, and they replied in the affirmative. It was held that they were "accused persons"; that they had not been legally pardoned; and that, therefore, they could not be examined as witnesses until they had been acquitted, discharged or convicted, and their evidence was rejected as absolutely inadmissible. That case differs from the one under consideration in that the witnesses had actually been arrested and brought before a Magistrate. Whereas, in the present case, the two witnesses had never been arrested at all.

The next case is that of *Queen-Empress* v. *Dala Jiva* (2), in which, following *Reg.* v. *Hanmanta* (1), it was held that, in a case in which a pardon cannot legally have been given, an accused person could not be examined as a witness. This case was followed in *Empress of India* v. *Asghar Ali* (3), in which the facts were almost the same.

These are all old cases; but the case upon which the appellant's counsel mainly relies is a case from the Court of the Judicial Commissioner, Nagpur, namely, *Govinda Sambhuji Mali* v. *Emperor* (4), which, I understand, has also been officially published by the Nagpur Court. This was also a case concerning

(2) (1886) 10 Bom., 190. (3) (1880) 2 All., 260.

(4) (1920) 58 I.C., 449.

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a forgery. It would appear that one Sakharam Dinaji was concerned in the forgery. He made a statement to the Police, but was never arrested, nor brought to trial before the Magistrate. He was, however, examined as a witness against the rest of the gang, and mainly upon his evidence, it would appear, they were convicted. The point was raised that he was not a competent witness, following the cases I have already mentioned.

It would seem, however, that the learned Additional Judicial Commissioner held that he was a competent witness, even though illegally converted into a witness ; but it was held that, as the trial had been in disobedience of an express provision of the Code, it was bad, and that the proceedings must be set aside. In coming to this conclusion, the learned Additional Judicial Commissioner considered that he was following the principle laid down by their Lordships of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (5).

It will be seen then that, even this case [*Govinda Sambhuji Mali* v. *Emperor* (4)] upon which appellant's counsel mainly relies, cannot be held to be in support of the contention that the witness, Sakharam, was an incompetent witness. On page 453, column 1, there is a definite statement, which runs as follows :—"I hold that Sakharam, even if illegally converted into a witness is none-the-less a competent witness. This view; which is in accordance with the plain meaning of section 342 (4) is supported by the authorities and is based on reasons of convenience."

There is, indeed, ample authority for holding that a witness of this nature is a competent witness. In *Queen-Empress* v. *Mana Puna* (6), where several

(5) (1901) 25 Mad., 61. (6) (1892) 16 Bom., 661.

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persons had been arrested in connection with a case of house-breaking and theft, one of the persons so arrested made certain disclosures to the police, whereupon the Police discharged him and made him a witness and, at the trial, he gave evidence against the accomplices, who were all convicted. It was held that the evidence of this person Hari was admissible under section 118 of the Indian Evidence Act, despite the fact that he had been illegally discharged by the police. This case follows an unreported case of the High Court of Calcutta, which is given on pages 667 and 668.

There is another case, *Mohesh Chunder Kopali* v. *Mohesh Chunder Dass* (7). In this case Mohesh Chunder Dass and one Dulaladee were jointly accused of stealing paddy. It was appearently a complaint case. The Magistrate issued process against Mohesh Chunder Dass only. It was sought to examine Dulaladee as a witness for the defence: but the Magistrate, following *Reg.* v. *Hanmanta* (1), refused to examine him. It was held that Dulaladee should have been examined as a witness. The case was apparently not argued before the Bench; but, nevertheless, it must be taken to be the opinion of the High Court. I may add that it was a two-judge decision.

I am asked to distinguish this case from the present one, because that was a case in which the "accused person was sought to be examined as a defence witness." But, nevertheless, in these cases section 118 of the Evidence Act has beeen relied upon as a basis of decision, and section 118 in no way distinguishes between witnesses called for the prosecution and those called for the defence.

(7) (1882) 10 Calcutta Law Reports, 553.

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I would also mention the case of *Banu Singh* v. *Emperor* (8). In this case many authorities have been quoted, which may, however, be summed up in the statement appearing on page 1357 :—"The law, however, is well settled, and there can be no controversy on the point that an accomplice, if he is not an accused under trial in the same case, is a competent witness and may, as any other witness, be examined on oath."

It is true, as was pointed out to me, that after making this statement, the learned Judges proceeded to discuss the matter for about five pages, and I am asked to hold that this shows that their statement, that there can be no controversy on the point, is hardly correct ; but I take it that they were merely summing up the results of their investigation before giving details of it.

In *Empress* v. *Durant* (9), where accused persons were being tried separately, because one was a European British subject and the remainder were Natives of India, and, therefore, were entitled to a separate jury, it was held that Durant was entitled to call his co-accused as defence witnesses ; and it was held that "'*the accused*' in clause 4 of section 342 of the Criminal Procedure Code means the accused then under trial and under examination by the Court." Here also the witnesses were sought to be examined for the defence, but, as I have said before, section 118 of the Evidence Act makes no distinction between witnesses called for the prosecution and those called for the defence.

The most recent case would appear to be that of *Akhoy Kumar Mookerjee* v. *Emperor* (10), in which it was held that an accused person actually under trial at

(8) (1906) 40 Cal., 1353. (9) (1899) 23 Bom., 213. (10) (1918) 45 Cal., 720.

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the time cannot be sworn as a witness, and no accused, jointly tried, is a competent witness for, or against, the co-accused; but, when accused persons are tried separately, each one, though implicated in the same offence, is a competent witness at the trial of the other.

It will be noticed that the words "at the trial of the other" are used without distinction as to whether he is sought to be examined as a witness for, or against, the co-accused.

It will, I think, therefore, be seen that there is ample justification for the dictum that it is now beyond controversy, that an accused person, when not being tried jointly with a co-accused, is a competent witness for, or against, him.

I will now proceed to deal with the second part of the Nagpur case [*Govinda Sambhuji Mali* v. *Emperor* (4)], in which it was held that, because the Police had failed to do their duty under section 170, and because the Magistrate had failed to issue process against a person shown to be implicated in the crime under section 204, Criminal Procedure Code, the whole trial was bad. It will be noticed that section 170 of the Criminal Procedure Code appears in Chapter V, which relates to information to the Police and their powers to investigate. The dictum of the learned Additional Judicial Commissioner is based upon *Subrahmania Ayyar's* case (5). That was a case in which the provisions of the Criminal Procedure Code with regard to joinder of charges had been infringed. There had clearly been a mis-joinder of charges. The indictment referred to no less than forty-one acts. Their Lordships of the Privy Council set aside the conviction, holding that the trial was illegally conducted. They state at page 98: "But this trial was prohibited in the mode in which

it was conducted . . . ," and, therefore, the conviction was set aside. This is the point which the learned Additional Judicial Commissioner professes to have followed ; but it must be noticed that their Lordships are only referring to the "trial" and "the mode in which it was conducted." They are in no way whatsoever adverting to the previous investigation by the Police.

I am quite unable to agree that *Subramania Ayyar's* case (5) is a warrant for holding that every trial, which is preceded by a Police investigation, which has failed to comply with Chapter V of the Criminal Procedure Code in its entirety, is thereby void. For example, it is possible that the Police may search a dwelling and find in it stolen property ; the witnesses to the search may be men of unimpeachable character, but not living in the locality in which the search is held. This would be a breach of section 103 of the Code of Criminal Procedure ; but, nevertheless, the fact of the finding of the stolen property may be proved beyond all possible doubt. If every breach of the Criminal Procedure Code renders the trial which follows it void, the owner of that house could never be convicted of possession of stolen property. *Subramania Ayyar's* case (5) must be held to refer to a trial of such a case, and it goes no further than that.

It was next argued that it was the duty of the Magistrate, on receipt of the Police papers and before beginning the proceeding under section 204, to have issued warrants or summonses, to Hormasji and Chit Maung, and that they should then have been put in the dock together with Joseph. How he could have done this, I entirely fail to see. All that he had before him was the Police charge sheet, on which Joseph's name alone appears. There is nobody

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else mentioned on the charge sheet except Joseph. Hormasji appears in the list of witnesses, and all that is noted against his name is that "he will prove that the accused gave instructions for false hammers to be made, for sleepers, which had been passed, to be butted and inferior sleepers to be marked with a false hammer mark and substituted therefor, and that the cost of the sleepers (? hammers), was entered in the accused's account." There is nothing here to suggest that Hormasji was supposed to be an accomplice.

Chit Maung also appears in the witness list, and all that is noted against him is "to prove the order for making a false hammer."

There is nothing whatsoever to suggest that either of these men is an accomplice.

Appellant's counsel argued, no doubt, inadvertently, that the Magistrate had the Police papers before him, and that he could have referred to them; but this was obviously suggested in a moment when learned counsel had forgotten the new form of section 162, Criminal Procedure Code. It appears to me that, when the charge sheet was placed before the Magistrate, he could do nothing but issue process against Joseph only. It is possible that, as the case progressed, he might have thought fit to join Hormasji, as a co-accused, or he might have directed the Police to take action against him in separate proceedings, or he might have taken the course that he did and left the matter for future consideration.

There is nothing in the Code, so far as I am aware, which states that a Magistrate is bound, at any stage of a trial, to stop the proceedings, arrest any person against whom he thinks there is a chance of getting a conviction, and start the original

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trial *de novo*. There is nothing on the record to show that Hormasji, or Chit Maung, has ever been promised a pardon, and, even if they had each been granted an illegal pardon, they would merely be in the same position as many of the persons who have been declared competent witnesses in the various cases I have already cited.

I see no reason whatsoever for holding that the evidence of Hormasji and Chit Maung must be excluded from consideration.

Appellant's counsel had much to say about the Police, who, by failing to arrest Hormasji and Chit Maung, connived at the offence of "compounding a felony." This, however, is not an offence as such under the Indian Penal Code, which knows nothing of "felony," and I note that the section under which, he says, they have committed an offence is section 213, Indian Penal Code. A reference to this section, however, shows that the gist of it consists in accepting or obtaining a gratification, in consideration of screening a person from punishment. But there is no evidence anywhere, which suggests that Hormasji bribed the Police, still less that Chit Maung did.

I hold, then, that Hormasji and Chit Maung are competent witnesses against the appellant, and that their evidence against him must be considered.

The next law point which was taken up was a complaint that Mr. Lamond's complaint to Police only referred to an offence under section 420, Indian Penal Code; and that it gave no specific details of time and place. I do not quite follow the criticism involved. Had Mr. Lamond's complaint to the Police been a charge framed by a Magistrate, or had it been a plaint in a Civil suit, one would certainly have expected much greater detail and definition? Nowhere, however, have I seen it laid

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down that a First Information Report to the Police has got to be made with the same precision and particularity as a charge, or a plaint in a Civil suit. It is the charge, as framed by the Magistrate, that the accused has to answer, and not the first information report, nor, ultimately, the charge sheet sent up by the Police.

Another legal point taken up on behalf of the appellant was that the Magistrate had wrongly admitted a large amount of, what was termed, "evidence of prejudice." This consisted of two sets; one was a large bundle of copies of decrees recently passed against Joseph; and the other was a series of letters found in the appellant's letter books, which show apparently that he had been complaining about Mr. Lamond's strictness in passing sleepers, and also that he was making desparate efforts to get all kinds of sleepers, which were not in accordance with the specification laid down in his contracts, passed as being in compliance with his contracts. For example, he writes to one of his sub-contractors telling him to get his sleepers passed as "*taukkyan*," suggesting that some of them where not *taukkyan* really, but of different kinds of wood—a point which is emphasized in the following Exhibit YY, which refers to an attempt to pass red coloured *thitsi*, *zinbyoon* and *banbwe* as *taukkyan*.

It is clear that these can, in no way, be held as direct evidence of the appellant's having forged, or used forgeries. But the decrees may well show the scarcity of money, which would perhaps be a motive for forgery, and thereby relevant under section 8, even though not directly admissible under section 11; and the attempts to pass off inferior sleepers would possibly come under the same category. These

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attempts, in part at any rate, failed, and the appellant may have had to have recourse to a false hammer in order to get through some of the sleepers, which, by trickery, or other means, he had failed to get Mr. Lamond to pass with a genuine hammer.

Another law point raised was that it was perfectly clear that Joseph did not make the hammer himself; that therefore, he did not forge it; that he certainly did not make hammer marks on the sleepers; that, therefore, he did not forge any mark on the sleepers; that, in consequence, a conviction of a substantive offence must be bad; and that all that he could have been convicted of, at the worst, would be of abetment of the substantive offence.

It was argued that, even if I found the facts as the Magistrate has found them, I must acquit the appellant of the substantive offence, and that I could not alter a conviction in appeal into one of abetment of a substantive offence. It appears to me that this argument is entirely devoid of merit. Section 236 of the Criminal Procedure Code states that if a single act, or series of acts, is of such a nature, that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and it is a very common thing to have a man charged in the Sessions Court with murder under section 302, abetment of murder under section 302, read with section 109, and also under section 302 read with section 114. Such joinder is a matter of every day occurrence and I have never before known it to be attacked as illegal.

Section 423 of the Criminal Procedure Code states that an Appellate Court, in an appeal from a conviction, may alter the finding; and section 237 of the Criminal Procedure Code states that, in any

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case mentioned in section 26, if the accused is charged with one offence, and it appears that he committed a different offence for which he might have been charged under that section, he may be convicted of the offence which he is shown to have committed, even though he was not charged with it. From this it is quite clear that a man, who is charged with a substantive offence, and nothing else, can always, without framing a further charge, be convicted of abetment of it. If authority for this statement is required, it can be found in the cases of *Kher Singh* v. *Emperor* (11); *Yeditha Subbaya* v. *Emperor* (12); and *Lala Ojha* v. *Queen-Empress* (13).

It was also argued that a hammer is not a document, and that, therefore, it is not susceptible of being forged. This argument is based on a dictum of L. J. Cockburn in *Rex* v. *R. V. Collins* (14); but it is pointed out that this is a decision under the English Common Law, where the definition of "document" is narrower than it is under the Indian Penal Code. That is shown in Mayne's "Criminal Law of India," page 756, and Gour's "Penal Law of India," 2nd Edition, page 265.

Holding, therefore, as I do the law points that have been raised by the appellant's counsel against him, it is necessary for me to turn to examine the evidence in detail to decide whether Hormasji and Chit Maung are accomplices, who can be believed without corroboration: and, if I consider that corroboration is necessary, whether there is sufficient corroboration to enable me to accept their statements.

Acquitted.

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(11) (1921) 59 I.C., 913.
(12) (1912) 15 I.C., 85.
(13) (1899) 26 Cal., 863.
(14) (1859) 28 L.J., 54.

PRIVY COUNCIL.

P.C.†
1924
Oct. 21.

MAUNG DWE AND OTHERS
v.
KHOO HAUNG SHEIN AND OTHERS.*

Buddhist Law, Inheritance—Right of step-children and step-grandchildren as against collaterals—Filial relations between the step parent and step-children, whether necessary to prove.

At Burmese Buddhist law, the step-children and step-grandchildren of a deceased person are entitled to inherit his estate to the exclusion of his collaterals.

Although conduct of the step-issue may be proved to be such as would disqualify them from inheriting the step-parent's estate, it is not necessary for the establishment of their right to inherit to prove that they maintained filial relationship with the deceased.

Held, on the facts, that in the present case failure on the part of minor step-grandchildren to live with the step-grandmother and their failure to bury her did not disqualify them.

Ma Gun Bon v. *Maung Po Kyaw and others*, 2 U.B.R., 66; *Maung Sein Thwe* v. *Ma Shwe Yi*, 10 L.B.R., 397—*followed*.

Kinwun Mingyi's Digest—*referred to.*

Appeal to His Majesty in Council, from a judgment and decree (30th January 1922) of the late Chief Court of Lower Burma, which reversed the judgment and decree (6th December 1920) of the District Court of Tavoy, passed in a suit brought by the respondents.

This appeal arose out of a dispute between the parties in respect of the estate of one Ma Shwe Kin, a Burmese Buddhist, who died at Tavoy on the 27th January 1919. Ma Shwe Kin was a widow of one Khoo Swe Goon, a Chinese Buddhist of Tavoy. Khoo Swe Goon was married thrice; and by his two previous wives Ma In and Ma Lin had issue, who were represented by the plaintiffs-repondents. Ma

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* *Present* :—LORD DUNEDIN, LORD CARSON AND SIR JOHN EDGE.

† On appeal from the late Chief Court of Lower Burma.

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Shwe Kin, herself, had no issue. The defendants-appellants were a brother of Ma Shwe Kin and a married sister and her husband. Ma Shwe Kin died possessed of considerable property which was her own; she was also entitled to a share in the undivided estate of her mother Ma Pwa Zo.

The plaintiffs-respondents instituted a suit in the District Court of Tavoy (Maung Hla, Esq.) which held that as the estate in question was not the joint estate of Khoo Swe Goon and Ma Shwe Kin, but the separate estate of Ma Shwe Kin alone, the collaterals of Ma Shwe Kin excluded her step-children and their representatives. It further held that as the step-grandchildren had never lived with the deceased and did not bury her, they could not lay claim to her estate at all. Against this decision, an appeal was preferred by the plaintiffs-respondents to the Chief Court of Lower Burma and on the matter coming up before a Division Bench composed of Pratt and Duckworth, JJ., the judgment and decree of the District Court of Tavoy was reversed, the learned Judges holding *inter alia*, "that Burmese Buddhist law does apply in this case, even though the parties on one side are not Burmese Buddhists, because the estate in question is that of a Burman Buddhist and the mere fact that an heir is not of exactly the same religion is therefore immaterial." Pratt, J., further held (Duckworth, J., concurring) that whatever the nature of the estate, whether joint or separate, of the deceased step-parent, collaterals are excluded by the step-children and step-grand-children; but that in respect of an undivided share in the ancestral estate to which the deceased had a right, the step-children take only a half and the collaterals the other half. He also held that in the absence of anything to show that the step-children

and step-grandchildren had deliberately cut themselves off from the step-mother, mere non-residence with the deceased and failure to bury her did not disqualify them from inheriting the estate.

On this appeal :—

E. A. Harvey, K.C., and R. L. Parry—for the Appellants.

G. S. Sanders—for the Respondents.

The judgment of their Lordships was delivered by—

LORD DUNEDIN.—This is the case of a disputed succession to the property of a lady named Ma Shwe Kin, a Chinese Buddhist living in Tavoy, who was the third wife and the widow of Khoo Swe Goon. Khoo Swe Goon was first married to Ma Lin and by her he had a son now deceased and another son Khoo Ping Hoe, one of the respondents in the appeal. Ma Lin died and Goon married Ma In, by whom he had a son Khoo Ping Kyan, now deceased. Khoo Ping Kyan married and had three sons and a daughter, who are the other respondents. Ma In died, and after some years Goon married his deceased wife's sister Ma Shwe Kin. Goon died in 1917 before his third wife, who died in 1919. He disposed of his own property by will.

Ma Shwe Kin died in 1919 possessed of considerable property, which was her own. She was also entitled to a share of the succession of her mother Pwa Zo. Ma Shwe Kin was survived by a brother and a married sister. This brother, the sister and her husband are the appellants in the present case. Originally a question was raised as to whether Goon really ever married his third wife, but it was held in the Courts below that the marriage was sufficiently

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established by habit and repute and no question as to that was raised before their Lordships. The case, therefore, resolves itself into the question, who are to be preferred, the step-son and step-grandchildren on the one hand or the lady's own brother and sister on the other?

The case was tried before the District Judge, who preferred the appellants. That learned Judge took the view that, though in the case of *Ma Gun Bon* v. *Maung Po Kywe and another*, 2 Upper Burma Rulings, p. 66, the grandchildren, as descendants, were preferred to the collaterals, that case really turned, not upon the general principle, but upon the fact that the property there in question had come from the real father and gone to the second wife and thus only reverted to the original family. He also held that, in this case, the step-grandchildren had not lived with the deceased and had not buried her, that ceremony being performed by the brother and sister.

Appeal was taken to the Chief Court of Lower Burma, and the learned Judges in appeal reversed the judgment. They held that the case of *Ma Gun Bon* v. *Maung Po Kywe and another* (*supra*) proceeded on general principles and not upon the special character of the property in question. They also held that the facts above narrated created no disqualification.

Their Lordships have examined the Digest of Burmese Buddhist Law, which is the available source of reference to the rules of the Dhammathats. They have also considered the authorities cited. The leading case on the subject is undoubtedly the case of *Ma Gun Bon* v. *Maung Po Kywe and another* (*supra*). It is quite true that in that case the property in question had come from the husband to the wife

and that it was that property that was the subject of the disputed succession, but the judgment in no way proceeds on that point. There is a large citation of texts as to step-children, and the learned Judge sums up the matter thus :—

> "These texts go to show that step-children are regarded as heirs without limitation, except in the case of ancestral property, and even in that they are granted a share provided the step-parent has lived to have a vested interest in it, or to reach it according to the Burmese expression."

This is quite in accordance with certain citations which are to be found in the Dhammathats. Thus section 6 (Manugye):—

> "There are four kinds of inheritance, namely, (1) that which is obtainable by children, grandchildren and great-grandchildren only; (2) that which is obtainable by children and step-children."

and in section 295 (Manugye),

> "The father marries again and both father and step-mother die leaving no off-spring of the marriage.
>
> "The rule of partition between the step children and their step-mother's co-heirs is as follows :—
>
> "The children shall receive the whole of their father's as well as their step-mother's animate and inanimate property. As regards the share of inheritance to which the step-mother was entitled in her deceased parents' estate which still remains undivided, her step-children shall inherit one half and her co-heirs the remaining half."

and Manu, to the same effect :—

> "The children shall inherit the property owned by the father and step-mother jointly."

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

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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.

There remains the question whether the appellants are disentitled to succeed, because, first, the respondents did not live with the deceased, and, second, that they did not bury her. The learned counsel for the appellants contended that these services, which he designated by the name of the filial bond, were a condition precedent to the allowance of a step-child's right. Their Lordships cannot accept this view. In the same paragraph, section 6 of the Digest of Burmese Buddhist Law, heading 4, is :

> "That which should be withheld from children who failed in filial duty,"

and this is explained thus :—

> "Among laymen disobedient and idle sons cannot inherit their parent's estate."

Their Lordships think it clear that conduct can indeed operate as a disqualification of the right, but that it is in no sense a necessary qualification to obtain the right. They agree with what was said in the case of *Maung Sein Thwe* v. *Ma Shwe Yi*, 10 Lower Burma Rulings., p. 397 :—

> "We are not prepared to assent to the view that a man who has proved that he is an heir has further to prove that he has not broken off filial relations in such a case as this."

and again p. 396 :—

> "Mere separate residence does not nowadays and by itself prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights."

Their Lordships, upon the whole matter, agree with what was said by the learned Judges of the Court of appeal, that in this case there is no forfeiture. It

would only be natural that the children, who are all minors, should live with their own mother, and for the same reason, they could not have been the conductors of the funeral ceremony.

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As to the hereditary property to which the deceased became entitled in respect of her mother, but which was not as yet in her possession, the judgment is in accordance with the texts quoted.

In view of the fact that Buddhist law is in many ways obscure and the judgments are few, their Lordships think that it is necessary to make two observations in case this judgment should be used for the purpose of upholding propositions which it does not contain. The step-son here has made common cause with the step-grandchildren and was content that they should share along with him. Their Lordships pronounce no opinion as to what would be the result in a contest between the step-son and the step-grandchildren; but either or both are entitled to exclude the appellants. Further, though the whole theory of succession depends upon the strict Buddhist view that intestacy is compulsory, this has so far been impinged upon that a Chinese Buddhist is allowed to test; which accounts in this case for Goon's will as to his own property.

Their Lordships will humbly advise His Majesty that the appeal shall be dismissed with costs.

Solicitors for the Appellants—HENRY HILBURY & SON.

Solicitor for the Respondents—A. M. BRAMWELL.

APPELLATE CIVIL.

Before Mr. Justice Godfrey.

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Nov. 21.

MA AIN LON AND ONE

v.

MA ON PU.*

Indian Penal Code (XLV of 1860), section 196—Defendant disclosing in his affidavit of documents ordered by the Court, documents alleged by the plaintiff to be fabricated—Subsequent production of the documents on the orders of the Court.

Where during the pendency of a suit instituted for the cancellation of certain documents which was subsequently decreed, the defendants disclosed in their affidavit of documents the documents in question and later produced them on being called upon by the plaintiff to do so, *held*, that such circumstance did not constitute a deliberate user of the documents by the defendants and a charge under section 196, Penal Code, would not, therefore, lie against them.

Held, further, that it cannot be taken that the defendants had corruptly and fraudulently used the documents within the meaning of the sections, because, at the hearing of the suit, they had deposed that the documents were genuine.

Assistant Sessions Judge v. Ramammal, 36 Mad., 387; *Re Muthiah Chetty*, 36 Mad., 392—*followed.*

Leong—for the Appellants.

Maung Ni—for the Respondent.

GODFREY, J.—In this matter the appellants appeal against an order passed by the District Court, Hanthawaddy, under section 476B, Criminal Procedure Code, charging them with the offence of corruptly using as genuine evidence in Suit No. 20 of 1923 of the Subdivisional Court, Twante, two documents (Exhibits 1 and 2), which they knew to be false or fabricated—an offence which is punishable under section 196, Indian Penal Code.

Application had previously been made to the Subdivisional Court for sanction for their prosecution

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* Civil Miscellaneous Appeal No. 36 of 1924 against the order of the District Court of Hanthawaddy passed in Civil Miscellaneous Application No. 14 of 1924.

in respect of the same offence; but this was rejected: and it was on appeal from the Subdivisional Court's order that the order now complained of was passed.

It appears that the suit in the Subdivisional Court was a suit filed by the respondent against the appellants for the cancellation of these very documents, which are registered sale deeds, upon the allegation that they had been executed by the respondent in consequence of the false and fraudulent representations made to her by the appellants, and it was after obtaining a decree for their cancellation upon this ground that she applied for sanction for the appellants' prosecution under section 196, Indian Penal Code.

It is an essential element of the offence charged that the documents should have been corruptly *used* or attempted to be *used* as true or genuine evidence. Now it is apparent from the nature of the suit filed by the respondent that the production of these documents was a necessary part of her claim to have them delivered up and cancelled. And in furtherance of this she took steps to obtain discovery from the appellants and subsequently, in the course of her own examination-in-chief, the appellants were called upon to produce and did produce the documents in question, which they had, as in duty bound, disclosed in their affidavit of documents. The documents were thereupon put in as exhibits in the case; but instead of being marked as the plaintiff-respondent's exhibits, as they should have been (*cf.* section 163, Evidence Act), they were marked as the defendant-appellants' exhibits.

Apart from this, however, it is abundantly clear that in such circumstances there was no deliberate user of the documents by the appellants as evidence at all. They disclosed the documents in compliance

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with an order of Court, and they produced them as they had to do when called upon. Independent volition on their part was entirely absent, and it is obvious that they could not have been convicted of an offence under this section, *Assistant Sessions Judge* v. *Ramammal* (1).

It is argued further that, since they have sworn in evidence that the documents were genuine, it must be taken that they have corruptly and fraudulently used them within the meaning of the section. This argument appears to me equally unsound, and I am fortified in that view by the ruling of the Madras High Court in the case of *Re Muthiah Chetty* (2).

For these reasons this appeal must be allowed, and the order of the District Court set aside.

(1) (1913) I.L.R. 36 Mad. 387.
(2) (1913) I.L.R., 36 Mad. 392.

APPELLATE CIVIL.

Before Mr. Justice Godfrey.

KOLAI SAI

v.

BALAI HAJAM.*

1924
Nov. 24.

Indian Stamp Act (II of 1899), section 12—Cross-mark made on the stamp—Meaning of "cancellation."

A cross-mark, made on the stamp by an illiterate person, in indication of his acknowledgment, constitutes an effectual cancellation of the stamp under the provisions of section 12 of the Stamp Act.

Ralli v. Caramalli Fazal, 14 Bom., 102 ; *Virbhardraja v. Bhimaji*, 28 Bom., 432—*dissented from.*

McMullen v. Sir Alfred Hickman Steamship Company, Limited, 18 Times L R., 650—*followed.*

Vertannes—for the Applicant.

GODFERY, J.—In this case the applicant seeks to revise the judgment and decree of the Third Judge, Rangoon Small Cause Court, decreeing a suit upon a promissory-note for Rupees eighty-one against him on the ground that the stamp on the promissory-note not having been duly cancelled, in conformity with the provisions of section 12 of the Stamp Act, the promissory-note must be deemed to have been unstamped in accordance with that section, and was, therefore, inadmissible in evidence, and should have been rejected and the suit dismissed.

This objection does not appear to have been taken at the trial of the suit, nor was it definitely raised in the petition first filed in revision in this Court; but it seems to have been argued, when the application was fixed for admission, and amended grounds have since been filed by leave, which make it, in effect, the only real ground put forward.

* Civil Revision No. 163 of 1924 against the decree of the Small Cause Court of Rangoon in Civil Regular No. 7634 of 1923.

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KOLAI SAI
v.
BALAI
HAJAM.

GODFREY, J.

It appears that the applicant, who was the defendant in the suit, is illiterate and cannot even sign his name. His petitions, therefore, bear his X mark, and the summons, with which he is said to have been served in the suit, was similarly marked with a X. The stamp on the promissory-note in suit has likewise a X mark on it; and it is contended that this is not an effectual cancellation of the stamp within the meaning of the section.

That section provides (*inter alia*) that the person executing any instrument on any paper bearing an adhesive stamp shall cancel the same "so that it cannot be used again"; and sub-section (3) provides that a person so required to cancel an adhesive stamp "may cancel it by writing on or across the stamp his name or initials, or the name or initials of his firm with the true date of his so writing, or in any other effectual manner."

The short question for disposal, therefore, is whether a X mark made on an adhesive stamp cancels it in an effectual manner, that is to say, so that it cannot be used again. And, for the purpose of arriving at a decision in the matter, a comparison may be made with the methods given as examples.

I have been referred to two cases, upon which reliance is placed, as showing that a X mark is an ineffectual method of cancellation. The one, *Ralli* v. *Caramalli Fazal* (1), where the only mark of cancellation on the stamp was a line on a minute portion of it forming the first portion of the first letter of the defendant's signature (*see* page 105), which was held to be ineffectual; and the other, *Virbhardrapa* v. *Bhimaji* (2), which followed that case and went somewhat further, holding that two paralled lines

(1) (1890), Indian Law Reports, XIV Bombay, page 102.
(2) (1904), Indian Law Reports, XXVIII Bombay, page 432.

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J.

drawn across the stamp did not effectually cancel it, the learned Judges being of opinion that there was no difference between "a small ink line" and "two lines."

With the greatest respect to the learned Judges, who constituted the Bench in the last-mentioned case, it seems to me that it is a question of degree, and that it is not essential that a person should go the length of either writing his name or initials. So long as he makes it obviously apparent, on the face of the stamp, that it has once been used, it appears to me that he has done all that can reasonably be expected of him, and all that is, in fact required by the section of the Act. And this would seem to have been the *ratio decidendi* adopted by the Court in *McMullen* v. *Sir Alfred Hickman Steamship Company, (Limited)* (3), where, in some cases, the stamps were cancelled by a cross, or other marks drawn across them.

In the particular case before me, it is obvious that a cross-mark is the petitioner's ordinary method of indicating his acknowledgment—as he, like very many others to whom money is lent upon promissory-notes in Rangoon, cannot sign his name. And, if his cross mark does not constitute an effectual cancellation of the stamp, it is difficult to see what else such a person could do.

In my opinion, however, the stamp in question was effectually cancelled within the meaning of the Act, and the promissory-note properly admitted in evidence. And it, therefore, follows that this application fails, and it is accordingly dismissed.

(3) (1901-02), XVIII, Times Law Reports, page 650.

APPELLATE CRIMINAL.

Before Mr. Justice Brown.

1924
Nov. 28.

KING-EMPEROR
v.
ISHAHAT AND ONE.*

Committal to Sessions Court—Criminal Procedure Code (V of 1898), section 254—Magistrate having power to punish adequately, whether fettered in exercise of discretion to commit—Stage at which Magistrate may commit—Criminal Procedure Code, sections, 207, 347, 348.

If, before the commencement of an inquiry or trial, the Magistrate is of opinion that the case is one which for any reason ought to be tried by the Court of Sessions, he has ample power to inquire in to it with a view of commitment, and subsequently, at any state up to the signing of the judgment, to commit if the evidence justifies that course. Section 347 of the Criminal Procedure Code gives him very wide powers of commitment, and there is no suggestion that the only possible reason for a competent Magistrate to commit a case to Sessions is that he will not be able to pass a sufficiently severe sentence. The discretion vested in him cannot clearly be limited by the provisions of section 254 of the Code.

King Emperor v. *Bindeshari Goshein and others*, 41 All. 454; *Queen Empress* v. *Kayemullah Mandal*, 24 Cal., 429—*dissented from.*

Crown Prosecutor v. *Bhavathi*, 42 Mad., 83—*followed.*

This was a reference made by the Sessiong Judge of Mergui to the High Court in its Revisional jurisdiction with a recommendation that the order of the Special Power Magistrate, Mergui, committing the trial of the respondents to the Sessions Court be quashed, the learned Sessions Judge being of opinion that having regard to the provisions of section 254 of the Criminal Procedure Code, the learned Special Power Magistrate had no power, under the cricumstances of the case, to commit to Sessions as he himself was competent to try the case, and to pass, if necessary, an adequate sentence.

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* Criminal Revision No. 1916a of 1924 from the order of the Special Power Magistrate of Mergui in Criminal Trial No. 228 of 1924.

BROWN, J.—The Sessions Judge, Mergui, had referred to this Court the proceedings in which Ishahat and one have been committed to stand their trial before his Court, with a recommendation that the commitment order be quashed. The recommendation is based on one of the grounds that the Magistrate had in the circumstances no power to commit to Sessions. Under the provisions of section 254 of the Code of Criminal Procedure, relating to the procedure to be observed in the trial of warrant cases, if there are grounds for presuming that the accused has committed an offence triable under the chapter, which the Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, the Magistrate is bound to frame a charge in writing against him. The contention is that this section allows no discretion to the Magistrate, and forbids him from committing to Sessions unless he is of opinion that he is either incompetent to try the case or is unable to inflict a sufficiently severe sentence. There is authority for this view in the case of *Queen-Empress* v. *Kayemullah Mandal*, (1897) I.L.R. XXIV, Cal., page 429. This case was followed in the Allahabad case of *Emperor* v. *Bindeshari Goshein and others*, (1918) I.L.R., All., XLI, page 454, but in this later case, no further reasons for the decision were given. The contrary view has been taken by a Bench of the High Court of Madras in the case of the *Crown Prosecutor* v. *Bhagavathi*, (1918) I.L.R., Mad. XLII, page 83. There is so far as I know no published decision on the point by any Court in Burma. In spite of the support he derives from the Calcutta and Allahabad cases, I am unable to accept the view of the law taken by the learned Sessions Judge. The Calcutta case was decided by a reference only to the

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BROWN, J.

provisions of Chapter XXI of the Code of Criminal Procedure. That chapter deals with the procedure to be observed by Magistrates in the trial of warrant cases. Chapter XXIV contains general provisions as to inquiries and trials, and section 347 which appears in that chapter specifically lays down that "if in any inquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Sessions or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained." This section is couched in general terms and gives the Magistrate very wide powers. There is no suggestion that the only possible reason for a competent Magistrate to commit a case is that he will not be able to pass a sufficiently severe sentence, and if that were the intention of the Legislature, it is extraordinary that there should be no indication of this in the section. Section 206 provides for the committing to the Court of Sessions for trial for any offence punishable by such Court. And under the provisions of section 207 the Magistrate is bound to adopt the procedure laid down for inquiry with a view to commitment whenever in the opinion of the Magistrate the case ought to be tried by the Court of Sessions. This discretion clearly cannot be limited by the provisions of section 254 which apply only when a comparatively late stage of proceedings under Chapter XXI have been reached. If the Magistrate decides under section 207 that the case is one which ought to be tried by a Court of Sessions then he must adopt the procedure laid down by Chapter XVII and not the procedure prescribed by Chapter XXI. Section 254 can, therefore, have no application whatever in such a case. It is to my mind quite clear that if

before the commencement of the enquiry or trial, the Magistrate is of opinion that the case is one which for any reason ought to be tried by the Court of Sessions, then he has ample power to inquire into the case with a view to commitment, and subsequently to commit if the evidence justifies that course. Nor does there seem to be any reason for holding that nevertheless if the Magistrate has once started an inquiry or trial under Chapter XXI, he no longer has the power to commit, unless he is of opinion that the sentence which he could pass would be inadequate. Section 254 merely lays down what a Magistrate must do when proceeding with the trial of warrant cases. It would be an undue extension of its scope to hold that it was meant to fetter the scope of a Magistrate in all circumstances. Section 347 is a general section, and applies to all inquiries and trials. It gives the Magistrate power to deal with the case under the provisions of Chapter XVII at any stage before the judgment is signed, and if this power is exercised, then the provisions of section 254 are no longer applicable. I find myself in entire agreement with the view of the law taken by the High Court of Madras. I am of opinion that the discretion of the Magistrate in the matter of committal to Sessions is not fettered in the manner suggested The provisions of section 348 to which the learned Sessions Judge refers are concerned with only a very special class of cases in which the need for a heavy sentence could ordinarily be the only reason for committing to Sessions. I see no sufficient reason for quashing the commitment in this case. The proceedings will be returned to the Sessions Judge to be dealt with according to law.

APPELLATE CIVIL.

Before Mr. Justice Godfrey.

1924
Dec. 5.

MESSRS. BARNETT BROTHERS
v.
MRS. E. FOWLE AND ONE.*

Legal representative—Intestate deceased subject to the Indian Succession Act (X of 1865)—Plaintiff's course where no Administrator appointed—Succession Act, sections 189, 190—Civil Procedure Code (V of 1908), section 2 (11) and Order 22, Rule 4.

The legal representative of a deceased or the person who in law would represent the estate of a deceased subject to the Indian Succession Act, would be either his executor or administrator, or one who had intermeddled with his estate and so made himself responsible as his executor *de son tort*.

Held, that where no representation of an intestate deceased defendant subject to the Indian Succession Act has been taken out, the only course open to the plaintiff would be to take proceedings to have an administrator appointed as no right to any part of the property of an intestate's estate can be established in Court unless Letters-of-Administration have been first granted.

Framji Dorabji v. Adarji Dorabji, 18 Bom., 337; *P.L.M. Firm v. Stacey*, 9 B.L.T., 122; *Sukh Nandan v. Rennick*, 4 All., 192—*followed.*

Patel—for the Applicants.

GODFREY, J.—This as an application to revise a judgment of the Chief Judge, Court of Small Causes, Rangoon, dismissing the plaintiff's suit against the respondents for the recovery of the balance of the price of goods sold and delivered to one E. Fowle.

It appears that during the pendency of the suit the defendant, E. Fowle, died, and upon application made to it the Court directed that the respondents, who are the widow and the brother of the deceased defendant, be brought on to the record as his legal representatives.

It is admitted that the deceased defendant died intestate and that no representation has been taken

* Civil Revision No. 150 of 1924 against the decree of the Small Cause Court of Rangoon in Civil Regular No. 407 of 1923.

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MESSRS. BARNETT BROTHERS v. MRS. E. FOWLE AND ONE.

GODFREY, J.

out to his estate. It cannot be disputed that the deceased defendant was, and the respondents are, persons to whom the provisions of the Indian Succession Act would apply. And the learned Judge in effect holding that the respondents were not the legal representatives of the deceased, dismissed the suit against them for that reason.

The application upon which the respondents' names were brought on the record in place of the deceased defendant was made under Order XXII, rule 4, Civil Procedure Code, which provides that where a defendant dies and the right to sue survives (which it does in this case) the Court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and it shall proceed with the suit. And the short question for disposal is whether the respondents are or are not the deceased's legal representatives. "Legal representative" is defined by section 2 (ii), Civil Procedure Code, as meaning "a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased."

It is clear from the Indian Succession Act (section 179) that the persons, who in law would represent the estate of the deceased defendant, would be either his executors or his administrators. The respondents are neither: and since it is also not alleged that they have intermeddled with his estate and so made themselves responsible as executors *de son tort*, the suit will not lie against them. It would further seem that since no representation has as yet been taken out to the deceased defendant's estate, the only course open to the plaintiff-applicants would be to take proceedings themselves to have an administrator appointed, as no right to any part of

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the property of an intestate's estate can be established in Court unless Letters-of-Administration have been first granted (section 190, Succession Act).

The case of *Sukh Nandan* v. *Rennick* (1) and *Framji Dorabji* v. *Adarji Dorabji* (2) are in point and in keeping with the opinion expressed in the ruling referred to by the lower Court of *P. L. M. firm* v. *Stacey* (3).

For these reasons this application fails and it must accordingly be dismissed.

APPELLATE CIVIL.

Before Mr. Justice Carr and Mr. Justice Maung Gyi.

1924
Dec. 8.

MAUNG SHWE PHE AND FIVE
v.
MA ME HMOKE.*

Criminal Procedure Code (V of 1898) section 476—Power of the successor of a trial Judge to lay a complaint—Effect of the amending Act XVIII of 1923—The Court forwarding an order for prosecution to the District Magistrate, whether sufficient—Power of the Court to complain confined only to parties to the suit before it—Delay in applying to the Court to act under section 476, Criminal Procedure Code.

Under the present amended provisions of section 476, Criminal Procedure Code, the trial Judge and his successor in office are both competent to lay a complaint.

Where instead of making a formal complaint, the Court ordered the prosecution of the appellants under the provisions of section 476, Criminal Procedure Code, and forwarded a copy of the order to the District Magistrate for necessary action, *held* that this was only a formal defect and did not vitiate the order.

Held also, that the Court can exercise its power under section 476, Criminal Procedure Code, only against those who were parties to the suit before it.

Held also, that applications to the Court to act under section 476, Criminal Procedure Code, should be made promptly.

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(1) (1881) 4 All. 192 ; (2) (1894) 18 Bom., 337 ; (3) (1916) 9 B.L.T. 122.

* Civil Miscellaneous Appeal No 17 of 1924 against the order of the District Court of Pegu in Civil Miscellaneous No. 82 of 1923.

Aiyakannu Pillai v. *Emperor*, 32 Mad. 49 : *Bagu Singh* v. *Emperor*, 34 Cal., 551 ; *Dharamadas Kumar* v. *Sagore Sastra*, 11 C.W.N., 119 ; *Rahimatulla Sahib* v. *Emperor*, 31 Mad., 140—*referred to*.

C. T. Guruswamy v *D. K. S. Ebrahim*, 2 Ran., 374—*followed*.

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MAUNG SHWE PYE AND FIVE v. MA ME HMOKE.

Kya Gaing—for the Appellants.

Banerji—for the Respondent.

CARR, J.—In Civil Regular Suit No. 24 of 1923 of the District Court of Pegu, Ma Me Hmoke was plaintiff and the first appellant Ko Shwe Hpe was the first defendant. The other appellants were not parties to that suit. The suit was heard by the Additional District Judge, U E Maung, who, on the 29th September 1923, decided it in favour of the plaintiff.

The defendants had put forward a written agreement, Ex. A., which the Judge believed to be false.

On the 17th October 1923, *i.e.* only eighteen days after the decision of the suit, Ma Me Hmoke applied under section 195, Criminal Procedure Code, for sanction to prosecute the appellants under sections 465 and 468, Indian Penal Code, in respect of the document, Ex. A. This was presented to the Judge, U E Maung, who had tried the suit. He, equally with Ma Me Hmoke's pleader, overlooked the fact that as the Criminal Procedure Code now stands, sanction to prosecute cannot now be granted under section 195. He ordered notice to issue to the appellants to show cause. He was then succeeded by U Ba On, who, on the 19th November, noted in the diary that sanction did not now appear to be necessary. He allowed respondents' pleader time to argue the question and on the 28th November an amended application was filed asking that action be taken under section 476, Criminal Procedure Code. Ultimately, on the 22nd December the Judge

ordered the prosecution of the appellants under the provisions of section 476, Criminal Procedure Code.

It may be noted that he did not strictly comply with the provisions of that section by making a formal complaint, but merely directed a copy of his order to be sent to the District Magistrate for the necessary action. This is, in my view, only a formal defect and does not vitiate the order.

This is an appeal against that order. So far as concerns appellants 2 to 6 the order must clearly be set aside. They were not parties to the suit and the decision *C. T. Gurusawmy* v. *D. K. S. Ebrahim* (1) is a sufficient authority for the proposition that for offences mentioned in section 195 (*c*), Criminal Procedure Code, the Court has jurisdiction to file a complaint only against parties to the suit.

As regards the first appellant reliance is placed on *Begu Singh* v. *Emperor* (2), *Rahimatulla Sahib* v. *Emperor* (3) and *Aiyakannu Pillai* v. *Emperor* (4). In those cases it was held by Full Benches of the Calcutta and Madras High Courts that action under section 476 can be taken only by the Judge who tried the case and that it must be taken at least very promptly after the conclusion of the trial.

I do not think it is necessary to discuss those cases in full, for in my view they are rendered obsolete by the recent amendments to the Code.

The Calcutta case is the leading one. In it the learned Chief Justice, in arriving at the conclusion that the power was given only to the Judge who tried the case, said "The expressions in the section '*is* of opinoin that there *is* ground,' 'committed *before* it or brought under its notice in the course of a judicial proceeding,' seem to indicate with some clearness

(1) (1924) Rangoon, 374.
(2) (1907) 34 Cal. 551.
(3) (1908) 31 Mad., 140.
(4) (1909) 32 Mad. 49.

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that it is the Judge alone who tries the case who can summarily, and at once, send the case for enquiry to the nearest Magistrate."

Now, however sound those observations may have been in respect of the wording of the section as it then stood, they have no application to the present section, which reads, "When any Court is, whether on application or otherwise, of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in section 195, sub-section (*1*), clause (*b*) or clause (*c*), which appears to have been committed in, or in relation to; a proceeding in the Court . . ."

The difference is very significant and in my opinion it is clear that the power may now be exercised by any Judge of the Court concerned and not only by the Judge who tried the case.

The learned Chief Justice further remarked, "If months after the trial the Court may act under section 476, it is difficult to appreciate the necessity for section 195." He pointed out that under section 195 sanction could be granted subsequently and by the successor of the Judge who tried the case, quoting *Dharamadas Kamar* v. *Sagore Santra* (5) as authority for this.

The judgments of other learned Judges both in that case and in the others mentioned show that they were moved by similar considerations in arriving at their decisions.

Sanction under section 195 has now been abolished and section 476 has been so modified as to allow the Court to act either on its own motion or on application. An application now made under that section occupies exactly the same position as one

(5) (1906-07) 11 C.W.N., 119.

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made formerly under section 195 and I see no reason whatever why on such an application action should not be taken by the successor of the Judge who tried the case.

On the question of delay there has not in my opinion been any under delay in filing the application in this case. It was filed in little over a fortnight and that it was in the first instance misconceived, was the fault of the pleader. It may be added in excuse for him that the amendments to the Code had then been in force for only some six or seven weeks.

In my opinion, therefore, there is no ground in law for interference in this case, as regards the first appellant.

On the facts also I see no ground for interference.

I would therefore dismiss the appeal of the first appellant Maung Shwe Phe.

I would allow the appeals of the remaining appellants and, under section 476B, Criminal Procedure Code, direct that the complaint as against them be withdrawn.

MAUNG GYI, J.—I concur. I should like to note, however, that in such cases applications should be made promptly. In the special circumstances of this case, I consider that the application was sufficiently prompt.

APPELLATE CIVIL.

Before Mr. Justice Young and Mr. Justice Brown.

1924
Dec. 12.

T. HUSSAIN
v.
CHIN CHONG.*

Construction of Document—Variance between the recital and the operative part—The recital of a bond providing for security for decretal amount and for appearance of the debtor—Operative part silent about the decretal amount.

If both the recitals and the operative part of a deed are clear and unambiguous, but are inconsistent with each other, the operative part must prevail.

M. R. Bailey v. *Lloyd*, 5 *Russell*, 330 ; *Walsh* v. *Trevanion*, 15 Q.B., 733—*followed.*

Norton on Deeds—*referred to.*

N. C. Sen—for the Appellant.

Doctor—for the Respondent.

YOUNG AND BROWN, JJ.—In our opinion the learned Judge on the Original Side was perfectly right in holding the condition of the bond to be fulfilled.

The condition was to produce the judgment-debtor before the Court on the 14th of December 1923 or at any time that he was called on to do so. If he did that it was provided that the obligation should be void. The sureties did produce the judgment-debtor before the Court and no order was made for his further appearanee. The condition of the bond was therefore fulfilled.

The recital however provided as follows : " Whereas . . . . it was directed by this Court that the execution of the decree should be further stayed for three weeks upon the defendant getting two

* Civil Miscellaneous Appeal No. 39 of 1924 against the decree of the High Court of Judicature at Rangoon on the Original Side in Civil Regular No. 241 of 1923.

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YOUNG AND BROWN, JJ.

sureties to enter into a bond for the decretal amount and costs for the appearance of the said defendant at the execution proceedings on the 14th of December 1923 or for further orders."

But the law is that if both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred (Norton on Deeds, page 181). "Where the operative part of the deed uses language which admits of no doubt, it can not be controlled by the recital (per Leach, M. R., *Bailey* v. *Lloyd*) (1). When the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals (per Pattison J., *Walsh* v. *Trevanion*) (2). Here the operative part of the deed was perfectly clear and unambiguous—that he should appear before this Court on the 14th December 1923 or at any time he was called on to do so.

It said nothing about his appearance at execution proceeding or for further orders. The Court did not call upon him to appear again at a subsequent date and we are of opinion that the sureties discharged the condition of their bond and must dismiss this appeal with costs—four gold mohurs.

(1) (1829) 5 Russell, 330, at page 344. (2) 15 Q.B., 733, at page 751.

APPELLATE CRIMINAL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Cuncliffe.

1925
Jan. 5

NGA WA GYI
v.
KING-EMPEROR.*

Approver, Prosecution of, on the original offence—Criminal Procedure Code section 339—Committal proceedings, whether void for want of Public Prosecutor's certificate—Effect of subsequent production of such certificate at the Sessions Court, prior to the trial—Acceptance by the Sessions Court of such certificate and of the committal as an irregular committal—Criminal Procedure Code, sections 193, 532.

A was tendered a pardon which he accepted and he was examined as a witness at the trial of the other two accused. On the conclusion of the trial the District Magistrate, being of opinion that A had not complied with the condition on which the pardon was given, ordered the Police to prosecute A of the original offence. The enquiring Magistrate's proceedings were held without the Public Prosecutor's certificate required under section 339, Criminal Procedure Code; and A was committed to stand his trial at the Sessions. Before the trial proceeded this defect having been noticed by the Sessions Judge, the Public Prosecutor filed the necessary certificate and the same was accepted by the Sessions Judge. The Sessions Judge convicted A, who thereupon appealed to the High Court.

Held, that what was forbidden by section 339 was the trial of A without the certificate, and that the enquiry before the Magistrate not being a trial which in this particular case had to be held by the Court of Sessions as a Court of Original Jurisdiction, the provisions of section 339 had been duly complied with on the production of the certificate in the Sessions Court.

Held further, that if such a certificate had been necessary for purposes of the committal proceedings, the provisions of section 532 of the Criminal Procedure Code empowered the Sessions Court to accept the commitment even if it was irregular unless it considered that A had been injured thereby.

Held also that no objection having been taken by A to the irregularity either before the Magistrate or before the Sessions Court even after the point was brought prominently to notice, no ground existed for setting aside the proceedings as totally invalid.

Dilan Singh v. *Emperor*, 40 Cal., 360; *Napier* v. *Sessions Judge of Tanjore*, M.L.J., 259; *Queen-Empress* v. *B. G. Tilak*, 22 Bom., 112; *Queen-Empress* v. *Morton*, 9 Bom., 288; *Queen Empress* v. *Reddy*, 17 Mad., 402—*followed*.

B. K. Ghose v. *Emperor*, 37 Cal., 467; *Emperor* v. *B. V. Nadgir*, 43 Bom., 172—*distinguished*.

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* Criminal Appeal No. 1243 of 1924 from the order of the Sessions Judge, Tharrawaddy in Sessions Trial No. 26 of 1924.

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NGA WA GYI
v.
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ROBINSON, C.J.—The appellant, Nga Wa Gyi, and two others were arrested on charges of kidnapping and murder. Nga Wa Gyi was tendered a pardon, which he accepted, and he was examined as a witness at the trial of the other two accused. On the conclusion of that trial the District Magistrate ordered the Police to prosecute him of the original offence. He overlooked the provisions of section 339 of the Code of Criminal Procedure. The accused went before a Magistrate, who also overlooked those provisions. The Magistrate committed Nga Wa Gyi to the Court of Session on charges of murder, etc. On the case coming up for trial, the learned Sessions Judge noticed the absence of the certificate from the Public Prosecutor. The Public Prosecutor desired time to see if he could make the necessary certification, and the trial was accordingly adjourned. On the adjourned date, a certificate was filed and accepted by the learned Sessions Judge, and the trial proceeded; in other words, the learned Sessions Judge accepted the commitment as an irregular commitment in exercise of the powers conferred by section 532 of the Code. He convicted Nga Wa Gyi under section 365, and sentenced him to seven years' rigorous imprisonment. Nga Wa Gyi has appealed, and the question, whether the commitment is illegal, having been made without a certificate, has been referred to a Bench.

The authorities naturally refer to cases concerned with the absence of sanctions that were required by the old Code, but the principles governing the matter are much the same although it would not necessarily follow that the absence of a Public Prosecutor's certificate, under section 339, is as fatal a defect as the absence of a sanction.

In the first place, it must be pointed out that, what section 339 lays down is that where a person who

has been tendered a pardon and the Public Prosecutor certifies that he has, either by wilfully concealing something essential or by giving false evidence not complied with the condition on which the pardon was given, such person may be tried for the offence in respect of which the pardon was so tendered. In the case of sanctions under the old Code, the provision was that no Court should take cognisance, and, in cases under the Arms Act, it was laid down that no proceedings may be instituted without certain sanction.

In the next place, it is to be noted that proceedings before a committing Magistrate fall under Chapter XVII of the Code which deals with the enquiry into cases triable by a Court of Session. The charge in the present case was one which was exclusively triable by a Court of Session, and the Magistrate, making the enquiry, was doing so only with a view to committal, and not with a view to trial by himself, though he could, no doubt, have found the accused guilty only of an offence triable by himself, or have discharged him.

In a case referred to the High Court at Madras (1), it was pointed out that an enquiry before a Magistrate is not a trial, the trial itself taking place before the Sessions Judge at a later stage. This is important, for the certificate of the Public Prosecutor is only required for the trial of a person who has accepted the tender of the pardon.

Coming now to the authorities in reference to cases of sanction, the first case that I will refer to is of *Queen-Empress* v. *Morton* (2). There a magisterial enquiry was held without the previous sanction required by section 197 of the Code of 1882, and it was held that proceedings were irregular and without jurisdiction and that the sanction subsequently

(1) (1918) XXXV Madras Law Journal, 259. (2) (1885) IX Bom. 288.

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obtained was of no effect ; but it was further held that the Judge presiding at the Sessions had nevertheless power in his discretion to accept the commitment and to proceed with the trial of the prisoner under the provisions of section 532. That case was followed in the case of *Queen-Empress v. B. G. Tilak* (3).

Again in *Dilan Singh* v. *Emperor* (4), it was held that a conviction by a Court of Session cannot be set aside simply on the ground of defect in the initiation of proceedings in the commitment Court, or on the ground of some irregularity in the commitment proceedings, more especially when that point was not raised in the lower Court, and it was held that section 532 would cure such a defect. Morton's case was again followed. No reference, however, was made to an earlier decision of the same Court in *B. K. Ghose* v. *Emperor* (5), in which it was held that there being no complaint under section 121 of the Penal Code, authorised by the Local Government, or in fact preferred, the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court. It was further held that section 532 did not cure the defect. That, however, was a case of an order under section 196 of the Code, and, in the complaint that was filed, a number of sections were actually specified, but section 121 was not amongst them. The case can, therefore, I think, be distinguished.

There is one other case, *viz. Emperor* v. *B. V. Nadgir* (6). The enquiry into the case was instituted and the whole of the evidence was taken in the absence of sanction to prosecute. The Magistrate committed the case to the Sessions Court and the

(3) (1898), XXII Bom. 112.
(4) (1913) XL Cal. 360.
(5) (1910) XXXVII Cal. 467.
(6) (1918) XLII Bom. 172.

Sessions Judge referred the case to the High Court, as he was of opinion that the commitment was illegal. It was held that, owing to the absence of sanction, the whole of the proceedings before the Magistrate were without jurisdiction and totally invalid. The Sessions Judge did not accept the commitment.

By section 193 of the Code it is land down that no Court of Session shall take cognisance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate duly empowered in that behalf. In this case, the Magistrate was, in my opinion, duly empowered to commit it. The proceedings before him were merely an enquiry and what is forbidden by the provisions of section 339 is the trial of the accused which, in this particular case, had to be a trial by a Court of Session as a Court of original jurisdiction. Even in the case of a Magistrate, who commits for trial by a Sessions Court, the fact that he had no territorial jurisdiction over the place where the alleged offence was committed has been held to be no ground for the Court, to which the commitment was made, quashing the commitment under section 532, the accused not having been injured thereby. And in that case, objection was taken before commitment. See *Queen-Empress* v. *Reddy* (7). Having regard to the weight of authority and to the wording of section 339, I am of opinion, that it was open to the Sessions Judge, in this case, to accept the commitment even if it was irregular. Before the trial began, the provisions of section 339 had been complied with, and the trial was in order. The proceedings before the Magistrate were not, therefore, in my opinion, totally invalid and there is no ground for setting aside the proceedings on this

(7) (1894), 17 Mad., 402.

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ground, more particularly, as no objection had been taken either before the Magistrate or before the Sessions Court even after the point was brought prominently to notice. We will now proceed to dispose of the appeal on the merits.

CUNLIFFE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

1924

Nov. 17.

MAUNG YAN KWIN

v.

MAUNG PO KA.*

Limitation Act (IX of 1908), Schedule I, Articles 116 and 120—Usufructuary mortgage—Deprivation of the mortgage security—Right to sue under section 68, Transfer of Property Act (IV of 1882)—Limitation, the starting point of—Court taking up on its own initiative question of limitation, when a suit on the face of it not obviously time-barred.

The plaintiff advanced money to the defendant on the security of certain land of which the defendant was in constructive possession. Subsequently, in execution of a decree for possession obtained by certain third parties in another suit against the defendant, the decree-holders were placed in possession. The plaintiff, thereupon, sued the defendant under the provisions of section 68 of the Transfer of Property Act for recovery of money advanced on the mortgage and obtained a decree. On appeal, however, the District Court, on its own initiative, took up the question of limitation and being of opinion that limitation would run from the date of the plaintiff's mortgage, held that the suit was time-barred under the provisions of Article 116 of the First Schedule of the Limitation Act.

Held, that assuming that the view of the District Court that Article 116 applied was correct, the starting point of limitation would not be the date of the plaintiff's mortgage, but of the deprivation of his security when the defendant's decree-holders were placed in possession.

Held further, that under Article 120, the suit would still be within time, since limitation would start from the date of the plaintiff's eviction.

Held also, that as the suit was not on the face of it obviously barred by limitation, the District Court did not exercise a wise discretion in taking up the question of limitation on its own initiative.

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* Special Civil Second Appeal No. 99 of 1924 against the decree of the District Court of Myingyan in Civil Appeal No. 103 of 1924.

Ram Jiwan v. *Jagarnath*, 25 C.L. 450; *Umachomar* v. *Ahmad*, 21 Mad., 242—*followed*.

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Maung Yan Kwin v. Maung Po Ka.

Pratt, J.

Sanyal and S. *Mukerjee*—for the Appellant.

Kale—for the Respondent.

Pratt, J.—Plaintiff sued in the Township Court to recover Rs. 192-12-0 advanced on a mortgage of land, which was subsequently made over to the decree-holders in Civil Regular Suit No. 314 of 1914 of the Township Court, Taungtha, by order of the Court on October 6th, 1917.

The Trial Court found the mortgage proved and, as the security was lost to plaintiff, granted a decree for the money advanced.

On appeal the Judge of the District Court held that, although the mortgage purported to be usufructuary, as a matter of fact it was not, because plaintiff never obtained possession of the land.

Plaintiff's case was that defendant after the mortgage remained in possession of the land as lessee and there was some evidence to this effect. Plaintiff was also made a party to the previous suit because of his connection with the land.

I see no reason to doubt that plaintiff was in constructive possession at the time of the previous suit and in any case the deprivation of the security for the mortgage would give plaintiff a cause of action for the recovery of the principal. The District Court, however, held that Article 116 of the First Schedule to the Limitation Act applied, and that the period of limitation dated from the execution of the deed of mortgage. The suit was accordingly dismissed as time-barred. Assuming that the view of the District Court that Article 116 applies is correct, it is obvious that under the circumstances the starting point for limitation will not be the date

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of the document, but of the deprivation of the security.

If defendant did not give plaintiff actual possession after the mortgage, he remained in possession with plaintiff's consent and there was no breach of the conditions of the mortgage prior to suit No. 314 of 1914.

Limitation would therefore run from the date on which plaintiff was deprived of his security and that was on the 6th October 1917, when the decree-holder in the previous suit was placed in possession.

If Article 120 of the First Schedule to the Limitation Act be applied, the suit will still be within time since limitation will start from the date of eviction from the land.

This is in accordance with the principles enunciated in *Umichamar* v. *Ahmad* (1) and *Ram Jewan* v. *Jagarnath* (2).

The Lower Burma ruling cited by the Judge of the lower Appellate Court does not support the view taken by him on the question of limitation. The suit was not on the face of it obviously barred by limitation and the lower Appellate Court did not exercise a wise discretion in taking up the question of limitation on its own initiative.

I set aside the decree of the District Court and restore the decree of the Township Court with costs throughout.

(1) (1897) 21 Mad. 242. (2) (1897) 25 Cal. 450.

APPELLATE CIVIL.

Before Mr. Justice Godfrey.

MAUNG KHANT GYI AND FOUR
v.
MA THET HNIN AND SIX.*

1924
Nov. 17.

Civil Procedure Code (V of 1908), Order XI, Rule 21—Dismissal for want of prosecution—Appropriate remedy either by way of appeal or review—Order IX, Rule 9, not applicable to such dismissals—Applying a rule which has no application, an irregularity.

Where a suit is dismissed for want of prosecution under Order XI, Rule 21, of the Code of Civil Procedure, the plaintiff's remedy to have the order of dismissal set aside would be by way of appeal. Where the Court, therefore, sets aside such an order under the provisions of Order IX, Rule 9, of the Code, its action in applying a rule which has no application is clearly irregular and its order passed in such circumstances must, therefore, be held to have been passed without jurisdiction.

Doctor—for the Petitioners.

GODFREY, J.—In this matter the petitioners seek to revise an order passed by the District Court of Insein setting aside a dismissal order passed in Suit No. 13 of 1924 of that Court and restoring that suit to the file. The present application is uncontested, the respondents not now appearing.

It seems that during the pendency of suit above referred to, the respondents, who were the plaintiffs, were directed by an order of Court passed under Order XI, Rule 12, Civil Procedure Code, to make discovery on oath of the documents which were or had been in their possession relating to the matters in question. They failed, however, to comply with this direction, although the case was adjourned on three occasions to enable them to do so, and in fact failed to put in any appearance, with the result that

* Civil Revision No. 192 of 1924 against the order of the District Court of Insein in Civil Regular No. 13 of 1924.

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GODFREY, J.

the suit was dismissed for want of prosecution under Order XI, Rule 21, Civil Procedure Code, and it was this order of dismissal, which the District Court set aside, purporting to act under Order IX, Rule 9, Civil Procedure Code, and holding that the dismissal order was really one passed under Order IX, Rule 8, Civil Procedure Code.

It is clear that the order of dismissal was one passed under Order XI, Rule 21, Civil Procedure Code, and that the provisions of Order IX, Rule 9, Civil Procedure Code, have been misapplied. The latter rule provides for the setting aside of a dismissal order passed under Order IX, Rule 8, Civil Procedure Code, upon sufficient cause being shown by a plaintiff for his non-appearance when the suit was called on for hearing; but it has no application to the present circumstances, where the case was fixed for the plaintiffs' compliance with the direction of the Court under Order XI, Rule 12, and the suit dismissed for their default in this respect under Order XI, Rule 21, Civil Procedure Code. Such an order was a decree and was appealable under Order XLIII, Rule 1 (*f*), Civil Procedure Code, and the plaintiffs' (respondents') remedy was either by way of appeal or perhaps by way of review.

A Court's powers to set aside decrees are those that are given to it by statute and to apply a Rule, which could have no application, was clearly irregular and the order passed in such circumstances must be held to have been without jurisdiction.

It, therefore, seems to me that the order of the District Court must be set aside and the dismissal order restored, this application being allowed—with costs two gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Godfrey.

1924
Nov. 21.

SYED ABDULLA RAHMAN HADY
v.
SYED AKABI BIN HAMID MOMAFER EMBITCHY KWEAR AND OTHERS.*

Ex-parte *decree, Suit to declare, as obtained by fraud—No previous application under Order IX, Rule 9, of the Civil Procedure Code—Plea of fraud complained of not included in matters previously adjudicated upon.*

The plaintiff sued to have it declared that an *ex-parte* decree obtained against him by the defendant had been obtained by fraud, he never having been served with a summons in the suit and the defendant having supported the claim by false evidence. Prior to his present suit the plaintiff had not applied to the Court under the provisions of Order IX, Rule 13, of the Civil Procedure Code to have the *ex-parte* decree set aside.

Held that although the plaintiff had made no previous application to have the *ex-parte* decree set aside, his present suit would lie, since the decree was impeached on the ground of fraud and the fraud complained of was not included in what had already been adjudicated upon.

Nga Yan v. *Nga So*, 11 U.B.R., (1914-16) 106—*referred to.*

K. E. Mutkan v. *Mohendra Nath Singh*, 1 Ran., 500—*distinguished.*

Abdul Mazumdar v. *Mahomed Gazi Chowdhry*, 21 Cal., 605—*followed.*

Kyaw Htoon—for the Appellant.

M. C. Naidu—for the Respondents.

GODFREY, J.—This is a second appeal under section 100, Civil Procedure Code, in which the appellant seeks to set aside the judgment and decree of the District Court, Pyapôn, confirming the judgment and decree of the Subdivisional Court, Kyaiklat.

The respondent sued the appellant in the Subdivisional Court to have it declared that a decree obtained by the latter in suit No. 54 of 1916 of that Court had been obtained by fraud, and that the bond upon which the appellant had sued, and which the

* Civil Second Appeal No. 398 of 1923.

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GODFREY, J.

respondent was said to have executed at Kyaiklat on the 15th October 1910 was a forgery. He further alleged that, at the date of that suit, he was living at Rangoon to the knowledge of the appellant and not at Kyaiklat; that he was never served with a summons in the suit; that the appellant had supported his claim by false evidence, and thereafter had fraudulently executed the decree he had so obtained by attaching and selling property belonging to the respondent in his native country (India).

Both the lower Courts have found in the respondent's favour, and decreed his suit as claimed. And it is contended, on behalf of the appellant on this appeal, in order to bring it within the purview of section 100, Civil Procedure Code, that the lower Courts have acted illegally, and that the suit will not lie.

This objection, as a matter of fact, was taken in the Court of first instance, but it was over-ruled upon the authority of *Nga Yan* v. *Nga So* (1).

The contention put forward, in effect, is that a suit will not lie to set aside a decree obtained by fraud, unless that fraud is extraneous to the suit and all matters and questions, which have already been adjudicated upon at the trial of that suit. And the reason for such a rule is obvious. If it were otherwise, it would still be open to a defendant to bring a fresh suit upon new allegations of fraud and subornation of perjury to set aside the decree obtained by the plaintiff, and the plaintiff thereafter could do the same, and so the parties might go on alternately *ad infinitum*.

This question has also been the subject of more recent judicial decision in *K. E. Musthan* v. *Mohendra*

(1) (1914-16), 11 Upper Burma Rulings, p. 106.

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SYED ABDULLA RAHMAN HADY v. SYED AKABI BIN HAMID EMBITCHY KWBAR AND OTHERS.

GODFREY, J.

Nath Singh (2); but the principle adopted and the test applied are invariably the same, the question for determination being whether the fraud complained of was included in what had already been adjudicated upon or not. If it was, then the suit will not lie; if it was not, it will.

Now, it is obvious that, in the present case, no part of the respondent's allegations had ever been previously adjudicated upon. The suit was disposed of *ex-parte*, and was undefended, in consequence (so it is found), of a fraudulent trick, resorted to by the appellant, whereby the summons was never served upon the respondent. He did not apply to set aside the *ex-parte* decree, as he might have done so that there was not even an adjudication upon these allegations of his and in this the case is distinguishable from the one reported in *1 Rangoon*. And the case of *Abdul Mazumdar* v. *Mohomed Gazi Chowdhry* (3) is authority for the proposition that a suit will lie to set aside an *ex-parte* decree impeached on the ground of fraud, although application has not been made to have that decree set aside.

It, therefore, appears to me that the appellant has failed to bring himself within the provisions of section 100, Civil Procedure Code, and that being so, his appeal must he dismissed with costs--three gold mohurs.

(2) (1923), Indian Law Reports, 1 Rangoon, p. 500.
(3) (1894), Indian Law Reports, XXI Calcutta, p. 605.

APPELLATE CRIMINAL.

Before Mr. Justice, Young.

1924
Dec. 3.

G. C. SIRCAR
v.
KING-EMPEROR.*

Penal Code (XLV of 1860), sections 366, 376—Charge and conviction under section 376—Appellate Court setting aside the conviction and framing a fresh charge and convicting under section 366—Criminal Procedure Code (V of 1898), sections 423, 439, sub-clauses (4) and (5).

It is incompetent of a Court in appeal to alter a charge under section 376, Indian Penal Code, to one under section 366 of the Code, because a charge under the latter section involves different elements and different questions of fact from a charge under section 376.

Where the trial Court had framed a charge and convicted the accused under section 376 of the Indian Penal Code, and the Sessions Court, sitting in appeal, having found that that section was not applicable, framed a fresh charge under section 366, called upon the accused to plead, examined him and allowed him to adduce evidence and finally convicted him under the fresh charge, *held*, that the Sessions Court should have set aside the conviction under section 376 and ordered the accused to be committed for trial under section 366.

Emperor v. Sankharam Garu, 8 Bom. L.R., 120—*followed*.

Vakharia—for the Petitioner.

Gaunt, Assistant Government Advocate—for the Crown.

YOUNG, J.—This is an application to revise the order of the Sessions Judge, Pegu, who sitting in appeal from a conviction by the Third Additional Special Power Magistrate, Pegu, on a charge of rape under section 376, Indian Penal Code, held that the charge of rape had no application by reason of the fact that the girl was over twelve and that the act could not be said to have been without her consent or against

* Criminal Revision No. 775-B of 1924 from the order of the Third Additional Special Power Magistrate, Pegu, in Criminal Regular No. 116 of 1924.

her will, and proceeded to frame a fresh charge under section 366 against the appellant of kidnapping a woman that she might be forced or seduced to illicit intercourse. To this charge he called on the appellant to plead, and examined him upon it and allowed him to call one witness in defence.

It seems to me that in so trying the case himself the learned Judge exceeded the powers conferred on an Appellate Court by section 423. This section empowers him *inter alia* to reverse the finding, and order the accused to be either re-tried by a Court of competent jurisdiction or committed for trial. A charge under section 366 is triable by a Court of Session only and under section 193 only on commitment, therefore the learned Judge should, after setting aside the conviction, have ordered the accused to be committed for trial, when he would have been tried before a Court of Session with the aid of assessors. If he had not tried him, but simply altered the finding and maintained the sentence, there is abundant authority for holding that such alteration is not permissible, where its effect would be to convict the accused, on his appeal, of a charge to which he had never pleaded and which involved different elements and different questions of fact from those involved in the charge to which he had pleaded. Thus in *Emperor* v. *Sankharam Garu* (1) an exactly parallel case where the Sessions Court had set aside a conviction for rape on the ground of consent and the Sessions Judge had, without trying the accused himself, merely altered the charge and convicted the accused under section 366, it was held that it was incompetent for a Judge in appeal to alter a charge under section 376, Indian Penal Code, to one under section 366 of the Code, because a charge under the latter section

(1) (1906) 8 Bombay Law Reporter, 120.

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involves different elements and different questions of fact from a charge under section 376.

In the trial as held there was no evidence that the girl was under the care and in the keeping of her mother or any one. Her mother was called and said that she was a beggar residing at Kayan and merely produced her daughter's horoscope; the daughter said she was also a beggar but residing at Pazundaung.

The conviction therefore under section 366 could not stand in any event. The Assistant Government Advocate, without attempting to defend the procedure of the learned Sessions Judge, asked me to restore the conviction for rape, but that would be to convert an acquittal order into one of conviction without an appeal having been preferred from such acquittal, a course forbidden by section 439, sub-clauses (4) and (5).

The acquittal order must stand unless and until Government appeals against it, when it can be considered.

The rest of the order must be set aside and the accused discharged, and I express no opinion as to further proceedings being taken under section 366 for kidnapping or abduction.

APPELLATE CIVIL.

Before Mr. Justice Brown.

1924
Dec. 10.

MAUNG DIN AND ONE
v.
MA HNIN ME AND FOUR.*

Fraudulent conveyance—Consideration, Proof of, whether necessary against a third party—Transfer prior to indebtedness—Relationship between transferor and transferee not conclusive.

A, the judgment-creditor of B, sought to attach a house in the possession of B. C, who was B's daughter, sought a declaration of her title to the house on the strenght of a sale by registered deed executed nearly two years prior to A's suit against B and some six months before his loan to B.

Held, that the sale deed being proved to have been duly executed and there being nothing on the face of it to suggest fraud, the burden of proving fraud, therefore, rested on A.

Held also, that as against A, third party, C need not prove that consideration passed on the transfer, such proof being only important, when taken with the other circumstances, it tends to show that the instrument was a mere sham.

Held further; that the fact of C being B's daughter was not sufficient in itself to raise a presumption of fraud.

Tha Dwe v. A.L.V.R.L. Allagappa Chetty, 4. L. B.R., 211—*distinguished*.
Chinnam v. Ramachandra, 15 Mad., 54, *K.V.K.M. Chetty v. S.N.V.R. Chetty*, 4. B.L.T., 199—*followed*.

Thet Tun—for the Appellants.

BROWN, J.—The appellants, Maung Din and Maung Htaw, obtained a money decree against Maung Taw and Ma Khin Za. In execution of that decree they attached a house and land. The respondent, Ma Hnin Me, filed a suit for a declaration that this house and land belonged to her. The trial Court passed orders dismissing the suit with costs. Ma Hnin Me appealed to the District Court, and the District Court passed orders to the effect that, "This appeal is, therfore, allowed with costs in both Courts."

*Special Civil Second Appeal No. 445 of 1924 against the decree of the District Court of Amherst in Civil Appeal No. 21 of 1924.

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BROWN, J.

The original decree-holders have now filed a second appeal in this Court. The house and land in question were in the possession of the judgment-debtor at the time of attachment. The burden of proving title, therefore, rested with Ma Hnin Me; but Ma Hnin Me has proved that by a registered deed of sale, dated the 3rd of August 1921, this property was sold to her by the judgment-debtor.

The trial Court held that, as Ma Hnin Me is the daughter of the judgment-debtor and did not prove any payment of any consideration for the sale, the sale was a fraudulent one and could not be upheld. The learned Judge of the trial Court referred to the case of *Tha Dwe* v. *A.L.V.R.S. Allagappa Chetty* (1). In that case the judgment-debtor had executed a deed of sale in favour of his brother. It was found as a matter of fact that the judgment-debtor's object in executing the deed was to avoid payment of his debts, and it was held in the circumstances that it could be presumed that the sale was a collusive one.

In the present case, the plaintiff is the daughter of the judgment-debtor, but otherwise the circumstances are entirely different from the circumstances in Tha Dwe's case. In Tha Dwe's case, at about the time of the execution of the conveyance, the debt, for which the decree-holders obtained a decree, was being pressed for payment. In the present case the document was executed on the 3rd day of August 1921. The decree-holders did not file their suit for recovery of their money until Apail 1923, and the promissory-note, on which they sued, was not executed till February 1922, some six months after the execution of the sale deed. One witness states that the consideration for this promissory-note was an old debt; but there is no

(1) (1907-08) L.B.R., Vol. III p. 211.

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BROWN, J.

evidence to show that the judgment-debtors were being pressed for the debt at the time of the execution of the sale deed. As pointed out in the case of *K.Y.K.M. Chetty* v. *S.N.V.R. Chetty* (2), it is not necessary that a person claiming title under a duly registered deed of sale should prove as against a third party that the considerations stated did pass. A passage from the case of *Chinnam* v. *Ramachandra* (3) cited in K.Y.K.M. Chetty's case runs as follows:—" *Prima facie* when the execution of a mortgage or other conveyance is proved—and here apparently it was proved and not denied by the mortgagee—further evidence is not required to show that the purchaser has taken the interest which the document purports to convey. It is not necessary for him to prove as against a third person that the consideration passed, and proof that the consideration mentioned did not pass, is of no avail to show that the interest which the instrument purported to convey was not conveyed to the purchaser. Such proof is only important, when taken with other circumstances, it tends to show that the instrument was a mere sham not intended to convey any interest to the ostensible purchaser at all."

The sale deed in the present case is proved to be duly executed; there is nothing on the face of it to suggest fraud, and the burden of proving fraud, therefore, rests on the appellants; and it is impossible to hold that, from the circumstances of the present case, fraud can be presumed.

The plaintiff says that her farther owed her money, and that that was why the deed was executed. As I have said, the deed was executed six months before the promissory-note in execution of which the appellants obtained their decree.

(2) (1916) B.L.T., Vol. IX, p. 199. (3) (1892) I.L.R., 15 Mad., p. 54.

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BROWN, J.

It is not suggested that Burmese Buddhist parents cannot transfer their land to their children, and the only suspicious circumstance in the case is the relationship between the parties. That, by itself, is entirely insufficient to establish fraud. I agree with the District Court that the plaintiff sufficiently established her case.

It has been suggested that the case might be sent back for further evidence; but I can see no ground for that. The defendants were given ample opportunity in the trial Court of proving fraud.

I dismiss this appeal summarily.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

1925

Jan. 12.

MAUNG THWE
v.
KING-EMPEROR.*

Burma Habitual Offenders' Restriction Act (Act II of 1919), section 7—Omission to state the period of restriction in the preliminary order as required by section 4, proviso (a)—Upper Burma Criminal Justice Regulations, clause XV of the schedule.

Under clause XV of the Schedule to the Upper Burma Criminal Justice Regulations, failure on the part of a Magistrate to state in his preliminary order, under proviso (a) to section 4 of the Burma Habitual Offenders' Restriction Act, the period of restriction being a mere irregularity which is cured by section 537 of the Criminal Procedure Code, does not render the whole proceedings void.

Farsodan v. King-Emperor, 2 Ran., 524—*distinguished.*

Chattarji—for the Petitioner.

CARR, J.—An order of restriction has been passed against the petitioner under section 7 of the Burma Habitual Offenders' Restriction Act. His appeal was

* Criminal Revision No. 1041-B of 1924 from the order of the Sub-divisional Magistrate of Myingyan in Criminal Miscellaneous Trial No. 113 of 1924.

dismissed by the District Magistrate, Myingyan, and he now comes to this Court in revision.

On the merits of the case I see not cause to interfere with the concurrent findings of the Courts below. There was, in fact, ample evidence that the petitioner is by repute an habitual dacoit.

But the learned Advocate for the petitioner has pointed out that the preliminary order in the case omitted to state the period for which it was proposed to pass an order of restriction, as imperatively required by proviso (*a*) to section 4 of the Habitual Offenders' Restriction Act. He contends that this omission renders the whole proceedings void.

As to the fact the learned Advocate is correct. The Magistrate appears to have left the preparation of the order to a clerk, instead of writing it himself, as he should have done. In the space provided on the form for entry of the term of the proposed order of restriction, there has been entered instead, quite meaninglessly, the name of the Magistrate.

But the Magistrate on the same form passed a preliminary order under sections 110, 112, of the Criminal Procedure Code, and in this case the term of three years was duly entered. I have no doubt that the petitioner was fully aware of the fact that the proposed restriction order was for the same term and that no failure of justice has in fact been occasioned.

The question therefore is whether the proceedings are void because of this technical omission. My own view is that they are not and that this is a mere irregularity which is cured by section 537 of the Criminal Procedure Code. To hold that because an imperative provision of any law has inadvertently been disregarded the whole proceedings are void, seems to be an unwarrantable extension of the principles

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laid down by their Lordships of the Privy Council in Subrahmania Ayyar's case (25 Madras, 61), and one not justified by the terms of that judgment.

But I am confronted by the decision in *Parsodan* v. *King-Emperor* (2 Rangoon 524), in which one Judge of this Court has laid it down that the omission to state the term in the preliminary order does render the whole proceeding void. I am bound, if the cases cannot be distinguished, either to follow that decision or refer the question for decision by a bench or a full bench.

I think, however, that the cases can be distinguished. That was a Lower Burma case and this is from Upper Burma and the Upper Burma Criminal Justice Regulation applies. Clause XV of the Schedule to that Regulation goes considerably farther than the Code itself and provides that "a finding, sentence or order shall not be reversed or altered on appeal or revision on account of any irregularity of procedure unless the irregularity has occasioned a failure of justice."

That provision is in my view sufficient to bar any interference in this case.

The application is therefore dismissed.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

MA TOK AND NINE

v.

MA YIN AND SEVEN.*

1925

Jan. 12.

Res Judicata—*Parties co-defendants in a previous suit—Necessary condition for the application of the rule of* res judicata—*Co-heir in peaceful possession of the land for thirty years after obtaining it by litigation—Limitation Act (IX of 1908), Article 123.*

For an adjudication to be *res judicata* as between co-defendants, there should be a conflict of interest between the co-defendants *inter se*, which it should be necessary to decide in order to give the plaintiff a relief appropriate to his suit and the judgment should contain a decision of the question raised as between the co-defendants.

The appropriate Article of the Limitation Act for suits against co-heirs for shares in the corpus of an inheritance is Article 123.

Gangaram Balkrishna v. *Varadas Dattatrya*, 47 Bom., 535; *Jadav Chandra Sarkar* v. *Kailash Chandra Singha*, 25 C.L.J., 322; *Maung Po Kin* v. *Maung Shwe Bya*, 1 Ran., 405; *Mehra* v. *Devi Ditta Mal*, 2 Lah., 88; *Nga Thet Tha* v. *Mi Kye Gyi*, 11 U.B.R., (1907-09) Civil Procedure Code 5; *Ramchandra Narayan* v. *Narayan Mahdev*, 2 Bom., 21—*followed.*

PRATT, J.—Plaintiffs as surviving descendants of Ma Min Sin and Ma Kin, daughters of Po Kyu, deceased, sued Ma Tôk and other representatives of Ko Hmu, a son of Po Kyu, the son of Ma Kin and others, for possession of half the estate of Po Kyu on payment of Rs. 750 being half the charges incurred by Ma Tôk on litigation for recovery of the estate.

Plaintiffs' case was that Ma Tôk held the lands on behalf of the co-heirs subject to discharge of the lien, which she possesses by reason of the expenses incurred by her on litigation in connection with the estate.

In a previous suit Po Ka sued Ma Tôk and other representatives of Ko Hmu for one-fourth share

* Special Civil Second Appeal No. 115 of 1924 (at Mandalay).

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MA TÔK AND NINE v. MA YIN AND SEVEN.

PRATT, J.

of the estate of Po Kyu and obtained a decree. The suit went up to the Court of the Judicial Commissioner, who held that Ma Tôk had admitted Po Ka's interest in the suit lands, and that Po Ka had proved that the lands belonged to the estate of Po Kyu, which remained undivided in the hands of Ko Hmu and his widow Ma Tôk, and that consequently Po Ka was entitled to one-fourth of the estate on payment of one-fourth of the charges incurred by Ma Tôk in connection therewith.

In the previous suit the present plaintiffs were co-defendants with Ma Tôk. The trial Court has found that the lands in suit were not part of the estate of Po Kyu; but on appeal the District Court has held that the finding of the Judicial Commissioner that the lands were ancestral property is binding in the present suit and that the subject-matter of it is therefore *res judicata*.

No doubt a finding in a previous suit may under certain circumstances be binding as between the defendants, but it is only with very strict reservations.

In *Nga Thet Tha* v. *Mi Kye Gyi* (1), it was laid down that where an adjudication between the defendants is necessary to give an appropriate relief to plaintiffs, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this effect to arise there must be a conflict of interest between the defendants *inter se*. I have studied the judgment of the learned Judicial Commissioner in Civil Appeal No. 404 of 1915 and it is quite clear to my mind that there was no adjudication as between Ma Tôk and the plaintiffs in the present case.

(1) (1907-09) U.B.R. II Civil Procedure 5.

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The learned Judge distinctly used the expression that as against Ma Tôk and her children, Po Ka was entitled to one-fourth. He nowhere came to an express finding that the present plaintiffs were entitled to a share as against Ma Tôk.

The limits within which an adjudication can be *res judicata* as between co-defendants were clearly laid down by a Bench of the Calcutta High Court in *Jadav Chandra Sarkar* v. *Kailash Chandra Singha* (2). Three necessary conditions were there prescribed: (1) that there should be a conflict of interest between the co-defendants; (2) that it should be necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit; and (3) that the judgment should contain a decision of the question raised as between the co-defendants.

In the earlier Bombay case of *Ramchandra Narayan* v. *Narayan Mahadev* (3), it was held *inter alia* that there must be a judgment defining the rights and obligations of the defendants *inter se*. This ruling was followed by a Bench of the High Court at Lahore in *Mehra* v. *Devi Ditta Mal* (4), and it was pointed out that without necessity a judgment will not be *res judicata* as between defendants.

A similar view was taken by a Bench of the Bombay High Court in *Gangaram Balkrishna* v. *Varadeo Dattatrya* (5).

I have no doubt that the law on the subject is correctly laid down in the judgments cited and that the conditions necessary to make the subject matter of the present suit *res judicata* have not been fulfilled.

It may be a legitimate inference from the judgment of the Judicial Commissioner in the suit between

(2) (1916) 25 C.L.J. 322.
(3) (1887) I.L.R. 11 Bombay, 216.
(4) (1921) 2 Lahore, 58.
(5) (1923) 47 Bombay, 535.

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Po Ka, the plaintiffs in the suit now under appeal and the defendant Ma Tôk, that the property in suit is ancestral property and that the present plaintiffs have a right to a half share as against Ma Tôk, but, as I have already pointed out, there has been no express adjudication to this effect as between the co-defendants in that suit.

I am unable, therefore, to accept the view of the learned District Judge that the subject matter of the present suit is *res judicata*.

Ma Tôk obtained possession of the disputed property as the result of litigation about 1892.

How long before that Po Kyu died is not clear. It is to my mind incontestable that a suit by co-heirs for a share against her has been long barred under Article 123 of the First Schedule to the Limitation Act.

I entirely agree with the observation of Lentaigne, J., in *Maung Po Kin* v. *Maung Shwe Bya* (6) (at page 415), that there is no reason why a different aspect should be given to a claim for a distributive share against an administrator, who should have distributed the estate and given a share but failed to do so, from the aspect of a similar claim against one or more heirs who should have amicably agreed to partition of the estate and given a share but failed to do so.

The appropriate article for suits against co-heirs for a share in the corpus of an inheritance is 123. I have little doubt that, had the applicability of Article 123 been urged before the Judicial Commissioner, the result of Po Ka's suit would have been different.

Assuming that when Ma Tôk obtained the estate by litigation, she was willing to give the heirs their legal shares on receipt from them of a proportionate

(6) (1923) 1 Rangoon, 405.

share of the expenses incurred by her, and that she was legally bound to do so, yet there must be a limit to her willingness and to her obligation.

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She cannot be expected to hold the estate for ever at the will and pleasure of the other heirs or their representatives.

The right to pay off a portion of her lien and obtain a share must be exercised within a reasonable time.

I am not prepared to hold that there was joint possession or that Ma Tôk was merely a trustee for the plaintiffs. The learned Judicial Commissioner attached more importance to the admission of Ma Tôk before the Settlement Officer in 1912 that Mi Yin, first plaintiff, is interested in the estate, than I am prepared to give. It cannot be treated as an unqualified admission that plaintiffs had a subsisting right to a share in the estate. Ma Tôk may have said that Ma Yin had an interest, but she did not know the law of limitation, and her statement cannot be construed as an admission that Ma Yin still had a legal title enforceable in Court.

It seems to me it would be iniquitous after Ma Tôk had peaceable possession of the estate for thirty years, having recovered it by litigation at her own expense, to allow other heirs to step in now and obtain a share, when they have slept on their rights for so long.

If their rights were conceded, no holder of ancestral estate which he had recovered or redeemed, would be safe so long as co-heirs, or their legal representatives survived, nor would his successors apparently until there has been an overt act rendering the possession adverse to the co-heirs.

The doctrine that an heir, who redeems or recovers ancestral estate with the consent, express or implied

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of the co-heirs holds on their behalf can be pressed too far.

In the present suit, however, plaintiffs have been held by both the Courts below to have failed to prove their claim on the merits. As I have held that the subject matter of the suit is not *res judicata*, the appeal must therefore succeed apart from the question of limitation.

I set aside the finding and decree of the District Court and restore the decree of the Subdivisional Court with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

1925

Jan 15.

MAUNG SET KHAING

v.

MAUNG TUN NYEIN AND TWO.*

Malicious prosecution—Prosecution solely to protect complainant's rights—Absence of a desire to bring the offender to justice not essential—Malice not presumed from want of enquiry by the complainant prior to prosecution.

Where a prosecution is obviously false and not instituted in good faith, the Courts will infer malice, but where a prosecution has been instituted under a *bonâ fide* belief that the accused has committed the offence, even though that belief is mistaken and an enquiry would have shown that no offence had been committed, the plaintiff cannot obtain a decree for damages for malicious prosecution, unless the prosecution is proved to be malicious as well.

Quinn v. *Leathem* (1901) A.C., 495—*followed.*

PRATT, J.—The defendant in the trial Court was working the Tongyi Fishery of which his son was lessee.

The defendant had himself purchased the lease of the fishery for two years previously.

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* Special Civil Second Appeal No. 188 of 1924 (at Mandalay).

1925

MAUNG SET KHAING v. MAUNG TUN NYEIN AND TWO.

PRATT, J.

He found the plaintiffs fishing in a channel, which he believed to be the Pakka Yo forming a part of his fishery, but which, it was subsequently proved, was not a part of his fishery and was not the Pakka Yo.

He made a report to the *thugyi* and, by his advice, to the police, to the effect that the plaintiffs had been caught fishing in the Pakka Yo, which was part of his fishery.

The police prosecuted for theft and the result of the trial was that the accused, plaintiffs, were acquitted.

The plaintiffs sued for damages for malicious prosecution in the Township Court.

The trial Court held that as the defendant believed that the 'Yo' was the Pakka Yo and part of his fishery, there was reasonable cause for his complaint.

It also found that there was no malice on the part of the defendant and dismissed the suit.

On appeal the District Court held that the defendant, had he made any inquiries before reporting to the police, would have found that the water in which the plaintiffs were fishing was no part of his fishery.

The learned District Judge found accordingly that the prosecution was instituted without reasonable cause.

As, however, the mere institution of a prosecution without reasonable and probable cause is not sufficient to justify a decree, if the defendant honestly believed that the accused (plaintiffs) had committed a criminal offence, it was necessary to find that the prosecution was malicious and the first Appellate Court has come to a finding on this point.

I regret I am not quite able to follow the reasoning by which the learned District Judge has come to the conclusion that there was malice.

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He observes that unless the sole object of the prosecution was to bring the offender to justice, there would be malice unless reasonable and probable cause were proved.

He proceeds to state that the object of the prosecution in the present case was solely to protect his own interests and that he was unable to hold that any sinister motive was proved.

Then follows a somewhat vague sentence:

"An honest belief that the defendant was justified in informing the police does not absolve him unless he could prove reasonable and probable cause, combined with a real desire to serve the ends of justice rather than his own private interests" and the conclusion drawn is "I am therefore bound to hold that in the present case malice was proved."

The conclusion does not seem to follow from the premises, and the absence of a real desire on the part of the defendant to serve the ends of justice rather than his own private interests does not necessarily involve malice.

On the District Judge's own showing the object of the prosecution was solely to protect the defendant's own interests, and there was no sinister motive.

This is practically a finding that there was no malice.

To protect one's own interests is not necessarily malicious and is not incompatible with a real desire to serve the ends of justice.

In reality the Judge's view seems to be that malice is a necessary corollary from the absence of reasonable and probable cause.

But this is not a correct view of the law.

There must be malice as well as an absence of reasonable and probable cause.

No doubt where a prosecution is obviously false and not instituted in good faith, the Courts will infer

malice, but where a prosecution has been instituted under a *bonâ fide* belief that the accused has committed an offence, even though that belief is mistaken, the plaintiffs cannot obtain a decree unless the prosecution is malicious as well, even if inquiry would have shown that no offence had been committed *vide Quinn* v. *Leathem* (1).

Actual malice has not been proved and it cannot be inferred from the fact that the defendant made no inquires before making a report; nor from the fact that he charged the plaintiffs with theft. From his point of view the plaintiffs were stealing his fish.

Both Courts were satisfied that the defendant believed, when he made the report that the plaintiffs were fishing in a part of the Tongyi Fishery, though, as a matter of fact, they were not.

The police did not investigate this point or they would have found there was no ground for a criminal prosecution, and if the Magistrate had gone into this point at the beginning of the proceedings, he would have found that there was no ground for framing a charge.

It is the plaintiffs' misfortune that the police prosecuted them without making any inquiry into the boundaries of the defendant's fishery.

It is to my mind impossible on the evidence to hold that the prosecution was malicicus, and, unless malice is proved or can be inferred, the suit was bound to fail.

I set side the finding and decree of the District Court and restore the finding and decree of the Township Court with costs in all Courts.

The cross objection must also be dismissed with costs.

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(1) (1901) A.C. 495, 524 quoted at page 240. Ratan Lal on Torts, 8th Edition.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

1929
Jan. 25.

MA KYAW AND ONE
v.
MAUNG PO MYIT AND ONE.*

Buddhist Law, Inheritance—Contest between half-brother and sister of deceased's mother and full cousin of the deceased's father—the rule of non-ascent.

It is a fundamental principle of the Buddhist Law that inheritance shall not ascend if it can possibly descend, and it is a logical corollary of that rule that inheritance must not ascend more than is necessary.

Held, that the half-brother and half-sister of the mother of the deceased excludes the full-cousin of the father of the deceased.

Le Maung v. *Ma Kwe*, 10 L.B.R., 107 ; *Ma Gyi* v. *Ma Khin Saw*, 11 L.B.R. 460 ; *Taung Mra* v. *Aung Nyun*, 12 B.L.T. 103—*referred to.*

N. C. Sen—for the Appellants.

Robertson—for the Respondents.

HEALD and CHARI, JJ.—This appeal deals with rival claims to the estate of Ma Hla Yin who died unmarried, the rival claimants being Ma Kyaw and Ma Ngwe Nyun (now represented by her daughter Ma Mya Sein) on the one side and Ma Hnaw Za on the other.

Ma Kyaw and Ma Nywe Nyun were children of Ma Hla Yin's maternal grandmother by a second husband who was not the father of Ma Hla Yin's mother, that is to say, they were half-sisters of Ma Hla Yin's mother, while Ma Hnaw Za is a cousin of Ma Hla Yin's father being a daughter of the sister of Ma Hla Yin's paternal grahdfather.

It is to be noted that in her written statement Ma Hnaw Za did not expressly claim to inherit Ma Hla Yin's estate on the ground of relationship, and the learned Judge in the trial Court said that it was not

* Civil Second Appeal No. 523 of 1923 against the decree of the District Court of Prome in Civil Appeal No. 62 of 1923.

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HEALD AND CHARI, JJ.

disputed that Ma Kyaw and Ma Ngwe Nyun would be the nearest natural heirs if the claim of one Ma Hla Tin who alleged that she was Ma Hla Yin's sister by adoption was not proved. Ma Hnaw Za's claim as embodied in her written statement was rather that she was entitled to the inheritance because she had supported Ma Hla Yin after her father's death, had tended her during her illness, and had buried her when she died, and that Ma Kyaw and Ma Ngwe Nyun had done none of these things, but on the contrary had neglected the ordinary duties of kindred and affection. Ma Hla Tin's claim, as adoptive sister of Ma Hla Yin, has been finally rejected, and so has Ma Hnaw Za's claim that Ma Kyaw and Ma Ngwe Nyun had by neglect deprived themselves of the right to inherit, but Ma Hnaw Za seems to have been allowed to raise a new claim that she was entitled to inherit on the ground of relationship.

The lower Appellate Court has found that the claims of the parties on the score of relationship are equally divided, since although Ma Kyaw and Ma Ngwe Nyun were nearer in relationship they were only half-sisters of Ma Hla Yin's mother, while Ma Hnaw Za was a full cousin of Ma Hla Yin's father. It accordingly gave each of them half the estate.

Both sides appeal, each of them claiming the whole estate.

The case resolves itself into the question, who are to be preferred, the mother's half-sisters, or the father's cousin.

It is a fundamental principle of Burmese Buddhist law that inheritance shall not ascend if it can possibly descend, and it is a logical corollary of that rule that inheritance must not ascend more than is necessary. An instance of this is to be found in the rule that brothers and sisters exclude grandparents.

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It is clear therefore that unless there is a rule which excludes half-brothers or half-sisters from the category of brothers and sisters, Ma Kyaw and Ma Ngwe Nyun were entitled to succeed to Ma Hla Yin's estate in preference to Ma Hnaw Za, since as sisters of Ma Hla Yin's mother they would exclude not only their own mother, that is Ma Hla Yin's maternal grandmother, but also Ma Hla Yin's paternal grandfather, through whose sister Ma Hnaw Za now claims.

We have not been referred to any such rule of exclusion in the Burmese Buddhist law books and we know of none. It is true that in a case *Taung Mro and one* v. *Aung Nyun and one* (1), which was not officially reported, a single Judge of the late Chief Court remarked that in his opinion "full-blood relations exclude half-blood relations," but the rule against the ascent of inheritance might have warranted the learned Judge's decision in that particular case, and in the case of *Ma Gyi* v. *Ma Khin Saw* (2), where the rival claimants were on the one side a half-brother and a half-sister and the other a natural grandmother of the owner of the estate and the maternal grandmother relied on that unreported case, a Bench of the Chief Court held that the half-brother and half-sister excluded the maternal grandmother and quoted with approval a dictum in the case of *Le Maung* v. *Ma Kwe* (3) the effect that in a case where there are half-brothers or half-sisters or both and no full brothers or sisters, the half-brothers or half-sisters exclude the parent of the owner of the estate.

In these circumstances we see no reason to believe that Ma Kyaw and Ma Ngwe Nyun ought not to be regarded as sisters of Ma Hla Yin's mother, and we

(1) (1919) 12 Burma Law Times, 103. (2) (1921-22) 11 L.B.R. 460.
(3) (1919-20) 10 L.B.R., 107.

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hold that as such sisters they exclude Ma Hnaw Za, who is a daughter of a sister of Ma Hla Yin's grandfather.

There is no dispute as to the properties of which the estate consists except the case. The trial Court accepted the defence that the case belonging to the estate amounted to Rs. 281-6-0 and that finding has not been questioned in this Court. The lower Courts have also accepted Ma Hnaw Za's valuation of the moveable properties of which the estate consists, and, as no objection has been taken in this Court, we see no reason to interfere. So far as the immoveable property is concerned, it was unnecessary to specify its value in the decree, which should have directed its delivery to Ma Kyaw and Ma Mya Sein.

Ma Kyaw and Ma Mya Sein will have a decree for R. 281-6-0 and for possession of the moveable property specified in the schedule attached to the plaint, or for its value, as shown in the schedule filed at page 19 of the record against Ma Hnaw Za and her husband, Po Myit. They will also have a decree for possession of the land and house described in the schedule attached to the plaint.

Ma Hnaw Za and Po Myit will pay the costs of Ma Kyaw and Ma Mya Sein throughout. We make no order for the costs of Ma Hla Tin and the legal representative of the third defendant, Maung Gauk, who are not parties to the appeal.

CIVIL REFERENCE.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice J. A. Maung Gyi.

1929
Feb. 23.

IN THE MATTER OF THE ESTATE AND EFFECTS OF MAUNG WIN PAN, DECEASED*

AND

IN THE MATTER OF THE ESTATE AND EFFECTS OF HAW WAH KAIN, DECEASED.*

Court Fee Act (VII of 1870), section 19C—Letters of Administration de bonis non, whether further Court Fee chargeable on application for—Court Fee on value of whole estate having been paid on previous grant.

When the appointment is made of an administration *de bonis non*, there is no new succession, and no new devolution of the estate, which would justify a finding that fresh Court fee must be paid.

In re Balthazar 4 Lower Burma Rulings 253; *Swarnamoyee Debi* v. *Secretary of State for India*, 43 Cal., 625—*followed.*

Burjorjee and *Ah Yain*—for Petitioners.

ROBINSON, C. J., AND MAUNG GYI, J.—These were two applications for letters of administration *de bonis non*. Previous grants had been made, and the proper Court fees on the value of the whole estate had been deposited. The question is whether any further Court fee is chargeable on these applications.

On the matter coming before the learned Registrar, Original Side, he was of opinion that the case did not fall within the purview of section 19C of the Court Fees Act, and, having regard to the wording of the form given in Schedule III of the Act, he was of opinion that Court fees must be paid on the increased value of the property and on certain other realisations.

The matter has been laid before this Bench for consideration because of a previous decision by a

* Civil Miscellaneous Nos. 60 and 234 of 1924 of the High Court of Judicature at Rangoon, Original Side.

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single Judge of the late Chief Court, the correctness of which is questioned.

In re Balthazar (1) in which exactly the same question arose, it was held : " Letters of administration have previously been issued in respect of the whole of the property in respect of which letters are now asked for. The full fee chargeable on the property at the value then placed upon it was levied. The property has since apparently risen in value. I am of opinion that this cannot affect the question. The full fee chargeable was paid when letters were previously issued. Consequently no fee is leviable now in spite of the rise in value." This decision was passed with reference to the provisions of section 19C of the Court Fees Act.

There can be no question that the wording of section 19C is wide enough to cover the present cases. It lays down in clear terms that " whenever a grant of probate or letters of administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate." The Legislature is careful to use language which covers the case of a subsequent grant such as a grant *de bonis non*. Section 19 (*i*) shows that the amount of the Court fee is to be calculated on the value of the property at the time the application is made. This may be at some interval after the death of the last owner, and the form given in Schedule III to the Act provides for an increase in value between the date of the death and the date of the application for probate or letters. That form is directed to be

(1) (1907-08) 4 L.B.R. 255.

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used with such modifications as may be necessary, and we can see no ground for holding that the reference therein to increased values refers to increased values between the first and second grant of probate or letters, and not merely to increased values between the date of the death and the date of the application. By section 19C, provided that the full fee chargeable under the Act has been paid, no further fee is to be chargeable when a like grant, *i.e.*, a grant of probate or letters of administration, is made in respect of the whole or any part of the same property belonging to the same estate. There is nothing in the wording of section 19C to confine its application to the case of some executors coming in to take out probate after one of their members has already taken out probate. It will apply equally to a subsequent application for administration of the whole estate, and to an application to administer that which has been unadministered so far. When the appointment is made *de bonis non*, there is no new succession, and no new devolution of the estate, which would justify a finding that fresh Court fees must be paid.

The decision in *In re Balthazar* (1) was cited with approval in the case of *Swarnamayee Debi* v. *Secretary of State for India* (2), which is an authority on the point arising in the present cases.

We agree with the learned Judges, who decided that case. There are some old rulings to the contrary effect, but these were either passed before section 19C was enacted, or were cases to which section 19C could not apply, because that section applies only when both the first and the subsequent grants were made after the Court Fees Act came into force.

For these reasons, we are of opinion that no further Court fee is chargeable on these applications.

1 (1907-08) 4 L.B.R. 255. (2) (1916) I.L.R., Cal., 625.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

1924
Nov 8

KING-EMPEROR
v.
MAUNG KHA GYI.*

Criminal Procedure Code (V of 1898), section 250—False charge—Magistrate's order for compensation to be paid by complainant to each of several accused and in default to suffer imprisonment—Whether term of imprisonment to be undergone in the whole or in respect of each accused—Postponement of sentence of imprisonment after period of detention in Civil Jail, illegal.

Held, that where under the provisions of section 250 (2) of the Criminal Procedure Code, the Court orders a complainant to pay compensation separately to each of several accused persons and in default to suffer imprisonment. Imprisonment may be awarded for default of each such separate payment as ordered.

Held also, that detention under the order of a Civil Court not being a "sentence of imprisonment, penal servitude or transportation," a Magistrate cannot order that his sentence of imprisonment shall take effect at the expiry of the term of the detention in Civil Jail.

CARR, J.—Maung Kha Gyi filed a complaint charging four person with theft. The Township Magistrate acquitted the accused and found that the charge was false. He accordingly called upon the conplainant to show cause why he should not be ordered, under section 250, Criminal Procedure Code, to pay compensation to accused. After hearing him he passed an order directing him to pay Rs. 10 to each of the four accused and further directing that in default he was to suffer ten days' simple imprisoment. He did not say whether this term was to be undergone in the whole or in respect of each accused, but it is clear that the latter was his intention. Maung Kha Gyi then appealed to the District Magistrate, who

* Criminal Revision No. 1514 A of 1924 from the order of the Township Magistrate, Ma-ubin, in Criminal Regular No. 167 of 1924.

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dismissed his appeal. On the facts I see on reason to differ from the concurrent finding.

Time for payment of compensation was allowed and later a distress warrant was issued. This realising nothing, Maung Kha Gyi was committed to prison for forty days' simple imprisonment. The Magistrate also ordered that the sentence should take effect at the expiry of a term of detetention in the Civil Jail which had been ordered by a Civil Court under the Civil Proceduae Code.

Two questions arise—whether the term of thirty days specified in section 250 (3) of the Criminal Procedure Code can be imposed in respect of each accused in whose favour payment of compensation has been ordered, or whether it is the maximum which can be imposed in respect of one case, and whether the Magistrate has power to order that the sentence shall take effect after a term of Civil detention. I can find no published decision on either question.

On the first question section 250 (2A) is not very explicit, but since clause (1) of the same section specifically provides for the payment of compensation separately to each accused, I think it must be held that thirty days' simple imprisonment may be awarded for default of each such separate payment as ordered.

On the second question I think there is no doubt that the Magistrate cannot so order postponement of the sentence. There is nothing in the Criminal Procedure Code empowering him to do so. Detention under the order of a Civil Court is certainly not a "sentence of imprisonment, penal servitude or transportation" and therefore section 397, Criminal Procedure Code, is not applicable,

I set aside that portion of the Magistrate's order dated the 29th October 1924 which directs that the sentence of imprisonment in this case shall take effect

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on the expiry of the term of detention in the Civil Jail ordered by the Township Court of Ma-ubin, in Civil Execution Case No. 105 of 1924. The rest of the Magistrate's order will stand. An amended warrant must be issued.

APPELLATE CRIMINAL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Godfrey.

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Dec. 2.

V. M. ABDUL RAHMAN AND ONE v. KING-EMPEROR.*

Jurisdiction of Magistrate, ab initio. Want of—Charge under section 120B, Indian Penal Code, without complaint or consent required by section 196A, Criminal Procedure Code, Magistrate not competent to frame his proceedings, without such complaint or consent, ab initio, without jurisdiction and illegal—Alternative charges under sections 466 and 109, Indian Penal Code, framing of subsequently cannot cure want of jurisdiction—Complaint by a Court under section 476, Criminal Procedure Code of an offence under section 120B read with sections 466 and 109 of the Penal Code—Sanction of Governor-General in Council or Local Government or Officer empowered in this behalf, not necessary for such trial—Charge framed by Magistrate not being the charge set out in the complaint but charge of doing a legal act by illegal means, sub-section (1) of section 196A, Criminal Procedure Code, applies and must be set aside as void—To charge under section 120B as laid in Court's complaint, Magistrate could have added the alternative charges under sections 466 and 109—Criminal Procedure Code, sections 195 (1) (c), 195 (4)—Discretion of Court to try accused persons separately not exercised improperly by holding a joint trial in conspiracy cases—Section 196A applies only to a prosecution for conspiracy punishable under section 120B and not for abetment by conspiracy punishable under section 109 of the Penal Code.

A, alleging that certain properties of B, had been under attachment for a period exceeding three weeks, applied to the High Court in its Insolvency jurisdiction to adjudicate B insolvent. B contested the application denying A's allegation and alleged that the warrants of the attaching Court had been tampered with in order to make it appear that the attachment had subsisted for over three weeks. The High Court finding for B dismissed the application to adjudicate him, and then proceeded under section 476 of the Criminal Procedure Code to lay a complaint against A and two other persons C and D, who were not parties before it, for offences under section 120B read with sections 466 and 109, Indian Penal Code, and D was subsequently discharged. C having appealed against the order formulating a complaint against him, the complaint so far as

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* Criminal Revision Nos. 949-B and 953-B of 1924 from the Order of the District Magistrate of Insein in his Criminal Trial No. 1 of 1924.

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it related to him was set aside on the ground that the Court had jurisdiction to lay a complaint only in respect of parties to the proceedings before it and C was a stranger to such proceedings. B then, in terms almost identical to the complaint laid by the Court, presented a complaint against C to the Magistrate who was trying A. The joint trial of A and C was thereupon proceeded with by the Magistrate and a charge was framed against them both that they had agreed to do an act which was not an illegal act by illegal means, to wit, the forging of the attachment warrants, and in pursuance thereof had caused some person or persons to commit the offence of forgery as described in section 463, Indian Penal Code, and had thereby committed an offence under section 120B, Indian Penal Code. Thus the complaint laid was not a complaint of a criminal conspiracy, the object of which was to commit a legal act by illegal means. When objection was raised as to the jurisdiction of the Court, the Court at the request of the prosecution framed additional charges of abetment of forgery under sections 466 and 109, Indian Penal Code, against both the accused.

Held that the charge framed being a charge of doing a legal act by illegal means, the provision of sub-section (1) of section 196A of the Criminal Procedure Code applied.

Held that as against A the charge framed being one not set out in the High Court's complaint but one that fell under sub-section (1) of section 196A of which the Magistrate could take cognisance only on a complaint by the Governor-General in Council or the Local Government, the Magistrate had acted without jurisdiction and that the trial as from the date of the framing of the said charge was void.

Held that as against C who was not a party to the proceedings before the High Court having regard to the provisions of section 196 (1) (*c*), the Magistrate was not empowered to take cognisance without the consent of the Local Government and that as he had acted entirely without jurisdiction and in direct disobedience of the express provisions of the Code, his proceedings were *ab initio* illegal, a defect which could not be cured by his subsequently framing the native charges such as he was, in law, entitled to and which he could have framed originally without objection.

Held also that the legality of a joint trial depends on the accusation and not on the result of the trial and that the discretion of the Court to try accused persons separately is not improperly exercised by holding a joint trial in cases of conspiracy.

Held further that section 196A of the Criminal Procedure Code applies only to a prosecution for conspiracy punishable under section 120B and not for abetment of conspiracy punishable under section 109 of the Penal Code.

Abdul Salim v. King-Emperor, 29 Cal. 325; *Giridhari Lal v. King-Emperor*, 2[illegible] C.W.N. 950—*referred to.*

de Glanville and *Cowasjee & Dass*—for the Petitioners.

Gaunt, Assistant Government Advocate—for the Crown.

ROBINSON, C.J.—This is an application for revision of an order passed by the District Magistrate, Insein,

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and also raising the question of the legality of the whole proceedings in the trial which has now been lasting for several months.

The immediate question raised did not strike any of the numerous counsel engaged in the case, so that the attach on the jurisdiction of the Magistrate is very belated.

After, however, hearing counsel for the Crown, we decided that we would hear this application although the trial was not concluded, as, owing to the facts and cricumstances on which the pleas are based, the objections go to the very root of the legality of the trial.

It is necessary for a complete understanding of the points, with which we have to deal, that the facts should be set out though as briefly as possible.

It is said that one Abdul Rahman was a rival in business of a firm carrying on business under the style of "D. K. Cassim & Son." Owing to this, rivalry and to some ill-feeling, it is said that Abdul Rahman entered into a conspiracy with one S.P.S. Mani Iyer to injure his rival in business by getting him adjudicated insolvent.

D. K. Cassim & Sons' immoveable properties were under attachment by the Court of Insein. Mani Iyer filed an application to adjudicate, setting out as the act of insolvency that their properties had been under attachment for three weeks and over. The application was strenuously opposed, respondents alleging that their financial position was very good, and denying that their properties had been under attachment for three weeks. They alleged that the warrants of attachment had been forged by altering the date from the 27th of November to the 20th and 21st of November.

After a full enquiry by the Judge sitting in insolvency, the application to adjudicate was dismissed.

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The matter, however, did not end there. He was of opinion that, in the interests of justice, steps should be taken to prosecute Abdul Rahman, Mani Iyer and one Guruswamy. This latter has since been discharged and I need not mention him any further.

After issuing notice, the learned Judge laid a formal complaint under section 476, Code of Criminal Procedure, and it is important to note the exact terms of that complaint. He said—"In the opinion of the Court it is expedient in the interests of justice that an enquiry should be made into the said offence which is punishable under section 120B, read with sections 466 and 109, Indian Penal Code, with rigorous imprisonment which may extend to seven years."

The conspiracy that is alleged, I understand, is a conspiracy to get D. K. Cassim & Sons adjudicated, and that conspiracy included a conspiracy to effect the necessary preliminary step of getting the attachment warrants forged.

The complaint was sent to the District Magistrate, Insein, who took action upon it, and framed charges against both Mani Iyer and Abdul Rahman, which are as follows. The charges against both are in similar terms :—"That you on or about the 7th day of December 1923, at Insein, agreed with S.P.S. Mani Iyer to do an act, to wit, sought to have D. K. Mohamed Ebrahim and two other persons carrying on business under the name of D. K. Cassim & Sons adjudicated insolvent, which is not an illegal act, by illegal means, to wit, the forging of a document purporting to be made by a public servant, and, in pursuance of that agreement, you did some acts, to wit, cause some person or persons unknown to so alter the dates of the execution of the warrants of attachment to the property in Civil Execution Cases

Nos. 98 and 99 of 1923 of the Court of the Sub-divisional Judge, Insein, Exhibits 16 and 17, as to make it appear that the said warrants had been executed on the 20th and 21st November 1923, respectively, instead of on or about the 27th of November 1923, that is, to commit the offence of forgery as described in section 463, Indian Penal Code, and thereby committed an offence punishable under section 120B, Indian Penal Code, and within my cognizance."

An appeal was filed in this Court against the order formulating a complaint under section 476, Criminal Procedure Code. The result of that appeal was that we set aside the complaint so far as it related to Abdul Rahman, on the ground that the learned Judge sitting in insolvency had only jurisdiction to lay a complaint, in respect of parties to the proceedings before him, out of which the necessity for laying a complaint arose. Abdul Rahman had not been a party to those proceedings. That, I may mention, was the view that was taken by the Calcutta High Court in the case of *Giridhari Lal* v. *King-Emperor* (1).

In the course of my judgment in the appeal I said—"It will, of course, be open to the Court, if it sees good grounds for so doing, to take action against them (Abdul Rahman and Guruswamy) also or it will be open to the respondent to lay a complaint before the Magistrate in respect to them."

This sentence has been completely misunderstood by counsel for the complainant, by counsel for the Crown, and by the learned District Magistrate himself.

It has been assumed that I expressed the opinion that, having taken cognizance properly of the case against Mani Iyer on the complaint under section

(1) 21. C.W.N. 950.

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476, it was open to the Court, when acting either of its own motion or on a complaint by the complainant, to entirely disregard the express provisions of the Code in respect of certain offences. That, of course, was not my meaning, and to frame on the authority of this sentence in my judgment a charge under section 120B, Indian Penal Code, without any complaint or consent such as is required by section 196A, Criminal Procedure Code, was entirely wrong. The offence, that was obviously as I thought in my mind, was the offence of abetment of forgery under sections 466 and 109, Indian Penal Code, for which no complaint or sanction was required by any provision of the Code.

The learned counsel for the complaint, however, drafted and presented a complaint, which follows almost *verbatim* the complaint, laid by the learned Judge sitting in insolvency. On that complaint the District Magistrate took proceedings against Abdul Rahman, and those proceedings went on unchallenged for several months, and no objection was raised to the joint trial of Abdul Rahman and Mani Iyer.

When Mr. de Glanville was retained for Abdul Rahman, and the possibility of objection was apparent, counsel for the Crown asked for additional charges to be framed—charges of abetment of forgery. This request was apparently at first refused, but when shortly after Mr. de Glanville raised his objection to the jurisdiction of the Court, counsel for the Crown, in reply to the objection, reiterated his request for additional charges. After hearing counsel on both matters, the learned District Magistrate passed the order, against which the present application for revision is made. He framed alternative charges under sections 466 and 109 of the Indian Penal Code against both accused.

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It is, I think, perfectly clear that what the prosecution alleges in this case is that Abdul Rahman and Mani Iyer entered into a conspiracy to injure the formers's trade-rival by getting him adjudicated insolvent ; that in order to do that, they found it necessary to instigate persons to forge certain warrants of attachment ; that, in pursuance of this conspiracy, they procured the forgery of those warrants ; and that, having effected this necessary preliminary step, Mani Iyer, in furtherance of the conspiracy, filed his application to adjudicate. If that be the case, I am not prepared to hold, nor is it necessary that I should hold or not hold or come, indeed, to any decision as to whether Abdul Rahman and Mani Iyer could be tried jointly in one trial.

It is said that there were two conspiracies—one to cause the forgeries, and the other to procure the adjudication ; and whether that is so or not is for the Magistrate to decide if and when the matter is raised before him. I mention it because it was openly stated to us that Abdul Rahman did not desire to be tried jointly with Mani Iyer ; but it is not necessary for the purposes of the present decision to go any further into that matter.

I have set out the charges originally framed by the Magistrate against both petitioners ; and I have set out the terms of the complaint laid by the learned Judge sitting in insolvency. That complaint is one of criminal conspiracy under section 120B, read with sections 466 and 109, Indian Penal Code.

As to section 120B, Indian Penal Code, the Code of Criminal Procedure in section 196A lays down that, where the object of the conspiracy is to commit an illegal act, other than an offence, or a legal act by illegal means, no Court shall take cognizance of the offence unless upon complaint made by order, or

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under authority from the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf. The charge, as framed by the Magistrate, is a charge of doing a legal act by illegal means, and the provisions of sub-section (1) of section 196A therefore apply to it.

It is to be noted that the complaint laid was not a complaint of a criminal conspiracy, the object of which was to commit a legal act by illegal means. Moreover, the punishment for the offence, which is charged in the original charges, is imprisonment for a term of six months, whereas in the complaint it is expressly stated that the offence complained of is punishable with rigorous imprisonment which may extend to seven years. This is an offence to which neither the provisions of sub-section (1) or sub-section (2) of section 196A apply, because of the proviso attached to sub-section (2) of the section, which renders no consent by the Local Government or any other authority necessary in the cases to which the provisions of sub-section (4) of section 195 of the Code of Criminal Procedure apply. This sub section (4) relates back to offences specified in section 195 (1) (c) of the Code, that is offences committed by a party to any proceedings in any Court in respect of a document produced or given in evidence in such proceedings.

Abdul Rahman was not a party to the proceedings before the Judge sitting in insolvency; he was not a person who came within the purview of section 195 (1) (*c*) of the Code; and, therefore, as regards him, the proviso to sub-section (2) of section 196A does not do away with the necessity for the sanction of the local Government to the initiation of proceedings

(2) I.L.R., 49 Cal., 573.

against him. This being so, the Magistrate took cognizance of the case against him on a complaint by the complainant alone, or he took cognizance of his own motion from information obtained during the course of the proceedings against Mani Iyer. In neither case could he take cognizance without the consent of the Local Government if the case was one under the second sub-section of section 196A, while in respect of the charge that he actually framed, which is a charge falling within the purview of sub-section (1) of section 196A, he would require a complaint by the Governor-General in Council, or he would require one from the Local Government to give him jurisdiction.

For these reasons I am of opinion that, as regards Abdul Rahman, the learned District Magistrate acted entirely without jurisdiction and in direct disobedience of the express provisions of the Code. This being so, the whole of his proceedings against Abdul Rahman were *ab initio* without jurisdiction and illegal.

It has been urged that the alternative charge now framed is sufficient to rectify any error that there may have been in his proceedings. I am quite unable to accept that argument. Having acted without jurisdiction throughout, the defect cannot be cured by now framing a charge which, by law, he was entitled to frame, and which, had he done so originally, would have avoided the present objection. It is impossible to hold that he could disregard the express provisions of the Code, and render legal all his previous trial, which was illegal, by now framing a charge of abetment of forgery, which required no complaint or consent.

We must, therefore in my opinion, set aside all the proceedings so far held against Abdul Rahman, and direct that he be discharged, leaving it open to the Magistrate to proceed against Abdul Rahman if

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a complaint is laid before him of an offence under sections 466 and 109 or any other sections which do not require the complaint of the Governor-General in Council, or consent of the Local Government, and if, after examining the complainant, he sees fit to do so, or of an offence within the purview of section 196A with the necessary complaint or consent.

Coming now to the case of Mani Iyer, which is the second application before us, he was a party to the proceedings and the Magistrate could and should have acted on the complaint laid by the Judge sitting in insolvency. But the charge that he framed was not a charge set out in that complaint; it was an entirely different charge; it was a charge that fell under the first sub-section of section 196A, and an offence of which he could not take cognizance without a complaint by the Governor-General in Council or of the Local Government. Had he framed a charge of the offence as speified in the complaint laid by the Judge sitting in insolvency, no other complaint and no consent by the Local Government would have been necessary. Had he taken cognizance of the case and framed a charge as laid out in the complaint, no objection could have been taken to his proceedings, and it would have been open to him at any time during the trial to have added the charge that he has since added, and tried Mani Iyer on that charge as well as on the charge specified in the complaint.

I may refer to the case of *Abdul Salim* v. *Emperor* (2) where it was held that a charge under sections 120B and 420, Indian Penal Code, of conspiring to cheat between certain dates may be legally joined with individual charges of every distinct offence committed in pursuance of the conspiracy by different members of it on different intermediate

(2) I.L.R. 29 Cal., 573.

dates. It was further held that the legality of the joint trial depends on the accusation, and not on the result of the trial, and that the discretion of the Court to try accused persons separately is not improperly exercised by holding a joint trial in conspiracy cases. And it is further and authority for the proposition that section 196A, Criminal Procedure Code, applies only to a prosecution for conspiracy punishable under section 120B of the Penal Code, and not for abetment by conspiracy punishable under section 109 of the latter Code,

The District Magistrate, therefore, had no jurisdiction to frame the charge that he did originally frame against Mani Iyer, and we must set aside that charge in my opinion, and direct that he be discharged in respect of it. But the Magistrate had jurisdiction to frame a charge under section 120B read with sections 466 and 109.

There remains the question as to the alternative charge now framed.

So far the Magistrate's proceedings appear to me to have been, up to the stage when a charge was framed, perfectly legal. His mistake was in framing a charge on the 21 October, which he was not entitled to frame by virtue of the complaint that had been laid. From that time onwards his proceedings were without jurisdiction, and consequently his second charge, which he framed, must also be set aside.

For these reasons I would remit the proceedings to the Magistrate to be continued so far as Mani Iyer is concerned as from the stage they were in on the 21st October last, and to frame a charge in accordance with the complaint laid, it being open to the Magistrate to frame an additional charge under sections 466 and 109 if he sees fit.

GODFREY, J.—Iconcur and have nothing to add.

PRIVY COUNCIL.*

(ON APPEAL FROM THE LATE CHIEF COURT OF LOWER BURMA.)

P.C.
1924
Dec. 5.

BAIJNATH SINGH

v.

HAJEE VALLY MAHOMED HAJEE ABBA

AND

HAJEE VALLY MAHOMED HAJEE ABBA

v.

BAIJNATH SINGH.

Bought and Sold notes.—Evidence Act (I of 1872) Section 92—Court whether debarred from going behind such notes to arrive at the true meaning and effect of a transaction in the light of circumstances

The preamble to the Evidence Act recites that "it is expedient to consolidate, define and amend the Law of Evidence," and section 92 merely prescribes a rule of evidence: it does not fetter the Court's power to arrive at at the true meaning and effect of a transaction in the light of all the surrounding circumstances.

The plaintiff sought redemption of certain shares from the defendant. His case was that he had lodged the certificates of these shares with the Bank of Bengal as security for an overdraft and that on the Bank pressing for reduction of his indebtedness, he borrowed Rs. 60,000 bearing interest at 75 per cent. per annum from the defendant for payment to the Bank and handed over the share Certificates to the defendant and executed a transfer of them in the defendant's favour as security for his loan. The parties then executed Bought and Sold notes whereby it was made to appear that the defendant had sold and the plaintiff had bought the same shares for Rs. 75,000, delivery to be within four months thereafter. The plaintiff alleged that the defendant representing that it was contrary to his principle as a Mahomedan to lend money at interest and that he was anxious not to have it known that he was charging interest at such an excessive rate induced him to sign the Bought notes so as to provide for the repayment of the principal together with the interest agreed upon. The plaintiff further contended that it was the intention of both Parties to treat the transfers as mortgages.

The defendant denied the plaintiff's right to redeem on the ground that the transaction on which the plaintiff relied was not a mortgage but a sale with a right to repurchase which had expired.

Held that on the the facts of the case, the plaintiff was entitled to prove that the Bought and Sold notes did not represent the contract between the parties.

Held also that the defendant had failed in his contention that the transaction was not a mortgage and that the plaintiff was entitled to redeem.

Balkishan Das v. *Legge*, 27 I.A., 58—*distinguished*.

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* PRESENT – Lord Sumner; Lord Phillimore, Sir John Edge and Sir Lawrence Jenkins.

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These consolidated appeals arose out of two regular suits, being Nos. 60 and 62 of 1916 instituted by Baijnath Singh in the late Chief Court of Lower Burma for the redemption of certain share and for the taking of an account of what was due by the Plaintiff to the Defendant. Suit No. 60 was against Hajee Vally Mahomed Hajee Abba and Suit No. 62 was originally against Hajee Mahomed Jamal but subsequently Hajee Vally Mahomed was substituted as Defendant in his stead.

The plaintiff was the Managing Director of the Nath Singh Oil Company, Limited, which he had founded by selling certain oil-wells and well-sites which belonged to him and for which he had received a large number of fully paid-up shares. In course of time, he opened a cash credit account with the Rangoon Branch of the Bank of Bengal and as security for the same lodged with the Bank, Certificates of some of his said shares. His case in Civil Regular No. 60 was that the Bank having pressed the plaintiff to reduce the amount of his debt, the Defendant Abba on the 17th January 1912 paid Rs. 60,000 to the Bank on the plaintiff's behalf and the Bank in return at the Plaintiff's request transferred 30,000 of the shares to him. At the same time plaintiff and Abba executed Bought and Sold notes whereby it was made to appear that the plaintiff had bought and the defendant had sold to him the 30,000 shares, delivery to be on the 17th May 1912. The purchase price was stated in the notes to be Rs. 75,000, being made up of Rs. 60,000 principal and interest thereon at 75 per cent, per annum for the period ending 17th May 1912. The plaintiff further alleged that the defendant represented that being a Mahomedan, the taking of usury was contrary to his religion and that he moreover did not desire it to be known that he was charging

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so high a rate of interest as 75 per cent.; and that by these representations the defendant induced him to execute the Bought and Sold notes as a cover for the real transaction. The plaintiff not being able to pay the money on the 17th of May 1912, fresh Bought and Sold notes were executed, the purchase price was shown as Rs. 95,625 being the Rs. 75,000 then due, *plus* the interest on the same at 75 per cent. and the date of delivery as the 31st December 1912. Defendant agreeing at the same time not to charge interest for the months of November and December. Again the plaintiff was unable to pay by the 31st December and on the 14th January 1913 the defendant gave a further sum of Rs. 4,375 to the plaintiff in order to make the debt a round figure. The rate of interest was then reduced to 30 per cent., the date of delivery was fixed as the 22nd December 1913, and the sum to be paid was shown as Rs. 1,30,000. On the 22nd December 1913, the Bought and Sold notes were renewed, the interest was enhanced to 37½ per cent. the date of delivery advanced to the 22nd December 1914 and the price fixed at Rs. 1,78,750. On the 28th of August 1914 the Company having declared a dividend of Re. 1 per share the dividends on the shares were handed over to the defendant. The plaintiff further alleged that in December 1914, he had been arranging to borrow money from the Burma Oil Company at 9 per cent. per annum to pay off his debts and that on his informing the defendant of his intention, the defendant agreed to charge him interest only at 9 per cent. after the 22nd December 1914. On the 30th of January 1915, defendant was given a further dividend of 30,000 as also a further sum of Rs. 3,000. Again, on the 2nd of August 1915, the defendant was paid Rs. 30,000 being further dividends

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on the share secured to him. On the 6th December 1915 also he paid the defendant a still further dividend of Rs. 30,000 bringing his total payments to Rs. 93,000 in all. The plaintiff claimed that the debt outstanding was only Rs. 85,750 and prayed for a decree that on his paying the amount due, the shares be transferred back to him. The defence was that the transaction was not a mortgage but an outright sale with the right to repurchase which was evidenced by the Bought and Sold notes and which had lapsed. The defendant also denied that he had at any time agreed to take interest at 9 per cent.

In Suit No. 62 the facts were similar and the defences raised also were practically the same. The points of dissimilarity between the two cases are clearly set out in the Judgment of the Judicial Committee of the Privy Council and need not therefore be repeated here.

When the two suits came up for a joint hearing before Robinson, J., on the Original Side of the Chief Court, preliminary objections were taken on behalf of the defendants to the effect that oral evidence could not be given of the contract between the parties as by the Bought and Sold notes the terms of the contract were reduced to the form of a document and section 92 of the Evidence Act forbade the reception of evidence to contradict or vary the terms. The learned Judge by two separate orders dated the 9th August 1916 and a third order dated the 23rd August 1916 ruled that oral evidence was admissible; the orders on this point being material to the subject of this report are given below *in extenso* in the order of their delivery. The first order being in Civil Regular 60 was as follows:

"An objection is raised that oral evidence cannot be given of the contract between the plaintiff and

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Abba. It is urged that that contract has been reduced to writing. Plaintiff's Counsel says it has not. The alleged facts are that the plaintiff had a cash credit account with the Bank of Bengal and as security he deposited with the Bank a large number of shares. These were handed to the Bank with a deed of transfer in blank. The Bank filled in the transfer and had the shares registered in its name. Then the Bank pressed plaintiff to reduce his account. Plaintiff approached Abba, and Abba, he says, agreed to lend him money to be paid to the Bank. He paid Rs. 60,000 to the Bank and the Bank released 30,000 shares and transferred them to Abba by deed. About the same time Abba and plaintiff executed Bought and Sold notes for 30,000 shares to evidence a transfer of them to plaintiff. This is the contract in writing that is relied on. In my opinion it is not the contract in question, but is a subsequent agreement necessitated by the manner in which the shares had been dealt with by the Bank. It is urged that the Bank was only mortgagee of the shares and that if it purported to make an out-and-out transfer as owner, that would have been a fraudulent dealing with the third party's property and the evidence would be admissible on that ground, *Maung Kyin* v. *Ma Shwe La*, 38 Cal., 892. It is said that Abba knew the position and it is relevant to the question of his contract in writing with plaintiff for the transfer of the shares. I must hold that the evidence is admissible."

The order in Civil Regular 62 passed on the same date was the following:—

"Plaintiff deposited with the Bank of Bengal a large number of shares as security for a cash credit account. The Bank received the share certificates and a deed of transfer in blank. It filled in this

transfer and had the shares registered in its name in the books of the Company. Later plaintiff was pressed to reduce the amount of the account and he alleges that defendant entered into a contract with him to enable him to do so. He was about to give evidence as to this contract when an objection was raised that the terms having been reduced to the form of a document, no oral evidence was admissible as to them. For plaintiff it was denied that the terms had ever been so reduced.

"In the plaint it is alleged that plaintiff approached defendant for a loan and it was agreed that he should advance one lakh on the security of 70,000 of the shares held by the Bank. Interest was fixed at 37½ per cent. per annum and was to run up to the 15th November 1913. It is then alleged that defendant at plaintiff's request paid one lakh to the Bank and it is agreed that this payment was made on the 15th November 1912. On that same day, plaintiff and defendant executed Bought and Sold notes as to 70,000 shares for Rs. 1,78,750, delivery to be on the 15th November 1913. In these, defendant was the seller. On the 16th November, it is agreed that Bank executed a transfer of 70,000 shares to defendant and handed over the share certificates. Defendant had, prior to this, lent plaintiff money which with interest then amounted to Rs. 30,000 and plaintiff pleads that these shares were held as security for the repayment of both the one lakh and the Rs. 30,000.

"In his written statement defendant denies that he lent money in this way. He alleges, he was approached by one Abba to buy certain of the shares held by the Bank and it was finally agreed that he should buy 70,000 shares for Rs. 1,30,000. In consequence one lakh was paid to the Bank and defendant retained Rs. 30,000 in satisfaction of the prior loan. The shares were duly transferred to him.

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"As to the Bought and Sold notes defendant pleads that on the 15th November 1922 he agreed to sell the same shares to plaintiff who agreed to buy them for Rs. 1,78,750, delivery to be given and taken on the 15th November 1913.

"Mr. Giles for defendant argues that the contract between the parties that was finally settled on the 15th November 1912 was reduced to writing in the form of the Bought and Sold notes. That is to say the contract was a double one, a sale by plaintiff to defendant of these shares for Rs. 1,30,000 and a re-sale of the same shares by the defendant to the plaintiff for Rs. 1,78,750. I cannot accept this argument. While negotiations were proceeding these shares belonged to the plaintiff but were pledged with the Bank and there was some agreement between the parties for either a mortgage or sale of these shares to the defendant. The terms of that agreement cannot, I think, be said to have been reduced to the form of a document. What was reduced to writing was an agreement to return the shares on the 15th November 1913 on payment of Rs. 1,78,750. This sum represents Rs. 1,30,000 *plus* interest at 37½ per cent. for one year. It is urged that whatever the agreement was, the parties chose to put it into this form and therefore cannot go behind the document. But the shares were transferred to defendant's name and he could thus have sold them if he was not re-paid. The Bought and Sold notes were, I think, it must be held at best, a subsidiary agreement by which defendant would be prevented from selling them and would be secured his interest for one year certain. I do not decide anything as to them and merely refer to this to point out that the execution of these documents cannot be taken to embody the agreement with which we are concerned.

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"If the terms of the contract had been reduced to writing, plaintiff cannot give oral evidence as to them, but I cannot hold they were so reduced and I think the evidence is admissible.

"Even according to the written statement, sale to defendant was for Rs. 1,30,000 and the Bought and Sold notes for Rs. 1,78,950 cannot be held to form the writing into which that contract was reduced."

The following third order was a joint one in the two suits and was passed on the 23rd August 1916 on further objections being raised as to the admissibility of oral evidence to vary the Bought and Sold notes :--

"Mr. Lentaigne for the plaintiff seeks to lead evidence to show how the Bought and Sold notes admittedly executed by the parties came to be executed and also to explain how fresh notes came to be executed when the date for delivery of the shares to which they related passed without the sale being carried through.

"Mr. Giles for defendant objects that by the Bought and Sold notes, the terms of the contract were reduced to the form of a document and that therefore section 92 of the Evidence Act forbids the reception of evidence to contradict, vary, etc., the terms.

"The question is whether in the case of Bought and Sold notes it must be held that the terms of contract have been reduced to the form of a document.

"The question was dealt with by their Lordships of the Privy Council in *Cowie* v. *Renfry* (3 Moo. I.A., 448) and it was held that in such cases the parties being merchants, the presumption is that they intend to be bound by the contract as expressed in the Bought and Sold notes and by that only, but that that presumption may be rebutted.

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"This is the view of this decision held by Sale, J., in the case of *Durga Prasad Surcka* v. *Phaggan Lall* (8 C.W.N., 489) to which I shall shortly refer.

"This decision was doubted by Willis, J., in *Heyworth* v. *Knight* (33 L.J.C.P., 398).

"In *Clarton* v. *Shaw* (9 B.L.R. 245), Sir R. Couch did not refer to *Cowie* v. *Renfry*, but relied on *Heyworth* v. *Knight*. *In re Jumnadas* v. *Srinath Roy* (17 Cal., 177) Trevelyan, J., following *Sieve Wright* v. *Archibald* (20 L.J.O.B. 529) held that Bought and Sold notes do not constitute the contract. He refers to *Clarton* v. *Shaw*, but not to *Cowie* v. *Renfry*. In *Jadoo Rai* v. *Bhubotaran Nandy* (I.L.R. 17 Cal., 173) and in *Rally* v. *Caramally Fazal* (I.L.R. 14 Bom., 102), it was held that the terms of the contract had been reduced to writing and that oral evidence was not admissible. In the latter case at any rate the notes were signed by the buyer and the seller respectively.

"The next case is *Ah Shain Shoke* v. *Muthiya Chetty* (4 C.W.N. 483). The notes were signed by the parties respectively, but Ah Shain Shohe added certain terms before signing. Sir Richard Couch delivered the judgment of the Privy Council but the point is not, I consider, dealt with and the addition of terms which made the notes differ from each other and which was not noticed till after the trouble arose made the decision of no assistance in deciding the point before me.

"The last case is also a decision of their Lordships of the Privy Council, *Durga Prasad Sureka* v. *Phaggan Lall* (8 C.W.N., 489). It does not appear from the report whether the notes were signed respectively by the parties or only by the broker. The contract was arranged between plaintiff and Phaggan Lall, the manager of the defendant firm by telegram and was for the sale of a cargo of oil which defendant had bought from Graham & Co. The broker when

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preparing the Bought and Sold notes enquired of the local manager of the firm the number of cases of oil there were in defendant's contracts with Graham & Co. This person did not approve of the contract and informed the broker the number was 100,000 cases whereas it was in fact 125,000 cases. Both lower Courts held that this was deliberate fraud and for this reason evidence would have been admissible. Sale, J., in the original Court following *Cowie* v. *Renfry* held a presumption only arose that the parties intended the Bought and Sold notes to constitute the contract and that the presumption had been rebutted. He held that plaintiff was not entitled to have the contract rectified. The Appellate Court held the fraud proved, but that as plaintiff had not appealed as to rectifying the document that relief could not be granted and that as plaintiff was precluded from proving his contract by any evidence other than the notes, they dismissed his suit. Their Lordships reversed this decision. They held that plaintiff's right was indisputable, namely to have the whole cargo or damages. They say 'nor did the right depend either for constitution or for evidence on the Bought and Sold notes. In India a contract of sale of goods can be proved by parol; and the Bought and Sold notes having in this instance been falsified, the aggrieved purchaser was entitled to disregard them and prove his contract by other and antecedent material. This he has done conclusively by the eivdence of the broker and by telegram.'

"Later on they say—' His case rested not on the falsified Bought and Sold notes which he was there to repudiate, but on the perfectly competent evidence which, while disproving the Bought and Sold notes, proved the contract which they falsely purported to

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record. For this case no rectifiation was needed and it was not touched by the 92nd section of the Evidence Act.'

"The learned commentators in Amir Ali and Woodroffe's work on the Evidence Act in dealing with this case lay down that their Lordships held that Bought and Sold notes do not constitute a contract of sale but a mere evidence which may be looked to for the purpose of ascertaining whether there was a contract and what the terms of the contract were and also that the rights of parties do not depend either for constitution or for evidence on the Bought and Sold notes. They point out that it would have been open to them to have held that oral evidence was admissible under section 92 by reason of the fraud that had been proved, but that they in conformity with the opinion that the notes do not constitute but are evidence merely of the contract, held that the case was not touched by section 92 of the Act. They then suggest that the decision in *Cowie* v. *Renfry* and *Ah Shain Shoke* v. *Muthiya Chetty* must be taken to be no longer law.

"In this I am unable to agree. Their Lordships in ruling that the plaintiff's rights depend neither for constitution nor for evidence on the Bought and Sold notes, do so only after they had held that the trick practised on him in the Bought and Sold notes had no legal effect on his original rights. They refer to fraud and the falsified note continually throughout their judgment; they point out that the High Court had treated the case as founded on the notes, a view they hold is wrong. I find no sufficient ground for holding that if there had been no such fraud they would have held that plaintiff could have gone behind the notes. The matter before me was not, I consider, really before them. Their previous decision

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in *Cowie* v. *Renfry* was referred to in the judgments of both lower Courts and was referred to by counsel before them. Had they intended to over-rule or differ from that decision, they would have discussed that ruling. Moreover the Bought and Sold notes in this case were not such notes as are expressed by the term in England, but were the result of direct negotiations between the parties and were signed by both parties. What view their Lordships might take 'in this state of fact' does not appear from the judgment. It is not alleged by plaintiff that he was not told everything by defandants when induced to sign the notes the sole question is whether the Bought and Sold notes so executed form the contract in writting or not.

"The decisions on the point are conflicting. The facts of the case of *Jamnadas* v. *Srinath Roy* (I.L.R. 17 Cal., 177) are very similar to those of the case before me and the evidence was held admissible, as they do not constitute the contract. It is based however on authorities holding them to be merely informations sent by the broker to his principals. Here they were a result of direct negotiation by the principals and were executed by them and there was, it is said, really no broker at all.

"In my opinion, the decision in *Cowie* v. *Renfry* covers the case. It may be that *Durga Prasad Sureka* v. *Phaggan Lall* has made that decision no longer law, though, in my opinion, it does not; but if so it decides that the evidence is admissible. If *Cowie* v. *Renfry* is still good law, there is merely a presumption that the parties intended to be bound by the Bought and Sold notes and that presumption may be rebutted or in other words the evidence is admissible."

The learned trial Judge found for the plaintiff in both the suits and passed a decree for an account and for redemption of the share on payment of the

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amount found due and costs. He also found that there was an agreement to take reduced interest as alleged by the plaintiff.

Both the defendants appealed; and during the pendency of his appeal the defendant Abba's name was substituted for that of the defendant Jamal, as Abba had by purchase succeeded to the rights of Jamal. The two appeals, being Civil First Appeals 67 and 68 of 1917, came up before a Division Bench of the late Chief Court of Lower Burma, composed of Twomey, C.J., and Ormond, J., and the judgment of the trial Court was varied, the Bench having held that the agreement to take reduced interest was not proved and having ordered that each party should bear his own costs.

On the legal question of the admissibility of the oral evidence, the following observations of Twomey, C.J., are to be found in Civil Appeal No. 68 :—

"We have . . . . . to consider . . . what was the nature of the transactions between the plaintiff and Jamal having regard to their conduct at the time and subsequently. It is urged strongly for the appellants that as the Bought and Sold notes were signed by the parties themselves and not merely by brokers on their behalf, they are conclusive evidence of the transactions covered by them. The transactions which we have to consider are however not those covered by the Bought and Sold notes, but the original transfers by the plaintiff to Jamal. These were not reduced to writing. Plaintiff gave directions to the Bank and to Sheo Chand to transfer the shares to Jamal. The Bank and Sheo Chand presumably held the shares under documents of transfer conveying them outright, but it is not disputed that both the Bank and Sheo Chand held the shares merely as security and that the form of outright transfer was

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employed only because the Company would not register mortgages of the shares and because the transferees wished to have the full remedies of owners in case of default in payment of the money lent. The documents by which the plaintiff had transferred shares to the Bank and Sheo Chand as security were presumably similar to the documents produced in this case by which the Bank and Sheo Chand transferred the shares to Jamal. The earlier tranfers by the plaintiff were admittedly intended to be by way of mortgage; and there is nothing to prevent the plaintiff from showing that the later transfers made by the Bank and Sheo Chand on his behalf to Jamal were intended also to be merely mortgages. The Bought and Sold notes constitute only one piece of evidence on this point. They may be conclusive evidence that Jamal was selling his interest in the share outright to the plaintiff, but they were not conclusive evidence that Jamal's interest was more than a mortgagee's interest, and if a mortgagee affect to sell his interest outright to the mortgagor, the transaction is in effect merely a contract for redemption."

The Learned Judges, composing the Division Bench, also held that while in an ordinary case of redemption of a chattel, time *may* be the essence of the contract, the present cases were out of the ordinary and that 'the Bought and Sold notes were essentially a device for ensuring the payment of the high rate of interest on the money lent'; and that 'it is a reasonable inference from the circumstances that dates for *re-purchase* were fixed so as to prevent the plaintiff from redeeming earlier than those dates rather than as binding him to redeem on those dates.'

From these judgments both the plaintiff and the defendant appealed to the Judicial Committee of the

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Privy Council (Privy Council Appeals Nos. 21, 31 and 32 of 1923) with the result reported below:—

H. Douglas—for Baijnath Singh.

Stuart Bevan, K.C., and W. Arnold Jolly—for Hajee Vally Mahomed Hajee Abba.

The judgment of their Lordships of the Privy Council was delivered by—

SIR LAWRENCE JENKINS.—These are consolidated appeals from two decrees of the Chief Court of Lower Burma, dated the 23rd of May, 1919, varying two decrees of that Court in its original Jurisdiction, one dated the 28th of February, 1917, in Suit No. 62 of 1916, and the other dated the 15th of March, 1917, in Suit No. 60 of 1916.

Both suits were brought by Baijnath Singh for the redemption of shares alleged to have been mortgaged by him.

Suit No. 60 of 1916 is against Hajee Vally Mahomed Hajee Abba. Suit No. 62 of 1916 was originally against Hajee Mahomed Jamal, but the plaint was amended by adding the defendant Abdul Kareem Abdul Shakoor Jamal. Later, during the pendency of the suit, Hajee Vally Mahomed Hajee Abba was substituted as defendant in their place, and he is now the sole defendant in both suits.

The plaintiff's right to redeem is denied on the ground that the several transactions on which the plaintiff relies were not mortgages, but sales with a right of re-purchase that has expired.

The trial Judge upheld the plaintiff's contention in both suits. On appeal, the Chief Judge decided that the transactions were mortgages. Ormond, J., held that they were sales with contracts for re-purchase, but that time was not of the essence of the contracts. In the result a decree was passed by the

Appeal Court in each suit that on payment by the plaintiff of the sum found due the shares claimed should be transferred to the plaintiff.

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Of the disputed transactions one (which will be called the Abba transaction) is the subject-matter of Suit No. 60 of 1916, the others (which will be called the Jamal transaction) are the subject matter of Suit No. 62 of 1916.

They have been conveniently tabulated in the judgment of the Chief Judge in the following form :—

No. of shares transferred.	To—	On—	Amount paid by transferee.	Series.
			Rs.	
30,000	Abba	16th January, 1912	60,0 0	J series of exhibits.
70,000	Jamal	15th November, 1912	1,30,000	A do.
10,000	do.	10th December, 1912	20,000	B do.
17,000	do.	31th Januray, 1913	42,500	C do.
30,000	do.	18th March, 1913	75,000	D do.
8,520	do.	6th Januray, 1914...	21,000	E do.

The first transaction, it will be seen, was in January, 1912.

At the time, Baijnath owned 181,020 fully paid shares of Rs. 10 each in the Nath Singh Oil Company, Ltd. The certificates of these shares had been lodged with the Bank of Bengal as security for a cash credit account, and in November, 1911, the shares had been transferred, still by way of security, into the names of two nominees of the Bank. In January, 1912, the sum due from Baijnath to the Bank was two lakhs and ten thousand rupees, and the Bank was pressing for reduction of this debt.

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The case alleged in the plaint is that Baijnath approached Abba for a loan and Abba offered to lend and advance to Baijnath for payment to the Bank a sum of Rs. 60,000 on the security of 30,000 of the Oil Company's shares, with interest at the rate of 75 per cent. per annum up to 17th May 1912. It is further alleged that Baijnath agreed to these terms; that Abba at Baijnath's request paid a sum of Rs. 60,000 to the Bank of Bengal in part payment of Baijnath's indebtedness to the Bank; and that as security for the loan the Bank on the 17th January, 1912, handed over the certificates for the shares to Abba and executed a transfer of them in his favour. In the 5th paragraph of the plaint it is said that prior to the transfer Abba represented to Baijnath that being a Mohammedan it was contrary to the precepts of his religion to lend money at interest, and that as he was anxious it should not be known that he was charging interest at the rate of 75 per cent. per annum, Baijnath and Abba should execute Bought and Sold notes by which it would be made to appear that Abba had sold and Baijnath had bought 30,000 fully paid up shares for Rs. 75,000, delivery on or before the 17th of May, 1912. Though Abba does not admit the correctness of this version, it is not disputed that there was an arrangement between him and Baijnath which resulted in the first transaction of January, 1912. In performance of it the sum of Rs. 60,000 found by Abba was paid to the Bank on Baijnath's account; 30,000 of the Oil Company's shares held by the Bank's nominees as security for Baijnath's cash credit were transferred to Abba, who knew that the shares were mortgaged to the Bank; and the Bought and Sold notes w re executed.

These notes purported to be a sale by Abba and a purchase by Baijnath of the 30,000 shares at the

rate of Rs. 2-8 *cum* all rights and dividends, delivery on or before the 17th of May, 1912, at buyer's option.

The rate thus stipulated came to Rs. 75,000, made up of the sum originally paid and interest thereon at 75 per cent.

On the 17th of May, Baijnath was unable to pay this sum and so a renewal was arranged at the same rate of interest, and Bought and Sold notes were executed for the sum of Rs. 95,625 for delivery on the 31st December, 1912.

On the 14th of January, 1913, a further sum of Rs. 4,375 was paid by Abba and this, with the sum alleged to be due on the 31st of December, 1912, amounted to one lakh. The rate of interest was reduced to 30 per cent. and Bought and Sold notes were executed providing for the re-purchase of the 30,000 shares on the 22nd of December, 1913, at the price of Rs. 1,30,000, or in other words, a lakh of rupees and a year's interest on it at 30 per cent. On the due date, fresh Bought and Sold notes were executed providing for the purchase on the 22nd December, 1914, at Rs. 1,78,750, that is to say, the sum of Rs. 1,30,000 with interest to the 22nd of December, 1914, at 37½ per cent. to which the rate was then enhanced. No further Bought and Sold notes were executed in connection with this transaction. According to Baijnath, this was in consequence of an oral agreement in November or December, 1914, providing for the reduction of interest to 9 per cent. The proof of this agreement will be considered later.

In both the lower Courts it was contended by Abba that this transaction was a sale and re-purchase, and that time being of the essence of the contract, Baijnath's right to re-purchase had expired. The decision was against this contention and Abba appealed to His Majesty in Council. But he has withdrawn that

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appeal, stating that he no longer objects to the redemption of the shares. In Suit No. 60, therefore, the decision that Baijnath is entitled to redeem the shares in the Abba transaction stands and cannot be controverted.

Abba maintains that this cannot affect his contention that the Jamal transactions, to which Suit No. 62 relates, give Baijnath no right of redemption. The learned trial Judge, however, points out that the transactions of the 16th of January, 1912, was the commencement of a series of similar transactions, that a certain course of procedure was then settled, and that this influenced and possibly accounted for the procedure adopted in the later transactions.

Having regard to the part Abba took in arranging the later transaction, and his pecuniary participation in two of them, their Lordships agree with this view.

The first of the Jamal transactions was on the 15th of November, 1912, and, in form, it follows precisely the lines of the Abba transaction of January, 1912.

The number of shares transferred was 70,000 the transferee was Jamal, the amount treated as paid was Rs. 1,30,000 and the transfer was from the nominees of the Bank of Bengal by whom (to the transferee's knowledge) the shares were held as security for Baijnath's cash credit. Though Abba's name does not appear, he was interested in 27,500 of the 70,000 shares transferred.

Of this sum of Rs. 1,30,000 the amount then advance was one lakh; the balance of Rs. 30,000 represented a sum already due from Baijnath to Jamal.

Bought and Sold notes were executed as in the case of the Abba transaction, the date of delivery was the 15th November, 1913, the rate of interest was 37½ per cent., and the purchase price was

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Rs 1,78,750. On renewal, further Bought and Sold notes were executed in November, 1913, the date of delivery being the 15th November, 1914. The price was Rs. 2,45,781-4-0, which represensted the previous amount of Rs. 1,78,750 with interest for one year as 37½ per cent. calculated from the expiration of the previous Bought and Sold notes. There were no further renewals and this is attributed, as in the Abba transaction, to the agreement for reduction of interest.

It is true, as was laid down in *Balkishan Das* v. *Legge*, L.R. 27, I.A. 58, that under section 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this case, the section and the ruling have no application to it.

The preamble to the Evidence Act recites that "it is expedient to consolidate, define and amend the Law of Evidence," and section 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. To these circumstances their Lordships will briefly advert.

At the date of their transfer the shares were held, as the transferee knew, as security for Baijnath's debt to the Bank, and it does not appear that the transfer was effected in exercise of any power of sale in the Bank. The money paid on that transfer went in reduction of the Bank's debt and there is nothing to indicate that the transferee acquired a greater right than was vested in the transferor. The amount paid by the transferee was Rs. 1,30,000, a

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sum which, as the Chief Judge remarks, had no relation to the market price of the shares, but was made up of 100,000 advanced at the time at 37½ per cent. interest and Rs. 30,000 a debt already due. The same remark applies to the purchase price in the succeeding Bought and Sold notes, the price being made up of that entered in the preceding notes with the addition of interest calculated in advance to the new date for delivery. Then, again, the recognition of Baijnath's claim to dividends, whether he paid the price in the notes or not, points, if anything to the shares being held by the transferee as a security and not as a purchaser, as does the fact that the transfer fees were paid by Baijnath and that no brokerage was paid.

These are all indications of the true nature of the transaction; they may properly be taken into consideration and their effect is to favour Baijnath's contention.

Of the other Jamal transaction, three only are now in dispute, for the 30,000 shares transferred on the 18th March, 1913, have been retransferred to Baijnath: these three need not be separately examined, for it is not suggested that they can be differentiated from the first, which has been discussed in detail.

Over and above the several matters to which attention has been drawn as indications that the Jamal transactions must, like the Abba transaction, be treated as a mortgage, in support of Baijnath's contention, great reliance is placed on two documents, Exhibits F and G.

Exhibit F is an instrument of the 12th June, 1913, made between Baijnath of the one part and Jamal and Abba of the other part. After a recital that Baijnath had transferred several wells and well

sites to the Oil Company, for which he had not been allotted shares, it was agreed that in consideration of Rs. 1,000 paid as earnest money, Baijnath would sell and transfer to Jamal and Abba every share which might be allotted to him at any time thereafter in the Oil Company for any well or well sites transferred by him at the price of one rupee per share.

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The genuineness of this agreement is not disputed and it is common ground that it was entered into for the purpose of preventing Baijnath from flooding the market with new shares. The draft was handed to Baijnath. He took it to his legal adviser, Mr. Halkar, who told Baijnath "that it would not be good to sign the agreement." The reason is obvious. By the terms of Exhibit F, Baijnath bound himself to transfer shares that might be allotted to him in the Oil Company at Re. 1 each, though at the time he was buying back 30,000 shares at Rs. 4-5-4 per share. The agreement was unqualified and did not even contain a provision for re-purchase, though, admittedly, the object was merely to protect the value of the shares that had been transferred in the several transactions. In accordance with his advice, Mr. Halkar prepared another draft. Baijnath deposes that it was given to Abdul Sattar, and after being kept by him for a day was returned with the assurance that it was all right and could be typed. The draft was accordingly typed by Mr. Halkar and the typed copy is Exhibit G.

It is expressed to be dated the 12th June, 1913, and to be between Jamal and Abba of the one part and Baijnath of the other. After recitals that Baijnath had transferred his 157,000 shares of the Oil Company to the names of Jamal and Abba as

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security for a loan on account, and that the shares were in their possession and names on which they had a lien for the amount advanced, and that Baijnath was to get a further allotment of shares in the Company which were to be sold by him to Jamal and Abba, in the witnessing part it is declared that Jamal and Abba had a mere lien on the shares and were not the owners of the shares, and that they should retransfer the shares to the name of Baijnath on his repaying the loans.

On the document are what purport to be the signatures of Jamal and Abba as executants and of A. H. N. Jamal, otherwise known as Abdul Sattar, as an attesting witness, and their close resemblance to the genuine signatures of these three persons is not contested. Baijnath swears to the execution of the document, but Jamal and Abba declare it is a forgery. Abdul Sattar, whose name appears as the attesting witness, is a son of Jamal, and though he came with his father to Court, he did not go into the witness box to deny his signature.

The trial Judge held the signatures of Jamal and Abba and of the attesting witness to be genuine.

The learned Judges on appeal came to a different conclusion. The Chief Judge was not satisfied that Jamal and Abba signed Exhibit G and thought it probable that the document was concocted not long before the filing of the suit in 1916. Ormond, J., thought it was prepared after Jamal had taken up the position that the shares could no longer be redeemed or re-purchased because the due dates had expired.

In their Lordships' opinion the view of the Appellate Court as to the time at which the document was prepared is disproved by the evidence of Mr. Halkar. He deposes that he prepared the document in June,

1913, in the circumstances already stated, and he is able to identify it by a correction in it initialled by him at the time. In Suit No. 60, he gave evidence to the effect that he actually had a conversation with Abba about this agreement in June, 1915. Their Lordships are satisfied that Exhibit G was prepared in June, 1913, and that the Appellate Court's view as to the date and purpose of its preparation is erroneous.

The Chief Judge, in arriving at his conclusion, adverse to the execution of Exhibit G, remarks on the fact that while in Exhibit F, the signature of Abba has the word Mohamed in full, in Exhibit G it has only the first syllable. But it has been shown in the argument that on other documents Abba has written his signature as in Exhibit G, so that the Chief Judge's comment loses its force.

The learned trial Judge examined the evidence given before him with critical care. After commenting on the manner in which it was given and weighing the probabilities, he came to the conclusion that the denial before him of the signatures was not true, with the result, as he expresses it, that he was entirely satisfied that Jamal and Abba did execute G. The judgment in the Appellate Court disclose no sufficient ground for disturbing the first Court's appreciation of the evidence, and the finding that Exhibit G was duly executed will therefore stand.

Apart from Exhibit G their Lordships would be prepared to hold that the transactions in suit are mortgages; if this document be accepted this conclusion is placed beyond controversy.

But then it has been contended that even if the transactions were mortgages, the English rule of law that a mortgage is redeemable after default has no application to mortgages of chattles or choses in action by Hindus and Mohammedans and that consequently

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the right of redemption was lost. Even if this were a correct statement of the law in Burma (a point on which their Lordships express no opinion), the lower Courts have rightly held that in the circumstances of this case the period for redemption cannot be held to have expired.

The only other point is as to the rate and period of interest to be allowed. Paragraph 26 of the plaint in Suit No. 62 of 1916 alleges that about the end of 1914 Baijnath was desirous of paying off the amount of his indebtedness by borrowing from other persons; that the defendant requested Baijnath not to make any definite arrangement to raise loans as the Company had commenced to pay large dividends, and that the amount due would shortly be repaid out of the dividends; but the defendant undertook to charge Baijnath, after the periods agreed to between the parties, interest at 9 per cent. per annum for further interest and agreed to credit all interest received by him towards the amount due; and that Baijnath agreed to the defendants' proposal and consented to allow the amount due to be repaid at Baijnath's convenience.

The plaint in Suit No. 60 of 1916 contained allegations to the same effect. In both suits there was an issue as to whether there was any such agreement, and, if so, what was its effect. The first Court decided this issue in Baijnath's favour: the Appeal Court decided against him.

The Judge of the Trial Court on the evidence found that Baijnath could have raised the money at 9 per cent. per annum, and he gives an account of how this part of the case was treated before him, which leaves no doubt as to the correctness of his finding.

Accepting it, as their Lordships do, it is inconceivable that Baijnath would have continued his liability for the extortionate interest payable under the original

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transactions, and the finding of the first Court must prevail.

Baijnath has objected that as the delay in payment off of the mortgages was due to the wrongful repudiation of his right to redeem, Abba is not entitled to subsequent interest. The answer is that this objection is opposed to the decision of the First Court, and from that decree no appeal was preferred by Baijnath. Therefore, the objection cannot now be entertained.

The result, then, is that Abba has failed in his contention that the transactions in Suit No. 62 are not mortgages, and also so far as interest in excess of 9 per cent. per annum was awarded from the date of the agreement for reduction of interest. Payments have been made into Court by Baijnath under the decrees of the lower Court, but it does not appear clearly how the money has been dealt with or whether any further account or payment by way of restitution or otherwise is necessary. These are matters for determination (if necessary) by the Court in Burma.

Their Lordships are of opinion that the decrees of the Appellate Court must be set aside and that the appeals from the Court of first instance ought to have been dismissed with costs by the Appellate Court, and they will humbly advise His Majesty accordingly. Abba will pay the costs of these consolidated appeals.

Solicitor for Baijnath Singh :—A. M. Bramall.

Solicitors for Hajee Vally Mahomed Hajee Abba :— Henry Hilbery and Son.

APPELLATE CIVIL.

Before Mr. Justice Godfrey.

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Dec. 8.

N.K.R.R.M. CHETTY FIRM

v.

M. SUBRAYA MUDALIAR.*

Practice—Stay of sale in execution, Refusal to, by Subdivisional Court—Order of District Court, on appeal, postponing confirmation of sale held in execution—Civil Procedure Code (V of 1908), Order XXI, rules 89—91, and section 115 Judgment-debtor's remedy under—No right of appeal to District Court against sale—Civil Procedure Code, section 47, Order under, must be conclusive and not contingent—Confirmation of sale imperative if no application made by judgment-debtor to set it aside.

When the Subdivisional Court, having refused to stay execution of a decree, has already sold the property attached and the sale is not confirmed, the District Court has no appellate jurisdiction in the matter, and the judgment-debtor's remedy is by way of either an application to the Subdivisional Court under Order XXI, rules 89—91, or an application for revision to the High Court under section 115 of the Civil Procedure Code

Held, that an order passed under section 47, Civil Procedure Code should conclusively and finally determine the rights of the parties with regard to the matters in controversy and should not be contingent upon future events.

Held also, that in the absence of an application by the judgment-debtor either under Order XXI, rules 89—91, or under section 115 for revision, the executing Court has no alternative but to confirm the sale.

Azimaddi Sheikh v. Zandari Bibi, 38, Cal., 339—*followed.*

Umesh Chandra Dass v. Shib Narain Mandal, 31 Cal., 1101—*referred to.*

P. B. Sen—for the Petitioner.

Hay—for the Respondent.

GODFREY, J.—These are applications in revision against two orders passed by the District Court, Insein, the one of the 5th May 1924 postponing the confirmation of the sale of certain property sold in execution of a decree at the instance of the present applicants, and the other of 14th June 1924 dismissing the applicants' appeal against the order

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* Civil Revision Nos. 134 and 177 of 1924 against the decrees of the District Court of Insein in Civil Miscellaneous Appeals 23 and 56 of 1924.

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of the Subdivisional Court declining to confirm this sale in conformity with the District Court's order before referred to, upon an application previously filed by the applicants in that behalf. They arise out of the same execution proceedings and are accordingly disposed of together.

It appears that on the 7th September 1922, the applicants obtained a money decree against the respondent for some Rs. 3,600 odd and in execution attached on the 26th January 1923 certain immoveable property belonging to the respondent, which was already mortgaged to the applicant. For a variety of reasons, and several times upon grounds put forward by the respondent which have been characterised by the District Court as obstructive, the sale of the property was delayed until January 1924, when on the 8th of that month a final sale proclamation was issued by the Subdivisional Court for the holding of the sale subject to the mortgage on the 16th February. Before that date, however, the respondent filed applications representing that the land had been acquired by Government. This was not quite accurate as it seems that, though land acquisition proceedings were pending, they were not, and have not even yet terminated. The Subdivisional Court, however, took notice of the fact and directed that the information should also be published in the sale proclamation for the benefit of intending bidders. The respondent then applied on the 15th February 1924 suggesting that the sale should be stayed, but if it was to take place, asking that it might be advertised in the *Rangoon Gazette*. Upon this the Subdivisional Court passed an order to the effect that there was no ground for further staying the sale, but it directed that the proclamation should be advertised as desired. The sale had in

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consequence to be postponed until the 15th March 1924.

On the 4th March 1924 the respondent filed a further application definitely asking that the sale be postponed until he had received compensation from the Collector in the Land Acquisition proceedings. This application was rejected and the sale took place as advertised and the land was bought by the attaching creditors—the applicants—who had obtained leave to bid. The Court then fixed the 1st May 1924 for the confirmation of the sale.

On the 26th March, however, the respondent filed an appeal to the District Court, attaching the diary of the whole proceedings of the Subdivisional Court terminating in the last order fixing a date for the confirmation of the sale, and it is against the order then passed by the District Court that the first of the present applications is made. The other application is subsidiary, and if this one is allowed, it follows that that should be too.

It is obvious that the sale having already taken place when that appeal was filed, no question of stay could possibly arise, and questions as to whether an appeal did or did not lie against an order refusing to stay the sale are entirely beside the point. There can be no doubt that the proceedings of the Subdivisional Court above detailed have been perfectly regular, and it is difficult to see how there was, in fact, any real ground in the circumstances for directing a stay of the sale. The land acquisition proceedings are still pending and it is not yet known whether the land will be acquired or not. A great deal has been made of the hardship likely to ensue upon the judgment-debtor (respondent), if the price awarded by the Collector is a large one, as he will not get the benefit. But this argument proceeds upon the

assumption that the property is worth a very large sum of money, and has been sold for a song, and also ignores the fact that the inclusion of the information regarding the pending acquisition proceedings in the Proclamation of sale can hardly have lessened the attractiveness of the purchase, and of this the judgment-debtor does get the benefit. Though it is stated by the judgment-debtor (respondent) that the property is worth something like Rs. 60,000, there is no proof of this, and the judgment-creditor in his application for execution only places its value at Rs. 20,000. The complaint that it was sold for Rs. 3,200 entirely ignores the fact that it was sold in execution of a decree for over that amount and also subject to a mortgage for Rs. 12,000 with accumulating interest. If the property had indeed been so very much more valuable, it is inconceiveable that the judgment-debtor would not have applied earlier for stay of execution and of the sale upon proper grounds and have raised the money to pay off his pressing creditor. What he did do was to wait until the very last moment—the day before the sale—and it was then only that he definitely applied on this ground for the postponement of the sale. For two or three months he had known of the land acquisition proceedings; but did not apply. And it would seem that there were some grounds for the Sub-divisional Court's thinking that his action was really dictated by the same obstruction, which had characterised his attitude throughout.

However apart from the merits, the question now involved is whether the present order of the District Court postponing the confirmation of the sale indefinitely can be sustained, or whether it is in fact illegal and made without jurisdiction, as it is contended. It has been contended that the present

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matter should come before this Court by way of second appeal; it would seem clear that it has been rightly classed as a revision application—*cf.* *Asimaddi Sheikh* v. *Zandari Bibi* (1).

The order of the Subdivisional Court refusing to postpone the sale was passed under Order XXI, rule 83, Civil Procedure Code, and was a matter resting in the discretion of the Court to be exercised in conformity with the provisions of sub-rule (1), which provides that "if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage, lease or private sale of such property . . . . . the Court may, on his application, postpone the sale . . . . ." The judgment-debtor did not apply until the very last day. His previous application had not indicated any very serious objection to the sale being held, but had asked that it should be advertised in the *Rangoon Gazette*, which was duly done. Having delayed his application until the very last day, and that application having been refused, he allowed himself no time to move the lower appellate Court in appeal against the order refusing postponement. And the sale having taken place, his only remedy then, it is clear, was to apply to have that sale set aside. Provision is made for such application in Order XXI, rules 89, 90 and 91, Civil Procedure Code. No such application was, however, made by him to the Subdivisional Court; but instead he appealed to the District Court to set aside the sale. The District Court postponed the confirmation of it.

It is difficult to understand how the District Court in its Appellate jurisdiction could have entertained by way of appeal an application, which should

(1) (1911) 38 Cal., 339.

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have been made to the original Court, which is practically what it did. It being no longer possible to effectively appeal against the order refusing to stay the sale, the sale having already taken place, and the respondent presumably not wishing to apply to the original Court to set aside the sale under the provisions above referred to, which would probably have been ineffectual, his only possible complaint being on the ground that his application to stay the sale had been refused, it would seem that his proper remedy in the circumstances would have been to apply in revision to the High Court under section 115, Civil Procedure Code, to have the proceedings of the Subdivisional Court including the sale, set aside upon the ground that the postponement of the sale had been improperly and illegally refused and not in proper exercise of the judicial discretion vested in that Court. The District Court has no such revisional powers, though it has in effect exercised them. But it seems to me that for still another reason the order of the District Court cannot be sustained. The order passed is an order contingent upon two events, neither of which has yet taken place, and is in the form of a sort of compromise. It postpones the confirmation of the sale, which in itself is a bad order in law, and provides that, if Government withdraws from the acquisition, the sale shall be confirmed, but if Government proceeds with the acquisition and an award is made, confirmation of the sale shall be refused.

Having treated the appeal as one arising on a question to be determined within section 47 of the Civil Procedure Code, it is obvious that the order passed should have been one, which conclusively and finally determined (so far as that Court was concerned) the rights of the parties with regard to the matters

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in controversy. This it did not, but as previously stated is a sort of compromise dependent upon certain contingencies. In my opinion the order cannot be sustained.

The other application before this Court is against the District Court's order confirming the order of the Subdivisional Court refusing to confirm the sale, Under Order XXI, rule 92 (1), Civil Procedure Code, where no application has been made under rules 89, 90 and 91, the Court has no alternative but to confirm the sale and the applicants were entitled to the order they asked for. *Umesh Chandra Dass* v. *ShibNarain Mandal* (2).

Both these applications must therefore be allowed, the orders of the District Court complained of set aside and the proceedings returned to the Subdivisional Court for the order of confirmation to be passed according to law. The respondent will pay the applicants' costs—five gold mohurs.

(2) (1904) 31 Cal., 1011, 1013.

APPELLATE CRIMINAL.

Before Mr. Justice Brown

NGA HLA U

v.

KING EMPEROR.*

1925
Jan. 15.

Criminal Procedure Code (V of 1898), section 342—Court's failure to further examine the accused after further cross-examination of two of the prosecution witnesses on recall after charge—Infringement of the provisions of the Criminal Procedure Code, when vitiating proceedings.

The intention of the framers of the Code of Criminal Procedure was to frame the Code in such a manner that mere technical defects would not have the effect of vitiating proceedings.

There is no authority for the view that a non-compliance with a mandatory provision of the Code of Criminal Procedure cannot, in any circumstances, be cured by the provisions of section 537 of the Code, and must invalidate a whole trial. The fact that section 537 itself refers to errors and omissions in the proceedings suggests that there are cases in which a mandatory provision has not been complied with, but to which, the provisions of section 537 would apply.

For an omission to take place, it would appear that there must be some neglect to comply with some definite order in the Code.

Held, that the failure on the part of the Court in this case to further examine the accused after two of the prosecution witnesses had been recalled for further cross-examination, after the charge had been framed, was not an error going to the root of the trial but at the most a mere mistake in the course of the trial which had not, in any way, prejudiced the accused, and that there was, therefore, no reason for holding that the trial by the Magistrate was vitiated.

Subramania Ayyar v. King-Emperor, 25 Mad., 61 ; *Varisai Rowther and another v. King-Emperor*, 46 Mad., 449—*referred to.*

Emperor v. Nga Po Myo, (1917-20) U.B.R., 18 ; *Raghu Bhumiji v. Emperor*, 58 I.C., 49—*distinguished.*

Emperor v. Bechu Chaube and another, 45 All., 124—*followed.*

BROWN, J.—One Nga Hla U was prosecuted under the provisions of section 408, Indian Penal Code, for criminal breach of trust. He was originally convicted by the Additional Magistrate, Prome, and sentenced to nine months' rigorous imprisonment. He appealed,

* Criminal Revision No. 5-B of 1925 from the Order of the Additional Special Power Magistrate, Zigôn, in Criminal Regular No. 174 of 1924.

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and the appeal was heard by the Sessions Judge, Tharrawaddy, who set aside the conviction, and ordered a retrial on the ground that the Magistrate had not complied with the provisions of section 342 of the Code of Criminal Procedure. The case was again tried by another Magistrate, who again convicted, and Nga Hla U again appealed to the Sessions Judge, Tharrawaddy.

The matter has been referred to this Court by the learned Sessions Judge on the following grounds. In the retrial the Magistrate examined all the prosecution witnesses, and then examined the accused and charged him. After this examination and the framing of the charge, two of the prosecution witnesses were recalled for further cross-examination, but the accused was not further examined after this cross-examination. The view of the learned Sessions Judge is that this failure further to examine the accused on the part of the Magistrate amounts to an illegality which vitiates the whole trial. He is of opinion that the only course open to him would be to set aside the conviction, and order a third trial. It was for the same reason that the first trial was set aside and a retrial ordered.

The undesirability of having a third trial is clear, and the proceedings have been submitted to this Court with a recommendation that this Court in revision should pass an order for the continuation of the trial by the Magistrate from the point where he wrongly omitted to examine the accused.

The view of the learned Sessions Judge that the absence of any examination of the accused after the cross-examination of the two prosecution witnesses is an illegality which, of necessity and apart from any question of miscarriage of justice, vitiates the trial, is a view supported by a considerable mass of

judicial authority ; but, with all respect to the opinions expressed in favour of this view, I find myself unable to accept it.

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The Sessions Judge does not suggest in this case that the accused has, in any way, been prejudiced by the failure to question him further. The accused was examined at considerable length after the completion of the examination of the prosecution witnesses and before the framing of the charge. No further prosecution witnesses were examined, but all that was subsequently done was to cross-examine two witnesses who had already been examined on behalf of the prosecution.

The accused himself did not raise this point in appeal, and I think it may be taken, as was apparently held by the learned Sessions Judge, that the point is a purely technical one, and that the accused has not, in any way, been prejudiced, by the failure of the Magistrate further to examine the witness.

I have examined the reports of a number of cases in which it was held that an illegality of this sort was fatal to the case. I have been able to find no judgment in the official rulings of this Court, or of the late Chief Court, or of the late Court of the Judical Commissioner, Upper Burma, upon the subject except that of *Emperor v. Nga Po Mya and one*, which is published at page 18, Upper Burma Rulings, Vol. III. In that case there was no examination of the accused whatsoever. It was held that the omission of the Magistrate to do so was fatal to the validity of the trial. But it is not necessary in this case to decide whether a total failure to examine the accused person vitiates the trial. In this case the accused person was examined at length. The only irregularity or illegality, if any such exists, was that the Magistrate did not examine him after the

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cross-examination of the witness for the prosecution was complete.

In the case of *Raghu Bhumji* v. *Emperor*, reported at page 49, Volume LVIII, Indian Cases, it was held that an omission to examine an accused person in a Sessions case was not a mere irregularity curable by section 537 of the Code, but was fatal to the trial. A number of previous cases were referred to in which such an omission was held to be fatal.

There is undoubtedly a large volume of authority for this view, but I have been unable to find precisely on what ground it has been based. It has often been suggested that a non-compliance with a mandatory provision of the Code of Criminal Procedure cannot, in any circumstances, be cured by the provisions of section 537 of the Code, and must invalidate the whole trial. I cannot find any authority for this view. The fact that section 537 itself refers to errors and omissions in the proceedings suggests that there are cases in which a mandatory provision has not been complied with, but to which, nevertheless, the provisions of section 537 would apply. For an omission to take place, it would appear that there must be some neglect to comply with some definite order in the Code. The decision of their Lordships of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor*, reported in I.L.R. 25 Madras, at page 61, has sometimes been referred to as authority for the principle that non-compliance with a mandatory provision of the Code is fatal to the trial, but I can find nothing in the judgment of their Lordships to justify this view. What their Lordships observed in that case was that they were " unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying [an accused

person for many different offences at the same time and these offences being spread over a longer period than by law could have been joined together in one indictment. The remedying of mere irregularties is familar in most systems of jurisprudence, but it would be an extraordinary extension of such a breach of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity." A positive enactment by the Code that a certain trial shall not take place is obviously a very different thing from a positive enactment that in the course of such a trial certain detailed procedure shall be followed. In the one case an infringement of the enactment amounts to an assumption of jurisdiction, and vitiates the trial from the very beginning. In the other case an infringement merely amounts to an error, omission or irregularity in the procedure adopted in the course of the trial. I have never heard it suggested that the neglect of a Magistrate to sign the deposition of a witness vitiates the whole trial, yet that is just as much an infringement of the mandatory provisions of section 356 of the Code as the failure to examine the accused is an infringement of the provisions of section 342. The failure to examine an accused person is, no doubt, a more serious irregularity than the failure to sign a deposition form, but the provisions of the law are as mandatory in the one case as in the other. Chapter XIV of the Code of Criminal Procedure, which deals with irregular proceedings, sets forth that in certain circumstances the proceedings of a Court shall be void ; but there is no section which says that a procedure such as is said to have been adopted in the present case makes

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the whole proceedings void. On the other hand, in section 537 it is laid down in very wide terms that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII, or on appeal or revision, on account of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or other proceedings before or during trial, or in any enquiry or other proceedings under the Code unless a failure of justice has been occasioned. These terms are very wide, and seem to me to be framed to meet such a case as the present. There is no question here of the proceedings being vitiated from the first. The contention is that because the Magistrate omitted further to examine the accused person after cross-examination of the prosecution witnesses, that is to adopt a certain procedure in the course of the trial, the proceedings became void. I cannot hold that at the most this was more than an error, omission or irregularity within the meaning of section 537, or that there is any authority in the Code for treating the proceedings as void simply because of this omission.

The Madras High Court was at one time of opinion that the adoption of the procedure adopted in this case was necessarily fatal to the trial; but that decision has now been over-ruled by a Full Bench ruling of the same Court in the case of *Varisai Rowther and another* v. *King-Emperor*, reported in I.L.R. XLVI Madras, at page 449. It was held that it was not obligatory on the Court to examine the accused further after cross-examination of the prosecution witnesses if he has already been examined generally on the case after the examination-in-chief. If this view be correct, then there can be no question of the trial being vitiated in the present case.

The contrary view has, however, been taken by the High Court of Calcutta. But, whichever view is correct as to the precise meaning of the terms of section 342, and the exact stage of the trial at which the accused should be examined, I am of opinion that such a mistake or omission, if it is a mistake or omission, as has occurred in this case does not necessarily vitiate the trial.

This is the view which has recently been taken by the High Court of Allahabad in the case of *Emperor* v. *Bechu Chaube and another*, reported in I.L.R. XLV, Allahabad, at page 124. The tests to be applied in deciding whether a particular infringement of the provisions of the Code vitiated the whole trial were there stated to be, "Does the error go to the whole root of the trial? Does it, in effect, vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature, the proceedings are vitiated in their very inception, and section 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceedings." In this opinion I agree. It seems to me clear that the intention of the framers of Code of Criminal Procedure was to frame the Code in such a way that mere technical defects would not have the effect of vitiating proceedings.

The learned Sessions Judge himself in his order of reference remarks—"Apart from the needless expense and delay, the prestige of the Courts would suffer by such an order; indeed, a third trial, on account of a highly technical mistake in procedure might well lead to some ridicule of the judicial administration of the country." With these remarks

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I fully agree; but I am unable to find anything in the Code of Criminal Procedure, which makes it necessary to hold that such a state of affairs as to make a further trial necessary does arise in this case.

If the view taken by the High Court of Madras is correct, then there has been no irregularity, and the question of the proceedings being vitiated does not arise. If the view taken by the High Court of Calcutta be correct, the proper stage of the trial at which to examine the accused is after the prosecution witnesses have been fully cross-examined. Then all that has occurred in this case is that the examination has been conducted at a slightly earlier stage of the proceedings than provided by law. I cannot look upon such an error as going to the root of the trial. It appears to me to be at most a mere mistake in the course of the trial, and a mistake which has not, in any way, materially prejudiced the accused. It is not a question here of an entire failure to examine the accused person, but merely a question as to the accused having been examined at the wrong stage of the proceedings. It does not appear to have been suggested that if the examination had been deferred, or if further questions had been put to the accused after the cross-examination of the prosecution witnesses, the accused would be in any better case. As I have said, the accused himself does not raise the point in his appeal, although he was represented by a pleader.

In my view of the law there is no reason for holding that the trial by the Magistrate in this case is vitiated. I do not, therefore, consider that there is any good ground for this Court to order any further enquiry or trial, and the proceedings will be returned to the Sessions Court for decision of the appeal on its merits.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

1925
July 19.

MAUNG KYAUK PU
v.
MAUNG PU.*

Bobabaing, whether village land can be—Upper Burma Land Revenue Regulations, sections 3, 23 and 25(d)—Rival claimants to State lands, Power of revenue officers to adjudicate between—Suit by person ousted, whether tenable against person put in possession by the Collector, the Collector's order being ultra vires.

All village lands need not necessarily be State Lands and there is no reason why persons should not own *bobabaing* land in a village.

The Upper Burma Land Revenue Regulation does not authorize Revenue Officers to decide a dispute between rival claimants to State lands, except within one year of a declaration that a particular land is State land.

Held that in this case the Collector having acted *ultra vires* in ejecting Plaintiff and putting the Defendant in possession, the Plaintiff was entitled to sue the Defendant to obtain possession.

Shwebauker v. Ddawar, 11 U.B.R. (1914-16), 151—*followed.*

Mitter—for the Appellant.

Sanyal—for the Respondent.

PRATT, J.—Plaintiff sued to recover possession of a house site, which he alleged to be the *bobabaing* property of his father-in-law, Maung Ne Dun.

The trial Court found that the land was the property of plaintiff's father-in-law and granted a decree as prayed.

On appeal, the District Court pointed out that defendant was in possession with permission of the Collector, and, assuming that the land was State land, his title as derived from the Collector must be deemed to be superior to that of plaintiff.

The learned District Judge based his finding that the land was State, on the fact that plaintiff by applying to the Collector for the land as village land had admitted that it was State.

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* Special Civil Second Appeal No. 184 of 1924 (at Mandalay).

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PRATT, J.

Plaintiff's application to the Collector for the land cannot be construed as an admission that the land is State, and the Judge himself had pointed out earlier in his judgment that the Collector had given no authority for the proposition that all village land is State land. I know of no authority for such a sweeping proposition.

State land is defined in section 23 of the Upper Burma Land Revenue Regulation and village land is not referred to in the section. Village is defined in section 3 as an area appropriated to dwelling places not included in a town.

There seems to be no reason why persons should not own *bobabaing* land in a village; and it is conceivable that *bobabaing* land might often exist in an area which was not originally appropriated to dwelling places, but was subsequently so appropriated.

It is not suggested that there has ever been any formal declaration that the land is State under section 24.

Maung Ne Dun was ejected from the plot of land by the Deputy Commissioner in a village proceeding. He appealed to the Collector against his order on the general side, and the Collector sitting on the revenue side confirmed his own order, holding that the land was State.

The Collector has assumed that the land was State land on quite inadequate grounds and has evicted Maung Ne Dun purporting to act, it may be presumed, under section 25 (*d*) of the Regulation. He has in effect decided a dispute between rival claimants to State land, which, it was definitely laid down by the Judicial Commissioner in similar circumstances in *Sheoshanker's case* (1), the Revenue

(1) U.B.R. 11, (1914-16) 151.

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Regulation does not authorize Revenue Officers to do, except within one year of a declaration that a land is State. Even, therefore, if the land was State, on this ruling the Collector had no power to decide between rival claimants and eject one of them.

It appears from the terms of the Collector's order that Maung Ne Dun claimed that the land had been in possession of himself and his forefathers for a long period. This obviously amounted to a denial that the land was State, and there was no justification for the Collector's assumption that the land was State.

As a matter of fact the Collector did not decide that Maung Pu (the defendant) had a better title to the land than Maung Ne Dun, but gave it to him because he was more in need of it.

In the absence of proof that the land was State, I am of opinion that the Collector's order was *ultra vires* and that he had no right to eject Ne Dun from the land.

This is not, however, an appeal against the Collector's order and no appeal lies to the Civil Court. We are concerned merely with the merits of the rival claims between plaintiff and defendant. Plaintiff based his title on Maung Ne Dun's long possession and that of his forefathers.

As against plaintiff, defendant had no claim except that derived from the Collector's order, which, I have held, was under the circumstances *ultra vires*. His need of a house site gives him no right as against a title derived from long occupation.

I consider the District Court was wrong in reversing the order of the trial Court on the merits.

I set aside the finding and decree of the District Court, and restore the decree of the Township Court with all costs.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

1929
Feb. 6

MAUNG DUN
v.
MA SEIN.*

Maintenance, Order of, whether discharged by a decree for restitution of conjugal rights—Criminal Procedure Code (V of 1898) section 489 (2) as amended by Amendment Act (XVIII of 1923).

The order of a competent Civil Court does not of itself cancel an order of maintenance passed under the provisions of the Criminal Procedure Code, and in considering an application for the discharge of such an order, the Magistrate is not necessarily bound to follow the order of the Civil Court but must consider it along with any other circumstance that may be brought before him.

Bragg v. *Bragg*, 41 Times L.R., 8; *D.M. Naika* v. *Marati Kaveri*, 30 Mad., 400; *Devi Ditta* v. *Ganga Devi*, (1906) P.R. Cr., 4; In re *Chandulal Ranchhod*, 45 Bom., 885; In re *Sulakhdas*, 23 Bom., 485; *Lufolea Doomony* v. *Tikka Moolai* 13 W.R.Cr., 52; *M.A.A. Kadar* v. *Ludden Sahiba*, 14 Cal., 276; *Maidu Venkaya* v. *Kamireddi Radamma*, 46 Mad., 721; *Maung Tha U* v. *Ma May Kin*, 9 B.L.T., 162; *Maung Po Saw* v. *Ma Taei*, (1910-13) U.B.R., 34; *Subad Domni* v. *Katiram Dome*, 20 W.R.Cr., 58; *Sukhudra* v. *Basdeo Dube*, 18 Cal., 29—*referred to.*

CARR, J.—In July 1921, Ma Sein obtained a maintenance order against her husband Maung Dun. In 1922, Maung Dun sued for restitution of conjugal rights and in November of that year a decree was passed by consent. In Miscellaneous Case No. 15 of 1924 of the Township Magistrate of Ye, Maung Dun applied for cancellation of the maintenance order. About a month later, in Miscellaneous No. 17, Ma Sein applied for recovery of Rs. 60 as arrears of maintenance.

Maung Dun's application was dismissed by the Magistrate and Maung Dun then applied in revision to the Sessions Judge of Amherst, who has referred the cases to this Court with a recommendation that the maintenance order be cancelled and that the proceedings in Criminal Miscellaneous No. 17 be closed.

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* Criminal Revision No. 998-B of 1924 from the order of the Township Magistrate of Ye in Criminal Miscellaneous Trial No. 17 of 1921.

Before the Magistrate, Maung Dun stated that he had asked Ma Sein, before elders, to return to him and that she had refused to do so unless she got her expenses.

The witnesses told a different story. They say that Maung Dun came to U Hlaing's house and asked that Ma Sein be sent for. She came and Maung Dun asked her if she would return to him. She said that she would and the parties then left. Two out of the three witnesses say that Ma Sein said she would come after drawing money from the Court. What happened afterwards the witnesses do not know.

Ma Sein herself says that she agreed to go with Maung Dun, but that she must go and get money. She asked him to come to her house but he would not. Maung Dun did not come again. She went and asked at Maung Pu's house but Maung Dun "went away." I take this to mean that he "had gone away." She contends that Maung Dun had no *bonâ fide* wish to take her back and merely wished to get the maintenance order cancelled.

That seems to have been the view on which the Magistrate dismissed the application. On the evidence I do not think that sufficient cause is made out for the cancellation of the order.

The question remaining is whether the decree for restitution of conjugal rights itself renders the order void. There is authority for the view that it does.

This was held by one Judge of the Chief Court in *Maung Tha U* v. *Ma Mya Kin* (1). Also by a bench of the Bombay High Court in *In re Chandulal Ranchhod* (2). In this case the learned Judges gave

(1) (1916) 9 B.L.T., 162. (2) (1919) 43 Bom., 885.

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the following explanation of their view—"The decree for restitution of conjugal rights is a statement by a Court of matrimonial jurisdiction that husband and wife are under an obligation to live together and that the wife had no right to live apart from her husband. The Magistrate's order of 1910 was in law a statement that the wife had a right to live apart from her husband; but of course, in the nature of things, any order made by a Magistrate in the exercise of the limited powers conferred on Magistrates by Chapter XXXVI of the Criminal Procedure Code is subject to the orders of Civil Courts exercising matrimonial jurisdiction." The application before the Court was one by the wife, asking under section 489, Criminal Procedure Code, for an increase in the order for maintenance. The final order was that the Magistrate should treat the application as one under section 488 and proceed to decide whether at that time the wife was entitled to an order for maintenance.

Another case which has been much cited is *In re Salakidas* (3). In this case no reasons for the decision were given. It was based on the case of *Lufotea Doomony* v. *Tikha Moodol* (4) and another unreported case. The former seems to be a very doubtful basis; it is difficult on the report to say what the learned Judges decided.

Maung Po Saw v. *Ma Thet* (5) is somewhat different. Here the wife applied for a maintenance order after the husband had obtained a decree for restitution of conjugal rights, and it appears that she raised no contention which she had not or could not have raised in defending that suit. This case is of little assistance.

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(3) (1899) 23 Bom., 485. (4) (1870) 13 W.R.Cr., 52.
(5) (1) U.B.R., (1910-13) 34.

On the other side we have *Devi Ditta v. Ganga Devi* (6) in which the judgment seems to imply that the decree for restitution might terminate the maintenance order, but that the order might be revived by subsequent circumstances. This does not seem very logical. One would think that the order, once determined, could not be revived, but that subsequent circumstances might give the wife the right to apply for a fresh order.

There are certain other decisions which bear indirectly on the question and which are to some extent conflicting. In *Maddu Venkaya* v. *Kamireddi Padamma* (7) a man against whom an order had been passed for the maintenance of an illegitimate child sued for and obtained a declaration that the child was not his. He applied to the Magistrate to abstain from giving further effect to the maintenance order. The Magistrate refused to consider the application. The learned Judges order him to do so. Had they held that the decree terminated the maintenance order, presumably they would have passed final orders themselves. Incidentally the decision suggests that the Civil Courts have power to give such a declaration.

In *M. A. A. Kadur* v. *Ludden Sahiba* (8) the husband against whom a maintenance order had been passed sued for a declaration that the relationship of husband and wife had been terminated and that he was not liable to pay the maintenance. He obtained the declaration of the termination of the relationship, but the Court held that it could not grant an injunction restraining the Magistrate from enforcing the maintenance order. The husband was referred to an application to the Magistrate based on the declaration.

(6) (1906) P. R. Cr., 4. (7) (1924) 46 Mad., 721.
(8) (1887) 14 Cal., 276.

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In *Subad Domni* v. *Katiram Dome* (9) the plaintiff obtained a decree declaring that he was not the father of an illegitimate child for whom he had been ordered to pay maintenance. The High Court held that the decree could not affect the Magistrate's order even if the Civil Courts had had jurisdiction to pass such a decree. It held further that they had no such jurisdiction.

This decision was followed in *Subhudra* v. *Basdeo Dube* (10). But in *D. M. Naika* v. *Marati Kaveri* (11) *Kadur's case* (8) was followed, and it was held that the Civil Courts had power to grant a declaration, but that no injunction could be issued restraining proceedings under a maintenance order. The effect of these two decisions seems to me to be that after a Civil Decree has been obtained, application should be made to the Magistrate to abstain from enforcing his order or to cancel it.

Finally there is the very recent English case of *Bragg* v. *Bragg* (12) in which the Court refused to interfere with a decision of a Magistrate refusing to discharge a maintenance order on proof of a *decree nisi* for divorce.

In view of all these decisions I think that, although there are direct decisions that a decree for restitution of conjugal rights *ipso facto* discharges an order for maintenance of the wife and there appear to be no direct decisions to the contrary, yet the proposition is one that is open to considerable doubt.

Had there been no change in the law since these decisions were given, I should have felt bound to refer the questions for decision by a bench or a full bench. But there has in fact been a change. Act XVIII of 1923 added the following as sub-section 2

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(9) (1877) 20 W.R.Cr., 58.
(10) (1891) 18 Cal., 29.
(11) (1908) 30 Mad., 400.
(12) (1924) 41 Times L.R., 8.

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to section 489, Criminal Procedure Code :—"Where it appears to the Magistrate that in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or as the case may be vary the order accordingly."

From this it seems to me to follow that the order of a competent Civil Court does not of itself cancel the maintenance order and that in considering any such application as the present, the Magiatrate is not necessarily bound to follow the order of the Civil Court but must consider it along with any other circumstances which may be brought before him.

On this view and on my finding that the petitioner did not make out sufficient cause for the cancellation of the order, I dismiss this application.

I also discharge the Sessions Judge's order staying proceeding on Ma Sein's application in Criminal Miscellaneous Case No. 17 of 1924 of the Township Magistrate, Yè.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

1925
Feb. 6.

NGA PO THAN
v.
KING-EMPEROR.*

Habitual Offenders' Restriction Act, section 9. An old offender not necessarily to be dealt with, under—who may be proceeded against—Criminal Procedure Code (V of 1898), section 565 and Rangoon Police Act—A Magistrate not to use an order subsequently set aside as proof that accused is an old offender.

A Magistrate is not entitled to use an order which had been set aside, on whatever grounds, as proof that the accused is an old offender.

The mere fact that the accused is an old offender is not a ground on which a restriction order can be passed under section 9 of the Habitual Offenders' Restriction Act.

CARR, J.—The petitioner was convicted under section 380, Indian Penal Code, and was sentenced to eighteen months' rigorous imprisonment. In addition an order of restriction for two years after the expiry of his sentence was passed under section 9 of the Burma Habitual Offenders' Restriction Act. With the conviction and sentence of imprisonment, there is no reason to interfere.

But the restriction order was very clearly illegal. The Magistrate's reason for passing it was as follows:—

"I find that the accused is an old offender because he was restricted to Mezali by the then Subdivisional Magistrate, Minbu, on the 24th September 1923, under section 7 of the Habitual Offenders' Restriction Act, but the order was set aside by the District Magistrate, Minbu, on technical grounds."

* Criminal Revision No. 1124-B of 1924 from the Judgment of the Subdivisional Magistrate, Minbu, in Criminal Regular Trial No. 88 of 1924.

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NGA PO THAN v. KING-EMPEROR.

CARR, J.

The Magistrate was not entitled to use an order which had been set aside, on whatever grounds, as proof that the accused was an old offender. Moreover the mere fact that the accused is "an old offender" is not a ground on which a restriction order can be passed under section 9 of the Habitual Offenders' Restriction Act. That section provides only that such an order may be passed in a case in which an order could be passed under section 565 of the Code of Criminal Procedure and in certain special cases under the Rangoon Police Act.

Section 565 of the Code of Criminal Procedure provides that an order under its provisions may be passed when a person who has before been convicted of one of certain specified offences under the Penal Code is again convicted of one of those offences. Its limits are therefore very clearly defined and it could not be applied to a case such as the present. That the Magistrate did apply it shows great carelessness on his part and it is not creditable to the Sessions Judge that he did not discover the illegality when the case came before him on appeal.

I confirm the conviction of Nga Po Than and the sentence of eighteen months' rigorous imprisonment passed on him, but set aside the order of restriction passed under section 9 of the Burma Habitual Offenders' Restriction Act.

APPELLATE CIVIL.

Before Mr. Justice Carr and Mr. Justice Brown.

1925
Feb. 9.

MAUNG PO SHEIN
v.
MAUNG PO KIN.*

Civil Procedure Code (V of 1908), Order XLV, rule 13—Whether High Court or Original Court competent to take security pending appeal to Privy Council.

The proper Court to deal with all questions regarding the execution of a decree under appeal to His Majesty in Council is not the Original Court but the High Court, on the Appellate Side.

Ram Bahadur v. Thakur Sri Sri Radha Krishen Chanderji, 3 Pat. L.J. 40—*followed.*

Das—for the Appellant.
Leach—for the Respondent.

CARR AND BROWN, JJ.—The appellant sued the respondent for the recovery of certain immoveable properties in the District Court of Myaungmya. His suit was dismissed by the trial Court, but was decreed by this Court on appeal. The respondent has now obtained leave to appeal against the decree of this Court to the Privy Council. Meanwhile, possession of the land in dispute, or a portion of the land in dispute, has been made over to the appellant. The respondent, after the making over of this land, applied to the District Court under the provisions of Rule 6 of Order XLI of the Code of Civil Procedure to have security taken from the appellant, and the District Court has ordered the decree-holder to furnish security for mesne profits at the rate of Rs. 3,400 a year. It is against this order that the present appeal has been filed.

It is contended that the District Court has no jurisdiction to pass the order it did, and, in our opinion, this contention must be upheld. Order XLI

* Civil First Appeal No. 196 of 1924.

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CARR AND BROWN, JJ.

of the Code of Civil Procedure is headed "Appeals from Original Decrees," and lays down rules for the procedure to be adopted in case of such appeals and for applications for stay of execution pending the appeal, or the giving of security by the appellant for restitution of property. In the case of second appeals it is provided by Order XLII that the rules of Order XLI shall apply: but there is no such provision in Order XLV with regard to appeals to the King in Council. On the contrary, the powers with regard to stay of execution or the taking of security from the respondent are specifically laid down in Rule 13 of the order. Under that rule, the Court may allow the decree appealed from to be executed taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal.

It seems to us quite clear that the provisions of this rule are meant entirely to govern all questions regarding the execution of the decree under appeal before His Majesty in Council, and that the provisions of Rule 6 of Order XLI have no application; and the proper Court to deal with the matter is not the Original Court, but this Court. The decree in question was passed by this Court, and not by the Original Court, and we agree with the view expressed in the case of *Ram Bahadur* v. *Thakur Sri Sri Radha Krishen Chanderji* (1), that in such circumstances the "Court" means the High Court. The District Court was, therefore, acting without jurisdiction in passing the order it did.

It has been contended on behalf of the respondent that no appeal lies against the order, and the appellant himself would appear to have been doubtful on this point as he originally drew up his memorandum of

(1) (1918) Patna Law Journal, Vol. III, page 40.

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CARR AND BROWN, JJ.

appeal in the alternative as an appeal or revision, and gave in his grounds of appeal reasons for interference in revision; but as in *Ram Bahadur's* case the matter is not of importance, as the order, being passed without jurisdiction, is one which we should be justified in setting aside in revision.

We set aside the order of the District Court requiring the decree-holder to furnish security. The respondent will pay the appellant's costs of this appeal—advocate's fee five gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

1925

Feb. 27.

MAUNG PO NYUN
v.
MA SAW TIN.*

Buddhist Law—Divorce and partition—Husband with two wives—No rule laid down in Law books nor Case Law, for partition between—Principles of justice, equity and good conscience—Interests of the parties on the second marriage and after—Share of second wife on divorce by mutual consent and on divorce claimed for husband's misconduct.

The Burmese Buddhist Law books do not lay down any rule for partition on the divorce of the husband by one of two or more wives of equal status and there is also no case law on the subject. It is therefore necessary to decide questions pertaining to the matter in accordance with the principles of justice, equity and good conscience having regard, of course, to the general rules of Burmese Buddhist Law so far as those rules can be applied.

Held, that if a Burmese Buddhist having a wife already takes a second wife the interests of the parties on the second marriage would be as follows:—

(1) In property brought by the husband to the first marriage, husband four-ninths, first wife three-ninths and second wife two-ninths.

(2) In property inherited by husband during the first marriage, husband four-ninths, first wife three-ninths and second wife two-ninths.

(3) In jointly acquired property of the first marriage, husband two-sixths, first wife three-sixths and second wife one-sixth.

Held further, that in property inherited by the husband after the marriage with the second wife, the respective shares would be—husband one-half, first

* Civil First Appeal No. 43 of 1924.

wife one-quarter and second wife one-quarter; and that in the jointly acquired property of the two covertures, each wife would take one-third and the husband one-third.

Held also, that on a divorce by mutual consent between the husband and the second wife, the second wife would take her share in the various properties as defined above, but that on her becoming entitled to divorce with forfeiture of all the husband's property owing to his misconduct, she would take in addition to her own above share the husband's share, that is to say, she would take all except the first wife's interest in the property.

Hay—for the Appellant.

Mya Bu—for the Respondent.

HEALD AND CHARI, JJ.—The parties are husband and wife and respondent, the wife, sued appellant, the husband, for divorce on the ground of desertion and for partition and possession of the property of the marriage.

Appellant said that respondent was merely a "lesser wife" and that he never deserted her but on the contrary she deserted him. He also alleged that being a "lesser wife" she was not entitled to get any property on divorce.

The Court found that appellant had married another wife before he married respondent, that that woman quarrelled with him and left him, that a few months later appellant asked for respondent in marriage saying falsely that he had divorced his earlier wife, that he married respondent and took her to live with him in his mother's house where he had lived with the earlier wife, that soon after his mother's death over three years ago he left respondent and went to live with the earlier wife, and that amounted to desertion and entitled respondent to divorce. As for the partition of property the learned Judge held that the two wives were on an equal footing and had equal rights under the Burmese Buddhist law of divorce, that under that law the party in fault was bound to forfeit the whole of the property, that the

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other wife's interests must nevertheless be protected, that the other wife's interest in the husband's property would be one-third, that respondent also would be entitled in her own right to one-third of the property acquired by appellant after his marriage with her, that respondent if she were the sole wife would have been entitled to all the husband's property, but that because there was another wife it would be inequitable to give her all the husband's share after deducting the shares of the two wives, and that it would be fair therefore to give half the husband's share to respondent and leave the other half for the husband and the other wife. On this basis respondent would have been entitled to considerably more than she claimed, but as she claimed only one-third of the lands and house and one-sixth of the rents and profits, the learned Judge gave her a decree for divorce and for partition and possession of a one-third share of the house and lands and Rs. 3,362 as representing one-sixth of the rents and profits.

Appellant appeals on the grounds that respondent was not entitled to a divorce, that she was proved to have been a "lesser wife" and that therefore if she was enlitled to divorce she was not entitled to partition, that if she was entitled to partition she was not entitled to any share of the properties which he already possessed at the time when he married her or of those which he inherited after he married her, and that she could not in any case be entitled to any share of the rents and profits.

As for the allegation that respondent was not entitled to divorce, we see no reason to disagree with the lower Court's finding on the evdience that appellant deserted respondent and that that desertion entitled respondent to divorce. We see no reason either to disagree with the lower Court's finding

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that respondent and the first wife were wives on an equal footing, and no authority has been produced to show that the second of two wives who are on an equal footing is not entitled to any property if she divorces the husband. It is admitted that the Burmese Buddhist law books do not lay down any rule for partition on the divorce of the husband by one of two or more wives of equal status, and that there is no Case Law on the subject. It is, therefore, necessary to decide the matter in accordance with the principles of justice, equity and good conscience having regard, of course, to the general rules of Burmese Buddhist law so far as those rules can be applied.

If a man has only one wife, that wife is regarded as acquiring by the marriage a one-third interest in all property which he brought to the marriage and a one-third interest in property inherited by him during the marriage. She also has a one-half interest in all property jointly acquired during the marriage. If a man having a wife already takes a second wife, it would seem that the property which the husband brings to his second marriage cannot be more than what had previously been regarded as his interest in the property acquired during the first marriage. If so, then the second wife would acquire by the marriage a one-third interest in his two-thirds interest in the property which he brought to the first marriage, a one-third interest in his two-thirds interest in the property inherited by him during the first marriage, and a one-third interest in his one-half interest in the jointly acquired property of the first marriage. She would thus be entitled to a two-ninths interest in the property which the husband brought to the first marriage and in the property inherited by him during he first marriage and to a one-sixth interest in the

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jointly acquired property of the first marriage, the interests of the parties on the second marriage being as follows :—

(1) Property brought by husband to first marriage. Husband four-ninths, first wife three-ninths, and second wife two-ninths.

(2) Property inherited by husband during first marriage. Husband four-ninths, first wife three-ninths and second wife two-ninths.

(3) Property jointly acquired during first marriage. Husband two-sixths, first wife three-sixths and second wife one-sixth.

As for the property inherited by the husband or jointly acquired during the marriage with two wives, there is no rule. If there is only one wife the husband takes two-thirds and the wife one-third of the inherited property and each shares equally in the jointly acquired property. So far as inherited property is concerned, the principle would seem to be that the husband's interest in property inherited by him during the marriage is twice that of the wife, so that if there are two wives, as in this case, the husband's interest would be one-half and that of each of the wives one fourth, while if there were three wives the husband's interest would be two-fifths and that of each of the wives one-fifth, and so on. As for property acquired during the marriage with two wives, where neither wife can be said to have contributed to the acquisition more than the other, we are of opinion that it would be in accordance with the principles of justice, equity and good conscience and would not be inconsistent with any rule of Buddhist Law that the husband and the two wives should take an equal interest in it, each taking one-third.

On a divorce by mutual consent or as by mutual consent, there would be no objection to partition on

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the above basis, but if the second wife were entitled to divorce for the husband's misconduct, that is to a divorce with forfeiture of all the husband's property, then the first wife might seem to be prejudiced if she were left with the husband entirely divested of all interest in any property, since it is contrary to the principles of Burmese Buddhist law that either of a married couple should be able to obtain partition of the property of the marriage otherwise than on divorce, and that would clearly be the effect of allowing the second wife to take all the husband's interest in the property. But on the other hand the taking of a second wife without the consent of the first entitles the first wife to a divorce as by mutual consent, so that if the first wife either consents to the taking of the second wife or does not claim divorce, she may be regarded as having acquiesced in the consequences which result from the taking of the second wife and one of those consequences would seem to be that if the second wife becomes entitled to divorce with forfeiture of property, the first wife is left in the same position as regards property as she would have been if she had herself claimed the divorce to which she was entitled except that she gets in addition one-third of the property jointly acquired during the marriage with the second wife. We think, therefore, that the first wife would have no cause for complaint if the partition on the second wife's divorcing the husband for misconduct were on the above basis, that is that the second wife takes all except the first wife's interest in the property.

In this case however although respondent claimed divorce for appellant's misconduct, she did not claim the whole of his interest in the property. What she did claim was one-third of the immoveable property and one-sixth of the property, jointly acquired during

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the marriage with her. It is difficult to understand on what basis that claim was made. The claim to one third of the immoveable property probably represented one-half of the husband's two-thirds interest in that property, which suggests that she was really claiming a divorce as by mutual consent. Similarly, the claim to one-sixth of the jointly acquired property may represent a claim to one-half of the husband's one-third share in that property, the husband and the two wives being regarded as each entitled to one-third of that property, but why she should claim half of the appellant's interest in the jointly acquired property, if the divorce was as by mutual consent, does not appear. It may be that she or her legal adviser regarded the two wives as being jointly entitled to a one-third interest in the jointly acquired property of the second marriage, in which case respondent's interest would be one-sixth, but this is mere speculation and we know of no authority for the suggestion that the husband is entitled to two-thirds of the jointly acquired property.

As we have found that appellant deserted respondent and that she was therefore entitled to divorce with possession of all the husband's interest in the property, respondent would, on the above basis, be entitled to two-thirds of the immoveable property and to two-thirds of the jointly acquired property.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

1925
Feb. 5.

KING-EMPEROR
v.
NGA THA BAY.*

Habitual Offenders' Restriction Act, section 18 (2)—Period of absence in contravention of the order or while under trial not to be excluded—Magistrate convicting under section 18, not to pass orders as to the period of restriction left unexpired—Magistrate should merely explain the provisions of section 18 (2)—A new term of restriction cannot be added to sentence under section 18—Sections 9 and 18.

Held, that under section 18 (2) of the Habitual Offenders' Restriction Act, the period of imprisonment under section 18 (1) alone was to be excluded in computing the period for which the period of restriction should remain in force and that the period during which the accused was absent from his tract in contravention of the order of restriction or any period during which he was under trial could not be so excluded.

Held also, that the Magistrate convicting the accused under section 18 of the Act had no power to pass any orders as to the period the restriction should remain in force; but that the Magistrate should merely explain to the accused the provisions of section 18 (2) of the Habitual Offenders' Restriction Act.

Held also, that to a conviction under section 18 of the Habitual Offenders' Restriction Act, an order of restriction cannot be added.

CARR, J.—The accused in this case was subject to a restriction order for three years from the 25th January 1923. He carried out this order until the 6th June 1924, that is, for a period of one year, four months and twelve days. Then he left his tract without permission. He was arrested on the 13th July and was sent up for trial and on the 19th August was convicted under section 18 of the Habitual Offenders' Restriction Act and was sentenced to six months' rigorous imprisonment. At the end of his judgment the Magistrate added, "After his release from jail Nga Tha Bay will go back to Thayagôn

* Criminal Revision No. 1485-A of 1924 from the order of the Sessions Judge, Bassein, in Criminal Appeal No. 408 of 1924

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and stay there for one year and eighteen months on conditions imposed by the Subdivisional Magistrate, Kyônpyaw."

Considered as a fresh order of restriction this order was illegal, since section 9, Habitual Offenders' Restriction Act, does not authorize the addition of a term of restriction to the sentence in the case of a conviction under section 18.

But I think that the Magistrate did not intend it as a fresh order of restriction, but as a carrying out of the provisions of section 18 (2). I will take it also that "eighteen" was a clerical error and that the Magistrate meant to write one year and eight months.

Even so the order was wrong. Section 18 (2) provides only that a period of imprisonment under section 18 (1) is to be excluded in computing the period for which the order of restriction shall remain in force. It does not allow of the exclusion of any period during which the accused has been absent from his tract in contravention of the order or of any period during which he has been under trial. The effect of the sentence was, therefore, only to extend the duration the restriction order for a period of six months beyond the 24th January 1926, on which date it would normally have expired. Thus the order would remain in force for a period of one year and a little over five months from the date of the accused's release at the expiry of his sentence, and not for one year and eight months.

And I do not think that the Magistrate should have made the order in his judgment at all. He had in fact no powers to make any order at all since the period of restriction is extended by the operation of law and is not within the discretion of the Magistrate. He might profitably have explained to the accused the provisions of section 18 (2) and

their effect on his period of restriction and have noted in the case diary that he had done so. But in doing so he should have been careful to do so correctly.

The Sessions Judge should have discovered these errors, but he merely dismissed the appeal summarily.

I confirm the conviction and sentence of imprisonment passed on Nga Tha Bay, but set aside the order directing him to stay at Thayagôn for one year and eighteen months after his release from jail.

The original restriction order will, of course, remain in force as provided by section 18 (2) of the Habitual Offenders' Restriction Act.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

MAUNG MAUK AND ONE

v.

MAUNG PO YÔN.*

1925

Feb. 10.

Criminal Procedure Code, section 145—Failure to serve a copy of the preliminary order and failure to post the order on the land, whether cured by section 537.

Held, that the failure to serve a copy of the preliminary order, under section 145, clause 1, on the respondent and the failure to post the order on the land are irregularities cured by section 537, Criminal Procedure Code, but Magistrates should, nevertheless see that these irregularities do not cocur.

Vertannes—for the Petitioner.

Choon Foung—for the Respondent.

CHARI, J.—Counsel for the petitioner has pointed out that the Magistrate did not comply with the

* Criminal Revision No. 1087-B of 1924 from the order of the Subdivisional Magistrate, Nyaunglebin, in Criminal Miscellaneous Trial No. 89 of 1924

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provisions of section 145, Criminal Procedure Code. This is so. Clause 1 of the section requires the Magistrate to make an order in writing stating the grounds of his being satisfied that a dispute exists which is likely to cause a breach of the peace. The Magistrate did this. But clause 3 requires a copy of the order to be served on the parties and this was not done. The notice actually issued was not a copy or translation of the order and gave no grounds. And no copy was published by being posted on the land itself, as is also required by clause 3.

These are decided irregularities, but I think that they are cured by section 537, Criminal Procedure Code, and do not invalidate the proceedings. The Magistrate should, nevertheless, see that they do not recur in future cases. These provisions appear to be very generally overlooked.

* * * *

APPELLATE CIVIL.

Before Mr. Justice Young and Mr. Justice Brown.

MAUNG PO CHO AND OTHERS
v.
MAUNG SAN HWIN AND OTHERS.*

1924
Dec. 10.

Waste Land—Rights of the temporary occupier—Eviction by duly authorised Revenue Officer—Suit for possession against person put in possession by such officer—Lower Burma Land and Revenue Act (II of 1876), sections 19 and 56 and Rules 51 and 52.

The Civil Courts have jurisdiction to entertain disputes between private persons as to the right to occupy land over which no landholder's rights have been acquired.

A temporary occupier of waste land, paying revenue therefor to the Government, is in the position of a tenant-at-will of the Government.

The plaintiffs in the present suit, being neither grantees, lessees nor persons having the status of landholder, were in possession of the land in suit and were paying revenue for it to the Government. On the application of the defendants, the Deputy Commissioner, as the Revenue Officer under the Lower Burma Land and Revenue Act, ordered that the plaintiffs must vacate the land at the conclusion of the cultivation season and that possession must be given to the defendants. Accordingly, the plaintiffs gave up and the defendants entered into possession of the land. The plaintiffs subsequently sued for possession in the Civil Court.

Held, that the plaintiffs, who were merely tenants-at-will of the Government, having acquiesced in the orders of their landlord represented by the Deputy Commissioner as the Revenue Officer and given up possession, had no longer any rights to the land to enforce against the defendants who had entered into possession with the consent of the plaintiffs' landlord.

Maung Naw v. Ma Shwe Hmat, 5 L.B.R. 227—*followed*.

Thein Maung (1)—for Appellants.

Aiyangar—for Respondents.

YOUNG AND BROWN, JJ.—In this and the four connected cases special leave has been given to appeal under the Letters Patent from the judgment passed in Second Appeal No. 141 and four other cases of this Court.

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*Letters Patent Appeals Nos. 25 to 29 of 1924 against the decree of the High Court of Judicature at Rangoon passed in Civil Second Appeals Nos. 137—141 of 1922.

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MAUNG PO CHO AND OTHERS v. MAUNG SAN BWIN AND OTHERS.

YOUNG AND BROWN, JJ.

The land in suit was originally in possession of two persons Maung Aung Min and Ma The U. In 1908-09 some of the land in their possession was resumed by Government for non-payment of revenue. This resumption was apparently a mistake, and the land, which ought to have been resumed, was the land in an adjoining holding in the name of another person. Possession of the land was, however, given up by Maung Aung Min, and it remained vacant for some years.

In 1916-17 some of the plaintiffs in the present litigation occupied parts of it, and other parts were occupied by other plaintiffs later on.

In 1920, Ma The U and her son-in-law, Po Cho, applied to the Deputy Commissioner for the return of the land in question. The Deputy Commissioner passed orders on this application that the plaintiffs must vacate the land, and that possession of it should be given to Aung Min, who was in possession with Ma The U originally.

The plaintiffs, in their plaint, alleged that the defendants wrongfully entered on the land; and it appears that the defendants entered on the land under the orders of the Deputy Commissioner. The plaintiffs appealed to the Commissioner, who rejected their appeal as time-barred. At the same time he pointed out that, as the dispute was essentially between private persons, it should have been referred to the Civil Court. It was apparently when the Commissioner had passed these orders that the plaintiffs filed the suits, out of which these appeals have arisen.

In second appeal before this Court it was held that the Deputy Commissioner had no jurisdiction in the matter, and that his order was *ultra vires*; and a decree was passed, directing the plaintiffs to be put into possession. The decree, which was passed

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by our brother Carr, was based largely on the decision in the case of *Maung Naw* v. *Ma Shwe Hmut* (1); and the reasons for giving special leave to file this special appeal were that the question was important, and that it was desirable that the law relating to the jurisdiction of the Civil Courts and of Revenue Officers in respect of land at the disposal of the Government should be more clearly defined. Our learned brother in giving leave to appeal also added that he had serious doubts of the correctness of the decision in Maung Naw's case.

Maung Naw's case was decided by a Full Bench of the Chief Court of Lower Burma, and has been regarded as settled law for many years. The correctness of the decision has not been seriously questioned before us in appeal, and we do not see sufficient reason for reconsidering the point there settled now. What was held in that case was that in a suit between private individuals for possession of land in respect of which there is no grantee, lessee or person having the status of landholder, the jurisdiction of a Civil Court is not ousted by section 56 of the Lower Burma Land and Revenue Act, when the plaintiff bases his claim upon a title to possession by virtue of his having paid land revenue to Government under the rules made under section 90 of the Act, and also upon the fact that he was in possession and was dispossessed by the defendant within twelve years before the institution of the suit. Accepting this finding it is clear that the Civil Courts have jurisdiction to decide as to the respective claims based on possession by the parties in this suit.

But the case for the defendants is that they have a preferable claim to the plaintiffs, because they have

(1) (1915-16) 8 L.B.R., 227.

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been put in lawful possession by the Government, which is the owner of the land; and the question for decision is, therefore, whether the Deputy Commissioner had the power to pass orders directing defendants to be put into possession and whether the defendant-appellants were lawfully put into possession. If he had such power and the appellants were lawfully put into possession, then the defendants, as tenants of the landlord, would clearly not be trespassers, and would be entitled to retain possession.

Under section 19 of the Act the Local Government may from time to time make rules to regulate the temporary occupation of land, and may empower any Revenue Officer to eject any person occupying or continuing to occupy such land in contravention of such rules. The rules framed by the Local Government under this section are rules 51 and 52 (we refer to the rules in force at the time the Deputy Commissioner passed orders in this case. They have been amended since). Rule 52 empowers the Revenue Officer to serve a notice of ejectment on a person occupying the land in contravention of rule 51. Rule 51 provides that any person in possession of waste land for purposes of cultivation shall be liable to pay revenue and shall also be liable to eviction. The Deputy Commissioner has been separately empowered as Revenue Officer for the purposes of rule 52 by the Local Government. A difficulty in connection with these rules is at once apparent. Rule 51 empowers no one to evict, and rule 52 only empowers the Revenue Officer to act when the provisions of rule 51 have been contravened. There is no question in the present case of a failure to pay revenue and the Deputey Commissioner would have the power to evict only if the persons in possession could be held to have contravened rule 51 in virtue of the clause,

"He shall also be liable to eviction." If the rules be strictly construed, then it would appear impossible for any person in possession of waste land for purposes of cultivation to be evicted at all unless he failed to pay revenue. The Revenue Officer is not empowered to act at all until the provisions of rule 51 have been contravened, and until the Revenue Officer acts, the occupier cannot be said to be contravening the rules because he is liable to eviction. But if section 19 of the Act and rules 51 and 52 be read together, we think that a broader construction must be put on the provisions of these rules. It is quite clear from section 19 and rule 51 that the intention of the legislature and of the Local Government was that the temporary occupier should be in the position of what is known in England as a tenant-at-will, and that the duly constituted Revenue Officer should have the power to evict such tenant if the land were required for other purposes. In the present case the Deputy Commissioner passed orders that the plaintiffs should leave the land after the conclusion of the cultivation season. That being so, and having regard to the clause in rule 51 to the effect that the temporary cultivator is liable to eviction, we are of opinion that if the cultivator had at the end of the cultivating season refused to leave the land he would have been occupying the land in contravention of rule 51, and would therefore have made himself liable to eviction under rule 25. We do not think that it is open to the Civil Courts to consider the propriety of the order of the Revenue Officer in such a case. The plaintiffs had no right as against Government beyond that of temporary occupation. That is clear from the clause in rule 51 as to liability to eviction. And that liability exists independently of any reason there may be for evicting them. If the plaintiffs

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YOUNG AND BROWN, JJ.

were dissatisfied with the order of the Revenue Officer, their remedy was to apply to the Commissioner, which they did actually do. As a matter of fact in this case no action under rule 52 was necessary. The judgment of the trial Court states that, "Mr. Dawson, learned counsel for the plaintiff, admits on behalf of his clients that the defendants went on the land under the Deputy Commissioner's orders passed on the 16th January 1921 in Deputy Commissioner's Revenue Proceedings No. 151 of 1920-21 and his clients the plaintiffs in all cases have been removed from the possession of their respective land under the said order (Exhibit II)." In the face of this admission it cannot be maintained that the defendants are mere trespassers. The plaintiffs were liable to eviction by their landlord the Government at any moment. An order was passed by the Deputy Commissioner as Revenue Officer that they should leave the land, and in consequence of this order the possession of the land passed from the plaintiffs to the defendants. The plaintiffs, it is true, appealed against the Deputy Commissioner's order. But they did not resist it, but gave up possession peacefully. The plaintiffs had undoubtedly a possessory title, but that possessory title ceased on their acquiescing in the Deputy Commissioner's orders, and they have no other title of any sort. We entirely accept the finding in Maung Naw's case that Civil Courts have jurisdiction to entertain disputes between private persons as to the right to occupy land over which no landholder's rights have been acquired. But we do not consider that the plaintiffs have shown any title in the present case which could give them a right to recover possession from the defendants. When once a tenant-at-will has acquiesced in the orders of his landlord to give up possession, then he no longer has any rights

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to the land to enforce against any other person in possession with the consent of that landlord, and that appears to us to be the position in the present case.

We are, therefore, of opinion that the plaintiffs failed to establish their right to possession as against the defendants.

We allow these appeals and direct that the plaintiff-respondent's suit be dismissed with costs in all Courts.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne.

1924
Dec. 17.

MAUNG AUNG GYAW AND FIVE

v.

MUTHIYA AND ONE.*

Appellate Court and findings of fact by the Trial Court.

The remarks of the Privy Council in *Ma Than Than* v. *Ma Pwa Thit*, 1 Ran. 451, on the functions of the Appellate Court on questions of fact, should be read with reference to the special aspects of that particular case in which a witness had been examined at very great length and had been severely cross-examined by an able advocate and his credibility had been especially commented on, discussed and accepted by the Judge who had tried the case, and should not be treated as having a too general application.

Ma Than Than v. *Ma Pwa Thit*, 1 Ran., 451—*explained*.

This was a Special Appeal to the High Court against the judgment and decree of the District Court of Myaungmya which, as an Appellate Court, after an exhaustive discussion of the evidence in the case, had, for the reason set forth in his judgment, rejected the plaintiff's story and set aside the judgment and decree of the Original Court. On the

* Special Civil Second Appeal No. 413 of 1923 against the decree of the District Court of Myaungmya in Civil Appeal No. 72 of 1923.

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Special appeal, reliance was placed on the decision of their Lordships of the Privy Council in *Ma Than Than* v. *Ma Pwa Thit* reported at page 451 of Volume I of these reports, and it was urged principally that the decision of the trial Judge, who had seen the plaintiff and his witnesses and had believed their evidence, should have been treated by the District Court as an Appellate Court with very great weight and should not have been set aside. The facts in the case and the High Court's observations on the especial application of the remarks in the judgment of the Privy Council will appear from the judgment reported below.

Ba Thein—for the Appellants.

Barnabas—for the Respondents.

LENTAIGNE, J.—The appellants-plaintiffs admittedly mortgaged the land in suit to the first respondent Muthiya for Rs. 450 in 1918 by a deed which stipulated that redemption be effected within four years. They again admittedly mortgaged the land to Muthiya with possession for Rs. 700 in 1919 under a deed which contained a clause for the forfeiture of the land if not redeemed within two years.

On the 11th March 1920 the plaintiffs-appellants executed and registered the deed (Exhibit D) by which they purported to sell the land outright to the defendants for Rs. 1,600. The appellants now allege that on the occasion when this last deed was executed the defendants also executed an unregistered agreement agreeing to sell the land back to the plaintiffs-appellants for the same price of Rs. 1,600 within three years: and the present suit is one for specific performance of such agreement.

The appellants however are unable to produce such agreement and they account for its absence by

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LENTAIGNE, J.

an allegation that it was fraudulently detained by Muthiya. They allege that Muthiya had leased the land to the appellant Maung Aung Gyaw for 300 baskets of paddy, that when Maung Aung Gyaw was unable to deliver more than 240 baskets of paddy out of this rent, Muthiya persuaded him to deposit the agreement as security for the balance of 60 baskets of paddy or its equivalent in value Rs. 70 and that when Maung Aung Gyaw offered to repay the Rs. 70 Muthiya at first put him off and then on the following day informed him that he had torn up the agreement and then again verbally promised to sell on the same terms as in the agreement.

The Trial Judge believed plantiffs' evidence on these points and granted plaintiffs a decree for specific performance of the ageement to re-sell the land on payment of the price of Rs. 1,600; but, on appeal, the District Judge reversed that decree and dismissed the plaintiffs' suit with costs after an elaborate discussion of the evidence in the case and setting forth his reasons for rejecting the story of the plaintiffs as to this agreement, etc.

The present second appeal is against that decision and it is urged that the decision of the Trial Judge should be accepted, as that Judge had seen the witnesses and believed their evidence and that his decision should not have been so lightly set aside by the lower Appellate Court. In this respect reliance is placed on the recent decision of the Privy Council in the case of *Ma Than Than* v. *Ma Pwa Thit* (1). I think however that the District Judge has given sound reasons for disregarding the findings of the learned Trial Judge who had completely failed to discuss the various improbabilities in the story of

(1) (1923) I Rangoon, 451.

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the appellant. Moreover the remarks of the Privy Council in the case so referred to had reference to a witness who had been examined at very great length and had been severely cross-examined by an able Advocate and whose credibility had been specially commented on, discussed and accepted by the Honourable Judge who had tried the case. In my opinion these remarks should be read with reference to such special aspects of that case and should not be treated as having a too general application.

In the case now before me I agree with the learned District Judge in regarding the story of the appellants as very improbable and as one shown to be incredible by the actions of the appellant. A claim to recover on an agreement which is not produced and is alleged to have been fraudulently detained by an opponent is always one which should be regarded with extreme suspicion and closely examined in every aspect before it is accepted. In the present case the appellants were bound to allege that the missing agreement was written by the writer of the original deed which was executed on the date of the alleged agreement and is now alleged to have been the occasion for such agreement; but such writer denies all recollection of any such agreement and no satisfactory reason has been shown why he should forget it or be in collusion with the respondent. It is admitted that the agreement was not prepared at the same time as the original sale deed, and it is alleged that the agreement was drafted subsequently to the drafting of the sale deed on the same morning at the Court House and not at the house where the deed was prepared, which facts would indicate that the proposal to have such agreement was an afterthought if it was made at all.

The sale deed shows that a Madrasee witness attested the original deed, but it is not alleged that any Madrasee witness attested the missing agreement though one would expect to find the same attesting witnesses to both documents.

Then it is extremely improbable that the appallents would be so extremely foolish and stupid as to hand over such agreement to the defendant, the person who had executed it. Moreover both parties would necessarily have realized the absurdity of handing over such agreement as a security when obviously it could be of no value at all expect to the intended purchaser and would not be security for anything. Then the evidence as to the alleged conversations as to explanation for not returning the agreement to the appellant is not at all convincing. Muthiya is described as being then willing to promise to allow re-purchase on the same terms as in the agreement, but he was not asked to execute a new agreement, which would have been the sensible manner of renewing the agreement. He is described as informing the appellant that he had torn up the agreement but the appellant also omitted to take any of the other steps which any ordinary man would take on receiving such a communication. He did not report the fact to any Headman or to the Police and he remained content with a mere oral assurance from a man whose action as described would indicate an intention to chew him.

Then the appellant waits for more than another year before claiming a re-purchase or instituting any suit. When he first comes forward to assert his claim, the value of the land had admittedly increased to such an extent as would constitute a strong motive for a false claim. It is admitted that the value was previously only Rs. 50 per acre and that

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it had then increased to Rs. 200 per acre. It is obvious that such an increase in value would excite cupidity and constitute a strong motive for a false claim to recover the land. Finally it is admitted that the agent who instituted and conducted the suit for the appellants had in fact purchased half the land on the terms that he would finance the suit.

All these points raise the gravest suspicion against the case of the appellants. These points were ignored by the learned Trial Judge and I agree with the conclusion come to by the learned District Judge that the case of the appellants cannot be treated as proved by the evidence now before the Court. I have carefully perused all that evidence and I do not find it convincing. For these reasons, I see no ground to interfere and I dismiss this second appeal with costs.

FULL BENCH.

Before Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice Lentaigne, and Mr. Justice Cunliffe.

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Dec. 22.

MAUNG SHWE MYAT

v.

MAUNG PO SIN AND ONE.*

Promissory-note, Suit on—Alternative cause of action on the original consideration, not pleaded—Defence, a denial of execution of the note but admission of receipt of the original consideration—Whether plaintiff can succeed on original cause of action.

An amendment of pleadings can be allowed at any stage of the proceedings, where the sole result of a refusal would be to force the plaintiff to another suit, to avoid which is one of the principal objects of the much wider rule as to amendment which has been introduced in the present Code of Civil Procedure.

The plaintiff filed a suit on a promissory-note the execution of which he failed to prove. The defendant, whilst denying execution of the note, admitted receipt of the original consideration. No alternative cause of action on the original cause of action was pleaded in the plaint.

Held, that plaint could be amended at any stage of the proceedings by the addition of an alternative plea and that the plaintiff be given a decree on the original consideration after the necessary amendment of his plaint.

Maung Kyi v. Ma Ma Gale, 10 L.B.R. 54—*referred to.*

The plaintiff sued the two defendants for Rs. 174-9-6 on a promissory-note alleged to be executed by them. The first defendant denied the execution as well as the loan; but the second defendant, while denying execution, admitted that he took a loan of Rs. 100. The Trial Court (Township Court of Henzada) held that execution was proved and gave a decree in favour of the plaintiff. The defendants appealed and the District Court of Henzada held execution not proved and dismssed the plaintiff's suit.

* Civil Reference No. 33 of 1924 arising from Civil Revision No. 106 of 1924

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The plaintiff then applied to the High Court in its Revisional Jurisdiction on the ground, *inter alia*, "That the learned District Judge had failed to exercise the jurisdiction vested in him by not giving a decree against second Respondent who had admitted the loan of Rs. 100 though he had denied the execution of the document in suit."

On the matter coming up for hearing before Young, J., the learned Judge made the following order of reference:—

"The only question in this appeal is whether when a plaintiff sues on a promissory-note simply and solely without adding an alternative cause of action based on the original loan, he should be allowed to succeed on such original cause of action.

"In the Full Bench case of *Maung Kyi* v. *Ma Ma Gale*, 10 L.B.R. 54, the following question was referred to the full Bench, 'Where money is lent and at the same time a promissory-note is given therefor, can the creditor sue for the money due as on the original contract of loan, if the promissory-note cannot be proved?'

"The question was answered by the majority of the Full Bench in the affirmative, but the case referred does not seem to touch the present question, though the suit on which the reference was made seems as here to have been on a promissory-note purely and simply. The question referred was merely whether the creditor could *sue* for the money as due on the original contract of loan, and did not take into consideration the question whether he could *sue* on the original cause of action without having pleaded it. The cases in India are at variance on the point. But in *Baij Nath Das* v. *Saligram*, 16 I.C., 33, the latest I can find, it was held that where a promissory-note which is inadmissible in evidence is taken for

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a pre-existing debt, the creditor may recover the debt. The action will be for money had and received and the suit brought on the promissory-note will be treated as suit for money had and received provided that the pleadings are properly framed for that purpose.

" I agree with this ruling and as the question referred to the Full Bench in *Maung Kyi* v. *Ma Ma Gale* does not seem to me to raise the point, I refer the following question to a Bench, Full or otherwise, as the Chief Justice may direct, 'Whether where a plaintiff *sues* on a promissory-note simply and solely without adding an alternative cause of action based on the original loan, he should be allowed to succeed on such original cause of action."

The matter came up for hearing before a Full Bench composed of Robinson, C.J., Lentaigne and Cunliffe, JJ., with the result reported below.

Ba Thein (1)—for the Applicant.

R. M. Sen—for the Respondent.

ROBINSON, C.J.—The question referred to the Full Bench is whether, where a plaintiff sues on a promissory-note simply and solely without adding an alternative cause of action based on the original loan, he should be allowed to succeed on such original cause of action.

In *Maung Kyi* v. *Ma Ma Gale* (1) it was held that, where money is lent and at the same time a promissory-note is given therefor, the creditor is not debarred from suing for the money lent as on the original contract of loan, if the promissory note cannot be proved.

In the present case there was no prayer for a decree based on the original loan; but the matter

(1) (1919-20) 10 L.B.R., p. 54.

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appears to us to be covered by the previous Full Bench ruling for an amendment of the pleadings can be allowed at any stage of the proceedings and could have been allowed in this case. After amendment, the case will be covered by the previous Full Bench decision. Amendment could clearly be allowed in a case where the original loan is admitted and where the sole result of refusing it would be to force plaintiff to another suit, to avoid which is one of the principal objects of the much wider rule as to amendment which has now been introduced.

I would answer the question referred by saying that he should be so allowed after the necessary amendments have been made.

LENTAIGNE, J.—I concur.

CUNLIFFE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne.

M.V.A.L. VISWANATHAN CHETTYAR
v.
ABDUL MAJID.*

1925
Jan 19.

Arrest of Judgment-debtor, Application for, made before adjudication—Production of an order of adjudication without Protection Order before Executing Court—The Executing Court to take security for appearance—Presidency-Towns Insolvency Act (V of 1909), section 18 (1)—Civil Procedure Code (V of 1908), section 55.

When a judgment-debtor, on being arrested in execution of a decree, produces an Adjudication Order obtained subsequently to the institution of the execution proceedings and it is shown that he has not up to the date of his arrest obtained any Protection Order, it is the duty of the Executing Court to comply with the provision of section 55 of the Civil Procedure Code and to require the judgment-debtor to give security that he will appear, when called upon, in any proceeding in insolvency or upon the decree in execution of which he was arrested.

Thakurdeen v. J. Dubey, 12 B.L.T., 218—distinguished.

Banerjee—for the Appellant.

S. M. Bose—for the Respondent.

LENTAIGNE, J.—This in an application for the revision of an order passed by the Third Judge of the Court of Small Causes, Rangoon, releasing a judgment-debtor on his producing an order adjudicating him an Insolvent under the Presidency-Towns Insolvency Act, 1909. The petitioner obtained a decree for Rs. 1,720 and Rs. 188-9-0 costs in the Court of Small Causes, Rangoon, against the respondent on the 18th February 1924. On the 29th February 1924 the petitioner applied to execute the decree by the arrest of the judgment-debtor, but that proceeding was infructuous and was eventually dismissed. On the 25th June 1924 the petitioner again applied to the Court to

* Civil Revision No. 211 of 1924 against the order of the Small Cause Court of Rangoon in Civil Execution No. 5212 of 1924.

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execute that decree by the arrest and detention in prison of the judgment-debtor; and an order was passed directing the issue of notice to the judgment-debtor. On the 29th July 1924 notice of that application was served on the Respondent judgment-debtor requiring him to appear and show cause on the 31st July 1924. On the 31st July 1924 the respondent failed to appear and an order was passed by the Third Judge of the Court granting the application for his arrest. On the 4th August 1924 the warrant fee of Rs. 2 was deposited in the Court and the warrant was issued; but the judgment-debtor was not arrested thereunder until the 11th August 1924. On that date he was arrested and brought before the Court, and the record states that he then produced an Adjudication Order passed by this Court in Insolvency Case No. 179 of 1924 and dated the 2nd August 1924. On the same day the 11th August 1924 the learned Third Judge heard arguments and held that he was bound to release the judgment-debtor under the provisions of section 17 of the Presidency-Towns Insolvency Act, 1909, placing reliance on the decision in ***Thakurdeen* v. *J. Dubay*** (1), a decision reported in an unofficial report.

The present application is for the revision of that order. It is clear that the learned Third Judge has misunderstood the effect of the decision cited by him and has overlooked the fact the decision in question expressly pointed out that *after* the Adjudication Order such a proceeding (for the arrest of the judgment-debtor) *cannot be commenced* against the insolvent without the leave of the Insolvency Court. A perusal of the section in question will also show that there is no provision in that section expressly prohibiting the continuance or completion of a proceeding *commenced before* the adjudication order, except in so

(1) (1919) 12 B.L.T., 218.

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far as it may involve an application for a remedy against the *property* of the Insolvent. In the case now before me the application for the arrest of the judgment-debtor and the order for his arrest had been passed by the Court prior to the Adjudication Order, and it is admitted that the Insolvent had not obtained any Protection Order up to the date of his release.

If the judgment-debtor had not produced the Adjudication Order and the Court had been unaware of any such order, it would have been the duty of the Court to comply with the provisions of sub-sections (3) and (4) of section 55 of the Code of Civil Procedure and to give the judgment-debtor an opportunity to furnish security to the satisfaction of the Court, *firstly*, that he would within one month apply to be declared an Insolvent, *and secondly that he would appear when called upon* in any proceeding upon the application or upon the decree in the execution of which he was arrested. When the judgment-debtor produced the Adjudicating Order, there was no necessity to require him to furnish security under both heads, because there was no longer any reason why he should be bound to apply to be declared an Insolvent; but it is obvious that the adjudicating order did not fulfil the object contemplated by the second point on which such security would be required. Consequently, it was in my opinion the duty of the learned Judge to require the judgment-debtor to give security that he would appear, when called upon, in any proceeding or upon the decree in the execution of which he was arrested. A little consideration of the question will show that the object of this second requirement is to compel the Insolvent, when he has obtained an Adjudicating Order, to be also reasonably diligent in proceeding with his Insolvency in a *bona fide* manner. In the

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event of his failing to do so or otherwise displaying bad faith, it would always be open to the Insolvency Court to grant leave for his arrest and if the Insolvent failed to appear in the Execution Court when so required, it would then be open to that Court to enforce the security bond against the sureties, etc., and recover the full amount of the bond for the benefit of the decree-holder.

The failure of the learned Judge to realize this important aspect of the question has, in effect, possibly given the judgment-debtor the opportunity of escaping a subsequent liability to arrest by a sham Insolvency proceeding if he has made his application for Insolvency solely for that purpose.

I think, therefore, that the learned Judge should, instead of at once releasing the judgment-debtor, have adopted the different procedure permitted under sub-section (3) of section 18 of the Presidency-Towns Insolvency Act, 1909, read with section 55 of the Civil Procedure Code, and given the judgment-debtor the opportunity of giving the modified security which I have indicated above. In my opinion the order which he passed deprived the decree-holder of an important advantage to which he was entitled and should be set aside, and the requirement should now be enforced unless some special reason has arisen in the interval barring that procedure or rendering it unfair. At the same time I realize the possibility that the judgment-debtor may in the interval have been diligent and obtained his protection order, and that having regard to the long interval of five months that has elapsed, there may now be a bar against an order being passed for his arrest. Consequently, whilst setting aside the above order I must refrain from passing any order for the arrest of the judgment-debtor, and my main object in passing the above

order is to lay down a rule for the guidance of the lower Court in future cases.

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I may here point out that the above remarks would not be applicable to this case if the proceeding for the arrest of the judgment-debtor had been *commenced* subsequently to the Adjudication Order, because in that case the bar under section 17 of the Presidency-Towns Insolvency Act, 1909, would have arisen and it would no longer have been open to the Execution Court to order the arrest of the judgment-debtor without the leave of the Insolvency Court. Likewise if the Insolvent had obtained his Protection Order from the Insolvency Court before his arrest even in a case where the proceeding had commenced prior to the Adjudication Order, it would have been equally illegal for the Execution Court to order his arrest or compel the execution of such a security bond in that manner as regards any debt covered by such Protection Order. In either of such cases the decree-holder would have lost the opportunity of obtaining the advantage of such a security bond ; but the extra diligence shown by the Insolvent would, to some extent, have indicated the probability that he was *bona fide* and that it was not a case requiring such a safeguard.

I may here note that the decree-holder had an alternative means of seeking redress against the order in question. It was open to him under section 17 of the Presidency-Towns Insolvency Act, 1909, to apply to the Judge exercising the Insolvency Jurisdiction for the leave of the Court to arrest the judgment-debtor, and that Court might have granted such leave if the decree-holder had pointed out the mistake that had been made by the Court executing the decree and the special hardship to the decree-holder entailed by the failure to require the judgment-debtor to give

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the necessary security as a condition of the order of release. It is still open to the decree-holder to make such an application to the Insolvency Court; and I think that such an application should be made by him, if he intends to seek any further redress by an application for the arrest of the judgment-debtor. The Insolvency Court will have full knowledge of the events that have happened in the Insolvency Proceedings during the five months which have elapsed since the Adjudication Order and whether it is a proper case for granting such leave and the conditions to be imposed; and I think it is the scheme of the Insolvency Act that such control should be exercised by that Court, more especially as a fresh application for the arrest of the insolvent might appear to come within the bar under section 17 of the Act. On obtaining such leave, it would be open to the decree-holder to make a fresh application to the Court executing his decree.

For the above reasons I set aside the order of the lower Court dated the 11th August 1924, but I do not order the re-arrest of the judgment-debtor. As the respondent is an insolvent, I do not make any order as to costs.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., and Mr. Justice Maung Gyi.

1925
Jan. 26.

U WATHAWA
v.
MAUNG PO HTI AND SEVEN.*

Buddhist Ecclesiastical Law—Poggalika gift of kyaung entitles the donee to sue for its possession—Sanghika gift—Presiding monk can be ousted only by the body of the Sangha.

Where a *kyaung* was dedicated to the plaintiff as his *poggalika* property and had been in his continuous possession for a long term of years, *held* that on being ousted the plaintiff was entitled to recover its possession.

Obiter: Even if the *kyaung* were *Sanghika* property, the plaintiff, having been all along the presiding *Pongyi*, could recover possession and could only be ousted by the body of the *Sangha*.

Maung Lat— for the Appellant.

Lambert, Jr.—for the Respondent.

MAUNG GYI, J.—The appellant sued for the recovery of possession of a *kyaung* and land in Yanthitshe Village which he claims as his *poggalika* property. He belongs to the *Dwara* sect which is much stricter and more orthodox than the *Kan* sect of Burman Buddhists.

He alleges that this land and monasery were dedicated to him some thirty years ago and that he has since been in continuous possession and control until his title was denied by the defendants. During the Buddhist Lent of the Burmese years 1281, 1282, 1283 and 1284, he resided at other *kyaungs* leaving a *locum tenens* in the *kyaung* in dispute. This season of lent or *Wazo* which lasts for three months is a time when all pious Buddhists fast and observe special precepts on the usual sabbath days. It is necessary on these days for a *pongyi* to be present to give, *i.e.*

* Civil First Appeal No. 152 of 1923 against the dercree of the District Court of Kyaukpyu in Civil Regular No. 2 of 1923.

to repeat the precepts to be observed, to deliver a sermon and to receive offerings from the laity and repeat the prayer or pious wishes of the donors of gifts, while the *yesetcha* ceremony or pouring out the water of libation is performed by them.

In 1283 B.E., while appellant resided temporarily in the Ramree North Monastery, he was accused of improper conduct with a poor girl named Shwe Tha Mra. This charge falls under one of the four *parajika* offences of the *Vinaya* the commission of which results, *ipso facto*, in the falling off from the status of a *Pongyi* or *Rahan* with no chance whatever in this existence of being re-ordained as a *Rahan*.

From the evidence it appears that an enquiry was held by the *Sangha*, and appellant exonerated. But the mere fact of being charged with so grave an offence had cut deep into appellant's soul and, although exonerated, he was too self-conscious to face his supporters and his little world in Yanthitshe village. He however returned to his *kyaung* at times. In 1284 B.E. he was invited by the people of Kabaingchaung to preside at a *Shinpyu* or novitiate ceremony and he continued to remain there. Just before lent the first respondent who is the headman of the village, and the other lay respondents requested appellant by letter to return and spend the lent in his *kyaung* in order to quiet the disputes between the two factions in the village and promote harmony and peace again. They said they felt helpless without a spiritual guide during that season, that his *locum tenens* had left and that if he failed to return they would appoint another *pongyi* to be the head and ruler of the suit kyaung. Once a *pongyi* takes up his residence at the beginning of lent in any place, he is prohibited by the rules of the *Vinaya*, from

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migrating during the three months, except for most vital reasons. Appellant probably thinking that sufficient time had not yet elapsed for the breath of scandal to be dissipated entirely, excused himself from returning to his *kyaung* on the plea that as cholera had broken out where he was staying it would not be well for him to return from an infected area. The lay respondents thereupon put the eighth respondent in possession of the *kyaung* and all the respondents refused to give up possession on demand by the appellant.

Although the lower Court framed three issues the last of which questioned whether appellant had still the status of a *pongyi*, it did not come to any definite finding on them.

It appears to me that the learned District Judge being a pious and orthodox Burman Buddhist was so horrified at the idea of any *pongyi* being charged with the offence above referred to, regardless of the Burmese Buddhist Ecclesiastical Law and the rules of evidence, dismissed appellant's suit.

The land on which the *kyaung* stands was granted in 1912 by the Government for the purpose of erecting a *thein* and nothing else. Government has the right to resume it on breach of that condition. The *kyaung* however had been built on the land and occupied long before the date of the grant. In any case Government alone had the right to resume the land and not the respondents.

There is evidence that the *kyaung* was dedicated to the appellant as his *poggalika* property and appellant had been in continuous possession for a long term of years.

It is contended that the land and *kyaung* were *sanghika* property. Even then as appellant had all along been the presiding *pongyi* he was entitled to

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recover possession and can be ousted only by the body of the *Sangha*.

But there is evidence to hold that the *kyaung* is appellant's *poggalika* property and he is entitled to recover possession.

The appeal is accepted and the judgment and decree of the lower Court are set aside. There will be a decree as prayed for by appellant with costs throughout.

ROBINSON, C.J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

1925

Jan. 29.

KIN FOO *alias* WHEE FONG

v.

WHEE SEIK CHENG.*

Receiver, Interlocutory appointment of—Court's jurisdiction to entertain the suit challenged—Receiver pendente lite could be appointed by the Court, without coming to a finding on jurisdiction.

The plaintiff instituted a suit in the High Court praying for dissolution of a partnership, the partnership contract having been made in Rangoon but the partnership prope ty being a pawnshop situated at Thônze—a place outside the original jurisdiction of the High Court. On an interlocutory application, the plaintiff applied for the appointment *pendente lite* of a receiver of the partnership property.

In his written statement the defendant urged that the Court had no jurisdiction in the suit and on the interlocutory application also he pleaded that the Court had no jurisdiction to appoint a receiver.

Held that, the Court has seisin of the suit and its subject matter till it gives its decision on the question of jurisdiction and that therefore it must of necessity have jurisdiction to pass the the necessary interlocutory orders and therefore to appoint a receiver *pendente lite* under proper circumstances.

Kink v. *Buldeo Dass*, 26 Cal., 715 ; *The Delhi and London Bank* v *Wordie* 1 Cal., 249—*referred to.*

Woodroffe on Receivers, 2nd Edition—*referred to.*

Villa—for the Appellcant.

Jeejeebhoy—for the Respondent.

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* Civil Miscellaneous Appeal No. 97 of 1924 against the order of this Cour on the Original Side in Civil Regular No. 70 of 1924.

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KIN FOO *alias* WHEE FONG *v.* WHEE SEIK CHENG.

HEALD AND CHARI, JJ.—This is an appeal against the order of Mr. Justice Beasley, the Original Side Judge, appointing a Receiver. The suit is one for dissolution of partnership and the partnership property is a pawnshop at Thônzè—outside the original jurisdiction of the High Court. In the plaint the appointment of a receiver is claimed as one of the reliefs, but the order appealed against is in respect of the appointment of Receiver *pendente lite* on an interlocutory application. A partnership suit is not only an action in which the appointment of a receiver is usually claimed in the plaint itself, but is also one in which it is desirable, and even necessary in most cases, to appoint a receiver to preserve the property in dispute during the pendency of the suit and to prevent the partner in possession of the partnership property from taking undue advantage of this position as against his co-partners who in the eye of the law are equally with him the owners of the property. On a consideration of the facts alleged in the affidavits, we are clearly of opinion that the appellant has no case on the merits and that the order of the learned Judge was a proper one.

It has been strongly urged before us that the Court has no jurisdiction in the suit and therefore no jurisdiction to appoint a receiver. This argument was also advanced in the Trial Court. The learned Judge did not think it necessary to decide the question of jurisdiction for the purpose of dealing with the application before him. He thought it ought to be tried as a preliminary issue. He was of opinion that the allegations in the affidavit, that the contract of partnership was made in Rangoon, *primâ facie* gave the Court jurisdiction to entertain the suit. There was in his opinion enough material on the record for the Court to assume jurisdication and that

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there was no necessity to decide the question of jurisdiction at that stage. In these circumstances the proper course for the defendant-appellant to take was to get the hearing of the suit on the Original Side expedited. Instead of doing this he comes up in appeal and has thus delayed by six months the decision of the question of jurisdiction on which he relies.

The Counsel for the appellant argues that the want of jurisdiction is patent on the face of the plaint. It is, however, not so. The plaint is vague and does not mention a single fact showing when and where the cause of action arose. The affidavit except for the statement that the capital was paid in Rangoon, is no better. It is however open to the plaintiff to establish, by evidence at the trial, facts which will give the Court jurisdiction. If authority were needed for this obvious proposition, it is to be found in the case of *Kink* v. *Buldeo Dass* (1). Where the allegations in the plaint disclose a want of jurisdiction, the Court ought to return the plaint for presentation to the proper Court. The Trial Court has not done so when the plaint was presented so that the defect in jurisdiction cannot be so patent as the learned counsel alleges it is.

Reliance is placed, in support of the appellant's argument, on a passage in Woodroffe's on Receivers which occurs at page 24 of the 2nd Edition, "So where there is no jurisdiction to entertain a suit on the ground that it is one for immoveable property situated without the local limits of the jurisdiction, the Court will have no power to grant provisonal relief by way of the appointment of a receiver to take charge of the subject-matter of dispute in such suit." This passage does lend some support to the

(1) (1899) I.L.R. 26 Cal. 715.

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appellant's contention and would seem to imply that even in cases where a receiver *pendente lite* is applied for, the Court must before granting the application come to a finding that it has jurisdiction to entertain the suit. If, however, the passage is considered, not detached from the context, but with what goes before and comes after and if the case of the *Delhi and London Bank* v. *Wordie* (2) which is cited as the authority for the passage is studied, it will be seen that the learned author's statement lends no support to the appellant's contention. The learned author was developing the theme that the appointment of a receiver is an Equitable Relief and Equity acts *in personam*. He then proceeds to consider how far the principle is applicable to the Courts in this country and draws attention to the limitations imposed on these Court by the Letters Patent and the Civil Procedure Code. He then cites the Calcutta case to show that even where there was personal jurisdiction, the Court refused to appoint a receiver when the Court had no jurisdiction over the subject-matter of the suit. A study of the ruling cited shows that the learned auther is either making a mistake in the use of the word "provisional," or is using it in the sense of "ancillary". The main relief claimed in that case was the carrying out of certain trusts and a receiver was prayed for in order to carry out those trusts. The Court having no jurisdiction over the subject-matter in respect of which the main relief was claimed had necessarily no jurisdiction to grant the "ancillary" relief. That this is all the learned author meant is made clear by the passage which immediately follows the one relied upon.

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(2) (1875) I.L.R., 1 Cal., 249.

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KIN FOO *alias* WHEE FONG *v.* WHEE SEIK CHENG.

HEALD AND CHARI, JJ.

Considering the matter now before us on principle, we reach a decision adverse to the appellant. When a plaint is presented and it is not rejected or returned for any of the reasons mentioned in the Civil Procedure Code, but is admitted, the Court has assumed jurisdiction, and has therefore seizin of the suit and the subject-matter thereof. This jurisdiction is assumed on the allegations in the plaint. The Court does not at that stage consider whether the facts do exist as a alleged, but whether they are alleged to exist. The Court may, in the case of ambiguous plaints, even make a mistake in thinking that certain facts are alleged, whereas they are not. The defendant may challenge the jurisdiction of the Court, but that challenge does not affect the action already taken and the Court has seizin of the suit and its subject-matter till it gives is decision on the question of jurisdiction. As it is sometimes put, when the jurisdiction of the Court is challenged, it has jurisdiction to decide whether it has jurisdiction or not. From this it follows that if the Court has seizin of the suit, it must of necessity have jurisdiction to pass the necessary interlocutory orders, *e.g.*, the appointment of a receiver *pendente lite* to take charge of the partnership properties in a partnership suit.

In the present c-se objection was taken by the defendant in his written statement, to the jurisdiction of the Court. After this objection, the plaintiff filed his application for the appointment of an interim receiver. At the hearing of the application the defendant pressed his objection to jurisdiction. The learned Judge refused to consider the question of jurisdiction at that stage. It was not necessary for him to come to a finding on that point to enable him to dispose of the application which was then being heard by him. We cannot therefore say that

he was wrong in postponing the consideration of the point of jurisdiction and we certainly cannot as a Court of Appeal interfere with his exercise of discretion. If we were to accede to the appellant's argument and consider the objection to jurisdiction ourselves, we would be usurping the function of the Trial Court and we would be deciding a point which the Trial Court had jurisdiction to decide and which it had purposely left undecided.

For these reasons we dismiss the appeal with costs. Advocate's fee—three gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

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Jan. 2

MAUNG HMÈ

v.

U PO SEIK AND TWO OTHERS.*

Insolvency—Annulment of Adjudication—Provincial Insolvency Act (V of 1920) section 37 (1), 53—Effect of such annulment on prior application by Receiver to avoid transfers.

When an adjudication order is annulled without making any appointment as to the Insolvent's property and without imposing any conditions, the estate with its liabilities reverts to the Insolvent and thereupon the Receiver of his property appointed on the adjudication ceases to represent the Insolvent or his creditors, and since the Receiver no longer represents the creditors, he cannot on their behalf claim the benefit of the provisions of section 53 of the Provincial Insolvency Act.

On the debtor's own petition under the Provincial Insolvency Act, he was adjudged insolvent and the Court appointed a Receiver of his property. The Receiver then made applications under the provisions of section 53 to avoid transfers made by the Insolvent in favour of certain persons. Subsequently and before the final disposal of the applications made by the Receiver, the order of adjudication was upon a creditor's application and with the consent of the Insolvent annulled, the Court making no appointment as the insolvent's Property and imposing no conditions.

Held that the Receiver had no power to prosecute his applications under section 53 after the adjudication has been annulled and that the application in question should therefore have been dismissed.

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* Civil Miscellaneous Appeal No. 55 of 1923 from the order of the District Court of Tharrawaddy in Civil Miscellaneous Case No. 12 of 1923.

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Rajkishto Singh v. Shaik Safatoola, 17 W.R., 85—*referred to.*
Mannu Lal v. Nelin Kumar Mukerji, 41 All., 200—*distinguished.*

Halkar—for the Appellant.

HEALD AND CHARI, JJ.—In Civil Miscellaneous Case No. 46 of 1922 of the District Court of Tharrawaddy, one Shwe Mya filed his petition under the Provincial Insolvency Act and on the 17th of July 1922 he was adjudicated insolvent, the present appellant, who is the Bailiff of the Court, being appointed Receiver.

In Civil Miscellaneous Case No. 11 of 1923 one of the creditors applied for the annulment of the adjudication order.

In Civil Miscellaneous Case No. 12 of 1923, which was instituted on the same date as No. 11 appellant, as Receiver, applied to the Court to avoid certain transfers under section 53 of the Act.

On the 7th of February 1923 the adjudication order was annulled, the insolvent consenting to the annulment.

Under section 37 (1) of the Act the effect of an annulment is to vest the property of the insolvent in such person as the Court may appoint or in default of such appointment to re-vest it in the debter on such conditions as the Court may impose.

No appointment was made by the Court and no conditions were imposed, so that it would seem that the property reverted to the insolvent unconditionally, and that appellant, as Receiver, no longer represented the insolvent except to the extent that all acts theretofore done by him as Receiver were valid.

The questions arose as to whether or not appellant as Receiver was entitled, after the adjudication order was annulled, to prosecute the proceedings to avoid transfers under section 53 of the Act, which he had instituted while the order was in force.

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The Court, in an order dated the 9th of March 1923, decided that he was entitled to prosecute the proceedings, but in its final order, dated the 4th June 1923, refused to avoid the transfers so far as the present respondents were concerned.

Appellant, still as Receiver, appeals against that refusal.

On or about the 1st of February 1924 one of the respondents Po Seik died and on the 26th of June appellant applied to bring his heirs and legal representatives on the record. His application was time-barred under Article 177 of the Limitation Act, and the appeal abated so far as Po Seik was concerned.

The second and third respondents Tun Pe and Ma Thin, who are alleged to be subsequent transferees of the property from Po Seik, have not appeared to contest the appeal. The District Court held that the transfer by the debtor to Po Seik was made in good faith and for valuable consideration and therefore could not be avoided under section 53 of the Act.

Two preliminary questions of law arise in the appeal, namely whether appellant as Receiver was entitled to prosecute the proceedings under section 53 of the Act after the adjudication order was annulled, and if he was so entitled, whether the abatement of the appeal as against Po Seik involves its abatement as against the two surviving respondents also. There is a further difficulty that if it is held that appellant was not entitled to prosecute the proceedings, the lower Court's order as against Maung Kan Gyi and Maung Po Saw, who have not appealed against that order will apparently have to be set aside.

It is clear that the case of *Mannu Lal* v. *Nalin Kumar Mukerji* (1) cited by the lower Court as

(1) (1918) 41 All., 200.

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authority for the proposition that appellant as Receiver was entitled to prosecute the proceedings under section 53 after the adjudication order had been set aside, was no authority for that proposition. In that case it was held that a suit instituted by the Receiver between the making of an adjudication order and its annulment against the insolvent's debtors with the object of ascertaining the *factum* and extent of their indebtedness could be continued by the Receivers after the adjudication order had been annulled. The reasons given for this decision were that the suit could have been continued after the annulment in the name of the person whose adjudication had been annulled if not by the Receivers themselves, that that person had raised no objection to the continuance of the suit by the Receivers and that no injustice could be done to the debtors by the case being heard out on the merits. That reasoning may or may not have been legally sound, but whether it was sound or not it is clear that that case was entirely different from that with which we are dealing. In that case the cause of action was entirely independent of the insolvency proceedings and the only effect of those proceedings was that the Receiver stood in the insolvent's place as plaintiff. If after the annulment the "late insolvent" himself ought to have taken the place of the Receivers as plaintiff, the irregularity was purely formal. In this case the application made by the Receiver is based entirely on the special provisions of section 53 of the Insolvency Act and the insolvent could not have made the application himself. So far as that particular application was concerned, the Receiver represents the insolvent's creditors rather than the insolvent. when the adjudication order was annulled and the estate with its liabilities reverted to the

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insolvent, the Receiver in our view no longer represented either the insolvent or the creditors, and since he no longer represented the creditors, he could no longer claim on their behalf the benefit of the provisions of section 53. We do not wish to suggest that in all cases where an adjudication order is annulled the Receiver is *ipso facto* relieved of all future duties, but we are of opinion that where as in this case the estate is allowed to revert to the insolvent unconditionally, it cannot have been the intention of the Act that the Receiver should continue to act as if he still represented the estate and to prosecute for the insolvent's benefit applications which the insolvent himself could not prosecute and which are based on an adjudication which has ceased to exist. The case of *Rajkishto Singh* v. *Shaik Safatoola* (2) seems to support this view.

We therefore feel bound to hold that in this case appellant as Receiver had no power to prosecute the application under section 53 after the adjudication had been annulled and to hold that appellant's application should have been entirely dismissed

We accordingly dismiss the appeal so far as the respondents Tun Pe and Ma Thin are concerned, and we also set aside the Lower Court's order as against Kan Gyi and Po Saw.

As Kan Gyi and Po Saw did not appeal we see no reason to award them costs as against the Receiver, but we set aside the order for costs in favour of the Receiver. The result is that all parties will pay their own costs.

(2) (1872) 17 W.R., 85.

APPELLATE CIVIL.

Before Mr. Justice Carr and Justice Brown.

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Jan. 30.

MA THEIN MAY

v.

U PO KIN.*

Limitation Act (IX of 1908) section 10, Article 120—Indian Trusts Act (II of 1882), sections 3 and 7 and Chapter IX—What amounts to vesting in trust—Minor's property, taking charge and managing of—Constructive trust.

The plaintiff while a minor inherited certain property which the defendant her father, took charge of and managed for her. Over six years after she had attained her majority she instituted her present suit for the recovery of money which she alleged the defendant had received on her account during her, minority, but for which he had never accounted. The trial court held that the suit was time-barred under Article 120 of the Limitation Act. On appeal it was urged that the case was that of an express trust and that therefore the Provisions of section 10 of the Limitation Act applied.

Held, that as a minor cannot create a trust, the position was that the defendant, as the plaintiff's father, had taken charge of her property and managed it for her and that therefore there was in fact no trust in the case.

Held also, that as the Indian Trust Act in Chapter IX treats constructive trusts not as trusts but as "obligations in the nature of trusts" and that as the defendant was not a trustee but by his acts had only incurred obligations similar to those of a trustee, the provisions of section 10 of the Limitation Act would not apply.

Kathiawar Trading Company v. *Virchand Dipchand*, 18 Bom., 119; *Rajah Rajeswara Dorai* v. *S. Ponnaswami Thevar*, 40 M.L.J., 52; *Sher Ali Khan* v. *Khwaja Muhammad Khan*, (1891) P.R. 94; *The Secretary of State for India* v. *Guru Proshad Dhur*, 20 Cal., 51—*followed.*

Narrondas Ramji v. *Narrondas Ramji*, 31 Bom., 418—*dissented from.*
Bhurabhai Jammadas v. *Bai Ruxmani*, 32 Bom., 394—*distinguished.*

Aiyangar—for Appellant.
Clarke—for Respondent.

CARR, J.—The only question for decision at present in this case is whether the suit was barred by limitation, and this turns on the question whether section 10 of Limitation Act is applicable.

* Civil First Appeal No. 19 of 1924 against the judgment and decree of the District Court of Hanthawaddy passed in its Civil Regular Suit No. 19 of 1923.

The facts found by the learned District Judge are as follows. The plaintiff-appellant is the daughter of the defendant-respondent. After the death of her mother, the plaintiff, while a minor, inherited property from her maternal grandfather. This property the defendant took charge of. Later the plaintiff married and the immoveable property and certain moneys were made over to her. After this the plaintiff attained her majority on the 14th July 1917. She instituted this suit on the 9th August 1923. In it she claimed to recover moneys which she alleged that the defendant had received on her account prior to her marriage and for which he had not accounted. The District Judge found that in fact the defendant was liable to account to the plaintiff for over Rs. 15,000. But he held that section 10 of the Limitation Act did not apply to this case and that the suit was time-barred under Article 120 of the Schedule to that Act.

It had been alleged that the plaintiff had entrusted her property to the defendant and that there was for that reason an express trust. But it is clear, under section 7 of the Indian Trusts Act, that a minor cannot create a trust and therefore this contention must fail. The position therefore is that the defendant, as the father of the plaintiff, took charge of her property and managed it for her. (I should say that I adopt this as the position for the purposes of the present discussion and that it is not admitted that the defendant took charge of the property.)

The interpretation of section 10 of the Limitation Act is by no means easy. The section itself does not in terms refer to "express" trusts, but has a side-heading referring to such trusts. At first sight it would seem that the section itself is wide enough

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to cover constructive or implied trusts. But the important point for our present purposes seems to be the wording of the first part of the section—"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose. . . ." All the requirements of this clause seem to be fulfilled by a constructive or an implied trust just as well as by an express trust, except that it is difficult to conceive of a case in which any but an express trust would vest the property in the trustee. There may, however, be such cases. But for our present purposes it is not necessary to consider anything but the question whether in this case it can be held that the property vested in the defendant. In my view it clearly cannot be so held and I hold therefore that section 10 of the Act is not applicable.

Certain English decisions have been cited before us from which it would appear that the rule that limitation does not operate in express trusts has been extended to certain constructive trusts. I do not think that these cases help us. We have to deal with the law as laid down in the Indian Limitation Act and not with the English Law.

In the case of *Kathiawar Trading Company* v. *Virchand Dipchand* (1) a Bench of the Bombay High Court held that the directors of a company are *quasi*-trustees and are liable to repay moneys of the company misapplied by them. But it was held also that section 10 of the Limitation Act did not apply in such a case. And this decision was based on the fact that although the directors have control of the company's funds, those funds do not *vest* in the directors.

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(1) (1894) 18 Bom., 119.

Again in *The Secretary of State for India* v. *Guru Proshad Dhur* (2), a Full Bench of five judges of the Calcutta High Court held, with one dissentient, that where property had been sold under Act XI of 1859 and the sale proceeds were held by the Collector for the claimant, the money did not vest in the Collector and section 10 was not applicable.

A more recent case is *Raja Rajeswara Dorai* v. *S. Ponnuswami Thevar* (3). There was a trustee who had created a mortgage in favour of the defendant and it was said that this was "a transaction which may be taken to have been a breach of trust by the trustee, of which the defendant had notice." The trustee had made certain payments of interest on this mortgage and the plaintiff sued to recover the sum so paid. It was claimed that section 10 applied on the ground that the defendant held these sums in trust for the plaintiff. The Bench held that the money did not vest in the defendant and that section 10 did not apply.

The word "vest" implies that the property becomes, in law the property of the trustee. In these three cases this was not the case and in my view of the present case the property remained the minor's and did not vest in the defendant.

In *Sher Ali Khan* v. *Khwaja Muhammad Khan* (4), the defendant had been appointed guardian of the plaintiff, who later sued for an account. Thus the case was stronger than the one now before us. But it was held that section 10 did not apply, though no very definite reasons for this view were given.

On the other side we have been referred to *Narrondas Ramji* v. *Narrondas Ramji* (5) and to

(2) (1893) 20 Cal., 51.
(3) (1919) 40 M.L.J., 52.
(4) (1891) P.R., 84.
(5) (1907) 31 Bom., 418.

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Bhurabhai Jammadas v. *Bai Ruxmani* (6). In the latter case there clearly was an express trust. The former case seems to me unsound. The Judge held that there was an express trust in circumstances in which in my view there was no more than a constructive trust. And he did not consider at all the question of the vesting of the property or whether the case came within the terms of section 10. I prefer to follow the decisions already quoted rather than this.

Reference may also be made to the definition of a trust in section 3 of the Indian Trusts Act, II of 1882. "A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner." From this it is clear that in all trusts the trustee is the legal owner. And, as pointed out in the Madras case *supra* (3), this Act, in Chapter IX, treats constructive trusts not as trusts but as "obligations in the nature of trusts." There was in fact no trust in this case, but the defendant by his acts incurred obligations similar to those of trustee.

I would therefore dismiss this appeal with costs.

BROWN, J.—I concur.

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(6) (1908) 32 Bom., 394

APPELLATE CIVIL.

Before Mr. Justice Carr.

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Feb. 3.

AMINA BIBI
v.
K. M. MOIDEEN KAKA AND ONE.*

Administration of an estate—Suit for, not a suit for money—Passing an order under a rule not applicable thereto, an illegality—Revision—Civil Procedure Code, section 115 and Order XXV, rule 1.

A suit for the administration of an estate consisting largely of immoveable property is not a suit for the payment of money within the meaning of Order XXV, rule 1, clause 2, of the Code of Civil Procedure.

Held, that where a Court passes an order under a rule which does not apply it exercises its jurisdiction illegally and the case is therefore a proper one for interference in Revision.

Kya Gaing—for the Applicant.

K. C. Bose—for the Respondent.

CARR, J.—The petitioner is the plaintiff in Suit No. 59 of 1922 of the Subdivisional Court of Taikkyi. This is a suit for the administration of an estate alleged to consist largely of immoveable property. A preliminary decree was passed as long ago as Marhc 1923, and a Commissioner was appointed. In April 1924 the first defendant applied under Order XXV, rule 1, that the plaintiff should be required to furnish security for costs. This application was dismissed on the 22nd May. The Judge held that the suit was one for payment of money within the meaning of clause 2 of the rule, but was not satisfied that the plaintiff was not possessed of sufficient immoveable property in British India. On the 30th June the first defendant applied for review of this order.

* Civil Revision No. 231 of 1924 against the order of the Subdivisional Court of Taikkyi in Civil Regular No. 59 of 1922.

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AMINA BIBI v. K. M. MOIDEEN KAKA AND ONE.

CAMP, J.

This the judge has dealt with as a renewed application. On the 17th July another of the defendants filed an application under the same rule. On the 17th November these applications were allowed and the plaintiff was called upon to furnish security. She applies for revision of that order. The real question is whether the suit falls within the provisions of Order XXV, rule 1 (3). In my opinion it clearly does not. The authority cited by the Judge and some others which have been cited before me relate to cases of suits for specific moveable property or its value. The present case is very different. It is, as I said, a suit for administration of an estate consisting largely of immoveable property. It may ultimately be necessary to sell the estate and distribute the proceeds in money, but I do not think that that is sufficient to make it a suit for the payment of money. It is in fact a suit relating to immoveable property. In my view, therefore, the order was wrong.

It is objected that an application for revision does not lie since the Court had jurisdiction to pass the order. In my view the case comes under clause (*c*) of section 115 of the Code inasmuch as the Court has exercised its jurisdiction illegally by passing an order in a suit to which Order XXV, rule 1, does not apply. The case is otherwise a very proper one for interference in revision. The alternative would be to allow the suit to be dismissed under Order XXV, rule 2, after which the plaintiff would have to appeal but must inevitably succeed. The result would merely be further to protract proceedings which have already been pending far too long and to add very largely to the cost of the litigation. I consider also the Judge of the lower Court would have exercised a wiser discretion had he refused to pass such an

order at this stage of the suit. The rule allows the Court a discretion in the matter.

I allow the application and set aside the order of the Subdivisional Court. The respondents will pay the petitioner's costs of this application. Advocate's fee—five gold mohurs.

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AMINA BIBI v. K.M. MOIDEEN KAKA AND ONE.

CARR J.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

1925

Feb. 10.

SAW DURMAY

v.

BAGGAH SINGH AND OTHERS.*

Church, Suit for possession of—Plaintiff suing on behalf of himself and Karen Baptist Christians—Consent of the Advocate-General not obtained and no relief provided by section 92, Civil Procedure Code, claimed in the suit—Suit as framed not maintainable at the instance of one or more of the worshippers.

The plaintiff, on behalf of himself and the Karen Baptist Christians of Burma, filed a suit (1) for the possession of certain premises alleged to be a church and auxiliary buildings, erected by public subscription; (2) for accounts from the defendants who were in possession thereof for loss or damage to the property; and (3) for an injunction restraining the defendants from removing or demolishing any part of the building, etc., pending the hearing of the suit. The consent of the Government Advocate to the suit, as required by the provisions of section 92 of the Civil Procedure Code, was not obtained; and in the suit, as framed, none of the reliefs provided by section 92 were claimed.

Held, that in respect of properties which form part of a public trust, such as the present, a mere worshipper can have no right by way of a suit to obtain possession of the properties and he certainly has no right to sue for any of the reliefs mentioned in section 92 of the Civil Procedure Code except in the manner prescribed by that section and that therefore the present suit as framed was not maintainable.

Ashraf Ali v. *Mahomed Zamma*, 23 C.W.N., 115; *Budridas* v. *Chabilal*, 33 Cal., 789; *Cowasjee* v. *Bella*, 11 B.L.T., 249; *Dasondhay* v. *Mahomed*, 33 All., 660; *Jamaliya* v. *Akbar Hussain*, 7 All., 178; *Saligram* v. *Basant Mal*, 1 Lah. L.J., 150—*distinguished.*

Lambert—for the Appellants.

Foucar—for the Respondents.

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* Civil First Appeal No. 111 of 1924.

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SAW DURMAY v. BAGGAH SINGH AND OTHERS.

HEALD AND CHARI, JJ.

HEALD AND CHARI, JJ.—The plaintiff in this case Dr. Saw Durmay, on behalf of himself and the Karen Baptist Christians of Burma, filed a suit in the District Court of Pegu for the following reliefs (1) for the possession of certain premises ; (2) for accounts from the defendants for loss or damage to the trust property ; and (3) for injunction restraining the defendants from removing or demolishing any part of the building, etc., pending the hearing of the suit. The defendants are two persons who have purchased the premises in suit under the following circumstances. One Ko San Ye, a well-known Karen, obtained a lease from the Secretary of State on the 21st of September 1900 of a piece of land in Nyaunglebin. He is said to have acquired this land from the Government for the purpose of building a *parai*. The certified copy of the lease produced by the pl intiff does mention the fact that the land is to be used for no other purpose or use than that of a *parai* but in the original lease from the Secretary of State, Exhibit 4, no mention is made of this covenant. In the view we take of the decision of the Trial Judge, it is not necessary to consider this discrepancy to which we merely draw attention. The plaintiff alleges that after Ko San Ye obtained the lease, he (Ko San Ye) collected subscriptions from the public and erected a church and auxiliary buildings on the land. On the 3rd July 1911 Mr. Maddon executed a mortgage deed in favour of Hajee Mahomed Jamal in which Ko San Ye appears as a surety. The premises in suit are included as one of the properties mortgaged and on behalf of Ko San Ye, Mr. Maddon, as Ko San Ye's attorney, signed the mortgage deed. It is unnecessary to consider the validity of the mortgage at this stage of the litigation, but on the 30th of June 1916 Naw Tha Wa, the widow of Ko San Ye, in part satisfaction

of the amount due on the mortgage, sold the premises in suit to Hajee Mahomed Jamal. He on his turn sold it to Bagga Singh and Nathuram who are in possession of the land. The learned Judge raised a number of issues, among them one as to the maintainability of the suit by the plaintiff. Issues 8 to 12, including among them as the 11th issue the maintainability of the suit, were decided by the predecessor of the learned Judge whose judgment is now under appeal, but those issues were re-argued and decided in the present judgment. The first Judge decided all the preliminary issues in favour of the plaintiff, while the second Judge came to a contrary conclusion.

The main point for decision assuming all the facts in the plaint are true, is whether in respect of properties which form part of a public trust, a mere worshipper can have the right by way of suit to obtain possession of the properties. He has certainly no right to sue for any of the reliefs mentioned in section 92 of the Civil Procedure Code except in the manner prescribed by that section. It is true that in the suit as framed, none of such reliefs are prayed for. The third relief is merely an interlocutory relief and the first and second reliefs are for possession of the premises and for an account from the defendants as trespassers and not as trustees, of loss or damage to the trust property. But these are the relief which are usually open to the owner of a property or a person in whom the legal title is vested and who for that reason exercises all the rights of an owner. Neither Dr. Saw Durmay nor the person on whose behalf the suit is instituted can be said to have any proprietary right in the premises or any such interest as would entitle them to maintain a suit for possession.

There are many rulings in the Indian High Courts to show that a trustee filing a suit against a trespasser

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HEALD AND CHARI, JJ.

need not do so under section 92 of the Civil Procedure Code. These decisions however do not help the plaintiff in the present case. There are other rulings which show that it is open to a person interested in a trust to obtain declaratory decree though he may not be able to file a suit for the recovery of possession. It is unnecessary to consider these decisions either, as in this case the plaintiff is not asking for any declaration. Two cases have been cited before us as being in favour of the plaintiff, but they do not help his case. The first of these cases is the Full Bench case of the Allahabad High Court *Jawahra* v. *Akber Hoossein* (1). This ruling merely shows that a Mohamedan, as having the right to use a mosque for purposes of devotion, has a right of action against any person who interferes with the exercise of his right to use the place of devotion. It is true that in that case the plaintiff alleged, that he wanted to repair the building which according to him was a mosque, and in respect of which the defendants had committed an unlawful trespass, but this relief is ancillary to the real claim, namely the undisturbed exercise of his right. As the judgment of the learned Chief Justice and Mr. Justice Mahmood show, a great deal in that case turned on the theory of Mohamedan Law that a mosque does not vest in any human being but is the property of God, and that it is the inherent right of His creatures to use God's property for purposes of worship. The next case relied on is *Badridas* v. *Chulilal* (2). In that case Mr. Justice Woodroffe held that section 539 of the Civil Procedure Code of 1882 did not apply to a suit against strangers such as alienors from the trustees and trespassers holding adversely to the trust. It will be noticed however that in that suit the plaintiff were persons who claimed

(1) (1885) 7 All. 178. (2) (1906) 33 Cal. 789.

to have been elected as trustees. The later Allahabad cases cited merely follow the decision in 7 Allahabad and do not carry the plaintiff's case much further. In a later case in the Calcutta High Court *Ashrap Ali* v. *Mahomed Zamma* (3) two worshippers of a mosque filed a suit for declaration that a permanent lease granted by *Mutawalli* was void and for possession of the property. The trial Court granted the declaration, but disallowed the claim for possession. In an appeal by the defendant against whom the declaration was made, the judgment of the lower Court was upheld, but it will be noticed that Mr. Justice Shamsul Huda justified that decision on the ground that the worshippers of a mosque residing in the locality have a right in it far and above those of the general Mahomedan public and could therefore maintain the suit. The decision was confined to the maintainability of the suit in respect of the declaration as the relief for possession had been disallowed in the trial Court. The Lahore case cited before us, *Saligram* v. *Bassao Mal* (4), was a case of a Hindu entitled to worship in a temple and it was held that though it was open to him to file a suit for declaration that an alienation of the trustee is invalid, he could not maintain a suit for recovery of possession which could only be done by a trustee. The Allahabad case of *Dasondhay* v. *Mahomed* (5) was a Mahomedan case. A suit was filed by two Mahomedans for a declaration that certain properties were *waqf* and that the alienation by the *Mutawalli* was illegal. This suit was held to be maintainable, but the learned Judges say at page 664 that whether the plaintiffs be regarded as suing for themselves or on behalf of the whole Mahomedan community, they were not entitled

(3) (1918-19) 23 C.W.N., 115. (4) (1919) I Lahore Law Journal, 150.
(5) (1911) 33 All., 660.

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HEALD AND CHARI, JJ.

to a decree for possession of the property. We may also refer to a case decided by Mr. Justice Young in *Cowasjee* v. *Bella* (6). For these reasons we have to hold that the suit as framed was not maintainable. The proper course for the plaintiff to take would be to file a suit under section 92 for the appointment of trustees. When the trustees are properly appointed, they can file a suit for setting aside the alienations and for the recovery of possession of the properties from the defendants. The appeal is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Maung Gyi.

1925

Feb. 12.

KING-EMPEROR

v.

SEIN CHOUNG.*

Reformatory Schools Act (VIII of 1897), section 11—Age of the accused to be determined before ordering his detention in a Reformatory School—Period of detention also to be fixed—Finding of suitability of accused for such detention also necessary.

Before sending a youthful offender to a Reformatory School, the Court must come to a clear finding as to his age and that he is a fit and proper person to be an inmate of such a school and it must also fix the period of his detention.

MAUNG GYI, J.—On the 6th September 1924 Sein Choung, an orphan lad of about 14—15 years, was sentenced by the Court of the First Additional Magistrate, Moulmeingyun, to receive ten lashes with a rattan for an offence under section 379, Indian Penal Code. On the 23rd of the same month he was convicted by the same Court under sections 380 and 75, Indian Penal Code, and sentenced to

(6) (1918) 11 B.L.T. 249.

* Criminal Revision No. 1526-A of 1924, from the order of the First Additional Magistrate, Moulmeingyun, in Criminal Regular Trial 271 of 1924.

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undergo six months' rigorous imprisonment. The Court decided that in lieu thereof he was to be detained in the Insein Reformatory School for a period of four years, or until he attains the age of 18 years.

Beyond the doctor's statement there is no evidence as to the age of the accused. According to him, he is 14, and, according to the doctor, he is between 14 and 15 years old. Section 11, Reformatory Schools Act, requires that an enquiry as to age should be held before sending a youthful offender to a Reformatory School. There must be a clear finding as to age.

The period of detention in the Reformatory School must also be fixed.

Further the Court must find that the youthful offender to be sent to the Reformatory School is a fit and proper person to be an inmate of such a school.

The case is remanded to the lower Court for an enquiry ; for specific findings on the points stated ; and for passing necessary orders.

APPELLATE CRIMINAL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Maung Gyi.

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Feb. 16.

U ZAGARIYA AND THREE OTHERS

v.

KING-EMPEROR.*

Jury, Trial by, Appeal from—Case triable under Chapter XXXIII, Criminal Procedure Code, but actually tried under Chapter XXIII—Claim for trial under Chapter XXXIII when to be made—Omission of the Committing Magistrate to inform the accused of his right of trial under Chapter XXXIII—Appeal whether under section 418 or 449, Criminal Procedure Code—Limitation—Time required for the obtaining of copies of the diary order on the claim for trial under Chapter XXXIII, not to be excluded.

Held, that where a case triable under the provisions of Chapter XXXIII of the Code of Criminal Procedure has been actually tried at the High Court Sessions under Chapter XXIII, without a claim on the accused's part under section 275 for a trial under Chapter XXXIII, an appeal would lie only under section 418 and not under section 449 of the Code. Further, that such a claim on the part of the accused must be made before the first juror is called and accepted.

Held also, that the omission of the Magistrate to inform the accused of his rights to be tried under Chapter XXXIII, as required by section 447, is absolutely cured by the provisions of section 534.

Held further, that time spent in obtaining copies of the diary orders in the case which were filed with the appeal would not be excluded in computing the period of limitations for appeal, there being no rule of the Court nor of the Code requiring those copies to be filed.

Mya U—for the Appellants.

ROBINSON, C.J., AND MAUNG GYI, J.—This is an appeal purporting to be laid under section 449 of the Code of Criminal Procedure. It has been put down for admission on the question as to whether any appeal lies. The accused was tried by a jury at the Sessions of this Court, and it is admitted that *primâ facie* no appeal lies under section 418 or under the Letters Patent except on the question of sentence. Section 449 (1) (*a*) gives an appeal in a

* Criminal Appeal No. 100 of 1925 from the Original Side of this Court in Sessions Trial No. 71 of 1924.

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ROBINSON, C.J., AND MAUNG GYI, J.

case tried by jury in a High Court under the provisions of Chapter XXXIII. This case was not, however, tried under the provisions of Chapter XXXIII, but under the provisions of Chapter XXIII.

It is clear that the case is one which might have been tried under the provisions of Chapter XXXIII, and the Magistrate, who committed the case to Sessions, did not inform the accused of their rights under Chapter XXXIII. His omission to do so is the principal ground put forward before us.

The accused were defended by two counsel before the Magistrate, but no claim to be tried under the provisions of Chapter XXXIII was made at any one of the stages specified in section 443. The case was then committed to Sessions, and after the charges had been read and explained to the accused and each accused had pleaded not guilty, the Court proceeded to empanel a jury. Mr. Mya U informed us that he took an objection that under the provisions of section 275 of the Code, the majority of the jury should consist of Indians. The record did not bear him out, and, on being pressed, he stated that he did not remember, that he was ill at the time, that he subsequently had to go to hospital, and that he was under the impression that, when the objection was made, no juryman had been empanelled. The objection was taken in the following way. Mr. Mya U had challenged eight jurymen, and when the ninth, one Mr. Morton, was called, he also challenged him. The learned Judge pointed out that eight objections without grounds had already been allowed, and he called upon Mr. Mya U to state the grounds of objection to Mr. Morton. Mr. Mya U then said that his only ground was that the accused wished to be tried by a majority of their own countrymen. It was in this fashion that the

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objection is said to have been taken. The diary proceeds to record that Mr. Mya U admitted that the accused had made no application to be tried under the provisions of Chapter XXXIII, and that he also admitted that they were not entitled to claim a majority of jury under section 275 of the Code. His objection to Mr. Morton was, therefore, not allowed, and Mr. Morton took his seat in the jury box. The list of the jury on page 18 of the record shows that Mr. Morton was the last juryman to be empanelled, and that there were, therefore, eight jurymen who had been called and empanelled without objection on either side before Mr. Morton was empanelled. We have also received a note from the learned Judge who presided at the Sessions. He states quite definitely that there is no doubt whatever that eight jurors had already been chosen unchallenged by either side who had actually taken their seats in the box, before Mr. Mya U made any claim or gave any indication that he intended to make it.

On these facts it remains to see whether any appeal lies under section 449. Section 443 lays down that the accused may, at any time before he is committed for trial under section 213 or is asked to show cause under section 242 or enters on his defence under section 256, as the case may be, claim that the case ought to be tried under the provisions of Chapter XXXIII. No such claim was made at any of these stages or at all before the Magistrate.

As regards the omission of the Magistrate to inform the accused of their rights under Chapter XXXIII, as required by section 447, that omission is absolutely cured by the provisions of section 534 which lays down that an omission to inform under section 447 any person of his rights under Chapter

XXXIII shall not affect the validity of any proceeding. When the case came before the Sessions, the claim might have been made under section 275 of the Code, but that section says that the claim must be made, before the first juror is called and accepted. It is perfectly clear that no such claim was made before the first juror was called and accepted. Over and above this, there is the statement in the diary that it was admitted that the right to be tried under the provisions of Chapter XXXIII did not exist at the time that Mr. Mya U gave his reasons for objecting to Mr. Morton. The case having been tried under the provisions of Chapter XXIII, section 449 of the Code does not apply, and an appeal would only lie under the provisions of section 418. That section debars any appeal on a matter of fact where the trial was by jury, in which case the appeal lies only on a matter of law. So far as the objections to the Magistrate's action and to the trial both amount to a matter of law, we are clearly of opinion that there is no substance in any of them for the reasons which we have set out above. The question of sentence is, for the purposes of an appeal, to be deemed a matter of law. We were not addressed on the question of sentence, although there is a ground of appeal. We have considered the sentences, and we are of opinion that there is no sufficient reason to interfere with them.

We also note that this appeal is barred by time. It is contended the time spent in obtaining a copy of the diary orders in the case, which were filed with the appeal, should be deducted; but there is no rule of this Court, nor of the Code, requiring those copies should be filed and it is not open to counsel to deduct this period. The appeal is, therefore, barred by time.

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We pointed out to Mr. Mya U that the proper course was to move the Government Advocate for a certificate; but he has stated that he has done so, and that the Government Advocate has refused the certificate.

The appeal is, therefore, summarily dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Pratt.

1925

Feb. 20.

KING EMPEROR
v.
NGA BO GYI.*

Penal Code (XLV of 1860), section 193—Grant of pardon—Approver examined by a Magistrate prior to his examination as a witness in committal proceedings—Procedure not provided for by law and not necessary in the interests of justice—Resilement from his previous statement when examined in the Committal Court.

The prosecution for perjury is an exceptional measure and sanction ought not to be granted when material has only been provided by an unnecessary examination on oath. Magistrates should not be encouraged to make unnecessary examinations on oath in order to obtain material for a prosecution for perjury in case the approver should subsequently resile from his statement.

G was granted a pardon by the District Magistrate under section 337 (1) of the Criminal Procedure Code, and at the instance of the Police his statement on oath was recorded by the committing Magistrate prior to his examination as a witness in the committal proceedings. From this statement he resiled when examined as a witness in the committal proceedings. On sanction being applied for by the District Magistrate to the High Court under section 339 (3) of the Criminal Procedure Code for G's prosecution under section 193 of the Penal Code, for giving false evidences.

Held, that the preliminary examination of G prior to his examination in the committal court and after he had been granted a pardon, was not permissible.

Held also, that the proper course under the circumstances of the case would be to prosecute G for the original offence and not for perjury.

Held further that where there was nothing to prove that the evidence given by G in the committal Court was false, and that the fact that he had made a different statement on a previous preliminary examination which was not

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* Criminal Miscellaneous Application No. 3 of 1925 (at Mandalay) being application for sanction, by the Headquarters Magistrate of Shwebo, for the prosecution of the approver under section 193 of the Penal Code.

provided for by law and not necessary in the interests of justice, would not be a good ground for granting sanction to prosecute him for perjury.

PRATT, J.—The District Magistrate, Shwebo, applies under section 339 (3), Criminal Procedure Code, for sanction to prosecute Nga Bo Gyi for giving false evidence. Nga Bo Gyi was granted a pardon by the District Magistrate under section 337 (1).

According to section 337 (3) he should next have been examined as witness before the Committal Court but prior to this he was sent by the District Superintendent of Police to the Committing Magistrate to have his statement recorded. The Magistrate proceeded to record his statement on oath in a miscellaneous proceeding and the approver then made a statement implicating himself and others in the dacoity.

I can find no authority for this preliminary examination on oath after the extension of the pardon to the approver.

When examined as a witness in the committal proceedings Nga Bo Gyi denied all knowledge of the dacoity. As I read the law the preliminary examination was not justified, and, had it not been made, apparently there would have been no proof that he had committed perjury and possibly no perjury in fact. I do not consider Magistrates should be encouraged to make unnecessary examinations on oath in order to obtain material for a prosecution for perjury in case the approver should subsequently resile from his statement.

The proper course was to proceed with the trial of the approver for dacoity under section 339 (1) on the certificate of the Public Prosecutor that he had not complied with the conditions of his pardon.

The prosecution for perjury is an exceptional measure and sanction ought not to be granted, when, as in the present instance, material has only

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been provided by an unnecessary examination on oath.

Under section 337 (2A) the Magistrate was bound if he was satisfied that there were reasonable grounds for believing that the approver was guilty of an offence, to commit him for trial. This he did not do. Apparently the difficulty is that there is no corroboration of the evidence of the approver and a conviction for dacoity could not have been obtained. It seems clear that there is no proof that he took part in the dacoity and that he ought not to have been granted a pardon.

If the Magistrate did not commit Nga Bo Gyi to stand his trial for dacoity, because he was not satisfied that there were reasonable grounds for believing that he took part in the dacoity, then it is obvious that he was not satisfied that his evidence in the committal proceedings was false.

The fact that in a previous preliminary examination, which was not provided for in section 337 and was not necessary in the interests of justice, Nga Bo Gyi made a different statement is not a good ground for granting sanction. To grant sanction under the circumstances would be practically to approve the practice of making a special separate examination of an approver on oath before examining him as a witness in the case in order that, in the event of his making conflicting statements in the two examinations, the material furnished by the prior and unnecessary examination should be used as a basis for a prosecution for perjury.

APPELLATE CIVIL.

Before Mr. Justice Rutledge.

1925
Mar. 11.

GODLA THAMMYA AND ONE
v.
G. NARISAMULU.*

Material alteration—Alteration of the rate of interest from 8 per cent. to 2 per cent.—Alteration to the advantage of the debtor, whether a material alteration.

The rate of interest to be charged is one of the most important conditions in any contract of borrowing or lending. That being so, an alteration in the terms of this very important provision must be a material alteration.

The plaintiff instituted his suit on a promissory-note which was dimissed on the ground of material alteration, it being held that after execution the rate of interest in the note had been altered from 8 per cent. to 2 per cent. by the plaintiff. It was contended for the creditor that the alteration, being to the advantage of the debter and not affecting him adversely, was not such as would void the note.

Held, that the test to be applied was not whether the alteration was to the advantage or disadvantage of the debtor, but whether the integrity and identity of the contract had been changed and that, accordingly, on the facts there was a material alteration which rendered the note void.

Gour Chandra Das v. Prasanna Kumar Chandra, 33 Cal., 812—*followed.*

Surty—for the Applicant.

S. M. Bose—for the Respondent.

RUTLEDGE, J.—This is an application for revision of the judgment of the Second Judge of the Small Cause Court, Rangoon, dismissing the petitioner-plaintiff's suit on a promissory-note on the ground of material alteration.

It is contended that the learned Judge committed a material irregularity in not coming to a finding on the evidence whether there had been a material alteration or not.

It seems clear, from a perusal of the judgment, that, on the evidence, he was quite satisfied that, at the time

* Civil Revision No. 295 of 1924 against the decree of the Small Cause Court of Rangoon in Civil Regular No. 3481 of 1924.

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GODLA THAMMYA AND ONE v. G. NARISANULU.

RUTLEDGE, J.

of the execution of the note, the interest was stated to be 8 per cent. per mensem; and, as the note now before the Court shows 2 per cent. per mensem, he was satisfied that it had been altered subsequent to execution. A perusal of the evidence, to my mind, fully justifies the learned Judge's conclusion.

The defendant not only swears that the note which he executed stated the interest to be 8 per cent. per mensem, but he also produces a former note (Exhibit 4), which he had paid off and which he had given to the plaintiff, where the interest is clearly stated as 8 per cent. per mensem. Moreover, before action brought on the 27th of October, 1922, the plaintiff instructed his advocate, Mr. Kyaw U, to demand immediate payment of the sum of Rs. 366, " being the balance of principle amount and the balance of interest at the rate of Rs. 8 per cent. per mensem as agreed by you due on your promissory-note for Rs. 400, dated 26th August 1922."

The plaintiff, in his evidence, states that he told Mr. Kyaw U that the note carried interest at 2 per cent. per mensem; that he showed Mr. Kyaw U the promissory-note when he was giving instructions for drafting the notice; and that Mr. Kyaw U read the promissory-note.

I consider that the learned Judge was amply justified on this, in concluding that a responsible advocate could not have written the notice, which he did, if the promissory-note shown to him was in the same condition as the note filed in Court.

It has been further urged, on behalf of the petitioner, that an alteration in the promissory-note from 8 per cent. per mensem to 2 per cent. per mensem is not a material alteration; that it is to the advantage of the debtor; and that it does not adversely affect him.

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RUTLEDGE, J.

I cannot agree with this contention, and I quite agree with the remarks of the learned Judges Rampini and Mookerjee in *Gour Chandra Das* v. *Prasanna Kumar Chandra* (1) :—" The test is not necessarily, however, whether the pecuniary liability of one of the parties has been incrased by the change ; it is of no consequence, whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether the integrity and identity of contract have been changed."

It cannot be seriously disputed that the rate of interest to be charged is one of the most important conditions in any contract of borrowing or lending. That being so, an alteration in the terms of this very important provision must be a material alteration.

It has been urged what benefit could the plaintiff gain from an alteration of this nature. It is not material for us to consider the motive or the benefit, though, from the previous transactions between the parties, it seems clear that the plaintiff belongs to that very undesirable class, whose extortionate rates of interest at last moved the Legislature to give the Courts some power to interfere and protect their victims. And the alteration may, as the trial Judge seems to think, have been made for the purpose of escaping from the odium, which very rightly attaches, or would attach, to people claiming 96 per cent. per annum interest on a loan.

The application is dimissed with costs.

(1) (1906) 33 Cal. 812 at 817.

ORIGINAL CIVIL.

Before Mr. Justice Young.

1925
Feb. 9.

MAHOMED AUZAM ISMAIL
v.
JAGANATH JAMNADAS.*

Light and air, Easements of—Test to be applied in granting or withholding injunction—Court's discretion to award compensation, when exercised—Specific Relief Act (I of 1877), section 54.

To Courts governed by the Indian Specific Relief Act (I of 1877), the question of an injunction or no injunction to restrain a party from so erecting and building as to interfere with his neighbour's easements of light and air, presents itself in a different light to what it does to the English Courts: therefore, to Courts subject to this Act, the English decisions have no application. In India, the Court has a discretion: it *may*, not *shall*, issue an injunction where the injury is such that pecuniary compensation would not afford adequate relief.

The plaintiff claimed an injunction to restrain the defendant from so erecting a building contiguous to the plaintiff's in the heart of the City of Rangoon as to interfere with the plaintiff's easements of lights and air. The easements were admitted but the defendant contended that the injury to the easements could be compensated in damages and paid Rs. 750 into Court. The proposed building, if allowed, would on that side completely block all access to light and air to the plaintiff's ground floor and middle room on the first floor, but he would not thereby be in any worse position the majority of house-owners in that part of Rangoon. While an injunction would practically prevent the defendant from building at all, the payment by him of a sum by way of damages to the plaintiff would enable the latter by structural alterations to obtain new light and air sufficient to make his house as well or better lit and ventilated than before.

Held, on the facts, that it would be oppressive to grant an injunction and that the grant of compensation would give the plaintiff the chance of putting his house in as good a position or better than it was before as regards air or light and place him in no worse position than all owners of interior houses in that part of Rangoon.

Colls v. Home and Colonial Stores, (1904) A.C., 179; *Dunjibhoy Amrigar v. Lisboa*, 13 Bom., 252; *Ghanasham Nadkarni v. Moroba Ramchandra Pai*, 18 Bom., 474; *Shelfer v. City of London Electric Lighting Company*, (1895) Ch., 287; *Sultan Nawaz Jung v. Rustomji Nanabhoy*, 20 Bom., 704—*referred to.*

Das—for the Plaintiff.

Burjorjee—for the Respondent.

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* Civil Regular No. 614 of 1925 On the Original Side of this Court.

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YOUNG, J.—This is a suit for an injunction to restrain the defendant from so erecting a building as to interfere with the plaintiff's easements of light and air.

The easements are admitted, and the only question is whether the injury can be compensated in damages or whether an injunction must issue.

The defendant has paid into Court the sum of Rs. 750 as sufficient compensation.

The two buildings will be contiguous and there is no doubt that the proposed building will completely block all access of air through thirteen ventilation holes on the ground floor, which gave ingress of air to a stable on this floor, and all access of light and air through a window on the first floor which was the only window giving light to the middle room on this floor.

On the other hand to grant an injunction will practically prevent the defendant from building at all on his land and leave the plaintiff in a better position than the vast majority of house-owners in this part of Rangoon, where nearly all houses are contiguous and no side light or air is obtainable for the ground and first floors.

"In India the power of the Courts to grant a perpetual injunction" as observed by Sargent, C.J., in *Dunjibhoy Amrigar* v. *Lisboa* (1) "is determined by the Specific Relief Act, section 54, which provides that the Court may grant such an injunction when the defendant invades or threatens to invade the plaintiff's right" and "where the invasion is such that pecuniary compensation would not afford adequate relief." Its duty therefor under the Act is not to grant an injunction where namages afford

(1) (1889) 13 Bom. 252, 259.

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YOUNG, J.

adequate compensation, see the remarks of Sargent, C.J., at page 262. Farran, J., in *Ghanasham Nadkarni* v. *Moroba Ramchandra Pai* (2), a case which followed *Lisboa's* case, said as follows: "Under the Specific Relief Act the Courts are given a discretion to grant or withhold an injunction, as in England they have a discretionary power to award damages in lieu of an injunction. In this view of the law the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed, or even materially infringed, but also whether under all the circumstances of the case, he ought to be granted an injunction as the proper and appropriate remedy for such an infringement where the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless it is stopped. In such a case, inasmuch as the only compensation that could be given to the plaintiff would be to compel the defendant to purchase his property out and out, the Court will not in the exercise of its discretion compel the plaintiff to sell his property to the defendant by refusing to grant him an injunction and awarding him damages on that basis. Between these two extremes, where the injury would be less serious, where the Court considers the property may still remain with and be substantially useful to him as it was before, and where the injury is one of a nature that can be compensated by money, the Courts are vested with a discretion to withhold or grant an injunction, having regard to all the circumstances of the particular case before them including the fact that the premises are situated in a city like this where land suitable for building is limited and very valuable." From these authorities it will be seen that to Courts

(2) (1894) 18 Bom. 474 at p. 488.

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YOUNG, J.

governed by the Specific Relief Act the question of injunction or no injunction presents itself in a different light to what it does to the English Courts and that to Courts subject to this Act the English decisions have do application [per Persons and Strachry, JJ., in *Sultan Nawaz Jung* v. *Rustomji Nanabhoy* (3)]. Here the proposed building will completely block all air which comes through the ventilation holes on the ground floor, and all light which comes through the window on the first floor which is the only window on the whole of that side of the house and the defendant recognising that the remaining light and air will be insufficient proposes to give by way of damages such a sum as will enable the plaintiff by structural alterations to get new light and air, sufficient to make the house as well or better lit and ventilated than before. The question is whether this should be allowed: no reported case, Indian or English, has been cited to me, where there this method of assessing damages has been followed and the plaintiff cannot be compelled to pull his house about. It is an attempt to import into a case of tort the rule as to damages applicable in the case of a breach of contract. I have no doubt that this is not permissible and that ordinarily speaking an injunction should issue, but in India the Court has a discretion: it *may*, not *shall*, issue an injunction where the injury is such that pecuniary compensation would not afford adequate relief. That it would not afford adequate relief here is shown by the fact that money would leave the house not comfortably habitable; to make it comfortably habitable, as, according to the ordinary notions of mankind the plaintiff is entitled to have it, something would have to be done with that money;

(3) (1896) I.L.R., 20 Bom. 704, 711.

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it would not in itself be adequate relief. But I have a discretion. The properties are situated in the heart of Rangoon where building land is scarce and very valuable. To issue an injunction would practically prevent the defendant from building at all on his land and prevent the lessening of a great scarcity of accommodation. To refuse an injunction and grant damages on the suggested principle would be to give the plaintiff the chance of putting his house in as good a position or better than it was in before as regards air or light and place him in no worse position than all owners of interior houses in this part of Rangoon. I think it would be oppressive to grant an injunction; an element to be considered even in England, *vide* the remarks of A. L. Smith, L.J., in *Shelfer* v. *City of London Electric Lighting Company* (4) cited with approval by Lord Lindley in *Colls* v. *Home and Colonial Stores* (5), who said the good sense of judges and juries might be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies. I therefore refuse an njunction. The question of the assessment of the damages should come on at an early date.

(4) (1895) Ch., 287. (5) (1904) A.C., 179. 212.

APPELLATE CIVIL.

Before Mr. Justice Carr and Mr. Justice Brown.

1925
Mar. 2.

MAUNG THEIN ZAN AND TWO
v.
S. A. S. FIRM, BY ITS AGENT MUTU RAMAN CHETTY.*

Attachment of rents of houses, not yet accrued—Court, whether empowered to authorise any one not a receiver to collect or sue for rent—Failure of tenants of houses under attachment to pay rent, not a subject for prosecution—Receiver. Appointment of, suo motu, by Court—Civil Procedure Code (V of 1908), section 94 (d) and Order XL, rule 1.

There appears to be no provision of the Code of Civil Procedure under which a debt that has not yet fallen due can be attached, and attachment of rents which are only prospective is merely an attachment of a debt that has not accrued.

In the District Court of Yamèthin the Respondent in execution of his decree obtained prohibitory orders for attaching rents of house properties, as they fell due. Subsequently, he also applied to the District Court to be allowed to collect the rents himself on his giving security and the District Court ordered accordingly.

Held, that the Court has no authority to empower any one to collect the rents except by duly appointing him as a Receiver. If that had been done there would have been imposed on the Receiver the duty as well as the right to collect the rents and he would be liable if he failed in that duty.

Held, that failure of tenants of attached houses to pay rents is only a subject matter for Civil Suits.

Held also, that in proper case', the Court can of its own motion appoint a receiver for the protection of property the subject of a suit.

Vakharia—for the Appellants.
Aiyangar—for the Respondents.

CARR AND BROWN, JJ.—The procedure of the District Court in this case has not been satisfactory. It appears that the respondent had obtained a money decree for a large sum and under it attached a large number of properties in Execution Case No. 19 of 1924

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* Civil Revision No. 217 of 1924 against the order of the District Court of Yamèthin in Civil Execution No. 21 of 1924.

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of the District Court, Yamèthin. In that case he applied for the appointment of a Receiver to collect the rents of the house properties and paddy lands, but that application was afterwards withdrawn.

Then in Execution No. 21 of 1924 he filed a separate application for attachment of the rents of the house properties and prohibitory orders were issued attaching those rents as they fell due (*la sin*). The legality of this is highly questionable. An existing debt can be attached, but there appears to be no provision of the Code under which a debt that has not yet fallen due can be attached. And attachment of rents which are only propective is merely an attachment of a debt that has not accrued due.

Then in Miscellaneous No. 42 of 1924 the present petitioners applied for removal of attachment on the properties not, apparently, for removal of the attachment of the rents.

Then, in Execution No. 21 of 1924, Maung Thin Maung applied to be allowed to collect the rents of the houses on furnishing security. In the diary Maung Thin Maung is described as the judgment-debtors, but his petition was filed as next friend of the present petitioners, who are minors. Notice was issued to the decree-holder, who appeared and objected and offered to give security himself if he were allowed to collect the rents. The District Judge then passed orders allowing the decree-holder to collect the rents on furnishing security. It is this order that we are asked to revise.

In our view the order was passed without jurisdiction. The Court has no authority to empower anyone to collect the rents except by duly appointing him as a receiver. If that had been done there would have been imposed on the receiver the duty as well as the right to collect the rents and he

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would be liable if he failed in that duty. As matters stand, no responsibility whatever seems to have been imposed upon him.

The order was otherwise objectionable. It directed the decree-holder to give security for the repayment of the rents with 6 per cent. interest if the attachment should be removed. In other words the Court has taken upon itself to lend the decree-holder this money at that rate of interest. It has no power to do this, and the procedure is otherwise objectionable. Even if the attachment be not removed the moneys will have to be brought into account in the settlement of the decree. A Receiver, if appointed, would be required to pay into Court from time to time the moneys realised.

Another objection is that the learned Judge has given no reason whatever for his order or for his selection of the decree-holder as rent collector.

On the file we find also a petition by the decree-holder complaining that the tenants have refused to pay the rent. On this is an order by the District Judge in which he says that if the occupants disobey the Court's order they can be prosecuted. This is highly unfortunate. The Court has no power to order the tenants to pay their rent, and if they refuse to pay it to the decree-holder they cannot be prosecuted. The rents can be recovered, if necessary, by suit by a duly appointed Receiver.

We are informed that the Court has authorised the decree-holder to file suits for rent. If this is correct it is again highly unfortunate, for the Court has no power to authorise anyone but a receiver to file suits.

For the respondent it has been argued that the order is in effect an order appointing a receiver. We cannot accept this contention. The proceedings

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MAUNG THEIN ZAN AND TWO v. S. A. S. FIRM, BY ITS AGENT MUTU RAMAN CHETTY.

CARR AND BROWN, JJ.

are highly irregular and the order cannot stand. It is set aside.

But we think that on record it is clear that a receiver should be appointed for the protection of the estate. We have no application for the appointment of a receiver before us, but it is clear under section 94 (*d*) and Order XL, Rule 1, of the Civi Procedure Code, that the Court can act on its own motion.

We therefore appoint the Bailiff of the District Court of Pyinmana to be receiver of the properties under attachment in this case until such time as the District Court may appoint some other person as Receiver. We direct the District Court to fix the powers, duties and remuneration rate of the Bailiff as temporary receiver and to issue to him an order of appointment in due form.

The District Court should then hear the parties and proceed to appoint a Receiver pending the disposal of the case.

The respondent will pay the petitioner's costs of this application—advocate's fee five gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne.

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Mar. 2.

MAUNG SAN BWIN

v.

MAUNG NYI, BY HIS MOTHER AND GUARDIAN-AD-LITEM MA PU MA AND ONE.*

Minor, Suit by, without next friend—Duty of the Court on discovery of fact of minority on an ex-parte hearing—Service of summons outside the jurisdiction of the Court—Service by other than an officer of the Court not sufficient—Civil Procedure Code (V of 1908), Order V, rule 21, and Order XXXII, rules 1 and 2.

Where a suit is filed by a minor without a next friend and without the plaint disclosing the fact of his minority, *held*, that if at the *ex-parte* hearing of the suit, the fact of his minority is disclosed, it is the duty of the Court to take notice of the disregard of the provisions of Rule 1 of Order XXXII of the Civil Procedure Code and to refuse to proceed further with the suit so illegally commenced.

Held also, that the service of the summons outside the jurisdiction of the Court issuing it and without an order from the Court having jurisdiction therein is irregular.

Held also, that the service to be effective must be made by an officer of the Court.

Kya Gaing—for the Applicant.

LENTAIGNE, J.—The first respondent, Maung Nyi, sued the defendant-petitioner for Rs. 52 as his wages as an agricultural labourer in the Township Court of Yedashè. The plaint was framed as if he were an adult and no person was joined as his next friend; but when Maung Nyi was examined at a hearing of the case *ex-parte* on the 6th May 1924, he appears to have given his age as 16.

The petitioner applied on the 5th June 1924 that the *ex-parte* decree be set aside, and in his affidavit he deposed that he was in the Court of the Additional District Magistrate at Yamèthin looking after a criminal prosecution of his brother for an offence under

* Civil Revision Nos. 187 and 221 of 1924.

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section 376, Indian Penal Code, when an old woman Ma Pu Ma came and handed over a summons to him; and that he was ready to come to Toungoo to defend the case but on receipt of a telegram from Rangoon about the bail matter of his brother he had to go suddenly to Rangoon; and consequently he could not appear on the day of hearing or intimate to the Court about the matter. As the defendant had not sent a telegram to the Court on the day of the hearing *ex-parte*, the learned Judge refused to set aside the *ex-parte* decree.

The petitioner then applied to this Court for revision of that order in Civil Revision No. 187 of 1924 on the ground that there was no service of summons in law on the petitioner; and that the lower Court having accepted the statements in his affidavit as true, should have allowed his application. He further took the objection that the learned Trial Judge erred in law in decreeing a suit instituted by a minor without a next friend; and he filed further affidavits in support of this application.

In Civil Revision No. 221 of 1924, the petitioner has also applied for revision of the *ex-parte* decree on the same grounds.

The respondents have not appeared to oppose this application. I think that it is clear that if the plaintiff, Maung Nyi, is a minor under 18 years of age, the Court acted with material irregularity in proceeding with the case without a next friend being appointed. The record indicates that Maung Nyi gave his age as 16, and consequently there was a sufficient indication to the Court that he was not entitled to obtain the *ex-parte* decree on the plaint as filed.

Rule 1 of Order XXXII of the Code of Civil Procedure expressly provides that every suit by a

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minor shall be instituted in his name by a person who in such suit shall be called the next friend of a minor. Rule 2 (1) of that Order provides that where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented; and sub-Rule (2) of that Rule provides for the issue of notice before the order is passed. In the present case the defendant had not appeared, but the irregularity was apparent on the examination of the plaintiff and I think that it was the duty of the learned Judge to take notice of the disregard of the provisions of Rule 1 of Order XXXII and to refuse to proceed further with the case so illegally commenced. For this reason (even apart from the other points), I think that the petitioner is entitled to the relief which he claims.

The service of the summons on the defendant at Yamèthin was also irregular under Order V, Rule 9, because it was effected outside the jurisdiction of the Yedashè Court and no summons had been sent to the Yamèthin Court by the Yedashè Court under Order V, Rule 21. Apparently the summons was not in fact served by any officer of the Court or by any person other than the mother of the plaintiff, and it was not a regular service for that reason also. Having regard to these defects when it was pointed out that the service had been effected at Yamèthin outside the jurisdiction without any order of the Court for such service, the learned trial Judge should have exercised a discretion to set aside the *ex-parte* decree especially as defendant had given a good reason for his attendance at Rangoon on the date of hearing. The practice of sending telegrams to Courts is not recognised by the Code and may be

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one recognised by advocates or persons of position, but I do not think that the defendant would have realised the advisability of adopting such a course which he might erroneously have regarded as disrespectful to the Judge.

In the present case the omission to join a next friend has left the proceeding in a position which would apparently prevent the defendant from recovering any costs that might be awarded to him; and for this reason and having regard to the illegality of the plaint, I do not think that any order should be passed directing any payment of costs as a condition of setting aside the *ex-parte* decree.

For the above reasons I set aside the *ex-parte* decree and I direct that it shall be open to the defendant to file an application in the trial Court under Rule 2 of Order XXXII, and that on service of notice thereof on the person, if any, concerned, the learned trial Judge shall pass such order as may seem fit under that rule; and on a failure of defendant to make, such application, it shall be open to the learned trial Judge to take such steps as he may think fit.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne.

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Mar. 2.

MAUNG MYAT TUN AUNG AND ONE
v.
MAUNG LU PU.*

Part-performance, plea of, not available to mortgagee in possession, to prove subsequent oral sale—Possession not unequivocably traceable to the title relied upon—Evidence Act (I of 1872), section 92 (4)—Oral evidence of subsequent sale not admissible to vary registered deed of mortgage.

The equitable doctrine of Part-performance is only applicable when all the requisite conditions set forth in Fry on Specific Performance and approve in Champernowne v. Lambert, (1917) 2 Ch., 356, are present. Acts of part performance relied on must be such as not only to be referable to the contract alleged but to be referable to no other title.

In a suit for redemption, the mortgagees pleaded that the mortgaged property was subsequently sold to them verbally for the mortgage debt and a further loan.

The mortgage which was by a registered deed contained a clause empowering the mortgagees to take possession and sell in the event of the mortgagor making default in payment and it was under this power that the mortgagees were alleged by the plaintiff to have come into possession.

Held that, the possession by a mortgagee being ordinarily referable to his mortgage or to his influence over the mortgagee by reason of such mortgage, the possession in the present case could not be relied upon as part performance of an agreement to sell.

Held also, that the mortgage being by a registered deed, evidence of a subsequent oral agreement of sale would be inadmissible under section 92 (4 of the Evidence Act.

Ma Min Byu v. *Maung Chit Pe*, 1 Ran., 419 ; *Mahomed Musa* v. *Aghore Kumar Ganguli*, 42 Cal., 801—*referred to.*

Champernowne v. *Lambert*, (1917) 2 Ch., 356—*followed.*

Fry on Specific Performance—referred to.

Christopher—for the Appellants.
Ba Shin—for the Respondent.

LENTAIGNE, J.—This is a second appeal against the judgment and decree of the District Court of Pegu modifying the decree of the Subdivisional

* Special Civil Second Appeal No. 32 of 1925.

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UNTAIGNE, J.

Court of Nyaunglebin granting the plaintiff-respondent relief in the form of redemption of a mortgaged piece of paddy land measuring about 32½ acres. The original mortgage was for Rs. 550 and the price of redemption fixed by the Subdivisional Court was Rs. 1,102, but that Court ordered the defendant-mortgage to bear the costs of suit. On appeal the District Court reduced the price of redemption to Rs. 877 and as neither party had been wholly successful on the appeal, he passed no order as to costs. The decree made out in pursuance of such judgment allowed a deduction of Rs. 127 as the costs of the trial Court and directed redemption on payment of Rs. 750.

The present second appeal is against that decree of the District Court. The original mortgage was effected by a registered deed dated the 30th May 1913, under which the Plaintiff-Respondent mortgaged the land to the two Defendant-appellants and one Maung Po Chein for Rs. 550 bearing interest at Rs. 2 per cent. per mensem; and it contained a clause empowering the mortgagees to take possession of the land and to sell the same in the event of the mortgagor making any default in payment and there was also a clause by which the mortgagor undertook to make good any deficiency on the sale. It is not disputed that about a year after the execution of this deed the Defendants-mortgagees did enter into possession of this land on a non-payment of any sum towards the amounts due under the deed.

The Plaintiff-Respondent-mortgagor alleged in his plaint that on the plaintiff being unable to pay the interest due, the mortgagees took possession of the mortgaged land and let it out to Plaintiff for three years on a rental of 150 baskets of paddy and that in subsequent years the mortgagees let it out to

others on a rental of 200 baskets of paddy; and that the mortgagees collected the rents all these years. After giving particulars as to price of paddy in various years, the plaint alleged that on an account being taken it would be found that the mortgage debt had been satisfied by the value of the rental paddy received by defendants: and the prayer of the plaint was that an account be taken of the rents and profits, and that on the amount being found due as the price of redemption, the Plaintiff be allowed to redeem the land on payment thereof. As Maung Po Chein the other mortgagee had died, his minor child was made the third Defendant.

The Written Statement of first and second defendants alleged that Maung Po Chein did not advance any of the mortgage money, but that his name was put in the deed for facility of collection, and that first and second defendants were sole owners of the mortgage money. In addition to various denials of allegations in the plaint, the first and second defendants alleged that the land was verbally sold to defendants for the mortgage debt and for another loan of Rs. 50 made about the beginning of 1276 B.E. They further gave particulars as to rents collected and set off against expenditure for land revenue and the debts for principal and interest, showing a balance of Rs. 1,772-1-0 as the amount which would be due to them on a mortgage basis.

Three issues were framed: (1) Whether there was an outright sale after the mortgage? (2) Whether oral evidence is admissible to prove the sale? (3) Who will get what sum on redemption?

It will be simpler if I discuss the decision on each of these questions separately with the points for determination thereunder on this appeal. As regards

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the first and second issues, no evidence was in fact offered by the defendants. The first defendant being an old man said to be aged 68 did not appear at the hearing, and as the burden of proof was placed on defendants on all issues of fact, his Pleader examined defence witnesses on points connected with the third issue. On the first day the 9th June 1923 three witnesses for defence were examined. On the 25th June the date fixed for the adjourned hearing, an application was made for the examination of the first defendant on commission and it was refused on the ground that the application was too late; and the case proceeded and was finished without any evidence being given in favour of defendant on the first and second issues. Consequently the findings on these issues were in favour of Plaintiff that the transaction was a mortgage throughout; and it was held that oral evidence was inadmissible to vary the mortgage deed.

It is now urged on second appeal that the case should be remanded in order to enable the evidence of the first defendant to be taken on the first issue. I do not think that any case has been made for such remand. Reliance has been placed on a decision reported in an unofficial report to the effect that it is permissible even in the case of a registered mortgage deed to give oral evidence of a subsequent transaction in which possession was given to the mortgagee on the basis of an oral sale to him in satisfaction of the mortgage debt. That decision is based on a supposed application of the equitable doctrine of part-performance. There are several answers to this contention. *Firstly*, in the case now before me the mortgage deed in fact contemplated such delivery of possession and that the mortgagee should have power to sell the land. Even if the mortgage deed contained a forfeiture clause, it would be invalid having regard

to the decision in *Ma Min Byu* v. *Maung Chit Pe* (1), and I do not think that a possession given and continued under a deed like that before me would be in any better position. *Secondly*, I think that evidence of the subsequent oral agreement purporting to vary the original mortgage deed would be inadmissible under proviso 4 to section 92 of the Indian Evidence Act, 1872, and it is not a case in which equities have arisen of a kind which would admit the evidence for a collateral purpose of enabling such equities to be administered, as was the case in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2). *Thirdly*, I am of opinion that there is another cogent reason why the equitable doctrine of part-performance is not available to a mortgagee who enters into possession under a subsequent oral agreement for a sale of the mortgaged property to him except in every exceptional circumstances, such as we find indicated in the case of *Mohamed Musa* v. *Kumar Ganguli* (2). The equitable doctrine of part-performance is only applicable when all the requisite conditions are present and these conditions are set forth in Fry on Specific Performance, and approved in the remarks of Warmington, L.J., in *Champonière* v. *Lambert* (3). One condition is that the possession or other acts of part-performance relied on "must be such as not only to be referable to a contract such as that alleged, *but to be referable to no other title.*" The same point is recognised by the Privy Council in the decision of *Mohamed Musa* v. *Aghore Kumar Ganguli* (2) in a passage at page 361 of the undercited report: "It is inferred from any proceedings not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect, *provided*,

(1) (1923) 1 Ran., 419. (2) (1914) 42 Cal., 801.
(3) (1917) 2 Ch. 356 at p. 361.

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they are unequivocably referable to the contract and productive of alteration of circumstances, loss or inconvenience though not irretrievable." I am of opinion that is only in very rare cases that the possession of the mortgagee who had entered under an oral agreement for sale would be accompanied and followed by additional acts and conduct of both parties of such a nature as to put his possession in the position of being "referable to no other title than the oral agreement" in the words of Fry, or to bring the possession and other circumstances into the position of being "unequivocally referable to the contract," in the words approved by their Lordships of the Privy Council. In all such cases the possession of the mortgage would ordinarily be referable to his mortgage, or in the case of a simple mortgage, to his influence over the mortgagor by reason of such mortgage and consequently to the mortgage. That would be the position, I think, in the case of an ordinary simple mortgage; but it is still more so in a case like the one now before me, where the mortgage deed confers an express power to enter into possession even for the limited purpose of effecting a sale to third parties. For these reasons I hold that there would be no use in examining the first defendant, even if there was no other objection to the granting of such application.

The third issue was decided in the lower Courts on the basis indicated in the pleadings that the defendants should account for the rents and profits received by them.

The learned Trial Judge, when making his calculations, pointed out that the evidence on both sides on the question of the amount of profits was mere guesswork and he also expressly stated that his own calculation was mere guesswork. It is obvious that the calculation framed on mere guesswork

cannot be treated as a satisfactory basis for a decision. The decision of the learned District Judge was, however, based on his own consideration of the weight to be attached to the evidence. No detailed reasons have been given why I should not accept that decision of the learned District Judge. I may add that it has been a common practice for mortgagors in Burma, who are unable to pay interest, to hand over the mortgaged land on an understanding that no subsequent interest should be payable and that the mortgagee shall take the rents and profits in lieu of subsequent interest. The prevalence of this practice is probably due to the fact that it is extremely difficult to obtain any reliable basis for an account, and the Courts have recognized such a transaction as justifying a decree for redemption on payment of the amounts due at the date on which possession was taken by the mortgagee. In the present case the mortgagee is in a more favourable position, because the mortgagor had expressly applied for the taking of the account on lines similar to those recognized under the Transfer of Property Act, 1882; and the sum calculated by the learned District Judge is in fact considerably in excess of what would have been allowed on the basis more common in Burma. This result was in fact due to the strong evidence produced by the mortgagee showing that the mortgaged lands had been subject to considerable damage from floods. This element of uncertainty added to the great difficulty which now arises as regards the ascertainment of the price of paddy during the great depression in prices prevailing during the War would render it practically impossible to fix the proper price for redemption with any certainty. As no reliable basis has been shown on which the amount awarded by the learned District Judge could be

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increased in favour of the mortgagees, and as no second appeal has been filed by the mortgagor, I see no reason why I should not accept the findings of the District Court on this point.

In reading the pleadings in this case, I noticed a point which had not been discussed in the lower Courts, namely, that the first and second defendants have claimed that they are entitled to all the mortgage debt on the ground that the name of the third mortgagee had been added merely for facility of collection. This third mortgagee is now dead and his minor child is a party represented by the Bailiff of the Trial Court. I find that there are passages in the evidence which indicate that the said Maung Po Chein was a brother of the first defendant. I think that the lower Courts should make a point of having the issue tried as to what share of the price of redemption is payable to each defendant before any part of that money is paid to first and second defendants. The decision of that issue is unnecessary for the decision of this appeal as between the mortgagor and the mortgagees as a group: but it should not be overlooked when the price of redemption is paid into Court, because it is always the duty of a Court to keep a watchful eye that the interests of minors are not disregarded.

For the above reasons, I see no reason to interfere with the decision of District Court and I dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

1925
Mar. 4.

MA TÔK
v.
MAUNG MO HAUNG AND ONE.*

Auction-purchaser, whether entitled to apply under section 144, Civil Procedure Code (V of 1908)—Purchase-money deposited in the Court but not withdrawn by decree holder—Purchaser, whether entitled to interest on the purchase-money, on sale being cancelled.

Held, that on an auction sale being cancelled, the remedy of the auction-purchaser cannot be by proceedings under section 144 of the Civil Procedure Code.

Held also, that where the purchase-money deposited in the Court has not been withdrawn by anyone from the Court, the auction-purchaser is not entitled, on the sale being canelled, to any interest on the same.

Brij Lal v. *Dhamodara Das*, 44 All., 555; *Collector of Ahmedabad* v. *Lavji Moolji*, 35 Bom., 155; *Jai Berhena* v. *Kadernath*, 2 Pat., 10—*referred to.*

Raja Row v. *Ananthanarrayana Chetty*, 44 Mad. L.J., 398—*followed.*

B. K. B. Naidu—for the Appellant.

Maung Maung Su—for the Respondents.

HEALD AND CHARI, JJ.—The appellant before us is one Ma Tôk. There was a long and protracted litigation between Ma Shwe Mya and Maung Mo Hnaung. The cases went up to the privy Council more than once, but the facts relevant to the point in issue in this appeal are that Maung Mo Hnaung obtained a decree for Rs. 34,000 in the Judicial Commissioner's Court of Upper Burma when the case went up in appeal to that Court from the District Court of Magwe. In execution, certain oil-wells were brought to sale and purchased by Ma Tôk for Rs. 38,000. Ma Tôk was not a party to the original suit or to the appeal or to the execution

* Civil Miscellaneous Appeal No. 31 of 1924.

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proceedings. The sale was held in January 1920, but for some reason or other, it was never confirmed. The Privy Council reversed the judgment of the Court of the Judicial Commissioner. As the decree was reversed, the District Court of Magwe on the 13th of July 1921 cancelled the sale. That order has become final, and it is not necessary to decide whether the order cancelling the sale was right or wrong. On the 5th of July 1921 Ma Tôk, the appellant before us and the auction-purchaser in the lower Court, applied that if the sale was set aside, she should get her money back with interest. On the 23rd July 1921 she did get back her money. This money was lying in the Court all the time, and it is material to note that none of the parties to the suit had the use of the money or derived any benefit from it. The District Judge passed an order on the application dated 5th July 1923 refusing interest, on the ground that the auction-purchaser of the property in execution of a decree which has been reversed is entitled to keep the property, except in the case where the decree-holder himself is the auction-purchaser. He therefore held that Ma Tôk should have appealed against the order cancelling her sale and has no claim for interest on the money. It has been laid down in many cases that a *bona fide* auction-purchaser is unaffected by the reversal of a decree, but it is doubtful whether Ma Tôk, who is a sister of Ma Shwe Mya, would be held to be a *bonâ fide* auction-purchaser. However that may be, she allowed the order passed by the District Judge setting aside her sale to become final. Her submission to that order cannot however be used to penalise her, if she is in law or equity entitled to interest on the money. To that extent the order of the learned Judge does not seem to be right, but

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we are, nevertheless, of opinion that Ma Tôk cannot succeed in her application. It is doubtful whether she is a party who can invoke the assistance of section 144 of the Civil Procedure Code at all. It is true that section 144 uses the words "any party" and does not say "any parties to the suit," but the words "any party" are restricted to a party "entitled to any benefit by way of restitution or otherwise," that is they apply to a party whose position has been changed by a reversal of a decree, and who on that account is entitled to be put back in the place which he originally occupied. Our attention has been drawn to two cases *Brij Lal* v. *Dhamodara Das* (1), and *Jai Berhma* v. *Kadernath* (2). In the former case a judgment-debtor was allowed relief by way of restitution against the transferee of a decree though the actual point decided in the case was one of limitation. That case does not help the appellant. In the second case, which is a Privy Council case, relief was granted against an auction-purchaser whose sale was set aside. The auction-purchaser contended that before he could be deprived of the possession of the property he was entitled to be reimbursed for certain amounts paid by him to discharge encumbrances. The Privy Council held that he was not so entitled. This decision does not touch the point whether an auction-purchaser is a party within the meaning of section 144 who could himself move the Court. The matter is discussed in a very recent case in the Madras High Court *Raja Row* v. *Ananthanarayana Chetty* (3). The facts of the case were slightly different from the present case, but the point is discussed in

(1) I.L.R., (1922) 44 All. 555. (2) I.L.R., (1923) 2 Patna 10.
(3) (1923) 44 Madras Law Journal, 308.

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HEALD AND CHARI, JJ.

the judgment of the Officiating Chief Justice and Mr. Justice Venkatasubba Rao, both of whom held that an auction-purchaser could not be held to be a party either to the decree or to the execution proceedings and was therefore not a part to the decree which has been varied or reversed, and could not claim the benefit of section 144. It seems to us that the remedy of an auction-purchaser, if any, cannot be by proceedings under that section. Assuming, however, that she is a party within the meaning of section 144, Civil Procedure Code, we do not think that appellant's claim has any merit. The principle on which the Courts give compensation by way of interest are given in the case of the *Collector of Ahmedabad* v. *Lavji Moolji* (4) where it is broadly stated, following the earlier cases, that where a party has taken from the Court monies deposited in Court by his opponent that Court has inherent power to enforce a refund of the amount with interest. In all the cases a claim for interest was allowed against a person who had the benefit of the money. In this case the auction-purchaser chose to leave the purchase money in the Court on the chance that if the decree appealed against should be confirmed she would be able to get the property purchased by her. The money was lying in Court all the time, and no one had the benefit of it, and it is inequitable that either of the parties to the suit should be ordered to pay interest on monies from which they derived no benefit of any kind.

For these reasons we dismiss the appeal with costs—advocate's fee three gold mohurs.

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(4) I.L.R., (1911) 35 Bom., 155.

APPELLATE CIVIL.

1925
Mar. 5

Before Mr. Justice Heald and Mr. Justice Chari.

MOOLJEE DHARSEE & Co.

v.

M. E. MOOLLA.*

Letters Patent, Clause 13—Order of the executing Court accepting security offered under order of Stay by Appellate Court—Such an order not a judgment under clause 13—Such an order also not a decree under section 47, Civil Procedure Code (V of 1908).

The Appellate Side of the High Court, on an application to stay execution of a decree of the Original Side, pending the disposal of the appeal, ordered, *inter alia*, that " execution may be stayed pending the decision of this appeal, 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." In accordance with this order, the learned Judge on the Original Side after enquiry accepted the security as valid and sufficient. On appeal from such order,—

Held that in making the order appealed from the learned Judge on the Original Side was not determining any right or liability which arose between the parties in the execution proceedings on the Original Side and that his order is not a " Judgment " within the meaning of clause 13 of the Letters Patent.

Held also that such an order is neither a decree within the meaning of section 47 of the Civil Procedure Code.

Ahmed Bin Sheik v. Ayesha Bai, 11 Bom. L.R., 248; *Saraswati v. Golap Das*, 41 Cal., 160; *The Justices of the Peace for Calcutta v. The Oriental Gas Co.*, 8 Beng. L.R., 433; *Tuljaram v. Alagappa Chettiar*, 35 Mad. 1—*followed*.

Das and Jeejeebhoy—for the Appellant.

Keith and Doctor—for the Respondent.

HEALD AND CHARI, JJ.—The plaintiff Messrs. Mooljee Dharsee & Co., in Suit No. 138 of 1922 on the Original Side of this Court, obtained a decree against M. E. Moolla for Rs. 16,63,570 with costs and subsequent interest. In execution of that decree they applied on the 9th April 1924 for the arrest and imprisonment of the judgment-debtor. On the 10th of April the matter was placed before the Judge

* Civil Miscellaneous Appeal No. 123 of 1924.

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and on that day the advocates for the judgment-debtor mentioned in Court that they were instructed to file an appeal, but had not yet been able to get the necessary copies. The learned Judge on the Original Side in exercise of the discretion allowed by Order XXI, rule 40, ordered the judgment-debtor's release on his furnishing security to the extent of 17 lakhs. This was clearly an *interim* order, because the learned Judge said expressly that the question of staying execution was matter to be decided in the Appellate Court. The judgment-debtor entered into a bond himself and offered E. M. Moolla & Son, Ltd., a limited liability company, as his surety and that company deposited the title deeds of certain properties with the Bailiff of the Court as security. On the 29th of April, the decree-holder again applied for execution by the arrest and imprisonment of the judgment-debtor on the ground that the judgment-debtor had not obtained from the Appellate Court an order for stay of execution. On the 3rd of May 1924 the decree-holder filed an application asking that the judgment-debtor be called upon to furnish other and sufficient security. In that application, two objections to the security were taken: (1) that the security itself was insufficient (2) that the property offered as security belonged to E. M. Moolla & Son, Ltd., and that therefore in law, it could not be a valid security. But on the 2nd May, an order had been received from the Appellate Side of this Court ordering *interim* stay of execution of the decree pending the disposal of an application for stay which had been made in the appeal. The application filed on the 3rd of May for furnishing further security was therefore kept pending. On the 28th of May an order was passed on the Appellate Side to the following effect: "After considering the matter from

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all points of view, I am of opinion that execution should be stayed on terms. Execution may be stayed pending the decision of this appeal, 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 and subject to the further condition that if the appeal fails, the appellant will pay interest on the decretal amount from this date to the date of decision at 9 per cent. per annum." That order, in our view, contemplate a decision by the Original Side on the sufficiency and validity of the security offered and accepted and left it open to the decree-holders, if the seccurity should be found invalid or insufficient, to apply for fresh or futher security. The advocates on both sides construed the order as meaning that a further enquiry should be held on a fresh application and on the 4th of June 1924 an application was filed by the decree-holder praying for an enquiry as to the sufficiency and legal validity of the security. Next day, the earlier application dated the 3rd of May was withdrawn.

On the 16th June, the learned Judge on the Original Side, after disposing of certain objections remitted the matter for enquiry and report to the Official Receiver as to the sufficiency and validity of the security. The Official Receiver reported on the 11th of July that in his opinion the security offered was not sufficient and that the validity of the security was doubtful, because it was not clear that M. E. Moolla & Son, Ltd., had power to mortgage the property. The report was considered by the learned Judge on the Original Side and on the 28th of July he passed an order in which he found after personal inspection of the property that it was worth on a conservative estimate at least 20 lakhs and he ordered

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a registered mortgage to be executed by all the share-holders of M. E. Moolla & Son, Ltd. The last part of this order disposes of the objection to the validity of the security.

It is this order holding that the secuity tendered was sufficient which is the subject matter of the present appeal. It is objected before us that it is not a "Judgment" within the meaning of claus 13 of the Letters Patent and that therefore no appeal lies. If the order comes within the ambit of section 47 of the Civil Procedure Code, it would be a decree and as such appealable; and even if it did not, it would still be appealable, if it came under the wider term "Judgment" used in clause 13 of the Letters Patent. It is quite clear that an order relating to the sufficiency of the security tendered is not one which comes within the purview of section 47. There is direct authority on this point in the case of *Saraswati* v. *Golap Das* (1), the facts of which are very similar to the facts of the present case. The High Court of Clacutta during the pendency of an appeal ordered stay of proceedings in execution on the petitioner furnishing security to the satisfaction of the Lower Court. Security was furnished and was held by the Court to be sufficient. The decree-holder appealed on the ground that the security was insufficient. The learned Judges of the High Court said: "The order assailed in the present case determines no rights of the parties that are in controversy. It was this Court that directed that the proceedings should be stayed; and this Court attached the condition that security should be given to the satisfaction of the Court below. That security has been given and the Court below is

(1) (1914) 41 Cal., 160.

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satisfied with it. It does not appear to us that this order can possibly be regarded as an order determining any of the rights of the parties or can be treated as a decree and be the subject of an appeal." That passage disposes of the argument that such an order is appealable because it comes within the purview of section 47 of the code, and in our opinion it also shows that such an order is not a "Judgment" within the meaning of that word in clause 13 of the Letters Patent. The word "Judgment" has been the subject of discussion in many cases beginning with the now classic case of *The Justices of the Peace for Clauctta* v. *The Oriental Gas Co.* (2). It has also been the subject of exposition in two later cases *Ahmed Bin Sheik* v. *Ayesha Bai*, (3) and *Tujaram* v. *Alagappa Chettiar* (4). The result of these rulings seem to be that the effect of the order as a whole must be considered. If when considered as a whole the decision is one which, to use the language of Couch, C.J., "affects the merits of the question between the parties by determining some right or liability," then it will be appealable. Almost every order does, in a sense determine some right or liability, but that this *dictum* of the learned Chief Justice was not to be understood in ihis wide sense is shown by the succeeding sentence where he states that a final judgment determines the whole case or suit and a preliminary or interlocutary judgment determines only a part of it. Applying the tests given by the learned Chief Justice as explained in the later judgment, it cannot be said in this case that any question determining the rights and liablities of the parties was decided by the order now under appeal. The execution of the decree had already

(2) (1871) 8 Bengal L.R., 433. (3) (1902) 4 Bom. L.R., 248.
(4) (1912) 25 Mad., 1.

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been stayed on the Appellate Side. That side had also ordered the security already given to be accepted with liberty to the decree-holder to apply for fresh or further security, if it should be decided by the Judge on the Original Side that the security given was invalid or insufficient. As soon as the judge on the Original Side decided that the security was valid and sufficient, the order of the Appellate Court became unconditional. All that the order of the Original Side determined was the right of the decree-holder to apply for fresh or further security. That right was a creation of the order made on the Appellate Side and cannot in our opinion be regarded as being one of the rights or liabilities of the parties in the execution proceedings on the Original Side. It is true that it is a primary right of a decree-holder to have his decree satisfied, but that right is subject to the discretion of the Appellate Court as to stay, and in this case the Appellate Bench ordered stay. It also ordered an enquiry on the Original side as to the sufficiency of the security and the learned Judge on the Original Side, when he made the order which is under appeal, was merely carrying out the orders of the Appellate Bench and was not determining any right or liability which arose between the parties in the execution proceedings on the Original Side.

For these reasons, we hold that his order wa not a judgment within the meaning of clause 13 c the Letters Patent. We dimiss the appeal wi' costs—advocates' fees to be five gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Carr and Mr. Justice Brown.

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Mar.

KYONE HOE TSEE
v.
KYON SOON SUN.*

Advocate, Authority of, to make admissions—Admission made under misapprehension, whether client may repudiate—Review, powers of, whether extended to proceedings in probate and administration—Civil Procedure Code (V of 1908), section 114 and Order XLVII, rule 1—Succession Act (X of 1865), section 261.

Where the advocate for one of the parties in a proceeding for the grant of Letters of Administration, under a misapprehension, consented to the other party being granted the Letters, *held* that if such consent was given by the advocate without instructions, the client may withdraw the consent so given by the advocate at any time prior to the actual issue of Letters.

Held also that, in addition to the powers under the provisions of section 234 of the Succession Act and section 50 of the Probate and Administration Act, the Court has power in review to alter its previous order in contested proceedings for the grant of Probate or Letters of Administration.

M. Haroon v. *M. Ebrahim*, 12 B.L.T., 234; *Neale* v. *Gordon-Lennox*, (1902) A.C., 465; *Shepherd* v. *Robinson*, (1919) K.B., 474; *U Po Yeik* v. *Ba Khaing*, 1 B.L.J., 1—*followed.*

Paget—for the Appellant.

Das—for the Respondent.

CARR AND BROWN, JJ.—On the 1st June 1923 an application was filed on the Original Side of this Court for Letters of Administration to the estate of Kyon Ah Kyit, deceased, by Kyon Soon Sun. The deceased was a Chinese Confucian, and the applicant claimed to be his son. The application was contested by the appellant Kyon Hoe Tsee who on the 11th June filed a cross-application. She claims to be the widow of the deceased. The case between the two rival claimants was fixed for hearing on the 7th December. On that date the learned Judge recorded

* Civil Miscellaneous Appeal No. 56 of 1924 against the decree of this Court in the Original Side in Civil Regular No. 521 and 522 of 1923.

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an order to the effect that Mr. Chari who appeared for the applicant Kyon Soon Sun admitted that under the Indian Succession Act the widow had the prior right to Letters, and stated that that being the case his client had no desire at that stage to contest the status of the plaintiff-widow, and consented to, Letters of Administration issuing to her. Letters were issued to her accordingly.

On the 12th December application was made on behalf of Kyon Soon Sun to review that order. The reasons set forth for a review were that he had never given instructions to Mr. Chari to agree to a consent-order, and that he denied that the appellant was the legally married wife of the deceased. On the 14th March the Judge passed orders granting the review and setting aside the order granting Letters to the appellant. It is against this order that the present appeal is filed. Since the passing of the order appealed against, Letters have been granted to the mother of Kyon Soon Sun who also claims to be a widow of the deceased, but with that order we are not at present concerned.

Objection to the order appealed against is taken on two main grounds. It is contended in the first place that the respondent was bound by the act of his counsel, and in the second place that the Court had no power to review the order passed by it.

On the first ground we have been referred to a large number of authorities. There appear to be no decisions directly bearing on this point published in the official reports of any Court in this province, but two unofficial reports have been referred to. In the case of *M. Haroon* v. *M. Ebrahim* (Burma Law Times XII, page 224) counsel for one of the parties had agreed to a decree being drawn up for the joint possession of certain property. Before the

decree had actually been drawn up, the party himself objected to the decree on the ground that his counsel had agreed to it against his insructions and without his consent. It was also then admitted by the counsel who had agreed to the decree that he had made a mistake in doing so. It was held that the agreement could not in the circumstances be enforced. In the case of *U Po Yeik and others* v. *Ba Khaing and one* (I Burma Law Journal, page 1) it was held that an advocate had no power to bind his client to a compromise decree without his consent. Both of these cases can be distinguished from the present case, because it appears that in both cases the advocate who appeared was acting on the general powers conferred on an advocate of the Chief Court and not under powers expressly conferred on him by *Vakaletnama*. In the present case the advocate for the respondent Mr. Chari was acting under a *Vakaletnama* which was signed by his client and which amongst other things gave him express power "to compound or compromise the case with any of the other parties in such manner, as to him might seem fit; to make admissions of fact or law and confess judgments on my behalf . . . in Court". These powers are very wide, and it can hardly be contended that they do not confer on Mr. Chari full power to agree to the passing of a consent order. But it does not seem to us that this concludes the matter. An advocate acting under a *Vakaletnama* is no doubt acting as the agent of his client. But it was held by Lord Lindley in the English case *Neale* v. *Gordon-Lennox* (Law Reports Appeal Cases, 1902, paragraph 465, at page 473), where the extent to which a client was bound by the act of his counsel was in question that "the ordinary doctrines of agency are only half ot what

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is to be considered in a matter of this kind." In England as explained in the case of *Shepherd* v. *Robinson* (K. B. Division, 1919, page 474) there are two classes of decided cases. In the one class of cases it was held that if counsel acts within his apparent authority, the client will be bound by the agreement made by his counsel and embodied in some order or judgment of the Court. In the other class of cases it was held that the consent given by counsel or solicitor might be withdrawn by the client if the counsel or solicitor gave it under a misapprehension, before that consent order had been drawn up and perfected. The present case seems to us to fall into the second class. Orders had been passed to the effect that Letters of Administration should issue to the appellant, but no further action had been taken, and no Letters had actually issued when the application in review was filed. In Neale's case Lord Halsbury said, "The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of Justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is to my mind the most extraordinary proposition that I ever heard." In the present case the Court was asked not to proceed with the enforcement of the order passed by it. It is not necessary for us to decide here whether in India counsel has the same power as in England to bind his client without his consent to a consent decree. However that may be, we are of opinion that the principles enunciated by Lord Halsbury must be accepted as binding on Courts of Justice in India no less than in England, and that the Courts are not deprived of their general authority over

justice between the parties by an unauthorized act of counsel. It was in our opinion open to the respondent to ask the Court not to proceed with the grant of Letters to the respondent on the ground that the order for that grant had been passed under a misapprehension that he had consented to the grant caused by the acts of his counsel.

As regards the second question which has been raised, it is contended that once Letters of Administration have been granted under the Indian Succession Act they can only be revoked under the provisions of section 234 of the Indian Succession Act, and that the provisions of Order XLVII of the Code of Civil Procedure relating to review are not applicable to proceedings under that Act. It appears to us that there is no justification for this contention. The right of review is given under section 114 of the code from a decree or order (*a*) from which an appeal is allowed by this code, but from which no appeal has been preferred, or (*b*) from which no appeal is allowed by this code. But in rule 1 of Order XLVII where the right of review is again set forth the words "by this code" are omitted. The provisions of section 261 of the Succession Act specifically lay down that where there is contention in dealing with applications for Letters the proceedings shall take as nearly as may be the form of a regular suit according to the provisions of the Code of Civil Procedure. If this had been a regular suit the right of review would undoubtedly have existed. Section 4 of the Code of Civil Procedure provides that in the absence of any provision to the contrary nothing in the Code shall be deemed to limit or otherwise effect any special or local law now in force . . . or any special form of procedure prescribed.

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But there is no provision of the code confining the right of review to the ordinary jurisdiction of the Courts, whilst section 234 of the Succession Act specifically provides for the adoption of the rules of procedure of the code in cases such as the present. The right of review given by the Code is a general one, and we see no reason for holding that it does not extend to orders passed in contested proceedings for the grant of Probate of Letters of Administration. No authority has been shown to us for the contention now put forward, and this contention was never raised in the Trial Court. We have been referred to certain authorities as to the circumstances that must be established before Letters can be revoked. But they deal with applications for revocation under the provisions of section 234 of the Succession Act or section 50 of the Probate and Administration Act. There is no discussion in them the right of review, which is an entirely different right from that given by section 234 of the Succession Act. We are of opinion that the powers of review given by the Code of Civil Procedure can be exercised by a Court which has been dealing with a contentions matter in proceedings for the grant of Letters of Administration. And we do not see sufficient reason for holding that the learned Judge on the Original Side was wrong in holding that a good case for review had been made out by the respondent.

In this original application for Letters, the respondent did name the appellant as a widow of the deceased; but before the order for the grant of Letters was passed, he filed a written objection to the grant of Letters to the appellant, and one of the grounds taken was that she was not the legally married wife of the deceased.

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On the day on which orders for the grant of letters were passed, Mr. Chari was not in Court when the case was called for. He was hurriedly sent for and, on his arrival, he conveyed to the Court the impression that the respondent did not contest the right of the appellant to Letters. It appears, however, that, in fact, the respondent had given no consent, and, in his written objections, he quite clearly contended that the appellant had no legal right to the Letters.

It further appears that Mr. Chari did not intend to agree to a consent-order. In passing orders for the grant of Letters, the Court wns acting under a misapprehension as to the attitude of the parties.

We agree that that provides a sufficient reason for review analogous to the discovery of new and important matter or evidence, or a mistake apparent on the face of the record.

We are, therefore, of opinion that no sufficient reason has been shown for interference in this appeal. We dismiss the appeal with cost—advocate's fee five gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Rutledge.

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Mar. 11.

MAUNG KYAW NYUN

v.

MA-U-BIN MUNICIPALITY.*

Limitation Act (IX of 1908), Article 2, Schedule I—Honest belief that the action or omission was under the provisions of an enactment necessary—Suit for malicious prosecution against a Municipality—Article 23, Schedule I, when applicable.

Held, that the defence of limitation under Article 2, Schedule 1, of the Limitation Act, is available only where the defendant has acted in the honest belief that he was empowered so to act by the provisions of an enactment.

Held further that Article 23, Schedule I, of the Limitation Act would apply to a suit for damage for malicious prosecution against a Municipality, if the Municipality has acted with the knowledge that it had, under the Burma Municipal Act, no power to institute the prosecution complained of.

Kanakasabai v. Muttu, 13 Mad., 445; *Pearson v. Dublin Corporation*, (1907) A.C., 351—*referred to.*

Ganesh Das v. Elliott, (1887) P.R., 160; *Moorarji v. Municipal Commissioner of Bombay*, 25 Bom., 387; *Municipal Board of Mussoorie v. H.B. Goodall*, 26 All., 482; *Narpat Rai and others v. Sirdar Kirpal Singh*, (1880) P.R., 65—*followed.*

Mukat Lal v. Gopal Sarup, 16 A.L.J., 1017 *dissented from.*

A. B. Banerji—for the Appellant.

Thein Maung (1)—for the Respondent.

RUTLEDGE, J.—The appellant sued the Ma-u-bin Municipality in Civil Regular Suit No. 8 of 1924 in the Township Court of Ma-u-bin for damages for malicious prosecution and without going into evidence the suit was dismissed as time-barred under Article 2 of First Schedule of the Indian Limitation Act. If this Article applies admittedly the suit is barred as much more than 90 days elapsed since the last prosecution case against the appellant was dismissed. Appellant appealed to the District Court alleging that the suit was governed by Article 23 which prescribes

* Civil Second Appeal No. 119 of 1924.

one year for compensation for malicious prosecution. The District Court upheld the decision of the Township Court. Hence this appeal.

Each side contend that their article is the more specific. And no doubt it depends upon the point of view. In the eleven prosecutions brought by the Respondent Municipality against the Appellant they purported to bring them under the Burma Municipal Act. It is contended however that no malicious act can be in pursuance of an enactment, and if the Acts are not malicious, appellant has no case. The question in issue does not seem to be governed by any reported authority in this Province, and there is some conflict of opinion among the High Courts of India. I think that it may be taken that in England the analogous period prescribed by the Public Authorities Protection Act does not apply to suits for malicious prosecution, *Pearson* v. *Dublin Corporation* (1). The words of the English Statute do not seem to me to be narrower than Article 2. In I.L.R. (1904) 26 All., page 482, a Bench consisting of Stanley, C.J., and Buckitt, J., decided that in a suit for damages for illegal distress against a Municipal Board, Article 28 was the more specific and applied rather than Article 2. A subsequent Bench in *Mukat Lal* v. *Gopal Sarup* (2), a suit where plaintiff alleged collusion and fraud on the part of the Amin in executing a decree after the amount was tendered to him, held that Article 2 applied. It may be observed that the decision in 26 Allahabad above referred to was not brought to the notice of the Court. In *Moorarji* v. *Municipal Commissioner of Bombay* (3), a Bench consisting of Jenkins, C.J., and Tyabji, J., held that a

(1) (1907) A.C., 351. (2) (1918) 16 A.L.J., 1017.
(3) (1900) 25 Bom., 387.

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RUTLEDGE, J.

suit for recovery of town dues did not come under Article 2. At page 393 Sir Lawrence Jenkins says, "The result appears to me to be that the person seeking the protection of the Act cannot claim that his conduct has any relation to the 'execution of the Act' if he knowingly and intentionally acts in contravention of its provisions." So here, if (as we have to assume) the amount payable by way of refund was ascertained and the plaintiff's right to receive it admitted, the refusal to refund would have been a "deliberate and conscious contravention of the provisions of the Act." Certain observations of Shepherd and Handley, JJ., at page 445 of I.L.R. (1890) 13 Mad., support the same view. I may also quote the following from Smyth, J's. judgment in *Ganesh Das* v. *Elliot*, 1883 P. R. No. 160, "The result then of the numerous cases appears to be that where there is a provision of law limiting the time or regulating the procedure for bringing actions for things done in pursuance of an enactment, the defendant is entitled to the benefit or protection of such provision if he honestly believed in the existence of a state of facts which, if it had existed, would have justified under the enactment to do the thing complained of." A Bench of the Punjab Chief Court took the same view in 1886 P.R. No. 65.

Applying these principles to the present case the respondents may have no difficulty in showing that they acted in the honest belief that they were empowered by the provisions of the Burma Municipal Act to pass the resolutions that they did and to bring the several prosecutions against the appellant. But the Lower Courts are of opinion that even if they knew that they had no such power and acted maliciously in bringing the prosecutions, the action for malicious prosecutions fall under Article 2

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I am of opinion that they are in error. In the words of Sir Lawrence Jenkins quoted above "the person seeking the protection of the Act cannot claim that his conduct has any relation to 'the execution of the Act' if he knowingly and intentionally acts in contravention of its provisions."

For these reasons the orders of the Lower Courts will be set aside and the case remitted to the Township Court for trial. The appellant will have costs of five gold mohurs in this Court and three gold mohurs respectively in the Township and District Courts.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

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Mar. 16.

U PE GYI

v.

U PYO AND TWELVE.*

Buddhist Law, Inheritance—Six relatives—Father's younger sister and mother's younger brother whether excluded—Aunt on father side excludes cousins on both father's and mother's side.

Held that father's younger sister and the mother's younger brother of the deceased are not excluded from the class of six relatives entitled to inherit.

Held also that an aunt on the father's side excludes the cousins of the deceased both the father's and the mother's side.

Kan Gyi v. *Ma Ngwe Nu*, 5 L.B.R. 70; *Kan Gyi* v. *Ma Pyu*, 6 L.B.R. 164; *Ma Ma Gale* v. *Ma Me*, 11 U.B.R., (1904-06), *Buddhist Law, Inheritance*, 5—*followed.*

Kyaw Din and Ba Shin (2)—for the Appellant.
Villa and E Maung (1)—for Respondent Ma Me.
Paw Tun—for Respondents 1 to 4.

HEALD, J.—Appellant claimed Letters-of-Administration to the estate of Ma Ôn who died without issue.

* Civil Miscellaneous Appeal No. 187 of 1924 from Civil Miscellaneous No. 14 of 1924 of District Court of Myaungmya.

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Her parents and grandparents had died before her and she had no brothers or sisters. Appellant, who was her cousin, being a son of her maternal aunt, claimed to be one of her heirs.

Caveats were filed by appellant's own brother Maung Pyo, by one Po Saung, who also was a son of a maternal aunt, and by Ma Me, a paternal aunt.

The District Court held that Ma Me excluded the others because she was one step nearer in relationship to Ma Ôn, and was therefore Ma Ôn's sole heir.

Appellant alleges in appeal that Ma Me, being a younger sister of Ma Ôn's father, cannot be one of Ma Ôn's heirs, because the father's younger sister and the mother's younger brother are not mentioned in the Dhammathats in the list of six relatives of the father and mother, that is the six kinds of uncles and aunts, who are heirs to a nephew or niece who dies without near relatives.

The six words which are used in Burmese to denote the six kinds of uncles and aunts specifically refer to the father's elder and younger brothers, the mother's elder and younger sister, the father's elder sister, and the mother's elder brother. It is clear that there are really eight and not six kinds of uncles and aunts the other two being the father's younger sister and the mother's younger brother, and the question to be decided is whether these two were for any reason intended to be excluded from inheriting like the other six. According to the Dhammathats the six uncles and aunts share equally as heirs, no distinction being made between brothers and sisters or between younger and elder or between the brothers or sisters of the mother and those of the father. Under these circumstances there seems to be no reason for discrimination against the father's younger sister and the mother's younger brother, and no

reason whatever is given in the Dhammathats or has, so far as I am aware, even been suggested. I think it probable therefore that no real discrimination was intended. The compilers of the early law books were extremely fond of enumeration into classes and the compilers of the Burmese Buddhist Dhammathats habitually accepted the number which they found in the older books on which the Dhammathats were based, and sometimes found difficulty in adapting those numbers to the facts which they found in Burmese Buddhist society. Thus there are six kinds of sons who are entitled to inherit and six kinds who are not entitled to inherit, but the lists of the six given in the different Dhammathats do not agree. Similarly there are six kinds of wives and six kinds of concubines, as well as six kinds of uncles and aunts, the numbers in each case being undoubtedly taken from the earlier law books. It seems probable that in the language or languages in which the earlier books were written six terms were sufficient to include all uncles and aunts, that is all the brothers and sisters of either parent. But in Burmese eight different words are used, and the compilers of the Burmese Dhammathats had somehow or another to include eight members into a class which, according to the authorities, could contain only six. The only way in which they could do so was by omitting two and regarding the description of two others as extended so as to cover the two who were omitted. It seems probable therefore that the list of the "six relatives" given in the Dhammathas was intended to include all uncles and aunts, and that the omission of the father's younger sister and the mother's younger brother was only apparent and was not intended to exclude those particular uncles and aunts from the inheritance.

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However that may be, it is certain that no such exclusion has ever been judicially recognized. In the case of *Kan Gyi* v. *Ma Ngwe Nu* (1), it was held that surviving uncles and aunts exclude the children of deceased uncles and aunts. It is true that in that case there seems to have been no younger brother of the mother, but the rule was laid down generally without any qualification and it was expressly based on the principle of Burmese Buddhist law that the nearer relative excludes the more remote.

In the case of *Kan Gyi* v. *Ma Pyu* (2), which dealth with the same estate, it was held that the surviving uncles and aunts, whether paternal or maternal, share equally in the estate of a deceased nephew or niece who has left no nearer relatives, and the father's younger sister was actually included as being entitled to share in the estate.

In the case of *Ma Ma Gale* v. *Ma Me* (3), it was said that, in the case of collateral succession, the general principle, that the nearer relative excludes the more remote, takes full effect, and the general rule, that failing descendants and ancestors the estate goes to the "six relatives," was mentioned and was interpreted as meaning that the estate goes to the paternal and maternal uncles or aunts without any such exclusion as that suggested in this case.

In these circumstances, I do not think that the exclusion alleged is established, and I would hold that the lower Court was right in finding that in this case Ma Me, being a sister of Ma On's father, excluded appellant, who was only a son of a sister of Ma Ôn's mother, and in dismissing appellant's application for Letters.

(1) (1909-10) V.L.B.R. 70. (2) (1911-12) VI, L.B.R., 164.
(3) II U.B.R. 1904-6, Buddhist Law, Inheritance, 5.

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HEALD AND CHARI, JJ.

I would, therefore, dismiss the appeal and would order appellant to pay Ma Me's costs in both Courts—advocate's fee in this Court to be ten gold mohurs.

The Administrator *pendente lite* should be discharged.

CHARI, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne.

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MAUNG SEIN HTIN

v.

CHEE PAN NGAW.*

Illegal consideration—Indian Contract Act, 1872, section 23—Agreement not to bid at an Excise auction and to prevent others from bidding—Money received, on such consideration, whether recoverable—Illegality to be proved not presumed.

Five Excise licenses for certain *Hlawaa* shops having been proclaimed for sale by auction by the Deputy Commissioner, the Plaintiff paid the Defendants certain monies on their undertaking, *inter alia*, that at the auction they would not bid in competition with the planitiff and that they would also prevent others from bidding. The Plaintiff claimed that as a result of the auction he was entitled according to the terms of his agreement with the Defendant to obtain from them a refund of the money he had paid them. Among several defences, the Defendants put forward the defence that the agreement sued on was illegal and void and contrary to public policy. They avoided pleading their own fraud, but left it to the Court to presume that they had fraudulent intentions and advanced no evidence that such was the case.

Held, firstly, that if the defendants intended to show that the contract was illegal under section 23 of the Indian Contract Act, the burden lay on them to prove clearly that it was intended to resort to illegal means, and, *secondly*, that it is not sufficient for the defendants to have used indefinite expressions when demanding the money from the Plaintiff and them to ask the Court to presume that they had intended to act fraudulently or illegally otherwise in contravention of any law.

Held also that, under the circumstances, to refuse the Plaintiff relief would be to encourage fraud and trickery by persons who intended nothing illegal except to defraud the person with whom they were entering into agreements of an indefinite kind with no intention of doing anything except to keep his money in any event.

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* Civil Second Appeal No. 89 of 1924.

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LENTAIGNE, J.

Mahomed Meera Ravuther v. Savvasi Vijaya Raghunada, 23 Mad., 227; *P.M.A. Nagappa Chettiar v. Ah Foke*, 12 B.L.T. 241—*followed*.

Ochme—for the Appellant.
Young—for the Respondent.

LENTAIGNE, J.—This is a second appeal against the judgment and decree of the District Court of Ma-ubin confirming the decree of the Subdivisional Court of Ma-ubin, and the only point for determination is whether the decree is invalid by reason of the fact that it is alleged by the defendant that the object of the alleged agreement was illegal, and that the contract sued on was void and contrary to public policy.

The plaint alleged that the plaintiff is the owner of the *Hlawza* shop at Ma-ubin Town; that first defendant is an Honorary Magistrate at Ma-ubin and a *Lugyi* of the Chinese Association, and has influence over the Chinese Community; that second defendant is a teacher of the Chinese School in Rangoon, and is a person having influence over the Chinese people; that in the year 1922 plaintiff purchased the licenses for Ma-ubin and Mezali *Hlawza* Shops, and joined as partner in the Yèlè, Kanwekabo and Payagyidaung shops; that the licenses for the said five shops were proclaimed for sale by auction in the Deputy Commissioner's Office, Ma-ubin, for the year 1923-24 on the 18th April 1923; that on the 17th April 1923 the first and second defendants came to the plaintiff's house at Ma-ubin and asked for payment of a total sum of Rs. 4,000—made up of Rs. 2,000 for Ma-ubin Hlawza shop, Rs. 5,000 for Mezali Shop, Rs. 500 for Payagyidaung shop and Rs. 500 for Yèlè shop; and said that they would not bid for the said five shops; that they would prevent others from bidding for the same, and that they would return the money, if there was no reduction in the revenue,

and if there was an increase of revenue as other persons were bidding for the same, and as plaintiff believed the statements made by the defendants, the plaintiff gave Rs. 4,000 to the defendants; that on the 18th April 1923 when there was a sale by auction other persons came and bid for the shops in question and plaintiff was about to be deprived of the shops, and therefore he had to purchase licenses for some shops at a reduced rate and for some shops at an increased rate of revenue; that the rates were as follows :—

Ma-ubin Shop for 1923-24 Rs. 22,100 but for 1922-23 Rs. 20,000 (an increase of Rs. 2,100);

Mezali Shop for 1923-24 Rs. 3,050 but for 1922-23 Rs. 2,800 (an increase of Rs. 250);

Yèlè Shop for 1923-24 Rs. 6,250 but for 1922-23 Rs. 7,050 (a decrease of Rs. 800);

Kanwekabo Shop for 1923-24, the plaintiff did not obtain the license;

Payagyidaung Shop for 1923-24 Rs. 5,000 but for 1922-23 Rs. 3,000 (an increase of Rs. 2,000);

that according to the agreement made by the plaintiff and the defendants, a demand for payment of Rs. 3,500 was made after leaving aside Rs. 500 for Yèlè Shop; that first defendant returned Rs. 500 promising that the balance of Rs. 3,000 would be paid when second defendant came back from Pyapôn; that on several occasions defendants were asked to pay Rs. 3,000 according to the agreement, but in vain; and the prayer was for recovery of Rs. 3,000.

The written statement of the first defendant denied the alleged agreement and denied the receipt of Rs. 4,000 from the plaintiff and denied the alleged repayment of Rs. 500 and promise to pay the balance; and the defendant contended that the suit is not maintainable and the money is not recoverable as it is paid in consideration of the promise to sacrifice the

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chance of pursuing one's own trade and to deter other competitors from outbidding the plantiffs at the Government *Hlawaa* License Auction Sale, thus inflicting injury on the publice purse, excluding one of the parties from competitions entirely at a sacrifice and restraining another from pursuing lawful trade, thereby rendering the said agreement void, being fraudulent, unlawful and opposed to public policy; that the defendant further contended that the plaintiff sued the defendant just to enable plaintiff to defend a criminal charge of defamation and criminal intimidation instituted by the defendant in a specified prosecution. The latter had reference to a prosecution instituted by the defendant against the plaintiff for calling him "a thief" in connection with this transaction. The second defendant raised similar legal defences and also denied the allegations of fact.

Both the lower Courts have decided all issues of fact in favour of the plaintiff. The learned Subdivisional Judge also decided the legal issue as to "whether the agreement was fraudulent, unlawful or opposed to public policy" in favour of the plaintiff. He disregarded two old decisions in Upper Burma and followed a more recent decision of a Bench of the late Chief Court in the case of *P. M. A. Nagappa Chettiar* v. *Ah Foke* (1), where the plaintiff was allowed to recover a sum of money which had been deposited with a Chetty to be paid to another Chinaman if certain *Hlawaa* licenses were sold below a certain price and on agreements that the defendants were not to bid for certain licenses. That decision was based on certain English decisions and also followed the Privy Council decision in *Mahomed Meera Ravuther* v. *Savvasi Vijaya Raghunada* (2).

(1) (1919) 12 B.L.T. 241. (2) (1900) 23 Mad., 227 at 233.

The learned trial Judge held that the facts of the present case are very similar to the facts of the case in the chief Court, and he granted the plaintiff a decree with costs.

On first appeal the learned District Judge held that there was not a title of evidence that Government had suffered any loss of revenue by the arrangement made between the parties; and that it is evident that defendants did not or could not induce the other intending buyers to desist from outbidding the plaintiff; and that there was no combination between the bidders to curtail the bidding; and that unless and until it was established that the arrangement made between them and the plaintiff was an artifice to defraud Government revenue, he found no reason for allowing them to take advantage of their own fraud, thereby enabling them to pocket a sum of Rs. 3,000, and he added that he was in full agreement with the learned Subdivisional Judge in following the decision in *P. M. A. Nagappa Chettiar v. Ah Foke* (1).

The present second appeal is against that decision. It is admitted that an agreement not to bid is not illegal, but it is urged that the case is not covered by the decisions of the Privy Council and of the late Chief Court, because it involves the further agreement of defendants that they would prevent others from bidding. I find, however, that no name of any other person was mentioned as a person to be so prevented and that no indication is given as to what defendants were to do, and that it is not clear what the defendants really contemplated when they used the original Chinese or Burmese expressions which have been so translated.

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(1) (1919) 12 B.L.T. 241.

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In the case of *Mahomed Meera Ravuther* v. *Savvasi Vijaya Raghunadha* (2) their Lordships of the Privy Council cited their previous decision that "all purchasers are bound to abstain from breaches of trust and from intimidation or falsehood in keeping off bidders"; and in a later passage they quote the finding of the High Court, "The means by which competition was discouraged at the auction were clearly of an innocent character. In employing them, as in making the agreement with the zamindar, the purchaser did not go beyond the limit of what he was entitled to do in order to make a good bargain"; and they expressed the view that such findings were in accordance with the view pronounced by the Board.

I think that if the defendants in this case intended to show that the contract was illegal under section 23 of the Indian Contract Act, 1877, the burden lay on them to show clearly that it was intended to effect the purpose by illegal means, and that it is not sufficient for them to have used indefinite expressions when demanding the money from the plaintiff and then to ask the Court to presume that they, defendants, had intended to act fraudulently, illegally or otherwise in contravention of any law. The defendants avoid pleading their own fraud, but they ask the Court to presume that they, the defendants, had fraudulent intentions of an unspecified or indefinite kind without their advancing any evidence that such was the case. To refuse plaintiff relief under such circumstances would be to encourage fraud and trickery of a different kind by persons who intended nothing illegal except possibly to defraud the person with whom they were

(2) (1900) 23 Mad., 227 at 223.

entering into agreements of an indefinite kind, with no intention of doing anything except to fraudulently keep the money in any event.

For the above reasons I see no reason to disagree with the decisions of the lower Courts, and I dismiss this second appeal with costs.

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APPELLATE CIVIL.

Before Mr. Justice Lentaigne.

MA E MYA AND ANOTHER *v.* U PE LAY AND OTHERS.*

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Buddhist Law—Orasa, Right of, to claim a quarter of the parental estate on father's re-marriage after death of mother—Right, whether vested—Orasa having died without claiming his quarter, whether his heirs entitled to the quarter.

The decision in Maung Shwe Po *v.* Maung Bein, 8 L.B.R., 115, to the effect that if the *Orasa* does not on his father's re-marriage claim his one-fourth share in the parental estate, he can only come in on his father's death with the other children and then claim only as heir to his father's estate, has been impliedly over-ruled by the decision of the Privy Council in Tun Tha *v.* Ma Thit, 9 L.B.R., 56.

Held, that the right of the *orasa* son to claim on the father's re-marriage a quarter share in the parental estate is a vested right.

Held further, that if the *orasa* dies without having claimed his quarter share, such share devolves on his heirs and legal representatives.

Maung Pan On v. *Maung Tun Tha and others*, 11 L.B.R., 298; *Maung Sin* v. *Mrs. Kirkwood*, 2 Ran., 693; *Tun Tha* v. *Ma Thit*, 9 L.B.R., 56; *V. T. Arunachellam Chetty* v. *Maung San Ngwe*, 2 Ran., 168; *Maung No* v. *Maung Po Thein*, 1 Ran., 363—*referred to.*

Shwe Po v. *Maung Bein*, 8 L.B.R., 115—*dissented from.*

Maung Seik Kaung v. *Maung Po Nyein*, 1 L.B.R. 23; *Maung Shwe Tuet* v. *Maung Tun Shein*, 11 L.B.R. 109—*followed.*

Foucar—for the Appellants.
On Pe—for the Respondents.

LENTAIGNE, J.—This is a second appeal against the judgment and decree of the District Court of

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* Special Civil Second Appeal No. 407 of 1924.

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LENTAIGNE, J.

Amherst, reversing the decree of the Subdivisional Court of Moulmein. The plaintiffs-appellants are the widow and minor children of one Maung Po Min, who was the first-born child and eldest son of the defendant-respondent U Pe Lay and his wife Ma Thin. According to the plaint, the said Ma Thin died adout ten years before the institution of this suit, leaving her surviving husband the defendant-respondent U Pe Lay and five children, namely, the said Maung Po Min as the eldest child and described in the plaint as the "*Orasa son*" and four daughters--Ma E May, Ma On Myaing, Ma E Gywe and Ma On Sein (who are not made parties to this suit). The plaint also stated that about eight years before the institution of the suit, the defendant U Pe Lay married a second wife Ma Sein; and that the *orasa* son was alive at that time and survived this second marriage of U Pe Lay by about one year when the said Maung Po Min died leaving the plaintiffs as his heirs. The plaint further alleged that the old couple U Pe Lay and his first wife Ma Thin acquired the joint property specified in the plaint consisting of certain lands valued at Rs. 6,000. The claim of the plaintiffs was that on the death of his mother Ma Thin, Maung Po Min was the *orasa* son and that on the father U Pe Lay taking a second wife eight years before the suit, the said Maung Po Min as the *orasa* acquired a vested right to one-quarter share of the said jointly acquired property of his parents; and that on the death of the said *orasa* about seven years before the institution of the suit, the said vested right of the *orasa* devolved on the plaintiffs as his widow and children. It was not alleged that the *orasa* son had in fact made a claim or an election to claim the said one-quarter share; but the case of the plaintiffs was based on the allegation

that such share had become vested in the *orasa* son on the re-marriage of his father, and that, on the death of the *orasa* son, such right became vested in the plaintiffs as his widow and children. The plaintiffs had been permitted to sue *in formâ-pauperis* and the prayer of the plaint was for a declaration that plaintiffs are entitled to one-fourth share in the properties described in paragraph 2 thereof and for partition and possession of the land.

The defendant U Pe Lay contested plaintiffs' claim on three grounds :—(1) that the suit is premature ; (2) that the first plaintiff, the widow of Maung Po Min, has married again ; and (3) that if plaintiffs are entitled at all to any share, it is only to an one-eighth share of the joint estate. He also alleged that Ma Sein, his second wife, was no longer his wife, but as that issue was decided against him, it need not be considered further in this appeal.

The learned Trial Judge framed four issues—

(1) whether the plaint is bad in law for misjoinder of parties ;
(2) whether the suit is premature or not ;
(3) whether Ma Sein is no longer defendant's wife. If so, how, if at all, are plaintiffs' rights effected ?
(4) what share, if any, are the plaintiffs' entitled to under the Burmese Buddhist Law ?

On the first issue, the learned Trial Judge stated that it was contended by the defendant that his other four children were necessary parties and that the first plaintiff Ma E Mya should not join as plaintiff, because she had re-married after the death of Maung Po Min. The learned Judge then stated that the plaintiffs had specifically stated that they were suing only as heirs and legal representatives of Maung Po Min for his *orasa* share in the estate, on account of the defendant's re-marriage ; and that they are not suing for their rights of inheritance to

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the estate; and on this ground he found on the issue in the negative. (I point out below that this is not in fact a claim to the *orasa* share, but a claim of a different kind arising on the re-marriage of the surviving parent.) I have set out the above passages because I understand that it is admitted by the plaintiffs that if the case is decided against the plaintiffs on the main question as to their right of suit for full one-quarter share, then the suit must be dismissed and it will be unnecessary to consider what would be the right of the plaintiffs as children of an *orasa* child claiming merely the ordinary preferential right of an equal share with each of their aunts. I understand that position to be admitted and I may add that neither side has addressed me on any of the aspects of the alternative case that would arise on such question or on the point as to whether the four aunts would be necessary parties.

On the other issues the learned Trial Judge decided in favour of the plaintiffs and holding that the re-marriage of the first defendant gave Maung Po Min the right to claim one-quarter share and that such right devolved on his heirs, he granted the plaintiffs a decree as prayed with costs.

On first appeal, the learned District Judge discussed the law very fully and holding that, though Maung Po Min had the right to claim one-quarter share on the re-marriage of the defendant, he died without making such claim and that the right did not devolve on his heirs. He allowed the appeal and reversing the decree of the Trial Court, he dismissed the suit with costs.

The only point, therefore, for determination on this second appeal is whether that decision of the learned District Judge is correct; or, to put the question differently the points for determination are

firstly whether any right to claim a quarter or other fixed share in the joint estate of the parents was acquired by Maung Po Min by reason of such re-marriage of the surviving father and whether such right devolved on the plaintiffs as heirs of the eldest son who had survived his mother and had also survived the re-marriage of his father, but had omitted to claim such quarter share before his death.

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I must first point out that on the more recent decisions it is necessary to consider separately questions as to the meaning of the term *orasa* child and as to the share claimable by the *orasa* child. According to the judgments of the majority of the Judges in the Full Bench decision of *Maung Sin* v. *Mrs. Kirkwood* (1) it would seem that Maung Po Min was technically an *orasa* child, because being the eldest-born child of the marriage, he had attained his majority and otherwise become competent to acquire, and therefore did acquire, that status of *orasa* child during the lifetime of both parents; but he never in fact acquired what I may describe as the further right of the *orasa* child to claim the one-quarter share of the joint estate under that decision, because that right would only have been acquired by him on his father predeceasing his mother, and as his mother died first, no male member of that family could acquire such right to a quarter share. It is most important to keep the above points clearly in mind, because the claim which has been made in this case is really based on the use of the word "vested" with reference to the claim of an *orasa* son to his one-fourth share as against his surviving mother on the death of the father who had predeceased the mother. Though the word "vested" was not used

(1) (1921) 11 L.B.R., 220; (1924) 2 Ran., 693 P.C.

by the Privy Council, the share of the *orasa* child was described as a definite one-fourth part of the estate, in terms which implied that it was a vested share in a decision of the Privy Council in the case of *Tun Tha* v. *Ma Thit* (2). In consequence of that decision the vesting of the right in the *orasa* son was recognised in the subsequent decision of a Bench of the late Chief Court in the case of *Maung Pan On* v. *Maung Tun Tha and others* (3) and certain aspects of the right connected with and depending on this vesting of the right were considered in the decision of a Bench of this Court of which I was a member in the case of *V. T. Arunachellam Chetty* v. *Maung San Ngwe* (4). The decision that the right of the *orasa* child to the quarter share is a vested right suggests the question whether the right to the quarter share does or does not devolve on the children of the *orasa* child even in the event of the death of the *orasa* child before the *orasa* child has made the claim to the quarter share. In this connection I must draw attention to the doubt raised on this point by Maung Kin, J., in the answer to the seventh question at page 248 in 11 L.B.R. and at page 718 of 2 Rangoon of the report of the decision in *Maung Sin* v. *Mrs. Kirkwood* (1) where he remarks: "Supposing the eldest-born child dies after it became entitled to claim a quarter share under the circumstances of the case, the question may arise whether his children will be entitled to claim the quarter share from their surviving grandparent. This question does not arise here and need not be answered." It appears that this question will be *res integra* when it arises, but it is one which is directly suggested by the authorities

(2) (1917) 9 L.B.R., 56. (3) (1921) 11 L.B.R., 292.
(4) (1924) 2 Ran., 168.

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cited above. In the case now before me it might appear that we are not *directly* concerned with the question arising on these authorities as to whether such right of the *orasa* son to claim his quarter share against his mother could on his death devolve on his children; but the question arises *indirectly*, if it can be held on a parity of reasoning that the different class of claim which I will discuss below is a claim to a vested right.

As pointed out above the claim which it is alleged that Maung Po Min had to one-quarter share on the re-marriage of his father was not a claim as *orasa* son arising on the death of a parent; but it was the entirely different claim of the eldest son to a quarter share on the re-marriage of the surviving parent.

The right to claim such quarter share on the re-marriage of the surviving parent was decided in the case of *Maung Seik Kaung* v. *Maung Po Nyein* (5), and was recognised by a Full Bench of the late Chief Court in the case of *Shwe Po* v. *Maung Bein* (6). In the latter case, Hartnoll, J., observed that because the eldest son had allowed the twelve-year period to pass, he could not claim the one-fourth share and so it became irrecoverable and lapsed in his father's estate; and that he could claim nothing further until his father died and then he would not claim as an heir entitled to inherit any portion of the estate consequent on his mother's death, but as an heir to his father's estate. In the case of *Maung No* v. *Maung Po Thein* (7), May Oung, J., stated that he was in entire agreement with that statement of the law and that it followed in his

(5) (1900) 1 L.B.R., 23. (6) (1914) 8 L.B.R., 115.
(7) (1923) 1 Ran., 363 at 368.

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view that the right of the eldest son to claim a quarter share from his father on the latter's re-marriage after his mother's death is not a vested one; and then he went on to apply the same view to the claim, if any, of the *Kanittha* children. These remarks, however, were *obiter*, and the actual decision in that case was based mainly on the law of *res judicata* and on the decision that the *Kanittha* children had no right to make the claim after the death of the surviving parent.

The decision in *Maung Seik Kaung* v. *Maung Po Nyein* (5) was partially discussed by Heald, J., at page 276 of the report of *Maung Sin's* case in 11 L.B.R. and at page 753 in 2 Rangoon; but the same question was again more fully considered by Heald, J., in the later case of *Maung Shwe Yuet* v. *Maung Tun Shein* (8), where he discussed all the Dhammathats and other authorities at considerable length; and he came to the definite conclusion that the law is now settled that whilst an *orasa* son cannot claim a one-fourth share of the property jointly acquired by his parents merely by reason of his mother's death, the re-marriage of his father gives him a right to claim the one-fourth share, which he would not have if his father did not re-marry. This decision appears to me, when taken with the previous Full Bench decision and the decision in *Maung Seik Kaung* v. *Maung Po Nyein* (5), to make it binding on me to hold that Maung Po Min had acquired the definite right to claim the one-fourth share on the re-marriage of his father.

The remaining question requiring consideration is whether such right to claim the one-fourth share

(8) (1921) 11 L.B.R., 199.

has devolved on the plaintiffs, having regard to the fact that Maung Po Min had not in fact made the claim before his death. I have referred above to the view expressed by May Oung, J., in the case of *Maung No* v. *Maung Po Thein* (7), that, on the remarks of Hartnoll, J., in the Full Bench decision in *Shwe Po* v. *Maung Bein* (6) the right would not be a vested right. I find that Heald, J., had also referred to this Full Bench decision in his judgment in *Maung Sin's* case at page 283 of 11 L.B.R. and at page 763 of 2 Rangoon where he says that the Full Bench case of *Shwe Po* v. *Maung Bein* (6) is interesting for the purposes of the present reference only, because its suggestion that the *orasa* has an option and can either claim the one-fourth share or wait till the death of both parents and come in with the other children, seems to have been since over-ruled by the Privy Council in the case of *Tun Tha* v. *Ma Thit* (2). This opinion was likewise *obiter*, but as I construe this remark, it means that the Privy Council, having held in *Tun Tha's* case that the right of the *orasa* to the one-fourth share is a vested right, have in effect over-ruled the previous decisions to the effect that the right was a *mere* option or right to elect as distinct from a vested right.

The consideration of this point brings me back to the question whether on a parity of reasoning, the remarks and reasoning of their Lordships of the Privy Council can apply to the share arising on the re-marriage of the surviving parent; I think the remarks and reasoning can so apply. At page 56 of the report of Tun Tha's case in 9 L.B.R. it will be noticed that the Bench of the Chief Court refer to one question for determination on the appeal as being whether an eldest son must act

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with reasonable promptitude in exercising his "*option*" of taking one-fourth of his parents' joint property on the death of the father, etc., whilst the contention that was rejected by the Privy Council was put in the different form as an *election* or a right *to elect* and on page 59 of the same Report the Lord Chancellor states that, "Their Lordships do not think that it is desirable to express an opinion upon the true construction of Rule 14. It is a matter that may arise for determination hereafter, and its determination is not relevant to the present question, because, even assuming in favour of the respondents, that the right of the eldest son would change in the event of his not having segregated his one-fourth share before his mother's death, it by no means follows that the right which he got under Rule 5 was *merely* the right *to elect* within a certain period of time whether he would take the property or not. Their Lordships can find no grounds whatever for the suggestion that he got anything under Rule 5 excepting *a definite one-fourth part of the estate*, a right which he was at liberty to assert within any period that was not outside the period fixed by Article 123 of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of the intestate." In other words, the use of the word "option" in this connection is misleading and does not mean *a mere right to elect*. Every person, who owns property or a share in property which has been in the possession of another person, has an option to avoid asserting his claim, but that fact does not prevent the interest from being a vested one.

If we apply these remarks to the case of the right to a share of one-fourth arising in favour of the eldest son on the death of the surviving parent,

we also find either the word *option* or passages describing the right as if the claim to it were optional and I think that the *option* in that case likewise was not a mere right to elect, but was a very similar option to the option of the *orasa* child to take *a definite one-fourth part of the estate.* The reference to Article 123 of the Indian Limitation Act, 1908, does not affect the question, because, the period under that article begins to run from the time when the share was payable or deliverable. The share would obviously not be a vested share prior to the re-marriage of the surviving parent, but a reference to the enactments as to contingent bequests should clear up any doubts arising under this head.

The fact that the right lapses after the twelve years, likewise does not make any difference, because the lapsing would be the same whether it was a lapsing of the right of an *orasa* child to take his *orasa* share as a definite one-fourth share in the joint estate, or whether it was a like failure to take the definite one-fourth share to which he had become entitled on the re-marriage of the father. Section 28 of the Indian Limitation Act, 1908, would equally apply and effect the extinguishment of the right in each case. The confusion which has arisen is the same in both classes of cases; and now that the Privy Council has finally decided the point in the one class of case, it is, I think, the duty of the Courts to apply the like rule of construction in the other class of cases, which is exactly similar so far as the question of an option or question of election comes in. For these reasons I agree with the *obiter* opinion of Heald, J., that the previous view that the right was mainly an option or a *mere*

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option was impliedly over-ruled by the decision of the Privy Council; and I must, therefore, hold that the right is a vested interest and right. That being so, I can see no reason why this vested interest and right should not devolve on the heirs and legal representatives of the holder of the vested interest or definite right to the one-fourth share.

In this connection I have also considered the question of the preferential right accorded by the Dhammathats to the children of the *orasa* child. As pointed out in different passages in *Maung Sin's* case, this preferential right to an equal share with the younger uncles and aunts will be effective in cases where the *orasa* child though acquiring his status of *orasa*, subsequently pre-deceases both his parents. In such an event he obviously cannot acquire the one-fourth share either as *orasa* or in the other class of cases on the re-marriage of the surviving parent. That is one class of cases in which the preferential right clearly can come in. In the case of Maung Po Min, who, though an *orasa* child, had not acquired the right to the *orasa's* share, the same position would have arisen, if his father U Pe Lay had not re-married prior to the death of Maung Po Min. That is another class of cases in which the preferential right of the children of the *orasa* can come in. I am not aware of any reason why these two classes of cases should not be the only classes in which that preferential right arises. If Maung Po Min had in fact claimed and received his one-fourth share before his death, it is clear that his heirs and legal representatives would have inherited that one-fourth share on his death. Likewise, once it is clear that his right to

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that one-fourth share was a vested right to a definite one-fourth share, I can see no reason why it should not similarly devolve on his heirs and legal representatives.

For these reasons I allow the appeal and I set aside the decree of the Lower Appellate Court; and I restore the decree of the Subdivisional Court granting the Plaintiffs' claim as prayed with costs in all three Courts. I also direct that the amounts of Court Fees which would have been paid by Plaintiffs in the Trial Court and also on the second appeal in this Court, if they had not been permitted to file the suit and this appeal respectively as paupers, shall be calculated and recovered from the defendants and that such amounts shall be a first charge on the subject-matter of the suit.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Lentaigne.

MAHOMED HUSSAIN
v.
HOOSAIN HAMADANEE & CO.*

1925
Mar. 18.

Letters Patent, Clause 13—Commission, Examination of witness on, dismissal of application for, not a Judgment.

Held that an order of dismissal of an application for the examination of a witness on commission is not a Judgment within the meaning of Clause 13 of the Letters Patent.

Mooljee Dharsee & Co. v. *M. E. Moolla*, 3 Ran., 255; *Tuljaram Row* v. *Alagappa Chetty*, 35 Mad., 1—*followed.*

Rahman—for the appellant.

HEALD AND LENTAIGNE, JJ.—In Suit No. 283 of 1924 on the Original Side of this Court, appellant,

* Civil Miscellaneous Appeal No. 33 of 1925 against an order of this Court on the Orginal Side in Civil Regular No. 283 of 1924.

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MAHOMED HUSSAIN v. HOOSAIN HANADANEE & Co.

HEALD AND LENTAIGNE, JJ.

who was defendant in the suit, applied for a commission to examine a certain witness in India.

Affidavits were filed by both sides, and the learned Judge, after hearing Counsel, dismissed the application.

Appellant has filed an appeal against that order, but his appeal has not yet been admitted.

His learned Advocate contends that the order is a "judgment" within the meaning of that word in Clause 13 of the Letters Patent.

The meaning of the word "Judgment" in that clause was recently considered by a Bench of this Court in the case of *Mooljee Dharsee & Co.* v. *M. E. Moolla* (1), and it was held that an order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit is not a "judgment". As was remarked in the case of *Tuljaram Row* v. *Alagappa Chetty* (2), "An order refusing to issue a commission, however serious the ultimate results to the party, is a purely interlocutory order and not a judgment terminating a suit or other proceedings or affecting the merits."

We are, therefore, of opinion that the order in this case was not a "judgment" within the meaning of Clause 13 of the Letters Patent, and that no appeal lies against it.

The appeal is accordingly dismissed.

(1) (1925) 3 Ran., 255. (2) (1912) 35 Mad., 1.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne.

1925
Mar. 20.

MAUNG PO KA
v.
MAUNG SAN PE.*

Sending of notice by person claiming interest in land to person in occupation warning him not to work the land—Abstention from cultivation by occupier in consequence thereof—Damages, whether cultivator can recover in tort.

The Law encourages persons who have *bonâ fide* rights to give notice to other persons who are likely to be affected by such rights; and consequently it is obviously not the policy of the Law to presume either malice or *mala fides* in such cases, but to require clear proof of the same.

Defendant claiming to be entitled to certain pieces of land, sent a notice to plaintiff, who was in occupation as tenant of a third party, warning plaintiff to desist from cultivating the land without defendant's permission. Plaintiff, in consequence, refrained from cultivating the land and sued defendant for damages. He adduced no evidence that defendant had acted maliciously or that he was not acting *bonâ fide*.

Held that on the facts no cause of action for the recovery of damages had been made out.

Derry v. Peek, (1889) 14 A.C., 337; *Halsey v. Brotherhood*, (1881) 19, Ch. D., 386; *Hargrave v. Le Breton*, 98 Eng. Rep., 27; *Pater v. Baker*, 3 C.B. 831—*referred to.*

Leong—for the Appellant.
Ko Ko—for the Respondent.

LENTAIGNE, J.—This Second Appeal No. 12 of 1924 has been heard with two other Second Appeals Nos. 13 and 14 of 1924; and as the three appeals cover the same points with the only material difference as to the amount of damages decreed, this judgment will cover all three cases, which had been similarly decided by the same judgment in the lower Appellate Court.

The facts which gave rise to all three suits are summarised in the judgment of the lower Appellate

* Civil Second Appeal No. 12 of 1924.

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Court as follows:—The lands to which these suits relate originally stood in the name of one Ma Nge Le, who died; and the appellant Po Ka claimed that on the death of Ma Nge Le the land devolved on her sister Ma Pu who was the wife of the appellant. Ma Pu died shortly after Ma Nge Le and the appellant then claimed that the lands became his property. The lands, however, were, in the possession of Ma Sein who was the aunt of Ma Pu and Ma Nge Le; and shortly afterwards the appellant Po Ka is said to have executed a registered deed of gift of the lands in favour of Ma Sein. Then the appellant is said to have changed his mind and to have executed a registered deed purporting to cancel the deed of gift to Ma Sein; and he is also said to have instituted a suit for the cancellation of the deed of gift to Ma Sein and that in such suit he was unsuccessful. This suit does not appear to have been made an exhibit in the cases now under appeal, but these facts have been referred to as explanatory of the facts more directly concerned with the three cases now under appeal.

The plaintiffs in each of these cases were tenants who had leased separate portions of the land from Ma Sein; and after they had partially cultivated the land, the Appellant Maung Po Ka informed these tenants that he claimed the land and that they must pay the rents to him; and he then served each of them with a copy of the written notice of which the following is a translation:—"On the first Waning *Tazaungmôn* 1283 B.E., I, Maung Po Ka, send this written notice to you, Ko On, Maung San Pe and Maung San Ba. On the eighth Waning *Tabaung* 1282 B.E. corresponding to the 31st March 1921, I gave and kept my own paddy land with Ma Sein. As I now did not want to gave it to her,

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I took it back into my possession in accordance with law on the thirteenth Waning *Tazaungmôn* 1283 B.E. corresponding to the 12th November 1921. So the rental paddy amounting to 1,050 baskets of the said paddy land must be given to me. If you fail to do so or use it in any way without my permission, legal steps will be taken and you shall incur payment of costs. Moreover, you shall not grow without my permission any crop or sugarcane, etc., on the paddy land belonging to me either this year or next year, and you are hereby forbidden."—*Signed* MAUNG PO KA.

The plaintiffs, the said tenants, subsequently on the 24th October 1922 instituted the three suits now under appeal alleging that portions of the land had been leased to them respectively by Ma Sein, and they had ploughed certain portions; that the defendant (appellant) Maung Po Ka sent for each plaintiff and "prevented him and others from cultivating the land both orally and by the written notice" (as above); and that owing to the action of the defendant the plaintiff could not plant certain crops; and the prayer was for specified sums as compensation for the losses so sustained.

The defendant in each case admitted sending the notice but denied liability for any of the damage alleged in the plaint; and he pleaded that the losses and damages alleged in the plaint were too remote as a basis for the claim of the plaintiff. At settlement of issues the defendant stated that Ma Nge Le, the owner of the land died in March 1921 leaving no children; that his wife Ma Pu inherited the land; that his wife died seven days later, and then the land became his; that pitying Ma Sein the aunt of his wife, he had given the land to Ma Sein by a registered deed dated the 31st March 1921; but

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that as Ma Sein failed to give him the jewellery of Ma Nge Le which belonged to him, he cancelled the deed of gift by a registered deed to which Ma Sein was not a party; and he had then instituted the suit in the District Court for the cancellation of the deed of gift, but before doing so he had sent the notice to the plaintiffs and that he did not know whether the plaintiffs had stopped work; and he also admitted that his suit against Ma Sein was dismissed. He further admitted having verbally told the plaintiffs not to work the land before he sent the written notice.

Five issues were framed:—

(1) Was the plaintiff a tenant of Ma Sein in the year 1283 B.E. in respect of a portion of holding No. 6 of 1921-22?

(2) If so, what was the area of that portion?

(3) Did the Plaintiffs suffer any loss in consequence of the written or verbal notice of the defendant?

(4) If so, how much? and

(5) What relief, if any is the Plaintiff entitled to?

These issues did not satisfactorily raise the points of the defence, as to denial of liability and remoteness of damage, though the last issue would cover the defence.

The learned Township Judge stated in his judgment that the defendant had set up the defence that when he gave the notice, the plaintiffs had replied that they could not stop planting; and he held that this reply was not proved satisfactorily, but that even if it were proved, it would not matter, because the plaintiffs might have subsequently stopped further planting through fear of consequences on account of the notice. The remainder of his judgment was occupied with the discussion of the value of crops which might have been got from a small area alleged to have been left unplanted in each case; and he awarded as damages Rs. 224-7-8 for an area of

decimal 92 of an acre alleged to have been left unplanted in San Pe's case; Rs. 244-0-0 for an area of about one acre alleged to have been left unplanted in San Ba's case, and Rs. 430-5-0 for an area of 1·78 acres alleged to have been left unplanted in Ko Ôn's case. He granted the plaintiffs decrees for these amounts with costs in the respective cases.

Both sides appealed in each case to the District Court, which dismissed the appeals in all the cases and allowed costs to the original plaintiffs. The learned District Judge considered the question whether the plaintiffs are entitled to any damages at all.

He held that as the defendant was a townsman and the plantiffs were cultivators, they would be impressed with the order forbidding them to work the land, and that they were not bound to continue working until the defendant resorted to any means of forcible prevention; but the learned Judge did not consider any precedents or authorities or attempt to clearly indicate what branch of the law of torts was applicable. He expressed the opinion that if a man orally forbids another to work certain land and then serves him with a written notice forbidding him to do so, and invests his actions with all the forms of formality that he can, it is quite impossible for him to plead afterwards (when the man whom he has forbidden to stop work does actually stop work) that this stopping is not the natural and probable consequence of his action in ordering a stoppage.

The present second appeal is against that decision. I think that it is obvious that if the above were a correct statement of the law, the amount of litigation in India would be greatly increased for a time, as numerous lawyer's notices warning persons not to take certain specified action with property pending a lawsuit would at once give rise to claims for damages and encourage the recipients to take or pretend to take an immediate

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holiday on receipt of the notice in anticipation of the damages to be recovered from the other party. Consequently, it is necessary that such a class of claim should be carefully scrutinised with grave suspicion. The first question for determination is to ascertain under what category of the law of torts the claim can lie. I think that it is clear that it cannot be treated as a trespass to the lands of the plaintiff, because the nature of such class of tort is indicated by the old writ *quare clausum fregit* (wherefore he broke the close); which indicates that there must be an entry on the land in order to enable plaintiff to maintain the suit. In this case it is not alleged that there was any entry on the land in the possession of the plaintiff, and consequently I do not think that there can be any claim on an allegation to a trespass.

The only cases which might appear to be analogous are actions for slander of title; but clearly such a cause can only arise when the slander is uttered to a third person and damage arises in consequence. It is pointed out in Pollock's Law of Torts that slander of title is in truth a special variety of deceit, which differs from the ordinary type in that third persons, not the plaintiff himself, are induced by the defendant's falsehood to act in a manner causing damage to the plaintiff. I think that the only cause of action which the plaintiffs could have had, if at all, for the loss arising on the receipt of the notice in question would be a claim as on an action for deceit. But it is clear that the essential point for an action for deceit have not been alleged or proved in this case. It would be necessary for the plaintiffs to allege and prove not merely that the statements in the notice were untrue in fact, but also that the person making the statement knew the statement to be untrue or was culpably ignorant, that is recklessly and consciously

ignorant whether it be true or not, besides the further elements as to the intent and the acting upon it in the manner intended or contemplated and the consequent suffering of damage. It was held in *Derry* v. *Peek* (1) that there is no cause of action in such a case without both fraud and damage. Here there is no allegation of fraud; and no attempt has been made to prove fraud.

If we test the question on the analogy of cases of slander of title, the same point becomes apparent. Such cases are commonly cases in which a property is being sold by public auction and the sale is stopped and the damage is caused to the owner by reason of disparaging remarks being made as to the title of the owner or as to the disadvantages which the purchaser will be under from certain facts. It was held in the case of *Pater* v. *Baker* (2) that it is necessary for the plaintiff to prove actual malice to sustain the action. It has also been held in the case of *Hargrave* v. *Le Breton* (3) that if the statement is made in the *bonâ fide* assertion of the defendant's own right, real or supposed, to the property, no action lies. It was similarly held in *Halsey* v. *Brotherhood* (4) as regards warnings by the holder of a patent to the public warning them against infringement that the wrong is a malicious one in the only proper sense of the word and the absence of good faith is an essential condition of liability.

If that is the position in the case of a statement disparaging a title made to a stranger to the title, who is more likely to be misled than the owner or tenant interested in the property, *a fortiori*, the same points must be established when the statement is

(1) (1889) 14 A.C., 337.
(2) (1847) 3 C.B., 831.
(3) (1769) 98 Eng. Rep., 271.
(4) (1881) 19 Ch. Div., 386.

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made to the owner or tenant so interested in disregarding the notice. The law encourages persons who have *bonâ fide* rights to give notice to other persons who are likely to be affected by such rights; and consequently it is obviously not the policy of the law to presume either malice or *mala fides* in such cases, but to require clear proof of the same. If the plaintiffs in this case had any doubt as to the right or wrong of the notice which they had received, it was to their interest to go at once to Ma Sein, who would have informed them of the strength of her title. If the plaintiffs were foolish enough to act on the notice, it was their own lookout and they acted at their own risk. As I have indicated, above, I believe that if such cases were encouraged, it would quickly result in persons deliberately pretending to take a rest and to have been misled by the notice in the hopes of levying blackmail from the sender of the notice. Where a litigant fails in a case, it is more difficult for him to prove his *bonâ fides* than if he had won, but that is no reason for presuming that he was not *bonâ fide*, and it is often noticeable that many persons who bring erroneous claims are more confident of success than those who do succeed.

In the cases now before me there is no allegation or evidence that the defendant was acting maliciously or that he was not acting *bonâ fide*; and under these circumstances I am satisfied that no cause of action for the recovery of damages was made out against him.

I therefore allow this second appeal, and I set aside the decrees of both the lower Courts in all three cases and I direct that all three suits be dismissed with costs.

FULL BENCH.

Before Sir Sydney Robinson, Kt., Chief Justice Mr. Justice Rutledge and Mr. Justice Maung Gyi.

1925
Mar. 23.

KING-EMPEROR
v.
SYED KHAN AND FOUR.*

Criminal Procedure Code (V of 1898), Section 476—Complaint in respect of offences enumerated in section 195 (1) (b) of the Code, whether to be confined against parties before Court—High Court sitting in revision whether to exercise power under section 476—Section 476-B.

Held that in respect of offences enumerated in section 195 (1) (b) of the Code of Criminal Procedure, the powers of the Court to complain are not confined only to the parties before it.

Held also that the fact that section 476-B of the Code gives a right of appeal against a complaint under section 476, cannot debar the High Court, sitting in revision from laying a complaint under section 476 of the Code of Criminal Procedure.

C. T. Guruswamy v. *D. K. Syed Ebrahim*, 2 Ran., 374—*distinguished.*

Keith and Young—for the Respondents 1 to 3.
Vakharia—for the Respondents 4 and 5.

This was a Reference made by the District Magistrate of Rangoon to the High Court and was considered by a Full Bench. The matter had come up before the learned District Magistrate himself on an application to revise the order of the Western Subdivisional Magistrate of Rangoon who, on the authority of the ruling in *C. T. Guruswamy* v. *D. K. Syed Ebrahim* reported at page 374 of the second volume of these reports, had held that the complaint before him, having been laid without the previous sanction of the Local Government, was not in order. The facts arising in the

* Criminal Revision No.84-B of 1925 from the order of the Western Subdivisional Magistrate of Rangoon in Criminal Regular Trial No. 1576 of 1923.

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matter appear in the judgment of the Full Bench reported below which was delivered by—

ROBINSON, C.J.—A complaint was made before a Magistrate as long ago as 1913 of a charge of criminal breach of trust. Ten years later, the person complained against, K.C. Nagoor Meera, laid a complaint before a Magistrate alleging a conspiracy between the original complainant and the five petitioners who, it was alleged, had instigated the original complainant to lay this false charge. The Magistrate dismissed the complaint for want of sanction as required by section 195 (1) (*b*). The District Magistrate, however, while holding that that order was correct as regards the original complainant, ordered the Magistrate to proceed with the complaint in respect of the remaining five. They, therefore, moved this Court in Revision to set aside the order of the District Magistrate. That application came before our brother Heald and, in the course of his order he came to the conclusion that a *primâ facie* case existed and that, while it was correct that this prosecution could not proceed in the absence of a complaint, he was of opinion that it was necessary, for the ends of justice, that the accused should be proceeded against, and he thereupon passed an order ordering as follows :—" And as I am satisfied that it is expedient in the ends of justice that an enquiry should be made into an offence under section 211, read with section 109 or 120B of the Indian Penal Code, which appears to have been committed in relation to Criminal Regular Trial No. 118 of 1913 in the Court of the Western Subdivisional Magistrate of Rangoon, a copy of this order signed by me will be sent to the Western Subdivisional Magistrate, Rangoon, as this Court's complaint."

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On this complaint being received by the Western Subdivisional Magistrate, he held, purporting to follow a ruling of a Bench of this Court in the case of *C. T. Guruswamy* v *D. K. Syed Ebrahim*, (1), that the learned Judge had no jurisdiction to lay a complaint, because the five petitioners were not parties to the proceedings in 1913. The District Magistrate, on being moved, apparently, was of opinion that this authority was applicable, and he referred the case to this Court, with the recommendation that the sanction of the Local Government may be applied for to put the complaint completely in order.

We are clearly of opinion the the ruling cited has no application whatever to the facts of this case. That ruling dealt specially and particularly with the express wording of sub-clause (*c*) of section 195 (1), and it is based on such particular wording. The present case falls under section 195 (1) (*b*), and such words not only do not occur but much wider words, fully wide enough to cover the facts of the present case, are employed. That being so we do not consider it necessary to again consider the correctness of the ruling cited. The High Courts are not at one on the matter, but that authority dealt only with a case falling under section 195 (1) (*c*).

It is further urged before us by learned counsel for the petitioners that that precedent is in no way wrong. This being so, two points only arise. It is urged that the sanction granted by our brother Heald was wrong, or without jurisdiction, because he included, in the alternative, section 120-B. We do not consider it necessary to deal with the point at any length. Even if the reference to section 120-B

(1) (1924) 2 Ran., 374.

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ROBINSON, C.J.

is struck out, our learned brother had jurisdiction to lay a complaint, and to lay a complaint of an offence under section 211, read with section 109.

It is next urged that his complaint is defective because he made a complaint when taking up proceedings from a subordinate Court in Revision.

It is said that section 476-B specially allows an appeal and that, if the High Court takes up a case of this kind, on second Revision, the party concerned will be deprived of the right of appeal to it. We do not think that this argument is sound. There is no question that section 476 gives the High Court, as a superior Court, full powers to lay a complaint in any and every case in which it appears expedient in the ends of justice to do so, and there is nothing in the Code to justify us in saying that that power and jurisdiction is taken away, because, in cases of a complaint or for its refusal to lay a complaint by some subordinate Court, an appeal from that order is allowed.

We therefore hold that the complaint laid in this case is a perfectly good and valid complaint of an offence under section 211, read with section 109, and we order that the case be referred back to the Magistrate with directions to hold further enquiry into such offence.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Lentaigne.

1925
Mar. 23.

MENGHA SINGH

v.

SUCHA SINGH.*

Letters Patent, Clause 13—Order for security by defendant before Judgment—Civil Procedure Code, Order XXXVIII, Rule 5, an order under, not a Judgment—Civil Procedure Code, Order XLIII, Rule 1 (q).

Where, on application by the plaintiff, the Court, acting under Order XXXVIII, Rule 5, of the Civil Procedure Code, ordered the defendant to furnish security before Judgment.

Held that such order is not a "Judgment" within the meaning of Clause 13 of the Letters Patent.

Held also, that such an order is not one of the orders appealable under the Civil Procedure Code.

Moolji Dharsee v. M. E. Moolla, 3 Ran., 233—followed.

Seshagiri Row v. Nawab Askur, 26 Mad., 502; Sonabai v. Tribhowandas, 32 Bom., 602—dissented from.

Auzam—for the Appellant.

HEALD AND LENTAIGNE, JJ.—In Suit No. 473 of 1924 on the Original Side of the Court respondent sued Bahan Singh and certain relatives of Thakur Singh, among whom was appellant, to recover Rs. 6,900 which he alleged to be due on a promissory note executed by Bahan Singh and Thakur Singh.

Respondent also applied for attachment before judgment in respect of a motor-car No. 4315 belonging to appellant on the ground that appellant had sold another motor-car, No. 3677, which belonged to the estate and had kept the proceeds, and that appellant was trying to sell car No. 4315 and was intending to leave the jurisdiction of the Court. That application was dismissed.

* Civil Miscellaneous Appeal No. 31 of 1925 against the order of this Court in the Original Side in Civil Regular No. 47 of 1924.

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HEALD AND LENTAIGNE, JJ.

Respondent then filed a fresh application claiming on the same grounds that appellant should be ordered to deposit in Court Rs. 1,700, as being the amount which Thakur Singh had paid for his interest in car No. 4315 and to give security for costs.

Affidavits in respect of that application were filed by both parties, and, after examining one of respondent's witnesses and hearing Counsel, the learned Judge passed an order directing appellant to furnish security in Rs. 1,784.

Appellant desires to appeal against that order, but his learned Advocate has been unable to satisfy us that an appeal lies.

He has referred us to the provisions of Order XLIII, Rule 1 (*q*) of the Civil Procedure Code, but it is clear that the order against which he wishes to appeal is not one of the orders mentioned in that rule.

The order of the learned Judge was presumably an order made under the provisions of Order XXXVIII, Rule 5, and would not, in our opinion, be a "Judgment" within the meaning of Clause 13 of the Letters Patent, because it is a mere interlocutory order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit.

It is true that it was held in the case of *Seshagiri Row* v. *Nawab Askur* (1) that an order directing a plaintiff to furnish security for costs, made under provisions corresponding to Order XXV, Rule 1, was a "judgment" within the meaning of a corresponding clause of Letters Patent and that that ruling was followed in *Sonabai* v. *Tribhowandas* (2), but it is clear from the judgment that both the Madras and the Bombay courts regarded the matter as being open

(1) (1903) 26 Madras 502. (2) (1908) 32 Bombay 602.

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HEALD AND LENTAIGNE, JJ.

to doubt. The meaning of the word "judgment" in the Letters Patent has recently been considered by this Court in the case of *Mooljee Dharsee* v. *M. E. Molla* (3), and, on the reasoning adopted in that case, we are of opinion that the order in this case was not a "judgment".

The question would have been different if an order under Order XXXVIII, Rule 6, had been made, because an appeal from such an order is actually given by the Code and it might well be argued that orders against which an appeal is given by the Code ought to be regarded as "judgment" within the meaning of the Letters Patent.

In the present case the order would not be appealable as an order under the Code, and we are of opinion that it is not appealable as a judgment under Clause 13 of the Letters Patent.

The appeal is accordingly dismissed.

(3) (1925) 3 Ran., 255.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Lentaigne.

1925

Mar. 23.

MAUNG PO AUNG AND ONE

v.

U BYA AND OTHERS.*

Limitation Act (IX of 1908), Section 12—Time required for obtaining copy of the trial Court's Judgments, whether to be excluded on second appeal—Inexperience of advocate or litigant—Whether Court Rules should be strictly enforced for the purpose of penalising.

Where a second appeal was filed on a day, which would make it one day too late if time is allowed only for the one day occupied in obtaining copies of the judgment and decree of the lower Appellate Court, but if time is allowed for the period occupied in obtaining the judgment of the trial Court, the appeal would be in time.

Held, that the Court may exercise its discretion in favour of the appellant and admit the appeal.

Ze Ya——for the Appellants.

LENTAIGNE, J.—This is a second appeal against the judgment of the District Court of Pyapôn confirming the judgment and decree of the Subdivisional Court of Pyapôn and dismissing the suit and appeal of the plaintiffs-appellants with costs in both Courts.

The appeal was presented on the 21st January 1925 and would be one day too late, if time is allowed for the one day occupied in obtaining the certified copies of the judgment and decree of the lower Appellate Court; but the appellant has applied that he should also be allowed the period of nine out of the ten days occupied in obtaining a certified copy of the judgment of the Trial Court which was applied for on the 4th November 1924 and was ready for delivery to appellant on the 13th November 1924. Technically, under section 12 of the Indian Limitation Act, 1908, the only deduction should be

* Civil Second Appeal No. 34 of 1925 against the decree of the District Court of Pyapôn in Civil Appeal No. 97 of 1924.

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LENTAIGNE, J.

for the time occupied in obtaining the copies of the decree and judgment of the lower Appellate Court, but it has apparently been held in certain cases reported in unofficial reports that where the rules of the High Court required that a certified copy of the judgment of the trial Court should also be filed with the appeal, the Court might in its discretion excuse the delay caused in obtaining the copy of the judgment of the Court of first instance. It is obvious that second appeals in the High Court are usually filed by advocates who have not appeared in the lower Courts, and that it is difficult for them to advise on the question whether an appeal should be filed without seeing a copy of the judgment of the trial Court, and in a case like that now before us where only one day was occupied in obtaining the copies of the lower Appellate Court, whilst the much longer period of ten days was occupied in obtaining the copy of the judgment of the trial Court, there would appear to be some ground for exercising the discretion where only one extra day beyond the unusually short period of one day allowed would be required. The question seldom arises in cases where the more experienced advocates have been concerned, because they usually have the common sense to apply for both sets of copies at the same time, with the result that even the shorter judgment and decree of the Appellate Court are entered as ready and supplied on the same date as the usually longer copy of the judgment of the trial Court ; but where an inexperienced advocate is engaged or the client makes his own application for copies, we are apt to find first an application for the copies of the judgment of the Appellate Court and then an application for the equally necessary copy of the judgment of the trial Court, as has occurred in

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LENTAIGNE AND HEALD, JJ.

this case. The question therefore resolves itself into the question whether the rules should be strictly enforced for the purpose of penalising inexperience. Under the rule it is open to an advocate to file an appeal without the copy of the judgment of the trial Court if he applies for time to comply with the rule requiring the filing of both judgments with the appeal; but that rule would not apply here where all copies had been previously obtained. If this were otherwise a suitable case for admission, I would, under the circumstances, exercise the discretion; but on a perusal of the evidence for the plaintiffs in the case, I have come to the conclusion that it is a case which should not be admitted in any event; and that the case against the appellants is much stronger even than appears on the judgments appealed against.

HEALD, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Lentaigne.

1925
Mar. 25.

MAUNG MYINT
v.
OFFICIAL ASSIGNEE.*

Presidency-Towns Insolvency Act, Sections 13 (8), 15 (2), 17, 21 and 23—Withdrawal of the petition by debtor, whether allowable after adjudication.

Held that under the Presidency-Towns Insolvency Act, 1909, the debtor cannot withdraw his petition in Insolvency after he has been adjudicated and that his proper remedy would be by way of an application for the annulment of the adjudication.

In re Hester, (1889) 22 Q.B.D., 632—*referred to.*

In the matter of Meghraj Gangabux, 38 Bom., 202—*followed.*

Williams' Bankruptcy Practice, 12th Edition—*referred to.*

Keith—for the Appellant.

LENTAIGNE, J.—This is an appeal by an Insolvent against an order passed by May Oung, J., in the original Insolvency Jurisdiction of this High Court dismissing an application made by the Insolvent for leave to withdraw his petition in Insolvency.

An Order of Adjudication had previously been passed on the 28th April 1924 on the Insolvent's own petition under the provisions of the Presidency-Towns Insolvency Act, 1909. On the 9th June 1924 the Insolvent had also previously applied for the annulment of the adjudication; and on the same day some creditors also applied for the annulment of the adjudication; but on the 10th June 1924 such applications were dismissed on the ground that the case was not one within the provisions of section 21 of the Act.

On the 5th August 1924 the Insolvent filed an application for leave to withdraw the application for the benefit of the Act, and certain creditors appeared

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* Civil Miscellaneous Appeal No. 146 of 1924.

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by learned counsel at the hearing of that petition on the 6th August and again pressed for the annulment of the adjudication, and it was pointed out that the insolvent had filed his petition in insolvency for the benefit of the Act after he had been arrested in execution of a decree of the Court, and that it would be in the interests of the creditors that he should be allowed to withdraw or that the adjudication be annulled. This application for annulment was also rejected on the same grounds and the insolvent filed his schedule on the following day.

On the 8th August 1924 the insolvent renewed his application for leave to withdraw his petition for the benefit of the Act and this application purported to be made under section 15, sub-section (2) of the Act. After notice of this petition had been served on all creditors, certain creditors again appeared by counsel on the 9th September 1924 and supported the application, and the attention of the Court was drawn to certain decisions under the Insolvency Statutes formerly in force.

It was held that these decisions did not bear directly on the question under consideration and that section 15 of the Presidency-Towns Insolvency Act, 1909, does not apply to a case where an order of adjudication has been made, because such a withdrawal with the permission of the Court could not remove the effects of the adjudication arising under the provisions of section 17 of the Act, which would continue to operate so as to vest all the property of the insolvent in the Official Assignee and to debar creditors from proceeding against the insolvent's property or instituting suits against the insolvent except with the leave of the Court. For these and other reasons the application was dismissed.

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The Insolvent has now appealed against that decision, and the point for determination is whether a debtor's petition for the benefit of the Act can be withdrawn even with the leave of the Court after the order for adjudication has been passed. I find that Macleod, J., of the High Court at Bombay held *In the matter of Meghraj Gangabux* (1) that a debtor who has been adjudicated insolvent on his own petition cannot, even with the leave of the Court, withdraw his petition; that Section 15 (2) of Presidency-Towns Insolvency Act, 1909, only applies to petitions that are pending before any order has been made, as also does section 13 (8) dealing with petitions by creditors; and that once an order of adjudication has been made, the debtor becomes an Insolvent and remains so until the order of adjudication is annulled or he obtains his discharge; and that the Court can only annul the order of adjudication under section 21 of the Act if the Court is of opinion that the debtor ought not to have been adjudicated an insolvent or it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, and in the latter case the "debts," including at least all debts actually and properly proved in bankruptcy, must have been fully paid in cash. It was also pointed out that this section is the same as section 35 (1) of the English Bankruptcy Act of 1883.

I agree with that statement of the law so far as the point now before me is concerned. Sub-section (2) of section 15 of the Presidency-Towns Insolvency Act, 1909, enacts that "a debtor's petition shall not, *after presentation*, be withdrawn without the leave

(1) (1914) 38 Bom., 200.

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of the Court." The words "after presentation" may appear unnecessary, because no question of withdrawal could arise before a petition was presented, but the wording is analogous to the use of the words "at any time after the institution of a suit" in Order XXIII, Rule 1 of the Code of Civil Procedure, and I do not think that in either case the withdrawal could be effected after the adjudication as an order of adjudication of insolvency in the one case or in the shape of a decree in the other case of a suit, so long as such adjudication continued in force. The fact that a withdrawal can be effected in an appeal from a decree does not affect this question, because the setting aside of the decree is necessarily presupposed if there is a withdrawal with the permission of the Appellate Court. Similarly I think that after an adjudication order had been passed, an annulment of the adjudication order would be necessary and is the only way in which a Court could effect this purpose.

I also think that a consideration of the provisions of section 17 of the Presidency-Towns Insolvency Act, 1909, necessarily leads to the same conclusion. A mere withdrawal with the leave of the Court would not annul the application of the provisions of section 17 of the Act, unless the adjudication were also annulled; and consequently the permission to withdraw would be futile, and the insolvent would still continue to be an insolvent, his property would still continue to vest in the Official Assignee and no suit could be filed against him without the leave of the Court. Section 23 of the Act contains express provisions as to what shall happen on annulment; but there are no similar provisions as regards what would happen on a withdrawal. I think that the reason for the absence of similar provisions in the

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case of a withdrawal is because they are not required in the case of a withdrawal before an adjudication order has been passed, and that after the passing of the adjudication order, the right to apply for withdrawal is gone and the proper remedy is an application for annulment in a suitable case.

I find also that in England under the later Bankruptcy Act it has been held that after an adjudication, except in the case of a scheme under section 21 of that Act, there is no power to annul other than the express power conferred by the section 29. The decision of Cave, J., in the case of *In Re Hester* (2) is instructive and other authorities are cited in this connection at page 131 of the 12th Edition of *William's Bankruptcy Practice.*

For the above reasons I think that the Court had no jurisdiction to allow the Insolvent to withdraw his petition after the passing of the adjudication order. I would therefore dismiss this appeal.

HEALD, J.—I concur.

(2) (1889) 22 Q.B.D. 632.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

1925
Mar. 30.

L. A. R. ARUNACHELLAM CHETTIAR
v.
U PO LU.*

Practice—Order of the Court directing Receiver to pay a certain sum of money in restitution on his discharge—Appeal, whether maintainable against such order—Civil Procedure Code (V of 1908), Order XLIII, Rule 1.

In a mortgage suit where present appellant was defendant, respondent was appointed receiver of appellant's properties. On the suit being dismissed, appellant applied for, and obtained, by way of restitution, delivery of some of the properties and obtained also an order directing respondents to file full accounts of his receivership. Appellant having filed objection to the accounts, the Court after due enquiry passed an order directing respondent to pay into Court within a month the sum of Rs. 4,760. Against this order defendant having appealed and respondent also having preferred his memorandum of objections.

Held that no appeal lay from the order in question as it was not one appealable under Order XLIII, Rule 1 of the Civil Procedure Code.

Ganesh Lal v. Kumar Satya, 4 Pat.L.J., 636; *Palaniappa Chetty v. Palaniappa Chetty*, 65 I.C., 403; *Samhautta v. Ragpatty*, 5 Pat.L.J., 47—*followed.*

Shrinivas v. Wax, 45 Bom., 99; *Zipru v. Hari*, 42 Bom., 10—*distinguished.*

Anklesaria—for the Appellant.

Ochme—for the Respondent.

HEALD AND CHARI, JJ.—One P.V.D.V. Muthiah Chetty filed a mortgage suit against L.A.R. Arunachellam Chetty. He applied for and obtained an order for the appointment of a Receiver of the mortgaged properties. U Po Lu, a pleader, was appointed Receiver. A mortgage decree was passed by the District Court, but that decree was set aside in appeal by the Chief Court which dismissed plaintiff's suit. The mortgagor applied for, and obtained, by way of restitution, delivery of some of the properties, but he could not, naturally, obtain

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* Civil Miscellaneous Appeal No. 122 of 1924 against the order of the District Court of Myaungmya in Civil Miscellaneous No. 79 of 1916.

delivery of a launch which had sunk. Another launch was delivered to him in such a condition that it was of little value. On the 16th November 1922 the Receiver was asked to file a full report. He took time to file his report and when he did file it, his report was found unsatisfactory. On the 15th of December 1922 he was asked to file full accounts. He filed his accounts on the 5th of January 1923 and after many adjournments, Mr. Ghose, on behalf of the mortgagor on the 9th of June 1923, filed his written objections to the Receiver's accounts. In that statement of objections, he drew attention to various items in respect of which the Receiver was liable to him and also challenged his accounts. He ended up his statement with a prayer that either the Receiver be ordered to pay all losses or sanction be granted to the objector to sue the Receiver for damages. The learned District Judge held an enquiry and on the 28th of April 1924 he passed an order directing the Receiver to pay within a month the sum of Rs. 4,760.

Against this order the mortgagor L. A. R. Arunachellam appeals. The Receiver has also filed a memorandum of objections. The question to consider is whether such an appeal lies. An appeal is a creature of statute and unless specially given by some law, no one can have a right to appeal. Order XLIII, Rule 1, deals with appeals from orders and Clause (s) makes orders under Rule 1 or Rule 4 or Order XL appealable. Thus all orders passed in respect of the appointment of a Receiver would be appealable and also orders under Rule 4 of Order XL provides that when a Receiver fails to submit his accounts or fails to pay an amount ordered or causes loss to the property, the Court may direct his property to be attached and sold. No such order for the

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attachment of the Receiver's property has been made in this case. Mr. Anklesaria for the appellant argues that on default being made in any of the acts enumerated as (*a*), (*b*) and (*c*) of Rule 4 of Order XL, there is a default within the meaning of that Rule and an appeal lies. This argument is obviously unsound. The operative part of Rule 4 is the part which enables the Court to attach and sell the Receiver's property and Clauses (*a*), (*b*) and (*c*) give only the grounds on which such an order can be made. It is therefore idle to argue that an appeal would lie when no order is made under the operative part of the section.

It is not necessary to deal with the authorities on this point at length and we will draw attention only to the recent cases. In *Ganesh Lal* v. *Kumar Satya* (1), a Receiver was found liable for a certain amount and he filed an appeal against the order containing that finding. The learned Judges held that no appeal lay since the finding was not accompanied by an order under Rule 4 of Order XL. This, it is true, was an appeal by the Receiver, but in a later case of the same High Court *Samhautta* v. *Bagvatty* (2) the appeal was instituted by the party seeking to hold the Receiver liable. The Court of the District Munsiff had held that the Receiver was liable only to account for the year 1916, but in appeal the Subordinate Court enlarged the order by directing that the Receiver should furnish accounts for 1917 and 1918 also. The Patna High Court in revision set aside the order of the Lower Appellate Court on the ground that no appeal lay to it. In a recent case, *Palaniappa Chetty* v. *Palaniappa Chetty* (3), a Bench of the Madras High Court took the same view as

(1) (1919) 4 Patna Law Journal, 636. (2) (1920) 5 Patna Law Journal, 97.
(3) (1921) Madras Weekly Notes 806 ; 65 Indian Cases 403.

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the Patna High Court following the two cases above cited. In the Madras case, also, the Receiver was ordered to pay a certain sum of money into Court and he appealed against that order. The appeal was an appeal by the Receiver, but the reasoning in the case shows that no appeal would lie even when the party challenging the Receiver's account is the appellant. In *Shrinivas* v. *Waz* (4), the facts of the case are different. There are some passages in it which may be used as supporting the position that an appeal would lie when relief is refused against the Receiver, but these remarks are *obiter* and were merely what the learned Judges thought to be an application of the principle in the decision of *Zifru* v. *Hari* (5) which deals however with an entirely different point.

It is not for us to speculate as to the reason why the legislature has thought fit not to give a right of appeal in such cases. Possibly it is because the aggrieved party has a remedy by suit after obtaining the leave of the Court. It is enough for our purpose that no appeal is, as a matter of fact, given, and the appeal must therefore fail and is dismissed with costs—five gold mohurs. As the substantial appeal has failed, the memorandum of objections must also fail, and is dismissed.

(4) I.L.R. (1921) 45 Bombay 99. (5) I.L.R. (1918) 42 Bombay 10.

FULL BENCH (CIVIL).

Before Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice Carr and Mr. Justice Maung Gyi.

1925
Apl. 1.

C. T. P. V. CHETTY FIRM AND OTHERS

v.

MAUNG THA HLAING AND OTHERS.*

Buddhist Law—Inherited property of the husband after marriage, whether thinthi *or* lettetpwa*—Share of each of two wives in such property—Such share, whether liable for husband's debts—Husband an* eindounggyi*—Whether rule different for couples previously unmarried.*

Where a Burman Buddhist *eindounggyi* having two wives, inherits immoveable property from his father, after the second marriage.

Held, that the property is *lettetpwa* of the marriages and is joint property of the husband and wives and not the separate property of the husband.

Held, further, that the share of the two wives jointly is one-third and since the two wives are of equal status the share of each is one sixth.

Held, also, that each wife acquires a vested interest in one-sixth of the property from the date on which it is inherited and that such interest is not liable for any part of the debts incurred by the deceased; husband alone.

Semble.—The rules would be the same in the case of previously unmarried couples.

Ma E Nyun v. *Maung Tok Pyu*, U.B.R. (1897-01) Divorce, 39; *Ma Ngwe Hnit* v. *Maung Po Hmu*, 11 L.B.R., 52; *Mi Myin* v. *Nga Twe and others*, U.B.R. (1904-06) II, Divorce, 19; *Ma Kyein* v. *Maung Tha Gaung*, 3 U.B.R. 237—*referred to.*

Ma Hmon v. *Ma Thok*, U.B.R. (1904-06), Buddhist Law, Divorce, 1; *Ma Ngwe Bwin* v. *Maung Lun Maung*, P.J., 295; *Ma Shwe U* v. *Ma Kyu*, 3 L.B.R., 66; *Ma Thaing* v. *Maung Tha Gywe*, U.B.R. (1902-03), Exs., 1; *Maung Lo* v. *Maung Pyaung*, 3 B.L.T., 149; *Maung Po Sein* v. *Ma Pwa and six*, P.J., 403; *Tola Ram* v. *Ma Kaing*, 5 B.L.T., 98—*approved and followed.*

Maung Shwe Ngon v. *Ma Mi Dwe*, S.J., 110—*dissented from.*

Kin Wun Mingyi's Digest, Vol. II; *Richardson's Edition of Manugye*; *Sparks' Code*—referred to.

This was a Reference matter arising out of Civil First Appeal No. 36 of 1922 from the judgment and

* Civil Reference No. 34 of 1924 arising against out of Civil First Appeal No. 36 of 1922.

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decree of the District Court of Hanthawaddy. On the appeal coming for hearing before a Division Bench of the High Court composed of Robinson, C.J., and Cunliffe, J., the learned judges referred to a Full Bench the questions of Buddhist Law set out in their order of Reference which is reported below:—

"The present appeal is concerned with the estate of one Po Ka who died on the 25th of December 1905. Po Ka was first married to Ma The Nu. The two were divorced in 1884; there was then a division of property between them. It is agreed that this marriage and divorce do not, in any way, affect the questions now to be decided.

"Shortly after the divorce, Po Ka married Ma Gyi, and some nine or ten years later, he married Ma Kin. He lived with Ma Gyi at Pazundaung, and she was undoubtedly his chief wife. Ma Kin lived at Thôngwa, where Po Ka had large business interests, and, when there, he lived with Ma Kin openly as his wife.

"There is no reason to doubt that Ma Kin was a wife in the full sense of the term, and was endowed with what is described in *Maung Tha Dun* v. *Ma Thein Yin*, 1 Ran., 1, as proprietary as well as personal rights.

"Po Ka's father, U Tok Pyu, died in 1892, and from him Po Ka inherited certain immoveable property which formed the whole of his estate which is now in dispute. It has been urged that this property was inherited before his marriage to Ma Kin. The whole of this argument is based on certain vague and indeterminate facts.

"Ma Gyi in her evidence says that she was married at the age of 16. In 1911, when giving evidence, she gave her age as 44. She stated that

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Ma Kin was married nine or ten years after she was married, and it is sought to extract from calculations based on these vague assertions that the marriage to Ma Kin must have taken place later than 1892.

"There is no reason to suppose that Ma Gyi is any more certain of her age than the ordinary Burman Buddhist witness, and it is impossible to decide this question on statements such as that Ma Kin was married nine or ten years after the first marriage. Ma Gyi herself in her evidence states that the property was inherited after Po Ka had married Ma Kin; and we are satisfied that the questions that arise must be dealt with on the assumption that the property was inherited after his second marriage.

"After Po Ka's death Ma Gyi and her children filed a suit for the administration of the estate, and to set aside a certain award that had been made with reference to the division of property between her and Ma Kin. The matter came before the late Chief Court, and the award was set aside. A Receiver was appointed, and all the properties were sold.

"There was a house at Pazundaung where Ma Gyi had always lived, and which was built on part of the inherited land. Ma Gyi claimed that as being the *lettetpwa* property of herself and Po Ka. She purchased the house at auction, and on this ground only paid half the purchase price.

"Po Ka had a large number of creditors—both secured and unsecured. Several of the secured creditors brought suits, and obtained decrees, as also did several of the unsecured creditors. There are other creditors—both secured and unsecured—who did not sue, but who claimed to come in and get their share in the administration decree.

"The matters arising in the suit were referred to a Commissioner, and, in the course of the proceedings before him, Messrs. Walker & Whyte obtained a decree against Ma Gyi, personally, and, in executions thereof, purchased themselves her share in the estate. They now take her place.

"The questions that arise for decision are whether Ma Gyi's share is taken by succession, or whether she has a vested right in one-third or any other share in the estate, and if so, whether her share is liable for the debts incurred by Po Ka alone.

"For the creditors it is urged that she succeeds by inheritance only, and that she could not obtain anything until after all the debts had been paid. On the other side, it is urged that she has a vested share, which is not subject to the debts and liabilities of her deceased husband.

"Certain questions as to jewellery are also raised—whether they were gifts to her by her husband, or whether they are joint property of the marriage. But this matter is merely one of academic interest, seeing that the jewelleries had been sold, and the proceeds have disappeared.

"Further questions are raised with reference to the house, and whether Ma Gyi is liable to account to the estate for the rent of the house, and for interest on the half share of the purchase price that she has not as yet paid.

"It must also be mentioned that Po Ka was an *eindounggyi* while Ma Gyi was a spinster. It is argued that the same rule will apply as if neither of them had been previously married, and for this proposition, the case of *Ma Ein Nyun* v. *Maung Tôk Pyu*, II U.B.R. (1897-01), Buddhist Law, Divorce 39, is quoted as authority.

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"It will be noticed, however, that this is an authority relating to division of property on a divorce.

"The argument before us has shown how loosely the expressions *payin*, *thinthi*, *hnapazon*, and *lettetpwa*—are used and the authorities, which are very numerous, also indicate a similar looseness of expression.

"The case has been argued before us on the strength of section 3, Chapter 12 of the *Manugye*, and we have been asked to apply the rule there laid down for partition of property on a divorce by mutual consent, on the ground that there is no rule to be found in the *Dhammathats* exactly dealing with the questions now for decision.

"The fact that the rules for partition on a divorce by mutual consent are not to be applied to a partition on inheritance has been frequently laid down, but it is clear from a consideration of all the numerous authorities that the questions arising have been differently dealt with and that there is no clear and definite decision on a point on which one is undoubtedly required.

"The questions are discussed in Mr. May Oung's work on Buddhist Law from page 53 onwards, and also Mr. Tha Gywe's Conflict of Authority in Buddhist Law, Volume 2, from page 73 onwards. We think it unnecessary to quote these authorities in this order of reference, but we are of opinion that the following questions should be referred to a Full Bench for authoritative decision; and they are accordingly referred :—

"(1) When **A**, a Burman Buddhist *eindounggyi* having two wives, **B** and **C**, after the second marriage inherits immoveable property from his father, is that property the *thinthi* or separate property of **A**, or is it the *lettetpwa* or joint property of the marriages?

"(2) What, under these circumstances, would be the share of **B**, the chief wife, in this inherited property ?

"(3) Will either or both wives acquire a vested right in one-third or any other share in the inherited property from the date on which it is inherited, and if so, is such share liable for all or any part of the debts incurred by the deceased husband alone ?"

The matter came up in due course for hearing before a Full Bench composed of Robinson, C.J., Carr and Maung Gyi, JJ.

Burjorjee and E Maung (1)—for Appellants.

Paget—for Respondents.

MAUNG GYI, J.—There are three points of reference, *viz* :—

(1) When **A**, a Burman Buddhist *eindounggyi*, having two wives **B** and **C**, after the second marriage, inherits immoveable property from his father, is that property the *thinthi* or separate property of **A**, or is it the *lettetpwa* or joint property of the marriages ?

(2) What, under the circumstances, would be the share of **B**, the chief wife, in this inherited property ?

(3) Will either or both wives acquire a vested right in one-third or any other share in the inherited property from the date on which it is inherited, and if so, is such share liable for all or any part of the debts incurred by the deceased husband alone ?

The answers to these points of reference are to be found in Book XII, section 3 of the *Manugye Dhammathat* which their Lordships of the Privy Council hold to be a work of high authority. This section states the law of partition of property on

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separation between husband and wife in the following cases :—

(1) When the husband and wife have not previously been married, called by some a "virgin couple":—

(*a*) When both, without fault on either side, desire to separate mutually ;

(*b*) When only one desires to separate and the other does not, though there is no fault on either side ;

(*c*) And when one party is at fault.

(2) When the husband and wife are *eindounggyis*, *i.e.*, when both have been married previously :—

(*a*) When both, without fault on either side, desire to separate mutually ;

(*b*) When one only desires to separate and the other does not, there being no fault on either side ;

(*c*) and when one party is at fault.

There is no mention of the partition on divorce when one party is an *eindounggyi* and the other is not.

In *Mi E Nyun* v. *Maung Tôk Pyu* (U.B.R., 1897-01), (Volume II, Divorce, page 39) and in *Ma Ngwe Hnit* v. *Maung Po Hla and others* (XI L.B.R., page 52), it was held that the rule for partition on divorce by mutual consent where neither party was at fault between an *eindounggyi* and a husband or wife who had not been previously married was the rule which applied where neither party had been married before. This is, I think, settled law.

Section 3 of Book XII of the *Manugye* begins by giving the rule of division of property on mutual divorce, where there is no fault on either side, between a couple that had not been previously married or a "virgin couple". The husband and wife each take the clothes and ornaments of his or

her rank, and the remainder of the property "animate and inanimate" is thus divided :—

"If there is any property acquired by the husband alone, or by the wife alone, let that party who separately acquired it have two shares and the other one. Property acquired equally by both, or where both had an equal share in the capital, should be divided equally. If the clothes and ornaments of the man are many, and those of the wife few, let both be valued, and let the man make up the difference ; if those of the woman are more valuable in the same way let her make up the difference to the man."

Here there is no reference to *thinthi*, *payin*, *kanwin*, *lettetpwa*, *hnapazon* or any particular kind of property belonging to a husband or wife. The "remainder of the property animate and inanimate" is divided.

The text then describes the three kinds of property acquired by the husband and three by the wife.

The three kinds of property acquired by the husband are :—

(1) when the wife, at the time of marriage had no property from her parents, and the husband had ;

(2) property acquired during their cohabitation by his skill, science ; and

(3) property specially given to him by the king.

The three kinds of property acquired by the wife are :—

(1) when the husband at the time of marriage had no property from his parents, and the wife had ;

(2) property acquired during their cohabitation by her skill, science ; and

(3) property given specially to her by the king.

In this classification of property, no reference is made to *kanwin* or property given at the time of marriage for the benefit of the couple, or to property

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given specially to both husband and wife by the king, or to property acquired jointly by the skill and science of the couple, or to property inherited by either party after marriage.

This classification though at first sight open to criticism is explained by the fact that in the case of a divorce where the "remainder of the property animate and inanimate" is divided the author of the text dispensed with a minute and scientific classification.

The word *thinthi* is sometimes used in the sense of *payin* property and at others as separately owned property which is not to be divided on partition.

To classify the property of a married couple broadly as *thinthi* and *hnapazôn* or jointly acquired property seems to me to be defective, because what is *thinthi* in one case may not be so in another. In the above rule of partition on divorce, *thinthi* and *payin* are divided and in other cases of partition on divorce they are not. The use of the term *hnapazôn* in the main classification of property of a married couple seems likewise defective as it excludes other kinds of property acquired after marrirge.

In the case of *Maung Shwe Ngon* v. *Ma Min Dwe* (S.J., page 110), on page 113, Jardine, J., refers to Major Sparks' definition of *lettetpwa* and *hnapazôn* translated respectively as "obtained since marriage" and "jointly acquired." Reference is also made to the terms *thinthi* and *payin* which Major Sparks translates as "separate" and "originally belonging." Major Sparks considers that these words are used indiscriminately in the *Dhammathat* through the inaccuracy of the translator and are not so used in the original Sanscrit.

With this I am not prepared to agree. Although we have borrowed many things from India, it does

not follow that we should slavishly adhere to the meanings of the Sanscrit terms in the Manu of the Hindus. The English word "fluke" which means a lucky accidental stroke is used by Burmans to mean an "outsider" or a dark horse in a race and is not used by them in any other connection except in billiards.

Major Sparks in his Code of Burmese Law, section 14, defines *thinthi* as separate property of a husband or wife consisting of—

(1) what belonged to either before marriage ;

(2) what has been given specially to either since marriage ;

(3) what has come into the possession of either by inheritance from his or her own family since marriage ; and

(4) clothes, jewels and ornaments.

He makes reference to Book X, section 81, of the *Manugye*.

He restricts *hnapazôn* to—

(1) all profits or interests arising since marriage from the employment or investment of the separate property of either ; and

(2) all property acquired by their mutual skill and industry.

If the word *thinthi* has a hard and fast meaning that the property it represents cannot be divided, then it will be inconsistent with the rules for partition on divorce laid down in section 3, Book XII, *Manugye*.

Hnapazôn and *lettetpwa* are used in the same section of the *Manugye* as one term, and I do not consider that because it is so used by the author of the text it has been used by him indiscriminately as a translator from the Sanscrit.

On page 315 of Richardson's *Manugye* twelve kinds of *thinthi* of children are given and on page

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317 the term *thinthi* is qualified by the addition of *apaing*. The text says "of the twelve kinds of *thinthi* the four last are called *thinthi-apaing*, *i.e.*, in which the right is perfect." I take it that the term *thinthi* does not always mean separate property which is never divided. *Thinthi* is separate property. But it is subject to partition in some cases. To my mind the proper main classification of the property belonging to a husband and wife is into *payin* what is broght to the marriage by either or both and *lettetpwa* property acquired after the marriage in any way. The other terms used are merely subdivisions of these two main classes.

When one party only desires divorce and the other does not and there is no fault on either side, each party is entitled to keep whatever property the king has given him or her. All the other property goes to the party who does not wish to separate and the party wishing to separate pays all the law expenses. But if there be fault on one side he or she forfeits all the property to the other.

Section 3 then proceeds to lay down the rules for partition on divorce between *eindounggyis* or those who have been married before. If the divorce is mutual and there is no fault on either side each takes the property brought at the time of the marriage and each pays his or her debts up to that time. The *hnapazôn* or jointly acquired property animate and inanimate, and the joint debts are divided equally.

Here the use of the term *hnapazôn* is meant for *hnapazôn lettetpwa* that is property acquired after marriage. As this property has been ascertained the section defines it. It says :—

"There are two kinds of property acquired during marriage (*hnapazôn lettetpwa*), which are these :

property or debts inherited by either party from their parents, and property acquired or debts incurred by them mutually and conjointly. Of these if the husband has inherited property or debts from his parents, it is more immediately his ; let him have two shares of the property, or bear two shares of the debts ; if it be on the wife's side, let her in the same manner receive and pay."

We see that the doctrine of *nissaya* and *nissita* (supporter and dependant) is applied here also. The supporter takes double that of the dependant.

If the husband wishes to separate and the wife does not, or the wife wishes to separate and the husband does not, and there is no fault on either side, let each take back the *payin* they brought at marriage ; but of the two kinds of property acquired since marriage (*letetpwa*) which is the common property of both, the person not wishing to separate shall have the whole, and the person who does shall pay all the debts.

Immediately following this paragraph is the last paragraph of this section in *Manugye* (Book XII, section 3) which has been the subject of much discussion. Richardson's translation is as follows : " Property obtained by the royal bounty, property in possession at the time of marriage, property that either may have inherited from their parents after marriage, these and the profits on them shall be considered as property acquired during the time they were together, and in accordance with this let the property be divided."

The Burmese text as given by Richardson is as follows :—

အရှင်ကရာဇ် သနားတော်မူ၍ ရသည့်နှစ်ဦးသင့်စည်းပါရှင်း၊ နှစ်ဦးသင့်မှ တယောက်တယောက်ကရသည်၊ မိဘအမွေအရင်းကို အရင်းအတိုင်း တည်ငြိမ်ဖြစ်၍ ငွေပွါးသည်ကို လက်ထက်ပွါးဟု မှတ်ရ၏၊ ဆိုခဲ့ပြီးသော စကားအတိုင်း ခွဲယူကြစေသတည်း။

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The same passage is given in the Digest, Volume II, section 264, extract from *Manugye*. The only important difference between these two texts is that the passage in the Digest has the preposition က (from) inserted after ရင်း in [illegible] thus making the meaning very clear. The published rendering of this extract on page 190, Volume II of the Digest in English is :—"Let each take the property given him or her alone by the king, that brought by each to the marriage, and that inherited by each from his or her parents subsequent to the marriage. The profits which accrue from the different kinds of property shall be treated as *lettetpwa* or jointly acquired property, and partition of it shall be made according to the rules already laid down."

Jardine, J., in his Notes on Buddhist Law Essay 2, page 31—translates this passage as "Property given by the king being property brought at the time of marriage, and property inherited by either party from their parents after marriage, having become the separate capital (အရင်း *ahyin*) the increase on profits from them, shall be considered as *lettetpwa* and let it be divided as laid down above."

Shaw, J.C., in *Mi Myin* v. *Nga Twe and two others* (U.B.R., 1904-06, Volume II, Divorce, page 19) being dissatisfied with Richardson's translation which is not quite correct and also with the published English translation because it is inconsistent with the extract from the *Manugye* in the Digest, Volume II, section 257, ninth line from the bottom of the page which says : "Property acquired and debts contracted by the husband and wife are of two kinds, namely, property and debts inherited after marriage by either from his or her parents and property acquired

and debts contracted while they are working jointly for their mutual benefit," and also inconsistent with the passage in *Manugye*, Book XII, section 3, page 344 of Richardson's text, gives his own translation. It runs thus:—

"Property obtained by gift from the king (*payin*) at the time of marriage, property inherited by either from parents during marriage, having been (as before explained) placed (*i.e.*, classified and dealt with) according to its origin (အရင်းအမြစ်) profits accruing from such property should be regarded as *lettetpwa*. Let the parties divide between them in accordance with what has been said before."

Richardson's translation of this passage is incorrect. Jardine, J.'s translation is not quite correct, because he has "property given by the king *being* property brought at time of marriage," and Shaw, J.C.'s translation does violence to the ordinary meaning of the Burmese words and the construction of the sentence.

The correct translation is that given by the translator of the Digest.

Relying on this passage the learned Advocate for the appellants contends that property inherited after marriage is not *lettetpwa*, but only the profits derived from it.

I am unable to agree with him.

Book XII, section 3, of the *Manugye* gives the rules for partition between husband and wife on mutual divorce according as they are previously unmarried couples or *eindounggyis*. When necessary the *Dhammathat* gives the definition of property in issue. In the case of "virgin couples" the property to be divided comes under three classes roughly and no mention is made of any other kind of property because the whole of the property, after

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taking away the ornaments and clothes, has to be divided.

The Rule for partition on divorce by mutual consent between *eindounggyis* when neither party is at fault differs from those of the partition of a virgin couple. For this purpose the *Dhammathat* defines what is property acquired during marriage. It consists of property or debts inherited by either party from their parents during marriage and property acquired or debts incurred by them mutually and conjointly.

It will be seen that the *Dhammathats* favour a "virgin couple" and gives them preferential treatment. They marry young. They are unsophisticated and do not know what life is at the time of their marriage, whereas *eindounggyis* are men and women of the world and have seen life. In the same way a Buddhist monk who is a *nge-pyu* (innocent from infancy) that is who became a monk as a *vir intactus* is much more honoured than a *taw-twet* or previously married man.

Towards the end of section 3 is given the rule of partition between *eindounggyis* on divorce when there is no fault on either side and one only desires to separate and the other does not. Each is allowed to take his or her *payin* and the whole of the property acquired after marriage. It is for the purpose of determining what is the whole of the property acquired after marriage in this case that the last paragraph of section 3 defines what is *lettetpwa*, and the property acquired after marriage other than jointly acquired property is strictly limited to the profits derived from their *payin minbè*, or gifts made by the king and property inherited after marriage.

If the section be read in this way there is no inconsistency in the *Dhammathat* and the words of the passage are given their natural meaning.

This is supported by the fact that the last paragraph of section 3 follows immediately the passage which refers to the partition of property between *eindounggyis* where there is no fault on either side and only one party desires to separate.

Section 264, Digest, Volume II, which gives the extract from the *Manugye*, section 3, last paragraph in the Burmese text has section 258 (ခ) against it, while section 228, *Manugye*, extract has (က) against it.

The heading of section 264 is "Distinction between *payin* and jointly acquired property" and that of section 258 "Divorce between a husband and wife who have both been previously married when only one party desires it."

In section 3 of Digest, Volume II, headed 'Instructions to readers" (of the original) sub-section (*j*) we have this direction :— "In the original extracts containing two or more similar cases, the first of the similar cases is distinguished by a (က), the second by a (ခ), the third by a (ဂ) and so on, using the letters of the Burmese alphabet in their order, so as to facilitate reference when any of them is taken up again in other parts of the Digest."

From this it is clear that the *lettetpwa* defined in section 264 of the Digest is the *lettetpwa* that applies only to *eindounggyis* on divorce when there is no fault on either side and only one party desires to separate, and the *lettetpwa* of "virgin couples" or of *eindounggyis* on mutual divorce, where there is no fault on either side, includes property inherited by either from their parents after marriage. In *Maung Lo* v. *Maung Pyaung* (3 B.L.T., page 149) and in *Tola Ram* v. *Ma Kaing* (5 B.L.T., page 98), it was held by Twomey, J., that property inherited after marriage is *lettetpwa*. In *Ma Ngwe Bwin* v. *Maung Lun Maung*

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(P.J., page 295), it was held that property inherited during coverture is *lettetpwa*.

In section 264 of the Digest, Volume II, the extract from Manu supports the *Manugye*. My answer to the first point of reference is that the property inherited by **A** is the *lettetpwa* or joint property of the marriages.

In section 3, Book XII of the *Manugye*, we have seen that the division of *lettetpwa* property is in the proportion of 2 to 1 according as the husband or the wife is the *nissaya* (supporter) or *nissita* (dependant). As the property referred to in the reference was inherited by **A** from his father he would be the *nissaya* and **B** and **C** would be *nissitas*. **A**'s share would be two-thirds and **B**'s and **C**'s share would be one-third. As **B** and **C** are of equal status, the share of each would be half of one-third or one-sixth of the whole. In *Maung Lo* v. *Maung Pyaung* (3 B.L.T., page 149) and *Tola Ram* v. *Ma Kaing* (5 B.L.T., page 98) it was correctly held that the *nissita's* share was one-third.

My answer to the second point of reference is that the chief wife **B**'s share is one-sixth of the inherited immoveable property.

The third point of reference is "will either or both wives acquire a vested right in one-third or any other share in the inherited property from the date on which it is inherited, and, if so, is such share liable for all or any part of the debts incurred by the deceased husband alone?"

In *Maung Po Sein* v. *Ma Pwa and six others* (P.J., page 403) the extent of the power of the husband of alienating property inherited by him after marriage was considered. It was held that the Court should be guided by the rules applicable to a partition upon divorce when neither party is in fault. It was also

held that it was settled law that the wife or husband has an interest in property acquired by the other by inheritance, after marriage, when they are living together and helping each other.

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In the case of *Maung Lo* v. *Maung Pyaung* (3 B.L.T., page 149), it was held that a durian garden inherited by Maung Pyaung after his marriage with Ma Aing was *lettetpwa*; that Ma Aing had a vested interest in it and that the extent of her interest is one-third. On this point *Mi Myin* v. *Nga Twe* (U.B.R., 1904-06, Divorce, page 19) was followed. It was held further that although a wife cannot alienate her share in joint property without her husband's consent, her interest in joint property is attachable. On this point *Ma Thaing* v. *Maung Tha Gywe* (U.B.R., 1902-03, Exs., page 1), *Ma Hmon* v. *Ma Thaik*, U.B.R., 1904-06, Buddhist Law, Divorce, page 1, were followed. It was also held that although Ma Aing had not "a disposing power which she may exercise for her own benefit" over the one-third share in the durian garden, that one-third share, nevertheless belongs to her and that this was sufficient for the purposes of section 60, Civil Procedure Code of 1908.

As soon as a person dies his heirs at the time under Burmese Buddhist Law immediately become entitled to his estate and when a husband or wife inherits property after marriage, the other party also becomes entitled at the same time to an undivided one-third share of such inherited portion.

In *Ma Shwe U* v. *Ma Kyu* 3 L.B.R., page 66, a Full Bench of the Chief Court of Lower Burma held that "a sale by a Burman Buddhist husband of the *hnapazôn* property of himself and his wife made without her consent constitutes a valid transfer of his share and interest in the property sold." It has been shown that section 3, Book XII of

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Manugye uses the two terms *hnapazôn* and *lettetpwa* together.

I think it is settled law that a wife's share in *lettetpwa* property is not subject to the debts of the husband where they were contracted by him without her knowledge and consent and where she was not a party.

My answer to the third point of reference is that both wives acquired a vested right in one-third of the inherited property from the date on which it was inherited and that such share is not liable for all or any part of the debts incurred by the deceased husband alone.

CARR, J.—In order to answer the questions referred it is necessary to determine the respective interests in property, during the continuance of the marriage of a Burmese Buddhist husband and wife. This matter is not directly dealt with in the *Dhammathats* and we can deal with it only by inference from certain provisions among which those of section 3 of Book XII of the *Manugye Dhammathat* are dominant. This *Dhammathat*, besides being accepted as the leading authority, appears to deal with the subject more fully than any other.

This section sets out the rules for partition on divorce, and it has been urged that we should not apply to a question of inheritance the rules applicable to divorce. This argument seems to me to involve a misapprehension. If the wife has a vested interest in the property during the life of the husband that interest will not be affected by his death and cannot be considered as passing to her by inheritance, but on the husband's death she will take either the whole or a part of his interest as his heir. The part so received by her by way of inheritance will of course be chargeable with the husband's

separate debts while the interest which she has all along held in her own right must be separately considered. The question, therefore, for decision is whether the property in question in the suit has come to her by inheritance or otherwise.

The *Dhammathats* frequently make use of the following terms :—

> *Payin*—property possessed by either party before marriage.
>
> *Lettetpwa*—property acquired during the continuance of the marriage.
>
> *Hnapazón*—joint property.
>
> *Thinthi*—separate property.

These terms are loosely used and are nowhere exhaustively defined. I shall come to some partial definitions later, but there seems to be no definition whatever of the *thinthi* of a husband or wife as between themselves. There are provisions regarding *thinthi* in *Manugye* X, 22, 23, 24 and 81, and in sections 119 to 136 of Volume I of the Kinwun Mingyi's Digest of Buddhist Law, but these relate to the *thinthi* of children as between them and their parents and lay down, generally speaking, that such *thinthi* is not to be included in the estate of the parents when that estate comes to be partitioned.

In view of the looseness of their use and the absence of precise definition too much weight should not be attached to the use of these terms in any particular context.

I come now to section 3 of Book XII of *Manugye*. This section first set out the rule for partition on divorce between a husband and wife, neither of whom has previously been married when both desire the divorce and no fault is attributable to either. Each party takes his own clothes and personal ornaments but, if these are materially more

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valuable than those of the other, must compensate the other of the difference. Property acquired jointly is equally divided, but if there is property acquired separately by or through one party that party takes two shares and the other party one share.

There follow provisions regarding the children and the right of re-marriage, which need not be discussed.

Then comes a statement of the three kinds of property acquired separately by or through one party. This is first given generally—"property originally in possession (*payin*); property acquired by skill or science; and property given by the king". This is then slightly elaborated:—

(1) Property inherited before marriage from parents by the husband (or wife) when the wife (or husband) had no such property.

(2) Property acquired during the marriage by the skill or science of the husband (or wife).

(3) Property specially given to the one party by the king.

Two points may be noted here. The general classification refers *payin* generally, that is all property possessed before marriage by the one party, but the more detailed statement would seem to limit this to inherited *payin*. This, however, is probably due to the fact that the marriage contemplated would probably take palce at an age when neither party was likely to have acquired any property of importance by his own exertions. I think the most reasonable interpretation is that all *payin* is considered as acquired by the party possessing it before marriage.

Again, though property inherited before marriage is expressly included, nothing is said about property

inherited after marriage. It may be, in view of the following rules, that the omission was intentional and that property inherited after marriage, that is, after the couple had become one, was to be shared equally. But the *Dhammathats* are neither precise nor entirely consistent and I think that the safer interpretation would include this class of property among the property acquired by or through the one party.

It is noticeable that so far the word *lettetpwa* has not been used. The rules cover all property, whether acquired before or after marriage of both parties. They thus disclose a very strong community of interest in the case of a first marriage and indicate that all property is joint, though the respective interests may vary in amount. This is entirely in accord with present day Burmese sentiment, which regards the union of a couple neither of whom has been married before (*ngè lin ngè maya*) as much more perfect and intimate than any other marriage.

The divorce being by mutual consent and without fault on either side it is equitable that neither party should suffer any material loss by the divorce. It is reasonable therefore to presume that the mode of division is based on the relative interests of the parties during the continuance of the marriage.

We have next the rule when one party wishes to separate and the other does not, there still being no fault on either side. The party wishing to separate forfeits all the property except that specially given to him by the king and one set of wearing apparel, and must pay all the debts.

This rule strongly emphasises the community of interest and the closeness of the union. The party wishing to separate can only do so on forfeiting all the property, including his own *payin*, except the

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very limited class of royal gifts, and sufficient clothing to satisfy the requirements of decency.

Passing over the rule for a case in which one party is in fault we come to the rules for a husband and wife both of whom have been married before and to neither of whom is any fault attributable. It both wish to separate each party takes his own *payin* and the joint property is equally divided. But if one wishes to separate and the other does not then the party not wishing * to separate takes all the joint property and the party who does wish to separate pays all the joint debts, while each party takes his own *payin*.

We are told that there are two kinds of "*hnapazôn lettetpwa* (this being the first time that the word *lettetpwa* has been used), namely, (*i*) property or debts inherited during the marriage by one party from his parents, and (*ii*) property acquired by their joint exertions". And it is said "If the husband has inherited property from his parents it is more immediately his; let him have two shares of the property" and similarly for the wife.

Here we have it very clearly laid down that property inherited after marriage is joint property and that the inheriting party takes two shares to one for the other party.

The last paragraph of the section has given rise to much discussion. It refers again to three classes of property—royal gifts, *payin* and property inherited by either party during marriage and it says clearly that the profit from these are *lettetpwa* and to be divided accordingly.

There is some obscurity in this passage in regard to the three classes of property mentioned, and we have conflicting translations. Richardson makes it

* There is a misprint in Richardson's translation, the "not" being omitted.

mean that these three classes of property themselves are also *lettetpwa*. This is undoubtedly wrong. The text cannot bear that meaning, which would also involve a contradiction of the preceding paragraph, which distinguishes *payin* from *lettetpwa*.

The translator of the Digest (section 264, Volume II) renders it " Let each take the property given to him or her alone by the king, that brought by each to the marriage, and that inherited by each from his or her parents subsequent to the marriage." That, in my view, is also wrong. I do not think that the text bears that meaning, which also contradicts the preceding paragraph, which says that of property inherited during marriage the inheriting party takes two shares.

There are two other translations—in Jardine's Notes on Buddhist Law, II, Marriage, page 31, and by Sir G. Shaw in *Mi Myin* v. *Nga Twe* (U.B.R., 1904-06, II, Divorce, 19). Neither of these is entirely satisfactory and I am unable myself to suggest a correct translation for the obscure words "*ayin ataing ti byi ywe*." But both of these translations, I think, support the view that I take of the paragraph which is that it is meant only to explain that the profits from the three classes of property specified are *lettetpwa* and does not deal with the disposition of the original properties themselves—that having already been done.

In any case I should not be prepared to accept a passage of such obscurity as sufficient to override the very clear provisions by which it is immediately preceded.

It is to be noticed that these rules indicate a much lower degree of community of interest than in the case of a previously unmarried couple. This may be accounted for in part by the sentiment

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already mentioned, but there are other obvious reasons for the difference. In the case of a first marriage there are no interests to be considered other than those of the husband and wife and of their children. But when either or both has been married before, it is likely that there will be children of the first marriage and their interest also have to be considered. That is a very good reason for not giving to each spouse the same rights in the *payin* property of the other as are given on a first marriage.

The rules in other *Dhammathats* given in the Digest differ sometimes from those of the *Manugye*, but I am unable to find anything to throw doubt on these rules in regard to the kind of property in question in this case, that is, property inherited during marriage.

In my view it is clearly shown that such property becomes *lettetpwa* or joint property immediately it accrues and that the interest of the inheriting party is two-thirds and that of the other party one-third. The interest is the same whether neither party has been married before or both have been married.

The intermediate case, in which one has been married before and the other has not, is not dealt with in the *Dhammathats*; but where the rule in the two extreme cases is the same, there is no difficulty in holding that it applies also to the middle case. It is not necessary, therefore, to decide which of two different rules is to be followed, but I wish to say that I am not satisfied that where the rules differ the one to be applied to the intermediate case is that for the case where neither party has been previously married. That has been held in *Ma E Nyun* v. *Maung Tok Pyu* (U.B.R., 1897-01, Divorce, 39), but the reasoning of Sir H. Thirkell White in that case seems to me to be based on a misconception

of the reason for the differences in the rules. This decision was followed in *Ma Ngwe Hnit* v. *Maung Po Hmu* (XI, L.B.R., 52), but there were special circumstances in that case which rendered the decision at least equitable.

It has also been argued that what is joint property for the purposes of partition on divorce is not necessarily joint for the purposes of partition of inheritance. It is difficult to see any reason why there should be any such distinction, but cases have been cited in favour of this proposition. The first and most important of these is *Maung Shwe Ngon* v. *Ma Min Dwe* (S.J., L.B., 110), in which Sir J. Jardine said:—"My opinion as to the application of the definition in page 344 (*Manugye* XII, 3) to the present case is as follows:—

"The definition of jointly acquired property in that section is not made for the purpose of inheritance; it appears to me to relate only to the law of divorce and partition following divorce. The rules about partition and inheritance on the death of a relation make frequent and plain distinctions between ordinary joint acquisitions made by skill, science, thrift or trade, and the succession of the husband or wife to his or her relations' property. I instance section 6 at page 272, section 8 at page 273, mentioned by Mr. Sen, sections 15 and 16 at page 276, as to children of surviving parents, which children have not received a share, section 38 at page 286, where the ancestral property inherited by a husband is expressly said to be his and thus liable to equal division among wives, and section 66, where the distinction is most plainly drawn." The sections quoted are all in Book X of the *Manugye*.

With the greatest respect for the high authority of Sir J. Jardine, whose judgments and whose Notes on Buddhist Law still stand in the front rank of

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authorities on that law, I am unable to follow this proposition, or to find in the sections mentioned anything entirely inconsistent with section 3 of Book XII.

Section 6 deals with the case of a man marrying a second time, having a son by the first marriage. On the death of the father and step-mother the son takes all their property. But if the step-mother's parents have died and their property, *undivided* is in her hands, the son takes only one-half of that property the step-mother's relations taking the other half. But again, if the step-mother has died first the son takes all the inherited property which has been divided and has come into his father's hands. Of the undivided part he takes two shares and the step-mother's relation take one.

The main thing to be deduced from this would seem to be that inheritance was not regarded as vesting completely until partition, but I can see nothing to contradict the proposition that the husband acquires a vested interest as soon as the inheritance accrues to the wife.

Section 8 deals with partition between a step-father and his step-sons on the death of their mother. The step-father takes one-fourth of the mother's property and her sons three-fourths. But if the mother has inherited property during her second marriage, then the step-father takes one-half of that property and the sons the other half.

This seems to me definitely to support the rule in Book XII, 3. Assuming that, under that rule as I have interpreted it, he had acquired a vested one-third interest in the inherited property, then he would keep that on his wife's death. Of her two-thirds interest he would, under the rule in the first part of section 8, take one-fourth, or one-sixth of the whole. This

together with his own one-third makes the one-half allotted to him. The division is therefore arithmetically consistent with section 3 of Book XII. See also *Ma Nyein* v. *Maung Tha Gaung*, 3 U.B.R., 237 at 238.

Sections 15 and 16 do not seem to have any bearing at all on the question. They deal with partition between the children and grandchildren of a single couple and make no distinction whatever between joint and separate property.

Section 38 deals with a husband having many wives of equal status. It says that property inherited by the husband after the marriages is his property and shall be divided equally among the wives. This is not inconsistent with the rules under discussion. The statement that it is the husband's property is made merely in disallowing a claim by any one wife that it was a gift to her by the husband, and does not justify an inference that the wives had no interest during the husband's life-time.

In one respect this section does conflict with Book XII, 3. It says that each wife is to keep her own *payin* and the property inherited by her during marriage. But it is very likely that this was a measure of practical convenience only.

Section 66 deals with a man who has had either two or three wives and on his death leaves children by each. It says that the rule for division of property inherited by him in the time of his first wife is—

(1) where there have been two wives the children of the first wife take two shares and those of the second wife one share.

(2) where there have been three wives the children of the first wife take two shares and those of the other two wives take one share each.

It is also explained that if the property has come into possession of the husband during the time of

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the second or the third wife the division shall be similarly made. This can only mean that the children of the wife in whose time the inheritance accrued take the larger share.

This again seems to me definitely to corroborate the rules in XII, 3. I can imagine no reason for giving a larger share to the children in the time of whose mother the property accrued other than the fact that their mother acquired a vested interest in it. Moreover in the case of the two families the division is again arithmetically consistent with the view that the wife's interest is one-third. Her children take that one-third as their mother's property and share the father's two-thirds equally with the children by the other wife. In the case of three marriages the division is not exactly correct arithmetically being in the proportion of 4 : 2 : 3, whereas under the one-third rule it should be in the proportion of 5 : 2 : 2. The difference, however, is not great.

There is one part of the section which may be in conflict with the one-third rule. It is laid down that the children of each wife shall take their mother's separate hereditary property. Nothing is said as to the time of accrual of the inheritance, but it is probably intended to include all her inherited property.

Taking all these sections together I think that they tend rather to support than to contradict the rules in Book XII, 3. The inconsistencies are slight and may be attributed to considerations of practical convenience.

In my view therefore the definition of *lettetpwa* in Book XII, 3, is applicable to questions of inheritance as much as to questions of divorce.

There is no very direct authority for the case where there are two wives to justify us in allotting

a larger share to two wives than to one, but *Manugye* X, 38, indicates that the two wives should share equally in the one-third interest, when both are of equal status.

The question of the liability of the interest of the wife for the separate debts of the husband is one rather of contract than of Buddhist Law and I can find no reason for holding that the wife's interest is so liable.

My answers to the questions referred are, therefore :—

(1) The property is the *lettetpwa* of the marriages and is joint property of the husband and wives and not the separate property of the husband.

(2) The share of the two wives jointly is one-third and since they are of equal status the share of each is one-sixth.

(3) Each wife acquires a vested interest in one-sixth of the property from the date on which it is inherited, and that interest in not liable for any part of the debts incurred by the deceased husband alone.

ROBINSON, C.J.—The questions have been so thoroughly discussed by my learned Brothers and as the results arrived at agree with the result at which I had arrived after discussion, I do not think I need do more than express my concurrence.

I am of the same opinion.

APPELLATE CRIMINAL.

Before Mr. Justice Rutledge and Mr. Justice Maung Gyi.

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RES GESTAE—*Statements of members of an assembly made at the time—Such evidence whether admissible to prove unlawful purpose in a charge against promoters under sections 325, 326 and 149 of the Penal Code (XLV of 1860).*

According to Burman Buddhist ideas, he who dons the yellow robe, has one of two duties to perform, to practise austerities and meditation in order to work out his own salvation or to learn the sacred scriptures and to impart the knowledge to others; when a *pongyi* performs neither of the said duties he is no longer entitled to live on the offerings of the laity, nor to receive respect from them. He has no *raison d'être*. In attempting to oppose the orders of the executive, he is not only breaking his own personal law but is setting an example to the laity which is greatly to be lamented. As for the laymen, in the words of the pronouncement of the *Thathanabaing* in Council in 1226 B.E., those who support *pongyis* who do not live in accordance with the *Vinaya* are but watering a poison tree which will prove fatal to themselves.

The promoters of an assembly consisting of *pongyis* and laymen were charged with an offence under sections 325, 326, *read* with section 149 of the Indian Penal Code in that they entered into a conspiracy to overawe the police and disobey their lawful orders, that there was an unlawful assembly in consequence with the common object, as above, and that in pursuance of such common object, offences under sections 325 and 326 were committed by the members of the assembly.

Held, that evidence of statements made by members of the assembly, of their determination to force their way through the police formed evidence of a part of the *res gestae* and was admissible to indicate that the promoters' intention to ignore the police orders and been communicated to sections of the crowd.

Lambert (senior)—for the Appellants.
Lütter—for the Crown.

RUTLEGDE and MAUNG GYI, JJ.—By way of preface we take this opportunity of thanking the learned advocates in this case for the great help we have received from them in dealing with this heavy

* Criminal Appeal No. 287 of 1925 from the order of the Sessions Judge of Mandalay in Sessions Trial No. 25 of 1924.

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appeal. Mr. Lambert has stated the appellants' case with great clearness and has argued it with great care and ability.

This is an appeal from the convictions and sentences passed upon eleven appellants by the Sessions Judge of Mandalay in what is commonly spoken of as the Mandalay Riot case.

The appellants were found guilty of offences under section 326 read with section 149, Indian Penal Code, and sentenced as follows:—

(1) Maung Tok	...	7 years'	rigorous imprisonment.
(2) Maung Saw Maung		2 "	"
(3) U Thoseikta	...	18 months'	"
(4) Maung Mya	...	7 years'	"
(5) U Zagaya	...	1 year's	"
(6) Maung Maung Gyi		3 years'	"
(7) C. P. Khin Maung		4 "	"
(8) Maung Shwe Po	...	1 year's	"
(9) Maung San Nyun	...	7 years'	"
(10) Maung Saung	...	18 months'	"
(11) Maung Tun Aung Gyaw	...	7 years'	"

In addition Maung San Nyun was found guilty under section 325, Indian Penal Code. He was sentenced to suffer seven years' rigorous imprisonment under section 325, Indian Penal Code, besides one year's rigorous imprisonment under section 326 read with 145, Indian Penal Code, the sentences to run concurrently.

As stated by the Appellants' Advocate and indeed what is familiar to any resident in Burma the advent of the Constitutional Reforms in Burma led to a split in the ranks of the General Council of Burmese Associations familiarly known as the G.C.B.A., one party known as the Twenty-one or Council Entry Party urging Co-operation with Government for the successful working of the Reforms

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and the other the Hlaing-Pu-Gyaw Party whose policy was to boycott the Councils and refuse to co-operate with Government. The name is derived from the leaders of the party. U Chit Hlaing, a barrister of Moulmein, U Pu, a pleader of Tharrawaddy and U Tun Aung Gyaw, the 11th Appellant, Manager of the Burma Urban Co-operative Bank whose headquarters are in Rangoon with branches, among other places, at Mandalay. In 1923 certain politicians endeavoured to bring about a reunion between the two parties and in this connection formed an association called the Union Party with its headquarters at Mandalay and with one U Kyaw Yan as President. It is in evidence that certain Buddhist monks, more especially those of the Mogoung *Taik*, sympathised with the Union Party. The Hlaing-Pu-Gyaw Party was opposed to the policy of the Union Party and were backed by a powerful association of Buddhist monks called the Sangha Samaggi. The Union Party in August last invited a leading Buddhist monk, the Weluwun *Sayadaw*, to come to Mandalay and deliver a lecture at the Eindawya Pagoda on the advantages of good fellowship and unity. The Hlaing-Pu-Gyaw Party invited a leading monk of their party, one U Ottama, at present undergoing three years' rigorous imprisonment for an offence under section 124A of the Indian Penal Code, to visit Mandalay and deliver a series of lectures. The principal organisation of the latter party at Mandalay is the Ratanabon Council whose headquarters were in the premises of the Burma Urban Co-operative Bank in 84th Street, of which Bank the 11th Appellant was the Head. The Ratanabon Council appointed a Reception Committee to organise the welcome to be given to U Ottama consisting of U Nyaneinda, Maung Tok, the 1st

Appellant, C.P. Khin Maung, the 7th Appellant, Maung Maung Gyi, 6th Appellant, Maung Kyu, Saya Lon and Ba Than. Handbills were printed and circulated inviting the public to attend the reception and to join in the procession keeping to the left hand side of the road. The route was to be from the Shanzu Railway Station through the Arakan Pagoda up 84th Street through the Zegyo Bazaar along 26th Street turning south past the Mogoung *Taik* to the Sagu *Taik* whose monks are adherents of the Sangha Samaggi where U Ottama was to stay during his visit. It was not until the 15th August that application dated the 14th was made by the 2nd Appellant, Saw Maung, Secretary of the Ratanabon Council, for a permit for the procession, both to the Deputy Commissioner and District Superintendent of Police. No mention of the route was made in the application itself, but it was indicated in the handbill attached to the application. The Deputy Commissioner was absent on tour, but the Head-quarters Assistant sanctioned the application, but his sanction was not communicated till 8 a.m. on the 16th and did not lay down any route for the procession. The District Superintendent of Police at first sanctioned the procession and the proposed route, but before the permit was issued circumstances were brought to his notice which led him to alter the proposed route. A deputation waited on him on the afternoon of the 15th pointing out that on that day a procession of first four gharries and afterwards 50 gharries, filled with *pôngyis* with objectionable placards and bands playing, encircled the Pitaka *Taik* where the Union Party where holding a meeting, with the object of disturbing it and that if the Ottama procession were permitted to pass along the proposed route past the Mogoung *Taik* they anticipated trouble by

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the processionists annoying and provoking the monks there who were opposed to them. He thereupon altered the route by making it go first a long DesVœux Road and thence north to the Sagu *Taik*. For the appellants it is urged that the District Superintendent of Police's action in this respect was unreasonable. We consider that the District Superintendent of Police was fully justified. The route prescribed by the District Superintendent of Police was shorter and more direct and admittedly broader than one part of the original route at or near the Zegyo Bazaar, but the deciding factor from the point of law and order was that it obviated a likely collision at the Mogoung *Taik*.

The District Superintendent of Police's permit with the new route prescribed was conveyed to the Ratanabon Council by U Po Hnon, Subdivisional Police Officer East, at about 8 p.m. on the 15th. He states that he was accompanied by Inspector Udailak Ram and the witness Ba Tun. He met Tun Aung Gyaw, Maung Mya, Maung Tok, Saw Maung and three others whom he did not notice. Of these latter, Ba Tun states that C.P. Khin Maung was one. Po Hnon treated Tun Aung Gyaw as the responsible leader and gave him the order which he read and passed to Maung Mya who in return read it and passed it to Saw Maung. The change of route was objected to and Po Hnon referred them to the District Surperintendent of Police. In conversation Po Hnon referred the *pôngyis'* procession of gharries at the Betaka *Taik* that afternoon and Tun Aung Gyaw told him that the *pôngyis* threatened to go on foot to the Betaka *Taik* when he hired fifty gharries and paid Rs. 240 to drive them round it. It it urged that this is unlikely as the fare would not be Re. 1 each. Tun Aung Gyaw may have exaggerated the extent of

his bounty. It is not uncommon or he may have had to pay as the Sessions Judge suggests extra to induce the gharry-wallahs to undertake what might well bring injuries to themselves and their gharries. But we see no reason to disbelieve U Po Hnon in this particular, as his evidence, has impressed us as truthful and has been given with care not to press it beyond what he actually observed this incident must be borne in mind when considering the presence and co-operation of a large body of *pôngyis* at the time of the riot. Saw Maung, the Secretary, sent an application to the District Superintendent of Police to revise his order and sanction the original route proposed about 11 p.m. On this being communicated to the District Superintendent of Police early next morning he refused to alter the route and gave orders for this refusal to be communicated at once. Ba Zin, Head Constable, took the message and was received by Maung Mya who declined to receive a verbal order and refused to allow the Head Constable to speak to Tun Aung Gyaw who with Maung Tok, C.P. Khin Maung and Saw Maung were seated at a table within hearing. The written order was communicated about 11 a.m. to the Ratanabon Council Secretary, Saw Maung, who replied by Exhibit F, stating that he didn't think the original route could be changed and that the District Magistrate had granted permission to hold the procession along the original route. As the Sessions Judge has remarked the latter statement is inaccurate as no route was prescribed in the latter from Deputy Commissioner's office. The Ratanabon Council must have known perfectly well that the District Superintendent of Police was the proper officer to prescribe the route for the procession and their duty was, if dissatisfied with his decision, to get it reversed on application to

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his superior, or else to obey it. It is perfectly clear that they chose to do neither.

It may be a matter for regret that the District Superintendent of Police does not seem to have realised the full significance of Exhibit **F**, as if he had, one would have expected him to have requisitioned such a force of Military Police as would have ensured compliance with his request. But the question whether a different disposition of the police or military police would have prevented the riot or ensured a different result is not before us but rather the intention of the appellants.

Before the train conveying U Ottama arrived at Shanzu, Maung Mya and Tun Aung Gyaw were informed of the District Superintendent of Police's order confirming the previous orders that the procession was to turn west into DesVœux Road, and both appellants said that they had got the District Magistrate's order permitting them to go along the route advertised by the Reception Committee. U Ottama arrived at Shanzu Station shortly after 1 p.m. on the 16th August and he entered the Arakan Pogoda to pray. When he came out of the West entrance the procession formed and started along 84th Street on which tram lines are laid. A number of *pôngyis* led the van. Then came what is referred to as the *Sundawgyi*. It means the offering for the Lord Buddha. It generally consists of the food served up to *pôngyis* and other requisites allowable to *pôngyis* according to the *Vinaya*. But no *Sundawgyi* is ever offered after midday as *pôngyis* are not allowed any meals after that hour. This so called *Sundawgyi* seems to have been a pretext for doing exceptional honour to U Ottama and carrying him round in royal state. The *Sundawgyi* was followed by *Osi* players and men dancing, then came

women; and then U Ottama in his litter with a golden umbrella over his head. Under the Burmese régime any commoner assuming any of the insignia of royalty especially in public would very soon die of official colic To the Burmese mind only those equipped with proper *karma* can safely assume high dignities or the insignia thereof and the more ignorant masses are only too ready to assume the converse that those who do assume such insignia belong to high estate and are possessed of *karma* which makes them independent of the law, and they are eager to follow in the train of such persons.

From the evidence of the two detective officers Maung Talok and Maung Ba Shin, Maung Tok, Maung Saw Maung, U Thuseitta, Maung Mya and Tun Aung Gyaw were with or near U Ottama when the procession left the Arakan Pagoda.

Another significant feature is that long before the procession appeared *pôngyis* had begun to concentrate in front of the Ratanabon Council premises and the Pariyatti *Taik* immediately to the south of DesVœux Road in 84th Street. Trams stopped here and several witnesses depose to *pôngyis* visiting several trams and requesting the passengers both *pôngyis* and laymen to alight; so that a large crowd had concentrated here when the van of the procession arrived. The District Superintendent of Police and about 40 men were stationed immediately to the north of Des-Vœux Road in 84th Street outside Ma Mya's building. It is noteworthy that though the procession was advertised to pass north up 84th Street to the Zegyo Bazaar no appreciable gathering of *pôngyis* or laymen had concentrated north of Ma Mya's building. There is a considerable amount of evidence about statements by members of the procession and by those concentrated outside the Ratanabon Council premises

of their determination to force their way through the police. The learned Advocate for the appellants has objected to its admissibility as hearsay. We consider that it was rightly admitted. It indeed forms part of the *res gestae* and indicates that the promoters' intention to ingore the District Superintendent of Police's orders had been communicated to sections of the crowd.

When the van of the procession neared Des-Vœux Road the *pôngyis* concentrated to the south-west side, joined in and swelled the van which moved north till stopped by the District Superintendent of Police and the Police. The judgment of the Sessions Judge sets out in some detail what occurred and we do not intend to repeat it. For the appellants it is urged that the whole affray was unpremeditated, that the Union Party had an office in Maung Mya's building and that stones thrown were from that building at the processionists and that this precipitated the riot. We consider that it is clearly established that the first stones did not come from Maung Mya's building, but from the south-west corner, *i.e.*, from the direction of the Pariyatti *Taik*, and that the first stones thrown were succeeded so quickly by such a shower of stones as to negative the suggestion of accident or unpremeditation. The Trial Court has classified the appellants into major and minor accused. Among the former are Maung Tok, Saw Maung, Maung Maung Gyi, C. P. Khin Maung, Maung Mya and Tun Aung Gyaw, while Shwe Po, Maung Saung, San Nyun, U Thuseikta and U Zagaya were among the latter or followers. The Sessions Judge has dealt with the evidence in detail and analysed it, and on this evidence we are bound to accept his finding except as to the following appellants, Maung Maung Gyi, Maung Saung

and Maung Shwe Po We consider that it is clearly established that there was a conspiracy in which Tun Aung Gyaw, Maung Tok, Maung Mya, C. P. Khin Maung and Saw Maung took a leading part to overawe the Police and disobey their lawful orders, that in pursuance of this conspiracy there was an unlawful assembly with the common object of overawng the police and disobeying their orders, and that in pursuance of that common object, offences under sections 325 and 326, Indian Penal Code, were committed by members of the unlawful assembly. While we cannot accede to the argument of the Appellants' Advocate to regard the riot as over once the District Superintendent of Police left the scene, we think for the reasons given by the Sessions Judge that it will be sufficient if the appellants are punished under sections 325 and 326 *read* with section 149, Indian Penal Code.

We shall now deal with the findings of the Sessions Judge which we are not prepared to accept.

Maung Maung Gyi.—It is clear that this appellant was not present at the Ratanabon Council on the evening of the 15th when the orders of the District Superintendent of Police were communicated. He allowed his name to appear among the members of the Reception Committee. He was present at the station on U Ottama's arrival and he was present at the earlier part of the riot, but there is no evidence that he took an active part in urging the mob to break through. In these circumstances we consider that there is not enough evidence on the record to justify us in classing him as one of the leaders. His appeal will be allowed and the conviction and sentence set aside.

Maung Saung.—The evidence of his throwing stones rests upon the two detective witnesses Maung

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Talok and Ba Shin. The learned Sessions Judge considers that certain of Ba Shin's statements are inaccurate to say the least, though he regards Maung Talok as a truthful witness. Even though truthful, in a situation so full of changing incidents as a riot, corroboration is very needful. It is true that Maung Kyu states that he saw him among the crowd that threw stones at the Police, but he does not say that Maung Saung actually threw. In these circumstances we think that the case is not established beyond a reasonable doubt. His appeal is allowed and the conviction and sentence are set aside.

Maung Shwe Po.—The case against him rests upon the evidence of Maung Kywe, Paw Byu and Maung Thoung. The Lower Court considers Maung Kywe to be a truthful witness but he only states that he saw Shwe Po and Maung Daung among the crowd who were throwing stones, not that Shwe Po actually threw stones. Maung Daung was discharged by the committing Magistrate. Paw Byu does not inspire, one with confidence and his evidence does not go any further than Maung Kywe's. Maung Thoung alone states that Shwe Po and Maung Yeik (discharged) threw stones. He appears to be a casual witness, Though present as he says at the corner of DesVœux Road he cannot or will not give evidence against any other accused. We do not consider that the case against Shwe Po is established beyond a reasonable doubt. His conviction and sentence will be set aside.

The learned Advocate for the Appellants has urged us in case we hold them guilty to reduce their sentences. We are unable to do so. The riot has resulted in four deaths and a large number of injuries, a considerable number of the latter being grievous. As far as the leaders were concerned, their intention, their common object was deliberate and the

results that followed were such as a reasonable person must know was likely to be committed in prosecution of that common object.

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This case is another illustration of the growing participation of the yellow robe in public affrays. And we desire to emphasise the grave responsibility incurred by any political leader who employs or allies himself with *pôngyis* for any party object. From the evidence on the record there is no doubt that among those who assaulted the police the majority were *pôngyis*, yet such is their hold over the people that only two of them have been sent up for trial. It is the bounden duty of the laity to do their utmost to discourage *pôngyis* from transgressing the bonds which the *Vinaya* lays down for them and the rules which, by donning the yellow robe, they voluntarily promised to observe. And it is the bounden duty of a *pôngyi* who desires to participate in party politics to put off the yellow robe and reassume the responsibilities as well as the privileges of ordinary civil life.

In 1226 B.E. (1864) at the request of the King of Burma the *Thathanabaing* in Council in the presence of monks and laymen examined exhaustively the sacred Pali texts, the commentaries and sub-commentaries bearing on the question of the status and duties of a Buddhist monk.

Relying on the Pāli text which begins :—

"Na mundake na samano, abhato alikam bhanam, icchā'obha samāpanno, samano kim bhavissati. The mere shaving of the head and begging with an alms bowl does not make one a rahan (*pôngyi*). How can any one be a rahan who does not control his senses, does not observe his personal law, discourses on subjects unprofitable (to a rahan) and is still filled with a craving for worldly things." The *Thathanabaing* in Council declared that those who

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having entered the order did not observe their personal law (The *Vinaya*) were not true rahans; that laymen who supported such persons were like the man who waters a poison tree and that when they pass out of this existence both the pseudo rahan and his supporter will be consigned to *avichi* or the lowest of the hells.

On page 391, Volume XIII, Sacred Books of the East, which is a translation of the *Vinaya* text by the late Professor Rhys Davids, we have this passage "I prescribe O Bhikkhus, that you obey kings."

This was in connection with the request of the King of Mahada that the Sangha should begin their lent on a certain day fixed by him. When the Bhikkhus told this to the Lord Buddha, he replied that kings must be obeyed, that is Bhikkhus are subject to the laws of the land they live in. If they are dissatisfied with such laws it is not for them to oppose the authorities but to move to other parts where the laws will be more congenial. The commentary on this passage which begins "anujānāmi Bhikeave rājuman, etc." explains that so long as the civil laws are not in conflict with the 227 rules to be observed by monks, they must be obeyed.

In the Pāli text of the Pācittiya we have the passage which begins "vigarabi buddho bhagavā kathamhināma tumhe mogha purisa vikāle gāmam pavicitvā, etc." (page 206), (Pācittiya Palidaw, Kavimyetmhan Press).

In this text the Lord Buddha admonishes certain of the monks for frequenting the villages after the hour of noon and indulging in talk which is unprofitable to a Bhikkhu, *i.e.*, will not help him to attain Nirvana. The text says—

"What is this unprofitable talk :—

Politics and official matters, dacoities, the doings of ministers and officials, warriors, dangers,

wars, feed, drink, clothing, dwelling, scents and flowers, relatives, etc., etc.

Any discourse on these subjects is unprofitable to rahans or *pôngyis*.

There are three baskets of the Law as preached by the Lord Buddha, *viz.*, Abhidhamma, Vinaya and Suttas.

The Abhidhamma is the Dhamma taught to those who are more spiritually evolved. The *Vinaya* or the Sama Dharma adapted for monks: and the Suttas contain the Sama Dharma explained popularly for who those are less spiritually evolved.

The preceding passage of the Pacittiya finds its parallel in the Samaññaphala Sutta of the Dīgha Nikāya. There is an excellent translation of this Sutta by the late Professor Rhys Davids (Volume II, Sacred Books of the Buddhists) Dialogues of the Buddha). The meaning of the Sutta is "the fruits of the life of a recluse." This Sutta has a bearing on the *Vinaya* and its ethical precepts.

According to Burman Buddhist ideas he who dons the yellow robe has one of two duties to perform :—

(1) to practise austerities and meditation in order to work out his own salvation; or

(2) to learn the sacred scriptures and to impart the knowledge to others.

Those who follow the first are known as Patibatti Sangha and those who adopt the second as Pariyatti Sangha.

When a *pôngyi* belongs neither to the Pariyatti nor to the Patibatti, he is no longer entitled to live on the offerings of the leity, nor to receive respect from them. He has no *raison d'être*.

We have touched on this point as the majority of those concerned in the riot were according

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to the evidence, members of the Order. In attempting to oppose the orders of the executive they are not only breaking their own personal law but are setting an example to the laity which is greatly to be lamented. As for the laymen we have shown from the pronouncement of the *Thathanabaing* in Council in 1226 B.E. that those who support *pôngyis* who do not live in accordance with the *Vinaya* are but watering a poison tree which will prove fatal to themselves.

In view of what we have stated, we are unable to accept Mr. Lambert's prayer for any reduction of sentence. In the circumstances we are of opinion that the sentences passed by the lower Court are not unduly severe.

The appeals of (1) Maung Tok, (2) Maung Saw Maung, (3) U Thuseikta, (4) Maung Mya, (5) U Zagaya, (7) C. P. Khin Maung, (9) Maung San Nyun and (11) Tun Aung Gyaw are dismissed and the covictions and sentences passed upon them are confirmed.

APPELLATE CIVIL.

Before Mr. Justice Rutledge and Mr. Justice Brown.

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Apl. 23.

A.T.A.R.M.M. CHETTY FIRM
v.
M.A.M. MAHOMED KASIM AND THIRTEEN.*

Limitation Act (IX of 1908), Article 134—Sub-mortgage without possession by mortgagee in possession, whether a transfer within the meaning of article.

Held, that the transfer by way of a sub-mortgage without possession in favour of a third party by a mortgagee in possession is not a transfer within the meaning of Article 134 of the Limitation Act and that therefore the transferee without possession cannot claim the benefit of the Law of Limitation.

Held, also, that when land is mortgaged without possession and possession subsequently passes to the mortgagee, the burden of proving that the transfer in which possession was given was an outright sale lies on the person alleging it: but in considering whether that burden has been discharged, all the circumstances of the case including the conduct of the parties must be borne in mind.

Husaini Khanam v. Hossein Khan, 29 All., 471—*referred to.*

Mulla Veetil Seeti Kutti and 6, v. K.M.K. Kunhi Pathumma and 3, 40 Mad. 1040; *Ramchandra v. Sheik Mohideen*, 22 Bom., 614—*followed.*

Ma Dun v. Lu O and 1, 5 L.B.R., 40—*approved.*

Jeejeebhoy—for Appellant.
Chari—for Respondents (1) and (2).
Moore—for Respondents (5) and (9) to (14).

RUTLEDGE AND BROWN, JJ.—The land in suit was originally owned by two Karen Christians, Maung Aung Tha and Ma Pa Dit, who were husband and wife. In the year 1901 by registered mortgage deed they executed a simple mortgage on the land in favour of the respondent Nadir Shah for Rs. 1,450. The mortgagors at first remained in possession of the mortgaged property, but in the year 1904, after the death of Maung Aung Tha, Ma Pa Dit made over posssession of the land to Nadir Shah. On the

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* Civil First Appeal No. 205 of 1923 against the decree of the District Court of Myaungmya in Civil Regular No. 20 of 1922.

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2nd August 1905, Nadir Shah executed a mortgage in favour of a firm of K. A. L. T. Annamalai Chettiar. The property mortgaged consisted of altogether 18 items of which the land in suit formed one. The mortgage was without possession. On the 6th July 1906, the Chetty firm instituted a suit on this mortgage for sale of the mortgaged properties. They obtained a decree but considerable delay ensued before the decree was executed. Finally the property now in suit was sold in execution of the mortgage decree on the 13th September 1915. The purchaser at the auction sale was one V.T.A.L. Swaminathan Chettiar and the appellants A.T.R.M.M. Firm have subsequently acquired the right of the auction puchaser. The suit out of which this appeal has arisen was filed by one M. A. M. Kasim. The plaintiff claimed that when possession of the land was made over to Nadir Shah in 1904, Nadir Shah continued to be merely a mortgagee of the land, and that the right of redemption still remained with the original owners. In the year 1912 Ma Pa Dit executed a registered deed of sale whereby she purported to sell her interest in the land to one Kya Gaing. In the year 1915 a further registered sale deed with regard to the land was executed. In this deed Ma Pa Dit and her two sons Maung San Dwa and Maung Tun, and the purchaser of 1912 Maung Kya Gaing, are shown as vendors, and Maung Po Chet as the vendee. Subsequently Maung Po Chet has sold his rights to Kasim. The present suit was filed by Kasim for redemption of the mortgage made by Ma Pa Dit and her deceased husband in the year 1901.

The appellants contended that the land was made over outright to Nadir Shah in the year 1904, and that Ma Pa Dit, and her sons therefore had no

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rights in the land to transfer to Po Chet, and Kasim has no right to redeem. They further contend that the suit is barred by limitation. The trial Court has found that Nadir Shah obtained possession as a mortgagee and not as an outright purchaser and that the suit is not barred by limitation. Kasim has been given a decree for redemption on the payment of Rs. 2,755.

The appellants attack this decree mainly on two grounds. They contend that the suit is barred by limitation, and that, if not so barred, the finding on fact by the trial Court ought to have been that the land was made over to Nadir Shah outright in the year 1904.

The persons from whom it is now sought to redeem the land are not the original mortgagees, and it is contended that Article 134 of the Limitation Act is applicable, and that the period of limitation begins to run from the date of the mortgage by Nadir Shah to the K.A.T.L. Firm, that is from the year 1905. If this contention is correct then the suit is clearly barred by limitation. There was at one time some doubt as to whether Article 134 applied to a case where, as in the present case, the subsequent transfer was by way of mortgage and not by way of sale. But these doubts were set at rest by the amendment of the article which was made in 1908. As the article now reads it is worded "property . . . . afterwards transferred by the trustee or mortgagee for valuable consideration," and these words are in our opinion clearly wide enough to include a transfer by way of mortgage. If the mortgage in 1905 had been a mortgage with possession, there would have been no difficulty in the matter, and the suit which was filed on the 3rd April 1922 would clearly have been

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barred by limitation. But possession was not given in 1905, and Nadir Shah appears to have remained in possession until 1915. The question for decision is therefore whether Article 134 bars the bringing of a suit in a case in which the transfer of possession to the defendant was made less than twelve years before the suit, but the original transfer by way of mortgage to his predecessor in interest was made more than twelve years before. The exact meaning of the article has been the subject of discussion in a number of reported cases of the High Courts in India. In the case of *Ramchandra* v. *Sheik Mohideen* (1), it was held that Article 134 applied only to cases where there had been a transfer of possession, and that the transferee could claim the benefit of the Law of Limitation only when he had enjoyed twelve years' possession. A number of cases were referred to in which the article had been held applicable, and in all those cases the purchasers or mortgagees had had possession. In the case of *Husaini Khanan* v. *Husein Khan* (2), a Bench of the Allahabad High Court stated that they were disposed to think that the article was applicable only to cases in which a purchaser whether his purchase be absolute or merely *sub mode*, has obtained and held possession for twelve years or upwards. This expression of opinion was an *obiter dictum* as it was held that in the case in question, possession for twelve years had been made out. The whole question was discussed at length by a Full Bench of the High Court of Madras consisting of five Judges in the case of *Mulla Veetil Seeti Kutti and* 6 v. *K. M. K Kunhi Pathumma and* 3 (3). The learned Judges who decided the reference in

(1) (1898) I.L.R. XXII Bom., 614. (2) (1907) I.L.R. XXIX All., 471.
(3) (1917) I.L.R., XL Madras, 1040.

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that case were divided in opinion. Wallis, C.J., and Coutts-Trotter, J., were of opinion that the word transfer in Article 134 could not be read as transfer with possession, that the article applied whether at the time of the transfer, possession did or did not pass and that, if possession passed subsequent to the transfer, limitation began to run from the date of transfer and not from the date of possession. The other three learned Judges took a contrary view. They were all of opinion that the article does not apply to cases where there has been a transfer without possession being taken by the transferee. Abdul Rahim, J., and Seshagiri Ayyar, J., were, however, of opinion that if possession did subsequently pass then the article would apply but limitation would run from the date when the transfer was completed by delivery of possession. Srinivasa Ayyangar, J., was of opinion that in such cases the article would have no application at all. The balance of judicial authority therefore appears to be in favour of the view that Article 134 of the Limitation Act cannot be pleaded in defence unless the person pleading it has had twelve years' possession of the property in suit. The opinions of the late Chief Justice and the present Chief Justice of the High Court of Madras are entitled to great weight, but we nevertheless think that the view of the majority of the Bench of that Court which is the view taken by the High Court of Bombay and Allahabad was correct. The opinion of Wallis, C.J., is founded largely on the fact that Article 134 is based on section 25 of the English Real Property Act of 1834. But it seems to us that if the three columns of Article 134 of the Limitation Act be read together, and the other provisions of the same Act whereby title can be acquired by twelve years' adverse possession are considered, the only reasonable interpretation of the

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article, as it stands, is that it refers to cases in which the subsequent transfer has been with possession. The article applies only in suits to recover possession of immoveable property. It would obviously not apply to a suit for the redemption of a usufructuary mortgage brought against the original mortgagee. A suit for redemption of a usufructuary mortgage from the original mortgagee could not in our opinion be a suit within the meaning of Article 134 of the Act. Such a suit would be founded on the original contract of mortgage between the mortgagor and mortgagee, and as between them it cannot have been the intention of the Legislature that the mortgagee should be able to shorten the period of limitation by the mere process of creating a charge of mortgage of his rights in favour of some third person. The article can in such a case be applicable only when the suit in question is being brought against the subsequent transferee. But it is obviously a *sine qua non* that before such a suit could be brought against the subsequent transferee, that transferee must be in possession. A mere transfer of certain mortgage rights in the land without delivery of possession can give no right of suit whatever under this section, nor in such a case would the original mortgagor have any right of suit against the subsequent transferee. And it cannot have been the intention of the Legislature to provide a period of limitation for suits which do not lie. The result of such an interpretation of the law would be to give no remedy whatever to a mortgagor who had mortgaged his land with possession when his mortgagee created a non-usufructuary mortgage of his rights, and then more than twelve years later delivered possession of the land to the person in whose favour he had created the non-usufructuary

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mortgage. So long as the second mortgage was non-usufructuary, the original mortgagor would have no right of suit whatever against the subsequent transferee and when his right of suit against him did arise it would already be barred by limitation. We find it impossible to hold that the Legislature intended this to be the case. Nor does it appear to us that it is an undue extension of the wording of the article to hold that in the case of a subsequent mortgage by the original usufructuary mortgagee, the article only applies when there has been actual delivery of possession. The article applies to a suit to "recover possession of immoveable property . . . . mortgaged, and afterwards transferred by the mortgagee for a valuable consideration." It appears to us reasonable to hold that a transfer in such a case means a transfer of such a nature that the original mortgagor cannot enforce his rights to the land against the original mortgagee. A subsequent non-usufructuary mortgage by the original mortgagee to a third person would clearly not have this effect. It would be a transfer of certain rights of the mortgagee, but would not be a transfer in any way affecting the original rights of the owner of the land and would give him no right of action against the third person. We are of opinion that the mere mortgage of his own rights in the land by Nadir Shah in 1905 was not a transfer of the property within the meaning of Article 134 of the Limitation Act, and that the present suit was not therefore barred by limitation.

There remains for decision the question whether the transfer to Nadir Shah in 1904 was an outright transfer or merely a mortgage. It was held in the case of *Ma Dun* v. *Lu O and one* (4), that when

(4) 5 L.B.R. 40.

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land is mortgaged without possession and possession subsequently passes to the mortgagee the burden of proving that the transfer in which possession was given was an outright sale lay on the person alleging it. The burden of proof in this case therefore in the first instance lies on the appellants. But in considering whether that burden has been discharged by all the circumstances of the case must be borne in mind including the conduct of the parties. Unfortunately the original mortgagee has no further interest in the land. Shortly before the sale of the land in execution of the mortgage decree he stated that his rights over the land were those of a mortgagee only and that he was not the absolute owner. Some stress has been laid on this fact by the learned District Judge. It is true that at the time that he made the statement he still had an interest in the property. This statement was therefore admissible in evidence as an admission against the present appellants. But it was by no means conclusive and in view of the circumstances in which it was made it is of very little value. There had at the time Nadir Shah made the admission been lengthy litigation between him and the decree-holder. Nadir Shah had denied the decree-holder's right to a decree, and had attempted to delay execution. And the sale did not as a matter of fact take place until many years after the decree had been passed in favour of the decree-holder. It does not appear that Nadir Shah really stood to lose or gain much by a finding that he was not the outright owner of the property in suit. He made the allegation at about the time that the original owner of the land was executing the sale deed in favour of Po Chet, and there is strong ground for suspecting that at the time he was acting in collusion with Ma Pa Dit

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and Po Chet. His statement is therefore of very little value. He has not himself given evidence in the present case. The appellant has called three witnesses U Aung Myat, U Lon and San Maung, who give direct evidence as to the transaction of 1904 being a sale and not a mortgage. Their evidence has been rejected as unreliable by the trial Court, and it is obvious that oral evidence of this sort after so many years is not by itself very convincing. Ma Pa Dit is dead, and her evidence has not therefore been procurable. But two of her sons Maung San Dwa and Maung Tun have given evidence in the case. Maung San Dwa was called as a witness for the original plaintiff, and stated definitely that his mother had made over the land outright to Nadir Shah. Maung Tun was called originally by the plaintiff but was not examined by him. He was subsequently examined as a witness for the appellant. After making two or three contradictory statements on the point he finally stated that the land had not been made over outright. It would obviously be to the interest of these two witnesses to claim that the rights of redemption still remained with their mother or with them, and the evidence of Maung San Dwa to the contrary effect is therefore of special value.

There is no oral evidence adduced by the plaintiff as to the terms of the transaction of 1904. The actions of Ma Pa Dit, and the persons who subsequently bought from her do, as contended on behalf of the appellants, suggest that Ma Pa Dit had, in the first instance, no real claim to the land, and that she entered into these transactions of sale speculatively. The suit for a mortgage decree was filed in 1906. But no claim of any kind appears to have been made by Ma Pa Dit until 1912. She then executed a sale deed of the land in favour of

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Kya Gaing but made no mention whatever of the mortgage to Nadir Shah in that deed. This transaction appears to have been infructuous as three years later we find her executing another sale deed in conjunction with Kya Gaing for the same land in favour of Po Chet. In this deed the mortgage is mentioned. By the time the deed of 1912 was executed a decree had already been passed in favour of the Chetty firm against Nadir Shah. In the judgment in that case reference was made to the land now in dispute, and it was stated that the decree affected only the equity of redemption of that land. (This was clearly not correct. If Nadir Shah had only a limited right in the land as against Ma Pa Dit it was clearly not the equity of redemption.) This entry was apparently made in the judgment on account of the fact that Nadir Shah was shewn as mortgagee in the revenue maps. And it was not till after this statement appeared in the judgment that Ma Pa Dit made any claim to the land at all. She does not appear to have made any claim at all when the suit was filed. Her dealing with the land in this way at so late a stage of the proceedings does not in any way increase the probability of her having any rights left in the land. And in the present case the transaction of 1905 was not between two Burmans. It was a transaction between a Karen on the one hand and an Indian on the other. The Indian appears to have been a trader and not a cultivator, and the presumption in favour of a mortgage if it can be drawn at all must be very much weaker than in the case of a transaction between Burman cultivators. It is true that the revenue map for the year 1907 shews Nadir Shah as a mortgagee only. But that is the only fact which really tells in favour of the plaintiff, and the

map of 1919-20 is in plaintiff's favour. In spite of the various sale transactions no really serious effort to enforce Ma Pa Dit's right to redeem was made until the filing of this suit in 1922. Maung Po Chet did file a suit to redeem but he subsequently withdrew it, and it was not till seven years later that the present suit was filed, and Ma Pa Dit is now dead. The evidence given by the only surviving representatives of Ma Pa Dit such as it is decidedly in favour of the appellant's claim. The oral evidence brought as to the outright sale though not conclusive in itself is all that could be expected to be procurable in the circumstances. There is a clause in the original mortgage deed of 1901 to the effect that on the failure of the mortgagor to pay principal and interest as stipulated, the mortgagee might do what he liked with the land. And the appellants or their predecessors in title have been in undisturbed possession for eighteen years before the filing of the suit. In our opinion the circumstances all point to the transfer to Nadir Singh having been an outright transfer. It has been suggested that as Ma Pa Dit and her deceased husband were Christians, Ma Pa Dit had no right to transfer the land outright. The suggestion curiously enough was first made on behalf of the appellants. The contention was that no right to the property of the deceased U Aung Tha could pass without letters of administration under the provisions of section 190 of the Indian Succession Act, and that therefore the plaintiff has acquired no right to the property in suit. But it has been enacted by Act VII of 1901 that section 190 of the Succession Act does not apply to the cases of native Christians. There was no bar therefore to a transfer of title here. Ma Pa Dit would not, as in the case of a Burman Buddhist be the sole heir of

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her husband. But that is not a matter of great importance, so far as the plaintiff is concerned. The right to redeem a mortgage lies with any person who has an interest in the property (section 91 of the Transfer of Property Act). The limits to the power of Ma Pa Dit would be damaging if at all rather to the appellant's than to the plaintiff's case. For the complete transfer after the death of her husband the consent of all the heirs would be necessary. But if it be believed that Ma Pa Dit made over the land outright it may safely be presumed in the circumstances that she did so as manager of the property and with the consent of the other children, her heirs. In any case as one of the original mortgagors she had the right to redeem the mortgage, and the result of her action in making over the land would be to put an end to the mortgage. Her action would therefore be effectual in defeating and claim the present plaintiff might have to the land. A suit for possession not based on the mortgage would clearly be barred by limitation.

We are of opinion that the mortgage on which the suit was based is no longer in existence, and that the plaintiff was not therefore entitled to a decree.

We set aside the decree of the trial Court and pass a decree dismissing the suit of the plaintiff-respondents with costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Carr.

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Apl 24.

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Tenant, agreement executed by, to cultivate and pay rent—Such unilateral document not a lease within the meaning Transfer of Property Act (IV of 1882)—Registration of such document whether and when necessary—Registration Act (XVI of 1908), sections 17 (1) (b) and 17 (1) (d).

Held, that a unilateral document executed by the tenant to cultivate the land and pay rent is not a lease within the meaning of section 105, Transfer of Property Act; and does not come within the purview of section 17 (1) (b) of the Registration Act, where the rent fixed is rupees one hundred or upwards.

Held, also, that such document need not be registered unless the tenancy is from year to year, or for any term exceeding a year or reserving a yearly interest.

Ba Thin—for the Appellant.

R. M. Sen—for the Respondents.

CARR, J.—This was a suit for rent of paddy land. The plaintiff claimed under an agreement, which has been marked Exhibit A, but is filed in the process file, which was, he alleged, executed by the three defendants. The rent fixed was 350 baskets of paddy.

The first defendant filed a written statement, confessing judgment. A decree has since been passed against him on this, and he is not a party to this appeal.

The second defendant denied execution of the agreement, and the third defendant did not appear at all. The case was fixed for hearing and one of the defendants appeared; but no evidence was taken and the suit was dismissed on the ground that

* Special Civil Second Appeal No. 248 of 1924 against the decree of District Court of Thatôn in Civil Appeal No. 4 of 1924.

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Exhibit A, was compulsorily registrable and therefore, could not be admitted in evidence, and that the agreement could not be proved.

So far as regards the second and third defendants, this decision was upheld by the District Court, which however, gave a decree against the first defendant on his confession.

The only question now for decision, is whether this document required registration.

The document is of a kind very common in Burma, and which is usually called a lease. It is, however, an agreement executed by the tenants only, who agree to cultivate the land and pay the rent, and also agree to certain other condition.

A "lease" is defined in section 105 of the Transfer of Property Act, which reads as follows :—

"A lease of immoveable property is a transfer of a right to enjoy such property, made for certain time express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasion to the transferer by the transferee, who accepts the transfer on such terms . . . ."

It is quite clear that the document now in question is not a lease within this definition. It is not executed by the lessor, the land-owner, and, consequently, it cannot transfer any right to the property. It is, in fact, merely an agreement to cultivate and pay rent. The document, therefore, does not come within the provisions of the Transfer of Property Act at all, and it is unnecessary to consider those provisions further.

The Registration Act, however, in section 2 (7) says:—"'lease' includes a counterpart, *kabuliyat*, an undertaking to cultivate or occupy, and an agreement to lease." This document, therefore, comes within the

definition of a lease, for the purposes of the Registration Act, as being an undertaking to cultivate or occupy. But whether registration is compulsory or not depends on section 17. Section 17 (*d*) provides that leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent are compulsorily registrable, provided that the Local Government may exempt certain kinds of leases.

Now, the present document, considered as a lease does not fall within this clause, for it is not for a term exceeding one year. So far, therefore, section 17 does not require it to be registered.

The only other clause which might apply is clause (*b*), and that could only apply if the instrument purported, or operated, to create a right or interest in immoveable property of the value of Rs. 100, and upwards. This condition, as I have pointed out above, is not fulfilled by the present document.

I can, therefore, see no sufficient reason for holding that this document required registration.

The Courts below have acted, in part, on Direction 46 (*d*) (1) of the Registration Directions. This embodies a ruling by the Inspector-General of Registration. This direction says :—"a lease for agricultural purposes for a year or less, must be made by oral agreement with or without delivery of possession, or by a document either registered or unregistered ; but when the value of the right created is Rs. 100, or upwards, if there is a document, it must be registered."

As regards leases within the definition in the Transfer of Property Act, I express no opinion as to the correctness or otherwise of this ruling ; but it appears to me to be quite wrong in respect of a document such as that now under consideration,

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which is not, strictly speaking, a lease at all, but is a lease within the wider definition in the Registration Act.

I have been referred also to an unpublished judgment of this Court in Special Civil Second Appeal No. 274 of 1921. In that case a document of a kind similar to the present one was involved, and the learned Judge remarked that it was abundantly clear that it required compulsory registration. He did not, however, give any reasons for this view, and the point, although it was taken up by the appellant in that case, had not been pressed, and does not appear to have been fully argued.

I do not consider, therefore, that I am bound by that decision. I hold, therefore, that the document now in question did not require compulsory registration.

The appeal is, therefore, allowed; the judgments and decrees of the Courts below, as regards the two respondents (the second and third defendants), in the suit, are set aside, and the suit is remanded to the Township Court for a decision on the merits as against these two defendants.

The appellant will be given a certificate for the refund of the Court-fees paid on this appeal. The other costs of this appeal will be costs in the suit and, together with the costs in the District Court, will follow the final result.

I would point out to the Township Judge that, although Exhibit A does not require registration, it does appear to require to be stamped, but it is unstamped at present. It will be necessary, therefore, for him to decide whether this document requires a stamp; and, if so, to require the duty and penalty to be paid before admitting it in evidence.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice and Mr. Justice Maung Ba.

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Apl. 27.

G. RAINEY AND ONE
v.
THE BURMA FIRE AND MARINE INSURANCE CO., LTD.*

Contract Act (IX of 1872), section 28—Condition limiting the time to enforce right distinguished from one extinguishing the right—Condition to extinguish the right, valid.

One of the conditons in a policy of insurance was that, if a claim be made and rejected, and an action or suit be not commenced within three months after such rejection, or, in case of arbitration taking place in pursuance of another condition of the policy, within three months after the arbitrator or arbitrators or umpire shall have made their award, "all benefit under this policy shall be forfeited."

On a suit being filed after the period prescribed, it was *held*, that the condition was not one limiting the time within which the policy holder may enforce his rights, but one by which the policy-holder had contracted that on the happening of a certain event, he shall lose all his rights.

Held, also, that such a condition was not void by reason of the special provisions of section 28 of the Contract Act.

Ma Ywet v. *The China Mutual Life Assurance Co., Ltd.*, 4 B.L.T., 173; *South British Fire and Marine Insurance Co.* v. *Brojo Nath Shaha*, 36 Cal. 516—*referred to.*

The Baroda Spinning and Weaving Co., Ltd. v. *The Satyabarayen Marine and Fire Insurance Co., Ltd.*—38 Bom., 344—*followed.*

Vertannes—for the Appellants.

Cowasjee—for the Respondents.

ROBINSON, C.J., AND MAUNG BA, J.—This is a suit on a policy of insurance, and the point before us is shortly this: clause 12 of the conditions lays down that, if a claim be made and rejected, and an action or suit be not commenced within three months after such rejection, or in case of arbitration taking place in pursuance of the 17th condition

* Civil First Appeal No. 105 of 1924 against the decree of the Original Side of this Court in Civil Regular No. 175 of 1923.

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of the policy, within three months after the arbitrator or arbitrators or umpire shall have made their award, "*all benefit under this policy shall be forfeited.*" The question then is whether, no suit having been brought within the period specified, the present suit is maintainable.

The question involves a consideration of section 28 of the Indian Contract Act. This section lays down that "every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

On the one side it is urged that this condition limits the time within which the plaintiff may enforce his rights in respect of the contract by the usual legal proceedings in the ordinary tribunals. On the other side it is argued that, by this condition, it was agreed that, after the expiry of the specified time, the plaintiff would no longer have any rights under the policy, and, therefore, no cause of action which he could bring before the Court.

It was held in *Ma Ywet* v. *The China Mutual Life Assurance Co., Ltd.* (1), where the condition in the policy was as follows :—"No suit to recover under this policy shall be brought after one year from the death of the assured" that such a condition was clearly contrary to the provisions of section 28, Contract Act, and, therefore, void. That case does not apply or given us any assistance in the present instance.

The matter came before the Calcutta High Court in the case of *South British Fire and Marine Insurance Co.* v. *Broio Nath Shaha* (2), but section

(1) (1911) 4 B.L.T., 173. (2) (1909) I.L.R., 36 Cal., 516.

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28 of the Contract Act was not considered, and, so far as this point was concerned, it seems to have been decided on the meaning to be attached to the word "month"; but it was held that the plaintiff's suit was instituted beyond the time specified, and, therefore, it may be implied that such a condition was not considered void by reason of the provisions of section 28. As the point was not, however, considered, the ruling gives us no assistance.

The point was expressly decided in the case of *The Baroda Spinning and Weaving Co., Ltd. v. The Satyabarayan Marine and Fire Insurance Co., Ltd.* (3). It was there held that there is a distinction between the extinction of a right and the loss of a remedy, that what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights, that what he had done was to limit the time within which he was to have any rights to enforce, and that that condition was not void.

Now it is clearly a matter of the utmost importance to insurance companies that claims should be made speedily, that they should have an opportunity of investigating the facts, and obtaining evidence, and that, if claims were to be delayed, they might easily find themselves in a position to be unable to meet a fraudulent claim. There can, in our oppinion, be no doubt as to what the meaning of the condition in this policy is, and that the parties distinctly contracted that, after the expiry of a certain period, plaintiff was to have no rights at all under the contract. Plaintiff willingly agrees that, in the happening of a certain event, he shall forfeit all his rights as from that date, and any suit, therefore, brought after that date, is brought on account of a

(3) (1913) I.L.R., 38 Bom., 344.

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cause of action which is non-existent. Conditions which clearly and distinctly limit the period within which a suit may be brought are distinctly conditions that are void by reason of the special provisions of section 28 of the Contract Act; but there is undoubtedly a marked distinction between a condition which so limits the time within which a suit may be brought to enforce rights, and one which provides that there shall no longer be any rights to enforce.

It is argued that such a condition is, in effect, only an ingenious method of defeating the express provisions of the section, but it cannot be said that such a condition was illegal in itself. A man may contract, that on the happening of a certain event, he shall lose all his rights. It cannot be argued that such a condition must be one that limits the period within which he may seek relief in the ordinary Courts, and, in our opinion, the distinction that was drawn by the learned Judges of the Bombay High Court, though a fine one, is a distinction that can be legitimately drawn, and that there is no ground for holding that it is a void condition. We are, therefore, of opinion that the suit was rightly decided.

The decree of the Court below will be confirmed, and the appeal dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Rutledge.

MAUNG SHWE HPU AND TWO

v.

U MIN NYUN.*

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Arbitrators, Procedure to be followed by—Strict adherence to technical rules of judicial procedure not necessary—Unfair action or action contrary to natural justice to be proved to invalidate award.

Held, that unless in the procedure adopted by the arbitrators there has been something radically wrong or vicious, an award cannot be impeached on the ground that the technical web of judicial procedure and rules of evidence which surround judicial procedure were not strictly adhered to.

Andrews v. *Mitchell*, (1905) A.C., 78 ; *Re Hopper*, 8 B. & S., 100—*followed*.

Kyaw Myint—for the Appellants.

Ba Thein—for the Respondent.

HEALD AND RUTLEDGE, JJ.—This is an appeal from an order of the District Judge of Myaungmya refusing to file an award made in an arbitration without the intervention of the Court, on the ground of misconduct on the part of the arbitrators. The alleged misconduct is that after receiving the statements of the parties and such evidence as the parties produced before them, they made enquiries from the villagers with regard to the lands without the presence of the parties. The learned Judge has relied on three decisions reported in unofficial reports and holds that, "a trial before arbitrators should be conducted in the same manner as nearly as circumstances will permit as trials before a Judge." We are unable to accept this dictum, as, if adopted it would inevitably lead to the great majority of the awards of arbitrators being upset for failure to

* Civil Miscellaneous Appeal No. 53 of 1924 against the decree of the District Court of Myaungmya in Civil Regular No. 24 of 1923.

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observe the highly technical web of procedure and rules of evidence which surrounds judicial procedure. As Lord Halsbury observes in *Andrews* v. *Mitchell* (1): "We must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions." We may bear in mind the remark of Cockburn, L.C.J., in *Re Hopper* (2): "I would observe that we must not be over ready to set aside awards when the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding." Misconduct is in our opinion a question of fact in each case which must be ascertained from the facts of the proceedings themselves.

From Exhibit G which is a rough memorandum of the proceedings of the arbitrators it seems that the first plaintiff, San Hpu, the defendant, and the Headman, San Tha, were examined. Then Exhibit G goes on: "It still needs to hold an enquiry from the local people who should know and also the witnesses produced by the plaintiff and defendant are yet to be examined." This passage does not indicate whether the arbitrators contemplated holding the enquiry among the local people in the presence of the parties which would be perfectly regular or in their absence which might be quite irregular. The only reference to this enquiry in the award is in the passage: "The statement of witness U Shan Tha . . . . is in agreement with what was

(1) (1905), A.C., 78 at p. 80. (2) (1867) 8 B. & S., 100.

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elicited by the enquiry made from the villagers of Shwegôn. Moreover, it tallies with the statements of the plaintiff and the defendant." One of the arbitrators, Ko Ba, states in his evidence: "The three of us made enquiries in the village separately relating to the paddy lands in suit. We did not make use of the information thus obtained because San Tha's statement tallied with that information. Even if they differed we would have acted upon San Tha's statement." This is all the evidence of alleged misconduct and we are of opinion that it completely fails to establish anything of the kind as it does not indicate that the arbitrators acted upon the result of their enquiries to the rejection of the evidence regularly taken before them. We may observe that if the arbitrators had found that the villagers' statements differed from the evidence produced before them, it would have been open to them to have called such of the villagers as they thought fit to give evidence before them.

From the record it seems clear that defendant submitted the matter in dispute to the three arbitrators by Exhibit A and that after the first meeting though he had due notice he declined to attend or produce further evidence. And he now seeks to upset the award upon technical grounds without showing that the arbitrators have acted unfairly to him or contrary to natural justice. For these reasons we reverse the judgment and decree of the District Court and direct that the award be filed and that judgment be pronounced according to the award. The appellants will have costs of the appeal and in the District Court.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Rutledge.

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May 11.

MA PAN

v.

MAUNG NE U.*

Rent of land, Suit for, whether suit of a Small Cause nature—Rent suit not a suit relating to immoveable property—Burma Courts Act, 1922, section 11—Civil Procedure Code (V of 1908), section 102.

A rent suit is a suit on contract for an ascertained sum and no question of title to the property necessarily arises. Rent is not in any strict sense a right of interest in immoveable property.

Held, therefore, that a suit for rent of agricultural land is not a suit relating to immoveable property and that if the amount involved does not exceed rupees five hundred, a second appeal would not lie.

Ma Dun v. *Ma Pa U*, 2 L.B.R., 124 ; *Shibu Haldar* v. *Gupi Sundari Dasea*, 24 Cal., 449—*distinguished.*

Kaung Hla Pru v. *San Paw*, 3 L.B.R., 90 ; *Sakadara Mudiali* v. *Nabin Chand Bosali*, 42 Cal., 638—*dissented from.*

Soundaram Ayyar v. *Sennia Naicken*, 23 Mad., 547—*followed.*

Bomanji—for the Appellant.

HEALD, J.—Appellant sued respondent, whom she alleged to be her tenant, to recover 200 baskets of paddy or its value Rs. 400 as rent of certain paddy lands.

Respondent denied that he was appellant's tenant. He said that his brother-in-law, Maung Kala, was her tenant, and that he had merely introduced Maung Kala to her.

The trial Court found that respondent was the tenant, but the Appellate Court found that it was Maung Kala who was the tenant.

Appellant attempted to file a second appeal, but the Registry of this Court noted that no appeal lay

* Special Civil Second Appeal No. 565 of 1924, against the decree of the District Court of Tharrawaddy in Civil Appeal No. 101 of 1924.

as the suit was an "unclassed suit" not exceeding Rs. 500 in value.

Appellant's learned Advocate contended that a second appeal lay because the suit was one for rent of agricultural land, and was therefore a "land suit," so the matter was put before a Judge.

The learned Judge, before whom the matter came, said that in his view a suit for rent is not a land suit, but he fixed a date for hearing appellant's Advocate.

After that hearing he recorded that the Advocate had cited rulings to the effect that a suit for rent of land is a "land suit," but that he disagreed with those rulings. He said that the question was an important one, as it affects a very numerous class of suits, and he directed that the appeal be heard before a Bench.

We have accordingly now heard the appeal as a Bench.

Unfortunately there was no appearance for the respondents, and the only ruling which appellant's Advocate cited before us were those which he cited before the single Judge, namely, the cases of *Shibu Haldar* v. *Dupi Sundari Dasva* (1), *Ma Dun* v. *Ma Pa U* (2) and *Kaung Hla Pru* v. *San Paw* (3). A reference to the first of those cases shows that the decision was irrelevant for the purposes of this case because it proceeded on special provisions of the Bengal Tenancy Act. The second was also irrelevant because it was a suit for a declaration in respect of standing crops, and not for rent. The third was a decision of a single Judge of the late Chief Court, who noted that no authority on the point in issue was cited on either side and who, after referring to the second

(1) (1897) 24 Cal., 442.
(2) (1903-04) 2 L.B.R., 121.
(3) (1905-06) 3 L.B.R., 90.

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case mentioned above, said without giving any reasons for his opinion that he thought that a right to rent of land was a right or interest in immoveable property, and that therefore a second appeal lay. That decision, for what it is worth, is in appellant's favour.

The law regulating such second appeal so far as this Court is concerned is contained in section 102 of the Code of Civil Procedure, which says that "no second appeal shall lie in any suit of the nature cognisable by Courts of Small Causes when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees," and in section 11 of the Burma Courts Act, which says: "In addition to the second appeals permissible under section 100 of the Code of Civil Procedure, 1908, a second appeal shall lie to the High Court from an appellate decree of a Court subordinate thereto on any ground which would be a good ground of appeal if the decree had been passed in an original suit, whenever the decree of the Appellate Court varies or reverses otherwise than as to costs the decree of the Court below; provided that no such second appeal shall lie:—

(*a*) in the case of a small cause, unless the value of the cause exceeds five hundred rupees, or

(*b*) in the case of an unclassed suit, unless the value of the suit exceeds five hundred rupees or the suit is of the nature described in section 13, sub-section (*1*), of the Burma Laws Act, 1898."

The Burma Courts Act divides suits into three classes which were presumably intended to be mutually exclusive, namely, "land suits," "small causes" and "unclassed suits"; a "land suit" being defined as a suit relating to immoveable property or to any right or interest in immoveable property; a "small cause" as "a suit of the nature cognisable by a Court of

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Small Causes under the Provincial Small Cause Courts Act, 1887"; and an "unclassed suit" as "a suit which is neither a land suit nor a small cause."

It seems clear that if the present suit is a "small cause," that is a suit of the nature cognisable by Courts of Small Causes, then it is not a "land suit," and, if so, since its value does not exceed Rs. 500, there would be no second appeal.

The question which arises under section 11 of the Burma Courts Act is thus similar to that which arises under section 102 of the Code, namely, whether or not the particular suit before the Court is of the nature cognisable by Courts of Small Causes, since, if it is, there will be no second appeal under either the Code or the Act, unless the value exceeds Rs. 500.

That specific question was considered by a Full Bench of the High Court of Madras in the case of *Soundaram Ayyar* v. *Sennia Naicken* (4), and four out of the five Judges were of opinion that a suit for the recovery of rent of lands is a suit of the nature cognisable by Courts of Small Causes, and decided that in respect of such suits no second appeal lies unless the value exceeds Rs. 500. It was assumed for the purposes of the reference to the Full Bench that the notification required by clause 8 of the second schedule of Provincial Small Cause Courts Act had been issued for all subordinate Courts in the Madras Presidency and the reference was decided mainly on a consideration of the wording of that clause, and of section 15 of the Act. Section 15 says: "(1) A Court of Small Causes shall not take cognisance of the suits specified in the second schedule as suits excepted from the cognisance of a Court of Small Causes, (2) subject to the exceptions specified in that schedule, and to the provisions

(4) (1900) 23 Mad., 547.

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of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees, shall be cognisable by a Court of Small Causes." Clause 8 of the second schedule includes among "suits excepted from those cognisable by Court of Small Causes" a suit for the recovery of rent, other than house rent, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto.

It seems clear that there is nothing in the nature of a rent-suit as such which prevents it from being cognisable by Courts of Small Causes since suits for house-rent are always so cognisable if within the pecuniary limits of the Court's jurisdiction. Suits for rent of lands are also cognisable by Courts of Small Causes subject to the condition that the Judge of the Court has been specially empowered. It can hardly be contended that the action of the Local Government in empowering a particular Judge of a Small Cause Court to exercise jurisdiction in respect of suits for rent of land alters the "nature" of such suits, and, unless it does, it would seem to follow that such suits are always "suits of the nature cognisable by Courts of Small Causes." That, at any rate, was the view of the Madras High Court, and one of the learned Judges added a further consideration, namely, that "it would be strange if the Legislature, when enacting the Civil Procedure Code, regarded rent-suits as being of such a character as to be suitable for second appeals, and yet, when enacting the Small Cause Courts Act, regarded them as suits which might, by notification of the Local Government, be made triable by a Court of Small Causes, in which case not even a first appeal in regard to them would be allowed."

A Bench of two Judges of the Calcutta High Court has, however, taken a different view. In the case of *Sahadora Mudiali* v. *Mabin Chand Bosali* (5), which was a suit for rent of lands, it was objected that no second appeal lay because such suits are of the nature cognisable by Courts of Small Causes, and the Madras Full Bench case was cited. One of the learned Judges said, " Article 8 of the Second Schedule of the Provincial Small Cause Courts Act expressly exempts suits for rent, other than house-rent, from the cognisance of Small Cause Courts unless the Judge of the Court of Small Cause has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. But the majority of the Judges constituting the above Full Bench of Madras High Court were of opinion that a suit for rent is of the nature cognisable by the Small Cause Court. It appears that by a notification the Madras Government has vested all subordinate Judges and Munsifs within the Presidency with jurisdiction to try on their small cause side all suits for rent falling within the pecuniary limits of their special jurisdiction. No such notification has been issued by the Local Government in this Presidency, and, so far as this Court is concerned, second appeals in suits for rent (other than house-rent),' although the value thereof does not exceed Rs. 500, have always been entertained. I accordingly over-rule the preliminary objection." The other learned Judge said, " All civil suits, the value of which does not exceed Rs. 500, are cognisable by Courts of Small Causes, subject to the exceptions contained in the second schedule of the Provincial Small Cause Courts Act, and to the provisions of

(5) (1915) 42 Cal. 638.

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any special Act. Suits for rent, other than house-rent, are included in the second schedule of the Provincial Small Cause Courts Act. But the Local Government has authority to vest Judges of Small Cause Court with powers to try rent suits. No notification has been made vesting Small Cause Court Judges in Bengal in general, or the Judge of the first instance in this particular case, with such powers. I am, therefore, of opinion that this appeal is not incompetent."

It appears, therefore, that the learned Judges in Calcutta regarded clause 8 of the second schedule as excepting suits for rent (other than the house-rent) from the cognisance of Courts of Small Causes with an exception to that exception in the case of Small Cause Courts where the Judge had been specially empowered to exercise jurisdiction in respect of such suits, while the Full Bench of Madras, looking at the "nature" of the suit, regarded clause 8 rather as a restriction on the cognisance of such suits by particular Small Cause Courts than as a declaration that suits were not of the nature cognisable by Courts of Small Causes.

I think it possible that the learned Judges in the Madras case over-emphasised the meaning of the word "nature." It is true that that was the particular word used by the Legislature, but it is possible that it meant no more than "kind," and, if the word "kind" be substituted for it, their argument will carry somewhat less weight.

On the other hand the learned Judges in the Calcutta case seem to have given scant consideration to the matter, and to have been influenced, perhaps unduly, by the feeling, natural enough in matters of procedure in an old established Court like Calcutta, that whatever it is right.

On the wording of the enactments it may be difficult to come to a definite conclusion, but, on general principles, I am in favour of the view taken in Madras, and so clearly was the learned Judge of this Court who referred the matter to this Bench. A rent suit is ordinarily a suit on contract for an ascertained sum, and no question of title to the property necessarily arises. Rent is not in any strict sense a right or interest in immoveable property, and I doubt whether a suit for rent ought to be regarded as a suit relating to immoveable property. If such a suit is a "small cause" within the meaning of section 2 of the Burma Caurts Act, and, if the classes of suits defined in that section were intended to be mutually exclusive, then it seems clear that rent suits were not intended to be regarded as "land suits." Suits for rent of lands are certainly triable by Small Cause Courts in which the Judge is specially empowered, and, if they are so tried, there is no provision for any appeal. It is true that the only Court in Burma in which the Judge was so empowered was the Small Cause Courts, Rangoon, but it seems unlikely, as the learned Judge said in the Madras case, that it was the intention of the Legislature that there should be no appeal in such a case if it was tried in a Court of Small Causes, and two appeals if it was tried in the ordinary Court in which the Judge did not need to be specially empowered.

I would, therefore, hold that a suit for rent of land is not a "land suit" within the meaning of section 2 of the Burma Courts Act, and that, therefore, if the value does not exceed Rs. 500, no second appeal lies under section 11 of that Act.

I would accordingly dismiss the appeal in this case, because the value does not exceed Rs. 500.

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Appellant's learned Advocate asks us to treat his memorandum of appeal as an application for revision if we hold that no appeal lies, but in my opinion the grounds which are alleged in the memorandum of appeal are not such as would be good grounds for revision, and I see no reason to deal with the case in the manner suggested.

I would dismiss the appeal.

RUTLEDGE, J.—I concur.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Maung Ba.

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May 25.

HALIMA BEE BEE
v.
KHAIRUNNISSA BEE BEE.*

Registration Act (XVI of 1908), sections 32, 33—Presentation for registration made by Advocate for the transferee—Admission of execution before an officer not competent to accept presentation, effect of.

Held, that the persentation of a document for registration by a pleader who holds no power of attorney for such is a presentation by an unauthorized person and that therefore the registering officer has no jurisdiction to register the document.

Held, further, that the admission of execution to an officer to whom a commission under section 38 of the Registration Act was issued, being an admission before an officer not competent to accept the document for registration, would not cure the defect in persentation and would not make the document legally registered.

Jamlu Prasad v. *Mohamed Aftab Ali Khan*, 37 All. 4 : *Khalil-ud-din Ahmad* v. *Banni Bibi*, 33 All., 34—*followed*.

Bharat Indu v. *Hamid Ali Khan*, 42. All., 487—*distinguished*.

Tun Byu— for the Appellant.

Po Han—for the Respondent.

ROBINSON, C.J., AND MAUNG BA, J.—The facts of this case are simple and are not open to any real doubt.

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* Civil First Appeal No. 174 of 1924 against the decree of the Original Side of this Court in Civil Regular No. 248 of 1923.

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ROBINSON, C.J., AND MAUNG BA, J.

The defendant was the aunt of the plaintiff. She was one of the three widows who were the sole heirs to the husband's estate. By consent the widows appointed a *Punchayet* to administer the estate and divide the results between the widows. It was again mutually agreed that the three houses of which the estate principally consisted should be purchased by the widows each taking a house. The defendant under this agreement was to take the house in suit for Rs. 9,000. She had to deposit Rs. 1,000 as earnest-money. She had apparently no means and borrowed this Rs. 1,000 from plaintiff's husband. Nothing was thereafter done for two years, and then the *Punchayet* called upon the widows to pay up the balance of the purchase-price and take over the houses. To raise the Rs. 8,000 the defendant agreed to take over from the estate a debt of Rs. 4,000 due to a Chetty. The Chetty agreed to this being done on condition that defendant executed a mortgage on the property on its being conveyed to her. She had some Rs. 2,000 due to her from the other parts of the estate which was already in the hands of the *Punchayet*. She raised Rs. 2,000 as a further loan from plaintiff's husband. On the 20th November 1919, she received a conveyance of the house from the administratrices, and, on the same day, she executed a mortgage in favour of the Chetty. On the following day she executed a conveyance of this property subject to the mortgage to the plaintiff in consideration of Rs. 5,000. That document was presented for registration by Mr. S. Dhar who is described as the advocate of the plaintiff.

As to how this conveyance to plaintiff came to be executed, we have the evidence of Mr. Abdul Rahman who was the Chairman of the *Punchayet* and apparently, a man of position who was trusted by all parties. He says that plaintiff's husband came to

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him and asked him to have the house conveyed to him as he had supplied the earnest-money already paid and that he would lose it if the Committee sold the house by public auction as they threatened to do if defendant did not pay up the purchase-price. He replied that he would consult the defendant and he says he told her of this, and that if the house was sold to plaintiff it would remain in the family. It was apparently assumed that defendant would never be able to pay off the debt due to the Chetty, and that the house would eventually by attached and brought to sale and would pass out of the family. The plaintiff had lived with the defendant ever since childhood until she married, and even after her marriage she used to stay with defendant and the relationship between them was more that of a mother and daughter than that of an aunt and niece.

Abdul Rahman states that defendant agreed and that in consequence this conveyance was drawn up in plaintiff's favour. The defendant, however, on the other hand, merely alleges that it was suggested to her that she should put the house in somebody else's name. She says that Abdul Rahman and Akbar Khan the plaintiff's husband both came to her after the death of her brother, and that Abdul Rahman said "take the house. I said I would take the house." Then they said "where is the money." I said that the Chetty would give the money. Abdul Rahman advised me to keep the house in somebody else's name. Akbar Khan then told me to keep it in his wife's name remarking that he would not play false with me. He further said that he had Rs. 2,000 lying idle with him and told me to take it. He added that I could get other moneys from him and that it was not necessary to get money from others I used to get money from Akbar Khan whenever I

wanted a loan since then." The position is no doubt unsatisfactory. While there is no reason to believe that this was a deliberate plot to cheat the old woman out of a very valuable property, it is, at the same time, necessary to bear in mind that she was a *purdanashin* lady and that her sole adviser her brother Abdul Razak had died four or five days before the notice was issued by the Committee calling upon the widows to make good the sales of the houses. It may be that she was upset by her brother's sudden death and had no one to advise her. She trusted plaintiff's husband, and she was able to see there was very little hope of her being able to save enough money out of the rents obtained from the house to pay off the Chetty's debt; and it is possible, therefore, that she agreed to sell the house to plaintiff on the terms set out in the deed coupled with verbal terms that they would maintain her so long as she lived. That there were some such terms appears from the post-script to the letter, Exhibit 3, but, at the same time, it is necessary that plaintiff should show that defendant had advice and fully understood all the terms and conditions of the conveyance and the results flowing from her action. That house is now worth between Rs. 30,000 and Rs. 40,000 and the plaintiff would have obtained it for about Rs. 10,000. Although the plaintiff has apparently carried out the promise to support the old lady it does not establish why it was necessary to go through the farce of conveying the property to the defendant one day and her conveying it to the plaintiff on the following day. It may have been to avoid the necessity of selling the house by public action. The only object of that would be to enable the plaintiff to get the property at a very small figure—far smaller than would have been realised had the property been sold by public

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auction. The greater portion of the Chetty's debt has been paid off. It is admitted that plaintiff's husband advanced Rs. 1,700 over and above the Rs. 3,000 which had been already advanced for the purchase of the house. It is also admitted that he paid defendant money every month and that she could raise from him any other money she wanted. However, there is another point which is fatal to the plaintiff's case. The plaintiff can acquire no title to this property without a registered deed of conveyance. The conveyance was presented for registration by Mr. S. Dhar. There is no question that he had no such power of attorney and the presentation by him was by an unauthorised person.

It was held by their Lordships of the Privy Council in *Jambu Prasad* v. *Mohammed Aftab Ali Khan* (1), that a Registrar or Sub-Registrar has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under it or by the representative or assign of such person, or by an agent of such person, representative or assign duly authorised by a power of attorney executed and authenticated in the manner prescribed by section 33 of the Act.

It is pointed out that the object of these provisions is to make it difficult for persons to commit fraud by means of registration under the Act and that it is the duty of the Courts in India not to allow the imperative provisions of the Act to be defeated. That decision was distinguished in a later decision by their Lordships in the case of *Bharat Indu* v. *Hamid Ali Khan* (2). In this case a servant of the executant broght a document to the Sub Registrar saying that the executant was ill and could

(1) (1915) 37 All., 49. (2) (1920) 42 All., 487.

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not come himself. The Sub-Registrar then went to the residence of the executant and read over to him the contents of the document. The executant admitted execution and completion and asked that after registration the document should be given to the person named in it. It was registered, and it was held that the executant was the person who really presented the document and was so treated by the Sub. Registrar, and that the document was therefore duly registered and authenticated. In the present case, what happened was that, on presentation by Mr. S. Dhar, the Sub-Registrar issued a commission under section 38 of the Act to Maung Chan Mya, the head clerk of the office for the purpose of enquiring whether the document had been executed by the defendant, and the head clerk having gone to the defendant reported that she had admitted execution and also admitted the receipt of the consideration as stated in the document. In this case it will be noticed that the person who went to the executant was a person with no jurisdiction to receive presentation, and the case is, on all fours with the decision of the Allahabad High Court in *Khalil-ud-din Ahmed* v. *Banni Bibi* (3), where it was held that the mere admission of the executant before an officer who had no jurisdiction to accept the document for registration was no compliance with the requirements of the Act. As regards presentation with that decision we agree. In the present case it cannot be held that this conveyance was duly presented for registration and that, all that followed thereafter was invalid with the result that the document has not been duly registered. It this defect was brought to notice in the lower Court steps might have been taken to obtain re-registration under the provisions

(3) (1913) 35 All., 34.

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of section 23 (*a*) which has been incorporated in the Act in order to give an opportunity for overcoming such mistakes, but that provision has not been taken advantage of and, as matters stand, we must therefore hold that this conveyance, not being legally registered, is of no validity and does not convey a title to the premises, and that plaintiff is not entitled to the declaration of the title that she seeks or to possession. We are unable to agree with the learned Judge in the Court below that this is merely a technical objection taken at the very last moment. It was taken as soon as the document was produced.

It is admitted that these findings cannot be contested, but we are asked to allow the appellant to amend the prayers in the plaint by adding prayers for the execution and registration of a fresh conveyance, or for the refund of the money advanced on the failure of consideration.

As regards the first prayer, it would be necessary to allow an amendment of the plaint, an amendment which is in direct conflict with the allegations contained in the plaint. It is said that plaintiff need not have produced or proved the conveyance because execution was admitted. Consideration was denied. We can find no sufficient reason to allow at this stage any amendment in that direction.

As regards an amendment by adding an alternative claim for refund of the money paid, we can see no particular advantage, seeing that the evidence has not been gone into in the manner in which it would have to be gone into if such a claim is advanced, and, having regard to all the facts and circumstances of the case, we do not consider that it would be of any advantage to either party. There would practically be a retrial of the case and seeing that the present position is due to plaintiff's own action, we see no

reason to allow the amendment, it being open to plaintiff if so advised to bring suit for the recovery of the money which it is said that defendant is ready and willing to pay.

For these reasons we accept the appeal, we reserve the finding of the Court below and we dismiss the plaintiff's suit with costs throughout.

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HALIMA BEE BEE v. KHAIRUNNISSA BEE BEE.

ROBINSON, C.J., AND MAUNG BA, J.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Rutledge.

V. S. T. THAMSUNDASEEN

v.

S. M. A. R. R. M. CHETTY FIRM AND ONE.*

1925

May 13.

Interest from date of institution, whether part of the subject matter of the suit—Claim of interest made in the plaint—Civil Procedure Code, section 110.

Held, that where interest is claimed in the plaint, such interest as accrues during the period between the filing of the suit and the decree is part of subject-matter of the suit and that the amount of such interest can be regarded as part of the amount or value of the subject-matter of the suit in the Court of the first instance within the meaning of section 110 of the Civil Procedure Code.

Dagleish v. *Domodar Narain Choudry*, 33 Cal., 1286 ; *Maung Thwe* v. *A.L.A.R. Chetty Firm*, 11 L.B.R., 335 ; *Moti Chand* v. *Ganga Prasad Singh* 24 All., 174—*referred to.*

A. V. Subramania Ayyar v. *Sellamal*, 39 Mad., 843—*distinguished.*

B. K. B. Naidu—for the Applicant.

Anklesaria—for the 1st Respondent.

J. K. Munshi—for the 2nd Respondent.

HEALD AND RUTLEDGE, JJ.—The 1st respondent, the S. M. A. R. R. M. Chetty Firm, sued the present applicant, V. S. T. Thamsundaseen (Thamsoo Thaseem) with others alleged to be his partners, as well as the second respondent and the Burma Railways Company, Limited, to recover from applicant and

* Civil Miscellaneous Application No. 35 of 1924.

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his partners and the second respondent Rs. 9,965-5-0 with interest at the rate of Re. 1 per cent. per memsem from the date of the institution of the suit to the date of realisation, and for certain ancillary reliefs.

The suit was instituted on the Original Side of the Chief Court of Lower Burma on the 13th of October 1920 and was dismissed by that Court on the 5th of July 1922.

The plaintiffs in the suit appealed and a Bench of this Court gave them a decree against the present applicant for the full amount in suit together with interest at Rs. 12 per cent. per annum from the institution of the suit to the date of the decree, and further interest at a lower rate from the date of the decree to the date of realisation and with costs.

Applicant has now asked for leave to appeal to His Majesty in Council, and the question arises whether or not the amount or value of the subject-matter of the suit in the Court of first instance was ten thousand rupees or upwards.

Applicant's learned Advocate admits that the suit and the appeal were actually valued at Rs. 9,965-5-0 but he contends that, because interest was claimed in the plaint, the claim to interest was part of the subject-matter of the suit and therefore such interest at any rate as accrued between the institution of the suit and the date of the decree ought to be regarded as part of the subject-matter of the suit in the Court of first instance, and for the purposes of valuation under section 110 of the Code ought to be added to the principal sum of Rs. 9,965-5-0 which was claimed.

If such interest can be added, then the amount or value of the subject-matter of the suit will be Rs. 10,000 or upwards.

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The learned Advocate admits that he has not been able to find any authority which expressly warrants such addition. He has referred us to three decisions, namely, the cases of *Moti Chand* v. *Ganga Prasad Singh* (1), *Dalgleish* v. *Damodar Narain Chowdry* (2) and *Maung Thwe* v. *A. L. A. R. Chetty Firm* (3).

In the first of these cases the applicant for leave had obtained a decree in the trial Court for Rs. 9,496, which included interest up to the date of the decree and for further interest up to the date of realisation. It was contended that interest which had accrued after the date of the decree could be taken into consideration for the purposes of the rules regarding leave to appeal, as being part of the suject-matter of the suit in the trial Court. Their Lordships of the Privy Council said that " the amount or value of the subject-matter of the suit in the Court of first instance, construing that in the manner most favourable to the proposed applicant " (that is including the interest up to the date the decree) " was at the outside the amount for which he recovered his decree, which was below Rs. 10,000," and they held that leave had been rightly refused. That decision clearly does not authorise the inclusion of interest from the date of institution to that of the decree, but on the other hand it does not reject the claim that such interest may be included.

In the second case cited the property in suit was valued at Rs. 5,460 but there was a claim for over Rs. 30,000 as mesne profits. A Bench of the High Court at Calcutta held that the plaintiffs in the suit, who were the applicants for leave to appeal to the Privy Council, were entitled to include their

(1) (1902) 24 All., 174, P.C. (2) (1906) 33 Cal., 1286.
(3) (1921-22) 11 L.B.R., 335.

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claim for mesne profits for the purpose of showing that the value of the matter in dispute reached the statutory amount of Rs. 10,000. It is to be noted, however, that most of the mesne profits claimed in that case must have accrued before the suit was instituted, so that that decision cannot be regarded as an authority for the proposition that mesne profits (or interest) accruing between the institution of the suit and the decree can be included.

In the third case the learned Judges said that the value of the suit in the Court of first instance is the amount claimed, together with *at most* interest which had accrued due up to the date of the decree. The effect of this *dictum* is clearly similar to that of the Privy Council in the Allahabad case. It does not authorise the inclusion of the interest, but it does not prohibit it.

The two Indian rulings cited were considered in the case of *A. V. Subramania Ayyar v. Sellamal* (4), in which it was said that mesne profits subsequent to the date of the suit cannot be included in the subject-matter of the suit. But in that case the question which arose was not whether mesne profits for the period between the institution of the suit and the date of the decree could be included, but whether those mesne profits and further mesne profits accruing after the date of the decree could be included, and there was no decision as to whether or not in a case where the mesne profits in question were profits up to the date of the decree only, those profits could be included. It may be noted that one of the learned Judges in that case said that he was unable to draw any distinction between interest and mesne profits in respect of claims to include them in the subject-matter of the suit, and we agree

(4) (19.6) 39 Mad., 843.

that in this respect interest and mesne profits are on the same footing.

The position, so far as the authorities are concerned, seems to be that there is no decision to the effect that interest (or mesne profits) from the date of institution to that of decree cannot be considered as being part of the subject-matter of the suit, while there are two decisions, one of them a judgment of the Privy Council, which contemplate, though they do not actually authorise, the inclusion of such interest as part of the subject-matter.

In the absence of any authoritative decision on the subject we are bound to decide the matter for ourselves, and we do not think that we shall be straining any principle of law or reason if we hold that where interest is claimed in the plaint, such interest as accrues during the period between the filing of the suit and the decree is part of the subject-matter of the suit and that the amount of such interest can be regarded as part of the amount or value of the subject-matter of the suit in the Court of first instance within the meaning of section 110 of the Code of Civil Procedure.

We hold that the subject-matter or the present suit in the Court of first instance, being Rs. 9,965-5, *plus* interest at 12 *per cent. per annum* for nearly two years, is over Rs. 10,000 and that the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is over Rs. 10,000, and as the decree appealed from reverses the decision of the Court below, we find that the applicant is entitled to the leave for which he applies.

We accordingly grant applicant a certificate that the case fulfils the requirements of section 110 of the Code and allow him the costs of this hearing advocate's fee to be five gold mohurs.

FULL BENCH (CIVIL).

Before Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice Heald, and Mr. Justice Rutledge.

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June 3.

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v.
BUKSHI RAM.*

Rangoon Rent Act, 1919—Rent Controller of Rangoon, not a Civil Court—High Court, whether having jurisdiction to revise the orders of the Rent Controller refusing a certificate under section 15 of the Rent Act—Code of Civil Procedure, section 115—Government of India Act, section 107.

Held (by Heald and Rutledge, JJ., Robinson, C.J., dissenting) that the Rent Controller of Rangoon is not a Court and that the High Court has no jurisdiction to interfere directly in revision with orders passed by the Rent Controller, Rangoon, refusing to grant a certificate certifying the Standard Rent under section 15 of the Rangoon Rent Act.

Held (by Robinson, C.J.) that the Rent Controller is a Court within the general superintendence, which is given to all High Courts over all Courts subordinate to them; that the refusal to exercise the jurisdiction conferred upon him is a case within the meaning of section 115 of the Code of Civil Procedure; that it is a decision of a Court subordinate to the High Court; that, therefore, it is open to the High Court, in a suitable case, to consider that decision in exercise of its powers of revision; but that, in any case, it is open to the High Court to do so in exercise of the general powers of superintendence conferred on it by section 107 of the Government of India Act.

Balakrishna Udayar v. *Vasudeva Ayyar*, 40 Mad., 793; *Mahomed Ebrahim Moolla* v. *S. R. Jaudass*, 11 L.B.R., 387—*referred to.*

Allen Bros. & Co. v. *Bando & Co.*, 49 Cal., 931; *Bala Krishna Pramanik* v. *A. K. Roy*, 26 C.W.N. 30; *Chatterjee* v. *Trivedi*, 26 C.W.N. 78; *India Engineering & Motor Co.* v. *Gladstone Wyllie & Co.*, 26 C.W.N. 102; *Kali Dasi* v. *Kanai Lal De*, 26 C.W.N. 53; *Nilmoni* v. *Taranath*, 9 Cal., 295—*distinguished.*

The matter arose out of an application for revision of the order of the Rent Controller of Rangoon, refusing to grant a certifiate certifying the standard rent under section 15 of the Rangoon Rent Act. The application having come up for hearing before a Division Bench of this Court, composed of Carr

* Civil Reference No. 6 of 1925 arising out of Civil Revision No. 156 of 1924.

and Brown, JJ., the learned Judges referred the matter to a Full Bench.

The facts of the case and the question for decision by the Full Bench appear from the order of reference below :—

The petitioner applied to the Rent Controller, Rangoon, for the fixing of a standard rent for certain premises in Rangoon and the Controller rejected his application The petitioner now asks this Court to interfere with this order of the Rent Controller in revision. Two questions arise for consideration, *firstly*—whether the proceedings of the Rent Controller are subject to the revisional jurisdiction of this Court, and, *secondly*, whether this is a case in which the revisional powers should be exercised.

The first question was considered in the case of *Mahomed Ebrahim Moolla* v. *S. R. Jandass* (L.B R. XI, p. 387). A Full Bench decided in that case that the First Judge of the Court of Small Causes when disposing of a reference under section 18 of the Act was a Court subordinate to the High Court within the meaning of section 115 of the Code of Civil Procedure. In the course of his judgment in the case the learned Chief Judge of the Chief Court expressed an opinion that the Controller when dealing with applications under the Rangoon Rent Act was acting judicially in the exercise of a Civil Jurisdiction, and must be held to be subordinate to the Chief Court. But the actual question for decision before the Court was as to the powers of superintendence over the Judge of the Small Cause Court. So far, therefore, as the matter now in issue is concerned, that judgment is merely *obiter*. It was further pronounced before the constitution of this Court, and referred to the revisionary powers of the Chief Court. The question so far as it relates to Calcutta under the Calcutta Rent Act has been discussed at length in the case of *Allen Bros. & Co.* v. *Bando & Co.* (I.L R. Cal. XLIX, p. 931). The decision in that case, though expressed with considerable hesitation, was that the High Court of Calcutta had revisional jurisdiction over the Rent Controller. Under the Calcutta Act references by parties who are dissatisfied with the rent fixed by the Controller have to be made to the President of the Tribunal appointed under section 72 of the Calcutta Improvement Act. In certain cases the orders of the President are subject to appeal to the High Court and it was held that this provided a connecting thread of authority sufficient to place the Controller under the

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superintendence of the High Court. If that reasoning be sound then it would appear to apply *a fortiori* to Rangoon where the reference under the Act is definitely to a Judge of a Civil Court, who as such Judge is undoubtedly subject to the Appellate Jurisdiction of this Court. But can this reasoning be applied to the powers of the Rangoon High Court? Under the provisions of section 107 of the Government of India Act a High Court has the power of superintendence over all Courts which may be subject to its Appellate Jurisdiction. In the Letters Patent for the High Court of Calcutta it is provided that the Appellate Jurisdiction is "from the Civil Courts . . . . . and from all other Courts subject to its superintendence." Clause 14 of the Letters Patent of this Court confers Appellate Jurisdiction over all Civil Courts in Burma for which the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma had been a Court of Appeal, and over any other Civil Courts for which the High Court is declared to be a Court of Appeal. There is no clause corresponding to the clause in the Letters Patent for Calcutta giving this Court Appellate Powers over all other Courts subject to its superintendence. The fact that a reference can be made from the orders of the Controller in certain circumstances to the First Judge of the Court of Small Causes, and that it has been held that orders passed by that Judge on such a reference are subject to the revisional jurisdiction of this Court might be held sufficient to make the Controller subject to the superintendence of this Court. But it does not seem to me possible, when the provisions of clause 14 of the Letters Patent of this Court are borne in mind, to hold that it makes the Controller subject to the Appellate Jurisdiction of the Court. He may be subject to the Appellate Jurisdiction of the First Judge of the Court of Small Causes by virtue of the powers of reference to that Judge. But the Rangoon Rent Act specifically provides that the orders passed by the Judge of the Small Cause Court on that reference are final. They are clearly not subject to appeal to this Court, and I find it difficult to hold that the fact that this Court could interfere with the orders passed by the Judge of the Small Cause Court in revision makes either the orders passed by him on the reference or the orders passed by the Controller in the first instance subject to the Appellate Jurisdiction of the Court. As we understand the judgment of Rankin, J., in the Calcutta case cited, his conclusion was based rather on the finding that the Controller was subject to the superintendence of the High Court than that it was otherwise

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subject to its Appellate Jurisdiction, and even so the concluding part of his judgment indicates that it was with considerable diffidence and largely in deference to previous decisions that he found that the proceedings of the Controller were subject to the revisional jurisdiction of the High Court. The Controller no doubt has to exercise many functions that are exercised by Civil Courts, but that does not of necessity make him a Civil Court. The Civil Courts in Burma are constituted by the Burma Courts Act, and the Rent Controller is certainly not a Civil Court under that Act. It has not been suggested that there is any special Act which makes the Rent Controller subject to the Appellate Jurisdiction of this Court, nor do we understand it to be suggested that that this Court can derive its powers of revision over the proceedings of the Controller otherwise than by virtue of the provisions of section 107 of the Government of India Act. Having regard to the wording of the Letters Patent of this Court, we find it impossible to hold that this Court has any powers in revision to interfere with the actions of the Rent Controller. It is true as pointed out that there is at present no other authority with such revisional powers, and it may be that it is undesirable that there should be none. But that is a matter for the legislature to decide. In our view the present application in revision does not lie.

The question raised is of considerable importance, and in view of the opinion expressed in Mahomed Ebrahim Moolla's case, it should, I think, be referred to a Full Bench.

As regards the merits of this application, if it be held that this Court has revisional powers the Controller must be treated as a Court, and the procedure adopted by him must be in accordance with judicial principles. He clearly had to decide whether the petitioner was or was not a landlord within the meaning of section 2 of the Act. But he appears to have done so without giving the petitioner a real opportunity to prove his claim, and there is not sufficient material on the record for the forming of my decision. If this Court has jurisdiction the case does therefore appear to be one in which it should exercise it.

We would therefore refer the following question for decision by a Full Bench,

"Has this Court jurisdiction to interfere in revision with orders passed by the Rent Controller, Rangoon, refusing to grant a certificate certifying a standard rent under section 15 of the Rangoon Rent Act?"

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The hearing came up in due course before a Full Bench composed of Robinson, C.J., and Heald and Rutledge, JJ., with

Campagnac—for the Applicant.

Auzam—for the Respondent.

ROBINSON, C.J.—The point referred for the decision of the Full Bench is:

"Has this Court jurisdiction to interfere in revision with orders passed by the Rent Controller, Rangoon, refusing to grant a certificate certifying the standard rent under section 15 of the Rangoon Rent Act?"

As a matter of fact I have expressed my opinion on this question in the case of *Mahomed Ebrahim Moolla* v. *S. R. Jandass* (1).

It is said that my decision there was merely an *obiter dictum*, in that it was not necessary for the decision of the point then before the Bench which had reference to the subordination of the First Judge of the Court of Small Causes of Rangoon to the Chief Court. But in that case I held that it was necessary to consider what the provisions of the Burma Rent Act with reference to the powers and duties of the Controller and the First Judge of the Small Cause Court are.

It was, in my opinion, necessary, in order to decide the question there referred, to consider the whole scope and frame of the Act with reference to the powers given to the two Courts thereby created; and for that purpose I considered the position of the Controller and his powers and duties and I came to the conclusion that he must be held to be a Civil Court, and, in the absence of anything in the Act

(1) (1922) 11 L.B.R., 387.

to the contrary, he must, therefore, be held to be a Court subordinate to this Court.

It was a decision given after full consideration, and it was in agreement with the decisions of the Calcutta High Court referred to therein.

Since that case was decided, there was another decision by the Calcutta High Court on the point in the case of *Allen Bros. & Co.* v. *Bando & Co.* (2). It was there held that the High Court has power of revising an order made by the Rent Controller of Calcutta. It is said—and it is so stated in the judgment—that the learned Judge had grave doubts on the point and that this decision was really based on a determination to follow previous decisions of the Court with which he was inclined to agree, but as to the correctness of which he was not very certain.

What the learned Judge said was: " . . . it is a question on which, though with some difficulty, I incline to the opinion that the decision of the Division Bench is right." And he concluded his judgment by saying: " . . . I have come to the conclusion that the decision of the Division Bench has all the common sense of the matter even if it may be doubted whether it has all the strict logic on its side . . . and in view of the fact that appeals from a Rent Controller's decision may come as occasion arises either to the Civil Courts of the District or, in Calcutta, to the President, I am in no way prepared to hold that an opinion which has been entertained by some four or five Judges of this Court is not the better opinion."

The learned Judge pointed out: " In my opinion the Controller, in discharging his duty under section

(2) (1922) 49 Cal., 931.

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15 and the President of the Tribunal in discharging his duties under section 18, act as Courts of Justice. Whether they are Civil Courts within the meaning of any particular enactment is another question, but they are both Civil Courts in the general sense; they are authorized to decide judicially, and by judicial methods only, between persons seeking their civil rights, *Nilmoni* v. *Taranath* (3). Such functions as they perform under sections 15 and 18 are neither administrative nor ministerial. It is written large, both over the Act and the Rules, that the procedure to be followed is in general the procedure of a Court of Law."

With reference to the right of appeal from the orders of the Controller he stated: "But, however the right in question is denominated or defined, its existence puts the Controller in the position of a Court subordinated to another Court not simply as a matter of dignity or precedence, but in the sense that the one Court controls the other, to confirm, vary or nullify the orders of the other."

The decision referred to above was a decision of their Lordships of the Privy Council with reference to the powers of the High Court to deal in revision with orders passed by the Collector under Act X of 1859. Their Lordships said: "A question was raised with respect to the jurisdiction of the High Court to entertain this question in revision at all. Their Lordships do not think it necessary to say anything upon that point, except that they entirely agree with the view taken by the Hight Court of their own jurisdiction."

Further, referring to certain sections of the Act X of 1859, they said: "It must be allowed that in those sections there is a certain distinction between

(3) (1882) 9 Cal., 295.

the Civil Courts there spoken of and the Rent Courts established by the Act, and that the Civil Courts referred to in section 77 and the kindred sections, mean Civil Courts exercising all the powers of Civil Courts, as distinguished from the Rent Courts, which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms ; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and whether, being a Civil Court in that sense, it does not fall within the provisions of Act VIII of 1859."

At the end of their judgment, their Lordships said: "It was not disputed that if an appeal went from the Collector to the higher Court,—to the Zillah Judge or to the High Court,—and the decree of the Collector for rent was there affirmed, it would become the decree of a Civil Court, which could not be excluded from the operation of Act VIII of 1859. Then this consequence would follow, that the act of the parties would alter the nature of the decree ; as long as the decree remains the decree of the Collector, it is incapable of enforcement in any other district ; but let the decree be affirmed by a Court of Appeal, and though it is between the same parties for the same subject-matter, it then becomes enforceable in another district. It is very difficult to suppose that any such result as that could posssibly have been intended by the Legislature."

Again, in the case of *Balakrishna Udayar* v. *Vasudeva Ayyar* (4), their Lordships called attention

(4) (1917) 40 Mad. 793.

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to another extraordinary result and they said: "And if the appellant's contention be correct, then if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie."

That is equally the case under our Act. If the Rent Controller refuses perversely or whimisically to exercise the jurisdiction conferred upon him by the Act in regard to fixing the standard rent, no reference to the Chief Judge of the Small Cause Court is possible; and, if the contention before us is correct, there is no remedy available, and that is certainly a result which could not have been contemplated by the Legislature.

Their Lordships in this last-cited case, which referred to proceedings under the Religious Endowments Act XX of 1863, held: "It appears to their Lordships to be clear that in all these matters the Civil Court exercises its powers as a Court of Law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal."

They expressed the opinion that the matter adjudicated upon was a case within the meaning of section 115 of the Civil Procedure Code.

The question then is: Is the Rent Controller exercising the jurisdiction conferred upon him by the Act acting as a Court and a Civil Court?

In my previous judgment I have given my reasons for holding that he would act judicially in the exercise of a Civil Jurisdiction, and that he must be held to be a Civil Court. If, therefore, he exercises his jurisdiction in regard to the fixing of

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the standard rent, and there is a reference from his decision to the Chief Judge of the Small Cause Court, who supports his decision, an application for revision of the order of the Chief Judge of the Small Cause Court would lie to this Court; and if this Court were to reverse the order it would equally reverse the order of the Rent Controller.

Under those circumstances, it cannot possibly be said that the Rent Controller was not a Court subordinate to this Court.

It has been urged that, if the Legislature has made a serious omission in not providing the High Court with any powers of interference with orders of the Rent Controller from which no reference can be had to the First Judge of the Small Cause Court, that is no justification for this Court to assume a jurisdiction in order to avoid this serious omission. That is, no doubt, perfectly correct.

It is not for the Court to create the law. Its duty is merely to interpret and enforce it. But, if it is possible to so interpret the Rent Act as to avoid such an anomaly as is disclosed, if the contrary view be held correct, it is perfectly justifiable to do so.

In my opinion it is no straining of language or argument to hold that the Rent Controller is to be regarded as a Civil Court, subordinate, through the channel of the Chief Judge of the Small Cause Court, to this Court; and, if that decision be correct, the Rent Controller is a Court within the general superintendence which is given to all High Courts over all Courts subordinate to them.

It is, however, urged that this superintendence is only over Courts subordinate to this Court's appellate jurisdiction. I am not prepared to agree that the expression "Appellate Jurisdiction" in section

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107 of the Government of India Act necessarily implies that there must be some right of appeal. The expression is used merely to indicate the limits of the jurisdiction of the Court so as to cover the largest area over which its jurisdiction extends.

I am of opinion, therefore, that the refusal to exercise the jurisdiction conferred upon him is a case within the meaning of section 115 of the Code of Civil Procedure; that it is a decision of a Court subordinate to this Court; that, therefore, it is open to this Court, in a suitable case, to consider that decision in exercise of its powers of revision; but that, in any case, it is open to it to do so in exercise of the general powers of superintendence conferred on it by section 107 of the Government of India Act.

I would, therefore, answer the reference in the affirmative.

HEALD, J.—The question which has been referred to us for decision is whether this Court has power to revise orders of the Controller of Rents appointed for Rangoon under section 3 of the Rangoon Rent Act, the particular order in respect of which revision is sought being an order refusing to grant a certificate certifying the standard rent under section 15 of the Act. The reference was considered necessary because in the Full Bench case of *Mahomed Ebrahim Moolla* v. *S. R. Jandass* (1), where the question referred was whether the First Judge of the Court of Small Causes, Rangoon, when disposing of a reference under section 18 of the Rangoon Rent Act is a Court subordinate to the High Court within the meaning of section 115 of the Code of Civil Procedure, the learned Chief Justice, after considering certain Indian

(1) (1922) II L.B.R., 387.

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cases, said, "In my opinion therefore, so far as the Controller is concerned, it must be held that he is acting judicially in the exercise of a civil jurisdiction and that he must therefore be held to be a Civil Court, and in the absence of anything in the Act to the contrary, he must therefore be held to be a Court subordinate to this Court." The learned Judges who were dealing with the present case regarded that statement as *obiter* and doubted its correctness, but they were not prepared to disregard it and so made the present reference.

The learned Chief Justice in his answer to this reference has maintained his former opinion, but with the greatest respect I find myself unable to agree with him.

A scrutiny of the enactments giving revisional powers to this Court makes it clear from the outset that there is nothing in them which says either expressly or by direct implication that decisions of the Controller of Rents in Rangoon are subject to revision by this Court.

The revisional power of this Court over the decisions of the Controller, if such power exists, must therefore be based rather on the interpretation of the enactments by the Courts than on the wording of the enactments themselves, and it is necessary to consider the cases in which that interpretation is expressed.

One of the earliest of those cases seems to be the Privy Council case of *Nilmoni Singh Deo* v. *Taranath Mukerjee* (2). In that case the Collector of a District, by whom under the special provisions of the Bengal Rent Act of 1859 suits for arrears of rents were cognizable and decrees in such suits were

(2) (1882) 9 Cal., 295.

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made, transferred decrees so made by him to the ordinary Civil Courts of other Districts for execution. It was contended in the High Court that the Act gave no power to transfer decrees and that Court was asked to set aside the transfers in revision. A question of the jurisdiction of the High Court to revise orders of the Collector was raised and the High Court said: "If the orders complained of are passed without jurisdiction, we think we have power to interfere under section 15 of the Act of Parliament constituting this Court." That was all that the High Court said on the question of jurisdiction, and having found that the orders were passed without jurisdiction, the learned Judges proceeded to deal with them in revision, setting aside one and staying proceedings on another. An appeal was filed in the Privy Council and the same question as to the jurisdiction of the High Court was raised. All that their Lordships said on this matter was as follows: "A question was raised with respect to the jurisdiction of the High Court to entertain this question in revision at all. Their Lordships do not think it necessary to say anything upon that point except that they entirely agree with the view taken by the High Court of their own jurisdiction." It is to be noted however that their Lordships proceeded to find that the Collector in taking cognizance of suits under the Rent Act was a Civil Court and that therefore decrees made by him in such suits could be transferred to and executed by the ordinary Civil Courts under the Civil Procedure Code, and on this footing they set aside the orders of the High Court interfering with the transfers. It seems to me clear that their Lordships' decision that the High Court had jurisdiction to deal in revision with the orders of the Collector was directly connected with their finding that the Collector when taking

cognizance of suits and making decrees under the special provisons of the Bengal Rent Act was a Civil Court, and that that finding was based on the special provisions of the Bengal Rent Act.

The next case is that of *Bala Krishna Pramanik* v. *A. K. Roy* (3). In that case the President of the Tribunal appointed under section 72 of the Calcutta Improvement Act, who, under section 18 of the Calcutta Rent Act, has power to revise orders made by the Controller of Rents at Calcutta, fixing a standard rent, had made an order for costs, but had held that he had no jurisdiction to execute it. An application for revision of his order was made to a Bench of the Calcutta High Court and that Bench revised it. No question of the jurisdiction of the High Court to deal with the President's order in revision was raised, but the Bench did say, "the learned President held, and we think rightly, that he is a Court and that the jurisdiction exercised by him under section 18 of the Rent Act is civil jurisdiction so that in proceedings under that section the President is a Court of Civil Jurisdiction within the meaning of (section 141 of) the Code of Civil Procedure.

In the case of *Kali Dasi* v. *Kanai Lal De* (4) a Bench of the Calcutta High Court was asked to revise an order of the Controller of Rents under the Calcutta Rent Act and did so, its jurisdiction not being contested.

In the case of *Chatterjee* v. *Tribedi* (5) a Bench of the same Court was again asked to revise an order of the Controller dismissing an application for the fixing of a standard rent. The circumstances of

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(3) (1919) 26, C.W.N., 30. (4) (1919) 26, C.W.N., 53.
(5) (1919) 26, C.W.N. 78.

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that case were that an application for revision of the Controller's order had been made under section 18 of the Calcutta Rent Act to the President of the Tribunal, and the President had held that because the order of the Controller did not fix a standard rent and because the Act provided for revision of a decision fixing the standard rent, and not of a decision refusing to fix such rent, he had no jurisdiction to deal with the order of refusal. The learned Judges of the High Court found that the President's decision that he had no jurisdiction to revise an order of refusal was correct, and the question then arose whether or not the High Court could itself directly revise the order of the Controller. The learned Judges said that because under rules framed under section 23 of the Calcutta Rent Act the Controller has all the powers possessed by a Civil Court for the trial of suits, and is bound to follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure for the trial of regular suits, the Controller is a Court of Civil Jurisdiction. They went on to consider whether or not, on the footing that the Controller was a Court of Civil Jurisdiction, the High Court had power to revise his orders, and on the strength of certain earlier decisions of the Court and that of the Privy Council in the case cited above they held that they had power to revise the orders, not under the provision of section 115 of the Code of Civil Procedure, but under section 107 of the Government of India Act.

In the case of *India Engineering & Motor Co. v. Gladstone Wyllie & Co.* (6), the High Court of Calcutta dealt in revision with an order of the Controller of Rents, no question of its jurisdiction being raised.

(6) (1919) 26 C.W.N. 102.

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The latest case on the Subject is that of *Allen Bros.* v. *Bando* (7). In that case also the Controller had refused to fix a standard rent as required by section 15 of the Act, and the question of the power of a single Judge of the Calcutta High Court sitting on the Original Side, to revise the Controller's order was raised, a rule being issued under both section 115 of the Code of the Civil Procedure and clause 15 (?) of the Letters Patent. The learned Judge found that because the Controller is authorized to decide judicially and by judicial methods only between persons seeking their civil rights, and because the procedure to be followed under the Calcutta Act is in general the procedure of a Court of Law, the Controller in discharging his duty under section 15 acts as a Court of Justice and is a Civil Court in the general sense, whether or not he is a Civil Court within the meaning of any particular enactment. He held further that because the orders of the Controller are subject to revision by the President of the Tribunal, the Controller is in the position of a Court subordinated to another Court in the sense that one controls the other, to confirm, vary, or nullify the orders of the other. He went on to say that by section 107 of the Government of India Act power of superintendence is given to the High Courts over all Courts subject to their appellate jurisdiction and that under its Letters Patent the Calcutta High Court has appellate jurisdiction not only over the ordinary Civil Courts but also over all other Courts subject to its superintendence. He pointed out that " Courts subject to the superintendence of High Court " means Courts which were subject to the superintendence of the Courts

(7) (1922) 49 Cal., 931.

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which the High Court superseded and Courts over which a right of superintendence or some other form of appellate jurisdiction has since been granted, and he said, "It remains therefore to consider whether the Calcutta Rent Controller, as a Court, is under the High Court in any one of the ways in which appellate jurisdiction can be exercised . . . . As matters stand the only facts connecting him in any way with the Appellate Jurisdiction of the High Court are these: that he is, as I think, subordinated to the President, that awards of the Tribunal made under the Calcutta Improvement Act are appealable to this Court under Act 18 of 1911; that in some cases the President may himself give decisions which are deemed to be decisions of the Tribunal: and that where the word 'Judge' as distinct from 'Court' appears in the Land Acquisition Act of 1894 the President is deemed to be the Judge." As between the Rent Controller on the one hand and the High Court on the other, the question is, is this a link or a gap? He went on to say, "An actual relationship to this Court must be established; an existing thread of connecting authority must be disclosed" and being of opinion that the learned Judges in *Chatterjee* v. *Tribedi* had decided that the President was subject to the superintendence of the High Court in respect of his duties under the Calcutta Rent Act, because appeals from his decisions under the Calcutta Improvement Act lay mostly to the High Court, said, "I have come to the conclusion that the decision of the Division Bench has all the common sense of the matter even if it may be doubted whether it has all the strict logic on its side." "For these reasons or perhaps I should say in these circumstances," the learned Judge decided to revise the order of the Controller, the

grounds of his decision being apparently that the President was subject to the superintendence of the High Court, because in certain cases appeals from his decisions lay to the High Court, and that because in certain circumstances the President had power to revise certain orders of the Controller, the Controller too must be subject to the superintendence of the High Court.

The result of these cases is that where the jurisdiction of the High Court has been questioned it has been held that the High Court's revisional powers must be referred to the provisions of section 107 of the Government of India Act, rather than to section 115 of the Code.

It is now necessary to consider the case of the Rangoon Controller in the light of these decisions and of the local law which applies to him.

Under the Rangoon Rent Act it is the duty of the Controller to fix standard rents, and for this purpose he is given power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and so far as may be in the same manner " as is provided in the case of a Court" by the Code of Civil Procedure. The Act provides that if the decision of the Controller fixing the standard rent is questioned a " reference " lies to the First Judge of the Court of Small Causes, Rangoon, that in disposing of such references the Judge shall follow, as nearly as may be, the procedure laid down in the Civil Procedure Code " for the regular trial of suits " (not appeals), and that the Judge's decision shall be final.

The provisions of the Bengal Rent Act of 1859 were entirely different. That Act was passed " to prescribe rules for the trial of . . . . suits for the recovery of arrears of rent and of suits arising out

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of the distraint of property for such arrears" and section 23 provided that the kinds of suits mentioned therein should be cognizable by collectors and, except in the way of appeal as provided in the Act, should not be cognizable in any "other Court" or by any other officer, or in any other manner. Section 148 said, "It shall be competent to the Collector to hold *a Court* for hearing and determining suits" under the Act in any place within the limits of his district. The Collector's procedure as laid down in the Act was clearly the procedure of a Civil Court. Appeals from orders passed by a Collector under the Act, "not being judgments in suits or orders passed in the course of suits and relating to the trial thereof or orders passed after decree and relating to the execution thereof" were made appealable to the Commissioner, but in "suits" an appeal from the "judgment" of the Collector lay to the Zillah Judge unless the amount or value in dispute exceeded Rs. 5,000, in which case the appeal lay to the Sudder Court. The functions and procedure of the Collector in the trial of suits under the Bengal Rent Act were thus entirely different from those of the Controller under the Rangoon Rent Act. The Collector "held Court" and tried "suits"; he had power to deliver "judgments" and make "decrees"; and an appeal lay from his "judgments" to the ordinary Civil Appellate Courts. The Controller merely fixes a standard rent at such amount as, having regard to the provisions of the Act and the circumstances of the case he deems just, he is not bound to follow any particular procedure and there is no appeal from his orders to the ordinary Civil Courts. There is merely a "reference" to the First Judge of the Court of Small Causes, which is not a Court of Appeal, and the

Judge deals with the reference not as an appeal but as if it were an original suit.

In these circumstances it seems clear that it does not follow that because the Collector under the Bengal Rent Act was a "Civil Court" the Controller of Rents under the Rangoon Rent Act is such a Court or is a Court at all.

The provisions of the Calcutta Rent Act also are different from those of the Rangoon Act. The duties and powers of the Controller are similar, but the provisions as to his procedure are different. Under the Calcutta Act it is laid down that in making enquiries the Controller shall follow as nearly as may be the procedure laid down in the Code of Civil Procedure for the regular trial of suits. There is no similar provision in the Rangoon Act and as a matter of fact the Controller in Rangoon does not follow that procedure. In view of these differences between the two Acts it seems clear that even if the Controller of Rents under the Calcutta Act must be regarded as a Civil Court, it does not follow that the Controller under the Rangoon Act is such a Court or is a Court at all.

But even if the Controller of Rents in Rangoon had to be regarded as a Court or as a Civil Court, it would not in my opinion follow that this Court has power to revise his orders.

The Calcutta High Court in the case of *Nilmoni* v. *Taranath* referred its revisory powers to section 15 of the Charter Act, 1861, to which section 107 of the Government of India Act now corresponds. That section gave the High Court "superintendence" over all Courts for the time being subject to its appellate jurisdiction, and power to call for returns, to transfer suits and appeals, to make rules of practice and procedure, to prescribe forms, and to settle tables of

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fees, but in view of the Privy Council's pronouncement that they entirely agreed with the view taken by the High Court of its own jurisdiction, it is not now possible to apply the rule of *ejusdem generis* to the provisions of that section or to avoid holding that the powers of superintendence given by its include power to revise orders, provided of course that the Court whose orders it is intended to revise is subject to the Appellate Jurisdiction of the High Court. Similarly in the case of *Allen Bros.* v. *Bando* the learned Judge referred the revisional powers which he exercised to the provisions of section 107 of the Government of India Act read with clause 16 of the Calcutta Letters Patent. Section 107, as has been said, refers to Courts for the time being subject to the Appellate Jurisdiction of the High Court, and clause 16 declares that the High Court shall be a Court of Appeal "from the Civil Courts . . . . . and from all other Courts subject to its superintendence." On the wording of those two provisions of law and on its claim that there is no form of judicial injustice which the High Court has not power to correct, the High Court of Calcutta has founded a series of decisions to the effect that it has powers of revision if there is any existing thread of connecting authority between it and the Court whose decisions it is asked to revise, and that such a thread exists whenever it has power in any circumstances to interfere even indirectly with the orders of that Court. On this footing it has revised the orders of a Collector under the Land Acquisition Act, and it might almost claim to revise the orders of private arbitrators on the ground that an award of such arbitrators may in certain circumstances be filed in Court and become the basis of a decree from which in certain circumstances an appeal would lie to the High Court. Whether those decisions are

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right or wrong on the wording of the Calcutta Letters Patent, it is not for us to decide, but I do not think that they could possibly be justified on the wording of the Letters Patent of this Court, which in the corresponding clause omit any reference to Courts subject to the superintendence of the High Court and refer to this Court merely as a Court of Appeal and to its jurisdiction merely as "Appellate Jurisdiction." If the words "subject to its Appellate Jurisdiction" in section 107 of the Government of India Act are read in conjunction with the description of the appellate jurisdiction of this Court in clause 14 of the Letters Patent, it seems to me impossible to hold that section 107 confers on this Court any powers of revision in respect of any courts for which this Court is not a Court of Appeal or over which it does not exercise Appellate Jurisdiction. I am unable to find that the Controller of Rents in Rangoon is a Court or a Civil Court or that this Court is a Court of appeal from him as a Court, or has appellate jurisdiction over him or that he is a Court subject to the appellate jurisdiction of this Court within the meaning of section 107 of the Government of India Act, or subordinate to this Court within the meaning of section 115 of the Code, so as to make his decisions subject to revision by this Court and I would accordingly give a negative answer to the reference. Such an answer may amount to refusing a remedy for what is possibly a wrong, but it is only a refusal of a particular remedy, and if, as seems possible, there is a defect or omission in the wording of the Act, the primary duty of correcting the mistake lies on the Legislature and not on the High Court. Hard cases make bad law, and in my opinion it would certainly be bad law if we held that the orders of the Controller of Rents are directly subject to revision by this Court.

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I would accordingly answer the reference as follows :—

> This Court has no jurisdiction to interfere directly in revision with orders passed by the Rent Controller, Rangoon, refusing to grant a Certificate certifying the standard rent under section 15 of the Rangoon Rent Act.

RUTLEDGE, J.—In order to answer the question referred it is necessary to decide (*a*) whether the Rent Controller under the Rangoon Rent Act, 1920, is a Court at all, and (*b*), if so, whether he is a Civil Court whose orders this Court has a power to revise.

Before considering these questions, however, it is necessary to decide whether this Full Bench of three Judges is precluded from going into the question by reason of the decision in *Moolla* v. *Jandass* (1). In that case the present Chief Justice held that it was necessary to consider whether the Controller was a Civil Court. He held that he was and that he was "a Court subordinate to this Court." Though the question of reference was only whether revision lay to the Chief Court from a decision of the First Judge of the Small Cause Court when disposing of a reference under the Rangoon Rent Act, as the Chief Justice held that the further consideration was necessary to his decision, I do not consider that so far as his judgment is concerned his views on the point can be called *obiter dicta*. Macgregor, J., simply concurred. This in my opinion merely meant concurrence in the affirmative answer to the matter referred. Pratt, J., limited his decision expressly

(1) (1922) 11 L.B.R. 367.

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to the matter referred. In these circumstances it cannot be held that this Bench is precluded from going into the question by reason of the aforesaid decision.

To decide whether the Controller is a Court we must consider the powers and duties conferred or imposed on him by the Act, and the procedure which any rules made under it may have prescribed for him to follow. He is defined in section 2 (*b*) as "the Controller of Rents appointed under this Act." By section 3 the Local Government may by notification appoint a Controller and one or more Assistant Controllers and may invest an Assistant Controller with all or any of the powers of the Controller. Section 5 gives a landlord under certain circumstances the right to apply to the Controller to alter the standard rent. Section 10 permits a tenant who is precluded from paying his rent to the landlord for any reason, to deposit the rent as it falls due with the Controller. Section 12 forbids any plaint being received for the recovery of rent unless accompanied by the Controller's Certificate of the standard rent, and by section 14 (2) in summary proceedings for recovery of excess rent, a Magistrate shall presume until the contrary is proved that the standard rent is as certified in the Certificate. By section 15 (1) on application by a landlord or tenant the Controller shall grant a Certificate certifying the standard rent of any premises leased or rented by such landlord or tenant, and by section 15 (2) in four specified cases he may fix the standard rent at such amount as having regard to the provisions of the Act and the circumstances of the case he deems just. By section 15 (3) the Controller before exercising any of his powers shall give notice of his intention to the landlord and tenant if any and

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shall dully consider any application received by him from any person interested within such period as may be prescribed in the notice. By section 15 (4) all orders of the Controller are to be in writing and a copy to be affixed on or near to the premises and another copy given to the landlord, and by section 15 (5) any person affected is entitled to a copy duly certified by the Controller to be correct. By section 16 the Controller is given power to enter any premises or land between 9 a.m. and 6 p.m. Section 17 (1) gives the Controller power to require by written order any person (*a*) to furnish him with particulars as to the rent at which and the manner in which any premises were let in 1913 or subsequently and (*b*) to produce for his inspection such accounts, rent receipts, books or other documents relevant to the enquiry as may be specified in the order. I shall later refer to the provisions of section 17 (2). Section 18 gives a reference to the First Judge of the Small Cause Court in case the Controller's decision is questioned. Section 21 forbids a prosecution under the Act without the previous sanction of the Controller. By section 22 the Local Government may make rules to "(*a*) regulate the procedure to be followed in enquiries by the Controller under this Act; (*b*) direct that such enquiries shall be conducted so far as desirable in private." I have set out the several powers conferred and it seems clear that with the exception of section 17 (2) and any procedure which the Local Government may have prescribed under section 22 the powers conferred are such as might be conferred on any executive or administrative public authority such as a Customs, Income-tax, Revenue or Municipal Officer. Section 17 (2) gives the Controller power to summon and enforce the attendance of witnesses and compel the

production of documents by the same means and so far as may be in the same manner *as is provided in the case of a Court* by the Code of Civil Procedure, 1908. But once the witnesses appear or the documents are produced, "the manner as is provided in the case of a Court" has no further application to the enquiry so far as the Act itself is concerned. Contrast this freedom from judicial trammels with the provision in section 23 that in disposing of references from the decision of the Controller the Judge shall follow as nearly as may be the procedure laid down in the Civil Procedure Code for the regular trial of suits. The only rules which I have been able to discover which the Local Government has made under section 22 prescribing the procedure of the Controller are those published in Financial Department Notification No. 35, dated the 27th May 1920 (*Burma Gazette*, Part I, 5th June 1920, p. 473). The only one of the four rules that I need refer to is Rule 3. "The Controller is empowered to award and apportion the costs of any proceedings before him among the parties thereto in such manner as he may deem just. Such costs may include (*a*) Court fees, (*b*) Process fees, (*c*) Witness expenses, (*d*) Advocate's fees not exceeding half the amount of the standard rent per mensem of the premises referred to in the case." If the Controller is not a Court but an executive public officer under the Act, I think it will be conceded that he is not transformed into a Court by calling the fee to be paid on an application to him a "Court fee" instead of a new coined expression like "Rent application fee." While the careful omission of prescribing any other judicial procedure for the Controller's enquiries is only reconcilable with the executive as against the judicial character of his office. If we contrast the provisions of the Bengal

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Rent Act, 1859, with the provisions set out above as has been done already by my brother Heald, it will be seen that the Collector's procedure as laid down in the 1859 Act was clearly the procedure of a Civil Court. Consequently the decision of their Lordships of the Privy Council in I.L.R. 9 Cal. 295 has no application to the present case.

With regard to the decisions of the High Court in respect of the Calcutta Rent Act it must borne in mind that the Local Government of Bengal made a series of rules under section 23 of the Act, which *inter alia* empowered it to make rules "regulating the procedure to be followed in enquiries by the Controller." By Rule 4 it is laid down, "In making enquiries under the Act the Controller shall follow as nearly as may be the procedure laid down in the Code of Civil Procedure, 1908, for the regular trial of suits." By Rule 24 it is prescribed, "In all proceedings before them under the Act the Controller and the President of the Tribunal shall have all the powers possessed by a Civil Court for the trial of suits." As we have seen there is no rule in any way analogous to either of these rules applying to the Controller in Rangoon. And instead of being endowed with *all* the powers of a Civil Court he is endowed under section 17 (2) with *one* power and that a subsidiary one. This difference is so vital that those two rules may form a sufficient basis for the decisions of the Calcutta High Court. But the absence of these two rules here renders the Calcutta decisions wholly inapplicable to Rangoon.

I am therefore of opinion that the Controller is not a Court but an Executive and Administrative Officer appointed by the Local Government under the provisions of the Rangoon Rent Act. That being so I must answer the question referred in the negative.

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For the purposes of this judgment the second question whether if he is a Court is he a Civil Court whose orders this Court can revise does not arise. If, however, there had been *indicia* of judicial character in the functions of the Controller which I have held are lacking, I would still hesitate to hold that this Court had revisional powers over his orders. To give such powers there must in my opinion be given directly or indirectly the right of appeal to superintendence. It is a growing practice of the Legislature to set up public authorities with executive and judicial or quasi-judicial functions. This Court has not been given that wide and powerful control which the King's Bench Division possesses over public authorities by way of *Mandamus* and *Certiorari*. If by a wide interpretation of its revisional powers, the proceedings of all these bodies become subject to this Court's revision, I fear that the proper discharge of the duties of the Court as expressly laid upon it would suffer. I am not seriously impressed by the argument that a subject may suffer a wrong without redress if the public authority fails to do its duty. The subject has always open to him the remedy of moving the authority's executive superior who has the power in this case of admonishing him or if need be removing him.

The only diffidence I have in answering this reference arises from my coming to a different conclusion to that of the Chief Justice whose opinion at all times carries great weight.

But for the reasons above given, my answer to the question referred is in the negative.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

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May 4.

MAUNG PO SAN AND OTHERS

v.

MAUNG PO THET.*

Burmese Buddhist Law—Inheritance—Step-children, Share of, on step-mother's death, in joint property of father and step-mother—Orasa, whether entitled to share on death of step-mother if he had taken his quarter share on his father's re-marriage.

What the Burmese Buddhist Law regards in its rules for partition is the family rather than the individual, and so long as the family subsists, all who are members of it are regarded as being entitled to partition of its property on its dissolution. On the surviving parent's re-marriage, either the old family might be regarded as continuing or a new family might be regarded as being instituted.

A, a widower with children, married B who also was a widow with children. There was no issue of A and B's marriage. A died first and B died 28 years later. The children of A's previous marriage had not taken any share of inheritance either on A's marriage with B or on his death.

Held, that on the death of B, the children of A and the children of B are entitled to the joint estate of A and B, in equal shares.

Semble: Even if the *Auratha* had taken his quarter share on the death of one parent or on the re-marriage of the surviving parent, he would still be entitled to claim, in the jointly acquired property of the parent and step-parents a share on the death of the surviving parent or on the death of the step-parent, unless separation from the family can be proved or presumed.

Ma Nyein v. Ma Tha Gaung, 3 U.B.R., 237; *Maung Dwe v. Khoo Haung Shein*, 3 Rangoon, 29; *Pan On v. Tun Tha*, 11 L.B.R., 292; *Shwe Ywet v. Tun Shein*, 11 L.B.R., 199—*referred to*.

Digest. 1, 214, 253—*referred to*.

Lambert (Junior)—for the Appellants.

Campagnac—for the Respondent.

HEALD, J.—Respondent, who gives his age as 46, is a son of Shwe Baw and his first wife, Ma Shwe Mè who died forty-five years ago. After Ma Shwe Mè's death, Shwe Baw married a second wife, Ma I, whom

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* Civil Second Appeal No. 124 of 1924 against the decree of the District Court of Toungoo in Civil Appeal No. 726 of 1923.

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he subsequently divorced. He then married a third wife, Ma Tè, a widow with three children, two of whom are the first and second appellants, the third having died and left three children who were defendants in the suit but have not joined in the appeal. Shwe Baw died twenty-eight years ago leaving respondent, who would then be at least eighteen years of age, and Ma Tè and her children surviving him. Ma Tè died two years ago.

Respondent sued Ma Tè's children and their representatives to recover a one-half share of certain properties which he alleged to be jointly acquired property of the marriage of Shwe Baw and Ma Tè, and he joined the third and fourth appellants as being purchasers from the first and second appellants of a plot of paddy land which stood in Ma Tè's name and which he alleged to form part of the jointly acquired property.

The defence, so far as appellants are concerned, was that respondent had received his share on his father's death, that the property was not the jointly acquired property of the marriage of Shwe Baw and Ma Tè, that respondent was not entitled to mesne profits, that his claim, which came into existence at the death of Shwe Baw twenty-eight years ago was time-barred, and that even if he was entitled to claim, the amount paid by them for the funeral of Ma Tè must be taken into consideration.

The lower Courts found that it was not proved that respondent received a share on his father's death, that the estate in which respondent was entitled to share consisted of the plot of paddy land which was worth Rs. 3,780, a house-site worth Rs. 200, four buffaloes worth Rs. 170 and two bullocks worth Rs. 120, that respondent was entitled to half the value of that estate, less Rs. 200 paid by the first

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and second appellants for Ma Tè's funeral expenses, and that he was also entitled to mesne profits for two years on his share of the land. A decree was accordingly passed in respondent's favour for half the paddy land, or its value Rs. 1,890, together with Rs. 690 as representing half the value of the other property and mesne profits.

Appellants allege in appeal that respondent's claim was time-barred, that in any case he could not be entitled to any property which was acquired after the death of his father, and that he could not under Burmese Buddhist law be entitled to half the estate.

I may say at once that I am satisfied that there is no basis for the first of these grounds of appeal. What the Burmese Buddhist law regards in its rules for partition is the family rather than the individual and so long as the family subsists, all who are members of it are regarded as being entitled to partition of its property on its dissolution. On the death of a parent the *auratha* becomes entitled in his own right to one-fourth of the family estate because he takes the place of the deceased parent in the family, but I do not think that the old law contemplated his being entitled to take away his share and leave the family. On the contrary I think that he was intended to remain in the family as one of its heads, a special share in the family property being segregated for him in consideration of his doing so. On the surviving parent's re-marriage, either the old family might be regarded as continuing or a new family might be regarded as being instituted. The *auratha* was entitled, if he chose to regard the old family as dissolved, to take away the share in its property which had been segregated for him. If he was not old enough to separate, his share was to be segregated for him in the property

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of the new family, *vide* the *Dhammathats* cited in *Shwe Ywet* v. *Tun Shein* (1). On the death of the surviving parent the *auratha*, whose share had been segregated because he was not old enough to separate is entitled to claim that share from the step-parent and the children, jointly apparently, are entitled to claim three-fourths of so much as remains of the property which their parent brought to the second marriage, *vide* the authorities cited in *Ma Nyein* v. *Ma Tha Gaung* (2). Further, on the death of the step-parent, the children of the first marriage have a fresh right to claim a share of the jointly acquired property of the marriage of their parent and the step-parent, *vide* the *Dhammathats* cited in section 253 of the Digest and section 9 of the X Book of *Manugye*, and, if there are no children of the marriage, but are step-children on both sides, as in this case, the estate is to be divided equally between them.

It is suggested that if the *auratha* on the death of a parent or on the re-marriage of the surviving parent, or the children on the death of the surviving parent have taken their shares, then they have no further interest in the estate, and that, if, as was suggested in the case of *Pan On* v. *Tun Tha* (3), the shares to which they are entitled vest in them and become their property, then they must be regarded as having taken those shares in spite of the fact that they may have lost them subsequently by operation of the Law of Limitation, and can have no further interest in the estate.

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

(1) (1922) 11 L.B.R., 199. (2) (1917-20) 3 U.B.R., 237.
(3) (1922) 11 L.B.R., 292.

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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 step-parent 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 re-marriage they have no interest in the property of the second marriage, while the *Dhammathats* cited in section 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* (4) 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 re-marriage 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 step-parent unless separation is proved or is to be presumed, but it is unnecessary to go so far as that in this case. So far as this case is concerned, since respondent has not taken a share either on the re-marriage or on the death of the surviving parent, it seems certain that he would be regarded by Burmese Buddhist Law as being entitled to share in the estate of the step-parent, and there can be no doubt that in such part of that estate, as can be regarded as jointly acquired property of the marriage of the parent and step-parent, his share as against his parent's step-children is one-half.

(4) (1925) 3 Rangoon, 29.

As for the suggestion that respondent could have no interest in property acquired by the step-mother after the death of his father, it seems clear that the estate in which he shares is the family estate as it stands on the death of his step-parent. In so much of that estate as can fairly be regarded as the joint family property of the marriage of his father and the step-mother, his share is one-half, and I see no reason to believe that any of the property in which he has been given that share ought to be regarded otherwise than as the property of that marriage. As for the mesne profits, in view of the decision in the case of *Pan Ôn* v. *Tun Tha* I do not see how they could have been refused.

I would therefore confirm the decrees of the lower Courts and dismiss the appeal with costs.

CHARI, J.—I concur.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Brown.

1925
May 18.

MA SEIN BYÈ
v.
S.R.M.M.R.M. CHETTY FIRM.*

Title deeds, Mortgage by deposit of—Memorandum of the transaction, when admissible without registration—The deposit and the memorandum, forming two different stages in the transaction—Power of Executor to bind the deceased's property by a mortgage—Succession Act (X of 1865), section 269.

A mortgage of certain property situate in Rangoon was created by deposit of its title deeds; and subsequently a memorandum stating, "*I beg to deposit* with you the undermentioned securities and request you to hold the same or any other securities which I may from time to time deposit with you to my order subject to your lien thereon for any loan granted to us . . . . you are hereby authorised to sell the said securities or any of them in any way you consider expedient," was signed by the mortgagor and given to the mortgagee. On a contention that this memorandum constituted the contract of an equitable

* Civil First Appeal No. 53 of 1924 against the decree of the Original Side of this Court in Civil Regular No. 38 of 1923.

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mortgage between the parties and not being registered, no proof of the mortgage could be admissible.

Held that on the evidence the memorandum did not form, and was not intended to form, the bargain between the parties. The equitable mortgage was completed by the handing over of the title deeds with intent to create hereby an equitable mortgage to secure repayment of the sum of money lent on the promissory-note, and the subsequent taking of a memorandum did not create a mortgage which was already in existence.

Held further that in India, an Executor has power to bind by mortgage the immoveable property of the estate.

Kadarnath Dutt v. *Shamlall Kettry*, 11 Beng. L.R., 405; *M. Subramonian* v. *M.L.R.M. Lutchman*, 1 Ran., 66; *Pranjivandas Mehta* v. *Chan Ma Phee*, 42 I.A., 122; *Shaw* v. *Foster*, (1872) L.R. 5 H.L. 321—*referred to.*

N. N. Burjorjee—for the Appellant.

Cowasjee—for the Respondent.

ROBINSON, C.J., AND BROWN, J.—Two suits were brought by the plaintiff Chettiar Firm to recover moneys due on two promissory-notes secured by equitable mortgage by deposit of title deees. The two cases were heard together, the evidence being the same, and a decree was passed in favour of the plaintiffs in both cases. The first suit was on a promissory-note for Rs. 40,000 executed by one Teo Khoo Tee. Certain title deeds were deposited at the same time as security with intent to create an equitable mortgage. There has been no appeal against the decree with reference to that promissory-note. The other suit, which was similar, was based on a promissory-note for Rs. 30,000. Originally, the defendants were the widow and children of Teo Khoo Tee, and his brother, who was his partner in the business, carried on under the style of Ban Aun & Co.

At the first hearing before issues were fixed counsel for the plaintiff stated that he desired a decree against the executors of Teo Khoo Tee's Will only, and counsel for defendants 2, 3, 4, and 5, who are the children of Teo Khoo Tee, argued that their names might be struck off the record and this was

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done. The suits then proceeded against defendants 1, 6 and 7, the son of Teo Khoo Tee's Chinese wife, the residuary legatee under the Will, his widow Ma Sein Byè, who is now the sole appellant, and his brother. Defendants 1 and 7 have not appeared or taken any part in the suits.

Teo Khoo Tee was trading in partnership with his brother the seventh defendant. He left a Will. Some seven or eight months after his death Ma Sein Byè, by the aid of *Lugyis*, had this Will opened and its contents were explained. The Will directs the executors to realize his share in the partnership and out of that share to pay certain legacies. He further devised the house No. 87, Tsitkai Maung Khine Street, which is the subject of the equitable mortgage in this appeal, to a minor son by his Chinese wife, who was the fifth defendant. There is no doubt therefore that Ma Sein Byè was fully aware that the testator's direction was that his share in the partnership should be realized and that the partnership should not be continued so far as he was concerned.

It is in evidence that after Teo Khoo Tee's death the Chettiar, being anxious for his money, went and interviewed the seventh defendant who was then carrying on the partnership business, and Ma Sein Byè and the adult children who were in Rangoon, and was informed that he need not be in fear for his money, and that the business would be continued as before, that it was continued, and that Rs. 10,000 was paid and the title-deeds of one of the houses deposited as security were returned. The takings of the partnership were paid in to the account with the Chettiar. The first defendant then came from China and became the manager of the business, his uncle, the seventh defendant going to China. Some two and a half years after Teo Khoo Tee's death it was

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desired to raise Rs. 30,000 from the Chettiar and the promissory-note in suit was executed.

It is in evidence that the title deeds of No. 87, Tsitkai Maung Khine Street, Rangoon, were handed over to the Chettiar for him to verify the title, and that the next morning the 23rd May 1921, the Chettiar, who was satisfied with the title, advanced the money. The promissory-note, **Exhibit K**, was executed by the first defendant on behalf of Ban Aun & Co. and the title deeds were handed over as security with intent to create an equitable mortgage.

It is also in evidence that that evening the Chettiar's agent ordered a clerk to draw out a memorandum, Exhibit **L**, and get it signed. This he did and took it the next day to the first defendant who executed it.

There are two points for decision in this case. The first is as to whether this memorandum, Exhibit **L**, constitutes the contract of equitable mortgage between the parties. If it does, it being not registered cannot be given in evidence and being the sole evidence of the equitable mortgage the equitable mortgage would therefore fail. The next point raised is that the action of the Executors in continuing the business and in borrowing this money for the business and granting an equitable mortgage is wrongful and, therefore, although they themselves may be personally liable, the estate cannot be made liable.

As to the first point, the law is set out in a decision by their Lordships of the Privy Council in the case of *M. Subramonian* v. *M.L.R.M. Lutchman* (1). Their Lordships quote with approval the dictum of Couch, C.J., in *Kadarnath Dutt* v. *Shamlall Kettry* (2)—

(1) (1923) 1, Rangoon, 66. (2) (1874) 11 Bengal Law Reports, 405.

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" The rule with regard to writing is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within section 17 of the Registration Act." They further refer to the case of *Pranjivandas Mehta* v. *Chan Ma Phee* (3), where it was laid down by their Lordships as follows:—" The law upon this subject is beyond any doubt: (1) where titles are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title; (2) where, however, titles are handed over accompanied by a bargain, that bargain must rule; (3) lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of security." The words of Lord Cairns in the case of *Shaw* v. *Foster* (4) are also quoted: " Although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the term of the written document, and any implication that might be raised, supposing there

(3) (1916) 43, Indian Appeals. 122. (4) (1872) L.R. 5 H.L. 321.

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was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed." There can, therefore, be no question that, if this document, Exhibit L, was given simultaneously with the execution of the promissory-note and the handing over of the title deeds and was intended by the parties to be the only repository and appropriate evidence of their agreement, that memorandum would create the equitable mortgage and it would come within section 17 of the Registration Act. We cannot go beyond it except to supply such facts as to which the document is silent. In *Subramonian* v. *M.L.R.M. Lutchman*, their Lordships then proceeded to consider the evidence which they held showed that the whole transaction was completed at one and the same time; and they then referred to the memorandum and held that its wording showed that it was a bargain between the parties and that without its production in evidence the plaintiff could, establish no claim, and as it was unregistered, it ought to have been rejected. That document states, "We hand you herewith title deeds relating to . . . . Please hold these as security against advances made to us. We also hand you . . . . Please hold these as further security against advances made to us." Turning now to Exhibit L, we find that it is in very similar terms. It says, "I beg to deposit with you the under-mentioned securities and request you to hold the same or any other securities which I may from time to time deposit with you to my order subject to your lien thereon for any loan granted to us etc., etc." It further sets out, "You are hereby authorised to sell the said securities or any of them in any way you may consider expedient." It would be very difficult to distinguish this from the document

executed in Subramonian's case, and, if the transaction was all one and this document was executed simultaneously with the deposit of title deeds, it would undoubtedly be the bargain between the parties by which alone the equitable mortgage could be proved.

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Coming now to the evidence, the plaint sets out the execution of the promissory-note and then proceeds that "at the same time, as agreed between the parties, the said defendant deposited the title deeds relating to house No. 87 in Tsitkai Maung Khine Street, Rangoon, ... with intent to create a security thereon in respect of the said loan in favour of the plaintiff firm. The said agreement and the title deeds are herewith filed and marked **B**, **C**, **C-1** and **C-2**." Exhibit **L** was filed with the plaint and was marked **B**. It is urged that this clear statement in the plaint points to the fact that Exhibit **L** was executed simultaneously as part of one and the same transaction with the promissory-note and the deposit of title-deeds. And it is urged that the oral evidence was dictated by the fact that in the written statement the agreement was pleaded and it was submitted that no valid mortgage was created for want of registration of the said agreement. Exhibit **L** bears date on the stamp the 28th of some month in 1919, and it is urged that the Chettiar got a number of these printed forms stamped for the purpose of using them always on such occasions and it was therefore eminently probablethat this document was executedsimultaneously and formed the bargain between the parties. Making all allowance for this argument we have to decide whether the oral evidence for the plaintiff is to be believed. There is no evidence to rebut it; there could not well be, for the first defendant has never appeared. The learned Judge in the Court

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below had the witness before him and he held that he told a plain straightforward story which was not broken in cross-examination. He was satisfied that the witnesses was speaking the truth. He is in a much better position to decide that question than we, as a Court of Appeal, are, and we see no reason to differ from his finding. Further, as is recorded in the judgment, this point was not argued. The judgment says, "With regard to issue No. 8 it has not been contended that Exhibit L is a document constituting the bargain between the parties;" and we have no doubt that this technical point is only pressed now, because it is the only hope of succeeding in this appeal. We therefore agree with the Court below that Exhibit L did not form, and was not intended to form, the bargain between the parties. Accepting the evidence, the equitable mortgage was completed by the handing over of documents on the morning of the 23rd May with intent to create thereby an equitable mortgage to secure repayment of the sum of money lent on the promissory-note. The subsequent taking of a memorandum did not create a mortgage which was already in existence.

The only other question is whether the Executors by acting in the manner they did can bind the estate. The Chettiar did not know there was a Will. We have been referred to the English Law on the subject. But it would appear that the Indian Law as regards immoveable property is different. That is contained in section 269 of the Indian Succession Act which lays down that, "An executor or administrator has power to dispose of the property of the deceased either wholly or in part in such manner as he may think fit." That power is unqualified and embodies the law in England as to personalty.

reference to the arbitration of a *panchayat* shortly after Udaya Servai's death, they had paid and respondents had accepted Rs. 1,000 in full settlement of their claims in respect of the estate.

The second appellant and the mother of the respondents are sisters. Udaya Servai lived with them both at the same time and had children by both, the first appellant being his son by the second appellant, and the respondents being his sons by her younger sister Minachi.

The Trial Court held that both were wives and that the first appellant and the respondents were all three legitimate sons of Udaya Servai and as such were entitled to share equally in his estate.

Appellants allege in appeal that the first respondent's suit was barred by limitation, that respondents were merely illegitimate children, that even if they were legitimate their share would be one-fourth each and not one-third because there was another son who died after Udaya Servai's death, that respondents were bound by the award since Minachi, being their mother and natural guardian, had power to refer their claims to arbitration and to bind them by such reference, and that having enjoyed the benefit of the award, they are estopped from denying its validity.

The first respondent filed a cross-objection alleging that the first appellant was illegitimate, and that therefore he (first respondent) was entitled to one-half and not to one-third of the estate.

It is in our opinion proved beyond doubt that there was a reference to arbitration and an award, and, if the first respondent is bound by the reference and the a ward, he clearly has no case.

The learned Judge in the lower Court held that the reference could not bind him because he was a minor.

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PUNUSHWAMI v. VEERANUTH

HEALD AND RUTLEDGE, JJ.

The case of *Semmakal* v. *Subrammal* (1) is almost exactly parallel to this case. In that case also there were two widows and two familes, a minor son on one side, and two sons on the other. The mother of the one son claimed that the husband's estate ought to be divided equally between the two families, while the mother of the two claimed that it ought to be divided into three shares; of which she or her family should get two. The widows agreed to abide by the decision of a *panchayat* and they and the minor son signed a reference to arbitration. The award of the *panchayat* decided that the property should be divided into equal moieties. The mother of the two refused to accept the award, and the other widow sued for a half share according to the award. It was contended that the award was invalid, because the minor could not be bound by the reference or by his mother's act in agreeing to it. The learned Judges said that all acts of the guardian which were such as an infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardian. If that decision is still good law, it is sufficient for the disposal of the suit, since we see no reason to believe that the reference in this case was not for the benefit of the first respondent and was not an act which he might reasonably and prudently have done for himself. The case was cited in *Romat Kissen Sett* v. *Hurrololl Sett* (2) where the learned Judge said that, "the cases appear to show that a natural guardian has power to submit to arbitration," though the minor is of course entitled to set aside the award on coming of age on proof that it was not for his benefit, and in the cases of *Sakrappa* v. *Shivappa* (3) where a reference to arbitration was made by the

(1) (1864-65) 2 Madras High Court Reports 47. (2) (1892) 19, Calcutta, 334.
(3) (1911) 35 Bombay 153.

Illustration **B** to the section lays down, "The executor, in the exercise of his discretion, mortgages a part of the immoveable estate of the deceased. The mortgage is valid." And where the executors borrowed money to discharge debts incurred by them in the administration of the estate and gave a bond for repayment, and at the same time mortgaged all their right, title and interest in certain real estate as further security giving power to sell on default made to the mortgagee, it was held that the executors had that power and that the conveyance made in exercise of the power given is valid and operative to transfer the property to the purchaser (*Seale* v. *Brown*, I.L.R., 1 All. 710). That being so,—and this point not having been raised before,—we are of opinion that the decision of the Court below was correct and the decree passed must be confirmed. The appeal will stand rejected with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Rutledge.

1925
May 26.

PUNUSHWAMI AND ONE
v.
VEERAMUTH AND ONE.*

Guardian. Reference to arbitration by, whether binding on minor—Whether action for benefit of minor and such as the minor, if of age, would reasonably and prudently do for himself, the test applicable.

Held that when a reference to arbitration made by the guardian of a minor is shown to have been for the benefit of the minor and not an act which the minor, if of age, would not reasonably and prudently have done for himself, it would bind the minor.

Ronnat Kissen Sett v. *Hurrolall Sett*, 19 Cal., 334, *Sabrappa* v. *Shivappa*, 35 Bom., 153; *Semmahal* v. *Subrammal*, 2 Mad. H.C.R., 47—*followed*.

Bhattacharia—for the Appellants.

Aiyangar—for the Respondents.

HEALD AND RUTLEDGE, JJ.—The first respondent sued for the administration of the estate of his father Udaya Servai, who died about 1909, and for the recovery of his share which he alleged to be one-half, from appellants. He joined as one of the defendants his brother, the second respondent, whom he alleged to be entitled to the other half of the estate. He claimed that he was within limitation because he was only two years over the age of the majority, and also because he had only recently been excluded from joint enjoyment of the estate.

Appellants' defence was that two respondents were illegitimate children of Udaya Servai and that the first appellant being the only legitimate son was solely entitled to the estate. They also pleaded that in accordance with an award which was made on a

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* Civil Appeal No. 20 of 1924 against the decree of the District Court of Hanthawaddy in Civil Suit No. 48 of 1923.

father of a minor as his guardian, the award, which was impugned by the minor as unfair, was upheld on the ground that it could not be said that the agreement when it was entered into was not a fair subject of compromise of disputed and doubtful rights.

In these circumstances we hold that the award in this case was binding on the first respondent and was a bar to this suit, and we set aside the judgment and decree of the lower Court, and dismiss the suit.

The first respondent will bear the appellants' costs throughout.

FULL BENCH (CRIMINAL).

Before Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice Brown, and Mr. Justice Maung Gyi.

1925

June 1

MA E SEIN
v.
MAUNG HLA MIN.*

Burmese Buddhist Law—Minor spinster whether capable of entering into a contract of marriage without consent of guardian—Age of majority for girls.

Held, that at Burmese Buddhist Law, no minor girl under the age of twenty can contract a valid marriage without the consent or against the will of her parents or guardians, or of the relation under whose protection she is living.

Held further that where there was no valid marriage to start with, the irregular union may be converted into a valid marriage as from the time of the union, by the consent, express or implied, of the parents or guardians given to it afterwards.

King-Emperor v. *Nga Ni Ta*, U.B.R. (1902-03) I, Penal Code, 15; *King-Emperor* v. *Nga Po Saw*, U.B.R. (1897-01), 328; *Queen-Empress* v. *Nga Ne U*, S.J., 202—*followed.*

King-Emperor v. *Nga Ne*, I U.B.R. (1904-06), Penal Code, 17—*dissented from.*

* Criminal Reference No. 35 of 1925.

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Crown v. *Chan Mya*, I L.B.R. 297; *Maung Chit Pe* v. *Ma Tin*, 3 B.L.T., 43—*referred to.*

Kinwun Mingyi's Digest, II, 33; Manugye, VI, 28—*referred to.*

This was a reference made by Mr. Justice Maung Ba sitting on the Appellate Side of the High Court to a Bench or Full Bench for the reasons appearing in the order of reference reported below :—

"This is an application to revise the order of the First Additional Magistrate, Rangoon, dismissing an application for maintenance under section 488 of the Criminal Procedure Code.

Applicant Ma E Sein was about seventeen years when she eloped with the respondent Maung Hla Min, who also was about the same age. They were living in neighbouring houses in the 52nd Street, Rangoon. The boy has a widowed mother Ma Sein, who is well to do. The girl is a poor orphan and she was working in the house of Maung Gyi (D.W. 3). She apparently has only one close relation in the person of her aunt, Ma Ta. The elopement was not followed by any marriage with the consent of either Ma Ta or Ma Sein. In fact, Ma Sein has separated her son from the girl and married him to another girl. Consequently, Ma E Sein applied for maintenance as a wife and her application has been dismissed on the ground that there was no valid marriage.

Although the case is somewhat petty, yet it involved important legal questions vitally affecting the interest of those governed by the Buddhist Law. The first question is at what age minority ceases and the next is whether during minority the want of consent of parents or guardians will invalidate marriage.

Marriage is one of the matters not affected by the provisions of the Indian Majority Act (IX of 1875). In most systems of law persons below a certain age are considered incompetent to marry. In the Roman Law, males below the age of fourteen years are declared incompetent to marry. Under the English Law while the ordinary age of majority is twenty-one the age of consent to matimony is fourteen in males and twelve in females. In the Mahomedan Law puberty is presumed at the completion of fifteen years, unless there is evidence to the contrary. As a general rule a person who completes the age of fifteen years is considered without distinction of sex to be adults and *sui juris* possessed of the capacity to enter into legal transactions. Among the Hanafis and Shiahs, the children of both sex on

attaining majority are free to contract marriages without the consent of their guardians.

In Hindu Law marriage is regarded not only as a civil contract but also as a sacrament. Want of age does not render a person incompetent to marry and there is no age fixed as the age of consent for marriage. But as investiture with the sacred thread which takes place for the Brahmin, Khastriya and Vaisya ordinarily at the ages of eight, eleven and twelve years, must precede marriage, practically the limits of the marriageable ages for these classes are eight, eleven and twelve years respectively; and for the Sudra there is no limit at all. In Buddhist Law the marriageable age for both sexes may be taken as fifteen or sixteen years. The seven *Dhammathats* mentioned in Section 33 of Volume II of the Kinwun Mingyi's Digest make it the duty of the parents to give their children in marriage on their attaining the age of fifteen or sixteen years. The reason is obvious. In the *Temi Jataka*, it is said that there is no one who on attaining the age of puberty has not experienced the desire to love or to be loved or to possess that which is naturally desirable. Just as the flowers bloom in their due season, so it is natural for sentient beings to manifest their desire at the age of puberty. So if the children who have attained the age of fifteen or sixteen years fall into sin, the *Dhammathats* attach the blame to the parents. The parents are to make suitable matrimonial alliances for them. But can the children contract marriage themsleves without the consent or approval of their parents or guardians? A single *Dhammathats* mentioned in Section 35 of the Digest says, " Marriage is valid when both the contracting parties as well as their parents agree to the union, and it is invalid when one of the contracting parties does not, or both do not, desire the union, although the perents may agree to it, or when the contracting parties desire the union but their parents do not approve of it." Now in Buddhist Law, marriage is a consensual contract. In Common Law a person below eighteen is not considered as having attained the age of discretion and competent to enter into a contract. A contract by a minor is no contract at all. A contract of marriage is just as important if not more important, that an ordinary contract. An unhappy marriage is attended with serious consequences, and Youths are as a rule infatuated. So this must have been the reason why the *Dhammathats* made the approval of the parents essential. Unfortunately, in the case of boys the *Dhammathats* do not mention any age limit. In consequence, the intention of the *Dhammaa-*

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MA E SHIN v. MAUNG HLA MIN.

thats becomes defeated. As in Hidu Law the texts speak of guardianship only with reference to females. So, Heald, J., was well justified in saying that there is nothing in Buddhist Law to prevent a youth from contracting a valid marriage without his parents' consent at any time after he is physically competent for marriage (*Maung Nyein* v. *Ma Myin*, 3 U.B-R., 75). He held that such a youth can be sued for breach of promise of marriage although he is under eighteen.

As pointed out above, the *Dhammathats* speak of guardianship only with respect to females. As many as twenty *Dhammathats* cited in section 145 of the Digest lay down that although a daughter may have borne ten children after elopement her parents have still the right of giving her in marriage. But exception is made in the case of widows and divorcees and women who have attained the age of twenty as well as women who have eloped with their lovers three times. Also under certain circumstances mentioned in sections 146 and 99 the consent of the parents will be presumed. So it seems that in the case of a woman under twenty the consent either expressed or implied of the parents or guardians is necessary.

Accordingly, the Special Court in *Queen-Empress* v. *Ne U* (S. J. 202) held that at Buddhist Law a man cannot contract a valid marriage with a virgin under twenty years without her guardian's consent. In *Crown* v. *Chan Mya* (1 L.B.R., 297) a contrary view was expressed. That view was that a Burmese Buddhist minor girl could under any circumstances contract a valid marriage without the consent of the guardian. But this was an *obiter dictum*. The correctness of this view was doubted by Adamson, J.C., in *King-Emperor* v. *Ni Ta* (U.B.R., 1902-03, 15). He observed, "it appears to be the opinion the two of the Honourable Judges of the Chief Court that the test is the real intention of the parties and that if the intention is to marry, the marriage is an accomplished fact from the date of the elopement. I cannot but think that this interpretation of the law would appear to be startling to Buddhist parents and I doubt any would be found who would admit it." The Hon'ble U May Oung in his Burmese Buddhist Law at page 9 observed, "A perusal of these texts, devoid of contradictions, leave no room for doubt that the consent of parents or guardians is essential to the validity of a marriage with a minor girl and this being also the case under other systems of law, it is submitted that it should now be declared authoritatively for Burmese Buddhists."

It is also settled law that a Burman Buddhist, whether male or female, adult or minor, cannot be legally married without his or her consent or against his or her will? (*Ma Thein* v. *Ma The Hnin*, 8 L.B.R., 347).

To sum up, both in the case of boys and girls the age of consent may be taken as fifteen or sixteen years. There is no age limit for boys as regards minority, but in the case of a girl who has not been married, she is a minor up to twenty. Except in the case of widows and divorcees, there can be no valid marriage with a minor girl without the consent, expressed or implied, of her parents and guardians.

In view of the vital importance of the question and of the conflicting views of the eminent judges in the cases quoted above, I beg to refer the following question, for the decision of a Bench or a Full Bench according as the Hon'ble the Chief Justice may direct.

Except in the case of widows and divorcees can a girl under twenty years contract a valid marriage without the consent either express or implied, of the parents or guardians under Burmese Buddhist Law?"

The matter came up in due course for hearing before a Full Bench composed of Robinson, C.J., Brown and Maung Gyi, JJ., with the result as reported hereunder :—

Ba Thein (2)—for the Applicant.
Davies—for the Respondent.

ROBINSON, C.J.—The question referred for decision of a Full Bench is :—" Except in the case of widows and divorcees, can a girl under twenty years contract a valid marriage without the consent, either express or implied, of her parents or guardians under Burmese Buddhist Law?"

The question is one of very great importance, but it is not one which, to my mind, presents any real difficulty.

In the case of *Queen-Empress* v. *Nga Ne U* (1), it was held by the Special Court that by Buddhist Law

(1) S.J., 202.

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ROBINSON, C.J.

a man cannot contract a valid marriage with a minor without her guardian's consent, and that sexual intercourse with the minor without such consent is "illicit intercourse" within the meaning of section 366, Indian Penal Code. That ruling was followed in *King-Emperor* v. *Nga Po Saw* (2).

In the case of *Crown* v. *Chan Mya* (3) three questions were referred to a Full Bench:—(1) Can a Burmese Buddhist minor girl under any circumstances contract a valid marriage without the consent of he guardian? (2) If a Burmese Buddhist girl under sixteen years of age elopes with a lover of her own free will intending to cohabit with him, is the resulting sexual intercourse necessarily illicit? (3) Does section 366 of the Indian Penal Code apply to a case in which a minor girl, at the time of the kidnapping from lawful guardianship, intends to cohabit of her own free will with the kidnapper? The last of these three questions was the only one that was necessary for the decision of the appeal. Irwin, J., referring to sections 21, 22 and 23, Book VI, of the *Manugye*, held that the real test was the intention of the parties, "and that if the girl is steadfastly determined to marry her lover, and he continues of the same mind, the rights of the guardian must give way before accomplished facts." Fox, J., merely concurred; but Thirkell White, C.J., while concurring as to the answer to the third question, declined to express an opinion on the first and second questions. He said that the questions had not been fully argued, and that he would not like to commit himself to an opinion on these important questions of Buddhist Law without hearing arguments on both sides and without a full examination of all the texts bearing on the points. No reference

(2) (1897-01) 1 U.B.R. (Criminal), 328. (3) 1 (1900-01) 1 L.B.R., 297.

was made in that decision to the *Rajabala* or to section 28, Chapter VI of the *Manugye*.

In the case of *King-Emperor* v. *Nga Ni Ta* (4), Adamson, J.C., held with reference to this question of marriage, "It appears to be the opinon of two of the Honourable Judges of the Chief Court that the test is the real intention of the parties, and that if the intention is to marry, the marriage is an accomplished fact from the date of the elopement. I cannot but think that this interpretation of the law would appear to be rather startling to Buddhist parents, and I doubt whether any would be found who would admit it." He pointed out that the provision of the *Dhammathats* as regards these three elopements is obsolete and would not receive countenance at the present day.

In *King-Emperor* v. *Nga Ngè* (5), Irwin, J., as Judicial Commissioner, adhered to the view previously expressed by him in *Chan Mya's* case.

I myself in the case of *Maung Chit Pe* v. *Ma Tin* (6), dealing with the question as to whether the consent of parents is essential to the validity of the marriage of a minor who elopes, doubted the correctness of the decision in *Chan Mya's* case.

That decision is thus the only one to support that view of the question.

There are decisions to the contrary, and doubts have been thrown on the correctness of the decision in *Chan Mya's* case on two subsequent occasions.

There is no doubt that the *Dhammathats* contain a large number of texts relating to the right and duties of parents and guardians, and that the control

(4) 1 U.B.R. (1902-03), Penal Code, 15.
(5) 1, U.B.R. (1904-06), Penal Code 17. (6) (1910) 3 B.L.T. 43.

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that they exercise over minors is a distinct and marked feature of Burmese Buddhist Law; and to hold that a minor girl could, by the exercise of her unguided impulse by running away with a lover, absolutely set at naught and take no account of the control of her parents or guardians is entirely contrary to a very prominent provision of Burmese Law.

The *Dhammathats* no doubt enjoin upon parents and guardians the necessity to marry minors at the age of fifteen or sixteen so as to prevent their falling into sin, but they expressly, as it seems to me, maintain the position that even though parents or guardians do not pay any regard to the rule enjoined upon them, it is only when the girl has reached the age of twenty years that she has a right to contract a valid marriage without their consent.

In Chapter VI of section 33, Kinwun Mingyi's Digest, Vol. II, we find a passage from the *Rajabala*, which runs as follows:—"After her attaining the age of twenty years a woman may marry a man of her choice although her guardians may not approve of the marriage." The reason is that her guardians did not give her in marriage when she arrived at the marriageable age.

None of the authorities that have been quoted have referred to section 28 of Volume VI of the *Manugye*.

It deals with the case of women who are under the protection of their parents; and it provides that, "as regards the eight women above noted, if their protector do not give them in marriage to a proper person, and they shall willingly have connection with a young man, *provided they are above twenty years of age*, let them have a right to live with the man of their choice. Why is this?—because their protector watched them with out regard to their

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desires." Earlier, it lays down as follows:—"If carnal knowledge be had of any of these eight classes of women with their consent, there is no punishment in a future state. If the person under whose care they be, shall not give consent, they shall not be claimed as a wife. Why is this?—because their protector is not willing."

Having regard to these provisions, and having regard to the position accorded to parents and guardians with reference to control over the children, especially in the matter of their marriage, there can, in my opinion, be no doubt that no minor girl under the age of twenty can contract a valid marriage without the consent or against the will of her parents or guardians, or of the relation under whose protection she is living.

The 21st section shows that the parents can reclaim the daughter, and that the man with whom she had eloped, even if she had ten children by him, has no right to say that she is his wife; but it is equally clear that the consent of the parents or guardians may be implied, and the lack of it be made good by subsequent conduct. Thus in the 22nd section it provides that if a minor, who has eloped, subsequently returns to the village and lives with the man, and has children by him, openly and to the knowledge of her parents or guardians, and they do not enforce their rights of reclaiming the girl and separating her from the man without unreasonable delay, they no longer have the power of reclaiming the girl. This, no doubt, is that the consent is to be implied from their conduct, and that the consent, though subsequently given or implied, will convert the connection into a valid marriage which the Courts would, no doubt, recognize with effect from the time of that elopement. It

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may therefore be that although there was no valid marriage to start with, the connection may be converted into a valid marriage by the consent, expressed or implied, of the parents or guardians given to it afterwards.

For these reasons, I would answer the question referred in the negative.

BROWN, J.—I concur.

MAUNG GIY, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Carr.

1925

May 5.

MAUNG SHWE YÈ

v.

MAUNG PO MYA AND OTHERS.*

Burmese Buddhist Law—Inheritance—Great-grand-children whether entitled to share when in competition with children or grandchildren—Shares of grandchildren, how computed—Children who predeceased parents leaving none entitled to inherit, whether to be considered in dividing the estate into shares.

Representation is not a principle of Buddhist Law: The basic rule is that the nearer heir excludes the more remote, and that the partial representation allowed to grandchildren in competition with children is merely an exception to that general rule, and is the only exception to it.

Held that great-grandchildren, when in competition with children or grandchildren, are not entitled to any share in their great-grandparents' estate.

Held also that the grandchildren take one-fourth of that which would have been their own parent's share and that in computing what would have been their own parent's share, their parent's brother or sister who had predeceased their grandparents without leaving issue, must be left out of the reckoning.

Ma Gun Bon v. Maung Po Kywe, U.B.R. (1897-1901), 66; *Maung Po Tha Daw v. Maung Po Thon*, 1 Ran., 316—referred to.

Ma Saw Ngwe v. Ma Thein Yin, 1 L.B.R., 198; *Maung Nyo v. Ma Hl Kyu*, 2 Chan Toon's Leading Cases, 226; *Mi Kin v. Mi San Me*, 8 B.L.T., 51

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* Civil Special Second Appeal No. 6 of 1924 against the decree of the District Court of Prome in Civil Appeal No. 73 of 1923.

Po Hmau v. *Maung Tin*, 8 L.B.R., 113; *Po Sein* v. *Po Min*, 3 L.B.R., 45; *Po Zau* v. *Maung Nyo*, 7 L.B.R., 27—*followed*.

Kya Gaing—for the Appellant.

Ba Thein—for the Respondents.

CARR, J.—This was a suit for partition of the estate of U Lôn, who had six children, most of whom predeceased him. The position is as follows :—

Ma Si, who has been found to be the *orasa* died before U Lôn, leaving a daughter, Ma Aung Tin, who was the original first plaintiff. She died during the pendency of the suit and her husband and children were substituted as the first four plaintiffs.

Ma Ni had a daughter Ma Hnin Nyun. Both had died before U Lôn, Ma Hnin Nyun leaving two children—Ma Wet Kyi and Ma Ngwe Kaing—defendants 6 and 7. It is claimed that they are out-of-time great-grandchildren and therefore not entitled to share.

Ma Dun also died before U Lôn leaving two children—Ma Thè Nyun and Maung Po Htaw—defendants 2 and 3.

The fourth child, U Shwe Yè, is still alive, and is the first defendant and the present appellant.

Maung Shwe E had also died before U Lôn, leaving two children—Maung Kyaw Mya and Maung Kyaw Than—defendants 4 and 5.

Maung Shwe Nyun had also died leaving children—Maung Tha I, Ma Saw Tin and Ma Pwa Tin—plaintiffs 5, 6 and 7.

Both Courts below gave Ma Aung Tin's children an equal share with the appellant Shwe Yè. It is contended in this appeal that this is wrong. I think this contention may be dismissed at once. On the finding that Ma Aung Tin's mother, Ma Si, was the

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orasa, which finding is not now contested, Ma Aung Tin was entitled to an equal share with her uncle Shwe Ye and that share had vested in her before her death. It therefore passed undiminished to her heirs.

The next question is whether the great-grandchildren Ma Wet Kyi and Ma Ngwe Kaing are entitled to share at all. Both the Courts below gave them one-fourth of the share allotted to the other sets of grandchildren, but neither Court has given any real reason for doing so or any authority for holding that they are entitled to share at all.

This is a question on which there are few published decisions. It was touched upon in *Ma Gun Bôn* v. *Maung Po Kywe* (1) where Mr. Burgess, J.C., said at page 74—"By analogy if all the children have predeceased their parents and some of them have left issue living at the time of the death of the grandparents, then the class entitled to the inheritance is that of the grandchildren. If one of the grandchildren should have died before the grandparents leaving issues, he would have missed reaching the inheritance, and the great-grandchildren, his offspring, would not be allowed to come into competition with the inheriting class, at least on the same level."

It is to be noticed that there is here no definite decision whether great-grandchildren are entitled to inherit in competition with nearer decesndants. That question did not in fact arise in the case.

The next case is *Maung Nyo* v. *Ma Hla Kyu* (2) in which it was definitely held that great-grandchildren were not entitled to share at all in competition with grandchildren. The correctness of this decision

(1) U.B.R. (1897-01), 66. (2) 2, Chan Toon's L.C. 226.

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was somewhat strongly contested by U Tha Gywe in his Treatise on Buddhist Law, Vol. II (pages 72—77); this I pass over for the present.

The next case—and the only other one that I can find—is *Mi Kin* v. *Mi San Me* (3), in which MacColl, A.J.C., accepted and followed the decision in Maung Nyo's case (2), and held that "An out-of time granddaughter of a predeceased son cannot inherit at all in competition with a daughter."

The question was again further discussed in U Tha Gywe's Conflict of Authority in Buddhist Law (Vol. II, p. 68, *et seq.*). Here at first the learned commentator seems inclined to contest the decision, but at page 71 he finally accepts it as correct. I have read through his arguments in both books and have referred to all the important authorities cited by him. Most of these are authorities for the proposition that in certain circumstances great grandchildren are entitled to inherit. But that is not the question—which is whether they are entitled to inherit in competition with children and or grandchildren. I do not think it is necessary to discuss all these authorities in detail, but would refer to section 183 of the *Attasankhepa*. This, in the translation, reads: "If it is desired that the undivided ancestral property left by parents or grandparents should be divided, a division can be made either among sons, grandsons or great-grandsons . . ." But referring to the text I find that it would be better translated as, "Sons may divide among themselves (*khin gyin*), grandsons may divide among themselves, great grandsons may divide among themselves." Thus it is clearly no authority for the proposition that there may be division between sons and great grandsons. Indeed the section as a whole

(3) (1915) 8 B.L.T., 51.

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seems to refer more to ancestral property long left undivided than to a division on or shortly after the death of the original owner.

The question really seems to depend upon whether representation is a principle of Buddhist Law. In my order of reference in *Maung Po Thu Daw* v. *Maung Po Than* (4) I suggested a doubt whether it was. The question was not definitely decided by the Full Bench in that case, but their decision on the question raised confirms me in the view that representation is not a principle of Buddhist Law, that the basic rule is that the nearer heir excludes the more remote, and that the partial representation allowed to grandchildren in competition with children is merely an exception to that general rule, and is the only exception to it.

On that view I have no hesitation in following the decisions in the cases of *Maung Nyo* (2) and *Mi Kin* (3) and in holding that great grandchildren cannot inherit in competition with children. It follows that Ma Wet Kyi and Ma Ngwe Kaing are not entitled to inherit.

The next question is how the estate is to be shared by the remaining parties. The plaintiffs, who are now respondents, after setting out that these great grandchildren were not entitled to share, claimed that they themselves were entitled to 1½ shares out of 2¾. The basis of this claim was that Ma Aung Tin, first plaintiff, and Shwe Yè, defendant, were entitled to one share each, and that each set of grandchildren was entitled to one-fourth share. One set of grandchildren was among the plaintiffs, the other two were among the defendants. Thus the plaint claims, in effect, that the child takes four shares and

(4) (1925) 1 Rangoon, 316.

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each set of grandchildren one share. This would perhaps be more satisfactory than the actual rule, but it is not the actual rule. The *Dhammathats* quoted in section 164 of the Digest are clear that the grandchildren take one-fourth of the share of their deceased parent. As an example of the application of this rule we may take the case of two children, one of whom has predeceased the parents. Had this child been alive, his share would have been one half. His children therefore take one-eighth and the remaining seven-eighths go to the surviving child. Similarly, if out of three children one is dead leaving issue, his share is one-third and his children will take one-fourth of this, or one-twelfth, and the remaining eleven-twelfths are divided equally by the two surviving children. If two out of three are dead, both leaving issue, then each set of grandchildren takes one-twelfth and the surviving children take the remaining ten-twelfths.

This, so far as I can ascertain, is the manner in which the rule has always been applied. Instances are *Ma Saw Ngwe* v. *Ma Thein Yin* (5), *Po Sein* v. *Po Min* (6), *Po Zan* v. *Maung Nyo* (7), and *Po Hman* v. *Maung Tin* (8). I should not have thought it necessary to go into this question in such detail, had it not been that the District Judge has adopted a method of division for which there seems to be no authority at all.

A further question arises. In calculating the shares of the grandchildren are we to take into account Ma Ni, the grandmother of the two great-grandchildren whom I have held to be excluded ?

I can find no definite authority on this point. In some of the cases that I have just mentioned there

(5) (1900-1902) 1 L.B.R., 198. (6) (1905-1906) 3 L.B.R., 45.
(7) (1913-1914) 7 L.B.R., 27. (8) (1915-1916) 8 L.B.R., 113.

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had been children who had died leaving no issue and in those cases such children were always left out of account altogether. This was done tacitly and without any discussion, but it seems to be reasonable and only fair to the grandchildren. Otherwise we might have to take into account all children who had died whether in infancy or later. The case of Ma Ni, is, I think, analogous. She has left descendants, but they are not entitled to share. Her line may, therefore, for the purposes of the partition, be considered to be extinct.

In my view, therefore, we should consider that there are only five heirs and not six. On this basis the division should be as follows :—

Ma Dun's children—Ma The Nyun and Maung Po Htaw, defendants 2 and 3—are entitled to one-fourth of one-fifth, or one-twentieth, which they will share equally between themselves.

Similarly Shwe E's children—Kyaw Mya and Kyaw Than, defendants 4 and 5—are jointly entitled to one-twentieth.

And Ma Shwe Nyun's children—Tha I, Ma Saw Tin and Ma Pwa Tin, plaintiffs 5, 6 and 7—are jointly entitled to one-twentieth.

The remaining seventeen-twentieths is to be divided equally between the appellant, Shwe Yè, who will take seventeen-fortieths, and Ma Aung Tin's heirs, who will jointly take the other seventeen-fortieths.

APPELLATE CIVIL.

Before Mr. Justice Doyle.

1925
June 8.

SIVA DASS DEY
v.
ASHABI AND ONE.*

Provincial Small Cause Court Act (IX) of 1887), Section 25—Jurisdiction of the High Court to interfere with findings of facts.

The Legislature intended to confer the most ample discretion on the High Court. Section 25 of the Provincial Small Cause Court Act is very vaguely, and intentionally vaguely, worded. The phrase 'according to law' cannot be held to exclude cases in which there has been a grossly erroneous decision on fact.

Held that unless it can be shown that the decisions on fact arrived at by the trial Judge were so perverse as to lead to a conclusion that the Judge made no serious attempt to deduce them from the evidence before him, the High Court will not interfere in revision on questions of fact, under section 25 of the Provincial Small Cause Court Act. Nor will the High Court interfere in revision on the ground that there had been substantial injustice due to an erroneous decision on facts, for to do so would make it practically a Court of Appeal from the Small Cause Court.

Poona City Municipality v. Ramji Raghunnath, 21 Bom., 250—*referred to*.

Lieut.-Colonel J. G. Turner v. Jagmohan Singh, 27 All., 531; *Nathuram Shivnarayan v. Dhularam Hariram Marwadi*, 44 Bom., 292—*followed*.

Hurdutroy Nandalall v. Burma Railways Company, Limited, 7 B.L.R., 241; *Maung Ba Kin v. Maung Hpaw*, 10 B.L.R., 298; *Subramonian Chetty and others v. D. D. Coath*, 7 B.L.R., 15—*dissented from*.

N. K. Bhattachariya—for the Applicant.

Thein Maung (1)—for the Respondents.

DOYLE, J.—Siva Dass Dey sued Ashabi and Mohammed Sultan as legal representatives of Ma Sa for Rs. 470 in the Small Cause Court of Moulmein.

Ashabi, in her written statement, admitted the claim. The learned Judge of the Small Cause Court of Moulmein decided that the evidence had failed to establish the liability of Ma Sa, and, considering that Ashabi had admitted the claim in collusion

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* Civil Revision No. 16 of 1925 against the decree of the Small Cause Court of Moulmein in Civil Regular No. 723 of 1924.

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with Siva Dass Dev, opined that whatever liability there was for the money would be the liability of Mohammed Sultan personally, and dismissed the suit against both Ashabi and Mohammed Sultan.

In revision it is urged that there should have been a decree at any rate against Ashabi; that Siva Dass Dey should have been allowed to amend his plaint so as to sue Mohammed Sultan in the alternative personally; and that the evidence went to show that the estate of Ma Sa was liable.

The Advocate for the applicant has argued that, where substantial injustice is patent on the face of the record, the High Court has power, under section 25 of the Provincial Small Cause Courts Act, to go into the question of fact.

In *Subramonian Chetty and others* v. *D. D. Coath* (1), Fox, J., held, that a High Court had no jurisdiction to interfere in any case in which the decision rested solely on facts. He again affirmed this principle in *Hurdutroy Nandalall* v. *Burma Railways Company Limited* (2). This decision was followed by Bigge, J., in *Maung Ba Kin* v. *Maung Hpaw* (3). The decision in *Subramonian Chetty* v. *D. D. Coath* was based on the decision in *Poona City Municipality* v. *Ramji Raghannath* (4), where it was stated that "an error of law or procedure in the Small Cause Court confers jurisdiction upon the High Court to exercise the power committed by that section." The Judge, who laid down that principle did not in my opinion intend the principle to be exhaustive; indeed the sentences of his judgment, which immediately follow, make that clear and it will be noticed that he stated later on that, "The Legislature intended to confer the most ample

(1) (1901) 7 B.L.R., 15.
(2) (1901) 7 B.L.R., 241.
(3) (1904) 10 B.L.R., 298.
(4) (1897) 21 Bom., 250.

discretion on the High Court." This view was taken in *Nathuram Shivnarayan* v. *Dhularam Hariram Marwadi* (5), where it was held that a High Court had power in exceptional cases to interfere with decisions on questions of fact. In *Lieutenant-Colonel J. G. Turner* v. *Jagmohan Singh* (6), the Allahabad High Court, after reviewing a number of orders and judgments of the Allahabad High Court including some referred to by Mr. Justice Fox, has laid down that a High Court is not precluded from interfering in exceptional cricumstances with a decision on fact.

With all due respect it appears to me that the interpretation placed on section 25 of the Provincial Small Cause Courts Act by Fox, J., was unduly narrow. The section itself is very vaguely, and in my opinion intentionally vaguely, worded. The phrase 'according to law' cannot be held to exclude cases in which there has been a grossly erroneous decision on fact. On the other hand to say that a High Court should interfere where there has been substantial injustice due to an erroneous decision on fact would be practically to make that a High Court a Court of Appeal from the Small Cause Court, since in the majority of cases, erroneous decisions on fact essentially result in substantial injustice. It may be taken therefore that, unless it can be shown that the conclusions on fact were so perverse as to lead to a conclusion that the Judge made no serious attempt to deduce them from the evidence before him or was utterly incapable of making such a deduction, a High Court will not interfere in revision on questions of fact.

No such case has been made out in the present instance.

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(5) (1921) 45 Bom., 292. (6) (1904) 27 All., 531.

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DOYLE, J.

I cannot regard the failure of the learned Judge of the Small Cause Court, Moulmein, to suggest an alteration in the frame of the suit as a material error of law or procedure. From the books produced by the plaintiff himself, it was clear that he could have sued Mohammed Sultan in his personal capacity as well as in his representative capacity. He made no application throughout the case, although represented by a pleader, for amendment of the plaint. I do not consider, therefore, that it was necessarily the duty of the Judge to have suggested an amendment.

The application is dismissed with costs—two gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Rutledge and Mr. Justice Heald.

1925

April 22.

KALENTHER AMMAL

v.

MA MI AND ONE.*

Additional parties, Joinder of, pending appeal to Privy Council against High Court's decree remanding suit to District Court for trial on merits—High Court functus officio—High Court's powers, Civil Procedure Code, Order XLV—District Court having seizin of suit after remand.

The plaintiff, claiming to be a widow of one M deceased, brought a suit in the District Court of Pegu for the administration of M's estate. Her suit was dismissed on the ground that she had no right to sue, as, sometime prior to his death, M had divorced her. On appeal to the High Court, it was held that she had not been divorced and the suit was remanded to the District Court for disposal on the merits. Against this judgment the defendants obtained leave to appeal to the Privy Council, and thereafter the petitioner, one Halima Bibi, claiming to be a grand-daughter of M, applied to the High Court to be the added as a defendant in suit.

* Civil Miscellaneous Application No. 93 of 1924.

Held that the High Court, having passed a final order remanding the suit to the District Court, was *functus officio* and that the District Court having *seisin* of the suit had the power to add parties.

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KALENTHER AMMAL v. MA MI AND ONE.

Patel—for the Applicants.

Kalyanwala—for the Respondents.

RUTLEDGE AND HEALD, JJ.—In Suit No. 8 of 1922 of the District Court of Pegu Kalenther Ammal, as widow of one Sheik Moideen, sued for administration of Sheik Moideen's estate by the Court, and joined as defendants Ma Mi, who also claimed to be a widow of Sheik Moideen's, and Mahomed Eusoof, who claimed to be his son by another wife Ma Kin.

The District Court found that Kalenther Ammal had been divorced by Sheik Moideen, and, holding on that ground that she had no right to sue, dismissed her suit.

She appealed to this Court, which found that she had not been divorced, and remanded the case to the District Court for disposal on the merits.

Ma Mi and Mahomed Eusoof then applied to this Court for leave to appeal to the Privy Council, and leave has been granted.

Now the present petitioner Halima, who claims to be a grand-daughter of Sheik Moideen, her mother Boodima having been a daughter of his by still another wife Jooma Bibi, claims in this Court to be added as a defendant in the suit.

She applied in the District Court after the suit was remanded by this Court, but, as the records were in this Court in connection with the appeal to the Privy Council, no orders were passed on her application.

It seems clear that this Court has no power either in the proceedings in Appeal No. 74 of 1923,

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or in the proceedings on the application for permission to appeal to the Privy Council to add petitioner as a defendant in the suit.

So far as the appeal to this Court is concerned, this Court, having passed a final order remanding the case to the District Court, is *functus officio.*

So far as the appeal to the Privy Council is concerned, this Court has no powers beyond those given in Order XLV, and there is in that order no power to add parties.

The District Court has *seizin* of the case as a result of the remand by this Court, which remand is still effective, although proceedings in the suit have, by consent of the parties, been stayed, and the District Court has power to add parties.

Petitioner should, therefore, renew her application to that Court.

The application to this Court is dismissed with costs—Advocate's fee to be two gold mohurs.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Maung Ba.

1925
Apl. 27.

CHINA AND SOUTHERN BANK, LTD.
v.
TE THOE SENG.*

Money paid under mistake of fact, when recoverable—Mistake not between the parties, not a ground for recovery.

Held that money paid under a mistake of fact, arising between the person making the payment and the payee, may be recovered; but that money paid under a mistake of some fact with which the payee had nothing to do, cannot be recovered.

Kelly v. *Solari*, 9 M. & W., 54; *Townsend* v. *Crowdy*, 8 C.B. & S., 477—*distinguished.*

Chambers v. *Miller*, 32 L.J.C.P., 30—*followed.*

Clifton—for the Appellants.

Young—for the Respondent.

ROBINSON, C.J., AND MAUNG BA, J.—The suit out of which this appeal arises is founded on money had and received to plaintiff's use. In the plaint originally filed there was an allegation of negligence on the part of the defendant Bank. Defendant demanded the particulars of the alleged negligence. The plaintiff was unable to supply them, and the Court ordered that this paragraph be struck out, plaintiff reserving permission to file a plea of negligence if, after inspecting documents, he was in a position to do so. Eleven days later an amended plaint was filed and all allegations of negligence were omitted.

There is no dispute as to the facts. The plaintiff firm carries on business in Penang under the style

* Civil First Appeal No. 89 of 1924 against the decree of this Court on the Original Side in Civil Regular No. 610 of 1922.

of Ghee Seng & Co. They have a branch in Rangoon under the style of Ghee Seng Chan & Co. On the 16th July 1922, plaintiff firm in Penang received a telegram purporting to come from their Rangoon branch. It ran as follows:—"Rupees bought pay Mercantile five thousand. Advice follow letter Ghee Seng Chan." On receipt of this telegram, plaintiff assumed it came from his Rangoon branch and went to the Mercantile Bank and, showing them the telegram, desired to pay in five thousand dollars. The Bank declined to receive the money saying that they had had no instructions to do so. On the 18th of July, the Mercantile Bank received a telegram "Receive five thousand Ghee Seng & Co., China and Southern Bank." Thereupon they informed plaintiff that they had now received advice and plaintiff paid them five thousand dollars. He was given a receipt in the ordinary printed form that the Bank uses, and, in that, it is stated "For the credit of China and Southern Bank, Rangoon." It appears that one Gaw Keong Pho went to the defendant Bank and offered to sell them 5,000 dollars. He told them that he was the travelling agent of Gee Seng & Co. of Penang. They asked if he had a power-of-attorney or any documents to prove this. He said he had not. They then enquired how he would pay them 5,000 dollars and he said that Gee Seng & Co. would pay the Mercantile Bank. They then instructed the Mercantile Bank to receive the money. After receiving advice from the Mercantile Bank that the money had been paid in, they paid Gaw Keong Pho the equivalent in Rupees. Subsequently plaintiffs enquired from their Rangoon branch and found that they had not sent this telegram. Gaw Keong Pho was searched for, but had, of course, disappeared.

It is obvious that he committed a fraud upon the defendant Bank and upon the plaintiffs.

The learned Judge in the Court below treated the case as being one raising the question as to which of two innocent parties was to suffer by this fraud. He held that plaintiffs had not done or omitted to do anything that they ought to have done which made the success of the fraud more easy, but that the defendant Bank had not made enquiries and had so conduced to the fraud, and he, therefore, held that plaintiff was entitled to recover his money back and that the defendant Bank was bound to restore it. He further held that even apart from that the money was paid to the Mercantile Bank by the plaintiff for his own use, and that the defendant Bank had received that money on account of the plaintiff firm and, through no fault of the plaintiff, had paid it away wrongly to someone else.

The appeal has been argued before us solely on the question as to whether this was money paid by mistake, and reliance is placed on the case of *Kelly* v. *Solari* (1). In that case Parke, J, said: "If, indeed, the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

(1) 9 M. & W., 54.

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We were also referred to the dictum of Williams, J. in *Townsend* v. *Crowdy* (2): "No doubt, at one time the rule, that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover it back had been guilty of no laches. But since *Kelly* v. *Solari* (1) it has been esblished that it is not enough that the party had the means of learning the truth, if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry." Now, it cannot be said in this case that plaintiff intended to waive all inquiry or intended that defendant Bank was to receive the money at all events, and, if the rule stopped there, plaintiff would be entitled to a decision in his favour. However, there is a further fact to be weighed in deciding these cases, and that is, that the mistake must be one as between the person paying and the person receiving the money and as to some fact affecting the right of the payee to receive the money.

In *Chambers* v. *Miller* (3), this principle is dealt with by Erle, C.J. It was a case in which a person presented a cheque for payment at a Bank. The Cashier paid the money, but, while the plaintiff was counting the money, he discovered that their client's account was overdrawn and demanded the money back. On plaintiff's refusing, the money was taken forcibly from him and a suit was brought for assault and trespass for taking the money by force, and it was urged that plaintiff was entitled to recover it. Erle, C.J., said: "It is true that there was a mistake in cashing the cheque at all, but that was a mistake as between the defendants and their customer. As between the plaintiff and the defendants there was

(2) 8 C.B. & S., 477. (3) 32 L.J.C.P., 30.

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no mistake at all; the plaintiff asked the defendants to cash the cheque, and they did so. But then the defendants say that by reason of this mistake they had a right to revoke the transaction; but it is clear to me that the money having once passed, it is, notwithstanding a mistake of this kind, a perfectly good payment and irrevocable. As to the case of *Kelly* v. *Solari* (1) and others of that class which have been cited, there the money was paid to a party who had no right to it whatever, and the mistake was between the parties themselves as to the money being due. Here the money was due, and as between the defendants and the plaintiff there was no manner of mistake whatsoever, and I am quite clear that, under these circumstances, the defendants could never have recovered back the money."

Williams, J., in his judgment said: "It may be that if he had been aware of all the facts of which he afterwards became aware he would not have paid the money, but you cannot recover back money because you have paid it in ignorance of some fact which, had you known it, would have influenced you not to pay it; that fact being one with which the payee has nothing to do."

The fact in this case is the fact that the telegram received by plaintiff on the 16th of July was a false telegram and did not come from his Rangoon branch. Plaintiff was asked, "for what purpose did you pay the money in;" and his answer was, "I paid the money in because on the 16th I received a telegram saying, 'Rupees bought by Gee Seng Chan'." Again he was asked, "When you paid the money into the Mercantile Bank, did you give any instructions?" And he replied, "No, because I paid it in, in accordance with the instructions I received by telegram." It is

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no doubt true that believing that this telegram came from his Rangoon branch he paid in the money believing that the equivalent in Rupees would be paid to his Rangoon branch. But the mistake of fact, on which he relies, was not a mistake as between him and the defendant Bank who received the money. The defendant Bank had nothing whatever to do with the fact that that telegram was a false telegram. The Bank was merely conducting an ordinary banking transaction with a stranger. All that they were concerned with was that they should get the dollars. They were told that plaintiff would pay the money in; they instructed the Mercantile Bank to collect the money; the plaintiff did pay the money in, and they thereupon carried through an ordinary business transaction. Under these circumstances, the rule laid down in *Kelly* v. *Solari* (1) does not apply. The money was not had and received to the plaintiffs' use, and, in our opinion, the decision of the Court below was wrong, and must be reversed. The appeal will be accepted and the plaintiffs' suit dismissed with costs in both Courts.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt, Chief Justice, and Mr. Justice Maung Ba.

1925
May 5.

MAUNG BA THEIN
v.
MA THAN MYINT AND OTHERS.*

Plaint, Amendment of—Alteration of claim on appeal from kittima to appatthitta adoption, whether and when permissible.

The plaintiff claimed to be a *kittima* adopted child of one L. deceased, and in his plaint an alternative cause of action on an *appatthitta* adoption was pleaded. On the suit being dismissed, leave was sought on appeal to amend the plaint by the addition of an alternative claim on an *appatthitta* adoption.

Held, that while the right of amendment of pleadings has been largely increased in the present Civil Procedure Code—and amendment is now much more freely granted—it remains a matter for discretion, and that discretion must be exercised with regard to all the facts and circumstances of the case.

Held further, that the causes of action on which the claims to be a *Kittima* son and an *Appatthitta* son are based being widely different, the Court of Appeal by allowing the amendment would be practically ordering a new suit to be commenced afresh and that should not be permitted.

Ma Sa Yi v. Ma Mi Gale, 7 B.L.R., 295; *Maung Aing v. Ma Kin*, 1 Ch. Toon's L.C., 157—*referred to.*

Maung Tha So v. Lu Pe, 11 B.L.T., 246; *Shwe Kin v. Maung Sin*, 10 L.B.R. 376—*followed.*

Maung Gyi v. Maung Aung Pyo, 2 Ran., 661—*distinguished.*

Kyaw Din—for Appellant.

Higinbotham—for Respondents.

ROBINSON, C.J., AND MAUNG BA, J.—The plaintiff sued claiming to be the *Kittima* adopted son of U Myat San and Daw Lay. He prayed that the estate be administered under the orders of the Court. On three occasions in the plaint, he set out the fact of a *Kittima* adoption. There was no alternative prayer made as an *Appathitta* son. The defendants also relied on a *Kittima* adoption.

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* Civil First Appeal No. 156 of 1924 against the decree of the Original Side of this Court in Civil Regular No. 423 of 1923.

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ROBINSON, C.J., AND MAUNG BA, J.

Two issues were drawn, namely :—

(i) Was the plaintiff the *Kittima* son of U Myat San and Daw Lay, or Daw Lay alone ?

and,

(ii) If the first issue is decided in the affirmative, was the first defendant the *Kittima* daughter of U Myat San and Daw Lay, and were the second and third defendants *Kittima* son and daughter respectively of Daw Lay ?

The learned Judge in the Court below held that the plaintiff had failed to prove the *Kittima* adoption and, therefore, did not consider it necessary to decide the second issue.

In this appeal, it is admitted that it is impossible to contest the finding of the Court below that the plaintiff was not the *Kittima* son he claimed to be ; but it is sought to obtain leave to amend the plaint by inserting an alternative claim as an *Appathitta* son, and we have heard counsel, in the first instance, on the question whether such an amendment can be allowed at this stage.

We have been referred to a number of authorities on the matter.

In the case of *Maung Aing* v. *Ma Kin* (1), the Judicial Commissioner of Upper Burma expressed an opinion that such a procedure was questionable. It was not, however, necessary in that case to decide the point.

In *Ma Sa Yi* v. *Ma Me Gale* (2), Mr. Justice Birks did not decide the point, because, even if the plaintiff established her position as an *Appathitta* daughter, she was not entitled to any share. Mr. Justice Fox laid down in that case that the plaintiff made no alternative claim upon the basis of her being an *Appathitta* daughter, and that, consequently, he

(1) I Chan Toon's Leading Cases, page 157.
(2) VII Burma Law Reports, page 295.

did not think it necessary to consider what her rights to share in the inheritance possibly might be, if she had made such a claim. The Court was clearly opposed to allowing any amendment.

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In the case of *Maung Tha So* v. *Lu Pe* (3), the late Sir Maung Kin definitely held that a plaintiff who sued as a *Kittima* son, but made no alternative claim as an *Appathitta*, cannot be allowed to make the alternative claim for a first time in appeal.

That decision was followed by a Bench of the late Chief Court in the case of *Shwe Kin* v. *Maung Sin* (4). In that case the appellant's Counsel, who appeared at the hearing of the appeal, asked to be allowed to make a claim as the children of an *Appathitta* daughter; and the learned Judge, after referring to the case last cited, said that he had no reason to change his views on that point. Mr. Justice Rigg must be presumed to have concurred in this view.

We were next referred to a single Judge judgment by Lentaigne, J., in *Maung Gyi* v. *Maung Aung Pyo* (5), in which the plaintiff claimed to be entitled to the estate as a cousin and the nearest surviving relation of one Ma Pu. The defendant, who was a more distant relation, contended that he was the *Kittima* adopted son of Ma Pu. The learned Judge said:

> "The learned District Judge has, however, overlooked the fact that Maung Gyi is a defendant, and that in that case it is not a question of altering the cause of action in the suit. The cause of action of the plaintiff-respondent remains the same whether the defence is based

(3) XI Burma Law Times, page 245.
(4) X Lower Burma Rulings page 376.
(5) Indian Law Reports, II Rangoon, pages 661 and 669.

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on a claim to a *Kittima* adoption or to an *Appathitta* adoption, and the question which the Court has to decide is whether the plaintiff is entitled to relief against the defendant. Even on the admissions of the plaintiff in his evidence in this case, it is apparent the plaintiff had in effect recognized Maung Gyi as an heir of Ma Pu after her death and had consented to Maung Gyi incurring all the funeral expenses and mortgaging the house if necessary for that purpose. It is clear, therefore, that it would be most inequitable to allow the plaintiff to take the whole estate and to deprive the defendant of his right as heir which is shown to have been recognized even on the admissions of the plaintiff in addition to depriving the defendant of all rights to reimbursement of the funeral expenses, etc."

He draws a distinction between the case of a plaintiff being allowed, at the last moment, to amend his plaint, and a defendant being allowed to amend his written statement. He also found that there were special circumstances in that case, which made it equitable to allow the amendment prayed for. That case is clearly distinguishable from the present one.

It has been often laid down that the plaintiff must be confined to the case that he sets up in his pleadings, or to a case which is consistent with those pleadings. While the right of amendment has been largely increased in the new Code—and amendment is now much more freely granted—it remains a matter for discretion, and that discretion must be exercised with regard to all the facts and circumstances of the case.

In this case, the plaintiff deliberately chose to take his stand on the allegation that he was the *Kittima*

adopted son. He made no effort to set up any other claim, and he claimed to be entitled to the whole of the estate. Having gone to trial on that issue, and there being no question raised of an *Appathitta* adoption, the cross-examination of the witnesses for the plaintiff and examination of the witnesses for the defendants were confined to that claim.

Moreover, it is established—and admitted—that there were no special circumstances in that case whatsoever; and, if we were to allow an amendment, and remand the case to the Court of first instance, we should practically be ordering a new suit to be commenced afresh and tried from the beginning.

There is ample authority for holding that the causes of action, on which the claims to be a *Kittima* or an *Appathitta* son are based, are widely different. Different considerations govern the question of these two distinct forms of adoption. We should not only be allowing the plaintiff, who has deliberately chosen his line of attack to alter his claim to one of a different character, but we should be allowing him to do so as a last hope, when he has entirely failed to establish the case with which he came to Court.

In our opinion, therefore, we should not permit the plaintiff to amend his pleadings now.

This appeal, therefore, fails; the decree of the Court below will be confirmed, and the appeal dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

1925
May 7.

MAUNG THAN

v.

ZAINAT BIBI AND ONE.*

Civil Procedure Code, Order XLI, Rule 19, Mistake of an advocate or his clerk, not sufficient cause within the meaning of—Exercise of inherent power of Court to restore even though sufficient cause not shown, a matter of discretion.

The laches of an advocate or the careless mistake of his clerk is not sufficient cause for restoration of an appeal dismissed for default nor is it a good ground for the exercise of the Court's inherent power to restore.

Mussamat Gauran v. *Brij Raj Saran*, Punjab Record LIV, 132—*referred to*.

San Wa—for Petitioner.
Litter—for Respondents.

PRATT, J.—Applicant seeks to have his revisional application, which was dismissed for default of appearance, restored under Order XLI, Rule 19.

Counsel's explanation of his failure to appear on the day fixed for hearing is that his clerk after examining the cause list for the week made a mistake and informed him that the case was fixed for hearing before the bench on the 17th or 18th.

Counsel went to Court to argue the case on the 17th and found that it had been heard *ex parte* on the previous day.

An examination of the cause lists for the week in question shows that the case was on the single Judge board fixed for the 16th.

There was a bench board fixed for the 17th and 18th.

It is hard *primâ facie* to understand how the clerk could have made the mistake, he is alleged to

* Civil Revision No. 15 of 1925.

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MAUNG THAN v. ZAINAT BIBI AND ONE.

PRATT, J.

have done, and in any case the revision application was not a bench matter and counsel should have known there was something suspicious, when his clerk informed him the case was down for hearing before a bench.

The Punjab case of *Mussamat Gauran* v. *Brij Raj Saran* (1) does not lay down that the mistake of an advocate is sufficient cause within the meaning of Rule 19 of Order XLI, but a single Judge there held that he had a discretion to restore an appeal where a case was made out even though that case did not amount to sufficient cause.

Apparently the Judge was of opinion that the case was one, where he was justified in using his inherent power of restoration.

The laches of an advocate or the careless mistake of his clerk is not sufficient cause for restoration of an appeal dismissed for fault.

I do not consider on the facts the present is a case in which good ground has been made out for the exercise of its inherent power by the Court.

The application is dismissed with costs—Advocate's fee one gold mohur.

(1) Punjab Record LIV, 132.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Rutledge.

1925
May 11.

MA MÈ MYA

v.

MA MIN ZAN.*

Remand, An order of, when appealable—Order made under Order XLI, Rule 23, of the Civil Procedure Code.

Held, that under Order XLIII, Rule 1 (u), of the Civil Procedure Code a right of appeal exists against an order of remand only if the order is made under Order XLI, Rule 23, that is to say when the trial Court has disposed of the suit on a preliminary point.

Ma E Hmyin v. *Ba Maung*, 2 Ran. 123—*referred to.*

R. M. Sen—for the Appellant.

D. Dutt—for the Respondent.

HEALD, J.—Appellant, claiming to be adoptive daughter of Nga Le and his first wife Ma Po, sued respondent who is Nga Le's second wife, to recover the share of the jointly acquired property of the marriage of Nga Le and Ma Po to which under Burmese Buddhist law she became entitled on Nga Le's death. Respondent has a minor son by Nga Le who was not made a party to the suit.

The trial Court gave appellant a decree for a five-eighths share of the property.

Respondent appealed and one of her grounds of appeal was that her son by Nga Le was a necessary party.

The lower Appellate Court, holding that the son was a necessary party, set aside the judgment and decree of the trial Court and remanded the case for a fresh trial with the son added as a defendant.

* Civil Miscellaneous Appeal No. 7 of 1925 against the order of the District Court of Henzada in Civil Appeal No. 74 of 1924.

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MA MÈ MYA v. MA MIN ZAN.

HEALD AND RUTLEDGE, JJ.

Appellant appeals, but I do not think that any appeal lies. Order XLIII, Rule 1 (*u*), gives a right of appeal against an order under Order XLI, Rule 23, but that rule applies only when the trial Court has disposed of the suit on a preliminary point. It is impossible to say that the lower Court in this case disposed of the suit on a preliminary point, and so neither Order XLI, Rule 23, nor Order XLIII, Rule 1 (*u*), applies.

I would therefore dismiss the appeal on this ground, but I would add that although on the death of Nga Le, his son by respondent was not one of his heirs, nevertheless since he had become an heir by reason of the re-marriage of his mother before the institution of the suit, I think that he was a proper party.

I would also add that the learned Judge in the lower Appellate Court has evidently read the judgment in the case of *Ma E Hmyin* v. *Ba Maung* (1) perfunctorily, and has failed to understand it.

I would dismiss the appeal with costs—Advocate's fee to be three gold mohurs.

RUTLEDGE, J.—I concur.

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(1) II Rangoon, 123.

APPELLATE CIVIL.

Before Mr. Justice Das.

1925
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June 2.

MAUNG PO TOKE
v.
MAUNG PO GYI.*

Provincial Insolvency Act (III of 1922), Section 28 (2)—Discharge, refusal of, whether terminating the proceedings.

Held that when the Court under provision of section 42 of the Provincial Insolvency Act refused the discharge of an insolvent, the proceedings had terminated as far as the Court was concerned; and that section 28 (2) of the Act would not be a bar to an application in execution.

Leong—for the Appellant.

Ray—for the Respondent.

DAS, J.—In this case one Maung Po Gyi presented an application for adjudication as an insolvent under the Provincial Insolvency Act, and he was adjudicated. His estate was vested in the hands of the Receiver; the Receiver declared a final dividend, and the estate was wound up as far as the Court was concerned. Maung Po Gyi then applied for his discharge, but his discharge was refused as his estate was not sufficient to pay eight annas in the rupee. One of his creditors, Maung Po Toke, then applied for his arrest in execution of the decree obtained by him against Maung Po Gyi. This application was resisted by Maung Po Gyi, on the ground that he was not liable to be arrested without the leave of the Court.

Mr. Ray, who appears for the insolvent, argues that under section 28 (2) of the Provincial Insolvency Act the creditor cannot commence any legal proceedings against the insolvent without the leave of the Court. He argues that an application for the arrest of an insolvent is "commencing a legal proceeding

* Civil Second Appeal No. 52 of 1925 against the decree of the District Court of Bassein in Civil Miscellaneous Appeal No. 95 of 1924.

against the insolvent," and that, as no leave of the Court had been obtained before the application was made, the application must be dismissed. Mr. Ray cited before me certain authorities to show that an application for the arrest of an insolvent is "commencing a legal proceeding"; but section 28 (2) provides that nothing should be done against the property of the insolvent or against the insolvent without the leave of the Court during the pendency of the insolvency proceeding.

The main question which has to be decided now is whether the insolvency proceeding is still pending before any Court.

I am of opinion that there is no proceeding pending before any Court now. As far as the Court was concerned the proceedings terminated when the application of the insolvent for the discharge was refused. There is nothing further to be done by the Court as far as the insolvent is concerned.

Section 41 (2) of the Provincial Insolvency Act provides that the Court may refuse an absolute order of discharge; and section 42 provides that the Court shall refuse an absolute order of discharge on proof of certain facts mentioned in that section, one of the facts being that the insolvent's assets are not of value equal to eight annas in the rupee.

The Court under the provisions of section 42 refused the discharge of the insolvent, and, as far as that Court was concerned, the proceedings had terminated. I am therefore of opinion that the insolvent is liable to be arrested in execution of any decree, and that the orders of the lower Court are wrong.

I therefore set aside the orders of both the lower Courts, and direct that the matter be heard on its merits by the Court of first instance. The Appellant will get his costs in all Courts.

PRIVY COUNCIL.

P.C.

1925.
June 30.

MAUNG BYA AND ONE
v.
MAUNG KYI NYO AND OTHERS.*

Riparian owner—Watercourse—Interference by one riparian owner with the flow of a watercourse, causing damage to another riparian owner by flooding his land—An artificial watercourse when attached with the incidents of a natural stream—Right of owner of.

The law applicable in Burma to the flow of and flooding by fresh water rivers or watercourses, whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is the same as that in England.

A watercourse originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream.

The appellants were owners of paddy lands bounded on certain sides by a watercourse which had been made by deepening and widening an ancient natural watercourse. The respondents, whose paddy lands also abutted on the watercourse, had stopped up by a bund the outfall of the watercourse, by which means the water of the watercourse, having been denied escape at the proper place, was ponded up, flowed back and flooded the appellants' lands and caused them considerable damage. It was found that the respondents' object in erecting the bund was to protect their own lands from the inflow of the access of some salt water from the sea at flood-tide.

Held, that the respondents were liable to the appellants for the damage caused.

Bailey & Co. v. *Clark, Son and Morland*, (1902) 1 Ch., 649; *Bickett* v. *Morris* (1866) L.R., H.L., 47; *Holker* v. *Porritt*, (1873) L.R., 8 Ex., 107; *Kensit* v. *Great Eastern Railway Co.*, (1884); 27 Ch. D., 122, 134; *Menzies* v. *Breadalbane (Earl of)*, (1828), 3 Bligh N.S. 414; *Nield* v. *The London & North-Western Railway Co.* (1874) L.R. 10 Ex. 41; *Orr Ewing* v. *Colquhoun*, (1877) 2 Appeal Cases, 839; *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, (1878) 4 Appeal Cases 121; *Sutcliffe* v. *Booth*, (1863) 32 L. J., Q. B., 136; *The King* v. *The Commissioners of Sewers for Pagham*, (1828) 8 B. & C., 355; *Whaley* v. *The Lancashire & Yorkshire Railway Company*, (1884) 13 Q.B.D., 131—*referred to.*

This was an appeal against the decree of the late Chief Court of Lower Burma (Maung Kin and Duckworth, JJ.) passed on the 31st May 1921 reversing the decree of the District Court of

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* PRESENT—LORD ATKINSON, LORD SHAW and LORD DARLING.

Pyapôn (U Po Bye) dated the 27th September 1919.

The appellants instituted their suit in the District Court for the recovery of Rs. 13,448 by way of damages upon the allegation that owing to the wrongful action of the respondents in erecting a bund across a watercourse the natural flow of water in the watercourse had been interfered with and the appellants' lands had been thereby flooded with the result that there had been a decrease in the appellants' crops for that season from 17,300 baskets of paddy to 3,867 baskets. Both the parties had paddy lands abutting on the watercourse, those of the appellants' being the higher and of the respondents the lower lands. It was alleged in the plaint that the watercourse was in reality a canal originally dug by the Government to connect two *chaungs* one of which opened into the sea, but as to this no evidence was adduced at all. The respondents admitted erecting the bund, but contended that the canal an was not made by the Government, but was the result of certain burrow pits dug by the Public Works Department at the time of their constructing a public road. They also pleaded that the bund was built by them for the purpose of preventing the access to their lands of salt water from the sea at flood-tide. On the evidence it was found that the canal was an ancient natural watercourse that had been subsequently widened and deepened. The District Court found for the appellants and gave them a decree for Rs. 8,821 against which the respondents having appealed to the Chief Court the trial Court's decree was reversed and the appellants' suit was dismissed.

1925 *May* 8, 11 *and* 22.—*Hon'ble Geoffrey Lawrence, K.C., with Beesly*—for the Appellants.

Harvey, K.C., and Leach—for the Respondents.

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MAUNG BYA AND ONE v. MAUNG KYI NYO AND OTHERS.

1925, *June* 30.—Their Lordships' judgment was delivered by—

LORD ATKINSON.—This is an appeal from a judgment of the Chief Court of Lower Burma (Maung Kin and Duckworth, JJ) dated 31st May, 1921, allowing the appeal of the respondents against a Decree of the District Court of Pyapôn (Po Bye, District Judge) dated 27th September, 1919, by which the said District Judge ordered the respondents to pay the appellants the sum of Rs. 8,821—48 by way of damages and the costs of the suit.

The appellants in the second paragraph of their case allege that the question raised is whether in Burma a lower agricultural owner is liable to compensate a higher agricultural owner for damage to crops by inundation caused by the blocking of a canal running through the lands of the lower owner by which the water would otherwise have been drained from the land of the higher owner.

In a sense, but only in a limited sense, is that statement accurate. Save in the second and third of the reasons for their appeal, it is put forward that the law applicable in Lower Burma to the flow of and flooding by fresh-water rivers or watercourses, whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is different from the law as applied to similar subjects in England. A little consideration of the two cases cited will show that there is no conflict between the two systems of law, and it was not contended in argument on the hearing of the appeal that the general principles of the laws of England touching the matters above mentioned did not apply to Lower Burma.

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MAUNG BYA AND ONE *v.* MAUNG KYI NYO AND OTHERS.

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The action out of which the appeal has arisen was brought by the two appellants (who are husband and wife) in the District Court of Pyapôn, Lower Burma, to recover damages amounting to Rs. 13,448 for the wrongful flooding by the acts and procurement of the respondents of a large tract of paddy lands 68,541 acres in extent, belonging to the appellants, whereby the productivity of these lands was, in the season in which the acts were done, so reduced that they only yielded 3,867 baskets of paddy instead of their normal yield of about 17,300. The District Judge decided in favour of the appellants and awarded them Rs. 8,821—48 damages. The Chief Court on appeal reversed the decree of the District Judge, and on grounds which appear to the Board strange, and are indeed unsound, decided in the respondents' favour.

Several maps of the locality were given in evidence; the two most intelligible and useful were the first, a map marked exhibit A, and the second, dated in the year 1906-7, described as exhibit 2A. With almost perverted ingenuity the draftsman of these and, indeed, of many other maps, has omitted to place upon the face of them any indication of the points of the compass, so that in dealing with them one is obliged to use the words left and right, and top and bottom of the maps in order to endeavour to fix any point or object. A study of these two maps, however, enables one to get an idea of the terrain, especially as the map of 1906 represents what was the nature of the tract of country with which the case is conversant before any of the works were executed, the misuse of which is alleged to have caused the flooding, and as the second map, exhibit A, shows what were the features of that tract after these works had been executed. The map of 1906-7

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purports to be a plan 126 of Sakangyi Circle, Bogale Township. It corresponded closely with the map, exhibit A.

Many rivulets or watercourses are depicted upon it. They correspond with those depicted upon exhibit A. The main difference between them is that on the latter a prolongation of the watercourse from Singu *Chaung* is to be found which is absent from 2A of 1906-7.

The watercourse, styled extravagantly the canal, represented on A and lettered A, B, C, D, G, H, emptying into the sea creek at A is precisely the same watercourse as is represented on the map of 1906-7, coming from Singu *Chaung* and debouching into the same sea creek at the same place. No doubt the so-called canal is represented as being something broader than the corresponding stretch of watercourse on the map of 1906, but the fact of vital importance is that all the rivulets or watercourses are depicted as of the same width and kind, and resemble each other in all respects. There could be no object in depicting on this map a watercourse as existing where none, in fact, existed when the map was made. The map therefore absolutely refutes the contention put forward with some hardihood on behalf of the respondents, that before the canal was made its site was a mere depression in the earth surface through which no stream ran ; but in which, after heavy rain, stagnant water for a time accumulated. Now what was done in 1913-14 was, in their Lordships' view, the widening a little, and deepening a little, and possibly trimming the banks a little, of an existing ancient fresh-water natural watercourse, not in their view the making by excavation and such work of a watercourse, styled a canal, where none such theretofore existed.

The lands of the first respondent lie to the left hand side of the map, between the lands of the appellant and the sea creek Kyonkan *Chaung*. On the map exhibit A they are numbered 17, 18, 30, 31, 32. The other respondents are merely cultivators in the village of Kamakalu. The lands of the appellants are comprised in three *kwins* lying to the right of the first respondent's lands and named respectively Kasaung Ngotto (both marked on exhibit A), and Sakangyi South and Kasaung Ngotto (both marked on map **C**). They are numbered separately 1—14 on map marked B. In addition to the refutation of the respondents' suggestion as to there never having been formerly a rivulet or watercourse where the canal exists now, one finds that several witnesses depose to there having been a small *Yo* where the bridge was afterwards erected, that a jungle log was placed across the *Yo* before the bridge was built, which certainly suggests to their Lordships that this log was designed to fulfil the function of stepping stones to enable people to cross the stream, possibly dry-shodded and in safety.

In the present case the early history of this *locus in quo*, this large tract of paddy land intersected with rivulets of water, large or small, is very vague. The evidence as to what were the rights and obligations which the inhabitants owed to each other in reference to these watercourses, the local law as to their regulation, their enjoyment and protection, is so confused and contradictory that it has occurred to the Board that it would possibly be better to reverse the usual order of procedure and, before dealing with the evidence of the witnesses, the facts proved, and the rulings of the Judges, to demonstrate, by reference to four or five well-known English cases, what the well-established law is touching the flow of

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and flooding by rivers and watercourses, the diminution of their currents or the diversion of their course, the trespass upon their beds, the incursion of the sea upon one's land and the measures the owner may take to protect himself, and then by applying a coherent and consistent body of principles to the facts proved, thus endeavouring to solve in harmony with English law the issues raised, considering any local law which may modify the English law.

The first of these cases is *Bickett* v. *Morris*, L.R. 1 H.L. (47). It deals with trespass on the alveus or bed of a fresh-water watercourse.

The appellant obtained, consideration of £ 10 paid by him, permission from a riparian owner on the river Kilmarnock, in Ayrshire, to extend a certain wall then standing on the respondents' premises on to the alveus of the river as far as was indicated by a red line drawn on an identified ordnance map. The appellant proceeded to build the wall, but, as the respondents alleged, not in the direction indicated. The respondents accordingly applied for an interdict against him, and brought an action for a declaration that the appellant had no right to erect buildings on the solum of the river beyond the red line aforesaid. Lord Cranworth, in delivering judgment, dealt at length with the legal points raised in the discussion. At page 58 of the report he said :—

"By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *primâ facie* owner of the soil of the alveus or bed of the river *ad medium filum aquæ*. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus, each of them, up to what was the *medium filum aquæ*, in

the same way as they were entitled to the adjoining land. The appellant contended that as a consequence of this right every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the alveus so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think that is a true exposition of the law.

Lord Cranworth then dealt with the difficulty, almost the impossibility, of determining in anticipation what damage may result in flood time by the erection of buildings on the alveus of a stream, and speaking of the riparian proprietors, put their case succinctly in these words:—

"They are entitled to say, 'We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.' This is a plain, intelligible rule, easily, understood and easily followed, and from which I think your Lordships ought not to allow any departure."

Lord Westbury, at page 61 of the report, thus expresses himself :—

"When, however, it is said that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow that that property is capable of being used in the ordinary way, in which so much land uncovered with water might be used ; but it must be used in such a manner as not to affect the interest of riparian proprietors of the stream. Now the interest of a riparian proprietor in the stream is not only to the extent of preventing it being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possible be attended with damage at a future period to another proprietor."

So much as to interference with the alveus which is stated in the head note of this case to be *sacred.*

In *Menzies* v. *Breadalbane (Earl of)*, 3 *Bligh* N.S. 414, it was held that a proprietor on the bank of a river, having commenced the building of a mound, which, according to the opinion and report of an engineer, would, if completed, in times of ordinary flood throw the waters of the river on to

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the grounds of a proprietor on the opposite bank so as to overflow and injure them, should be restrained by perpetual interdict from the further erection of any bulwark or other work which might have the effect of diverting the stream of the river in time of floods, *i.e.*, ordinary flood, from its accustomed course and throwing the same upon the lands of the appellant. Lord Eldon, in delivering the judgment of the House (at page 418), said :—

"It is unnecessary to trouble your Lordships with any observations on the law of England . . . because it is clear beyond a possibility of doubt that by the law of England such an operation" (*i.e.*, as that complained of) "could not be carried on . . ."

At p. 419 he then said :—

"But let us see what is said on this subject by the institutional writers on the law of Scotland."

He then quotes with approval the following passage from Erskine's Institutes :—

"When a river threatens an alteration of the present channel by which damage may arise to the proprietor of the adjacent or opposite ground, it is lawful for him to build a bulwark *ripæ muniendæ causa* to prevent the loss of ground that is threatened by that encroachment."

Lord Eldon then proceeds :—

"so that the proprietor whose lands are threatend to be washed away, may, for the purpose of protecting his own property in a case of that description, raise a bank for his own security ; but this bulwark must be so executed as to prejudice neither the navigation nor the grounds on the opposite of the river."

This right of navigation, however, is not a right of property. It is simple a right of way which must not be interfered with. (*Orr Ewing* v. *Colquhoun*, 2 App. Cas, 839, 846.)

In *Nield* v. *The London and North-Western Railway Company*, L.R. 10, Ex. 4, the defendants owned a canal which was threatened with an overflow into it of flood water from a neighbouring

river, and, fearing damages to their premises situated on the banks of the canal, placed across the canal some planks rising up higher than the level of the water in the canal, which, being obstructed when the flood increased, rose till it flooded the plaintiff's premises. In an action brought by the plaintiff to recover damages for this injury, it was held that the defendants were not liable on the ground that they had not brought on to the plaintiff's premises the water which did the injury, and that there was no duty on the owners of a canal analogous to that resting on the owners of a natural watercourse not to impede the flow of the water down it.

So much as regards fresh-water streams. As regards the right of an owner of land whose land is exposed to the inroads of the sea, the case of *The King* v. *The Commissioners of Sewers for Pagham*, 8 B. & C., 355, many times approved of, is a distinct authority. In delivering his judgment that most able and learned Judge, Bayley, J., stated the rule of law in these words :—

"Every land owner exposed to an inroad of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose, and the Commissioners (*i.e.*, the defendants) may erect such defences as are necessary for the land entrusted to their superintendence. If, indeed, they make unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment for an abuse of the powers vested in them. But if they act *bonâ fide*, doing no more than they honestly think necessary for the protection of the level (*i.e.* the land they superintend) their acts are justifiable, and those who sustain damage therefrom must protect themselves."

The last English case necessary to refer to on this subject is that of *Whaley* v. *The Lancashire and Yorkshire Railway Company*, 13 Q.B.D., 131. It is

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somewhat peculiar in its features. The defendants were proprietors of a railway which ran along from east to west over a flat country on a low embankment. A ditch ran along on each side of this embankment for the purpose of draining the railway. The surrounding land sloped from south-east to north-west, so that the land on the north-west side of the railway embankment, where the damage occurred, was at a lower level than on the south-east side of the embankment. The plaintiff was a farmer occupying lands on the north-west side, the lower side of the railway, but separated from it by other lands belonging to other persons. By reason of an unprecedented rainfall a quantity of water which accumulated on the south-eastern side of the embankment, was dammed up against it, and ultimately rose to such a height as to expose the embankment to danger. This water, it was apparently considered, might possibly have percolated through the embankment, and in no sense did the Company, as did the defendant in *Rylands* v. *Fletcher*, L.R. 3 H.L., 330, bring the water upon or up to the Company's lands, but when the water had risen to such a height that the defendants thought it was necessary for the protection of their embankment, they caused trenches to be cut in the embankment, through which the water was enabled to escape to the north-west side of the railway and from thence to flow into the adjoining lands and ultimately to the plaintiff's land, damaging his crops. The case was tried before Mr. Justice Day and a jury. The jury found that the cutting of the trenches through which the water flowed was reasonably necessary for the protection of the defendants' property, that it was not done negligently, and that the plaintiff was injured by the water that so came through the trenches to the

extent of £138 beyond what it would have been if the trenches had not been cut. On these findings the learned Judge gave judgment for the plaintiff for £130. Brett, M.R., deals in his judgment with the facts of the case and the principles applicable to it. At page 137 he said :—

"But then it is suggested that if a person has brought the danger on his land, it makes a difference. So it does. If he has not brought the danger there, and without any act of his it breaks through his land on to his neighbour's land, I take it he is not liable. In that case both have suffered from a common extra. ordinary danger, but one has suffered before the other : that is all . . . In this case the water endangered the embankment and, moreover, it would have gone on to the plaintiff's land in any event : but then if it had been left alone and allowed simply to percolate through the embankment, even though all of it would have gone on the plaintiff's land, it would have gone without doing the injury which was done by reason of its pushing through the cutting which the defendants made. The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and therefore it seems to me that they are liable."

Lord Justice Lindley, at page 140 of the report says :—

"It appears to me that this case is more analogous to the Scotch case of *Menzies* v. *Earl of Breadalbane* and *Nield* v. *L.N.W.R. Company.*

"It seems to me established by those cases that if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away without being responsible for the consequences, although his neighbours may be injured by it."

"*Rex* v. *Pagham Commissioners* is another step in the same direction. . . . We must look at the broad question, which is whether a land owner on whose land there is sudden accumulation of water, brought there without and fault or act of his, is at liberty actively to let it off on the land of his neighbour without making that neighbour any compensation for damages, because the land owner by doing so has been able to save his own property from injury? I can see no

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authority for that, and it appears to me the general rights and duties of land owners are decidedly against it."

Some point was made in this case to the effect that the stream alleged to have been stopped up was at best merely an artificial watercourse and not a natural one. In the latter case the successive riparian owners have been each entitled to the unimpeded flow of the water in its natural course and to its reasonable enjoyment as it passes through his land as a natural incident of the ownership of his land. In the former case, however, any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought. (*Rameshur Pershad Narain Singh* v. *Koonji Behari Pattuk*, 4 App. Cas., 121; *Kensit* v. *Great Eastern Railway Company*, 27 C.D., 122, 134.)

There is, however, a well-established principle of law directly bearing upon this case and vitally affecting it, namely, that a watercourse originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land situate on its bank will have all the rights over it that riparian owner would have if it had been a natural stream. (*Sutclife* v. *Booth*, 32 L.J., Q.B., 136; *Holker* v. *Poritt*, L.R., 8 Ex., 107; *Baily & Co.* v. *Clark, Son and Morland* [1902], 1 Ch., 649, 664, 669, 673.)

It is not necessary in order to apply the principles of these decisions to analyse the evidence in detail. It was proved by a Public Officer, the Superintendent of Land Records, and not contradicted, that this so-called canal went right up to the boundary of the appellants' land; while on the following five paragraphs of the written statement of the respondents they practically admitted the facts founding the

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charge against them, though at the same time they misrepresent the conduct and action of the appellants. These paragraphs run thus :—

6. The said channel became wider and longer through erosion, with the result that the salt water from Kyonkan *chaung* overflowed on the lands of this defendant and of adjoining cultivators and caused damage thereto.

7. In order to prevent such damage in or before the year 1914 the first defendant admits there was a bund erected across the said channel at a point where it flows through the land of this defendant and others. Such erection was said to be by the permission of Maung Thi Hla, the then Township Officer of Bogale.

8. The said bund gave away in or about the year 1906-07, and this defendant with his assistants repaired the bund formerly erected at the same place where the original bund was erected without any objection on the part of the plaintiffs or any one else.

9. On the 1st July 1917, the plaintiff and others illegally trespassed on the first defendant's lands originally acquired and lands purchased afterwards and opened the said bund, but the bund was erected again as there was no legal order and report that effect was made to *Thugyi* Maung Shwe Loon.

10. On or about the 25th August, 1917, in pursuance of an order of the Deputy Commissioner of Pyapôn, the said bund was opened, and after such date it has not been closed.

The evidence and findings of the Judges upon these statements establish, as will presently be shown, that the defendants themselves erected the bund referred to in the second as well as in the third of these paragraphs. To effect this work they must have gone in upon the alveus of the canal, closed up with this bund, the eye of the bridge what was the outfall of the canal into the sea, and thus have offended against the law as laid down in the English cases. The District Judge framed for himself certain issues and answered them thus : To the second issue he gave the answer that the canal was not a Government constructed work, but was for a long time

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before 1906-07 a naturally-formed channel. The third issue so framed ran, "Did this canal facilitate the free outflow of rain water from the plaintiff's (appellants') paddy lands?" His answer ran thus: "There cannot be any doubt that as all the parties admitted the canal takes the water into the *Kwin* from the Kyonkan Creek at flood tide, and takes the water out from the *Kwin* into the creek at ebb tide, therefore a certain extent of rain water must find its way into the Kyonkan Creek as a natural consequence." And, again, "there cannot be any doubt as to the motive of the defendants that they erected the bund and closed the canal to protect their own fields from salt water; but there cannot also be any doubt that the stoppage of the outflow at ebb tide caused the excess water to remain in the fields of both the parties." He answers the fifth issue in the following words: the "weight of evidence is clearly in favour of the plaintiffs," and I would [thus] answer the fifth issue.

He further finds that Map 2A makes it clear that the channel had been in existence before the year 1906-07, and that there was no canal construction by any one. He ultimately gave a decree in favour of the appellants for Rs. 8,821—48. No case has been made that these damages were excessive in amount if the legal wrong complained of had been actually committed. There was ample evidence in the case to sustain the findings of the District Judge if he believed the witnesses who gave it, as apparently he did, having seen and heard them. It appears to their Lordships plain that the access of some salt water from the creek through the eye of the bridge into the canal twice in the twenty-four hours in flood tide does not resemble in any way those incursions of the sea dealt with in *The King* v. *The Commissioners*

of Sewers for Pagham, and still less did the closing up of the eye of the bridge, by this bund, and in seasons of heavy rain the ponding up of the fresh water in the canal, so that lands higher up that stream were flooded resemble those necessary precautions which a landowner whose land is at the mercy of these incursions of the sea is entitled to take to protect his property. If the stopping up of the outfall of the canal was justifiable by reason of this access of some salt water at flood, then every freshwater tributary to a tidal river could be closed up at its mouth to prevent the like consequences.

Both the cases referred to in the third reason for the appellants' appeal deal with surface water, the rain which falls on agricultural land not with watercourses of any kind. They are irrelevant therefore to the questions in controversy in this case, and are not in conflict it appears to their Lordships with any of the English cases cited.

The respondents appealed, and on the appeal the learned Judges of the Chief Court of Appeal seem to have taken a course as unwise as it was extraordinary. The appellants had undoubtedly in paragraph 4 of their plaint stated that the Government had in the year 1913 dug this canal, shown by letters A, B, C, D, on Exhibit "A." That was no doubt found to be untrue, but no evidence whatever was given to show that the Government had any jurisdiction or authority to do such a thing, and what is much more important that if they had such authority an action could not be brought for any injurious consequence resulting to individuals from its execution.

That paragraph of the plaint is followed by two other Nos. 5 and 9.

5. The said canal thus facilitated the free outflow of the rain water from the plaintiff's paddy lands aforesaid into the said

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Kyonkan *chaung* and rendered cultivable all the lands situate in Kasaung Ngotto West *Kwin* and Sakangyi South (A) and (B) *Kwins*, which adjoin the said Kamakalu *Kwin*.

9. The plaintiffs have been informed and verily believe that during the month of *Kason* or *Nayon*, 1279 B.E., the first defendants, tenants and servants by order of the first defendant and the defendants Nos. 2 to 8 closed the said canal at the point B shown in red ink in the plan, Exhibit A.

The alleged wrong for which the plaintiffs claim damages was the stopping up by a bund of the outfall of the canal, by which means the water of the canal, having been denied escape at the proper place, was ponded up, flowed back, and flooded their lands. The identity of the body or person which or who actually formed the canal was a matter wholly irrelevant to the matters in issue. It did not form even an ingredient in the cause of action, and there is not an averment in the plaint to show that the plaintiffs did not rely upon the canal being an old natural watercourse enlarged, but new or artificial. The plaint is entirely consistent with their relying upon the one thing or the other, as suited them best.

Yet, strange to say, one of the learned Judges in the Chief Court (Mr. Justice Duckworth) considered that this statement as to the digging of the canal by the Government was a matter of such vital importance, that the judgment of the District Judge should be reversed, and his decision in the plaintiffs' favour be over-ruled because this allegation had not been proved.

In justice to Mr. Justice Duckworth, the following pages from his judgment should be quoted :—

"I have only to add a few remarks. It appears to me that the plaintiff-respondent Maung Bya set up a certain case in his pleadings by which he must either stand or fall. It is clear, from his plaint that this case was that, until Government made a canal, the lands which belong to him were unworkable, but that, after Government made a canal connecting the Fishery creeks with the Kyonkan *chaung*, his fields became culturable. Further, he

contended that owing to the appellant Maung Tet closing this canal, at the Kyonkan *chaung* end, by a bund, in 1917 he suffered certain damage through his fields becoming inundated."

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It does not appear to their Lordships that this is at all an accurate or fair construction of the plaint of the appellants.

The leaned Judge then proceeds:—

"In fact, treating this channel, as I think we must as a natural watercourse (see *Kyaw La* v. *Maung Ke*, 8 L.B.R., 556), we find that appellant is a riparian proprietor, whereas the respondent is not.

"This is the only view of the case which can be inferred from the evidence."

This would go to show that the map of 1906 was right, and that was done in 1913 was to clean up flooded areas and deepen a natural watercourse, and not to create a new one, involving the forfeiture of the riparian owners' rights.

The last paragraph, the different portions of which seem scarcely consistent with each other, runs thus:

"It is quite unnecessary to consider any other points. The respondent set up a case, which he failed to prove, and obtained a decree before the District Court on a case which he had not pleaded. It is settled law that a plantiff must not be permitted to succeed on a case which he has not put forward directly or in directly in his plaint. Further, it is apparent that the learned Judge of the District Court took a mistaken view of the fact, his chief error being his overlooking the fact that respondents' lands drew no advantage whatever from this channel until it had opened a way through the road bund into the Kyonkan *chaung*, and that only some four years prior to any cause of action having arisen.

"I concur with my learned brother in allowing the appeal with costs, and in the decree passed by him, including special costs to Messrs. Leach and Lentaigne, Junior."

The passage appears to suggest that a defendant who diverts or stops the flow of a natural watercourse and thereby floods the lands of a riparian owner is not to be held responsible in damages for the wrong unless he, the defendant, has made a profit by it. In their Lordships' opinion such a doctrine is unsound.

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The other learned Judge, Mr. Justice Maung Kin, deals with this point somewhat differently. He says :—

"The finding that the canal was not one made by the Government is not contested before us. It is, however, contended that plaintiff had the right to the undisturbed flow of water from his land through the canal into the Kyonkan *chaung* on the ground that the canal is a natural waterway.

"It is doubtful whether the learned District Judge was right in giving a decree upon a case not set up by plaintiff in his plaint. The basis of the suit as described in the plaint is that the canal was dug by the Government for the benefit of the cultivators, and that it, in fact, benefited them, because it drained the surplus rain water from plaintiff's land."

This, as has been already pointed out, is not a true construction of the appellants' case and contention.

The learned Judge then proceeds to add :—

"I may add that there is no equity in favour of plaintiff. He had not derived any benefit before the depression became sufficiently wide and deep to allow of its carrying water coming from the direction of his land, and when the bund was built by Government, there was no reason for thinking that that water would flow in the direction of the bund. But the defendants have all along enjoyed the benefit of the existence of the bund because it has prevented blackish water coming to defendants lands from tha Kyonkan *chaung*. I do not see any justice in allowing plaintiff's claim to remove the bund for the benefit of his land, unless he has a natural or prescriptive right to make it. I have held that he has no natural right, and sufficient time has not elapsed for a prescriptive right to ripen.

"For the above reasons I would allow the Appeals Nos. 183 and 188 of 1919, with costs."

It appears to their Lordships difficult to understand what the learned Judge meant by the first of these paragraphs.

Their Lordships are quite unable to concur with the learned Judges of the Chief Court in the views they have taken of the rights and liabilities of the parties litigant in this case. They think these views

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are conflicting *inter se*, unsound and misleading. To gather together the points fully dealt with above it may be said that in their Lordships' view it is clearly established (1) that a raised road or burd ran transversely across the depressed ground through which flowed the channel of water, and was properly provided with a gap for the flow and a bridge over the channel; (2) that the bund thus provided with an eye and a bridge to permit the inflow and out flow of water was interfered with by the respondent, who filled up the eye and channel course thereat, and converted an innocuous bund into a dam, which dammed back the water on to the appellant's land, and that in law (3) the respondents are responsible for the damage thus caused to the appellant's property. They think the judgment appealed from was erroneous and ought to be set aside, that the decision of the District Judge was right and should be restored, and will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants in the hearing of the Chief Court and of this appeal

Light & Fulton—Solicitors for Appellants.

H. Hilbery & Son—Solicitors for Respondents.

APPELLATE CRIMINAL.

Before Mr. Justice Maung Ba.

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June 30.

KING-EMPEROR
v.
MAUNG THAN GYAUNG *

Amateur Ayat-zat's performance for public entertainment at a Shinpyu Ahlu, *whether a pwe—Burma Village Act, Section* 21 (*a*).

Held, that amateur performance of an *Ayat-zat* held for public entertainment in a private compound at a *Shinpyu Ahlu*, although without payment, comes within the purview of section 21 of the Burma Village Act.

MAUNG BA, J.—Maung Than Gyaung of Myitnabole village in the Allanmyo Township held a *Shinpyu Ahlu* at his house. The local amateurs designated as *Ayat-zat* performed without payment in his compound on the night of 13th February last. Unfortunately a robbery took place during the performance a short distance away. Maung Than Gyaung had taken no previous permit for the show. Consequently he was run in under section 21 (*a*), Burma Village Act, and fined Rs. 5.

The learned District Magistrate of Thayetmyo doubted whether any permit was required for such amateur performances by villagers and submitted the case with a recommendation that the conviction and sentence be set aside.

For the purposes of the Act *pwe* ordinarily includes a theatrical or dramatic performance held for public entertainment whether on public or private property.

The gist of the above definition is "the holding for public entertainment." The object of requiring a permit is to ensure that the authorities get timely

* Criminal Revision No. 696-B of 1925 from the order of the Additional Magistrate of Allanmyo Criminal Regular Trial No. 27 of 1925.

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MAUNG BA, J.

notice to arrange for precautionary measures. In the present case the performance was for public entertainment at an *Ahlu*, and, as the authorities had not been given any notice, a robbery took place. Moreover though the troupe was composed of local amateurs, there is evidence to the effect that this *zat* used to perform in other villages on hire ranging from Rs. 40 to Rs. 60. This offence was committed in the Allanmyo Township where the Local Government have deemed fit to declare even *payapwes* and *pongyipyans* to be *pwes* for the purposes of the Act (*see* General Department Notification at page 43 of the Village Manual).

I am of opinion that this *Ayat-zat* comes within the purview of section 21 of the Village Act. Let the case be returned accordingly.

APPELLATE CIVIL.

Before Mr. Justice Carr.

A.R.P.L. FIRM.

v.

MA GUN.*

1925

May 12.

Practice—Civil Procedure Code, Order XXI, Rule 63—Service of summons in original suit effected on person bearing a name other than that shown in plaint—Removal of attachment by applicant upon the ground that the applicant was not the judgment-debtor—Declaratory suit, whether would lie to declare plaintiff's right to attach.

The Appellant had filed a suit on two On-demand promissory-notes against one Ma Kwin, but the summons was tendered to the Respondent whose name was not Ma Kwin but Ma Gun. The Respondent thereupon filed a written statement denying that she had borrowed any money from the Appellant or executed any promissory-note in his favour and stating that her name was not Ma Kwin but Ma Gun. The written statement was returned to her and a fresh

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* Special Civil Second Appeal No. 508 of 1923 against the decree of the District Court of Myaungmya in Civil Appeal No. 116 of 1923.

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summons was issued against Ma Kwin. This second summons was also tendered to the Respondent who refused to accept it and an *ex-parte* decree was thereupon passed against Ma Kwin. The Appellant then applied for execution against Ma Kwin *alias* Ma Gun and attached property belonging to the Respondent who succeeded in having it released upon the ground that she was not Ma Kwin. The Appellant thereupon filed his present suit for a declaration that he had the right to attach the property in question.

Held, that the suit would lie under Order XXI, Rule 63, of the Civil Procedure Code since the decree would be binding upon the Respondent if it is shown that she is the person who had posed as Ma Kwin and had borrowed money from him in the name of Ma Kwin.

Banerji——for the Appellants.

P.S. Chari--for the Respondent.

CARR, J.—The facts leading up to this suit are as follows :—In Civil Regular No. 20 of 1922 of the Subdivisional Court of Wakèma the plaintiff-appellant sued Ma Kwin and Maung Chit Pe for the money due on two promissory-notes. The defendant-respondent, Ma Gun, was served with summons in the suit and on the 31st March 1922 she appeared and tendered a written statement in which she said that she had never borrowed any money from the plaintiff or executed any promissory-note in his favour. She also said that her name was not Ma Kwin but Ma Gun.

The plaintiff himself was not present then, but his pleader was and both he and the Judge told Ma Gun that if she was not Ma Kwin she was not wanted. The written statement was returned to her and she took it away, and kept it.

This incident was not mentioned by the Judge in the diary, when he said merely that Ma Kwin was not served. But on the evidence I have no doubt that the above statement is correct.

A fresh summons was issued to Ma Kwin and this was again taken to Ma Gun, who refused to accept it. The Judge then recorded that Ma Kwin was duly served. Later, Chit Pe appeared and contested the

suit, which was heard *ex parte* as against Ma Kwin. The Court found that Ma Kwin and Chit Pe had executed the promissory-notes, but that the Chit Pe before the Court was not the man who had done so. He dismissed the suit as against Chit Pe and gave a decree *ex parte* against Ma Kwin.

Later, in Execution No. 47 of 122 of the same Court the plaintiff applied for execution of the decree against "Ma Kwin *alias* Ma Gun" and attached a piece of land belonging to Ma Gun. The latter then, in Civil Miscellaneous No. 12 of 1922, applied for and obtained removal of attachment on the ground that she was not Ma Kwin.

The plaintiff then filed the present suit for a declaration that Ma Gun was the judgment-debtor in suit No. 20 and that the land was liable to attachment under that decree. He succeeded in the Subdivisional Court, but lost in the District Court.

The case is of an unsual kind and there appear to be no authorities bearing on it.

The first question is whether the suit will lie at all. On consideration I think it will lie under Order XXI, Rule 63, of the Civil Procedure Code. The plaintiff attached the land as the property of his judgment-debtor and Ma Gun got the attachment removed on the ground that it was her's and not the judgment-debtor's. It is common ground that the land is Ma Gun's and the dispute is whether she is the judgment-debtor or not. That, however, is only incidental, the real question in issue is the right to attach.

The case was not very satisfactorily dealt with by the Subdivisional Judge, who came to the conclusion that his predecessor knew perfectly well when he gave judgment that he was giving it against the woman who had been sent away. I can see nothing

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on the record to support that conclusion, which is negatived by the fact that it was the same judge who allowed the application for removal of attachment. And I think that the conclusion is unjust to the Judge in question, who would have failed in his duty had he knowingly passed an *ex parte* judgment against Ma Gun in the circumstances. It would have been incumbent on him to see that she was duly served with notice requiring her to attend, and in her proper name.

Nor is the judgment of the District Court very satisfactory. It shows distinct signs of prejudice. Thus the witness Thanascoty is dismissed with the remark that he "describes himself as a Court interpreter though there is none appointed by authority for the Courts at Myaungmya." Now this witness began his evidence by saying. "I draw Rs. 145 as Court Interpreter in *Bassein*." In view of this the suggestion contained in the judgment was unjustifiable and improper.

That summons in the case was twice served on Ma Gun is admitted. Aut I do not think it is sufficient to charge her with liability as judgment-debtor. She had once been told that she was not wanted. Moreover if a person named Jones is given a summons addressed to Smith he is ordinarily quite justified in refusing it and taking no notice of it. On the other hand if Jones has posed as Smith and had dealings with the plaintiff in that name, then there can be no doubt that he knows that the summons is intended for him and in those circumstances the service of a summons in the name of Smith, even though that is not his real name, is, I think, sufficient notice of the suit.

In that view I think the decree is binding on Ma Gun if it is shown that she is the person who posed

as Ma Kwin. In order to prove that, the plaintiff must prove that it was Ma Gun who borrowed money from him and executed the promissory-notes in the name of Ma Kwin.

It is objected for the respondent that this matter is *res judicata*. I do not think that it is. If it is, then it is *res judicata* against Ma Gun. But her whole case is that Ma Gun is not Ma Kwin and was not a party to the suit and if that is so there is no *res judicata*. It is possible, of course, to put up plausible technical arguments on the subject, but it seems to me that the reasonable common-sense view of it is that it is only by deciding whether Ma Gun is the Ma Kwin who borrowed the money or not, that this suit can be decided, and that this must be done.

No direct issue on this point was framed, but I do not think it is necessary to remand the case. The Subdivisional Judge did admit evidence on the question, in spite of a written objection, on which he should have passed orders in writing but did not. I see no reason to suppose that either party has been prejudiced by the absence of an issue.

On the question of identity we have really little evidence. The plaintiff's clerk or agent who made the loans swears that Ma Gun is the person who took them, but he is interested. And he does not improve his case by having got the account books so translated as to fit each case in turn. Morever he alleges that in the first suit he spoke of Ma Gun and not of Ma Kwin, which is undoubtedly a lie. That suit was against Ma Kwin, which was clearly the name written in Burmese in the pro-notes. Moreover it is incredible that the Judge should have written Ma Kwin if he spoke of Ma Gun.

This last remark applies equally to Po Aung, a stamp vendor, who claims to have been casually

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present when both loans were taken, and who also says he spoke of Ma Gun and not of Ma Kwin.

Another witness, Tun Aung, a petition-writer, says he heard Ma Gun promise to settle her debt to the plaintiff. But that was the only time he met Ma Gun. Then we have Vellasami Pillay who also speaks to an admission. Evidence of this kind is of very little value.

The only support lent by the evidence of the process-server is in his statement that the first witness pointed out Ma Gun to him as the person to be served.

Against all this we have it that the pro-notes are signed by Ma Kwin and her son Chit Pe. It is admitted now that Ma Gun has no son of that name and the plaintiff alleges that Chit Pe is the younger brother of her husband, but has stated no concrete grounds for saying so. Plaintiff claims also to know Ma Gun well, and to have had previous dealings with her. If that is so he should at least have known what her name was.

On the evidence as a whole, I think it is not fully proved that Ma Gun is the person who took the loans.

This appeal is therefore dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Rutledge.

1925
June 1.

MA CHO GALE
v.
MA NAN CHAW AND OTHERS.*

Burmese Buddhist Law—Inheritance—Children of an inferior wife whether entitled to inherit as step-children in the estate of the superior wife.

The appellant was the daughter of one T, deceased, by his inferior wife who had separated from T twenty years before his death and had remarried. The claimant had never lived with her father nor with the superior wife; neither, had she maintained any filial relationship with the superior wife. T died in the year 1906 and his superior wife in 1922 when appellant claimed to inherit her estate as a step-daughter.

Held, that the provisions of the Burmese Buddhist law as to step-children inheriting from step-parents cannot apply where the so-called step-child is the child of an inferior wife with whom the husband lived while still married to the superior wife, and where the step-child could not possibly be regarded as having belonged to the family of the so-called step-parent.

Thet Tun—for the Appellant.

Aiyangar—for the Respondents 1 and 2.

Hay—for the third Respondent.

HEALD AND RUTLEDGE, JJ.—Appellant's story according to her plaint was that she was a daughter of one Po Thin and his wife Ma San Byaing, that Po Thin first married one Ma We, whom he subsequently divorced, that he then married Ma San Byaing, that appellant was the child of that marriage, that when appellant was about six years old Po Thin took back Ma We without Ma San Byaing's consent, that nevertheless he never severed his connection with Ma San Byaing or appellant, that Po Thin died in 1906, Ma San Byaing in 1908, and Ma We in

* Civil First Appeal No. 137 of 1924 against the decree of the District Court of Myaungmya in Civil Regular No. 11 of 1923.

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1922, that on Ma We's death the first respondent, who was Ma We's younger sister, took possession of the property which she left, and that appellant herself being Ma We's sole heir was solely entitled to the property. She joined also as defendants the second respondent who was Ma We's first cousin once removed and who claimed to be her adopted daughter, and the third respondent, an elder sister of Po Thin, who claimed to be owner of one of the pieces of land which appellant alleged to belong to the estate of Ma We.

The first respondent denied that Ma San Byaing was ever Po Thin's wife. She said that she herself was adopted by her sister Ma We as her daughter and that the second respondent also was similarly adopted and that they were the only heirs of Ma We.

The second respondent also denied that Ma San Byaing was ever Po Thin's wife. She said that she herself was Ma We's adopted daughter and sole heir. She said too that in view of the fact that Po Thin died more than twelve years before the institution of the suit, appellant's claim as Po Thin's daughter was time-barred.

The third respondent practically admitted appellant's claim, though she denied that Po Thin ever divorced Ma We and said that Ma San Byaing was only his "lesser wife." She admitted that the second respondent was brought up by Ma We but did not admit that she was adopted as her daughter. She said that the plaint disclosed no cause of action as against her and asked that the suit as against her should be dismissed.

The learned Judge found that appellant was Po Thin's daughter by Ma San Byaing, that Ma San Byaing was an "inferior" wife, that Po Thin deserted

Ma San Byaing and she took another husband, that appellant lived with Ma San Byaing and the other husband, that there was never any filial connection of any sort between appellant and Ma We, and that therefore appellant could not claim to inherit Ma We's estate.

Appellant appeals on the ground that being a step-child she was entitled to inherit.

We are satisfied on the evidence that appellant's mother was a "wife" of Po Thin and in the absence of proof of an actual severance of the tie of relationship between Po Thin and appellant, appellant would have been entitled to be regarded as an heir of Po Thin. As a matter of fact she herself says that Ma We gave her some twelve acres of land which she sold for Rs. 2,500, and that gift was doubtless made because she was Po Thin's daughter. But any claim which she might have had as an heir of Po Thin is now time-barred and she can claim only as heir of Ma We. We do not think that the provisions of the Burmese Buddhist Law as to step-children's inheriting from step-parents apply where the so-called step-child is the child of an inferior wife with whom the husband lived while still married to the superior wife, and where the step-child could not possibly be regarded as having belonged to the family of the so-called step-parent. Po Thin lived for nearly twenty years after his separation from appellant and her mother. Appellant's mother married another husband, or at any rate lived with another man as his wife and had children by him. After the separation appellant never lived with Po Thin and she never at any time lived with Ma We or had any filial relations of any sort with her. In these circumstances we see no reason to believe that under Burmese Buddhist Law she ought to be

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regarded as an heir to Ma We, and we hold that her suit was rightly dismissed.

The appeal is dismissed with costs and appellant will pay the Court-fees which would have been paid by her if she had not been permitted to appeal as a pauper. A copy of the decree will be sent to the Collector.

APPELLATE CRIMINAL.

Before Mr. Justice Rutledge, Chief Justice, and Mr. Justice Brown.

1925

July 20.

McDONNELL
v.
KING-EMPEROR.*

Privilege of Advocate—Defamation—Statements made in the course of judicial proceedings not absolutely privileged at Criminal Law—Penal Code (XLV of 1860), sections 5 and 499, exception 9—Presumption of statements made in good faith and on instruction in the protection of client's interest.

There is no basis for the doctrine that the Legislature, in enacting the Indian Penal Code, intended to leave untouched the provision of the English Common Law on the question of defamation. Section 499 of the Code is meant to be universal in its application. Consequently, for purposes of fixing criminal liability, the English Law of absolute privilege does not apply in this country to statements of advocates in judicial proceedings.

Held, that when a complaint is made against an advocate or legal practitioner for defamation in respect of a statement made in the course of a judicial proceeding, it is the duty of the Court to presume that the statement was made on instruction and in good faith and for the protection of his client's interest, and that unless circumstances clearly show that the statement complained of as defamatory was made wantonly or from malicious or private motive, the complaint should not be entertained.

Baboo Gannesh Dutt Singh v. *Mugneeram Chowdhry*, 11 Beng. L.R., 321 ; *Emperor* v. *Purshottamdas Ranchhoddas*, 9 B.L.R., 1287 ; *Meer Burks* v. *Maung Hla Pe*, 3 U.B.R., 101 ; *Munster* v. *Lamb*, 11 Q.B.D., 588 ; *Nikunja Behari Sen* v. *Harendra Chandra Sinha*, 41 Cal., 514—*referred to.*

Mya Thi v. *Henry Po Saw*, 3 L.B.R., 265 ; *Satish Chandra Chakravarti* v. *Ram Dayal De*, 46 Cal., 388 ; *Upendra Nath Bagchi* v. *Emperor*, 36 Cal., 375—*followed.*

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* Criminal Miscellanous Application No. 51 of 1925.

In re *P. Venkata Reddy*, 36 Mad., 216 ; *Sullivan*, v. *Norton*, 10 Mad., 28—*dissented from.*

1925

MCDONNELL v. KING-EMPEROR.

Applicant—in person.

Cowasjee—*Amicus curiae*, for the Rangoon Bar Association.

RUTLEDGE, C.J.—This is an application by Mr. McDonnell to quash the Criminal proceedings instituted on the complaint of Ponniah Pillay in the Court of the District Magistrate of Insein, or, in the alternative, to transfer the case for trial by the District Magistrate of Rangoon.

The facts of the case leading up to the present application are as follows :—

Mr. McDonnell, one of the leading advocates of this Court, who has practised, with repute and distinction, in Rangoon for over twenty years, was engaged in the defence of one V. M. Abdul Rahman, who was being prosecuted last year before the District Magistrate of Insein. In the course of his address on the 8th of September, 1924, at the close of the prosecution case, he asked that his client should be discharged, and was asked by the Magistrate : "Who is Ponniah Pillay ?" Mr. McDonnell answered that his name was down on the C.I.D. records ; and that he was employed by Cassims (the complainants). On a protest from Mr. Gaunt, Assistant Government Advocate, Mr. McDonnell reiterated the statement that he was employed by Cassims to help in their litigation work, and that, as he had already said, he was on the C.I.D. records.

Ponniah Pillay filed a complaint for defamation, under section 500 of the Indian Penal Code, before the District Magistrate, Insein, through Mr. Patel,

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advocate, on the 12th of September, 1924, alleging, *inter alia*, that Mr. McDonnell had defamed the complainant by making the abovementioned imputation intending to harm, or having reason to know that such imputation would harm the complainant's reputation.

It may be noted that neither in his complaint, nor in his examination by the Magistrate, did the complainant charge Mr. McDonnell with either malice or wanton recklessness. Mr. McDonnell has stated that his answer to the Magistrate was on written instructions which he had no reason to disbelieve.

The Magistrate thought fit to issue summons which owing to Mr. McDonnell's absence in Europe on leave, could not be served until last month.

For reasons, which will hereafter be given, I am of opinion that the Magistrate should not have issued summons, and the proceedings will accordingly be quashed.

If the applicant had been satisfied to base his case upon the very extensive, but still qualified, privilege, which an advocate enjoys under the Indian Penal Code, the question might be dealt with quite briefly. But Mr. McDonnell, not so much on behalf of himself as on behalf of the profession to which he belongs, and Mr. N. M. Cowasjee, whom we have heard as *amicus curiae*, on behalf of the Rangoon Bar Association, have asked us to concur in the decision of the Madras High Court and declare that any statement of an advocate during the course of judicial proceedings is absolutely privileged. This was the position taken up by a Full Bench of that Court in the case of *Sullivan* v. *Norton* (1). The

(1) (1887) 10 Mad., 28.

basis of that decision has been very fully stated in *In re P. Venkata Reddy*, (2)—another Full Bench Case of the same High Court. No doubt that was a case not of an advocate but of a witness. But the learned Judges came to the conclusion that it was not the intention of the Legislature, in enacting the Indian Penal Code, to exclude the application of the English doctrine of "absolute privilege" from the law of defamation in India.

Speaking personally, I should be glad if I had been able to find myself in agreement with the Madras decision, as I think that the legal profession might very well be left to the control not merely of the Judge before whom they plead, but also to the very real supervision and powers which this Court enjoys through the provisions of the Legal Practitioners' Act and the Letters Patent. But I am unable to find any valid basis for the doctrine that the Legislature, in enacting the Indian Penal Code, intended to leave untouched the provisions of the English Common Law on the question of defamation.

It has been urged that, as section 5 of the Indian Penal Code states: "Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions * * * * of any special or local law"; and that, as the English Law with regard to defamation was in existence at the time of the passing of the Code in 1860, it comes under the head of special or local law. I am unable to accept this argument. As I understand it, the types of law covered by this phrase are such as the Opium Act, or the Gambling Act, and not a vast system like the English Common Law. If the argument were

(2) (1913) 36 Mad., 216.

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well founded, there would not seem to be any occasion for inserting section 77, which gives protection to a Judge, and which, though wide, is not quite absolute. If he were absolutely privileged by reason of the application of the English Common Law, it would be idle and confusing to insert in the Code the provisions of section 77.

This argument has been dealt with and dismissed in the judgment of a Full Bench of the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Dayal De* (3). No doubt that was a case of a party or witness, but on this particular point, it is equally applicable to the case of an advocate. There are decisions of single Judges in this Province, *viz.* *Mya Thi* v. *Henry Po Saw* (4), and *Meer Burks* v. *Maung Hla Pe* (5), to the like effect.

I am consequently of opinion that section 499 of the Indian Penal Code is meant to be universal in its application. That being so, the English Law of absolute privilege does not apply in this country to statements of advocates in judicial proceedings. Nor do I think it is necessary that it should, if the position of an advocate is clearly grasped by the various tribunals of this country.

In the words of Lord Esher, M.R. in *Munster* v. *Lamb* (6), "A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he

(3) (1921) 48 Cal., 388 at p. 399.
(4) L.B.R., 265.
(5) 3 U.B.R., 121.
(6) 11 Q.B.D., 588 at p. 603.

were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform."

A Bench of the High Court of Bombay, in the case of *Emperor* v. *Purshottamdas Ramchhoddas* (7) observes : "Therefore when a pleader is charged with defamation in respect of words spoken or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose."

I do not think I could get anything which more correctly summarizes the position than the following passage from the judgment of Imam and Chapman JJ., in the case of *Nikunja Behari Sen* v. *Harendra Chandra Sinha* (8):—

"In our opinion the Magistrate should have dismissed the complaint. It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it or of any other person (Indian Penal Code section 499, Ninth Exception). A pleader is entitled to the presumption that the questions he asks in cross-examination are asked in good faith for the protection of the interest of his client. The presumption, therefore, is that a question asked in cross-examination making an imputation affords no ground for a criminal prosecution. To rebut this presumption it is not sufficient

(7) (1907) 9 B.L.R., 1287 at p. 1288 (8) (1916) 41 Cal., 514 at pp. 516-51

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merely to allege that the client knew the imputation to be untrue for the duty of the pleader is to present his clients' case. So far at any rate, as the purposes of a prosecution for defamation are concerned, it would be wholly unreasonable to say that it is the duty of a pleader to require whether his clients' case is true or false. To rebut the presumption of good faith in such a case there must be convincing evidence that the pleader was actuated by an improper motive personal to himself and not by a desire to protect or further the interests of his client in the cause. No such motive was suggested in the present case.

The view which we have taken is supported by the case of *Upendra Nath Bagchi* v. *Emperor* (9).

It is for the public good that a person charged with the responsibility of an advocate should, so far as may be, feel unfettered by any control other than that of the presiding judge, in the use of every weapon placed at his disposal by the law for the defence of the liberty of his client. The provisions of the Ninth Exception to section 499 of the Indian Penal Code must be interpreted accordingly."

The learned Judges were, in that case, dealing with a question put in cross-examination, but it applies equally to an answer as in the present case made by an advocate to a question from the Court, or, indeed, to any remarks made by an advocate while addressing the Court.

It is the duty, therefore, of a Court, when a complaint is made against an advocate, or legal practitioner, for defamation, that it should presume that the remark was made on instructions and in good faith ; and, unless circumstances clearly show

(9) (1909) 36 Cal., 375—13 C.W.N., 340.

that it was made wantonly, or from malicious or private motive, the complaint should not be entertained. I go further and say that, even if the circumstances suggest recklessness or malice, further enquiry should be made and an opportunity if possible should be given to a legal practitioner to offer an explanation before summons is issued.

If Court should entertain cases under section 500 of the Indian Penal Code, as in this case, without any such safeguard, I agree with the petitioner and Mr. Cowasjee that the position of an advocate in this country would become intolerable.

For the above reasons, I am of opinion that the proceedings must be quashed.

BROWN, J.—I concur in the order proposed, and also in the finding that the law as to absolute privilege is not applicable to the criminal law of defamation in India. The Indian Penal Code is a complete Code in itself. It is to a large extent founded on the Common Law of England, but the ordinary criminal offences in this country are punishable, not because they would be offences under the English Common Law, but because they have been declared to be offences punishable under the Indian Penal Code. Section 499 defines the criminal offence of defamation. The section is quite clearly wide enough in certain circumstances to make statements made by advocates in the exercise of their profession amount to criminal defamation punishable under section 500. There are a number of exceptions set forth in section 499, and any statement falling within those exceptions does not amount to criminal defamation. But any statement which does not fall within any of these exceptions, and which otherwise satisfied the terms of the general definition in the

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section, is quite clearly declared by section 499 read with section 500 to be punishable. Section 2 of the Code states that every person shall be liable to punishment under this Code. When the Legislature has thus in definite terms declared that a person shall be punishable, it seems to me to be idle to reply that it is highly desirable in the public interests that in certain circumstances that person should not be punishable, and that that person would not be punishable under the Common Law of England. I know of no authority for the view that a definite pronouncement of the Indian Legislature in clear and unmistakeable terms is liable to be over-ridden by the provisions of the Common Law of England. I agree with the learned Chief Justice in his interpretation of section 5 of the Code and it has not been suggested that any other portion of the Code is an authority for the special privilege claimed.

Their Lordships of the Privy Council held in the case of *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* [(1873) 11 Bengal Law Reports, 321)] that so far as witnesses are concerned the law of absolute privilege did apply in any action for civil damages. But, there is no enactment by the Indian Legislature as to the circumstances in which a civil action for defamation would lie, and there is nothing to bar the application of the general principles of justices, equity and good conscience in such cases. It is true that in the course of their judgment their Lordship remarks "The ground of it is this that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages ; but that the only penalty which they should incur if they give

evidence falsely should be indictment for perjury." These words may suggest that witnesses would not be liable on a criminal prosecution for defamation. But that was not the question before their Lordships for their decision, and I do not understand it to be suggested that their Lordships did really decide that point.

In my opinion the provisions of the Indian Penal Code on the point are perfectly clear, and the rule obtaining in England as to the absolute privilege of advocates, witnesses and parties in judicial proceedings is not applicable to a criminal prosecution for defamation in India.

But I am in entire agreement with the learned Chief Justice as to the applicability of the provisions of the ninth exception to section 499 of the Code to the circumstances of the present case. It is quite obvious that if an advocate is to carry out his duties to his client, he must frequently have to make imputations or statements the correctness of which he has not had the time or opportunity to verify, and it is a fair presumption in ordinary cases that a statement or imputation so made by an advocate in the course of judicial proceedings is made, not for the purposes of defamation but in good faith for the protection of the interests of his client. In such a case therefore to establish an offence of criminal defamation it is necessary not only to show that a defamatory statement has been made, but that it has been made maliciously, wantonly or with some improper motive. It follows that a Magistrate should refuse to take cognizance of a complaint in such a case unless there is some allegation of malice, wantonness or improper motive. No such allegation has been made in the present case either in the written complaint or in the statement made by the

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complainant when examined by the Magistrate under the provisions of section 200 of the Code of Criminal Procedure. The Magistrate should therefore have dismissed the complaint under the provisions of section 203.

And it is obvious that if advocates are to be liable to promiscuous prosecutions of this nature, even though the ultimate result of the prosecution may be an acquittal, their position will be an impossible one. The case is therefore one in which the interests of justice call for interference by this Court in revision.

I agree that the proceedings in this case must be quashed.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

1925

July 23.

S. A. MENON

v.

REVD. FATHER J. F. LAFON.*

Dismissal, for default, of an application under Order IX, Rule 9, of the Civil Procedure Code—Further application under the same rule, whether maintainable.

Primâ facie an application to set aside an *ex-parte* order dismissing a suit is a proceeding and an order dismissing it for default is part of a proceeding, so that the provisions of Order IX, Rule 9, of the Civil Procedure Code would apply thereto.

Held therefore that an application under Order IX, Rule 9, lies to set aside an order of dismissal for default of an application to re-open a suit.

Bipin Behari Shaha v. *Abdul Barik*, 41 Cal., 950—*followed.*

Bhubaneswar Prasad Singh v. *Tilukdhari Lal*, 4 Pat. L.J., 135 ; *Hari Charan Ghose* v. *Manmatha Nath Sen*, 41 Cal., 1 ; *Thakur Prasad* v. *Fakir Ullah*, 17 All., 106—*distinguished.*

Rangulam Singh v. *Sheo Deonarain Singh*, 4 Pat. L.J., 257—*dissented from.*

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* Civil Revision No. 43 of 1925.

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S. A. MENON v. REVD. FATHER J. F. LAFON.

S. Mukerjee and Sanyal—for the Applicant.
Mitter—for the Respondent.

PRATT, J.—This is an application under section 115 of the Civil Procedure Code to revise the order of the District Court, Sagaing, of the 1st April 1925 in Civil Regular Suit No. 1 of 1925, setting aside its previous order dismissing for default the plaintiff's application to set aside its previous *ex-parte* order for dismissal of the suit.

It is contended that the order was *ultra vires* and that the Court had no jurisdiction under Order IX or any rule thereunder to set aside its own *ex-parte* order dismissing for default the application to re-open the suit.

It is argued that Order IX applies to suits only and not miscellaneous applications of this nature.

If Order IX applies to miscellaneous proceedings of this nature, then the order objected to must be deemed to have been passed under Rule 9.

The advocate for applicant relies upon the case of *Rangulam Singh* v. *Sheo Deonarain Singh* (1), where a bench of the Patna High Court held that having regard to the Full Bench decision in *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (2) they were bound to hold that no application under Order IX would lie against an order made under Order IX.

With all due deference to the opinion expressed in *Rangulam Singh* (1), I am unable to agree that the ruling of the Patna Full Bench in *Bhubaneswar Prasad Singh* (2) renders inevitable a finding that no application under Order IX will lie against an order made under Order IX.

(1) (1919) 4 Pat. L.J., 287. (2) (1919) 4 Pat. L.J., 135.

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PRATT, J.

What the Full Bench did lay down definitely and in so many words was that Order IX, Rule 9, has no application to a proceeding in execution instituted under Order XXI, Rule 90;—a very different proposition of law.

The Full Bench was of opinion that the true legal principles applicable were deducible through the current of authority commencing with the decision of the Privy Council in *Thakar Prasad* v. *Fakir Ullah* (3). In that case also their Lordships of the Privy Council were dealing with the principles to be applied to execution cases, and held that there being a special procedure provided under Chapter XIX of the Code for dealing with execution cases the provisions of section 647 (corresponding to section 141 of the present Code) did not apply.

In *Hari Charan Ghose* v. *Monmatha Nath Sen* (4), of which the Patna Full Bench spoke eulogistically, Sir Lawrence Jenkins laid down that Order IX, Rule 13, is not applicable to a proceeding under rules 100 and 101 of Order XXI. All the other authorities relied upon, which I have been able to verify, refer to execution proceedings.

The fact that it has been authoritatively laid down that Order IX and section 141 do not apply to proceedings in execution does not to my mind justify a finding that Order IX, Rule 9, does not apply to orders made under Order IX.

Section 141 lays down that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Primâ facie an application to set aside an *ex-parte* order dismissing a suit is a proceeding, and

(3) (1895) 17 All., 106. (4) (1914) 41 Cal., 1.

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an order dismissing it for default is part of a proceeding, so that the provisions of Order IX, Rule 9, would apply thereto.

I am fortified in this view by the ruling of a Calcutta Bench in *Bipin Behari Shaha* v. *Abdul Barik* (5) that an application under Order IX, Rule 9, lay to set aside an order, made under the same rule and order, dismissing an application to reopen a suit, and I note that the bench there held that the application might equally have been dealt with as one for review.

Even assuming that an application under Order IX, Rule 9, to set aside a previous order under the same order and rule would not lie, I should hold that the Court was entitled to deal with it as an application for review, and if the provisions of Order XLVII could not be applied, I should be disposed, if necessary, to fall back upon the inherent power of the court in the interests of justice to set aside its own *ex-parte* order.

The application is dismissed with costs.

Advocate's fees—two gold mohurs.

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(5) (1917) 44 Cal., 950.

APPELLATE CRIMINAL.

Before Mr. Justice Doyle.

1925
July, 31.

MOHAMMED EUSOOF AND ONE

v.

KING-EMPEROR.*

Bail—Offences "punishable with death or transportation for life,"—Criminal Procedure Code, section 497—Points for consideration in granting bail in non-bailable case.

It must be understood that, while a wide discretion as to the grant of bail in cases other than those involving capital punishment has now been placed in the hands of Magistrates, they are bound, when weighing the probability of the prisoner appearing for trial, to consider the nature of the offence charged, the character of the evidence against the accused, and the punishment which, in the event of conviction, is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner, if released, will tutor witnesses, should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses, or where there are reasonable grounds for believing that he will use his liberty to suborn evidence.

Held, that the phrase "death or transportation for life" in section 497, Criminal Procedure Code, does not extend to offences punishable with transportation for life only; and means only those offences for which death and transportation for life are alternative sentences.

In the matter of Barronet, E.R., K.B., 338; *Mackintosh* v. *McGlinchey* S.C., 75; *Narendra Lal Khan* v. *Emperor*, 36 Cal., 166; *Regina* v. *Frazer* 13 N.S.W.L.R., 150; *Regina* v. *M'Cartie*, 11 I.C.L.R., 188; *Regina* v. *McNamara*, 18 B.C.R., 125; *Regina* v. *Valle*, 23 N.Z.L.R.—*referred to.*

Bandeville v. *King-Emperor*, 2 Ran., 546—*dissented from.*

Keith—for the Applicants.

Gaunt, Assistant Government Advocate—for the Crown.

This was a reference made to the High Court under section 438 of the Criminal Procedure Code by the Sessions Judge of Insein (H. H. Mackney, Esq., I.C.S.) on the 3rd day of July 1925 in his Criminal Miscellaneous Trial No. 4 of 1925. The point

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* Criminal Revision No. 688-B of 1925 from Criminal Miscellaneous Trial No. 4 of 1925 of the Sessions Judge, Insein.

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raised being that in his opinion the words "an offence punishable with death or transportation for life" in section 497 of the Criminal Procedure Code referred to offences to which the alternative sentences of death or transportation for life applied.

DOYLE, J.—Under section 497 of the Criminal Procedure Code, as recently amended, any person accused of any non-bailable offence arrested without warrant by an officer in charge of a Police Station, or who appears, or is brought before a Court, may be released on bail, but shall not be so released if there appears reasonable ground for believing that he has been guilty of *an offence punishable with death or transportation for life*.

The phrase "an offence punishable with death or transportation for life" contains an ambiguity which has resulted in a reference to this Court by the Sessions Judge of Insein, who, while believing that the phrase was intended to cover only offences which are punishable with death, as well as, in the alternative, with transportation for life, considered that the case of *H. M. Boudville* v. *King-Emperor* (1), contained, by implication, a ruling that the phrase covers offences punishable only with transportation for life.

I agree with the learned Sessions Judge that, in the case of *H. M. Boudville* v. *King-Emperor* (1), there is an implication that Magistrates have no option as regards granting bail in the case of offences punishable with transportation for life, although the point does not seem to have been fully argued before Mr. Justice Duckworth.

The phrase "an offence punishable with death or transportation for life" is not a particularly elegant one from a grammatical point of view, and, were it intended to be disjunctive, one would be

(1) Indian Law Reports (1924), II Rangoon, page 546.

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DOYLE, J.

inclined to favour the alteration of the phrase to "an offence punishable with death or with transportation for life." The phrase is, however, taken directly from the Indian Penal Code which details a number of offences in which either punishment may be inflicted at the discretion of the sentencing Court.

Following the principle that an accused is regarded as innocent until he is proved guilty, it is an established principle throughout the greater part of the British Empire that an accused is kept in detention before his trial mainly that his appearance for trial may be assured, bail being normally accepted when the security is such as to make it morally certain that the accused will appear. See *Regina* v. *Scaife*, approved in *In the matter of Barronet* (ii). Also *Regina* v. *McNamara* (*Can.*) (iii); *Regina* v. *M'Cartie* (*Ir.*) (iv); *Regina* v. *Fraser* (*Aus.*) (v); *Regina* v. *Valle*, (*N.Z.*) (vi); *Mackintosh* v. *McGlenchy* (*Scot.*) (vii), I have perused the case of *Narendra Lal Khan* v. *Emperor* (viii), which, however, merely goes so far as to say that other circumstances may also guide a Magistrate in granting or refusing bail, but does not expressly negative the main principle.

It is, therefore, pertinent to enquire to what class of cases was this rule intended to be made applicable when the Code was altered, it being permissible for a Judge to deduce intention, where it can be deduced from the phraseology contained in the alteration.

There is only one offence in the whole Code which is punishable with death alone, and, as this happens

(ii) E.R.K.B., page 338.
(iii) 18 B.C.R., page 125.
(iv) 11 I C.L.R., page 188.
(v) 13 N.S.W.L.R., page 150.
(vi) 23 N.Z.L.R., page
(vii) S.C. 75, page
(viii) India Law Reports, XXXVI Calcutta, page 166.

to be murder by a life convict, the question of bail under section 497, Criminal Procedure Code, obviously does not arise.

As regards the other offences for which the capital sentence may be inflicted, it is difficult to frame a phrase that would include these offences that would be succinct, and that, at the same time, would be free from ambiguity which has given rise to the present reference.

It may be remarked, however, that, as a general rule, even in those parts of the Empire in which the general principle prevails, it is unusual to grant bail where the offence charged involves the possibility of capital punishment. If, therefore, the limited interpretation suggested by the learned Sessions Judge, Insein, to be placed upon the phrase "offences punishable with death or transportation for life" be accepted, the recent amendment to the Code brings the principles governing bail in India into conformity with the practice throughout the portions of the Empire administered under a developed systems of law. It would be idle to assume that the practices prevailing throughout the Self-Governing portions of the British Empire were not in the minds of the amenders of the Criminal Procedure Code when they were considering the amendment in question.

It is difficult to see what principle, other than pure empiricism, should distinguish offences punishable with transportation for life from offences punishable with long terms of imprisonment; why, for instance, the detenu accused of lurking house trespass with a view to commit theft, for which the punishment is fourteen years' imprisonment, should be specially favoured as against the individual who has dishonestly received stolen property, knowing that it was obtained by dacoity, for which the punishment happens to be

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transportation for life? It cannot seriously be argued that the comparatively slight difference in degree of possible punishment will render it morally less likely that the person arrested will put in an appearance in the one case rather than the other. On the other hand, the degree of difference is so great as between transportation for life and death as to be immeasurable. A prudent Legislature will, therefore, withdraw from the discretion of the magistracy cases in which, if guilt is probable, even a man of the greatest fortitude may be willing to pay a material price, however exorbitant, for life.

I, therefore, hold that the phrase "death or transportation for life" in section 497, Criminal Procedure Code, must not be taken as extending to offences punishable with transportation for life only.

It must be understood that while a wide discretion as to the grant of bail in cases other than those involving capital punishment has now been placed in the hands of Magistrates, they are bound, when weighing the probability of the prisoner appearing for trial, to consider the nature of the offence charged, the character of the evidence against the prisoner, and the punishment which, in the event of conviction, is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner, if released, will tutor witnesses, should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses, or where there are reasonable grounds for believing that he will use his liberty to suborn evidence.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

MAUNG PO HMEIN

v.

MAUNG AUNG MYA.*

1925

Aug. 17.

Stake-money, whether recoverable from winner once it is paid by stake-holder in spite of protest and warning from loser—Indian Contract Act (IX of 1872), section 30.

Held that although under the Indian Contract Act (IX of 1872) it is quite competent to the loser of a bet to recover his deposit from the stake-holder before the latter has paid it over to the winner, there is no authority for holding that the loser has the right to recover from the winner the money once it has been paid to him by the stake-holder in spite of the loser's protest and request to the contrary.

Maung Shin v. Maung Po Kaing, U.B.R. (1897-01), II, 329 : *Queen-Empress v. Nga Po Twe*, S.J., 130—*distinguished.*

Pollock and Mulla on Contracts, Fifth Edition, page 244—*referred to.*

Mitter—for the Appellant.

Ko Ko Gyi—for the Respondent.

PRATT, J.—Plaintiff Maung Aung Mya sued Maung Than Gyi and Maung Po Hmein to recover Rs. 550, stake deposited with Maung Than Gyi to abide the result of a race between the carts of plaintiff and second defendant.

Plaintiff protested against the decision of the Judge that Maung Po Hmein's cart had won the race and warned the stake-holder Maung Than Gyi not to make over his money to second defendant.

First defendant nevertheless made over the stakes to Maung Po Hmein.

The trial Court awarded plaintiff a decree against second defendant, the adjudged winner of the race, but dismissed the suit against first defendant holding that he was not liable as he had parted with the money under the directions of the Judge.

* Civil Second Appeal No. 58 of 1925.

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MAUNG PO HMEIN v. MAUNG AUNG MYA.

PRATT, J.

An appeal by Maung Po Hmein to the District Court was dismissed, the Judge holding that there was ample authority for the recovery of a stake, if the protest was made by the depositor before the stake-holder had paid out the money.

In this Court the only ground which has been seriously argued is that a suit for recovery of the stake is barred by section 30 of the Contract Act.

Section 30 definitely provides that no suit shall be brought for recovering anything entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

The cart race was an uncertain event and the money was entrusted to abide its result.

Primâ facie therefore section 30 of the Contract Act bars the suit.

In *Queen-Empress* v. *Nga Po Twe* (1), however, the Special Court, Lower Burma, approved the English case of *Diggle* v. *Higgs* (2 Ex. D., 422, L.R.) where it was held that the loser of a bet was entitled to recover his deposit from the stake-holder, which he had demanded from the latter before he paid over to the winner.

In the later case of *Maung Shin* v. *Maung Po Kaing* (2), it was held by the Judicial Commissioner, Upper Burma, that the deposit might be recovered from the stake-holder in similar circumstances provided plaintiff had demanded its return before the stake-holder had paid it away.

These decisions are an authority for recovering the deposit from the stake-holder provided the money has been demanded from him before it has been paid away; but not for recovery from the winner of the wager.

(1) S.J., 130. (2) U.B.R., 1897-01, II, 329.

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MAUNG PO HMBIN v. MAUNG AUNG MYA.

PRATT, J.

In the present instance the respondent objected to the money being paid over, but did not ask for its return.

His suit against the stake-holder has been dismissed and he has not appealed.

I can find no authority for the right to recover the money, deposited by way of wager, from the winner, to whom it was paid by the stake-holder in spite of plaintiff's protests.

In Pollock and Mulla's notes on the Contract Act (at page 224, Fifth Edition) it is pointed out with reference to section 30 that it is quite competent to the loser to recover his deposit before the stake-holder has paid it over to the winner. The inference is that he cannot recover it from the winner after it has been paid over.

In the present instance plaintiff did not demand its return and it has been paid over to the winner.

I do not consider the Court can go behind the provisions of section 30 and give plaintiff a decree for the recovery from the winner.

On this view the appeal must succeed.

The decree against the present appellant is set aside and it is ordered that the suit against him be dismissed.

Appellant is entitled to costs throughout.

FULL BENCH (CIVIL).

Before Mr. Justice Rutledge, Chief Justice, Mr. Justice Brown and Mr. Justice Maung Ba.

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SEPT. 2

MA THAN
v.
MAUNG BA GYAW.*

Practice—Letters Patent, clause 13—Effect of the Judge, who passed the Judgment, being on leave—Rule 28 of the Appellate Side Rules of the High Court.

Held that Rule 28 of the Appellate Side Rules of Procedure is *ultra vires* so far as it contemplates that a Judge other than the Judge who passed the judgment, may declare that a case is a fit one for appeal.

Held that the Letters Patent, clause 13, restrict the grant of a certificate declaring that the case is a fit one for appeal to the Judge who passed the judgment.

This was a reference made to a Full Bench of the High Court by the Chief Justice, who was asked to certify, under Rule 28 of the Appellate Side Rules, that a judgment passed by Carr, J., prior to his going on leave, was a fit one for appeal. The learned Chief Justice being of opinion that the rule in question was *ultra vires* referred the matter in the following terms to a Full Bench :—

In this case I am asked to certify that the case is a fit one for appeal as the Judge who passed the judgment is absent on leave. In my opinion the Letters Patent restrict the grant of a certificate to the Judge who passed the judgment.

The learned Advocate for the applicant relies on Rule 28 of the High Court Rules last paragraph which if valid would cover his application. In my opinion this part of the rule is *ultra vires* and is in effect indexing the personal and special remedy given by section 13 of the Letters Patent. The question of the validity of our rules is one of importance and I direct that it be put down for

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* Civil Miscellaneous Application No. 80 of 1925.

consideration by the next Full Bench that is to sit to consider a point of Burmese Buddhist Law in the near future.

The reference was in due course considered by a Full Bench composed of the Chief Justice and Brown and Maung Ba, JJ.

Ba Thein (2)—for Applicant.

RUTLEDGE, C.J.—An application was made to me for a declaration under section 13 of the Letters Patent that the judgment passed by Mr. Justice Carr on the 20th of May 1925 in Civil Second Appeal No. 397 of 1924 was a fit one for appeal.

From my reading of the terms of section 13, I did not consider that I had any power to give such a certificate. The learned Advocate for the applicant relied upon Rule 28 of the Appellate Side Rules of Procedure of this Court. And if Rule 28 is *intra vires*, it would appear that I had such power; but as I was not satisfied that it was *intra vires*, I referred the matter for the consideration of a Full Bench.

We have now heard the learned Advocate for the applicant in support of the validity of the rule. He contends that though the power is not given by section 13 of the Letters Patent, that section must be read with section 47 and also section 35, and that the Rule 28 was made under the powers not only of Letters Patent but also of section 122 of the Civil Procedure Code and section 108 of the Government of India Act, 1915. He also contends that Rule 28 is in effect not an extension of the provisions of section 13 since it is only to make provision for a Judge who either by death or incapacity through leave or other reasons, is unable to give a certificate. We are unable to accept this argument. The words of section 13 are: "Notwithstanding anything

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MA THAN v. MAUNG BA GYAW.

RUTLEDGE, BROWN AND MAUNG BA, JJ.

hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court . . . . . where the Judge, who passed the judgment, declares that the case is a fit one for appeal" and the section concludes "that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, our Heirs or Successors in Our or Their Privy Council as hereinafter provided." The section gives in this one instance a very restrictive right of appeal, namely, where the Judge, who passed the judgment, gives a certificate declaring that the case is a fit one for appeal. If it had been the intention of His Majesty to permit of any person other than the Judge who passed the judgment granting such certificate, it seems clear to me that He would have made provision by either omitting the words "who passed the judgment" or by a special proviso that, in case the Judge for any reason was not available, such certificate could be given by any other Judge. That has not been done because the intention of the Letters Patent was to confine the granting of a certificate to the Judge who actually heard the appeal and passed the judgment.

Section 47 of the Letters Patent has no bearing upon the question before me. It gives the Local and the Indian Legislature power to amend the Letters Patent. It does not confer any such power upon the Judges of this Court or the Rule Committee. Section 35 of the Letters Patent as well as section 122 of the Civil Procedure Code and section 108 of the Government of India Act, 1915, merely give this Court power to make rules and orders for the purpose of regulating proceedings in civil cases. This application is not merely a matter

of procedure in civil cases, but is a case of widening the terms of the Letters Patent themselves and in a manner, in my opinion, repugnant to the terms of the Letters Patent. In my opinion Rule 28 is *ultra vires* so far as it contemplates that a Judge, other than the Judge who passed the judgment, may declare that a case is a fit one for appeal.

I answer the reference accordingly.

BROWN, J.—I concur.

MAUNG BA, J.—I concur.

FULL BENCH (CIVIL).

Before Mr. Justice Rutledge, Chief Justice, Mr. Justice Brown and Mr. Justice Maung Ba.

MA NYEIN E
v.
MAUNG MAUNG AND TWO.*

1925
Sep. 15.

*Buddhist law—Inheritance—*Pubbaka *children, share of, in the* hnapazon *property of their parent and the step-parent—Rules of division differ where there is issue of the second marriage and where there is no such issue.*

Held that where a Burmese Buddhist, who has married more than once dies leaving *hnapazon* property of the last marriage, the law for the division of that property is that *(a)* where there is an issue of the last marriage, the child or children of the first marriage will take a one-eighth share and the surviving step-parent a seven-eighths share and *(b)* where there is no issue of the last marriage, the child or children of the first marriage will take a one-sixth share and the surviving step-parent a five-sixths share.

Ma Hnin Bwin v. *U Shwe Gon*, 8 L.B.R. 1; *Ma In Than's case*, S.J., 103; *Ma On* v. *Ko Shwe O*, S.J., 378; *Ma Sein Ton* v. *Ma Son*, 8 L.B.R., 501; *Maung Chit Saya* v. *Ma Mein Kale*, U.B.R. (1892-96), II, 93; *Maung Hme* v. *Ma Sein*, 9 L.B.R., 191; *Nga Po Thit* v. *Mi Thaing*, S.J., 18—*referred to.*

Ma Ba We v. *Mi Sa U*, 2 L.B.R., 174; *Mi So* v. *Mi Hmat Tha*, S.J., 177—*dissented from.*

Attasankhepa; *Manukye*, X, 8; U May Oung's Leading Cases on Buddhist law—*referred to.*

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* Civil Reference No. 10 of 1925 arising from Civil First Appeal 223 of 1924.

1925

MA NYEIN E v. MAUNG MAUNG AND TWO.

This was a reference made by a Divisional Bench of the High Court (Das and Maung Ba, JJ.) for a re-consideration by a Full Bench of the decision in the case of *Ma Ba We* v. *Mi Sa U*, 2 L.B.R., 174, on the respective shares of *pubbaka* children and their surviving step-parent in the *hnapazon* estate of their parent and step-parent, the learned referring Judges being of the opinion that the rule where there was no issue of the last marriage, differed from that where there was such issue. The facts of the case and the question referred to the Full Bench appear from the order of reference reported below.

"In this litigation the estate of one U Chit Pon, a Burman Buddhist, was involved. He married three wives in succession. The first one, Ma Me Tu, was divorced over 30 years ago. By that wife he had two children, Maung Maung and Maung Aung, who are still alive. After divorcing Ma Me Tu, he married one Ma Kyaw, who died a few years afterwards. There was no issue of that union. After her death, he again married Ma Nyein E (appellant-defendant). Ma Nyein E had a daughter, Ma Hla, by a former marriage. One Maung Shwe Pu, a nephew of the second wife, Ma Kyaw, claims to have been adopted by U Chit Pon and Ma Kyaw. At first only Maung Maung and Maung Aung brought a suit against Ma Nyein E for their share of inheritance. They allege that 3 pieces of paddy land known as *Yonbin le*, *Taukshabin le* and *Banbwebin le* were the *payin* property of their father when he married Ma Nyein E. It is common ground that other properties in Schedule B are the *hnapazon* property of U Chit Pon and Ma Nyein E. They claim a three-fourths share in the *payin* property, and a one-eighth share in the *hnapazon* property.

"After the institution of the suit, Maung Shwe Pu made an application to the District Court of Yamèthin that he might be impleaded as a co-plaintiff on the strength of his alleged adoption. The District Judge granted his application, and ordered an amendment of the plaint.

"In the new plaint Maung Maung and Maung Aung admit the adoption of Maung Shwe Pu, and the three jointly claim the whole of the *payin* property and one-fourth of the *hnapazon* property.

"The defence set up by Ma Nyein E is that Maung Shwe Pu was never adopted, that Maung Maung and Maung Aung are not entitled to claim any share because, after the divorce of their mother, they have not maintained filial relationship with their father, and, lastly, that the 3 pieces of paddy land form part of the *hnapazon* property of herself and the deceased.

"The issues framed are defective, and it is unfortunate that the learned District Judge has not recast them. The disputed adoption has not been specifically mentioned in any of the issues, but, as pointed out by the learned District Judge, this omission does not appear to have prejudiced either party because they have produced evidence on that point. The allegation is that Maung Shwe Pu was adopted when he was about 7 or 8 years of age. He is now 42. So one cannot expect the evidence tendered to prove it to be entirely free from discrepancies.

"The evidence tendered in the present case is that of persons who are old enough and who are also in a position to know about the alleged adoption. The lower Court has been favourably impressed by those witnesses. Their evidence has been strengthened by the admission of Ma Nyein E that, when she and the deceased *shinbyued* Maung Shwe Pu, they referred to him as their son (*tha*), and also by the admission

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MA NYEIN E v. MAUNG MAUNG AND TWO.

of her witness U Chit Twe (3 D.W.) that it was common knowledge that Shwe Pu was their adopted son. For this reason we accept the finding of the lower Court on this point of adoption as correct.

"As regards the claim of Maung Maung and Maung Aung, it must be disallowed in case it is proved that they have severed filial relationship with their father.

"There is satisfactory proof that there has not been such a severance. Maung Maung has been blind for some time, and Maung Aung has been an invalid for some time. They have latterly lived separately from their father, but there is evidence that they visited him occasionally, and that they stayed with him till they married. Ma Nyein E herself admitted that Maung Aung came and stayed with them for about one and half month about a year before U Chit Pon's death. U Chit Pon was a *wunthanu*, but his children are not. There is some indication that for such reason the visits to the father were not more frequent. We hold that there has been no severance of the filial relationship, and that Maung Maung and Maung Aung have not forfeited their right to inherit.

"As regards the dispute about the 3 pieces of paddy land, the evidence tendered by the plaintiffs is convincing that they constitute the *payin* property of the deceased. Even Ma Nyein E, contradicting her own written statement, admitted in her evidence that 2 of the pieces, namely Yonbin and Banbwe lands, were brought by U Chit Pon when he married her. In her evidence she stated that the remaining piece, Taukshabin *le* was acquired by clearing jungle after his marriage with her. The evidence produced by her in support of that allegation is not satisfactory and cannot be accepted in the face of more reliable evidence produced by the other side. We decide that all the 3 pieces constitute the *payin* property of the deceased.

"The learned District Judge has given the plaintiffs the whole of the *payin* property and one-fourth of the *hnapazon* property. The allotment has now been disputed by the appellant. We are of opinion that the division of shares is not correct.

"As regards the *payin* property, it is settled law that the *pubbaka* children (children of previous marriages) should get three-fourths and their step parent one-fourth, as decided by the Full Bench of the late Chief Court in 1903. *Ma Ba We* v. *Mi Pa U*, 2 L.B.R. 174). This mode of division is supported by section 8, Book X of Manukye.

"As regards the *hnapazon* property, according to the above ruling, the step children should get one-eighth and the step mother seven-eighths. We doubt the correctness of this division. As in the present case there was *no* issue of the last marriage. The division should be in the proportion of 1 to 5 and not 1 to 7. Section 8 of Book X is clear on the point. The division in the proportion of 1 to 7 would be correct according to section 10 if there was an issue of the last marriage.

"The learned Judges who decided that case made no differentiation between a case where there was an issue of the last marriage and a case where there was not. When there was an issue some sort of provision for that issue was contemplated and the share of the *pubbaka* children was reduced from one-sixth to one-eighth. That issue would get 2 shares out of 8 as against 1 share for the *pubbaka* children.

"The two ex-Ministers who were great authorities on Buddhist Law, *viz.*, Kinwun Mingyi and Wetmasut Wundauk, and who were consulted on this very issue by the late Mr. Burgess in a similar case (*Maung Chit Saya* v. *Ma Mein Kale*, 2 U.B.R., 1892-96,

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page 93) quoted authorities which support the division in the proportion of 1 to 5.

"After the decision of the Full Bench case in 1903 the Privy Council in 1914 in the case of *Ma Hnin Bwin* v. *U Shwe Gon* (1) has given the Manugye a commanding position and has held that "where it is not ambiguous other Dhammathats do not require to be referred to."

"Manugye is not ambiguous on this point. We are of opinion that this important point requires to be reconsidered and we therefore refer the following question for the decision of a Full Bench :—

"'Where a Burman Buddhist who has married more than once dies leaving *hnapazon* property of the last marriage, what is the law of partition of that property between the *pubbaka* children and their step-parent (1) where there is an issue of the last marriage and (2) where there is not?'"

The Reference was heard in due course by a Full Bench composed of Rutledge, C.J., Brown and Maung Ba, JJ., and their Lordships' order is reported below.

Hla Tun Pru—for the Appellant.

Thet Tun—for the Respondent.

MAUNG BA, J.—This reference relates to the estate of one U Chit Pon, a Burman Buddhist.

The facts are as set out in the order of reference.

U Chit Pon married three wives in succession, the second wife after divorcing the first and the third after the demise of the second. By the first wife he had two sons and the second wife and himself adopted a child. By the third wife he had no issue. On his death he left both kinds of property, namely, *payin* property brought to the last marriage

and *hnapazon* property acquired during that marriage.

The reference arose out a suit brought against the widow by her step-children and relates to the *hnapazon* property.

The question referred to us is as follows :—

"Where a Burman Buddhist who has married more than once dies leaving *hnapazon* property of the last marriage, what is the law of partition of that property between the *pubbaka* children and their step-parent (1) where there is an issue of the last marriage and (2) where there is not?"

The law of division in both cases has hitherto been that the step-child takes one-eighth and the step-parent seven-eighths. That law was laid down as early as 1873 in the case of *Nga Po Thit* v. *Mi Thaing* (1) where Mr. Sandford, the then Judicial Commissioner, held that "on the death of the father who has married two wives in succession, the child of the first marriage is entitled to one-eighth share in property acquired during the continuance of the second marriage." He based his decision on the rule of partition given in Book X, section 10 of the Manugye Dhammathat. That section relates to the partition between the step-parent, the child of the former marriage and the child of the last marriage. It gives the step-parent five shares, the child of the former marriage one share and the child of the last marriage two shares. So the decision of Mr. Sandford would be quite justified under the Manugye Dhammathat if, in the case reported, there was a child of the second marriage. That decision of Mr. Sandford was followed by his successor, Sir John Jardine, in 1883 in the case of *Mi So* v. *Mi Hmat Tha* (2).

(1) S.J., 1872-1892, Vol. 1, page 18.
(2) S.J., 1872-1892, Vol. 1, page 177.

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Unfortunately in that case there was no child of the last marriage. The attention of Sir John Jardine was drawn to section 8, Book X of the Manugye Dhammathat, which gives the step-son one-sixth and the step-parent five-sixths; yet with some doubt he decided to adopt the rule of the Manugye Dhammathat as expounded by Sandford, J., as he was of the opinion that Wunnana and Mohavicchedani supported such exposition of the law. This law was again considered by a Full Bench of the late Chief Court in 1903 in the case of *Ma Ba We* v. *Mi Sa U* (3). In that case the third wife, who was childless, sued her step-children by the former wives for her share in the estate left by her husband. The previous rulings were considered. As regards *hnapazon* property the rule laid down in section 10, Book X of the Manugye Dhammathat, was again followed. In all those cases the presence of a child of the last marriage was lost sight of. Apparently the learned Judges were of the opinion that, in view of the settled law that no child except the *orasa* was entitled to claim a share during the lifetime of his own parent, the two shares allotted to the child of the last marriage should be included in the share of his parent. Section 8, Book X of the Manugye Dhammathat makes no mention whatever of a child of the last marriage and it gives a larger share, namely, one-sixth to the step-child; but section 10, Book X mentions a child of the last marriage and also gives that child two shares out of eight. A comparison of these two sections clearly shows that the share of the step-parent is reduced when there is a child of the last marriage. It cannot be supposed that the framer of the Manugye Dhammathat had had

(3) (1903-04) 2 L.B.R., 174.

no object in making that reduction. If it were contemplated that the one law laid down in section 10 were to be indiscriminately applied to all cases no matter whether there was an issue of the last marriage or not, then the writer of the Manugye Dhammathat would be guilty of having laid down two rules of division, one close on the heels of another, prescribing different shares, one greater than the other; but such a charge of inconsistency and indiscrimination would disappear if section 8 were taken to refer only to a case where there was no issue of the last marriage and section 10 to a case where there was such an issue. In my opinion the writer contemplated that some provision should be made for the child of the last marriage who had no immediate right of claiming any share, owing to the presence of his parent.

In a similar case, *Maung Chit Saya* v. *Ma Mein Kale* (4), decided by the late Mr. Burgess, Judicial Commissioner, Upper Burma, the late Kinwun Mingyi and the Wetmasut Wundauk, who are great authorities on Buddhist law, were consulted. One of the questions referred to them was as to the law of partition between the step-parent and the step-child where there was no issue of the last marriage. In answer to that question the Kinwun Mingyi quoted this law:—"On the partition between the children of the two former marriages and the third wife, who is the step-mother of the said children, the law is this:—On the death of the father leaving a subsequently married wife *without* children the law of partition between the step-mother and the former children is this. All the acquired property should be divided into six shares, the former children to receive one share and the step-mother five shares

(4) U.B.R., 1892-96, Vol. II, page 93.

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. . . . . This view of the law given in the Attathankeik Dhammathat coincides with the law given in the following Dhammathats: Commentary on the Manu Dhammathat; Dhamma Vinicchaya Dhamma, Pakainnaka Dhammathat in verse and Sesadayajja Dipani Dhammathat in verse."

Attasankhepa Vannana Dhammathat was compiled by the late Kinwun Mingyi on consideration and comparison of all the available texts, and contains the view of the learned compiler on the law as it actually stood at the time of compilation. It was first printed in Burmese in the year 1882 and has always been regarded as a weighty authority.

The Wetmasut Wundauk also gave the same law of partition relying upon the Attasankhepa Vannana Dhammathat.

The Kinwun Mingyi, however, proposed to take away one share from the widow and give it to the step-child of the second marriage instead of strictly adopting the law pointed out in his Dhammathat.

The learned counsel for the widow admitted that the law laid down in section 8, Book X of the Manugye Dhammathat, was the correct law; but he urged that the law of division in the proportion of one to seven laid down in 1873 has been accepted and followed ever since by the Burman Buddhists as a settled law on the point, that any sudden change in that law would result in confusion and that therefore it would not be advisable to introduce any change but allow tha law though incorrect to remain. This argument, though plausible, is not warranted by precedents.

The law about the widow's powers of disposal over her deceased husband's estate laid down in 1886 in *Ma On* v. *Ko Shwe O* (5) was found to be incorrect

(5) (1872-92) S.J., 378.

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and had to be changed in 1915 in *Ma Sein Ton* v. *Ma Son* (6). Another law that the taking of a lesser wife by the husband does not in itself constitute a ground for a divorce laid down in 1881 in *Ma In Than's case* (7) was also found to be incorrect and changed in 1918 in *Maung Hme's case* (8) and a wife who is not consenting can now obtain a divorce without any further proof of cruelty.

In 1914 their Lordships of the Privy Council in the case of *Ma Hnin Bwin* v. *U Shwe Gon* (9) made Manugye the paramount authority in these words: "The Manugye has held a commanding position since the time of King Alompara and is still to be regarded as of the highest authority. Where it is not ambiguous other Dhammathats do not require to be referred to."

In the case under review the Manugye Dhammathat is not ambiguous and the rule given there has been adopted by the Kinwun Mingyi in his work. In the case of a large estate the difference in the share by non-observance of this plain law may be considerable.

The Hon'ble U May Oung in his work on Buddhist Law has noticed this misconception of the law and he has urged the reconsideration of the law in the following words: "It is submitted, therefore, that the question should be re-opened and that the distinction expressly drawn in the Dhammathats between a case in which there is issue of the second marriage and one in which there is not should be recognised. The present practice has, it is true, been a long-standing one, but where a rule of law is clear, unambiguous and well founded, as shown above, there appears to be no reason why a decision, even so old

(6) (1915-16) L.B.R., VIII, page 501.
(7) S.J., 103.
(8) (1917-18) 9 L.B.R., page 191.
(9) (1915-16) 8 L.B.R., page 1.

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as the one in Mi So's case (based on a misconception and given with some hesitation), should not be overruled.

I am of opinion that it is but right to rectify the errors and lay down the correct law in conformity with the Manugye Dhammathat. Accordingly my answer to the question referred to us will be as follows:—

That in a case where there is an issue of the last marriage the step-child or children collectively take one-eighth and the step-parent seven-eighths and that in a case where there is no issue of the last marriage the former take one-sixth and the latter five-sixths.

RUTLEDGE, C.J.—I concur.

BROWN, J.—I concur.

FULL BENCH (CIVIL).

Before Mr. Justice Rutledge, Chief Justice, Mr. Justice Heald and Mr. Justice Chari.

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Sep. 29.

THE MUNICIPAL CORPORATION OF RANGOON

v.

M. A. SHAKUR.*

Revisionary Jurisdiction of the Hight Court—Exercise by the Chief Judge, Small Cause Court, of the powers conferred by section 14 of the Rangoon Municipal Act (Burma Act VI of 1922)—The Chief Judge not a Court but a persona designata.

Held that the Chief Judge of the Rangoon Small Cause Court, in performing the functions assigned to him by section 14 of the Rangoon Municipal Act, acts as a *persona designata* and not as a Court and that the High Court has no jurisdiction either under section 115 of the Civil Procedure Code or under section 107 of the Government of India Act to interfere in Revision with his decisions.

In re *Royal Aquarium*, [1892] Q.B., 431; *Manavala Govindan* v. *Kumarappa Reddy*, 30 Mad., 326; *Vasudeva Iyer* v. *Negapatam Devastonam Committee*, 38 Mad. 594; *National Telephone Co.* v. *The Post Master General*, (1913) A.C., 540—*referred to.*

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* Civil Reference No. 12 of 1925.

Balaji Sakaram v. *Merwanji Nowroji*, 21 Bom., 279; *R. S. Navalkar* v. *Mrs. Sarojini Naidu*, 25 Bom. L.R. 463; *The Municipality of Belgaum* v. *Subbararao*, 40 Bom., 509; *Vijiaragam Pillay* v. *Thyagaraja Chetty*, 38 Mad., 581—*followed*.

Balakrishna v. *Vasudeva*, 40 Mad., 793; *Kokku Parthasaradhi* v. *Chintli Cherru Koteswara*, 47 Mad., 369; *Ramasawmi Govindan* v. *Muthu Velapa*, 46 Mad., 536—*distinguished*.

This was a reference made by Doyle, J., sitting as a single judge in review of his order passed in Civil Revision No. 88 of 1925. The Respondent was a councillor in the Rangoon Municipal Corporation, and on his becoming a sub-contractor under a contractor, employed by the Corporation, the question arose whether he had become disqualified for office as councillor by reason of section 12 of the Rangoon Municipal Act (Burma Act VI of 1922).

The Chief Judge of the Rangoon Small Cause Court exercising the functions vested in him under section 14 of the Act held that he had become disqualified. The Respondent having taken the Chief Judge's order to the High Court on revision, Doyle, J., came to the contrary conclusion and set aside the order. On an application for review being preferred by the Corporation, on the contention that the High Court had no jurisdiction to interfere in revision in such matters, Doyle, J., referred the matter to a Full Bench, made the following order of reference to a Bench :—

"In Civil Revision No. 88 of 1925 I held, following the ruling in *Mahomed Ebrahim Moolla* v. *S. R. Jandass* (1), that, although section 14 of the Rangoon Municipal Act declared that the decision of the Chief Judge of the Rangoon Small Cause Court on matters referred to in that section was final, the section did not oust the jurisdiction in revision of the High Court. My grounds for following

(1) (1921-22) 11 L.B.R., page 387.

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that ruling were that the wording of section 14 of the Rangoon Municipal Act was similar to that of section 18 of the Rangoon Rent Act. My attention was not drawn during the hearing of that revision case to section 199 of the City of Rangoon Municipal Act which provides that the decision of the Chief Judge of the Rangoon Small Cause Court, unless it is otherwise expressly provided by the said Act on any matters, in respect of which he exercises his powers of jurisdiction, shall be final. An application has now been filed for a review of my order on the ground that the omission to consider section 199 constituted, if not an error of law, apparent on the face of the record, at any rate, a sufficient reason by analogy for a review of the order passed by me.

I have no hesitation in saying that, had my attention been drawn to section 199 of the Rangoon Municipal Act instead of deciding the case on my own initiative, I should have submitted the question as to the finality of the order of the Chief Judge of the Rangoon Small Cause Court, to a Bench of the High Court. In view of the fact that the party who applied for review has no further recourse and of the circumstance that my decision, although not necessarily erroneous, was come to without considering a very material section of the Rangoon Municipal Act, I am of opinion that sufficient ground exists for a review.

Section 199 of the Rangoon Municipal Act sets forth that, notwithstanding anything contained to the contrary in the Rangoon Small Cause Court Act, 1920, or any other enactment, the Chief Judge of the Rangoon Small Cause Court shall exercise all powers and jurisdiction conferred on and vested in the said Judge under the provisions of this Act, and,

unless it is otherwise expressly provided by this Act, his decision on any matters in respect of which the exercise of such powers of jurisdiction, shall be final.

It is argued on behalf of the applicant that this section gives a definition of finality which expressly excludes recourse to any legal remedy unprovided for by the Rangoon Municipal Act. This contention would, at first sight, appear to be unimpeachable. Unfortunately, however, whereas, in the Rangoon Rent Act, there is no provision for an appeal from the decision of the Chief Judge of the Court of Small Causes, Rangoon (there is provision under section 91 of the Rangoon Municipal Act, of instance) for an appeal in certain circumstances from the decision of the Chief Judge of the Rangoon Small Cause Court. It was, therefore, essential that there should be some clause to qualify the last phrase of section 199 of the Rangoon Municipal Act providing that the jurisdiction of the Chief Judge of the Rangoon Small Cause Court should be final. It is therefore a matter of considerable doubt as to whether the definition of section 199 of the Rangoon Municipal Act extends the finality of the decisions of the Chief Judge of the Rangoon Small Cause Court beyond the finality of his decisions under the Rangoon Rent Act. In section 200 of the Rangoon Municipal Act it is held that, for the purpose of any appeal, inquiry or proceeding, under this Act, the Chief Court or the Chief Judge of the Rangoon Small Cause Court may exercise all the powers conferred on the said Court by the Code of Civil Procedure, 1908, or the Rangoon Small Cause Court Act, 1920, as the case may be, and the said Chief Judge shall observe the procedure prescribed in the said Code, and act, so far as the same is consistent, with the provisions of this Act. It has been argued

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that this section limits the power of the High Court. To my mind it leaves the power of the High Court untrammelled and, so far as it is a limiting section, it merely deals with the procedure to be followed by the Chief Judge of the Rangoon Small Cause Court.

Had I been free to discuss this case without considering the Full Bench Ruling in *Mahomed Ebrahim Moolla* v. *S. R. Jandass* (1), I should have been prepared to hold that section 199, read with section 14 of the Rangoon Municipal Act, precluded the High Court from interfering in revision in the case under consideration. In the Full Bench decision just cited, the late Chief Justice held that the ordinary legal meaning of the word "final" was that the order was not appealable. He did not discuss this point at length but referred to the case of *Balkaran Rai and others* v. *Gobind Nath Tiwari and another* (2), in which case he held that the matter had been fully considered. With all due respect to the late learned Chief Justice, I am unable to find in the decision quoted by him any countenance for the theory that the word "final", as applied to a decision means that, although not appealable, it is open to revision. Far from that being the case Edge, C.J., who discussed the point at length, appears to have held the exact opposite. On page 152 of the judgment in question he says "another contention was that the word term "final" in section 5 of the Court-fees Act does not mean final as that term is understood in law, and that the decision of the taxing officer, the Chief Justice, or the Judge appointed under section 5 is open to appeal or revision. "The only interpretation, which

(1) (1921-22) 11 L.B.R. page 387. (2) I.L.R. 12 All. (1890) page 129.

can be placed on the remarks of Edge, C.J., is that he holds that the term 'final' as understood in law, signifies that the decision is not open to appeal or revision." Again, at page 158, he says "I have consequently come to the conclusion that not only did the Legislature intend that the decision, under section 5 of the Court-fees Act, of the taxing officer of the High Court or of the Chief Justice, or the Judge appointed under section 5 should, for all purposes, be final, but that the Legislature has been careful to avoid providing or suggesting any means by which such decision might be questioned; whether or not such decision *ought* to be open to appeal, review or revision is another question, as to which I do not feel bound to express an opinion." That Edge, C.J., did not use the word "revision" in the sentence quoted by the late learned Chief Justice of the High Court in *Mahomed Ebrahim Moolla* v. *S.R. Jandass* (1) was due to the fact that the question under review was a question as to whether an appeal lay. It is significant that the head note to *Balkaran Rai and others* v. *Gobind Nath Tiwari and another* (2), states that, a decision under section 5 of the Indian Court-fees Act, is not open to appeal, revision or review and is final for all purposes and no means have been provided or suggested by the Legislature for questioning it.

Finally, on page 152, Edge, C.J., has remarked "I have no doubt that the term final in section 5 of the Court-fees Act, has precisely the same meaning as the term "final in section 12 of that Act." In so far as section 5 of the Court-fees Act contains a qualifying clause it is analogous to section 14,

(1) (1921-22) 11 L.B.R., page 387. (2) I.L.R. 12 All., (1890) page 129.

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Rangoon Municipal Act, while, in section 12, Court-fees Act, like section 18, Rangoon Rent Act, the phrase "shall be final" is unqualified.

It would appear to me, therefore, that while the decision in *Mohamed Ebrahim Moolla* v. *S. R. Jandass* (1) may be sound yet it finds no support in *Balkaran Rai and others* v. *Gobind Nath Tiwari and another* (2).

Section 115 of the Civil Procedure Code invests the High Court with a power to interfere where a Subordinate Judge has not followed the ordinary principles which should guide him in coming to a decision. It would appear to me to be advisable that there should always be inherent in the High Court such power of interference. On the other hand, it is pointed out, with a good deal of force, that such a power of interference, if contemplated in a case like the particular one now under review, would lead, as in the present case, to grave inconvenience since a constituency might remain practically disfranchised for some considerable time pending a final decision by the High Court. It is argued therefore that it was with a view to preventing the High Court from exercising this power of revision that section 199 of the Rangoon Municipal Act was specially enacted.

In view of the great public importance of the question now under issue, I submit for the decision of a Bench, the following question :—

"Under section 199 of the Rangoon Municipal Act is the High Court of Judicature at Rangoon precluded from exercising its powers of revision under section 115 of the Civil Procedure Code?"

The matter was finally disposed of by a Full Bench composed of the Chief Justice and Heald and Chari, JJ.

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(1) (1921-22) 11 L.B.R., page 3?7. (2) I.L.R. 12 All., (1890), page 129.

Cowasjee—for the Applicant.

Auzam—for the Respondent.

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RUTLEDGE, C.J., HEALD AND CHARI, JJ.—This is a reference made by Mr. Justice Doyle, a Judge of this Court. The matter arises in the following way. Mr. M. A. Shakur was a Councillor in the Rangoon Municipal Corporation. He became a sub contractor under a contractor employed by the Corporation and the question arose whether he became disqualified for office by reason of section 12 of the Rangoon Municipal Act (Burma Act VI of 1922). On application to the Chief Judge of the Rangoon Court of Small Causes under section 14 of that Act the learned Judge held that he had become disqualified. Mr. Shakur being dissatisfied with the order took it up in revision to the High Court and Mr. Justice Doyle sitting as Revision Judge came to the contrary conclusion and was of opinion that he had not become disqualified. An application for review was then filed on behalf of the Municipal Corporation and it was urged before Mr. Justice Doyle that the High Court had no jurisdiction to interfere in revision with the decision of the Chief Judge of the Court of Small Causes. The learned Judge after hearing arguments made a reference in the following terms :—" Under section 199 of the Rangoon Municipal Act is the High Court of Judicature at Rangoon precluded from exercising the powers of revision under section 115 of the Civil Procedure Code." The terms of the reference are not satisfactory. As we understood that the parties desired to argue the matter on all points and not merely with reference to the provisions contained in section 199 of the Rangoon Municipal Act, we allowed Counsel on both the sides to argue the matter in all its bearings and we have decided to deal with the reference

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after amending the order to read as follows :—" When the Chief Judge of the Court of Small Causes, Rangoon, exercises any of the powers conferred on him by section 14 of the Rangoon Municipal Act is his decision open to revision by the High Court of Judicature at Rangoon"? We have confined the reference to the powers which the Chief Judge of the Court of Small Causes, Rangoon, exercises in respect of qualifications of councillors.

It is desirable first to refer to the relevant sections. Section 13 of the Rangoon Municipal Act enacts that a councillor shall cease to hold office as such, *ipso facto*, on his becoming disqualified by reason of the provisions of section 12. Section 14 runs as follows :— "Whenever it is alleged that any councillor has become disqualified for office for any reason aforesaid, and such councillor does not admit the allegation, or whenever any councillor is himself in doubt whether or not he has become disqualified for office, such councillor or any other councillor or the Corporation may apply to the Chief Judge of the Rangoon Small Cause Court; and the said Judge, after making such enquiry as he deems necessary, shall determine whether or not such councillor has become disqualified for being a councillor, and his decision shall be final."

Sections 199 and 200 of the Act are to the following effect :—

Section 199.—"Notwithstanding anything contained to the contrary in the Rangoon Small Cause Court Act, 1920, or any other enactment, the Chief Judge of the Rangoon Small Cause Court shall exercise all powers and jurisdiction conferred on, or vested in, the said Judge under the provisions of this Act, and unless it is otherwise expressly provided by this Act his decision on any matter in respect of

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which he exercises such powers or jurisdiction shall be final."

Section 200.—(1) "For the purposes of any appeal, inquiry or proceeding under this Act the Chief Court or the Chief Judge of the Rangoon Small Cause Court may exercise all the powers conferred on the said Court by the Code of Civil Procedure, 1908, or the Rangoon Small Cause Court Act, 1920, as the case may be, and the said Chief Judge shall observe the procedure prescribed in the said Code and Act so far as the same is consistent with the provisions of this Act."

(2) "The cost of every such appeal, inquiry or proceedings as determined by the said Court, shall be payable by such parties and in such proportions as the Court shall direct and the amount thereof shall, if necessary, be recoverable as if the same were under a decree of the Court."

The first point for consideration is whether, when dealing with election disputes and qualifications of councillors, the Chief Judge of the Small Cause Court is to be deemed "a Court" or a *persona designata*. We shall refer only to those authorities in which persons discharging similar functions to those of the Chief Judge of the Rangoon Small Cause Court in the case before us, have been held to be a Court or otherwise. The case of *Balaji Sakaram* v. *Merwanji Nowroji* (1) was a case concerning a Municipal election in the Bombay Presidency which was sought to be set aside under section 23 of the Bombay District Municipal Act Amendment Act (II of 1884), the wording of which is similar to the wording of section 15 of the Rangoon Municipal Act. The District Judge of the district in which the

(1) (1897) I.L.R. 21 Bom., 279.

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election had been held, was the person to whom application had to be made and he after enquiry was authorised to pass orders confirming, amending or setting aside the election. There was a provision in the section that for the purposes of the enquiry he might exercise any of the powers of the Civil Court and that his decision should be conclusive. Chief Justice Farran and Mr. Justice Parsons held, following an earlier ruling of their own Court, that the High Court had no jurisdiction to revise an order setting aside an election. They held that a District Judge was not a Court within the meaning of section 622 of the Civil Procedure Code but was merely a *persona designata*. It is true that in that case Mr. Chandravarkar (afterwards Mr. Justice Chandravarkar) who appeared for the appellant conceded in argument, on account of the earlier ruling of the High Court, that the High Court had no jurisdiction to entertain a revision application with respect to the order of the District Judge relating to the election, but contended that the High Court could entertain an application in respect of that part of the order relating to costs. The learned Judges of the Bombay High Court held however that as he was not a "Court" at all they had no jurisdiction to interfere with any part of his order. The above case was referred to in a later case in the same High Court (*The Municipality of Belgaum* v. *Subbarao* (2). That case was under section 160 of the Bombay District Municipal Act (Bombay Act III of 1901) and related to compensation about which there was a dispute between the Municipality and the owner of land which the Municipality was acquiring. Sub-section (3) of section 160 provides that the matter may be

(2) (1916) I.L.R. 40 Bom., 509.

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determined by the District Court which is directed to follow in the case of land the procedure provided by the Land Acquisition Act. The learned Judges of the Bombay High Court had already held in an earlier case that no appeal lay from an order under this section to the High Court and they therefore held that a revision was also incompetent as being the only consistent course. They said at the end of the judgment that although the words occurring in section 23 of the Bombay District Municipal Act are "District Judge" and the words occurring in section 160 of the later Act are "District Court" the distinction was not sufficient to support the argument that an application for revision is competent although admittedly no appeal would lie. The matter was again before the High Court of Bombay in a very recent case *R. S. Navalkar* v. *Mrs. Sarojini Naidu* (3). Under the provisions of the Bombay Municipal Act in respect of elections of Municipal Commissioners in Bombay City the Chief Judge of the Small Cause Court is by section 33 of that Act appointed to decide on the validity of the elections. The wording of that section is similar to the wording of sections 14 and 15 of the Rangoon Municipal Act. Sub-section (1) of section 33 enables an elector to apply to the Chief Judge of the Small Cause Court in cases where the qualification of an elected person is disputed or where the validity of the election is questioned. Sub-section (2) directs the Chief Judge to make such enquiries as he deems fit and decide the matter, and sub-section (3) provides that his orders shall be conclusive. On an application for revision of an order made by the Chief Judge of the Small Cause Court, Sir Norman Macleod, C.J., and Mr. Justice Crump held that the Chief Judge of the

(3) (1923) 25 Bombay Law Reporter, 483.

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Small Cause Court was a *persona designata* and that the High Court had no power to interfere in revision with his decision. We notice that the Privy Council case of *Balakrishna* v. *Vasudeva* (4) was brought to the notice of the learned Judges by the petitioner, though no reference was made to that case in the judgment itself. The case of *Vijiaragava Pillay* v. *Thyagaraja Chetty* (5) dealt with a petition under section 15, Charter Act, corresponding to section 107 of the Government of India Act, praying the High Court to revise an order of a Presidency Magistrate who, by the rules framed by the Government under the Madras City Municipal Act, was authorised to decide on the competency or otherwise of a candidate for a Municipal election. The learned Judges of the Madras High Court held that the Magistrate was not "a Court" or subject to the appellate jurisdiction of the High Court within the meaning of section 15 of the Charter Act. The attention of the learned Judges was drawn to the case which later formed the subject of the Privy Council decision mentioned above in regard to which they said that that decision had no direct bearing on the matter they had to decide. After referring to the observations of Fry, L.J., in the Royal Acquarium case (6) they cited from Halsbury's Laws of England (p. 9) of Volume 9 the following passage: "Many bodies are not courts although they may have to decide questions and in so doing have to act judicially in the sense that the proceedings must be conducted with fairness and impartiality." They then referred to the case of *Manavala Goundan* v. *Kumarappa Reddy* (7) and the case of *Balaji Sakaran* v. *Merwanji Nowroji* (1) and

(4) (1917) I.L.R. 40 Mad., 793.
(5) (1915) I.L.R. 38 Mad., 581.
(6) L.R. (1892) Q.B., 431.
(7) (1907) I.L.R. Mad., 326.
(1) (1897) I.L.R. 21 Bom., 279.

concluded as follows: "These authorities show that when quasi-judicial functions are delegated to an officer ordinarily subject to the revisional powers of the High Court he is not with reference to the delegated power necessarily subject to its appellate or revisional authority." We have been referred to certain later decisions of the same High Court where in respect of a different Act the High Court of Madras has taken a different view. Thus in *Ramasami Goundan* v. *Muthu Velapa* (8) that Court held that a District Judge acting under section 57 of the Madras Local Boards Act (XIV of 1920) was subject to the revisional jurisdiction of the High Court.

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Our attention has also been drawn to the more recent case of *Kokku Parthasaradhi* v. *Chintla Cheruv Koteswara* (9) in which a Bench of three judges have in reference to the same Act, arrived at the same conclusion as that of the learned Judges in *Ramasawmi Goundan's* case. These decisions are distinguishable from the case before us, as they proceeded upon a consideration of the rules framed under the Act in question. It is unnecessary to cite the other Madras cases. We would however refer to a passage in the judgment of Sir Arnold White, C.J., in the case of *Vasudeva Iyer* v. *Negapatam Devastanem Committee* (10) which went on appeal to the Privy Council. Referring to the case of *Balaji Sakaram* (1), Sir Arnold White says "The Chief Justice and Parsons, J. were of opinion that a District Judge acting under section 23 of the Bombay District Municipal Act (Amendment Act,) 1884, is not a Court within the meaning of the word in section 622 of the old Civil Procedure Code. They suggest that he was a *persona designata*

(8) I.L.R. 46 Mad., 536. (9) (1924) I.L.R. 47 Mad., 369.
(10) (1915) I.L.R. 38 Mad., 594. (1) (1897) I.L.R. 21 Bom., 279.

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apparently for a specific purpose. That seems to be so. It seems to me that under the Act in question the District Judge is a *persona designata* for a specific purpose and not an officer exercising judicial functions under the Act. As regards the Religious Endowments Act it is clear that for the purpose of several sections of the Act the District Court is not a *persona designata* but a Civil Court exercising jurisdiction under the Act."

In the case of the *National Telephone Co., Ltd.* v. *The Post Master General* (11), the question for decision was whether the Railway and Canal Commission which was constituted a Court of Record acted as such Court or as arbitrators in a certain matter. Lord Parker of Waddington said "where by statute matters are referred to the determination of a Court of Record with no further provision the necessary implication is, I think, that the Court will determine the matters as a Court. Its jurisdiction is enlarged, but all incidents of such jurisdiction including the right of appeal from its decision remain the same." This is the dictum of a very high authority and if, in the case before us, the "Court" as a "Court" had been directed to determine matters, his remarks would be apposite, but these remarks may be taken as suggesting that when the Legislature enacts that certain matters unconnected with the ordinary jurisdiction of a particular Court, shall be determined, not by the Court, but by the Judge, the intention must have been that those matters should be determined by him not as a Court but as *persona designata*. The Privy Council case of *Balakrishna* v. *Vasudeva* (4) deals with a different matter. The order challenged was passed

(4) (1917) I.L.R. 40 Mad., 793. (11) [1913] A.C., 540.

under section 10 of the Religious Endowments Act which authorized the Civil Court to fill up a vacancy in the Temple Committee. "Civil Court" and "Court" are defined in the Act itself as being the principal Court of original civil jurisdiction in which the mosque, temple, or religious establishment is situate. Their Lordships say "Moreover it is to the Civil Court and not to an individual Judge who may preside in or constitute a Civil Court that jurisdiction is given." In all probability this remark of their Lordships was made with reference to the Bombay case of *Balaji Sakaram* which was cited with approval by Sir Arnold White in the judgment under appeal, as the words used in the Bombay Act were "District Judge." Their Lordships later dealt with the argument that was raised that the order in question in the case was not a judicial but merely an administrative or ministerial act. They then considered the preceding sections and came to the conclusion that in a question such as the amotion of an officer from his office for misconduct or unfitness the Court which makes the order removing him is exercising judicial function. They referred to some of the succeeding sections and concluded this part of their judgment as follows: "It appears to their Lordships to be clear that in all these matters the Civil Court exercises its powers as a Court of Law not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal." These remarks of their Lordships seem to indicate that a Civil Court exercising special jurisdiction may be a *persona designata* and that whether it is so or not will have to be inferred from a consideration of the special powers exercised and the special functions performed by the Civil Court. This decision is no authority

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for the proposition that when the Judge of a Court is directed to determine certain matters, it must be presumed that the Judge is intended to determine these matters as a Court.

The effect of the Bombay decisions, with which we are in respectful agreement, is that when, by an Act of the Legislature, a new authority is constituted for the purpose of determining questions concerning rights which are themselves the creations of the Act, and a Judge or Presiding Officer of a Court, as distinct from the Court itself, is directed to perform the functions of the newly created authority, then it must be presumed, unless the contrary is expressly enacted or necessarily implied, that the intention of the Legislature, was that the Judge or Presiding Officer should perform those functions as a *persona designata* and not as a Court. Such a presumption is stronger in the case of a Court like the Rangoon Small Cause Court which consists of a plurality Judges when only one particular Judge is invested with the new powers. It would had been easy for the Legislature to indicate the Court by name if it was the intention of the enactment that the jurisdiction should be exercised by the Court as such. In our opinion therefore the Chief Judge of the Rangoon Small Cause Court in performing the functions assigned to him by section 14 of the Rangoon Municipal Act acts as a *persona designata* and not as a Court. This being so the High Court of Judicature at Rangoon has no power of interference in revison with his decisions either under section 115 of the Civil Procedure Code or under section 107 of the Government of India Act. We therefore answer the reference as follows. The High Court of judicature at Rangoon has no jurisdiction

to interfere in revision with the orders passed by the Chief Judge of the Small Cause Court, Rangoon, in the exercise of the powers conferred on him by section 14 of the Rangoon Municipal Act.

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APPELLATE CRIMINAL.

Before Mr. Justice Maung Ba.

SULTAN

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Penal Code, section 182—Statement made by witness after First Information was laid—Information and statement distinguished—Information need not be volunteered to come under section 182 of the Penal Code.

An "information" within the meaning of section 154 of the Criminal Procedure Code, could be given orally or in writing. If given orally, the Police Officer is required to record it, and every such information, whether given in writing or reduced to writing, requires to be signed by the person giving it. Such information forms the basis upon which an investigation under Chapter XIV commences.

A Police Officer making an investigation has power under section 160 to require the attendance of witnesses who appear to be acquainted with the circumstances of the case and to examine them. Section 162 lays down that no statement made by a person to a Police Officer in the course of such an investigation shall, if reduced to writing, be required to be signed by that person.

On the 6th of June, a certain building was burned down and a First Information report was lodged. On the 26th June, while the enquiry was pending, the petitioner was examined by the investigating officer, who took down his statement, which was not signed by the petitioner. On the petitioner being charged with an offence under section 182 of the Penal Code.

Held that the statement made by the petitioner was not an information given to a police officer but was made under section 161 of the Criminal Procedure Code.

Held also that on these facts, the petitioner had not committed the offence under section 182 of the Penal Code.

Obiter The words "whoever gives" in section 182 of the Penal Code should not be restricted to imply "whoever volunteers."

King-Emperor v. Nga Aung Po, (1904-06) 1 U.B.R., Penal Code, 13; *Mangu* P.W.R. No. 35 of 1915; *Queen-Empress v. Bhikhabhai*, Ratanlal, 124; *Queen-Empress v. Ramji Sajona Rao*, 10 Bom., 124—referred to.

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* Criminal Revision No. 836B of 1925.

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S. M. Bose—for the Petitioner.

Gaunt, Assistant Government Advocate—for the Respondent.

MAUNG BA, J.—Applicant Sultan was being prosecuted before the District Magistrate of Insein under section 182 of the Indian Penal Code. The particulars of the offence are as follows:—

"That you on or about the 26th day of June 1925 at Insein gave to U Aung Tun, a public servant, information to the effect that E. A. Bharoocha Mahomed Uussuf and Gur Khan were driven by you in your taxi to the Insein Municipal Office on the night of the 5th/6th June 1925 which information you knew or believed to be false and knew to be likely to cause such public servant to do an act which he should not have done or to cause him to use his lawful power to the injury or annoyance of any person."

It is now contended that he did not give information, but only made a statement to a Police Officer who was making an investigation under Chapter XIV of the Criminal Procedure Code, and that for that reason he has committed no offence punishable under section 182 of the Penal Code.

This case is a sequel to the famous arson case under section 436 of the Penal Code in connection with the destruction by fire of the Insein Municipal Office. The offence under sectian 436 is a cognizable one. A reference to the Criminal Regular Trial No. 47 of 1925 of the Subdivisional Magistrate of Insein shows that the First Information Report was lodged by Mr. Yusoof, Secretary of the Insein Municipality.

The principal point for decision is whether the statement made by Sultan to U Aung Tun, Inspector,

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C.I.D., can be considered as information relating to the commission of a cognizable offence given to the Police within the meaning of section 154 of the Criminal Procedure Code, or whether it should be considered simply as a statement made to an Investigating Officer under section 161 of that Code.

An information could be given either orally or in writing. If given orally, the Police Officer is required to record it, and every such information whether given in writing or reduced to writing requires to be signed by the person giving it. Such information forms the basis upon which an investigation under Chapter XIV commences. A Police Officer making an investigation has power under section 160 to require the attendance of witnesses who appear to be acquainted with the circumstances of the case, and examine them. Such persons are bound to attend and are also bound to answer all questions relating to the case other than questions the answers to which would incriminate them. Section 162 lays down that no statement made by a person to a Police Officer in the course of such an investigation shall if reduced to writing be signed by that person.

In the present case Sultan's statement (Ex. A) was recorded by the Inspector, but it does not appear to have been signed by Sultan. It was recorded on 26th June 1925, and from the evidence of U Aung Tun it would appear that the fire occurred on 6th June, that he took up the investigation from the 15th June, and that a First Information Report had been opened previously. U Aung Tun further stated that one Gur Khan offered to give information and so he recorded Gur Khan's statement on the 20th June that Gur Khan then made a confession before the Subdivisional Magistrate, that Gur Khan mentioned

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a taxi, that later at an identification parade Sultan was identified as the taxi-cab driver, that after that identification Sultan was brought to him, and that on his asking him what he knew about this case Sultan made the statement (Ex. A). U Aung Tun admitted that before he recorded Sultan's statement he had examined two other witnesses whose statements afforded no corroboration of Gur Khan's statement.

In the above circumstances one is driven to the conclusion that the statement of Sultan was recorded under the provisions of section 161. By no stretch of imagination can that statement be treated as information given to the Police under section 154. There has been a conflict of judicial opinion as regards the word "give" used in section 182 of the Penal Code. That word has been interpreted to mean "volunteer" in *Mangu's case* (1), and a similar view has been taken by Irwin, J.C., in *King-Emperor* v. *Nga Aung Po* (2). In that case it was held that giving false answers to questions put by a Police Officer in the course of investigation of a cognizable offence is not punishable under section 182 of the Penal Code. A contrary view was held in the very old case of *Queen-Empress* v. *Bhiklaiji* (3).

I am not inclined to give that restricted meaning of "volunteer" to the word "give". For instance, if a Police Officer has reason to suspect the commission of a cognizable offence, he can investigate the case under section 157 for the discovery and arrest of the offender. During such investigation he may find a person who gives him the required information in answer to questions put by him. There is nothing in my opinion to prevent that officer from recording that information under the provisions of

(1) P.W.R., No. 35 of 1914. (2) (1904-6) L.U.B.R., Penal Code, page 15.
(3) Ratanlal, page 124.

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section 154. In that view I am fortified by the opinion of the learned Judges of the Bombay High Court in the case of *Queen-Empress* v. *Ramji Sajaua Rao* (4). In that case the information from the accused was elicited by a Forest Officer in the course of his enquiry. It was then held "that any false information given to that Forest Officer with the intent mentioned in section 182 of the Penal Code was punishable under that section whether that information was volunteered by the informant or given in answer to questions put to him by that officer.

Having held that the statement of Sultan did not amount to information given to a Police Officer but amounted to a statement made as a witness to an Investigating Officer under section 161 of the Criminal Procedure Code, it follows that his prosecution under section 182 is unjustifiable, because he has not committed that offence.

Accordingly his application is allowed and the criminal proceedings against him are quashed."

(4) (1886) 10 Bom., 124.

PRIVY COUNCIL.

P.C.* 1925 Oct. 22.

SAKLAT AND OTHERS (PLAINTIFFS)

v.

BELLA (DEFENDANT).

ON APPEAL FROM THE LATE CHIEF COURT OF LOWER BURMA.

Parsis—Parsi Temple Trust—Grants of land by Government for a Temple " for the use of the Parsi population of Rangoon "—Construction of such grants—Whether a person not a racial Parsi entitled to worship in the Temple or its use and benefit—Meaning of the term Parsi—Suit by certain members professing to sue on their own behalf and on behalf of a large number of other members of the Community for declaration and injunction to exclude a person from the use of the Temple—Trustee not a party to suit.

Appellants who were three members of the Parsi community resident at Rangoon claimed that they sued on their own behalf and on behalf of a large number of members of the Parsi community at Rangoon (a) for a declaration that the Respondent Bella was not entitled to use the Parsi Temple at Rangoon or to attend or to participate in any of the religious ceremonies performed therein and (b) for an injunction to restrain her from entering the said Temple. The temple had been built on a parcel of land granted by the Government of India on the 24th November 1868 and regranted on the 14th August 1882 to certain persons " upon trust to build and maintain upon the said land a temple for the use of the Parsi population." Respondent Bella, who was admittedly the daughter of a non-Parsi father, claimed that her mother was a Parsi, and that she herself, having been duly initiated into the Zoroastrian religion, was entitled to the use of the Temple and the benefits of its Trust. On the 21st March 1915 she attended a religious ceremony held at the temple and this gave rise to the suit the subject of the present appeal. Appellants alleged that the Temple was for the exclusive benefit of Zoroastrians who were also racial Parsis and they denied Bella's claim. In their plaint they did not, however, pray for a general declaration as to the persons who were the object of the Trust or seek for a construction of the scheme or for any order to be made upon the Trustee; nor did they make the Trustee a party.

Held that the Parsi community had grown up to be such a distinct body, and admissions into it from outside had been so very rare, that at the time the grants were made the Government must have intended that the temple should be for the benefit of professing members of the Parsi community, that is, racial Parsis or people deemed after a long lapse of ages to be racial Parsis, and that therefore the benefits of the Trust were confined to persons who possessed the double qualification of Zoroastrians and racial Parsis.

* PRESENT:—LORD PHILLIMORE, LORD BLANESBURGH AND SIR JOHN EDGE.

Held that with reference to the contention that Respondent Bella's mother was a Parsi, it was settled that as regards racial claim, maternity is of no importance.

Held that the evidence warranted the conclusion that the ceremonies adopted for Bella's initiation into the Zoroastrian religion were sufficient for that purpose and that the additional ceremonial known as "Barasnam" was not necessary.

Held that Bella, even though a Zoroastrian, not being a racial Parsi, had no right of entering into the temple, and may therefore be excluded or extruded therefrom as a traspasser by the Trustees. That the Trustees could treat her as a trespasser but that it did not follow that they were bound so to treat her.

Held that appellants be granted a declaration that Bella was not entitled as of right to use the temple or to attend or to participate in the religious ceremonies performed therein.

Held further that appellants were not entitled to the injunction because for trespass upon land the only person to bring the action is the person in possession of the land, that is the Trustee, and for a beneficiary or two or three beneficiaries of a Trust for public purposes to bring a suitfor trespass against an intruder was a novel procedure of jurisprudence and such beneficiaries' case could not be made stronger by the suggestion that several other beneficiaries agreed with them.

Sir Dinshaw Manakji Petit v. *Sir Jamsetji Jijibhoy*, (1908) I.L.R., 33 Bom., 509, *approved and applied*.

Quaere: Whether in India there may not be circumstances in which a beneficiary or beneficiaries of a Trust for public purposes may be allowed to bring a suit for trespass against an intruder as in *Anandrao Bhikaji Phadke* v. *Shankar Dajicharya*, (1883) I.L.R. 7 Bom., 323, but if so, the circumstances must be as powerful as in that case which did not arise in the present case.

Decree of the Chief Court varied.

Appeal (No. 57 of 1924) from the Chief Court of Lower Burma in its Appellate Jurisdiction (July 28, 1920) affirming a decree of that Court in its Original Jurisdiction (April 23, 1918).

In 1915 the two appellants, together with another plaintiff Merwanji Cowasjee (since deceased) instituted a suit in the Original Civil Jurisdiction of the Chief Court against the Respondent Bella, then a minor, and her guardian Sapurjee Cowasjee (since deceased) claiming (*a*) a declaration that the Respondent Bella was not entitled to the use and benefits of the Parsi Fire Temple at Rangoon, or to attend or participate in any of the religious ceremonies performed therein; (*b*) an injunction restraining her from entering the

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said fire temple and repeating the trespass complained of ; (c) an injunction restraining her guardian the said Sapurjee Cowasjee from taking her into the said fire temple premises.

The circumstances in which the suit was brought appear from the judgment of the Judicial Committee.

The following were the issues settled and the decisions thereon of the Original and Appellate Courts in Lower Burma:—

1. Whether the plaint disclosed any cause of action ? Both Courts: Yes.
2. Whether the suit is maintainable ? Both Courts : Yes.
3. Who are entitled to the benefit of the fire temple trusts ? Trial Court : Not answerable in this suit. Appellate Court : All persons professing the Zoroastrian religion whether Parsis by race and descent or by conversion.
4. Is the first defendant Bella the daughter of a Parsi mother ? Trial Court : Not necessary to decide. Appellate Court : Yes.
5. Is it possible for the first defendant, being the daughter of a non-Parsi father, to be initiated into (a) the Zoroastrian religion, (b) into the Parsi community ? (a) Both Courts : Yes. (b) Trial Court : Not necessary to decide. Appellate Court : Yes.
6. If it were possible, whether the ceremonies adopted for the purposes were defective ? Both Courts : No.

The trial Judge (Young, J.) on the 11th September 1915 held by a preliminary judgment that the Plaintiffs could maintain the suit as the matter could be regarded (1) as an ordinary trespass by Bella on land not belonging to her, (2) as a trespass into the temple erected on such land, and (3) as an interference with appellant's right to exclusive worship The suit accordingly proceeded to trial.

On the 23rd April 1918 Mr. Justice Young delivered judgment and after stating the facts and that the Navjot ceremony was a ceremony required for the initiation of a person into the Zoroastrian religion

held that the suit was only maintainable by the Plaintiffs if and in so far as they could shew that their temble was polluted and their religious susceptibilities wounded by the intrusion into their place of worship of the Defendant Bella; that the action for physical trespass was not maintainable, and that the trust deed could not be construed in the absence from the suit of the Trustee; but that the alleged "moral trespass" afforded a right of action [*Anandrao Bhikaji* v. *Shankar Daji* (I.L.R. 7 Bom., 323); *Jawahra* v. *Akbar Hussain* (I.L.R. 7 All., 178; *Subarayadu* v. *Assanali* cited in *Kamaraju* v. *Assanali* (I.L.R. 23 Madras at p. 100); *Mohiuddin* v. *Sayiduddin* (I.L.R. 20 Cal. at p. 816) and *C. P. Sankaralinga Nadan* v. *Raja Rajeswarar* (12 C.W.N., p. 946)] and that the Defendants could be restrained unless the Defendant Bella was a Zoroastrian and duly initiated; that the Zoroastrian religion not only permits but enjoins the conversion of a person born in another religion and of non-Zoroastrain parents [*Sir Dinshaw Petit* v. *Sir Jamsetji Jijibhoy* (I.L.R. 33 Bom., 509)] that on issue No. 6 (*viz.*, whether the ceremonies undergone by the Defendant Bella were defective) the Plaintiffs and not raised an issue whether or not conesecrated "nirang" was used at the Navjot ceremony and that therefore the Court could not go into that matter, but that even it it was entitled to do so the Plaintiffs had not discharged the onus of proving that unconsecrated "nirang" was used; that the Defendent Bella underwent the Navjot ceremony at the age of discretion (15) and that her initiation was not invalid on that ground; that it was not necessary or esssential in Rangoon for a convert to undergo the archaic and primitive ceremony of "Barasnum" (total naked lustration from head to foot during nine successive nights)

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which in former days was rather an outward sign of superior knowledge and holiness; that in the Zoroastrian religion the power of admitting persons into the fold lies with the priest who in the present case was satisfied, and that it was not proved that the rites and ceremonies differed in the case of a convert from what was necessary in the case of a child born of Zoroastrian parents; that the Plaintiffs had not proved that either "Barasnum" or a second Navjot was necessary; that compliance with the two conditions known as "the 5th and 6th conclusions") stated by Davar, J., in the Bombay *Tata Case* in 1904 (reported in I.L.R. 33 Bom., 525) was not necessary; that the Plaintiffs had not proved that the Defendant Bella was not duly initiated and that accordingly the suit failed so far as "the moral trespass" was concerned. The learned Judge also held the question whether the Defendant Bella was the daughter of a Parsi woman and whether she was one of the Parsi population could not be decided in the suit but he observed that the Parsis of Rangoon were in a very different position from their co-religionists in Bombay. He therefore answered issues 1, 2 and 5 (*a*) in the affirmative and held that issue 3 could not be answered in the suit; that it was unnecessary to decide issues 4 and 5 (*b*) in the suit, and that on issue 6 the ceremonies were not shown to be defective, and he accordingly dismissed the suit with costs and a decree was made accordingly.

Against the said decree Appellants having appealed to the Chief Court on the 21st June 1920 the Chief Court in its Appellate Jurisdiction (Mr. Justice Robinson, Acting Chiet Justice and Mr. Justice MacGregor) delivered a preliminary Judgment (which was to be incorporated in their final judgment) holding that the Plaintiffs-Appellants had a cause of action

and that the suit was maintainable. It held that there was a personal individual cause of action vested in the Plaintiffs-Appellants [*see Jawahra* v. *Akbar Hussain*(I.L.R. 7 All., 178); *Vergamuthu* v. *Pandaveswara Gurukal* (I.L.R. 6 Mad., 151); *Venkuta Chalapati* v. *Subbarayadu* (I.L.R. 13 Mad.,) 293 ; *Srinivasa Chariar* v. *Raghava Chariar* (I.L.R. 23 Mad., 28) and *Anandrao Bhikaji Phadke* v. *Shanker Dajicharya* (I.L.R. 7 Bom., 323.)] It was held that the suit was maintainable notwithstanding that the Trustee of the Fire Temple was not made a party because as the right of suit was personal to the Plaintiff no question under Order 1, Rule 8, or Order 31, Rule 1, of the Civil Procedure Code arose.

On the 28th July 1920 the Chief Court in its Appellate Jurisdiction delivered final judgment dismissing the Appeal with costs. It held that the Defendant Bella was the daughter of a Parsi mother ; that the Zoroastrian religion enjoined conversion ; that the child of a non-Parsi father could be initiated in the Zoroastrian religion ; that the Defendant Bella had admittedly undergone the Navjot ceremony and that the Plaintiffs had not proved that her intiation was invalid by reason of the fact that no "Barasnum" was performed ; that on the true construction of the Trust Deed relating to the Fire Temple the expression "Parsi population" was not exclusively confined to the Parsis as a race, and that the words "Parsi" and "Zoroastrian" were interchangeable ; and that the Bombay case (33 Bom., 509) did not apply. It accordingly held that the Government in the grant of the Fire Temple lands clearly indicated an intention to create a trust for a particular religion and that the persons entitled to the benefit of the Fire Temple Trust were the persons professing Zoroastrian religion whether they are Parsis by race and descent or are

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persons of other races duly converted and initiated into that religion, and that Bella was a member of the Parsi community of Rangoon.

Dunne, K.C., Sir G. Lowndes, K.C. and *E. B. Raikes* for the appellants. The Appellate Court should have held that the temple was held in trust for racial Parsi exclusively following *Dinshaw Manekji Petit* v. *Jamsetji Jijibhoy* (1). The terms of the trust in the present case are clearer, because there the term "Parsis" was not used. The evidence did not establish that Bella was, or could be, duly initiated into the Zoroastrian religion. But in any case she was not a racial Parsi, though her mother may have been a Parsi. Her use of the temple was repuguant to the religious views, and disturbing to the worship, of the plaintiffs. Apart from trespass to land they had a good cause of action without joining the trustees, and without the consent of the Advocate-General, see *Anandrao Bhikaji Phadke* v. *Shankar Dajicharya* (2), *Jawahra* v. *Akbar Husain* (3), *Vengamuthu* v. *Pandeveswara Gurukal* (4). The plaintiffs were entitled to a declaration and if necessary to an injunction, *Mansur Hasan* v. *Muhammad Zaman* (5), *Sankaralinga Nadan* v. *Rajeswara Dorai* (6).

Upjohn, K.C., and *Draper* for the respondent. The cause of action which the Courts below considered was maintainable on the point could not be maintained without the consent of the Advocate-General under section 92 of the Code of Civil Procedure. The cause of action really put forward by the plaintiffs was based upon an alleged trespass and could be maintained

(1) (1908) I.L.R. 33 Bom., 509.
(2) (1883) I.L.R. 7 Bom., 323.
(3) (1884) I.L.R. 7 All., 178.
(4) (1882) I.L.R. 6 Mad., 151.
(5) (1924) I.L.R. 47 All., 151, L.R. 52 I.A., 61.
(6) (1908) I.L.R. 31 Mad., 236, L.R. 35 I.A., 176.

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only by the trustees. The Plaintiffs suffered no damage entitling them to maintain the suit. Further, on the true construction of the deed, Bella, having been duly initiated into the Zoroastrian religion, was entitled to use the temple. The trust should be construed as in favour of Zoroastrians, whether racial Parsis or not.

Dunne, K.C., in reply. From early times the British treated the Parsis as being a sect by themselves. See ***Ardaseer Cursetji*** v. ***Perozeboye*** (1), ***Mihirwanjee Nuoshirwanjee*** v. ***Awan Bace*** (2), ***Reg.*** v. ***Shapurji Bezonji*** (3). The consent of the Advocate General to the suit was not necessary. See ***Venkataramana Ayyangar*** v. ***Kasturirangar Ayyangar*** (4).

The judgment of their Lordships was delivered by :—

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LORD PHILLIMORE.—The circumstances of this case are as follows :—

Some time in 1899 a Goanese Christian named Jones with his wife arrived in Rangoon. They were in humble circumstances, and the wife applied for assistance to a Parsi of good position at Rangoon, Bomanji Cowasji, stating that she too was a Parsi. He befriended her till he went to England in 1900 and then asked his brother Sapurji Cowasji to look after her and the child, to which she had just given birth, the respondent Bella. The father died and when her mother died shortly afterwards Sapurji, who was a defendant in this suit, but died pending the appeal, took Bella into his own house, and he and his wife treated her as their own child.

When Bella was nearly 14, it was desired that the initiation ceremony into the Zoroastrian religion called Navjot should be performed for her, but

(1) (1856) 6 Moo. I.A. 361, 384.
(2) (1820) 2 Bor. (1162) 23.
(3) (1843) Perry's Oriental Cases 91, 98.
(4) (1916) I.L.R. 40 Mad.

the local Head Priest at Rangoon refused, chiefly because—as it appears from his evidence—he thought it would be unpopular with the Parsi community. Advantage was then taken of the temporary presence of some other priest, who performed the ceremony; and after that invitations were sent by the Head Priest to Bella to come with Sapurji and his wife to the temple on festival days. Three such invitations were sent, the High Priest said, with the expectation that they would not be accepted; but on the third occasion, being 21st March 1915, Sapurji brought her and put her within the sacred precincts facing the sacred fire, and in such a position that she went through all the ceremonies like other worshippers.

This proceeding gave great offence to a number of members of the Parsi community in Rangoon, and on 31st March, this suit was brought by three members of the Parsi community, who stated that they brought it not only on their own behalf but on behalf of a large number of members the Parsi community at Rangoon, against Bella and against Sapurji, stating that the temple was held on trust for the free and unrestricted use of the Parsi inhabitants in Rangoon professing the Zoroastrian faith, further stating that it was alleged that the mother of Bella was a Parsi, and that Bella had been validly converted or initiated into the Zoroastrian religion, but denying that this was so or indeed could be so, and averring that the defendants had by their acts "not only wounded the religious feelings entertained by religiously inclined Parsis, but also caused the desecration of the said sacred Temple."

In another paragraph of the plaint, they stated that only members of the Parsi community professing

the Zoroastrian religion were entitled to the use of the temple, to the access of the sacred precincts and to attend, witness or take part in any religious ceremonies held therein, and that it was never the intention of the Parsi community that the children of non-Parsi fathers should be allowed the use of the temple. They further said that even assuming that Bella could be duly admitted into the Zoroastrian religion, and assuming that her mother was a Parsi, even then she could not be considered a Parsi or a member of the Parsi population. They prayed for a declaration that Bella was not entitled to use the temple or to attend or to participate in any of the religious ceremonies performed therein and for injunctions to restrain her from entering the temple and Sapurji from taking her there.

Sapurji, in his own name and as guardian for Bella, put in their written statement. In this it was contended that the plaint disclosed no cause of action, that the defendant Bella was entitled to attend the temple and the ceremonies and caused no desecration by her presence; and it was stated that her mother was a Parsi, that she had been brought up from early infancy as a Parsi and in the Zoroastrian faith, and that she came within the terms of the trust of the temple.

The following issues were then settled:

"1. Whether the plaint discloses any cause of action?

"2. Whether this suit is maintainable?

"3. Who are entitled to the benefit of the Fire Temple Trust?

"4. Is the first defendant the daughter of a Parsi mother?

"5. Is it possible for the first defendant, being a daughter of a non-Parsi father, to be initiated (*a*) into the Zoroastrian religion and (*b*) into the Parsi community?

"6. If it was possible, whether the ceremonies adopted for the purpose were defective (the second defendant to give

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particulars of the ceremonies performed at the initiation of the first defendant within one week, and the plaintiffs to state within one week thereafter whether, and if so, in what respects they contend that these ceremonies were inefficacious) ?"

and the case was set down for a preliminary hearing on the first and second issues.

The Judge decided these points in favour of the plaintiffs; and thereupon some oral evidence was taken before the Judge at Rangoon, and a mass of evidence covering 664 pages of the record was taken on commission at Bombay.

It appears that this was not the first occasion in modern times in which the question of the admissibility of a person who was not a racial Parsi, but who had become a convert to the Zoroastrian religion, to participate in the religious services and enter the temples of the Parsis had arisen.

In 1903 a French woman had declared that she had become a convert to the Zoroastrian religion and had married a Parsi gentleman of position at Bombay. Her claim to participate in religious worship had given rise to much excitement in the Parsi community, and seven Parsis, one of whom was the French woman's husband, had brought a suit in the High Court of Bombay against the trustees of the Parsi endowments, first making a general case of some misfeasances requiring the intervention of the Court, and secondly claiming a declaration that the trust deeds ought to be construed as admitting to their benefits any person professing the Zoroastrian religion whether a racial Parsi or not.

After a prolonged litigation, this suit, except in so far as it prayed for a correction of the general misfeasances, was dismissed; and the Judges, for reasons which will have to be more minutely entered

into, held that the various endowments were limited to the use of people who as well as being Zoroastrian were also racial Parsis. But the controversy had not been forgotten, and its echoes are to be heard in the evidence given on commission in the present case.

Young, J., in the preliminary Judgment given in the present case, held that the plaintiffs could not sue for trespass on land or in the temple, but that they might have a third cause of action which he described as an interference with their right to exclusive worship. He thought that they had sufficiently alleged this right and its infringement, that the right was one which had been often upheld by the Courts, and that the suit could be brought without joining the trustee or without obtaining the consent of the Advocate-General. When he came to his later decision upon the whole case, he described the injury as "an injury to the plaintiffs' individual right to worship undisturbed by the intrusion of a person not belonging to their faith," and applying his mind to the fifth and sixth issues, he held that Bella could be initiated into the Zoroastrian religion and into the Parsi community; that the ceremonies adopted for the purpose were sufficient, and that therefore there was no intrusion of a person not belonging to the plaintiff's faith, and it became immaterial to decide issues 3 and 4 Accordingly he dismissed the suit.

When the matter came before the Chief Court, on appeal, the Judges, though apparently they heard one continuous argument, gave two judgments: the first in respect of the preliminary issues. In this they confirmed the actual decision of Young, J, but enlarged the plaintiffs' cause of action, saying that they might treat it as an injury to themselves, that Bella, even though she were a Zoroastrian, yet not being a Parsi, came to the temple to worship.

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This made it necessary for the Judges in the Chief Court to determine the third issue, *viz.*, who are entitled to the benefits of the Fire Temple Trust; and they held that it was a trust for a religion and not for a race. They then held in agreement with Young, J., that Bella could be and was converted or initiated into the Zoroastrian religion, and therefore they concurred with him in dismissing the suit.

The Judges in the Chief Court took the view that the fourth issue might also have been decided in favour of Bella, *i.e.*, that her mother was a Parsi, but that this fact was unimportant, except as leading up to her conversion or initiation. Their Lordships agree with this. In their view it is settled that as regards the racial claim, maternity is of no importance.

The appeal to their Lordships' Board has raised among other questions the actuality and validity of Bella's conversion and initiation; but on this point their Lordships see no reason for differing from the judgment of the Chief Court.

In the great controversy in the Bombay case, *Dinshaw Manekji Petit* v. *Jamsetji Jijibhoy* (1) the two learned Judges (one of whom was himself a Parsi) came to the following conclusions thus expressed by the Parsi Judge, Davar, J:—

"1. That the Zoroastrian religion not only permits but enjoins the conversion of a person born in another religion and of non-Zoroastrian parents.

"2. That, although such conversion was permissible, the Zoroastrians, ever since their advent into India 1200 years ago, have never attempted to convert anyone into their religion.

"3. That there is not a single instance proved before the Court of a person born of both non-Zoroastrian parents ever having been admitted into the Zoroastrian religion professed by the Parsis in India."

(1) (1908) I. L. R. 33 Bom., 509.

It is true that as regards the quantum of the necessary ceremonial on initiation, Davar, J., expressed an opinion that a piece of ritual called Burushnun was an essential part; but in this matter he was travelling outside anything necessary for the case before him; and their Lordships do not find that Beaman, J., the other Judge, concurred with him as to this, and they think that the evidence given in the present case warranted the decision to which the Chief Court came that this additional ceremonial was not necessary.

It follows therefore that the points which their Lordships have now to determine are whether the trusts of the temple are for the benefit of all persons professing the Zoroastrian religion or limited to those who, professing that religion, are also racial Parsis in the sense in which that word is understood in the Parsi community; and secondly, whether if Bella, not being a racial Parsi, is not a person within the benefits of the Temple Trust, this fact gives the plaintiffs any right of direct action against her and against her guardian.

The contention on behalf of the plaintiffs was the same as that of the contention of the defendants in the Bombay case, namely, that all these trusts were intended for Parsis in the limited sense, *i.e.*:—

"*First.* The descendants of the original emigrants into India from Persia who profess the Zoroastrian religion.

Secondly. The descendants of the Zoroastrians in Persia who were not amongst the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroastrian religion.

"*Thirdly.* The children of a Parsi father by an alien mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion."

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Now the origin of the temple, the right to worship at which is in dispute in the present case, is as follows :—

On the 24th November, 1868, the Deputy-Commissioner at Rangoon, on behalf of Her Majesty's Government, granted to Bajunji Cowasji and Sapurji Hirji a parcel of land in the town of Rangoon of a certain size "upon trust to build and maintain upon the said parcel of land a temple for the use of Parsi population."

It was provided that the Deputy-Commissioner might nominate new trustees, and that if a temple was not erected within a year, he might revoke the grant.

On the 14th August, 1882—probably because there had been delay in building the temple—a re-grant was made to new trustees upon trust for the same intents and purposes as the old grant, with like powers to appoint new trustees and a similar power of revocation if no temple was built within a year.

Previously on the 11th January, 1859, the then Deputy-Commissioner had granted to two Parsi gentlemen another piece of land upon trust to maintain it "as a cemetery and to the free use of persons of the Parsi denomination." There was a similar power given to the Deputy-Commissioner to appoint new trustees and a power of revocation in case the land was applied to other uses. This grant was again renewed also on the 14th August, 1882.

Some disputes having arisen as to the temple, a suit was brought to have a new trustee appointed, and a scheme of management framed; and on the 20th March, 1889, the Recorder appointed Bomanji Cowasji sole trustee and ordered a scheme to be framed.

About the same time, a similar suit had been brought in respect of the burial ground, and by an

order of the same date the same person was appointed trustee and a similar order to frame a scheme was made. The scheme in respect of the temple gave the trustee charge of the temple and its appurtenances with duty to manage and improve as funds permitted and power to build a range of shops on part of the trust lands, borrowing money for the purpose. After repayment of monies borrowed the rest was to be applied for the current expenses of the Fire Temple and the Parsi Burial Ground. In this way and to this extent the two properties were brought together.

When the scheme for the burial ground was to be framed, there was a serious dispute with regard to children of Parsi fathers who died without having gone through the ceremonies of initiation, and eventually the scheme was framed in the following words :—

"1. The burial ground shall be used for burying persons who shall at his or her death be actually professing the Zoroastrian religion and no other."

"EXPLANATION.—No one shall be taken to be actually professing the Zoroastrian religion who has not been duly invested with the Sudra and Kusti, in accordance with the rites prescribed by that religion, provided, nevertheless, that children born of fathers following the Zoroastrian religion, and brought up in that faith, and dying before the age of 14 years and three months, without having been invested with the Sudra and Kusti, may be taken to be actually professing the Zoroastrian religion, but children dying after having attained that age without having been invested with the Sudra and Kusti shall not be taken to have professed the Zoroastrian religion unless his or her investiture was prevented by unforeseen and unavoidable circumstances."

It is suggested for the defendants that this document shows that the stress of the matter was laid upon the religion and not upon the race.

One other document must be mentioned. Apparently it took a long time before the Temple

or at any rate the present temple was built, and on the 20th August, 1904, Bomanji Cowasji executed a deed of declaration of trust reciting that he and his brother had built at their charge a fire temple upon the trust lands so that the same might form part of the said trusts and be for the use of the Parsi inhabitants of Rangoon, and purporting to declare for himself and his successors in office that he held the fire temple "for the use of the Parsi inhabitants of Rangoon free and unrestricted but subject notwithstanding to the tenets of the pure Zoroastrian religion and to the scheme prescribed by the Court."

The defendants at their Lordships' bar contended that this was an attempt to alter the trust and as such should be rejected, but in their written statement they accepted it as a valid document. So far as it goes, it rather makes in the plaintiffs' favour, but their Lordships are not disposed to attach grave importance to it.

The Chief Court—as already stated—considered that the effect of these documents was to impose a trust for the benefit of persons professing the Zoroastrian religion and no others.

Their Lordships agree with the latter part of this proposition. Parsis who cease to be Zoroastrians have, in their Lordships' view, no claim. But upon the whole and after much consideration they think that the benefits are confined to persons who possess the double qualification of Zoroastrians and racial Parsis.

The judgment in the Bombay case travelled over much ground—indeed, in their Lordships' opinion, much unnecessary ground—but both Judges came to the conclusion that the various trusts in that case must be construed as being confined to persons who were of the Zoroastrian religion and racial Parsis.

There were several trusts, and the expressions in the deeds were different; but the word Parsi never appeared in them, and the word Zoroastrian or some equivalent religious word was used. Sometimes the trusts were for the members of the Zoroastrian community of Bombay; other phrases were similar. Nevertheless, both Judges came to the conclusion that they must be read as has been already stated.

Davar, J., thus expressed himself (1):—

"A Juddin (that is a Gentile) may become a Zoroastrian, but how he ever could possible become a member of the 'Holy Zoroastrian Anjuman of Bombay' or be one of 'the members of the Zoroastrian Community of Bombay" or become one of 'the Anjuman of the Mazdiasni faith' passes my comprehension. A Juddin converted to Zoroastrianism had never come into existence. Such a person could not possibly have been within the contemplation of the donors and founders: the possibility of such a being coming into existence would be so new and novel that if the donor ever conceived such an idea and intended to include him in his benefaction, he would certainly designate him separately and specially, and not include him in the general description of the community of his then existing co-religionists and their descendants."

Beaman, J., said (2):—

"The question is not whether the Zoroastrian religion permits conversion, but whether, when these trusts were founded, the founders contemplated and intended that converts should be admitted to participate in them."

In their Lordships' view the same line of reasoning applies to the present case. The Parsi community had grown up to be such a distinct body, and admissions into it from outside had been so very rare, that at the time when these grants at Rangoon were made the Government must have intended that the temple should be for the benefit of professing members of the Parsi community, *i.e.*, racial Parsis or people deemed after a long lapse of ages to be racial Parsis.

(1) 33 Bom. 509 at 548. (2) *Ibid* 568.

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But this does not exhaust the matters to be determined on the present appeal. It determines that the Respondent Bella has no right of entering into the temple and may therefore be excluded or extruded from the temple by the trustees. They can treat her as a trespasser. But it does not follow that they are bound so to treat her. Still less does it follow that in an action to which the Trustees are not parties, and in which therefore no indirect remedy can be obtained, a direct claim can be supported as if for a tort committed by Bella or her guardian.

When property is set apart for public or charitable uses, it will be a malversation to apply any of the funds for persons who are not objects of the trust. Those who are objects of the trust must have all the benefits they require; and if there is a surplus, it must be left to the Courts to make a cy-pres application of it. But when the subject matter of such a trust or charity is the rendering of some convenience or service of such a nature that it will not hurt the lawful recipients if others share with them, their Lordships are aware of no case in which it has been held that the Trustees are bound to exclude persons who have no legal title to share. They may do so; they may treat all such persons as trespassers and say: *Sic volo sic jubeo, stet pro ratione voluntas.* But if they choose to admit to the benefit of some park or garden established for a particular district some persons from over the border or to admit to a public library destined for a particular municipality persons from outside, or what is perhaps a nearer analogy, admit to the hearing of a lecture by a University professor persons not members of the University, this of itself furnishes no ground of complaint. If the numbers admitted are too large

or the persons are disorderly or unpleasant in their habits or in any way substantially interfere with the convenience or benefit of those for whom the endowment was created, the Trustees may be required to exclude them. But the mere claim of **A** that **B** shall not share in such a benefit because **B** is not within the terms of the foundation is not one that Courts would encourage.

Many illustrations of this doctrine could be drawn from the history of English institutions. The great schools of Westminster, Eton and Winchester arose from small nuclei, namely a fixed number of endowed and privileged scholars taught by appointed masters. They have become what they are because unprivileged boys in greater numbers have been allowed to benefit by the services of the appointed masters, and to use the school classroom and playgrounds.

The statutes of the colleges in Oxford and Cambridge make provision for the education of a fixed number of students or scholars privileged and endowed. Many, if not most, of them make no provision for the admission of other members in *statu pupillari*. But "commoners," so called, though their legal position is merely that of boarders (*Rex* v. *Grundon Exp. Davison*, (2) have been for several centuries admitted equally with the privileged scholars to the benefits of the colleges, particularly to the use of hall, library and chapel.

The intrusion of an unbeliever into a place of religious worship might well be a case of substantial interference with the devotions of worshippers. But the plaintiffs have failed to make out that Bella was not a Zoroastrian. They suggested indeed that her conversion was impossible, or at any rate that it had not been completed by due initiation; but their

(2) Cowper's Reports 319.

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Lordships agree with the Judge of first instance that this suggestion was not established; while except in the evidence of one unsatisfactory witness, there was nothing to show that Bella's presence would be thought to cause desecration, if once it was accepted that she was a Zoroastrian.

Also, if it were a question of caste and worshippers of a higher caste would be defiled by the presence of a lower caste, as in *Anandrao Bhikaji Phadke* v. *Shankar Daji Charya* (3) this would be a serious disturbance.

As was said in that case:—

"This right is one which the Courts must guard as otherwise all highcaste Hindus would hold their sanctuaries and perform their worship only so far as those of lower castes chose to allow them."

But this claim is again not established. Indeed, what may be called the quasi-caste claim is not even suggested in the pleadings. It is the wounding of religious feelings and the desecration of the Temple which are put forward.

Their Lordships have now to consider the relief which the plaintiffs have sought in this suit. They have not sought for a general declaration as to the persons who are objects of the trust. They have not sought for a construction of the scheme, or for any order to be made upon the trustee, nor have they made the trustee a party. For this they would probably have required the consent of the Advocate-General. They pray in the plaint "for a declaration that the Defendant Bella is not entitled to the use and benefits of the Parsi Fire Temple in Dalhousie Street known as 'Captain's Agiary or Dhurraymair' or to the use and benefits of the buildings standing on the said trust land or to attend at or participate in any of the religious ceremonies performed therein."

(3) (1883) I.L.R. 7 Bom., 323

Then they claim an injunction to restrain the Defendant Bella from entering and the other defendant, now dead, from bringing her into the temple to attend the religious ceremonies. This is a claim for an injunction to prevent the repetition of an alleged trespass. It must therefore first be established that there was a trespass and one for which damages, though possibly only nominal, could be recovered. But for trespass upon land, the only persons to bring the action is the person in possession of the land, that is, the trustee. That a beneficiary or two or three beneficiaries of a trust for public purposes may bring a suit for trespass against an intruder is a novel principle of jurisprudence, and the case is not made stronger by the suggestion that several other beneficiaries agree with them.

It may be that in India it would be convenient in some cases to allow such a suit, and the judgment in I.L.R. 7 Bombay Series may form a precedent. But, if so, the circumstances must be as powerful as in that case. It must be established that the juxtaposition of the two sets of persons is so repugnant to their habits of mind that the entrance of one set into the temple entails the departure of the other, so that it is as it were trespass to the person.

As already stated, no such case has been established, and therefore it is not necessary to discuss the principle on which the judgment in 7 Bombay Reports is founded and which was indeed accepted by the Judge of first instance in the present case. The facts do not warrant the claim, if it be a sound one, and no injunction can be granted.

With regard to cost, the learned Judge of first instance, while giving the defendants the general costs of the action, thought that both sides were to blame for the inordinate length of the Bombay

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commission and made the plaintiffs pay two-thirds only of the defendants' costs of the Commission.

If any costs of the action were to be given, some similar provision should be applied. But, upon the whole, their Lordships feel that the plaintiffs have failed in the greater part of their suit, and that the giving to them of a declaration is an indulgence. They were given the cost of the preliminary issues before Young, J., and the cost of so much of the appeal as related to those issues. These they keep and the orders against them in respect of other costs in the Courts below will be discharged, and there will be no costs of this appeal. Their Lordships will humbly recommend His Majesty that this appeal be allowed, that the judgment of the Chief Court be varied, and that a declaration be made, namely, that Bella was not entitled, as of right, to use the temple, or to attend or to participate in any of the religious ceremonies performed therein, that except as to the costs awarded to the plaintiffs in the Court of first instance, and in the Chief Court, there be no costs in the Courts below, and that there be no costs of this appeal.

Solicitor for appellants : *A. M. Bramall.*

Solicitors for respondents : *Waterhouse and Co.*

APPELLATE CIVIL.

Before Mr. Justice Rutledge, Chief Justice, and Mr. Justice Brown.

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Aug. 19.

P. ABDUL GAFFOR
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THE OFFICIAL ASSIGNEE.*

Presidency Towns Insolvency Act (III *of* 1909), *section* 8 (2)—*Order refusing to issue a commission for examination of a witness, whether appealable—"Judgment," definition of—Civil Procedure Code, Order XLIII, Rule* 1, *and Letters Patent, clause* 13.

For an order made in exercise of the Ordinary Original Civil Jurisdiction to be appealable, it must come either under Order XLIII, Rule 1, of the Civil Procedure Code, or be a judgment within the meaning of clause 13 of the Rangoon High Court Letters Patent.

Appellant who was adjudicated an insolvent petitioned to have the adjudication annulled. For purposes of his petition he applied for the issue of a commission to Madras for his examination but the learned Judge sitting in Insolvency on the Original Side of the High Court refused to issue the commission. Appellant preferred an appeal against the order of refusal contending that the Presidency Towns Insolvency Act, section 8 (2), clause (*f*), read with clause 13 of the Rangoon High Court Letters Patent gave him the right of appeal.

Held that as the order appealed from could not be said to determine any right or liability between the parties, it was not a "Judgment" within the meaning of clause 13 of the Letters Patent and was not therefore appealable.

Yeo Eng Byan v. *Beng Seng & Co.*, I.L.R. 2 Ran., 469—*followed.*

Veerabadran Chetty v. *Nataraja Desikar*, 28 Mad., 28—*dissented from.*

Aiyangar—for the Appellant.

Jeejeebhoy—for the Respondent.

RUTLEDGE, C.J., AND BROWN, J.—This is an appeal from an order of the Judge sitting in insolvency on the Original Side in Insolvency Case No. 250 of 1924. The order is as follows :—

"The application for commission is refused and the case will proceed on the ordinary lines. Further hearing will be adjourned to next insolvency day."

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* Civil Miscellaneous Appeal No. 138 of 1925.

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As a preliminary objection was taken on behalf of the respondent that no appeal lines from this order, we have heard Mr. Aiyangar, solely on this point.

The learned advocate does not contend, and cannot contend, that such an order comes under any of the heads enumerated in Order XLIII, Rule 1 of the Code of Civil Procedure. He rests his claim on the Presidency Towns Insolvency Act, section 8, sub-section (2), clause (*b*), read with section 13 of the Letters Patent of this High Court. Clause (*b*) runs "An appeal from an order made by a Judge in the exercise of the jurisdiction conferred by this Act shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court." For an order made in exercise of the ordinary original civil jurisdiction to be appealable, it must come either under Order XLIII, Rule 1, or be a judgment within the meaning of section 13 of the Letters Patent, so that for the purpose of this application the appellant must establish that it is a judgment within the meaning of section 13.

Certain decisions of the Madras High Court have been cited in one of which I.L.R. 28 Madras, page 28, the refusal to issue a commission was held to be a "judgment" within the meaning of section 15 of the Madras High Court Letters Patent.

We are unable to agree with this judgment. The most recent decision upon what is a judgment within the meaning of section 13 of the Letters Patent is a judgment of this Bench in the case of *Yeo Eng Byan* v. *Beng Seng & Co.* (1). The Chief Justice Sir Sydney Robinson, at page 473 states :—" I agree that

(1) (1924) 2 Ran., 469.

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 final adjudication." We are in agreement with this statement of the law, and, applying it to the present case, the refusal to issue a commission was a matter within the discretion of the Insolvency Judge. While it may have an important effect in the final determination of the question at issue, it cannot be said to determine any right or liability. At the utmost it paves the way for such determination and is nothing more than a step towards obtaining a final adjudication.

We are consequently clearly of opinion that no appeal can lie from such an order as the one impugned in this case.

The appeal must accordingly be dismissed with costs, which are to be taxed by the Taxing Master under Rule 4 (*b*) as between advocate and client.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

1925
Aug. 27.

MAUNG TUN BYU
v.
MAUNG KYA.*

Possession of land, suit for—Plaintiff's title based on defendant's delivery of possession to plaintiff's vendors under a contract for sale—absence of registered conveyance from defendant to plaintiff's vendors—Land leased on plaintiff's behalf to defendant by plaintiff's vendors on their sale to Plaintiff.—Whether defendant entitled to take advantage of the absence of registered conveyance from him to plaintiff's vendors.

A sued to recover from D possession of land which A had purchased from B and C. B and C had themselves obtained possession from D under a contract of sale which however was not completed by the execution of a formal conveyance. On B and C's sale to A, the land had been leased by them on A's behalf to D.

Held, that D cannot resist A's claim by being permitted to take advantage of his own laches in not having completed his contract of sale by executing a conveyance with legal formility in favour of B and C.

Maung Myat Tha Zan v. *Ma Dun*, 2 Ran., 285—*followed.*

Mukerjee—for the Appellant.

Chatterjee—for the Respondent.

PRATT, J.—Plaintiff Maung Tun Byu sued to ecover possession of a piece of paddy land measuring 11·96 acres, which he had purchased by a registered deed from the first and second defendants Maung Saw and Ma Pwa on the 26th March 1921, from the third defendant in possession.

His case was that after the purchase by him first and second defendants leased the land on his behalf to third defendant Maung Kya.

Subsequently, when plaintiff asked for the return of the land early in 1922, Maung Kya refused to give possession.

* Special Civil Second Appeal of No. 90 of 1925 (at Mandalay).

The first and second defendants admitted sale of the land to plaintiff and based their title thereto on an oral transaction of sale accompanied by possession, effected in their favour by third defendant in satisfaction of his debts some years previously.

The trial Court in a well considered judgment, in which it analysed the evidence of the witnesses most carefully, accepted the fact that the third defendant Maung Kya made over the land outright to first and second defendants in satisfaction of the debt due by him.

The Judge held that Maung Kya having parted with possession under a contract of sale, to which he had omitted to give effect in legal form, and having only regained possession as lessee, was not entitled to resist the claim for recovery of possession by the purchaser from his vendee.

On appeal the District Court disagreed with the trial Court's view of the evidence and dismissed the suit.

The trial Court's reasons for accepting the evidence as to the oral sale by Maung Kya in favour of first and second defendants are to my mind unassailable.

The District Court has gone out of its way to find excuses for rejecting the oral evidence.

This is corroborated by the entry in revenue register No. VII of a report by Maung Kya and his wife of an alienation of the suit land in favour of Maung Saw and Ma Pwa for Rs. 320 dated June 1st, 1919.

This entry was duly proved by a certified copy from the register and raises the presumption that the report was made by Maung Kya.

The District Court has commented on the failure to examine the Revenue Surveyor on this point and the foils produced but this comment is beside the mark.

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The Revenue Surveyor could not be expected to remember the details of all reports and transactions recorded by him.

Register No. VII is a public document and has considerable evidential value, though of course it is not by itself proof of a sale.

A certified copy of an entry is admissible as evidence, and when produced, the receipt given for the report, the foil, or to use the Burmese term, the *pyatbaing*, is superfluous. In any case the receipt for the report can only have a limited evidential value under special circumstances.

Maung Hein produced no evidence and his own deposition goes to show the truth of the evidence for plaintiff.

He alleged that he had borrowed Rs. 100 from Ma Pwa and repaid her in paddy, which he deposited in the witness Maung Hein's house.

He also admitted a payment of Rs. 60 in Maung Hein's house the same year in the presence of Maung Hein, Maung It, and Maung Po, though he alleged it was on account of interest.

He did not cite Maung Po as a witness and he did not deny on oath having made a report of the transfer for Rs. 320 to the Revenue Surveyor.

It is common ground that Maung Kya was the original owner of the land. He has made it over on a contract of sale to Maung Saw and Ma Pwa for good consideration ; but has neglected to complete their title by a formal conveyance. Maung Saw and Ma Pwa have given plaintiff a registered conveyance. Maung Kya has obtained possession by virtue of his tenancy from Ma Pwa. Is he, now that his tenancy has expired, entitled to retain possession as against his vendees or persons claiming possession through them on the basis of his

original ownership, because of his failure to give his vendees a legal title?

It must be taken as settled law in the light of the Full Bench Ruling in *Maung Myat Tha Zan* v. *Ma Dun* (1) that it is a valid defence against a suit by the legal owner for recovery of possession that the defendant is in possession under a contract for sale by the legal owner. In the present case the principle involved is the same, as the trial Court saw.

Maung Kya cannot be allowed to take advantage of his own laches in not completing the contract of sale by executing a conveyance with legal formality. He has taken advantage of the fact that his vendees let to him, to retain possession to which he was no longer entitled. I agree with the trial Court that plaintiff was entitled to a decree for possession. There is no question that the area of the land is correctly stated in the plaint. I allow the appeal. I set aside the decree of the District Court and restore the decree of the trial Court.

Plaintiff will be given costs as against respondent Maung Kya throughout.

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(1) 2 Ran. 285.

APPELLATE CRIMINAL.

Before Mr. Justice Doyle.

1925
Sept. 10.

E. E. MAYETH
v.
KING-EMPEROR.*

Failure to read over deposition to witness—Accuracy of the record challenged on appeal.

On appeal from conviction by the lower Court, it was proved that the depositions had not been read over to the witnesses. Further, accuracy of the record was challenged and there was evidence also that a relevant statement made by a witness had been omitted from the record.

Held that, while failure to read over the deposition to the witnesses would not of itself vitiate the trial, on the facts established, and under the circumstances set out above the proceedings must be quashed and a trial ordered.

Mani Iyer and Abdul Rahman v. King-Emperor. Criminal Appeal No. 682 of 1925—*referred to.*

Villa—for the Appellant.

Jawad—for the Respondent.

DOYLE, J.—I am unable adequately to deal with by this appeal, because the record can clearly not be relied on. It is proved by the evidence of the interpreter that the depositions of the witnesses, who were cross-examined after the charge, were not read over to them on the completion of their evidence. It has been held in *Mani Iyer and Abdul Rahman v. King-Emperor* (1) that failure to read over the evidence of a witness does not necessarily vitiate the trial.

In the present case, however, the accuracy of the record has been challenged by the advocate, who conducted the appeal. It is furthermore clear from the evidence of the interpreter that one of the

* Criminal Appeal No. 1150 of 1925 from the order of the 5th Additional Magistrate, Rangoon, Criminal Register, in Trial No. 30 of 1925.

(1) Criminal Appeal No. 682 of 1925.

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witnesses made a statement which was relevant to the case but omitted from the record.

It would appear to be the practice in the Magistrates' Courts of Rangoon to defer the reading over of statements to witnesses till the conclusion of the trial (or presumably if the trial takes more than a day to the end of each day). Obviously under such circumstances, the witnesses must have some difficulty in recollecting what they actually said and this difficulty must be still greater in the case of the Magistrate, who records the evidence and the accused, who is listening to it, both of whom are vitally interested in having a correct record.

It is argued that if the work of reading the evidence over to a witness on the completion of his evidence were adopted by the Rangoon Courts, it would be necessary to strengthen the number of the Magistrates. Such a contingency is in the highest degree probable but that does not justify deliberate disobedience of a definite rule of procedure. A continuance of this objectionable practice will merely lead to a wholesale quashing of trials with corresponding increase in the work of the Magistrate.

Holding in the present case that the record is unreliable, I have no other alternative, but to quash the proceedings, to set aside the conviction and sentence and to order a new trial, which should be held before another Magistrate.

FULL BENCH.

Before Mr. Justice Rutledge, Chief Justice, Mr. Justice Das, and Mr. Justice Brown.

1925
Sept. 9.

THE COMMISSIONER OF INCOME-TAX, BURMA

v.

MESSRS. STEEL BROTHERS & CO., LTD.*

Income-tax Act (XI of 1922) Sections 2 (4), 4 (1) and (2), 6 and 42 (1)—"Business", meaning of Section 6.—Assessment of non-resident limited Company registered under the English Companies's Act with headquarters in London—Money received out of India, when deemed money accruing, earned or arising in India—Sale proceeds of goods exported to the United Kingdom (a) which had in India undergone some process of conversion or working-up and (b) which had not, whether distinguishable—Profits arising from contracts made in the United Kingdom for insurance of cargoes consigned from India, whether liable to Indian income-tax.—In arriving at amount of profits liable to Indian income-tax, whether allowance to be made to London Office for a reasonable Commission Agents' commission.

It is necessary to look to section 42 (1) of the Indian Income-tax Act XI of 1922, to find out, in the case of a non-resident, what income, profits or gains are "deemed to accrue, or arise, or to be received in British India" under the provisions of the Act; and from section 42 (1), we find that all profits or gains accruing or arising to a non-resident, whether directly or indirectly, through or from any business connection or property in British India is deemed to be such income, and is therefore, chargeable under section 4 (1) and 6.

A limited Company incorporated under the English Companies' Act and admittedly non-resident in British India, had its headquarters in London. It carried on various large business undertakings in Burma, especially in connection with rice, timber and cotton. It also had numerous rice-mills, saw-mills, cotton-ginning mills and vegetable oil-mills in Burma where commodities of raw materials were "worked-up into forms suitable for use" and shipped to the United Kingdom. Further, it also exported from Burma raw commodities, in the same form as purchased.

Held (1) that the fact of the produce being sold in London and the money being received there did not prevent profits or gains accruing, or arising, or being deemed to accrue or arise in British India, from being taxable under the Indian Income-tax Act.

Held (2) that no distinction, so far as liability to income-tax is concerned, could be drawn between profits on produce, which had undergone some process of conversion or "working-up" by the company in Burma, and profits

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* Civil Reference No. 7 of 1925.

on produce purchased by it in Burma and exported in the same form as when purchased.

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Held (3) that in arriving at the amount of profits liable to the Indian income-tax, the Commissioner of Income-tax must allow the London Office a reasonble commission agents' commission on the sale and realization of the produce, and therefore so much of the profits as can reasonably be attributed to commission agents' commission should not be assessable to income-tax in Burma.

Held (4) that as regards profits arisen on contracts of insurance entered into in England by the London Office on cargoes consigned to it from Burma, the profits were earned in England and the fact that the insurnce policy were effected on produce coming from Burma was much too remote a connection to justify the inclusion of these profits among profits deemed to arise accrue in British India.

Held (5) that, similarly the commission earned by the Company's Export Department in London on stores, etc., purchased and shipped from the United Kingdom to Burma also should not be amenable to Income-tax in Burma.

Commissioners of Taxation v. *Kirk*, A.C., (1900), 588; *Re Rogers Pyatt Shellac Company* v. *Secretary of State for India*, 52 Cal., 1—*followed*.

The Secretary, Board of Revenue v. *Madras Export Company*, 46 Mad. 360—*dissented from*.

Greenwood v. *Smidth*, (1920) 3 K.B., 275 : (1921) 3 K.B., 583: (1922) 1 A.C. 419—*distinguished*.

This was a reference made to the High Court by the Commissioner of Income-tax, Burma (J. C. Mackenzie, Esq., I.C.S.), under the provisions of section 66 (1) of the Indian Income-tax Act, 1922. The facts leading to the reference, the questions referred and the learned Commissioner's considered opinion on the points of wide-reaching importance involved are fully reported below :—

I.—*Statement of Facts.*

This is a reference made on my own motion under section 66 (1) of the Income-tax Act, 1922. The questions of law on which it is desired that the Honourable Judges of the High Court should give a decision have arisen in the course of an appeal preferred before me by Messrs. Steel Brothers and Company, Limited, against in assessment order of the Assistant Commissioner of Income-tax, Rangoon.

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The said assessment order was passed by the Assistant Commissioner in exercise of the powers of an Income-tax Officer with which he had been invested by an order passed under section 5 (4) of the Income-tax Act, 1922. Against such an order appeal lies in accordance with section 30 of the Act to the Commissioner of Income-tax.

2. The facts regarding the assessee and the assessment are set forth in the following paragraphs. Messrs. Steel Brothers and Company, Limited, are a limited Company registered in London under the English Companies Acts. The headquarters of the business is in London. The Company claims to be, and it is admitted that it is, a non-resident of British India.

3. In addition to their business activities in the United Kingdom and in British India, Messrs. Steels carry on business in Siam. Part of their income is also derived from investments in the United Kingdom. Income from both these sources, *viz*, business carried on outside of British India and investments in the United Kingdom, do not come under the scope of the Indian Income-tax Act and are not concerned in the present reference. Part of Messrs. Steels income olso is derived from business wholly carried on within British India. As a type of this class of business we may take, for instance, the purchase of paddy in Burma, the milling of it in Burma and the sale of the resulting rice in Bombay. Income from this class of business is admittedly liable to Indian income tax and it also is not concerned in the present reference.

The third class of business carried on by Messrs. Steels involves transactions both in British India and outside of British India. As a type of such transactions we may take business consisting in the purchase

of paddy in Burma, the milling of it in Burma, and the sale of the resulting rice in London. It is with the profits from this third class of business that the present reference in part is concerned. The profits arising the Messrs. Steels from business done on account of subsidiary or connected companies is also concerned.

4. Messrs. Steels' business activities in Burma are numerous and there are different departments of their business dealing with imports, insurance, shipping, rice, timber, cotton and produce and oil.

Part of Messrs. Steels' business is carried on direct and part is carried on by means of subsidiary companies. Thus dealing with imports and insurance there is a subsidiary company George Gordon and Company (Burma), Limited, the whole of the shares in which are held by Messr. Steels with the exception of a few held by Messrs. Steels' nominees. Another subsidiary company is the Burma Company, Limited, which carries on part of Messrs. Steels' business in rice.

As regards oil Messrs. Steels carry on the managing agency of the Indo-Burma Petroleum Company, Limited, in which Company they have large shareholding interests. The relations of Messrs. Steels, with this Company will be noticed in detail below.

Of the branches of their business whtch Messrs. Steels themselves carry on direct, the only departments concerned in the present reference are those dealing with (*a*) Rice, (*b*) Timper, and (*c*) Cotton and Produce. For the purposes of the present reference it is necessary to indicate the extent of Messrs. Steels' activities in Burma in connection with each of the three departments enumerated.

5. The headquarters of Messrs. Steels' business in India is in Rangoon where there is a large staff.

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In connection with their business in rice Messrs. Steels have mills in Rangoon and also in the principal exporting towns in Burma. Upcountry they also own mills where cotton is ginned and oil-seed pressed. In connection with their timber department Messrs. Steels own saw-mills and also hold leases of Government forests at various places throughout the province. The same mills and the same staff deal with the goods and merchandice which are the subject both of of Messrs. Steels trade within India and also of their export trade. As regards rice Messrs. Steels purchase paddy in Burma which is milled in their mills in Burma. Of the three resulting products, white rice, broken rice, and bran, all three may be exported. But it does not follow that if one of the products resulting from the milling of a particular parcel of paddy is exported that the other products will also be exported. They may be sold locally. The three products, white rice, broken rice, and bran from a particular parcel of paddy may all be sold in India or they may all be exported; or any of the intermediate permutations and combinations between export and local sale may take place.

6. In the department of Cotton and Produce the principal commodities dealt in are cotton and ground-nuts. As regards cotton, raw cotton (kappas) is purchased and ginned in Messrs. Steels' mills, the resulting product being cleaned cotton and cotton seed. The cleaned cotton is baled. Some of it is exported to Europe, some to Japan, and some of it is sold in India. Part of the cotton seed is pressed, the resulting products being cotton-seed oil and cotton seed oil-cake. The cotton-seed oil is sold locally. The cotton-seed oil-cake is exported to Europe. As regards ground-nut Messrs. Steels purchose groundnuts and press them in their mills. Of the two

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resulting products ground-nut oil and oil-cake all the oil cake is exported to Europe. The graund-nut oil is all sold locally.

As regards the timber business I cannot give a more succinct account than has been supplied by Messrs. Steels themselves. The following is an extract from their letter:— "All timber extracted from our leased forests or purchased at auction is not converted for shipment to Europe. The logs are converted into the most valuable form of cut timber that their size, shape and quality permit and the squares, planks, scantlings, etc., so produced are exported to the various markets in which they can be most suitably sold or are disposed of locally. In some cases when logs are so inferior as to make it unprofitable to cut up for export or sale locally, they are auctioned by us in the form of round logs."

7. In addition to the commodities purchased in a raw form and exported by them after they had been converted in Messra. Steels' mill into a form suitable for export Messrs. Steels also in each of the three departments of their business concerned purchase in India produce which they export out of British India in the same form as when purchased. Thus they ship quantities of rice, rice bran, cut timber, ground-nut oil-cake, beans, etc., which they purchase in a form ready for export and which are submitted to no process before shipment.

None of the commodities exported by Messrs. Steels, however, was after being exported from Burma subjected to any other process bebore being sold by them.

8. The different items constituting the profits, the liability or non-liability of which to Indian income-tax is at issue in the present reference, are shown in Messrs. Steel Brothers and Company's Profit and Loss

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Account and also in the "Statement of Profits" for the year ending 31st December 1922 which accompanied Messrs. Steels' return. These items are :—

		£	s.	d.
(a) Profit on Burma Rice in London	...	68,218	14	11
(b) Profit on Timber in London	...	14,163	0	0
(c) Profit on Cotton and Produce in London		6,816	18	8
(d) Profit on Insurance in London	...	2,507	16	9
(e) London Commission, a/c I.B.P.	...	3,667	8	11
(f) Sales Commission, etc. a/c Attock Oil Company Limited	...	8,354	13	2
(g) London Commission on Stores shipped		7,199	0	0

9. It is necessary to examine these items seriatim. It will also be necessary to subdivide some of the items into different categories from the point of view of liability to income-tax.

10. As regards the two items :—

		£	s.	d.
Profit on Burma Rice in London	...	68,218	14	11
Profit on Timber in London	...	14,163	0	0

the following draft of the present paragraph was made by me after interview with Messrs. Steels' representative and was submitted by me to Messrs. Steel Brothers for their remarks :—

The first two items :—

		£	s.	d.
Profit on Burma Rice in London	...	68,218	14	11
Profit on Timber in London	...	14,163	0	0

appear to be entirely homogenous for the purposes of the present reference. The two sums in question represent the profits accruing to Messrs. Steels, respectively out of their transactions in Burma rice and in Burma timber sold outside of Brish India. Messrs. Steel Brothers' method accounting for this class of business is such that all the profits are shown as accruing in London or at any rate in the London books. For such business Messrs. Steels, Rangoon, run accounts with Messrs. Steels, London. In the Rangoon accounts the produce, etc., is shown as made over to Steels, London, at the actual cost. Steels, London, are debited with the actual cost incurred in Burma including the price of purchase, the cost of converting or working up and of putting the

produce on board aship as nearly as can practically be ascertained. The figures concerned therefore represent the difference between the final price realized in London and the actual cost in Burma *plus* any further expenses incurred outside of India.

In reply to my letter forwarding the draft Messrs. Steels made the following observation :—

In this paragraph the description of the method of arriving at invoice cost of rice shipped to Europe obscures a most important fact *viz.* that included in "the cost of converting or working up and of putting the produce on board aship," there is an item of Milling Hire charged to London for cost of converting paddy into rice, which leaves a margin of profit in the Burma Accounts. It will be readily understood that when mills are employed in milling both for shipment to Europe and for local sales, it is not possible to determine the exact cost of conversion of each lot of rice milled for Europe and a fixed charge is therefore adopted. In our experience of the rice milling industry, the milling hire thus charged is greater than can generally be obtained by selling rice in the local market. Conversely, it is our experience that we can generally buy rice in the local market as cheaply as or at a lower price than the cost to produce the same quality in our own mills inclusive of the abovementioned milling hire. On these grounds we claim that the price at which we transfer rice to our London accounts is at least as high as could be obtained by selling in Rangoon. Any profit secured over and above this price is therefore in our opinion, due to the operations of our London house who finance shipments and sell the rice in the various markets to which they have access by virtue of their establishment in London. Such profit we hold does not accrue or arise in India.

We consider it necessary that the above facts should be brought out in the Statement of Reference.

11. The next item in question, *viz.*, £ 6,816-10-8 "Profit on Cotton and Produce in London" is arrived at differently. Steels' method of accounting for this department of their business is different to that followed in the case of rice and timber. Formerly up till 1920 the Cotton and Produce department of Messrs. Steels' business was carried on through the medium of a limited company, the Jamal's Cotton and Produce Company, Limited, in

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which Messrs. Steels held half the shares and of which Messrs. Steels were Managing Agents. This company is now defunct and its business has been taken over by Messrs. Steels and is run by one of their departments. But the former method of accounting as between Steels, London, and this department of the business in Burma has persisted. This is that Messrs. Steels, London, in consideration for the work done at the London end, charge Messrs. Steels, Rangoon, a commission of 2½ per cent. of the sale proceeds received for cotton and produce sold by the London Managers out of British India. In the case of this item the actual profit accruing is shown as accruing in the Rangoon books, and is shown as a Rangoon profit. (It is assumed for the purposes of the present reference that the whole of this sum of £6,816-18-8 is of the nature indicated. Strictly it is not so. A sum of £17-15-9 represents the commission on stores shipped by the Export Department of Messrs. Steels, London. If, after the decision of the Court has been obtained, it should be necessary to differentiate between this latter sum and the main sum this can be done. But in the meantime, in order to avoid further complicating a reference that is already complicated enough, the whole of the sum of £6,816-18-8 is assumed to be as stated above).

12. The item "Profit on Insurance in London, £2,507-16-9" is described by Messrs. Steel Brothers as being made up as follows:—

	£	s.	d.
(a) Brokerage and discount allowed on marine insurance taken out in London covering rice shipments from Burma ...	2,149	19	10
(b) Agency commission on Fire, Riot and Civil Commotion covers taken out in London on rice stored in Europe	357	16	11
Total ...	2,507	16	9

13. The item "London Commission Account Indo-Burma Petroleum Co., Ltd., £3,667-8-11" is made up as follows :—

	£	s.	d.
(a) Commissions earned by Oil Department, London, on sales of Wax, etc., in the United Kingdom for account of Indo-Burma Petroleum Company, Limited ...	1,058	16	6
(b) Commission earned by Steels' Export Department in London on Stores, etc., purchased and shipped from the United Kingdom to Burma for account of the Indo-Burma Petroleum Company, Limited	2,608	12	5
Total ...	3,667	8	11

14. The item "Sales Commission, etc.,—Attock Oil Company, Limited, £8,354-13-2" is made up as follows :—

	£	s.	d.
(a) Allowance from Attock Oil Company, Limited, to cover administration expenses as managing agents as per agreement dated 14-11-21	6,374	13	7
(b) Agency commissions received by Steels on Insurance effected by them in London on Attock Oil Company's account ...	740	0	5
(c) Commissions earned by Steels' Export Department in London on Stores, etc., purchased and shipped from the United Kingdom to India	1,239	19	2
Total ...	8,354	13	2

15. The item "London Commission on stores shipped £7,199-0-0" is described by the Company as arising from "Commissions charged by the Export Department, London, on General Goods, Stores, etc., purchased by London Office and shipped to Steels, Rangoon."

16. As has been stated above the main part of the produce exported by Messrs. Steels in all the

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three departments of their business concerned consists of produce converted or worked up by them in Burma. But, again in all the three branches of their business, part of the produce exported was purchased by Messrs. Steels in Burma in the same form in which it was exported. It is possible that it will be necessary to differentiate for the purposes of the present reference between each of the two classes of business. In their books Messrs. Steels do not maintain separate accounts for the two classes of business. The extraction of figures showing separately the profit from the two classes of business would involve considerable labour. In the present case the contention of Government is that the whole of the profits concerned from both classes of business are liable to Indian income-tax. Messrs. Steels' contention is that no portion of the profits concerned is liable to income-tax. It is possible that ultimately it will not be necessary to extract the figures in question. Accordingly in order to save trouble I have decided with the consent of Messrs. Steels to adopt for the purposes of the present reference an arbitrarily fixed figure. For all the three departments of Messrs. Steels' business that are concerned it is assumed that of the total profits 80 *per cent.* arises from transactions in produce which was submitted to some process of conversion or working up in British India and that 20 *per cent.* arises from transactions in produce which was exported from British India by Messrs. Steels in the same form as when purchased by them in British India. This 80 : 20 proportion is purely arbitrary. If as a result of the decision of the Honourable Judges in the present reference it is necessary to differentiate between the profits of the two classes of business, the exact figures will have to be worked out later on.

According to this arrangement we have the following subdivision of some of the items enumerated in paragraph 8 above :—

I. The item (*a*) rice profits in London £68,218 14*s*. 11*d*. is divided as follows :—

	£	s.	d.
(*a*) (i) Profits in London on rice, etc., milled in India	54,575	0	0
(ii) Profits in London on rice purchased in India and exported in the same form	13,643	14	11

II. The item "Profits on Timber in London" must be similarly subdivided as follows :—

	£	s.	d.
(*b*) (i) Profits in London on timber which has been converted or worked up in India	11,330	8	0
(ii) Profits in London on timber which has been exported from India in the same form as it was purchased ...	2,832	12	0

17. As regards the item shown as "London Profits on Cotton and Produce £6,816-18-8," as has been stated above this sum is really wrongly described in the accounts. The particular method of accounting which Messrs. Steels have adopted as regards this part of their business cannot in any way affect the liability or otherwise to income-tax of the profits concerned. There is nothing in this department of Messrs. Steels' business that is fundamentally different to the business done by the Rice Department and Timber Department. The decision of the Court on the liability to Indian income-tax of the profits of the Rice Department and of the Timber Department will be applicable to the profits of the Cotton and Produce Department.

18. The remaining items appear to involve section 42 (1) of the Act. As regards the items "Profit on Insurance in London" and "London Commission on Stores shipped," Messrs. Steels, London, and their branch, Messrs. Steels, Rangoon, are the two parties concerned. In connection with the other items, it is

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necessary to examine the relations between Messrs. Steels and (*a*) the Indo-Burma Petroleum Company, Limited, (*b*) the Attock Oil Company, Limited, and (*c*) the Burma Company, Limited. The Indo-Burma Petroleum Company, Limited, was originally founded by Messrs. Steel Brothers and Messrs. A. S. Jamal Brothers, each of whom held half of the issued shares. The original authorized capital of the Company was Rs. 1,00,00,000 of which Rs. 93,38,000 was issued almost immediately. The issued shares were held equally between Messrs. Steels and Messrs. Jamals up till the end of 1921 when Messrs. Jamals fell behind. In the last annual statement filed with the Registrar of Joint-Stock Companies of a total of 1,55,950 shares issued, 92,975 shares were held by Messrs. Steel Brothers direct. The original articles of association contain provisions ensuring that in the event of new shares being issued half of every such issue should be offered to Messrs. Steel Brothers and Company, Limited, and half to Messrs. A. S. Jamal Brothers and Company and in the event of either of these two parties not exercising its option of taking up its full quota of shares that the other party should have the right of pre-emption before any shares were offered to the public. The Articles of Association also contain provisions that, while certain conditions should continue, Messrs. Steels had the right to nominate, out of a directorate of three, one Director and Messrs. Jamals has the right of nominating another Director. Messrs. Steels and Messrs. Jamals had the right of jointly nominating the third Director. By the Articles of Association it was also laid down that Messrs. Steels should be the Managing Agents of the Indo-Burma Petroleum Company, Limited, for so long as they were willing to act in that capacity. Messrs. Steel Brothers and

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Company, Limited, were precluded from engaging in any other oil business in India and without the consent of the Indo-Burma Petroleum Company, Limited, even from holding shares in another Oil Company in India. The Articles of Association of the Attock Oil Company, Limited, of 1919 reserve to Messrs. Steel Brothers and Company, Limited, certain rights as regards the taking up of new shares issued by the Attock Oil Company, Limited. These rights were exercised through the medium of the Indo-Burma Petroleum Company, Limited, which holds a large part of shares in the Attock Oil Company, Limited. By the Articles of Association of the Attock Oil Company, Limited, the managing Agency of the Attock Oil Company, Limited, was reserved to Messrs. Steel Brothers and Company, Limited. As regards the third subsidiary company, the Burma Company, Limited, the whole of the shares in this Company are held by Messrs. Steel Brothers and Company, Limited, and by Assistants in Messrs. Steel Brothers and Company, Limited.

19. I think it best to refer to each item separately and accordingly submit the appended statement of the questions referred :—

II.—*Questions Referred.*

I. Is the whole or part of the sum of £68,218-14-11 described as London Profits on Rice and consisting of £54,575-0-0 profits on produce which has undergone some process of conversion or working up in Messrs. Steels' hands in Burma and £13,643-14-11 profits on produce purchased in Burma and exported in the same form as when purchased, liable to Indian income-tax ?

II. Is the whole or part of the sum of £14,163-0-0 shown as London profits on timber

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and consisting of £11,330-8-0 being profits on timber which has undergone some process of conversion or working up in Messrs. Steel hands in Burma and of £2,832-12-0 being profits on timber purchased in Burma and exported in the same form as when purchased, liable to Indian income-tax?

III. Is the whole or part of the sum of £6,816-18-8 (approximately) described as London profits on cotton and produce and consisting of £5,453-10-11 (approximately) being profits on cotton and produce which has undergone some process of conversion or working up in Messrs. Steels' hands in Burma and £1,363-7-9 (approximately) being profits on cotton and produce purchased in Burma and exported in the same form as when purchased liable to Indian income-tax?

IV. Is the whole or part of the sum of £2,507-16-9 described as profits on insurance in London and consisting of £2,149-19-10 being brokerage and discount allowed on marine insurance taken out in London covering rice shipments from Burma and £357-16-11 being Agency Commission on Fire, Riot and Civil Commotion covers taken out in London on rice stored in Europe liable to Indian income-tax?

V. Is the whole or part of the sum of £3,667-8-11 described as "London Commission Account, Indo-Burma Petroleum Company, Limited," and consisting of £1,058-16-6 being commission earned by the Oil Department, London, on sales of wax, etc., in the United Kingdom for account of the Indo-Burma Petroleum Company, Limited, and £2,608-12-5 being commission, earned by Steels' Export Department in London on stores, etc., purchased and shipped from the United Kingdom to Burma for account of the Indo-Burma Petroleum Company, Limited, liable to Indian Income-tax?

VI. Is the whole or part of the sum, of £8,354-13-2 described as "Sales Commission, etc.,—Attock Oil Company, Limited," and consisting of £6,374-13-7 being allowance from Attock Oil Company, Limited, to cover administration expenses as Managing Agents as per agreement dated 14th November 1921, £740-0-5 being Agency Commission received by Steels' London, on insurances effected by them in London, on Attock Oil Company's account and £1,239-19-2 being Commissions earned by Steels' Export Department in London on Stores, etc., purchased and shipped from the United Kingdom to India liable to Indian income-tax?

VII. Is the whole or part of the sum of £7,199-0-0 described as "London commission on stores shipped" liable to Indian income-tax?

III.—*Commissioner's Opinion.*

1. In this case the plan which I think it will be best to follow is first to discuss the general principles of law involved and then to apply these to each of the six questions stated.

2. At one of the hearings it was put forward by the Barrister who appeared for Messrs. Steels that the principal decided cases on which they rely in their contention that the items of income at present under reference are not liable to Indian income-tax are the cases *Madras Export Company* v. *Board of Revenue* (1) and the English case *Greenwood* v. *Smidth* (2). The claim of Messrs. Steels however is very much wider than the claims put forward against the Revenue authorities either in the *Madras Export Company* case or in *Greenwood* v. *Smidth* or in any

(1) I.L.R. XLVI, Madras, 360. (2) 3 K.B. 583, C.A.

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of the other leading English cases. For convenience these English cases may be quoted here: *Sully* v. *Attorney General* (3), *Erichsen* v. *Last* (4), *Tischler* v. *Apthorpe* (5), *Pommery* v. *Apthorpe* (6), *Colquhoun* v. *Brooks* (7), *Werle & Co.* v. *Colquhoun* (8), *San Paulo Railway Co.* v. *Carter* (9), *Crookston Brothers* v. *Furtado* (10), *Weiss Biheller & Brooks* v. *Farmer* (11). In all of these cases which concern dealing in commodities, the trading the profits of which it was proposed to tax was the purchase or sale of a finished article or of an article which was not transformed by manufacture within the taxing realm while in the hands of the person whom it was proposed to tax. Messrs. Steels however go much further. As stated in paragraph 7 of the Statement of Facts the vast bulk of the rice, timber, cotton, oil-cake, etc., which Messrs. Steels exported during the accounting period now in question was produce which had been submitted to some process of manufacture in British India by Messrs. Steels before export. The claim of Messrs. Steels is that none of the profits which arise, for instance, from the export and sale out of British India of teak extracted from Burma forests and converted in Burma to a form marketable in Europe is liable to Indian income-tax.

3. I think that there are two general questions of law which it is necessary to decide before each of the questions referred can be properly decided. These two principal questions of law are:

(*a*) whether a person who makes profits by buying or extracting produce in British India, transforming or working it up by

(3) 5 H. & N., 711.
(4) 8 Q.B.D., 414.
(5) 52 L.T., 814 = 2 Tax C., 89.
(6) 56 L.T., 24 = 2 Tax C., 182.
(7) 14 A.C., 493.
(8) 20 Q.B.D. 753.
(9) A.C., 31.
(10) 5 Tax C., 602.
(11) 2 K.B., 725.

mechanical process in British India and exporting and selling it outside of British India is liable to pay Indian income-tax on such profits, and

(*b*) whether certain classes of income derived by a non-resident from a business connection in British India are made liable to Indian income-tax by the provisions of section 42, sub-section 1, of the Indian Income-tax Act, XI of 1922.

4. In connection with both these general questions it is pertinent to observe that the definition of "trade" in section 237 of the United Kingdom Income-Tax Act of 1918 is practically the same as the definition of "business" in section 2, sub-section (4) of the Indian Income-tax, Act, XI of 1922.

5. In Murray's "New English Dictionary" to "manufacture" is defined as "to work up (material) into forms suitable for use." In Annandale's "Concise English Dictionary" "manufacture" is defined as "the operation of reducing raw materials into a form suitable for use by more or less complicated processes." In Chambers' "Twentieth Century Dictionary" to "manufacture" is defined as "to make from raw materials by any means into a form suitable for use." According to these definitions it appears to me to be self-evident that Messrs. Steels' operations in the milling of rice, in the extraction and conversion of timber, in the ginning of raw cotton and the pressing of oil-seeds all amount to "manufacture."

6. As regards the former of the two principal questions to be decided, namely, whether profits derived from the sale outside of British India of commodities converted or worked up in British India are liable to Indian income-tax I can find no

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legal authority whatever to support the view that the profits in question are not taxable. The profits concerned arise from activities which include manufacture in British India. Accordingly under the definition in section 2, sub-section (4) of the Indian Income-Tax Act, Messrs. Steels' activities in British India in connection with the produce from which the profits in question arise amount to carrying on business. All the profits arising therefrom appear to be liable to Indian income-tax under the provisions of section 4, sub-section (1) and sections 6 and 10.

7. The law on the subject is clearly set forth in the Calcutta Ruling *Rogers Pyatt Shellac Company* v. *The Secretary of State for India in Council* (12) by Mr. Justice Chatterjee at the end of his judgment :

"So far as the factory at Wyndhamgunj is concerned it clearly comes within the Act. Admittedly there is a manufacturing branch of the Company at that place and under section 2, clause 3 of Act VII of 1918 business includes among other things any manufacture, the income therefore from such manufacture would be income from business and as such taxable under sections 3 and 5 of the Act."

In this respect there is no difference between Act VII of 1918 to which Mr. Justice Chatterjee refers and the present Act XI of 1922. The case quoted *Rogers Pyatt Shellac Company* v. *The Secretary of State* is the only Indian case I can find dealing directly with the question under examination. The same question arose in a Madras case *Commissioner of Income-tax* v. *North Ananthpur Gold Mines* (13). In this case Gold Mining Company which had its registered office in London earned profits from the sale in Great Britain of gold mined in the Ananthpur District in the Madras Presidency. The Company contended that as the sale of the gold took place

(12) 52 Cal., 1. (13) 44 Mad., 718.

entirely in Great Britain its profits did not arise and accrue in India. The Madras High Court in refusing to issue a *mandamus* requiring the Commissioner of Income-Tax to state a case incidentally expressed the opinion that having regard to the language of the Act the assessment was validly imposed. The relevant passage is at page 728 of I.L.R. 44 Madras, 1921, where Wallace, C.J., is reported as stating "As regards this particular case I will only say that while the Commissioner has rightly based his decision on the language of the Indian section which differs materially from the corresponding section of the English Act, etc."

It is to be noted that this question, *i.e.*, the first of the two general questions set out in paragraph 3 above, did not arise at all in the *Madras Export Company's* case.

8. I can find no relevant English ruling. So far as I can ascertain it has never been contended that a Company carrying on manufacture in the United Kingdom is not liable to English income-tax on its profits. No process of manufacture was concerned in any of the relevant English cases. In *Sulley* v. *The Attorney-General* the firm which it was sought to tax purchased piecegoods in England and sold them in America. In *Werle & Co.* v. *Colquhoun* and *Tischler* v. *Apthorpe* and also in *Crainger* v. *Gough* (14) the business concerned was the sale of French champagne in England. In *Crockston Bros*. v. *Furtado* the business was the importation of phosphates from Algeria. In *Erichsen* v. *Last* the business concerned was the despatch of foreign cablegrams from the United Kingdom. In *Weiss Biheller & Brooks* v. *Farmer* the business consisted

(14) 1896, A.C. 325.

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in the sale in the United Kingdom of gas mantles imported from Holland.

9. There is however a Colonial case decided by the Judicial Committee of the Privy Council which appears to apply directly to the question at present under examination. The case is *Commissioners of Taxation* v. *Kirk* (1900 A.C., 588). In this case the assessee was a Company registered in the Colony of Victoria and managed by a Board of Directors with headquarters at Melbourne in Victoria. The Company carried on the business of mining in the Colony of New South Wales. The ore obtained in New South Wales was treated in that Colony but the merchantable product was sold outside the Colony of New South Wales. The Income-Tax authorities in New South Wales sought to tax the Company on the whole of its profits. In the judgment the operations of the Company are divided into four parts :—

(1) the getting of the ore ;
(2) the refining of the ore ;
(3) the sale ;
(4) the receipt of the money.

Of these four processes only the first two took place in New South Wales. In the judgment it is laid down as follows with regard to the four processes mentioned :—

> 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 Judicial Committee held that as the profits of the first two stages arose or accrued in New South Wales it necessarily followed that the Company was liable on the whole of their profits.

10. The whole judgment of the Judicial Committee in this case supports the finding in the *Rogers Pyatt Shellac Company's* case. This ruling also points to

the conclusion that the profits we are considering, namely, profits derived from the sale outside of British India of produce extracted and worked up in British India, are liable to Indian income-tax.

11. In applying the finding in the case of *Commissioners of Taxation* v. *Kirk* to an Indian case it is necessary to consider whether there is any difference between the relevant sections in the Indian Income-tax Act and the sections in the New South Wales taxing statute. The relevant sections of the latter Act are quoted in the judgment cited. It is clear from the judgment that the words "earned", "derived" and "arising and accruing" are used interchangeably throughout. Under the New South Wales law tax was payable on the annual amount of all incomes—

> (1) arising or accruing to any person wheresoever residing in New South Wales from any profession or business carried on in New South Wales . . . .

There is a provision in section 27, however, to the effect that—

> (3) No tax shall be payable in respect of income earned outside the Colony of New South Wales.

The net effect of these provisions appears to me to be exactly the same as the net effect of the relevant section of the Indian Income-tax Act. The Indian Act makes taxable profits arising or accruing in British India or deemed to arise or accrue in British India. The New South Wales Act makes taxable profits arising and accruing from business carried on in New South Wales. There is so far no local limitation as regards arising or accruing. But the clause which exempts income earned outside New South Wales has, in view of the fact that "earned" and "derived" and "arising and accruing" are

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treated as being interchangeable, the effect of making the law the same as the Indian law.

12. On the above view both on the authority of the Calcutta High Court in the *Rogers Pyatt Shellac Co.* case and on that of the Judicial Committee in the case *Commissioners of Taxation* v. *Kirk* there is ground for holding that if any part of the process of arising or accruing takes place in British India the whole of the profits are liable to Indian income-tax. An alternative view, for which I can find no legal authority whatever, is that the total profits in question can be divided up into two portions :—

(*a*) a portion arising and accruing in British India ;

(*b*) a portion arising and accruing outside of British India.

There is no means of making such a division. The only actual profits are constituted by the money received by Messrs. Steels in London less the expenses incurred at all stages of the transactions involved. But if it were theoretically possible to divide the profits into two parts as above, the part (*a*) would on the authority of the *Rogers Pyatt Shellac Co.* case and the *Commissioners of Taxation* v. *Kirk* case be liable to Indian income-tax. The second portion would, it is submitted, be income derived by a non-resident from a business connection in British India and would, as is claimed below, also be liable to Indian income-tax.

13. I turn now to examine the second principal question of law, namely, whether profits derived directly or indirectly from a business connection in British India are made liable to Indian income-tax by the provisions of section 42 (1) of the Indian Income-tax Act, 1922.

On this point there are two conflicting Indian rulings. In 1922 in the *Madras Export Company* case the Madras High Court held that section 42 (1) is a machinery section and that it does not make liable to Indian income-tax any income which would not be otherwise chargeable. In March 1924 the Calcutta High Court in the case *Rogers Pyatt Shellac Co.* v. *Secretary of State* dissented from the view taken by the Madras High Court and held that section 42 (1) is a charging section. These are the two principal rulings. But there are references in other Indian cases which throw light on the questions at issue.

14. The questions at issue have been so thoroughly examined and the findings so clearly set forth by the Honourable Judges of the Calcutta High Court that it is unnecessary for me to do more than shortly to recapitulate the main points decided. As pointed out by Mr. Justice Mukerjee with reference to the *Madras Export Co.* case "the learned Judges in that case proceeded upon the supposition that the Legislature intended no change from the earlier Statutes which to a large extent were modelled on the English Statutes. That there is now a substantial difference is clear, and has been recognised in the cases, amongst others, of *Board of Revenue* v. *Ramanathan Chetty* (I.L.R. 43 Mad., 75, at page 86) in regarding Aurangabad Mills (I.L.R. 45 Bom., 1286) and in regarding John & Co. (I.L.R. 43 All., 139).

Under the United Kingdom law a person is liable to United Kingdom income-tax who exercises a trade in the United Kingdom. In the English cases concerned which have been enumerated in section 2 above the Judges have divided up the kind of trading concerned which, as has been pointed out, above,

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practically invariably consists in the purchase or sale of a completely finished article, into three constituent parts :—

(a) the making of the contract ;

(b) the delivery of the goods ;

(c) the payment for these goods.

The Judges have decided the English cases according to the locality in which one or other of the three constituent parts of trading has taken place. The provisions of the Indian Income-tax Act as has been pointed out are entirely different. Section 4 (1) of Act XI of 1922 expressly lays down that the Act applies not only to (a) income accruing or arising or received in British India, but also to (b) income deemed under the provisions of this Act to accrue or arise or to be received in British India. Section 42 (.) enacts that in the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connection or property in British India shall be deemed to be income accruing or arising within British India. The sorts of income described in section 42 (1) are deemed to accrue or arise or be received in British India and therefore as laid down in section 4 (1) the provisions of the Act apply to them and they are laible to Indian income-tax.

15. The scheme of the Indian Act appears to me to be as follows. The principal charging section is section 4 (1). This, I think, is made more clear from the fact that the principal exempting section is section 4 (3). Section 4 (1) and also section 4 (2) create a liability to income-tax. In section 6 income, profit, or gains which, under the provisions of section 4 (1) or 4 (2), are liable to tax, are divided into heads. Sections 7 to 12 lay down the method in

which the chargeability to tax is to be applied to the heads into which income liable to tax is divided by section 6. Sections 6 to 12 may be described as secondarily or derivatively charging sections. They prescribe the manner in which the chargeability to tax which is created by section 4 (1) or 4 (2) is to be applied to the several heads into which income liable to tax has been divided for the purposes of assessment.

It appears to me that the fundamental fallacy underlying the decision of the Honourable Judges of the Madras High Court is that they have treated section 5 of Act VII of 1918 (which corresponds with section 6 of Act XI of 1922) as being the principal charging section. It is clear from various passages in the printed judgments that the Honourable Judges regarded section 5 as being the principal charging section. Thus in the headnote it is stated: "It (Section 31 of the Income-tax Act, 1918) is not a section designed to declare some other gains taxable beyond what has been declared by section 5 of the Act to be taxable." Lower down in the headnote we find "Section 33 (1) of the Income-tax Act was not intended in any way to enlarge the scope of section 5." Sir Walter Schwabe, C.J., states (I.L.R. Madras 46, page 363, line 1), "by section 6 which is the charging section." Lower down (page 364, line 8), he says, "the words are in my view most unsuitable if intended to have a wider meaning than the well-known meaning of the words in the charging section 5 (4) . . . ." Mr. Justice Wallace (page 368, line 7) states, "The charging section of the Act is section 5," and lower down (at page 368, line 28) he states, "Section 33 (1) is not designed or situated in the Act as a charging section in addition to section 5." On page 369, line 7, it is stated that

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"It is not a charging section designed to declare some other gains taxable beyond what has been declared by section 5 to be taxable."

16. This view that section 5 of Act VII of 1918 (corresponding to section 6 of Act XI of 1922) is the principal charging section is quite at variance with previous opinions given by the Honourable Judges of the Madras High Court and also with the stated opinions of other High Courts in India. Thus the whole scheme of Act VII of 1918, which is the same as the scheme of Act XI of 1922, is properly set forth by Mr. Justice Seshagiri Ayyar in his judgment at page 89 of I.L.R., Madras 43. Again in the case *Chief Commissioner of Income-tax* v. *Bhamjee Ramjee* (44, I.L.R. Madras, page 776) the Honourable Judges correctly treat section 3 of Act VII of 1918 (corresponding to section 4 of Act XI of 1922) as being the principal charging section. I quote the beginning of the opinion of the Madras High Court Bench in that case :—

"Now the income which is taxable under the Act is as provided in section 3. All income from whatsoever source it is derived if it accrues or arises or is received in British India or is under the provisions of this Act, deemed to accrue or arise or to be received in British India.

And under section 33 (i), in the case of any person residing out of British India.

All profits or gains accruing or arising to such person whether directly or indirectly through or from any business connexion in British India shall be deemed to be income accruing or arising in British India.

And is consequently taxable under the express provisions of section 3.

Again in the case *In re the Aurangabad Mills* (45 I.L.R. Bombay, page 1287) Mr. Justice Macleod states (p. 1289), "The important section is section 3, sub-section (1) of the Act (VII of 1918). "Save as hereinafter provided, this Act shall apply to all

income from whatever source it is derived, if it accrues or arises or is received in British India, or is under the provisions of this Act, deemed to accrue or arise or to be received in British India."

17. There are other fallacies involved in the Madras *Export Company case*. The Madras High Court held that section 42 (1) only applied to profits received in British India by the agent of a non-resident. But if this were so why does section 42 (1) say that "profits . . . . from a business connection in British India" shall be "deemed to accrue or arise in British India." It is impossible to make sense of section 42 (1) on the view that it is a machinery section.

18. For the reasons stated in the preceding paragraphs it appears to me that section 42 (1) of Act XI of 1922 coupled with section 4 (1) has the effect of making liable to Indian income-tax profits or gains accruing or arising to a non-resident whether directly or indirectly through or from a business connection in British India.

19. In paragraph 8 above I set forth the conclusion arrived at as regards the first general question of law stated in paragraph 3 above, namely, that a person who makes profits from exporting produce manufactured in British India is liable to pay income-tax thereon. In the immediately preceding paragraph I have come to the conclusion that income derived by a non-resident from a business connection in British India is also liable to Indian income-tax. I now proceed to examine the six referred questions by the light of the above conclusions.

20. With regard to the question as to whether the whole or part of the sum of £68,218-14-11 described as "London profits on Rice" is liable to Indian taxation it appears to me that (*a*) one

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constituent portion £ 54,575 being profits arising from transactions in produce which has undergone some process of manufacture in Messrs. Steels' hands in Burma is liable to Indian income-tax under the provisions of section 4 (1) and sections 6 and 10 of the Indian Income-tax Act XI of 1922. Messrs. Steels carry on manufacture in Burma in respect of this produce and accordingly under the definition in section 2, sub-section 4, they are carrying on business and liable to income-tax in respect of these profits under section 10.

(*b*) With regard to the other constituent portion of the total sum concerned in the first question referred, namely, £ 16,345-14-11 being profits on produce purchased in Burma and exported in the same form, in my opinion these profits are liable to Indian income-tax under the provisions of sections 4 (1) and 42 (1) of the Indian Income-tax Act. For Messrs. Steels are by admission non-resident in British India. Their position with regard to the transactions concerned is exactly the same as that of the *Rogers Pyatt Shellac Co.* in the corresponding transactions in the Calcutta case. Accordingly following that decision the profits in question are profits derived from a business connection in British India and are liable to Indian income-tax.

21. With regard to the second question the two constituent items into which the profits have been divided appear to me to be exactly on all fours with the corresponding portions of the profits dealt with in question (1) and call for no further remark. The whole of these profits also is liable to Indian income-tax for the reasons given in the preceding paragraph.

22. It may be possible to differentiate Messrs. Steels' profits from the rice, timber and cotton and produce purchased by them in India and exported in the same form from the profits that were at issue in

the English decided cases which have been quoted. So far as I can ascertain in all the English cases in which the profits concerned were derived from transactions in merchandise, these transactions were the only business done in the United Kingdom by the firm which it was sought to assess to income-tax. As has been shown this is not the case with Messrs. Steels. They carry on, in addition to the class of business now under examination, business to a very large extent both entirely within Brritish India and also in exporting produce manufactured by them in British India. The same staff deals with all these classes of business. "The purchase-export" business is merely part of a large business the profits and gains of the other parts of which are liable to income-tax. The whole of Messrs. Steels' business in Burma is a venture in the nature of commerce. It may be questioned if it is legitimate to isolate one particular type of business and hold that they are not "carrying on business" in respect of that type of business. Futhermore, Messrs. Steels themselves lease forests and own rice mills, cotton mills, saw mills, and maintain a large staff to operate these. It is a legitimate presumption that they want to make all the profits possible. On this view their purchases of manufactured commodities would be made merely to supplement the available stocks of their own manufacture. On this view the "purchase-export" business would be merely ancillary to their other business. I suggest that the profits at present under reference can be differentiated for the above reasons from the profits in the English cases quoted.

23. With regard to the item £6,616-18-8 approximately, described as "London Profits on Cotton and Produce" it has been stated above that this sum really represents a commission of two and a

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half per cent on the value of the Cotton and Produce sold in London. I cannot see that there is any case for exempting from Indian income-tax this sum as it stands at present. The sum in question is part of Messrs. Steels' profits. There is in my opinion no provision of law enabling Messrs. Steels' to charge themselves a commission for doing their own business and then to claim that such commission should be allowed as a deduction from their profits for purposes of income-tax. The sum in question is my opinion clearly liable to Indian income-tax. Messrs. Steels claim that the profits in question are not liable to income-tax on the ground that the profits are shown as accruing in London. The method of book-keeping adopted by Messrs. Steels, however, has nothing to do with the question of liability to income-tax. In my opinion the whole of the profits of the Cotton and Produce Department whether shown in Messrs. Steels' books as accruing in London or in Rangoon should be treated as a whole and divided into two portions in the same manner as the profits of the Rice Department and of the Timber Department, one portion representing profits on produce manufactured in India and the other portion profits on merchandise exported from India in the same form as when purchased by Messrs. Steels. The liability or otherwise to Indian income-tax of the profits of this Department would then have to be decided on the same lines as laid down in paragraph 20 above.

24. With regard to the fourth question referred, regarding the sums described as "Profits on Insurance in London" in my opinion the whole of these profits are liable to Indian income-tax either on the ground that the insurances in question are part of Messrs. Steel's business in Rice and that as the expenses of insurance are included as a charge against the profits,

so any incidental profits made by Messrs. Steels out of the same transactions in insurance should be added back to the profits. Alternatively the profits in question are profit derived from a business connection in British India and are taxable under section 42 (1).

25. As regards the fifth question referred, the relations subsisting between Messrs. Steels and the Indo-Burma Petroleum Company, Limited, and the Attock Oil Company, Limited, have been fully set forth in the Statement of Facts. Messrs. Steel's connection with the Indo-Burma Petroleum Company, Limited, is not that of ordinary share-holders. Rather it is the case that Messrs. Steels carry on an oil business and that their method of doing so is through the medium of the Indo-Burma Petroleum Company, Limited. The relations between Messrs. Steels and the Indo-Burma Petroleum Company, Limited, as set out in paragraph 18 of the Statement of Facts, and in particular the fact that the Managing Agency of this Company is reserved to Messrs. Steels by the Articles of Association appear to me to be sufficient proof of this. The profits now under question whether "Commission on Sales in the United Kingdom" or "Commission on Stores exported from London" are in my opinion profits arising from a business connection in British India. In his judgment in the *Rogers Pyatt Shellac Co.* case Mr. Justice Mukerjee interpreted the words "Profits . . . . . . arising from a business connection in British India" as including income "which is attributable to the connection (a person) has with a business in British India." On this view the profits in question are liable to Indian income-tax.

26. The profits concerned in the sixth question referred are in my opinion exactly on all fours with those in the fifth question referred and are liable to Indian income-tax for precisely the same reasons.

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27. The profits concerned in the last question referred, namely, "London Commission on Stores shipped £7,199" appear to me to be part of Messrs. Steels' general profits from business. This profit has been separated off only because of the particular method of book-keeping followed by Messrs. Steels. But the fact that Messrs. Steels follow a particular method of book-keeping does not affect the liability of the profits in question to income-tax. I cannot see that there is any sanction for Messrs. Steels charging themselves a commission for work done for themselves and then claiming to deduct the amount of this commission from their profits. In my opinion the profits in question should be added to Messrs. Steels' general profits which are taxable as income derived from business.

The Reference was in due course heard by a Full Bench (Rutledge, C. J., and Das and Brown, JJ.).

E. Higinbotham, Government Advocate with *Alan Keith*—for the Commissioner of Income-tax.

T.F.R. Macdonnell—for Steel Brothers and Company, Limited.

RUTLEDGE C.J., DAS AND BROWN, JJ.—This is a reference made by the Commissioner of Income-tax on his motion under section 66 (1) of the Income-Tax Act, 1922.

The facts and the questions referred are clearly stated by the Commissioner of Income-tax in his reference.

The assese is a limited Company registered in London under the English Companies' Act. Its headquarters are in London and, admittedly, it is a non-resident of British India. For many years the firm has carried on large business operations in Burma, especially in connection with rice, timber and cotton.

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It was stated in Court that for some time the firm was assessed on a certain percentage of its net profits by consent and without prejudice to the strict legal liability, but the Income-tax authorities considered that this percentage was not high enough. The Company contends that none of its profits which form the subject of reference are assessable to income-tax in British India. The Commissioner of Income-tax, on the other hand, considers that all the heads of profit mentioned in his reference are assessable.

The question raised is one of very great legal and practical importance, and it has been very fully and ably argued before us for three days.

A great many cases have been cited before us, both English and Indian, but it will be only necessary, for the reasons hereinafter given, to refer to a few of these.

The assessment was made under the provisions of section 4 (1), read with section 42 (1) of the Indian Income-tax Act, 1922. The provisions of section 4 (1) run as follows:—

> Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

On reference to section 6, the only head therein applicable seems to be the 4th—" Business "—In the definition section—section 2 (4)—" Business includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

The firm admittedly has various rice mills, saw-mills, cotton ginning mills and vegetable oil mills in the Province, whereby commodities or raw material are "worked up into forms suitable for use." (New

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Oxford Dictionary). It consequently manufactures and, so, carries on business within the Province. Any income, profits, or gains arising from such business seems to be chargeable under sections 4 (1) and 6 of the Act of 1922.

For the Assessee it is contended that no income, profit or gain accrues or arises in respect of the bulk of its rice, timber and cotton business, because these goods are shipped to the head office in London, where they are sold on the English market and the payment is received in London and not remitted to India, and that a profit or gain cannot be said to accrue or arise until the goods are sold and the money is received.

This contention was put forward in the case of *Commissioners of Taxation* v. *Kirk* (i), but was overruled by their Lordships of the Privy Council in the judgment of Lord Davey.

Under the New South Wales Land and Income-tax Assessment Act of 1895, section 15, income-tax was payable in respect of the annual amount of all income :—

(i) "Arising or accruing to any person wheresoever residing from any * * *, trade, * * * carried on in New South Wales, * * * * ;

(ii) Derived from lands of the Crown held under lease * * * * ;

(iii) Arising or accruing to any person wheresoever residing from any other source whatsoever in New South Wales not included in the preceding sub-sections."

The Company was registered in Victoria and had its head office and Board of Directors at Melbourne. It had mines in New South Wales, where the crude ore was smelted. None of the ore was sold in New South Wales, sales being made for the most part in

(i) Law Reports (1900), Appeal Cases, page 588 at page 592.

Melbourne, and the money received for the ore either in London or Melbourne.

Their Lordships held that, whether or not the Company traded in New South Wales, so as to come within sub-section (1), if there was income, it was clearly income from lands of the Crown held on lease and so came under sub-section (3), and also was income from some other source in New South Wales, and so came under sub-section (4).

As to whether there was income: "It appears to their Lordships that there are four processes in the earning or production of this income—(i) the extraction of the ore from the soil; (ii) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (iii) the sale of the merchantable product; (iv) 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-section (3) and the second or manufacturing process, if not within the meaning of 'trade' in sub-section (1), is certainly included in the words 'any other source whatever' in sub-section (4).

So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South Wales."

As the Commissioner of Income-tax, in his opinion attached to the reference, seems to have fallen into an error on this point, it is well to remember that their Lordships did not decide that the whole of the profits to the Company were chargeable. They merely answered the first question stated in the special case in the affirmative, and that question was whether the Companies had *any* income in 1897 within the meaning of the Act.

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Applying that case to the present, it seems clear that, in determining whether any income, profits or gains arise or accrue, we must not be content to look only at the last stage of the accrual, but must take into consideration the previous stages as well.

The main battle-ground, however, in this case has been over the provisions of section 42 (1).

For the Assessee it is contended that the section is not a charging section at all, but merely a machinery section, that is, in the words of Lord Sterndale, a section which provides a method of carrying out the charge imposed by some other section ; that it is embedded amongst a number of other provisions clearly of that character ; that, if it is taken as a charging section, it is so wide and far reaching in its terms and so manifestly unjust in its application to non-residents, that it could not have been so intended by the Legislature ; and that a fiscal burden can only be imposed upon the subject by clear and unmistakable language.

Reliance is placed on the case of *Greenwood* v. *Smidth*, (ii) in its various stages in the English Courts, which has been followed by a Bench of the Madras High Court in the case of *The Secretary, Board of Revenue (Income-Tax), Madras.* v. *The Madras Export Company*, (iii). The English Courts were construing section 31 of the Finance Act No. 2 of 1915, and, if the Act which we are construing was, in its provisions, identical with, or similar to, the English Finance Act, No. 2 of 1915, the decisions of the several eminent Judges, though not binding on us, would naturally carry the greatest

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(ii) Law Reports (1920), III King's Bench Division, p. 275.
Law Reports (1921), III King's Bench Division, p. 583.
Law Reports (1922), I Appeal Cases, p. 417.

(iii) Indian Law Reports, XLVI Madras, p. 360.

weight and authority. But a comparison of the two Acts, shows that not merely in arrangement, but also in substantive provisions, the Acts are, in many respects, dissimilar.

To take one point of difference indicated by Chatterjee, J., in *Re Rogers Pyatt Shellac Company* v. *Secretary of State for India*, (iv): "It will be seen that under the English Acts, it is essential that the profits should arise from the *exercise of the trade within the United Kingdom*. In the Indian Acts, (VII of 1918 and XI of 1922), however, in the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connection in British India shall be deemed to be income accruing or arising within British India. There is no such provision in the English Acts, and that distinguishes the English Acts, and the cases decided thereunder from the Indian Acts."

With regard to non-residents, the only question in the English Acts is whether there is a trade exercised in the United Kingdom. This, as we have seen, is not the case under the Indian Acts.

We may here state that, though the Madras decision, already quoted, (iii), was under the Indian Income-tax Act of 1918, for the purposes of the question before us that Act does not differ from the Act of 1922, with which we are dealing.

A significant point is that the words "or deemed under the provisions of this Act to accrue, or arise, or to be received in British India" in section 4 (1), and the analogous words in section 4 (2), do not appear anywhere else in the Act except in section 42 (1).

(iv) Indian Law Reports, LII Calcutta, p. 1 at p. 15.

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That being so, it is, in our opinion, necessary to read both sections together to arrive at the meaning of the legislature. In other words, it is necessary to look to section 42 (1) to find out, in the case of a non-resident, what income, profits or gains are "deemed to accrue, or arise, or to be received in British India" under the provisions of the Act; and from section 42 (1), we find that all profits or gains accruing or arising to a non-resident, whether directly or indirectly, through or from any business connection or property in British India is deemed to be such income, and is, therefore, chargeable under sections 4 (1) and 6.

This is the view taken by a Bench of the Calcutta High Court in *re Rogers Pyatt Shellac Company v. Secretary of State for India*, (iv), and we find ourselves in general agreement with the judgment of Mr. Justice Chatterjee, with which Mr. Justice Chotzner agreed, and with conclusions of which Mr. Justice Mukerji was in complete agreement.

We admit the difficulty arising from the vague expression "from any business connection." Taken in its wide sense, it would render liable to Indian income-tax any profits made by a manufacturer in England on a single consignment of goods to an importer in India. This is the meaning which the Commissioner of Income-tax seems to have attached to the phrase, and is the meaning which, the learned Government Advocate contends, is the correct one. It is one, however, which we cannot adopt, as such a meaning would be repugnant to the word "business" in section 6 as defined by section 2 (4), and we can assign no wider meaning to it than the latter words of the definition as "any adventure or concern in the nature of trade, commerce or manufacture." It was probably used, as Mr. Justice Chatterjee

conjectures, as a compendious expression to cover such concerns in the nature of trade, commerce, or manufacture as arise through a branch, factorship, agency, receivership or management. But be this as it may, its meaning, in our opinion, must be strictly confined to the meaning of the word "business" in section 6.

Applying the foregoing conclusions to the questions of reference, we would answer the first and second questions referred as follows :—

Under the Authority of *Commissioners of Taxation* v. *Kirk* (i), we hold that the fact of the produce being sold in London and the money being received there does not prevent profits or gains accruing, or arising, or being deemed to accrue or arise in British India from being taxable under the Indian Income-tax Act.

We are also of opinion that no distinction, so far as liability to income-tax is concerned, can be drawn between profits on produce, which has undergone some process of conversion or "working up" by the assessee in Burma, and profits on produce purchased by the assessee in Burma and exported in the same form as when purchased.

But a serious practical question arises as to whether all the net profits are liable to Indian Income-tax. As we have already seen, their Lordship of the Privy Council did not so decide in the case of *Commissioners of Taxation* v. *Kirk* (i). At page 42, Mr. Justice Mukerji, in the Full Bench Case of *Rogers Pyatt Shellac Company* v. *Secretary of State for India* (iv), seems to indicate that the calculation of what part of the net profits are to be deemed to arise and accrue in

(i) Law Reports (1900) Appeal Cases, page 588 at page 592.
(iv) Indian Law Reports, LII Calcutta, page 1 at page 15.

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India and what part at the place of disposal and realization may have to be made.

No doubt, in calculating the net profits, due deductions have already been made in respect of the Home establishment; but this, in our opinion, is not sufficient.

If the assessee had not had a Head Office in London and wished to ship and dispose of its produce in the English market, it could only do so, for ordinary practical purposes, by means of commission agents there, and a reasonable remuneration to such commission agents would have to be deducted before arriving at the net profits earned. But, if the Head Office in London and the various branches controlled by the Head Office in Rangoon happen to be one and the same firm, it does not, in our opinion, affect the question. And in arriving at the amount of profits liable to Indian income-tax, the Commissioner of Income-tax, in our opinion, should allow a reasonable commission agents' commission on the sale and realization of the produce. So much of the profits as can reasonably be attributed to commission agents' commission should not be assessable to income-tax in Burma.

With regard to question No. 3 in paragraph 19 of the Reference, the Commissioner refers to the same as being claimed as a commission of 2½ per cent. of the sale proceeds received for cotton and produce sold by the London Managers out of British India in consideration for the work done at the London end. It is not clear to us whether the claim is considered as a reasonable commission agents' commission. If it is, in accordance with our answer to the previous questions, this sum should not be assessed. If it is not a reasonable commission, so much of it as would represent a reasonable commission ought to be deducted and the balance assessed to income-tax.

With regard to question No. 4: These profits seem to have arisen on contracts of insurance entered into by the Head Office on rice cargoes consigned to it by its Rangoon branch. Admittedly, the Burma Branch or agency had nothing to do with them. The profits were not merely earned in England, but the contract was entered into in England.

That the policies were effected on produce coming from Burma is much too remote a connection to justify us in holding that the profits could be deemed to arise or accrue in British India, bearing in mind the circumscribed meaning to be attached to the expression "business connection."

With regard to question No. 5: The items there referred to belong to two quite distinct categories. The sum of £2,608-12-5 is described as commission earned by Steel Brothers' Export Department in London on stores, etc., purchased and shipped from the United Kingdom to Burma for account of the Indo-Burma Petroleum Company. As regards this item, our answer is the same as our answer to question No. 4.

As regards the item of £1,058-16-6 which is described as commission earned by the Oil Department, London, on sale of wax, etc., in the United Kingdom for account of the Indo-Burma Petroleum Company, our answer is the same as our answer to question No. 3.

With regard to question No. 6: The last two items of £740-0-5 and £1,239-19-2 are, in our opinion, not liable to income-tax in Burma. The first item of £6,374-13-7 is described as an allowance from the Attock Oil Company, Limited, to cover administration expenses as Managing Agents as per agreement dated the 14th November 1921. So much of this sum as represents profits on management in British India is assessable to Indian income-tax. There are not

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sufficient data before us to answer this question with regard to this item more specifically.

With regard to question No. 7 the reference does not specify what part of the item arises from commission on stores not for sale, such as mill plant and accessories, and what, if any, arises from goods for sale, such as piece-goods. As we have already indicated, the Head Office in London are entitled to charge a reasonable commission on all goods shipped to their branch in Burma. Unless the commission charged is unreasonable, it is not assessable to income-tax in Burma.

On our finding, as neither party has wholly succeeded in its contention, we make no order as to costs.

APPELLATE CIVIL.

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Sept. 22.

Before Mr. Justice Rutledge, Chief Justice, and Mr. Justice Brown.

MA THAN AND OTHERS

v.

MA KYIN AND OTHERS.*

Buddhist Law—Inheritance—Lesser or inferior "wives"—Separate residence from that of the "husband," a disqualification from inheritance, settled law.

The decisions of the High Court in the case of Ma Thein Yin v. Maung Tha Dun, reported in I.L.R. 1 Ran. at page 1, and 2 Ran. at page 62, do not revolutionize Burmese Buddhist Law in respect of the rights of a lesser or inferior "wife" when living apart from her "husband" and occasionally visited by him, but are decisions following successive decisions for a period of about 30 years of the highest Court in Upper Burma, consistent with the law as stated in the Manukye *Dhammathat*, Volume X, section 42, and should be regarded as settled law.

Petitioner, who claimed to be the lesser wife of one Shwe Yin. deceased applied to the High Court for leave to appeal to the Privy Council from its judgment which had affirmed the decision of the Trial Court. The High Court judgment admittedly followed the principles laid down in Ma Thein Yin v.

* Civil Miscellaneous Applications Nos. 87 and 88 of 1925.

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Maung Tha Dun reported in 1 Ran. and 2 Ran., 62. It also appeared that petitioner had parted with her rights, if any, in the subject matter of the suit by selling the same to a third party.

Held that the Court would not be justified in certifying that the case involved a substantial question of law.

Held also that the Court not being satisfied that a substantial point of law was involved, it would not be disposed to assist a gambler in litigation at the expense of the legal heir to the estate and the application must accordingly be dismissed.

Ma Theiu Yin v. *Maung Tha Dun*, 1 Ran., 1, and 2 Ran., 62—*affirmed*.

Ma Gyue v. *Ma Thi Da*, (1892-96) U.B.R. II, 194; *Ma Shwe Ma* v. *Ma Me* (1910-13), I U.B.R., 114; *Ma U Byu* v. *Ma Hnyin* (1897-01), II, U.B.R., 160—*followed*.

Mi Kin Gale v. *Mi Kin Gyi*, (1910-13) 1 U.B.R., 42—*referred to*.

Manugye X, 23—*referred to*.

Burjorjee—for the Applicants.

Kyaw Din—for the Respondents.

RUTLEDGE C.J., AND BROWN, J.—These are two applications for leave to appeal to His Majesty in Council from the decisions of the Appellate Side of this Court passed in Civil First Appeals Nos. 183 and 187 of 1923.

The learned Advocate for the applicants admits that in the second of these applications Ma Pwa Yin's appeal was dismissed on the 7th of January 1924 for want of prosecution. In these circumstances it is obvious that leave to appeal cannot be granted to her in that case. She is, however, a respondent in Ma Than's appeal, and as such her claim was considered in the judgment from which an appeal to the Privy Council is sought. Consequently, if we grant the leave to appeal in the first of these applications, Ma Pwa Yin's status and claim would necessarily come up for consideration before their Lordships.

Admittedly, the decree sought to be appealed from affirmed the decree of the District Court. Consequently, under section 110 of the Code of Civil Procedure the appeal must involve some substantial questions of law. It is admitted that the judgment in appeal followed

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the decisions of this Court reported in I.L.R. 1 Rangoon at page I, and II Rangoon at page 62.

For the applicants it is urged that these decisions revolutionized Burmese Buddhist Law in respect of the rights of a lesser or inferior wife when living apart from her husband and occasionally visited by him, and that in such circumstances it is only right and proper that a ruling should be obtained from the highest tribunal. We cannot agree that the rulings in question revolutionize Burmese Buddhist Law at all.

It is true that no Lower Burma Ruling has been cited before us. But successive Upper Burma Rulings for about 30 years have been cited, and they are in general agreement with the principles enunciated by a Bench of this Court in I Rangoon at page I, and II Rangoon at page 62. We need only refer to the Judicial Commissioner, Mr. Hodgkinson's judgment in *Ma Gywe's* case (1), the Judicial Commissioner, Sir H. Thirkell White's judgment in *Ma U Byu's* case (2), and the Judicial Commissioner, Sir George Shaw's judgment in *Shwe Ma's* case (3). Some remarks by the Additional Judicial Commissioner, Mr. McColl, in *Mi Kin Gale's case* (4) would seem to indicate a different opinion, *i.e.*, "A wife who lives in a separate house from her husband is entitled or is not entitled to inherit according as she is a wife or a concubine." But a perusal of the facts of that case shows clearly that this is but an *obiter dictum* and not necessary for the decision arrived at. The decisions of this Court following, as they do, successive decisions of the highest Court in Upper Burma are in our opinion consistent with the law as stated in the *Manukye Dhammathat*, Vol. X., section 42, and should be regarded as settled law. In these circumstances, we do not consider that we would be

(1) (1892-96) II U.B.R., 194.
(2) (1897-01) II U.B.R., 160.
(3) (1910-13) I U.B.R., 114.
(4) (1910-13) I U.B.R., 42 at p. 49.

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justified in certifying that the case involves a substantial question of law.

It is to be observed that though the application is made in the name of Ma Than, a lesser wife of the deceased Shwe Yin, she seems to have parted with all interest in the subject-matter of the suit by selling her rights to one Khorasany who similarly purchased the rights of Ma Pwa Yin. In these circumstances unless we were satisfied, as we are not, that a substantial point of law was involved, we would not be disposed to assist a gambler in litigation at the expense of the legal heirs to the estate.

The applications are accordingly dismissed with costs five Gold Mohurs in each case.

APPELLATE CRIMINAL.

Before Mr. Justice Brown.

KING-EMPEROR

v.

MAUNG BA THAUNG.*

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Oct. 13.

School-master, authority of, to inflict corporeal punishment necessary for purposes of school discipline—Pupil when to be considered under authority—Holidays, effect of, on such authority.—Bonâ fide action of school-master in inflicting punishment—Indian Penal Code (XLV of 1860) sections 79, 89 and 323.

When a child is sent by its parent or guardian to a school, the parent or guardian must be held to have given an implied consent to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline and the purpose with which the parental authority is delegated to the school-master, who is entrusted with the bringing-up and discipline of the child, must to some extent include authority over the child when it is outside the school walls.

But if the school were closed for any length of time for a period of regular holidays, the child would have to be held to have returned to the charge of its parent or guardian and the authority of the school-master would cease.

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* Criminal Revision No. 20-B of 1925 from Criminal Regular Trial No. 126 of 1924 of the Subdivisional Magistrate, Zigôn.

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KING-EMPEROR v. MAUNG BA THAUNG.

Petitioner A, a school-master, was convicted and fined under section 323 of the Indian Penal Code for caning a school-boy B under his charge. It appeared that while the school was temporarily closed for a period of two days C, a pupil of the school, was assaulted in the night by some other pupils. It also appeared that the pupils were in the habit of attending night classes which ordinarily they would have attended on that night also. On the re-opening of the school, C's mother lodged a complaint with A in consequence of which A held an inquiry and came to the conclusion that B had taken part in the assault. A punished B by giving him some eight or nine strokes with a cane. A was prosecuted under section 323 of the Indian Penal Code. It was not suggested that A was actuated by improper motives or that he was not acting *bonâ fide* in the interest of school discipline or that the punishment was unduly excessive or conducted in other than a humane manner; but it was contended that A was mistaken in his finding that, B had taken part in the assault.

Held that in the circumstances of the case A had acted within the implied authority delegated to him by the parents or guardian of B and that he must be held to have inflicted the punishment *bonâ fide* for the good of the boy and in the interests of school discipline and therefore he had committed no offence under the provisions of section 323 of the Indian Penal Code.

Cleary v. *Booth*, 1 R.B.D. (1893), 465; *R.* v. *Hopely*, 2 F. & F. 202—*referred to.*

This was a reference made to the High Court in its Criminal Revisional Jurisdiction by the Sessions Judge of Tharrawaddy in respect of the conviction by the Subdivisional Magistrate, Zigôn, in Criminal Regular Trial No. 126 of 1924 of Maung Ba Thaung, a school-master, under section 323 of the Indian Penal Code for caning a pupil. The facts arising in the case appear clearly in the judgment of the High Court reported below.

BROWN, J.—The petitioner, a school-master, has been convicted and fined for caning a school boy under his charge under the provisions of section 323 of the Indian Penal Code. It appears that when the school was closed a pupil of the school was assaulted by other boys. The school reopened two days later, and on complaint by the mother of the boy who was assaulted the petitioner held an enquiry, and finding that a boy named Hoke Sein had taken part in the assault, gave him some eight or nine strokes with a cane. Hoke Sein

was a pupil of the school. The evidence is conflicting at to whether he did actually take part in the assault on the boy, but there is no reason for doubting the good faith of the petitioner in the matter. There is no suggestion that he was actuated by improper motives, or that he was not acting *bóna fide* in the interests of school discipline. Nor does it appear that the punishment was unduly excessive or conducted in other than a humane manner. The question for decision therefore is whether a school-master in such circumstances is justified in inflicting corporeal punishment by way of school discipline. There is no doubt that school-masters have such rights within limits under English law. It was held by Cockburn, J., in the case of *R.* v. *Hopely* (2 F. & F. 202) that "a parent, or a school-master who for this purpose represents the parent, may for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always however with this condition, that it is moderate and reasonable." There is no specific provision in the Indian Penal Code dealing with this point. It would appear however to have been incorporated into the Code, by the provisions of section 79 under which nothing is an offence which is done by a person who is justified in law in doing it, and of section 89. Section 89 lays down "that nothing which is done in good faith for the benefit of a person under twelve years of age . . . . by or by consent, either express or implied, of the guardian or other person having lawful charge of that person is an offence by reason of any harm which it may cause, or be intended by the doer to cause or to be known by the doer to be likely to cause." There are certain provisoes to this section but they are not relevant to the present case. The infliction of chastisement by way of parental discipline by the parent c

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guardian would come within the scope of this section provided it was inflicted in good faith for the benefit of the child. And when a child is sent by its parent or guardian to a school, the parent or guardian must in my opinion be held to have given an implied consent to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline. In the case of boys of over twelve years of age the same principle would probably be applicable under the provisions of section 88 of the Code though as the boy in this case was aged ten years it is not necessary to decide this point. The general principles of the English Law as to infliction of corporeal punishment by way of school discipline are to my mind applicable to the circumstances of the present case, and the question is the extent to which this right to punish goes. If the offence of which the boy had been found guilty had been committed in school there would be no difficulty. Nor would there be any difficulty if it were committed whilst the boy was on the way to or from school. In the present case however the school was actually closed at the time the offence was alleged to have been committed. It is not quite clear to me from the record whether the school had been open on the day on which the assault is alleged to have taken place. But it is clear that it was closed for a period of two days only. It appears from the evidence of the boy Maung Ngoat Yin who was assaulted and of Maung Ba Chit, one of the boys who assulted him, that Ngoat Yin was called out of his house by Ba Chit on the ground that the school-master wanted him and was then assaulted on the road. It also appears that the boys were in the habit of going to night classes, and that in the ordinary course of events they would have gone to such a class that night. Hoke Sein says that he did not go that night because the teacher had gone to play football.

Ngoat Yin says that the reason the boys did not go on that night was that there was a confinement in the house of the teacher. A number of boys from the school were engaged in the assault which took place on the road and apparently in fairly close proximity to the school. Other boys who were caned in connection with the same matter have stated that they were rightly punished, and Hoke Sein's grievance appears to be rather that the finding that he took part in the assault was mistaken than that the master had no authority over the boys at the time. The petitioner took action on the complaint of Ngoat Yin's mother who made a complaint immediately.

I have found no Indian authorities on the point, and I have been able to find no authority precisely bearing on the facts of the present case in English Law. In Halsbury's Laws of England, Volume XII, at page 124, it is stated that for the purposes of correction the school-master may inflict moderate punishment, and that such punishment may be inflicted for offences committed not only within the school limits but also on the way to or from school. This was the decision come to in the case of *Cleary* v. *Booth* (I., Q.B. Div., 1893, p. 465). In the course of his judgment in that case, Collins, J., remarked "In my opinion the purpose with which the parental authority is delegated to the school-master, who is entrusted with the bringing up and discipline of the child must to some extent include an authority over the child when he is outside the school walls. It may be a question of fact in each case whether the conduct of the master in inflicting corporeal punishment in each case is right." And Lawrence, J., says "It is difficult to express in words the extent of the school-master's authority in respect of the punishment of his pupils; but in my opinion the authority extends not only to acts done in school, but also to cases where

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a complaint of acts done out of school, at any rate while going to and from school, is made to the school-master." Neither of the learned judges definitely lays down the limits within which the power of the school-master extends to inflict punishment for offences committed out of school. But it would appear to depend largely on the facts of each case whether the school-master had authority to act. The questions for decision appear to me "In the circumstances of the case is it a reasonable inference that the boy was at the time the offence was committed under the authority of the school-master and was the punishment *bonâ fide* reasonably considered necessary for the purposes of school discipline?" I think it clear that if the school were closed for any length of time for a period of regular holidays, the boy would have to be held to have returned to the charge of his parents and the authority of the school-master would cease. But in the present case, although the school was closed for two days, it was not closed for a long holiday. The boys but for an accident would have actually been attending night school at the time the assault was committed, and the boy who was assaulted was on the scene because he had been called by another boy to visit his master. An assault by a number of boys of the school on another boy of the school may reasonably be held to be a matter seriously affecting the discipline of the school. Ngoat Yin at least thought at the time that he was under the authority of the school-master, and the other boys appear to have been of the same opinion. It was presumably as pupils of the school that the boys had collected together on the road, and a direct complaint was made to school-master by the mother of the boy who was assaulted. If the school-master were bound in such cases to refuse to take action it is difficult to see how he could be expected to maintain proper

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control over the boys under his charge and as pointed out by the learned Sessions Judge in his order of reference he would probably incur opprobrium if his boys misbehaved themselves in such places. In all these circumstances I think it is a reasonable inference that the implied consent of the parents of the boy to his being under the discipline and control of the school-master extended to the alleged offence for which the school-master found it necessary to punish him, and that the boy must be held at the time to have been under the authority of the school-master. It may be that the school-master made a mistake and that Hoke Sein was not actually guilty of taking part in the assault. But as I have said there is no suggestion that the action of the school-master was not *bôna fide* and that he did not honestly believe that the boy deserved punishment. A proper inquiry was made, and the view that the punishment was necessary in the interests of school discipline was a reasonable one. I am of opinion that in this case the school-master was acting within the implied authority delegated to him by the parents or guardians of the boy Maung Hoke Sein, and that he must be held to have inflicted the punishment *bôna fide* for the good of the boy and in the interests of school discipline. In this view of the case he committed no offence under the provisions of section 323 of the Indian Penal Code.

The punishment inflicted in the present case was little more than nominal but the principle involved is an important one and does in my opinion justify interference in revision. I set aside the conviction of Maung Ba Thaung and direct that the fine and costs paid by him be refunded.

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BAIL—*Offences" punishable with death or transportation for life."—Criminal Procedure Code, section 497—Points for consideration in granting bail in non-bailable case.* It must be understood that, while a wide discretion as to the grant of bail in cases other than those involving capital punishment has now been placed in the hands of Magistrates, they are bound, when weighing the probability of the prisoner appearing for trial, to consider the nature of the offence charged, the character of the evidence against the accused, and the punishment which, in the event of conviction, is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner, if released, will tutor witnesses, should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses, or where there are reasonable grounds for believing that he will use his liberty to suborn evidence. *Held* that the phrase "death or transportation for life" in section 497, Criminal Procedure Code, does not extend to offences punishable with transportation for life only: and means only those offences for which death and transportation for life are alternative sentences. *In the matter of Barronet*, E.R., K.B., 338; *Mackintosh v. McGlenchey* B.C., 75; *Narendra Lal Khan v. Emperor*, 36 Cal., 166; *Regina v. Frater* 13 N.S.W.L.R., 150; *Regina v. M'Cartie*, 11 I.C.L.R., 188 *Regina v. McNamara*, 18 B.C.R., 125; *Regina v. Valle*, 23 N.Z.L.R.,—*referred to*. *Baudville v. King-Emperor*, 2 Ran., 546—*dissented from*.

MOHAMED EUSOOF AND ONE *v.* KING EMPEROR 518

BOBABAING, WHETHER VILLAGE LAND CAN BE—*Upper Burma Land Revenue Regulation, sections 3, 23 and 25 (d)—Rival claimants to State lands. Power of revenue officers to adjudicate between—Suit by person ousted whether tenable against person put in possession by the Collector, the Collector's order being ultra vires.* All village lands need not necessarily be State lands and there is no reason why persons should not own bobabaing land in a village. The Upper Burma Land Revenue Regulation does not authorize Revenue Officers to decide a dispute between rival claimants to State lands, except within one year of a declaration that a particular land is State land. *Held* that in this case the Collector having acted *ultra vires* in ejecting Plaintiff and putting the Defendant in possession, the Plaintiff was entitled to sue the

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Defendant to obtain possession. *Sheoshanker* v. *Delawar*, 11 U.B.R. (1914-16), (6), 151, *followed*—

MAUNG KYAUK PU v. MAUNG PU 147

BONA-FIDE ACTION OF SCHOOLMASTER IN INFLICTING CORPORAL PUNISHMENT ... ...

BONA-FIDE ACTION OR OMMISSION UNDER AN ENACTMENT : *See* LIMITATION ACT, ARTICLE 2, SCHEDULE I 268

BOUGHT AND SOLD NOTES—*Evidence Act (I of 1872), Section 92—Court whether debarred from going behind such notes to arrive at the true meaning and effect of a transaction in the light of circumstances.* The preamble to the Evidence Act recites that " it is expedient to consolidate, define and amend the Law of Evidence," and section 92 merely prescribes a rule of evidence ; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. The plaintiff sought redemption of certain shares from the defendant. His case was that he had lodged the certificates of these shares with the Bank of Bengal as security for an overdraft and that on the Bank pressing for reduction of his indebtedness, he borrowed Rs. 60,000 bearing interest at 75 per cent. per annum from the defendant for payment to the Bank and handed over the share certificates to the defendant and executed a transfer of them in the defendant's favour as security for his loan. The parties then executed Bought and Sold notes whereby it was made to appear that the defendant had sold and the plaintiff had bought the same shares for Rs. 75,000, delivery to be within four months threafter. The plaintiff alleged that the defendant representing that it was contrary to his principle as a Mahomedan to lend money at interest and that he was anxious not to have it known that he was charging interest at such an excessive rate induced him to sign the Bought notes so as to provide for the repayment of the principal together with the interest agreed upon. The plaintiff further contended that it was the intention of both parties to treat the transfers as mortgages. The defendant denied the plaintiff's right to redeem on the ground that the transaction on which the plaintiff relied was not a mortgage but a sale with a right to re purchase which had expired. *Held* that on the facts of the case, the plaintiff was entitled to prove that the Bought and Sold notes did not represent the contract between the parties. *Held also* that the defendant had failed in his contention that the transaction was not a mortgage and that the plaintiff was entitled to redeem. *Balkishan Dass* v. *Legge*, 27 I.A., 58—*distinguished.*

BAIJNATH SINGH v. HAJEE VALLY MAHOMED HAJEE HIBBA ... 109

BUDDHIST ECCLESIASTICAL LAW—*Puggalika gift of kyaung entitles the donee to sue for its possession—Sanghika gift—Presiding monk can be ousted only by the body of the Sangha.*—Where a *kyaung* was dedicated to the plaintiff as his *puggalika* property and had been in his continuous possession for a long term of years, *held* that on being ousted the Plaintiff was entitled to recover its possession. *Obiter* : Even if the *kyaung* were *Sanghika* property, the plaintiff, having been all along the presiding *Pongyi*, could recover its possession and could only be ousted by the body of the *Sangha*.

U WATHAWA v. MAUNG PO HTI AND SEVEN 193

BUDDHIST LAW—*Divorce and Partition—Husband with two wives—No rule laid down in Law books nor Case Law for partition between—Principles of justice, equity and good conscience—Interests of the parties on the second marriage and after—Share of second wife on*

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divorce by mutual consent and on divorce claimed for husband's misconduct. The Burmese Buddhist Law books do not lay down any rule for partition on the divorce of the husband by one of two or more wives of equal status and there is also no case law on the subject. It is therefore necessary to decide questions pertaining to the matter in accordance with the principles of justice, equity and good conscience having regard, of course, to the general rules of Burmese Buddhist Law so far as those rules can be applied. *Held*, that if a Burmese Buddhist having a wife already takes a second wife the interests of the parties on the second marriage would be as follows:—

(1) In property brought by the husband to the first marriage—Husband four-ninths, first wife three-ninths, and wife two-ninths.

(2) In property inherited by husband during the first marriage—Husband four-ninths, first wife three-ninths and second wife two-ninths.

(3) In jointly acquired property of the first marriage—Husband two-sixths, first wife three-sixths and second wife one-sixth.

Held further, that in property inherited by the husband after the marriage with the second wife, the respective shares would be—husband one-half, first wife one-quarter and second wife one-quarter; and that in the jointly acquired property of the two coverture, each wife would take one-third and the husband one-third. *Held also*, that on a divorce by mutual consent between the husband and the second wife, the second wife would take her share in the various properties as defined above, but that on her becoming entitled to divorce with forfeiture of all the husband's property owing to his misconduct, she would take in addition to her own above share the husband's share, that is to say, she would take all except the first wife's interest in the property.

MAUNG PO NYUN *v.* MA SAW TIN 160

BUDDHIST LAW—INHERITANCE—*Children of an inferior wife whether entitled to inherit as step-children in the estate of the superior wife.* The appellant was the daughter of one T, deceased, by his inferior wife, who had separated from T twenty years before his death and had remarried. The claimant had never lived with her father nor with the superior wife; neither, had she maintained any filial relationship with the superior wife. T died in the year 1906 and his superior wife in 1922 when appellant claimed to inherit her estate as step-daughter. *Held*, that the provisions of the Burmese Buddhist Law as to step-children inheriting from step-parents cannot apply where the so-called step child is the child of an inferior wife whom the husband lived while still married to the superior wife, and where the step-child could not possibly be regarded as having belonged to the family of the so-called step-parent.

MA CHO GALE *v.* MA NAN CHAW AND OTHERS 521

BUDDHIST LAW: *Inheritance—Contest between half-brother or sister of deceased's mother and full cousin of deceased's father—the rule of non ascent.* It is a fundamental principle of the Buddhist Law that inheritance shall not ascend if it can possibly descend, and it is a logical corollary of that rule that inheritance must not ascend more than is necessary. *Held*, that the half brother and half-sister of the mother of the deceased excludes the full cousin of the father of the deceased. *Le Maung v. Ma Kwe*, 10 L.B.R., 107; *Ma Gyi v. Ma Khin Saw*, 11 L.B.R. 460; *Taung Mra v. Aung Nyun*, 12 B.L.T. 103—*referred to.*

MA KYAW AND ONE *v.* MAUNG PO NYIT AND ONE ... 86

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BUDDHIST LAW—INHERITANCE—*Grandchildren whether entitled to share when in competition with children or grandchildren—Shares of grandchildren how computed—Children who predeceased parents leaving none entitled to inherit, whether to be considered in dividing the estate into share.* Representation is not a principle of the Buddhist Law : The basic rule is that the nearer heir excludes the more remote, and that the partial representation allowed to grandchildren in competition with children is merely an exception to that rule and the only exception. *Held* that great-grandchildren when in competition with children or grandchildren are not entitled to any share in their great-grandparent's estate. *Held also* that the grandchildren take one-fourth of what would have been their own parent's share, and that in computing what would have been their parent's share, their parents's brother or sister who has predeceased their grandparent without leaving issue must be left out of the reckoning. *Ma Gun Bon* v. *Maung Po Kywe*, U.B.R., (1897-01), 66 ; *Maung Po Thu Daw* v. *Maung Po Than*, 1 Ran. 316—*referred to.* *Ma Saw Ngwe* v. *Ma Thein Yin*, 5 L.B.R., 198 ; *Maung Nyo* v. *Ma Hla Kyu*, 1 Chan Toon's L.C., 226 ; *Mi Kin* v. *Mi San Me*, 8 B.L.T., 51 ; *Po Hman* v. *Maung Tin*, 8 L.B.R., 113 ; *Po Sein* v. *Po Min*, 3 L.B.R., 45 ; *Po Zan* v. *Maung Nyo*, 7 L.B.R., 27—*followed.*

MAUNG SHWE YE *v.* MAUNG PO MYA AND OTHERS ... 464

BUDDHIST LAW—INHERITANCE—*Lesser or inferior "wives"—Separate residence from that of the "husband" a disqualification from inderitance, settled law.* The decisions of the High Court in the case of Ma Thein Yin *v.* Maung Tha Dun, reported in I.L.R. 1 Ran. at page 1 and 2 Ran. at page 62, do not revolutionize Burmese Buddhist Law in respect of the rights of a lesser or inferior "wife" when living apart from her "husband" and occasionally visited by him, but are decisions following successive decisions for a period of about 30 years of the highest Court in Upper Burma, consistent with the law as stated in the Manukye *Dhammathat*, Volume X, section 47, and should be regarded as settled law. Petitioner, who claimed to be the lesser wife of one Shwe Yin, deceased, applied to the High Court for leave to appeal to the Privy Council from its judgment which had affirmed the decision of the Trial Court. The High Court judgment admittedly followed the principles laid down in Ma Thein Yin *v.* Maung Tha Dun reported in 1 Ran. and 2 Ran. 62. It also appeared that petitioner had parted with her rights, if any, in the subject matter of the suit by selling the same to a third party. *Held* that the Court would not be justified in certifying that the case involved a substantial question of law. *Held also* that the Court not being satisfied that the substantial point of law was involved, it would not be disposed to assist a gambler in litigation at the expense of the legal heir to the estate and the application must accordingly be dismissed. *Ma Thein Yin* v. *Maung Tha Dun* 1 Ran., 1 and 2 Ran., 62—*affirmed.* *Ma Gyme* v. *Ma Thi Da*, (1892-96) U.B.R., II, 194 ; *Ma Shwe Ma* v. *Ma Me* (1910-13), I U.B.R., 114 ; *Ma U Bin* v. *Ma Hnyin* (1897-01), II, U.B.R. 160—*followed.* *Mi Kin Gale* v. *Mi Kin Gyi* (1910-13) I, U.B.R., 42—*referred to.* *Manukye* X, 23—*referred to.*

MA THAN AND OTHERS *v.* MA KYIN AND OTHERS ... 656

BUDDHIST LAW—INHERITANCE—Pubbaka *children, share of, in the* hnapazon *property of their parent and the step parent—Rules of division differ where there is issue of the second marriage and where there is no such issue.* *Held* that where a Burmese Buddhist, who has married more than once, dies leaving *hnapazon* property of the last marriage, the law for the division of that

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property is that (*a*) where there is an issue of the last marriage, the child or children of the first marriage will take a one-eighth share and the surviving step-parent a seven-eighths share and (*b*) where there is no issue of the last marriage, the child or children of the first marriage will take a one-sixth share and the surviving step-parent a five-sixth share. *Ma Hnin Bwin* v. *U Shwe Gon*, 8 L.B.R., 1; *Ma In Than's case* S.J., 103; *Ma On* v. *Ko Shwe O*, S.J., 378; *Ma Sein Ton* v. *Ma Son*, 8 L.B.R., 501; *Maung Chit Saya* v. *Ma Min Kale*, U.B.R., (1892-96), II, 93; *Maung Hme* v. *Ma Sein*, 9 L.B.R., 191; *Nga Po Thit* v. *Mi Thaing*, S.J., 18—*referred to*. *Ma Ba We* v. *Mi Sa U*, 2 L.B.R., 174; *Mi So* v. *Mi Hmat Tha*, S.J., 117—*dissented from*. Attasankhepa Manukye X, 8; U May Oung's Leading Cases on Buddhist Law—*referred to*.

MA NYEIN E *v.* MAUNG MAUNG AND TWO 549

BUDDHIST LAW: INHERITANCE—*Right of step-children and step-grandchildren as against collaterals—Filial relations between the step-parent and step-children whether necessary to prove.* At Burmese Buddhist law, the step-children and step-grandchildren of a deceased person are entitled to inherit his estate to the exclusion of his collaterals. Although conduct of the step-issue may be proved to be such as would disqualify them from inheriting the step-parent's estate, it is not necessary for the establishment of their right to inherit to prove that the maintained filial relationship with the deceased. *Held*, on the facts, that in the present case failure on the part of minor step-grandchildren to live with the step grand-mother and their failure to bury her did not disqualify them. *Ma Gun Bon* v. *Maung Po Kywe and others*, 2 U.B.R., 66; *Maung Sein Thwe* v. *Ma Shwe Yi*, 10 L.B.R., 397—*followed*, *Kinwun Mingyi's Digest*—*referred to*.

MAUNG DWE AND OTHERS *v.* KHOO HAUNG SHEIN AND OTHERS 29

BUDDHIST LAW, INHERITANCE—*Six relatives—Father's younger sister and mother's younger brother whether excluded—Aunt on father's side excludes cousins on both father's and mother's side. Held* that the father's younger sister and the mother's younger brother of the deceased are not excluded from the class of six relatives entitled to inherit. *Held also*, that an aunt on the father's side excludes the cousins of the deceased on both the father's and the mother's side. *Kan Gyi* v. *Ma Ngwe Nu*, 5 L.B.R., 70; *Kan Gyi* v. *Ma Pyu*, 6 L.B.R., 164; *Ma Ma Gale* v. *Ma Me*, 11 U.B.R., (1904-06) *Buddhist Law, Inheritance*, 5—*followed*.

U PE GYI *v.* U PYO AND TWELVE 27

BUDDHIST LAW—INHERITANCE—*Step children, Share of on step-mother's death, in joint property of father and step-mother—Orasa, whether entitled to share on death of step-mother, if he had taken his quarter share on his father's re-marriage.* What the Burmese Buddhist Law regards in its rule for partition is the family rather than the individual and so long as the family subsists, all who are members of it are regarded as being entitled to partition of its property 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. A, a widower with children married B, who also was a widow with children. There was no issue of A and B's marriage. A died first and B died 28 years later. The children of A's previous marriage had not taken any share of the inheritance on A's marriage with B or at his death. *Held* that on the death of B, the children of A and the children of B are entitled to the joint estate of A and B in equal shares. *Semble*: Even if *Orasa* had taken his quarter share on the death of one parent, or on the

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re-marriage of the surviving parent, he would still be entitled to claim in the jointly acquired property of the parent and the step-parent, a share on the death of the surviving parent or on the death of the step parent, unless separation from the family can be proved or presumed. *Ma Nyein* v. *Ma Tha Gaung*, 3 U.B.R. 237; *Maung Due* v. *Khoo Hong Shein*, 3 Ran., 29; *Pan On* v. *Tun Tha*, 11 L.B.R., 292; *Shwe Yeat* v. *Tun Shein*, 11 L.B.R., 199—*referred to*. Digest, I, 214, 253—*referred to*.

MAUNG PO SAN AND OTHERS *v.* MAUNG PO THET ... 438

BUDDHIST LAW—*Inherited property of the husband after marriage whether* thinthi *or* lettetpwa—*Share of each of two wives in such property—Such share, whether liable for husband's debts—Husband an* eindounggyi—*Whether rule different for couples previously unmarried.* Where a Burman Buddhist *eindounggyi* having two wives inherits immoveable property from his father after the second marriage. *Held*, that the property is *lettetpwa* of the marriages and is joint property of the husband and wives and not the separate property of the husband. *Held, further*, that the share of the two wives jointly is one-third and since the two wives are of equal status the share of each is one-sixth. *Held, also*, that each wife acquires a vested interest in one-sixth of the property from the date on which it is inherited and that such interest is not liable for any part of the debts incurred by the deceased husband alone. *Semble*—The rules would be the same in the case of previously unmarried couples. *Ma E Nyun* v. *Maung Tok Pyu*, U.B.R., (1897 01) Divorce, 39; *Ma Ngwe Hnit* v. *Maung Po Hmu*, 11 L.B.R., 52; *Mi Myin* v. *Nga Twe and others*, U.B.R., (1904-06) II, Divorce, 19; *Ma Nyein* v. *Maung Tha Gaung*, 3 U.B.R., 237—*referred to*. *Ma Hmon* v. *Ma Thaik*, U.B.R. (1904-06) Buddhist Law, Divorce, 1; *Ma Ngwe Bwin* v. *Maung Lun Maung*, P.J. 295; *Ma Shwe U* v. *Ma Kyu*, 3 L.B.R., 66; *Ma Thaing* v. *Maung Tha Gyaw*, U.B.R. (1902-03), Exs. 1; *Maung Lo* v. *Maung Pyaung*, 3 B.L.T., 149; *Maung Po Sein* v. *Ma Pwa and six*, P.J., 403; *Tola Ram* v. *Ma Kaing*, 5 B.L.T., 98—*approved and followed*. *Maung Shwe Ngon* v. *Ma Min Dwe*, S.J., 110—*dissented from*. *Kinwun Mingyi's Digest*, Vol. II; *Richardson's Edition of Manugye*; *Sparks' Code*—*referred to*.

C.T.P.V. CHETTY FIRM *v.* MAUNG THA HLAING ... 322

BUDDHIST LAW—*Minor spinster whether capable of entering into a contract of marriage without consent of guardian—Age of majority for girls.* *Held* that the Burmese Buddhist Law, no minor girl under the age of twenty can contract a valid marriage without the consent or against the will of her parent or guardian or of the relation under whose protection she is living. *Held further* that where there was no valid marriage to start with, the irregular union may be converted into a valid marriage as from the time of the union by the consent, express or implied, of the parents or guardians given to it afterwards. *King-Emperor* v. *Nga Ni Ta*, U.B.R., (1902-03), 1 Penal Code, 15; *King-Emperor* v. *Nga Po Saw*, U.B.R., (1897-01), 328; *Queen-Empress* v. *Nga Ne U*, S.J., 202—*followed*. *King-Emperor* v. *Nga Ne*, 1, U.B.R., (1904-06), Penal Code, 17—*dissented from*. *Crown* v. *Chan Mya*, 1 L.B.R., 207; *Maung Chit Pe* v. *Ma Tin*, 3 B.L.T., 43—*referred to*. *Kinwun Mingyi's Digest*, II, 43; *Manukye*, VI, 28—*referred to*.

MA E SEIN *v.* MAUNG HLA MIN 455

BUDDHIST LAW—Orasa, *Right of, to claim a quarter of the parental estate on father's remarriage after death of mother—Right, whether vested—Orasa having died without claiming his quarter, whether his heirs entitled to the quarter.* The decision in Maung

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Shwe Po v. Maung Bein, 8 L.B.R., 115, to the effect that if the *orasa* does not on his father's re-marriage claim his one-fourth share in the parental estate, he can only come in on his father's death with the other children and then claim only as heir to his father's estate, has been impliedly over ruled by the decision of the Privy Council in Tun Tha v. Ma Thit, 9 L.B.R., 56. *Held*, that the right of the *orasa* son to claim on the father's re-marriage a quarter share in the parental estate is a vested right. *Held, further*, that if the *orasa* dies without having claimed his quarter share, such share devolves on his heirs and legal representatives. *Maung Pan On v. Maung Tun Tha and others*, 11 L.B.R. 298 ; *Maung Sin v. Mrs. Kirkwood*, 2 Ran., 693 ; *Tun Tha v. Ma Thit*, 9 L.B.R. 56 ; *V. T. Arunachellam Chetty v. Maung San Ngwe*, 2 Ran., 158—*referred to*. *Shwe Po v. Maung Bein*, 8 L.B.R. 115—*dissented from*. *Maung Sheik Kaung v. Maung Po Nyein*, 1 L.B.R., 23 ; *Maung Shwe Yeet v. Maung Tun Shein*, 11 L.B.R. 199—*followed*.

MA E MYA v. U PE LAT AND OTHERS 281

BURMA COURTS ACT, 1922, SECTION II : *See* RENT OF LAND, SUIT FOR, WHETHER SUIT OF A SMALL CAUSE NATURE 390

BURMA HABITUAL OFFENDERS' RESTRICTION ACT (II OF 1919), SECTION 7—*Omission to state the period of restriction in the preliminary order as required by section 4, proviso (a), Upper Burma Criminal Justice Regulations, clause XV of the Schedule.* Under clause XV of the Schedule to the Upper Burma Criminal Justice Regulations, failure on the part of a Magistrate to state in his preliminary order, under proviso (*a*) to section 4 of the Burma Habitual Offenders' Restriction Act, the period of restriction being a mere irregularity, which is cured by section 537 of the Criminal Procedure Code, does not render the whole proceedings void. *Parsodan v. King-Emperor*, 2 Ran., 524—*distinguished*.

MAUNG THWE v. KING-EMPEROR 74

BURMA VILLAGE ACT, SECTION 21 (*a*) : *See* AMATEUR AYAT-ZAT ... 514

BUSINESS, MEANING OF, UNDER SECTION 6, INCOME-TAX ACT ... 614

CANCELLATION OF A STAMP, WHERE A CROSS-MARK AMOUNTS TO : *See* STAMP ACT, SECTION 12 39

CHARGE UNDER SECTION 120-B, PENAL CODE, WITHOUT COMPLAINT OR CONSENT REQUIRED BY SECTION 196-A, CRIMINAL PROCEDURE CODE, MAGISTRATE NOT COMPETENT TO FRAME PROCEEDINGS : *See* JURISDICTION OF MAGISTRATE AB INITIO, WANT OF ... 95

CHIEF JUDGE, RANGOON SMALL CAUSE COURT, A *persona designata* AND NOT A COURT UNDER SECTION 14 OF THE RANGOON MUNICIPAL ACT : *See* REVISIONARY JURISDICTION OF THE HIGH COURT ... 560

CHILDREN OF AN INFERIOR WIFE NOT ENTITLED TO INHERIT AS STEP CHILDREN IN THE ESTATE OF THE SUPERIOR WIFE ; *See* BUDDHIST LAW—INHERITANCE 521

CHILDREN WHO PREDECEASED PARENTS LEAVING NONE ENTITLED TO INHERIT, WHETHER TO BE CONSIDERED IN DIVIDING THE ESTATE INTO SHARES FOR GRANDCHILDREN ; *See* BUDDHIST LAW, INHERITANCE 464

CHURCH, SUIT FOR POSSESSION OF—*Plaintiff suing on behalf of himself and Karen Baptist Christians—Consent of the Advocate-General not obtained and no relief provided by section 92, Civil Procedure Code, claimed in the suit—Suit so framed not maintainable at the instance of one or more of the worshippers.* The plaintiff, on behalf of himself and Karen Baptist Christians of Burma, filed

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a suit (1) for the possession of certain premises alleged to be a church and auxiliary buildings, erected by public subscription ; (2) for accounts from the defendants who were in possession thereof for loss or damage to the property, and (3) for an injunction restraining the defendants from removing or demolishing any part of the building, etc., pending the hearing of the suit. The consent of the Government Advocate to the suit, as required by the provisions of section 92 of the Civil Procedure Code, was not obtained ; and in the suit, as framed, none of the reliefs provided by section 92 were claimed. *Held*, that in respect of properties which form part of a public trust, such as the present, a mere worshipper can have no right by way of a suit to obtain possession of the properties and he certainly has no right to sue for any of the reliefs mentioned in section 92 of the Civil Procedure Code except in the manner prescribed by that section and that therefore the present suit as framed was not maintainable. *Ashraf Ali* v. *Mahomed Zamma*, 23 C.W.N., 115 ; *Badridas* v *Chunilal*, 33 Cal., 789 ; *Cowasjee* v. *Bella*, 11 B.L.T., 249 ; *Dasondhay* v. *Mahomed*, 33 All., 660 ; *Jawahra* v. *Akber Hossein*, 7 All., 178 ; *Saligram Rasaao Mal*, 1 Lah. L.J., 150—*distinguished*.

SAW DURMAY *v.* BAGGAH SINGH AND OTHERS ... 213

CIRCUMSTANCES SURROUNDING TRANSACTION ADMISSIBLE TO SHOW THAT BOUGHT AND SOLD NOTES EVIDENCE MORTGAGE TRANSACTION : *See* BOUGHT AND SOLD NOTES 106

CIVIL COURT'S ADVERSE DECREE WHETHER VOIDING MAGISTRATE'S ORDER OF MAINTENANCE : *See* MAINTENANCE, ORDER OF ... 150

CIVIL JAIL, DETENTION IN, POSTPONEMENT OF IMPRISONMENT IN DEFAULT OF PAYMENT OF COMPENSATION UNDER SECTION 250, CRIMINAL PROCEDURE CODE, TILL THE EXPIRY OF, NOT PERMISSIBLE : *See* CRIMINAL PROCEDURE CODE, SECTION 250 ... 93

CIVIL PROCEDURE CODE, SECTION 2(11), ORDER XXII, RULE 4 : *See* LEGAL REPRESENTATIVE 46

CIVIL PROCEDURE CODE, SECTION 47 : *See* LETTERS PATENT, CLAUSE 13 255

CIVIL PROCEDURE CODE, SECTION 47, ORDER UNDER TO BE CONCLUSIVE AND NOT CONDITIONAL : *See* PRACTICE 132

CIVIL PROCEDURE CODE, SECTION 55 : *See* ARREST OF JUDGMENT-DEBTOR, APPLICATION FOR 187

CIVIL PROCEDURE CODE, SECTION 102 ; *See* RENT OF LAND, SUIT FOR, WHETHER SUIT OF A SMALL CAUSE NATURE 390

CIVIL PROCEDURE CODE, SECTION 110 : *See* INTEREST FROM DATE OF INSTITUTION WHETHER PART OF SUBJECT-MATTER OF THE SUIT 405

CIVIL PROCEDURE CODE, SECTION 115 ; *See* RANGOON RENT ACT ... 420

CIVIL PROCEDURE CODE, SECTION 115 AND ORDER XXV, RULE 1 : *See* ADMINISTRATION OF AN ESTATE 211

CIVIL PROCEDURE CODE, ORDER IX, RULE 9 WHETHER APPLICABLE TO DISMISSALS FOR DEFAULT OF AN APPLICATION UNDER THE SAME RULE AND ORDER : *See* DISMISSAL FOR DEFAULT ... 534

CIVIL PROCEDURE CODE (V OF 1908), ORDER XI, RULE 21—*Dismissal for want of prosecution—Appropriate remedy either by way of appeal or review—Order IX, Rule 9, not applicable to such dismissals—Applying a rule which has no application, an irregularity.* Where a suit is dismissed for want of prosecution under Order XI, Rule 21, of the Code of Civil Procedure, the plaintiff's remedy is

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have the order of dismissal set aside would be by way of appeal. Where the Court, therefore, sets aside such an order under the provisions of Order IX, Rule 9 of the Code, its action in applying a rule which has no application is clearly irregular and its order passed in such circumstances must, therefore, be held to have been passed without jurisdiction.

MAUNG KHANT GYI AND FOUR *v.* MA THET HSEIN AND SIX ... 63

CIVIL PROCEDURE CODE, ORDER XXI, RULE 63, WHETHER APPLICABLE TO SUITS TO DECLARE THAT THE DEFENDANT IS THE JUDGMENT-DEBTOR IN A PREVIOUS SUIT : *See* PRACTICE 515

CIVIL PROCEDURE CODE, ORDER XXI, RULES 89—91 : *See* PRACTICE... 132

CIVIL PROCEDURE CODE, ORDER XLI, RULE 19. MISTAKE OF AN ADVOCATE OR HIS CLERK NOT SUFFICIENT CAUSE, WITHIN THE MEANING OF—*Exercise of inherent power of Court to restore even though sufficient cause not shown, a matter of discretion.* The laches of an advocate or the careless mistake of his clerk is not sufficient cause for restoration of an appeal dismissed for default nor is it a good ground for the exercise of the Court's inherent power to restore.

MAUNG THAN *v.* ZAINAT BIBI AND ONE 488

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any stage up to the signing of the judgment, to commit if the evidence justifies that course. Section 347 of the Criminal Procedure Code gives him very wide powers of commitment, and there is no suggestion that the only possible reason for a competent Magistrate to commit a case to Sessions is that he will not be able to pass a sufficiently severe sentence. The discretion vested in him cannot clearly be limited by the provisions of section 254 of the Code. *King-Emperor* v. *Bindeshwari Goshain and others*, 41 All., 454; *Queen-Empress* v. *Kazemullah Mondal*, 24 Cal., 429—*dissented from*. *Crown Prosecutor* v. *Bhagavathi*, 42 Mad., 85—*followed*.

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CONTRACT ACT (IX OF 1872), SECTION 28—*Condition limiting time to enforce right distinguished from one extinguishing the right—Condition to extinguish the right, valid.* One of the conditions in a policy of insurance was that, if a claim be made and rejected, and an action or suit be not commenced within three months after such rejection, or in case of arbitration taking place in pursuance of another condition of the policy, within three months after the arbitrator or arbitrators or umpire shall have made their award "all benefit under this policy shall be forfeited". On a suit being filed after the period prescribed, it was *held*, that condition was not one limiting the time within which the policy-holder may enforce his rights, but one by which the policy-holder had contracted that on the happening of a certain event, he shall lose all his rights. *Held*, *also*, that such a condition was not void by reason of the special provisions of section 28 of the Contract Act. *Ma Yust* v. *The China Mutual Life Assurance Co., Ltd.* 4 B.L.T., 173; *South British Fire and Marine Insurance Co.* v. *Brojo Nath Shaha*,

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36 Cal., 516—*referred to. The Baroda Spinning & Weaving Co., Ltd.* v. *The Satyanarayan Marine and Fire Insurance Co., Ltd.*—38 Bom., 344—*followed.*

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COURT FEES ACT (VII OF 1870), SECTION 19C—*Letters of Administration de bonis non, whether further Court fee chargeable on application for—Court fee on value of whole estate having been paid on previous grant.* When the appointment is made of an administration *de bonis non*, there is no new succession, and no new devolution of the estate, which would justify a finding that fresh Court fee must be paid. *In re Balthazar* 4 L.B.R. 255; *Swarnamoyee Devi* v. *Secretary of State for India*, 43 Cal., 625—*followed.*

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CRIMINAL PROCEDURE CODE, SECTION 145—*Failure to serve a copy of the preliminary order and failure to post the order on the land, whether cured by section 537.* *Held* that the failure to serve a copy of the preliminary order under section 145, clause 1, on the respondent and the failure to post the order on the land are irregularities cured by section 537, Criminal Procedure Code, but Magistrates should, nevertheless, see that these irregularities do not occur.

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CRIMINAL PROCEDURE CODE (V OF 1898), SECTION 250—*False charge—Magistrate's order for compensation to be paid by complainant to each of several accused and in default to suffer imprisonment—Whether term of imprisonment to be undergone in the whole or in respect of each accused—Postponement of sentence of imprisonment after period of detention in Civil Jail, illegal.* *Held*, that where under the provisions of section 250 (2) of the Criminal Procedure Code, the Court orders a complainant to pay compensation separately to each of several accused persons and in default to suffer imprisonment, imprisonment may be awarded for default of each such separate payment as ordered. *Held also*, that detention under the order of a Civil Court not being a "sentence of imprisonment, penal servitude or transportation," a Magistrate cannot order that his sentence of imprisonment shall take effect at the expiry of the term of the detention in Civil Jail.

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CRIMINAL PROCEDURE CODE (V OF 1898), SECTION 342—*Court's failure to further examine the accused after further cross-examination of two of the prosecution witnesses on recall after charge—Infringement of the provisions of the Criminal Procedure Code, when vitiating proceedings.* The intention of the framers of the Code of Criminal Procedure was to frame the Code in such a manner that mere technical defects would not have the effect of vitiating proceedings. There is no authority for the view that a non compliance with a mandatory provision of the Code of Criminal Procedure cannot, in any circumstances, be cured by the provisions of section 537 of the Code, and must invalidate a whole trial. The fact that section 537 itself refers to errors and omissions in the proceedings suggests that there are cases in which a mandatory provision has not been complied with, but to which, the provisions of section 537 would apply. For an omission to take place, it would appear that there must be some neglect to comply with some definite order in the Code. *Held*, that the failure on the part of Court in this case to further examine the accused after two of the prosecution witnesses had been recalled for further cross-examination, after the charge had been framed, was not an error going to the root of the trial, but at the most a mere mistake in the course of the trial which had not, in any way, prejudiced the accused, and that there was, therefore, no reason for holding that the trial by the Magistrate was vitiated. *Subramania Ayyar v. King-Emperor*, 25 Mad., 61 ; *Variyai Rowther and another v. King-Emperor*, 46 Mad., 449—*referred to*. *Emperor v. Nga Po Mya*, (1917-20) U.B.R., 18 ; *Raghu Bhamiji v. Emperor*, 58 I.C., 49—*distinguished*. *Emperor v. Bachu Chaube and another*, 45 All., 124—*followed*.

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CRIMINAL PROCEDURE CODE (V OF 1898), SECTION 476—*Complaint in respect of offences enumerated in section 195 (1) (b) of the Code, whether to be confined against parties before Court—High Court sitting in revision whether to exercise power under section 476—Section 476-B.* *Held* that in respect of offences enumerated in section 195 (1) (b) of the Code of Criminal Procedure, the powers of the Court to complain are not confined only to the parties before it. *Held also* that the fact that section 476-B of the Code gives a right of appeal against a complaint under section 476 cannot debar the High Court sitting in revision from laying a complaint under section 476 of the Code of Criminal Procedure. *C. T. Gurusawmy* v. *D. K. Syed Ebrahim*, 2 Ran. 374—*distinguished.*

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CRIMINAL PROCEDURE CODE (V OF 1898), SECTION 476—*Power of the successor of a trial Judge to lay a complaint—Effect of the amending Act XVIII of 1923—The Court forwarding an order for prosecution to the District Magistrate whether sufficient—Power of the Court to complain confined only to parties to the suit before it—Delay in applying to the Court to act under section 476, Criminal Procedure Code.* Under the present amended provisions of section 476, Criminal Procedure Code, the trial Judge and his successor in office are both competent to lay a complaint. Where instead of making a formal complaint, the Court ordered the prosecution of the appellants under the provisions of section 476, Criminal Procedure Code, and forwarded a copy of the order of the District Magistrate for necessary action. *Held*, that this was only a formal defect and did not vitiate the order. *Held also*, that in respect of offences set out in section 195 (1), Criminal Procedure Code, the Court has jurisdiction to file a complaint only against those who were parties to the suit. *Held also*, that applications to the Court to act under section 476, Criminal Procedure Code, should be made promptly. *Aiyakannu Pillai* v. *Emperor*, 32 Mad., 49; *Bagu Singh* v. *Emperor*, 34 Cal., 551; *Dharamdas Kumar* v. *Sagore Santra*, 11 C.W.N., 119; *Rahimatulla Sahib* v. *Emperor*, 31 Mad., 140—*referred to.* *C. T. Gurusawmy* v. *D. K. S. Ebrahim*, 2 Ran., 374—*followed.*

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DISMISSAL FOR DEFAULT, OF AN APPLICATION UNDER ORDER IX, RULE 9, OF THE CIVIL PROCEDURE CODE—*Further application under the same rule, whether maintainable : Primâ facie* an application to set aside an *ex-parte* order dismissing a suit is a proceeding, and an order dismissing it for default is part of a proceeding so that the provisions of Order IX, Rule 9, of the Civil Procedure Code would apply thereto. *Held* therefore that an application under Order IX, Rule 9, lies to set aside an order of dismissal for default of an application to re-open a suit. *Bipin Behari Shaha* v. *Abdul Barik*, 44 Cal., 950—*followed*. *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal*, 4 Pat. L.J., 135 ; *Hari Charan Ghose* v. *Monmatha Nath Sen*, 41 Cal., 1 ; *Thakur Prasad* v. *Fakir Ullah*, 17 All., 106—*distinguished*. *Gangulam Singh* v. *Sheo Deonarain Singh*, 4 Pat. L.J., 287—*dissented from*.

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EX-PARTE DECREE, SUIT TO DECLARE, AS OBTAINED BY FRAUD—*No previous application under Order IX, Rule 9, of the Civil Procedure Code—Plea of fraud complained of not included in matters previously adjudicated upon.* The plaintiff sued to have it declared that an *ex-parte* decree obtained against him by the defendant had been obtained by fraud, he never having been served with a summons in the suit and the defendant having supported the claim by false evidence. Prior to his present suit the plaintiff had not applied to the Court under the provisions of Order IX, Rule 13, of the Civil Procedure Code to have the *ex-parte* decree set aside. *Held* that although the plaintiff had made no previous application to have the *ex-parte* decree set aside, his present suit would lie, since the decree was impeached on the ground of fraud and the fraud complained of was not included in what had already been adjudicated upon. *Nga Yan* v. *Nga So*, II U.B.R., (1914-16) 106—*referred to.* *K. E. Musthan* v. *Mohendra Nath Singh*, 1 Ran., 506—*distinguished.* *Abdul Mazumdar* v. *Mahomed Gazi Chowdry*, 21 Cal., 605—*followed.*

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FAILURE TO READ OVER DEPOSITION TO WITNESS—*Accuracy of the record challenged on appeal.*—On appeal from conviction by the lower Court, it was proved that the deposition had not been read over to the witnesses. Further, accuracy of the record was challenged and there was evidence also that a relevant statement made by a witness had been omitted from the record. *Held* that, while failure to read over the deposition to the witnesses would not of itself vitiate the trial, on the facts established, and under the circumstances set out above the proceedings must be quashed and retrial ordered. *Mani Iyer and Abdul Rahman* v. *King-Emperor*, Criminal Appeal No. 682 of 1925—*referred to.*

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FRAUDULENT CONVEYANCE—*Consideration, Proof of, whether necessary against a third party—Transfer prior to indebtedness—Relationship between transferor and transferee not conclusive.* A, the judgment-creditor of B, sought to attach a house in the possession of B. C, who was B's daughter, sought a declaration of her title to the house on the strength of a sale by registered deed executed nearly two years prior to A's suit against B and some six months before his loan to B. *Held*, that the sale deed being proved to have been duly executed and there being nothing on the face of it to suggest fraud, the burden of proving fraud, therefore rested on A. *Held also*, that as against A, a third party, C need not prove that consideration passed on the transfer, such proof being only important when taken with the other circumstances, it tends to show that the instrument was a mere sham. *Held further*, that the fact of C being B's daughter was not sufficient in itself to raise a presumption of fraud. *Tha Dun* v. *A.L.V.R.S. Allagappa Chetty*, 4 L.B.R. 211—*distinguished*. *Chinnaya* v. *Ramachandra*, 15 Mad. 54; *K.V.K.M. Chetty* v. *S.N.V.R. Chetty*, 4 B.L.T. 199—*followed.*

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applicable. *Held*, when a reference to arbitration made by the guardian of a minor is shown to have been for the benefit of the minor and not an act which the minor, if of age, would not be reasonable and prudently have done for himself, it would bind the minor. *Romat Kissen Sett v. Hurrolall Sett*, 19 Cal., 334; *Sakrappa v. Shivappa*, 35 Bom., 153; *Sewmokal v. Subrammal* 2 Mad., H.C.R., 47—*followed*.

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HABITUAL OFFENDERS' RESTRICTION ACT, SECTION 9—*An old offender not necessarily to be dealt with, under—who may be proceeded against—Criminal Procedure Code (V of 1898) section 565 and Rangoon Police Act—A Magistrate not to use an order subsequently set aside, proof that accused is an old offender.* A Magistrate is not entitled to use an order which has been set aside, on whatever grounds, as proof that the accused is an old offender. The mere fact that the accused is an old offender is not a ground on which a restriction order can be passed under section 9 of the Habitual Offenders Restriction Act.

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HABITUAL OFFENDERS RESTRICTION ACT, SECTION 18 (2)—*Period of absence in contravention of the order or while under trial not to be excluded—Magistrate convicting under section 18, not to pass orders as to the period of restriction left uncompleted—Magistrate merely should explain the provisions of section 18 (2)—A new term of restriction cannot be added to sentence under section 18—Sections 9 and 18.* *Held*, that under section 18 (2) of the Habitual Offenders Restriction Act, the period of imprisonment under section 18 (1) alone was to be excluded in computing the period for which the period of restriction should remain in force, and that the period during which the accused was absent from his tract in contravention of the order of restriction or any period during which he was under trial could not be so excluded. *Held also* that the Magistrate convicting the accused under section 18 of the Act had no power to pass any orders as to the period the restriction should remain in force; but that the magistrate should merely explain to the accused the provisions of section 18 (2) of the Habitual Offenders' Restriction Act. *Held also*, that to a conviction under section 18 of the Habitual Offenders' Restriction Act, an order of restriction cannot be added.

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ILLEGAL CONSIDERATION—*Indian Contract Act, 1872, section 23—Agreement not to bid at an Excise auction and to prevent others from bidding—Money received on such consideration, whether recoverable—Illegality to be proved not presumed.* Five Excise licenses for certain *Hlaw* shops having been proclaimed for sale by auction by the Deputy Commissioner, the plaintiff paid the

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defendants certain monies on their undertaking, *inter alia*, that at the auction they would not bid in competition with the plaintiff and that they would also prevent others from bidding. The plaintiff claimed that as a result of the auction he was entitled according to the terms of his agreement with the defendants to obtain from them a refund of the money he had paid them. Among several defences, the defendants put forward the defence that the agreement sued on was illegal and void and contrary to public policy. They avoided pleading their own fraud, but left it to the Court to presume that they had fraudulent intentions and advanced no evidence that such was the case. *Held, firstly*, that if the defendants intended to show that the contract was illegal under section 23 of the Indian Contract Act, the burden lay on them to prove clearly that it was intended to resort to illegal means, and, secondly, that it is not sufficient for the defendants to have used indefinite expressions when demanding the money from the plaintiff and then to ask the Court to presume that they had intended to act fraudulently, illegally or otherwise in contravention of any law. *Held also* that, under the circumstances, to refuse the plaintiff relief would be to encourage fraud and trickery by persons who intended nothing illegal except to defraud the person with whom they were entering into agreements of an indefinite kind with no intention of doing anything except to keep his money in any event. *Mahomed Meera Rawther v. Savvasi Vijaya Raghunada*, 23 Mad., 227 *P.M.A. Nagappa Chettiar v. Ah Foke*, 12 B.L.T., 241—*followed*.

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ILLEGALITY OF CONSIDERATION NOT PRESUMED: *See* ILLEGAL CONSIDERATION 275

IMPRISONMENT BY A CRIMINAL COURT NOT TO BE POSTPONED TILL AFTER DETENTION IN CIVIL JAIL: *See* CRIMINAL PROCEDURE CODE, SECTION 250 93

INCOME-TAX ACT (XI OF 1922) SECTIONS 2 (4) 4 (1) AND (2), 6 AND 42 (1)—"*Business*", *meaning of, section 6—Assessment of non-resident Limited Company registered under the English Companies' Act with headquarters in London—Money received out of India, when deemed money accruing, earned or arising in India—Sale proceeds of goods exported to the United Kingdom (a) which had in India undergone some process of conversion or working-up and (b) which had not, whether distinguishable.—Profits arising from contracts made in the United Kingdom for insurance of cargoes consigned from India, whether liable to Indian income-tax—In arriving at amount of profits liable to Indian income-tax, whether allowance to be made to London Office for a reasonable Commission Agents' commission.* It is necessary to look to section 42 (1) of the Indian Income-tax (Act XI of 1922), to find out, in the case of a non-resident, what income, profits or gains, are "deemed to accrue, or arise, or to be received in British India" under the provisions of the Act; and from section 42 (1), we find that all profits or gains accruing or arising to a non-resident, whether directly or indirectly through or from any business connection or property in British India is deemed to be such income, and is, therefore, chargeable under sections 4 (1) and 6. A limited Company incorporated under the English Companies' Act and admittedly non-resident in British India, had its headquarters in London. It carried on various large business undertakings in Burma, especially in connection with rice, timber and cotton. It also had numerous rice-mills, saw-mills, cotton-ginning mills and vegetable oil-mills in Burma where commodities or raw materials were "worked-up into form suitable for use" and shipped to the United Kingdom. Further, it also

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exported from Burma raw commodities in the same form as purchased. *Held* (1) that the fact of the produce being sold in London and the money being received there did not prevent profits or gains accruing, or arising, or being deemed to accrue or arise in British India, from being taxable under the Indian Income-tax Act. *Held* (2) that no distinction, so far as liability to income-tax is concerned, could be drawn between profits on produce, which had undergone some process of conversion or "working up" by the company in Burma and profits on produce purchased by it in Burma and exported in the same form when purchased. *Held* (3) that in arriving at the amount of profits liable to the Indian Income-tax, the Commissioner of Income-tax must allow the London Office a reasonable Commission Agents' commission on the sale and realisation of the produce and therefore so much of the profits as can reasonably be attributed to commission agents' commission should not be assessable to income-tax in Burma. *Held* (4) that as regards profits arising on contracts of insurance entered into in England by the London Office on cargo consigned to it from Burma the profits were earned in England and the fact that the insurance policies were effected on produce coming from Burma was much too remote a connection to justify the inclusion of these profits among profits deemed to arise or accrue in British India. *Held* (5) that similarly the commission earned by the Company's export department in London on stores, etc., purchased and shipped from the United Kingdom to Burma also should not be assessable to income-tax in Burma. *Commissioner of Taxation v. Kirk, A.C.* (1900) 588; *Re Rogers Pyatt Shellac Co. v. Secretary of State for India*, 52 Cal., 1—*followed*. *The Secretary, Board of Revenue v. Madras Export Co.*, 46 Mad., 366—*dissented from*. *Greenwood v. Smidth*, (1920) 1 K.B., 275—*distinguished*.

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INFERIOR WIFE, CHILDREN OF, WHETHER ENTITLED TO INHERIT AS STEP-CHILDREN IN SUPERIOR WIFE'S ESTATE : *See* BUDDHIST LAW, INHERITANCE 549

INFERIOR WIVES WITH SEPARATE RESIDENCE FROM HUSBAND NOT ENTITLED TO INHERIT 656

INFORMATION WITHIN THE MEANING OF SECTION 154 OF THE CRIMINAL PROCEDURE CODE NEED NOT BE VOLUNTEERED TO COME UNDER SECTION 182 OF THE PENAL CODE : *See* PENAL CODE, SECTION 182 577

INFORMATION AND STATEMENTS TO THE POLICE, DIFFERENTIATED : *See* PENAL CODE, SECTION 182 577

INFRINGEMENT OF THE PROVISIONS OF THE CRIMINAL PROCEDURE CODE WHEN VITIATING PROCEEDINGS : *See* CRIMINAL PROCEDURE CODE, SECTION 342 139

INHERITED PROPERTY, OF BURMESE BUDDHIST HUSBAND ACQUIRED AFTER MARRIAGE, WHETHER *Thinthi* OR *Lettetpwa* : *See* BUDDHIST LAW 322

INJUNCTION, A DISCRETIONARY RELIEF IN INFRINGEMENT OF EASEMENTS : *See* LIGHT AND AIR, EASEMENTS OF 230

INSOLVENCY—*Annulment of Adjudication—Provincial Insolvency Act (V of 1920) sections 37 (1), 53—Effect of such annulment on prior application by Receiver to annul transfers.* When an adjudication order is annulled without making any appointment as to the insolvent's property and without imposing any conditions, the estate with its liabilities reverts to the insolvent and thereupon the Receiver of his property appointed on the adjudication ceases to represent the insolvent or his creditors, and since the Receiver no longer represents the creditors, he cannot on their behalf claim

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the benefit of the provisions of section 53. On the debtor's own petition under the Provincial Insolvency Act, he was adjudged insolvent and the Court appointed a Receiver of his property. The Receiver then made applications under the provisions of section 53 to avoid transfers made by the insolvent in favour of certain persons. Subsequently and before final disposal of the applications made by the Receiver, the order of adjudication was upon a creditor's application and with the consent of the insolvent annulled, the Court making appointment as to the insolvent's property and imposing no conditions. *Held*, that the Receiver had no power to prosecute his applications under section 53 after the adjudication had been annulled and that the application in question should therefore have been dismissed. *Rajkishto Singh v. Shaik Safatoola*, 17 W.R., 65—*referred to*. *Mannu Lal v. Nalin Kumar Mukerjee*, 41 All., 200—*distinguished*.

MAUNG HME *v.* U PO SEIN AND TWO OTHERS 201

INTEREST FROM DATE OF INSTITUTION, WHETHER PART OF THE SUBJECT-MATTER OF THE SUIT—*Claim of interest made in the plaint—Civil Procedure Code, Section 110*. *Held*, that where interest is claimed in the plaint, such interest as accrues during the period between the filing of the suit and the decree is part of the subject-matter of the suit and the amount of such interest can be regarded as part of the amount or value of the subject-matter of the suit in the Court of the first instance within the meaning of section 110 of the Civil Procedure Code. *Dagleish v. Damodar Narain Chowdry*, 33 Cal., 1286; *Maung Twe v. A.L.A.R. Chetty Firm*, 11 L.B.R., 335; *Moti Chand v. Ganga Prasad Singh*, 24 All., 174—*referred to*. *A. V. Subramania Ayyar v. Sellamal*, 39 Mad., 843—*distinguished*.

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INTEREST, WHEN RECOVERABLE ON DEPOSIT IN COURT: *See* AUCTION PURCHASER 251

INTERFERENCE BY ONE RIPARIAN OWNER WITH THE ALVEUS OF THE WATER-COURSE: *See* RIPARIAN OWNER 494

IRREGULAR COMMITTAL, ACCEPTANCE BY SESSIONS COURT: *See* APPROVER, PROSECUTION OF 55

IRREGULARITY, MISAPPLYING A RULE NOT APPLICABLE IS AN: *See* CIVIL PROCEDURE CODE, ORDER XI, RULE 21 63

ISSUE OF THE SECOND MARRIAGE, LAW FOR DIVISION BETWEEN PUBBAKA CHILDREN AND STEP-MOTHER VARIES WITH THE PRESENCE OR THE ABSENCE OF: *See* BUDDHIST LAW ... 549

JOINDER OF ADDITIONAL PARTIES PENDING APPEAL TO PRIVY COUNCIL, WHETHER TO BE MADE IN TRIAL COURT OR HIGH COURT ... 474

JOINT TRIAL IN CONSPIRACY CASE JUSTIFIED: *See* JURISDICTION OF MAGISTRATE, *ab initio*, WANT OF 95

JUDGE, ABSENT ON LEAVE, IF CERTIFICATION FOR APPEAL UNDER LETTERS PATENT POSSIBLE BY ANOTHER JUDGE: *See* PRACTICE ... 546

JUDGMENT, DEFINITION OF: *See* PRESIDENCY TOWNS INSOLVENCY ACT 605

JUDGMENT, MEANING OF, UNDER THE LETTERS PATENT, CLAUSE 13 293, 310

JUDGMENT UNDER CLAUSE 13, LETTERS PATENT: *See* LETTERS PATENT, CLAUSE 13 257

JURISDICTION OF MAGISTRATE, AB INITIO, WANT OF—*Charge under section 120-B, Indian Penal Code, without complaint or consent required by section 196A, Criminal Procedure Code, Magistrate not competent to frame his proceedings, without such complaint or consent* ab initio, *without jurisdiction and illegal—Alternative charges under sections 446 and 109, Indian Penal Code, framing of subsequently cannot cure*

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want of jurisdiction—Complaint by a Court under section 476, Criminal Procedure Code, of an offence under section 120-B read with sections 466 and 109 of the Penal Code—Sanction of Governor-General in Council or Local Government or Officer empowered in this behalf not necessary for such trial—Charge framed by Magistrate not being the charge set out in the complaint but charge of doing a legal act by illegal means, sub-section (1) of section 196-A, Criminal Procedure Code, applies and must be set aside as void—To charge under section 120-B as laid in Court's complaint Magistrate could have added the alternative charges under sections 466 and 109—Criminal Procedure Code, sections 195 (1), (c), 195 (4)—Discretion of Court to try accused persons separately not exercised improperly by holding a joint trial in conspiracy cases—Section 196-A applies only to a prosecution for conspiracy punishable under section 120-B and not for abetment by conspiracy punishable under section 109 of the Penal Code. A, alleging that certain properties of B had been under attachment for a period exceeding three weeks, applied to the High Court in its Insolvency Jurisdiction to adjudicate B insolvent. B contested the application denying A's allegation and alleged that the warrants of the attaching Court had been tampered with, in order to make it appear that the attachment had subsisted for over three weeks. The High Court finding for B dismissed the application to adjudicate him, and then proceeded under section 476 of the Criminal Procedure Code to lay a complaint against A and two other persons C and D, who were not parties before it, for offences under section 120-B read with sections 466 and 109, Indian Penal Code, and D, was subsequently discharged. C having appealed against the order formulating a complaint against him, the complaint so far as it related to him was set aside on the ground that the Court had jurisdiction to lay a complaint only in respect of parties to the proceedings before it and C was a stranger to such proceedings. B then, in terms almost identical to the complaint laid by the Court, presented a complaint against C to the Magistrate who was trying A. The joint trial of A and C was thereupon proceeded with by the Magistrate and a charge was framed against them both that they had agreed to do an act which was not an illegal act by illegal means, to wit, the forging of the attachment warrants, and in pursuance thereof had caused some person or persons to commit the offence of forgery as described in section 463, Indian Penal Code, and had thereby committed an offence under section 120-B, Indian Penal Code. Thus the complaint laid was not a complaint of a criminal conspiracy, the object of which was to commit a legal act by illegal means. When objection was raised as to the jurisdiction of the Court, the Court at the request of the prosecution framed additional charges of abetment of forgery under sections 466 and 109, Indian Penal Code, against both the accused. *Held*, that the charge framed being a charge of doing a legal act by illegal means, the provision of sub-section (1) of section 196-A of the Criminal Procedure Code applied: *Held*, that as against A the charge framed being one not set out in the High Court's complaint but one that fell under sub-section (1) of section 196-A of which the Magistrate could take cognizance only on a complaint by the Governor-General in Council or the Local Government, the Magistrate had acted without jurisdiction and that the trial as from the date of the framing of the said charge was void. *Held*, that as against C who was not a party to the proceedings before the High Court having regard to the provisions of section 196 (1) (c), the Magistrate was not empowered to take cognizance without the consent of the Local Government and that, as he had acted entirely without jurisdiction and in direct disobedience of the express provi-

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sions of the Code, his proceedings were *ab initio* illegal, a defect which could not be cured by his subsequently framing alternative charges such as he was, in law, entitled to and which he could have framed originally without objection. *Held*, also that the legality of a joint trial depends on the accusation and not on the result of the trial and that the discretion of the Court to try accused persons separately is not improperly exercised by holding a joint trial in cases of conspiracy. *Held further* that section 196-A of the Criminal Procedure Code applies only to a prosecution for conspiracy punishable under section 120-B and not for abetment of conspiracy punishable under section 109 of the Penal Code. *Abdul Salim* v. *King-Emperor*, 29 C.L.J. 573; *Giridari Lal* v. *King-Emperor*, 21 C.W.N., 950—*referred to.*

V. M. ABDUL RAHMAN AND ONE v. KING-EMPEROR ... 95

JURISDICTION TO ENTERTAIN APPLICATION FOR RECEIVERSHIP, APPLICATION WHERE JURISDICTION OF THE COURT IN THE SUIT CONTESTED: *See* RECEIVER, INTERLOCUTORY APPOINTMENT OF ... 196

JURY TRIAL BY APPEAL FROM—*Case triable under Chapter XXXIII, Criminal Procedure Code, but actually tried under Chapter XXIII—Claim for trial under Chapter XXXIII when to be made—Omission of the Committing Magistrate to inform the accused of his right of trial under Chapter XXXIII—Appeal whether under section 418 or 449, Criminal Procedure Code—Limitation—Time required for the obtaining of copies of the diary order on the claim for trial under Chapter XXXIII, not to be excluded.* *Held*, that where a case triable under the provisions of Chapter XXXIII of the Code of Criminal Procedure has been actually tried at the High Court Sessions under Chapter XXIII, without a claim on the accused's part under section 275 for a trial under Chapter XXXIII, an appeal would lie only under section 418 and not under section 449 of the Code. Further, that such a claim on the part of the accused must be made before the first juror is called and accepted. *Held also*, that the omission of the Magistrate to inform the accused of his rights to be tried under Chapter XXXIII, as required by section 447, is absolutely cured by the provision of section 534. *Held further*, that time spent in obtaining copies of the diary orders in the case which were filed with the appeal would not be excluded in computing the period of limitations for appeal, there being no rule of the Court nor of the Code requiring those copies to be filed.

U ZAGARIYA AND THREE v. KING-EMPEROR 220

JUSTICE, DESIRE TO BRING OFFENDER TO, NOT ESSENTIAL TO RELIEVE COMPLAINANT: *See* MALICIOUS PROSECUTION 82

KITTIMA CLAIM, WHETHER CAN BE AMENDED ON APPEAL TO APATITTIMA: *See* PLAINT, AMENDMENT OF 483

LACHES OF ADVOCATE OR HIS CLERK NOT SUFFICIENT GROUND FOR RESTORATION OF APPEAL DISMISSED FOR DEFAULT 488

LAND, POSTING ON THE, OF THE PRELIMINARY ORDER, FAILURE TO AN IRREGULARITY CURED BY SECTION 537, CRIMINAL PROCEDURE CODE: *See* CRIMINAL PROCEDURE CODE, SECTION 145 ... 169

LEASE, WHETHER A UNILATERAL DOCUMENT BY THE TENANT IS A: *See* TENANT, AGREEMENT EXECUTED BY, TO CULTIVATE AND PAY RENT 379

LEGAL REPRESENTATIVE—INTESTATE DECEASED SUBJECT TO THE INDIAN SUCCESSION ACT (X OF 1865)—*Plaintiff's course where no Administrator appointed—Succession Act, sections 189, 190—Civil Procedure Code (V of 1908), section 2 (11) and Order XXII, Rule 4.* The legal representative of a deceased or the person who in law would represent the estate of a deceased subject to the Indian Succession Act, would be either his executor or administrator, or

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one who had intermeddled with his estate and so made himself responsible as his executor *de son tort*. *Held*, that where no representation of an intestate deceased defendant subject to the Indian Succession Act has been taken out, the only course open to the plaintiff would be to take proceedings to have an administrator appointed as no right to any part of the property of an intestate's estate can be established in Court unless Letters of Administration have been first granted. *Framji Dorabji* v. *Adarji Dorabji*, 18 Bom., 337 ; *P.L.M. Firm* v. *Stacey*, 9 B.L.T., 122 ; *Sukh Nandan* v. *Renwick*, 4 All., 192—*followed*.

BARNETT BROTHERS *v.* MRS. E. FOWLE AND ONE ... 465

LESSER WIVES, SEPARATE LIVING A DISQUALIFICATION FROM INHERITANCE 656

LETTERS OF ADMINISTRATION DE BONIS NON, WHETHER COURT FEES SHOULD BE PAID ON : *See* COURT FEES ACT, SECTION 19C ... 90

LETTERS PATENT, CLAUSE 13—*Commission, Examination of witness on, Dismissal of application for, not a Judgment*. *Held* that an order of dismissal of an application for the examination of a witness on commission is not a judgment within the meaning of Clause 13 of the Letters Patent. *Mooljee Dharsee & Co.* v. *M. E. Moola*, 3 Ran. ; *Tuljaram Row* v. *Alagappa Chetty*, 35 Mad., 1—*followed*.

MAHOMED HUSSAIN *v.* HOOSAIN HANADANEE & CO. ... 293

LETTERS PATENT, CLAUSE 13—*Order for security by defendant before Judgment—Civil Procedure Code, Order XXXVIII, Rule 5—An order under, not a Judgment—Civil Procedure Code, Order XLIII, Rule 1 (q)*. Where, on application by the plaintiff, the Court, acting under Order XXXVIII, Rule 5, of the Civil Procedure Code, order the defendant to furnish security before judgment. *Held* that such order is not a "judgment" within the meaning of clause 13 of the Letters Patent. *Held also*, that such an order is not one of the orders appealable under the Civil Procedure Code. *Mooljee Dharsee* v. *M. E. Molla*, 3 Ran., *followed*. *Seshagiri Row* v. *Nawab Askur*, 26 Mad., 502 ; *Sonabai* v. *Tribhoandas*, 32 Bom., 402—*dissented from*.

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LETTERS PATENT, CLAUSE 13—*Order of the executing Court accepting security offered under order of Stay by Appellate Court—Such an order not a Judgment under clause 13—Such an order also not a decree under section 47, Civil Procedure Code (V of 1908)*. The Appellate Side of the High Court, on an application to stay execution of a decree of the Original Side pending the disposal of the appeal, ordered, *inter alia*, that "execution may be stayed pending the decision of this appeal, 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." In accordance with this order, the learned Judge on the Original Side after enquiry accepted the security as valid and sufficient. On appeal from such order.—*Held* that in making the order appealed from the learned Judge on the Original Side was not determining any right or liability which arose between the parties in the execution proceedings on the Original Side and that his order is not a "Judgment" within the meaning of clause 13 of the Letters Patent. *Held also*, that such an order is neither a decree within the meaning of section 47 of the Civil Procedure Code. *Ahmed Bin Sheik* v. *Ayesha Bai*, 11 Bom. L.R., 248 ; *Saraswati* v. *Golap Das*, 41 Cal., 160 ; *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.*, 8 Ben. L.R., 433 ; *Tuljaram Row* v. *Alagappa Chettiar*, 35 Mad., 1—*followed*.

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LETTERS PATENT, CLAUSE 13 : *See* PRESIDENCY TOWNS INSOLVENCY ACT, SECTION 8 (2) 605

LETTERS PATENT, CLAUSE 13 : WHO CAN CERTIFY : *See* PRACTICE ... 546

LETTETPWA, WHETHER INHERITED PROPERTY IS 322

LIGHT AND AIR, EASEMENTS OF—*Test to be applied in granting or withholding injunction—Court's discretion to award compensation, when exercised—Specific Relief Act (I of 1877), section 54.* To Courts governed by the Indian Specific Relief Act (I of 1877), the question of an injunction or no injunction to restrain a party from so erecting and building as to interfere with his neighbour's easements of light and air, presents itself in a different light to what it does to the English Courts; therefore, to Courts subject to this Act, the English decisions have no application. In India, the Court has a discretion; it *may*, not *shall*, issue an injunction where the injury is such that pecuniary compensation would not afford adequate relief. The plaintiff claimed an injunction to restrain the defendant from so erecting a building contiguous to the plaintiff's in the heart of the City of Rangoon as to interfere with the plaintiff's easements of light and air. The easements were admitted but the defendant contended that the injury to the easements could be compensated in damages and paid Rs. 750 into Court. The proposed building, if allowed, would on that side completely block all access to light and air to the plaintiff's ground floor and middle room on the first floor, but he would not thereby be in any worse position than the majority of house-owners in that part of Rangoon. While an injunction would practically prevent the defendant from building at all, the payment by him of a sum by way of damages to the plaintiff would enable the latter by structural alterations to obtain new light and air sufficient to make his house as well or better lit and ventilated than before. *Held*, on the facts, that it would be oppressive to grant an injunction and that the grant of compensation would give the plaintiff the chance of putting his house in as good a position or better that it was before as regards air or light and place him in no worse position than all owners of interior houses in that part of Rangoon. *Colls v. Home and Colonial Stores*, (1904), A.C., 179; *Dunjibhoy Amrighar v. Lisboa*, 18 Bom., 252; *Ghanasham Nadkarni v. Moroba Ramchandra Pai*, 13 Bom., 474; *Shelfer v. City of London Electric Lighting Company*, (1895) Ch., 287; *Sultan Nawaz Jung v. Rustomji Nanabhoy*, 20 Bom., 704—*referred to.*

MAHOMED AUZAM ISMAIL *v.* JAGANATH JAMNADAS ... 230

LIMITATION ACT (IX OF 1908), SECTION 10, ARTICLE 120—*Indian Trusts Act (II of 1882), sections 3 and 7 and Chapter IX—What amounts to vesting in trust—Minor's property, taking charge and managing of—Constructive trust.* The plaintiff while a minor inherited certain property which the defendant, her father, took charge of and managed for her. Over six years after she had attained her majority she instituted her present suit for the recovery of money which she alleged the defendant had received on her account during her minority, but for which he had never accounted. The trial court held that the suit was time-barred under Article 120 of the Limitation Act. On appeal it was urged that the case was that of an express trust and that therefore the provisions of section 10 of the Limitation Act applied. *Held*, that as a minor cannot create a trust the position was that the defendant, as the plaintiff's father, had taken charge of her property and managed it for her and that therefore there was in fact no trust in the case. *Held* also, that as the Indian Trusts Act in Chapter IX treats constructive trusts not as trusts but as "obligations in the nature of trusts" and

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that as the defendant was not a trustee but by his acts had only incurred obligations similar to those of a trustee, the provisions of section 10 of the Limitation Act would not apply. *Kathiawar Trading Company* v. *Virchand Dipchand*, 18 Bom., 119; *Rajah Rajeswara Dorai* v. *S. Ponnuswami Thewar*, 40 M.L.J., 32; *Sher Ali Khan* v. *Khwaja Muhammad Khan*, (1891) P.R., 84; *The Secretary of State for India* v. *Guru Proshad Dhur*, 20 Cal., 51—*followed*. *Narrondas Ramji* v. *Narrondas Ramji*, 31 Bom., 418—*dissented from*. *Bhurabhai Jammadas* v. *Bai Ruxmani*, 32 Bom., 394—*distinguished*.

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LIMITATION ACT (IX OF 1908), ARTICLE 2, SCHEDULE I—*Honest belief that the action or omission was under the provisions of an enactment necessary—Suit for malicious prosecution against a Municipality—Article 23, Schedule I, when applicable*. *Held*, that the defence of limitation under Article 2, Schedule I, of the Limitation Act, is available only where the defendant has acted in the honest belief that he was empowered so to act by the provisions of an enactment. *Held further*, that Article 23, Schedule I, of the Limitation Act would apply to a suit for damage for malicious prosecution against a Municipality, if the Municipality has acted with the knowledge that it had, under the Burma Municipal Act, no power to institute the prosecution complained of. *Kanakasabai* v. *Mutlu*, 13 Mad., 445; *Pearson* v. *Dublin Corporation*, (1907) A.C., 351—*referred to*. *Ganesh Das* v. *Elliott*, (1883) P.R., 160; *Morarji* v. *Municipal Commissioner of Bombay*, 25 Bom., 387; *Municipal Board of Mussoorie* v. *H. B. Goodall*, 26 All., 482; *Narpat Rai and others* v. *Sirdar Kirpal Singh*, (1886) P.R., 65—*followed*. *Mukat Lal* v. *Gopal Sarup*, 16 A.L.J., 1017—*dissented from*.

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LIMITATION ACT (IX OF 1908), SECTION 12—*Time required for obtaining copy of the trial Court's judgment whether to be excluded on second appeal—Inexperience of advocate or litigant, whether Court Rules should be strictly enforced for the purpose of penalising*. Where a second appeal was filed on a day, which would make it one day too late if time is allowed only for the one day occupied in obtaining copies of the judgment and decree of the lower Appellate Court, but if time is allowed for the period occupied in obtaining the judgment of the trial Court, the appeal would be in time *Held*, that the Court may exercise its discretion in favour of the appellant and admit the appeal.

MAUNG PO AUNG AND ONE v. U BYA AND OTHERS ... 310

LIMITATION ACT, ARTICLE 23: *See* LIMITATION ACT 268

LIMITATION ACT (IX OF 1908), SCHEDULE I, ARTICLES 116 AND 120—*Usufructuary mortgage—Deprivation of the mortgage security—Right to sue under section 68, Transfer of Property Act (IV of 1882). Limitation, the starting point of—Court taking up on its own initiative question of limitation, when a suit on the face of it not obviously time-barred*. The Plaintiff advanced money to the defendant on the security of certain land which the defendant was in constructive possession. Subsequently, in execution of a decree for possession obtained by certain third parties in another suit against the defendant, the decree holders were placed in possession. The plaintiff, thereupon, sued the defendant under the provisions of section 68 of the Transfer of Property Act for recovery of money advanced on the mortgage and obtained a decree. On appeal however, the District Court, on its own initiative, took up the

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question of limitation and being of opinion that limitation would run from the date of the plaintiff's mortgage, *held* that the suit was time-barred under the provisions of Article 116 of the First Schedule of the Limitation Act. *Held*, that assuming that the view of the District Court that Article 116 applied was correct, the starting point of limitation would not be the date of the plaintiff's mortgage, but of the deprivation of his security when the defendant's decree-holders were placed in possession. *Held further*, that under Article 120, the suit would still be within time, since limitation would start from the date of the plaintiff's eviction. *Held also*, that as the suit was not on the face of it obviously time-barred by limitation, the District Court did not exercise a wise discretion in taking up the question of limitation on its own initiative. *Ram Jewan v. Jagarnath*, 25 Cal., 450; *Unichamar v. Ahmed*, 21 Mad., 242—*followed*.

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LIMITATION ACT, ARTICLE 123 : *See* RES JUDICATA 77

LIMITATION ACT IX OF 1908, ARTICLE 134—*Sub-mortgage without possession by mortgagee in possession, whether a transfer within the meaning of article.* *Held*, that the transfer by way of a sub-mortgage without possession in favour of a third party by a mortgagee in possession is not a transfer within the meaning of Article 134 of the Limitation Act and that therefore the transferee without possession cannot claim the benefit of the law of Limitation. *Held also*, that when land is mortgaged without possession and possession subsequently passes to the mortgagee, the burden of proving that the transfer in which possession was given was an outright sale lies on the person alleging it; but in considering whether that burden has been discharged, all the circumstances of the case including the conduct of the parties must be borne in mind. *Husaini Khanam v. Hussain Khan*, 29 All., 471—*referred to*. *Mulla Vettil Seeti Kutti and six v. K.M.K. Khuni Pathumma and three*, 40 Mad., 1040. *Ramchandra v. Sheik Mohidin*, 22 Bom., 614—*followed*. *Ma Dun v. Lu O and one*, 5 L.B.R., 40—*approved*.

A.T.A.R.M.M. CHETTY FIRM *v.* M.A.M. MAHOMED KASIM ... 367

LIMITATION, TIME TAKEN IN OBTAINING COPIES OF DIARY ORDER REFUSING TRIAL UNDER CHAPTER XXXIII, CRIMINAL PROCEDURE CODE, WHETHER TO BE EXCLUDED : *See* JURY, TRIAL BY, APPEAL FROM 220

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MAGISTRATE HAVING POWER TO PUNISH ADEQUATELY, WHETHER CAN COMMIT TO SESSIONS : *See* COMMITTAL TO SESSIONS 42

MAINTENANCE, ORDER OF, WHETHER DISCHARGED BY A DECREE FOR RESTITUTION OF CONJUGAL RIGHTS—*Criminal Procedure Code (V of 1898), section 489 (2), as amended by Amendment Act (XVIII of 1923).* The order of a competent Civil Court does not of itself cancel an order of maintenance passed under the provisions of the Criminal Procedure Code and in considering an application for the discharge of such an order, the Magistrate is not necessarily bound to follow the order of the Civil Court but must consider it along with any other circumstance that may be brought before him. *Bragg v. Bragg*, 41 Times L.R., 8; *D.M. Naiks v. Maruti Kanari*, 30 Mad., 400; *Devi Ditta v. Ganga Devi* (1906) P.R. Cr. 4; In re *Chandulal Ranchod*, 43 Bom., 865; In re *Salehidas*, 23 Bom., 485; *Lupetas Daomoy v. Tikha Mondol*, 13 W.R. Cr. 52; *M.A.A. Kader v. Luddan Sahiba*, 14 Cal., 276; *Madda Venkaya v. Kamireddi Rudamma*, 45 Mad., 721; *Maung Tha U v. Ma Mya*

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Kin, 9 B.L.T. 162 ; *Maung Po Saw* v. *Ma Thet* (1910-13), U.B.R., 34 ; *Sukad Domni* v. *Katiram Dome*, 20 W.R. Cr. 58 ; *Subhadra* v. *Basdeo Dube*, 18 *Cal.*, 29—*referred to.*

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MALICIOUS PROSECUTION—*Prosecution solely to protect complainant's rights—Absence of a desire to bring the offender to justice not essential—Malice not presumed from want of enquiry by the complainant prior to prosecution.* Where a prosecution is obviously false and not instituted in good faith, the courts will infer malice, but where a prosecution has been instituted under a *bonâ fide* belief that the accused has committed the offence, even though that belief is mistaken and an enquiry would have shown that no offence had been committed, the plaintiff cannot obtain a decree for damages for malicious prosecution, unless the prosecution is proved to be malicious as well. *Queen* v. *Leathem*, 1901 A.C., 495—*followed.*

MAUNG SET KHAING *v.* MAUNG TUN NYEIN AND TWO ... 82

MALICIOUS PROSECUTION, SUIT FOR, AGAINST A MUNICIPALITY : *See* LIMITATION ACT 268

MARRIAGE OF A MINOR BURMESE BUDDHIST GIRL INVALID IF WITHOUT CONSENT OF PARENT OR GUARDIAN : *See* BURMESE BUDDHIST LAW, MINOR SPINSTER 455

MATERIAL ALTERATION. *Alteration of the rate of interest from 8 per cent, to 2 per cent. Alteration to the advantage of the debtor, whether a material alteration.* The rate of interest to be charged is one of the most important conditions in any contract of borrowing or lending. That being so, an alteration in the terms of this very important provision must be a material alteration. The plaintiff instituted his suit on a promissory-note which was dismissed on the ground of material alteration and it being held that after execution the rate of interest in the note had been altered from 8 per cent to 2 per cent by the plaintiff. It was contended for the creditor that the alteration, being to the advantage of the debtor and not affecting him adversely, was not such as would void the note. *Held*, that the test to be applied was not whether the alteration was to the advantage or disadvantage of the debtor but whether the integrity and identity of the contract had been changed and that, accordingly, on the facts there was a material alteration which rendered the note void. *Gour Chandra Das* v. *Prasanna Kumar Chandra*, 33 Cal., 812—*followed.*

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MINOR SPINSTER AT BUDDHIST LAW INCAPABLE OF ENTERING INTO VALID MARRIAGE WITHOUT CONSENT OF PARENTS OR GUARDIAN : *See* BURMESE BUDDHIST LAW, MINOR SPINSTER ... 455

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MINOR, SUIT BY, WITHOUT NEXT FRIEND—*Duty of the Court on discovery of fact of minority on an ex-parte hearing—Service of summons outside the jurisdiction of the Court—Service by other than an officer of the Court not sufficient—Civil Procedure Code (V of 1908), Order V, Rule 21, and Order XXXII, Rules 1 and 2.* Where a suit is filed by a minor without a next friend and without the plaint disclosing the fact of his minority, *held*, that if at the *ex-parte* hearing of the suit, the fact of his minority is disclosed, it is the duty of the Court to take notice of the disregard of the provisions of Rule 1 of Order XXXII of the Civil Procedure Code and to refuse to proceed further with the suit so illegally commenced. *Held also*, that the service of the summons outside the jurisdiction of the Court issuing it and without an order from the Court having jurisdiction therein is irregular. *Held also*, that the service to be effective must be made by an officer of the Court.

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MONEY PAID UNDER MISTAKE OF FACT, WHEN RECOVERABLE—*Mistake not between the parties not a ground for recovery.* *Held* that money paid under a mistake of fact, arising between the person making the payment and the payee, may be recovered; but that money paid under a mistake of some fact with which the payee had nothing to do, cannot be recovered. *Kelly v. Solari*, 9 M. & W., 54. *Townsend v. Crowdy*, 8 C. B. & S., 477—*distinguished.* *Chambers v. Miller*, 31 L.J.C.P., 30—*followed.*

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Operative part of a document differing from the recital: *See* Construction of Document 53

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Parsis—*Parsi Temple Trust—Grants of land by Government for a temple "for the use of the Parsi population of Rangoon"—Construction of such grants—Whether a person not a racial Parsi entitled to worship in the temple or its use and benefits—Meaning of the term Parsi—Suit by certain members professing to sue on their own behalf and on behalf of a large number of other members of the community for declaration and injunction to exclude a person from the use of the temple—Trustee not a party to suit.* Appellants who were three members of the Parsi community resident at

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Rangoon claimed that they sued on their own behalf and on behalf of a large number of members of the Parsi community at Rangoon (a) for a declaration that the Respondent Bella was not entitled to use the Parsi Temple at Rangoon or to attend or to participate in any of the religious ceremonies performed therein and (b) for an injunction to restrain her from entering the said temple. The temple had been built on a parcel of land granted by the Government of India on the 24th November 1868 and regranted on the 14th August 1882 to certain persons "upon trust to build and maintain upon the said land a temple for the use of the Parsi population." Respondent Bella, who was admittedly the daughter of a non-Parsi father, claimed that her mother was a Parsi, and that she herself, having been duly initiated into the Zoroastrian religion, was entitled to the use of the temple and the benefits of its Trust. On the 21st March 1915 she attended a religious ceremony held at the temple and this gave rise to the suit the subject of the present appeal. Appellants alleged that the temple was for the exclusive benefit of Zoroastrians who were also racial Parsis and they denied Bella's claim. In their plaint they did not, however, pray for a general declaration as to the persons who were the object of the Trust or seek for a construction of the scheme or for any order to be made upon the Trustee: Nor did they make the Trustee a party. *Held* that the Parsi community had grown up to be such a distinct body, and admissions into it from outside had been so very rare, that at the time the grants were made the Government must have intended that the temple should be for the benefit of professing members of the Parsi community, that is, racial Parsis or people deemed after a long lapse of ages to be racial Parsis, and that therefore the benefits of the Trust were confined to persons who possessed the double qualification of Zoroastrians and racial Parsis. *Held* that with reference to the contention that Respondent Bella's mother was a Parsi, it was settled that as regards racial claim, maternity is of no importance. *Held* that the evidence warranted the conclusion that the ceremonies adopted for Bella's initiation into the Zoroastrian religion were sufficient for that purpose and that the additional ceremonial known as "Barashnum" was not necessary. *Held* that Bella, even though a Zoroastrian, not being a racial Parsi, had no right of entering into the temple, and may therefore be excluded or extruded therefrom as a trespasser by the Trustees. That the Trustees could treat her as a trespasser but that it did not follow that they were bound so to treat her. *Held* that appellants be granted a declaration that Bella was not entitled as of right to use the temple or to attend or to participate in the religious ceremonies performed therein. *Held further* that appellants were not entitled to the injunction because for trespass upon land the only person to bring the action is the person in possession of the land, that is the Trustee, and for a beneficiary or two or three beneficiaries of a Trust for public purposes to bring a suit for trespass against an intruder was a novel procedure of jurisprudence and such beneficiaries' case could not be made stronger by the suggestion that several other beneficiaries agreed with them. *Sir Dinshaw Manockji Petit v Sir Jamsetji Jijibhoy*, (1909) I.L.R. 33 Bom., 509, *approved and applied*. *Quaere*: Whether in India there may not be circumstances in which a beneficiary or beneficiaries of a Trust for public purposes may be allowed to bring a suit for trespass against an intruder as in *Anandrao Bhikaji Phadke v. Shankar Daji Charya*, (1883) I.L.R. 7 Bom., 323, but if so, the circumstances must be as powerful as in that case which did not arise in the present case. Decree of the Chief Court varied.

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PART-PERFORMANCE, PLEA OF, NOT AVAILABLE TO MORTGAGEE IN POSSESSION, TO PROVE SUBSEQUENT ORAL SALE—*Possession not unequivocably traceable to the title relied upon—Evidence Act (I of 1872), section 92 (4)—Oral evidence of subsequent sale not admissible to vary registered deed of mortgage.* The equitable doctrine of Part-performance is only applicable when all the requisite conditions set forth in Fry on Specific Performance and approved in Champoniere v. Lambert, (1917) 2 Ch., 356, are present. Acts of part performance relied on must be such as not only to be referable to the contract alleged but to be referable to no other title. In a suit for redemption, the mortgagees pleaded that the mortgaged property was subsequently sold to them verbally for the mortgage debt and a further loan. The mortgage which was by a registered deed contained a clause empowering the mortgagees to take possession and sell in the event of the mortgagor making default in payment and it was under this power that the mortgagees were alleged by the plaintiff to have come into possession. *Held*, that the possession by a mortgagee being ordinarily referable to his mortgage or to his influence over the mortgagee by reason of such mortgage, the possession in the present case could not be relied upon as part-performance of an agreement to sell. *Held also*, that the mortgage being by a registered deed, evidence of a subsequent oral agreement of sale would be inadmissible under section 92 (4) of the Evidence Act. *Ma Min Byu v. Maung Chit Pe*, 1 Ran., 419: *Mahomed Musa v. Aghore Kumar Ganguli*, 42 Cal., 801—*referred to*. *Champoniere v. Lambert*, (1917) 2 Ch., 356—*followed*. *Fry on Specific Performance—referred to*.

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PARTIES, ADDITION OF, PENDING APPEAL TO PRIVY COUNCIL: *See* ADDITIONAL PARTIES, JOINDER OF 474

PARTIES BEFORE COURT, COMPLAINT UNDER SECTION 476, CRIMINAL PROCEDURE CODE, TO BE CONFINED TO: *See* CRIMINAL PROCEDURE CODE, SECTION 476 48

PECUNIARY POSITION RELEVANT TO SHOW MOTIVE: *See* ACCUSED PERSON, WHETHER COMPETENT WITNESS 11

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PENAL CODE, SECTIONS 29, 461 AND 471: *See* ACCUSED PERSON WHETHER A COMPETENT WITNESS 11

PENAL CODE, SECTIONS 79, 89 AND 323: *See* SCHOOLMASTER, AUTHORITY OF TO INFLICT CORPORAL PUNISHMENT ... ...

PENAL CODE, SECTIONS 120-B, 466, 109: *See* JURISDICTION OF MAGISTRATE, *ab initio*, WANT OF 95

PENAL CODE, SECTION 182—*Statement made by witness after First Information was laid—Information and Statement distinguished—Information need not be volunteered to come under section 182 of the Penal Code.* An "information" within the meaning of section 154 of the Criminal Procedure Code, could be given orally or in writing. If given orally, the Police Officer is required to record it, and every such information, whether given in writing or reduced to writing, requires to be signed by the person giving it. Such information forms the basis upon which an investigation under Chapter XIV commences. A Police Officer making an investigation has power under section 160 to require the attendance of witnesses who appear to be acquainted with the circumstances of the case and to examine them. Section 162 lays down that no statement made by a person to a Police Officer in the course of

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such an investigation shall, if reduced to writing, be required to be signed by that person. On the 6th of June, a certain building was burned down and a First Information report was lodged. On the 26th June, while the enquiry was pending, the petitioner was examined by the investigating officer, who took down his statement, which was not signed by the petitioner. On the petitioner being charged with an offence under section 182 of the Penal Code. *Held* that the statement made by the petitioner was not an information given to a Police Officer but was made under section 161 of the Criminal Procedure Code. *Held also* that on these facts, the petitioner had not committed the offence under section 182 of the Penal Code. *Obiter* The words "whoever gives" in section 182 of the Penal Code should not be restricted to imply "whoever volunteers."

King-Emperor v. Nga Aung Pe, (1904-06) 1 U.B.R., Penal Code 13; *Mangu*, P.W.R. No. 35 of 1915; *Queen-Empress v. Bhikhaiji*, Ratanlal, 124; *Queen-Empress v. Ramji Sajana Rao*, 10 Bom., 124—*referred to.*

SULTAN v. MAJOR C. DE M. WELLBORNE 577

PENAL CODE (XLV OF 1860), SECTION 193—*Grant of pardon—Approver examined by a Magistrate prior to his examination as a witness in committal proceedings—Procedure not provided for by law and not necessary in the interests of justice—Resilement from his previous statement when examined in the committal court.* The prosecution for perjury is an exceptional measure and sanction ought not to be granted when material has only been provided by an unnecessary examination on oath. Magistrates should not be encouraged to make unnecessary examinations on oath in order to obtain material for a prosecution for perjury in case the approver should subsequently resile from his statement. G was granted a pardon by the District Magistrate under section 337 (1), Criminal Procedure Code, and at the instance of the Police his statement on oath was recorded by the committing Magistrate prior to his examination as a witness in the committal proceedings. From this statement he resiled when examined as a witness in the committal proceedings. On sanction being applied for by the District Magistrate in the High Court under section 339 (3) of the Criminal Procedure Code for G's prosecution under section 193 of the Penal Code for giving false evidences. *Held* that the preliminary examination of G prior to his examination in the committal court and after he had been granted a pardon, was not permissible. *Held also*, that the proper course under the circumstances of the case would be to prosecute G for the original offence and not for perjury. *Held further* that where there was nothing to prove that the evidence given by G in the committal court was false, the fact that he had made a different statement on a previous preliminary examination which was not provided for by law and not necessary in the interests of justice would not be a good ground for granting sanction to prosecute him for perjury.

KING-EMPEROR v. NGA BO GYI 224

PENAL CODE (XLV OF 1860), SECTION 196. *Defendant disclosing in his affidavit of documents ordered by the Court, document alleged by the plaintiff to be fabricated—Subsequent production of the documents on the orders of the Court.* Where during the pendency of a suit instituted for the cancellation of certain documents which was subsequently decreed, the defendants disclosed in their affidavit of documents the documents in question and later produced them on being called upon by the plaintiff to do so, *held*, that such circumstances did not constitute a deliberate user of the documents by the

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defendants and a charge under section 196, Penal Code, would not, therefore, be against them. *Held further*, that it cannot be taken that the defendants had corruptly and fraudulently used the documents within the meaning of the section, because, at the hearing of the suit, they had deposed that the documents were genuine. *Assistant Sessions Judge* v. *Ramammal*, 36 Mad., 387 ; *Re Muthiah Chetty*, 36 Mad., 392—*followed*.

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PENAL CODE, SECTIONS 325, 326 AND 149 : *See* RE GENTAY ... 352

PENAL CODE (XLV OF 1860), SECTIONS 366, 376—*Charge and conviction under section 376—Appellate Court setting aside the conviction and framing a fresh charge and convicting under section 366—Criminal Procedure Code (V of 1898), sections 423, 439, sub-clauses (4) and (5).* It is incompetent of a court in appeal to alter a charge under section 376, Indian Penal Code, to one under section 366 of the Code, because a charge under the latter section involves different elements and different questions of fact from a charge under section 376. Where the trial Court had framed a charge and convicted the accused under section 376 of the Indian Penal Code and the Sessions Court sitting in appeal having found that that section was not applicable, framed a fresh charge under section 366, called upon the accused to plead, examined him and allowed to adduce evidence and finally convicted him under the fresh charge. *Held*, that the Sessions Court should have set aside the conviction under section 376 and ordered the accused to be committed for trial under section 366. *Emperor* v. *Sankaram Garu*, 8 Bom., L.R., 120—*followed*.

G. C. SINCAR *v.* KING-EMPEROR 68

PERIOD OF DETENTION IN REFORMATORY SCHOOL TO BE DETERMINED IN THE ORDER OF DETENTION : *See* REFORMATORY SCHOOLS ACT, SECTION 11 218

PERSON OUSTED BY COLLECTOR ULTRA VIRES OF HIS POWERS CAN SUE THE PERSON PUT IN POSSESSION OF STATE LAND BY COLLECTOR : *See* BOBABAING, WHETHER VILLAGE LAND CAN BE 147

PERSON PUT IN POSSESSION OF WASTE LAND BY AUTHORISED REVENUE OFFICER CANNOT BE SUED BY PERSON DULY EVICTED : *See* WASTE LAND 171

PLAINT, AMENDMENT OF—*Alteration of claim on appeal from kittima to appatittha adoption, whether and when permissible.* The plaintiff claimed to be a *kittima* adopted child of one L deceased, and in his plaint no alternative cause of action on an *appatittha* adoption was pleaded. On the suit being dismissed, leave was sought on appeal to amend the plaint by the addition of an alternative claim on *appatittha* adoption. *Held*, that while the right of amendment of pleadings has been largely increased in the present Civil Procedure Code—and amendment is now much more freely granted—it remains a matter for discretion, and that discretion must be exercised with regard to all the facts and circumstances of the case. *Held further*, that the causes of action on which the claims to be a *kittima* son and an *appatittha* son are based being widely different, the Court of Appeal by allowing the amendment would be practically ordering a new suit to be commenced afresh and that should not be permitted. *Ma Sa Yi* v. *Ma Me Gale*, 7 B.L.R., 295 ; *Maung Aing* v. *Ma Kin*, 1 Ch. Toon's L.C., 157—*referred to*. *Maung Tha So* v. *Lu Pe*, 11 B.L.T., 246 ; *Shwe Kin* v. *Maung Sin*, 10 L.B.R., 376—*followed*. *Maung Gyi* v. *Maung Aung Pyo*, 2 Ran., 661—*distinguished* ...

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POGGALIKA GIFT OF *kyaung*, DONEE CAN SUE FOR POSSESSION : *See* BUDDHIST ECCLESIASTICAL LAW 193

POINTS FOR CONSIDERATION IN GRANTING BAIL IN NON-BAILABLE CASES : *See* BAIL 538

POLICE, FAILURE OF, TO DO THEIR DUTY WHETHER VITIATES SUBSEQUENT MAGISTERIAL TRIAL : *See* ACCUSED PERSON, WHETHER COMPETENT WITNESS 11

POSSESSION OF LAND, SUIT FOR—*Plaintiff's title based on defendant's delivery of possession to plaintiff's vendors under a contract for sale—absence of registered conveyance from defendant to plaintiff's vendors—Land leased on plaintiff's behalf to defendant by plaintiff's vendors on their sale to plaintiff. Whether defendant entitled to take advantage of the absence of registered conveyance from him to plaintiff's vendors*: A sued to recover from D possession of land which A had purchased from B and C. B and C had themselves obtained possession from D under a contract of sale which however was not completed by the execution of a formal conveyance. On B and C's sale to A the land had been leased by them on A's behalf to D. *Held*, that D cannot resist A's claim by being permitted to take advantage of his own laches in not having completed his contract of sale by executing a conveyance with legal formality in favour of B and C. *Maung Myat Tha Zan v. Ma Dun*, 2 Ran., 285—*followed*.

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POSSESSION, SUIT FOR, BY PRESIDING MONK OF POGGALIKA OR SANGHIKA KYAUNG MAINTAINABLE AGAINST TRESPASSER : *See* BUDDHIST ECCLESIASTICAL LAW 193

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POSTPONEMENT OF A SENTENCE OF IMPRISONMENT AFTER DETENTION IN CIVIL JAIL ILLEGAL : *See* CRIMINAL PROCEDURE CODE, SECTION 250 93

POWER OF COURT TO APPOINT RECEIVER PENDING DECISION AS TO JURISDICTION : *See* RECEIVER, INTERLOCUTORY APPOINTMENT ... 166

PRACTICE—*Civil Procedure Code, Order XXI, Rule 63—Service of summons in original suit effected on person bearing a name other than that shown in plaint—Removal of attachment by applicant upon the ground that the applicant was not the judgment debtor—Declaratory suit, whether would lie to declare plaintiff's right to attach.* The Appellant had filed a suit on two On-demand promissory-notes against one Ma Kwin, but the summons was tendered to the Respondent whose name was not Ma Kwin but Ma Gon. The Respondent thereupon filed a written statement denying that she had borrowed any money from the Appellant or executed any promissory-note in his favour and stating that her name was not Ma Kwin but Ma Gon. The written statement was returned to her and a fresh summons was issued against Ma Kwin. This second summons was also tendered to the Respondent who refused to accept it and an *ex-parte* decree was thereupon passed against Ma Kwin. The Appellant then applied for execution against Ma Kwin *alias* Ma Gon and attached property belonging to the Respondent who succeeded in having it removed upon the ground that she was not Ma Kwin. The Appellant thereupon filed his present suit for a declaration that he had the right to attach the property in question. *Held further*, that the service on

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Jones of a summons addressed to Smith would be good service if Jones had posed as Smith and has had dealings with the plaintiff in the name of Smith.

A.R.P.L. FIRM *v.* MA GUN 515

PRACTICE—*Letters Patent, clause 13—Effect of the Judge, who passed the judgment being on leave—Rule 28 of the Appellate side rules of the High Court.* *Held* that Rule 28 of the Appellate Side Rules of Procedure is *ultra vires* so far as it contemplates that a Judge other than the Judge who passed the judgment, may declare that a case is a fit one for appeal. *Held* that the Letters Patent, clause 13, restrict the grant of a certificate declaring that the case is a fit one for appeal to the Judge who passed the judgment.

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PRACTICE—*Order of the Court directing Receiver to pay a certain sum of money in restitution on his discharge—Appeal whether maintainable against such order—Civil Procedure Code (V of 1908), Order XLIII, Rule 1.* In a mortgage suit where present appellant was defendant, respondent was appointed receiver of appellant's properties. On the suit being dismissed, appellant applied for, and obtained, by way of restitution, delivery of some of the properties and obtained also an order directing respondents to file full accounts of his receiver ship. Appellant having filed objections to the accounts, the Court after due enquiry passed an order directing respondent to pay into Court within a month the sum of Rs. 4,760. Against this order defendant having appealed and respondent also having preferred his memorandum of objections, *held* that no appeal lay from the order in question as it was not one appealable under Order XLIII, Rule 1, of the Civil Procedure Code. *Ganesh Lal v. Kumar Satya*, 4 Pat. L.J., 646; *Palaniappa Chetty v. Palaniappa Chetty*, 65 I.C., 403; *Sambhoutta v. Bagwitty*, 5 Pat. L.J., 97—*followed*. *Shrinivas v. Was*, 45 Bom., 99; *Ziprу v. Hari*, 42 Bom., 10—*distinguished*.

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PRACTICE—*Stay of sale in execution. Refusal to, by Subdivisional Court—Order of District Court, on appeal, postponing confirmation of sale held in execution—Civil Procedure Code (V of 1908), Order XXI, rules 89—91 and section 115. Judgment debtor's remedy under—No right of appeal to District Court against sale—Civil Procedure Code, section 47—Order under, must be conclusive and not contingent—Confirmation of sale imperative if no application made by judgment-debtor to set it aside.* When the Subdivisional Court, having refused to stay execution of decree, has already sold the property attached and the sale is not confirmed, the District Court has no appellate jurisdiction in the matter, and the judgment-debtor's remedy is by way of either an application to the Subdivisional Court under Order XXI, Rules 89—91 or an application for revision to the High Court under section 115 of the Civil Procedure Code. *Held*, that an order passed under section 47, Civil Procedure Code, should conclusively and finally determine the rights of the parties with regard to the matters in controversy and should not be contingent upon future events. *Held also*, that in the absence of an application by the judgment-debtor either under Order XXI, Rules 89—91, or under section 115 for revision, the executing Court has no alternative but to confirm the sale. *Asimuddi Sheik v. Zandari Bibi*, 38 Cal., 339—*followed*. *Umesh Chandra Dass v. Shib Narain Mandal*, 31 Cal., 1011—*referred to*.

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PRELIMINARY ORDER NOT STATING THE PERIOD OF RESTRICTION, EFFECT OF: *See* HABITUAL OFFENDERS' RESTRICTION ACT, SECTION 7 74

PRELIMINARY ORDER TO BE SERVED ON THE ACCUSED AND TO BE POSTED ON THE LAND: *See* CRIMINAL PROCEDURE CODE, SECTION 145 ... 169

PRESENTATION FOR REGISTRATION BY A PLEADER WHO HOLDS NO POWER OF ATTORNEY FOR SUCH PRESENTATION IS A PRESENTATION BY AN UNAUTHORISED PERSON: *See* REGISTRATION ACT, SECTIONS 32, 33 398

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SECTION 8 (2)—*Order refusing to issue a commission for examination of a witness whether appealable—"Judgment," definition of—Civil Procedure Code, Order XLIII, Rule 1, and Letters Patent, clause 13.* For an order made in exercise of the Ordinary Original Civil Jurisdiction to be appealable, it must come either under Order XLIII, Rule 1, of the Civil Procedure Code, or be a judgment within the meaning of clause 13 of the Rangoon High Court Letters Patent. Appellant who was adjudicated an insolvent petitioned to have the adjudication annulled. For purposes of his petition he applied for the issue of a commission to Madras for his examination but the learned Judge sitting in Insolvency on the Original Side of the High Court refused to issue the commission. Appellant preferred an appeal against the order of refusal contending that the Presidency Towns Insolvency Act, section 8 (2), clause (f), read with clause 13 of the Rangoon High Court Letters Patent gave him the right of appeal. *Held* that as the order appealed from could not be said to determine any right or liability between the parties, it was not a "Judgment" within the meaning of clause 13 of the Letters Patent and was not therefore appealable. *Yeo Eng Byan v. Beng Seng & Co.*, I.L.R., 2 Ran., 469—*followed*. I.L.R., 25 Mad., 26—*dissented from*.

P. ABDUL GAFFOOR *v.* THE OFFICIAL ASSIGNEE 603

PRESIDENCY-TOWNS INSOLVENCY ACT, SECTIONS 13 (8), 13 (2), 17, 21 AND 23—*Withdrawal of the petition by debtor, whether allowable after adjudication.* *Held* that under the Presidency-Towns Insolvency Act, 1909, the debtor cannot withdraw his petition in Insolvency after he has been adjudicated and that his proper remedy would be by way of an application for the annulment of the adjudication. *In re Hester*, (1889) 22 Q.B.D., 632—*referred to*. *In the matter of Maghraj Gangabux*, 38 Bom., 202—*followed*. *Williams' Bankruptcy Practice*, 12th Edition—*referred to*.

MAUNG MYINT *v.* OFFICIAL ASSIGNEE 313

PRESIDENCY-TOWNS INSOLVENCY ACT, SECTION 18 (3) 187

PRESUMPTION OF GOOD FAITH AND IN THE INTEREST OF CLIENT: *See* PRIVILEGE OF ADVOCATE 524

PREVIOUS ATTEMPTS RELEVANT TO PROVE MOTIVE: *See* ACCUSED PERSON, WHETHER A COMPETENT WITNESS 11

PRINCIPAL AND AGENTS' ACCOUNT: *See* ACCOUNT—STATED ... 1

PRIVILEGE OF ADVOCATE—*Defamation—Statements made in the course of Judicial proceedings not absolutely privileged at Criminal Law—Penal Code (XL of 1860), sections 5 and 499, exception 9—Presumption of statement made in good faith and on instruction in the protection of client's interest.* There is no basis for the doctrine that the Legislature, in enacting the Indian Penal Code, intended to leave untouched the provision of the English Common Law on the question of defamation. Section 499 of the Code is meant to be universal in its application. Consequently,

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for purposes of fixing criminal liability the English Law of absolute privilege does not apply in this country to statements of advocates in judicial proceedings. *Held*, that when a complaint is made against an advocate or legal practitioner for defamation in respect of a statement made in the course of a judicial proceeding it is the duty of the Court to presume that the statement was made on instruction and in good faith and for the protection of his client's interest, and that unless circumstances clearly show that the statement complained of as defamatory was made wantonly or from malicious or private motive, the complaint should not be entertained. *Baboo Gonesh Dutt Singh* v. *Mugneeram Chowdhry*, 11 Beng. L.R., 321; *Emperor* v. *Purshottamdas Ranchhoddas*, 9 B.L.R., 1287; *Meer Burke* v. *Maung Hla Pe*, 3 U.B.R., 10; *Munster* v. *Lamb*, 11 Q.B.D., 588; *Nikunja Behari Sen* v. *Harendra Chandra Sinha*, 41 Cal., 514—*referred to*. *Mya Thi* v. *Henry Po Saw*, 3 L.B.R., 265; *Satish Chandra Chakravarti* v. *Ram Dayal De*, 46 Cal., 388; *Upendra Nath Bagchi* v. *Emperor*, 36 Cal., 375—*followed*. In re *Venkata Reddy*, 36 Mad., 216; *Sullivan* v. *Norton*, 10 Mad., 28—*dissented from*.

McDonnell v. King-Emperor 524

Privy Council, Appeal to, High Court alone could order stay of execution: *See* Civil Procedure Code, Order XLV, Rule 13 158

Probate, Grant of may be revoked in review: *See* Advocate, authority of, to make admission 261

Profits arising from contracts made in the United Kingdom for insurance of cargoes consigned from India, whether liable to India Income-tax 614

Promissory-note, Suit on—*Alternative cause of action on the original consideration, not pleaded—Defence, a denial of execution of the note but admission of receipt of the original consideration—Whether plaintiff can succeed on original cause of action.*—An amendment of pleadings can be allowed at any stage of the proceedings, where the sole result of a refusal would be to force the plaintiff to another suit, to avoid which is one of the principal objects of the much wider rules as to amendment which has been introduced in the present Code of Civil Procedure. The plaintiff filed a suit on a promissory note the execution of which he failed to prove. The defendant, whilst denying execution of the note, admitted receipt of the original consideration. No alternative cause of action on the original cause of action was pleaded in the plaint. *Held*, that the plaint could be amended at any stage of the proceedings by the addition of an alternative plea and that the plaintiff be given a decree on the original consideration after the necessary amendment of his plaint. *Maung Kyi* v. *Ma Ma Gale*, 10 L.B.R., 54—*referred to*.

Maung Shwe Nyat v. Maung Po Sin and one ... 183

Property inherited by Burmese Buddhist husband after marriage, share of wife or wives therein: *See* Buddhist Law 322

Protection Order, absence of, where judgment-debtor adjudicated after institution of execution proceedings: *See* Arrest of Judgment-debtor 157

Protection of one's own rights, negatives malice: *See* Malicious Prosecution 62

Provincial Insolvency Act (V of 1920), Section 28 (2)—*Discharge, refusal of, whether terminating the proceedings*. *Held*, that when the Court under the provision of section 42 of the Provincial Insolvency Act refused the discharge of an insolvent, the proceedings had terminated as far as the Court was concerned; and that

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section 28 (2) of the Act would not be a bar to an application in execution.

MAUNG PO TOKE *v.* MAUNG PO GYI 492

PROVINCIAL INSOLVENCY ACT, SECTIONS 37 (1) AND 53 : *See* INSOLVENCY 201

PROVINCIAL SMALL CAUSE COURT ACT (IX OF 1887), SECTION 25—*Jurisdiction of the High Court to interfere with findings of facts.* The Legislature intended to confer the most ample discretion on the High Court. Section 25 of the Provincial Small Cause Court Act is very vaguely, and intentionally vaguely, worded. The phrase 'according to law' cannot be held to exclude cases in which there has been a grossly erroneous decision on fact. *Held*, that unless it can be shown that the decisions on fact arrived at by the trial Judge were so perverse as to lead to a conclusion that the Judge made no serious attempt to deduce them from the evidence before him, the High Court will not interfere in revision on questions of fact, under section 25 of the Provincial Small Cause Court Act. Nor will the High Court interfere in revision on the ground that there had been substantial injustice due to an erroneous decision on facts, for to do so would make it practically a Court of Appeal from the Small Cause Court. *Poona City Municipality* v. *Ramji Raghannath*, 21 Bom., 250—*referred to*. *Lieut-Colonel J. G. Turner* v. *Jagmohan Singh*, 27 All., 531 ; *Nathuram Shivnarayan* v. *Dhularam Hariram Marwadi*, 44 Bom., 292—*followed*. *Hurdutory Nandalall* v. *Burma Railways Company, Limited*, 7 B.L.R., 241 ; *Maung Ba Kin* v. *Maung Hpaw*, 10 B.L.R., 298 ; *Subramonian Chetty and others* v. *D.D. Coath*, 7 B.L.R., 15—*dissented from*.

SIVA DASS DEY *v.* ASHABI AND ONE 471

PUBBAKA CHILDREN, SHARE OF, WHEN THERE IS NO ISSUE OF THE SECOND MARRIAGE : *See* BUDDHIST LAW 549

PUBLIC PROSECUTOR'S CERTIFICATE FOR PROSECUTION OF APPROVER REQUIRED ONLY AT THE TRIAL AT THE SESSIONS : *See* APPROVER, PROSECUTION OF 55

PUNISHABLE WITH DEATH OR TRANSPORTATION FOR LIFE, MEANING OF : *See* BAIL 538

PUPILS WHEN TO BE CONSIDERED UNDER THE AUTHORITY OF THE SCHOOLMASTER : *See* SCHOOLMASTER 659

PWE, WHETHER AMATEUR AYAT-ZAT PERFORMED FOR PUBLIC ENTERTAINMENT IS A 514

RANGOON RENT ACT, 1919—*Rent Controller of Rangoon, not a Civil Court—High Court, whether having jurisdiction to revise the orders of the Rent Controller refusing a certificate under section 15 of the Rent Act—Code of Civil Procedure, section 115—Government of India Act—section 107.* *Held* (by Rutledge and Heald, JJ., Robinson, C.J., dissenting) that the Rent Controller of Rangoon is not a Court and that the High Court has no jurisdiction to interfere directly in revision with orders passed by the Rent Controller, Rangoon, refusing to grant a certificate certifying the standard rent under section 15 of the Rangoon Rent Act. *Held* (by Robinson, C.J.,) that the Rent Controller is a Court within the general superintendence, which is given to all High Courts over all Courts subordinate to them ; that the refusal to exercise the jurisdiction conferred upon him is a case within the meaning of section 115 of the Code of Civil Procedure ; that it is a decision of a Court subordinate to the High Court, that, therefore, it is opened to the High Court, in a suitable case, to consider that decision in exercise of its

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powers of revision ; but that, in any case, it is open to the High Court to do so in exercise of the general powers of superintendence conferred on it by section 107 of the Government of India Act. *Balakrishna Udayar v. Vasudeva Ayyar*, 40 Mad., 793 ; *Mahomed Ebrahim Moolla v. S. R. Jamiass*, 11 L.B.R., 387—*referred to*. *Allen Bros. & Co. v. Banda & Co.*, 49 Cal., 931 ; *Bala Krishna Pramanik v. A. K. Roy*, 26 C.W.N., 30 ; *Chatterjee v. Tribedi*, 26 C.W.N., 78 ; *India Engineering & Motor Co. v. Gladstone Wyllie & Co.*, 26 C.W.N., 102 ; *Kali Dasi v. Kamia Lal De*, 26 C.W.N., 53 ; *Nilmoni v. Taranath*, 9 Cal., 295—*distinguished*.

K. A. M. MOHIDEEN *v.* BUKSHI RAM 410

RECEIVER, APPOINTMENT OF, SUO MOTU, BY COURT : *See* ATTACHMENT OF RENTS OF HOUSES, NOT YET ACCRUED 235

RECEIVER, DIRECTION TO, TO PAY INTO COURT A CERTAIN SUM, WHETHER APPEAL LIES AGAINST 318

RECEIVER, INTERLOCUTORY APPOINTMENT OF—*Court's jurisdiction to entertain the suit challenged—Receiver* pendente lite *could be appointed by the Court without coming to a finding on jurisdiction.* The plaintiff instituted a suit in the High Court praying for dissolution of a partnership, the partnership contract having been made in Rangoon but the partnership property being a pawnshop situated at Thônzè—a place outside the original jurisdiction of the High Court. On an interlocutory application, the plaintiff applied for the appointment *pendente lite* of a receiver of the partnership property. In his written statement the defendants urged that the Court had no jurisdiction in the suit and on the interlocutory application also he pleaded that the Court had no jurisdiction to appoint a receiver. *Held* that the Court has seizin of the suit and its subject matter till it gives its decision on the question of jurisdiction and that therefore it must of necessity have jurisdiction to pass the necessary interlocutory orders and therefore to appoint a receiver *pendente lite* under proper circumstances. *Kink v. Baldeo Dass*, 26 Cal., 715 ; *The Delhi and London Bank v. Wordie* 1 Cal., 249—*referred to*. *Woodroffe on Receivers*, 2nd Edition—*referred to*.

KIN FOO *alias* WHEE FONG *v.* WHEE SEIK CHENG ... 196

RECEIVER NOT ENTITLED TO PROCEED WITH SUIT TO SET ASIDE TRANSFER AFTER ANNULMENT OF ADJUDICATION : *See* INSOLVENCY 201

RECITAL AND OPERATING PART OF A DEED, VARIANCE BETWEEN : *See* CONSTRUCTION OF DOCUMENT 53

REFORMATORY SCHOOLS ACT (VIII OF 1897), SECTION 11—*Age of the accused to be determined before ordering his detention in a Reformatory School—Period of detention also to be fixed—Finding of suitability of accused for such detention also necessary.* Before sending a youthful offender to a Reformatory School, the Court must come to a clear finding as to his age and that he is a fit and proper person to be an inmate of such a school and it must also fix the period of his detention.

KING-EMPEROR *v.* SEIN CHAUNG 218

REFUSAL TO STAY SALE IN EXECUTION HOW QUESTIONED : *See* PRACTICE 132

REGISTRATION ACT, SECTION 17 (1) (*a*) AND (*b*) : *See* TENANT, AGREEMENT EXECUTED BY 379

REGISTRATION ACT (XVI OF 1908), SECTIONS 32, 33—*Presentation for registration made by Advocate for the transferee—Admission of execution before an officer not competent to accept presentation Effect of.* *Held*, that the presentation, of a document for

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registration by a pleader who held no power of attorney for such is a presentation by an unauthorised person and that therefore the registering officer has no jurisdiction to register the document. *Held, further*, that the admission of execution to an officer to whom a commission under section 38 of the Registration Act was issued, being an admission before an office not competent to accept the document for registration, would not cure the defect in presentation and would not make the document legally registered. *Jambu Prasad* v. *Mohamed Aftab Ali Khan*, 37 All., 49 ;—*Khalil-ud-din Ahmed* v. *Bani Bibi*, 35 All., 34—*followed*. *Bharat Indu* v. *Hamid Ali Khan*, 42 All., 487—*distinguished*.

HALIMA BEE BEE *v.* KHAIRUNNISSA BEE BEE 398

RELATIONSHIP BETWEEN TRANSFEROR AND TRANSFEREE NOT CONCLUSIVE EVIDENCE OF FRAUD : *See* FRAUDULENT CONVEYANCE 71

REMAND, AN ORDER OF, WHEN APPEALABLE—*Order made under Order XLI, Rule 23, of the Civil Procedure Code*. *Held*, that under Order XLIII, Rule 1 (*u*), of the Civil Procedure Code a right of appeal exists against an order of remand only if the order is made under Order XLI, Rule 23, that is to say when the trial Court has disposed of the suit on a preliminary point. *Ma E Hmyin* v. *Ba Maung*, 2 Ran., 123—*referred to*.

MA ME MYA *v.* MA MIN ZAN 490

REMOVAL OF ATTACHMENT ON THE GROUND THAT THE APPLICANT WAS NOT THE JUDGMENT-DEBTOR WHETHER A DECLARATORY SUIT WOULD LIE AGAINST : *See* PRACTICE 515

RENT CONTROLLER NOT A CIVIL COURT : *See* RANGOON RENT ACT, 1919 410

RENT OF LAND, SUIT FOR, WHETHER SUIT OF A SMALL CAUSE NATURE—*Rent suit not a suit relating to immoveable property—Burma Courts Act, 1922, section 11—Civil Procedure Code (V of 1908), section 102*. A rent suit is a suit on contract for an ascertained sum and no question of title to the property necessarily arises. Rent is not in any strict sense a right or interest in immoveable property. *Held*, therefore, that a suit for rent of agricultural land is not a suit relating to immoveable property and that if the amount involved does not exceed rupees five hundred, a second appeal would not lie. *Ma Dun* v. *Ma Pu*, 2 L.B.R., 124 ; *Shiba Haldar* v. *Gopi Sundari Dassi*, 24 Cal., 449—*distinguished*. *Kaung Hla Pru* v. *San Pon*, 3 L.B.R., 90 ; *Sahadara Mudali* v. *Nobin Chand Bysak*, 42 Cal., 630—*dissented from*. *Swaminathan Ayyar* v. *Somasundaram Naickar*, 23 Mad., 547—*followed*.

MA PAN *v.* MAUNG NE U 390

REX GENTAR—*Statements of members of an assembly made at the time—Such evidence whether admissible to prove unlawful purpose in a charge against promoters under sections 325, 326 and 149 of the Penal Code (XLV of 1860)*. According to Burman Buddhist ideas, he who dons the yellow robe has one or two duties to perform, to practise austerities and meditation in order to work out his own salvation or learn the sacred scriptures and to impart the knowledge to others : when a *pongyi* performs neither of the said duties he is no longer entitled to live on the offerings of the laity, nor to receive respect from them. He has no *raison d'être*. In attempting to oppose the orders of the executive, he is not only breaking his own personal law but is setting an example to the laity which is greatly to be lamented. As for the laymen, in the words of the pronouncement of the *Thathanabaing* in Council in 1226 B.E., those who support *pongyis* who do not

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live in accordance with the *Vinaya* are but watering a poison tree which will prove fatal to themselves. The promoters of an assembly consisting of *pongyis* and laymen were charged with an offence under sections 325, 326, *read* with section 149 of the Indian Penal Code in that they entered into a conspiracy to overawe the police and disobey their lawful orders, that there was an unlawful assembly in consequence with the common object, as above, and that in pursuance of such common object offences under sections 325 and 326 were committed by the members of the assembly. *Held*, that evidence of statements made by members of the assembly, of their determination to force their way through the police formed evidence of a part of the *res gestae* and was admissible to indicate that the promoters' intention to ignore the police orders had been communicated to sections of the crowd.

MAUNG TOK AND TEN *v.* KING-EMPEROR 352

RES JUDICATA—*Parties co-defendants in a previous suit—Necessary condition for the application of the rule of Res Judicata—Co-heir in peaceful possession of the land for thirty years after obtaining it by litigation—Limitation Act (IX of 1908), Article* 123. For an adjudication to be *Res Judicata* as between co-defendants, there should be a conflict of interest between the co-defendants, *inter se*, which should be necessary to decide in order to give the plaintiff a relief appropriate to his suit and the judgment should contain a decision of the question raised as between the co-defendants. The appropriate Article of the Limitation Act for suits against co-heirs for shares in the corpus of an inheritance is Article 123. *Gangaram Balkrishna v. Vasudeo Dattatrya*, 47 Bom., 535; *Jadas Chandar Sarkar v. Kailash Chandra Singha*, 25 C.L.J., 322; *Maung Po Kin v. Maung Shwe Bya*, 1 Ran., 405; *Mahra v. Devi Ditta Mal*, 7 Lah., 88; *Nga Thet Tha v. Mi Kye Gyi*, II U.B.R., (1907-09), Civil Procedure Code 5; *Ram Chandra Narayan v. Narayan Mahdev*, 2 Bom., 21—*followed.*

MA TOK AND NINE *v.* MA YIN AND SEVEN 77

RESILEMENT OF APPROVER FROM A STATEMENT ON OATH TAKEN BEFORE EXAMINATION IN COMMITTAL COURT: *See* PENAL CODE, SECTION 193 224

RESTITUTION OF CONJUGAL RIGHTS, DECREE FOR, NOT NECESSARILY VOIDING MAINTENANCE ORDER: *See* MAINTENANCE ORDER WHETHER DISCHARGED BY DECREE FOR RESTITUTION OF CONJUGAL RIGHTS 150

RESTRICTION, ORDER OF, NOT TO BE ADDED TO SENTENCE UNDER SECTION 18, HABITUAL OFFENDERS' RESTRICTION ACT ... 165

RESTRICTION, PERIOD OF, NOT STATED IN PRELIMINARY ORDER: *See* HABITUAL OFFENDERS' RESTRICTION ACT, SECTION 7 ... 64

REVIEW, POWER OF COURT, TO REVOKE PROBATE ON: *See* ADVOCATE, AUTHORITY OF, TO MAKE ADMISSION 261

REVISION, PASSING AN ORDER UNDER A RULE NOT APPLICABLE THERETO A GROUND FOR: *See* ADMINISTRATION OF AN ESTATE 211

REVISIONARY JURISDICTION OF THE HIGH COURT—*Exercise by the Chief Judge, Small Cause Court of the powers conferred by section 14 of the Rangoon Municipal Act (Burma Act VI of 1922)—The Chief Judge, not a Court but a persona designata.* *Held* that the Chief Judge of the Rangoon Small Cause Court, in performing the functions assigned to him by section 14 of the Rangoon Municipal Act, acts as a *persona designata* and not as a Court and that the High Court has no jurisdiction either under section 115 of the

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Civil Procedure Code or under section 107 of the Government of India Act to interfere in Revision with his decisions. *In re Royal Aquarium*, (1892) Q.B., 134 ; *Manavala Govindan* v. *Kumarappa Reddy*, 30 Mad., 326 ; *Vasudeva Iyer* v. *Negapatam Devasthanam Committee*, 38 Mad., 594 ; *National Telephone Co* v. *The Post Master-General*, (191-) A.C., 540—*referred to*. *Balaji Sankaram* v. *Nowroji*, 21 Bom., 279 ; *R.S. Nanalkar* v. *Mrs. Sarojini Naidu*, 25 Bom., L.R., 463 ; *The Municipality of Belgaum* v. *Subbarayan*, 40 Bom., 509 ; *Vijarangam Pillay* v. *Thyagaraja Chetty*, 38 Mad., 581—*followed*. *Balakrishna* v. *Vasudeva*, 40 Mad., 793 ; *Kakku Parthasaradhi* v. *Chintli Cheruvu Koteswara*, 47 Mad., 369 ; *Ramaswami Govindan* v. *Muthu Velapa*, 46 Mad., 536—*distinguished*.

THE MUNICIPAL CORPORATION OF RANGOON v. M. A. SHAKUR ... 560

RIGHTS OF THE OCCUPIER OF WASTE LAND : *See* WASTE LAND ... 171

RIPARIAN OWNER—*Watercourse—Interference by one riparian owner with the closing of a watercourse, causing damage to another riparian owner by flooding his land—An artificial waterway when attached with the incidents of a natural stream—Right of owner of.* The law applicable in Burma to the flow of and flooding by fresh water rivers or watercourses, whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is the same as that in England. A watercourse originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream. The appellants were owners of paddy lands bounded on certain sides by a watercourse which had been made by deepening and widening an ancient natural watercourse. The respondents, whose paddy lands also abutted on the watercourse, had stopped up by a bund the outfall of the watercourse, by which means the water of the watercourse having been denied escape at the proper place, was ponded up, flowed back, flooded the appellants' lands and caused them considerable damage. It was found that the respondents' object in erecting the bund was to protect their own lands from the inflow of the access of some salt water from the sea at flood tide. *Held*, that the respondents were liable to the appellants for the damage caused. *Bailey & Co.* v. *Clark, Son and Morland*, (1902), 1 Ch., 649 ; *Bickett* v. *Morris*, (1866), L.R. H.L., 47 ; *Holker* v. *Porritt*, (1873), L.R., 8 Ex., 107 ; *Ennis* v. *Great Eastern Railway Co.*, (1884) 27 Ch.D., 122, 134 ; *Menzies* v. *Breadalbane (Earl of)*, (1829), 3 Bligh N.S., 414 ; *Nield* v. *The London & North-Western Railway Co.*, (1874), L.R., 10 Ex., 4 ; *Orr Ewing* v. *Colquhoun*, (1877), 2 Appeal Cases, 839 ; *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, (1878), 4 Appeal Cases 121 ; *Sutcliffe* v. *Booth*, (1863), 32 L.J., Q.B., 136 ; *The King* v. *The Commissioners of Sewers for Pagham*, (1828), 8 B. & C., 355 ; *Whaley* v. *The Lancashire & Yorkshire Railways Co.*, (1884), 13 Q.B.D., 131—*referred to*.

MAUNG BYA AND ONE v. MAUNG KYI NYO AND OTHERS ... 494

RIVAL CLAIMANTS TO STATE LAND, POWER OF REVENUE OFFICERS TO ADJUDICATE BETWEEN : *See* HOBARAINS, WHETHER VILLAGE LAND CAN BE 147

RULE 28 OF THE APPELLATE SIDE RULES, ULTRA VIRES : *See* PRACTICE 546

RULES OF DIVISION BETWEEN STEP PARENT AND STEP CHILD DIFFERS WITH THE PRESENCE AND ABSENCE OF A CHILD OF THE SECOND MARRIAGE 549

SALE IN EXECUTION HOW TO BE QUESTIONED : *See* PRACTICE ... 132

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SALE, ORAL, WHETHER TO BE ALLOWED TO BE PROVED WHERE PRIOR TRANSACTION WAS MORTGAGE BY REGISTERED DEED: *See* PART-PERFORMANCE, PLEA OF 243

SALE PROCEEDS OF GOODS EXPORTED TO THE UNITED KINGDOM WITHOUT CONVERSION OR WITH CONVERSION, WHETHER DISTINGUISHABLE FOR PURPOSE OF INCOME-TAX 614

SANCTION UNDER SECTION 196A, CRIMINAL PROCEDURE CODE, WANT OF, EFFECT ON SUBSEQUENT CHARGE ON A SECTION NOT REQUIRING SUCH SANCTION: *See* JURISDICTION, WANT OF, AB INITIO 95

SANGHIKA *Kyaung*, WHETHER SUIT FOR POSSESSION WILL LIE AT THE INSTANCE OF THE PRESIDING MONK: *See* BUDDHIST ECCLESIASTICAL LAW 193

SCHOOLMASTER—*Authority of, to inflict corporal punishment necessary for purposes of school discipline—Pupil when to be considered under authority—Holidays, effect of, on such authority—Bonâ fide action of schoolmaster in inflicting punishment—Indian Penal Code (XLV of 1860), sections 79, 89 and 323.* When a child is sent by its parent or guardian to a school, the parent or guardian must be held to have given an implied consent to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline and the purpose with which the parental authority is delegated to the schoolmaster, who is entrusted with the bringing-up and discipline of the child, must to some extent include authority over the child when it is outside the school walls. But if the school were closed for any length of time for a period of regular holidays, the child would have to be held to have returned to the charge of its parent or guardian and the authority of the schoolmaster would cease. Petitioner A, a schoolmaster, was convicted and fined under section 323 of the Indian Penal Code for caning a school-boy B under his charge. It appeared that while the school was temporarily closed for a period of two days C, a pupil of the school, was assaulted in the night by some other pupils. It also appeared that the pupils were in the habit of attending night classes which ordinarily they would have attended on that night also. On the re-opening of the school, C's mother lodged a complaint with A in consequence of which A held an inquiry and came to the conclusion that B had taken part in the assault. A punished B by giving him some eight or nine strokes with a cane. A was prosecuted under section 323 of the Indian Penal Code. It was not suggested that A was actuated by improper motives or that he was not acting *bonâ fide* in the interest of school discipline or that the punishment was unduly excessive or conducted in other than a humane manner, but it was contended that A was mistaken in his finding that B had taken part in the assault. *Held*, that in the circumstances of the case A had acted within the implied authority delegated to him by the parents or guardian of B and that he must be held to have inflicted the punishment *bonâ fide* for the good of the boy and in the interests of school discipline and therefore he had committed no offence under the provisions of section 323 of the Indian Penal Code. *Cleary v. Booth*, 1 K.B.D., (1893), 465; *R. v. Hopley*, 2 F. & F., 202—*referred to.*

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SENDING OF NOTICE BY PERSON CLAIMING INTEREST IN LAND TO PERSON IN OCCUPATION WARNING HIM NOT TO WORK THE LAND—*Abstention from cultivation by occupier in consequence thereof—*

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Damages, whether cultivator can recover in tort. The Law encourages persons who have *bonâ fide* rights to give notice to other persons who are likely to be affected by such rights; and consequently it is obviously not the policy of the law to presume either malice or *malâ fides* in such cases, but to require clear proof of the same. Defendant claiming to be entitled to certain pieces of land, sent a notice to plaintiff, who was in occupation as tenant of a third party, warning plaintiff to desist from cultivating the land without defendant's permission. Plaintiff, in consequence, refrained from cultivating the land and sued defendant for damages. He adduced no evidence that defendant had acted maliciously or that he was not acting *bonâ fide*. *Held* that on the facts no cause of action for the recovery of damages had been made out. *Derry* v. *Peek*, (1889), 14 A.C., 337; *Halsey* v. *Brotherhood*, (1881), 19 Ch.D., 386; *Hargrave* v. *LeBreton*, 98 Eng. Rep. 27; *Pater* v. *Baker*, 3 C.B., 831—*referred to.*

MAUNG PO KA *v.* MAUNG SAN PE 295

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SERVICE OF SUMMONS INVALID IF MADE BY OTHER THAN AN OFFICER OF THE COURT: *See* MINOR, SUIT BY 239

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SESSIONS COURT, POWER OF, TO ACCEPT IRREGULAR COMMITTAL: *See* APPROVER, PROSECUTION OF 55

SETTING ASIDE EX PARTE DECREE, APPLICATION FOR, NOT A CONDITION PRECEDENT TO SUIT TO SET ASIDE DECREE FOR FRAUD: *See* EX PARTE DECREE 65

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das Mehta v. *Chan Ma Lhee*, 42 I.A., 122 ; *Shaw* v. *Foster*, (1872), L.R., 5 H.L., 321—*referred to.*

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WASTE LAND—*Rights of the temporary occupier—Eviction by duly authorised Revenue Officer—Suit for possession against person put in possession by such Officer—Lower Burma Land and Revenue Act (II of 1876), sections 19 and 56 and Rules 51 and 52.* The Civil Courts have jurisdiction to entertain disputes between private persons as to the right to occupy land over which no landholder's rights have been acquired. A temporary occupier of waste land paying revenue therefor to the Government, is in the position of a tenant-at-will of the Government. The plaintiffs in the present suit, being neither grantees, lessees nor persons having the status of landholder, were in possession of the land in suit and were paying revenue for it to the Government. On the application of the defendants, the Deputy Commissioner, as the Revenue Officer under the Lower Burma Land and Revenue Act, ordered that the plaintiffs must vacate the land at the conclusion of the cultivation season and that possession must be given to the defendants. Accordingly, the plaintiffs gave up and the defendants entered into possession of the land. The plaintiffs subsequently sued for possession in the Civil Court. *Held*, that the plaintiffs, who were merely tenants-at will of the Government, having acquiesced in the orders of their landlord represented by the Deputy Commissioner as the Revenue Officer and given up

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possession, had no longer any rights to the land to enforce against the defendants who had entered into possession with the consent of the plaintiffs' landlord. *Maung Naw* v. *Ma Shwe Hmut*, 8 L.B.R., 227—*followed*.

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