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.

REPORTED BY

Privy Council ... A. M. TALBOT (*Inner Temple*).

High Court, Rangoon { J. C. BILIMORIA (*Lincoln's Inn*), ED
G. R. RAJAGOPAUL.

GENERAL INDEX

TO

VOL. X—1932.

Published under the authority of the Governor BY AUTHORITY
by the Supdt., Govt. Printing and Stationery, Burma, Rangoon.

CORRIGENDA.

(1) Page 73, line 1, *for* of *read* or.

(2) Page 111, The extract quoted from the judgment of Maung Ba, J. ends with line 8. *Read* the sentence commencing with "Whether an individual Chinese is a Buddhist or not, etc." as a continuation of the judgment of Page, C.J.

(3) Page 227, line 22, *for* Yannadhamma *read* Vannadhamma.

(4) Page 303, line 12 from bottom, *for* the words „ *et nos*" *read* "*nos et*".

(5) Page 307, line 5, *after* the words "present case" *add* "in which".

(6) Page 310, line 8, *for* mortgagees *read* mortgages.

(7) Page 312, headnote in the case of KING-EMPEROR *v.* U SAN WIN: In the first sentence *after* the words "An appeal" *add* the words "on the facts" and *delete* the second sentence "The High Court ought not . . . . . the appraisement of evidence".

(8) Page 396, headnotes, line 2, *for* limits *read* limit.

THE HIGH COURT, 1932.

1st January to 31st December.

CHIEF JUSTICE.

Hon'ble Sir ARTHUR PAGE, Kt. (On leave from 4th August to 1st September).

Hon'ble Sir JOHN ROBERT ELLIS CUNLIFFE, Kt., *Barrister-at-Law* (Officiating from 4th August to 1st September).

PUISNE JUDGES.

Hon'ble Sir BENJAMIN HERBERT HEALD, Kt., I.C.S. (On leave from 12th May).

Hon'ble Sir WILLIAM CARR, Kt. I.C.S. (On leave from 4th January).

Hon'ble Sir JOHN ROBERT ELLIS CUNLIFFE, Kt., *Barrister-at-Law* (On leave from 14th November).

Hon'ble JYOTIS RANJAN DAS, *Barrister-at-Law* (On leave from 14th November).

Hon'ble ROBERT EDWARD OTTER, *Barrister-at-Law* (Died at Rangoon on 14th October).

Hon'ble MYA BU, *Barrister-at-Law.*

Hon'ble HAROLD ARROWSMITH BROWN, *Barrister-at-Law*, I.C.S.

Hon'ble JOHN MINTY BAGULEY, *Barrister at-Law*, I.C.S.

Hon'ble SURENDRA NATH SEN, *Barrister-at-Law* (On leave from 2nd May to 1st September).

Hon'ble ARCHIE GERARD MOSELY, I.C.S. (Officiating from 4th January. Permanent from 10th February).

Hon'ble BA U, *Barrister-at-Law* (Permanent from 29th April).

Hon'ble HERBERT FRANCIS DUNKLEY, *Barrister-at-Law*, I.C.S. (Officiating from 14th November).

Hon'ble JOSEPH SHAW, *Barrister-at-Law* (Officiating from 2nd May to 1st September and from 14th November).

Hon'ble HERBERT HODDY MACKNEY, I.C.S. (Officiating from 21st November).

Mr. A. EGGAR, *Barrister-at-Law*, Government Advocate (On leave from 8th April to 7th October).

Mr. CLIVE HERBERT GAUNT, Assistant Government Advocate (On leave from 18th November).

U TUN BYU, *Barrister-at-Law*, Assistant Government Advocate.

Mr. E. W. LAMBERT, *Barrister-at-Law*, Officiating Assistant Government Advocate.

TABLE OF CASES REPORTED.

CIVIL REVISION.

CRIMINAL REFERENCE.

APPELLATE CRIMINAL.

TABLE OF CASES CITED.

REFERRED TO.

DISCUSSED.

DISTINGUISHED.

APPROVED.

FOLLOWED.

DISSENTED FROM OR OVERRULED.

GENERAL INDEX

OF

CASES REPORTED IN THIS VOLUME.

PAGE

Per OTTER and BROWN, JJ.—S. 56 of the (Lower) Burma Land and Revenue Act, 1876, is no bar to the jurisdiction of the Civil Courts to decide claims against Government in respect of land, title to which is based on grants issued under rules framed under s. 18 of the Act, and accretions to which are claimed under the general law. In re *Maung Nee* v. *Ma Shwe Hmit*, 8 L.B.R. 227—*distinguished*. Submergence of land does not destroy the title of its owner unless he abandons it. Mere non-payment of revenue is not a sufficient proof of an intention to abandon land. *Arun Chandra* v. *Kamini*, I.L.R. 51 Cal. 683; *Hannath Dutt* v. *Ashgar*, I.L.R. 4 Cal. 894; *Lopez* v. *Thakoor*, 13 M.I.A. 467; *Maharaja of Vizianagram* v. *Secretary of State for India*, I.L.R. 49 Mad. 249; *Mochar Rai* v. *Ramgat*, I.L.R. 18 All. 290; *Ramnandas* v. *Jaigovind*, I.L.R. 2 Pat. 839—*followed*. *Per* DAS and OTTER, JJ. (BROWN, J., dissenting).—The English law of accretion applies in Burma as a matter of justice and equity, provided that it is not excluded by the natural features, or by the nature of the tenure. The nature of the property claimed in the present case, its growth and user, and the general condition of rivers in Burma allowed the application of the English law of accretion. Neither the terms of the grants, nor the Burma Land and Revenue Act and the Rules thereunder, prohibited a landholder from claiming accretion. *Per* BROWN, J.—A grant by Government for the purposes of *dhani* cultivation of a small defined piece of land arising above low water in a large tidal river and entirely covered by high water did not give the grantee the right to claim title by accretion to any further land which may arise above low water-mark. The English law of accession in its entirety could not be applied owing to the special conditions of Burma, and the grants in this case were never intended to cover more than the land actually granted. *Attorney-General of S. Nigeria* v. *John Holt & Co.*, (1915) A.C. 599; *Attorney-General* v. *Jones*, 158 Eng. Rep. 144; *Brighton & Hove Gas Co.* v. *Hove Bungalows, Limited*, (1924) 1 Ch. Div. 372; *Duke of Beaufort* v. *Mayor of Swansea*, 154 Eng. Rep. 905; *Foster* v. *Wright*, (1878) 4 C.P.D. 438; *Freeman* v. *Fairlie*, 1 M.I.A. 305; *Gann* v. *Free Fishers of Whitstable*, 11 H.L.C. 192; *Gifford* v. *Lord Yarborough*, 5 Bing. 163; *Hindson* v. *Ashby*, (1896) 2 Ch. 1; In re *The Hull and Selby Railway*, 5 M. & W. 327; *Khan Bahadur Mekrban Khan* v. *Mahhna*, 34 C.W.N. 529; *Lopez* v. *Muddun Mohun Thakoor*, 13 M.I.A. 467; *Lyon* v. *Fishmonger's Company*, (1876) 1 Ap. Cas. 662; *Maung Bya* v. *Maung Kyi Nyo*, I.L.R. 3 Ran. 494; *Micklethwait* v. *Newlay Bridge Company*, 33 Ch. Div. 133; *Rex* v. *Yarborough*, 3 B. & C. 91; *Scratton* v. *Brown*, 4 B. & C. 485; *Secretary of State for India* v. *Kadirikutti*, I.L.R. 13 Mad. 369; *Secretary of State for India* v. *Raja of Vizianagram*, I.L.R. 40 Mad. 1083 and I.L.R. 45 Mad. 207; *Sri Balusu* v. *Collector of Godavari District*, I.L.R. 22 Mad. 464; *Waghela* v. *Masludin*, I.L.R. 11 Bom. 551—*referred to*.

PAGE

PAGE

PAGE

PAGE

G.B.C.P.O.—No. 55, H.C.R., 21-12-32—3,000.

THE INDIAN LAW REPORTS

Rangoon Series.

APPELLATE CIVIL.

Before Mr. Justice Otter and Mr. Justice Brown and before Mr. Justice Das.

FOUCAR AND COMPANY, LTD.

1930

May 28.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS.*

Burma Land and Revenue Act (II of 1876), ss. 18, 56—Claims by grantees against Government—Jurisdiction of Civil Courts—Accretions—Application of English Law—Natural features—Tenure of land—Accession to land above low water in tidal river—Submergence—Non-payment of revenue—Abandonment.

The appellant Company sued Government in respect of an island in the Pegu River which had been formed by gradual silting up in the river. From 1894 onwards grants were made by Government, under the provisions of the Burma Land and Revenue Act, to various persons, piece by piece as the island grew. The grants ultimately passed by various assignments into the hands of the Company. Since the original grants were made, erosions took place in some parts, fresh land was added in other parts by alluvion, and also portions previously eroded were reformed. The Company now claimed the whole island with its accretions and reformations.

Government contended that the Civil Courts had no jurisdiction to entertain the suit, that the Company had abandoned the submerged pieces of land by not paying revenue thereon, and that the Company had no title to the accretions, the English law of accretions being inapplicable.

Per OTTER and BROWN, JJ.—S. 56 of the (Lower) Burma Land and Revenue Act, 1876, is no bar to the jurisdiction of the Civil Courts to decide claims against Government in respect of land, title to which is based on grants issued under rules framed under s. 18 of the Act, and accretions to which are claimed under the general law.

In re Maung Naw v. *Ma Sikwe Hmi*, 9 L.B.R. 227—*distinguished.*

Submergence of land does not destroy the title of its owner unless he abandons it. Mere non-payment of revenue is not a sufficient proof of an intention to abandon land.

Arun Chandra v. *Kamini*, I.L.R. 51 Cal. 683; *Hemnath Dutt* v. *Ashgar*, I.L.R. 4 Cal. 894; *Lopez* v. *Thakoor*, 13 M.I.A. 467; *Maharaja of Vizianagram*

* Civil First Appeal No. 151 of 1928 from the judgment of the District Court of Insein in Civil Regular No. 22 of 1927.

1930

FOUGAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

v. *Secretary of State for India*, I.L.R. 49 Mad. 249 ; *Mazhar Rai* v. *Ramgat*, I.L.R. 18 All. 290 ; *Ramnandas* v. *Jaigovind*, I.L.R. 2 Pat. 839—*followed*.

Per DAS and OTTER, JJ. (BROWN, J., dissenting).—The English law of accretion applies in Burma as a matter of justice and equity, provided that it is not excluded by the natural features, or by the nature of the tenure. The nature of the property claimed in the present case, its growth and user, and the general conditions of rivers in Burma allowed the application of the English law of accretion. Neither the terms of the grants, nor the Burma Land and Revenue Act and the Rules thereunder, prohibited a landholder from claiming accretion.

Per BROWN, J.—A grant by Government for the purposes of *dhani* cultivation of a small defined piece of land arising above low water in a large tidal river and entirely covered by high water did not give the grantee the right to claim title by accretion to any further land which may arise above low water-mark.

The English law of accession in its entirety could not be applied owing to the special conditions of Burma, and the grants in this case were never intended to cover more than the land actually granted.

Attorney-General of S. Nigeria v. *John Holt & Co.*, (1915) A.C. 599 ; *Attorney-General* v. *Jones*, 159 Eng. Rep. 144 ; *Brighton, and Hove Gas Co.* v. *Hove Bungalows, Ltd.*, (1924) 1 Ch. Div. 372 ; *Duke of Beaufort* v. *Mayor of Swansea*, 154 Eng. Rep. 905 ; *Foster* v. *Wright*, (1878) 4 C.P.D. 438 ; *Freeman* v. *Fairlie*, 1 M.I.A. 305 ; *Gann* v. *Free Fishers of Whitstable*, 11 H.L.C. 192 ; *Gifford* v. *Lord Yarborough*, 5 Bing. 163 ; *Hindson* v. *Ashby*, (1896) 2 Ch. 1 ; *In re The Hull and Selby Railway*, 5 M. & W. 327 ; *Khan Bahadur Mehrban Khan* v. *Mathna*, 34 C.W.N. 529 ; *Lopez* v. *Muddun Mohan Thakoor*, 13 M.I.A. 467 ; *Lyon* v. *Fishmonger's Co.*, (1876) 1 Ap. Cas. 662 ; *Maung Bya* v. *Maung Kyi Nyo*, I.L.R. 3 Ran. 494 ; *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. Div. 133 ; *Rex* v. *Yarborough*, 3 B. & C. 91 ; *Scratton* v. *Brown*, 4 B. & C. 485 ; *Secretary of State for India* v. *Kadirikutti*, I.L.R. 13 Mad. 369 ; *Secretary of State for India* v. *Raja of Vizianagram*, I.L.R. 40 Mad. 1083 and I.L.R. 45 Mad. 207 ; *Sri Balusu* v. *Collector of Godavari District*, I.L.R. 22 Mad. 404 ; *Waghela* v. *Masludin*, I.L.R. 11 Bom. 551—*referred to*.

McDonnell for the appellants. The Law of Accretion applies to all waters non-tidal, tidal, navigable or non-navigable and to the sea : *Foster* v. *Wright* (1) ; *Hindson* v. *Ashby* (2) ; *Sri Balusu Ramalakshmamma* v. *Collector, Godavari District* (3). "Accretion" is merely a particular example of the general civil law doctrine of "accession." *Holt*'s case (4) has now authoritatively decided that the principle on which the doctrine rests is "security and general convenience." In *Brighton & Hove Gas Co., Ltd.* v.

(1) (1878) 4 C.P.D. 438 at pp. 447, 448.
(2) (1896) 2 Ch. 1.
(3) I.L.R. 22 Mad. 404.
(4) (1915) A.C. at p. 613.

1930

FOUCAR AND COMPANY, LTD v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Hove Bungalow, Ltd. (1), it was held, following the *Rajah of Vizianagram*'s case (2), that the rule applies even when the former land boundary is readily ascertainable. In the *Rajah of Vizianagram*'s case relating to a lanka in the tidal portion of the river the Privy Council treated the description of the non-tidal portion which was in question in *Sri Balusu Ramalakshmamma*'s case as equally true of the tidal portion. The description in *Sri Balusu*'s case shows that during the flood season the lankas are totally submerged. The only distinction between the lankas in the tidal portion and the island here is that in the case of the lankas the submersion is by fluvial flood and continuous for a certain length of time, whereas here the submersion is by tidal action and periodic. This seems to be a distinction without a difference. Island and lanka are both land, permanently appropriated and used and paying revenue as such. Both receive an increment by the natural operation of flowing water. Every consideration of "security and general convenience" is as applicable to the one as to the other. The English law of alluvion applies in Madras. It would be applied in Bengal but for the Bengal Regulation XI of 1828. The fact that there are zemindari tenures (as well as ryotwari tenures) in Madras and Bengal can in no way affect the application of the English rules which are part of the English Common Law. The Lower Burma Land and Revenue Act of 1876 is entirely silent on alluvion, and its provisions cannot be held to prevent the application of the English rules. Although in a scientific sense an island may be said to be an accretion to the subsoil, being frequently caused by volcanic action, the English law of alluvion does not recognise that there

(1) (1924) 1 Ca. 372. (2) I.L.R. 40 Mad. 1083.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

is any such thing as vertical accretion, but always regards alluvion as a lateral increment. The size of the rivers in Burma has nothing to do with the application of the laws of alluvion.

The law of watercourses in Burma is identical with the law of watercourses in England : *Maung Bya* v. *Maung Kyi Nyo* (1). The same rules of alluvion apply to land between high and low water mark as apply to land above high water mark : *Scratton* v. *Brown* (2) ; *Dee d. Seebkristo* v. *East India Company* (3) ; *Corporation of Hastings* v. *Ivall* (4) ; *Hindson* v. *Ashby* (5). The Burma Acts being silent as to accretion the English Common Law applies, or at any rate the rule of justice, equity and good conscience. See Burma Laws Act ; *Khan Bahadur Mehrban Khan* v. *Makhna* (6) ; *Waghela Rajsanji* v. *Shekh Masludin* (7).

A. Eggar (Government Advocate) for the Crown. The main issue in this case is whether the plaintiff company, as holder of a portion of alluvial land formed as an island in the bed of a large tidal river, is entitled to all increase to the island by further alluvial formations.

The Government oppose the claim on the grounds (*a*) that as this island grew and developed by accretions from the bed of the river, it was allotted piece by piece and year by year, by Government, to a series of potta-holders, and the plaintiff company by becoming ultimately the holder of all these pottas is barred, by the circumstances, from claiming rights to further accretions, which are at the disposal of Government as heretofore, and (*b*) that English law,

(1) I.L.R. 3 Ran. 494.
(2) 4 Banwell & Creswell 485.
(3) 5 M.I.A. 267.
(4) 19 Eq. 558.
(5) (1896) 2 Ch. 1 at pp. 25, 27, 28.
(6) 34 C.W.N. 529.
(7) I.L.R. 11 Bom. 551 at p. 564.

as to alluvion being regarded as an accretion laterally to adjoining land, has no force *proprio vigore* in Burma, it is unsuited to the conditions of the large river-wastes of this country, and it is negatived by the local land-law.

It is a basic principle, throughout all British India, that the Crown is the owner of the wastes of waters, as well as of waste lands. In particular, the Crown owns the bed of the sea, of tidal navigable rivers, and of the foreshore, because it is unoccupiable.

Coulsen, Waters, 4th Edn., p. 77; Moore, Foreshore, 3rd Edn., p. 511; 28 Halsbury, p. 392; *Doe d. Seebkristo* v. *East India Co.* (1); Madras Act III of 1905; Bombay Acts II of 1876, s. 24, and V of 1879, s. 37.

It is admitted that the island in suit belonged to the Government (from whom the plaintiff company claims title) by reason of its being an accession to the bed of this river.

It is undeniable that islands newly formed are to be treated as accretions to the sub-soil, and follow the ownership of the latter. *Secretary of State for India* v. *Chellikani Rama Rao* (2); 28 Halsbury 371. There is statutory recognition of the like rule as to alluvion (Bombay Act V of 1879, ss. 63, 64). And it is the practice of the Revenue authorities in Burma to treat all alluvial formations (*myenu*) as being at the disposal of Government (Direction 40 of the Land Revenue Manual).

The English law of rivers has grown in narrow circumstances. Only tidal portions were, in early days, unoccupiable and therefore regarded as wastes of the Crown. Above the tide, it was otherwise (at the time the law was framed, before locks and weirs

(1) 6 M.I.A. 267. (2) I.L.R. 39 Mad. 617 P.C.

1930

FOUGAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

were made for the improvement of navigation. Above the tide, the banks closed in, and private ownership became a fact resulting in the rule that the riparian ownership extended *ad medium filum*.

The English law of rivers is applicable to the circumstances of narrow tidal creeks in Burma as recent Privy Council cases show. But it is obviously inappropriate to the conditions of a river a mile wide that the cultivator of a small plot on a bank should be automatically entitled to the bed of the river for half a mile out.

In England, and in Rome where the law of alluvion first grew, riparian rights were, from the circumstances, predominant. And, as a short cut to contentions as to the right to alluvion, it was given to the bank to which it was contiguous, on the assumption that it was an accession to the bank, made laterally.

But in the case of the large rivers of Burma, the sub-soil ownership is predominant and the primary and obvious view must be that alluvion is an increment to the sub-soil, and an accession to the bed of the river.

It may be conceded that the Bengal Regulation XI of 1825 was a statutory recognition of the English law of alluvion. But the circumstances were large zamindari estates to which the rivers (although large) were a mere incident; and from a bird's-eye view the relative conditions would appear to be the same as in England. And Madras followed Bengal because Madras is also a zamindar's province.

Even so, the Privy Council indicated that their Lordships were not entirely satisfied with the reason for applying English law to the large rivers of India :— See *Sri Balusu Ramalakshmamma* v. *Collector of Godavari* (1).

(1) I.L.R. 22 Mad. 464, 469.

The rule of regarding alluvion as a lateral increment—an accession to the bank to which it adheres, is based on nothing but expediency—"from the supposed necessity of the case," because the line of the bank has moved forward gradually and no-one can say where it was, so that some rule such as this is necessary "for the ascertainment of title." *Secretary of State for India* v. *Kadirikutti* (1); *Lopez* v. *Muddun Mohun* (2).

A more reasonable explanation is that the subsoil ownership is in fact abandoned to the neighbouring land when the boundary is so changed without opposition:—Coulsen, Waters, p. 36; *Hindson* v. *Ashby* (3).

It is inequitable that the sub-soil owner should be expropriated by an accident. And, when possible, alluvion should be treated as a vertical accretion—an increment to the bed, so that no change of sub-soil ownership is compelled:—*Court of Wards* v. *Radha Pershad Singh* (4); *Buddun Chunder Shaha* v *Bepin Beharee Roy* (5); *Lopez* v. *Muddun Mohun* (2); Moore, p. 383; *Nogendra Chunder Ghose* v. *Mahomed Esof* (6); *Maharaja of Burdwan* v. *Secretary of State* (7); *Tuggot Singh* v. *Brij Nath Kunwar* (8).

(So also the the rules of loss of land by submergence, and the retention of the right to reformations, may be attributed to the principles of abandonment or, as the case may be, intentional retention of the sub-soil):—*Sree Eckowrie Sing* v. *Heeraloll Seal* (9); *Ramnandan Sahay* v. *Jaigovind Panday* (10); *Maharaja of Vizianagram* v. *Secretary of State* (11);

(1) I.L.R. 13 Mad. 369, 374.
(2) 13 M.I.A. 467, 473, 476.
(3) (1896) 2 Ch. 1, 4.
(4) 22 W.R. 238, 241.
(5) 25 W.R. 110.
(6) 10 Ben.L.R. 406, 432.
(7) I.L.R. 6 Pat. 481.
(8) I.L.R. 27 Cal. 768, 772.
(9) 12 M.I.A. 136, 140.
(10) I.L.R. 2 Pat. 839.
(11) I.L.R. 49 Mad. 249, 257.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Arun Chandra Singh v. *Kamini Kumar* (1); *Manhar Rai* v. *Ramyat Singh* (2); *Ananda Hari Barak* v. *Secretary of State* (3); *Rampati Chatterjee* v. *Ramani Mohan Sen* (4); *Dasanta Kumar Roy* v. *Secretary of State* (5).

In the case in suit, the alluvion was obviously an accession to the sub-soil—the bed of the river—as was the island which was originally formed.

By no enactment or other authority does the English law of alluvion have effect in Burma; and English rules are not always applicable to British India. The precedents are to be applied only if equitable and common-sense:—*Rahim Bakhsh* v. *Bachcha Lal* (6); *Srinath Roy* v. *Dinabandhu Sen* (7); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (8).

Private rights to land, in Lower Burma, must be shown to emanate from the Land and Revenue Act of 1876, s. 22, which is based on the view that the Crown holds all rights in land except (1) lands held under grant, or rights "derived" from grants, (2) easements and (3) the occupancy-rights which have developed into landholders-rights.

"Derived" must mean, derived by transfer, mortgage, lease, succession or other assurance or act in the law. It cannot mean "arising from a grant," otherwise (2) need not be stated.

Section 22 in effect bars claims to alluvial accretions, as against the Crown, overriding (as *lex loci*) all such claims based on imported law.

Lastly, there is no estoppel against the Crown by reason of having granted land up to the water's edge,

(1) I.L.R. 41 Cal. 683.
(2) I.L.R. 18 All. 290.
(3) 3 C.L.J. 317, 335.
(4) 34 C.W.N. 772.
(5) I.L.R. 44 Cal. 858.
(6) I.L.R. 51 All. 589.
(7) I.L.R. 42 Cal. 469, 525, 533.
(8) (1914) A.C. 153, 159.

as there was in the case of *Attorney-General for S. Nigeria* v. *John Holt & Co.* (1). The Crown was not a party to the deed whereby the plaintiff company was styled the owner of the "island."

The plaintiff company stands upon no better footing than the *dhani* cultivators whose *pottas* were acquired by the company. And it is clear, from the history of the case, that the cultivators had no claim to follow the river boundary.

BROWN, J.—The plaintiff-appellant Company brought a suit in the District Court of Insein against the Secretary of State for India and five others with respect to a certain island in the Pegu River known as "O Bok Kyun." This island has been formed by gradual silting up in the river. Various grants of portions which had been silted up were made by Government in about the year 1894 and subsequent years to various persons for the purpose of *dhani* cultivation. These grants have passed by various assignments into the hands of the appellant Company. Meanwhile, since the original grants were made, erosions have taken place in some parts, fresh land has been added in other parts to the island by the process of silting up, and in some places there have been reformations of land which had previously been eroded. The appellant Company claims that the whole island now is made up of land which has passed to them by assignment, or which has been added thereto by the process of gradual accretion, and that they are therefore entitled to the enjoyment of the whole of the island. Respondents 2 to 6 are squatting on portions of the island, and according to the plaint are doing so with the permission of the first respondent. The appellant sued for various

(1) (1915) A.C. 599.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

declarations of right with regard to these lands and for possession and damages. The suit was contested by the first defendant, the other defendants having taken no part in the proceedings throughout. Very little oral evidence was recorded, the principal facts of the case having been admitted. The main grounds of defence were :—

(1) that the Civil Courts have no jurisdiction to entertain such a suit ;

(2) that the appellant Company have no rights in the land except to grow *dhani* thereon, and that the grants of the land for that purpose are liable to be resumed ; and

(3) that the English law of accretions is not applicable to the circumstances of the case.

The District Court has held in favour of the defendants on these points and has dismissed the suit.

The first line of defence as to jurisdiction is founded on the provisions of the (Lower) Burma Land and Revenue Act. Section 56, clause (*a*), of that Act lays down that

"Except as hereinbefore expressly provided, no Civil Court shall exercise jurisdiction as to any of the following matters, namely :

(*a*) matters, claims and questions mentioned in the first proviso to section 55."

The first proviso to section 55 of the Act deals with various matters, claims and questions, but the only relevant portion is clause (*b*) in the proviso relating to

"claims to occupy or resort to lands under sections 19, 20 and 21, and disputes as to the use or enjoyment of such lands between persons permitted to occupy or resort to the same."

The leading case on the applicability of these sections is the case of *In re Maung Naw* v. *Ma Shwe Hmint and one* (1).

(1) (1915) 8 L.B.R. 227.

In that case it was held by a Full Bench of the Chief Court of Lower Burma that the word "claims" in the proviso (*b*) meant claims against Government only. The learned District Judge has held in the present case that so far as the appellant's case against the respondents 2 to 6 is concerned, the Court had jurisdiction, but that the Courts have no jurisdiction to decide the Company's claim against Government. The rights of the appellant Company are based on certain deeds of grant. Documents have not been produced with regard to each portion of the land, but it is admitted that all the grants are couched in terms similar to the terms of Exhibit A. The document is headed "Instrument of Grant (Rule 46)." It describes the land granted and states that it is granted for the purpose of *dhani* cultivation. It is signed by the Deputy Commissioner and contains on the reverse certain of the rules under which it was granted. One of these rules is that not less than half of the area granted must be brought under cultivation before the expiry of the five years for which exemption of revenue is allowed. It is admitted that in any case this period of exemption expired many years ago. Section 6 of the Act enacts that

"No right of any description shall be deemed to have been or shall be acquired by any person over any land to which this part applies, except the following:

(*a*) rights created by any grant or lease made by or on behalf of the British Government;

(*b*) rights acquired under sections 27 and 28 of the Indian Limitation Act, 1871;

(*c*) rights created or originating in any of the modes hereinafter in that behalf specified;

(*d*) rights legally derived from any right mentioned in clauses (*a*), (*b*) and (*c*) of this section."

Section 18 provides that the Local Government may from time to time make rules for the disposal

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

by way of grant or otherwise of any land over which no person has a right of either of the classes specified in clauses (*a*) and (*c*) of section 6. And section 19 provides that the Local Government may from time to time make rules to regulate the temporary occupation of such land, *i.e.*, of land over which no person has a right of either of the classes specified in clauses (*a*) and (*c*) of section 6.

Quite clearly the appellants are not claiming in this case to occupy or resort to lands under section 19 of the Act. Their title is based on grants issued under rules which had been framed under section 18, and they claim that by virtue of the provisions of section 6 and by the law of accretion, they are entitled to hold the whole island on the same tenure as that of their original grants. They make no claim whatsoever to the right of temporary occupation or resort to the lands. Sections 20 and 21 clearly have no application to the circumstances of the present case. That being so it is in my opinion impossible to hold that the claims that the appellant Company makes against Government are claims of the kind mentioned in clause (*b*) of the first proviso of section 55. The provisions of section 56 do not therefore bar the jurisdiction of the Civil Courts. It has been contended that even if the Act did enact that the Civil Courts had no jurisdiction, such an enactment would be *ultra vires* of the powers of the Legislature. But in view of the interpretation I put on sections 55 and 56 of the Act it is unnecessary for me to express an opinion on this point. I am of opinion that the Civil Courts have jurisdiction to decide the present case.

As regards what actually passed to the grantees under the original grant in this case arguments have been raised as to the exact meaning of the word

"pottah." According to the learned Government Advocate the word "pottah" imports a mere temporary right of occupancy of the nature of ryotwari tenure in certain parts of India. It does not appear to me, however, that the meaning of the word "pottah" is of much more than academic interest so far as this case is concerned. It is true that the revenue proceedings which led to the making of the grants are headed "pottah cases." And it is true that in the Burmese portion of the form on which the grant is drawn up the word "pottah" is used. The form which is drawn up bilingually is headed in English

"Instrument of Grant"
Lease

and in Burmese

"Instrument of (pottah) grant"
(pottah) lease.

But with regard to the Instrument with which we are concerned the word "lease" has been struck out in each case. The grant is declared to be made in accordance with the rules framed under the Burma Land and Revenue Act. Section 18 of the Act empowers the Local Government to make rules for the disposal by way of grant or otherwise. The grants must therefore have been made under the rules in force at the time they were made. Rule 2 of these rules reads as follows:

"Except as provided in Rule 1, such land may be disposed of by grant of the status of landholder, or by lease, and on the condition and in the mode hereinafter prescribed; grants and leases of such land shall not, without the previous sanction of the Governor-General in Council, be made on any other condition or in any other mode."

It is quite clear, therefore, that the grants in this case were made under Rule 2, and that what the appellants' predecessors in title obtained was a "grant"

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

and not a lease. Further, the rule so far as a grant is concerned provides only for the grant of the status of landholder. What was granted in the various deeds relevant to this case was therefore the status of landholder subject to such conditions as are expressly or impliedly applicable to the grant. A landholder is defined in section 8 of the Act which lays down :

"A landholder shall have a permanent heritable and transferable right of use and occupancy, subject only

(a) to the payment of all such revenues, taxes, cesses and rates as may from time to time be imposed in respect of such land under any law for the time being in force,

(b) to the reservation in favour of Government of all mines and mineral products, and of all buried treasure, with full liberty of writ and search for the same, paying to the landholder only compensation of surface damage as estimated by the Revenue Officer."

It seems to follow from this definition that a grantee of land under the rules obtains a permanent heritable and transferable right of use and occupancy, and not a mere temporary right as it is suggested is involved in the meaning of the word "pottah." It has been suggested that a landholder's rights are very much the same as freehold rights. It is dangerous to apply technical terms of the English law to tenure of land in Burma, but it is clear that the rights of the plaintiffs in the lands held under grant in this case are very considerable rights, and far greater than those of mere squatters. Nor can I see how the first respondent's claim to have the right to resume these lands has been made out. The learned trial Judge refers to Rules 4 and 21 of the Burma Land Revenue Rules at present in force, and remarks that the holders of the grants undertook to use the lands for the purpose of *dhani* cultivation only,

and that the grants are liable to resumption if used for other purposes. These particular rules were not in force when the grants were made, and I find it difficult to read section 60 (2) of the Act as having the effect suggested by the learned Government Advocate of making the rules applicable to grants which were issued under different rules and thereby derogating from already existing rights. But if section 60 (2) has the effect contended for, I am still unable to see how under either Rule 4 or Rule 21 the grants could be resumed. Rule 4 enacts that a grantee's land shall be liable to be resumed if the grantee fails to comply with any of the conditions of the grant. The grants in this case were made for the purpose of *dhani* cultivation, but nowhere do the deeds of grant suggest that the grants would for all time be conditional on the land being used solely for that purpose and for no other. There is an express condition that at least half of the lands granted should be brought under cultivation within five years of the grant, but there is no suggestion that this condition has not been complied with, and in fact there is nothing to show that the greater part of the land granted is still not being used for purposes of *dhani* cultivation. Rule 21 I find difficult to understand. It enables the Deputy Commissioner to resume a grant if any grantee or lessee fails to comply with the conditions mentioned in Rule 20. I do not understand it to be suggested that any of these conditions have been broken. Rule 21 then goes on to prescribe that if a grant has been made for cultivation with a period of exemption from assessment to land revenue, and the grantee does not employ the *terms of exemption* in the *bonâ fide* cultivation of the products for the cultivation of which the grant was made, the land

1930

FOSCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

may be resumed. So far the meaning is clear enough. It is the following portion of the rule I find obscure. But even if it means to enact that even after the period of exemption the land must not be used "principally for other crops, or for the purpose of obtaining fuel, timber or other spontaneous products," or that it shall be liable to resumption if the grantee at any time remove "timber otherwise than in accordance with the conditions prescribed in Rule 6, or during a period of two years makes no use of the land or abandons it without sufficient cause," it still does not seem to me that any of the circumstances making the land liable to resumption have been shewn to exist in the present case.

According to the rules under which the grants were issued the bringing of the land under cultivation was a direct condition of the grant. Rights to minerals and to teak trees were also reserved to Government. Otherwise there were no other definite restrictions on the use of the land, and subject to these conditions and to the payment of revenue the grantees must be held to have obtained a permanent heritable and transferable right of use and occupancy.

The remaining and vital issue in this case is a matter on which it is extremely difficult to decide. It is contended on behalf of the appellants that they are entitled to claim against Government on the same terms as they hold the grant lands, any land that since the issue of the grant has been added thereto by the natural process of accretion from the river. It is also contended that they are entitled to claim what originally formed portions of the grants but which have since eroded and have subsequently reformed. A number of authorities on the law of accretion have been cited to us dealing with cases arising in India, England and elsewhere.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

that no decided case in Burma has been brought to our notice, and so far as we know the applicability of the law of accretion to Burma has never previously been the subject matter of judicial decision.

Before discussing the various authorities which have been cited to us, it will be convenient to set forth briefly the circumstances connected with the lands concerned in this case. It would appear that the present island began to appear out of the bed of the Pegu River some forty years ago. The river is a tidal and a navigable one, and admittedly title to the bed of the river vests in Government. There is no oral evidence on record on the subject, but admittedly the history of the land is given in the series of maps—Exhibits 1 to 22. The present island is situated in two kwins. The western portion is in the Kyagan kwin, and the eastern portion in the Tapathun kwin. The map for the year 1892-93 shews that in that year two small plots of land had been granted out to Maung Aung Myat and Maung Po in Kyagan kwin whilst a long strip of land was forming to the east of these holdings. The next year's map shews that this strip had been granted to one Po Thet, and another strip of land in the adjoining Tapathun kwin had been granted to Maung On Gaing. Further extensions are shewn in the year 1894-95. In the year 1896-97 a further portion was added to the south-west of Kyagan kwin. After this the land remained more or less stationary until 1900-01 when the portion added in 1896-97 was surrendered to Government. After this the changes are slight until the year 1914-15 by which time the portion granted in the two kwins had joined up. From 1914-15 the position remained stationary until 1923-24 when fresh pieces of land are shewn to the south-east of the area, and an extension is shewn

1930

FODCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

on the east which is in part a reformation of land shewn in some of the earlier maps. Since 1923-24 there do not appear to have been any great changes.

The grants were all made for the purpose of *dhani* cultivation, and *dhani* cultivation can be carried on on land which is covered at ordinary spring tides but uncovered at low water. According to the plaint the whole or nearly the whole of the island is still in this condition. It is still used mostly for the purposes of *dhani* cultivation, but the appellant Company, a timber firm, chiefly require it for the storing of logs, and use parts of it for that purpose. The various original grants had by the year 1895-96 mostly passed into the hands of one Nagiappa Chetty. Since then they have changed hands several times until the whole island was purchased by the appellants in the year 1922 from one M. E. Mulla. At the time of this purchase it does not appear from the maps that the accretions now claimed were in existence. They are first shewn in the map of the following year. I have already indicated that in my opinion the appellants hold the status of landholders as to the original grants, subject to the conditions implicitly or impliedly attached to these grants, and that that involves a permanent heritable and transferable right of use and occupancy. But it is also quite clear that the purpose of the original grants in each case was *dhani* cultivation, that the area in the case of each grant was set forth, and the boundaries were apparently demarcated (*vide* Rule 40 in Chapter VII of the rules then in force), and that it was set forth in express terms in the deeds of grant that if the grantees wished to erect bunds they must do so within the area granted. The boundaries on one or more sides in each case were set forth as the Pegu River. It is also clear that the idea that the grantees were entitled to

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

accretions never occurred to either the original grantees on the one side or the officers of Government on the other. If the law of accretions as now contended for by the appellants had been rigorously applied from the first, then the first grantee of a small rectangular plot must in process of time have become the owner of the whole island. Authorities have been cited in which the law of accretions has been held applicable to foreshore. Foreshore has been defined as land between high and low water-mark. If this is the correct definition then it appears that the whole of the land owned by the appellants in this case is foreshore, and that they own no solid land behind it. In all the cases cited foreshore has been attached to solid land.

There can be no doubt that the law of accretion has been held applicable in other parts of India. By section 4 of the Bombay Land Revenue Code, 1879, alluvial accretions where exceeding one acre in extent are at the disposal of Government, and no Bombay case has been cited before us. In Bengal, however, the position under the statutory law is different. By the Bengal Regulation 11 of 1825 it was enacted that where there was no local usage to the contrary, land gained by gradual accession whether from the recess of a river or of the sea, shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed. No other statutory enactments on the law of accretion have been cited to us, and admittedly the Bengal Regulation is not in force in Madras. The right of adjacent owners to gradual accretion has, however, been recognised in several cases in Madras, as in the case of *The Secretary of State for India* v. *Kadirikutti and others* (1). The

(1) (1890) I.L.R. 13 Mad. 369.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

general principles on which the rights to soil gained from a river arise were first enunciated in that case, and the judgment then goes on to say :

"There seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India in the absence of local usage or statutory enactment to the contrary."

In the case of *Sri Balusu Ramalakshmamma* v. *The Collector of the Godavari District* (1), the Privy Council dealing with a case of accretion remarked :

"There does not appear to be in Madras as in Bengal an express law embodying the principle that gradual accretion enures to the land which attracts it, but the rule though unwritten is equally well established."

It is clear, however, that their Lordships were not prepared to accept the view that the whole of the English law on the subject of land gained from rivers was applicable, as they also express themselves as "having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari."

In the case of *The Secretary of State for India in Council* v. *Rajah of Vizianagram* (2), it was held by a Bench of the High Court of Madras that in the case of large rivers in India like the Godavari it is not necessary to apply the English rule that accretions must be slow and imperceptible. At page 1099 of his judgment in that case Srinivasa Ayyangar, J., refers to the law of accretion as "now a part of the law of all civilised countries." This case was taken on appeal to the Privy Council whose decision is reported at page 207, XLV Madras. Their Lordships upheld the decision of the Madras High Court on the ground that the accretion in that case must be held to have been "gradual, slow and imperceptible."

(1) (1899) I.L.R. 22 Mad. 464. (2) (1917) I.L.R. 40 Mad. 1083.

Tisey expressed no opinion as to the general extent to which the law of accretion was applicable in Madras.

In all these reported cases it seems to have been assumed that the general law of accretion was applicable to the circumstances of the cases reported, but the grounds for that assumption were never argued or stated. And their Lordships of the Privy Council have indicated that they might have doubts as to the wholesale application of the English law on the subject. In each of the cases cited the lands were claimed as accretions to solid land to full title to which there was no serious dispute. In none of the cases is there any real analogy with the circumstances of the present case, where it is in effect claimed that the grant by Government of a small defined area arising above low water-mark for the purpose of *dhani* cultivation gives the grantee the right to claim complete title to any further land which may rise above low water-mark and be adjacent to the land originally granted. And as late at any rate as 1870 the Privy Council indicated doubts as to the extent to which the law of accretions applied even in Bengal where Regulation No. XI of 1925 was in force. In the judgment of their Lordships in the case of *Felix Lopez* v. *Muddun Mohun Thakoor* (1) at pages 473 and 474 occurs the following passage :

"There is, however, another principle recognised in the English law, derived from the Civil Law, which is this,—that where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there from the supposed necessity of the case, and the difficulty of having to determine year by year to whom an inch, or a foot or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land (*Rex* v. *Lord Yarborough*, 2 Bligh, N.R. 147). And the converse of that rule was, in the year 1839, held by the English Courts to

(1) (1870) 13 M.I.A. 467.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (*In re The Hull and Selby Railway Company*, 5 Mee. and Wel. 327). *To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined.*"

The principles underlying the law of accretions have been variously stated. At one time it was suggested that "*de minimis non curat lex*" was the basis of the law. But this has been dissented from and cannot now be looked on as correct. In the case of *Brighton and Hove General Gas Company* v. *Hove Bungalows, Limited* (1), the general law as stated by Blackstone is quoted at page 381 of the judgment of Romer, J., as follows:

"As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra-firma*; or by dereliction, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be that if this gain be little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For "*de minimis non curat lex*": and besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration, for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King."

The learned Judge goes on to remark:

"The reason given by Blackstone for this rule of law is not now accepted as being the true one."

And at page 386 the same learned Judge remarks:

"I am rather disposed to adopt the reason assigned for the rule by Baron Alderson in the case of the *Hull and Selby Railway Company*, namely, 'That which cannot be perceived in its progress is taken to be as if it had never existed at all.' And as Lord Abinger said in the same case: 'The principle' as to gradual accretion "

(1) (1924) 1 Ch. Div. 372.

founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' "

And in the case of *Attorney General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited, and others* (1) at page 612 a reference is made to " that general convenience and security which lie at the root of the entire doctrine of accretion."

We have been referred on behalf of the appellant Company to a number of English authorities, which bear directly or indirectly on the applicability and scope of the law of accretions so far as the circumstances of this particular case are concerned.

In the case of *Micklethwait* v. *Newlay Bridge Company* (2) the question in issue was whether a grant of land included all the grant of a non-navigable river bounding it " ad medium filum." The judgment has no direct bearing on the doctrine of accretion, but on page 145 are contained certain observations on the presumption to be drawn from a grant :

" It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded is intended to pass, but that presumption may be rebutted. In my opinion you may look at the surrounding circumstances but only to see whether there were facts existing at the time of the conveyance and known to both parties, which shewed that it was the intention of the vendor to do something which made it necessary for him to retain the soil in the half of the road or the half of the bed of the river, which would otherwise pass to the purchaser of the piece of land abutting on the road or river."

In the case of *Gann* v. *Free Fishers of Whitstable* (3) the right of the Crown to make a grant of the bed or soil of an estuary or navigable river was recognised, but it was held that the grant was subject

(1) (1915) A.C. 599. (2) (1886) 33 Ch. Div. 133.
(3) 11 Eng. Rep. 1311.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

to the public right of navigation. The case of the *Duke of Beaufort* v. *The Mayor, Aldermen and Burgesses of Swansea* (1) was a case in which the claim was a claim by a subject to certain foreshore. It was held that it was for the jury to decide whether in the circumstances of the case a grant of the foreshore could be held proved. The case of the *Attorney-General* v. *Jones* (2) is an authority to a similar effect. In the case of *Scratton* v. *Brown* (3) it was held that the grant by the Crown of land between high and low water-mark meant the grant of whatever land might from time to time be between high and low water-mark. At page 1146 of the judgment of Bayley, J., the following passage occurs :

"Then what was the object of the parties to the deed of 1773? To grant the land within limits. Those to the East and West were ascertained, but those on the North and South were to be ascertained by the high and low water-marks." I think that these words must be construed with reference to the rule of the common-law on the subject of accretion, and that as the high and low water-marks shift, the property conveyed by the deed also shifts."

This is rather an authority, as to the construction of the terms of a grant than as to the applicability of the general law of accretion. The grants in the present case were grants of specified areas all of which were under high water-mark, and the boundaries of which are simply described as the Pegu River.

In *the matter of the Hull and Selby Railway* (4) the question arose whether land which had become foreshore by the invasion of the river was the property of the original owner or the Crown. It was held to be the property of the Crown. In his judgment in the case Alderson B. observed :

"Suppose the Crown, being the owner of the foreshore—that is, the space between high and low water-mark—grants the

(1) 154 Eng. Rep. 905.
(2) 159 Eng. Rep. 144.
(3) 107 Eng. Rep. 1140

adjoining soil to an individual; and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible; in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all."

To two other cases which are important in their bearing on the present case I have already referred in regard to their interpretation of the reason for the law of accretions. The case of the *Attorney-General of Southern Nigeria* v. *John Holt & Company* (1) is specially relied on as being a case to which the English law has been applied although the land affected was in Lagos. On this point, however, it is to be noted that at page 601 of the judgment it is stated that "by Ordinance 3 of 1863 of Lagos, English law is there applicable so far as local circumstances permit, and unless inconsistent with any ordinance in force in the Colony." In that case the respondents had obtained crown-grants, the sea being generally stated to be the boundary, and it was held that the general law of accession would apply notwithstanding the fact that in some parts the area of the land granted had been stated in the grants. In this connection Lord Shaw observes at page 612 of this judgment:

"To suppose that lands which, although of specific measurement in the title deeds, were *de facto* fronted and bounded by the sea were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a strip of land (it might be yards, feet or inches) between the receded foreshore and the actual measured boundary of the

(1) (1915) A. C. 599.

1930

FODCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into inland property would be followed by grotesque and well-nigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage."

It is to be observed, however, that the crown-grants in that case appear to have been in general terms and always intended to have been made use of for purposes of commerce for which a sea-front was indispensable. The original grant in the present case was of a small piece of land, which had recently in part emerged from the river, for the specific purpose of *dhani* cultivation, and the land has not yet fully emerged. It might with some force be argued that grotesque and well-nigh impossible results would be more likely in the present case if the appellant's claim were pushed to its logical conclusion that if he were kept within the bounds of his original grants.

In the case of *Brighton & Hove General Gas Company* v. *Hove Bungalows, Limited* (1), it was held, following the decision in *Gifford* v. *Lord Yarborough* (2), that where the original boundary of land granted was the high water-mark, the grantee was entitled to claim the high water-mark still to be the boundary even though that mark had shifted, and was demonstrably different from its original position.

Most of the decided English authorities deal with accretion to solid land bounded by the high water-mark. In some cases it has been laid down that a grant of the foreshore would mean a grant of the foreshore as it might be from time to time. But in none of the decided cases are the circumstances in any way similar to those of the present case. Here the grant was not of the foreshore, nor was it a

(1) [1924] 1 Ch. Div. 372. (2) 5 Bing. 163.

1930

FORCAR AND COMPANY LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL

BROWN, J.

grant bounded by the high water-mark. It was a grant of a small portion of land below high water-mark and above low water-mark. It is true that the Pegu River was stated to be the boundary, but the boundary clearly was not the high water-mark of the Pegu River; nor can it well have been the low water-mark. It was clearly intended to be a boundary actually demarcated by posts on the spot; and that this was intended to be a rigid boundary is evidenced by the clause which prohibits the creation of bunds except inside the boundary.

As regards the applicability of English law we have been referred to the case of *Maung Bya* v. *Maung Kyi Nyo and others* (1), where the general principles of English law were held to be applicable to the flow of and flooding by fresh-water rivers or water-courses in Burma. But no general principles as to the applicability of English law were laid down. In a recent case, *Khan Bahadur Mehrban Khan* v. *Maklina* (2), the Privy Council held that in the North-West Frontier Province where regulations in force required Judges to decide according to justice, equity and good conscience, that should generally be held to mean the rules of English law if found applicable to Indian society and circumstances. The matter in issue was as to the law of mortgage. It is impossible to hold, and has not in fact been seriously contended, that the whole of the English common-law can be applied to Burma. And the English law of accession though generally held applicable in Bengal and Madras is not of universal application in India. The Bombay Code makes it clear that it does not apply to that province. Whilst rules of English common law are frequently applied as the rules of justice, equity and good conscience, it by no

(1) (1925) I.L.R. 3 Ran. 494. (2) (1930) 34 C.W.N. 529.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

means follows that the whole of the present English law of accession which has been evolved by slow degrees as being suitable to the conditions in England should be applied in Burma. The general principles underlying that law have been stated to be of universal application and I am certainly not prepared to go so far as is, I understand, suggested on behalf of the Crown that these principles should never be applied in Burma. But before deciding whether the law should be applied to the circumstances of this particular case it does seem to me very necessary to consider very carefully not only the special conditions of Burma, but also the circumstances peculiar to the present case.

No oral evidence as to local custom has been given. Some reliance has been placed on behalf of the Crown on Direction 40 of the Directions to Land Revenue officers published at pages 216 to 218 of the Land Revenue Manual. The directions are in the nature of executive instructions and have no legal force. They do however indicate the manner in which alluvial formations of land are ordinarily dealt with, and they do suggest that the law of accretion is not ordinarily held applicable to such formations. Further, it is reasonably clear that both Government and the grantees have dealt with the present island in the past as though what was granted was a specific area of land only and did not carry with it the right to use and occupy adjacent land which might subsequently be formed by the river. The natural right of a riparian owner to retain a sea or river frontage would seem to be the principle underlying the decision in the case of the *Attorney-General of Southern Nigeria* v. *John Holt & Co.* (1).

(1) (1915) A.C. 599.

But that was a case where the original grant of the land had been apparently for commercial or industrial purposes, and the principle of justice, equity and good conscience clearly justified the application of the rule. The conditions of the present case are entirely different Burma is still mainly an agricultural country and the Burma Land and Revenue Act is framed principally for the purpose of dealing with agricultural land. The original grants in the present case were quite clearly made for the purposes of cultivation, and the land was not and never has been suitable for the ordinary purposes of commerce or industry. A river frontage was clearly unnecessary for the purposes of *dhani* cultivation. All that would be required for this purpose would be free access to and egress from the particular holding concerned. In my view of the case the original grantees obtained a permanent heritable and transferable right of use and occupancy of the land originally granted. But there is nothing in the original grants to indicate that the grants were ever intended to cover more than the land then actually granted. Section 22 of the Act lays down that no person shall acquire, by length of possession or otherwise, any right over lands disposed of or allotted under section 18, section 20 or section 21 beyond that which is given by the rules made under the said section respectively. I am not prepared to say that this section operates to exclude the applicability of the law of accretion to all lands which are subject to the Act, but it does indicate that in deciding what are the rights of any particular person to land the provisions of the Act and the rules thereunder must ordinarily be the sole or at least the chief consideration. The Indian cases cited are all cases in which there was no dispute as to the nature of the tenure of the lands to which the principle of accretion was

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

held to apply, and they were all cases in which what was accreted to was solid land.

The principle of the law of accretion must now be held to be founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property. I am unable to see how such a necessity exists in the present case. The original grants were clear enough, and all the purposes of those grants can be served by limiting the grantees to the portions originally granted. The necessity which exists in the case of solid land used for the purposes of commerce or industry does not arise in the case of a purely agricultural grant on land which is not attached to any solid land at all but is itself washed by high spring tides. Nor can it be said in the present case that either the high water-mark or the low water-mark was the boundary of the original grants. True, the boundary was described as the Pegu River. But it clearly was not the high water-mark, nor can I see any reason for supposing that it was the low water-mark. It was some line in between the two which at the time of the original grant was definitely demarcated, but which bore no definite relationship either to high or low water-mark. I can find no authority for applying the law of accretion to such a case, and in my opinion the original grantee obtained only the land within the fixed boundaries of his original grant, and not the right to any land which might subsequently be added thereto by the process of accretion.

Nor can I see that the present appellants are in any better position than the original grantees. In the case of the *Attorney-General of Southern Nigeria* v. *John Holt & Company* (1), the riparian owners were held to have a perpetual right to place stone on the reclaimed land and to erect buildings thereon on the

(1) [1915] A.C. 599.

ground that they had an irrevocable license from the Crown for that purpose. No such claim can possibly be made here. It is not shown that Government have ever acquiesced in the storage of logs by the appellants on lands not covered by the grants, and no buildings are alleged to have been erected on the lands. So far as is shown by the record it would appear that as new lands have appeared from time to time in the past they have been the subject of fresh grants, or fresh persons have been allowed the temporary use and occupation of them. The principles of estoppel or of irrevocable license cannot possibly be urged in favour of the appellants, nor can it justly be urged in their behalf that in buying lands which were under water at high spring tide and which had expressly been granted for the purposes of *dhani* cultivation they had been induced to believe that they thereby acquired all the incidents of ownership which might ordinarily be attached to lands granted or for a long period used for the purposes of commerce or industry. In my opinion the appellant Company is not entitled to claim any lands outside the areas of the original grants simply because those lands have been formed by the process of gradual accretion.

The next question for consideration is the appellants' claim to such portions of the island as formed part of the original grants which have since been eroded and have subsequently reformed on the original sites. It is not clear from the maps and the evidence on record exactly which of the lands in dispute are in this category. According to the last map—that for the year 1925-26—it would appear on a comparison with earlier maps that the only portion which has so reformed is the northern portion of the holding shown in the 1925-26 map in the name of Maung Ba Shin. And this land would appear to have disappeared

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

somewhere about the year 1914-15. Since then no revenue appears to have been paid to Government by the appellants or their predecessors in title for this land, but there is no other evidence to indicate any intention on their part to abandon the land. There is no express provision in the Lower Burma Land and Revenue Act as to the abandonment of land which has been the subject of a grant by Government. But the grant in the present case was in my view a grant of landholders' rights, and the provision contained in section 11 of the Act would appear to be applicable. That section lays down that "Any landholder who, except as provided in section 12, voluntarily relinquishes the possession of any land after the expiry of three years from the date on which this Act comes into force, shall at once forfeit his status of landholder in respect of such land." The subject of reformation of "diluviated" land was dealt with by the Privy Council in the case of *Lopez* v. *Muddun Mohun Thakoor* (1). At page 472 of his judgment Lord Justice James remarks :

"The rule of the English law applicable to this case is thus expressed in a work of great authority, *Hale, de Jure Maris*, p. 15 : 'If a subject hath land adjoining the Sea, and the violence of the Sea swallow it up, but so that yet there be reasonable marks to continue the notice of it ; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land the same can be known, or it be by art or industry regained, the subject doth not lose his property.' 'If the mark remain or continue, or the extent can reasonably be certain, the case is clear.' And in another place, p. 17, he says : 'But if it be freely left again by the reflux and recess of the Sea, the owner may have his land as before, if he can make out where and what it was ; for he cannot lose his propriety of the soil, although it for a time becomes part of the Sea, and within the Admiral's jurisdiction while it so continues.'

(1) (1870) 13 M.I.A. 467.

"This principle is one not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a Vineyard which is covered by lava or ashes from a Volcano, or a field covered by the Sea or by a River, the ground, the site, the property, remains in the original Owner."

It is not, however, suggested that this rule is a rigid rule to be enforced in all circumstances, and at page 478 of their judgment their Lordships remark:

"Their Lordships, however, desire it to be understood that they do not hold that property absorbed by the Sea or a River is, under all circumstances, and after any lapse of time, to be recovered by the old Owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the Sea or River of the State, and so liable to the written law as to accretion and annexation."

A number of later cases on the subject of reformations of land have been cited to us, where the main question has been what is sufficient to constitute such abandonment of land as to merge the land again into the public domain. In the case of *Hamnath Dutt and another* v. *Ashgur Sindar and others* (1), it was held that tenants holding under ryotwari tenure who had ceased to pay revenue on their submerged holdings must be deemed to have abandoned their holdings. Ryotwari tenure does not appear to be very different from the tenure of a landholder as defined in section 8 of the Lower Burma Land and Revenue Act. In the case of *Maharaja of Vizianagram* v. *The Secretary of State for India in Council* (2), their Lordships of the Privy Council held that ryotwari tenants who had ceased to pay revenue on submerged lands had

(1) (1879) I.L.R. 4 Cal. 894.

(2) (1926) I.L.R. 49 Mad. 249.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

forfeited their tenure of rights. There were in that case other indications of abandonment besides a mere failure to pay revenue.

It was however held by the High Court of Allahabad in the case of *Mazhar Rai and others* v. *Ramgat Singh and another* (1), that mere failure to pay rent was not a sufficient indication on the part of the tenants of their intention to abandon their tenancy. And the Privy Council held in the case of *Arun Chandra Singh* v. *Kamini Kumar* (2), that the principle applicable to this class of cases was rightly enunciated in *Mazhar Rai*'s case, and that the Calcutta decision in *Hemnath Dutt*'s case was not good law. Their Lordships' later decision in the case of *Maharaja of Vizianagram* might at first sight appear to be in conflict with this decision, but in that case non-payment of revenue was not the only factor taken into consideration. The High Court had held that for numerous reasons it must be held as a fact that the ryots had relinquished their holdings and their Lordships of the Privy Council merely upheld this decision. On the other hand, in *Arun Chandra Singh*'s case their Lordships definitely approved the principle laid down in *Mazhar Rai*'s case.

As a result of these authorities the general rule would appear to be that, although non-payment of revenue is a very important factor for consideration in such cases, it is not necessarily by itself sufficient proof of the intention to abandon land. Now in this case it would appear that the land concerned became submerged in about the year 1914 and was [redacted] that for several years unfit for *dhani* cultiv[redacted] Revenue was not paid during those years, but [redacted] is no evidence of any kind of any action on th[redacted]

(1) (1896) I.L.R. 18 All. 290. (2) (1914) I.L.R. 41 [redacted]

of the appellants or their predecessors in interest indicating any desire to abandon that land beyond non-payment of revenue ; and the present claim seems to have been launched not very long after the land re-appeared. There does not seem to me, therefore, in the present case to be sufficient material on the record to justify the view that the appellants had abandoned this land.

Under section 11 of the Lower Burma Land and Revenue Act the status of landholder is lost if the landholder voluntarily relinquishes possession. I am not, however, satisfied that this section has the effect of making the case against the appellants any stronger. There is nothing to show—and the presumption is to the contrary—that they or their predecessors gave up the cultivation of *dhani* so long as that cultivation was possible. Presumably they ceased to cultivate, not because they wished to do so but because they were forced by the action of the river. I do not, therefore, think that it can be said that they voluntarily relinquished possession. In fact there appears to me very little difference between voluntary relinquishment of possession and abandonment of land such as is discussed in the rulings referred to. I hold that the appellants are entitled to possession of so much of their former grants or the former grants of their predecessors in interest as have re-appeared above the river.

The result is that I would dismiss the appeal so far as the claim to accretion is concerned. But so far as the claim to reformation is concerned I am of opinion that the appeal should be allowed and I would remand the case to the trial Court for decision as to which of the lands in dispute are reformations of grants previously made to the appellants or their predecessors in interest.

1930

FODCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BROWN, J.

As I am holding on many of the points raised in this case in favour of the appellants I would direct that the parties should bear their own costs in both Courts.

OTTER, J.—I have had the advantage of reading the judgment of my learned brother and, upon the first two grounds of defence reviewed by him, I need only say that I agree with his reasoning and conclusions. In my view both defences fail.

The last remaining ground raises points of peculiar difficulty, more especially as, so far as I know, this is the first case of its kind in Burma. Moreover, the land legislation of this Province is silent upon the matter, and the inherent features of the case differ in some respects from previously decided cases in other Indian High Courts and in England.

As my learned brother states, the last of the three main grounds of defence was, that the English law of accretion is not applicable in the circumstances of the case. Both in Bengal and Bombay, ordinances have been passed dealing with accretion, and it is unnecessary to consider in any detail the law in force in these Provinces, although it will be necessary to refer to certain cases decided in the Calcutta High Court at a later stage.

It is perhaps sufficient to state that so long ago as 1825, Bengal Regulation No. 11 of that Province was passed, declaring the rules to be observed in determining claims to lands gained by "alluvion or by dereliction" of a river or the sea. Later legislation also dealt with the matter, and there can be no doubt that, speaking generally, the English law of accretion has been made to apply to various forms of land tenure in Bengal.

In Bombay, the position is different, for the law there is that all alluvial lands and newly formed islands vesting in holders of alienated land are liable to revenue, when the area exceeds a certain acreage, and the occupant of a bank or shore upon which alluvial land forms is entitled to the temporary use thereof "unless or until the area of the same exceeds an acre"; when such area is exceeded such land is "at the disposal of the Government"; see Bombay Act V of 1879, sections 46 and 64, and see also section 63 (substituted by Bombay Act V of 1913), which gave Government power to grant alluvial lands. Thus, it would seem that the general law of accretion does not apply in the Province of Bombay, and, moreover, it seems to have been necessary to pass special legislation to exclude it.

In Madras, however, so far as I know, there has been no legislation of a general character upon the matter, but there are a number of important decided cases which have arisen in that Province where the principles of English law of accretion (with certain modifications) have been held to apply.

It may be we first of all to endeavour to ascertain what the original grantees of the plots now forming the island obtained. In my view, they obtained landholders' rights within the meaning of section 8 of the Burma Land and Revenue Act, 1876. I am not sure that Mr. McDonnell, who appeared for the appellant Company, put his case quite in this way. He said, as I understood him, that the grants were made by virtue of section 6 of the Act, and were "out-and-out grants." For my part, I doubt whether section 6 of the Act provides for the making of grants at all. Grants of land over which no person had existing rights were made, I think, by virtue of section 18 of the Act and Rule 2

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

of the Rules. Such grants were, of course, subject to the conditions upon which they were made and conveyed a permanent, heritable, and transferable right of possession and occupancy in the land granted.

My learned brother has dealt in some detail with the terms of the grants, and I need only observe that the purpose for which the grant was made was for *dhani* cultivation, and, in order that certain exemptions for revenue might be obtained, a certain proportion of the land granted had to be brought under cultivation within a certain time. It is unnecessary to set out these last mentioned matters in detail, for it was admitted before us that the purpose for which the land was granted has been at all material times carried out, and that there has been no breach of the conditions as to cultivation or payment of revenue.

The purpose, however, for which the grants were expressed to be made must be kept in mind, for this may have material bearing upon the question whether the law of accretion should be applied or not. In any view of the effect of the grants under examination, it seems to me that the grantees obtained something akin to a grant of freehold in England, subject, however, to the reservation of minerals and to the incidence of certain covenants, the chief of which I have just referred to. In this connection one further restrictive covenant should be mentioned, viz., the restriction directing that any protective bunds must be constructed from inside the land.

There is no evidence as to the date when, or the circumstances under which, the land first emerged above the surface of the river. It is, however, agreed that the river at this point is both tidal and navigable, and that the bed of the river is vested in Government.

1930

FOCCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

Apart from the question of reformation, the case for the appellant Company, quite shortly, is: that, by reason of the conveyance to them n the year 1922, they obtained not only the whole island, as it then stood, but the right to any perceptible increase to it by accretion which either had occurred or may occur in the future.

For the respondent, on the other hand, it is argued that the appellant Company obtained no more than rights of occupancy for the purpose of *dhani* cultivation upon the lands actually conveyed.

It was not, and, so far as I can see, it could not have been, successfully argued that the appellant Company would not be entitled to succeed if the English law of accretion (with certain modifications, to which I shall refer, allowable by virtue of the altered conditions obtaining in this Province) is to be applied. The two main grounds, which, as I understand the learned Government Advocate, it is said, prevent such application rest upon:

(i) the nature of the grants and the principles of land tenure in this Province, and,

(ii) the particular natural features peculiar to the holdings under review.

These two matters involve consideration which are closely allied, and in examining some of the numerous authorities quoted by the learned Advocates on both sides, each must be borne in mind.

I propose first to briefly refer to two cases, viz., *Maung Bya and 1* v. *Maung Kyi Nyo and others* (1) and *Khan Bahadur Mehrban Khan* v. *Mukhna* (2). The first of these, though far different from the present case, is the only authority in this Province

(1) (1925) I.L.R. 3 Ran. 494. (2) (1930) 34 C.W.N. 529.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

which, so far as I know, throws any light upon the question whether English law may be said to be applicable upon questions arising in connection with the water-flow of rivers. Part of the head-note is :

"The law applicable in Burma to the flow of and flooding by fresh-water rivers or water-courses, 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."

The short facts in that case were that the respondents, whose paddy lands abutted on a water-course, had stopped up the overflow of the water, and that, by reason of this action, the waters flowed back and caused damage upon the appellants' land. The suggestion that English law was not applicable in that particular case was not put forward before their Lordships of the Privy Council, who, after referring to a number of English authorities, held the respondents liable.

In the second case, it was held that a direction in a Statute "to decide by justice, equity and good conscience" means a direction to decide by the rules of English law, if such are found to be applicable to Indian society and circumstances. The question in that case related to the right of redemption of a mortgage.

Section 60 of the Transfer of Property Act, which deals with such rights, was not in force in the place where the case arose. As, however, that section indicated that the rules of English law relating to such rights are applicable to Indian society and circumstances, and as there was no indication to the contrary, it was held that the matter must be determined by the rules of English law.

I am of opinion, therefore, that *prima facie* the English law of accretion may be applied as a rule

of justice, equity and good conscience, in the absence of any specific rule of law applicable in this Province, if it is found to be applicable to the particular circumstances of the case.

I am fortified in this conclusion by a reference to the case of *Waghela Rajsanji* v. *Shekh Masludin* (1). At page 561 of the report I find this passage in the judgment :

" Now it was most candidly stated by Mr. Mayne, ... that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances."

Moreover, when I find, as I shall proceed to show, that in Madras (where no appropriate legislation is in force) the English law has been applied, and such application has not been animadverted upon by their Lordships of the Privy Council. I have no doubt that, provided it is not excluded by local or other conditions applicable to the particular case, the Courts of this Province would be right in applying the English law upon matters of the nature now under review.

I will now turn to certain authorities of the High Court of Madras, which seem to me to be of the highest inportance upon the matter.

The first case is *Secretary of State for India* v. *Kadirikutti and others* (2). It will be seen that this was the first case of its kind in the Madras Presidency. Part of the head-note runs as follows :

" The rules of English law, according to which the rights of the Crown or of riparian owners to accretions caused by alluvion are determined, with reference to the character of the river and

(1) (1887) I.L.R. 11 Bom. 551 at p. 561. (2) (1890) I.L.R. 13 Mad. 369.

1930

FODCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

the manner in which the accretion is occasioned, are applicable in British India unless excluded by enactment or local usage."

The facts and issues differ from those in the present case, but in the judgment, at pages 373 and 374 of the report, the Court has referred briefly to the Institutes of Justinian and to certain extracts from the classic English Commentaries, *inter alia*, the well-known passage from Stephen's Commentaries, which may be found mentioned in the modern text-books dealing with this question.

It is also pointed out (and this is of some importance in the present case) that the ownership in the land between the ordinary high and low water-marks is vested in the Crown and subject to the user of the public for the purposes of navigation and otherwise.

This principle was laid down in *Gann* v. *Free Fishers of Whitstable* (1).

At page 375 of the report in the Madras case appears this passage :

"There seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India in the absence of local usage or statutory enactment to the contrary."

It was then pointed out that the rule that the Government is the owner of the soil in the bed of a navigable river up to high water-mark is recognized in the Regulation XI of 1825 (Bengal), and the case of *Felix Lopez* v. *Muddun Mohun Thakoor* (2) was referred to. It will be necessary to refer to this last case at a later stage, but it may be mentioned here that it was a case of a navigable river. In the Madras case under review it had been argued that the English rule was inconsistent with the law

(1) 11 H.L.C. 192. (2) (1870) 13 M.I.A. 467.

prevailing in Malabar with regard to ownership in land, but it was found, as a fact, that this was not so.

Later in the judgment, at page 376, it was observed that the character of the river must be considered, and the manner in which the accretion is occasioned, and it became necessary, *inter alia*, to refer back certain questions to the District Judge. One of these was whether the variation to the river bank was caused by the acts unlawfully done by the plaintiffs and persons claiming under them, and, as the answer to this question was in the affirmative, the claim of the riparian owner was dismissed.

I would observe that there is no suggestion that, in the present case, the variations were caused by the acts of the appellants. It may be mentioned that one of the passages at page 374 of the judgment (viz. a quotation from Stephen's Commentaries) is relied upon by the learned Government Advocate. It is as follows :—

"The principle on which this rule as to gradual accretion rests is founded as well 'on the necessity which exists for some such rule of law for the permanent protection and adjustment of property' as 'on the impossibility of identifying from time to time small addition to or subtraction from land caused by the constant action of running water.'"

It was said, of course, that in the present case the accretion was rapid, and that it was possible to identify additions to the land in question from time to time. It will be necessary to refer at a later stage to the first of these assertions ; but, bearing in mind that we know that the accretions have been going on since the year 1892, at any rate, it would appear doubtful whether the second of the contentions of the learned Government Advocate is justified. No doubt after each rainy season such identification may be possible, but it would be at least difficult to identify the accretions from day to day.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

The next case is *Sri Balusu Ramalakshmamma* v. *The Collector of the Godavari District* (1). In this case part of the head-note is as follows :

"Although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvion enures to the land to which the accretion is made, following the ownership of that land, the rule is equally well established in both those provinces."

In my view this authority is of much importance in relation to the present case, and I consider it useful to set out in full an extract on pages 465 and 466 from the judgment of the District Judge describing the property under review :

"The Godavari is a broad river. In places it is about four miles wide. In the hot weather the river-bed is a waste of sand with some streams of clear water here and there finding their way down to the sea. When the floods come down in June and later months, the river is a turbid torrent, more than twenty or thirty feet deep, very heavily laden with rich silt from the black soil of Central India. When the river reaches the deltaic tract, where the fall is only one foot per mile, the current slackens and the silt is deposited in large islands or accretions in the river-bed, which are called lankas. These are composed of rich black soil, carried down and re-arranged by the river, and they are extremely fertile. As the river falls, these lankas have their edges cut off abruptly by the current. When the river is at its lowest in the hot weather, one sees, as I said above, a few streams of clear water, an extensive waste of barren valueless sand, and, standing up in the midst of this waste of sand, the black fertile lankas."

So far as I am able to understand the physical features which exist in the present case, it seems to me that they are somewhat similar to those in the Godavari case. The lanka was thrown up originally in the river much as the island here. The accretions were to the island and, so far as I can see, the difficulty pointed out by my learned

(1) (1899) I.L.R. 22 Mad. 463 (P.C.).

brother, viz., that, if the contention of the appellant is correct, the owner of a first small plot forming an island would be entitled to every subsequent accretion to it, was there present.

I would point out, however, that it was found, as a fact, that the river was not tidal or navigable, and I am not sure that the conditions in the dry weather are similar. The question in both Courts was whether the existing lanka belonged to the plaintiff or the defendant. This point having been decided against her, the appellant in the Privy Council endeavoured to base her claim to the lanka upon grounds other than those put forward in the Courts below. It was held that she was not allowed to do so, and it followed, therefore, that as the accretions were to a lanka belonging to the defendant, the latter was entitled to them.

Two passages at page 469 of the judgment are of importance. The first is :

"There does not appear to be in Madras, as in Bengal, an express law embodying the principle that gradual accretion enures to the land which attracts it ; but the rule, though unwritten, is equally well established. It is hard to see why it should not apply to land *which the river washes on both sides, as well as to land which is washed only on one side.*"

I would point out here that it never seems to have been suggested that, if the accretions were gradual and imperceptible, they did not enure to the benefit of the owner of the land to which they adhered.

The second passage is :

"The result is that their Lordships, having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari, would require to know much more about the river in question and the mode in which it has been dealt with, before deciding as to the presumption or

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

its rebuttal. The plaintiff must abide in this suit by the case she has presented."

This passage was much relied upon by the learned Government Advocate as showing that the principle that the English law of accretion would be applied in India is not crystallized. I would point out, however, that their Lordships of the Privy Council did apply the principle to the Godavari River, and, moreover, it seems to me that in the passage quoted they are referring only to be the contention on behalf of the appellant sought to be raised before them for the first time, which was based upon ownership of both banks of the river. It is perfectly true that in England in a non-tidal river the riparian owner owns the soil *ad medium filum*, and, in my view, it was to the presumption that this was so, and to this alone, that their Lordships referred in the passage relied on by the learned Government Advocate.

One other Madras case remains to be mentioned, viz., *The Secretary of State for India in Council* v. *The Rajah of Vizianagram and another* (1). In that case the material portion of the head-note runs as follows :

"*Held*, that the suit land was an accretion to the plaintiff's land, that in applying the rule of English law as to accretions, local physical conditions must be taken into consideration, and that in the case of large rivers in India like the Godavari which on occasions leave large and sudden deposits, it is not necessary that the accretion should be slow or imperceptible."

The facts of that case may be shortly mentioned. The lanka in dispute had been formed in contiguity with another lanka in midstream. Subsequently it became detached by the formation of a channel and became a separate island. The importance of the case is that it was found to be impossible to say

(1) (1917) I.L.R. 40 Mad. 1083.

that the accretion was slow or imperceptible; but, nevertheless, the decision in that case applying the law of accretion was upheld by their Lordships of the Privy Council.

Before referring to the judgment of the Committee, however, I would point out that the addition amounted to no less than six hundred acres in the course of a single flood season, and it was pointed out that in *Lopez*'s case, and another case, the accretions were 2,500 and 5,000 acres respectively. There can be no doubt, of course, that in England accretion must be formed by gradual, slow and imperceptible degrees; indeed, it was at one time said that it was because of the principle *de minimis non curat lex* that accretion was recognized in law. In this connection Srinivasa Ayyangar, J. (who delivered the principal judgment of the Court), referred (at page 1099) to the two English cases of *Rex* v. *Yarborough* (1) and *Advocate-General* v. *M'Carthy* (2).

One other case referred to by the learned Judge was *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool), Limited* (3). I must refer to this case also at a later stage, but I would point out here that the Court distinguished these decisions upon the question whether the accretion must be gradual, slow and imperceptible. That they must now be so regarded is, I think (at least so far as Madras is concerned), settled, for, in the head-note of the report of the appeal in the *Rajah of Vizianagram*'s case (4) appears this passage:

"The actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India."

(1) (1824) 3 B. & C. 91.
(2) (1911) 2 Ir. R. 260.
(3) (1915) A.C. 599.
(4) (1922) I.L.R. 45 Mad. 207.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

It was admitted, as I have already pointed out, by the learned Advocate for the appellants in that case that the English law of accretion was applicable in Madras, but it was said, of course, that the accretion must be gradual, slow and imperceptible. Lord Carson, however, who delivered the judgment of the Committee, said that he did not propose to discuss the exact meaning of the word "imperceptible" in the English rule,

"for, assuming the applicability of the English rule, 'slow' and 'imperceptible' are only qualifications of the word 'gradual,'"

and he went on to say :

"and this word with its qualifications only defines a test relative to the conditions to which it is applied. In other words, the actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India."

Later, he referred, with approval, to the following passage in the judgment of Mr. Justice Ayling (as he then was in the Madras Court) (Pages 213 and 214) :

"It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the normal action of physical forces ; and the different conditions of Indian and English rivers is such that what would be abnormal and almost miraculous in the latter is normal and common-place in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen* (1)."

It seems clear, therefore, that no objection that the accretions in the present case were slow or imperceptible can be entertained, and that the question whether they were gradual or not must depend upon the conditions found in the Pegu River. Thus, it is at least arguable that the objection of the learned Government Advocate that there is no reported case where the law of accretion has been held to apply to land, practically covered at high water, may be of

(1) (1915) I.L.R. 42 Cal. 489 (P.C.).

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

little force, for such a state of things may well be described as one of the abnormal conditions referred to in the judgment of the Judicial Committee. It is well known, of course, that such conditions are common in the rivers of this Province.

I have now referred to all the cases decided in the High Court of Madras material to the issues under review. Certain cases decided in the High of Calcutta were cited to us, but I do not propose to deal with them upon the question of accretion pure and simple, for the law in that Province is laid down by the ordinance to which I have already referred. It will be necessary, however, to deal with certain of these cases when I come to the question of reformation.

It will be convenient now to turn to certain English authorities which are of importance upon the particular features of the present case.

The English law of accretion upon most points is so well settled that no useful purpose would be served by stating it at any length; moreover, after examination of a number of authorities upon the subject and a perusal of such text-books as Coulson and Forbes' Law of Waters, it seems clear that the same principles must *primâ facie* be applied in the case of islands in rivers as have been applied in the case of the banks of rivers or sea foreshore. In the nature of things, there is no English case which approximates to the present case, but certain authorities are useful upon such matters as the alteration of the high and low water-marks.

The case of *Hull and Selby Railway Company* (1) may be very briefly referred to as throwing light upon the reasoning which underlies the principle of the law of accretion.

(1) 5 M. & W. 328.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

At page 332 of the report, Lord Abinger said that the necessity for some such rule of law (is) "for the permanent protection and adjustment of property; for it must be borne in mind that the owner of lands does not derive benefit alone but may suffer loss from the operation of the rule; for if the water gradually steals upon the land, he loses so much of his property."

I need hardly say there is no English case where the facts are those of the present case; and it is not easy to ascertain what the actual facts were. I would suggest, however, that, though posts may have been used to mark the boundaries of each successive holding, it appears that, starting from the earliest grant and map, the boundary may well have been the "river." For example, in the grant of April, 1894, I find the "South and East boundaries" described in the body of the grant as "Pegu Main River" and "Pegu Main River Channel," and on the map on three sides at any rate (enclosing almost the whole area) a boundary line is shown dividing the subject of the grant from the Pegu River or Pegu Main Channel.

At the same time, as I understand the evidence, that river boundary was not the high or low water-mark. It was something between the two, and nearly all the subject of the grant was covered with water at high tide. But that which was cultivable could be demarcated from time to time, and was, in fact, described and shown as bounded by the river.

Now, I doubt very much whether the boundaries at material times were well defined, but, if they were, the case of *Rex* v. *Yarborough* (1) is, I think, an authority that in England the law of accretion might apply in such a case.

Upon this I would say here that the mere fact that the land was nearly all covered with water, to

(1) (1824) 3 B. & C. 91.

my mind, makes no difference, for it was just as much land for cultivation purposes, at any rate, as dry land. Moreover, the facts in *Rex* v. *Yarborough* (1) (a salt marsh case) were not dissimilar to the present case. Assuming, therefore, that the boundaries of each grant to have been well defined, does this make any difference? Mr. McDonnell says no, and cites, *inter alia*, *Scratton* v. *Brown* (2). The point is one of difficulty. There is no doubt that in that case, where the boundaries of the grant were to be ascertained by the high and low water-mark, it was held that by the deed the right of soil in that portion of land *which from time to time lay between high and low water-mark passed* to the grantee; and Bayley, J., at page 499 of the report said:

"I think that those words must be construed with reference to the rule of the common-law upon the subject of accretion, and that as the high and low water-marks shift, the property conveyed by the deed also shifts."

Littledale, J., at page 1148 puts the principle on which the decision rests clearly. He says:

"The distinction is well established, that where there are words sufficient to pass property in the first instance, and there are in a subsequent part of the deed words of affirmation, these latter words, though they may be wrong in point of description, do not affect the previous part of the grant. The words are, 'which said sea-grounds,' etc. (after description), of their boundaries on the north and south by high and low water-mark, ... 'do contain, on the whole, 800 acres *of land covered with water*.' Now these words of suggestion or affirmation may be true or false. Instead of 800 acres there might have been 5,000 acres, and it is quite immaterial whether they were bounded on the east and west by the lands of the persons mentioned in the deed; because, in the operative part of the grant, the sea-grounds are the thing granted, ..."

Now, it is perfectly true that the case of *Scratton* v. *Brown* (2) turned on the construction of a grant, and

(1) 3 B. & C. 91. (2) 4 B. & C. 485.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

the principles of conveyancing. In the present case we have a form devised to comply with a Revenue Act passed in the earlier days of the occupation. But may it not be argued (from this case) that, if what was granted was what was bounded by the river on two sides at least that, the facts that 8·00 acres (in one grant) only are mentioned, and that certain posts marked out the corners only, the boundaries of what was granted should remain the Pegu River where the cultivable land abutted upon it?

It may be said, of course, that in the present case there is no well-defined line (as high water-mark) which moves from time to time. But that the limit of cultivable land moved and was defined and granted from time to time is also plain. It will be seen, I think, that until *Scratton* v. *Brown* (1) (1826) (when *Rex* v. *Yarborough* was considered), it was not clear whether the law of accretion would apply to land, the boundaries of which were clearly defined. The position was most carefully reviewed in the important fishery case of *Hindson* v. *Ashby* (2). There the main question was whether a strip along a river bank left dry by the water level sinking had ceased to be part of the river bank. Romer, J., said this was a question to be determined regarding all the circumstances of the case . . . , nature of the land and its growth and uses, and found that it had ceased to be part of the bed and belonged to the plaintiff by accretion.

These principles were approved by a strong Court of Appeal, but that Court found that as a fact the land in dispute had not ceased to form part of the river bed. In distinguishing *Foster* v. *Wright* (3) (a fishery right case, where it was held that the

(1) 4 B. & C. 485. (2) L.R. (1896) 2 Ch. 1.
(3) (1878-79) 4 C.P.D. 438.

fishery right owner by virtue of his rights of the bed of the river could follow the river when it changed its course), Lindley, L.J., pointed out (at page 88) that

"the old six feet bank has been ever standing where it is. There stands the old line of demarcation of the plaintiff's land, and there it has stood clearly defined whenever the deposit of alluvium by reason of the silting up of the sand became such as to be in itself apparent, and then and at that very moment when the first and indeed every subsequent accretion became apparent, so also at the same time it became perceptible to the ordinary observer, that the accretion so formed was no part of plaintiff's land."

It is clear, therefore, that this case might be said to support the case for Government, but great stress was laid on the *gradual* and imperceptible nature of the accretion. This element, as I have endeavoured to show, might well be held to make no difference since the Godavari River cases. Moreover, in the present case there is no such thing as the *six feet* wall, and I have the gravest doubts where the existence of posts (if proved), at the time the grants were made, so defined the boundaries as to take the case out of the ordinary law. Furthermore, the boundaries, in fact, seem to me to have been *the River* where the land abutted upon it.

A further passage in the judgment of Lindley, L.J., may be usefully quoted (page 87, Stuart Moore):

"Passages were cited from Bracton, Britton, Fleta, and Hale de Jure Maris, c. i and vi, and the Year Book, 22 Ass. fo. 106, pl. 93, to show that the doctrine of accretion does not apply where boundaries are well defined and known. This may be if the boundary on the waterside is a wall or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water, except the water itself. The cases of *Rex* v. *Lord Yarborough*,

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

affirmed by the House of Lords in *Gifford* v. *Lord Yarborough*, and *In re Hull and Selby Railway Company*, seem opposed to these authorities if applied to fluctuating water boundaries. The judgments in *Scratton* v. *Brown* point in the same direction. On the other hand, *Attorney-General* v. *Chambers* seems the other way. But it is unnecessary to dwell more on this question, and I leave it for reconsideration and decision when it shall arise."

I regard this passage as significant. It is plain that Lindley, L. J. was of opinion that to exclude the doctrine it must be easy to see whether the accretions, as they became perceptible, are on one side of the boundary or the other. Now, in any view of the case, the existence of the posts would scarcely make the ascertainment of the exact limits of the accretions an easy matter.

Surely, from the nature of the grants, the boundaries on the water fronts must be held to have been the line between the cultivable land and the water.

That being so, there can be little doubt as to the application of the doctrine in England. I would put the matter in this way: if the boundaries of the grants can be described as well defined at any time, they were not so well defined as to exclude the doctrine. If, on the other hand, they were not defined at all (and there is no real evidence as to the construction or maintenance of the posts), and the boundary on the water fronts was the river, then the doctrine would apply.

Upon this I would refer to what was said in *Lopez*'s case (1). There doubt was expressed whether the rule would be applied if there were existing certain means of identifying the original bounds by "landmarks, by maps, etc., etc." There do not appear to be landmarks today, and, to my mind, the maps only afford indication sufficient to show quite roughly what it was possible to grant out for cultivation.

(1) (1870) 13 M.I.A. 467.

Before leaving this aspect of the case, I would refer to a case relied upon by Mr. McDonnell, viz. *Lyon* v. *Fishmonger's Co.* (1). Part of the head-note is:

"The right of navigating a tidal river is common to the subject of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of the river, and the latter is a private right to the enjoyment of the land, the invasion of which may form the ground for an action for damages, or for an injunction. . . . .

"The right of a riparian owner to the use of the stream does not depend on the ownership of the soil of the stream."

It has been suggested in that case that a riparian proprietor, where the tide flows and re-flows, had rights different to those existing in respect of the banks of a stream above the flow of the tide. At page 672 of the report, the Lord Chancellor said:

". . . I should have thought that some authority should be produced to show that the natural rights possessed by a riparian proprietor, as such, on a non-navigable river are not possessed by a riparian proprietor on a navigable river."

He later rejected the suggestion that such a riparian owner must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation.

The suggestion, of course, is that the appellant Company in the present case have special rights of access to the shores of the island greater than those of ordinary members of the public.

There are a large number of authorities dealing with the rights of riparian owners in inland waters, and a number of them may be found collected in chapters of Coulson and Forbes' work to which I have already referred.

That being so, it is said, additional force is lent to the suggestion that accretion may be claimed in

(1) L.R. (1876) 1 A.C. 662.

1930

FORBAN AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

respect of land which, before the foreshore receded, was part of it. Were it otherwise the appellant Company would be denied access to their land for any purposes, for there would be a strip of land (not foreshore but above it) which would enure to Government.

So far then I have endeavoured to show that the natural features of the present case may well not prevent the application of the doctrine of accretion. The Madras cases strongly support this view in my judgment. Further, I think that when once it is established that the English law may apply, the case of *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool), Limited* (1), throws further light on the position.

It must be borne in mind that the Lagos Ordinance gives rise to a position closely allied to that which I believe to obtain in the present case. The English law is to apply in Lagos "as far as local circumstances permit." That, I think (apart from the question of tenure, peculiar to the present case), is the position here.

There are, of course, points of fact, upon which the Lagos case differs from those under review, *e.g.*, it was a sea foreshore case, and the tide did not ebb and flow over a greater part of the area. The head-note may be set out in full:

"The respondents were in occupation of lands on the shore of the island of Lagos and there carried on business as African merchants. The lands had originally been granted by native grants to the respondents' predecessors in title, who in 1861 had obtained Crown grants. All the grants described the lands as bounded by the sea. About 1863 a wharf and two piers had been built upon the foreshore. At various dates subsequent to the Crown grants the respondents had carried out works on the foreshore to prevent incursion by the sea and erosion. Owing to these works a strip of land had been reclaimed below that which in 1861

(1) (1915) A.C. 599.

had been high water-mark. The respondents had built stores and sheds upon the reclaimed land and had for a period of from thirty to fifty years used it, together with the land granted and the piers and wharf, for the purposes of their businesses and had had exclusive possession. The Government of the island had knowledge of the reclamation and of the building upon and use of the reclaimed land:

Held, that the reclaimed land, not being the result of natural accretion, vested in the Crown as owner of the foreshore, but that the respondents continued to have the rights of riparian owners over the foreshore, and that there was to be presumed in the respondents' favour an irrevocable license from the Crown to erect buildings and to store goods upon the reclaimed land and to use it generally for the purposes of their businesses."

It would seem arguable, therefore, if (as in the present case) the rights are claimed by *natural* accretion, the plaintiff Company may be entitled not only to the rights of riparian owners but also to the soil itself. It is clear from page 610 of the report that there was no express grant of the foreshore, nor could one be held to be implied. There can be little doubt that, if the accretion had been by natural causes, the Company would have acquired the soil.

I would also point out that the grants were old and made when the place was undeveloped, and were described as, *inter alia*, 'facing the beach' and 'having a water frontage,' and it was found as a fact by their Lordships of the Privy Council that they were all treated in description 'as being bounded by the Sea.'

Moreover, there was no express grant of foreshore. Further, I think the judgment throws much light on the underlying principle relating to the law of accretion in such a case.

At pages 611 to 612 of the report occurs a passage which may be usefully quoted:

"On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim

1930

FODDAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

of the Crown that the foreshore upon the line of in-road had *de facto* been transferred to the Crown, as owners of the sea and its bed within territorial limits, and of foreshore even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles. Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel, and the like, and these accretions had been of the gradual character to be afterwards referred to, *they would have been added to the land*, notwithstanding the measurement in square yards or feet which the title contained."

The last words seem significant. If it be the fact that the grants in the present case were by metes and bounds, this circumstance would seem to make no difference. Moreover, we know the south and east boundaries were described as the Pegu River.

I have shown that in Madras the accretion need not be "gradual" in the sense of the old maxim of *de minimis*. The passage in *Lord Yarborough's* case (1), referred in the *Lagos* case at page 614, may perhaps be mentioned:

"The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law for the permanent protection and adjudgment of property."

So far as the natural features are concerned, therefore, I can see no reason why they should prevent the application of the English law of accretion in the present case.

The river, though much smaller (and, therefore, more like an English river), resembles the Godavari. Its seasonal increases and decreases in volume, the carrying down of silt, the formation of islands and increases to them are all points of similarity.

The island is, it is true, almost covered at high water, and this raises a point of difficulty. It can be cultivated, however, and foreshore by the English law can be gained or lost by accretion or erosion.

(1) (1824) 3 B. & C. 91.

Moreover, if the Godavari cases are examined closely (see especially the judgment of Iyengar, J., at page 1097 of the report), it would seem that the lankas were completely covered by water at flood times of the year.

Furthermore, it does not seem to be the law that, although as in the *Lagos* case, the portion adhering by accretion did not enure to the grantees and their successors, yet this fact did not deprive these persons of their ordinary rights of user in connection with their business.

But the matter is by no means concluded, and my learned brother, in coming to the conclusion that English accretion law should not be applied, was influenced, I think, by the nature of the tenure conveyed by the grants.

That they are not "pottahs" in the sense this word is used in Bengal, I think, is clear from an examination of the documents, and the definition of the status of "landholder" conveyed under them. In *Freeman* v. *Fairlie* (1), pottahs are described as merely documents in the nature of receipts for revenue. The word "pottah" seems to have been much used in connection with land tenure in India, but it does not occur in the Act of 1876, and, though the word may be found in the grants in the present case, the actual terms of these must be looked at.

But the objection is put somewhat in this way:

It is said Burma is an agricultural country, and you must look at the purpose for which these grants were made, viz., *dhani* cultivation. How can it be suggested, it is argued, that rights such as are permitted to free-holders in England or "owners" in Madras be applied, where the original grants

(1) (1829) M.I.A. 305 at p. 347.

1930

FORBAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

conveyed (at most) something less than "ownership"?

On the other hand it may be argued that landholders' status is highly important; it is the highest form of private land tenure known in Burma; and if cannot be said that so long (at any rate) as the proper quantity of *dhani* is (or has been) grown, the holder is restricted to that form of user of the island. Surely, he could (as Mr. McDonnell suggested) put up a rice mill on it, if the soil is or becomes sufficiently secure. The only covenants or conditions imposing liability to forefeiture relate to revenue (and perhaps to minerals); and, lastly, may it not be argued that the ancient proprietary rights in land which have been recognized from earliest times in Burma (see Baden Powell, Vol. III, Part VI, Chapter II) are embodied in the status of landholder created by the Act of 1876?

The matter is one of difficulty, and there are no authoritative decisions or pronouncements which assist its determination. The grant is described as being for the purpose of *dhani* cultivation. The condition, however, about *dhani* cultivation only is that three-fifths of the area should be brought into cultivation "within five years"; and this was for the purpose of obtaining exemption from revenue.

Upon this point, I think Rule 16 of the Rules, which impose penalties where land is used for other purposes than the cultivation for which the land was leased, *during the period of exemption from revenue*, lends considerable support to my view.

It cannot, I think, be suggested that so far as the term of the grants are concerned, nothing can be done except to grow *dhani*. Turning to the Act itself and rules, the tenure of a landholder is defined, and as, I think, I shall show, there are no limitations

except those in the definition section and the rules as to revenue.

May it not be said, then, that so long as no forfeiture is incurred, a landholder may use his land in any way he pleases so long as he does not break the law? In other words, may he not enjoy a user which in this Province is highly important and extremely common, viz., that of mooring timber?

But my learned brother goes further. He lays stress on section 22 of the Act. That section says:

"No person shall acquire, by length of possession or otherwise, any right over land disposed of or allotted under section 18, section 20, or section 21 beyond that which is given by the rules made under the said sections respectively."

Rules under sections 20 and 21 do not affect this case, and Rule 2 (passed under section 18) must be again referred to.

It provides for the grant of the status of landholder on the conditions hereinafter specified. These are contained in Chapter II; Rule 3 requires applicants to have "sufficient means to fulfil the purposes for which and the conditions on which the land is to be granted or leased."

The only application of this rule would seem to be that it lays stress on the fulfilment of the conditions, and it might possibly be used in support of the argument that the grant was for *dhani* cultivation alone.

But cannot a landholder, who has a permanent, heritable and transferable right, gain rights by accretion, even it be only more land for *dhani* cultivation? Moreover, is it not said by Government that he lost such rights by erosion or flooding?

Rule 4 states the conditions applicable to grants for cultivation where a period of exemption from revenue has or has not been given. This rule, and

1930

FORCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

Rule 5, which follows, cannot affect the question, for all conditions have been complied with. Rules 6 and 7 prohibit acquisition of minerals and the cutting of teak trees except under license. Rules 9, 10, 11, and 12 do not affect the matter.

Thus, it comes to this, that the Company cannot acquire any rights over land beyond those giving rise to the status of landholder subject to the conditions attached to the grant.

I am unable to see that the Rules 3 or 4 say that anything is given, they merely impose conditions on what was given by Rule 2, and the whole question is, therefore, Does the rule, by implication, exclude the acquisition of land by accretion?

I cannot see, first of all, that the Courts should lean towards such a construction in view of the fact that accretion might have been directly provided for as in *Bengal and Bombay*. Moreover, in Madras the Privy Council have approved its application. It is true that the persons allowed to benefit were described as owners, and it must be conceded, I suppose, that landholders' status is something less than a freeholder's status in England. It may also be that it is less than that of an "owner" in Madras or Bengal.

In any view of the case, however, it seems to me that strong grounds should be shown in order to deprive a "landholder" in Burma from the benefit of rights which have been allowed to "owners" of land in Madras. I am satisfied that the "purpose" for which the grants were made would not of itself be sufficient. The *conditions* of the grants do not in terms exclude accretion, and, as I have tried to show, the fact that, in the documents, the boundaries purport to be delimited may well make no difference.

Upon the whole, therefore (and in the absence of direct authority), I am of opinion that the particular tenure which passed by the grants does not exclude rights of accretion.

Upon the question of reformation, it may be useful to refer to an extract from Doss on Riparian Rights (1891). At page 211 the learned author says [in connection with certain passages in the case of *Lopez* v. *Muddun Mohan Thakoor* (1), to which I am about to refer] :

"They contain at once a complete exposition and a precise definition of the principles upon which the law of accretion, as well as the doctrine of reformation on original site, is based."

Lord Justice James, in delivering the judgment of the Judicial Committee in that case, said this (at page 472 of the report) :

"The rule of the English law applicable to this case, is thus expressed in a work of great authority, Hale, de Jure Maris, page 15 :—'If a subject hath land adjoining the Sea, and the violence of the Sea swallow it up, but so that yet there be reasonable marks to continue the notice of it ; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land, the same can be known, or it be by art or industry regained, the subject doth not lose his property.'"

Later he said :

"This principle is one not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and justice ; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a Vineyard which is covered by lava or ashes from a Volcano, or a field covered by the Sea or by a River, the ground, the site, the property, remains in the original owner."

My learned brother referred, *inter alia*, to this authority, and pointed out that at page 478 of the report appears a passage showing clearly that property absorbed by a Sea or a River is not, under all

(1) (1870) 13 M.I.A. 467.

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

circumstances, and after any lapse of time, to be recovered by the old owner, and he went on to say that it may have been so completely abandoned as to merge again into the public domain.

It is clear from the facts in *Lopez*'s case (1) that the claimants to the reformed land took most effectual steps to prevent the possibility of the question of abandonment being raised, for the description and measurement of the submerged *mouzah* were recorded and rent continued to be paid.

In the present case the only substantial question for us to decide upon this point is whether there had or had not been abandonment. This, I think, was substantially admitted by the learned Government Advocate; but his case was that, upon the facts, we should hold that abandonment had taken place.

My learned brother has dealt at some length with what actually happened, so far as can be ascertained, as regards reformation, and I need only say that it seems to me that what is now claimed upon this ground is part of that portion shown in the 1925-26 Map in the name of Maung Ba Shin. This land seems to have been submerged for something less than ten years, and so far as I know there is no evidence that revenue was paid in respect of it during that period, or any other evidence that the appellant Company, or its predecessors-in-title on the one hand, or Government on the other, ever displayed any intention to preserve, or to resume their rights over it.

I do not propose to refer to all the cases on this matter, for my learned brother has dealt with them. One of the most recent cases, however, is *Ramnandan Sahay* v. *Jaigovind Pandey* (2). In the course of the

(1) (1870) 13 M.I.A. 467. (2) (1923) I.L.R. 2 Pat. 839.

1930

FOUGAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

judgment in that case, all the important Indian cases are reviewed, and the conclusion come to by a Bench of that High Court was, that the mere fact that a person with whom land was settled by the Government obtained a remission of revenue on account of part of the land having been diluviated by the action of a river, does not necessarily prove that he abandoned the land in respect to which the remission was granted. It was further held that the question must depend upon the intention of the parties, and that, if the circumstances indicate that in taking the abatement of revenue, there was an intention to abandon the land, then, when the land has re-appeared, the person who took the abatement cannot claim the land.

As I have already indicated, in the present case it does not appear that there was any demand for, or refusal to pay, or application for abatement of, revenue. It seems to me that it may well be that non-payment affords at least no more evidence of an intention to abandon than does the obtaining of remission; and, in any event, I do not think that this decision entirely disposes of the contention put forward on behalf of the appellant Company, viz., that mere non-payment of revenue shows an intention to abandon. That this is so may follow from what was said by their Lordships of the Privy Council in the case of *Arun Chandra Singh* v. *Kamini Kumar* (1). At page 693 of the report I find that the principle laid down in the case of *Mazhar Rai and others* v. *Ramgat Singh and another* (2) was approved. The material portion of the head-note in the Allahabad case is:

"Hence where the lands of certain tenants became submerged by the action of a river, and the tenants, though they ceased to pay rent during the period of the submersion, made no

(1) (1914) I.L.R. 41 Cal. 683. (2) (1896) I.L.R. 18 All. 290.

1930

FODCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

overt indication of their intention to relinquish the said lands, but, on the contrary, on the river again shifting its course, laid claim to lands which had emerged . . . . . It was held that there had been no relinquishment."

In the present case it may be useful to observe that, so far as I know, no assertion of claim to the reformed land was made until the correspondence prior to the institution of the present case, although it would seem that at some time before 1925 or 1926, at any rate, some portion at least of the reformed land may have appeared. But there were changes in ownership up till 1922, and it is possible that the reformed land only appeared after the rains of 1925.

I would further point out that at the conclusion of the judgment in *Arun Chandra Singh*'s case appears this passage:

"The diluviated lands formed part of a permanent, heritable, and transferable tenure; until it can be established that the holder of the tenure has abandoned his right to the submerged lands it remains intact."

It will be remembered that the tenure of a landholder is described in identical words in the Act of 1876. So far as I know, there were no overt acts on the part of the predecessors of the appellant Company, and, in any event, it seems to me that non-payment of revenue is far from conclusive in this case. From earliest recorded times in this Province, produce and revenue have gone hand in hand. See upon this question Baden Powell on "Land Systems of British India" [(1892) Vol. II, Part VI].

There is no evidence that revenue was not paid at a time when *dhani* was, in fact, being cultivated on any portion of the reformed land, and it may be assumed, I think, that at the time when the land

was submerged *dhani* was not cultivated and revenue was not paid. This seems likely, for Rule 5 of the Rules specially deals with failure to pay revenue and its consequences, and, moreover, specifically lays down that Government may resume upon abandonment. Government did not do so. Does not this circumstance lend support to the view that in law there was no abandonment?

So far as the Indian case law is concerned, therefore, might it not well be held (in the absence of any overt indication) that there was no intention to abandon in the present case? As my learned brother has pointed out, however, by section 11 of the Act of 1876, it is provided that any landholder (except where land is made over temporarily to a revenue officer), who voluntarily relinquishes the possession of any land after the expiry of three years from the date on which this Act comes into force, shall at once forefeit his status of landholder in respect of such land.

The question under the Act, therefore, is whether there is any evidence of "voluntary relinquishment" of possession. Upon this I cannot help thinking that the same principles would apply as were enunciated in the cases that I have mentioned. As I have said, I think the grants created the status of landholder and created a permanent, heritable and transferable right of use and occupancy, and, unless there is some outside evidence of it, I do not think it necessarily follows that when lands are submerged a voluntary relinquishment or abandonment must be presumed from a non-payment of revenue which may well have been not leviable.

Furthermore, it may well be argued that stronger evidence would be required to establish *voluntary* relinquishment than abandonment, when it is

1930

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

OTTER, J.

remembered that it was the action of the river that was the primary cause of the non-payment of revenue.

I am of opinion, therefore, that the evidence of abandonment or voluntary relinquishment is insufficient, having regard to the nature of the holding, the purpose for which it was granted, and the fact that no overt indication to abandon or relinquish is to be found.

I have now endeavoured to deal with the last remaining defence referred to by my learned brother. It will have been seen that this defence deals with different portions of the island, and as has been shown the relevant principles of law relating to each portion are separate and distinct.

Upon the question of accretion, I have endeavoured to indicate my views upon the considerations which seem to me to be most relevant to the present case.

Quite shortly, my views are as follows:

(i) The English law of accretion would apply to this Province provided that it is not excluded by the natural features, or by the nature of the tenure regarding the subject-matter of the suit.

I arrive at this conclusion mainly because in Madras, where no special legislation upon the matter exists, the application of this law with certain modifications appropriate to that Province has been recognized and approved by the Privy Council.

(ii) Upon the difficult question whether in view of the natural features attendant upon the present case this law should be held to apply, I think that the natural features surrounding the island in question do not differ greatly from those under consideration in the cases arising in Madras.

I think, further, that the question must be considered in the light of all the material circumstances of the case, including the nature of the property, its growth and its user and, at the same time, the general conditions appertaining to rivers in Burma must be borne in mind.

In these circumstances and for reasons which I have endeavoured to indicate, I see no real reason why these matters should take the case outside a law which has been recognized from the earliest times and, so far as the Indian High Courts are concerned, so recently as the year 1926.

(iii) Upon an examination of the grants themselves, and the law contained in the Burma Land and Revenue Act of 1876 and the Rules thereunder, I can find nothing which, either directly or indirectly, prohibits a landholder from enjoying benefits which have been permitted to owners of land in England and in India.

(iv) Upon this part of the case, I have no doubt at all that the ordinary law regarding reformation would be held to apply in Burma, and, in view of the facts of the case and the special provisions of the Rules passed under the Burma Land and Revenue Act, I see no reason to hold that such rights as the appellant Company, or its predecessor-in-title, had, were ever abandoned by them or resumed by Government.

I must express my thanks to the learned Advocates on both sides for their very great assistance upon this difficult matter, and I regret very much that the result of my opinion upon what is the main question under review must be that the case upon

1931

FOUCAR AND COMPANY, LTD. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

this question must be re-heard in this Province. I agree with the proposed order as to costs.

[As their Lordships differed on the question as to the accretions, the case was, under the provisions of clause 34 of the Letters Patent, referred for hearing to Das, J.]

OTTER, J.

1931

Mar. 30.

DAS, J.—In this appeal my learned brothers Brown and Otter differed and the case was referred to me under clause 34 of the Letters Patent.

It is unnecessary for me to deal with the authorities cited in this appeal as both the learned Judges have dealt with them elaborately in their judgments. It is only necessary for me to say that I agree with the judgment of my learned brother Otter, J., and therefore the appeal must be allowed and a decree passed in favour of the plaintiffs in terms of the prayer of the plaint. As both my learned brothers have agreed that each party should bear their own costs in both Courts, that order as to costs will stand.

CRIMINAL REVISION.

Before Mr. Justice Baguley.

MARIAM BI BI

v.

A. E. MOTALA.*

1931

Aug. 20.

Provincial Insolvency Act (Act V of 1920), s. 23—No power to grant interim protection—Enforcement of maintenance order—Criminal Procedure Code (Act V of 1898), s. 488.

Under the Provincial Insolvency Act, the Court has no power to issue a protection order before adjudication. The Court may, under s. 23, release the debtor, only if he is under actual arrest or imprisonment in execution of a money decree.

Query: Whether imprisonment under s. 488 (3) of the Criminal Procedure Code for maintenance can be said to be imprisonment in execution of a money decree of a Court.

Auzam for the applicant.

Guha for the respondent.

BAGULEY, J.—The applicant Mariam Bi Bi had an order for maintenance for herself and her two children against the respondent Motala. She applied to the First Additional Magistrate, Rangoon, for enforcement of the payment of arrears due under that order. The respondent objected to being made to pay, and produced a document signed by the Additional District Judge, Amherst, purporting to be an "*interim* protection order" passed in an insolvency case in the District Court of Amherst. The order was passed after Motala had applied to be declared an insolvent, and it is worthy of note that this application was made after Mariam Bi Bi applied for enforcement of her arrears of maintenance. The wording of the protection order is as follows:

"Upon reading an application presented by Mr. Roy, advocate for Ahmed Ismail Motala of Fourth Division, Moulmein, applicant, praying for an *interim* protection order to prevent his arrest in execution of decree or being detained in prison for any debt.

* Criminal Revision No. 1018 of 1931 from the order of the First Additional Magistrate of Rangoon in Criminal Miscellaneous Trial No. 438 of 1930.

1931

MARIAM BI BI v. A. E. MOTALA.

HAGUELY, J.

"It is ordered that Ahmed Ismail Motala applicant be protected from being arrested in execution of decree or detained in prison for any debt pending the disposal of the said application to be declared an insolvent."

In the course of argument I was informed that *interim* protection orders of this kind are well known in the districts. The Magistrate faced with this order came to the conclusion that it was not for him to question the order passed by the District Court. He says that it appears to be irregular, but he thought that a Criminal Court could not sit in judgment on the Insolvency Court. In the ordinary way I should have agreed with him. The Courts are supposed to recognise each other's orders when they appear, on the face of them, to be good—a principle which has very recently been enforced by a Special Bench of this Court in the case of *Nathan* v *Samson*,* which will no doubt shortly be reported.

In the present case, however, I think the *interim* protection order must be regarded as not merely an irregular or incorrect order but as a pure nullity, for I can find no section of the Provincial Insolvency Act under which such an order could have been passed. Protection orders can be issued under the Provincial Insolvency Act under section 31; but such protection orders can only be issued after an order of adjudication has been passed, and, so far as this Court is aware, no order of adjudication has even now been passed. It was certainly not passed on the 14th January, 1931, when the *interim* protection order was passed. Before adjudication the insolvency Court can help a debtor under section 23 which runs as follows:

"At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may

* Reported at I.L.R. 9 Ran. 480.—ED.

if the debtor is under arrest of imprsonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary."

This section contemplates a debtor being under arrest or imprisonment. The present respondent has not been under arrest or imprisonment in connection with this order for maintenance, and, even had he been, it seems doubtful whether it could be said that he was under arrest or imprisonment in execution of a decree of any Court. If he were suffering imprisonment in connection with this order for maintenance he would be imprisoned by an order under section 488 (3) of the Criminal Procedure Code.

It was argued before this Court that the order for maintenance could not be enforced as against a respondent who was an insolvent, or who had applied for insolvency, and a very old case, *Tokee Bibee* v. *Abdool Khan* (1), was quoted. This ruling dates from 1879. Insolvency in this country was then governed by the Insolvency Act (11 and 12, Victoria, Cap. 21), and under section 13 of that Act, which is quoted at page 541 of the report, it is clear that *interim* protection under that Act could be granted by an order which could be made to apply to all debts and liabilities mentioned in the schedule including money due under an order for maintenance. There is no corresponding section in the Provincial Insolvency Act now in force, and although under English Law a protection order can be given, the English Law does not apply in this country despite the fact that insolvency law in general in this country is based on the insolvency law of England, and we have got to keep within the provisions of the Provincial Insolvency Act.

For these reasons I set aside the order of the First

(1) (1880) I.L.R. 5 Cal. 536.

1931

MAHOMED BI BI v. A. E. MOTALA.

BAGULEY, J.

Additional Magistrate, Rangoon, dismissing the application and direct that he proceed with the enforcement of the order for maintenance according to law.

ORIGINAL CIVIL.

Before Mr. Justice Cunliffe.

BYASH CHANDRA ROY

v.

AJODHYNATH DEB AND OTHERS.*

1931

Nov. 16

Amendment of pleadings—Fresh matter—Limitation—Civil Procedure Code (Act V of 1908), s. 153, O. 6, R. 17.

Where the plaintiff seeks to introduce by way of amendment fresh matter into his plaint which would deprive the defendant of the benefit of his defence under the Limitation Act, the application ought to be refused.

Jamardan v. Shib Parshad, I.L.R. 43 Cal. 95; *Weldon v. Neal*, 19 Q.B.D. 394—*followed.*

Robertson for the plaintiff. The suit was filed on a promissory note. The promissory note is challenged and the plaintiff wants to fall back upon the original cause of action and to amend the plaint. The amendment can be allowed at any stage of the suit.

K. C. Bose (with *J. C. De*) for the defendants. The promissory note is challenged as a forgery. The plaintiff wants to give up his case on the promissory note altogether and to set up a case for an amount due on settlement of accounts. It is alleged that the settlement took place on the 15th June 1928 when the promissory note was executed. The suit was filed on the 12th January 1931. An application for amendment was made on the 25th September

* Civil Regular Suit No. 38 of 1931.

1931 when the suit was in the list for hearing. The amended cause of action was time-barred on the 25th September 1931. No amendment ought to be allowed when the amended cause of action is time-barred. The plaintiffs' case stands or falls on the promissory note itself. See *Weldon* v. *Neal* (1), *Janardhan* v. *Shib Pershad* (2), *Hirjee Devraj & Co.* v. *Maung Nyun* (3), *Ma Shwe Mya* v. *Maung Mo Hnaung* (4).

Robertson in reply. The case of *Maung Shwe Myat* v. *Maung Po Sin* (5) covers the amendment in this case.

CUNLIFFE, J.—This is an application to amend a plaint in the manner contemplated by section 153 of the Code. By Order VI, rule 17, the Court is permitted at any stage of the proceedings to allow amendments which may be necessary for the determining of the real question between the parties.

The plaintiff does not actually seek to set up a new cause of action, but he does seek to introduce fresh matter into his plaint which it is admitted on both sides would deprive the defendants of the benefit of their statutory defence set up by virtue of the Limitation Act.

The question at issue was decided many years ago in England by the Court of Appeal, notably in the case of *Weldon* v. *Neal* (1). Lord Esher in that case said: "We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments."

(1) (1887) 19 Q.B.D. 394.
(2) I.L.R. 43 Cal. 95.
(3) 1 L.R. 2 Ran. 414.
(4) I.L.R. 48 Cal. 832.
(5) I.L.R. 3 Ran. 183.

1931

BYASH CHANDRA ROY v. AJODHYA NATH DEB.

CUNLIFFE, J.

And on the particular facts of that case Lord Lindley said: "I do not think it would be just to the defendant to allow these amendments, the effect of which would be to deprive him of his defence under the Statute of Limitations." That decision has been followed in Calcutta in the case of *Jaiardan Kishore Lal* v. *Shib Pershad Ram* (1), and there is further support for that view in one of our own cases, although I think that the point was really considered *obiter*. I therefore decide that the application which it is sought to obtain here must be disallowed as it infringes the practice which is a salutary one. The application is dismissed with costs two gold mohurs.

(1) (1916) I.L.R. 43 Cal. 95.

G.B.C.P.O.—No. 80, H.C.R., 16-1-32—3,000

INCOME-TAX REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das, and Mr. Justice Bagaley.

In re THE COMMISSIONER OF INCOME-TAX, BURMA

v.

HAJEE CASSIM TAYOOB SURTY.*

1931
Nov 5.

Income-tax Act (XI of 1922), s. 2 (1) (a)—Sabape *loans—Agricultural income.*

Sabape loans, which are loans made in cash at the beginning of the cultivating season, and repayable in paddy at harvest time, are not "agricultural income" within s. 2 (1) (a) of the Income-tax Act. It is immaterial that the lender of such loans happens to be the landlord of the borrower.

Mehr Bano v. Secretary of State for India, I.L.R. 53 Cal. 34—*distinguished.*

The Commissioner of Income-tax made the following reference to the High Court under s. 66 (2) of the Indian Income-tax Act :

Hajee Cassim Tayoob Surty (hereinafter called the assessee) is a land-owner in the Myaungmya District. For the year 1928-29 he was assessed under section 23 (3) on an income which included a sum of Rs. 8,400 as income from loans on the *sabape* system made to his tenants.

Loans made on the *sabape* system are loans made in cash at the beginning of the cultivating season and repayable in paddy at harvest time. The excess in value of the paddy received by the assessee over the cash lent by him to the cultivators was taken as his taxable income from this source. This income is entirely separate from his rents.

The assessee appealed unsuccessfully against the inclusion of *sabape* income in his assessment and being dissatisfied with this decision he has asked me to refer the following question to the High Court :

> "Whether such portion of assessee's income as was derived from *sabape* loans was "agricultural income" within the meaning of the Income-tax Act."

I refer that question.

Agricultural income which is defined in section 2 (1) of the Act is exempt from income-tax by section 4 (3) (viii) of the Act. The

* Reference No. 11 of 1931.

1931

In re THE COMMISSIONER OF INCOME-TAX, BURMA v. HAJEE CASSIM TAYOOB SURTY.

part of the definition of agricultural income in section 2 (1) which is relevant to this case is sub-section (1) (a) which is as follows:—

"any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of Government as such;".

The land in question is used for agricultural purposes and it is assessed to land-revenue. The question to be decided therefore is whether this *sahajc* income comes under the head rent or revenue derived from such land.

Assessee's contention appears to be as follows:—Since the loans were made only to tenants and for the purpose of working the assessee's lands, the profit from the loans arose out of the ownership of the lands and therefore it is revenue derived from those lands.

The Income-tax Act is not concerned with the reason for which an assessee lends money; but when he does lend it, the source of his income therefrom is the contract with the person to whom he has lent it and not anything more remote. The fact that the assessee would not have lent the money if he had not been the landlord and the borrower his tenant and the fact that the borrower provides the interest on the loan out of his agricultural income from the lender's lands are not relevant. These transactions are not different from ordinary contracts between borrowers and lenders, the income from which is taxable in the hands of the lenders.

I am therefore of opinion that the answer to the question is in the negative.

A. Eggar (Government Advocate) for the Crown. Conflicting views have been expressed in cases where a money-lender has advanced moneys to an agriculturist who happens to be his tenant. In some cases the lender has taken an usufructuary mortgage of the land and leased it back to the borrower: *Ibrahimsa* v. *Commissioner of Income-tax, Madras* (1); In the matter of *Sarup* (2); *Rajniti Prasad* v. *Commissioner of Income-tax, Bihar and Orissa* (3); *Mehr Bano* v. *Secretary of State for India* (4); *Maharaja of*

(1) I.L.R. 51 Mad. 455.
(2) I.L.R. 50 All. 495.
(3) I.L.R. 9 Pat. 194.
(4) I.L.R. 53 Cal. 34.

Darbhanga v. *Commissioner of Income-tax, Bihar and Orissa* (1); *Commissioner of Income-tax, Madras* v. *Linga Reddy* (2); *Commissioner of Income-tax, Madras* v. *Yagappa* (3).

The principle underlying exemptions of agricultural income is avoidance of double taxation—once as land revenue, and again as a tax on the cultivator's profits. The position of the parties in this case is that of lender and borrower. It is purely a loan transaction, and profits on a loan do not come under s. 2 of the Act.

Foucar for the assessee. A money-lender cannot claim that his profits are derived from land, merely because he has lent money to an agriculturist. But in this case the money-lender is the owner of the land out of which he received his income. The case, therefore, falls within s. 2 (1) (*a*) of the Act: *Mehr Bano* v. *Secretary of State for India* (4); *Maharaja of Darbhanga* v. *Commissioner of Income-tax* (1).

PAGE, C.J. — The question propounded is: "Whether such portion of the assessee's income as was derived from *sabape* loans was "agricultural income" within the meaning of the Income-tax Act."

Under section 2 (1) (*a*) of the Act "agricultural income" means "any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of Government as such," and the question that falls for determination is whether the assessee's income derived from *sabape* loans was "rent or revenue derived from land" within section 2 (1) (*a*).

(1) I.L.R. 7 Pat. 550.
(2) I.L.R. 50 Mad. 763.
(3) I.L.R. 50 Mad. 923.
(4) I.L.R. 53 Cal. 34.

1931

In re THE COMMISSIONER OF INCOME-TAX, BURMA v. HAJEE CASSIM TAYOOB SURTY.

PAGE, C.J.

It has been found as a fact that "loans made on the *sabape* system are loans made in cash at the beginning of the cultivating season, and repayable in paddy at harvest time. The excess in value of the paddy received by the assessee over the cash lent by him to the cultivators was taken as his taxable income from this source. This income is entirely separate from his rents." Now, it so happened that these *sabape* loans were made by the assessee to his tenants, but for the purpose in hand, in my opinion, it makes no difference whether the lender was the landlord of the borrower or not. The solution of the problem depends upon whether the income that accrued from these loans to the assessee was "rent or revenue derived from land which is used for agricultural purposes."

It could not have been intended that any and every person who lent money to a cultivator to be repaid in kind, and made a profit from the transaction, should be treated as thereby receiving "rent or revenue derived from land which is used for agricultural purposes." As the *sabape* loans under consideration were transactions between a lender and a borrower the mere fact that the lender happened to be the landlord of the borrower is *nihil ad rem*. These transactions being loan transactions the income accruing to the assessee therefrom, in my opinion, was not "agricultural income" within the meaning of that term in section 2 (1) (*a*).

The learned advocate for the assessee relied upon a passage in the judgment of Mr. Justice Greaves in the Full Bench case of *Meher Bano Khanum* v. *Secretary of State for India* (1). His Lordship stated that the income then under consideration, being *nasar* or

(1) (1926) I.L.R. 53 Cal. 34 at p. 41.

1931

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA v. HAJEE CASSIM TAYOOB DOSTY.

FAGE, C.J.

salami paid by a tenant to his landlord for recognizing the transfer of a non-transferable holding, was "money which comes to the landlord by virtue of the fact that he is the owner of the land"; and as such was "rent or revenue derived from land which is used for agricultural purposes." In my opinion this authority tells against the contention urged on behalf of the assessee, for the money which the landlord received as profit from these *sabape* loans did not "come to the landlord by virtue of the fact that he was the owner of the land," but was profit accruing to the lender from a loan transaction. Rent or revenue derived from land differs *toto cœlo* from profit derived from such loan transactions as those now under consideration.

In my opinion the answer to the question propounded is in the negative. Costs 5 gold mohurs.

DAS, J.—I agree.

BAGULEY, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Das.

1931
Nov. 26

MOHAMED CHOOTOO AND ANOTHER
v.
ABDUL HAMID KHAN AND OTHERS.*

Limitation Act (IX of 1908), Sch 1, Art. 123—Suit by heirs of deceased owner—Claim against trespasser.

Art. 123 of the Limitation Act does not apply to a suit by the heirs of a deceased owner to recover property from a person whom they allege to be a trespasser, and is in no way representing the estate of the deceased.

P. B. Sen for the appellants.

Kyaw Myint for the second respondent.

Rauf for the third respondent.

PAGE, C.J.—This appeal must be allowed.

The appellants, who were plaintiffs in the suit, are the son and daughter of one Noor Mohamed, who died in 1907. The appellants, under the Mohamedan law, are two of the three heirs of Noor Mohamed, and claim to be entitled to five-sixths of his estate, one-sixth falling to the fourth respondent, who is their mother, as the wife of Noor Mohamed. The contesting respondents are not the heirs of Noor Mohamed, and are not entitled in any sense to represent, or to be treated as, the heirs of the estate of Noor Mohamed. The claim against the contesting respondents 1, 2 and 3 is that they are in possession of the estate of Noor Mohamed, consisting of certain immoveable property, without any title to be in possession, and the suit is brought against them by the son and daughter of Noor Mohamed for possession.

* Civil First Appeal No. 68 of 1931 from the judgment of the District Court of Tharrawaddy in Civil Regular No. 15 of 1930.

It is, of course, essential that the appellants, as plaintiffs, should succeed on the strength of their own title, and they allege that they are the heirs of Noor Mohamed, and as such are entitled to five-sixths share of the property in suit. The difficulties that have resulted in this appeal are to some extent due to the inartistic form in which the plaint is drawn. The substance of the claim as set out in the plaint, however, appears to be what I have stated. In those circumstances, in my opinion, article 123 of the Limitation Act has no application. It is a suit brought by persons who claim to be entitled to possession of certain property, and no doubt they base their title upon the fact that they are the heirs of their father. But the contesting respondents, it is alleged, have no right or title to, or to represent the estate of Noor Mohamed, and the appellants seek to recover possession of the property from these respondents as trespassers. The learned District Judge has dismissed the plaintiff's suit upon the ground that, as this is a suit brought for a distributive share of the property of an intestate, article 123 applies. For the reasons that I have stated, in my opinion, article 123 does not apply to the claim in this suit.

In these circumstances the decree from which the present appeal is brought cannot stand, and the proceedings must be remanded to the District Court of Tharrawaddy to be retried according to law. We do not determine in this appeal whether the suit is or is not barred by limitation, or whether the plaintiffs have succeeded in making out their claim or not, and we do not propose to indicate what article of the Limitation Act is applicable to the plaintiffs' claim otherwise than by holding that article 123 is not applicable to the suit. The learned advocate for the appellants states that when the proceedings are returned

1931

MOHAMED CHOOTOO v. ABDUL HAMID KHAN.

PAGE, C.J.

to the District Court he will prefer an application for leave to amend the plaint in order to make clear what the claim is. Whether such an application ought to succeed or not is a matter to be determined by the learned District Judge. A considerable volume of evidence was adduced at the trial, and the learned District Judge, in his discretion, will determine whether further evidence should be allowed.

As regards costs, we think the right order to make is that the costs of this appeal should be the contesting respondents' costs in the cause; which means this, that, if the respondents lose at the re-hearing, they will not pay the appellants' costs of this appeal, while if they succeed at the re-hearing they will be entitled to the costs of this appeal. We make this order as to costs because, in our opinion, the learned District Judge may have been misled by the faulty manner in which the plaint has been drafted.

A certificate will issue for the refund of Court fees.

DAS, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Das.

SALLAY MAHOMED HAJEE SULAIMAN AND ANOTHER

v.

S. B. NEOGI & CO.*

1931
Nov. 17

Damages—Infringement of Trade-mark—Mode of assessment—Plaintiff's loss—Defendant's profits.

Where a plaintiff succeeds in a trade-mark case, he is entitled to claim either the damages he has sustained by reason of the infringement on the part of the defendant or the profits which the defendant has made by his wrongful act. The computation in these two cases is different.

Lever v. *Goodwin*, 36 Ch. Div. 1—*followed.*

If the plaintiff wishes to recover damages he should prove what profit he would have made if the offending article had not been put upon the market, and the best evidence in that behalf is the evidence of any loss of trade the plaintiff has suffered during the period in which the defendant was importing goods with the offending mark on them.

Juggi Lal v. *Swadeshi Mills Co.*, I.L.R. 51 All. 182—*followed.*

N. N. Burjorjee with *Clifton* for the appellants.

J. K. Munshi with *Miss Dantra* for the respondents.

PAGE, C.J.—The plaintiffs are flour millers, Rangoon, and until a few years ago they put upon the market only whole-meal flour of a superior quality. At the end of 1928 finding that atta was being imported from Calcutta of a quality inferior to that which the plaintiffs were selling the plaintiffs commenced to sell in Rangoon atta of an inferior quality similar to that which was being imported from Calcutta, and they imprinted on the gunny bags in which this atta was sold a "Hans" mark.

In October 1930 the second defendants commenced importing into Rangoon atta of a similar quality to

* Civil First Appeal No. 141 of 1931 from the judgment of this Court on the Original Side in Civil Regular No. 614 of 1930.

1931

SALLAY MAHOMED HAJEE SULAIMAN v. S. B. NEOGI & CO.

PAGE, C.J.

that which was sold by the plaintiffs under the "Hans" mark, with the "Hans" mark on their gunny bags.

On the 18th December 1930 the respondents filed the present suit against the first appellants as importers of the second appellants' goods bearing the "Hans" mark. At a later stage of the proceedings the second appellants were impleaded as defendants in the suit. Before the trial commenced the appellants applied that a commission should issue for the examination of certain witnesses in Calcutta, and they further applied on a later occasion that an adjournment of the case should be granted in order that certain witnesses might be called from Calcutta to give evidence in the case. Both these applications were rejected by the learned trial Judge. Thereupon the learned advocates who appeared on behalf of the appellants withdrew from the case, and the suit was heard *ex-parte*.

The learned trial Judge, after hearing such evidence as the plaintiffs elected to adduce, passed a decree in favour of the plaintiffs against both defendants for an injunction, directing the first defendants to deliver up any gunny bags in their possession bearing the "Hans" mark, and for damages amounting to Rs. 4,125 against the first defendants, and Rs. 8,250 against the second defendants.

Both defendants have now appealed. The only contention which has been argued is that the damages awarded as against each of the appellants were excessive. The appellants do not now challenge the decree in so far as an injunction was granted, and an order for delivery up of gunny bags bearing the "Hans" mark was made.

Now

"it is well-known that, both in trade-mark cases and patent cases, the plaintiff is entitled, if he succeeds in getting an

injunction, to take either of two forms of relief ; he may either say, 'I claim from you the damage I have sustained from your wrongful act,' or, 'I claim from you the profit which you have made by your wrongful act'"

per Cotton, L.J., in *Lever* v. *Goodwin* (1).

In the plaint the plaintiffs prayed *inter alia* for

"an account of the profits made by the defendants by importing into and selling in Burma atta bearing the 'Hans' trade-mark and for an account of the loss and damage sustained by the plaintiffs by reason of the defendants' wrongful use of the 'Hans' trade-mark on atta imported into and sold in Burma."

Now, when the issues were settled the plaintiffs did not ask that any issue should be raised with respect to an account of the profits made by the defendants, but they did raise an issue as to the amount of damages to which the plaintiffs were entitled.

At the trial the learned trial Judge invited the plaintiffs to state whether they were willing that he should determine the question of damages ; and the plaintiffs assented to the damages being assessed by the learned trial Judge, instead of being sent, as normally would be the case, to a referee for determination. Certain witnesses were then recalled by the plaintiffs for the purpose of proving the damages that they had suffered.

In the course of his judgment the learned trial Judge observed :

"In their plaint the plaintiffs ask that an account of the profits made by the defendants by importing their 'Hans' brand atta into Burma and selling it should be taken, and had this suit been contested throughout I should, in the ordinary course, have referred this matter of taking an account of the profits to the Official Referee. But, as the defendants have withdrawn from the suit, and as the plaintiffs cannot now bring the first defendants who would ordinarily be the accounting parties, to a strict account,

(1) (1882) 36 Ch. Divn. 1 at p. 7.

1931

SALLAY MAHOMED HAJEE SULAIMAN v. S. B. NEOGI & CO.

PAGE, C.J.

I have heard evidence on the question of damages in the course of this hearing, and I propose to decide the matter now."

The learned trial Judge then proceeded to consider the evidence adduced for the purpose of proving the profits that the appellants respectively had made by reason of the importation of atta in bags bearing the "Hans" mark, and awarded Rs 4,125 damages against the first defendants, and Rs. 8,250 against the second defendants upon that footing.

With all respect to the learned trial Judge I am disposed to think that he did not fully appreciate that in the present case it was open to the plaintiffs either to prove the profits which the defendants had made by importing atta with the "Hans" mark, or to prove the damages which the plaintiffs had suffered by reason of such importation. The computation in the two cases is, of course, different The learned trial Judge, as I understand the issues which he settled and the judgment which he delivered, was under the impression that the measure of damages which the plaintiffs had suffered was the amount of profit which the defendants had made. That, of course, is not the case, and an estimate of damages based upon the amount of profits that the defendants had made would not be in accordance with law. On the other hand, if it is assumed that the learned trial Judge was using the word "damages" not in its strict sense but loosely, it may be that the learned trial Judge intended in his judgment to estimate the amount of profits which the defendants had made out of these transactions, and to award those profits to the plaintiffs. In that case I am of opinion that there was no evidence upon the record which would justify the learned trial Judge in estimating the amount of profits accruing to the defendants by reason of the importation of atta under the "Hans" mark. The only evidence as to the

amount of atta that was imported by the defendants was the oral evidence of certain persons connected with the flour trade in Burma, who admittedly had no connection with the defendants, and did not pretend to do more than guess the amount of atta which the second defendants had imported into Rangoon. No attempt was made to obtain from the official records figures showing how much atta had been imported from Calcutta, or how much had been imported by the second defendants, or had been imported by the second defendants bearing the "Hans" mark. The witnesses could only speak vaguely in giving a bare estimate of what they regarded might probably be the amount of atta which the second defendants would be expected during the material period to import into Rangoon. In the absence of any evidence, except the vague estimates that the plaintiffs adduced, in support of their claim to an account of the profits made by the defendants in importing into Burma atta with the "Hans" mark on it, in my opinion, it was neither expedient nor feasible for the learned trial Judge to pass a decree in favour of the plaintiffs upon that footing. Nevertheless, we are prepared, upon the assumption that the learned trial Judge with the assent of the plaintiffs estimated as best he could the damages that the plaintiffs had suffered, to determine this appeal on that basis.

Now, the proper way to approach the question as to how much damage the plaintiffs had suffered by reason of the infringement of their mark by the defendants is to ascertain what profit the plaintiffs would have made if the offending articles had not been put upon the Rangoon market, and the best evidence in support of such a claim is evidence of any loss of trade that the plaintiffs had suffered

1931

SALLAY MAHOMED HAJEE SULAIMAN v. S. B. NROSI & Co.

PAGE, C.J.

during the period in which the defendants were importing goods with the "Hans" mark on them; see *Juggi Lal, Kamalapat* v. *Swadeshi Mills Company, Ltd.* (1).

In the course of his evidence the Managing Director of the plaintiff firm produced a statement of the plaintiffs' sales of atta bearing their "Hans" trade-mark from January 1929 to June 1931, marked Ex. C. From that statement it appears that, so far from there being a diminution in their sales after the period when the defendants had commenced to import atta with the "Hans" mark into Burma, in each year the sales steadily increased. Taking the period from October 1929 to June 1930, the amount of bags sold was 17,118, while the sales in the period from October 1930 to June 1931, the period material for the purpose of this suit, was 25,610 bags. Indeed, in March 1931 the sales reached their high water mark. No doubt there was a diminution in the sales during April, May and June 1931; but there was a corresponding diminution in the sales during those months in the two preceding years.

Now, that is the only evidence that the plaintiffs adduced in support of their claim to damages. No damage could be awarded to the plaintiffs upon any other ground. For instance, it was not pretended in this case that by reason of the importation of inferior atta with the "Hans" mark by the defendants the reputation of superior quality atta bearing the same mark belonging to the plaintiffs had in any way suffered, because it is conceded that the atta imported with the "Hans" mark on it by the defendants is of a similar quality to the atta put on the market by the plaintiffs with the same mark. Nevertheless, we

(1) (1929) I.L.R. 51 All. 182 (P.C.).

are disposed to think that there must have been some loss accruing to the plaintiffs by reason of the importation by the defendants of the atta bearing the "Hans" mark.

The plaintiffs having obtained an injunction are entitled to some damages. The question is, how much? Taking all the circumstances of the case into consideration we are of opinion that a fair sum to award to the plaintiffs for damages would be Rs. 1,250, and for that sum a decree will be passed against both defendants. The result is that the appeal is allowed, and the decree of the trial Court varied. In lieu of the sums awarded at the trial for damages there will be a decree against both the defendants for Rs. 1,250.

Now, as to the costs, I notice that the learned trial Judge awarded special costs, 15 gold mohurs a day, to the plaintiffs. The plaintiffs will have special costs of ten gold mohurs a day during the trial for the senior counsel only; and the appellants will have half the costs of the appeal.

DAS, J.—I agree.

INCOME-TAX REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das, and Mr. Justice Baguley.

1931
Dec. 1.

In re THE COMMISSIONER OF INCOME-TAX, BURMA

v.

S.P.K.A.A.M. CHETTYAR FIRM.*

Income-tax Act (XI of 1922), ss. 22 (4), 23 (3) and (4)—Accounts accepted as genuine—Assessee's failure to prove certain items in Suspense Account—Rejection of the whole account—Assessment under s. 23 (4).

The assessee, complying with a notice under s. 22 (4) of the Income-tax Act produced his accounts. The Income-tax Officer did not raise any objection as to their genuineness or accuracy, except that he held that the assessee had failed to prove the identity of persons who were parties to certain deposits and withdrawals entered in the suspense account in the names of *Pwesa* (Broker), Rangoon *Pwesa*, Rangoon *Pwesa* Chinaman, etc. The Income-tax Officer concluded from this that the accounts produced were either false or incomplete, and that there was another set of accounts relating to these names which had been withheld from him. He held, therefore, that the assessee had not produced all his accounts, and made an assessment under s. 23 (4).

Held, that the inferences drawn by the Income-tax Officer did not follow from the facts, and that he had no materials before him to justify the rejection of the return *in toto*, and to make an assessment under s. 23 (4). If the Income-tax Officer was of opinion that these were profitable loan transactions, in making an assessment under s. 23 (3) he should have calculated and included those profits in his assessment.

A. Eggar (Government Advocate) for the Crown. The assessment is under s. 23 (4), and there is no question of law for the High Court to decide.

The Income-tax Officer had certain facts before him, and he came to the conclusion on those facts that all the books were not produced. This is a question of fact only, in respect of which the High Court does not interfere.

Leach for the assessee. There was a notice to produce account books for the year 1928-29, and this notice was complied with. The fact that only certain

* Income-tax Reference No. 13 of 1931.

particular items therein were disbelieved, did not justify the Officer in rejecting the accounts and making an assessment under s. 23 (4).

PAGE, C.J.—For the year 1929-30 the S.P.K.A.A.M. firm of money-lenders were assessed to income-tax by the Income-tax Officer, Toungoo, under section 23 (4). In the course of the assessment proceedings, a notice under section 22 (4) was served upon the assessees, and pursuant thereto accounts were produced disclosing a profit of Rs. 43,209-7-0. In the notice under section 22 (4) the assessees were required to produce "all accounts, including old agency accounts, for the account year 1928-29." A number of books disclosing the accounts for that year were produced, and *pro tanto* the accounts based upon the entries in those books have been accepted as accurate. It appeared, however, that in a suspense account entries were made purporting to relate to certain sums deposited and withdrawn by Rangoon brokers and others, the entries being in names such as *Pweza*, Rangoon *Pweza* and Rangoon *Pweza* Chinaman. No entries relating to interest in connection with these deposits and withdrawals were made. The assessees were asked to explain these entries, and on their behalf it was stated that the deposits and withdrawals were temporary deposits and withdrawals effected by Rangoon brokers who came down to Pyu; that the assessees had the benefit of the money while it was deposited, and that therefore no interest was charged by the assessees in respect of these short-term withdrawals. The suspicion of the Income-tax Officer was aroused, and a notice was served on the assessees under section 23 (2) requiring them to produce any evidence on which they might rely in support of these entries.

1931

In re THE COMMISSIONER OF INCOME-TAX v. S.P.K.A.A.M. CHETTYAR FIRM.

PAGE, C.J.

When the assessees appeared before the Income-tax Officer the managing partner of the firm stated that he could not prove the identity of the five persons mentioned in the notice, that all the transactions in question related to a short period of three months and ten days in the year of account in respect of which the accounts were made, that if he saw these brokers he would be able to identify them, but that he could not remember their names, that they came to Pyu one day with money which they deposited for a short period, that they then withdrew it, that these were not loan transactions, and, therefore, that no profit in respect of them had been earned, or disclosed in the return that the assessees made.

A further notice was served upon the assessees under section 22 (4), but nothing turns upon that notice. In these circumstances the Income-tax Officer came to the conclusion that the assessees had failed to comply with the notice that was served upon them under section 22 (4) requiring them to produce their accounts for the accounting period, and, disregarding all the accounts which had been produced, he refused to accept the return, and made an estimated assessment upon the assessees under section 23 (4).

An application under section 27 was made by the assessees and was rejected; and an appeal from the refusal of the Income-tax Officer to re-open the assessment under section 27 was dismissed by the Assistant Commissioner.

The question that has been referred by the Commissioner of Income-tax for the opinion of the Court under section 66 (2) is:

"Were there any materials upon which the Income-tax Officer or the Assistant Commissioner could find that there was no

sufficient cause excusing the assessees from complying with the notice issued under section 22 (4)?"

It is common ground that the notice therein referred to was the original notice requiring the assessees to produce their accounts for the year 1928-29.

Now, the complaint of the Income-tax Officer in connection with the accounts which were produced was that the assessees had failed to prove the identity of the persons who were parties to the deposits and withdrawals entered in the suspense account in the names of *Pweza* or Rangoon *Pweza*, etc. No other complaint as to the accuracy or genuineness of the accounts was made by the Income-tax Officer in his order of assessment of the 4th of October 1929. The Income-tax Officer observed that

"if these names and transactions are ungenuine what can be inferred from that? The accounts produced must be either false or incomplete. It is probable that under these names additional capital was brought into the business and accounts are kept separately for this additional capital which the assessees have withheld to escape payment of income-tax on their true income. Therefore the accounts produced cannot be accepted as a basis for assessment."

In my opinion from such premises *conclusio non sequitur*. If the assessees were minded to conceal the accounts in respect of transactions other than those referred to in the accounts that were produced, why did they fabricate the *Pweza* entries, and thus disclose that there were other transactions which had resulted in a profit which they were bound to disclose to the Income-tax authorities? If the assessees are as astute as the Income-tax Officer would have the Court believe, and they wished to conceal the profit that had been made on some other transactions, the simple course would have been to make no reference to such other transactions in the accounts which they

1931

In re THE COMMISSIONER OF INCOME-TAX v. S.P.K.A.A.M. CHETTYAR FIRM.

PAGE, C.J.

produced. In other respects it is not pretended that the return that was made can be challenged as inaccurate, incomplete, or fraudulent. The only complaint is that, with respect to the withdrawals and deposits in question, the identity of the persons who were parties to the transactions has not been disclosed. Upon that foundation the Income-tax Officer has built up the following argument:

(1) that the *Pweza* names and transactions in the accounts are not genuine; *ergo*,

(2) that there must be other transactions from which a profit has been made;

(3) that there must be accounts of such other transactions; and

(4) that the assessees have deliberately withheld such accounts.

In my opinion the foundation will not bear up the structure. What is the nature of these undisclosed transactions the existence of which is to be presumed because the identity of the persons to whom the *Pweza* entries relate has not been proved? The Commissioner of Income-tax states that "it is not, of course, possible for this Department to say what was concealed." I agree. I am of opinion that there were no materials from which the Income-tax Officer reasonably could infer that there were transactions other than those set out in the books of account for which separate accounts had been made, and which had not been disclosed.

The Income-tax Officer served upon the assessees a notice under section 23 (2), and if the Income-tax Officer was of opinion that the transactions appearing in the suspense account were not temporary deposits and withdrawals for which no interest was charged, but were loan transactions which had resulted in a profit to the assessees, in making an assessment under

section 23 (3), he might have included such profit as he found had accrued to the assessees from those transactions in the assessment that he made. Whether his finding would have been correct or not is a matter of fact with which the Court is not concerned, but from such an assessment an appeal would lie. In my opinion there were no materials before the Income-tax Officer or the Assistant Commissioner justifying them in disregarding the return *in toto*, and making an assessment under section 23 (4). This case turns on its own facts, and is not to be treated as an authority in other cases where the facts are not the same.

The answer to the question propounded is in the negative. Costs, 10 gold mohurs.

DAS, J.—I agree.

BAGULEY, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Cunliffe.

TAN MA SHWE ZIN

v.

TAN MA NGWE ZIN AND OTHERS.*

Chinese Buddhists—"Buddhist," meaning of, under Burma Laws Act (XIII of 1898), s. 13, and Succession Act (XXXIX of 1925)—Personal law of Parties—Succession and inheritance—Chinese customary law.

Whether a Chinese is a Buddhist or not is a question of fact. A Chinese Buddhist is a Buddhist within the meaning of that term both in section 13 of the Burma Laws Act and in the Indian Succession Act. The true meaning of section 13 (1) of the Burma Laws Act is that in matters regarding succession, inheritance, etc., where the parties profess the Buddhist or Mahomedan or Hindu religion, the rule of decision shall be the personal law that governs the

* Civil First Appeal No. 128 of 1931 from the judgment of this Court on the Original Side in Civil Regular No. 536 of 1930.

1932

TAN MA SHWE ZIN v. TAN MA NGWE ZIN.

community or religious denomination to which the parties belong, except in so far as that law in Burma has been altered or abolished by the Legislature or is opposed to any custom having the force of law. The personal law of the Chinese Buddhists in Burma is Chinese customary law and therefore the will of a Chinese Buddhist is subject to that law.

Chan Pyu v. *Saw Sin*, I.L.R. 6 Ran. 623; *Foue Lan* v. *Ma Gyee*, 2 L.B.R. 95; *Gyan Shi* v. *Kim Tee*, 10 L.B.R. 23; *Hong Ku* v. *Ma Thin*, (1881) S.J. 135; *Kyin Wet* v. *Ma Gyok*, 9 L.B.R. 179; *Ma Pwa* v. *Yu Lwai*, 8 L.B.R. 405; *Ma Sein* v. *Ma Pan Nyun*, I.L.R. 2 Ran. 94; *Ma Shein* v. *Kim Sein*, 8 L.B.R. 225; *Maung Kwai* v. *Yeo Choo Yone*, 10 L.B.R. 159; *Maung Po Maung* v. *Ma Pyit Ya*, I.L.R. 1 Ran. 161—*approved*.

Ma Yin Mya v. *Tan Youk Pu*, I.L.R. 5 Ran. 406; *Phan Tiyok* v. *Lim Kyin Kauk*, I.L.R. 8 Ran. 57—*discussed and explained*.

Jeejeebhoy for the appellant. The question before the Court is whether section 118 of the Indian Succession Act applies to the will of a Chinese Buddhist. The Succession Act applies to the estate of a Chinese Buddhist, firstly, as a matter of law and, secondly, as embodying the principles of justice, equity, and good conscience. This is the decision of the Full Bench ruling in *Phan Tiyok* v. *Lim Kyin Kauk* (1). There is nothing to indicate in that ruling that only a part of the Succession Act is to be applied. Therefore section 118 of the Act does apply in this case. The Trial Court's view that the principles of English Common Law should be applied in this case is unsustainable in view of the Full Bench ruling. The preamble of the Burma Laws Act indicates that the Act was specially and primarily intended for application in Burma. The expression Buddhist law in section 13 therefore means Burmese Buddhist law. A Chinese Buddhist is not a Buddhist within the meaning of that section. His religion is not pure Buddhism, but also includes ancestor worship and other things. As Buddhist law does not apply to him, "an enactment in force" will apply to him and that is the Indian Succession Act. As he is not a

(1) I.L.R. 8 Ran. 57.

1932

TAN MA SHWE ZIN v. TAN MA NGWE ZIN.

Buddhist within the meaning of section 13 (1) (*a*) of the Burma Laws Act, so also he is not a Buddhist within section 29 of the Succession Act: *Phan Tiyok* v. *Lim Kyin Kauk* (1). The law applicable to a Kalai is the Succession Act. A Kalai would profess Buddhism and Hinduism with equal devotion, but then he is neither a Buddhist nor a Hindu under section 13 of the Burma Laws Act: *Ma Yait* v. *Maung Chit Maung* (2). By parity of reasoning a Chinese Buddhist who is not a Buddhist within the meaning of section 13 is governed by the Succession Act.

The Full Bench cases of this Court of *Ma Yin Mya* v. *Tan Yauk Pu* (3), and of *Phan Tiyok* v. *Lim Kyin Kauk* (1), have laid down that the Chinese customary law is inapplicable to the Chinese in Burma. A Chinese who is not a Buddhist is not subject to his personal law in Burma. He is governed by the Succession Act. Then why should the Chinese Buddhist be asked to follow in Burma the customary law of China?

Eunoose for the first and second respondents.

Mootham for the third to eighth respondents. A Chinese Buddhist is a Buddhist within section 13 of the Burma Laws Act and so his customary law in regard to succession must apply. In the case of *Phan Tiyok* (1), the decision as to what law applies to a Chinese Buddhist is *obiter*. A majority of Judges in that case said that a Chinese Buddhist was a Buddhist within section 13 of the Burma Laws Act, and two of them held that the provisions of the Succession Act as to inheritance on intestate succession were applicable only on the ground of justice, equity, and good conscience.

(1) I.L.R. 8 Ran. 57. (2) 11 L.B.R. 155 (P.C.).
(3) I.L.R. 5 Ran. 406.

1932

TAN MA SHWE ZIN v. TAN MA NGWE ZIN.

Jeejeebhoy in reply. The decision in *Phan Tiyok's* case (1) that the Succession Act applies is not *obiter*; see page 94. It was necessary to decide in that case what law applied, as Burmese Buddhist law could not be applied to the estates of Chinese Buddhists.

PAGE, C.J.—The determination of this appeal depends upon the true construction of section 13 of the Burma Laws Act (XIII of 1898) which runs as follows:

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

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

(*b*) the Muhammadan law in cases where the parties are Muhammadans, and

(*c*) the Hindu law in cases where the parties are Hindus,

shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

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

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

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

The material facts are not in dispute, and lie within a narrow compass. Tan Ma Thin died at Rangoon on 14th April 1929. She left a will dated 27th June 1927, of which probate was granted on 7th August 1929 to defendants 3 to 8, of whom

(1) I.L.R. 8 Ran. 57.

defendants 3 to 6 and 8 are the present respondents. The appellant and the first respondent were half-sisters of Tan Ma Thin, and the second respondent was her half-brother. It is common ground, as set out in paragraph 2 of the plaint, that

"The said Tan Ma Thin was born of a Chinese settler in Burma and a lady of Chinese descent. She married Khoo Boon Tin, a Chinese, who predeceased her without leaving any issue. She was a Buddhist, and during her lifetime she observed the Chinese customs and ceremonies, and attached herself to the Chinese Community."

In the plaint the property left by Tan Ma Thin is set out in three schedules—A, B and C. "A" referred to property for which no provision was made in the will; "B" to property which it was conceded by the plaintiff duly passed under the will; "C" to property which under the will was to be appropriated to various religious and charitable uses.

The plaintiff claimed that she and the first and second respondents were the heirs of Tan Ma Thin, and that as such the plaintiff was entitled, *inter alia*, to one-third of the property set out in "A" as on an intestacy, and to one-third of the property in "C" upon the footing that the bequests in the will of the property therein referred to were null and void under section 118 of the Indian Succession Act (Act XXXIX of 1925).

This section provides

Bequest to religious or charitable uses.

"118. No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons."

The first and second *pro-formâ* respondents admitted the allegations in the statement of claim, and

1932

TAN MA SHWE ZIN v. TAN MA NGWE ZIN.

PAGE, C.J.

prayed that they might be awarded their respective shares in the inheritance.

The defendants 3 to 6 and 8 in substance contended in their written statements that the will was not governed by section 118 of the Indian Succession Act, that as executors they were entitled to distribute the estate in accordance with the terms of the will, and in so far as there was an intestacy, in accordance with the principles of justice, equity, and good conscience.

The learned trial Judge held that Tan Ma Thin was a Chinese Buddhist, and that Chinese Buddhists are Buddhists within the meaning of that term as used in section 13 of the Burma Laws Act and in the Indian Succession Act. He further held that Chinese customary law is inapplicable to the testamentary succession to the estate of a Chinese Buddhist, that there is no Buddhist law that can be applied, and that in accordance with the principles of justice, equity, and good conscience, the will of Tan Ma Thin was governed by the rules of English law. Upon that footing he held, *inter alia*, that the property in schedule "C" was validly disposed of under the will, and passed a declaration in favour of the appellant and the first and second respondents that each of them was entitled to one-third of the property set out in schedule "A" as on an intestacy.

Now, the first question that falls for determination is whether Tan Ma Thin was a Buddhist or not. That is a question of fact, and it is the common case of all parties that she was a Buddhist of Chinese descent, who had married a Chinese, and who throughout her life "observed the Chinese customs and ceremonies, and attached herself to the Chinese community."

I am further clearly of opinion, indeed I think it is settled law, that a Chinese Buddhist is a Buddhist within the meaning of that term both in section 13 of the Burma Laws Act and in the Indian Succession Act. It follows, therefore, inasmuch as the questions which arise for decision in the present case fall within the ambit of section 13 of the Burma Laws Act, that the problem to be solved is the meaning of the expression "Buddhist Law" in section 13 (1) (*a*) of the Act.

Now, much judicial time has been expended, and divers opinions have been expressed, by the Courts in Burma in connection with the interpretation of section 13, but it appears to me that if the intention of the Legislature in passing this enactment is steadily borne in mind when the construction of this section is under consideration its meaning and effect is free from difficulty. It is a fundamental principle of British imperial policy that, so far as may be consistent with the maintenance of good government and ordered progress, the particular habits and customs of the various communities under British rule should be recognized and respected. I have no doubt that the Legislature intended to give effect to this principle when section 13 was enacted. But the language in which the section is couched is unfortunate, for there is no law by which all Hindus or all Mahomedans are governed, and in the strict sense of the term no Buddhist Law at all. The system of law applicable to Sunni Mahomedans differs from that to which Shiah Mahomedans are subject; Hindus who follow the Benares School are governed by the Mitakshara, those who follow the Bengal School by the Dayabhaga; while in the religious system known as Buddhism no rules of law concerning secular matters are laid down or prescribed. Bearing in mind

1932

TAN MA SHWE ZIN v. TAN MA NGWE ZIN.

PAGE, C.J.

the object that the Legislature had in view, however, the meaning and effect of the expressions "Buddhist Law," "Mahomedan Law" and "Hindu Law" in section 13, in my opinion, is plain, and section 13 (1) must be construed as laying down that in "any question regarding succession, inheritance, marriage or caste or any religious usage or institution" where the parties profess the Buddhist or Mahomedan or Hindu religion the rule of decision shall be the personal law that governs the community or religious denomination to which the parties belong, except in so far as their personal law in Burma "has by enactment been altered or abolished, or is opposed to any custom having the force of law." In my opinion, it would be neither reasonable nor feasible to construe the section in any other sense. It follows, therefore, that the questions to be determined in the present case are to be decided by reference to the personal law of the Chinese Buddhists in Burma, which *primâ facie* is Chinese customary law. Whether there is any such law and what is prescribed thereunder, are questions of fact to be determined by the trial Court on a consideration of the evidence adduced in the case, and as there are experts in such matters resident in Rangoon, and we are informed that the Chinese customary law has now been set forth in a series of volumes as a codified system, the Court should find no difficulty in ascertaining what are the provisions of that law relevant to the issues raised in the present case. The view that I hold as to the construction of section 13 not only appears to me to be in consonance with what was the intention of the Legislature when section 13 was enacted, and to be the plain meaning and effect of the terms therein contained, but is also in conformity with, and is supported by, a series of decisions

of the Courts in Burma during a period of nearly fifty years: *Hong Ku* v. *Ma Thin* (1); *Fone Lan* v. *Ma Gyee* (2); *Ma Shein* v. *Kim Sein* (3); *Ma Pwa* v. *Yu Lwai* (4); *Kyin Wet* v. *Ma Gyok* (5); *Gyan Shi* v. *Kim Twe* (6); *Maung Kwai* v. *Yeo Choo Yone* (7); *Maung Po Maung* v. *Ma Pyit Ya* (8); *Ma Sein* v. *Ma Pan Nyun* (9); *Chan Pyu* v. *Saw Sin* (10).

In the leading case of *Fone Lan* v. *Ma Gyee* (2), Fox, J., in the course of his judgment observed:

"On consideration of what the Hindu and Mahommedan Laws are composed of, I take it that when in section 13 of the Burma Laws Act, 1898, the Legislature uses the words 'Mahommedan Law' and 'Hindu Law,' it means the laws applicable to such Mahommedan and Hindu parties whencesoever such laws may be derived. No doubt, provision has been expressly made in the section for the validity of customs opposed to what is referred to as Hindu and Mahommedan Laws, as if customary law formed no part of such laws, but if customary law is in fact a part of Hindu and Mahommedan Law, tautology or an inexact method of expressing the intention of the Legislature cannot make it otherwise. If the terms "Hindu Law" and "Mahommedan Law" in section 13 of the Act must be read as above, I think the term "Buddhist Law" in the section must be read in the same way, namely, as meaning the law of succession, inheritance, marriage, etc., applicable to the Buddhist parties in the case. What is the law of succession and inheritance applicable to a Chinese Buddhist? As far as the evidence in this case goes it is customary law wholly unconnected with the Buddhist faith."

The learned Judge added that "the personal law is left to all who are exempted from the operation of the Indian Succession Act." With these observations I respectfully agree (sections 29, 57, and 58 of the Indian Succession Act, 1925).

---

(1) (1881) S.J. 135.
(2) (1903) 2 L.B.R. 95.
(3) (1915) 8 L.B.R. 225.
(4) (1916) 8 L.B.R. 405.
(5) (1918) 9 L.B.R. 179.
(6) (1919) 10 L.B.R. 23.
(7) (1919) 10 L.B.R. 159.
(8) (1923) I.L.R. 1 Ran. 161.
(9) (1924) I.L.R. 2 Ran. 94.
(10) (1928) I.L.R. 6 Ran. 623.

1932

TAN MA SHWE ZIN v. TAN MA NGWE ZIN.

PAGE, C.J.

I will now consider two Full Bench cases of the Rangoon High Court, *Ma Yin Mya* v. *Tan Yauk Pu* (1) decided in 1927 by Rutledge, C.J., Das, Maung Ba and Brown, JJ., and *Phan Tiyok* v. *Lim Kyin Kauk* (2), decided in 1930 by Heald, Offg. C.J., Chari, Otter, Maung Ba and Brown, JJ., in which section 13 of the Burma Laws Act was discussed and construed.

In *Ma Yin Mya's* case the question propounded for the determination of the Full Bench was "in the case of Chinese Buddhists is the Burmese Buddhist law regarding marriage applicable to them as the *lex loci contractus*, or if not, which is the law applicable?" The learned Chief Justice in the course of his judgment, after tracing the genesis of the rules set out in section 13 of the Burma Laws Act, proceeded to construe the section as follows:

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

Das and Brown, JJ., agreed with the view expressed by the learned Chief Justice, and Maung Ba, J. in a concurring judgment observed:

"So far as I know, the *lex loci contractus* of the Buddhists in Burma is the one to be found in the *Dhammathats* known as Burmese Buddhist Law. Of course, it is but right to allow the Chinese Buddhist to show that that law is opposed to any custom having the force of law, provided that it works no injustice to the Buddhist women, and it should be on him to establish that contention."

(1) (1927) I.L.R. 5 Ran. 406. (2) (1930) I.L.R. 8 Ran. 57.

It is unnecessary for the purpose of deciding the present appeal to consider whether the actual decision in *Ma Yin Mya*'s case was correct or not, but the construction that the learned Judges in that case placed upon the words in section 13 (1) (*a*), "the Buddhist law in cases where the parties are Buddhists," with all respect, in my opinion, cannot reasonably be accepted. Notwithstanding the view expressed by Maung Ba, J. (*ibid*, p. 421), that "the term 'Buddhist law' is a misnomer, 'Buddhist' means what appertains to the Buddhist faith, and Buddhism has laid down no law which is to be applied to secular matters," their Lordships in that case, as was pointed out by Cunliffe, J., in *Chan Pyu* v. *Saw Sin* (1), held "that the expression 'the Buddhist law in cases where the parties are Buddhists' means, so far as Burma is concerned, the Burmese Buddhist law in cases concerning any adherents to the Buddhist religion irrespective of whether they are Burman Buddhists or not." Cunliffe, J., added :

"I am exceedingly doubtful (and I only say so with great respect) whether had I been sitting on the Full Bench I should have been able to agree to this interpretation. It appears to me, firstly, that such a reading introduces by implication into the statute an adjective qualifying the words 'Buddhist law,' and, secondly, having introduced this adjective the qualification is not again applied to the second use of the term 'Buddhists.' I incline to the view that once the term 'Burmese' is introduced, the interpretation should rather read 'the Burmese Buddhist law in cases where the parties are Burmese Buddhists.' The question whether the qualification should have been introduced at all may perhaps be tested by the application of some adjective to the two other provisions in the section dealing with the Mahomedan and the Hindu law. Would it be possible, for example, to qualify the expressions 'Mahomedan law' and 'Hindu law' in some special way, and direct that this special

(1) (1928) I.L.R. 6 Ran. 623.

1932

TAN MA SHWE ZIN v. TAN MA NOWE ZIN.

PAGE, C.J.

law in some particular province in India should apply to all Mahomedans and to all Hindus?"

I find myself in entire agreement with these observations of Cunliffe, J. In *Hong Ku* v. *Ma Thin* (*supra*), Jardine, J.C., observed :

"I know of no authority for the proposition that the *Dhammathat*, or even the general body of Buddhist law, is an exclusive *lex loci*. Under section 4 of the Courts Act it becomes one of several *leges fori*. The mofussil Courts apply different religious laws to the various religious classes. This important subject has been discussed at great length in our judgment in Miscellaneous Appeal 2 of 1878, printed in the Judicial Commissioner's Memorandum 125 of the 19th October 1878. We have been shown no authority for the doctrine set forth in defendant's written answer, and apparently held by the Judge, that a Buddhist coming from a distant country must be held subject to the Burmese Buddhist law of marriage or succession merely because he has a civil domicile here and has married, among other wives, a Burman Buddhist. In India, where the absence of *lex loci* has caused similar questions, the Courts have applied the special laws of peculiar sects to Jains and Sikhs under the directions of Charters which required the Hindu law to be applied to Hindus. These suitors were treated as Hindus, but with a right to their peculiar laws (*Bhagwandas Tejmal* v. *Rajmal*, 10 Bom. R. 259; *Lopes* v. *Lopes*, 5 Bom. R. 185; *Soorendronath Roy Cussamal Heeramonee*, 12 Moo. I.A. 81). Chief Justice Westropp's judgments on these subjects seem to me perfect storehouses of information, and I quote a part of his judgment in the Jain case: 'Those words, *the usage of the country in which the suit arose*, should be liberally interpreted, and would comprise the ancient and clearly established usage of a tribe or caste, which, or some members of which, may have migrated from one part of India to another. They have been regarded as carrying their laws of succession and of marriage with them to their new domicile.' The limits within which this doctrine has to be applied are suggested in the judgments. We all know that the Courts apply different systems of both Hindu and Mahomedan law to people belonging to different races, countries, or sects. I doubt, therefore, whether it is obligatory on our Courts here to apply the Burma Buddhist law to Buddhists from Ceylon or China. The subject teems with difficulties";

and the learned Judicial Commissioner added :

"I will suppose the case of the Emperor of Turkey empowering his Judge to administer 'Christian law when the parties are Christians' at Constantinople or Bagdad. I do not think a Judge would treat such a direction as limiting him to the law of the indigenous Christians, and requiring him to treat English, French, and Italian merchants as subject to the law of the Greek Church or of the Armenians or Nestorians. Neither would it require him to confine himself to books of religious authority such as Leviticus or Deuteronomy, which might be useless as guides to the law of the present time. I incline, therefore, to think the Judge below was wrong in supposing that he was limited to the *Dhammathat* in his application of Buddhist law. In section 4 of the Courts Act the word Buddhist is not limited by such words as *Burmese, religious,* or *written.*"

The construction that was given to section 13 by the learned Judges who decided *Ma Yin Mya* v. *Tan Yauk Pu* (1) was not accepted by the Full Bench which subsequently determined *Phan Tyoke* v. *Lim Kyin Kauk* (2). In that case the question referred was :

"does Burmese Buddhist Law govern the succession to the estate of a Chinese Buddhist born in China, but who was domiciled and died in Burma"?

The unanimous answer given by the Full Bench in that case was in the negative. This Court is bound to follow that ruling, but I may perhaps venture respectfully to add that I agree with it. The learned Judges in *Phan Tiyok*'s case did not content themselves, however, with answering the question that was referred to them for determination, but proceeded further to consider and decide what was the law by which the succession to a Chinese Buddhist domiciled in Burma was governed, and laid down (Otter, J., *dissentiente*) that the law

(1) (1927) I.L.R. 5 Ran. 406. (2) (1930) I.L.R. 8 Ran 57

1932

TAN MA SHWE ZIN v. TAN MA NGWE ZIN.

PAGE, C.J.

applicable in such circumstances was the Indian Succession Act. The discussion and decision of the Full Bench on this question, however, admittedly were *obiter*, and although the observations of their Lordships are, of course, entitled to the greatest respect, this Bench is not bound by the conclusion of the Full Bench on that subject, and as the question directly falls for determination in the present case this Bench is both entitled and bound to express its own opinion upon the matter. With the judgment of Otter, J., who dissented from the conclusion that was arrived at by the other members of the Full Bench in *Phan Tiyok*'s case, I find myself in complete agreement; but with all respect I am unable to concur either with the decision of the majority of the Full Bench, or with the various grounds upon which it was based by the learned Judges who decided that case.

Heald (Offg. C.J.) based his conclusion upon the simple and sufficient ground (if it is accepted) that Chinese are not Buddhists, and, therefore, are outside the ambit of section 13 of the Burma Laws Act, and are not exempted from the operation of the Indian Succession Act. The view expressed by Heald, Offg. C.J., commended itself also to Chari, J. The majority of the Court, however, held that the question whether a Chinese was a Buddhist or not was a question of fact, and, although their Lordships found as a fact that the Chinese whose estate was the subject matter of the suit was a Chinese Buddhist, Maung Ba and Brown, JJ., concurred in the conclusion at which Heald, Offg. C.J., had arrived upon the ground that questions concerning the succession to the estate of a Chinese Buddhist were to be decided "according to justice, equity, and good

conscience" as provided by section 13(3) of the Act.

I confess that I am unable to persuade myself that there is a *presumptio juris et de jure* that a Chinese is not a Buddhist. Such a view has never been taken by any other Court so far as I am aware, and the answer to it, in my opinion, was tersely given by Maung Ba, J., who, in the course of his judgment in *Phan Tiyok*'s case (at p. 136), observed :

"With all respect, in my opinion, the term 'Buddhist' used in clause (1) of section 13 of the Burma laws Act is wide enough to include a Chinese Buddhist. Buddhism has two main schools—Mahayan and Hinayan—and many sub-sects. China follows the Mahayan school, while Burma follows the Hinayan school. Naturally there must be differences in beliefs, etc., but the same Buddha is revered. A Chinese Buddhist, though he may not follow the Burmese form of Buddhism, is still a Buddhist. Whether an individual Chinese is a Buddhist or not appears to me to be a question of fact that is to be determined according to the evidence adduced in any particular case in which the question arises. As was pointed out by the Special Court in *Hong Ku* v. *Ma Thin* (1), 'it would be as wrong to presuppose of a Chinaman that he is a Buddhist as to presume of an Indian that he is a Hindu and not a Mahomedan, or of an Irishman that he is a Catholic and not a Protestant. Such things require to be proved before a Court can form any opinion.'"

I agree, and I cannot accept the view expressed by Heald, Offg. C.J., on this matter as being correct.

The following passages in the judgment of the Full Bench sufficiently indicate the ground upon which the opinion expressed by Maung Ba and Brown, JJ., was based :

"Although the ordinary Chinese Buddhist is a 'Buddhist' within the meaning of section 13 of the Burma Laws Act, there is no law which can be called 'Buddhist Law' recognised by the Chinese Buddhists residing in Burma, apart from the general customary law applicable to both Buddhist and non-Buddhist

(1) (1881) S.J. 135 at p. 141.

1932

TAN MA NGWE ZIN v. TAN MA SHWE ZIN.

PAGE, C.J.

Chinamen. They do not recognize the *Dhammathats* which are recognized by the Burmese Buddhists, and which have come to be known as the Burmese Buddhist law. So it may not be right to force Burmese Buddhist law upon a Chinese Buddhist who has not adopted the Burmese form of Buddhism. In these circumstances the best solution would be to apply to ordinary Chinese Buddhists the law of justice, equity, and good conscience, as provided in clause 3 of section 13 of the Burma Laws Act. The Indian Succession Act applies to non-Buddhist Chinamen, and so its principles relating to intestate succession might be applied to Buddhist Chinamen as well, except those who have adopted the Burmese form of Buddhism. To the latter Burmese Buddhist law might justifiably be applied."

(per Maung Ba, J.), and

"the chief difficulty I find in the way of applying the Chinese customary law is that I am unable to see how such law can in any sense be called Buddhist law. It has been suggested that Buddhist law in the case of a Chinese Buddhist must be interpreted to mean the law that would have been applicable to the particular Buddhist concerned if he had died in his native country. This seems to me to be straining the meaning of the term 'Buddhist law' further than is justifiable. It has been pointed out that, so far as Burmese Buddhist law is concerned, the name is a misnomer, and that the law is not Buddhist in origin in any way. That is no doubt correct. But it is quite clearly the law applicable to Burman Buddhists as such. Although not Buddhist in origin, it is now the accepted law that applies to indigenous Buddhists of Burma, and to followers of no other religion. The Chinese customary law may apply to Chinese Buddhists, but it is in no sense whatsoever connected with Buddhism, and applies in China equally to Buddhists and non-Buddhists. I find myself unable to hold that the Chinese customary law can be called Buddhist law simply because it would be applicable to a Chinaman in China if he happened to be a Buddhist."

(per Brown, J.). His lordship added:

"In the view I have taken there is no Buddhist law applicable to Chinese Buddhists. The case of the Chinese Buddhist is not therefore provided for by sub-section (1). Under this section, the law of succession in the case of Chinese Buddhists must therefore be in accordance with justice, equity, and good conscience."

The fallacy, if I may venture to say so, that appears to me to underlie the reasoning of Maung Ba and Brown, JJ., is that it would follow that there is no Buddhist law by which any community is governed, or which can be applied to any community, for neither the Chinese customary law nor the Burmese customary law is Buddhistic in its origin, or is in any way connected with the Buddhist religion. As was pointed out by Brown, J., in the same case

"The Hindu law is laid down in section 13 as the law to be followed in the case of Hindus and the Muhammadan law in the case of Muhammadans. But in the cases both of Hindus and Muhammadans, variations of the law are applied in accordance with the particular race or caste to which the persons concerned belong. The Burmese Buddhist law is the law applicable to Burmese Buddhists in Burma, but it does not follow that the same law must be applied without any modification to Buddhists coming from another race and country. It is not really Buddhistic in its origin, and is applied to the Burmese Buddhists because it is the law to which they have been subject from time immemorial. Chinese Buddhists have never been subject to it, and it cannot be called Buddhist law at all when considered in its possible reference to them."

(See also per Maung Ba, J., in *Ma Yin Mya* v. *Tan Yauk Pu, supra*, at p. 420.) It follows, therefore, that if the Chinese customary law is not to be regarded as Buddhist law in the sense in which that term is used in section 13 (1) (*a*) of the Burma Laws Act, because it does not emanate from and is not connected with the Buddhist religion, in like manner the customary law of the Burmans, the source of which is Hindu law, upon which has been superimposed customs peculiar to the Burmese people, and which is unconnected with Buddhism, equally cannot be treated as Buddhist law within section 13 (1) (*a*) of the Act. Such reasoning, in my opinion, if it were to be accepted and followed in practice to its logical

1932

TAN MA SHWE ZIN v. TAN MA NGWE ZIN

PAGE, C.J.

conclusion, would frustrate the object that the Legislature had in mind when section 13 was enacted, and would render the provisions of section 13 (1) (*a*) nugatory, and I respectfully express my dissent from it. As I apprehend the meaning and effect of section 13 of the Burma Laws Act, however, the Burmese customary law is to be applied in Burma to Burmese Buddhists and the Chinese customary law to Chinese Buddhists, not because these customary laws are part and parcel of the Buddhist religion, but because they are the personal law by which the Burmans and Chinese in Burma who profess the Buddhist religion respectively are governed. For the reasons that I have stated the issues raised in the present case relating to the succession or inheritance to the estate of Tan Ma Thin are to be determined according to Chinese customary law. The result is that the appeal is allowed, and the case will be remanded to the trial Court to be heard and determined on the merits in due course of law, and according to the principles that I have enunciated and laid down. The costs of the appeal will be costs in the cause.

CUNLIFFE, J.—I have had the advantage of reading the judgment of the learned Chief Justice. I agree with his conclusions and the reasons on which they are based. Some time ago, in *Chan Pyu*'s case (*supra*), I had occasion to discuss the legal effect of section 13 of the Burma Laws Act. I adhere to what I said in that case. I am unable usefully to add anything further.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Otter.

L. J. SWAINE
v.
D. H. SWAINE AND ANOTHER.*

1931
Nov. 27.

Indian Divorce Act (IV of 1869), s. 16—Intervener, who can be—Adultery of Petitioner—Adulterer's competency as witness—Court's discretion to grant divorce—Non-disclosure by Petitioner—Rescission of decree nisi.

Under the Indian Divorce Act, any person other than the respondent, the co-respondent, and a person acting at the instance of either of them, can intervene. The fact that the intervener is related to the respondent (in this case she being the mother of the respondent but not acting in collusion with him) is immaterial.

Howarth v. *Howarth*, L.R. (1884) 9 P.D. 218—*referred to.*

It is open to the intervener to call the person (in this case her own second husband) who is alleged to have committed adultery with the petitioner as a witness.

The Court has discretion to grant a divorce, notwithstanding the misconduct of the petitioner. But it is the duty of every petitioner to deal with the Court with the utmost good faith and to place all the facts before the Court. Failure to do so may result upon intervener proceedings in a rescission of the decree nisi.

Aplet v. *Aplet*, 46 T.L.R. 456; *Elliott* v. *Elliott*, 37 T.L.R. 834; *Stuart* v. *Stuart*, L.R. (1930) P. 77; *Wilson* v. *Wilson*, L.R. (1920) P. 20—*referred to.*

Paw Tun for the intervener.

Gregory for the petitioner.

OTTER, J.—On the 30th of January, 1931, Mrs. Lilly Joan Swaine obtained a decree nisi from this Court for the dissolution of her marriage. The case was undefended. At the same time an order was made giving the custody of a female child of the marriage, then about five years old, to the petitioner. This order forms part of the decree. The present proceeding was instituted on the 27th July, 1931, by Mrs. C. F. K. Sharrock by way of intervention under

* Civil Regular No. 9 of 1931.

1931

SWAINE v. SWAINE.

OTTER, J.

section 16 of the Indian Divorce Act of 1869, whereby she asks that the decree should be rescinded upon two main grounds:

(i) that the divorce was arranged for and obtained in collusion between the parties; and

(ii) that the petitioner failed to disclose her own adultery.

There is also an application by the petitioner to make the decree absolute.

The case is an unusual one, not only because intervener proceedings are rare in this Province, but also because the facts relied on by the intervener are themselves peculiar.

It should be stated that the husband of the petitioner is the son of the intervener by her first husband. Further she alleges that the undisclosed adultery of the petitioner was committed with her own second husband.

It is clear, I think, that with the exception of the respondent and the co-respondent, and any person acting at the instance of either of these persons, in this country, any person may proceed by way of intervention proceedings.

Some suggestion was made that Mrs. Sharrock was in truth acting on behalf of her son (the respondent), but I regard this as not established. The mere fact of her relationship to the respondent is not sufficient [see as to this *Howarth* v. *Howarth* (1)], and there was no other evidence in support of the suggestion made.

A further point of some importance was raised in the early part of the case, *viz.*, as to whether the intervener could call into the witness box her own

(1) L.R. (1884) 9 P.D. 218.

husband to prove the acts of adultery on his part with the petitioner. It is clear, I think, that in India in proceedings for divorce instituted by a wife a Court has no power to allow the alleged adulteress to be made a party, and so to cross-examine the witnesses for the petitioner, give evidence and call witnesses herself [see *Ramsay* v. *Boyle* (1)]. It is also clear that formerly in England, in a case where the King's Proctor intervened, alleging adultery on the part of the petitioner, the Court had no power to allow the person with whom such adultery was said to have been committed to intervene as a party to the proceeding [see, *inter alia*, *Grieve* v. *Grieve* (Queen's Proctor intervening) (2)]. This is not now the law; see the cases cited in Note (L) on pages 149 and 150 of the Eleventh Edition of Browne & Latey's Law of Divorce.

The present case is, I think, quite different. It is not sought to make Mr. Sharrock a party, but merely to call him as a witness. In spite, therefore, of objection on behalf of the petitioner I allowed this to be done.

One further point must be mentioned. It will be seen that the motive which prompted Mrs. Sharrock to intervene is that she wishes to prevent the operation of the order giving custody of the child to the petitioner. She is desirous of herself obtaining such custody. It is true that had it not been for the existence of the child the intervener proceedings would in all probability not have been brought. It is said, therefore, that as the real motive of the intervener was not to expose the conduct of the petitioner, but to obtain custody of the child, this Court would be bound to pronounce a decree absolute. I am clearly of opinion, however, that

(1) (1903) I.L.R. 30 Cal. 489. (2) L.R. (1893) P. 288.

1931

SWAINE v. SWAINE.

OTTER, J.

this suggestion is unfounded; for should I come to the conclusion that the charges against the petitioner are made out, I should have full power to refuse a decree absolute, irrespective of the motive prompting the intervention.

The substantial question, however, which does arise is, whether I am satisfied that, because of her own conduct, the petitioner is not entitled to a dissolution of her marriage.

I would point out that it is not in every case that a petitioner, who has committed adultery, is disentitled to a decree; see as to this section 14 of the Indian Divorce Act of 1869. In certain cases the Court will exercise its discretion in favour of a guilty petitioner. In the present case, however, I am not asked to exercise such discretion, and the case for the petitioner is, that the adultery alleged by the intervener did not take place. It will be necessary to return to this aspect of the matter at a later stage.

I do not propose to discuss in any detail the evidence called. It must speak for itself. I must, however, refer to certain matters which were deposed to before me.

In the year 1921, Mr. and Mrs. Sharrock were living in Colombo, and in January, 1922, the petitioner and her husband joined them there. The child to which reference has been made was born on the 26th November, 1925, and there can be no doubt that trouble between the petitioner and her husband commenced during the time that they were so living in Colombo. On one occasion when it was ascertained that the respondent, who had gone to Rangoon, was about to return, the petitioner herself left Colombo for Rangoon in order to avoid him.

In November, 1927, the petitioner and her husband left Colombo for Rangoon, and Mr. and Mrs. Sharrock followed them to Burma in the month of January, 1928. Mr. Sharrock had obtained appointment in Mandalay, and although there is some suggestion that at Colombo the petitioner and Mr. Sharrock were on something more than friendly terms, the incidents of adultery alleged by the intervener all took place in Mandalay. There is no dispute that since the birth of the child Mr. and Mrs. Sharrock have paid for its maintenance. They have also looked after it during the frequent periods when the petitioner did not reside with the Sharrock family. Moreover, there is no dispute, I think, that the respondent was not at any material time since the year 1926 in regular employment; and it is also admitted that the petitioner, apart from a period of work in Calcutta in the year 1929, did not support herself.

The case for the intervener is that during the occasion of three visits by the petitioner to the home in Mandalay adultery took place. Mrs. Sharrock herself gives little direct evidence upon the matter; but she did state that on one occasion she found her husband coming from the bed room of the petitioner, at about one o'clock in the morning. The evidence of Mr. Sharrock is that misconduct took place upon three occasions, viz., in June, 1928, February, 1929, and April, 1930. It is obvious, of course, that there can be no possible excuse for such conduct as is admitted by this man, and it is said that such evidence ought to be regarded with grave suspicion, and that no reliance should be placed upon the word of a man who confesses to such conduct. I agree that his testimony must be scrutinised with the greatest care; but it must be

1931

SWAINE v. SWAINE.

OTTER, J.

pointed out that it is somewhat difficult to believe that such admissions would be made in Court, were they not true. It is also said that deliberate perjury was committed for the admitted purpose of getting the custody of the child. I would say at once that had the case rested upon the evidence of Mr. and Mrs. Sharrock alone, the matter would have stood upon a different footing. Certain correspondence, however, was before me; and in particular a letter (Ex. A) written by the petitioner to Mr. Sharrock some time in February, 1931, and intercepted by Mrs. Sharrock, which in my view affords strong corroboration of the case for the intervener. I do not propose to examine these letters at any length, but it is sufficient to say that in my view upon the face of them they point strongly to a previous guilty relationship.

The evidence as to collusion put forward on behalf of the intervener was weak, and had it not been for certain statements made by the petitioner herself, I should have scarcely considered this part of the case at all. The account given by the petitioner amounted to a total denial of any actual impropriety. She stated, *inter alia*, that in August, 1926, she was advised by Mr. Sharrock to leave her husband, who was about to return from Rangoon, and that she left Colombo in consequence. She admitted that in February or March, 1929, Mr. Sharrock tried to make love to her, apparently at a time when he had provided her with money to take up work in Calcutta. In cross-examination she admitted that in November, 1930, she and Mr. Sharrock made love to each other, but she denied that on this, or on any other occasion, sexual intercourse took place. When confronted with the correspondence her explanation seems to me to be scarcely worthy of serious consideration. While making every allowance for the painful position of the petitioner in the witness box, I must record my

impression that her answers, especially those relating to the letters, frequently were given at random ; and it was clear to me that some at least of her answers were made in a desperate attempt to mislead the Court. In particular when asked about a certain passage in Ex. A she made the statement that although she in the end consented to the repeated improper suggestions of Mr. Sharrock, the latter at the last moment refused to take advantage of her consent. I would also mention that the petitioner took precautions to prevent the letters directed to Mr. Sharrock falling into the hands of the intervener. This it is scarcely necessary to say would have been quite unnecessary if the letters had been really innocent ones. In view of the evidence of the petitioner before me when the decree nisi was obtained I thought it necessary to ask her about the statement she then made to me to the effect that she had asked her husband to return to her, but that he had refused. She told me she had no recollection of making that statement, or of any such conversation with her husband.

It is hardly necessary to point out that had there not been some evidence of the desertion which she alleged, the petitioner could not have obtained a decree nisi. The attitude of the petitioner in this regard reveals in my view a deliberate misrepresentation of fact, which it is the duty of this Court to guard against with the greatest care. It seems to me necessary to say that in divorce proceedings, and especially in undefended cases, the evidence must be sifted with great particularity.

In the present case I now have upon the one hand the testimony of Mr. and Mrs. Sharrock, coupled with the correspondence. I do not propose to refer further to this evidence, except to state that that of Mrs. Sharrock seemed to me to have been given with

1931

SWAINE v. SWAINE.

OTTER, J.

candour. The position of Mr. Sharrock was obviously a difficult one, and I feel bound to say whatever may be thought of his conduct from the point of view of morality, he did not appear to be endeavouring to deliberately deceive the Court.

Upon the other hand I have the oral testimony of the petitioner which, for the reasons I have indicated, I regard with profound distrust; and the conclusion I have come to is that the intervener has satisfied me that adultery did take place between the petitioner and Mr. Sharrock.

Upon the question of collusion, there are grounds for suspicion, especially in view of the answers of the petitioner to me. I need only say, however, that I do not regard this as proved.

The only question remaining, therefore, is whether, though (and I think rightly) not invited to do so by Mr. Gregory who appeared for the petitioner, it could possibly be said that it is my duty to exercise my discretion in favour of the latter in spite of the case proved against her. I have no hesitation in refraining from taking this course for the following reasons. The petitioner admitted that she was warned by her lawyer that if she had misconducted herself she would not obtain divorce. She may not have been expressly told to place all the facts before the Court, but I have no real doubt that she knew perfectly what she was doing, and that her deception of the Court was deliberate. I make every allowance for the fact that the petitioner was a guest in the house of Mr. Sharrock; and I have little doubt that, at first at least, it was he and not the petitioner who made advances. Had she, however, made a clean breast of the matter before me I might perhaps have taken a more lenient view as to her conduct. She, however, in my opinion not only suppressed the fact of her

adultery when she asked for the decree nisi, but committed deliberate prejury in the present proceeding.

After a consideration of a number of authorities upon the point, *inter alia*, *Wilson* v. *Wilson* (1); *Elliott* v. *Elliott* (2); and the judgment in *Wilkinson* v. *Wilkinson* (unreported), there cited; *Apted* v. *Apted* (3); *Stuart* v. *Stuart* (4); I have no doubt at all that it would not be my duty to exercise discretion in favour of the petitioner in this case.

I wish to say that the recent authorities to which I have referred contain weighty pronouncements upon cases similar to the present. They among others should be studied by all legal practitioners who have to advise in like circumstances. The present case presents regrettable features. I realize that there must be little prospect of the parties effecting a reconciliation. In other circumstances it might be well that the marriage should be dissolved, but the present case, owing to the conduct of the petitioner, is different. I must emphasize that it is the duty of every petitioner in this Court to place the fact of his or her case most fully before the Court; and the wholesome and well-established rule that on intervention a decree nisi may be rescinded, if there is a failure to deal with the Court with the utmost good faith, is one that is not to be relaxed.

In the present case the petitioner has not acted in good faith, and I have no doubt that it is not my duty to overlook her conduct.

There still remains the question as to the custody of the child. As the matter stood at the first hearing the petitioner was entitled to an order for custody. To-day she is not so entitled. The intervention

---

(1) L.R. (1920) P. 20.
(2) (1921) 37 T.L.R. 834.
(3) (1930) 46 T.L.R. 456.
(4) L.R. (1930) P.77.

1931

SWAINE v. SWAINE.

OTTER, J.

therefore succeeds and the decree of the 30th January, 1931, is set aside. In the circumstances I propose to make no order for costs.

The future care of the child is a matter for this Court; and if the intervener desires to be appointed guardian, as I have no doubt she does, she must institute proceedings to this end, under the Guardian and Wards Act, within two weeks, otherwise the case will be placed in my miscellaneous list for mention.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Cunliffe.

1931

Dec. 3.

MAUNG OHN KHIN AND OTHERS

v.

U NYO.*

Burmese Buddhist Law—Son living with mother—Mother in possession of family property—Son's death without issue—Son's heir—Mother or widow—Manukye, Vol. X, s. 28.

Where a Burman Buddhist lives with his mother, and the mother is in possession of the family property inherited from her deceased husband, and the son dies leaving no issue, the mother and not the childless wife of the deceased is his heir in respect of such property. It is immaterial whether the son had or had not a vested interest in such property.

N. N. Burjorjee for the appellants. A perusal of Book X of *Manukye* shows that property descends but does not ascend. "All property actually in possession" of the parents referred to in section 28 must mean moveable property and not immoveable property. In this case there is a trust deed under which the son entrusted to his mother the property which he had obtained from his deceased father and which had vested in him. Section 28 has reference to property that devolves by way of inheritance, and has

* Civil First Appeal No. 187 of 1930 from the judgment of this Court on the Original Side in Civil Regular No. 246 of 1925.

no reference to property belonging to a person who has handed over that property to his mother as a trustee. See May Oung's Buddhist Law, page 224. On the death of the son his widow and not the mother is entitled to this property.

Thein Maung for the respondent. Section 28, Book X, *Manukye*, lays down the law for partition in cases where a son-in-law lives with his wife's parents. The son-in-law does not *inherit*, through his wife, any property from her parents. He is only entitled to what has been given to the wife at the time of marriage and any property that is actually in the wife's possession. See Kinwun Mingyi's Digest, s. 320, Vol. 1, *Attasankhepa*, s. 245.

In this case the alleged entrustment was before the marriage and the property was "actually in possession" of the parent within the meaning of section 28. The principle of this rule is to keep the ancestral property in the family. What the Burmese Buddhist Law regards in its rules for partition is the family rather than the individual : *Maung Po Aung* v. *Maung Kha* (1).

PAGE, C.J.—This appeal must be dismissed.

One U Toke Pyo was a Burman Buddhist possessing considerable property. He married as his first wife Daw Kho, who died in 1870. At the time of U Toke Pyo's death in 1890, there were surviving him three children of his first marriage with Daw Kho, his second wife Daw Sone, and five children by Daw Sone—Ma Si, Maung Nyun, Po Aung, Ma Kyin and U Nyo, the respondent. After the death of U Toke Pyo, disputes arose between the children of Daw Kho and Daw Sone and her children, with respect to the right to participate in the property of which he was possessed at his death.

(1) I.L.R. 6 Ran. at p. 441.

1931

MAUNG OUK KHIN v. U NYO.

PAGE, C.J.

In 1892 an award was made in an arbitration, by which one-quarter of the estate left by U Toke Pyo was awarded to the children of the first marriage, one-half of the estate to Daw Sone, and one-quarter to the children of U Toke Pyo and Daw Sone. At the time when the award was made Ma Si had attained her majority, but the other children of Daw Sone were all minors. At all material times till their death, the children of Daw Sone—other than Maung Nyun—lived with, and were supported by, their mother.

Now, under the Burmese Buddhist Law, on the death of U Toke Pyo, subject to any rights that the children of the first marriage might possess to inherit the estate of their father, Daw Sone, as his widow, would be his sole heir, and entitled to the residue of the estate.

On the 21st October 1905 a deed of assignment and release was entered into between Daw Sone, Maung Nyun, and the other children of Daw Sone. All the parties to this agreement had then attained their majority. In the deed of the 21st October 1905 it is recited, *inter alia* :

"WHEREAS after the death of the said U Tok Pyo his property was divided in the manner following :

(*a*) It was divided into four equal parts ;

(*b*) one of the said parts was given to the children of U Tok Pyo by his first wife ;

(*c*) two of the said parts to the said Daw Son ;

(*d*) and the remaining one part was given to and was set aside for the children by the said Daw Son :

AND WHEREAS by arrangement the share of the children by Daw Son was made over to her in trust for the said children and she is in possession thereof on their account AND WHEREAS the said Maung Nyun is desirous of having his share apportioned and paid to him AND WHEREAS the said Maung Nyun has agreed to accept a sum of Rupees 40,000 (Forty Thousand only) in full satisfaction of his share of the said one-fourth share AND WHEREAS the said Mah Tsee, Maung Nyo, Maung Po Aung and Ma Kyin have agreed that a sum of Rupees 40,000 (Forty Thousand

only) be paid by the said Daw Son to the said Maung Nyun out of the one-fourth share to which they are jointly entitled with the said Maung Nyun. NOW THIS INDENTURE WITNESSETH that in consideration of the payment to the said Maung Nyun by the said Daw Son of Rupees 40,000 (Forty Thousand only) (the receipt of which is hereby acknowledged by the said Maung Nyun) He the said Maung Nyun his heirs representatives and assigns hereby releases and relinquishes all his right interest claim and demand in the said one-fourth share of the estate of the said U Tok Pyo AND the said Maung Nyun on behalf of himself his heirs representatives and assigns covenants with the said Mah Tsee, Maung Nyo, Maung Po Aung and Mah Kyin and the heirs representatives and assigns of each of them that he the said Maung Nyun will not make any claim or demand from the said Mah Tsee, Maung Nyo, Maung Po Aung and Mah Kyin or the heirs representatives and assigns of each of them in respect of the said one-fourth share of the said U Tok Pyo's estate AND that the said one-fourth share shall be held by the said Daw Son entirely in trust for and on behalf of the said Mah Tsee, Maung Nyo, Maung Po Aung and Mah Kyin their heirs representatives and assigns without any interruption claim or demand by him the said Maung Nyun his heirs representatives and assigns."

Ko Po Aung died on the 10th June 1915, and Daw Sone on the 30th December 1924. Ma Kyin died on the 5th August 1926. Po Aung left surviving him Ma Tha, whom he had married in 1904, and who died on the 7th March 1916. The contesting parties in this suit are the brothers of Ma Tha and U Nyo, the surviving son of U Toke Pyo and Daw Sone. The plaintiffs claim, as the heirs and legal representatives of Ma Tha, the interest in the one-fourth share of U Toke Pyo's estate, to which they allege that Po Aung was entitled at his death.

A number of defences were raised by the defendant. He contended, *inter alia*, that the submission and the award were invalid in law as well because, with the exception of Ma Si, the children of Daw Sone, who were parties to the submission and the award, were all minors, as because the submission

1931

MAUNG OHN KHIN v. U NYO.

PAGE, C.J.

was to five arbitrators and the award was made only by four of them. It was further contended that Daw Sone at all material times was solely entitled to the estate left by U Toke Pyo, and that neither under the award nor under the deed of 1905 nor in any other way did she ever relinquish, release, or lose her right as the sole heir of U Toke Pyo to obtain, and remain in possession of, his estate subject to the rights of the children of the first marriage.

The defence set up by the respondent was accepted by the learned trial Judge, but it is unnecessary for the purpose of this appeal to determine all the questions which were raised and elaborately argued at the trial, because, in my opinion, this appeal may be disposed of on one short but conclusive ground.

The plaintiffs must succeed upon the strength of their own title, and unless Ma Tha was the heir of Po Aung it is conceded that they are out of Court.

Now, normally Ma Tha, as the widow of Po Aung, would have been entitled to obtain possession of any property that he possessed at his death as his sole heir. It has been contended, however, by the respondent, both at the trial and in the appeal, that Ma Tha was not the heir of Po Aung, but that his sole heir was Daw Sone. If that be the correct legal position *ex concessis* the suit must fail.

This defence that has been raised on behalf of the respondent is based upon section 28 of Volume X of the *Manukye* which runs as follows:

"28th. *The parents, sons, daughters, sons and daughters-in-law, living together, a husband or wife dies, the law for the partition between the son or daughter, son or daughter-in-law, and the father and mother, or father and mother-in-law, what shall, and what shall not be divided.*

In case the parents and their children, sons and daughters-in-law are living together, if a son or daughter dies, the two laws

by which their property is shared by the son or daughter-in-law (relict of deceased) and the father and mother-in-law are these: If the daughter dies before she has any family, let the son-in-law have all the property, animate and inanimate, which was given to him at the time of marriage; let him also have all her personal chattles, and all property actually in possession; the parents of the deceased shall have no share in these; nor shall the son-in-law, though he demands the wife's inheritance of her parents, have any right to obtain it. Besides this, he shall not recover any of his wife's property actually in the possession or keeping of her parents; they shall retain it. But if it has been placed in their charge after the marriage, the parents and son-in-law shall share it equally between them; this is said when the (young couple) have no family. If there be any children, they shall inherit the property left by their grandparents. Thus the lord recluse said.

In another case: if the woman shall live with her husband in his parents' house, and the husband shall die, let the law be the same as above, that is to say, if there be no children born to them. If there be any children, let them inherit the grandparents' property."

It was incumbent upon the defendant to satisfy the learned trial Judge that at the time of his death Po Aung and Daw Sone were living together. The learned Judge has found that Po Aung had not separated from Daw Sone, and usually lived with Daw Sone at whose house he died, though sometimes he lived in his wife's parents' house, and that he always managed Daw Sone's property as her agent, and not being entitled thereto as an heir of U Tok Pyo.

Now, it is not uninteresting to observe that in paragraph 12 of the first plaint that was filed it is alleged that after the award of 1892 and the deed of 1905 "the said Ko Po Aung, Ma Si, Ko Nyo and Ma Kyin continued to live and work together with their mother". No doubt, the plaint was subsequently amended for the purpose of pleading that after Po Aung's marriage he and his wife lived separately from Daw Sone; but, in my opinion,

1931

MAUNG OHN KHIN v. U NYO.

PAGE, C.J.

there is force in the view taken by the learned Judge, "that the plaintiff should not be allowed to resile from the original statements in the plaint four years after it was filed." It is true that the defendant originally pleaded that Po Aung, after his marriage, lived separately from Daw Sone, and that subsequently he obtained leave to amend his defence, and by his amended written statement pleaded that they did not live separately. In paragraph 12 he denied, *inter alia*:

> "(*a*) that Ko Po Aung lived separately from Daw Sone, except for a month or two after his marriage which took place about 28 years ago, and (*b*) that Ko Po Aung had any establishment separate from Daw Sone's."

I think it is clear from the evidence that for two or three months after his marriage Po Aung and Ma Tha lived at the house of Daw Me, the bride's mother, and that for the purpose of some of her confinements she went to her mother's house; but there is evidence that according to Burmese custom it is not unusual that directly after the marriage, for a short period, the bride and bridegroom should reside in the house of the bride's parents, and that a wife, when she is to be confined, not infrequently goes home to her own father and mother before the child is born.

There is ample evidence upon the record, in my opinion, to justify the finding of the learned Judge that Ko Po Aung, and after his death Ma Tha, at all material times, were not separated from Daw Sone, but were living with her, or in one of her houses, and were being maintained by her, and that Ko Po Aung, at any rate until a year or two before his death, when he lost his reason, was looking after Daw Sone's property as well as the property in suit as the paid agent of his mother.

In these circumstances I see no ground for differing from the finding of the learned Judge that Ko Po Aung and his mother were living together at the time of his death within the meaning of those words in section 28 of Volume X of *Manukye*. In my opinion, therefore, Daw Sone and not Ma Tha—his childless widow—was the heir of Ko Po Aung.

Now, what was the nature of the property in suit? It was property which belonged to U Toke Pyu, and formed part of his estate on his death. More than that, it was property which, from the death of U Toke Pyu until the death of Daw Sone in 1924, remained in the possession and keeping of Daw Sone. For the purpose of section 28 it matters not whether the plaintiffs are able to prove that Po Aung possessed a vested interest in that property under the award or the deed of 1905 or not; for, it was property which had formed part of the estate of U Toke Pyu, and was "actually in the possession or keeping" of Daw Sone at the time of Ko Po Aung's death. It would be idle to urge the contrary in the face of the terms of the deed of the 21st October 1905, which was signed by all the parties concerned, including Po Aung. It would be sufficient to dispose of any such contention that in the deed of the 21st October 1905 it is recited that "by arrangement the share of the children by Daw Sone was made over to her in trust for the said children and she is in possession thereof on their account". That possession she retained until long after the death of Po Aung.

For these reasons, in my opinion, the plaintiffs have failed to establish that they possess any title to the property in suit as the heirs of Ma Tha or otherwise, and the appeal must be dismissed.

It is unnecessary in these circumstances to consider

1931

MAUNG OHN KHIN v. U NYO.

PAGE, C.J.

the other issues which were raised at the trial, and which were decided adversely to the appellants.

The appeal is dismissed with costs. The appellants will pay the usual court fees.

CUNLIFFE, J.—I am of the same opinion both on the facts and on the law, although I am bound to confess that at first I was somewhat doubtful about the whole aspect of the case. As my Lord has pointed out, the legal position depends upon section 28 of Volume X of the *Manukye Dhammathat*. That section is, in my opinion, quite unequivocal, but curiously enough it has not been interpreted by any direct judicial authority.

An attempt was made to distinguish the fact that the section would have bound a vested interest as property to inheritance. That argument was based upon a passage, I think, contained in page 224 of the late Mr. Justice May Oung's book which deals with this subject; but it is to be noted here that even if that arrangement was sound it is doubtful whether a vested interest does in fact exist on the facts before us.

The arbitration which has been mentioned in this case has, as the defence pointed out, a good deal of tainted authority owing to various points. It was apparently not properly signed, and it dealt with the rights of persons, or some of them at any rate, who were minors at the time. No doubt it attempted to embody a family arrangement,, but even if it did, the ruling which we are directed by the Privy Council to regard as the leading authority on Burmese Buddhist Law—which is that of the *Manukye Dhammathat*—clearly, in my view of the peculiar facts of the case, will prevail.

For these reasons I agree with my Lord that the appeal must be dismissed.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Cunliffe.

1931

Dec. 9.

O. K. MOHIDEEN BAWA
v.
RIGAUD PERFUME MANUFACTURERS.*

Passing-off case—Proof by plaintiff—Acquiescence, plea of—Nature of acquiescence—Delay in filing suit.

In a passing-off case the plaintiff must establish that the goods sold under his label and get up had a reputation in the market as being goods manufactured or sold by him of which the label and get up was distinctive and well-known in the particular market, and that the label and get up of the defendant on his goods of a similar character is a colourable imitation of that of the plaintiff.

If the defendant's plea is that the plaintiff acquiesced in the infringement of his label the defendant must prove that he was ignorant of the plaintiff's rights, and was deluded into thinking that his wrongful action was assented to by the plaintiff with knowledge of the infringement. But this defence is of no avail to the defendant if he is aware of the legal rights of the parties, and deliberately or fraudulently infringes the plaintiff's rights.

Moolji Sicca & Co. v. Ramjan Ali, 129 I.C. 612; *Proctor v. Bennis*, 36 Ch.D. 740; *Ramsden v. Dyson*, L.R. 1 H.L. 129—*followed.*

A plaintiff does not lose his remedy on account of delay in filing the suit if he has good ground for not filing the suit immediately on becoming aware of the infringement.

Poiret v. Jules Poiret, Ltd., 37 R.P.C. 177—*referred to.*

Leach for the appellants. The appellants maintained that they had adopted the larger of the two labels complained of by the respondents (Ex. B) as long ago as 1899, and that it had been used extensively on goods sold by them in the Burma market since 1906. There were no importations into Burma during the war but that made no difference. The Peace Treaty of Versailles restored to the German people rights acquired by them in trade marks before the Great War. *Wulfing* v. *Jivandas* (1). The right to use Ex. B conferred the right to use the label Ex. B1.

* Civil First Appeal No. 168 of 1931 from the judgment of this Court on the Original Side in Civil Regular Suit No. 283 of 1929.

(1) I.L.R. 50 Bom. 402.

1931

O. K. MOHIDEEN BAWA v. EGGATO PERFUME MANUFACTURERS.

[PAGE, C.]. Is there any property in a trade-mark in India? There is no system of registration of trade-marks here, and so actions for infringement of trade-marks are framed as passing-off cases.]

The distinction between actions for infringement of trade-marks and passing-off actions is shown in Kerly on Trade-marks, 6th Edition, page 13, and page 435.

Assuming that the appellants' labels were a colourable imitation of the respondents' labels the appellants were still entitled to use them as the result of the acquiescence and delay of the respondents. Large quantities of Ex. B1 had been imported into Burma since 1925, and the suit was not filed until 1929. *Mouson & Co.* v. *Boehm* (1); *Rowland* v. *Mitchell* (2); *McCaw Stevenson and Orr, Ltd.* v. *Lee Bros.* (3); and *G. H. Gledhill & Son, Ltd.* v. *British Perforated Toilet Paper Company* (4).

J. K. Munshi (*Miss Dantra* with him) for the respondents. Mere delay in filing a suit does not deprive a plaintiff of his right to sue for the infringement of his trade-mark, especially when there are good reasons for the delay. The local agent of the perfumery manufacturers became aware of the infringement only in 1927, and then there were consultations and interviews with the head office which is situate in Paris, before any suit could be filed. There were good grounds for not filing the suit earlier.

There is no evidence at all to show that the appellants were using any of the labels complained of in Burma since 1906, or that they had acquired a reputation in respect thereof in the Burma market prior to the Great War. The infringement began in

(1) (1884) 26 Ch.D. 398.
(2) (1896) 13 R.P.C. 457.
(3) (1906) 23 R.P.C. 1.
(4) (1911) 28 R.P.C. 429.

1927. There has been no acquiescence on the part of the plaintiffs so as to deprive them of their right to sue. Acquiescence is a form of estoppel, and it is for the appellants to show that the plaintiffs' conduct or words misled them, and that they deliberately allowed the appellants to infringe their label. *Moolji Sicca & Co.* v. *Ramjan Ali* (1) ; *Ramsden* v. *Dyson* (2).

Leach in reply. In *Moolji's* case there was a finding of fraud. In the present case there has been no finding of fraud.

PAGE, C.J.—This appeal must be dismissed.

The suit is the result of business rivalry between a French firm and a German firm which import perfumery into Burma. The nature of the perfumery with which we are concerned in the present case is Kadow, that is, a scent with a musk perfume.

The plaintiffs claim that for many years before action brought they had acquired a reputation in the market in Burma for Exhibit A and Exhibit A1, bearing a label and get up which was distinctive of the goods that they sold. They contend that in 1925 the defendants deliberately put upon the market Kadow perfumery in bottles Ex. B1, with a label and get up that was a colourable imitation of the label and get up of A1, and they claim an injunction and other relief against the defendant firm preventing them from selling Kadow perfumery with a label and get up of the nature of B1 in Burma. Plaintiffs further contend that in 1927 the defendants imported into Burma, and caused to be put on the market, Kadow perfumery with a label and get up Ex. B, which, the plaintiffs contend, is a colourable imitation of their label and get up A, and they seek an

(1) 129 I.C. 612. (2) 1 H.L. 129.

1931

O. K. MOHIDEEN RAWA v. ROGAUD PERFUME MANUFACTURERS.

PAGE, C.J.

injunction in similar terms in respect of B. The learned Judge at the trial upheld the plaintiffs' claim, and decreed an injunction and incidental relief in favour of the plaintiffs.

Now, this is a passing-off suit, and it is incumbent upon the plaintiffs in such a suit in the first instance to prove that the goods sold under their label and get up were goods which had a reputation in the market as being goods manufactured or sold by them, of which the label and get up was distinctive and well-known in the particular market. The learned Judge has held—and there is abundant evidence to justify his finding—that for more than twenty-five years before the suit was filed the plaintiffs had acquired in respect of A and A1 a reputation as bearing a distinctive design and get up which was well-known in connection with their Kadow perfumery. It is unnecessary to discuss in detail the evidence upon this issue, because not only was there abundant evidence adduced by the plaintiffs in that behalf, but the reputation of A and A1 in the market as distinctive of Kadow perfumery sold by the plaintiffs was admitted by the witnesses for the defendant.

It appears that from 1896 onwards, including the years of the Great War, goods with the label and get up A and A1 have been sold in Burma, and have acquired a considerable reputation. From 1925, however, there is evidence that the plaintiffs' trade in A1 perfumery began to decrease, and it is not an unnatural inference to draw from the evidence that the sales dropped owing to B1 having been put on the market by the defendants from 1925.

We are satisfied after examining B1 and A1 that the label and get up of B1 on the little bottles of Kadow perfumery sold by the defendants is a colour-

able imitation of the label and get up of A1 on the little bottle in which Kadow perfumery has been sold by the plaintiffs. It is true that no direct evidence was called on behalf of the plaintiffs to prove that any particular purchaser was deluded into thinking that when he wished to buy A1 he was led to believe that he was given A1 when in truth and in fact he was given B1 by the seller; but that is by no means fatal to the plaintiffs' claim. It is, of course, material and proper evidence, and cogent evidence where the Court is in doubt whether an article such as B1 is a colourable imitation of A1. But if the Court is clearly of opinion from an examination of the two bottles with the get up upon each of them that B1 is a colourable imitation of A1, the fact that no witnesses are called to prove that they were deluded into thinking that B1 was A1 is not of so much importance.

In this case, in our opinion, B1 obviously is a colourable imitation of A1, and if B1 were offered to an unwary purchaser of the type who would be likely to buy A1 in Burma and who wished to buy A1, such a purchaser, in our opinion, might reasonably conclude that B1 was in fact A1.

Having come to the conclusion that B1 is a colourable imitation of A1 the next question arises: Why was B1 imported into Burma and put upon the Burma market by the defendants in 1925? The answer appears to us to be a simple one. In 1924-25 and for many years previously A1 had been proving very attractive to purchasers of perfumery in Burma, and I have no doubt that Messrs. Georg Dralle and Company of Hamburg, who imported B1 into Burma for the purpose of having it put upon the Burma market by the defendants did so because they desired by means of B1 to obtain some of the trade

1931

O. K. MOHIDEEN BAWA v. RIGAUD PERFUME MANUFACTURERS.

PAGE, C.J.

which had been worked up by the plaintiffs through their successful exploitation of A1.

After the war A1 was being sold at Rs. 16 to Rs. 19 per gross. In 1925 B1 was put on the market at Rs. 12 to Rs. 12-8-0 per gross. The lower price of B1 obviously would help the defendants to obtain a market for B1 at the expense of A1.

Now, why is it that it so happens that the label and get up of B1 resembles A1 so closely? Because the defendants deliberately intended to put B1 on the market in such a form that the incautious buyer might be deluded into thinking that B1 was A1; and their endeavours were crowned with success, because the sales of B1 since it was put upon the market in 1925 have been very great. In 1925, according to Exhibit X, which was adduced in evidence on behalf of the defendants, 9,662 dozen bottles with the label and get up of B1 were imported into Burma; in 1926, 6,425 dozen; in 1927, 42,464 dozen; in 1928, 36,299 dozen; and in 1929, 30,158 dozen.

What is the defence? It is two-fold. Firstly, the defendants contend that, although a diminutive bottle with the particular design and get up of B1 was not put on the Burma market until 1925, inasmuch as B1 is in substance only B *en miniature*, and the label and get up of B has been on the Burma market since 1902 (or, as it is alleged in the written statement, in 1906), they are entitled to a concurrent right with the plaintiffs to use B, and the right of user that B has acquired can be fathered on B1. Secondly, they contend, upon the assumption that B1 is a colourable imitation of A1, that they were justified in putting B1 upon the market as the plaintiffs did not take any steps to prevent the sale of B or B1 in Burma from 1925, when the plaintiffs must have known that B and B1 were being sold extensively in Burma, and

the plaintiffs have allowed the defendants to build up a large business in B and B1 in Burma, and thus must be taken to have acquiesced in the exploitation of B and B1 in the Burma market by the defendants, and are not now entitled to take legal proceedings to prevent any further sale of these articles by the defendants.

I will first consider the defence of acquiescence. The law upon the subject of acquiescence appears to me to be what I ventured to lay down in *Moolji Sicca & Co.*, v. *Ramjan Ali* (1) in Original Suit No. 2178 of 1927, while I was a Judge of the Calcutta High Court. In that case I held that :

> Acquiescence is only a form of estoppel, and it is of the essence of acquiescence that the party acquiescing should be aware of, and by words or conduct should represent that he assents to, what is a violation of his rights, and that the person to whom such representation is made should be ignorant of the other party's rights, and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party. . . . . .

In *Proctor* v. *Bennis* (2) Lord Justice Cotton observed that

> 'it is necessary that the person who alleges this lying-by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title,'

and at page 761 Lord Justice Bowen added :

> 'In order to make out such acquiescence it is necessary for them to establish that the plaintiff stood by and knowingly allowed the defendants to proceed and to expend money in ignorance of the fact that he had rights and meant to assert such rights.'

See also *Ramsden* v. *Dyson* (3).

In determining whether the plaintiffs acquiesced in the infringement of A1 by the defendants when they put B1 upon the Burma market the Court has

(1) (1928) 129 I.C. 612. (2) (1887) 36 Ch.D. 740.
(3) L.R. 1 H.L. 129.

1931

O. K. MOHIDEEN RAWA v. ROGACO PERFUME MANUFACTURERS.

PAGE, C.J.

to consider the circumstances of the case in a sensible and reasonable way. It is not the law that any person who becomes aware of the infringement of his right to use a particular label, get up, or trade-mark, must forthwith file a suit against the person so infringing his legal right, and that if he does not immediately take legal proceedings against such a person he should for ever be debarred from asserting such rights in a Court of law. It depends upon the circumstances. As I ventured to point out in *Moolji Sicca*'s case (1), it would be an intolerable burden upon a trader if he had had to take notice of every petty infringement by a man of straw. Of course, if he does not take steps to vindicate his rights he runs the risk of a defence subsequently being put forward that he has acquiesced in the particular infringement, but whether he has acquiesced or not is a question of fact that depends upon the circumstances of the particular case under consideration.

Again, there may be reasons that would afford a ready explanation why a suit was not filed against the infringer immediately after the trader became aware that the infringement had taken place. An instance of that kind is to be found in *Poiret*'s case (2). Moreover, although one might reasonably expect a trader in normal circumstances to take proceedings as soon as may be against an infringer who happens to be residing or carrying on business in the same locality as he does ; where, as in the present case, the plaintiffs are traders carrying on business in Paris, with a local representative in Burma, it is not unreasonable before a suit is filed for infringement that the local representative should desire to place the facts before his principals in Paris, with the result that some time must elapse before the

(1) (1928) 129 I.C. 612. (2) (1920) 37 R.P.C. 177.

principals in Paris would be in a position to instruct their representative in Burma to file a suit.

The representative of the plaintiffs in Burma from 1909 onwards has been Mr. Isaac Meyer, and the question now is whether Mr. Meyer, who admittedly knew in 1927 that B1 had been put on the Burma market, deliberately refrained from taking any steps to vindicate his principals' rights in such circumstances that his principals must be taken to have acquiesced in the infringement of A1 by B1. This question is not free from difficulty. Mr. Meyer was thoroughly conversant with the perfumery trade, and it seems to me difficult to believe that from 1927 onwards (or 1925 as the defendants allege) Mr. Meyer was not aware of the extensive and increasing trade that was being carried on in B1 by the defendants in Rangoon. On the other hand Mr. Meyer gave evidence upon this issue at the trial, and he explained that the delay was due to several causes; that he first became aware of the infringement in 1927; that thereafter he got into communication, and had interviews, with Mr. Galle, a representative of the plaintiffs who happened to be travelling in the East; that subsequently Mr. Meyer went to Paris and saw his principals; and that it was only after the matter had been fully discussed in Paris that it was decided to file a suit against the defendants for infringing the rights that the plaintiffs had acquired in A and A1. It is unnecessary, however, in the present case to determine that question, because there can be no doubt that at all material times the defendants were fully aware that both A and A1 had been sold for many years by the plaintiffs in the Burma market, and that in respect of the label and get up of A and A1 the plaintiffs had acquired a well-known reputation in the market for their goods as denoted by A and A1.

1931

O. K. MOHIDEEN BAWA v. RIGAUD PERFUME MANUFACTURERS.

PAGE, C.J.

The learned advocate for the appellants contended that the defendants were not aware of any facts which would justify them in assuming that the plaintiffs had any such rights, but for the reasons which I shall now state, in my opinion, the defendants, when they first put upon the Burma market B1 in 1925 and B in 1927, knew full well that in so doing they were putting upon the market articles with designs and forms of get up that were colourable imitations of the plaintiffs' A and A1; that the plaintiffs had acquired a right—and an exclusive right—to use A and A1 as denoting their Kadow perfumery, and yet deliberately put upon the market B1 in 1925 and B in 1927 for the express purpose of attempting thereby to filch trade from the plaintiffs by deluding incautious and unwary purchasers of Kadow perfumery o this description into thinking that when they were given B or B1 they were really being given what they wished to buy, A or A1. In my opinion such a deliberate infringement of A and A1 by the defendants amounts in law to a fraudulent infringement. It is, in my opinion, settled law that if the defendants were aware of the real legal position, and yet deliberately or fraudulently put upon the market B and B1 in order to obtain trade which otherwise might go to the plaintiffs, there is no room for the doctrine of acquiescence to operate in their favour.

[His Lordship then proceeded to consider the evidence and held that the appellants had failed to prove that by reason of prior user they had a concurrent or any right to put upon the Burma market Kadow perfumery with the label and get up of either B or B1.]

CUNLIFFE, J., concurred and the appeal was dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Cunliffe.

F. G. ROBSON AND OTHERS
v.
DAWSONS BANK, LTD.*

1931
Dec. 10.

Winding up—Companies Act (VII of 1913), ss. 162, 174—Effect of compulsory Winding up—Wishes of creditors—Creditor's right ex debito justitiae—Court's guidance—Payment in ordinary course.

The respondent bank largely utilised its capital, which was mainly derived from fixed depositors, to finance cultivators in Burma. So long as there was agricultural prosperity the bank flourished, but in 1931 there was a serious trade depression and a great fall in the price of paddy, and the situation was rendered more acute by the Rebellion. The directors felt that if the period of depression was prolonged it would embarrass the bank, as loans might not be readily repaid and deposits might not be renewed. They maintained that the bank was solvent, but to meet the situation they suggested a voluntary liquidation with a view to reconstruction in which depositors would become long-term debenture-holders. The shareholders resolved on voluntary liquidation and reconstruction. Certain depositors of an amount of 2½ lakhs of rupees out of a total of over Rs. 66 lakhs applied to the Court for compulsory winding-up. Creditors for over 11 lakhs of rupees opposed the motion. The trial Judge refused the application, and the petitioning creditors appealed.

Held, refusing the application, that the circumstances of the case did not justify an order for compulsory winding-up. The effect of compulsory winding-up is to put an end to the company. The majority of the creditors did not want the bank to come to an end but to continue its business in a reconstructed form, and having regard to the facts of this case the Court would respect the wishes of the majority. A creditor unable to obtain payment of his debt is normally entitled *ex debito justitiae* as against the company to an order for compulsory winding-up, but as he represents not himself alone but all other creditors, the Court is guided in its decision by the wishes of the majority, and the circumstances of the case.

In re Crigglestone Coal Company, (1906) 2 Ch. Divn. 327; *In re Uruguay Central and Hygueritas Railway Co.*, 11 Ch. Divn. 372—*referred to*.

A bank cannot be said to give preference to certain creditors when it is merely paying its debts in the ordinary course of business as a going concern.

N. N. Burjorjee for the appellants. This is an application for winding up the respondent bank under s. 162 (5) and (6) of the Indian Companies Act. S. 203 deals with voluntary winding-up. The share-

* Civil Miscellaneous Appeal No. 158 of 1931 from the order of this Court on the Original Side in Civil Miscellaneous No. 125 of 1931.

1931

F. G. ROSSOX v. DAWSONS BANK, LTD.

holders of the bank passed a resolution for the voluntary winding-up and reconstruction of the bank. A creditor has a right to apply for a compulsory winding-up of a company after a resolution for a voluntary winding-up has been passed, especially if his rights are not safe-guarded.

[PAGE, C.J. The Court has a discretion in respect of the compulsory winding-up of a company. In a voluntary winding-up a creditor or a person aggrieved may apply to the Court to remove a particular liquidator and appoint another in his place. There is a great difference between a compulsory winding-up and a voluntary winding-up. In the latter case the company may be revived, whereas in the former case the company sooner or later is brought to an end.]

The object of a compulsory winding-up may not always be to close down the company. The Court in a compulsory winding-up is given the same powers as are given to the liquidators in a voluntary liquidation. Under s. 153, the Court can accept any arrangement (of reconstruction, for instance), and so allow the company to continue.

S. 213 deals with reconstruction. In a reconstruction scheme the claims of the creditors must be satisfied by the transferor company or satisfactorily provided for by the transferee company. Under ss. 174 and 239 the Court will have regard to the wishes of the creditors. If the company cannot pay its debts, *i.e.* if its assets are insufficient to satisfy its liabilities, the Court may wind up the company. That is the position of the bank. See *Re The Bombay Cotton Manufacturing Co.* (1). A scheme for reconstruction

(1) I.L.R. 34 Bom. 533.

1931

F. G. ROBSON v. DAWSONS BANK, LTD.

cannot fairly be considered until an order for winding-up is made. That is the only way in which the interests of a minority who do not agree to the reconstruction can be protected. *In re Bristol Joint Stock Bank* (1). If the bank has no chance of a successful life even after reconstruction the Court will compulsorily wind it up.

On the passing of a special resolution to wind up voluntarily the company must immediately stop payment of its creditors; and if it continues to pay its debts it will be making preferential payments. S. 203 (3) of the Companies Act.

Lambert for the Bank was not called upon to address the Court.

PAGE, C.J.—The appeal fails. In my opinion this is a *mala fide* and idle petition, which was properly dismissed by my brother Das, J. It is *mala fide*, because it is not only apparent from the argument, but it was specifically stated by the learned advocate who appeared for the appellants, that the real ground upon which his clients desire that this company should be wound up compulsorily by order of the Court is because the liquidators of the company, Mr. Dawson and Mr. Heaton, are not considered to be fit and proper persons to conduct the liquidation of the company having regard to the way in which they have managed the affairs of the bank from 8th June to the 22nd June 1931. The object and effect of an order for the compulsory winding-up of a company is the closing down of its business. No doubt, in order that the assets of the company should be distributed among those entitled to them in the most efficient and fair

(1) (1890) 44 Ch.D. 703.

1931

F. G. ROBSON v. DAWSONS BANK, LTD.

PAGE, C.J.

manner the Court in some cases may permit the realization of the assets to be suspended temporarily, but for no other purpose. The reason why an order is made that the affairs of a company should be wound up by the Court is because it is deemed expedient that the company should come to an end, and no longer remain in existence as a business undertaking.

Now, in order to ascertain whether the present petition was filed *bonâ fide* or not it is necessary to refer to a letter written on the 22nd of July 1931 by Sir Oscar de Glanville, an advocate employed by Mr. Hormasji, to Messrs. Leach and Clark, who had been instructed by Mr. Dawson in connection with a complaint that a statement had been made by Mr. Hormasji that was defamatory of Mr. Dawson. In this letter Sir Oscar de Glanville stated on behalf of Mr. Hormasji that

"he did not and does not suggest that the present position of the bank is due to bad management. At no time was there any intention to make any charges or to reflect on Mr. Dawson's conduct or on that of any of the officials of the bank . . . .

In conclusion if any of Mr. Hormasji's remarks have been misunderstood as casting aspersions on your client or on the bank he expresses regret, and asks you to assure your client that he makes no charges against him, and that he is actuated solely by the desire, which he believes Mr. Dawson shares, that the affairs of the bank shall be fully investigated, and he will render all assistance in his power to any reasonable scheme calculated to restore it to its former flourishing condition, which has been due to the care and assiduous attention of your client as its Managing Director."

Now, if the terms of that letter accurately represent the view that Mr. Hormasji took of the way in which the affairs of the bank had been managed, and he really desired to restore the bank to "its former flourishing condition," it is difficult to understand why he should have been a party to

this petition for the compulsory winding-up of the bank, and he could not consistently or *bonâ fide* have instructed the learned advocate who appeared for him to contend that the real objection of the petitioners to the voluntary winding-up of the bank was that they disapproved of the way in which the bank had been managed, and had no confidence in Mr. Dawson or Mr. Heaton as liquidators, having regard to the manner in which they were carrying out the voluntary liquidation of the bank.

Now, who are petitioning for the compulsory winding-up of this bank? Mr. and Mrs. Robson, who are depositors to the amount of Rs. 11,000, but as between them and the bank there is a dispute as to whether Mr. and Mrs. Robson are presently entitled to withdraw the sum which they have deposited; Mr. Hormasji, who is a depositor for Rs. 8,000, but the sum which he deposited was not payable until the 16th of July 1931; and the deposit of Rs. 1,200 by Mr. Hormasji was repayable on the same day; and Mr. Blake, who had joined with the other petitioning creditors in filing the petition but who withdrew from the case before the petition was heard.

Mr. Burjorjee on behalf of the appellants has stated that in addition to the depositors for whom he appears affidavits in support of the petition were filed at the hearing by other depositors in Dawsons Bank the value of whose deposits amounted to Rs. 2,69,346. The total value of the deposits in Dawsons Bank in June 1931 was Rs. 66,09,276 and depositors in respect of Rs. 11,35,556 at the hearing of the petition supported the bank in opposing an order for the compulsory winding-up of the company.

Now, under section 174 of the Indian Companies Act "the Court may, as to all matters relating to a

1931

F. G. ROBSON v. DAWSON'S BANK, LTD.

PAGE, C.J.

winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence." The reason for the enactment of section 174 is plain. A company is a business concern, and it is fair and reasonable that the Court in considering whether it should order that the company be wound up or not should have regard to the views and wishes of the creditors of the company. If a company is unable to pay its debts or is temporarily in embarrassed circumstances it is peculiarly a matter for those primarily concerned in its assets and well-being to determine whether the company shall be wound up or not. If the general body of creditors are of opinion that it will best serve their interest that an order for compulsory liquidation should be made and the company closed down, their views are entitled to respect; on the other hand, if the creditors think that it will be more to their interest that the company should go into voluntary liquidation, again it is primarily a matter for them to decide. Voluntary liquidation may have as its object the closing down of the business; on the other hand the creditors may resolve upon a voluntary liquidation, and their object in winding up the company may be not that the business should cease, but that the company should continue to transact business in a reconstructed form and under new conditions. Of course, the wishes of the majority of the creditors are not binding upon the Court, but in every case the Court ought to give them serious consideration. It may be that the condition of the company is such that its very substratum has ceased to exist. For example, suppose a company has been formed for the purpose of performing stage plays at some particular theatre, and the site of the theatre has been acquired by a

1931

F. G. ROBSON v. DAWSONS BANK, LTD.

PAGE, C.J.

public body. In such circumstances the Court would probably hold that the company should be wound up because its substratum has been removed; or, again, suppose the condition of the company is such that, although the majority of the creditors might be content that it should stagger on as a business concern, the Court takes the view that there is no reasonable prospect of the company being carried on in the future as a successful commercial undertaking. In such a case, too, no doubt, the Court would order the compulsory winding-up of the company. But whether the Court ought to pass such an order depends upon the circumstances obtaining in each case.

Now, it is often contended that a creditor, who is unable to obtain payment of his debt, is entitled *ex debito justitiae* to an order for the compulsory winding-up of the company. I will assume, without deciding, that the petitioners in the present case at the time when they filed the petition were creditors entitled to do so. It is urged on their behalf that they were entitled in the circumstances obtaining on the 22nd June to claim *ex debito justitiae* an order for the compulsory winding-up of Dawsons Bank. The course that the Court ought to follow in cases where a minority of the creditors seek a compulsory winding-up order while the majority of the creditors are opposed to the company being wound up by the Court was never explained with more robustness and good sense than it was by Jessel, M.R., in *In re Uruguay Central and Hygueritas Railway Company of Monte Video* (1). In that case a Railway Company had covenanted with the trustees of certain bondholders that it would pay interest upon the bonds at certain fixed dates. The Government of the

(1) (1879) 11 Ch. Div. 372 at p. 383.

1931

F. G. ROBSON v. DAWSONS BANK, LTD.

PAGE, C.J.

Republic of Uruguay, owing to temporary financial embarrassment, was unable to pay the interest which it had guaranteed, and in the events that happened interest was not paid by the company to the trustees. Thereupon a petition for the compulsory winding-up of the company was filed by a minority of the creditors. In the course of his judgment the Master of the Rolls observed :

"There is another ground on which I think also the petition should be dismissed, and it is this, that bondholders to the amount of £142,700 have instructed counsel to appear for them to oppose the petition. Now under the 91st section (which corresponds to section 174 of the Indian Companies Act) it has been decided that the Court may have regard to the wishes of persons opposing a winding-up petition. It has been decided that the section authorizes the Court even to refuse a winding-up order. I agree that, as a general rule, a creditor is entitled to a winding-up order *ex debito justitiae* ; but that rule is not without an exception ; and if ever there was a case of exception, I think I have it here. Supposing my view of the nature of the instrument is not correct, and that the petitioner is a creditor of the company, he is a *pari passu* creditor with the others ; that is, he has only £600 compared with £142,700, and he has not got a single person to support him. He has £600 compared with £142,700, the holders of which large amount actually appear to oppose him. He then being a *pari passu* creditor can only sue on behalf of himself and all the other creditors. Any judgment that could be obtained by a winding-up order or otherwise is to enure to the benefit of all. If ever there was a case in which the Court might say that it should have regard to the wishes of the creditors, I think we have it here. Mr. Buckley did not suggest they were not fairly represented, nor did he desire that a meeting should be called. But then I have to look also to the circumstances of the case, and though I should have regard to the wishes of the creditors, I must also see what sort of case it is in which they express their wishes. Now the matter stands in this way. The railway earns something, and the trustees divide all they can from that. The Government of this Republic of Uruguay has guaranteed the payment of the interest to a certain extent, and has not performed its guarantee. There is no means of suing the Republic, or making

the Republic pay, but there is some expectation that when the Republic is in funds, as it is to be hoped will be shortly the case, it will pay. Therefore it appears to me that the petitioner will never get anything more by a winding-up order than he is getting now . . . . . Looking at the peculiar circumstances of the case, and seeing what has been decided by the authorities and having regard to the wishes of the creditors in the matter, I think, on the second ground, the Court will properly exercise its judicial discretion by refusing the order."

In re Crigglestone Coal Company (1), Buckley, J., observed :

"I think that, as between the creditor and the company as his debtor, the creditor who proves insolvency is, without exception, entitled *ex debito justitiae* to a winding-up order. But then comes another consideration, viz., that the order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right *ex debito justitiae* is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment by abstaining from seizing the assets, then, upon general grounds and upon section 91 of the Companies Act, 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class ; that it is for the majority to seek or to decline the order as best serves the interest of their class."

Now, what attitude have the creditors adopted towards this petition? I do not suppose that the creditors of Dawsons Bank, while it is being wound up voluntarily, would be prepared to give a free hand to the liquidators of the company to manage the affairs of the company in their own way without consulting the wishes of the creditors, and it is always open to the creditors at any time to petition the Court to wind up a company compulsorily when it is in voluntary liquidation. In the present case we have to consider how matters stood on the 22nd of June

(1) (1906) 2 Ch. Divn. 327 at p. 331.

1931

F. G. ROBSON v. DAWSONS BANK, LTD.

PAGE, C.J.

1931, when the present petition was filed. The petition for compulsory liquidation was opposed by creditors representing more than Rs. 11,00,000 and was supported by creditors of only Rs. 2,69,346 out of a total of more than Rs. 66 lakhs. What were the circumstances prevailing at that time? On the 8th of June a meeting of the shareholders had been called, and they had unanimously resolved upon a voluntary winding-up of the company with a view to its reconstruction upon certain terms. On the 23rd of June the resolution of the 8th June was confirmed by an overwhelming majority of the shareholders. Between the 8th June and the 23rd June, that is, on the 22nd June, the present petition was launched, obviously for the purpose of preventing the resolution of the 8th June being confirmed on the 23rd June.

Now, in the petition an order for compulsory liquidation of the bank was sought on three grounds:

(1) Because it is "unable to pay its debts";

(2) because of "the conduct of the management since the passing of the resolution of the 8th of June 1931, in paying one class of its creditors in preference to, and to the serious prejudice of, another and much larger class in order to give colour to the contention that it is not insolvent"; and

(3) because "it is just and equitable that the bank should be wound up" as the scheme of reconstruction is necessarily prejudicial to the class of creditors to which the petitioners belong.

As regards the first ground upon which the petition was founded, namely, that on the 22nd of June, the company was unable to pay its debts, reference has been made to Exhibits B, C, and D, for the purpose of establishing by way of admission that on the 22nd

1931

F. G. ROBSON v. DAWSONS BANK, LTD.

PAGE, C.J.

of June the company was unable to pay its debts, and the learned Judge has found that upon the 22nd June the bank was not in a position to pay its debts. With all respect I am unable so to construe these exhibits.

Dawsons Bank was formed for a laudable object, which must have the sympathy of all persons who have regard to the welfare of a country like Burma. No one can live for any length of time in a province of the Indian Empire without being aware that one of the great difficulties that stand in the way of the cultivator is that he has not enough credit or capital to work as a free man should. Any bank, such as Dawsons Bank, which has for its object the financing of cultivators on honest and reasonable terms in order to enable them to cultivate the land without undue harassment and anxiety, is performing a public service. But the success of such a bank depends largely upon the proceeds of the paddy crop from year to year. A number of persons have deposited money with the bank for fixed periods, and the money so deposited has mainly been invested by way of loan upon petty agricultural adventures. Of course, so long as there is agricultural prosperity in Burma, Dawsons Bank will be in a flourishing condition, and the normal variation in the crop from year to year will not seriously affect its stability. But in an agricultural country like Burma some temporary disaster, coincident perhaps with other transitory difficulties, may occur which for the time being will render the collection of the debts due by the cultivators to an agricultural bank a matter of great difficulty, and if such a period of depression is unduly prolonged the stability of the bank may grievously be diminished. The position of the bank, however, at any particular time must depend upon the circumstances then prevailing.

1931

P. G. ROBSON v. DAWSONS BANK, LTD.

PAGE, C.J.

Now, it so happens that Burma recently has been passing through a period of deep depression owing to the partial collapse of the paddy market. Such a situation necessarily would cause anxiety to those responsible for the management of an undertaking like Dawsons Bank. In April 1931, however, the problem became further complicated by reason of the rebellion which it was feared might seriously affect the volume of the paddy grown in Burma in the ensuing year. It was incumbent upon the management of Dawsons Bank in such circumstances to consider what steps they ought to take to meet the emergency that had arisen, and in Exhibits B, C, D the directors of the bank made known to the general public how they appraised the situation. The directors took the view that for a prolonged period of depression the system of obtaining money by fixed deposits was inconvenient, and might be dangerous if it so happened that capital was required for the business of the bank at a time when a number of fixed deposits became payable. In that event the bank might temporarily become embarrassed, although the management of the company in Exhibits B, C, D expressly stated that Dawsons Bank was in a position to pay its debts as and when they became due, and that if the condition of the paddy market improved and the rebellion was speedily crushed matters would right themselves. On the other hand they pointed out that if the period of depression was abnormally prolonged the result might be that whereas on the one hand the depositors might not be prepared to renew their deposits, on the other hand it would become increasingly difficult for the bank to collect the loans which it had made to the cultivators in the districts. They suggested, therefore, that the best scheme for ensuring the

1931

F. G. ROBSON v. DAWSONS BANK, LTD.

PAGE, C.J.

success of the bank in the future would be to change the system of raising capital by way of fixed deposits, and substituting for it a system of long-term debentures, thereby guaranteeing fixed capital for the company, and, in their opinion, rendering the stability of the company and the position of the depositors more secure.

As I read Exhibits B, C and D, so far from interpreting these documents as containing an admission that the bank on the 22nd June was unable to pay its debts, I am disposed to regard it as a frank statement by the management of the bank to the effect that although the bank was in a position to pay its debts and was a solvent concern on that date, they must as wise and reasonable persons make provision for contingencies in the future.

I am of opinion that the evidence adduced at the hearing of the petition to prove that the bank was unable to pay its debts on the 22nd June would not have justified the Court on that ground in making a compulsory order for winding up the company.

The second ground upon which the petition is based is even more unsubstantial. Indeed, the moment it is investigated it collapses. My learned brother in the course of the argument invited the learned advocate who appeared for the appellants to explain what was meant in paragraph 11 of the petition by the statement that the management after the 8th of June 1931 had been "paying one class of its creditors in preference to, and to the serious prejudice of, another and much larger class in order to give colour to its contention that it is not insolvent". Cunliffe, J., asked whether it was intended by that paragraph to convey that the petitioners were in a position to prove that between the 8th of June and the 22nd of June the liquidators had been

1931

F. G. ROSS
v.
DAWSONS BANK, LTD.

PAGE, C.J.

discriminating between one class of creditors and another, and whether there had been what would be called in insolvency undue preference given to some of the creditors of the bank over the other creditors. Mr. Burjorjee frankly and properly admitted that the petitioners were not in a position to prove that there had been any discrimination between one creditor and other creditors in the payment of the bank's debts. Indeed the learned advocate was driven to contend that all that was intended by this statement in the petition was that between the 8th of June and the 22nd of June the company had actually been paying its debts, and carrying on business, and in so doing had been paying certain creditors without paying his clients, and that by the passage in paragraph 11 which I have stated the petitioners did not intend to prefer any other charge against the liquidators.

Now from Exhibit H which is a statement of the position of the company on 30th of April 1931, 30th of May 1931, and 22nd of June 1931, it appears that the current account, savings bank account and provident fund stood at Rs. 14,63,263 on the 30th April 1931, at Rs. 12,06,235 on the 30th May 1931, and at Rs. 2,64,987 on the 22nd of June 1931; and upon those figures the learned advocate argued that the bank ought to be wound up compulsorily because there must have been a payment of nearly 10 lakhs to creditors between the 8th and 22nd June in preference to, and to the prejudice of, the class of depositors to which his clients belonged. He contended that it must be taken that on the 8th of June the company was insolvent and unable to pay its debts, and, therefore, that it ought to have ceased to carry on business on the 8th of June, and ought not to have made any

further payments to anybody after that date. For the reasons that I have stated I am not prepared to hold, as at present advised and for the purpose of this petition, that on the 8th of June Dawsons Bank was unable to pay its debts. But the fallacy of the argument became apparent when it was conceded that until the 23rd of June Dawsons Bank was a going concern, and as a business undertaking *in esse* it was bound to pay any debts which accrued due before the resolution for voluntary liquidation had been passed. In my opinion this contention, which was solemnly urged on behalf of the appellants, not only cannot bear investigation, but denotes a complete misconception of the true position of the bank. No bank, however sound its financial position may be, keeps liquid cash in its coffers sufficient to satisfy the demands of all its customers even on current account. If all the customers of a bank on the same day decided to claim payment forthwith of the balance due to them on current account there is no bank, I take it, which would be able to provide cash from its till to satisfy its customers' demands. When the learned advocate was asked whether that was not so, his answer was: "Yes, but it can obtain credit. Some other bank will come to its rescue and will enable it to tide over the temporary embarrassment." That normally would be the case, and that, I apprehend, is what happened in connection with Dawsons Bank, because it is not denied by the learned advocate on behalf of the appellants that in fact these 10 lakhs were paid to the creditors of the bank before the 22nd of June. Where did the money come from? The bank must have obtained it either from its own coffers, or from other persons who were willing to give it credit. I have a shrewd notion that the increase in the secured overdrafts of

1931

F. G. ROBSON
v.
DAWSONS BANK, LTD.

PAGE, C.J.

the bank from 14 lakhs on the 30th May 1931 to 25 lakhs on the 22nd June indicates the source from which Dawsons Bank was able to provide this large sum for payment to its creditors prior to the 22nd June. My learned brother further asked the learned advocate for the appellants whether the class to the prejudice of which it is alleged that these payments were made was not the class of depositors. He replied that it was. My learned brother then asked : "Were not the depositors paid out of this 10 lakhs ?" The learned advocate said that he did not know. Be it so ; nevertheless, I am disposed to think that it would not be an unreasonable inference to draw from the figures disclosed in Ex. H that some 4 lakhs out of the 10 lakhs were paid to the class to which the petitioners belong, for on the 30th of May the fixed deposits stood at 70 lakhs, and on the 22nd of June they had fallen to 66 lakhs. In my opinion the second ground upon which the petition is based is utterly fallacious, and has no substance in it.

The third ground, namely, that it was otherwise just and equitable that an order for compulsory liquidation should be made, in my opinion, also fails. When the learned advocate was invited to state upon what grounds he based the contention that it was just and equitable that an order for compulsory liquidation should be made he stated that from the terms of the scheme for reconstruction it necessarily followed that if the scheme was carried out the class of depositors to which he belonged would be prejudiced. Depositors, however, of sums amounting to Rs.11,35,556 took a different view, and at the hearing before Das, J., instructed learned advocates to oppose the petition. Moreover, the shareholders of the company unanimously on the 8th of June, and by a vast majority on the 23rd June, have taken the same view

1931

P. G. ROBSON v. DAWSONS BANK, LTD.

PAGE, C.J.

as the depositors of 11 lakhs took at the hearing of the petition. Why should the Court pay more regard to the opinion of the petitioners and those who think with them than to the wishes of the far larger body of creditors who have taken the opposite view? As I have stated *primâ facie* the creditors are in the best position to decide whether their interest in the company will be better served by the compulsory winding-up of the bank, or by voluntary liquidation for the purpose of reconstruction. I go further and say that it would be extremely unwise for the Court, on a petition filed on the 22nd June, and before the wishes of the creditors as a whole had formally been ascertained, to determine that Dawsons Bank should be closed down by compulsory liquidation in the circumstances obtaining on that date; and the view that I have expressed has been confirmed by the events that have happened, because on the 22nd of July at a meeting of the creditors a motion for the compulsory winding-up of Dawsons Bank was defeated by Rs. 21,30,130 against Rs. 1,81,647. A scheme of reconstruction requires the sanction of the Court, and when an application in that behalf is made the Court will determine whether it ought to sanction the proposed scheme for reconstructing Dawsons Bank in whole or in part. For the purpose of disposing of the present petition it is enough to hold that the Court is not satisfied in the circumstances obtaining on 22nd June that the proposed scheme if carried out would of necessity work prejudice to the depositors.

Having regard to the principles by which the Court should be guided in determining whether an order for the compulsory winding-up of a company should be made or not I am of opinion that there is no substance in this petition; that it is not a *bonâ fide*

1931

F. G. Hobson v. Dawsons Bank, Ltd.

Page, C.J.

petition; and that it was rightly dismissed by the learned Judge who heard it. The appeal is dismissed with costs 15 gold mohurs.

CUNLIFFE, J.—I find myself in complete agreement with what my Lord the Chief Justice said, and have very little to add to his observations. In my view, too, this application is put forward *mala fide*. I can put no other construction on the combination of the two conflicting assertions in the letter of the 22nd of July which the petitioner instructed Sir Oscar de Glanville to write on his behalf when he specifically withdrew all charges of fraud or denied all charges of fraud and mismanagement against those in charge of Dawsons Bank, but still we find on the file this paragraph 11 in which he has asserted that because of the conduct of the management since the passing of the special resolution of the 8th June 1931 in paying one class of its creditors in preference to, and to the serious prejudice of, another and much larger class, they are to my mind important words in order to give colour to its contention that the bank is not insolvent. That must, in my opinion, be a charge of fraud; and it is persisted in. It is my considered view also that it is the inherent right of every Court of law to dismiss and disregard *mala fide* applications of this kind. Further I hold the view, as my Lord has pointed out, that all compulsory liquidation spells finality. I asked the learned advocate for the appellants if he could produce any authority in which a compulsory liquidation had been accompanied by any formal or substantial reconstruction; but so far, he has been unable to produce that authority. I have no doubt in my mind that if he had been able to do so he would have done so. I express no opinion as to the complete

1931

P. G. [illegible]
v.
DAWSONS BANK, LTD.

CUNLIFFE, J.

desirability of the scheme which has been outlined on the file before us; but it seems to me that the care with which those who have been placed in charge of the voluntary liquidation of this concern should continue. I notice that the legal adviser was present at the last meeting. I see the Directors of the Bank at the meeting of the 22nd July were present. There was also present a Chartered Accountant, and it was decided that instead of appointing a separate Chartered Accountant to keep an eye on the affairs of the bank a Committee of four depositors should be in charge of that aspect of the management. I express no opinion whether this would be a successful scheme or not, but do say this, that it has to receive the sanction of this Court. On consideration of that application the present applicant will have every opportunity of being heard, and in these difficult times, both in political and commercial affairs, I consider that it would be contrary to public policy to compulsorily wind up a substantial company of this character against which no substantial allegations of fraud have been proved before the Court.

For these reasons I agree that the appeal should be dismissed.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Cunliffe.

1931

Dec. 22

MAUNG BA
MA SAING } HEIRS OF MAI BU, DECEASED

v.

MAI OH GYI.*

Burmese Buddhist Law—Inheritance of deceased parent's estate—Death of unmarried child before partition—Surviving children's shares—Manukye, Vol. X, s. 17

S. 17 of Book X, *Manukye*, provides that if after the death of the parents and before the division of the property an unmarried child dies, the surviving brothers and sisters share equally on partition in the deceased person's effects.

A Burman Buddhist, whose wife had predeceased him, died leaving two sons and two daughters. Then one son and one daughter, both unmarried, died.

Held, that the surviving brother and sister took the property equally.

Ganguli for the appellants.

Anklesaria (*Thein Maung* with him) for the respondent.

PAGE, C.J.—This case relates to the inheritance of the property of one U Weik Gale, who died about 1883. U Weik Gale's wife predeceased him. He died leaving four children: (1) U Chin, who married the plaintiff as his second wife, and who survived him. U Chin died in 1920; (2) U Taung Thu, who died unmarried in 1904; (3) Mai Dok Ma, who died unmarried in 1914; and (4) Mai Bu, the defendant, who died unmarried in 1928.

The present suit was brought in 1925 by the surviving widow of U Chin to recover the share in the inheritance of U Weik Gale which fell to her husband. The younger sister, Mai Bu, was impleaded as defendant, and on her death in 1928 the present appellants were impleaded as her heirs and legal representatives upon the footing that they were her adopted children. The status of the appellants has

* Civil First Appeal No. 58 of 1928 from the judgment of the District Court of Minbu in Civil Regular No. 1 of 1925.

1931

MAUNG BA
v.
MAI OH GYI

PAGE, C.J.

been the subject of litigation, and the validity of their adoption is not now challenged.

The case has run a somewhat strange course. A partial decree was passed by the learned District Judge of Minbu. That decree was considered by the High Court on appeal. This Court, being of opinion that proper issues had not been raised and determined at the trial, recast the issues, and remanded the proceedings to the District Court of Minbu, not in order that they should be determined according to law as one might have expected, but that the learned District Judge should try and determine the issues as settled by the High Court, and return the proceedings in order that this Court should be in a position finally to determine the appeal.

At the hearing after remand the learned District Judge passed a decree substantially in favour of the respondent. From that decree the present appeal has been brought, and cross-objections to the decree have been filed by the respondent.

Now, the main question that falls to be determined in the case is the extent of the share of the inheritance of U Weik Gale that ultimately fell to the plaintiff's husband, U Chin.

On behalf of the appellants it is contended that section 18 of Book X of the *Manukye* applies to this case, with the result that U Chin became the heir of U Weik Gale to the extent of one-fourth of his property, but that U Chin as the eldest child was precluded by section 18 of Book X from participating as an heir in the shares inherited by his brother and sister, and that Mai Bu as the only surviving sister was entitled as against the plaintiff to three-fourths of the joint estate, and the whole of the separate estates of her brother and sister who predeceased her. It is settled law that in cases to

1931

LAUNG BA v. MAI OH GYI.

PAGE, C.J.

which section 18 applies the younger brothers and sisters are to be preferred to those who are older than the deceased (*Maung Tu* v. *Ma Chit*, I.L.R. 4 Rang. 62). In that case, however, the Court did not purport to consider what the relative position of the elder and younger brothers and sisters of the deceased was in cases which fell under section 17 of Book X of the *Manukye*, and notwithstanding the diligence of the learned advocates, with the exception of one unreported case, Civil First Appeal No. 261 of 1929, no authority has been discovered that bears upon the construction of section 17.

Now, section 17 in Richardson's translation is not placed in the same position in Volume X as it is in the Burmese version. In the Burmese version section 17 is inserted in section 16 after the words "his children are entitled to inherit", and the body of section 17 is placed after the concluding words of section 16. In my opinion, however, that circumstance is of no importance, for in unequivocal language section 17 provides that "If after the death of the parents, and before the division of the property left, an unmarried child shall die, the law for the partition of the deceased child's effects amongst the relations (brothers and sisters) is, that they shall share in equal proportions." In the unreported case to which I have referred it is pointed out that in other *Dhammathats* the same rule is laid down. In my opinion this Court is bound to give effect to section 17 in cases which fall within its ambit.

In the present case, therefore, the first question that falls to be determined is whether after the death of U Weik Gale and his wife there was a division of his property between his four children before they died. It is the common case of both parties that no such division took place, and that no partition of

1931

MAUNG BA v. MAI OH GYI.

PAGE, C.J.

the estate of U Weik Gale was ever made. This is a case, therefore, to which section 17 directly applies, and in the events that have happened it is immaterial whether the property in suit is joint property or the separate property of the several children of U Weik Gale. In either case the plaintiff as the sole heir of U Chin is entitled to one-half, and Mai Bu was entitled to the other half. The learned trial Judge has so held, and, in our opinion, any other decision upon this issue in the circumstances obtaining in the present case would not be correct.

The learned Chief Justice then proceeded to determine other issues raised in the appeal.

CUNLIFFE, J. concurred.

SPECIAL BENCH.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Cunliffe, and Mr. Justice Baguley.

1931

Dec. 23.

S. N. S. MUDALIAR

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Indian Press (Emergency Powers) Act (XXIII of 1931), s. 4 (1)—Seditious words —Words inciting acts of violence—Context and surrounding circumstances.

A Tamil newspaper of small circulation contained an exhortation to its Tamil readers in Rangoon to free India from an alien Raj with the "Sword of Ahimsa" and by a campaign of passive resistance.

Held, (i) that in deciding whether the words complained of fall within section 4 (1) of the Indian Press (Emergency Powers) Act, the Court must have regard to the surrounding circumstances: the context in which the words appear: the persons to whom the words were addressed; the political atmosphere in which the words were delivered: and the place where they were published; (ii) that in the circumstances obtaining in the case, although the words complained of were clearly seditious, they did not fall within s. 4 (1) of the Act.

Sarat Chandra Mitra v. *Emperor*, I.L.R. 38 Cal. 202—*distinguished.*

* Civil Miscellaneous Application No. 105 of 1931.

1931

S. K. S. MOHALLIM v. THE SECRETARY OF STATE FOR INDIA.

Tambe for the applicant. The article complained of was published before the publication of the Indian Press (Emergency Powers) Act, 1931. Under s. 68 of the Government of India Act, a Bill does not become an Act until the Governor-General in Council declares his assent by notifying it in the official Gazette.

[PAGE, C.J. A Bill becomes an Act as soon as it is duly assented to after passing the two houses of the Legislature. The notification of assent becomes necessary only in the case of Bills reserved for the signification of His Majesty's assent.]

A poem glorifying a rebellion is not necessarily an incitement to murder within the Act. See *Sarat Chandra* v. *Emperor* (1). The newspaper in this article is not advocating murder and acts of violence but the practice of "Ahimsa" or harmlessness.

A. Eggar (Government Advocate) for the Crown. The wording of s. 4 of the Act is wide enough to cover the words complained of. The ruling in *Sarat Chandra*'s case (1) does not apply in this case.

PAGE, C.J.—This is an application to set aside two orders of the 25th of November 1931, passed upon the applicant by the Local Government under section 3, sub-section 3, and section 7, sub-section 3, of the Indian Press (Emergency Powers) Act, 1931.

The applicant is the proprietor and keeper of the "Swadantran" Press, Rangoon, and also the publisher and editor of a newspaper in the Tamil language known as the "Swadantran." The applicant printed at the Swadantran Press, and published in the daily issue of the "Swadantran" on the 21st of October 1931, and in the weekly edition of the same newspaper on the 23rd of October 1931, a leading

(1) I.L.R. 38 Cal. 202.

article containing certain passages which appeared to the Local Government to offend against the provisions of section 4, sub-section 1, of the Act. Under section 3 (3) it is provided that

"Whenever it appears to the Local Government that any printing-press kept in any place in the territories under its administration, in respect of which security under the provisions of this Act has not been required, or having been required has been refunded under sub-section (2), is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations of the nature described in section 4, sub-section (1), the Local Government may, by notice in writing to the keeper of the press, stating or describing such words, signs or visible representations, order the keeper to deposit with the Magistrate within whose jurisdiction the press is situated security to such an amount, not being less than five hundred or more than three thousand rupees as the Local Government may think fit to require, in money or the equivalent thereof in securities of the Government of India as the person making the deposit may choose."

Section 7 (3) provides that

"Whenever it appears to the Local Government that a newspaper published within its territories, in respect of which security under the provisions of this Act has not been required, or having been required has been refunded under sub-section (2), contains any words, signs or visible representations of the nature described in section 4, sub-section (1), the Local Government may, by notice in writing to the publisher of such newspaper, stating or describing such words, signs or visible representations, require the publisher to deposit with the Magistrate within whose jurisdiction the newspaper is published, security to such an amount, not being less than five hundred or more than three thousand rupees, as the Local Government may think fit to require, in money or the equivalent thereof in securities of the Government of India as the person making the deposit may choose."

The words, signs or visible representations of the nature described in section 4 (1) referred to in section 3 (3) and section 7 (3) are :

"any words, signs or visible representations which

(*a*) incite to or encourage, or tend to incite to or to encourage, the commission of any offence of

1931

S. N. S. MUDALIAR v. THE SECRETARY OF STATE FOR INDIA.

PAGE, C.J.

murder or any cognizable offence involving violence, or

(b) directly or indirectly express approval or admiration of any such offence, or of any person real or fictitious, who has committed or is alleged or represented to have committed any such offence."

Accordingly, on the 25th of November 1931 the following orders were served upon the applicant under section 3, sub-section 3, and section 7, sub-section 3, of the Act, respectively.

[His Lordship here set out the two orders dated the 25th of November 1931 served by the Local Government on the applicant, as a keeper of the press and as publisher of the paper, requiring him to deposit Rs. 750 with the District Magistrate for publishing an article in its issue of the 23rd October 1931, which the Government maintained came under section 4 (1) of the Act. The Court translation of the words complained of is given below.]

The applicant now applies to the High Court for an order setting aside the said orders and each of them under section 23 (1) of the Act.

Now, the Court is not concerned to decide whether, if the words set out in the orders were a correct translation of the Tamil words used in the offending article, such words would fall within the ambit of section 4 (1), because it is common ground that the words in the orders of which complaint is made are different from the corresponding words in the translation of the article by the Court translator, and both the applicant and the learned Government Advocate on behalf of the Local Government are content that the application should be decided upon a consideration of the words contained in the translation by the Court translator, which runs as follows:

"Today we have worshipped all the tools and offered incense (to them). In the same way, the labour (or work arts and crafts)

pursued with the aid of these tools and the labourers (or workers) who follow these arts and crafts should also be adored . . . . Let the grip be on the handle of the sword of 'Ahimsa' (non-violence). As soon as order is issued let us draw out (unsheath) thirty-three crores of swords in one sweep (or cast), and raise (or lift) them up. Until full or complete freedom is attained there will be no rest or cessation in the meantime. May the Goddess of Victory live! Let the Goddess of Heroism shine!"

It cannot, we think, be doubted that in using these words those responsible for the publication of this article intended to bring into hatred and contempt, and to incite disaffection towards, His Majesty and the Government established by law in British India. The question, however, that falls to be determined on the present application is not whether the applicant has committed the crime of sedition, but whether the words under consideration "incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence." This is not an academic enquiry, in which the Court is invited to determine whether certain words are capable of bearing a certain meaning. On the present application the Court has to decide a practical and not an abstract question, namely, whether the words of which complaint is made fall within section 4, sub-section 1, of the Act. In considering this question it is the duty of the Court to have regard to the surrounding circumstances; for instance, the context in which the words appear, the persons to whom the words were addressed, the political atmosphere in which the words were delivered, and the place where they were published. Such matters as these are *ad rem*, and must be borne in mind when a problem of this nature is under consideration.

Now, the article of which the offending words form part is to be read as a whole, and, undoubtedly, it

1931

S. N. S. MUDALIAR v. THE SECRETARY OF STATE FOR INDIA.

PAGE, C.J.

contains a number of militant and extravagant passages. Indeed, with the exception of the word "Ahimsa" the language in which the article is couched sounds strangely like a warcry, and lies ill in the mouth of a pacifist. Yet such the applicant claims to be. What is the meaning of the word "Ahimsa"? "A" means "not," and "himsa" "injury" or "harm," and the essence of the doctrine of "Ahimsa," we are told, is that the surest way to overcome evil is to do good, and the best method of combating force is spiritual endeavour, to the end that there may be brought about a new era of kindness, mutual consideration, and good-will.

Now, the applicant stated that he had published the article in question because he was a follower of one Gandi, a political doctrinaire and agitator from the west of India; but the doctrine of "Ahimsa" appears to me to differ *toto coelo* from the precepts of Gandi. Gandi is not a pacifist but a fighting politician, although, no doubt, he is wont to protest that he relies for success in his campaign against the British Raj upon such weapons as satyagrayha, the refusal to pay taxes, and the boycott of British goods, rather than upon the cannon or the sword; and he commends passive resistance, non-violence, and non-physical force, as the weapons best suited to overthrow the British government in India. I am not prepared, however, to hold that all propaganda in support of passive resistance necessarily tends to incite persons to commit crimes of violence. It depends upon the language that is used and the surrounding circumstances. A firework thrown into the jungle in July would be innocuous; in March it might cause a conflagration. But upon one subject there will be found unanimity of opinion on every side, for there is no doubt, I apprehend, in the

mind of any reasonable man that whereas the doctrines of "Ahimsa" or "non-violence" or "passive resistance" may possess a clear, definite, and it may be a laudable, meaning in the minds of educated people such expressions may be wholly unintelligible to illiterate or untutored persons, and if the spiritual fight connoted by those terms is not explained with care and moderation that emotional people may be carried away by the fervour of their enthusiasm into dangerous and violent courses. Only a hardened controversialist, I take it, would challenge the assertion that in recent years the practice of passive resistance not infrequently has resulted in violence and disorder.

The decision in *Sarat Chandra Mitra* v. *Emperor* (1), to which the learned advocate for the applicant referred in the course of his argument, turned upon its own facts. Whether this Court would have reached the same conclusion upon the question of fact which in that case was under consideration it is unnecessary to say. It is to be observed, however, that the provisions of the Act which applied in the circumstances of *Sarat Chandra Mitra*'s case were more restricted than those of section 4 (1) of the present Act, and it may be that in order to meet the difficulty raised in *Sarat Chandra Mitra* v. *Emperor* (1) it was thought advisable in section 4 (1) (*a*) to add the words "or tend to incite to or to encourage" which are found in that section.

Now, as I understand the article in which the offending passages occur, the object of the writer was to induce those who read it to join a campaign for "redeeming India," and freeing it from alien domination. He referred to the example set by

(1) (1911) I.L.R. 38 Cal. 202.

1931

S. N. S. NEELAM v. THE SECRETARY OF STATE FOR INDIA.

PAGE, C.J.

Joshi Bai, who

"in order to save the high virtue of her chastity and to redeem the beautiful country of her birth, plunged her dagger deep in her bosom in the august presence of Rajput Kings of Bikanir, Sunderi and Marwar, shed her womanly blood and (thus) infused the spirit of heroism in the blood of the brave Rajputs."

The author of the article then proceeded to exhort his readers to free India from the British Raj:

"Today, let us carry our polished (or shining) weapons and start for the battle front. Come ye all":

and he concluded in a minatory vein:

"Last year we observed devoutly this festival by doing penance in the prison. Today we celebrate it in the wide-open prison without the four walls. We have well and pointedly sharpened the weapon of "Ahimsa" (non-violence) and tested its sharpness and sheathed (it). The Round Table Conference also is being impeded and is tottering. If it failed or was overturned, our general Gandi would start the battle as soon as he returned. Be watchful (or vigilant)! Let the grip be on the handle of the sword of "Ahimsa" (non-violence). As soon as order is issued let us draw out (unsheath) thirty-three crores of swords in one sweep (or cast) and raise (or lift) them up. Until full or complete freedom is attained, there will be no rest or cessation in the meantime. May the Goddess of Victory live! Let the Goddess of Heroism shine!"

Now, if these words had been addressed in their own tongue to the Burmans in Burma, or to the Hindus in Cawnpore, without doubt in the highly charged political atmosphere that now obtains I should have held that they were within the mischief to obviate which section 4 was enacted. But the question is, would they have the same tendency when addressed to the Tamil community in Rangoon? To the general body of Tamils in Rangoon the word "Ahimsa" probably means little or nothing, and I do not suppose that they have the vaguest notion of its import or connotation, and let it be assumed that

the impression that the article under consideration would convey to their minds would be that they were therein being exhorted to free India from an alien Raj by joining in a campaign of passive resistance. In such circumstances—and the case for the Local Government cannot be put higher than that—the question is, can the Court reasonably infer that the tendency of the words used in the offending passages is to incite the Tamils in Rangoon to commit murder or some other crime of violence? In my opinion it cannot. How would such conduct on their part advance the cause of "freedom" in India? Rangoon is in Burma, and Burma is not India. What use would it be? Obviously none at all. I cannot persuade myself that the effect of the language used in the offending passages upon the few Tamils in Rangoon who read such an insignificant newspaper as the "Swadantran" would be to induce them to commit murder or any criminal act of violence. So to hold, in my opinion, would be to attribute to the Swadantran authority and importance that it neither merits nor possesses. I am not prepared to hold that the "Swadantran" newspaper is of any account, or entitled to claim that it exerts any influence over the Tamils in Rangoon or anyone else. Moreover, an Oriental is wont to express himself in allegory and parable, and delights in hyperbole. Why should the Tamils in Rangoon give to the militant passages in this political effusion a literal meaning that normally they would not expect it to bear? No doubt the intention of the applicant in publishing this article, and the language in which it is couched, is incriminatory and seditious, but, taking all the circumstances into account, and bearing in mind the occasion upon which the words were used, the place where they were published, the context in which they appear

1931

S. N. S. MUDALIAR v. THE SECRETARY OF STATE FOR INDIA.

PAGE, C.J.

and the persons to whom they were addressed, in my opinion, it cannot fairly or reasonably be held that the words of which complaint is made "incite to or encourage or tend to incite to or encourage the commission of any offence of murder, or any cognizable offence involving violence," or are otherwise within the ambit of section 4 (1) of the Act. The result is that the application succeeds, and the orders will be set aside.

CUNLIFFE, J.—I am of the same opinion, but I think that this is a case which is near the line.

There is no doubt that the translation of the excerpt from the Tamil article which was under consideration of Government was of a stronger nature than the translation which we have accepted, and which has been accepted by both counsel in the case.

To take an instance, the translation, which was before the Government official who advised action in this case, in one particular, runs as follows: "Beware! Let your grip be on the handle of the 'Ahimsa's' sword"; whereas, as we know, the correct translation is: "Let the grip be on the handle of the sword of 'Ahimsa.'" It sounds as if the word "Ahimsa" indicated a person and not an abstract political term. The intention of the writer of the article, in my view, however, was frankly seditious, and it is no fault of his that he escapes the provisions of the Statute.

The language of the article of which complaint is made is of a very florid character. It is also distinguished by a very commonplace line of thought. The author appeals to the religious and political prejudice of those who may read it. In appealing to the religious passions of the masses, he adopts a well-known allegorical basis in adjuring his hearers to consider themselves soldiers of an army.

1931

S. N. S. MUDALIAR v. THE SECRETARY OF STATE FOR INDIA.

CUNLIFFE, J.

We are not unfamiliar in the religions of the West with such language of hyperbole as "fighting the good fight," "the sword of righteousness" and "the buckling on of spiritual armour." Such expressions are very often met with in the religions of the West. I have no doubt they are common to all religions, and the curious thing to my mind is this, that the more ordinary and even timid the disposition of the hearers the more sustaining it is to them to imagine that they are the soldiers of a victorious army.

The passages complained of strike me as being on the border line. If we were looking at the intention of the writer there is to my mind direct evidence of his intention to inflame his hearers, but the nature of this offence, unlike many criminal offences, does not rest on intention. It rests on the effect produced on the minds of others. I am not satisfied that the passages complained of transgress the provisions of section 4, and, therefore, am prepared to give the applicant here the benefit of the doubt. As my Lord has pointed out, in the peculiar political conditions of this Province probably the whole article would have little or no effect upon his hearers.

For these reasons I agree that the course suggested by my Lord should be adopted.

BAGULEY, J.—I agree that to find out whether words tend to have a certain effect one must look not merely to the words themselves, but also to the circumstances under which they were published and the audience to which they were addressed.

I agree to the course that my Lord Chief Justice has suggested.

1931

Dec. 15.

* CRIMINAL REVISION.

Before Mr. Justice Carr.

MAUNG KYI PE
v.
MA HTU IN.*

Criminal Procedure Code (Act V of 1898), s. 488 (3)—Sentence of imprisonment for arrears of maintenance—Second imprisonment for same arrears.

A person who has undergone a sentence of imprisonment on account of his failure to pay certain arrears of maintenance under s. 488 of the Code of Criminal Procedure cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears.

No appearance by the parties.

CARR, J.—This proceeding arises out of two successive applications for the recovery of arrears of maintenance under section 488 (3) of the Code of Criminal Procedure made in the Court of the Headquarters Magistrate of Mergui.

Both cases were very carelessly dealt with by the Magistrate, and the District Magistrate in making his order of reference has been to some extent misled by the Headquarters Magistrate's orders, so that the facts stated in the order of reference are not entirely correct.

On the 9th of May, 1931, Ma Htu In applied for the recovery of Rs. 40, being arrears of maintenance at Rs. 5 a month from the respondent, Maung Kyi Pe. A distress warrant was issued, and, after considerable delay, Rs. 5 was realized by the sale of the respondent's property. This distress warrant was actually issued for nine months' arrears, being the sum of Rs. 45. This was incorrect, and the Magistrate displayed great carelessness in signing it. After the

*Criminal Revision No. 437B of 1931 of the order of the Headquarters Magistrate of Mergui in Criminal Miscellaneous Case No. 58 of 1931.

Rs. 5 had been realized, the Magistrate proceeded to sentence the respondent to one month's simple imprisonment. That order was passed on the 24th of August, 1931.

On the 19th of September, Ma Htu In filed a further application in which she stated that there were Rs. 30, arrears of maintenance, and Rs. 29-8-0, as costs, still outstanding from the first application, and further that since then there had accumulated further arrears of Rs. 20 for four months' allowance, and she asked that a warrant might be issued under section 488 (3) of the Criminal Procedure Code. The Magistrate apparently did not read this petition. He examined Ma Htu In on oath, but her statement was solely confined to the arrears of Rs. 35, maintenance from the previous application, and the question of costs and of the further arrears was not even touched upon. The Magistrate did not issue a fresh warrant but again passed an order sentencing the respondent to one month's rigorous imprisonment for the same arrears of Rs. 35 for which the previous sentence had been passed. Again, in his order he made no mention of the fact that a further arrears had accumulated and was being claimed. He remarked in his order: "The imprisonment, if served, does not absolve the person from liability for arrears of maintenance. 3 W.R. 61, and 12 P.R. 1919 (Criminal). (Sohoni's Criminal Procedure Code, latest edition, page 1045)." He seems to have considered that as justification for passing a second sentence for the same arrears for which the respondent had already been imprisoned.

The original decisions quoted in Sohoni's Criminal Procedure Code are not, I think, available at Mergui, and, therefore, neither the Headquarters Magistrate nor the District Magistrate can be blamed for not

1931

MAUNG KYI PE v. MA HTU IN

CARR, J.

referring to the original decisions. I have myself referred to them, and I find that in fact neither of them touches on the question now in issue at all.

Queen v. *Moodoosoodun De*, (1). This case deals simply with the question whether, after imprisonment in default of payment of fine has been served, the offender is still liable to have the amount levied by a sale of his moveable property. There is nothing whatever about maintenance in this case.

The other case, *Crown* v. *Budhu Ram* (2), also does not touch this question. The petitioner had been sentenced to six months' simple imprisonment for default in paying maintenance for a period of over six months, and the High Court at Lahore held that this was a legal sentence.

These decisions are, therefore, of no use in the present proceeding, and I am compelled to say also that even the misleading Note in Sohoni's Code of Criminal Procedure did not justify the Magistrate in passing a second sentence of imprisonment for the same default.

There does not appear to be any positive decision on the question whether under section 488 (3) of the Code a defaulter can be sentenced a second time to imprisonment for a default for which he has already undergone a sentence of imprisonment ; but I have not the slightest hesitation in saying that the passing of the second sentence in such circumstances is entirely at variance with the principle of Criminal Law and cannot be upheld.

I set aside the order of the Headquarters Magistrate sentencing Maung Kyi Pe in his Criminal Miscellaneous Case No. 58 of 1931 to one month's rigorous imprisonment and direct that Maung Kyi Pe be discharged in respect of the arrears of Rs. 35,

(1) 3 W.R. Cr. 61. (2) (1919) P.R. Cr. 12.

1931

MAUNG KYI PE v. MA HTU IN.

CARR, J.

and that the bail bond on which he has been released under the District Magistrate's orders be cancelled.

That, however, cannot be the end of the case. As I have already said, Ma Htu In in her second application claimed to recover further arrears of Rs. 20 for four months' allowance, and that claim the Magistrate has not yet dealt with. His Criminal Miscellaneous Case No. 58 of 1931 is, therefore, remanded to the Magistrate, who will proceed to deal with it in accordance with law by issuing a warrant for the total amount claimed, and, if on that warrant the arrears are not realized, by considering the question whether Maung Kyi Pe should or should not be sentenced to imprisonment in respect of the arrears of Rs. 20, which was not dealt with in the earlier case, and I express the hope that this time in dealing with the application the Magistrate will display more care than he has done in the previous proceedings.

The District Magistrate in his order of reference has raised the question whether under section 488 (3) of the Code the total sentence which may be passed at any one time is restricted to one month or whether a defaulter may be sentenced to one month's imprisonment in respect of each month's arrears. Since in both proceedings the Headquarters Magistrate passed only a sentence of one month's imprisonment, this question does not seem to me to arise, and I, therefore, express no opinion upon it, except that the decision in *Zaw Ta* v. *King-Emperor* (1), appears to be the latest authoritative Burma ruling on the question, and that, therefore, unless and until that decision is overruled, Magistrates in Burma should be guided by it.

(1) (1914) 7 L.B.R. 351.

1932

Jan. 19.

APPELLATE CRIMINAL.

Before Sir Arthur Page, Kt., Chief Justice

VELLU THEVAR AND ANOTHER

v.

KING-EMPEROR.*

Judicial Officers—Unfettered exercise of jurisdiction—Directions from superior judicial officers to subordinate officers—Impartial administration of justice—Litigants' right to fairness.

Every order passed by a judicial officer should be the outcome of his own impartial and unprejudiced opinion. Any direct or indirect attempt to influence the decision of a Judge or Magistrate in a matter of which it is his duty to take cognizance in a judicial capacity, or to approach him in connection with any proceeding within his jurisdiction except in the manner prescribed by law, is to be condemned. It is highly improper for a District Magistrate or any other official to direct or influence a Magistrate subordinate to him for certain purposes, in respect of an order that might be passed by the Magistrate in the exercise of the jurisdiction with which he has been entrusted.

It is a fundamental of the due administration of justice that Judges and Magistrates should not only be fair and impartial, but also should appear to reasonable persons to be fair and impartial, and that neither accused persons nor litigants should have any reasonable ground for supposing that the Judge or Magistrate who is trying a case in which they are concerned is biassed either in their favour or against them.

Serjeant v. Dale, 2 Q.B.D. 567—*referred to.*

Rafi for the applicants.

Gaunt (Assistant Government Advocate) for the Crown.

PAGE, C.J.—This is an application for the transfer of certain criminal proceedings from the Court of the Headquarters Magistrate of Pyapôn to a Court in some other district.

If the allegations set out in the petition and in the affidavits in support of it are true I have no doubt that an order of transfer ought to be made.

---

*Criminal Miscellaneous Application No. 47 of 1931 arising out of Criminal Regular Trial No. 141 of 1931 of the Court of the Headquarters Magistrate, Pyapôn.

Mr. Barretto is both the Deputy Commissioner and the District Magistrate of Pyapôn, and I agree with the view of my learned brother Sen, J., to whom an application for the transfer of these proceedings has already been made, that the diary of the First Additional Magistrate of Bogale, who granted bail to the first petitioner, supports the allegation that he subsequently cancelled the bail bond by the sureties of the first petitioner "under orders of the District Magistrate, Pyapôn" (see diary order—12th March 1931). That is one of the allegations upon which the present application for transfer also is based. If it is the fact that the District Magistrate of Pyapôn gave directions to or otherwise attempted to influence a Magistrate, who for certain purposes was subordinate to him, in respect of any order that might be passed by the Magistrate in the exercise of the jurisdiction with which he had been entrusted, I do not hesitate to say that the District Magistrate acted not only indiscreetly, but most improperly.

It is further alleged that on another occasion the District Magistrate, acting either in that capacity or as Deputy Commissioner of Pyapôn, wrote to the Additional Sessions Judge who had granted bail to the first petitioner requesting the Additional Sessions Judge to review the order that he had passed if he could see his way to do so. It is alleged that the Additional Sessions Judge replied: "I am afraid I have no power to review my own order." What the Additional Sessions Judge ought to have done was to have taken immediate steps to ensure that in the future he should not again be interfered with by the District Magistrate in the exercise of the criminal jurisdiction that had been committed to his trust. If this allegation also is true it would afford a further ground for concluding that the District Magistrate of

1932

VELLU THEVAR v. KING-EMPEROR.

PAGE, C.J.

Pyapôn had acted in connection with the present case in an unjustifiable and improper manner.

It is also alleged that when the second petitioner, who is an accused in the case, on the 26th of September, 1931, complained to the Headquarters Magistrate that he had been ill-treated by the police, the Headquarters Magistrate, who twice had refused to grant bail to the first petitioner but whose order on each occasion had been set aside, warned the second petitioner that if he failed to substantiate the complaint against the police he would be liable to be whipped.

The petition for transfer contained other allegations, but for the purpose in hand it is unnecessary to consider them. No affidavits in reply to the allegations set out in the application for transfer have been filed. What purported to be a report to the Court by the District Magistrate, however, has been received, but in the circumstances I do not think that the Court ought to act upon it. If specific allegations are made such as those set out in the application for transfer and the allegations are supported by affidavits, in my opinion, in the absence of evidence in rebuttal or a statement by the judicial officer concerned duly tendered by the Crown, the Court for the purpose of deciding the application for transfer ought to treat such allegations as being correct, unless the allegations appear to the Court to be inherently untrustworthy. In every case where allegations in a petition for transfer are made against a judicial officer it is fair and proper that the Crown should be represented.

A preliminary inquiry into the case against the petitioners is now being held by the same Headquarters Magistrate, and if a committal order is made the trial will probably be held before the Sessions or Additional Sessions Judge of Pyapôn.

The petitioners state, having regard to the action which they allege has been taken by the District Magistrate in interfering with the administration of justice by judicial officers in the district, that they apprehend that they may not obtain impartial justice if the case is investigated or tried by a judicial officer in the district over which the District Magistrate of Pyapôn has charge.

When an application for a transfer of these proceedings was before Sen, J., on a previous occasion the learned Judge stated that he was "not satisfied that the Magistrates who have dealt with the case have shown any real bias against the petitioners . . . . . The most that can be said on behalf of the petitioners is that the police have displayed excessive zeal in this case, and that the District Magistrate has also taken an active interest in the case."

With all due deference if I had taken the same view of the matter as that which commended itself to the learned Judge, and I had thought that the Magistrates in the Pyapôn District had shown any bias at all against the accused, I should have felt bound to transfer the proceedings from their jurisdiction. It is a fundamental of the due administration of justice that Judges and Magistrates should not only be fair and impartial, but also should appear to reasonable persons to be fair and impartial, and that neither accused persons nor litigants should have any reasonable ground for supposing that the Judge or Magistrate who is trying a case in which they are concerned is biassed either in their favour or against them. The law, as Lush, J., observed in *Serjeant* v. *Dale* (1) :—

"has regard not so much perhaps to the motives which might be supposed to bias a Judge as to the susceptibilities of the litigant

(1) (1877) 2 Q.B.D. 558 at p. 567.

1932

VELLU THEVAR v. KING-EMPEROR.

PAGE, C.J.

parties. The important object, at all events, is to clear away everything which might endanger suspicion and distrust of the tribunal, and so promote the feeling of confidence in the administration of justice which is so essential to social order and security."

The Courts of law, as well in Burma as in the other provinces of British India, have consistently administered justice with a fairness and impartiality that has excited admiration not only in India and Burma but throughout the civilized world. On the rare occasions on which a judicial officer has deviated from the strict standards to which he is bound to conform, with the approbation of all right-thinking persons, it has been made impossible for him further to pollute the source from which justice flows.

Now, one of the essential ingredients of the due administration of justice is that every order passed by a judicial officer should be the outcome of his own impartial and unprejudiced opinion. It is for this reason that any direct or indirect attempt to influence the decision of a Judge or Magistrate in a matter of which it is his duty to take cognizance in a judicial capacity, or to approach him in connection with any proceeding within his jurisdiction except in the manner prescribed by law, invariably excites general and whole-hearted condemnation. The decision of a Judge or Magistrate may be right or wrong—no one is infallible ; but that directions should be issued, or suggestions made, I care not from whomsoever they come, to a Judge or a Magistrate as to what his decision should be in a matter or proceeding before him is utterly reprehensible, and will not be tolerated.

In order that injustice should not be done to the District Magistrate and the Headquarters Magistrate against whom allegations are made in the application for a transfer of these proceedings I have perused the report of the District Magistrate of Pyapôn which he

has forwarded to the Court, and in considering whether a transfer should be ordered I shall not travel outside the three specific allegations which I have mentioned.

As regards the allegation in paragraph 4 of the petition "that the learned District Magistrate acted wrongly in influencing the learned First Additional Magistrate to cancel the bail-bond resulting in the first petitioner being re-arrested by the police", the report does not appear to contain any denial or explanation. As regards the allegation in paragraph 10 of the petition that "the Deputy Commissioner wrote to the Additional Sessions Judge 'to request if you would see your way to review your order of bail'" the allegation appears to be borne out by the diary of the Additional Sessions Judge, and the District Magistrate has reported that

> "it appeared to me that there were sufficient grounds for the Additional Sessions Judge to review his order, and instead of returning the report to the District Superintendent of Police I submitted it to the Additional Sessions Judge requesting him if he could see his way to review his order of bail. The Additional Sessions Judge returned the report to me saying that he had no power to review his order, and I accordingly instructed my office to put up the ruling on the subject (*vide* page 1064, para. 7, Sohoni Criminal Procedure Code, the tenth edition) which possibly escaped the Additional Sessions Judge's attention. The Additional Sessions Judge on receipt of the ruling quoted reviewed his order and cancelled the bail."

I feel bound to say that in approaching the Additional Sessions Judge in this manner the District Magistrate acted most improperly. If it was considered expedient to obtain a reversal of the order granting bail to the first petitioner a formal application should have been presented to the Court in that behalf as provided by law, and for the action of the District Magistrate in communicating with the Additional Sessions Judge in the manner he did, in my opinion,

1932

VELLU THEVAR v. KING-EMPEROR.

PAGE, C.J.

there can be no justification or excuse. I regard it as a matter of the utmost importance that it should be made known and understood that any attempt to interfere with a judicial officer in the exercise of his judicial functions is not to be permitted and will not be countenanced under any circumstances, and that any person who seeks to approach a judicial officer in connection with a proceeding that is *sub judice* before him otherwise than in the manner permitted and prescribed by law will incur the reprobation of all right-thinking people, and will be subjected to such pains and penalties as the Court has at its disposal. As regards the allegation in paragraph 14 of the petition that, when the second petitioner complained to the Headquarters Magistrate who is now investigating the case against the petitioners that he had been ill-treated by the police, the Magistrate "warned him that if he ...d to substantiate his allegations he was liable to whipping", the only explanation vouchsafed in the report of the District Magistrate is that "the learned Magistrate stated to me that he warned the accused Manickam that he would be liable to punishment if he failed to substantiate his allegation against the police. This he states is thepractice he adopts in all such complaints". If that is the practice of the Magistrate the sooner it comes to an end the better. It must not be taken that I desire or pretend to express any opinion as to the merits of the case against the petitioners. I know nothing, and I say nothing, about it. On the present application the sole question that falls for determination is whether it is expedient in the interests of justice that the proceedings should be transferred from the Pyapôn District. I think it is.

In the circumstances to which I have referred it appears to me not unreasonable that the petitioners

1932

VELLU THEVAR v. KING-EMPEROR.

PAGE, C.J.

should fear that they might not obtain impartial justice if the criminal proceedings against them now under investigation are continued in the Pyapôn District, and I have no doubt that an order of transfer should be made. These proceedings will be transferred from the Court of the Headquarters Magistrate of Pyapôn, and will be forwarded to the District Magistrate of Rangoon to be disposed of by the District Magistrate or some other Magistrate in Rangoon as he may direct according to law.

APPELLATE CIVIL.

1932

Jan. 26.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

MAUNG CHIT AND ANOTHER
v.
S. P. Y. S. P. CHETTYAR FIRM.*

Provincial Insolvency Act (V of 1920), ss. 24 (2), 25—No examination of debtor by consent—Debtor not prejudiced—Adjudication.

In the presence of the debtor and with his consent the advocates for the petitioning creditor and the debtor agreed that no evidence should be taken on either side, and that the debtor was not to be examined, and without examining the debtor the Judge adjudicated the debtor insolvent on an act of insolvency under section 6 (b) of the Provincial Insolvency Act.

Held, that failure to examine the debtor as provided in s. 24 (2) of the Provincial Insolvency Act, unless the debtor is thereby prejudiced, does not *ipso facto* vitiate the adjudication order.

Chan Tun Aung for the appellants.

Kalyanwala for the respondents.

PAGE, C.J.—This appeal must be dismissed.

The sole contention on behalf of the appellant is that if a debtor happens to be present at the hearing of an insolvency petition an order of adjudication

* Civil Miscellaneous Appeal No. 159 of 1931 from the order of the District Court of Hanthawaddy in Insolvency Case No. 33 of 1931.

1932

MAUNG CHIT v. S.P.Y.S.P. CHETTYAR FIRM.

PAGE, C.J.

cannot be made, whatever the circumstances may be, unless the debtor has been examined. [Provincial Insolvency Act (V of 1920), s. 24 (2) (4).]

The learned advocate for the appellant conceded, however—as I think he was bound to do—that, if at the hearing of the petition the debtor is present but refuses to submit to examination, he ought not to escape an order of adjudication merely upon that ground, and that in such circumstances the Court would have jurisdiction to pass an order adjudging the debtor to be insolvent.

Failure to examine the debtor is not one of the facts upon proof of which the Court is bound to dismiss the petition (see s. 25), and, in my opinion, unless the debtor is thereby prejudiced, failure to examine the debtor as provided in section 24 (2) does not *ipso facto* vitiate the adjudication order.

In the present case we are informed that at the hearing of the petition the learned advocate for the petitioning creditor and the learned advocate for the debtor in the presence, and with the consent, of the debtor agreed that there should be no evidence taken on either side, and it is common ground that the debtor desired that he should not be examined. The learned Judge decided—and the correctness of his decision is not challenged—that an adjudication order ought to be made upon the ground that the debtor had committed an act of insolvency under section 6 (*b*) of the Provincial Insolvency Act. It is not suggested that the debtor has in any way been prejudiced by reason of the fact that he was not examined.

In such circumstances, in my opinion, the appeal fails, and must be dismissed.

MYA BU, J.—I agree.

APPELLATE CIVIL.

1932

Feb. 1.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

L. DAWSON AND OTHERS
v.
J. HORMASJI AND OTHERS.*

Letters Patent, Cl. 13—Statutory meeting of Creditors—Companies Act (VII of 1913), s. 153—Court's order rejecting proxies and directing another meeting—Effect of order—Appeal—Scrutineers appointed to advise Chairman—Validity of proxies—Decision by scrutineers.

An order of the Judge on the Original Side that the proxy forms used at a statutory meeting of creditors held under s. 153 of the Indian Companies Act must be rejected, and that another meeting of the creditors must be held, is a "judgment" within clause 13 of the Letters Patent, and an appeal lies therefrom. The effect of the order was finally to determine that the decision of the creditors as to a proposed scheme was not to be ascertained or recorded and the poll taken at the meeting was to be inoperative.

Levy Brothers v. S. K. Day, 31 C.W.N. 894—*referred to.*

Scrutineers appointed by the Court to assist the Chairman of a statutory meeting whose decision, pursuant to an order of the Court, as to the admissibility of any proxy was final, had no right to decide themselves whether any proxy was good or bad, and no *locus standi* to present a petition for the Court's directions as to the validity of the proxies.

McDonnell, for certain creditors. There is a preliminary objection that no appeal lies from this order. Ss. 38 and 202 of the Indian Companies Act provide for all appealable orders, and the present order is not one of them. The Full Bench case of *P. K. P. V. E. Chettyar* v. *N. A. Firm* (1) defines what a "judgment" is under clause 13 of the Letters Patent, and Das, J.'s order was not a "judgment". It has not put an end to the proceedings; on the contrary it has paved the way for the proper ascertainment of the wishes of the creditors in a regularly constituted meeting, that would enable the

* Civil Miscellaneous Appeal Nos. 19 and 25 of 1932 from the order of this Court on the Original Side in Civil Miscellaneous No. 180 of 1931.

(1) I.L.R. 6 Ran. 703.

1932

L. DAWSON v. J. HORMASJI.

Court to come to a final decision whether the proposed scheme should be sanctioned or not. Not all orders passed by a Judge in liquidation proceedings are appealable, see *Ghansham Das* v. *Hindustan Bank* (1). The Court has an inherent power to give directions in respect of the holding of meetings.

Leach, for other creditors. The order of Das, J., merely decided how the statutory meeting was to be held. It did not affect the rights of the parties. An order made in the winding up of a company to be appealable under s. 202 of the Act, must be a "judgment" within clause 13 of the Letters Patent. See *Sansar Chand* v. *Punjab Industrial Bank* (2), and *Madan Gopal* v. *Sen* (3).

Lambert, for the liquidators. The order of Das, J., is a final order. The creditors have recorded their votes in a certain way, and are entitled to the benefit of that voting. The result of another meeting may not be the same. *Levy Brothers and Knowles, Ltd.*, v. *S. K. Day* (4). S. 202 of the Act gives a right of appeal from every order in a winding-up proceeding, and the restriction relates only to procedure, *viz.* that the appeal should be brought within the time prescribed for it. The Legislature has not said that the right of appeal is to be governed by the Civil Procedure Code, hence every order in a winding-up proceeding is appealable. In *The People's Industrial Bank* v. *Har Kishan Lal* (5) it was held that the right of appeal is an incident of the winding up.

Young, for other creditors. The effect of Das, J.'s order is to nullify the consent of the

(1) I.L.R. 1 Lah. 73 at p. 76.
(2) I.L.R. 10 Lah. 806.
(3) I.L.R. 55 Cal. 262.
(4) 31 C.W.N. 894.
(5) 16 All. L.J. 70

creditors who had sent in their proxies. The learned Judge's order cancels the meeting, and the date of a meeting is always important in winding up matters. Once a meeting has been held according to the directions of the Court, and the votes have been recorded, the Judge become *functus officio*.

[PAGE, C.J. S. 153 of the Act gives a wide discretion to the Court to prescribe the form of a meeting. But the position may be different when a meeting has been duly held and votes duly cast according to the directions of the Court. If the Court cancels that meeting and orders that another meeting be held such an order may abrogate the vested rights of the creditors who have duly cast their votes, and if the order finally determines their rights is it not a "judgment"? Was any resolution passed at this meeting?]

Yes. A resolution was put before the meeting, votes were recorded, but before the result of the poll was ascertained the meeting was adjourned to obtain the Court's opinion on the proxies.

McDonnell and *Leach* in reply. Voting at a meeting is a procedural act. The same persons can vote again. The meeting did not decide or take away any of their rights. S. 239 of the Act enables the Court to order a meeting of creditors whenever it desires to ascertain their wishes.

PAGE, C.J.—On the 15th of December, 1931, Messrs. Stuart, Smith and Allan, Chartered Accountants, who had been appointed scrutineers by the Court to assist the chairman of a statutory meeting of creditors held under section 153 of the Indian Companies Act (VII

1932

L. DAWSON v. J. HORMASJI.

PAGE, C.J.

of 1913), filed a petition for directions as to the validity of certain proxies which had been used at the statutory meeting.

My learned brother Das, J., heard the petition and held that as "the contravention of Rule 145 is fatal to the proxy form all the proxy forms used in this matter must be rejected; so the result is that another meeting of the creditors must be held."

Appeals against the order of Das, J., have been preferred by the liquidators, by certain gentlemen who have been elected to form a committee of the creditors, and by certain other creditors.

A preliminary objection has been raised on behalf of certain of the creditors that no appeal lies from this order. In my opinion the preliminary objection fails. Under the provisions of section 153 creditors casting their votes at a duly convened and conducted meeting of creditors for or against a scheme of arrangement are entitled to have the result of the poll recorded. The decision of the creditors at such a meeting has an important bearing upon the future of the company, and the interests of those connected with it; it may in effect determine whether the company is to continue as a business undertaking or not. If the votes duly cast in favour of the scheme are less than the statutory majority prescribed under section 153 (2), the result will be that the scheme of arrangement cannot be presented to the Court for sanction. *E contra*, if as the result of the poll the statutory majority of creditors in favour of the scheme is obtained the creditors who voted in favour of the scheme of arrangement have a right to have the scheme presented to the Court for sanction. The effect of the order of the learned trial Judge that another statutory meeting for ascertaining the wishes of the creditors with respect to the proposed scheme is to be held was finally to deter-

1932

L. DAWSON v. J. HORMASJI.

PAGE, C.J.

mine that the decision of the creditors who had duly voted for and against the scheme at the meeting of the 11th December, 1931, should not be ascertained or recorded ; and to render inoperative the poll that had been taken at the statutory meeting held on that day. In my opinion the order of Das, J., as made was a "judgment" within clause 13 of the Letters Patent, and as such was appealable [see *Levy Brothers and Knowles, Ltd.*, v. *Subodh Kumar Day and another* (1)]. It is necessary therefore to consider the case on the merits, and in my opinion the appeals should be allowed, and the order of Das, J., set aside. The petition appears to me to be wholly misconceived. The function of the applicants as scrutineers, pursuant to the order of Sen, J., was merely to assist the chairman. If, and in so far as, the chairman required them to assist him with their experience and advice in connection with the poll it was the duty of the scrutineers to comply with his request. It was not the duty of the scrutineers, and they had no right, to decide whether any proxy was good or bad. The *persona designata* to determine that question was the chairman of the meeting. Upon that matter nothing could be clearer than the order of Sen, J., of the 2nd December, 1931, "I also direct that the decision of the chairman as to the admissibility of any proxy shall be final for the purpose of this meeting, subject to the Court's power of revision".

These words connote that, unless and until the chairman of the meeting has given his decision as to the admissibility of the proxies tendered at the meeting, and his decision has been impugned and duly brought before the Court by way of revision, the Court ought not to consider or determine whether any proxy was valid

(1) (1927) 31 C.W.N. 894.

1932

L. DAWSON
v.
J. HORMASJI.

PAGE, C.J.

or not. In my opinion the Court was not justified in embarking upon a consideration of the matters raised in the petition for two reasons, (1) that the petitioners had no *locus standi* to present the petition; and (2) that, having regard to the order of Sen, J., the Court ought not to exercise its powers of revision unless and until the chairman of the meeting has given his decision as to the admissibility of the proxies that have been tendered. I do not propose, and for the purpose of deciding these appeals it is unnecessary, to consider whether any of the proxies tendered at the meeting were admissible or not. At this stage of the proceedings it is premature for the Court to consider or determine that question.

We have decided that the Court is entitled to entertain the appeal, and that being so all parties to the appeals consent to the appeals being allowed, and the order from which the appeals are brought set aside.

The costs of the liquidators will be defrayed out of the funds of the bank, five gold mohurs.

MYA BU, J.—I agree.

1932

Feb. 2.

CRIMINAL REVISION.

Before Mr. Justice Heald and Mr. Justice Brown.

U BA THAUNG
v.
MA AYE.*

Maintenance arrears of—Defence to claim—Child's majority and ability to maintain itself—Code of Criminal Procedure (Act V of 1898), s. 488 (1) and (3).

Against a claim for arrears of maintenance, ordered under s. 488 of the Criminal Procedure Code in respect of a child, it is "sufficient cause" within the meaning of clause 3 of that section to prove that the child has now attained the age of majority, and is able to maintain itself.

---

* Criminal Revision No. 521B of 1931 of the order of the 2nd Additional Magistrate of Ingabu in Cr. Misc. Trial No. 23 of 1931.

Shah Abu Ilyas v. *Ulfat Bibi*, I.L.R. 19 All. 50—*referred to*.

In re *Din Muhammad*, I.L.R. 5 All. 226; *Prohlad Lal* v. *Rami*, I.L.R. 25 All. 165—*distinguished*.

1932

U BA THAUNG v. MA AYE.

Venkatram for the applicant.

Carlos for the respondent.

HEALD and BROWN, JJ.—On the 26th of June, 1911, an order was passed by the 1st Additional Magistrate of Ingabu directing the petitioner U Ba Thaung to pay to the respondent, his wife Ma Aye, a sum of Rs. 5 a month as maintenance for his daughter aged 2. In 1916 an application was made by Ma Aye for an increase of the amount of maintenance but that application was unsuccessful. On the 4th of June last Ma Aye applied to the Magistrate claiming arrears of maintenance for four months. Ba Thaung objected to the claim on the ground that his daughter is now of age. The Magistrate refused to consider this application but directed Ba Thaung to make a separate application under section 489 to have the order for maintenance of his child set aside. Ba Thaung made an application in revision against this order to the Sessions Judge, and the Sessions Judge has submitted the proceedings to this Court with a recommendation that the order of the Magistrate should be set aside.

We are given to understand that in the interval Ba Thaung has made an application under section 489 and that that application has been successful. The respondent Ma Aye, however, claims that in the interval until the setting aside of the order she is entitled to claim maintenance.

It is admitted that the daughter for whom maintenance is claimed is now 22 years old.

Two matters have been argued before us in the hearing of this application: Firstly as to the

1932

U BA THAUNG v. MA AYE.

HEALD and BROWN, JJ.

meaning of the word "child" in section 488 of the Code of Criminal Procedure and secondly as to the meaning of clause 3 of that section. Section 488, clause (1), lays down that

> "if any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate . . . . . may order such person to make a monthly allowance for the maintenance of his wife or such child."

There is no definition in the Code of Criminal Procedure as to the meaning of the word "child". It is argued on behalf of the petitioner that the word "child" must mean a person under the age of majority. The term "child" does ordinarily signify a young person but it is also sometimes used as synonymous with the term "son" or "daughter".

There is authority for the view that the provisions of section 488 as to children cannot apply after the child has attained the age of majority, but cases undoubtedly do arise where a son or daughter after attaining the age of majority, is unable to maintain itself and we should hesitate to lay down as a rigid rule that in no such case could an order of maintenance in favour of a child be enforced as regards a major.

It is clear, however, that the section ordinarily contemplates a case of a child unable to maintain itself owing to its tender years, and in ordinary cases a strong presumption would arise that when a child reached the age of majority it was no longer unable to maintain itself under the provisions of the section. It is not necessary, however, for us to come to any definite finding on this point as that is not the question which directly arises in the application before us.

1932

U BA THAUNG v. MA AYE.

HEALD and BROWN, JJ.

The question we have to decide is whether the person against whom an order for maintenance has been passed when ordered to pay up arrears of maintenance is entitled to resist that order on the ground that his child is now of age and able to maintain itself. A number of rulings on this point have been cited to us. It was held *In the matter of the petition of Din Muhammad* (1) that in a defence for an application for arrears of maintenance a husband could plead that he had been divorced from his wife. In the case of *Shah Abu Ilyas* v. *Ulfat Bibi* (2) a Full Bench by a majority took the same view of the law. In the case of *Prabhu Lal* v. *Rami* (3) it was held that an agreement come to between the parties subsequent to an order for maintenance could not be pleaded in answer to a claim for arrears. This view of the law was founded on the wording of section 490 which lays down:

"A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due."

These cases were, however, all decided prior to 1923. Before that date clause (3) of section 488 read—

"if any person so ordered wilfully neglects to comply with the order, any such Magistrate may . . . . . issue a warrant."

In 1923 the section was amended and the clause now reads:

"if any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may . . . . . issue a warrant."

(1) (1883) I.L.R. 5 All. 226. (2) (1897) I.L.R. 19 All. 50.
(3) (1903) I.L.R. 25 All. 165.

1932

U BA THAUNG v. MA AYE.

HEALD and BROWN, JJ.

A warrant can therefore only issue when the person ordered to pay has failed to do so without sufficient cause. The words "without sufficient cause" are very wide and seem to us to justify the raising of a plea that the order has become "spent" owing to the child for whom the maintenance was ordered having attained the age of majority and being able to maintain itself. That is the view which was taken even under the old section by a majority of the Full Bench of the High Court of Allahabad in *Shah Abu Ilyas'* case (1) where the defence raised was the divorce of the wife in whose favour maintenance was ordered. We do not consider it can have been the intention of the Legislature that an order which obviously is spent can still be enforced until the person affected thereby shall have made a formal application under the provisions of section 489. The fact that an order is so spent seems to us to be sufficient cause within the meaning of clause (3) of section 488.

We therefore set aside the order passed by the Magistrate on the 11th of June refusing to entertain Ba Thaung's objection to the payment of maintenance on behalf of his daughter, and direct that the Magistrate shall consider that petition on its merits, and that if the Magistrate is satisfied that Ba Thaung's daughter was of age and able to maintain herself during the period for which the arrears were claimed the application of Ma Aye to have an order passed for payment of those arrears should be dismissed. The respondent Ma Aye will pay the applicant Ba Thaung his costs in this Court, advocate's fee two gold mohurs.

(1) (1897) I.L.R. 19 All. 50.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Cunliffe.

S. P. L. K. S. N. CHETTYAR FIRM

v.

U SEINT.*

1932
Jan. 13.

Attachment—Alienation during attachment—Removal of attachment—Revival of alienation—Civil Procedure Code (Act V of 1908) s. 64.

Property under attachment was mortgaged. The amount due under the writ of execution was paid and the attachment came to an end. Thereafter the decree-holder re-attached the property for some further interest that was due.

Held, that the mortgage was rehabilitated on removal of the first attachment, and was not void under s. 64 of the Civil Procedure Code.

Annamalai Chettyar v. *Palaniselai*, I.L.R. 41 Mad. 265; *Anund Lall* v. *Jullodhur*, 14 Moo. I.A. 546; *Bhoshekhand* v. *Nandram*, I.L.R. 35 Bom. 519—*followed*.

Tun Tin for the appellants. Order XXI, rule 55, of the Civil Procedure Code provides that on payment of the amount due under a decree, an attachment of property shall be deemed to be withdrawn and any further attachment must be regarded as a new attachment. There is no such thing as a revival of an old attachment. See *Likhmichand* v. *M. E. V. R. M. Chettyar* (1); *Najimunnessa Bibi* v. *Nacharuddin* (2); Consequently, a transfer made between the first and second attachments can in no way be questioned under section 64 of the Code. Section 64 uses the words (a private transfer pending attachment) "shall be void as against all claims enforceable under the attachment". At the date of the transfer in this case, no attachment could be said to exist because the decretal amount had been paid into Court.

Moreover, section 64 was enacted only with a view to preserving intact the rights of attaching creditors,

* Civil Miscellaneous Appeal No. 126 of 1931 from the order of the District Court of Thayawaddy in Civil Miscellaneous Case No. 138 of 1929.

(1) I.L.R. 8 Ran. 491. (2) I.L.R. 51 Cal. 548 at p. 563.

1932

S.P.L.K.S.N. CHETTYAR FIRM v. U SEIN.

and it has been held that even a transfer pending attachment is not void provided the judgment-creditor is satisfied in regard to his debt immediately after the transfer. See *Umesh Chunder Roy* v. *Raj Bullubh* (1); *Anund Loll* v. *Juliodhur* (2); *Annamalai Chettyar* v. *Palamalai* (3); *Khushalchand* v. *Nandram* (4); *Abdul Rashid* v. *Gappo Lal* (5).

Aiyangar for the respondent. Order XXI, rule 63, of the Civil Procedure Code saves the rights of a party, against whom an order is made, to establish his right to attached property which is jeopardised; and where a suit to establish such a right is filed by the judgment-creditor and decided in his favour, the attachment must be held to revive.

Full satisfaction of a decree means that all amounts, including interest up to date of payment, have been paid; it is not merely payment of the amount specified on the face of the writ for execution. Till the whole sum due is paid, an attachment cannot be deemed to be withdrawn.

PAGE, C.J.—This is an application by a petitioning creditor in the insolvency of Ma Thein Mya for an order setting aside a certain mortgage transaction, to the extent of a third interest therein, which it is alleged contravened the provisions of section 64 of the Code of Civil Procedure. At the hearing of the application it was also contended on behalf of the applicant, who is the respondent in this appeal, that the mortgage transaction contravened the provisions of section 53 of the Provincial Insolvency Act. The learned District Judge, upon a consideration of the evidence, held that the case did not fall within

(1) I.L.R. 8 Cal. 279.
(2) 14 Moo. I.A. 543.
(3) I.L.R. 41 Mad. 265.
(4) I.L.R. 35 Bom. 516.
(5) I.L.R. 20 All. 421.

sections 53 or 54 of the Provincial Insolvency Act; that the mortgage transaction was a *bonâ fide* one, and that there was fair and reasonable consideration passing from the mortgagee in respect of the property which was mortgaged to him.

This finding by the learned District Judge is not challenged on appeal, for the learned advocate who appeared for the respondent properly stated that upon this issue of fact he could not hope to succeed in persuading this Court on appeal to interfere with the conclusion at which the learned District Judge arrived.

The sole question that falls for determination in the appeal is whether the mortgage transaction falls within the ambit of section 64 of the Code. Section 64 runs as follows:

"Where an attachment has been made any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

Now, the material facts are few and simple. The petitioning creditor in insolvency obtained a money-decree against the insolvent in 1927, and in execution of the decree attached the property in dispute on the 28th of April 1927. An application was made by the insolvent's mother, Daw Sein, in those execution proceedings for removal of the attachment upon the ground that the property was not liable to be attached in execution of a decree against the insolvent, and on the 13th of September 1927, as appears from the diary order of that date, the execution case was closed, and the attachment withdrawn, on the petitioning creditor informing the Court that he was filing a declaratory suit to establish his title in the property. The petitioning creditor thereupon filed Civil Regular Suit No. 4

1932

P.L.K.S.N. CHETTYAR FIRM v. U SEIN.

[PAGE, C.J.

of 1928, and on the 25th of April 1929 the High Court held that Daw Sein's allegation was without substance, and passed a decree in favour of the petitioning creditor. On the 10th of May 1929 the insolvent and two others mortgaged the property which had been attached to the appellant Chetty, and, as I have stated, it is common ground that a fair and reasonable consideration passed to the mortgagors in respect of the mortgage of this property. On the 25th of July 1929 the insolvent applied to the Subdivisional Court, Tharrawaddy, to be allowed to deposit the decretal amount with costs in Court.

Now, the petition for execution by way of attachment dated the 7th of April 1927 stated that the sum due with interest and costs amount to Rs. 3,150-1, and the form of the writ of attachment was that set out in Appendix E of the Code of Civil Procedure, No. 24. The learned Judge held that the decretal amount with costs was Rs. 3,172-1 and not Rs. 3,150-1 as stated in the application, and an order was passed permitting the applicant to deposit in Court Rs. 3,172-1 on the 29th of July 1929. On the 29th of July 1929, as appears from the diary order of that date, the applicant, Ma Thein Mya, deposited in Court a sum of Rs. 3,172-1, received the bailiff's receipt for same, and an order was passed that full satisfaction of the amount due under the writ of execution in respect of which the properties had been attached had been paid by the judgment-debtor to the judgment-creditor, and on the following day, the 30th of July 1929, a voucher for Rs. 3,172-1 was delivered to the decree-holder, who is the petitioning creditor in the present proceedings. On the 6th of August 1929, the decree-holder filed an application for leave to execute the decree for further interest due from the date of the decree to the date of realisation, and on the 29th of

August 1929 the Court issued a warrant of attachment in respect of the insolvent's interest in the property in respect of the additional interest which was found due under the decree. On the 30th August the property was re-attached. Meanwhile, on the 5th of August the petitioning creditor had filed a petition for the adjudication of Ma Thein Mya as insolvent, and on the 4th of October 1929 an order of adjudication was passed against her. The question to be determined is whether in these circumstances the mortgage transaction of the 10th of May 1929 was void under section 64 of the Code.

Now, we are satisfied, having regard to the form of the writ of attachment, that upon payment of the sum therein stated and satisfaction of the amount due thereunder being registered, the execution came to an end and the attachment ceased with it. On the 10th of May 1929 however when the mortgage was executed the amount due under the execution in respect of which the property had been attached had not been paid, and therefore the mortgage was void " as against all claims enforceable under the attachment." In my opinion, when the amount due under the writ of execution was paid and the attachment came to an end, there were no further claims enforceable under the attachment in respect of which the mortgage could be said to be void, and *ex post facto*, in my opinion, the mortgage transaction was rehabilitated in law.

As stated by Chandravarkar, J., in *Khushalchand Pemraj Marwadi* v. *Nandram Sahebram Marwadi* (1),

" all obstruction to the legal validity of the private alienation made during the continuance of the attachment having been removed, the alienation revived and became legal

(1) (1911) I.L.R. 35 Bom. 516 at p. 525.

1932

S.P.L.K.S.N. CHETTYAR FIRM v. U SEIN.

PAGE, C.J.

because the question then came to be one entirely between the alienor and the alienee."

See also *Annamalai Chettiar* v. *Palamalai Pillai* (1) and *Anund Loll Doss* v. *Jullodhur Shaw* (2).

For these reasons, in my opinion, the appeal must be allowed, the order from which the appeal is brought set aside, and the application dismissed with costs.

CUNLIFFE, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Bagaley.

1932

Jan. 18.

MAUNG PE THAUNG AND ANOTHER
v.
TOUNGOO TIMBER COMPANY.*

Partnership—Trading firm—Timber business—Buying and Selling—Borrowing power of a partner—Contract Act (IX of 1872), s. 251.

Two persons carried on business in partnership in timber, trading with capital the fixed part of which was relatively small. They bought some elephants and buffaloes for their business, but their main expenditure was on extracting logs from trees cut down in the jungle, and floating them to the revenue stations, and in paying a large revenue to Government. They acquired no property in the logs until they had paid the Government dues, and then they sold the logs. One of the partners borrowed a sum of money from the plaintiffs on behalf of the firm on a promissory note.

Held, that the activities of the firm were of the nature of buying and selling which are the marks of a trading firm. A partner in such a firm has ostensible authority to borrow money on behalf of the firm.

Elizabeth Hadley v. *Bainbridge*, (1842) 3 Q.B. 316; *Higgins* v. *Beauchamp*, (1914) 3 K.B. 1192; *Maung Po Myat* v. *Dawood*, 11 L.B.R. 137; *S. Punamchand* v. *Kuparchand*, I.L.R. 48 Bom. 176; *Thicknesse* v. *Bromilow*, (1852) 2 Cr. & J. 425; *Wheatley* v. *Smithers*, (1906) 2 K.B. 321—*referred to.*

N. N. Sen for the appellants.

Thein Maung for the Receiver.

The facts of the case are set out in the judgment.

---

(1) (1918) I.L.R. 41 Mad. 265. (2) (1872) 14 Moo I.A. 546.

* Special Civil Second Appeal No. 155 of 1931 from the judgment of the District Court of Toungoo in Civil Appeal No. 128 of 1930.

The form of the promissory note sued upon was as follows :—

(Maung Pe Thaung and Ma Tint, Creditors, Pyu.)

On-demand Pro-note.

Dated the 20th day of October 1926.
Dated the 14th waxing Thadingyut 1288 *B.E.*

I, the undersigned, on the pro-note, Mr. Earnshaw, residing at Môn Village, Kyaikkyi Township, on behalf of the Toungoo Timber Company, take from Maung Pe Thaung and Ma Tint, residing at Okpiyat Street, Pyu, an unsecured loan of Rs. 2,000 (two thousand only) bearing interest at the rate of Rs. 2 per cent. per mensem, and having undertaken to repay the said sum to the creditors, Maung Pe Thaung and Ma Tint, or order, on demand at any time, in full satisfaction at a single payment, it is hereby signed.

(Sd.) R. A. EARNSHAW,
for Toungoo Timber Company.

BAGULEY, J.—The point for decision in this appeal is whether the Toungoo Timber Company, a partnership consisting of Messrs. Petley & Earnshaw, was liable on a promissory note signed by Earnshaw alone on behalf of the Toungoo Timber Company. The partnership is now being wound up, and the appellants sued the Receiver on this promissory note. That the promissory note was executed by Earnshaw is admitted.

It is claimed that under section 251 of the Contract Act Earnshaw was the agent of the partnership, and by signing in the way in which he did he binds both himself and his co-partner.

The trial Court found that Earnshaw had power and permission to execute it, and gave a decree for the amount sued with interest and costs.

On appeal the learned Additional District Judge held that the company was not liable on the promissory note because he held that the partnership was not an

1932

MADHO PR TRADING v. TOOMROO TRADER COMPANY.

BAGULEY, J.

ordinary trading company, and borrowing was not part of the ordinary business of the company. It was also mentioned in the partnership agreement that the other partner, Petley, should do the financing of the company.

A similar point was dealt with in *Saremal Punamchand* v. *Kapurchand Punamchand* (1) in which authorities were reviewed. Most of the authorities are English authorities, and I have referred to the authorities in the original. The leading case referred to is *Higgins* v. *Beauchamp* (2). This case does not appear to me to be of very particular importance because it was obviously decided on the facts of that particular case. To quote the last words of the judgment of Lush, J., " at all events I am satisfied that this particular business is not a trading business ". The business in this case was one of proprietors and managers of picture palaces, etc. It is mentioned, however, in the course of the judgment " that the managing partner of a common trading partnership has implied authority to borrow money for partnership purposes, and in so borrowing he may bind the other partners although he may wrongfully apply it to other than partnership purposes." Reference was made to *Wheatley* v. *Smithers* (3) in which it was held " that buying and selling were essential features of trading " and as the partnership in question was that of an auctioneer it was not a trading partnership. That case, however, was reversed on appeal because the partnership deed showed that the business contemplated the sale and purchase of goods and property. There is also authority in *Elizabeth Hedley* v. *Bainbridge* (4) that a professional business was not of a commercial nature, the partnership in that case being one of attorneys ; and on the particular facts of the case a quarry working

(1) (1924) I.L.R. 48 Bom. 176.
(2) (1914) 3 K.B. 1192.
(3) (1906) 2 K.B. 321.
(4) (1842) 3 Q.B. 316.

partnership was held in *Thicknesse* v. *Bromilow* (1) not to be an ordinary trading partnership, although in that case the partnership was held liable because both partners were held to have known of the borrowing. In *Maung Po Mya & Ma Mya May* v. *A. H. Dawood & Co.* (2), it was held that a partnership for working a rice-mill, milling other people's paddy and charging milling hire, was not a trading partnership.

In the present case the business of the partnership is stated in the partnership deed as being that of "timber trading generally", and it is stated that the partners cut down trees in the jungle, extracted logs, floated them to the revenue stations, paid Government revenue on them and sold them. It was argued that this was not buying and selling timber. In my opinion, it is clear that in the case of a partnership of a professional nature as mentioned in some of the cases referred to, the borrowing of money could not be regarded as an act necessary for or usually done in the carrying on of the business. In the case of a partnership, the main business of which consists in buying and selling goods, it is obvious that at a certain time it is necessary to raise money unless the capital of the partnership is very large and not fixed. A business of this kind is one in which what may be called the trading capital necessary is large and little fixed capital is employed. On the other hand, in the case of extracting stones from a quarry on a large scale in which the facts show that a large amount of fixed capital is involved in the way of steam engines, railway lines, etc., or in the case of working a rice-mill for the sake of milling on hire where the proportion of fixed capital is large

(1) (1852) 2 Dr. & J. 425. (2) 11 L.B.R. 137.

1932

MAUNG PE THAUNG v. TOUNGOO TIMBER COMPANY

BAGULEY, J.

in comparison with the amount of the floating capital employed, it must be held that raising of money would not be an ordinary incident of the business. A certain amount of floating capital would be necessary but this would be comparatively small in proportion to the amount of the fixed capital employed for the business of managing a picture palace, and business of that description.

In the present case the amount of the fixed capital appears to have been comparatively small. There was absolutely no fixed capital so far as the record goes. The money invested in elephants and buffaloes, etc., can scarcely be regarded as fixed because an outbreak of anthrax or other disease would sweep it away in a few days. Although the partnership did not actually buy logs from anybody it had to expend a considerable amount in cash in order to make logs available for sale, and even when the logs had been got to the revenue stations they did not become the property of the partnership until they had been set free from the Government claim by paying a considerable amount per ton, and this payment may well be regarded in one sense as equivalent to buying from the Government.

A reference to the partnership deed shows that the business was that of timber trading generally, and although there is a clause that the other partner, Petley, should supply the capital required this clause limits his total liability to Rs. 20,000, and the record shows that he had already put in considerably more than Rs. 100,000. Even if the partnership deed had been shown to the lender he might well have been under the impression that Petley had come to the end of the capital that he was bound to supply, and he had, in fact, already invested more than five

times as much as he was bound to supply by the partnership deed.

I hold, therefore, that this must be regarded as a trading partnership which would make the signature of Earnshaw alone on the promissory note on behalf of the timber trading company sufficient to bind the company itself.

I must add that I am astonished at this case having been fought to the extent that it has been fought by the Receiver. This particular debt was mentioned in the accounts furnished by the Receiver, and the partner, Petley, raised no objection to it. Earnshaw admits the debt, and has admitted it all along. One would have expected the Receiver to admit the debt, and pay the appellants. He may have been advised by the Court to put the plaintiffs to strict proof of their claim, but having once defended the case unsuccessfully in the trial Court, I fail to understand how he as Receiver could justify his action in filing the appeal which, owing to the erroneous decision of the Additional District Judge, has merely put both parties to very considerably extra and unnecessary expense. The memorandum of appeal does not show whether he has the permission of the Court to file an appeal, and, when the Receiver's accounts come up for examination, the District Judge might well consider seriously the question of allowing the Receiver his costs for what appears on its face to be an entirely unnecessary litigation.

For these reasons I set aside the decree of the Lower Appellate Court and restore that of the trial Court and give the plaintiffs a decree as prayed with costs in all Courts.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932

Feb. 10.

M. P. M. S. FIRM

v.

KO PYU AND OTHERS.*

Lease by mortgagor in possession—Transfer of Property Act (IV of 1882), s. 66—Transfer of Property Amendment Act (XX of 1929), s. 65A—Ordinary course of management—Yearly and monthly leases—Three years' lease of building—Rent paid in advance—Mortgagee's right to evict.

A mortgagor in possession may make a lease conformable to usage in the ordinary course of management; for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent for the mortgagor to grant a lease on unusual terms, or to alter the character of the land or to authorize its use in a manner or for a purpose different from the mode in which he himself has used it before he granted the mortgage.

This view of the law has been embodied in the Transfer of Property Amendment Act (1929), s. 65A.

Madan Mohan Singh v. *Raj Kishori Kunwari*, 21 C.W.N. 88—*followed*.

Anund Rau v. *Dhunpat Singh*, 1 Pat. L.J. 563; *Beni Prasad* v. *Ganga Singh*, I.L.R. 7 Pat. 349; *Kiran Chandra Bose* v. *Dutt & Co.*, 29 C.W.N. 94—*referred to*.

N. C. Macleod v. *Vithal Singh*, I.L.R. 30 Bom 250; *Rustomji* v. *Kesharji*, 28 Bom. L.R. 1162; *T. P. Reuther* v. *M. P. Uma*, 8 L.B.R. 413—*dissented from*.

If a mortgagee elects to treat a three years' lease granted by the mortgagor as not binding upon him, and seeks to eject the tenants, it is no defence that they had paid the rent in advance to the mortgagor.

Rustomji v. *Kesharji*, 28 Bom. L.R. 1162—*referred to*.

Chari for the appellants.

A mortgagor in possession of mortgaged property cannot lease it without the concurrence of the mortgagee. The mortgagee's right is paramount. See *N. C. Macleod* v. *Vithal Singh* (1). A mortgagor is like a bailee or an agent of the mortgagee and should not create an unusual type of lease. *Madan Mohan Singh* v. *Raj Kishori* (2); *K. C. Bose* v. *Dutt & Co.* (3);

---

* Civil First Appeal No. 110 of 1931 from the judgment of the District Court of Myaungmya in Civil Regular No. 85 of 1930.

(1) I.L.R. 30 Bom. 250 at p. 269. (2) 21 C.W.N. 88.

(3) 29 C.W.N. 94.

1932

M.P.M.S. FIRM v. KO PYU

Ananda Ram Marwari v. *Dhanpat Singh* and *Anandaram Marwari* v. *A. R. M. Lakhan Singh* (1); *Beni Prasad* v. *Aangoo Singh* (2). Section 65A of the Transfer of Property Act has adopted the Calcutta rulings. In *T. P. Rowther* v. *Uma* (3), it was held that a mortgagor's right to lease the mortgaged property is only restricted by the fact that he should not impair the security.

Halkar for the respondents.

The appellants in this case are claiming possession as mortgagee auction-purchasers and as auction-purchasers they are only entitled to the right, title and interest of the mortgagor. As between the mortgagor and the lessee the lease is valid, and the lessees are not liable to eviction. In this respect the cases cited are distinguishable. Moreover, the lessees are *bonâ fide* transferees from the mortgagor, as was not the case in *T. P. Rowther's* case. They have paid the rent in advance, and ought not to be made to pay it over again to the auction-purchasers if they attorn to them.

Chari in reply. The mortgagee auction-purchaser may elect to keep the mortgage alive under section 101 of the Transfer of Property Act, if it is beneficial to him to do so. The mortgagee can either sue the lessee for avoidance of the lease or, in his capacity as auction-purchaser, can call upon the lessee to attorn to him. If the lessee refuses to do so, he becomes a mere trespasser.

PAGE, C.J.—This is a suit to recover possession of certain immoveable property in the possession of the defendants and for mesne profits.

The defendants claimed to be in possession under a lease for three years granted by Daw Ngwe Yon.

(1) 1 Pat. L.J. 563. (2) I.L.R. 7 Pat. 349.
(3) 8 L.B.R. 413.

1932

M.P.M.S. FIRM v. KO PYU.

PAGE, C.J.

At the time when the lease was executed the property had been mortgaged by Daw Ngwe Yon to the plaintiff. Subsequently, the plaintiff brought a suit against Daw Ngwe Yon, and obtained a money decree against her. In execution of that decree the plaintiff attached the property in suit, brought it to sale, and purchased the property at the auction sale held in execution of the decree. After the sale the plaintiff invited the tenants of Daw Ngwe Yon to attorn to him. Upon their refusal he brought the present suit for possession of the property, alleging that the defendants were trespassers upon the land. In their written statement the defendants pleaded that that they were in possession as the tenants of Daw Ngwe Yon under a lease for three years, and that the plaintiff was bound by the lease. In his reply the plaintiff contended that as mortgagee of the lands the lease was not binding upon him.

Now, the question that arises for determination is whether a lease for three years by a mortgagor is binding upon the mortgagee. Three different views have been expressed by the Courts in India upon this question, but having regard to the provisions of section 65A of the Transfer of Property Act in due course the question will become academic. One line of authorities has held that without the consent of the mortgagee, express or implied, a mortgagor is not entitled to create a lease of the property which is the subject-matter of the mortgage. *N. C. Macleod and another* v. *Kissen Vithal Singh and another* (1) and *Rustomji Dorabji* v. *Keshavji Damji* (2).

It has also been held that a mortgagor in possession can *prima facie* exercise the ordinary rights of an owner in possession. The only restriction imposed on

(1) (1904) I.L.R. 30 Bom. 250. (2) (1926) 28 Bom. L.R. 1162.

him is that contained in section 66 of the Transfer of Property Act, that is to say, he must not commit any act which is destructive or permanently injurious to the property if the security is insufficient or will be rendered insufficient by such act. (Per Fox, C.J., and Twomey, J., in *Tana Peena Cheena Pitchay Meera Rowther* v. *Mamakkantakath Pathumakutti Uma and others* (1).)

In my opinion, however, the true view lies between these two extremes, and was enunciated by Mookerjee and Beachcroft, JJ., in *Madan Mohan Singh* v. *Raj Kishori Kumari and others* (2) as follows :—

"The true position thus is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage."

See also *Kiran Chandra Bose* v. *Dutt & Co.* (3); *Anand Ram Marwari* v. *Dhanpal Singh and Anand Ram Marwari* v. *Lakhan Singh* (4); and *Beni Prasad* v. *Ganga Singh* (5). The opinion expressed by the learned Judges in *Madan Mohan Singh's* case has now been embodied in section 65A of the Transfer of Property Act.

In the present case the plaintiff as mortgagee by filing the suit elected to treat the lease in question as not binding upon him, and an issue was framed at the trial for the purpose of determining whether in the circumstances obtaining in the case he was bound by the terms of the lease.

(1) (1916) 8 L.B.R. 413.
(2) (1912) 21 Cal. W.N. at p. 92.
(3) (1924) 29 C.W.N. 94.
(4) (1916) 1 Pat. L.J. 563.
(5) (1928) I.L.R. 7 Pat. 349.

1932

M.P.M.S. FIRM v. KO PYU.

PAGE, C.J.

The learned District Judge dismissed the plaintiff's suit upon the ground that the law was correctly laid down in *Tana Peena Cheena Pitchay Meera Rowther* v. *Mamakkantakath Pathumakutti Uma and others* (1). In my opinion, however, the law was not accurately stated in that case, and, having regard to the principles enunciated by Mookerjee and Beachcroft, JJ., in *Madan Mohan Singh* v. *Raj Kishori Kumari and others* (2), with which I respectfully agree, it is clear that the lease in the present case was not one that was made in the ordinary course of management, or binding upon the mortgagee.

The learned advocate for the respondents contended that it would be unreasonable and unjust that the tenants should be evicted. Notwithstanding that they had paid rent in advance to Daw Ngwe Yon when she was the mortgagor in possession, in my opinion, and whatever rights the defendants may have against Daw Ngwe Yon with respect to the rent paid in advance, the fact that they had paid rent in advance is no answer to a suit for ejectment brought against them by the mortgagee who has elected to treat the lease as not binding upon him (*Rustomji Dorabji* v. *Keshavji Damji, supra*).

The result is that the appeal is allowed and the decree from which the appeal is brought set aside, and a decree for possession will be passed in favour of the appellant against the respondents. The proceedings will be remanded to the District Court, Myaungmya, in order that the *quantum* of mesne profits may be ascertained. The appellant is entitled to his costs in both Courts.

MYA BU, J.—I agree.

(1) (1916) 8 L.B.R. 413. (2) (1912) 21 Cal. W.N. at p. 92.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

ABDUL SATTAR

v.

V. E. A. R. M. CHETTYAR FIRM AND ANOTHER.*

1932

Mar. 1.

Insolvency—Act of insolvency—Liability for personal act or act by agent—Agent's authority—Agent's act when binding on his principal—Presidency Towns Insolvency Act (III of 1909), s. 9.

It is a fundamental principle of insolvency law that a person is not to be adjudicated insolvent except for an act of insolvency which he has personally committed, or which has been committed by his agent under such circumstances that it must be taken that the act of insolvency by the agent has been expressly or impliedly authorized by the principal against whom an order of adjudication is sought.

A partner gave notice of suspension of payment to his firm's creditors.

Held, in the circumstances of the case, that the notice did not affect another alleged partner who had neither expressly nor impliedly authorized this notice.

Gopal Naidu v. *Mohanlal*, I.L.R. 49 Mad. 189; *Harish Chandra* v. *East India Coal Company*, 16 C.W.N. 733; *Kastur Chand* v. *Dhanpat Singh*, I.L.R. 23 Cal. 26; *In re Mahomed Hashim Company*, 24 Bom. L.R. 861—*followed*.

Hormasji for the appellant.

Talukdar for the 1st respondent.

PAGE, C.J.—This appeal must be allowed.

The question that arises for determination is whether there was an available act of insolvency set out in the petition upon which the firm could be adjudicated.

On the 25th of August 1931 a creditors' petition was presented for the adjudication of the firm of Yusoof Abdul Aziz & Co., "a firm which carried on business at No. 84, Tseekai Maung Tawlay Street, Rangoon, through its partners Yusoof Abdul Aziz of

* Civil Miscellaneous Appeal No. 213 of 1931 from the order of this Court on the Original Side in Insolvency Case Nos. 283 and 324 of 1931.

1932

ABDUL SATTAR v. V. E. A. R. M. CHETTYAR FIRM.

PAGE, C.J.

No. 74, Tseekai Maung Tawlay Street, Rangoon, and Abdul Sattar Abdul Aziz of No. 63, Edward Street, Rangoon". The act of insolvency upon which the petition was based was an alleged notice that the firm had suspended payment of its debts, contained in the following letter written on the 19th August 1931 to the advocate of the petitioning creditors by an advocate on behalf of Yusoof Abdul Aziz :—

"To

MESSRS. BOSE, VENKATRAM, DE AND BASU,
Advocates, Rangoon.

Dear Sirs,

Your notice dated the 18th August 1931 has been placed in my hands by Eusoof Abdul Aziz to reply thereto as follows :

My client, Eusoof Abdul Aziz, has been adjudged insolvent in Insolvency Case No. 304 of 1930 of the High Court of Judicature at Rangoon. The firm of Eusoof Abdul Aziz & Co. has suspended payment of its debts and the said firm cannot satisfy your claim."

Now, the question is whether in the circumstances obtaining in the present case this letter was an available act of insolvency upon which the petition to adjudicate the firm could be supported. In India, for the purpose of committing an act of insolvency under section 9 of the Presidency Towns Insolvency Act (Act III of 1909),

"the act of an agent may be the act of the principal, even though the agent has no specific authority to commit the act."

Whether the act of an agent is to be treated as an act of his principal depends upon the circumstances of each case; see *Kastur Chand Rai Bahadur* v. *Dhanpat Singh Bahadur* (1); *Harish Chandra Mukherjee* v. *East India Coal Company, Limited*, (2), In *re*

(1) (1896) I.L.R. 23 Cal. 26. (2) 16 Cal. W.N. 733.

Mahomed Hasham & Co. (1) and *Gopal Naidu* v. *Mohanlal Kanyalal* (2).

It is a fundamental principle of insolvency law that a person is not to be adjudicated insolvent except for an act of insolvency which he has personally committed, or which has been committed by his agent under such circumstances that it must be taken that the act of insolvency by the agent has been expressly or impliedly authorized by the principal against whom an order of adjudication is sought. That principle was illustrated and emphasized by the Judicial Committee in *Kastur Chand Rai Bahadur* v. *Dhanpat Singh Bahadur* (3).

Now, the material facts are few and simple. Yusoof Abdul Aziz was adjudicated insolvent on the 16th of December 1930, and after that date the firm of Yusoof Abdul Aziz & Co. ceased to carry on business. The petitioning creditors alleged that the business carried on in the name and style of Yusoof Abdul Aziz & Co. did not belong to Yusoof Abdul Aziz but to a firm consisting of Yusoof Abdul Aziz and Abdul Sattar Abdul Aziz. The petitioning creditors, having failed to obtain payment of a debt which they alleged to be due to them from this firm, filed the present petition for the adjudication of the firm. They founded the petition upon the letter from the advocate of Yusoof Abdul Aziz of the 19th of August 1931. No business had been carried on under the style of Yusoof Abdul Aziz & Co. by any one since the 16th of December 1930, but it was common ground that a business in that name had been carried on in partnership by Yusoof Abdul Aziz and Abdul Sattar Abdul

(1) 24 Bom. L.R. 861. (2) (1926) I.L.R. 49 Mad. 189.
(3) (1896) I.L.R. 23, Cal. 26.

1932

ABDUL SATTAR v. V.E.A.R.M. CHETTYAR FIRM.

PAGE, C.J.

Aziz, that the firm had not been dissolved by the adjudication of Yusoof Abdul Aziz, and that it was still in existence when the letter of the 19th of August 1931 was written. Now, on the 19th August 1931, Yusoof Abdul Aziz was an insolvent whose estate had vested in the Official Assignee, and the appellant, who has consistently denied that he was a partner in the firm, alleged that the letter of the 19th of August 1931 was written in collusion between the petitioning creditors and Yusoof Abdul Aziz for the purpose of obtaining an adjudication order against him. Be that as it may, there was no evidence that the appellant, Abdul Sattar Abdul Aziz, either expressly or impliedly authorized Yusoof Abdul Aziz to cause this letter to be written or sent to the petitioning creditors, and in the circumstances obtaining in the present case I am of opinion that the letter cannot be treated as a notice that the firm had suspended payment of its debts, or as an available act of insolvency upon which a petition to adjudicate the firm could be based.

For these reasons, in my opinion, the appeal must be allowed, and the petition dismissed with costs, five gold mohurs in each Court.

MYA BU, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932
March 8.

OFFICIAL ASSIGNEE, RANGOON
v.
H. POPE.*

Insolvency—Transfer of entire property to creditor—Double effect—Fraudulent preference—Deprivation of other creditors—Knowledge as to existence of other creditors—Presidency Towns Insolvency Act III of 1909, s. 55.

If an unsecured creditor elects to take a transfer of the whole of his property from a debtor who is insolvent the transfer has the double effect of preferring his claim against the debtor to the claims of other unsecured creditors, and further of removing from the reach of other creditors the whole of the assets out of which the unsecured creditors would be entitled to receive a ratable distribution. It is, therefore, void under s. 55 of the Presidency Towns Insolvency Act. The fact that the creditor did not know that there were other creditors is immaterial.

Ex-parte Chaplin, 26 Ch. Div. 319; *Khoo Kwat Siew v. Wooi Taik Hwat*, I.L.R. 19 Cal. 223; *Official Assignee, Bengal, v. Yokohama Specie Bank*, C.W.N. 374; *Official Assignee v. S. M. Ruthna*, I.L.R. 50 Mad. 948—*followed.*

Ba Maw for the appellant.

Aiyangar for the respondent.

PAGE, C.J.—This appeal must be allowed.

The proceeding out of which the appeal arises was launched under section 55 of the Presidency Towns Insolvency Act, upon the ground that the transfer by the debtor within four months of her insolvency of the whole of her assets to the respondent was a transfer otherwise than in good faith and for valuable consideration, and void as against the Official Assignee.

In my opinion the case is concluded against the respondent by authority, and is within the words of Lord Blackburn in *Tomkins v. Saffery* (1):

"It comes round to this, that I think . . . . . that when they knew that the man was insolvent and unable to pay his

* Civil Miscellaneous Appeal No. 6 of 1932 from the order of this Court on the Original Side in Insolvency Case No. 196 of 1931.

(1) (1887) 3 Ap. Ca. 213 at p. 237.

1932

OFFICIAL ASSIGNEE v. H. POPE.

PAGE, C.J.

debts, when they knew that this money was given them to prefer a particular body of creditors to all the other creditors, if there were others, they were then fixed with the knowledge of an infringement of the statute, and although they were told by the man who afterwards became a bankrupt that he had no other creditors, they cannot get out of it; they took their chance. If he had told them the truth, and there had been in fact no other creditors, this transaction would have stood and been perfectly good; if he had any other creditors it would not stand. They knew all that it was necessary for them to know, and I think they took their chance, and they must take the consequences."

Again, in Ex-parte *Chaplin*, In *re Sinclair* (1) Cotton, L.J., observed:

"In my opinion, if persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void, under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction that it might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors."

See *Khoo Kwat Siew and others* v. *Wooi Taik Hwa and others* (2); *The Official Assignee of Bengal* v. *The Yokohama Specie Bank, Limited*, (3) and *The Official Assignee of Madras* v. *S. N. Sheik Moideen Rowther* (4).

The facts are simple and undisputed. The insolvent, who is a Mrs. Young, was proposing to start a millinery business in 1928, and in order that she should be in a position to commence business, for she had no capital, the respondent agreed to guarantee an overdraft with the Chartered Bank in favour of

(1) 20 Chan. Divn. p. 319.
(2) (1891) I.L.R. 19 Cal. 223 (P.C.).
(3) (1924) 29 C.W.N. 374.
(4) (1927) I.L.R. 50 Mad. 948.

Mrs. Young for Rs. 25,000, and also guaranteed the rent of the premises in which she was proposing to carry on the business.

Now, the nature of this business, which is that of a milliner and dress-maker, is such that Mr. Pope, who is a business man, must have known that Mrs. Young would incur ordinary trade liabilities, and must have been aware that from time to time she would come under financial obligations to trade creditors. In the course of his evidence he stated, "I knew from the start that she would not be able to pay the bank as she was trading on an overdraft." Periods of depression come to every trade from time to time, and in February 1931 Mrs. Young found that she could no longer carry on her business. In these circumstances on the 4th of February 1931 the Chartered Bank wrote to the respondent:

"H. POPE, Esq.,
C/o. Messrs. Watson & Son, Ltd.,
Rangoon.

Dear Sir,

As all efforts to obtain a reduction in this client's indebtedness to the Bank are proving futile, this is to advise you that as guarantor, we intend calling upon you to liquidate the debt at the end of this month which please note.

Yours faithfully,
(Sd.) A. R. MACQUEEN,
Agent."

On receiving this notice of demand from the Bank the respondent saw Mrs. Young, and asked her what she proposed to do about liquidating her liability to the Bank; Mrs. Young frankly stated that she had not the money to pay off the debt, but that she was going to England and hoped to realise Rs. 35,000 from her father's estate. Mr. Pope added, "So I said that I would try and make arrangements with the Bank as I had not the

1932

OFFICIAL ASSIGNEE v. H. POPE.

PAGE, C.J.

Rs. 20,000 to spare, and the Bank agreed to receive it by two instalments." On the 27th February 1931 Mrs. Young transferred by registered deed of sale everything that she possessed in Burma to the respondent, and four days later left the country.

On the 2nd of June 1931 a petition was filed for her adjudication, and she was adjudicated an insolvent on the 16th of June 1931. In due course, by two payments of Rs. 16,521-2-9 and Rs. 4,000, Mr. Pope liquidated Mrs. Young's indebtedness to the Chartered Bank.

It is common ground that there was valuable consideration for the transfer, but the question that falls for determination is whether the Official Assignee has discharged the burden of proving that the transfer was not in good faith.

Now, if an unsecured creditor elects to take a transfer of the whole of his property from a debtor who is insolvent the transfer has the double effect of preferring his claim against the debtor to the claims of other unsecured creditors, and further of removing from the reach of other creditors the whole of the assets out of which, according to the law of insolvency, the unsecured creditors were entitled to receive a rateable distribution. The learned advocate for the respondent has stated that there was no evidence that the respondent knew that Mrs. Young had any other creditors. That is not what he says. The respondent himself said, "I had no reason to believe that Mrs. Young was in insolvent circumstances at any time. I did not know who her creditors were besides those for whom I stood surety". It is quite obvious that the respondent must have known that Mrs. Young in the course of her business would contract certain trade liabilities from time to time, and after the letter that he received from the Bank on the

4th of February it is, to my mind, incredible that he did not know that she was in insolvent circumstances. The respondent knew Mrs. Young well. She was a friend of his wife. He had taken so great an interest in her business as a milliner and dress-maker that from the outset he had guaranteed the rent of the premises in which she was to carry it on, and also an overdraft of a quarter of a lakh with the Bank. In my opinion the only reasonable inference from the circumstances disclosed in the evidence is that at the time when this transfer was made by Mrs. Young to the respondent he knew that she had no available assets except those which were transferred to him, that she was in insolvent circumstances and unable to carry on her business, and that if the whole of her assets were transferred to him there would be nothing left out of which any other creditors that she might have could receive a rateable distribution. In those circumstances, in my opinion, the proper inference to draw from the facts was that, although no moral obloquy attached to the transaction, for the respondent might quite honestly in his own interest have accepted this transfer, this transfer was not made in good faith within section 55 of the Presidency Towns Insolvency Act, and therefore as against the estate of the insolvent it is void.

The result is that the appeal is allowed, and the order from which the appeal is brought set aside, and an order will be passed declaring that this transfer is void as against the Official Assignee. The proceeds of the sale of the stock-in-trade of the business which the respondent has received must be handed over to the Official Assignee, after deducting the expenses reasonably incurred in connection therewith.

MYA BU, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932

Mar. 14.

U TEZAWUNTA

v.

MAUNG ZAW PE AND ANOTHER.*

Buddhist Law—Testamentary disposition invalid under Burmese Buddhist Law—Transfer inter vivos to take effect after death—Death-bed gifts—Presumption of law.

It is contrary to the principles of Burmese Buddhist law that a Burman Buddhist by means of a testamentary disposition should attempt to evade the rules of succession and inheritance prescribed under the personal law to which he is subject. If a Burman Buddhist by a voluntary transfer *inter vivos* assigns property to a person who is a stranger, with the intention that such transfer should become operative after his death, the transfer is null and void. When such a transfer is made by a Burman Buddhist whose death is imminent, and who is under an apprehension that his dissolution is at hand, it is commonly called a "death-bed" gift and a *presumptio juris et de jure* arises that the transferor intended the transfer to become operative after his death.

Ma Pwe Sue v. *Ma Tin Nyo*, (1902-03) 2 U.B.R. 1; *Ma Thin Myaing* v. *Maung Gyi*, I.L.R. 1 Ran. 351; *Ma Yu* v. *Po Thaung*, 11 B.L.T. 234; *Maung Thu Ka* v. *U Thumanda*, I.L.R. 5 Ran. 371; *U Nago* v. *Maung Hla*, (1907-09) 2 U.B.R. 7—*referred to.*

Sein Tun Aung for the appellant.

Thein Maung for the respondents.

MYA BU, J.—The main question for determination in this appeal is whether certain gifts made by a Burmese Buddhist lady, since deceased, were death-bed gifts, or were tantamount to dispositions of property by will, and were therefore null and void.

The donor was Daw Saw, the minor plaintiffs' maternal grandmother, who died on the 15th September 1930 at the age of 69. The defendant-appellant, a Burmese Buddhist monk, was Daw Saw's son and the plaintiff-respondents are the children of Ma Chit, Daw Saw's daughter. It

* Civil First Appeal No. 76 of 1931 from the judgment of the District Court of Thayawaddy in Civil Regular No. 31 of 1930.

is said that in or about 1925 Daw Saw had made a gift of certain landed property in favour of the defendant-appellant, which led to a dispute between Daw Saw and Ma Chit as to its validity. The result of the dispute was that Daw Saw executed a registered deed in October 1926 under which Ma Chit was constituted a joint owner with Daw Saw in respect of all the paddy lands which then belonged to Daw Saw. After that Ma Chit died, and subsequently a partition of the lands mentioned in the deed of October 1926 was effected by means of a registered instrument in January 1928 among Daw Saw, Maung Si (Ma Chit's widower) and the plaintiffs, Daw Saw being described in the instrument as the plaintiffs' guardian. On the 1st of August 1930 Daw Saw executed two registered deeds of gift conveying to the defendant-appellant certain lands which had been allotted to her share in the instrument of January 1928. According to the finding of the learned trial Judge, which has not been seriously disputed, Daw Saw had been ill for a few months and was weak and infirm, contemplating an early death. Daw Saw resided at Mataungda Village, Minhla Township, where she died on the 15th of September 1930, or about one and a half months after she had executed the deeds of gift at the office of the Sub-Registrar at Minhla. The learned District Judge held that the gifts were death-bed gifts according to the Burmese Buddhist law and were void as such, but was of the opinion that the contention on behalf of the plaintiffs that the gifts amounted to a will was untenable.

It is not disputed that the question as to the validity of a death-bed gift arising between Burman Buddhists must be decided according to the Burmese Buddhist law, nor is it disputed that a death-bed gift

1932

U THA-WUNTA v. MATHOO ZAW PE.

MYA BU, J.

is invalid under the Burmese Buddhist law. It has been urged on behalf of the defendant-appellant that the gifts in question are not death-bed gifts under the Burmese Buddhist law, while the learned advocate for the respondents supports the decree of the trial Court, not on the ground that the gifts are death-bed gifts, but on the ground that though in form the transactions are gifts *inter vivos* in reality they are dispositions of property by will inasmuch as the transfers were meant to take effect after the death of the donor.

The Burmese Buddhist law recognizes only one form of succession, *i.e.*, intestate succession; and testamentary succession is opposed to the fundamental principles of the Burmese Buddhist law. Therefore, a Burman Buddhist cannot dispose of his property after his death by will and consequently no Burman Buddhist can, under the guise of making a gift, be allowed in effect to make a will; for he cannot set at naught the provisions of his personal law as to the inheritance of his property after his death; see *Ma Thin Myaing* v. *Maung Gyi* (1). Subject to this, there is nothing in the Burmese Buddhist law within the scope of its applicability as regulated by section 13 of the Burma Laws Act (1898) which renders a gift *inter vivos* invalid unless it is a death-bed gift.

What are the essential elements which distinguish a death-bed gift from an ordinary gift? It is stated that a death-bed gift is one made when the donor is "on the couch from which he is never to rise again" (U May Oung's Leading Cases on Buddhist Law, page 182) or "a gift made in contemplation of death" (Lahiri's Principles of Modern Burmese

(1) (1923) I.L.R. 1 Ran. 351 at p. 358.

1932

U TEZAWUNTA v. MAUNG ZAW PE.

MYA BU, J.

Buddhist Law, page 248). In my opinion, these statements are too wide to define the essential elements of a death-bed gift. The subject of death-bed gifts is dealt with in the Dhammathats of which appropriate extracts are collected in section 79 of Kinwun Mingyi's Digest of the Burmese Buddhist Law, Volume I. In the translation of the Digest, the descriptions given in the Burmese extracts are uniformly described as "a gift made *in extremis*" without reference to the "bed" which appears in all the Burmese extracts. The terms employed in the Burmese extracts are as follows :—

Kaingza.—သေခါနီးဝယ်ညောင်စောင်းထက်နှိုက်။

(The-kha nee-wai nyaung-zaung htet-hnike.)

—While on (his) death-bed about to breathe his last.

Kandaw.—သေခါနီးဆုံးဆုံးညောင်သလွန်ထက်။

(The-nee son-sun nyaung-thalun htet.)

=At (the royalties' or aristocrats') death-bed about to breathe (his) last and to come to an end of (his) life.

Yannadhamma.—မထသောအိပ်ခြင်းဖြင့်ကျိန်းအိပ်ရာဖြစ်သောမဇ္ဈေ ညောင်စောင်းနှိုက်။

(Mahta-thaw eikchin phyin kyein-eik-ya phyit-thaw myinze nyaung-zaung hnike.)

=While on the middle of (his) death-bed which is (his) sleeping place where he sleeps to awake no more.

Rasi.—သေခါနီးညောင်စောင်းထက်နှိုက်။

(The-kha-nee nyaung-zaung htet-knike.)

=While on (his) death-bed about to breathe (his) last.

Panam.—အုံးအိပ်ရာဝယ်ခန္ဓာပြတ်ကြွေသေလုခါတန်။

(On-eik-ya wai khan-da-pyat-kywe the-lu-kha-tan.)

=While lying on the bed when the mortal body must die as the time for its death is come.

1932

U TEZA-WUNTA v. MAUNG ZAW PE.

MYA BU, J.

The Burmese word "nyaung-zaung" appearing in the extracts from the Kaingza, the Vannadhamma and the Rasi by itself means "bed" only. Similarly, each of the words "nyaungthalun" and "on-eik-ya" appearing in the extracts from the Kandaw and the Panam respectively by itself means no more than "bed." But when each of these words is taken together with the remainder of the phrase in which it appears or is read in the light of the context, it becomes evident that the bed referred to must necessarily be the death-bed.

I reproduce these Burmese phrases in this judgment to show the necessity of laying stress upon the term "extremis" as used in the translation of the Digest. The ordinary meaning of the Latin expression "in extremis" is "at the last gasp", "in extremity (of a person at the point of death implying mortal illness under which the sufferer, if conscious, is aware that his end is near)". It is clearly deducible from the Burmese phrases quoted above that what is known as a "death-bed gift" under the Burmese Buddhist law is a gift made while the donor is in fact on his death-bed and about to die, or, in other words, when his death is imminent. In my opinion the gift must also be made by the donor in the hopeless expectation of death, or, as observed by their Lordships of the Privy Council in *Ebrahim Goolam Ariff* v. *Saiboo* (1), "under pressure of the sense of the imminence of death"; the underlying idea of the rule that a death-bed gift is invalid under the Burmese Buddhist law being that such a gift, if recognized, would enable a Burman Buddhist to defy his own personal law and practically to dispose of his property by a method which in effect would be equivalent to, and would

(1) (1908) I.L.R. 35 Cal. 1.

operate as, a will : *Ma Pwe Swe* v. *Ma Tin Nyo* (1), *U Naga and three* v. *Maung Hla* (2), and *Ma Yu* v. *Po Thaung* (3).

By one of the deeds in question (exhibit A) Daw Saw gave to the respondent "outright" a piece of paddy land measuring 9·47 acres, "to enable him to build a monastery", and by the other (exhibit B) Daw Saw gave three other pieces of land "outright" to the respondent. Turning to the facts of the case the finding of the learned trial Judge that Daw Saw had been ill for a few months and was weak and infirm at the time of the making of the transfers in question is clearly borne out by the evidence in the case. The illness is said to have been due to old age. As to the seriousness of the illness at the time of the transfers, the evidence is extremely vague. It is clear, however, that until a few days before her death Daw Saw was able to get up and walk about. It was only during the last few days before her death that she gave up the hope of living. In her journey to the Registration Office at Minhla to effect the registration of the deeds in question she had to be carried from her village to the railway-station at Okpo, and after travelling from Okpo to Minhla by train she was taken to the deed-writer's house, and thence to the Registration Office in a pony-cart. She had to be helped by other persons in moving about, and could not walk properly without such help. After having the deeds registered she said to the Sub-Registrar, a distant cousin of hers, "You might not see me after this alive. This might be the last meeting." I have no doubt that at the time of the execution of the deeds exhibits A and B,

(1) (1902-03) 2 U.B.R. Budd. Law, Gift, 1.
(2) (1907-09) 2 U.B.R. Budd. Law, Gift 7.
(3) 11 B.L.T. 234 at p. 236.

1932

U TEZA-WUNTA v. MAUNG ZAW PE.

MYA BU, J.

Daw Saw believed that she would not live much longer, and might die soon. The fact that she gave land to the respondent so that the latter might utilize the same for the expenses of building a monastery for himself suggests very strongly that she did not expect to live long enough to dispose of the land, and see to the building of the monastery herself with the proceeds. I would, therefore, uphold the finding of the learned trial Judge that at the time of the execution of the deeds Daw Saw was contemplating an early death. But, according to my view of what a death-bed gift is, the mere fact that Daw Saw had been ill for a few months and was weak and infirm and contemplating an early death at the time of the making of the gifts is insufficient to bring them within the purview of death-bed gifts under the Burmese Buddhist law. But I consider that the gifts in question are in effect and substance dispositions of property by will inasmuch as they were intended to take effect after Daw Saw's death. As I have already pointed out what Daw Saw meant to give by means of the deed, exhibit A, was a monastery, which she contemplated would be built after her death. As regards the transaction evidenced by the deed, exhibit B, the appellant admitted that it was Daw Saw's wish that he should build a monastery out of all the lands, and make some charitable gift to the respondents if they grew up to be good men, and that he would give the lands to the plaintiffs if he was satisfied with them and if they proved deserving. This admission throws a strong light on the question as to the intention of Daw Saw in executing the deeds.

In the circumstances obtaining in this case, Daw Saw's intention in making the gifts must be deemed to be that the transfers were to take effect after her death. This view of the case justifies the declaration that the

1932

A. D. RAI v. KING-EMPEROR.

BAGULEY, J.

gifts in question are *Maung Gyi* (1) and M[illegible]nt and, therefore, the only *U Thunanda and one* (2). [illegible]rt is whether he was

In the result the appeal fai[illegible] with costs. [illegible]ch appeared in the [illegible] 23rd November [illegible]

PAGE, C.J.—I concur. [illegible]t with large

It is contrary to the principles of Burmese and horse law, to be collected from the texts and auth[illegible] ourself that a Burman Buddhist by means of what is, or [illegible]k"; effect, a testamentary disposition, should attempt to evade the rules of succession and inheritance prescribed under the personal law to which he is subject. If a Burman Buddhist by a voluntary transfer *inter vivos* assigns property to a person who is, or is deemed to be, a stranger, with the intention that such transfer should become operative after his death, the transfer is null and void. Whether, having regard to this rule of law, a transfer is void or not depends upon the facts of the particular case. When such a transfer is made by a Burman Buddhist whose death is imminent, and who is under an apprehension that his dissolution is at hand, it is commonly called a "death-bed" gift, and a *presumptio juris et de jure* arises that the transferor intended the transfer to become operative after his death. A transfer of this nature is invalid as being a device by which a Burman Buddhist has attempted "to defeat his own personal law, and practically to dispose of his property by a method which would be in all essentials equivalent to a will". *Ma Pwe Swe* v. *Ma Tin Nyo* (3) and *U Naga* v. *Maung Hla* (4).

I agree that the appeal should be dismissed.

(1) (1923) I.L.R. 1 Ran. 351 at p. 358.
(2) (1927) I.L.R. 5 Ran. 371.
(3) (1902-03) 2 U.B.R. Budd. Law, Gift 1.
(4) (1907-09) 2 U.B.R. Budd. Law, Gift 7.

Before Mr. Justice Bagnley.

A. D. RAJ

v.

KING-EMPEROR.*

...ode (Act XLV of 1860), s. 294A.—Interest derived from capital divisible by lots—No return of capital.

...accused invited the public to subscribe a large sum for an association ...e object was said to be for the relief of people in debt or distress. There ...as no provision for the ... of the capital sum, but one-sixth of the interest derived therefrom was to be used for the objects of the association, whilst the remainder became divisible every three months among the subscribers as cash bonuses of various amounts. These bonuses were to be distributed by lot.

Held that the transaction was a lottery within the meaning of s. 294A of the Indian Penal Code.

Menon for the appellant.

Gaunt (Assistant Government Advocate) for the Crown.

BAGULEY, J.—The appellant has been convicted under section 294A, Indian Penal Code, and sentenced to pay a fine of Rs. 51. Section 294A, second paragraph, under which he has been convicted, runs as follows :—

"Whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees."

The words "such lottery" referring to the first portion of the section speak of any lottery not authorised by Government. The appellant admits having published certain proposals which involved the drawing of lots. It is admitted that his action whether it amounted to a lottery or not was not

* Criminal Appeal No. 2022 of 1931 from the order of the Additional District Magistrate of Rangoon in Criminal Trial No. 33 of 1931.

1932

A. D. RAI v. KING-EMPEROR.

HAGGLEY, J.

sanctioned by Government and, therefore, the only question before the Court is whether he was holding a lottery.

The particular publication which appeared in the *Rangoon Daily News* of Sunday, the 23rd November 1930, consists of a display advertisement with large headlines: "Lose not money in lotteries and horse races"; "Without losing anything benefit yourself and your country"; "Have your luck without risk"; "You will get Rs. 10,000 in the luckiest event or Rs. 20 in the unluckiest event". The advertisement contains a definite proposal

"The Association issues, in all, 10,00,000 Donation Bonds of Rs. 10 each and the Donation Bond amount of Rs. 1,00,00,000 collected from the Bond-holders will be utilized for granting loans to the Donation Certificate and Bond-holders of the Association on the security of their immoveable properties at 6 per cent. interest per annum under the Property Investment Scheme. Out of Rs. 6,00,000 interest the Association gets every year on the said donation amount Rs. 5,00,000 will be utilized for granting Cash Bonuses as abovesaid, *i.e.*, at Rs. 1,25,000 every three months, and the remaining Rs. 1,00,000 will be utilized for maintaining charitable institutions started or aided by the Association for feeding the disabled poor and nourishing the sickly and disabled cattle and other domestic animals, and meeting the working expenses of the Association. After all the bonds draw Cash Bonuses, the entire donation amount will be invested in Government securities and the whole of the interest, Rs. 6,00,000, will be exclusively utilized for the perpetual maintenance of the abovesaid charitable institutions. So the bond-holders will have not only benefitted themselves but also afforded relief to those in debt and distress."

It is also stated that Rs. 1,25,000 to be distributed every three months will be divided into one cash bonus of Rs. 10,000, one of Rs. 5,000, ten of Rs. 1,000 each, one hundred of Rs. 500 each, and two thousand five hundred of Rs. 20 each. The bonuses are admittedly to be distributed by lot. It is perfectly clear from the headlines that for the

1932

A. D. RAI v. KING-EMPEROR.

BAGULEY, J.

sake of selling bonds the gambling element takes precedence over the charitable element.

Lottery has apparently not been defined in any law, so in the first place, one has to turn to the standard dictionaries. According to some of the older judgments, Webster's Dictionary defines "lottery" as "the distribution of prizes by lot or chance", and Johnson's Dictionary is said to have the same definition. Taking a more modern standard in the Oxford Dictionary "lottery" is defined as follows: "An arrangement for the distribution of prizes by chance among persons purchasing tickets." If we look no further than this the case is decided at once, and the appellant must be found guilty, for he undoubtedly did propose to distribute prizes by chance among persons purchasing tickets. In Halsbury's Law of England, Vol. 15, page 299, a passage occurs in connection with the definition of the word "lottery". "A lottery has been described as a scheme for distributing prizes by lot or chance."

I have only had one case quoted before me in which a conviction under section 294A, Indian Penal Code, was dealt with and that is *Madan Gopal and Madan Mohan Lal* v. *The King-Emperor* (1). In this case every subscriber paid Rs. 10-8-0 and got a bond for Rs. 10 which could be cashed at the bank for Rs. 10 at any time. As soon as 2,000 tickets had been sold draws for prizes were to begin and were to be repeated until everyone had got prizes or had their money returned. Those who did not draw prizes in the first draw would go on drawing at each distribution until they got a prize or decided to withdraw their money. At the first drawing there were to be 81 prizes varying from Rs. 1,000 to Rs. 12

(1) (1940) 45 P.L. Cr. J. No. 17.

1932

A. D. R.
v.
KING-EMPEROR.

BAGULEY, J.

and of an aggregate total value of Rs. 3,000. It was held that this amounted to a lottery, and the appeal against a conviction under the second part of section 294A, Indian Penal Code, was dismissed.

On behalf of the appellant, however, it has been strongly urged that this is a "chit fund" and chit funds have been declared legal by the Madras High Court. It is worthy of note that in the advertisement concerned the words "chit fund" are not used nor does it appear on the receipt given for money paid, Exhibit F, nor on the bonds which were filed as Exhibit H 1, etc. The words "chit fund" appear to be English words used in the Madras Presidency in a broad sense to cover, so far as decided cases show, anything up to a pure lottery. If they are used the lottery appears to be regarded as legal though on what principle I am unable to understand. In its simplest form a chit fund appears in *Kamakshi Achari* v. *Appavu Pillai* (1). In this case twenty people entered into an agreement that each should contribute Rs. 10 per month for 20 months. At the end of each month the subscribers drew lots and one person took the whole Rs. 200 but after drawing his prize he had to go on contributing to the end of 20 months. It would appear from the judgment that the Rs. 200 which was drawn bore interest for the common benefit though this is not quite clear. That case was a civil case, and the question was whether the transaction was a lottery barred by Act V of 1844 which declared all lotteries not authorised by Government as common nuisances. A similar fund was before the Court in *Vasudevan Nambudri* v. *Mammod* (2). In this case it is clear that the money went to each person in turn without his having to pay interest.

(1) 1 Mad. H.C.R. 448. (2) (1899) I.L.R. 22 Mad. 213.

1932

D. RAJ
v.
KING-EMPEROR.

BAGULEY, J.

The judgment, which is only four lines, no doubt because the respondent, who claimed as a creditor, was not represented before the Court, merely states that the law as laid down in *Kamakshi Achari* v. *Appavu Pillai* (1) has been followed without question for 35 years. This also was a civil case. After this there seems to have been considerable difference of opinion among the Judges in the Madras High Court as to whether "chit funds" were legal or not, and in *Narayana Ayyangar* v. *K. Vellachami Ambalam* (2), another civil case, on a reference to a Full Bench it was decided that the chit fund then before the court was legal. The chit fund in this case had developed far beyond the ones dealt with in the previous cases. Five hundred people became subscribers each subscribing Re. 1 a month. The affair was to run for 50 months, and, at the end of each month, Rs. 50 was to be given to one person, decided by drawing lots. Any person who thus got Rs. 50 left the fund and had no further interest in it, nor did he make any further payments. The remaining money was lent out at interest and at the end of the 50 months the idea was that the remaining 450 members should each get back their Rs. 50 but with no interest; the profits were to go to the promoters of the fund. There was no question of a conviction under the second part of section 294A, Indian Penal Code, but in the judgment it was held that there were two conceiveable grounds on which Courts could refuse to enforce the terms of a chit fund; (1) "that it is an unlawful transaction as it involves the commission of an offence under section 294A of the Indian Penal Code; and (2) that it amounts to a wagering contract and is therefore void under section 30 of the Contract Act". It

(1) 1 Mad. H.C.R. 448. (2) (1927) I.L.R. 50 Mad. 696.

was found that no offence had been committed under section 294A as no office or place for the purpose of drawing any lottery was kept, and, presumably, there had been no publication which would have been an offence under the second part of section 294A. After this the judgment leaves the question of lottery entirely aside and only goes into the question of whether the contract was a wager or not; but Ramesam, J. who wrote the judgment, mentions that he adheres to the opinion expressed by him in *Shanmuga Mudali* v. *Kumaraswami Mudali* (1) that these are perfectly valid transactions. It will be noticed that this judgment does not hold that it was not a lottery. So far as section 294A, Indian Penal Code, is concerned it merely holds that there had been no office kept for the drawing of a lottery. Turning now to *Shanmuga Mudali's* case it must first be noted that this also was a civil case. The conditions of the fund seem to have been exactly the same as those in *Narayana Ayyangar's* case. The leading judgment was written by Venkatasubba Rao, J. in which he says—

"Let me now examine what the essential features of this transaction are—

"(1) There is no uncertainty in regard to the sum which each subscriber receives. It is clearly understood from the start that every member will be paid Rs. 50. He receives neither more nor less. The sum which each subscriber gets is thus fixed;

"(2) No subscriber takes the risk of losing any portion of the amount subscribed. The utmost that any subscriber may be required to contribute is Rs. 50 and each subscriber gets the same back;

"(3) The element, therefore, that is generally present in a lottery or a wagering transaction, namely, that loss is occasioned to one or more, does not exist in this transaction."

(1) (1925) I.L.R. 48 Mad. 661.

1932

A. D. RAJ v. KING-EMPEROR.

BAGULEY, J.

All the members got back Rs. 50 and none paid more than Rs. 50 while some paid in less. It will be seen at once that wealth had been created by means of interest ; for some of the subscribers made a profit and it can quite well be understood that the promoters of the fund intended to make profit for themselves. Therefore the remaining members must have lost interest on their money.

It is true that in *Narayana Ayyangar's* case the passage occurs " In my opinion the loss of interest is not loss strictly so called " but with due respect though this may be an opinion I certainly cannot regard it as correct. To the modern business man and financier it is impossible to divorce the idea of money from the idea of earning interest. Money which is not earning interest is regarded as sterile, and for the moment scarcely as money at all ; and to say that losing interest is not losing anything is directly contradictory to modern business principles. It may be correct in a state of society in which people instead of using banks, hoard coins buried in the earth, but that idea now belongs to a past age.

In *Shanmuga Mudali's* case it is laid down that there is nothing to distinguish the chit fund described there from the chit fund mentioned in the old cases where every man paid in the same amount but some got back their *money* earlier and some later. If one omits entirely from one's ideas all question of interest there may perhaps be nothing in it ; but there is one great distinction to be seen between the two classes of cases, *viz.*, that in the old cases nobody drew out more than he paid in. In this particular case some men made a profit, which might amount to as much as Rs. 49 in one month.

The present case cannot be regarded from a point of view entirely divorced from the idea of interest.

The advertisement, as I have shown, distinctly states that no man will ever get his capital back; the whole of the capital will be invested for "feeding the disabled poor and nourishing the sickly and disabled cattle"; and the whole of the bonuses, so called, are to come out of interest. The entire basis of the scheme is founded upon the earning of interest and, therefore, it is impossible to regard this fund from the point of view that interest does not really matter but is merely an opportunity of making a profit.

It is, I think, unnecessary to deal further with the Madras cases. They are civil cases and not criminal cases, and in none of them is a conviction under section 294, Indian Penal Code, dealt with. The recent ones, in my opinion, are based on fallacious reasoning.

The learned Additional District Magistrate who has written a very careful judgment winds up as follows:

"If, as I have been led to conclude by a study of the cases the intention with which the purchasers of these bonds purchased them affords the ultimate test whether they were partaking in a lottery within the meaning of section 294A of the Indian Penal Code or not, then I see no difference in principle between this case and *Madan Gopal's* case: *Taylor* v. *Smetten* (1) or *Reg.* v. *Harris* (2)."

This statement is not entirely accurate because the guilt or innocence of the man who publishes the proposal cannot depend on the intention of those who purchase bonds from him. I agree with him that there is no difference in principle between this case and *Madan Gopal's* case. I do not think that a study of the English cases is really of very much assistance. This case is to be decided under

(1) 11 Q.B.D. 207. (2) 2 M. & C. 912.

1932

A. D. RAI v. KING-EMPEROR.

BAGULEY, J.

the Indian Penal Code and it must be remembered that the basis of the Lottery Acts in England was not that lotteries were undesirable but private lotteries were stopped because they interfered with the success of Government lotteries, and in those days Government held regular lotteries as an important source of revenue, and could not afford to regard them as inherently immoral.

Reference was made in argument, and also in the Madras cases, to *Wallingford* v. *Mutual Society* (1). This was a case in which the question of what constituted a lottery was only incidentally touched upon. The principal judgment, which covers nine pages, only devotes one paragraph of twelve lines to the question of whether the transaction came under the Lottery Acts. The transaction in question, which seems to have been considerably more complicated than is shown in the reference to it in the Madras cases, and included some form of tontine was held not to be an illegal transaction under the Lottery Acts. It was obviously a mixed lottery, business, and savings association, together with some element of life insurance, and it is quite clear that a transaction of this kind would not come under 42 Geo. 3, c. 119, s. 2, which runs as follows :

"No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little ease, or any other lottery whatsoever not authorised by parliament, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures or by any other way, contrivance, or device whatsoever, any such game or lottery in his or her house, room, or place, upon pain of forfeiting for

(1) (1880) 5 A.C. 685.

every such offence the sum of five hundred pounds, to be recovered in the Court of Exchequer at the suit of His Majesty's attorney-general, and to be to the use of His Majesty, his heirs and successors; and every person so offending shall be deemed a rogue and vagabond within the true intent and meaning of an Act passed in the seventeenth year of the reign of his late Majesty King George the second, intituled 'An Act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons, and to houses of correction' and shall be punishable as such rogue and vagabond accordingly."

To sum up, in the present case the appellant tried to get the public to subscribe and that money they would never see again. The interest of that money was intended to be distributed in sums large or small by lots. He invited the public to buy his bonds, and I fail to see how this transaction could be differentiated from "an arrangement for the distribution of prizes by chance among persons purchasing tickets"—the Oxford Dictionary definition of lottery.

The appellant was fined Rs. 51 with a view to making the sentence appealable, and he seems to have been regarded as misguided because there were respectable people on the board of this affair in Madras.

I find on the file what appears to be a revenue account of this concern for a period of 14 months ending 31st December 1929. In the statement the income side of the account shows Rs. 52,820 as received for Donation Certificate admission fees. On the expenditure side, in addition to the allowance to agents and establishment charges, there is one item of commission and salary to agents, etc., of Rs. 49,026-5-3. It seems scarcely necessary to say more. Any man who has been engaged in selling certificates of this nature in which practically the whole of the receipts go in agents' commission is getting off very lightly if he is fined only Rs. 51.

For these reasons I dismiss the appeal.

PRIVY COUNCIL.

M. E. MOOLLA SONS, LIMITED (IN LIQUIDATION)
v.
BURJORJEE.

* J.C. 1932
Mar. 3.

(On appeal from the High Court at Rangoon.)

Registration—Document admitted by Parties—Document within Act—Duty of Court—Privy Council Practice—New Point of Law—Material Facts not before Board—Indian Registration Act (XVI of 1908), s. 49.

Section 49 of the Indian Registration Act, 1908, does not compel the Court to take notice of the non-registration of an admitted document unless at any rate, it must, if treated as effective, be the foundation of a judgment affecting immovable property comprised in it.

A claim was made against a company in liquidation for damages for breach of contract to purchase immovable property. The only question in issue in the Courts in India was whether the purchaser named in the written agreement contracted on his own behalf or as agent for the company. Upon an appeal to the Privy Council by the liquidator he contended for the first time that the agreement was inoperative as it was unregistered. The facts before the Board indicated, but were insufficient to determine definitely, that there had been a course of conduct, or an agreement, by the liquidator precluding him from raising any point except that dealt with in India.

Held that in the circumstances above stated the contention as to non-registration should not be considered by the Board.

Connecticut Fire Insurance Company v. *Kavanagh*, [1892] A.C. 473, 480—*followed*.

Decree of the High Court affirmed.

Appeal (No. 96 of 1931) from a decree of the High Court in its Appellate Jurisdiction (August 4, 1930) reversing an order of that Court in its Original Jurisdiction (December 23, 1929).

The appeal arose out of a claim by the respondent in the liquidation of M. E. Moolla Sons, Limited, to rank as a creditor in respect of damages for breach of an alleged contract of July 27, 1921, to purchase immovable property. The trial judge dismissed the claim holding on the facts that M. E. Moolla, the purchaser named in the contract, had not acted as

* *Present*: Lord Blanesburgh, Lord Tomlin and Sir George Lowndes.

agent for the company. Upon appeal that decision was reversed and the proof admitted.

The facts appear from the judgment of the Judicial Committee.

1932 February, 1, 2, 4, 5. *Upjohn, K.C.*, and *Ramsay* for the appellant liquidator. Having regard to clauses 2 and 4 of the contract sections 17 and 49 of the Indian Registration Act prevented the document from being admissible in evidence, or indeed operative, in the absence of registration : *Dayal Singh* v. *Indar Singh* (1), *Skinner* v. *Skinner* (2), *Sundarchariar* v. *Narayanna Ayyar* (3), *Khoo Sain Bau* v. *Tan Guat Tean* (4). The amendment of section 49 by Act XXI of 1929, section 10, sub-section 3 (*b*), shows that apart from that provision, made after the present claim, registration was required although the document was used only to prove an agreement to purchase. This point being one of law, the appellant can rely upon it although it was not put forward in India : *Connecticut Fire Insurance Company* v. *Kavanagh* (5). Apart from the above submission, the trial Court was right upon the facts of the case.

Dunne, K.C., and *Pennell* for the respondent. The proceedings did not affect any immovable property. Even if some provisions of the agreement fell within section 17 of the Registration Act, they were wholly collateral. That being so the agreement was admissible for the purposes of the proceedings although unregistered : *Vyravan Chetti* v. *Subramanian Chetti* (6), *Imperial Bank of India* v. *Bengal National*

(1) (1920) L.R. 53 I.A. 214.
(2) (1929) I.L.R. 51 All. 367 ; L.R. 56 I.A. 363.
(3) (1931) I.L.R. 54 Mad. 257 ; L.R. 58 I.A. 65.
(4) (1929) I.L.R. 7 Ran. 234. (5) (1892) A.C. 473, 482.
(6) (1920) I.L.R. 43 Mad. 660 : L.R. 47 I.A. 188.

1932

M. E. MOOLLA SONS, LIMITED v. BURJORJEE.

Bank (1). In *Dayal Singh's* case the suit was for specific performance; the decision should be confined to the precise point decided. The proviso added to section 49 of the Indian Registration Act by section 10, sub-section 3 (*b*), of Act XXI of 1929 merely gave statutory effect to the view which had been uniformly expressed in India that though an agreement contained provisions which were unenforceable in the absence of registration it was admissible for collateral purposes: *Ulfatunissa* v. *Hosain Khan* (2), *Bengal Banking Corporation* v. *Mackertich* (3), *Mugniram* v. *Gurmukh Roy* (4), *Vani* v. *Bani* (5), *Pulaka* v. *Thirupalli* (6). Further, the agreement was a document admitted by the parties; that being so the respondent was not called upon to prove it: *Burjorji* v. *Muncherji* (7). The facts before the Board raise a presumption that the course of the proceedings excluded the point; if they are insufficient so to determine, the point cannot now be taken for the first time. In any case upon the evidence the judgment appealed from was right on the facts.

Upjohn, K.C., replied.

March 3. The judgment of their Lordships was delivered by

LORD TOMLIN. This appeal is concerned with the question whether a creditor's proof lodged by the respondent in the liquidation of the company whose liquidator is the appellant and rejected by the liquidator was properly so rejected.

On the 23rd December, 1929, the trial judge on the original side of the High Court of Judicature at Rangoon held that the proof was rightly rejected.

(1) (1931) I.L.R. 59 Cal. 377; L.R. 58 I.A. 323.
(2) (1883) I.L.R. 9 Cal. 520 (F.B.).
(3) (1884) I.L.R. 10 Cal. 315.
(4) (1899) I.L.R. 26 Cal. 334.
(5) (1895) I.L.R. 20 Bom. 553.
(6) (1909) I.L.R. 32 Mad. 410 (F.B.).
(7) (1880) I.L.R. 5 Bom. 143.

On the 4th August, 1930, this decision was reversed on appeal to the appellate side of the Court.

The proof in question was for Rs. 63,219-15-0, damages alleged to have been incurred by the respondent by reason of the failure of the Company to complete the purchase of property agreed to be sold by the respondent by an agreement dated the 27th July, 1921.

The only question in issue or debated at the hearing before the trial judge, or on the appeal, was whether the agreement for sale (on the face of which the purchaser was one M. E. Moolla) had been entered into by Moolla on his own account or whether the Company was the undisclosed principal of Moolla in respect of such agreement.

The trial judge held that Moolla had entered into the agreement as principal and had afterwards transferred the benefit of it to the Company and that therefore the Company was under no liability to the respondent.

The appellate Court held that the Company was the undisclosed principal and was liable to the respondent and that the proof had been wrongly rejected.

Against this decision the liquidator appealed to His Majesty in Council and before their Lordships' Board raised the contention that the agreement of the 27th July, 1921, required registration under the Indian Registration Act, that it had not been registered and that as it had not been registered it could not be used for any purpose whatever and ought to be ignored by the Court with the result that any claim for damages based by the respondent upon breach of that agreement must necessarily fail.

The questions therefore which arise for their Lordships' consideration are : (1) Ought the appellant

1932

M. E. MOOLLA SONS, LIMITED v. BURJORJEE.

to be allowed to raise now for the first time before the tribunal of last resort the question as to the registration of the agreement? (2) If the question as to registration can now properly be raised (*a*) did the agreement, which admittedly was not registered, require registration, and (*b*) if it did require registration, what is the effect of non-registration in regard to the respondent's right to claim damages under the agreement? (3) If the question as to registration cannot now be properly raised, or if it can be properly raised but upon consideration of the merits of the question, it is held that the non-registration of the agreement does not preclude the respondent from putting forward a claim for damages under the agreement whether the Company was or was not the undisclosed principal of M. E. Moolla in regard to the agreement?

To enable these questions to be considered, it will be convenient to state the facts so far as they are proved or admitted.

The Company was formed under the Indian Companies Act, 1913, on the 21st January, 1921, as a private company. Clause III (6) of the Memorandum of Association enabled the Company to acquire by purchase, lease, exchange or otherwise land, buildings and hereditaments of any tenure or description in Burma. By Articles of Association 115 and 116 (2) the directors had power to purchase for the Company any property which the Company was authorised to acquire.

At a meeting of the Board of Directors held on the 1st February, 1921, Moolla was appointed Managing Director, with power to manage the business of the Company as he thought fit.

He was further authorised to purchase and sell any property (moveable or immoveable) as he thought best in the interest of the Company.

The issued share capital of the Company stood as to about 90 per cent. thereof in the name of Moolla, and as to the remainder in the name of his mother, Mariam Bee Bee. The trial judge said "the Company was essentially a one man Company, being for all practical purposes Moolla incorporate". The Company's office was also Moolla's office.

The agreement of the 27th July, 1921, was made between the respondent (described as the vendor) and Moolla (described as the purchaser) and contained no reference to the Company. Omitting formal parts, the agreement was as follows :—

1. The vendor agrees to sell to the purchaser and the purchaser shall purchase from the vendor the properties described in the schedule hereinunder written measuring 12·54 more or less at or for the price of Rs. 12,500 per acre.

2. That the purchaser had paid to the vendor Rs. 10,000 as earnest money, the receipt of which the vendor doth hereby acknowledge.

3. That the purchaser agrees to complete the conveyance within three months from the 12th July, 1921, by paying the balance of the purchase money calculated at the rate aforesaid save and except a sum of Rs. 1,00,000 which sum is to remain outstanding as in the clause next provided.

4. The vendor agrees to keep the said balance of unpaid purchase money, namely Rs. 1,00,000, invested with the purchaser for a period not exceeding three to five years as the purchaser may wish on the purchaser paying interest thereon at the rate of eight per cent per annum payable monthly and the same secured by the equitable mortgage of the premises hereby agreed to be sold, that is, by the purchaser depositing the title-deeds of the said premises including the conveyance in his favour with the vendor.

5. That the vendor shall make out a good and clean title to the said premises and produce for inspection the title-deeds as soon as required by the purchaser.

The schedule contained a description of certain immoveable property in Burma belonging to the respondent. The acreage is given as 12·54 acres and

1932

M. E. MOOLLA SONS, LIMITED v. BURJORJEE.

on this basis, the total purchase price under the agreement would be Rs. 1,57,375. Upon the execution of the agreement Rs. 10,000 was paid to the respondent as earnest money.

The respondent had no personal contact with Moolla in connection with the negotiation for or the execution of the agreement. She acted by brokers throughout.

On the 31st December, 1921, the Board of Directors held a meeting, the Minutes of which state that "the following properties were purchased by the managing director during the course of the year on behalf of the Company." A list of twenty-eight properties follows. The second on the list under date, 13th July, 1921, is the property, the subject of the agreement of the 27th July, 1921.

Of the twenty-eight properties in the list, twenty-five had been bought in the name of the Company, three properties (including the respondent's property) had been purchased in Moolla's name and admittedly the two properties other than the respondent's property had been purchased on the Company's behalf.

On the 30th March, 1923, the purchase being uncompleted, the respondent's brother-in-law wrote to Moolla, asking for the balance of the purchase price, or at least Rs. 15,000. Moolla replied by executing four promissory notes in the respondent's favour, for a total of Rs. 40,000. On the 20th November 1923, the respondent gave to Moolla a receipt for Rs. 1,000 in respect of interest. Further payments of interest were made up to February 1927, but the purchase was never completed.

Moolla at the trial admitted that Rs. 15,000 in respect of the promissory notes and all interest was paid out of the Company's funds. He alleged that the

earnest money was paid by himself but refunded to him by the Company. He stated that all the Company's books prior to 1924 were destroyed under his instructions, and that he had no books to show that the earnest money came originally out of his own moneys. He alleged that he had purchased the property on his own account and had subsequently transferred the benefit of the agreement to the Company. He produced no document to evidence the alleged transfer.

On the 6th April, 1927, a creditors' petition was presented to wind up the Company, and an order for winding up was made on the 21st June, 1927, and one Hormasji was appointed liquidator.

Between the presentation of the petition and the making of the order, *viz.*, on the 18th June, 1927, the respondent, at the instance of Moolla, filed in opposition to the petition, an affidavit prepared by Moolla's clerk. In this affidavit she stated that she was a secured creditor of the Company for Rs. 1,31,137-8-0. This was the sum then calculated to be owing under the agreement of the 27th July, 1927.

Moolla himself was declared insolvent on some date between April and June, 1927. His assets were practically nil. He did not enter the name of the respondent as a creditor in the schedule relating to his own affairs which it was his duty to file in the insolvency proceedings.

What subsequently followed is not clear.

The record before their Lordships' Board contains an affidavit sworn by the liquidator on the 17th February, 1928, on an application which he made to the Court for directions. This affidavit was treated as his evidence at the trial and at the trial no oral evidence was given by him.

1931

M. E. MOOLLA SONS, LIMITED v. BURJORJEE.

[The affidavit was here set out, omitting the formal parts. The purport of it is mentioned below in the judgment.]

Of the exhibits referred to in the affidavit, Exhibit "A" was a copy of the agreement of the 27th July, 1921, Exhibit "B" was a statement printed in the record before their Lordships described as "Statement of payments made from the funds of M. E. Moolla Sons, Limited".

This statement purports to show payments made by the Company in respect of the agreement of the 27th July, 1921, to a total amount of Rs. 66,409-12-0 including Rs. 10,000 for earnest money paid by the Company on the 27th July, 1921, and Rs. 15,000 to satisfy one of the promissory notes given by Moolla, paid by the Company on the 7th July, 1923. The balance of the Rs. 66,409-12-0 was made up of interest payments in respect of the period between the 1st April, 1923, and February, 1927.

With regard to the Exhibits "C" and "D", reference has already been made to the material minutes of the directors' meeting. The only letter of the respondent's brother-in-law, N. N. Burjorjee, printed in the record, is one asking for payment of the Rs. 15,000 and carries matters no further.

Exhibits "E" and "E 1" dealt with the powers of the managing director to purchase immoveables, which have never been in dispute.

Exhibit "F" is not printed in the record, and the form of the respondent's proof is therefore not before their Lordships.

It is, however, reasonably clear from the affidavit (1) that the respondent had put in a proof of claim presumably on the same lines as that contained in her affidavit of the 18th June, 1927; (2) that for the purpose of minimising her claim to damages she

had offered to take over the property at Rs. 4,500 per acre; (3) that the liquidator had neither admitted nor rejected her claim, but had applied to the Court for directions, putting in the agreement and pointing out that there was a question whether Moolla was principal or agent.

The printed extracts from the official diary of the proceedings in the winding up contains the following passage :—

"28th February, 1928. Doctor for Mrs. Burjorjee. Munshi for Company. Clark for Chartered Bank. Official Liquidator in person.

"Let the property mentioned in the application of the official liquidator be sold by public auction after due advertisement, with a reserve price of Rs. 56,000. No orders will be passed on the present application of the official liquidator till after the sale, and his proposal will be sanctioned thereafter if Mrs. Burjorjee is still willing to abide by the terms of the arrangement.

"As regards Mrs. Burjorjee's claim against the Company, it will be enquired into by me on 12th March, 1928, unless before that date the official liquidator and Mr. Clark for the Company admit the claim. The sale may be held after the enquiry, and, if at the enquiry, I uphold Mrs. Burjorjee's claim, she will be given leave to bid at the auction and set off the purchase price against her claim *pro tanto*."

Their Lordships are informed and both parties are agreed that the property was in fact sold and the proceeds paid to the respondent.

Presumably it was sold under the order referred to in the extract from the diary. It is, however, obvious that no title could have been made without the concurrence of the respondent. An agreement of some kind between the official liquidator and the respondent in relation to the matter seems therefore to have been essential, though the appellant does not admit that there was any such agreement.

Having regard to the material before their Lordships' Board there may well have been such an

1932

M. E. MOOLLA SONS, LIMITED v. BURJORJEE.

agreement upon the lines that, the existence of an agreement for purchase at Rs. 1,57,375 and non-performance of that agreement by the purchaser being admitted, the parties arranged to minimise damages by concurring in a sale of the property and in handing the proceeds of sale to the respondent, the question whether the Company was the principal in respect of the agreement of sale being the only question left open for the decision of this Court.

However this may be, the respondent subsequently amended her proof by giving credit for the purchase money, her claim being thus reduced to Rs. 63,219-15-0.

On the 16th July, 1929, the official liquidator rejected the claim, giving the following reason :—

"I am not satisfied that the Company was the real contracting party. The contract is, therefore, not binding on and enforceable against the Company."

On the 29th July, 1929, the respondent petitioned to have the decision of the official liquidator reversed.

At the hearing of the petition the respondent gave oral evidence. Neither the official liquidator nor Moolla gave oral evidence. The affidavit of the official liquidator already referred to was treated as his evidence, and a deposition of Moolla, made apparently at some earlier stage in the winding-up proceedings, was treated as his evidence.

In his evidence in chief, Moolla stated as follows :—

"I entered into the transaction with Mrs. P. R. Burjorjee as evidenced by the agreement of 27th July, 1921. When I agreed to buy this land, I was buying it at first for myself. I myself was the buyer. I signed the pro-notes which were given as part consideration of the purchase-price. The pro-notes were given in my own name and I paid Rs. 10,000 as earnest money and that was my own money. (Minutes of M. E. Moolla & Sons, Limited, dated the 31st December, 1921 explained to the witness.) I purchased that property and put it in the assets of the Company. From 31st December, 1921 it was considered as the

property of the Company. The Directors of the Company agreed and as I did not want to sell the property I put it into the Company. The Company agreed to take it over in December, 1921. I presided at that meeting. Mariam Bee Bee is my mother. Hashim Eusoof Moolla is my brother's son (nephew). I held shares worth 1 crore and 53 lakhs and 50 thousand. The capital of the Company was 1 crore and 65 lakhs. My mother held shares worth Rs. 11,50,000. The minute was recorded at my suggestion. It was at my suggestion that the Company took over this deal. Apart from this minute there is no written document showing that this deal was taken over by the Company. The receipts made out by Mrs. Burjorjee were made out in my name."

In cross-examination, Moolla said :—

"I still say [sic] that the purchases by me of Mrs. Burjorjee's, Emin's and Bymeah's properties were for the Company. I don't remember whether I stated to Mr. Hormasji that the purchases made in my own name of Mrs. Burjorjee's, Emin's and Bymeah's lands were made for the Company.

* * * * *

"When the official assignee examined me I made the following statements : 'As for properties purchased by me in my own name after the promotion of the Company, they were treated as the Company's properties because the purchase-money or part purchase-money was paid from the Company and debited in the Company's accounts and they were bought for the Company. There are only two such properties, *viz.*, Mrs. R. N. Burjorjee's land and the house in Park Road mortgaged to Emin. The Tiger Alley property, which has been sold, was another such transaction. I shall furnish lists in a day or two of all properties held for the Company though they are not in the Company's name.'"

In reply to the Court, Moolla subsequently added "as regards Mrs. Burjorjee's land it was in my own name and this was because Mrs. Burjorjee refused to negotiate with the Company".

Mrs. Burjorjee denied that she had refused to negotiate with the Company and said in effect that she only knew of the Company in the matter some time after the agreement.

1932

M. E. MOOLLA SONS, LIMITED v. BURDOUSS.

The only matter debated before the Judge who tried the petition was the question of fact whether the Company was in connection with the purchase the undisclosed principal of Moolla. The learned Judge held that Moolla purchased on his own account.

The respondent appealed. The question, and the only question, debated before the appellate side was that which had been debated below.

The appellate side reversed the trial judge and held that the Company was the principal in the matter.

Subsequently the appellant applied for a review of the judgment on the ground that Exhibit "B" to his affidavit had been erroneous in so far as it showed the earnest money to have been paid out of the Company's funds on the 27th July, 1921, the books of the Company for 1921 having been destroyed and there being, therefore, no evidence of such payment.

The application for a review of judgment was rejected.

On the 7th January, 1931, leave to appeal to His Majesty in Council was granted to the appellant. In his application for such leave, the appellant for the first time raised the question of the non-registration of the agreement in these terms: "This Honourable Court has omitted to take note of the fact that the agreement of sale of 27th July, 1921, had not been registered and was thereby invalid and inoperative." The same point was raised in his case before their Lordships' Board.

The first question for consideration, therefore, is ought the applicant to be allowed at this stage to raise for the first time the point of non-registration?

In *Connecticut Fire Insurance Company* v. *Kavanagh* (1) Lord Watson, in delivering the

(1) [1892] A.C. 473, 480.

judgment of their Lordship's Board, said as follows :—

"When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea."

Section 49 of the Registration Act, which states the results of non-registration is, so far as material, as follows :—

"49. No document required by section 17 to be registered shall—(*a*) affect any immoveable property comprised therein, . . . or (*c*) be received as evidence of any transaction affecting such property . . . , unless it has been registered."

Their Lordships are satisfied that there is nothing in the section cited when properly construed to compel the Court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document.

Here the agreement has been admitted throughout. Indeed, it was first put in by the appellant. Further, the proceedings do not in any respect affect any immovable property. The immovable property affected by the agreement long since passed out of the picture, and the only claim in these proceedings is a personal one for damages for breach of an admitted contract against an

1932

M. E. MOOLLA SONS, LIMITED v. BURJORJEE.

alleged undisclosed principal who denies he was a principal.

Their Lordships therefore regard themselves as free to consider upon general principles, whether the appellant ought to be allowed to raise the point of non-registration.

They are satisfied that he ought not to be allowed to do so. It has already been pointed out that the circumstances in which the appellant's petition founding these proceedings was launched are by no means clear. The parties are not agreed upon the facts. There are indications of a course of conduct or agreement on the part of the liquidator which would preclude him from raising any point in the proceedings except that as to the respective positions of the Company and Moolla in regard to the agreement of the 27th July, 1921.

In this state of the evidence, it would not in their Lordships' judgment be in accordance with the principles indicated by Lord Watson, in the judgment already cited, to take into consideration at this stage for the first time the point of the non-registration of the document.

It becomes therefore unnecessary to consider the second question as to the necessity for registration.

There remains the third and last question, one of fact upon which the Courts below have differed, *viz.*, was the Company the undisclosed principal of Moolla in relation to the agreement of the 27th July, 1921.

Their Lordships are satisfied that the Company was the undisclosed principal of Moolla. All the contemporary documents support this view. There is nothing in Moolla's conduct inconsistent with it. There is much in his conduct which, though not necessarily inconsistent with the other view, points

1932

M. E. MOOLLA SONS, LIMITED v. BURJORJEE.

strongly in the direction of his having acted as the Company's agent throughout. His own evidence was obscure and contradictory, and he was not seen in the witness box by the trial judge. In their Lordships' opinion the learned judges of the appellate side reached a correct conclusion upon the issue of fact.

In the result, therefore, the appeal fails and should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers* and *Nevill.*

Solicitor for respondent: *J. E. Lambert.*

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

P. R. M. P. R. CHETTYAR

v.

MUNIYANDI SERVAI.*

1932

Mar. 9.

Negotiable instrument—Person liable—Name to be clearly stated on the document—Signature by alleged agent—Absence of promise by Principal.

The name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. It is not sufficient that the principal's name should be "in some way" disclosed: it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bill.

A promissory note was signed by a Chetty who was alleged to be the agent of the appellant firm. The Chetty signed it in his own name and it contained no promise by the appellant firm to repay the loan.

Held, that the firm was not liable on the promissory note.

Ramgopal v. *Dhirendra Nath Sen*, I.L.R. 54 Cal. 380; *Sadasuk Jankidas* v. *Maharaja Sir Kishen Pershad*, 46 I.A. 33—*followed.*

---

* Civil First Appeal No. 154 of 1931 from the judgment of the District Court of Myaungmya in Civil Regular No. 14 of 1928.

1932

P.R.M.P.R. CHETTYAR v. MUNIYANDI SERVAI.

Hay for the appellant. The action is upon a promissory note executed by Ramanathan and the question is whether P. R. M. P. R. firm is liable. Evidence to show that Ramanathan intended to involve the responsibility of the P. R. M. P. R. firm was inadmissible. The liability must be ascertained from a perusal of the document and without further investigation. *Ramgopal* v. *Sen* (1). The promissory-note does not comply with the test laid down in *Sadasuk Jankidas* v. *Sir Kishen Pershad* (2) so as to bind the P. R. M. P. R. firm.

Venkatram for the respondent. The operative portion of the promissory note runs as follows :

"I promise to pay on demand either to you or your order . . . . . ."

The person who promises to pay is P. R. M. P. R. Ramanathan Chettyar. P. R. M. P. R. is the name of the Chettyar Firm and Ramanathan Chettyar was the agent of the firm, acting under a power of attorney, Exhibit 16, granted by his father.

It is usual for agents of Chettyar Firms when they execute promissory notes to indicate that they sign as agent for the firm by prefixing the initials of the firm. This has been judicially recognised and the power of attorney also authorises him so to sign.

The body of the promissory note recites that it was given in respect of "the monies kept with our firm and of the monies given (to us) on hand loan". So it was given in respect of the firm's liability.

The description of the executant of the promissory note as Ramanathan Chettyar, son of P. R. M. P. R. Perichiappa Chettyar, only indicates who actually signed and not the capacity in which he signed.

Assuming that there is a conflict between the different portions of the promissory note, the promissory note must be read as a whole so as not to lead to

(1) I.L.R. 54 Cal. 380 at p. 388. (2) 46 I.A. 33.

conflict and on a fair interpretation of the instrument, it is the firm that is really liable and the principal is disclosed in this sense. *Sadasuk Jankidas* v. *Sir Kishen Pershad* (1).

In the alternative the suit is also on the original cause of action and should be remanded for trial on these issues which were not tried by the Lower Court.

It was conceded in the Lower Court that it was the case of neither party that plaintiff dealt with Ramanathan personally.

PAGE, C.J.—This appeal must be allowed.

The suit is brought upon a promissory note against "the P. R. M. P. R. Chettyar firm, moneylender of Kyonmangè-Wakèma, represented by its agent, Veluswami Pillay".

The sole question which it is necessary to consider for the purpose of determining the appeal is whether, having regard to the terms of the promissory note, the defendant firm was liable. This is not a case in which a claim was made in the alternative upon the original consideration in respect of which the promissory note was given as security. The suit purports to be, and in fact is, based solely upon the promissory note.

Now, the promissory note is in the following form :

"*11th Thai of Ruthrothkari year* (*24th January* 1924).

"The promissory note written and given in favour of Muniandy Servai, son of Jagannathan Servai Karar of Tiruppattur, Ramnad District, by Ramanathan Chettyar, son of P. R. M. P. R. Perichiappa Chettyar, of O. Siruvayal in the aforesaid district, is as follows : Having gone into the account up to the 11th of Chithirai—current, in respect of the moneys given and kept with our firm and of the money given (to us) as hand loan while you were in Kyonmangè, a receipt was written and given in your favour on the 15th of the said month at Rangoon for Rs. 12,000. On taking it back and

(1) I.L.R. 46 Cal. 663 (P.C.)

1932

P.R.M.P.R. CHETTYAR v. MUNIYANDI SERVAI.

PAGE, C.J.

deducting the payment of Rs. 1,798, made on this date and of Rs. 12,798 being the amount arrived at together with interest up to the 10th instant on the receipt, the balance is Rs. 11,000. This sum of rupees eleven thousand I promise to pay on demand, either to you or your order, with interest at the rate of 'three-quarters' (of a rupee—0-12-0) per cent. per mensem, that is, principal together with the interest accrued, and take back the promissory note with the payment (noted thereon).

(Sd.) P.R.M.P.R. RAMANATHAN CHETTY."

The case, in my opinion, is concluded against the respondent by well settled authority. (*Sadasuk Jankidas* v. *Maharaja Sir Kishen Pershad* (1) and *Ramgopal Ghose* v. *Dhirendra Nath Sen and others* (2).

"It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand . . . . . It is not sufficient that the principal's name should be 'in some way' disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bill."

Sadasuk Jankidas v. *Maharaja Sir Kishen Pershad* (1*a*). In this case it is contended on behalf of the respondent that the promissory note was signed by the firm. It does not so appear on the face of the document, and if it was signed by the firm, inasmuch as it is conceded that the firm consisted of a number of persons who were the members of a joint Hindu family the signature on the promissory note is inconsistent with the body of the document, in which it is stated that the "promissory note was written and given . . . . . by Ramanathan Chettyar, son of P. R. M. P. R. Perichiappa Chettyar" and "I promise to pay on demand . . . ."

(1) [1918] 46 I.A. 33. (1*a*) *ibid*, p. 36.
(2) [1927] I.L.R. 54 Cal. 380.

1932

P.R.M.P.R. CHETTYAR v. MUNIYANDI SERVAI.

PAGE, C.J.

The learned District Judge stated in the course of his judgment

"It is further argued that Ramanathan Chettyar has not signed on exhibit C as agent of the defendant. Such a description would have made matters absolutely clear, but it is open to the plaintiff to prove that he did sign as agent, although he did not describe himself as such."

That is not a correct statement of the law as laid down in the cases to which I have referred. It is quite clear upon the face of this document that there is no liability imposed thereunder upon the defendant firm.

For these reasons, in my opinion, the appeal must be allowed, the decree from which the appeal is brought set aside, and the suit dismissed with costs.

MYA BU, J.—I agree.

PRIVY COUNCIL.

U PE

v.

U MAUNG MAUNG KHA.

* J.C. 1932

Mar. 18.

[On appeal from the High Court at Rangoon.]

Burmese Buddhist Law—Marriage—Common Property—Right of Alienation—Divorce—Wife leaving Husband.

A husband and wife governed by Burmese Buddhist Law are tenants in common, not joint tenants, of property in which under that law, each has rights by virtue of the marriage. Where therefore the wife has made a gift of *letletpwa*, being property which she has inherited during the marriage, the gift is valid to the extent of her two-thirds interest. As the *Dhammathats* do not point to joint ownership by husband and wife rather than to tenancy in common it is right to prefer that alternative which leads to the least evil consequences.

---

* PRESENT: Viscount Dunedin, Lord Thankerton and Sir Dinshah Mulla.

1932

U PE
v.
U MAUNG
MAUNG
KHA.

Under Burmese Buddhist Law a wife by merely deserting her husband does not commit a fault causing her to forfeit her interest in property of the marriage.

Ma Paing v. *Maung Shwe Hpaw*, (1927) I.L.R. 5 Ran. 296—*disapproved*.

N.A.V.R. Chettyar Firm v. *Maung Than Daing*, (1931) I.L.R. 9 Ran. 524—*approved*.

Decree of the High Court reversed.

Appeal (No. 1 of 1931) from a decree of the High Court (March 17, 1930) reversing a decree of the District Court of Henzada (February 12, 1929).

The appeal related to the validity of a deed of gift dated March 3, 1927, by which Ma Ma Gale, who was the wife of the respondent-plaintiff, Maung Maung Kha, and died on June 28, 1927, made a gift of *letletpwa*, being property which she had inherited during the marriage, to the appellant-defendant. At the date of the gift the donor had been living apart from her husband for over a year and was in possession of the whole of her *letletpwa* property.

The facts appear from the judgment of the Judicial Committee.

The trial judge held upon the facts that the marriage had become dissolved under book 5, section 17, of the *Manukye* by reason of desertion and separation for over a year, and that the gift was not void for undue influence or fraud; the respondent being entitled upon the dissolution of the marriage to a one-third share of the property, the gift was valid to the extent of two-thirds.

Upon appeal the decision was reversed by Heald and Otter, JJ. The learned Judges were of opinion that having regard to the facts of the case, more particularly that the wife had been in possession of the whole *letletpwa* property, there had been no dissolution of the marriage. Upon the authority of the Full Bench

decision in *Ma Paing* v. *Maung Shwe Hpaw* (1), and cases applying that decision, the learned Judges held that as the gift had been made during the existence of the marriage, and, without the consent of the husband, it was void. Since the delivery of the judgment a Special Bench in *N. A. V. R. Chettyar Firm* v. *Maung Than Daing* (2) had overruled the Full Bench decision above mentioned.

1932, February 5, 8, 9, 11. *Hon. Geoffrey Lawrence, K.C.*, and *R.W. Leach* for the appellant. By the *Manukye*, book 5, section 17, in effect, where a wife for a period of a year has ceased to live with her husband owing to want of affection for him, and has received from him no active support, the marriage tie is dissolved. The evidence shows that these conditions existed in this case. Ma Ma Gale was therefore free to make a gift of her two-thirds interest in the *letletpwa* property now in suit. The conditions referred to in the text automatically produce a divorce as was held by a Full Bench in *Ma Nyun* v. *Maung San Thein* (3), reversing the view of a majority of a Full Bench in *Thein Pe* v. *U Pet* (4) that some act of volition is necessary. In *Ma San Kin* v. *Maung Tun Aung* (5) the Board referred to the above cases but did not decide which view was correct. It is submitted that upon the construction of the text a divorce takes place automatically. But in any case the evidence shows that the wife treated the marriage as dissolved, and an act of volition by her is to be inferred. There is no authority for the view of the High Court that the fact that the wife was in possession of *letletpwa* property inherited by her was a giving of

(1) (1927) I.L.R. 5 Ran. 296.
(2) (1931) I.L.R. 9 Ran. 524.
(3) (1927) I.L.R. 5 Ran. 537.
(4) (1906) 3 L.B.R. 175.
(5) (1927) I.L.R. 6 Ran. 79; L.R. 55 I.A. 38.

1932

U PE
v.
U MAUNG
MAUNG
KHA.

maintenance which prevented the text from applying, and it is submitted that it was not. In the case last mentioned the wife had been left in possession of property which she had inherited. But even if there was no dissolution of the marriage the wife was entitled to make a gift of her two-thirds interest in the *letteipwa* property inherited by her. The decision of the High Court to the contrary was based upon the view of the Full Bench in *Ma Paing* v. *Maung Shwe Hpaw* (1) that in Burmese Buddhist Law husband and wife are joint tenants of the property of the marriage, and in the position of partners in relation to it. After the judgment appealed from however that decision was overruled by a Special Bench of seven judges in *N. A. V. R. Chettyar Firm* v. *Maung Than Daing* (2) which held that spouses are tenants in common, and that the vested share of each is liable to separate attachment and (Maung Ba, J. dissenting) are within his or her unfettered control. It is submitted that that view is correct upon the grounds stated by the learned Chief Justice.

[Reference was made to texts and cases there cited.]

Pennell for the respondent. The evidence shows that Ma Ma Gale deserted her husband and in Burmese Buddhist Law a wife who does so thereby forfeits her interest in the joint property: *Ma Thet* v. *Ma San On* (3); Maung Tha Gwe's Buddhist Law, volume 1, page 97. The law is the same for both spouses; in the old days either abandoning the other was punishable: *Manukye*, VI, 30. In two cases the Courts in Burma have held that a husband who deserts his wife forfeits all the joint property: *Maung Po Nyun* v. *Ma Saw Tin* (4), *Ma*

(1) (1927) I.L.R. 5 Ran. 296.
(2) (1931) I.L.R. 9 Ran. 524.
(3) (1903) 2 L.B.R. 85.
(4) (1925) I.L.R. 3 Ran. 160.

Kin v. *Ma Po Sein* (1). Upon appeal to the Privy Council in the former case (2) the decree was affirmed though upon different grounds; the observations as to forfeiture were obiter. There was no divorce under *Manukye*, book V, section 17. In *Ma Saw Kin* v. *Ma Tau Aung Gyaw* (3) the Board held that unless both conditions mentioned in the text were satisfied no divorce resulted. The wife being in possession of the whole of the *letlelpaw* property inherited by her the second condition was not satisfied: *Maung Hmoon Htaw* v. *Mah Hpeah* (4). Further, upon the principles laid down in *Smith* v. *Kay* (5) and *Mahomed Buksh Khan* v. *Hosseini Bibi* (6) the deed of gift by which Ma Ma Gale stripped herself of her whole property, was void as being obtained by undue influence. Upon the general question as to the right of Burmese Buddhist spouses to alienate his or her share of the joint property, it is submitted that the recent decision of a Special Bench in *N. A. V. R. Chettyar Firm* v. *Maung Than Daing* (7) was wrong, and that the Full Bench decision in *Ma Paing* v. *Ma Shwe Hpaw* (8) was right. The Special Bench decision was based largely upon *Ma Shwe U* v. *Ma Kyu* (9). But upon the particular point now in issue the judgment was wrong in overriding the decision of Copleston, C.J. in *Maung Weik* v. *Shwe Lu* (10) which reflected what has been considered to be the law since

(1) (1927) I.L.R. 6 Ran. 1.
(2) (1927) I.L.R. 5 Ran. 841; L.R. 54 I.A. 403.
(3) (1927) I.L.R. 6 Ran. 79, 85; L.R. 55 I.A. 38, 45.
(4) (1884) I.L.R. 10 Cal. 777; L.R. 11 I.A. 109.
(5) (1859) 7 H.L.C. 750, 778, 779.
(6) (1888) I.L.R. 15 Cal. 684; L.R. 15 I.A. 81.
(7) (1931) I.L.R. 9 Ran. 324. (9) (1925) 3 L.B.R. 66.
(8) (1927) I.L.R. 5 Ran. 296. (10) (1902) 1 L.B.R. 184.

1932

U PE
v.
U MAUNG
MAUNG
KHA.

Mr. Fulton's judgment in *Ma Thu* v. *Ma Bu* (1). The question in those days was whether a husband could alienate the whole property, not whether he, still less the wife, could alienate his or her share. The *Dhammathats* give little assistance in deciding the question, which they did not contemplate. Most of the cases decided are as to involuntary alienation, and are thereupon distinguishable. [Reference was made also to *Maung Lo* v. *Maung Pyaung* (2), referred to by Heald, J. in *Ma Paing's* case (3).]

In the Special Bench case Page, C.J. over-estimated the *cursus curiae* which *Ma Paing's* case (3) overruled. That *cursus curiae* began only in 1905; before that, since the decision in 1874 of *Sein Maung Ko* v. *Ma Me* (4), a contrary view had been taken. The importance which Burmese Buddhists attach to the rule that one spouse cannot alienate any part of the joint property is reflected in the judgment of Maung Ba, J. in the Special Bench decision.

March 18. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. This is a suit in which U Maung Maung Kha the plaintiff seeks to set aside a conveyance of certain property gifted to U Pe, the defendant, by Ma Ma Gale, wife of the plaintiff but now deceased. The plaintiff and his wife were Buddhists and their mutual rights depended on Burmese Buddhist Law. They were married in 1892 having both been previously married and they had no children but adopted two girls, Ma Khin May and Ma E Kyi. The father of Ma Ma Gale was U Pan; he lived in Henzada. The

(1) (1891) P.J. 578.
(2) Special Civil Second Appeal No. 264 of 1909.
(3) (1927) I.L.R. 5 Ran. 296, 313, 314.
(4) (1874) S.J. 59.

plaintiff lived at Rangoon and his wife lived sometimes with her husband at Rangoon and sometimes at Henzada. She traded on her own account at Henzada.

In 1910 U Pan died leaving two daughters, the said Ma Ma Gale and one Ma Ma Gyi a spinster, and some grandchildren the offspring of a deceased child. In 1912 U Pan's estate was divided between his two daughters. It consisted of two houses, one the pucca house and the other the little house and some paddy-fields. The plaintiff then came to Henzada permanently and lived with his wife in U Pan's little house. In 1916 the plaintiff built another house and when it was finished his wife and he lived in it. The adopted children lived with Ma Ma Gyi in the little house. Ma Ma Gyi began to rebuild the pucca house but died in 1923; the rebuilding was finished by the plaintiff and his wife. On Ma Ma Gyi's death her share of U Pan's property passed to Ma Ma Gale. Ma Ma Gale looked after the two houses and received all rents from them so far as let and also the rents from the paddy lands. A conveyance was then executed by the plaintiff and Ma Ma Gale of the houses and lands in favour of the adopted children, but as it is admitted on both sides that this was *benami* and did not represent any real transaction it may be ignored. After Ma Ma Gyi's death the little house was sold by the plaintiff and Ma Ma Gale to one Olivari. The adopted children then moved to the pucca house which was nearly finished. In 1924 the spouses quarrelled and after that did not live together the plaintiff living in his own house and Ma Ma Gale in the pucca house. They never lived together again. In 1927 Ma Ma Gale fell ill. The plaintiff attempted to enter the house

1932

U PE
v.
U MAUNG
MAUNG
KHA.

where his wife was but the door was shut against him. Following on this, on the 2nd March, 1927, Ma Ma Gale removed to the house of the defendant and appellant and on the next day she executed a deed of gift of all her properties inherited from her father, U Pan, in favour of the defendant. The plaintiff thereupon instituted a suit for restitution of conjugal rights against her but before any progress had been made Ma Ma Gale died on the 28th June, 1927. Thereupon the plaintiff raised the present suit to have the conveyance in favour of the defendant declared void.

Before stating the grounds of action it will be well to state the Burmese Buddhist Law in regard to the property of married persons so far as it is not a matter of controversy between the two parties. Married persons hold during the subsistence of the marriage an interest in all property belonging to either or both. What that exactly means will be discussed afterwards. Partition takes place either on death or on divorce. Property consists of three kinds: *payin*, which is the property which had belonged to the spouses individually before marriage; *lettetpwa*, which is the property accruing to either spouse individually either by particular exertion or by succession after the marriage; sometimes, therefore, described as of two kinds, *viz.*, ordinary *lettetpwa* and *lettetpwa* by succession; and *hnapazon*, which is the property acquired by the spouses during the marriage by their exertion or from the produce of the property they already have. On partition *lettetpwa* goes two-thirds to the spouse who actually made it or succeeded to it and one-third to the other. *Hnapazon* and *payin* are equally divided.

In the present case the subject of the gift was admittedly *lettetpwa* of the wife acquired by succession

on her part, as it was the property which either directly or through her sister she had inherited from her father, U Pan.

The plaintiff attacked the conveyance on three grounds: (1) he said the deed was secured by undue influence on the part of the defendant; (2) he said that there having been no divorce the wife could not alienate *letletpwa*; (3) that the only ground on which divorce could have been alleged being desertion, and that being desertion by the wife, she had forfeited her property for her fault. To these assertions the defendant replied (1) that there was no undue influence; (2) and (3) that there was divorce and not for fault; and (4) that in any view she was entitled to deal during the marriage with her *letletpwa* to the extent of two-thirds. The trial judge held that there was no undue influence and that there was divorce. He, therefore, held that she was entitled to dispose of her *letletpwa* to the extent of two-thirds, to which extent he confirmed the conveyance. The Court of Appeal held that there was no divorce and that being so that the wife had no power to dispose of any *letletpwa*. This made it unnecessary for them to consider the question of undue influence but enabled them to recall the judgment and to give decree in favour of the plaintiff. Against this judgment the present appeal has been taken.

The question of undue influence may be at once disposed of. On such a question their Lordships would not willingly reverse the judgment of the trial judge, untouched by the appellate Court, he having individually seen the majority of the witnesses—some of them were examined by others than himself. But on the evidence as it stands their Lordships are of opinion that the case utterly fails. There is not the slightest trace of evidence of weakness of character

1932

U. PE
v.
U MAUNG
MAUNG
KHA.

or want of intelligence on the part of the wife up to the day of her death. On the contrary she was an able, managing woman, who, according to the testimony of the plaintiff himself, had successfully made much money, had been left by him in entire charge of the properties which came from her father, and had never needed assistance in business matters in any way. It is true that by the conveyance she entirely divested herself in favour of the defendant but he was her friend whom she trusted. She was utterly estranged from her husband; for three years they had no dealings together and all her relations were gone, the adopted children being dead and the grandchild who was still with her having forfeited all claim by elopement. Their Lordships, therefore, have not the slightest hesitation in affirming the decision of the trial judge in this matter.

Next, as to divorce. The divorce that has here to be dealt with is of a kind quite foreign to western ideas. It is known as "automatic". The passage of the Laws of Menoo (*Manukye*), book 5, section 17, which is admitted to rule the matter is, as translated by Richardson, as follows:

> "If the wife not having affection for the husband, shall leave (the house) where they were living together, and if during one year he does not give her one leaf of vegetables, or one stick of firewood, let each have the right of taking another husband and wife; they shall not claim each other as husband and wife; let them have the right to separate and marry again."

The difference of view that developed between the trial judge and the appellate Court was partly based on a survey of the evidence as to what communication there had been between the spouses after the wife definitely left her husband, and partly on a difference of opinion as to whether the wife, being admittedly in possession of the total amount of the

letteipwa property, one-third of which on partition would belong to the husband, could be held to have been supported by him in a way to meet the text cited above. As to forfeiture on account of fault that matter, which does not seem to have been even stated below but was urged before their Lordships, may at once be dismissed, for the text and decisions which deal with fault show that fault is a fault of another kind, the mere going away, or as in western phraseology it would be termed desertion, not being a fault. Their Lordships, however, do not think it necessary that they should decide as between the trial judge and the appellate Court on the question of divorce because they are prepared to decide the case on another ground, a ground which though pleaded was not open to the Court below as they were bound by a former decision of a Full Bench.

The case which bound them was *Ma Paing* v. *Maung Shwe Hpaw* (1). The headnote of that is as follows :—

"Held, that at Burmese Buddhist Law in respect of the property of the marriage whether that property be the *payin* property of either party or *letteipwa* property of the marriage, a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether *payin* or *letteipwa*, is partnership property.

Held, further, that at Burmese Buddhist Law, the partnership between husband and wife is dissolved only by death or divorce and neither partner is entitled to separate possession of any share of the partnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce."

This case was decided by five judges in 1927 but since that case was decided there has been decided the case of *N. A. V. R. Chettyar Firm* v.

(1) (1927) I.L.R. 5 Ran. 296.

1932

U PE
v.
U MAUNG
MAUNG
KHA.

Maung Thon Daing (1) in 1931 by a Special Bench of seven judges, one judge dissenting, and this case overruled the case of *Ma Paing* (2); the head-note of that case states that it held—

"The husband and wife in a Burmese Buddhist marriage do not hold the property as joint tenants, but as tenants in common. Each of them has a vested interest in such joint property, and such an interest is liable to attachment and sale in execution of a decree against the party entitled to it."

Further—

"Either party to the marriage is competent to alienate or otherwise dispose of his or her own interest in the joint property, but neither is entitled to alienate the interest of the other without the consent, express or implied, of that party."

It is, therefore, clear that the judgment of the Board in this case must depend on whether they agree with the law as laid down in the earlier or the later of these two cases. To appreciate the question it is necessary to go back to the case law as it stood when the earlier case of *Ma Paing* came up for decision. In the case of *Ma Shwe U* v. *Ma Kyu* in 1905 (3) a Full Bench had held that a sale by the Burmese Buddhist husband of the *hnapazon* property of himself and his wife without her consent amounted to a valid transfer of his share in the property sold. It is obvious that the case of *letletpwa* property is *a fortiori* of this as to the interest of one spouse therein. This was clear law and stood undisturbed till 1927 when *Ma Paing's* case was decided. There were other decisions to the same effect and it was candidly admitted by the judges in *Ma Paing's* case that they were overruling the existing law.

Ma Paing's case was this. A Burmese trader had had five wives. He got into difficulties through

(1) (1931) I.L.R. 9 Ran. 524. (2) (1927) I.L.R. 5 Ran. 296.
(3) (1905) 3 L.B.R. 66.

speculation and his creditors attached his various properties. These properties were the whole properties enjoyed during the marriage. The last of the five wives applied at the time of the attachment for the release of her interest which was granted. The properties were sold. The wife then brought the action against the purchaser seeking a declaration that her interest in the properties amounted to half. The trial judge dismissed the suit. The wife appealed and the case came before a Divisional Court of two Judges, Heald and Chari, JJ. They did not, however, decide it at once but made a reference to the Full Bench in the following terms :—

"(1) Where the interest of a Burmese Buddhist husband in property which was *payin* property brought by him to the marriage, is during the subsistence of the marriage sold in execution of a decree against him for a debt incurred by him in a business carried on by him while he was living with the wife, does the buyer acquire the right to have the property partitioned and to obtain possession of part of the property as representing the husband's interest in it ?

(2) In a similar case, where the property is jointly acquired *letletpwa* and not *payin*, does the buyer acquire a right to partition and possession of a share ?

(3) Can a decree against a Burmese Buddhist husband be executed against (*a*) *payin* property brought by him to the marriage and (*b*) jointly acquired *letletpwa* property of the marriage, to the extent of the whole of such property or if not to the extent of the whole to the extent of any part of such property, and if to the extent of part only to the extent of what part ?"

The reference was accompanied by a disquisition on reported cases by Heald, J. which is far too long to quote. It must be incidentally stated that in this disquisition, and in the phrasecology of the questions referred, the term *letletpwa* is used as including what is more accurately called *hnapazon*. The accurate nomenclature is used by the Full Bench to which the case was referred and is in accordance with

1932

U PE
v.
U MAUNG MAUNG KHA.

what has already been said above. He ends the disquisition by these words "on the authorities I am unable to decide what answer ought to be given in the present case. It seems clear that the case law is conflicting and unsatisfactory and there are practically no rules in the *Dhammathats*." But he had previously given no uncertain sign as to what his own opinion was. Two citations will be sufficient:

"Most of the cases mentioned above were considered by a Full Bench of the Chief Court in the case of *Ma Shwe U* v. *Ma Kyu* (1) where it was held that a Burmese Buddhist husband cannot sell or alienate the *hnapazon* (*lelielpwa*) property of himself and his wife without the consent of the wife express or implied or against her will but that a sale by a Burmese Buddhist husband of such property without the consent of his wife constitutes a valid sale of his share and interest in the property sold. These two findings seem to be inconsistent and with all respect I venture to suggest that the latter part of this decision was mistaken."

(Inconsistent they certainly are not though the latter part may be mistaken.)

And again:

"It would seem to follow that if the interest of one of a married couple is attached all that can be attached is the expectancy of receiving a share of the family property on divorce or death and since neither of the parties can claim partition or separate possession of any part of the property or can alienate any part of it without the consent of the other it is difficult to see how a creditor attaching the interest of one of the couple can enforce partition or alienation of any particular item of the property, or can attach or bring to sale more than the expectancy, which his debtor has, of receiving something on divorce or at the death of one of the parties."

The Full Bench consisted of the two judges who had made the reference with the addition of

(1) 3 L.B.R. 66.

Rutledge, C.J. and Maung Ba and Doyle, JJ. Now though all the learned Judges agreed in answering questions 1 and 2 in the negative and question 3 in the affirmative "so long as the debt was incurred in the usual course of business by or on behalf of the firm consisting of husband and wife" they did not quite agree in their views. One view ran through all their opinions and that was that the right in common which indubitably a Burmese husband and wife had as to all property to which either or both could lay a claim was a right of partnership and that being settled they had recourse for the consequences which flowed from that to the law of partnership as is understood and incorporated in the Indian Contract Act. Now one consequence of partnership is that partnership property is joint property; the partners are joint tenants. This necessarily overrules the proposition which had been laid down in *Maung Shwe U's* case (1) but when it came to the discussion as to what was to be done about attachment and realisation their views did not agree. The one set thought that as regards a partnership debt attachment and realisation was simple, and in the case of debts singly contracted by husband or wife alone they laid down the proposition that there was a presumption that such debts were incurred by the husband or wife as the case may be as agent for the partnership. Obviously this could not apply to an ante-nuptial debt and in that case the creditor would either have to wait until the partnership was dissolved by death or divorce or could proceed under Order XXI, rule 49, of the Code of Civil Procedure. The others went further and thought that so far as an

(1) (1905) 3 L.B.R. 66.

1932

U PE
v.
U MAUNG
MAUNG
KHA.

individual debt was concerned there was no fund to be looked to other than a sort of *spes successionis* when death dissolved the partnership and partition took place, and that no proceedings could be taken under Order XXI, rule 49. A very few quotations will illustrate this. Both sets of Judges are obviously struggling with the idea that the law they are laying down would be subversive of business with any married Buddhist. Thus Maung Ba, J. says, in *Ma Paing's* case (1), "a person dealing with a Buddhist has the ordinary law of contract to fall back upon". This at first sight looks like a confusion of thought. The law of contract in the abstract has nothing to do with the question of what property can be attached in respect of an obligation admitted or decreed but in the next sentence he gives his real reasons and shows that he means the law of contract as embodied in the law of partnership: "It has been rightly held from time to time that to all intents and purposes Burmese husbands and wives may be regarded as partners. A partner can bind his partner and every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership." Assuming that the law of partnership applies he holds that any debt as say the debt in the case before him contracted by the husband in the course of business binds the wife as incurred by her partner agent. Obviously the reasoning did not deal with an ante-nuptial debt by either but that case was dealt with by Chari, J. iwho followed him. He held that the partnership created by marriage could only be dissolved by divorce or death and that if one of the couple alienated his or her interest in the partnership it was possible for the alienee to make

(1) (1927) I.L.R. 5 Ran. 296, 329.

good his right by putting in force Order XXI, rule 49, of the Code of Civil Procedure. This rule provides for the charging of a partnership share at the instance of the creditor of an individual partner so that the profits of a share of the partnership become payable to the charger but does not allow of the sale of partnership property. This view, however, did not commend itself to either Heald, J. or Doyle, J. They went the full length and said that there was no partnership property out of which a debt due by the husband or wife could be satisfied during the subsistence of the marriage, and when the case after the reference came to be finally determined by Heald and Doyle, JJ. they laid it down as settled by the judgment in the reference (though their Lordships doubt whether they were quite fair to all their brethren in saying so) that during the subsistence of the marriage the separate interest of the partners to the marriage in the property of the marriage was not only impartible but also indeterminate and indeterminable since it can only be determined on the death or divorce of the parties and further they held that such an interest is not saleable property within the meaning of section 60 of the Code of Civil Procedure and as such liable to attachment and sale in execution of a decree. That is equivalent to saying that it does not come within the words "all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit."

Then came the case of *N. A. V. R. Chettyar Firm* v. *Maung Than Daing* (1) The facts are simple. There was an ante-nuptial debt of the wife for which debt the husband was not liable. The property sought to be taken in execution was proper *letletpwa* of the

(1) (1931) I.L.R. 9 Ran. 524.

1932

U PE
v.
U MAUNG
MAUNG
KHA.

marriage. Now, this case was not ruled by the actual decision in *Ma Paing's* case but it was obviously affected by what had been said in the general review of the law given in the reference in that case. The trial judge accordingly referred to a Full Bench the following question :—

"Whether the joint property acquired by the husband and wife possibly out of the property brought to the marriage by the couple is liable to pay the debt contracted by either of the couple before the marriage ?"

The three Judges who constituted the Full Bench had such doubts as to the soundness of what had been laid down in *Ma Paing's* case that they in their turn referred to a special bench of seven Judges the following questions :—

"(1) Whether the joint property of a Burmese Buddhist husband and wife can be attached in execution of a decree obtained against one of the spouses in respect of an ante-nuptial debt contracted by such spouse alone ?

(2) Whether in such circumstances the interest therein of the judgment-debtor can be attached ?

(3) Whether in such circumstances the separate property (if any) of the judgment-debtor can be attached ?

(4) Whether the principles of law enunciated in *Ma Paing's* case are correct."

The leading judgment was a very exhaustive and able judgment by Page, C.J. It begins by pointing out the serious results of upholding *Ma Paing's* case which had upset the standing judgments of about 20 years. It comes to this, that no one would be in safety to deal commercially with a married Burmese Buddhist unless he was sure that the wife could be held party to the transaction, and further, that as far as ante-nuptial liability was concerned that would be for practical purposes escaped by marriage. And now it may be as well to say something as to the law by which Burmese Buddhists' relations fall to be determined.

The *Dhammathats* are a body of authority, consisting of many texts, sometimes contradictory but yet in their entirety forming what may be called the institutional Buddhist Law. There is no difficulty in holding this as the supreme authority where such questions as succession are concerned, and an instance may be given in the judgment of this Board in the case of *Ma Nhin Bwin* v. *U Shwe Gone* (1). But when commercial relations or execution for debt come into question, then they are not necessarily in accordance with modern conditions. The ancient idea of making good a debt by selling the debtor into slavery is, for instance, quite obsolete. Indeed, the Court in *Ma Paing's* case felt this; recognising that the *Dhammathats* provided for a right to both husband and wife in all property during the marriage, they assumed that that right was a right of partnership, with the consequences set forth above.

The key to the judgment in *Chettyar Firm's* case (2) is to show that the position is best established by holding that the spouses are in western nomenclature not joint tenants but tenants in common. Thus the idea of an interest in common asserted by the *Dhammathats* is preserved without the evil consequences following from holding that that is the joint interest of partnership. It is admitted by all the Judges in *Ma Paing's* case (3), that the *Dhammathats* do not deal exactly with the situation. They could not well do so. Their Lordships do not think it is necessary to examine the texts quoted because that has been done with great thoroughness by Page, C.J. in his judgment. The outcome of it is that there is nothing in them which would point more to joint ownership than to tenancy in common, and therefore it is quite right to prefer the one which leads to the least

(1) (1914) 41 Cal. 887; L.R. 41 I.A. 121. (2) (1931) I.L.R. 9 Ran. 524.
(3) (1927) I.L.R. 5 Ran. 296.

1932

U PE
v.
U MAUNG
MAUNG
KHA.

evil consequences. After all, the ancient law has still a wide scope if admittedly all property acquired by either or both of the spouses before or during marriage passes into the common enjoyment and it is only dealt with by either according to his or her vested interest therein.

One word more remains to be said. Maung Ba, J. was one of the Court that decided *Ma Paing's* case. He was also one of the Court that sat on the *Cheltyar Firm's* case. It would have been quite understandable if he had chosen to remain of his original opinion and dissented, but he did not do that. He was content to abandon nearly all the points that had been laid down in *Ma Paing's* case but thought he might save something out of the wreck. So he said that subject to the right of creditors, neither the husband nor the wife as between themselves had the right to alienate his or her interest in the joint property without the consent express or implied of the other. This was dead in the teeth of what the others had laid down. They had said that either party to the marriage is competent to alienate or otherwise dispose of his or her interest in the joint property. The others were bound to lay this down, not because the facts of the case needed it but because the reference had referred the whole law as laid down in *Ma Paing's* case, and that case had laid down exactly the opposite. But in truth Maung Ba, J.'s position is an impossible one. Once he had given up as he had given up the theory of joint property and of the interest of the spouses being indeterminate and indeterminable, there was no possibility of excluding creditors, and creditors not being excluded it followed that there was a power of disposition. Of course there

are situations in which property may be beyond the disposing power of the owner and yet be liable to be taken by creditors, but that is only when there is something which affects the property itself. The simplest illustration is that of property held under strict settlement but on which there is a mortgage which was put on the property before it was put in settlement. But when there is nothing which affects the property as such, then if the owner's personal creditors can attach, the owner can dispose. The position of unburdened property which can be attached but cannot be disposed of is a judicial contradiction in terms.

The result is that the conveyance was good to the extent of Ma Ma Gale's interest therein, *viz.*, two-thirds. That is the same result as arrived at by the trial judge though on different grounds.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the decree of the trial judge restored; the respondent paying to the appellant the costs in the High Court and before this Board.

Solicitors for appellant: *Cutler, Allingham* and *Ford.*

Solicitor for respondent: *J. E. Lambert.*

1932

Mar. 23.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

N. S. IYER
v.
S. A. S. M. R. CHETTYAR.*

Malicious prosecution, suit for—Malice and want of reasonable and probable cause essential—Malice alone no proof of want of reasonable and probable cause—Meaning of reasonable and probable cause—Persistence in prosecution after discovery of plaintiff's innocence—Prosecutor, when defendant becomes.

To support an action for malicious prosecution both malice and the absence of reasonable and probable cause must be proved. Even if there be excessive malice but reasonable and probable cause for the prosecution no action lies.

Musgrove v. *Newell*, 1 Mee. & W. 582—*followed.*

An honest belief in the guilt of the plaintiff based on reasonable grounds is the very essence of the defence to a suit for malicious prosecution.

Broad v. *Ham*, 5 Bing. N.C. 722 ; *Brown* v. *Hawkes*, (1891) 2 Q.B. 718 ; *Lister* v. *Perryman*, 4 H.L. 521 ; *Mearing* v. *Graham White Aviation Company*, 122 L.T. 44 ; *Shrosbery* v. *Osmaston*, 37 L.T. 792—*referred to.*

However malicious the motive of a man may be in launching the prosecution it does not preclude him from justifying the course he took by establishing that when he became the prosecutor, he honestly and on reasonable grounds believed that the accused was guilty of the offence for which he was prosecuted. Absence of reasonable and probable cause is evidence of malice, but proof of malice is not evidence of the absence of reasonable and probable cause.

Abrath v. *North-Eastern Railway Company*, 11 Q.B.D. 440 ; *Delegal* v. *Highley*, 3 Bing. N.C. 950 ; *Turner* v. *Ambler*, 10 Q.B. 252—*referred to.*

Reasonable and probable cause means an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Broad v. *Ham*, 5 Bing. N.C. 722 ; *Hicks* v. *Faulkner*, 8 Q.B.D. 167—*referred to.*

The fact that the defendant persisted in prosecuting a false charge against the plaintiff after it had become reasonably clear that there was no ground to justify the prosecution of the plaintiff would be evidence of malice, but would not be evidence that at the time when he became the prosecutor the defendant had acted without reasonable and probable cause.

Fitzjohn v. *Mackinder*, 9 C.B. (N.S.) 505—*discussed.*

---

* Civil First Appeal No. 18 of 1931 (from Mandalay).

Whether the defendant was the prosecutor or not depends in each case upon the facts and circumstances disclosed in the evidence. The mere fact that the defendant did not in the first instance set the law in motion against the plaintiff does not determine that he was not the prosecutor.

Clements v. *Ohrly*, 2 Car. & K. 686; *Weston* v. *Beeman*, 27 L.J. Ex. 27—*referred to.*

McDonnell for the appellant. A prosecution once commenced *bonâ fide* may become malicious if the prosecutor, in the course of the proceedings, comes to know that the accused is innocent and yet persists in his action: *Fitzjohn* v. *Mackinder* (1). Similarly, where the evidence on which the prosecution relies turns out to be absolutely unreliable, and the prosecutor does not thereupon withdraw his action (especially where the case is a compoundable one), such conduct will indicate that there was malice. See *Fitzjohn* v. *Mackinder, ante,* at p. 531, and *Turner* v. *Swainson* (2).

Reasonable and probable cause means an honest belief in the guilt of the accused based on the facts within the knowledge of a prudent and cautious prosecutor: *Hicks* v. *Faulkner* (3). In this case, the respondent had no honest belief in the guilt of the accused as disclosed by the evidence.

Leach for the respondent. In an action for malicious prosecution the plaintiff must prove that the proceedings terminated in his favour if from their nature they were capable of so terminating: *Balbhaddar Singh* v. *Badri Sah* (4). If there was reasonable and probable cause at the outset of the proceedings the defendant cannot be held liable in damages. What transpires later cannot *ex post facto* alter the position. It is for the plaintiff to prove that the defendant knew that there was no reasonable and probable cause for commencing his action: *Turner* v. *Ambler* (5).

(1) 9 C.B. (N.S.) 505.
(2) 46 Rev. Rep. 405, 410.
(3) 8 Q.B.D. 167, 171.
(4) 1 Luck. 215.
(5) 116 E.R. 98.

1932

N. S. IYER v. S.A.S.M.R. CHETTYAR.

PAGE, C.J.

In actions of this sort defendant will succeed if he proves that there was reasonable and probable cause for his action when he became the prosecutor. *Shrosbery* v. *Osmaston* (1) ; *Fitzjohn* v. *Mackinder* (2). Persisting in an action when facts subsequently revealed do not warrant such a course may be strong evidence of malice, but not of absence of reasonable and probable cause at the date of the institution of the proceedings : *Abrath* v. *North-Eastern Railway Company* (3).

McDonnell replied.

PAGE, C.J.—On the 27th of November, 1929, the following article was published in the *Rangoon Mail* and the *Rangoon Daily News* :

Money-lenders and Forged Currency Notes.

A Mandalay Associated Press Message contradicted.

To the EDITOR, RANGOON MAIL.

SIR,

On the 6th November 1929, there appeared an Associated Press news item in all newspapers regarding a case of forged currency notes being found in the business premises of a non-Chettyar firm, Messrs. P. L. S. and A. L. A. on B Road, Mandalay. This information is absolutely incorrect and misleading. The facts are as follows :—

In Mandalay there are seven non-Chettyar money-lending firms, P. L. S., R. M. G., R. K. K., A. L. A., P. M., P. R. M. and M. A. K.; these or rather the majority of them have been doing business for over two years, and their familiarity with the business and public have greatly improved their business. P. L. S. was at one time a clerk in the firm of S. A. S. M. Chettyar Firm. When so employed he desired to proceed to his native place and wanted leave and some money. This was refused, so he resigned his appointment and after borrowing Rs. 60 from a friend was about to leave Mandalay, when a complaint was lodged with the Police to the effect that P. L. S. had stolen Rs. 60 and was trying to abscond.

(1) 37 L.T. 792. (2) 9 C.B. (N.S.) 505.
(3) 11 Q.B.D. 440.

This however proved false and P. L. S. was acquitted. Since then P.L.S. started on his own and his example was followed by other Chettiar clerks with the result that much of the business once handled by the Chettyar firms went into the hands of the non-Chettyar houses and there was naturally jealousy. In 1923 this took place and in 1925, the non-Chettyar houses came into existence, and have been carrying on smoothly when a kind of boycott propaganda was started against them. Donations to the temple funds were refused entry in the temple books, all current accounts and material help that existed before were stopped, and non-Chettyar firm kandis and measures refused. These were put into effect since 1928 and are still in effect. As recently as the 28th October 1929, there was a quarrel on the street between P. L. S. and S. A. S. M. in the course of which there was an exchange of hot words, and the latter in the presence of a large number of people threatened to ruin both P. L. S. and his business. On the third day, that is, 1st November 1929, a report was lodged by a Burman to the effect that he had been paid by P. L. S. a forged currency note of rupees ten denomination for some jewellery pledged. The Police did not search the business premises of P. L. S. and A. L. on B Road, as stated in the Associated Press message, but the private residence of these two persons. The Police did not make a search of the premises at once, but a Policeman went straight to the window from behind which he extracted a plain envelope which contained 28 ten-rupee forged notes. A search of the other parts of the house and the business premises produced nothing. The matter was reported to the District Superintendent of Police who personally inspected the places and in his report stated that the case was a false one and further noted in that report that there was a good deal of jealousy between the Chettyars and the non-Chetty business firms and classing the case as false closed the case. In the course of the enquiry it was found that the Burman was not paid a currency note but in cash. The case was not sent up to the Courts but thrown out by the District Superintendent of Police on 3rd November 1929. The Associated Press message it will therefore be seen is not only false but also unjust.

Yours sincerely,
N. S. IYER,
Mandalay.

1932

N. S. IYER v. S.A.S.M.R. CHETTYAR.

PAGE, C.J.

It is common ground that this article contained defamatory statements of and concerning S. A. S. M. On the 11th of December 1929, S. A. S. M. R. Chettyar, the defendant, filed a complaint in the Court of the Senior Magistrate of Mandalay in Criminal Regular No. 60 of 1929 against the plaintiff, N. S. Iyer, a medical practitioner carrying on business in Mandalay, and S. C. Battacharjee, the Editor of the *Rangoon Mail*, for defamation under section 500 of the Indian Penal Code, and on the same day the defendant filed a similar complaint in Criminal Regular No. 59 of 1929 against Y. D. Motala, the editor of the *Rangoon Daily News*.

On the 4th of February 1930 the defendant compounded the offence alleged to have been committed by Battacharjee, and he was acquitted.

On the 7th of February 1930 the alleged offence by Motala was compounded, and he also was acquitted.

On the 15th of October 1930, after the case for the prosecution had been heard and the accused, N. S. Iyer, had been examined by the Court, the accused was discharged without being called on for his defence.

On the 29th November 1930 the plaintiff filed the present suit against the defendant to recover damages for malicious prosecution.

It is common ground that the prosecution of the plaintiff was instituted by the defendant, and that the criminal proceedings terminated in the plaintiff's favour.

The two issues which fall for determination in the appeal are whether the defendant prosecuted the plaintiff (1) without reasonable and probable cause, and (2) with malice. The onus of establishing these issues is on the plaintiff, and unless he obtains a finding in his favour on each of the issues the suit

1932

N. S. IYER
v.
S.A.S.M.K.
CHETTYAR.

PAGE, C.J.

must fail. The learned District Judge found for the defendant on both the issues, and dismissed the plaintiff's suit.

Now, what does "reasonable and probable cause" mean in a suit to recover damages for malicious prosecution?

In *Broad* v. *Ham* (1) Tindal, C.J. laid down that "in order to justify a defendant there must be a reasonable cause, such as would operate on the mind of a discreet man: there must also be a probable cause, such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge: otherwise there is no probable cause for him".

And in *Hicks* v. *Faulkner* (2) Hawkins, J. defined "reasonable and probable cause" as

"an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".

His Lordship added:

"The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable *bonâ fide* belief in the existence, of such a state of things as would amount to a justification of the course pursued in making the accusation complained of—no matter whether this belief arises out of the recollection and memory of the accuser, or out of information furnished to him by another. It is not essential in any case that facts should be established proper and fit and admissible as evidence to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between facts to establish actual guilt and those required to establish a *bonâ fide* belief in guilt should never be lost sight of in considering such cases as that I am now discussing. Many facts admissible to prove the latter would be wholly inadmissible to prove the former."

(1) 5 Bingham N.C. 722 at p. 723. (2) (1878) 8 Q.B.D. 167 at p. 171.

1932

N. S. IYER v. S.A.S.M.R. CHETTYAR.

PAGE, C.J.

Now, at the hearing of the appeal the learned advocate for the appellant contended that there must be reasonable and probable cause for prosecuting the plaintiff, not only when the defendant first set the criminal law in motion, but throughout the proceedings, and if at any stage of the prosecution (specially in respect of an offence compoundable at the discretion of the complainant), there is an absence of reasonable and probable cause it is no defence that when the defendant first became the prosecutor he had reasonable and probable cause for prosecuting the plaintiff.

In my opinion this contention is unsound in law, and cannot be accepted. I do not think that the case of *Fitzjohn* v. *Mackinder* (1) upon which the learned advocate for the appellant relied supports any such proposition or tells in the appellant's favour. In that case Mackinder having been bound over to prosecute Fitzjohn for perjury preferred an indictment against him at the Oakham Assizes. Fitzjohn was acquitted, and thereafter brought a suit to recover damages for malicious prosecution against Mackinder. The jury found a verdict for the plaintiff for £200 damages, but Williams, J. directed that a non-suit be entered. In *Fitzjohn* v. *Mackinder* (1), the only issue raised on appeal was whether the defendant had caused the prosecution of the plaintiff. The case proceeded upon the footing that the defendant at all material times knew that the plaintiff had not committed perjury, and was guilty of malice in preferring the indictment against the plaintiff. In the appeal before the Court of Common Pleas and also before the Exchequer Chamber it was contended that, inasmuch as the defendant had been bound over to prosecute he could not be regarded as

(1) (1861) 9 C.B. (N.S.) 505.

having prosecuted the plaintiff by preferring a bill of indictment against him at the Assizes. When the case was before the Court of Common Pleas Erle, C.J. and Williams, J. held that the defendant had not caused the prosecution of the plaintiff. Willes, J. *dissentiente*, was of opinion that the mere fact that the defendant had been bound over to prosecute the plaintiff was no defence to the suit, and that the order directing the defendant to prosecute the plaintiff at the Assizes "ought not to aid the defendant; first, because it was occasioned by his own contrivance and wrong, secondly, because it is void as a judicial act inasmuch as it was obtained by a fraud upon the Court *in scena non in foro*" [8 C.B. (N.S.) at p. 93]. In the Exchequer Chamber Blackburn and Wightman, JJ. were for affirming the judgment of the Common Pleas (Erle, C.J. and Williams, J.) on the ground that the defendant had not caused the prosecution of the plaintiff; Cockburn, C.J., Channell, B., and Bramwell, B. on the other hand held that the non-suit must be set aside and judgment entered for the plaintiff. The case is not a satisfactory authority, as four of the Judges who decided the case were in favour of the plaintiff, and four in favour of the defendants, and the decision of the majority of the Judges in the Exchequer Chamber was based on different, and to some extent inconsistent, grounds. Bramwell, B. held that the defendant was not liable for having preferred the indictment, but for "having *laid a case* before the Grand Jury, false to his own knowledge, which caused them to find a true bill". Cockburn, C.J. and Channell, B. however, were of opinion that "so far as the defendant is concerned the prosecution commences with the preferring of the indictment. Having been bound over to prosecute, to prefer

1932

N. S. IYER v. S.A.S.M.R. CHETTYAR.

PAGE, C.J.

an indictment is for him the first step of the prosecution". Their Lordships in these circumstances held that it must be taken that the defendant caused the prosecution of the plaintiff, and, following *Dubois* v. *Keats* (1), that the fact that the defendant was bound over to prosecute the plaintiff afforded no defence to the action. Cockburn, C.J., Bramwell, B., and Channell, B. however, were all of opinion that in one form or another the defendant was the prosecutor, and that finding was sufficient to support the decision of the majority of the learned Judges in the Exchequer Chamber. Whether or not the defendant was the prosecutor in the criminal proceedings is, of course, the first issue that arises in every suit to recover damages for malicious prosecution. In the passage in Cockburn, C.J.'s judgment in *Fitzjohn* v. *Mackinder* upon which the appellant relied, his Lordship observed that,

"no doubt, under ordinary circumstances, where the question of malice is still open the fact that some one else set the law in motion would be conclusive in favour of the defendant; or if the existence of reasonable and probable cause were in dispute, the fact that a judge or magistrate had spontaneously bound over the defendant would go very far to show that the prosecution was a proper one. But this reasoning can have no application where the maliciousness of the prosecution and the absence of probable cause are necessarily implied in the fact that we have the guilty man pursuing the innocent. To say, in any other view than the one I have just been putting, that a man's liability to an action for a malicious prosecution depends on his having first set the law in motion, appears to me untenable in principle and unwarranted by authority; and assuredly nothing short of the most conclusive authority would induce me to assent to such a position."

No Judge, I imagine, would hold to the contrary, and it appears to me plain that, because the defendant in a suit for malicious prosecution did

(1) 11 Ad. & E. 329.

not in the first instance set the law in motion against the plaintiff, that fact in itself does not determine that he was not the prosecutor. Whether the defendant was the prosecutor or not depends in each case upon the facts and circumstances disclosed in the evidence. *Weston* v. *Beeman* (1) and *Clements* v. *Ohrly* (2). If Cockburn, C.J. or Bramwell, B. in *Fitzjohn* v. *Mackinder* intended to lay down that in an action for malicious prosecution the defendant must have had reasonable and probable cause for prosecuting the plaintiff not only when he first became the prosecutor, but also throughout all the subsequent stages until the criminal proceedings terminated in the plaintiff's favour, with all respect I should have been unable to agree with them. But as I understand *Fitzjohn* v. *Mackinder*, Cockburn, C.J. and Bramwell, B. did not, and did not intend to, lay down any such proposition, which, in my opinion, is neither common law nor common sense. If the defendant in the present case had reasonable and probable cause for prosecuting the plaintiff at the time when he filed the complaint for defamation under section 500 of the Indian Penal Code and thus set the law in motion against the plaintiff, why should he be deprived *ex post facto* of that ground of defence because it subsequently transpired in the course of the proceedings that if at the time when he filed the complaint he had known the true facts he would not have been justified in launching the prosecution against the plaintiff, *Musgrove* v. *Newell* (3)? The law, in my opinion, was correctly laid down in *Delegal* v. *Highley* (4). That case was decided on a special demurrer on the ground "that the defendant had not averred that at the time he

(1) 27 L.J. Ex. 57.
(2) 2 Cur. & K. 686.
(3) 1 Mee. & W. 582.
(4) 3 Bing. (N.C.) 950.

1912

N. S. IYER
v.
S. A. S. M. R.
CHETTYAR

PAGE, C.J.

made the charge before the Magistrate he had knowledge of any facts sufficient to make him believe the truth of the charge." In delivering the judgment of the Court, Tindal, C.J. observed that,

"the gravamen of the declaration is that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time; and under the plea of not guilty the defendant must have failed at the trial if he had not proved that the facts of the case had been communicated to him, or at all events so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt in the mind of any reasonable man, previous to the charge being laid before the Magistrate. This was held by the Court of King's Bench in the course of last term upon a motion for a new trial in a case of *Decaux* v. *Hilton*. And if the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the Court in a plea of justification it is obvious that he must allege as a ground of defence that which is so important in proof under the plea of not guilty, viz., that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the Magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion."

[See also *Abrath* v. *North-Eastern Railway Company* (1).]

In my opinion the fact that the defendant in a suit for malicious prosecution persists in prosecuting a false charge against the plaintiff after it has become reasonably clear that there was no ground to justify the prosecution of the plaintiff would be evidence of malice, but would not be evidence that at the time when he became the prosecutor the defendant had acted without reasonable and probable cause. A man's motive is one thing, his opinion is something very different, and however malicious the motive may have been that induced the defendant to launch the prosecution against the plaintiff, the malice of the

(1) (1883) 11 Q.B.D. 440.

defendant does not preclude him from justifying the course he took by establishing that when he became the prosecutor he honestly and on reasonable grounds believed that the accused was guilty of the offence for which he was prosecuted. No doubt the absence of reasonable and probable cause is evidence of malice, for an honest belief in the guilt of the plaintiff based on reasonable grounds is the very essence of the defence to a suit for malicious prosecution. As Cockburn, C.J. pointed out in the passage in *Fitzjohn* v. *Mackinder* to which reference has been made,

"a prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or a Magistrate, or if spontaneously undertaken, from having been commenced under a *bonâ fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused".

[See also *Broad* v. *Ham* (1); *James Brown Lister* v. *Henry Perryman the younger* (2); *Shrosbery* v. *Osmaston* (3); *Brown* v. *Hawkes* (4); *Meering* v. *Graham White Aviation Company* (5).]

On the other hand, the fact that malice is proved is not evidence of the absence of reasonable and probable cause, for as Denman, C.J. observed in *Turner* v. *Ambler* (6), "the unfair use made of the charge may prove malice, as the jury held that it did, but does not raise any inference of a belief that there was no reasonable or probable cause; for the contrary belief is perfectly consistent with malice." In the course of the argument

(1) 5 Bingham N.C. 722.
(2) L.R. (1870) 4 H.L. 521.
(3) 37 L.T. 792.
(4) (1891) 2 Q.B. 718.
(5) 122 L.T. 44.
(6) (1847) 10 Q.B. 252 at p. 261.

1932

N. S. IYER v. S.A.S.M.R. CHETTYAR.

PAGE, C.J.

in the same case Patterson, J. observed: "The most express malice would not be sufficient if there were probable cause." In *Musgrove* v. *Newell* (1) Abinger, C.B., laid down, and I entirely agree with the law as enunciated by the learned Chief Baron in that case, that

> " to support an action of this kind there must be both malice in the defendant, and a want of reasonable and probable cause. It is admitted that even if there be excessive malice, if it is combined with probable cause, the action cannot be supported. So also it is admitted that a total want of probable cause is sufficient evidence from which the jury may infer malice, inasmuch as in such case the party could have no ground for proceeding in the charge but a malicious one. But, on the other hand, from any degree of malice you cannot infer a want of probable cause ; that stands upon a class of facts to be looked at by themselves."

Now, applying the above principles to the facts of the present case, the question is whether the plaintiff at the trial proved that at the time when the defendant launched the prosecution against him and thus became a prosecutor the defendant acted without reasonable and probable cause. Did the defendant then honestly believe on reasonable grounds that Dr. Iyer had caused the defamatory article to appear in the *Rangoon Mail*? What was the information in the defendant's possession at the time when he filed the complaint?

It is common ground—

(1) that at all material times there was ill-feeling between the Chetty and non-Chetty communities in Mandalay ;

(2) that there was enmity between the non-Chetty P. L. S. Palaniandy Pillai and the defendant;

(3) that P. L. S. Palaniandy Pillai was the patient and close friend of Dr. Iyer ;

(4) that Dr. Iyer was a leading member of the non-Chetty community;

(1) 1 Moo. & W. 582.

(5) that the article purported to have been signed by N. S. Iyer, Mandalay ;

(6) that Dr. Iyer followed the profession of a medical practitioner in Merchant Street, Mandalay ;

(7) that on his signboard Dr. Iyer styled himself N. S. Iyer ;

(8) that the only well-known member of the Tamil community in Mandalay, who described himself as N. S. Iyer, was the plaintiff ;

(9) that considerable excitement had been created among the Tamils in Mandalay by the publication of the article in suit ;

(10) that a persistent rumour was current among the Tamils in Mandalay that the plaintiff was the author of the article ;

(11) that on the 29th November two days after the article had appeared in the *Rangoon Mail* a pleader, Mr. Augustine, had written to Dr. Iyer asking him to inform Mr. Augustine whether the article had been written by the plaintiff or by some other person on his behalf, and that Dr. Iyer had not sent any written reply to Mr. Augustine.

(12) that the defendant held his hand from the 27th November until the 11th December before filing a complaint under section 500 of the Indian Penal Code against the plaintiff, and that during that period no public disclaimer was made by Dr. Iyer or appeared in the press or elsewhere in which Dr. Iyer denied that the article had been written by him or with his authority ;

(13) that the defendant consulted Mr. Vardon, a pleader, before he took steps to prosecute the plaintiff ; and

1932

N. S. IYER v. S.A.S.M.K. CHETTYAR

PAGE, C.J.

(14) that before filing the complaint on the defendant's behalf Mr. Vardon informed Dr. Iyer that the defendant was about to institute criminal proceedings against him upon the footing that the plaintiff was the author of the article in suit and that the plaintiff did not send any reply in writing to Mr. Vardon denying or admitting that he was the author of the article.

At the trial, in answer to questions put to him both in examination-in-chief and in cross-examination, the defendant stated that before he instituted criminal proceedings against the plaintiff he had sent a clerk from Mandalay to Rangoon to make enquiries at the office of the *Rangoon Mail* in Rangoon for the purpose of ascertaining, if possible, who had sent the article in question to the *Rangoon Mail* for publication. He further stated that the clerk on his return to Mandalay informed him that the writer was N. S. Iyer, Medical Hall, Merchant Street, Mandalay, and a typewritten letter containing the article and signed in that manner was adduced in evidence at the trial.

The learned District Judge held, and there was evidence to support the finding, that the defendant before filing the complaint had made enquiries from the *Rangoon Mail* in order to discover who was the writer of the article, and that the evidence of the defendant that his clerk had informed him on returning from Rangoon that the writer of article was N. S. Iyer, Medical Hall, Merchant Street, Mandalay, was corroborated by the letter containing the article, Exhibit D, which purported to have been signed in that manner. On the evidence adduced at the trial I am not prepared to disturb these findings of the learned District Judge.

1932

N. S. IYER v. S.A.S.M.R. CHETTYAR.

PAGE, C.J.

On behalf of the appellant it was strenuously argued that a reasonable and prudent man before instituting criminal proceedings against the plaintiff would have made further enquiries (1) by sending a letter to Dr. Iyer formally demanding that he should either admit or deny that he was the author of the article and (2) by taking steps to ascertain whether the signature purporting to be that of "N. S. Iyer" on Exhibit D was in the handwriting of the plaintiff.

Now, it would have been reasonable that the defendant should have made these further enquiries; but the question is whether in the circumstances it was unreasonable that the defendant should have launched the prosecution without making further enquiries, resting satisfied that the plaintiff was guilty upon the information then in his possession. [*Lister* v. *Perryman* (1); *Abrath* v. *North-Eastern Railway Company* (2); *Brown* v. *Hawkes* (3) and *Bradshaw* v. *Waterlow & Sons, Ltd.* (4).]

The defendant stated that when he filed the complaint he had no doubt that the article had been written by the plaintiff, and if the defendant honestly believed that the information then in his possession was true, and in particular the report that had been made to him by his clerk as the result of enquiries at the office of the *Rangoon Mail*, I am of opinion that the defendant had reasonable and probable cause for prosecuting the plaintiff. Why should the defendant in the light of the other circumstances of which he had information, as a reasonable and discreet man not have believed the report that his clerk had made to him on his return from Rangoon to Mandalay?

"What is now to be decided is this, how far this gentleman, having this information conveyed to him, may be said to have

(1) L. R. (1879) 4 H. L. 521.
(2) (1883) 11 Q.B.D. 440; (1886) 11 A.C. 247.
(3) (1891) 2 Q.B. 718.
(4) (1915) 3 K.B. 527.

1932

N. S. IYER
v.
S.A.S.M.R.
CHETTYAR.

PAGE, C.J.

reasonably and discreetly trusted his informant. Because I apprehend that you are to have regard to every shade of difference between the amount of credit to be given to one person and to another, according to the character of the informant. Information given by one person of whom the party knows nothing would be regarded very differently from information given by one whom he knows to be a sensible and trustworthy person. And the question whether or not a reasonable man would or would not act upon the information must depend in a great degree upon the opinion to be formed of the position and circumstances of the informant, and of the amount of credit which may be due under those circumstances to the person who thus conveyed the information."

Per Hatherley, L.C., in *Lister* v. *Perryman* (1).

The fact that the defendant selected this particular clerk to make enquiries in Rangoon indicates that the defendant regarded him as reliable and trustworthy, and I can see no reason why the defendant should not have believed what the clerk reported to him as the result of the enquiries that he had made. In my opinion it was not incumbent upon the defendant to have made any further enquiries having regard to the information already in his possession, and I have no doubt that the learned District Judge was right in holding that the defendant had reasonable and probable cause for instituting the criminal proceedings in Criminal Regular No. 60 of 1929 against the plaintiff.

In the circumstances disclosed in the evidence, however, it must not be taken that I should have arrived at the same conclusion upon the issue of malice as that which commended itself to the learned District Judge. But for the reasons that I have stated, and as the Court is of opinion that the plaintiff has failed to prove that the defendant prosecuted the plaintiff without reasonable and probable cause, it is unnecessary to determine the issue of malice, and I refrain from expressing an opinion upon it one way or the other.

(1) L.R. 4 H.L. 521 at p. 531.

1932

N. S. IYER
v.
S.A.S.M.R. CHETTYAR.

PAGE, C.J.

For the purpose of deciding this appeal it is sufficient to hold that the plaintiff did not prove that the defendant prosecuted the plaintiff without reasonable and probable cause, and upon this issue the finding of the learned District Judge must be upheld. The result is that the appeal is dismissed with costs.

MYA BU, J.—I agree.

APPELLATE CIVIL

Before Sir Arthur Page, Kt., Chief Justice, and Mr Justice Mya Bu.

1932

March 23.

LILLY SWAINE
v.
DENNIS SWAINE AND ANOTHER.*

Divorce—Indian Divorce Act (IV of 1869), s. 14—Petitioner guilty of adultery—Discretion of Courts in India—Unfettered exercise of discretion—Dicta of English Judges—Value of the dicta—Appellate Court's function.

A Court administering divorce jurisdiction in India has a discretion, where the petitioner has been guilty of adultery during the marriage, to grant or refuse a decree for dissolution of the marriage as it deems fit having regard to the circumstances of the particular case before it. This discretion is unfettered; but the Court should exercise it not capriciously, but cautiously and carefully, and as far as possible consistently, both with regard to the parties and the interest of public morality.

Brooke v. *Brooke*, (1912) P. 205; *Holland* v. *Holland*, (1918) P. 273; *Wickins* v. *Wickins*, (1918) P. 265—*followed*.

The dicta of Judges in England explaining the tests they would respectively apply in exercising their discretion to grant or refuse a divorce in the particular cases before them, are not to be regarded as laying down principles or rules of practice by which the discretion of the Courts in India is fettered or limited. They are merely illustrations of matters to which the Courts will have regard in coming to a judicial determination on the matter and as such only are entitled to consideration and respect.

Aptad v. *Aptad*, (1930) P. 264; *Elliott* v. *Elliott*, 37 T.L.R. 834; *Hampson* v. *Hampson*, (1914) P. 104; *Morgan* v. *Morgan*, L.R. 1 P. & M. 644; *Pretty* v. *Pretty*, (1911) P. 83; *Stuart* v. *Stuart*, (1930) P. 77; *Tichner* v. *Tichner*, (1920) P. 118; *Wain* v. *Wain*, 101 L.T. 815; *Wilkinson* v. *Wilkinson*, 37 T.L.R. 835n; *Wilson* v. *Wilson*, (1920) P. 29—*referred to*

---

*Civil First Appeal No. 213 of 1931 from the order of this Court on the Original Side in Civil Regular No. 9 of 1931.

1932

SWAINE v. SWAINE.

Hines v. *Hines*, [1918] P. 364—*dissented from*.
Ramsay v. *Doyle*, I.L.R. 30 Cal. 489—*doubted*.

Where the trial Court has properly exercised its discretion, the appellate Court will not interfere with it or substitute its own discretion, unless the judgment is erroneous.

Gregory for the appellant.

Paw Tun for the respondent.

PAGE, C.J.—On the 7th of September 1920, the appellant married Dennis Swaine, the son of the second respondent by a former marriage. At the time of her marriage the appellant was 22 years of age, and in 1925 a girl was born to Dennis and Lilly Swaine. On the 30th of January 1931, the appellant obtained a decree *nisi* for dissolution of her marriage with Dennis Swaine on the ground of his adultery and desertion. During the period that intervened between the passing of the decree *nisi* for dissolution of the marriage and the appellant's application for a decree absolute the second respondent, on the 27th of July, 1931, intervened in the divorce proceedings by a petition presented under section 16 of the Indian Divorce Act. In the petition she prayed that the decree *nisi* should not be made absolute upon the ground that the appellant during her marriage with Dennis Swaine had committed adultery with the intervener's present husband, and that her adultery had not been brought to the notice of the Court during the divorce proceedings. The learned Judge, after hearing the witnesses and the arguments presented on behalf of the contending parties, found as a fact that during her marriage with Dennis Swaine the appellant had been guilty of adultery with her mother-in-law's second husband, one Keith Sharrock.

Notwithstanding the appellant's adultery, and her persistent denial that she had been guilty of

1932

SWAINE v. SWAINE.

PAGE, C.J.

*misconduct, and the fact that she had concealed her adultery from the Court during the hearing of the divorce proceedings, it was strenuously urged at the trial that the learned Judge ought to exercise his discretion in favour of the appellant, and to make the decree dissolving her marriage with Dennis Swaine absolute. The learned Judge, however, refused to exercise his discretion in the appellant's favour, rescinded the decree *nisi*, and dismissed the appellant's petition for the dissolution of her marriage.*

At the hearing of the appeal it was contended, (1) that the learned Judge had not arrived at the right conclusion upon the evidence when he found that the petitioner had been guilty of adultery, and (2) that in refusing to make the decree absolute and dismissing the petition the learned Judge had not properly exercised the discretion with which he was invested.

It cannot be doubted that there was abundant evidence before the learned Judge, if he accepted it, to justify the finding that the petitioner had been guilty of adultery with Keith Sharrock during her marriage with Dennis Swaine. On appeal, however, the learned advocate for the appellant urged that the evidence adduced on behalf of the intervener was unworthy of credence, and ought not to have been believed.

[His Lordship then discussed the evidence and proceeded.]

The result is that the finding of the learned Judge that during her marriage with Dennis Swaine the appellant had been guilty of adultery must be upheld. Indeed, in my opinion, it was the only reasonable

* Reported at I.L.R. 10 Ran. 115.—ED.

1932

SWAINE v. SWAINE.

PAGE, C.J.

inference that could have been drawn from the evidence by the learned trial Judge.

The second question is whether, notwithstanding her adultery, the Court in the exercise of its discretion ought to grant the petitioner a divorce. If a husband or a wife seeks to be released by the Court from the tie of marriage the petitioner ought to come to the Court with clean hands; but, human nature being what it is, the Court has been invested with a discretion, where the petitioner has been guilty of adultery during the marriage, to grant or refuse a decree for dissolution of the marriage as it deems fit having regard to the circumstances of the particular case before it. In this respect section 14 of the Indian Divorce Act corresponds to section 178 (3) of the English Judicature (Consolidation) Act, 1925, which reproduced section 31 of the Matrimonial Causes Act, 1857, and in exercising the discretion with which they have been entrusted the Courts in India, as nearly as may be, will be guided by the principles and rules upon which the Divorce Division of the High Court in England acts and gives relief. But what are those principles and rules, and how do the authorities in England stand? In my opinion the correct, and, if I may venture to say so, the commonsense view of the way in which the Court should approach the consideration of a problem of this nature was stated as follows by Evans, P. in *Brooke* v. *Brooke* (1):

"The discretion conferred by the Act was, in my opinion, intended to be unfettered; though it should, no doubt, be exercised not capriciously but cautiously and carefully, and, as far as possible, consistently, not only in regard to the parties themselves, but also with reference to the interests of

(1) (1912) P. 205n.

public morality, and of decent society, which is a consideration that must not be forgotten."

In *Wickins* v. *Wickins* (1) the Court of Appeal (Swinfen Eady, M.R., Bankes, L.J. and Eve, J.) observed:

"From time to time the Court has referred to particular circumstances as justifying it in exercising its discretion in favour of granting a decree in cases where, having regard to section 31, the Court was not bound to pronounce such decree. We agree with the view expressed by the President in *Brooke* v. *Brooke* that where Parliament has invested the Court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greater fetters upon the judge of the Divorce Division than the Legislature has thought fit to impose."

See also *Holland* v. *Holland* (2).

No doubt the social conventions of to-day differ widely from those which obtained when Lord Penzance decided *Morgan* v. *Morgan* in 1869 (3), and post-war Judges are wont to treat matrimonial laxity with greater leniency than it would have received at the hands of the Judges who lived in the mid-Victorian era. *Tempora mutantur et nos mutamur in illis.* It is only natural, therefore, that from time to time the Judges who administer divorce jurisdiction should refer to various matters which in their opinion ought to be borne in mind when the Court is considering whether it should exercise its discretion in favour of a petitioner who has been guilty of adultery during the subsistence of the marriage. But I decline to regard these *dicta* as laying down principles or rules of practice by which the discretion of a Judge in any other case is fettered or limited. In my opinion they "are merely illustrations of matters to which the Court will have regard in coming

(1) (1918) P. 265 at p. 272. (2) (1918) P. 273.
(3) L.R. 1 P. & M. 644.

1932

SWAINE v. SWAINE.

PAGE, C.J.

to a judicial determination on the matter" [*Wickins* v. *Wickins* (1)], and the *dicta* of Judges explaining the tests which they respectively are disposed to apply for the purpose of determining whether the Court ought to exercise its discretion in favour of the petitioner, although entitled to consideration and respect [*Wilkinson* v. *Wilkinson* (2)], do not free or prevent the Court, which is bound to follow and apply the general principles laid down by the Court of Appeal in *Wickins* v. *Wickins* (1) and *Holland* v. *Holland* (3), from exercising its own discretion in the way that it deems best in the circumstances of the case that is before it. Indeed, the tests referred to from time to time by Judges sitting in the Divorce Division in England for determining how the Court should exercise its discretion in this matter are various and not always consistent. For instance, in *Stuart* v. *Stuart and Holden* (4), Hill, J. observed that

"this is a case where the husband not only did not make a disclosure of his own adultery at the time he was seeking a decree *nisi* against his wife, but when the charge was made against him he strenuously denied it, fought it throughout, and gave evidence upon oath, and was disbelieved by the Court. If in those circumstances the Court is still to exercise its discretion on behalf of a man who is not only an adulterer, but a perjurer, it would be to encourage people to perjury, first of all to concealment and then to perjury, and every one who is guilty and himself seeking relief from the other spouse would be encouraged to run the risk of first of all making no disclosure, in the hope that the Court would be hoodwinked, and secondly, of successfully perjuring himself. I think that that would be making a most mischievous use of the Court's power to use its discretion on behalf of a spouse who has been guilty of adultery.

"It is the condition upon which the Court can properly exercise its discretionary power that there should be complete frankness on the part of those who are asking for its discretion. Therefore,

(1) (1918) P. 265 at p. 272.
(2) 37 Times L.R. 835.
(3) (1918) P. 273.
(4) (1930) P. 77.

even assuming that if all the facts had been disclosed by the petitioner on the hearing when asking for a decree *nisi* the Court would have exercised its discretion in his favour, after the course he has chosen to pursue I am satisfied it is not a case in which the Court ought to exercise its discretion."

On the other hand in *Apted* v. *Apted* (1) Lord Merrivale, P. stated that,

" as to the admitted falsehoods of the petitioner it has been said on various occasions when falsehoods of petitioners have been exposed that in such cases the Court may properly consider whether on a true statement of the facts in the first instance the discretion would have been exercised. I do not dissent from this view subject to the provision that it pre-supposes the Court to have at length learned the true facts."

Thus the oracle has spoken both at Delphi and at Dodona, but to which voice am I to hearken ? [See *Wain* v. *Wain* (2) ; *Pretty* v. *Pretty* (3) ; *Hampson* v. *Hampson* (4) ; *Wilson* v. *Wilson* (5) ; *Elliott* v. *Elliott* (6) ; *Wilkinson* v. *Wilkinson* (7) ; *Tickner* v. *Tickner* (8).]

The correct view, as I apprehend the matter, is that the Court, for the purpose of determining whether it ought to exercise its discretion in favour of a petitioner who has been guilty of adultery, is bound to follow the general principles and rules laid down by the Court of Appeal in *Wickins* v. *Wickins* and *Holland* v. *Holland* (*supra*) and also should bear in mind, so far as possible, the various matters which other Judges have thought well to take into consideration but that it would be neither expedient nor in accordance with law—indeed, it would be running counter to the statute—that the Court should be compelled to search among the various authorities for subsidiary tests by which the unfettered judicial discretion entrusted to it is to be limited and controlled. I confess, with all respect, that I am unable

(1) (1930) P. at p. 264.
(2) 101 L.T. 815.
(3) (1911) P. 83.
(4) (1914) P. 104.
(5) (1920) P. 20.
(6) 37 Times L.R. 834.
(7) 37 T.L.R. 815 n.
(8) (1924) P. 118.

1932

SWAINE v. SWAINE.

PAGE, C.J.

to subscribe to the view upon this subject that was expressed by McCardie, J. in *Hines* v. *Hines and Burdett* (1). It appears from the judgment in that case that McCardie, J. was strongly of opinion that he ought to exercise his discretion in favour of the petitioner, and the learned Judge further stated that the Court of Appeal had laid down in *Wickins* v. *Wickins* and *Holland* v. *Holland* (*supra*) that his discretion was wholly unfettered. His Lordship then proceeded to add "But the exercise of a discretion, though unfettered is not to be the mere exercise of caprice." Of course not; but is the considered and reasonable exercise of an unfettered discretion capricious merely because other judges, taking into account the same considerations but appraising them differently, might have come to a different conclusion? In my opinion, a Judge administering divorce jurisdiction in India must follow the principles laid down in *Wickins* v. *Wickins* and *Holland* v. *Holland*, and take into consideration the various *dicta* in the decided cases, but bearing in mind, as Lord Merrivale pointed out in *Apted* v. *Apted* (2), that "to formulate and limit with precision the grounds on which discretion is to be exercised is a practical impossibility", it is the duty of the Judge to exercise his own discretion in the matter, and to decide as he deems fit, having regard to the facts and circumstances of the case, whether he ought or ought not to grant the petitioner a divorce, notwithstanding that during the marriage the petitioner had committed adultery.

Now, the petitioner in the present case not only concealed from the Court the fact that she had committed adultery in the proceedings in which she prayed the Court to grant her a decree for dissolution

(1) (1918) P. 364. (2) (1930) P. at p. 285.

of her marriage, but during the intervention proceedings has persistently, deliberately and foolishly denied that adultery ever took place. In my opinion in circumstances such as those obtaining in the present case the learned Judge after hearing the parties and their witnesses, in the exercise of his discretion has refused to grant a decree for dissolution of marriage to a petitioner who has been guilty of adultery, the Court on appeal should be slow to interfere with the order that has been passed by the learned Judge.

"The question for consideration by this Court is whether his judgment is erroneous, and not whether we should have exercised the discretion in the same manner as the judge below did. There is no appeal from his discretion to our discretion, and the appellant is not entitled to succeed unless the judgment is erroneous."

[Per Swinfen Eady M.R. in *Holland* v. *Holland* (*supra*) at page 280.]

Having regard to the circumstances disclosed in the evidence it cannot be held that the judgment of Otter, J. was erroneous, or that the learned Judge was judicially bound to exercise his discretion in favour of the petitioner, and I am not prepared to interfere with the order that he passed. The appeal, therefore fails and must be dismissed. I desire to add that I am not disposed, as at present advised, to accept the judgment of the Calcutta High Court in *Ramsay* v. *Boyle* (1) as correctly laying down the law, and if and when the occasion arises the decision in that case may require to be reconsidered.

There will be no order as to costs.

MYA BU, J.—I agree.

---

(1) (1903) I.L.R. 30 Cal. 489.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932

March 31.

R.M.A.R.M. CHETTYAR FIRM
v.
N.S.P.R.M. CHETTYAR FIRM.*

Costs—Mortgage suit—Puisne mortgagee's liability for costs.

Normally a puisne mortgagee impleaded as a defendant in a mortgage suit is not ordered to pay the costs of the suit, but he may so conduct himself that the Court would be justified in ordering him in the circumstances of the particular case to pay them. If the plaintiff seeks to make a puisne mortgagee liable for the costs, he should take care that an order against the defendant mortgagee to pay the costs is passed by the Court, and inserted in the decree.

The trial Court passed a preliminary decree in the following terms: "There will be a preliminary decree in the usual form for Rs. 12,000 with costs, against the two defendants, the decree against the second defendant as subsequent mortgagee, and costs against the first defendant on the uncontested scale."

Held that, having regard to the language of the judgment, the puisne mortgagee was not liable under the decree for the costs of the suit.

K. C. Bose for the appellants. A puisne mortgagee who is made a party to a mortgage suit is not personally liable for costs that may be awarded in the suit unless there is a clear indication to that effect in the decree. In *Maung Po Mya* v. *M. A. S. Firm* (1) the law is not correctly laid down. The authorities cited therein do not support the decision. See Civil First Appeal No. 36 of 1932 of this Court and *Maharaj Bahadur* v. *Basiruddin* (2). In this case, the decree merely states that there will be a "preliminary mortgage decree in the usual form, with costs against the two defendants". This is not sufficient to fix a personal liability for costs on the puisne mortgagee.

* Civil First Appeal No. 199 of 1931 from the order of the District Court of Myaungmya in Civil Regular No. 8 of 1930.

(1) I.L.R. 9 Ran. 186. (2) 41 Cal. L.J. 607.

1932

R.M.A.R.M. CHETTYAR FIRM v. N.S.P.R.M. CHETTYAR FIRM.

N. N. Burjorjee for the respondents. The term "Mortgage decree in the usual form" means merely that the puisne mortgagee has the right to redeem the mortgage and moreover any surplus of the sale-proceeds left over after satisfying the first mortgagee will go to him. In this case, the Court gave a decree "with costs against the two defendants". The puisne mortgagee contested the suit whereas the mortgagor confessed judgment; the costs against the latter were therefore awarded on the uncontested scale. All these facts show that the Court intended to make the puisne mortgagee personally liable for the costs.

PAGE, C.J.—This appeal must be allowed.

This proceeding arises out of a petition by the decree-holder in a mortgage-suit for the purpose of amending the preliminary decree so that it should conform with the judgment of the Court. The object with which this amendment is sought is that the plaintiff decree-holder should be in a position to execute the decree for the costs of the suit against a puisne mortgagee, who was impleaded as a defendant.

Now, it is common ground that in a suit brought by a mortgagee against the mortgagor and a puisne mortgagee, the costs of the suit will be added to the mortgage debt and form part of the sum in respect of which the final decree for the sale of the mortgaged property will be passed, and if the proceeds of sale are not sufficient to liquidate the amount decreed to the mortgagee a personal decree will be passed against the mortgagor. Normally, a puisne mortgagee is not ordered to pay the costs of the suit. The puisne mortgagee is impleaded as defendant because in a mortgage suit it is incumbent upon the mortgagee to make defendants all persons

1932

R.M.A.R.M. CHETTYAR FIRM v. N.S.P.R.M. CHETTYAR FIRM.

PAGE, C.J.

who would be entitled to redeem the property by paying the mortgage debt. But whether the puisne mortgagee is a party to the suit or not the Court-fee would have to be defrayed in the first instance by the plaintiff, and it is to the advantage of the plaintiff to implead the puisne mortgagee so that there can be no question thereafter as to which of the two mortgagees takes priority. It may be, however, that the defendant mortgagee has so conducted himself that it is right and proper that he should be ordered to pay the costs of the suit. Each case turns on its own facts. In my opinion, however, if it is sought to make a defendant mortgagee liable for the costs of the suit the plaintiff should take care that an order against the defendant mortgagee to pay the costs is passed by the Court, and inserted in the decree.

Now, in the present case the question turns on whether the judgment of the Court, ordering that a preliminary mortgage decree should issue, indicated with sufficient clearness that the Court also ordered that the defendant mortgagee should pay the costs of the suit. The material words in the order are "There will be a preliminary decree in the usual form for Rs. 12,000 with costs, against the two defendants, the decree against the second defendant as subsequent mortgagee, and costs against the first defendant on the uncontested scale."

In the preliminary decree no order or direction is found to the effect that the appellant, who was a puisne mortgagee defendant, was to pay the costs of the trial, and no reference to such an order is found in the final decree. The proceeds of sale being insufficient to satisfy the sum decreed to the first mortgagee the present petition was filed for an order that the preliminary decree should be amended, so that it

should clearly indicate that an order had been passed that the appellant should pay the costs of the suit. In my opinion the amendment ought not to be allowed. I am not satisfied upon a true construction of the language used in the judgment that it amounts to an order that the appellant should pay the costs of the suit. As I apprehend the meaning of the relevant passage in the judgment what was intended was that there should be a preliminary mortgage decree in the usual form for Rs. 12,000 and costs against the two defendants. A preliminary decree in the usual form with costs would be a decree against the first defendant who was the mortgagor for the amount due under the mortgage and the costs, and against the second defendant that his mortgage is postponed to the mortgage of the plaintiff, and that if he wishes to redeem he must do so by paying the amount due in respect of the plaintiff's mortgage. It would be unusual that a preliminary mortgage decree should include a direction that the puisne mortgagee should pay the costs of the suit. The learned District Judge I think has made the meaning of the passage clear by adding that the decree is to be against the defendant mortgagee as subsequent mortgagee, that is to say, that the mortgage of the plaintiff is to have precedence to the mortgage of the defendant mortgagee, and that the plaintiff is to have "costs against the first defendant on the uncontested scale" which means that the plaintiff is to be paid his costs by the first defendant not on the contested scale but on the uncontested scale inasmuch as the first defendant did not contest the suit. In my opinion it is not clear from the terms of the decree that the defendant mortgagee was ordered to pay the costs of the trial personally.

1932

R.M.A.R.M. CHETTYAR FIRM v. N.S.P.R.M. CHETTYAR FIRM.

PAGE, C.J.

In those circumstances, in my opinion, the appeal succeeds, the order of the learned District Judge of Myaungmya is set aside, and the petition dismissed. We make no order as to costs.

MYA BU, J.—I agree.

APPELLATE CRIMINAL.

Before Sir Arthur Page, Kt., Chief Justice, and Justice Mya Bu.

1932

April 7.

KING-EMPEROR
v.
U SAN WIN.*

Appeal against acquittal—Miscarriage of justice—Appraisement of evidence—Grounds for interference—Code of Criminal Procedure (Act V of 1898), s. 417—Expediency of filing appeal—Limitation Act (IX of 1908), Sch. I, Art. 157.

An appeal against an acquittal should only succeed where the order of acquittal was clearly wrong, and involved a miscarriage of justice. The High Court ought not to interfere if there is no question of law involved in the appeal but only the appraisement of evidence.

Deputy Legal Remembrancer v. *Karuna Baislobi*, I.L.R. 22 Cal. 104—*referred to.*

In the public interest and in justice to the person whose acquittal is sought to be reversed, Government should file the appeal with all reasonable expedition, although the law allows six months within which such appeals may be presented.

Empress of India v. *Yacub Khan*, I.L.R. 5 All. 253—*referred to.*

Gaunt (Assistant Government Advocate) for the Crown. There has been a delay of over five months in the filing of this appeal since the acquittal. A Departmental Circular (No. 30 of 1924, Burma, Judicial Department) deprecates delay and states that sanction would ordinarily be refused if an appeal is attempted

* Criminal Appeal No. 878 of 1932 from the order of the Sessions Judge of Myaungmya in Criminal Appeal No. 449 of 1931.

1932

KING-EMPEROR v. U SAN WIN.

"to be filed after the expiry of three months. The Circular is not intended to and does not override the provisions of law. Under Article 157, Schedule I, of the Limitation Act, Government is entitled to file the appeal within six months from the acquittal. The delay was unavoidable. In this case a magistrate has been defamed, and in the interest of the administration of justice this appeal has been filed.

PAGE, C.J.—This is an appeal by the Local Government presented by the learned Government Advocate, against an order of acquittal passed by the learned Sessions Judge of Myaungmya.

On the 28th of August 1931, the respondent was convicted of defamation under section 500, Indian Penal Code, and was sentenced to pay a fine of Rs. 100 or in default two months' simple imprisonment, by the 2nd Additional Special Power Magistrate, Myaungmya.

On the 6th of October 1931, the conviction and sentence were set aside, and an order acquitting the respondent was passed by the learned Sessions Judge, Myaungmya. Five and a half months elapsed before the present appeal was filed on behalf of the Local Government, and I desire to repeat what was said by Stuart, C.J. and Straight, J. in *Empress of India* v. *Yakub Khan* (1), where their Lordships observed that

"It is true that a period of six months is the limitation allowed by law for appeals from acquittals, but we would earnestly commend to the attention of Government the policy of, and necessity for, such appeals, when made, being preferred with all reasonable expedition possible, not only in the public interest, but in justice to the persons whose acquittal it is sought to reverse."

(1) (1883) I.L.R. 5 All. 233 at p. 255.

1932

KING-EMPEROR v. U SAN WIN.

PAGE, C.J.

Now, the intention of the Legislature in enacting section 417 of the Code of Criminal Procedure, was pointed out by the learned judges in *Deputy Legal Remembrancer* v. *Karuna Baistobi and another* (1). In that case Banerjee and Sale, JJ., observed that

"the law, by limiting the right of appeal against judgments of acquittal to the Local Government, prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal, and evidently intends that such interference shall take place only in cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter. We think it is a most salutary principle, quite as necessary for the well-being of society as the repression and punishment of crime, that interference with judgments of acquittal should take place only in cases where there has been a miscarriage of justice of a grave nature."

The present appeal is based solely on the allegation that the learned Sessions Judge did not rightly appraise the evidence adduced at the trial. No question of law is involved in the appeal, which turns on the facts. An appeal against an acquittal in such circumstances would only succeed where the order of acquittal was clearly wrong, and involved a miscarriage of justice.

We have had the advantage of hearing Mr. Gaunt, the learned Assistant Government Advocate, in support of the appeal but, notwithstanding his argument, after perusing the record I am bound to say that I am at a loss to understand the ground upon which it was thought that the filing of this appeal was necessary or justifiable in the public interest. I have studied the proceedings in this case with care, and, in my opinion, there was ample evidence to support the order of acquittal that was passed; and, upon the evidence adduced at the trial the

(1) (1898) I.L.R. 22 Cal. 164 at p. 170.

order of acquittal was plainly right. With all due respect I do not think that the trying magistrate appreciated the significance of the evidence at the trial. To illustrate the view I take it is enough that no reference was made by the trying magistrate in his judgment to Exhibit 1, which was a most important document, and threw a flood of light upon the problem under consideration.

1932
KING-EMPEROR
v.
U SAN WIN.
PAGE, C.J.

In my opinion, there is no substance in this appeal, which is summarily dismissed.

MYA BU, J.—I agree.

CRIMINAL REVISION.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932
April 7.

KING-EMPEROR
v.
U SAN WIN.*

Revision—Discharge of accused—Order in substance and in fact an acquittal.

At the trial, the accused was duly charged with an offence under section 385, Indian Penal Code, and was convicted after having been called on to enter upon his defence. On appeal, the Sessions Judge set aside the conviction and sentence and ordered the discharge of the accused. The Local Government applied for revision against "the order of discharge".

Held, that the order discharging the accused was in substance and in fact an order of acquittal and no revision lay therefrom. Treating the application as an appeal, *held* it was groundless as the evidence justified the acquittal.

Gaunt (Assistant Government Advocate) for the Crown.

PAGE, C.J.—This an application for revision against what is stated to be an order of discharge passed on appeal by the learned Sessions Judge of Myaungmya, and the proceedings are akin to, and arise out of, the same matter in respect of which the appeal, No. 878 of 1932, has been filed.

* Criminal Revision No. 1188 of 1932 from the order of the Sessions Judge, Myaungmya, in Criminal Appeal No. 450 of 1931.

1932

KING-EMPEROR v. U SAN WIN.

PAGE C.J.

The respondent was convicted of an offence under section 385, Indian Penal Code, and sentenced to pay a fine of Rs. 100 or in default to undergo two months' rigorous imprisonment, by the 2nd Additional Special Power Magistrate, Myaungmya. He appealed to the Sessions Judge of Myaungmya, and on the 13th October 1931, the conviction and sentence were set aside, and the learned Sessions Judge ordered the discharge of the accused.

On the 19th March 1932, an application for revision of what is alleged to be the order of discharge by the learned Sessions Judge was filed on behalf of the Local Government by the learned Government Advocate.

In my opinion this application for revision is both groundless and misconceived. It is groundless because there was ample evidence to justify the order of acquittal which, in my opinion, was the correct order to make, having regard to the facts and circumstances disclosed in the evidence. It is misconceived because, although the order purports to be an order discharging the accused, it was in substance and in fact an order of acquittal. At the trial a charge was framed against the accused, and he was convicted after having been called on to enter upon his defence. In such circumstances the order against which the present application was filed was in truth and in fact an order acquitting the respondent. From such an order an appeal would lie, and an application in revision would not be entertained. Treating the present application in revision as an appeal, however, for the reasons that I have stated there is no substance in it, and whether the present application is regarded as an application in revision or an appeal, it is summarily dismissed.

MYA BU, J.—I agree.

CRIMINAL REVISION.*

Before Mr. Justice Heald and Mr. Justice Brown.

KING-EMPEROR

v.

NGA AUNG MYAT.*

1932

April 8.

Alteration of sentence—Appellate Court's powers—Portion of term of imprisonment undergone—Substitution of sentence of whipping—Alteration without enhancement—Code of Criminal Procedure (Act V of 1898), s. 423.

Under s. 423 of the Code of Criminal Procedure, an appellate Court has power to alter a sentence of imprisonment into one of whipping where the offence is punishable with whipping in lieu of any other punishment. It can so alter the sentence in the case of an accused who has already undergone a part of the original sentence of imprisonment.

The Court must however take into consideration the part of the sentence already undergone and may impose a sentence of whipping provided it does not become in effect an enhancement of the original sentence.

The accused was sentenced to suffer nine months' rigorous imprisonment under s. 457, Indian Penal Code. He appealed to the Sessions Court and asked, *inter alia*, for conversion of the sentence into one of whipping. The Sessions Judge was of opinion that the sentence could not be altered. When the case reached the High Court, the accused had undergone three and a half months of the sentence.

Held, that the alteration of the sentence into one of whipping at this stage was inappropriate.

King-Emperor v. Chit Pon, I.L.R. 7 Ran. 319—*referred to*.

King-Emperor v. Nga Tun Seiu, 3 U.B.R. 32; *King-Emperor v. Po Wun*, 8 L.B.R. 466; *Queen-Empress v. Banda Ali*, 6 Ben. L.R. 95—*dissented from*.

BROWN, J.—The respondent, Nga Aung Myat, was convicted under the provisions of the second part of section 457, Indian Penal Code, and sentenced to suffer nine months' rigorous imprisonment. He appealed to the Sessions Court, and one of the grounds in his memorandum of appeal was that a sentence of whipping would have been more appropriate. The Sessions Judge with regard to this prayer remarked that the sentence could not be altered as the respondent had already undergone a portion of

* Criminal Revision No. 200A of 1932 from the order of the 3rd Additional Special Power Magistrate of Twante in Criminal Trial No. 142 of 1931.

1932

KING-EMPEROR v. NGA AUNG MYAT.

BROWN, J.

the term of imprisonment. The offence of which the respondent has been found guilty is punishable with whipping in lieu of any other punishment.

In the case of *King-Emperor* v. *Po Wun* (1) an accused person had been sentenced to six months' rigorous imprisonment for theft under section 379 of the Indian Penal Code. On appeal the Sessions Judge altered the sentence to one of whipping. On the date of the Sessions Judge's order the accused had already served 14 days of the sentence of imprisonment. It was held that as for the particular offence whipping could only be imposed in lieu of any other punishment the intention of the law was infringed by ordering a man to be whipped after he had already served part of the sentence of imprisonment. This case was followed in Upper Burma in the case of *King-Emperor* v. *Nga Tun Sein* (2) and the Sessions Judge was bound to follow those rulings. It has been suggested however that the law was not correctly laid down in those cases and the proceedings in this case have been called in revision to consider the point. Under the provisions of section 423 of the Code of Criminal Procedure an appellate Court has power, without altering the finding, to alter the nature of the sentence passed but not so as to enhance the same. I know of no provision of the Code of Criminal Procedure, or any other Act, which would prevent an appellate Court from altering a sentence of imprisonment into a sentence of whipping. It seems to me that provided the effect of the change is not to enhance the sentence it is open to an appellate Court to alter a sentence of imprisonment into one of whipping where the accused person has been found guilty of an offence which is punishable with whipping

(1) (1916) 8 L.B.R. 466. (2) (1917) 3 U.B.R. 32.

in lieu of any other punishment. The effect of such orders passed by the appellate Court is to set aside the sentence of imprisonment altogether, and the only sentence remaining is that of whipping.

In considering what sentence it should itself inflict, the appellate Court should, of course, bear in mind the part of the original sentence which before its order the accused person has, in fact, undergone and this part of the original sentence together with the sentence that the appellate Court inflicts should not in effect be more severe than the sentence passed by the trial Court.

The question whether, and in what circumstances, the substitution of a sentence of whipping for a sentence of imprisonment would amount to enhancement of the sentence was considered by a Full Bench of this Court in the case of *King-Emperor* v. *Chit Pon and another* (1). In the judgment in that case reference was made to the case of *Queen-Empress* v. *Banda Ali* (2), in which case it was held that the substitution of a sentence of imprisonment for a sentence of whipping should always be regarded as an enhancement of the original sentence. This view of the law was not accepted by the Full Bench which suggested that ordinarily the substitution of a sentence of 30 stripes for a sentence of one year's rigorous imprisonment or more, or the substitution of a sentence of 25 stripes for a sentence of 9 months' imprisonment or more, or the substitution of a sentence of 20 stripes for a sentence of 6 months' imprisonment or more would not amount to enhancement of the sentence within the meaning of section 423 (1) (*b*) of the Code of Criminal Procedure. In the present case the appellant was sentenced by the Magistrate to 9 months' rigorous imprisonment and the substitution of a sentence of 25 lashes by the appellate Court would

(1) (1929) I.L.R. 7 Rang. 319. (2) 6 Ben. L.R. (App.) 95.

1932

KING-EMPEROR v. NGA AUNG MYAT.

BROWN, J.

not, by itself, have been an enhancement of the sentence but in deciding what sentence to pass the Sessions Court would be bound to consider the imprisonment already undergone. At the time orders were passed by the Sessions Judge in this case the appellant had undergone more than a month of his original sentence, and I do not think the passing by the Sessions Judge of a sentence of more than twenty lashes would have been justified. By now the appellant has undergone three and a half months of his original sentence and has less than six months of that sentence still to serve.

I do not, therefore, think that we should now alter the sentence into a sentence of whipping, and I would refuse to interfere with the orders passed by the Lower Courts.

HEALD, J.—I have had the advantage of reading my learned brother's order and I accept his view that *Po Wun's* case was wrongly decided in so far as it laid down that in a case where whipping can be imposed only in lieu of any other punishment and where the accused had already served any part of a sentence of imprisonment passed by the lower Court, the appellate Court has no power to alter the sentence of imprisonment passed by the trial Court into a sentence of whipping.

As was said in *Chit Pon's* case, there is nothing in the Whipping Acts, or in the Code of Criminal Procedure apart from the provision of section 423 (1) (*b*) against enhancement of the original sentence, which prohibits an appellate Court from passing a sentence of whipping.

The question which arose for decision in *Po Wun's* case was not a question of enhancement. It was a question of the intention of section 3 of the Whipping Act, 1909, which says that on a conviction for certain offences an accused person "may be punished with

whipping in lieu of any punishment to which he may for such offence be liable " under the Indian Penal Code.

I accept my learned brother's view that when under section 423 (1) (*b*) of the Code of Criminal Procedure an appellate Court alters a sentence of imprisonment to a sentence of whipping the sentence of imprisonment ceases in law to exist, and that the sentence of whipping, which is in law the only sentence, is a sentence in lieu of and not in addition to the punishment to which the accused was originally sentenced.

But although in law the original sentence ceases to exist, the fact remains that the accused person has suffered part of it, and in my view that fact should be taken into consideration by the appellate Court in deciding what sentence should be substituted for the sentence originally passed.

The difficulty of comparing the severity of sentences of imprisonment with sentences of whipping was considered in *Chit Pon's* case and with a view to overcoming that difficulty a Full Bench of this Court said in effect that as a matter of practice this Court does not in the case of adult accused persons regard the substitution of a sentence of thirty stripes for a sentence of one year's imprisonment or more, or the substitution of a sentence of twenty-five stripes for a sentence of nine months' imprisonment or more, or the substitution of a sentence of twenty stripes for a sentence of six months or more as being ordinarily an enhancement of sentence within the meaning of section 423 (1) (*b*) of the Code of Criminal Procedure. That scale seems to have been laid down as a rule of practice, not of law, but I think that we ought to follow it.

If that rule and the suggestion that an appellate Court should take into consideration the part of the original sentence which the accused person has in

1932

KING-EMPEROR v. NGA AUNG MYAT.

HEALD, J.

fact already suffered be accepted, then it seems clear that the accused person in this case, who has already served more than three months of his original sentence of nine months, should not be sentenced to a whipping of even twenty stripes, and, since it was suggested in *Chit Pon's* case that the minimum sentence of whipping which is likely to be effective in the case of an adult is twenty stripes, I agree that we should not alter the sentence passed by the trial Court in this case.

PRIVY COUNCIL.

MAUNG SEIN DONE (DEFENDANT)

v.

MA PAN NYUN (PLAINTIFF) AND OTHERS.

* J.C. 1932

April 12.

[On appeal from the High Court at Rangoon.]

Res Judicata—Res Judicata *between Co-Defendants—Conditions applicable—Absence of Relief to Plaintiff—Decision in Administration Suit.*

A decision operates as *res judicata* between co-defendants provided that (1) there was a conflict of interest between them, (2) it was necessary to decide that conflict in order to give the plaintiff the relief which he claimed, (3) the question between the co-defendants was finally decided. The above principle, laid down in *Munni Bibi* v. *Tirloki Nath*, (1931) I.L.R. 53 All. 103; L.R. 58 I.A. 158, applies although as a result of the decision the plaintiff was not granted any relief.

The Burmese widow of a Chinaman died survived by two sons and two daughters. In 1918 one of the daughters sued claiming administration of her mother's estate, and contending that under Burmese Buddhist law she was entitled to a one-fourth share therein; in addition to her brothers, who were in possession of the estate, she made her sister a defendant as being one of the heirs. The suit was dismissed on the ground that Chinese customary law applied, and that under it the sons alone were entitled. In 1927 the sister who had been a defendant in the 1918 suit sued the defendant brothers and her sister claiming the same relief as was sought in that suit.

Held, that the 1927 suit was barred by *res judicata*.

Decree of the High Court, I.L.R. 6 Ran. 575, reversed.

Appeal (No. 7 of 1931) from a decree of the High Court (April 1, 1930) affirming a decree of the District Judge of Pyapôn (December 10, 1928).

* *Present*: LORD RUSSELL of KILLOWEN, SIR GEORGE LOWNDES, and SIR DINSHAH MULLA.

1932

MAUNG SEIN DONE v. MA PAN NYUN.

The suit was brought in 1927 in the District Court by respondent No. 1 against her brothers (the appellant and respondent No. 2), her sister (respondent No. 3) being added as defendant *pro formâ*. The plaint stated that Ma Myit, the mother of the parties, died a Burmese Buddhist on January 22, 1918, possessed of property of which the brothers had taken possession; the plaint claimed a one-fourth share of the property, and administration of the estate.

Ma Myit had been married to a Chinaman who died in 1902.

The appellant alone put in a written statement. In addition to pleas by which he relied upon Chinese Buddhist law as being alone applicable, he pleaded that the suit was barred by *res judicata* by reason of the decision in a suit brought in 1918. That suit had been brought by respondent No. 3, the defendants being the other parties to the suit and the relief the same as that now sought. The suit had been dismissed by a final decree of the High Court made in 1924 upon the ground that Chinese customary law applied, and that under it Ma Myit's sons alone succeeded to the property. The matter is reported at I.L.R. 2 Ran. 94.

The facts appear fully from the judgment of the Judicial Committee.

A preliminary issue was framed whether the suit was barred by *res judicata*. The District Judge, though holding that the suit was not barred by *res judicata*, was of opinion that he was bound by the previous decision of the High Court; he accordingly dismissed the suit. An appeal to the High Court was allowed by Das and Doyle, JJ. (reported at I.L.R. 6 Ran. 575)* and the suit was remitted for trial.

* Doyle, J.'s name was, by an error, omitted in that report and the judgment published as of Das, J. alone.—ED.

1932

MAUNG SEIN DOKE v. MA PAN NYUN.

Further issues were then framed upon which the District Judge found that Ma Myit had died a Burmese Buddhist and that Burmese Buddhist law applied. He made a decree for administration of the estate.

An appeal to the High Court was dismissed by a judgment delivered by Heald, A.C.J., Otter, J. concurring. The learned Judge referred to the Full Bench decision in *Phan Tiyok* v. *Lim Kyin Kauk* (1) and held that, under that decision, whether Burmese Buddhist law or the Indian Succession Act applied, the plaintiff was entitled to a one-fourth share of the estate.

1932. March 7, 8. *Dunne, K.C.*, and *R. W. Leach* for the appellant. The suit should have been dismissed. First, because it was barred by *res judicata* having regard to the decision of the 1918 suit; secondly, because the property in Ma Myit's possession was held by her on behalf of her sons. The judgment of the High Court upon the preliminary issue was based upon the terms of section 11 of the Code of Civil Procedure, but in a series of decisions the Board has held that section 11 is not exhaustive of the principle. The 1918 suit like the present suit claimed administration of the estate of Ma Myit, and the present plaintiff, as one of the heirs, was a necessary party. The decision then given finally determined the rights of all the parties: *Hook* v. *Administrator-General of Bengal* (2), *Ramachandra Rao* v. *Ramachandra Rao* (3), *Kalipada De* v. *Dwijapada Das* (4). Apart from the principle that a decision in an administration suit is binding upon

(1) (1930) I.L.R. 8 Ran. 57.
(2) (1921) I.L.R. 48 Cal. 499; L.R. 48 I.A. 187.
(3) (1922) I.L.R. 45 Mad. 320; L.R. 49 I.A. 129.
(4) (1929) L.R. 57 I.A. 24.

all parties, all the conditions under which a decision is *res judicata* between co-defendants were present in this case: *Mumni Bibi* v. *Tirloki Nath* (1).

Their Lordships directed that the respondents' counsel should argue the first point before the second was proceeded with.

Pennell for respondent No. 1. *Mumni Bibi's* case (1) is distinguishable, because there a decree had been made in the previous suit whereas in this case the suit of 1918 was dismissed. The principle as laid down by the Board as to *res judicata* between co-defendants does not apply where no relief was granted. The terms of the judgment in *Coltingham* v. *Earl of Shrewsbury* (2) which was applied by the Board, exclude the case where no relief was granted. [Reference was made also to *Chanly* v. *Lord Dunsany* (3) and *Farquharson* v. *Seton* (4).]

In India the principle has been confined to cases in which there is an earlier judgment defining the rights of the parties: *Ramachandra Narayan* v. *Narayan Mahadev* (5), *Ma Tok* v. *Ma Yin* (6).

A reply was not called for.

April 12. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. In this appeal their Lordships find it unnecessary to decide upon the merits of the case as in their opinion the plea of *res judicata* must prevail. In order, however, to explain how the plea arises, it is necessary to relate the facts in some detail.

(1) (1931) I.L.R. 53 All. 103; L.R. 58 I.A. 158.
(2) (1843) 3 Ha. 627; 67 E.R. 530.
(3) (1807) 2 Sch. and Lef. 690.
(4) (1828) 5 Russ. 45; 38 E.R. 944.
(5) (1886) I.L.R. 11 Bom. 216.
(6) (1925) I.L.R. 3 Ran. 77, 79.

1932

MAUNG SEIN DONE v. MA PAN NYUN.

The four parties to this appeal are two sons and two daughters of Chan Sit Shan and Ma Myit, his wife. Chan Sit Shan had three other children born of this wife, two of whom died before their father; the third died in 1903.

Chan Sit Shan was a Chinaman, who was born in China and settled in Pyapôn, Burma. There he married Ma Myit, a native of Pyapôn, who before her marriage was a Burmese Buddhist. At some time, Chan Sit Shan went back to China and there married a second wife, a Chinawoman, named Ma Kee Ya. He returned to Burma with this second wife and a Chinese boy named Pwin Lit whom they had adopted. Subsequently his wife, Ma Kee Ya, bore him a daughter, who was named Ma Kyin Myaing.

Chan Sit Shan died in 1902 intestate. On his death, there was a division of property between his two families as a result of which no further claim has arisen from or on behalf of Ma Kee Ya, Pwin Lit, and Ma Kyin Myaing, or any of them.

When Chan Sit Shan died, the eldest of his five surviving children, offspring of Ma Myit, was only about 15 or 16 years old. Their mother took possession of and managed the property which had not, on the division, gone to the other family, and she seems to have remained in possession and management until her death, which took place on the 22nd January, 1918.

She was survived by her two sons, the respondent Maung Sit Paung, and the appellant, Maung Sein Done, and her two daughters, the respondents, Ma Pan Nyun and Ma Sein. On her death her two sons took possession.

Thereupon one of the daughters instituted legal proceedings, the nature and course of which require consideration, inasmuch as these are the earlier

proceedings upon which the defence to the present suit of *res judicata* is founded.

The suit was instituted in the District Court of Pyapôn, the parties being Ma Sein, plaintiff, and her sister and two brothers, defendants. The plaint is dated the 21st December, 1918. By it the plaintiff alleges that Ma Myit, a Burmese Buddhist, died intestate possessed of considerable moveable and immoveable properties, set out in an annexed schedule; that she left as her heirs and representatives under Burmese Buddhist law, her children, the plaintiff and the defendants; that the two sons had taken possession of her property without taking out letters of administration; that the plaintiff, as a daughter, was entitled to an equal fourth share in the estate and effects of the deceased; and that Ma Pan Nyun was also an heir and was joined as a formal defendant. The relief claimed included administration of the estate of Ma Myit, accounts against the sons as executors *de son tort* of the deceased, and the appointment of a receiver of her estate.

The two sons put in a joint written statement. By it they denied that Ma Myit left any property at her death, and alleged that the property in suit represented the natural growth and increase of Chan Sit Shan's property which, after his death, had been managed by Ma Myit. As to both Chan Sit Shan's property and the property (if any) owned by Ma Myit, the two sons by their written statement further alleged (1) that the succession thereto was governed by Chinese customary law and not by Burmese Buddhist law, because Chan Sit Shan was a Chinaman and Ma Myit had become a Chinawoman and had died a Chinese widow; and (2) that by Chinese customary law (females being excluded by that law in the presence of male issue), the plaintiff had no

1932

MAUNG SEIN DONE v. MA PAN NYUN.

right to inherit from either parent, and that her suit was therefore not maintainable.

The daughter, Ma Pan Nyun, filed no written statement, but she gave evidence, at the hearing, on behalf of the plaintiff, and in support of her claim.

The suit was tried by a Burmese judge, the issues including (amongst others) the following:

"1. Was Ma Myit a Burman Buddhist at the time of her death?

"4. Is the plaintiff entitled to inherit the estate of Ma Myit? If so, to what extent?

"7. Are the parties legitimate children of Chan Sit Shan and Ma Myit and, if so, what law of succession should be applied?

"8. What relief is the plaintiff entitled to?"

The judge delivered judgment on the 18th February, 1921. After a detailed examination of the evidence he answered the first issue in the negative. He decided that she was a Chinese Buddhist at her death. The fourth issue he answered in the negative. His finding in regard to the seventh issue was that as both Chan Sit Shan and Ma Myit were Chinese Buddhists the Chinese customary law must be applied to them. Upon the eighth issue he said: "As I have held that Ma Myit was not a Burman Buddhist, the plaintiff is not entitled to a fourth share in her estate." He dismissed the suit with costs.

Ma Sein appealed to the High Court of Judicature at Rangoon upon the ground that Ma Myit was a Burmese Buddhist and that therefore Ma Sein was one of her heirs. The appeal was dismissed on the 21st January, 1924, upon the grounds (1) that upon the facts of the case Chinese customary law governed the succession to the property (if any) left by Ma Myit and (2) that under that law her sons and not her daughters would inherit.

Thus a suit to administer the estate of Ma Myit, to which Ma Pan Nyun was a necessary and proper party if she had any interest in her mother's estate, was dismissed upon the grounds that Chinese customary law applied to the succession to Ma Myit's property and that under that law no female could inherit in the presence of male issue.

The suit which has given rise to the present appeal was instituted on the 23rd July, 1927, in the District Court of Pyapôn. The plaintiff is the daughter Ma Pan Nyun; the defendants are the two sons and the other daughter who had been the plaintiff in the former suit. The plaint is, with the necessary alterations, substantially the same as the plaint in that suit. The relief sought is establishment of the plaintiff's right to a one-fourth share in Ma Myit's estate, and administration of that estate, the claim to that relief being based upon the allegation that Ma Myit died a Burman Buddhist leaving as her heirs her two sons and her two daughters. The defendant Maung Sein Done (who is the appellant before their Lordships' Board) filed a written statement in August, 1927, dealing briefly with the claim on the merits, but raising also the plea that the plaintiff's claim was "barred by *res judicata*" by reason of the previous litigation and the judgments and decrees therein. The other defendants did not defend.

A preliminary issue was tried, viz., "Is the suit barred by the doctrine of *res judicata*?" The District Judge delivered his judgment on the 24th November, 1927, answering the issue in the negative, and stating as his reason, without entering into particulars, that "all the conditions requisite for *res judicata* between parties who were co-defendants in a former suit, are not present in this case."

1932

MAUNG SAIN DON v. MA PAN NYUN.

He, however, dismissed the suit upon the ground that the High Court's ruling in the previous case was binding upon him, viz., that Ma Myit could have no share according to Chinese customary law in the estate of her deceased husband, and that since the plaintiff before him claimed through Ma Myit, she could have no better claim than Ma Myit. It seems to have been overlooked by the judge that Ma Pan Nyun's action related to her mother's estate and not to her father's estate. By his decree, dated the 24th November, 1927, it was ordered that the suit be dismissed with certain provisions as to costs.

Upon appeal (No. 9 of 1928) to the High Court the order of the District Judge was on the 7th June, 1928, set aside, and the case was returned to the District Court to be disposed of on the merits. The judges on appeal treated the judgment of the District Judge as founded on the view that the plaintiff could have no cause of action because a Bench of the High Court had ruled that her mother, Ma Myit, was a Chinese Buddhist and that ruling was binding upon him. If that was in truth the foundation of the decision it was obviously wrong; for unless the matter were *res judicata*, it would be open to the plaintiff upon sufficient evidence to obtain a different decision. Upon the question of *res judicata* the judges on appeal thought that the case did not fall within section 11 of the Code of Civil Procedure, 1908, because there was in the former suit "no active contest as to rights and no decision thereon as between Ma Pan Nyun and her co-defendants". By their decree dated the 7th June, 1928, it was ordered that the decree of the 24th November, 1927, be set aside, that the case be returned to the District Court for disposal

1932

MAUNG SEIN DOON v. MA PAN NYUN.

on the merits, and that the costs do follow the event.

The suit was ultimately tried on the merits, with the result that on the 10th December, 1928, a decree was made ordering accounts to be taken of Ma Myit's estate from the date of her death to the date of the decree. Upon appeal (No. 296 of 1928) to the High Court a decree (dated the 1st April, 1930) was made confirming the decree of the 10th December, 1928, and containing certain provisions as to costs.

If, however, the plea of *res judicata* affords a decisive answer to the claim of Ma Pan Nyun, the trial should not have proceeded. Their Lordships accordingly do not propose to examine the evidence which was adduced, but proceed at once to consider whether the plaintiff is bound by what was decided in the earlier litigation.

It is unnecessary to consider whether the present case falls within the actual wording of section 11 of the Code. It is well settled that the statement of the doctrine of *res judicata* contained therein is not exhaustive, and that recourse may properly be had to decisions of the English Courts for the purpose of ascertaining the general principles governing the application of the doctrine.

The well-known statement of Wigram, V.C., in *Cottingham* v. *Earl of Shrewsbury* (1) may, their Lordships think, properly be cited in reference to the present case, viz.: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or

(1) (1843) 3 Ha. 627, 638: 67 E. R. 530, 533.

1932

MAUNG SEIN DONE v. MA PAN NYUN.

involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

Further, in a recent case, Sir George Lowndes, in delivering the judgment of this Board, stated what was required in applying the rule of *res judicata* as between co-defendants in the following language: "In such a case, therefore, three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided."

[See *Mumni Bibi* v. *Tirloki Nath* (1).]

Their Lordships now turn to a consideration of the first litigation.

The suit brought by Ma Sein was an administration suit, the purpose and object of which was to have the mother's estate divided among her four children as her heirs. To that suit all the alleged heirs were necessary and proper parties, for every one entitled to a share would be entitled to be heard upon the question whether or not an order for administration should be made. Further, no person who was not entitled to a share would be entitled to bring such a suit, or to have any voice upon the question of administration. From the outset, it was clear what was the issue to be decided. The plaintiff's only title to sue depended upon the answer to the question whether all the four children were heirs of the mother or whether only the sons were entitled to succeed to her property, and this, in turn, depended upon the answer to the question

(1) (1931) I.L.R. 53 All. 103, 111; L.R. 58 I.A. 158, 165.

1932

MAUNG SEIN DONE v. MA PAN NYUN.

whether the succession to the mother's property was governed by Chinese customary law or by Burmese Buddhist law. In a word, the question to be determined was one between the sisters on the one hand and the brothers on the other. The rights of each sister in regard to the mother's estate were identical; they were either both of them co-heirs with their brothers or neither of them was entitled to any share.

The matter which was adjudged was that the succession to Ma Myit's estate was governed by Chinese customary law, and that her daughters, therefore, were not entitled to any share therein. The language actually used in the appellate Court was as follows: "I would hold that the Chinese customary law should be applied to her estate. Under that law her sons, and not her daughters, would inherit, and, therefore, appellant's suit was rightly dismissed." That is, in terms, a finding that neither Ma Sein nor Ma Pan Nyun was entitled to any share in the estate of Ma Myit.

It was urged that the doctrine of *res judicata* could not apply as between co-defendants to a previous suit, if no relief had been granted to the plaintiff in that suit. Their Lordships are aware of no principle or authority which justifies this contention. In Ma Sein's suit there had necessarily to be an adjudication upon the issues involved before the suit could have been dismissed. It was not any less an adjudication because its consequence was the dismissal of the suit, than it would have been if its tenour had been the other way.

The issues involved in the present suit of Ma Pan Nyun are identical with the issues in the earlier suit; and their Lordships are of opinion that in regard to those issues (1) there was in the earlier

1932

MAUNG SEIN DONE v. MA PAN NYUN.

suit a conflict of interest between Ma Pan Nyun and her brothers; (2) this conflict would necessarily have had to be decided in order to give Ma Sein the relief which she claimed; and (3) the question between Ma Pan Nyun and her brothers (*viz.*, whether she was entitled to any share in her mother's estate) was finally decided.

It follows, therefore, that the plea of *res judicata* raised in the present litigation ought to have been successful and the suit of Ma Pan Nyun ought, on that ground, to have been dismissed.

For these reasons their Lordships are of opinion that this appeal should be allowed. The decrees of the 7th June, 1928, the 10th December, 1928, and the 1st April, 1930, should be set aside and the decree of the 24th November, 1927, restored. In regard to costs, the respondent Ma Pan Nyun should pay to the appellant (1) his costs of the appeal No. 9 of 1928; (2) his costs of the suit incurred subsequently to the 7th June, 1928; (3) his costs of the appeal No. 296 of 1928; and (4) his costs of the appeal before their Lordships' Board. Any costs already paid by the appellant under any former decree in this litigation, should be repaid to him by the person or persons to whom, under such decree, they were payable.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Cutler, Allingham and Ford.*

Solicitor for respondent No. 1: *J. E. Lambert.*

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Sen.

U NYO

v.

MA PWA THIN AND OTHERS.*

1932

April 25.

Final Order—Final Disposal of Rights—Subsidiary Questions—Remand for determination of issues of fact—Rights of Parties not decided—Seizin of the Court—Appeal to His Majesty in Council—Civil Procedure Code (Act V of 1908), s. 109 (a); Order 41, r. 25.

Whether an order is a final order or not within s. 109 (a) of the Civil Procedure Code depends upon the effect of the order as made. If it finally disposes of the rights of the parties, the order is final, and if it does not, it is an interlocutory order. Where the appellate Court has finally determined that the plaintiff has a good and subsisting cause of action, and all that remains is to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order is in substance and effect a final order though the quantum of the rights or liability remains to be ascertained.

Under Order 41, r. 25, of the Code, the Divisional Court ordered the remand of the proceedings to the trial Court for determination of certain issues of fact and their return with a report of the trial Court. The Divisional Court had stated its views upon certain issues, but it had not purported to decide the rights of the parties nor lost seizin of the case. *Held*, that the order was not a final order within s. 109 (a) of the Civil Procedure Code.

Bozson v. *Altrincham Urban District Council*, (1903) 1 K.B. 547; *Ramchand* v. *Goverdhandas*, 47 I.A. 124—*followed*.

Isaacs & Sons v. *Salbstein*, (1916) 2 K.B. 139; *Nuri Miah* v. *The Ganges Sugar Works*, I.L.R. 38 All. 150; *Rahimbhoy* v. *Turner*, 18 I.A. 6; *Syed Muzhar Husein* v. *Bodka Bibi*, 22 I.A. 1—*referred to*.

Thein Maung for the appellant. An order remanding a case to the lower Court for decision on certain issues may be a 'final order' for the purposes of appeal to His Majesty in Council under s. 109 of the Code of Civil Procedure, if such order tends to decide certain 'cardinal' issues in the case. Where a cardinal point in the suit is decided and the case is remanded for mere arithmetical calculations, the order

* Civil Miscellaneous Application No. 35 of 1932 arising out of Civil First Appeal No. 138 of 1930 of this Court.

1932

U NYO
v.
MA PWA
THIN

of the appellate Court is a 'final order': *Rahimbhoy* v. *Turner* (1); *Syed Husein* v. *Bodha Bibi* (2); *Ananda* v. *Nafar Chandra* (3).

[PAGE, C.J.—In all these cases, the decision of the appellate Court went to the root of the matter, and consequently the orders were held to be 'final orders'.]

In this case also, two important issues have been decided, and they are in no way subordinate to the other issues. A decision on a 'cardinal issue' is sufficient to make it a 'final order': *Khagendra* v. *Saheyram* (4).

If the Court is of opinion that the order as made is not a 'final order', it may still certify the case to be a 'fit one for appeal' under s. 109 (*c*) where a question of public importance is involved.

Doctor for the 1st respondent. The appellate Court which passed the order of remand has not become *functus officio*, and its order as made in this case was not meant to be final.

In *Rahimbhoy's* case (1), the Court ceased to have seizin of the proceedings. There was only one point to be decided in that case; the order as passed therein could be construed as a decree for accounts. The same was the case in *Syed Husein* v. *Bodha Bibi* (2). The remand order in this case was made under Order XLI, r. 25, and such an order is not an appealable order.

There is no reference to the word 'cardinal' in *Ramchand* v. *Goverdhandas* (5) and their Lordships do not refer in this case to *Rahimbhoy* v. *Turner* or *Syed Husein* v. *Bodha Bibi*.

(1) I.L.R. 15 Bom. 155, 159. P.C.
(2) I.L.R. 17 All. 112. P.C.
(3) I.L.R. 35 Cal. 618.
(4) (1921) 25 C.W.N. 806.
(5) (1920) 47 I.A. 124.

A decision on one issue out of several issues cannot be said to be a final order: *Sultan Singh* v. *Murli Dhar* (1); *Nuri Miah* v. *The Ganges Sugar Works* (2); *Rai Radha Kishen* v. *Collector of Jaunpore* (3); An order is final when it finally disposes of the rights of the parties. An order relating to procedure is not a final order; *Bozson* v. *Altrincham Urban District Council* (4); *Isaacs & Sons* v. *Salbstein* (5).

PAGE, C.J.—In my opinion this application for a certificate granting leave to appeal to His Majesty in Council is misconceived.

The High Court at the hearing of the appeal remanded the proceedings to the trial Court in order that the trial Court should determine certain issues of fact, and then return the proceedings to the High Court with a report as to what its findings upon those issues of fact were. The remand order was made pursuant to Order 41, rule 25, and the High Court never lost seizin of the case. It is true that in passing the remand order the Divisional Court stated its view upon certain issues raised in the case. It was, I think, somewhat unfortunate (and I can say so more freely as I was a party to the remand order) that the Divisional Court should have stated its opinion in the remand order upon any of the issues raised in the case; but the Divisional Court in the remand order did not finally determine whether the plaintiff had a good cause of action or not, or purport to decide the rights of the parties. Indeed, in order that the plaintiff should succeed, the first step in her case was to prove that she was entitled to her deceased husband's share in the inheritance. If she was not the heir of her

(1) (1924) 6 Lah. L.J. 240. F.B.
(2) I.L.R. 38 All. 150. F.B.
(3) (1900) 28 I.A. 28.
(4) (1903) 1 K.B. 547.
(5) (1916) 2 K.B. 139, 146.

1932

U NYO
v.
MA PWA
THIN.

PAGE, C.J.

alleged husband, Maung Nyun, her suit must fail. That issue was not determined at the trial, and the proceedings were remanded *inter alia* in order that that issue might be tried and determined by the trial Court before the Divisional Court finally decided the appeal. In the order of remand the Divisional Court remitted "the undetermined facts to the lower Court again for a decision on the two points that I have mentioned, when a further report will be made to us on which we can come to a final determination of the case."

It is unnecessary for the purpose of disposing of this application to decide whether at the further hearing before the Divisional Court it would be open to the Divisional Court (constituted as it was in the first instance, or, it may be, manned by different Judges), to reconsider the questions upon which the Divisional Court had expressed an opinion in the remand order, for, judged by any test which the Court is entitled to apply to the facts of this case, in my opinion, the order of remand from which it is sought to appeal to His Majesty in Council was not a "final order" within section 109 (*a*) of the Code of Civil Procedure. Whether an order is a final order or not within section 109 (*a*) depends upon the effect of the order as made. Each case turns upon its own facts.

In *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand* (1) Lord Cave, who delivered the judgment of the Privy Council, observed: "The question as to what is a final order was considered by the Court of Appeal in the cases of *Salaman* v. *Warner* (2), *Bozson* v. *Altrincham Urban District Council* (3) and *Isaacs* v. *Salbstein* (4). The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties."

(1) (1920) 47 I.A. 124 at p. 127.
(2) (1891) 1 Q.B. 734.
(3) (1903) 1 K.B. 547.
(4) (1916) 2 K.B. 139.

Judged by this test the order now under consideration, in my opinion, is not a final order.

In *Bozson* v. *Altrincham Urban District Council* (1) Lord Alverstone, C.J. observed : "It seems to me that the real test for determining this question ought to be this : Does the judgment or order, as made, finally dispose of the rights of the parties ? If it does, then I think it ought to be treated as a final order ; but if it does not, it is then, in my opinion, an interlocutory order." [See also *Isaacs & Sons* v. *Salbstein and another* (2) and *Nuri Miah* v. *The Ganges Sugar Works, Limited, Cawnpore* (3).]

The learned advocate for the applicant referred to two earlier cases decided by the Privy Council in support of the view for which he was contending. In *Rahimbhoy Hibibhoy* v. *Turner* (4) what had been decided by the Court of Appeal was that the appellant was bound to render an account to the respondent, and the Court remanded the case to the Court of first instance in order that the *quantum* of the accountability of the appellant should be ascertained. Lord Hobhouse, in delivering the judgment of the Board, having regard to the nature of the order that had been made observed that "the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him. Now, that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree against the defendant in such a way that in this suit it is final."

(1) (1903) 1 K.B. 547.
(2) (1916) 2 K.B. 139.
(3) (1916) I.L.R. 38 All. 150.
(4) (1890) 18 I.A. 6 : I.L.R. 15 Bom. 155.

1932

U NYO
v.
MA PUA
THIN.

PAGE, C.J.

In *Syed Muzhar Husein* v. *Bodha Bibi and another* (1) the Court of Appeal in India held that the alleged will of the testator was valid, and remanded the proceedings to the trial Court in order that certain subsidiary issues should be decided. Lord Hobhouse observed: "In this case the will of Ibn Ali is the cardinal point of the suit; and as after the decision of the High Court that can never be disputed again, their order is final, notwithstanding that there may be subordinate inquiries to make."

No doubt, in a case where the appellate Court has finally determined that the plaintiff has a good and subsisting cause of action, and all that remains is to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order is in substance and effect a final order, because the order as made has finally determined the rights of the parties, and all that remains is to ascertain the *quantum* of those rights.

In the present case, however, *non constat* that the Divisional Court, when it finally determines the appeal, will hold that the plaintiff has any cause of action; on the other hand it may be held that she is entitled to succeed in the suit. Whether in the event the plaintiff succeeds or not, however, it is obvious that the order from which it is sought to appeal to His Majesty in Council has not determined whether the plaintiff has a good cause of action against the defendants, and has not finally disposed of the rights of the parties.

Now, assuming for the purpose in hand that in the remand order the Divisional Court decided certain important issues in the case, inasmuch as the remand order did not purport finally to dispose of the rights

(1) (1894) 22 I.A. 1; I.L.R. 17 All. 112.

of the parties, it would be intolerable that the order should be treated as a final order. The result of so holding would be that a case might be taken on appeal to the Privy Council piecemeal for the purpose of determining any number of important but not conclusive issues as they arose. That is not to be permitted.

For these reasons, in my opinion, the order in respect of which a certificate for leave to appeal to His Majesty in Council is sought is not a "final order" within section 109 (*a*) of the Code of Civil Procedure.

The learned advocate for the applicant further urged that, even if the order under consideration was not a final order, under section 109 (*c*) the Court ought to certify that the case is "a fit one for appeal to His Majesty in Council." At this stage of the proceedings I decline to answer that question. When the appeal is finally determined it may be that the case will be found to turn solely on the facts, and that the plaintiff has no cause of action because she has not proved that she is the heir of Maung Nyun. On the other hand it may be that in the event the order which is ultimately passed by the Court of appeal will depend upon some question of general importance, in which case it would be incumbent upon the Court to consider whether it is brought within the ambit of section 109 (*c*). In my opinion, however, it is premature at this stage of the proceedings for the Court to consider or determine that question.

The result is that the application fails, and must be dismissed with costs, ten gold mohurs.

SEN, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932
April 25.

JOHNSON PO MIN AND ANOTHER
v.
U OGH AND OTHERS.*

Civil Procedure Code (Act V of 1908), s. 92—Scope and Effect—Rights of Third Parties—Declaration of Title or Possession against Strangers to Trust—Parties to a Suit under s. 92—Clause 1 (c), meaning of—Suit by Trustee for Eviction of Trespasser.

The scope and effect of s. 92 of the Civil Procedure Code is to provide means for obtaining the directions of the Court in connection with matters relating to the administration of public trusts, and for exposing the malpractices of defaulting or fraudulent trustees. Issues relating to the rights of third parties are outside its scope, and the plaintiffs in a suit framed under s. 92 are not entitled to claim against strangers to the trust either a declaration of title or possession or any other relief. Such persons are not necessary or proper parties to a suit framed under this section.

Abdur Rahim v. *Mahomed Barhat Ali*, I.L.R. 55 Cal. 519; *Ayshunnissa Bibi* v. *Kalifa Khalifa*, I.L.R. 41 Cal. 749; *Budh Singh* v. *Roy*, 2 C.L.J. 431; *Budree Das* v. *Chaoni Lal*, I.L.R. 33 Cal. 789; *Ganga Puri* v. *Mohan Lal*, I.L.R. 4 Lah. 259; *Husseni Begum* v. *Collector of Moradabad*, I.L.R. 20 All. 46; *K. Ayyangar* v. *Narasimhacharior* I.L.R. 40 Mad. 212; *Lakhmandas* v. *Ganpatrav*, I.L.R. 8 Bom. 565; *Muhammad Abdul* v. *Ahmad*, I.L.R. 35 All. 459; *Munshi Gholam Mowlah* v. *Mollah Ali*, 28 C.L.J. 4; *Shailajananda* v. *Umeshanunda*, 2 C.L.J. 460—*followed.*

Ali Hafiz v. *Abdur Rahman*, I.L.R. 42 Cal. 1138; *Assam Chetty* v. *Sitamma*, 27 M.L.J. 266; *C. Mudaliar* v. *Bala Krishnammal*, 53 M.L.J. 183; *C. Reddiar* v. *Collector of Trichinopoly*, I.L.R. 38 Mad. 1064; *Collector of Poona* v. *Bai Chanchalbai*, I.L.R. 35 Bom. 470; *Ghaffar* v. *Yawar*, I.L.R. 28 All. 112; *Manohari* v. *Ismail*, I.L.R. 33 All. 752; *Rampur* v. *Ramdhari*, I.L.R. 47 All. 770; *Sajedur Raja* v. *B. Deb*, I.L.R. 20 Cal. 397; *Sajedur Raja Chaudhuri* v. *Gour Mohan Das*, I.L.R. 24 Cal. 418—*dissented from.*

The words in s. 92 (1) c "vesting any property in a trustee" refer to cases where a new trustee is appointed, and are not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it. Until a trustee has been removed the trust estate is vested in him, and he alone is competent to institute a suit for possession. When a trustee is removed by a decree of the Court, and the estate is vested in a new trustee, the latter is then in a position to maintain an action in ejectment.

Budh Singh v. *Roy*, 2 C.L.J. 431—*referred to.*

Ali Hafiz v. *Abdur Rahman*, I.L.R. 42 Cal. 1138—*dissented from.*

* Civil First Appeal No. 31 of 1931 from the judgment of the District Court of Thayawaddy in Civil Regular Suit 5 of 1930.

1932

JOHNSON PO MIN v. U OOH.

Lambert for the appellants. A trustee has no power to alienate property which he holds in trust: and in a suit under section 92 of the Code of Civil Procedure, a declaration that the property so alienated is trust property may be asked for. In *Sajedur Raja Chowdhuri* v. *Gour Mohan* (1) it was held that it was competent in a suit under section 539 of the old Code of Civil Procedure (corresponding to the present section 92) to ask for the dismissal of a trustee and also for the recovery of trust property from the hands of a third party. See also *Nagaraja* v. *Bellala* (2).

Transferees from trustees of properties wrongfully alienated are proper parties to a suit under section 92: *Ramrup* v. *Ramdhari* (3). The 5th respondent who obtained a mortgage decree against the trust property is a necessary party to this suit.

N. N. Burjorjee for the 5th respondent. Section 92 is not mandatory but an enabling and permissive section: *Budree Das* v. *Choroni Lal* (4). Sub-section 2 of that section states that all suits in which any of the reliefs (*a*) to (*g*) of sub-section (1) is claimed must be brought in conformity with the provisions of that section, unless otherwise provided for by the Religious Endowments Act, 1863. It does not mean that all suits relating to trust property must be framed under section 92. See *Abdur Rahim* v. *Mahomed Barkat Ali* (5). A stranger to a trust, as for instance the mortgage-decree-holder in this case, cannot be made a party to a suit under s. 92, because the relief claimed against him is outside the scope of that section.

Sajedur Raja's case (1) has been dissented from in *Budree Das's* case (4) and also in *Budh Singh* v.

(1) I.L.R. 24 Cal. 418, 423.
(2) I.L.R. 45 Mad. 67, 69.
(3) I.L.R. 47 All. 770.
(4) I.L.R. 33 Cal. 789.
(5) I.L.R. 35 Cal. 599 (P.C.)

1932

JOHNSON FO MIN v. U GOK.

Niradbaran Roy (1). In the latter case it was pointed out that possession of an interest in the trust property is an essential condition precedent to the maintenance of a suit under s. 539. A beneficiary, merely as such, cannot, in a suit under that section, seek to evict an alienee of trust property; for it is the trustee alone, in whom the trust estate is vested, who can sue for possession.

Ayatunnessa Bibi v. *Kulfu Khalifa* (2); *Inayat Husain* v. *Faiz Muhammad* (3); *Ganga Charan* v. *Ram Chandra* (4); *Kalyana* v. *Kasturiranga* (5); *Muhammad* v. *Ahmad* (6); *Ghelabhai* v. *Udcram* (7); *Lachman* v. *Muni* (8); *Raghavelu* v. *P. Sittamma* (9); *Collector of Poona* v. *Bai Chanchalbai* (10); *Ali Hafiz* v. *Abdur Rahaman* (11).

The object of a suit under s. 92 is "to put the house in order". Once there is a proper trustee of the property, he alone represents the trust property and is the only person entitled to bring suits for eviction or ejectment of trespassers.

[PAGE, C.J.—Can an alienee of trust property be regarded as a constructive trustee and so be made to come under s. 92?]

This section is a special section giving jurisdiction to a particular Court to decide matters coming within the purview of that section. Order I, rule 10 (as to joinder of parties), will not apply to such suits.

Lambert in reply. Under s. 92, the appointment of a new trustee and vesting of the trust property in

(1) 2 Cal. L.J. 432.
(2) I.L.R. 41 Cal. 749.
(3) I.L.R. 45 All. 335.
(4) I.L.R. 50 All. 165.
(5) I.L.R. 40 Mad. 212, 231 F.B.
(6) I.L.R. 35 All. 459.
(7) I.L.R. 36 Bom. 29.
(8) I.L.R. 47 All. 867.
(9) 27 Mad. L.J. 266.
(10) I.L.R. 35 Bom. 470.
(11) I.L.R. 42 Cal. 1135.

1932

JOHNSON PO MIN v. U OGH.

him are two of the reliefs that may be sought. If it were to be held that an alienee of trust property is not a proper party to a suit under the section, an order vesting the trust property in the new trustee would be meaningless.

In Civil Revision 114 of 1927 of this Court it was decided that an alienee from a trustee is a proper party to a suit under section 92. See also *C. N. Evalappa* v. *T. Balakrishnammal* (1).

PAGE, C.J.—On the 4th of September 1903, a grant of the land in suit situate in Letpadan Circle was issued by Government to the 2nd respondent, Maung San Nyun, for religious purposes, to wit, upon trust for a Christian Chapel to be erected thereon. It was a condition of the grant that the land and premises might be resumed at any time by Government if the same were used for any purpose other than the specified purpose for which the grant was made.

The learned District Judge has found, and there is evidence to support the finding, that San Nyun was a follower of one Po Paik San, a Karen Christian, and a fervent evangelist; and that Po Paik San collected money from various sources with which a Karen Baptist Chapel was erected upon the land in suit.

The plaintiffs, who are members of the Karen Baptist Christian Society, alleged that the Chapel was built out of funds belonging to that Society, while the respondents 6 to 8 alleged that the expense incurred in erecting the Chapel was defrayed out of the funds of the Po Paik San's Karen Baptist Self-Supporting Mission of Letpadan.

The learned District Judge has further held, and again there is evidence to support the finding, that the Chapel was erected out of funds collected by Po Paik

(1) 53 Mad. L.J. 183.

1932

JOHNSON PO MIN v. U OCH.

PAGE, C.J.

San as best he could, and not exclusively from the funds of either of the abovementioned Societies. He also held, and, in my opinion, correctly held, that all Karen Christians who are Baptists are beneficiaries under the trust and, therefore, that the plaintiffs are entitled, as being persons interested in the trust, to file a suit under section 92 of the Code of Civil Procedure (V of 1908).

In the present suit, which purports to have been brought solely under section 92 of the Code with the sanction of the Government Advocate, the plaintiffs claim :—

"(1) that the 1st and 2nd defendants be removed from the position of trustees of the trust property, or otherwise declared to be no longer trustees of the same,

(2) that the 1st and 2nd plaintiffs or any other person or persons approved by this Hon'ble Court being members of the Karen Baptist Christian Society be appointed trustees in place of the 1st and 2nd defendants,

(3) that the trust property be vested in the trustee or trustees so appointed,

(4) a declaration that the mortgage decree obtained by the 5th defendant against the trust property is of no effect and does not bind the said trust property, and that the trust property is the property of the Karen Baptist Christian Society, and

(5) any further and other relief as this Hon'ble Court may deem fit and proper having regard to the nature of the trust and the incidentals relating thereto."

The defendant-respondents 1 to 4 did not file an appearance, or defend the suit.

Defendant-respondents 6 to 8 supported the plaintiffs in their attack upon defendants 1, 2 and 5, and the documents impugned in the plaint, but claimed that the new trustees should be members of the Society to which they belonged, and the property in suit vested in the trustees so appointed. Defendant-respondent 5 is the Administrator-General of Burma, and respresents the

estate of a mortgagee to whom the 1st respondent mortgaged the property in suit. The mortgagee obtained a preliminary mortgage decree in Civil Regular No. 25 of 1927 of the District Court of Tharrawaddy, and the Administrator-General in the present suit pleaded that the decree passed in the mortgage suit was binding on the property, and further that

"this defendant states that the plaintiffs cannot get a declaration in this suit that the mortgage decree passed in Civil Regular No. 27 of 1927 of this Hon'ble Court does not bind the property, as such relief is not within the scope of section 92 of the Civil Procedure Code ".

On the 16th of August 1920 the 2nd respondent, San Nyun, by a registered deed of transfer assigned the property in suit absolutely and without consideration to the 1st respondent, U Ogh, and the 1st respondent for himself and his children on the 14th of July 1921 by a registered instrument mortgaged the property in suit, together with other property, to Aga Mohamed Ally Khorasanee, whose estate is now represented by the 5th respondent, for Rs. 40,000, and by another registered instrument on the 25th of October 1921 again mortgaged the said properties to Khorasanee for a further sum of Rs. 5,000.

It is plain from the terms of the mortgage deeds and an undisputed fact that the mortgagee had notice at all material times that the property in suit was trust property.

As between the appellants and the respondents 6 to 8 on the one hand and the respondents 1 and 2 on the other, according to well-settled principles of law it cannot be doubted that the transfer from the 2nd respondent to the 1st respondent was invalid, and amounted to a breach of trust. It must be held also that, inasmuch as the 1st respondent acquired no right or interest in the property in suit under the transfer by

1932

JOHNSON PO MIN v. U OGH.

PAGE, C.J.

the 2nd respondent to him, the mortgages of the property to Khora sanee, who entered into the transactions with full notice that the property in suit was trust property, *primâ facie* passed no right or title to the mortgagee. Moreover, the 1st respondent never became in law a trustee, and at all material times the 2nd respondent was, and at the date when the suit was filed remained, the sole trustee of the property in suit.

It is unnecessary to cite authorities in support of the view that I take of these transactions. It is enough to repeat what Lord Ellenborough laid down in *Taylor* v. *Plumer* (1) that "an abuse of trust can confer no rights on the party abusing it, nor on those who claim any privity with him".

Before considering the form of relief to which the plaintiffs are entitled as against the 1st and 2nd respondents, however, it will be convenient to determine whether the plaintiffs are entitled to claim any relief in the present suit against the 5th respondent who is a stranger to the trust, and against whom a declaration is sought "that the mortgage decree obtained by the 5th defendant against the trust property is of no effect, and does not bind the said trust property, and that the trust property is the property of the Karen Baptist Christian Society".

Section 92 (1) is in the following terms :—

"In the case of any alleged breach of any express or constructive trust created for purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction

(1) 3 M. & S. 574.

"the whole or any part of the subject-matter of the trust is situate to obtain a decree—

(*a*) removing any trustee ;

(*b*) appointing a new trustee ;

(*c*) vesting any property in a trustee ;

(*d*) directing accounts and inquiries ;

(*e*) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;

(*f*) authorising the whole or any part of the trust-property to be let, sold, mortgaged or exchanged ;

(*g*) settling a scheme ; or

(*h*) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

Now, section 92 is found in Part V of the Code styled "Special Proceedings", and the object for which this section was enacted was twofold : (i) to provide proceedings of a special nature for the purpose of determining questions that relate to the administration of public religious or charitable trusts ; and (ii) to prevent multifarious and vexatious suits being filed by irresponsible persons against the trustees whose duty it is to administer such trusts. [See *exparte Skinner* (1).]

Bearing in mind the form of relief which it is competent for the Court to decree in a suit under section 92 it appears to me plain that section 92 was intended to apply only to questions relating to what I may call "the indoor management" of the trust, and that the Legislature did not intend that the right or interest claimed by a stranger in the

(1) 2 Merivale 456.

1932

JOHNSON PO MIN v. U OGA.

PAGE, C.J.

trust property should be determined in a suit framed under that section. The Court, however, is concerned, not with what was intended but what was enacted by the Legislature, and three clear-cut and irreconcilable views have been expressed by the Courts in India as to the meaning and effect of section 92. In some cases it has been held, having regard to clause (*h*) of section 92 (1), that "all suits founded upon any breach of a trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of section 92, Code of Civil Procedure", upon the ground that "the words 'such further or other relief as the nature of the case may require' must be taken, not in connection with the previous clauses (*a*) to (*g*), but in connection with the nature of the suit, *viz.*, *any* relief other than (*a*) to (*g*) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case". [See *Abdur Rahim* v. *Mahomed Barkat Ali* (1)]. *Sajedur Raja* v. *Baidyanath Deb* (2); *Sajedur Raja Chowdhuri* v. *Gour Mohan Das Baishnav* (3); *C. Prasanna Venkatachella Reddiar* v. *The Collector of Trichinopoly* (4). This view was negatived by the Privy Council in *Abdur Rahim* v. *Mahomed Barkat Ali* (1), and it must now be taken as settled that such a construction is not correct.

A second view of the meaning and effect of the section, which may be called "the Allahabad construction", is set out in the judgment of Stanley, C.J. in *Ghazaffar Husain Khan* v. *Yawar Husain* (5).

(1) (1928) I.L.R. 55 Cal. 539 at p. 552.
(2) (1893) I.L.R. 20 Cal. 367.
(3) (1897) I.L.R. 24 Cal. 418.
(4) (1915) I.L.R. 38 Mad. 1014.
(5) (1906) I.L.R. 28 All. 112 at p. 116.

1932

JOHNSON PO MIN v. U OOR.

PAGE, C.J.

His Lordship observed :

" It may be that the Court has no power in a suit brought under section 539 to set aside a deed whereby endowed property has been mortgaged or transferred to a stranger : but I see no good reason for holding that under that section the Court cannot, as it did in this case, determine of what the trust properties consisted or find that particular alienations of it could not be maintained, provided all proper parties are represented before it. If transferees or mortgagees who have been impleaded in a suit instituted under section 539 do not accept the findings of the Court in that suit, it may be necessary for the trustee appointed by the Court to manage the trust property to institute a suit for recovery of possession."

And Richards, C.J. and Banerji, J. in *Manohari* v. *Muhammad Ismail* (1) held that

" this case is a direct authority that persons who dispute the existence of the trust can be made parties to a suit under section 539, and, of course, it necessarily follows that they will be bound by the decision arrived at in the suit."

In *The Collector of Poona* v. *Bai Chanchalbai* (2) Chandavarkar, J. observed :

" It does not follow from the decisions on which the Courts below have relied, that to a suit of this character, where a breach of trust is complained of and where the alienee denies that the property is a public trust for religious purposes, he is not a proper and necessary party, because relief cannot be given as against him by way of a decree in ejectment. Though such a decree does not fall within the reliefs which the Court can grant under section 539 it has jurisdiction to determine, for the purpose of the reliefs which can be granted, whether the property is a public trust for a religious purpose, if that question is in controversy . . . The question cannot be properly tried unless he is before the Court. He is, therefore, a necessary party, though possession cannot be recovered from him in this suit, if the issues in question are found against him.

[See also *Sajedur Raja Chowdhuri* v. *Gour Mohan Das Baishnav* (3).] And in *Rampur Goshain*

(1) (1911) I.L.R. 33 All. 752 at p. 756. (2) (1911) I.L.R. 35 Bom. 470 at p. 472.
(3) (1897) I.L.R. 24 Cal. 418.

1932

JOHNSON PO MIN v. U OCH.

PAGE, C.J.

v. *Ramdhari Bhagat* (1) Boys, J. added :

"It is clearly necessary for the purposes of an inquiry into the propriety of transfers by the trustee that the Court should have before it the transferees themselves.

To consider then the first portion of the relief (*d*), which prays for a declaration that the alienations made by the trustee, whose removal is prayed for in relief (*b*), may be declared void. As the removal of a trustee is to be based on breach of trust, clearly the acts of the trustee must be examined, and if those acts prove to be breaches of the trustee's duty, clearly the Court must say so, and this is equivalent to declaring the acts to be invalid, and the alienations to be void."

With all respect I am of opinion that this lame and impotent construction cannot be accepted. If the alienees from defaulting trustees are necessary and proper parties to a suit in which it is sought to remove a trustee upon the ground that the transfer amounted to a breach of trust, and in a suit under section 92 a declaration that the alienation is void is binding upon the alienees and *res judicata* as against them, it would seem to follow as a necessary and reasonable corollary that the plaintiffs ought to be permitted in the same suit to perfect their title by a decree for possession against the alienees. Why halt half way along the road? Why limit the relief to which the plaintiffs are entitled against the alienees to a mere declaration? Surely the right to a declaration of title as against the alienees and the right to recover possession of the trust property from the alienees are on the same footing, and must stand or fall together. [See the observations of Wallis, O.C.J. in *Assam Raghavalu Chetty* v. *Pellati Sitamma* (2) and of Seshagiri Ayyar, J. in *Kasturiranga Ayyangar* v. *N. C. Narasimhachariar* (3), in which case Seshagiri Ayyar, J. resiled from the opinion that he

(1) (1925) I.L.R. 47 All. 770 at p. 774. (2) (1914) 27 M.L.J. 266.
(3) (1917) I.L.R. 40 Mad. 212.

*previously expressed in *Assam Raghavalu Chetty* v. *Pellati Sitamma* (1), *ibid.*, at page 268.] *.

In my opinion, however, the plaintiffs in a suit framed under section 92 are not entitled to claim against strangers to the trust either a declaration of title or possession or any other relief, and a suit under section 92 in which a claim for relief against strangers to the trust is added to a claim for relief which the Court is competent to decree in such a suit entails a clear misjoinder both of parties and of causes of action, and unless the plaint is amended the suit cannot be sustained. As I apprehend the scope and effect of section 92 it was enacted to provide means for obtaining the directions of the Court in connection with matters relating to the administration of the trust, and for exposing the malpractices of defaulting or fraudulent trustees, and issues relating to the rights of third parties are outside the scope of a suit brought under this section of the Code.

The construction that I put upon the section embodies the third view of the meaning and effect of section 92, to which I subscribe.

In *Abdur Rahim* v. *Mahomed Barkat Ali* (2) Lord Sinha, in delivering the judgment of the Privy Council, observed :

"Their Lordships see no reason to consider that section 92 was intended to enlarge the scope of section 539 by the addition of any relief or remedy against third parties, *i.e.*, strangers to the trust. They are aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit under section 539, but the general current of decisions was to the effect that, even if such third parties could properly be made parties under section 539, no relief could be granted as against them."

I go further and hold, not only that no relief can be granted against strangers to the trust in a suit

(1) (1914) 27 M.L.J. 266. (2) (1928) I.L.R. 55 Cal. 519 at p. 530.

1932

JOHNSON PO MYE v. U OGH.

PAGE, C.J.

under section 92, but also that such persons are not necessary or proper parties to a suit framed under that section : *Husani Begum* v. *The Collector of Moradabad* (1) ; *Lakshmandas Parashram* v. *Ganpatrav Krishna* (2) ; *Budh Singh Dudhuria* v. *Nirabaran Roy* (3) ; *Shailajanand Dut Jha* v. *Umeshanunda Dut Jha* (4) ; *Budree Das Mukim* v. *Chooni Lal Jokurry* (5) ; *Muhammed Abdul Majid Khan* v. *Ahmad Said Khan* (6) ; *Kasturiranga Ayyangar* v. *N. C. Narasimhachariar* (7) ; *Ayatunnessa Bibi* v. *Kulfu Khalifa* (8) ; *Munshi Gholam Mowlah* v. *Mollah Ali Hafiz* (9) ; *Ganga Puri* v. *Mohan Lal* (10).

No doubt it not infrequently happens that in a suit under section 92 the ground upon which it is sought to remove a trustee is that he has been guilty of a breach of trust by improperly alienating property belonging to the trust, and in a suit of that nature it will be necessary for the Court to determine whether the alienation amounted to a breach of trust ; but because a trustee has committed a breach of trust by alienating the trust property it does not follow as between the trustees and the *cestuis qui trustent* on the one hand and the alienees on the other that the transfer is invalid. The validity of alienations as between the trust estate and the transferees from defaulting trustees may, and often does, depend upon questions of law and fact that would not be relevant to an issue as to whether the trustee who effected the transfer and thereby committed a breach of trust ought to be removed from his office. Further, if it is contended that in order effectively to vest the property in a trustee under section 92 it

(1) (1899) I.L.R. 20 All. 46.
(2) (1884) I.L.R. 8 Bom. 365.
(3) 2 C.L.J. 431.
(4) 2 C.L.J. 460.
(5) (1905) I.L.R. 33 Cal. 789.
(6) (1913) I.L.R. 35 All. 459.
(7) (1917) I.L.R. 40 Mad. 212.
(8) (1914) I.L.R. 41 Cal. 749.
(9) 28 C.L.J. 4.
(10) (1923) I.L.R. 4 Lah. 259.

1932

JOHNSON PO MIN v. U OGH.

PAGE, C.J.

is essential that it should be declared in the presence of an alienee of the property that the transfer to him is void as against the trust, and that he should be ordered to deliver up possession of the trust property, the answer is two-fold; (i) that the words in clause (*c*) "vesting any property in a trustee", in my opinion, refer to cases where a new trustee is appointed, and are not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it [*Rampur Goshain* v. *Ramdhari Bhagat* (1); *Kasturiranga Ayyangar* v. *N. C. Narasimhachariar* (2)]: (ii) that, as pointed out by Mookerjee, J. in *Budh Singh Dudhuria* v. *Nirabaran Roy* (3)

"Till the trustee has been removed the trust estate is vested in him, and he alone is competent to institute a suit for possession; when he has been removed by a decree of Court and the estate vested in a new trustee, such new trustee may be in a position to maintain an action in ejectment, but his cause of action manifestly arises only when the estate becomes vested in him. Besides, the new trustee need not necessarily be one of the plaintiffs, but, even if he were, that would not improve his position, for it is an elementary principle that at the time of the institution of the suit the plaintiff must have a subsisting cause of action, and he cannot take advantage of events that have happened subsequently,—least of all, of the decree in the case,—to complete his cause of action, and justify a decree for ejectment in his favour. It is conceivable that a suit under section 539, Civil Procedure Code, may be instituted by the Advocate-General, and I am unable to see upon what principle he may be supposed to have at the time of the institution of the suit a cause of action sufficient to support a decree in his favour for the ejectment of a person who sets up a title hostile to the trust."

The opinion expressed by Greaves, J. in *Ali Hafiz* v. *Abdur Rahaman* (4) [see also *The Collector of Poona* v. *Bai Chanchalbai* (5)], that an alienee of

(1) (1925) I.L.R. 47 All. 770.
(2) (1917) I.L.R. 40 Mad. 712.
(3) 2 C.L.J. 431.
(4) (1915) I.L.R. 42 Cal. 1138.
(5) (1911) I.L.R. 35 Bom. 470.

1932

JOHNSON PO MIN v. U OGH.

PAGE, C.J.

trust property might "be declared to be a trustee of the trust property and be directed to convey the property" appears to me, with all due deference, to be altogether too extravagant a notion, and cannot be accepted. "A dacoit might be that, and the provision was surely never intended to protect him from being sued too readily": [Per Carnduff, J. in *Ayatunnessa Bibi* v. *Kulfu Khalifa* (1); and see *Budree Das Mukim* v. *Chooni Lal Johurry* (2); *Munshi Gholam Mowlah* v. *Mollah Ali Hafiz* (3)].

Notwithstanding any observations to the contrary that may be found in the judgments in *The Collector of Poona* v. *Bai Chanchalbai* (4), *Assam Raghavalu Chetty* v. *Pellati Sitamma* (5), *Ali Hafiz* v. *Abdur Rahaman* (6) and *C. N. Evalappa Mudaliar* v. *T. Balakrishnammal* (7), in my opinion, strangers to the trust are not proper or necessary parties to a suit under section 92, and in such a suit the plaintiffs who have wrongly impleaded third parties cannot pray in aid the provisions of Order 1, rule 3, or Order 1, rule 10; for

"once it is held, as I think it must be held, that a suit for ejectment of a trespasser or of a transferee from a trustee is not within the scope of section 92, it follows as a necessary corollary that the Court is not competent to bring before the *forum* any such person under either of the two rules mentioned."

Per Mookerjee, J. in *Munshi Gholam Mowlah* v. *Mollah Ali Hafiz* (3).

For these reasons, in my opinion, the suit as against the 5th respondent must be dismissed.

Maung San Nyun, who has been guilty of a deliberate breach of trust, must be removed from his position as trustee. We have heard the learned

(1) (1914) I.L.R. 41 Cal. 749.
(2) (1905) I.L.R. 33 Cal. 789.
(3) 28 C.L.J. 4.
(4) (1911) I.L.R. 35 Bom 470
(5) (1914) 27 M.L.J. 266.
(6) (1915) I.L.R. 42 Cal. 1138.
(7) 53 M.L.J. 183.

1932

JOHNSON PO MIN v. U OGH.

PAGE, C.J.

advocates for the appellants and for the respondents 6 to 8, and by consent the appellants, Johnson Po Min and Saw Kyaw Zan, and the respondent, U Aung Zan, are appointed trustees in lieu of San Nyun, and the trust property will be vested in these persons as trustees, and they will be entitled to the control and management thereof for one year from this date or until further order of the Court. Liberty to apply. There will be no order as to costs.

MYA BU, J.—I agree.

FULL BENCH.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Heald, Mr. Justice Cunliffe, Mr. Justice Das and Mr. Justice Mya Bu.

1932

May 2.

U BA DWE AND OTHERS
v.
MAUNG LU PAN AND ANOTHER.

LEONG AH FOON
v.
LEONG AH CHOY.*

Pauper Suit—Civil Procedure Code (Act V of 1908), O. 33—Scheme of Order 33—Rule 5 (d)—Cause of action, how ascertained—Evidence on the Merits of the Claim—Enquiry under Rules 6 and 7 (1)—Issue of Pauperism—Rule 7 (2), arguments under—Argument and Decision under Rule 5 (d)—Pauper's application and examination under Rule 4, use of.

The scheme of Order 33, Code of Civil Procedure, is that before an applicant is granted the privilege of suing *in formâ pauperis* it is incumbent on him to satisfy the Court that (*a*) his application is in proper form, (*b*) he has a good and subsisting cause of action, (*c*) he is *bonâ fide* and in fact a pauper.

For the purpose of deciding whether the allegations of the applicant show a cause of action under rule 5 (*d*), the Court must take into consideration not only the averments in the application, but also any statements by the applicant or his agent regarding the merits of the claim that may have been made in the course of an examination by the Court under rule 4.

Kamrakh Nath v. *Sundar Nath*, I.L.R. 20 All. 299—*followed.*

The Court is not entitled to take into account any other evidence, oral or documentary, in considering whether the allegations of the applicant disclose a cause of action. On an application for leave to sue *in formâ pauperis* it

* Civil References Nos. 2 and 3 of 1932 arising out of Civil Revision Cases Nos. 218 of 1931 and 160 of 1931 of this Court.

1932

U BA DUN v. MAUNG LU PAN AND LEONG AH FOON v. LEONG AH CHOY.

is not the function of the Court to try or determine the suit on the merits. Further if the allegations of the applicant *prima facie* disclose a cause of action the Court ought not to embark, at that stage, upon the consideration of a complicated or doubtful question of law or fact arising upon those allegations.

Amirtham v. *A. Manikkam*, I.L.R. 27 Mad. 37 ; *Chattarpal Singh* v. *Raja Ram*, I.L.R. 7 All. 661 ; *Dalsri* v. *Vallabdas*, I.L.R. 13 Bom. 126 ; *Govindasami* v. *Municipal Council, Kumbakonam*, I.L.R. 41 Mad. 620 ; *Jogendra Narayan* v. *Durga Charan*, I.L.R. 46 Cal. 651 ; *Kamrakh Nath* v. *Sunder Nath*, I.L.R. 20 All. 299 ; *Nawab Bahadur of Moorshedabad* v. *Harish Chandra*, 13 C.L.J. 503 ; *Rathnam* v. *Pillai*, 13 M.L.J. 292 ; *Sankaraswier* v. *Subramania*, 13 M.L.J. 425 ; *Shaik Muhammad* v. *Shukurullah*, I.L.R. 3 Pat. 275 ; *Shaaran Bibi* v. *Abdus Samad*, I.L.R. 45 All. 548—*referred to*.

At an enquiry under rules 6 and 7 (1), both the evidence adduced by the parties and the examination of the applicant or his agent must be confined to the issue of pauperism, *i.e.*, to issues falling within rule 5 (*b*), (*c*) and (*d*). Under rule 7 (2) parties are entitled to argue that the applicant has or has not complied with the terms of clauses (*a*) to (*e*) of rule 5, or any of them ; but in respect of rule 5 (*d*) the argument and decision must be based solely upon the averments of the pauper in his application, and the statements in his examination or that of his agent, if any, under rule 4.

Ma Shapjauhi v. *Mubarak Ali*, I.L.R. 7 Ran. 361—*dissented from*.

PER HEALD, J.—It is open to the Court to examine the applicant regarding the merits of his claim under rule 7 (1) as well as under rule 4, but without going into a complicated or doubtful question of law or fact. The matters mentioned in clauses (*c*) and (*e*) of rule 5 are matters relating to the applicant's pauperism, and therefore they are matters on which evidence can be adduced under rule 6.

The first of the two References (Nos. 2 and 3 of 1932) for the decision of a Full Bench was made in the following terms by

PAGE, C.J. AND MYA BU, J.—This is an application to revise an order of the learned Additional District Judge of Mergui rejecting an application for leave to sue *in formâ pauperis*.

On the application being filed the learned District Judge of Mergui did not think fit to examine the applicant under Order 33, rule 4, but ordered that the learned Additional District Judge should hear and determine the suit "so far as the question of pauperism is concerned".

The learned Additional District Judge thereupon issued the notices prescribed under Order 33, rule 6, and at the hearing under rule 7 both the applicant and the respondent gave evidence, and other witnesses were called on the one side and on the other. So far as the learned Additional District Judge

decided that the applicant was not a pauper upon the ground that he possessed property sufficient to pay the prescribed Court-fees, in our opinion, there was no evidence upon the record which would justify such a finding. The learned Additional District Judge obviously was influenced in arriving at the conclusion that the applicant was not a pauper by what he stated to be an admission by the applicant himself that the applicant was possessed of unencumbered immoveable property worth Rs. 1,000. No such admission, however, was made by the applicant, and if the alleged admission is excluded the evidence upon the record was not such that the finding of the learned Additional District Judge could be sustained.

The view that this Bench takes upon the evidence before the Court is the same as that which was taken by another Bench of this Court in a previous suit, namely, that for the purposes of this case also the applicant must be regarded as a pauper. That, however, does not dispose of the application, because the learned Additional District Judge further held that the allegations of the applicant did not disclose a cause of action within Order 33, rule 5 (*d*), of the Civil Procedure Code.

Now, the finding of the learned Additional District Judge upon that question was based neither upon the allegations set out in the application for leave to sue *in formâ pauperis*, nor upon any statements of the applicant in the course of an examination by the Court under Order 33, rule 4. At the hearing of the issue relating to the pauperism of the applicant the learned Additional District Judge, purporting to act under rules 6 and 7, proceeded to admit the evidence of the applicant by way of examination, cross-examination and re-examination upon the merits of the case, in order *inter alia* that the Court might be in a position to determine whether the provisions of Order 33, rule 5 (*d*), had been complied with. We are of opinion, as at present advised, that in permitting an examination of the applicant under rules 6 and 7 for the purpose of determining whether his allegations disclosed a cause of action the learned Additional District Judge was exceeding his jurisdiction, and we are fortified in that conclusion by the following rulings: *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta* (1), *Govindasami Pillai* v. *The Municipal Council, Kumbakonam* (2) and *Shauran Bibi and another* v. *Abdus Samad and others* (3).

(1) (1919) I.L.R. 46 Cal. 651. (2) (1918) I.L.R. 41 Mad. 620.
(3) (1923) I.L.R. 45 All. 548.

1932

U BA DUK
v.
MAUNG
LU PAN
AND
LEONG
AH FOON
v.
LEONG
AH CHOY.

On the other hand, as we understand the ruling of a Divisional Bench of this Court (Rutledge, C.J. and Brown, J.) in *Ma Shofjaubi* v. *Mubarak Ali and others* (1), their Lordships in that case purported to lay down that it is competent for the Court in order to determine whether the provisions of Order 33, rule 5 (*d*), have been complied with, to permit the applicant to be examined, cross-examined, and re-examined under Order 33, rules 6 and 7. With all due deference, if the judgment of the Court in *Ma Shofjaubi* v. *Mubarak Ali and others* (1) was such as I have stated, in my opinion the law was not correctly laid down in that case.

For these reasons we refer to a Full Bench constituted as may seem best to the learned Chief Justice, the following question :

> "Whether, for the purpose of determining whether an applicant for leave to sue *in formâ pauperis* has complied with the provisions of Order 33, rule 5 (*d*), it is competent for the Court to allow the applicant to be examined under Order 33, rules 6 and 7, upon the merits of the case, or for such purpose to take the result of such examination into consideration."

The second Reference is as follows :

PAGE, C.J. AND MYA BU, J.—This is an application for revision of an order by the learned District Judge of Amherst dismissing an application by the present applicant for leave to sue *in formâ pauperis*. The learned District Judge did not examine the applicant under Order 33, rule 4, or reject the application for leave to sue as a pauper under rule 5. On the 6th of May 1931 an order was passed that notice should issue to the Government pleader and to the present respondent as the opposite party under rule 6. The opposite party filed an objection to the application upon the ground that the applicant's cause of action was barred by *res judicata*. The Government pleader did not file an objection. On the 18th of May 1931, at the hearing of the enquiry under rule 7, the learned pleader for the respondent adduced the proceedings in Civil Regular No. 28 of 1927 as evidence that the issue which fell for determination in the present suit had therein been determined in a manner adverse to the applicant. The learned District Judge, after arguments had been heard held, that the plaintiff's cause of action in the present suit was barred by *res judicata*.

(1) (1929) I.L.R. 7 Ran. 361.

Now, on the present application it is contended that in an enquiry pursuant to rules 6 and 7 the only issue upon which evidence may be adduced or arguments presented is an issue to determine the pauperism of the applicant, and further that in an enquiry held under rules 6 and 7 it is not competent for the Court to determine whether the applicant had complied with the provisions of Order 33, rule 5 (*d*). The learned advocate for the respondent has relied upon *Ma Shofjaubi* v. *Muborak Ali* (1), and it is contended that this case is an authority in support of the proposition that at an enquiry under rules 6 and 7 the Court may entertain an objection, admit evidence, and hear arguments to prove that the applicant has not complied with the provisions of rule 5 (*d*). With all due deference I am bound to say that I do not fully understand what was determined in that case. It would seem that their Lordships were of opinion that the learned District Judge had held that the applicant's claim *on the face of it* was barred by limitation; although the Court had not acted under rule 4 or rule 5. But in the course of an enquiry under rules 6 and 7 it appears that the Court examined the applicant, and took judicial notice of certain earlier proceedings to which the applicant was a party, and that, after taking into consideration the evidence of the applicant and the earlier proceedings, the Court had come to the conclusion that the applicant's claim was barred by limitation. If that is what took place in the District Court I find it difficult to understand how it could have been held in that case that the applicant's claim on the face of it was barred by limitation. Their Lordships, however, appeared to have been of opinion that in an enquiry under rules 6 and 7 it is competent for the Court to consider the merits of the case with a view to determine whether the provisions of rule 5 (*d*) have been complied with, and if that is the effect of the judgment in *Ma Shofjaubi's* case it raises a question of importance, as to which there is a conflict of judicial authority, and I am not satisfied that the principle laid down in or underlying that case is correct in law.

For these reasons we refer to a Full Bench, to be constituted as the learned Chief Justice may determine, the following question:

> "Whether the Government pleader or an opposite party duly served with a notice under Order 33, rule 6, is entitled under rule 6 or rule 7 to file an objection or to adduce evidence or to present an argument that the applicant for

(1) (1926) 7 Ran. 361.

1932

U BA DWE v. MAUNG LU PAN AND LEONG AH FOON v. LEONG AH CHOY.

leave to sue *in formâ pauperis* has not complied with the provisions of Order 33, rule 5 (*d*), and/or whether at an enquiry under rule 7 it is competent for the Court to determine whether the applicant has complied with the provisions of rule 5 (*d*)."

Kyaw Din for the appellants in Reference No 2. Except as provided by rule 4 of Order 33, Code of Civil Procedure a Court inquiring into the pauperism of an applicant has no power to go into the merits of the case. Rule 3 lays down the mode of presenting the application ; rule 4 provides for the examination of the applicant or his agent regarding the merits of the claim ; that is to say whether he has made out a *primâ facie* case or not. Under rule 5, the Court can, among other grounds, reject an application if it does not on the face of it show a cause of action. If it does not so reject the application the Court gives notice to the other party to adduce evidence as to the pauperism of the applicant. At that stage no evidence as to the merits of the case is permissible. Under rule 7, the Court hears arguments as to the merits under rule 4, and the evidence as to pauperism adduced under rules 4 and 6.

The words " any of the prohibitions specified in rule 5 ", occurring in rule 7 (2) refer only to clauses (*c*) and (*e*). Clauses (*a*), (*b*) and (*d*) cannot be called prohibitions.

Under rule 6, the only evidence that can be adduced is in regard to the pauperism of the applicant. The arguments under rule 7 should be based on the evidence under rule 6 and also the evidence obtained from the examination of the applicant under rule 4. Any argument on the merits must be confined to the application as it stands.

The applicant must make out that he has a good, *primâ facie* cause of action : *Kamrakh Nath* v.

Sunder Nath (1). Elaborate questions of law cannot be gone into at the stage contemplated by Order 33, rule 5 ; *Govindasami Pillai* v. *The Municipal Council, Kumbakonam* (2). The allegations on the face of the application must be the basis for a decision to reject the application.

The Court cannot examine witnesses, other than the applicant himself, to decide, say, a question of limitation ; *Jogendra Narayan Ray* v. *Durga Charan Thakurta* (3) ; *Sheikh Nasarullah* v. *Sheik Shukurulla* (4). It cannot decide the suit on the merits before the application for leave to sue as a pauper is granted : *Shauran Bibi* v. *Abdus Samad* (5).

The case of *Ma Shojambi* v. *Mubarak Ali* (6) went further than the Indian decisions and seems to lay down that an inquiry or argument under rule 7 is not restricted in its scope. *Jogendra Narayan Ray* v. *Durga Charan Thakurta* lays down the law correctly. It indicates the extent to which the Court can go under rules 4, 5 and 7.

Po Han for the respondents in Reference No. 2. Although the proceedings have reached the stage of rule 7, the Court can still examine the applicant under rule 4 as to the merits of the case. "Prohibitions" in rule 7 (2) refers to all prohibitions under rule 5. Rule 7 does not preclude the respondent from adducing evidence, which the applicant has suppressed in his application, as to whether there is a *prima facie* case or not.

Sutherland for the appellant in Reference No. 3. The objection filed by the respondent stating that the

(1) I.L.R. 20 All. 299.
(2) I.L.R. 41 Mad. 620.
(3) I.L.R. 46 Cal. 651.
(4) I.L.R. 3 Pat. 275.
(5) I.L.R. 45 All. 548.
(6) I.L.R. 7 Ran. 361.

1932

U BA DWE v. MAUNG LU PAN AND LEONG AH FOON v. LEONG AH CHOY.

suit is barred by reason of *res judicata* is evidence on the merits which cannot be adduced under rule 7. If the Court has judicial notice of such facts it may be a different matter. But where the question whether the application is barred is not on the face of it capable of decision, the Court has no power to entertain further evidence. In this case, the Court's attention was drawn to the records by adducing evidence, and that cannot be done under rule 7. Moreover the Court has decided the case on a complicated question of law.

Darwood for the respondent in Reference No. 3. The objection filed by the respondent under rule 7 is not evidence. It is filed only to draw the attention of the Court to certain facts. Order 13, rule 10, of the Code of Civil Procedure provides that the Court may of its own motion or on its attention being drawn to it, call for certain records. Arguing by analogy the Court has done or has been asked to do the same thing.

PAGE, C.J.—The material facts are set out in the orders of reference, and need not be restated.

The scheme of Order 33 is that before an applicant is granted the privilege of suing *in formâ pauperis* it is incumbent upon him to satisfy the Court that his application is in proper form, that he has a good and subsisting cause of action, and that he is *bonâ fide* and in fact a pauper.

The answers to the questions propounded depend upon the true construction of Order 33, rules 4 (1), 5, 6 and 7, which run as follows :—

"4 (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant or his agent, when the applicant is allowed to appear by agent regarding the merits of the claim and the property of the applicant.

" (5) The Court shall reject an application for permission to sue as a pauper—

(*a*) where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(*b*) where the applicant is not a pauper, or

(*c*) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or

(*d*) where his allegations do not show a cause of action, or

(*e*) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

" 6. Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

" 7. (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper."

Now for the purpose of deciding whether the allegations of the applicant show a cause of action within rule 5 (*d*) the Court must take into consideration not only the averments in the application, but also any statements by the applicant or his agent regarding the merits of the claim that may have been made in the course of an examination by the Court under rule 4.

1932

U BA DWE v. MAUNG LU PAN AND LEONG AH FOON v. LEONG AH CHOY.

PAGE, C.J.

"It is obvious that the mere statements in the plaint which accompanies an application for leave to sue as a pauper cannot be accepted as the sole materials on which a decision as to whether the applicant's allegations do or do not show a right to sue can depend. If the allegations in the plaint were the sole matters to be looked to and the applicant were admittedly a pauper, the granting of this application to sue as a pauper would depend, not on whether he had any merits to go upon, but on the skill of the gentleman who drafted his petition and his plaint, and the examination as to the merits under section 406 would be superfluous."

[Per Edge, C.J. and Burkitt, J. in *Kamrakh Nath* v. *Sundar Nath* (1).] If and so far as Bakewell and Kumaraswami Sastriyar, JJ. in *Govindasami Pillay* v. *The Municipal Council, Kumbakonam* (2) intended to hold that rule 5 (*d*) applied only to cases where it appeared "clearly on the face of the petition" that the allegations of the applicant did not show a cause of action I should respectfully disagree with the view that was expressed by the Madras High Court in that case. In my opinion, however, the Court is not entitled to take into account any other evidence, oral or documentary, in considering whether the allegations of the applicant disclose a cause of action. It appears to me that this must be so, both because on an application for leave to sue *in formâ pauperis* it is not the function of the Court to try or determine the suit on the merits, and because under rule 5 (*d*) it is upon a consideration of "his", that is the applicant's, allegations that the Court is to determine whether the provisions of rule 5 (*d*) have been complied with.

I am further of opinion that the Court which proceeds *exparte* under rule 5, is not precluded at an enquiry held under rule 7 (2) from hearing an argument on behalf of the parties upon the question

(1) (1898) I.L.R. 20 All. 299 at p. 301. (2) (1918) I.L.R. 41 Mad. 639.

whether the application should be dismissed under rule 5 (*d*) and that after hearing the parties, if they elect to present an argument to the Court, the Court is entitled under rule 7 (2) to reject the application upon the ground that the applicant's allegations do not show a cause of action. On the other hand I hold that the argument and decision of this question under rule 7 (2) must proceed and be based solely upon the averments in the application and any statement regarding the merits of the claim that may have been made by the applicant or his agent in the course of an examination by the Court under rule 4. As I apprehend the meaning and effect of Order 33, in considering whether the case falls within rule 5 (*d*), it would be as wrong to hold that the Court must have regard only to the allegations set out in the application as to hold that the Court may take into consideration any evidence other than the statements of the applicant or his agent made in the course of an examination under rule 4. I respectfully dissent from the decision in *Vijendra Tirtha Swami* v. *Sudhindra Tirtha Swami* (1), which, in my opinion, was rightly over-ruled by a Full Bench of the Madras High Court in *Rathnam Pillai* v. *Pappa Pillai* alias *Sundaram Pillai* (2).

To permit the Court when considering whether the case falls within rule 5 (*d*) to take into account other matters of which it has received notice *aliunde*, in my opinion, would be to travel outside the scope and ambit of Order 33, and in effect to allow the Court to try the suit on the merits of an application for leave to sue *in formâ pauperis*. That could never have been intended : [*Chattarpal Singh* v. *Raja Ram* (3) ; *Kamrakh Nath* v. *Sundar Nath* (4) ; *Dulari*

(1) (1896) I.L.R. 19 Mad. 197.
(2) (1903) 13 M.L.J. 292.
(3) (1885) I.L.R. 7 All. 661.
(4) (1898) I.L.R. 20 All. 299.

1932

U BA DWE v. MAUNG LU PAN AND LEONG AH FOON v. LEONG AH CHOY.

PAGE, C.J.

v. *Vallabdas Pragji* (1) ; *Rathnam Pillai* v. *Pappa Pillai* alias *Sundaram Pillai* (2) ; *Sankararamier and another* v. *Subramania Aiyar and others* (3) ; *Amirtham* v. *Alwar Manikkam and others* (4) ; *Nawab Bahadur of Moorshedabad* v. *Harish Chandra Acharjee* (5) ; *Govindasami Pillai* v. *The Municipal Council, Kumbakonam* (6) ; *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta* (7) ; *Shauran Bibi and another* v. *Abdus Samad and others* (8) and *Shaikh Muhammad Nasurullah* v. *Sheik Muhammad Shukurullah* (9).]

Further, I am of opinion that, if the allegations of the applicant *primâ facie* disclose a cause of action, the Court ought not to embark upon the consideration of a complicated or doubtful question of law or fact that may arise upon the allegations of the applicant for the purpose of determining whether the allegations show a cause of action, for it is contrary to the scheme and the provisions of Order 33 that the Court for the purpose of disposing of an application for leave to sue *in formâ pauperis* should decide issues affecting the merits that more properly and fairly can be determined at the hearing of the suit. *Govindasami Pillay* v. *The Municipal Council, Kumbakonam* (6). Again, at an enquiry held pursuant to Order 33, rules 6 and 7 (1), the evidence adduced by the parties and the Government pleader and the examination of the applicant or his agent, in my opinion, must be confined to the issue of pauperism, *i.e.*, to issues falling within rule 5 (*b*) (*c*) and (*e*), which were enacted to enable the Court to determine whether the applicant is *bonâ fide* and in fact

(1) (1889) I.L.R. 13 Bom. 126.
(2) (1903) 13 M.L.J. 292.
(3) (1903) 13 Mad. L.J. 425.
(4) (1904) I.L.R. 27 Mad. 37.
(5) 13 Cal. L.J. 593.
(6) (1918) I.L.R. 41 Mad. 620.
(7) (1919) I.L.R. 46 Cal. 651.
(8) (1923) I.L.R. 45 All. 548.
(9) (1924) I.L.R. 3 Pat. 275.

a pauper ; and I am of opinion that it is not competent for the Court at such an enquiry to admit evidence relating to the merits of the applicant's claim. Further, I hold that under rule 7 (2) the parties are entitled to present an argument to the Court for the purpose of proving that the applicant has or has not complied with the terms of clauses (*a*) to (*e*) of Order 33, rule 5, or any of them, but that in respect of rule 5 (*d*), for the reasons that I have stated, the argument and decision must be based solely upon the averments in the application and the allegations of the applicant or his agent in any examination that may have been held under rule 4. In *Ma Shopjambi* v. *Mubarak Ali* (1), as I apprehend what was decided in that case, Rutledge C.J. and Brown, J. held in a case in which the applicant had not been examined under rule 4 and the Court had not rejected the application for leave to sue *in formâ pauperis* under rule 5, the Court was entitled to examine the applicant as to the merits of the claim at an enquiry held under rules 6 and 7. Their Lordships referred to *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta* (2) as an authority supporting the view that they expressed but it appears to me, that in *Jogendra Narayan Ray's* case (2) the Calcutta High Court laid down the law in the contrary sense. Again, in *Ma Shopjambi* v. *Mubarak Ali* (1) it was held that the District Court was right in taking "judicial notice of certain proceedings in Court in which the petitioner was a party and in which she made certain applications". I confess that I do not appreciate the meaning and use of the term "judicial notice" in this connection or how statements or other matters of which the Court may have

(1) (1929) I.L.R. 7 Ran. 361. (2) (1919) I.L.R. 46 Cal. 651.

1932

U BA DWE v. MAUNG LU PAN AND LEONG AH FOON v. LEONG AH CHOY.

PAGE, C.J.

obtained information *aliunde*, (unless they are admitted by the applicant), can be treated as "his allegations" within rule 5 (*d*). I have perused the original record of the proceedings of the High Court in *Ma Shopjambi's* case (1), and what appears to have happened is that the learned District Judge sent for the record of certain proceedings unconnected with the application before him, in which petitions and applications were made by and against the applicant in the present case, and the learned District Judge then proceeded exhaustively to analyse the statements and actions of the parties to these earlier proceedings, and drew inferences therefrom adverse to the applicant, and arrived at findings of fact upon controversial questions relating to merger and adverse possession. The learned District Judge finally concluded his investigation of these earlier proceedings by holding that "it seems to me that her application is, on the face of it, time-barred". I am at a loss to understand how in such circumstances it could be held that the "petitioner's present claim is on the face of it barred by limitation", but that appears to have been the view held and expressed both by the learned District Judge, and by Rutledge, C.J. and Brown, J. in the appeal in that case. With all due respect I am of opinion that in *Ma Shopjambi* v. *Mubarak Ali* (1) the law was not correctly stated, and the decision in that case must be over-ruled.

In Reference 2 I would answer the questions propounded in the negative, and in Reference 3 I would answer that it is not competent for the Government Advocate or an opposite party under rule 6 or rule 7 to adduce evidence for the purpose of proving that the applicant for leave to sue *in formâ pauperis* has not complied with the provisions of Order 33, rule 5 (*d*), but

(1) (1929) I.L.R. 7 Ran. 361.

that under rule 7 (2) it is competent for the parties to present an argument in that behalf, and for the Court to determine whether the provisions of rule 5 (*d*) have been complied with.

The costs of each Reference will be in the discretion of the Court by which the Reference was made.

HEALD, J.—I concur in the answers which the learned Chief Justice gives to the questions referred, but I would respectfully add that in my opinion it is open to the Court to examine the applicant regarding the merits of his claim under rule 7 (1) as well as under rule 4. I would also note that I regard the matters mentioned in clauses (*c*) and (*e*) of rule 5 as matters relating to the applicant's pauperism, and therefore as matters on which evidence can be adduced under rule 6. With all respect I am not prepared to go so far as to say that in my opinion the judgment in *Ma Shopjambi* v. *Mubarak Ali* did not state the law correctly. The headnote to the official report is undoubtedly wrong in its suggestion that the opposite party is entitled under rule 6 to adduce evidence to show that the applicant has no cause of action, but I venture to suggest that the learned Judges were right in holding, as I think they did hold, that under rule 7 (2) the Court is entitled to consider the allegations made by the applicant in his examination by the Court under that rule for the purpose of deciding whether or not his allegations show a cause of action. On the further question whether or not the learned Judges were right in holding that the lower Court acted correctly in using judicial records, for which it had sent presumably under the powers given by Order 13, rule 10, I am not at present prepared to express a decided opinion because the question of the use which a Court is entitled to make of records so sent for has not been

1932

U BA DWE v. MAUNG LU PAN AND LEONG AH FOON v. LEONG AH CHOY.

HEALD, J.

argued before us, but I venture to say that I am inclined to think that if a Court sends for records in such a case, whether of its own mere motion or as a result of the arguments of the opposite party heard under rule 7 (2), it may in a proper case use those records in its discretion for the purposes of its examination of the applicant under rule 7 (1). I however entirely agree that the Court ought not to embark upon the consideration of a complicated or doubtful question of law or fact at the hearing under Order 33, rule 7, and that such questions would more properly and fairly be determined at the hearing of the suit.

I concur in the proposed order as to costs.

CUNLIFFE, J.—I agree with the judgment delivered by the learned Chief Justice.

DAS, J.—I agree with the judgment of my Lord the Chief Justice.

MYA BU, J.—I also agree with the judgment of the learned Chief Justice.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932

May 8.

STEEL BROTHERS & CO., LTD.

v.

TOKERSEE MOOLJEE.*

Milling Notice—Rangoon Rice Contracts—Delivery ex-hopper—Date at seller's option—Exercise of Option—Option, whether exercisable more than once within contract period—Milling notice fixes date and place of delivery—Failure to give notice of date and place of delivery—Alleged usage of Rangoon Rice Millers—Claim for Damages—Construction of Contracts.

The rule of construction applicable in general to all written contracts is, that they are to be construed according to the real intention of the parties, to

---

* Civil First Appeal No. 214 of 1931 from the judgment of this Court on the Original Side in Civil Regular No. 22 of 1931.

1932

STEEL BROTHERS & CO., LTD. v. TORRISBY MOOLJEE.

be collected from the language they have used; that effect is to be given, if possible to every word used, and that every word is to be interpreted according to its natural and ordinary meaning, unless such construction would be contrary to the manifest intention of the parties, or would necessarily lead to some contradiction or absurdity.

Coddington v. *Paleologo*, L.R. 2 Ex Ca. 193—*referred to*.

In pursuance of a contract for the sale of rice the plaintiffs sent two milling notices to the defendants in the form commonly used by the Rangoon rice millers, requiring them to send their representative to one of the mills mentioned in the contract on a given date to accept or reject delivery of the rice that was to be milled on that day, and to send gunnies and twine. Under the contract the sellers had the option of fixing the date of delivery on any day within the stipulated period, and of giving delivery of the rice from any one or more of the mills specified in the contract. The buyers complied with the notices, but the plaintiffs failed to mill any rice on the day fixed for delivery and instructed the buyers to come again six days later. The defendants did so, but on that occasion also the plaintiffs failed to mill or deliver the rice. The defendants claimed that the plaintiffs, having once exercised their option to fix the date and place of delivery could not postpone the delivery to another date. The plaintiffs claimed that they were entitled to postpone the milling and delivery from day to day within the contract time, both in accordance with the terms of the contract and also under an usage of the Rangoon rice market. They sued the defendants for damages for breach of contract in failing to take delivery. The trial Court dismissed the suit, and the plaintiffs appealed.

Held, confirming the trial Court, (1) that upon the true construction of the contract the buyers were entitled to notice from the sellers of the date and place fixed by the sellers for delivery of the rice, and that when the sellers had once exercised the option of fixing the date and place of delivery they were not entitled to alter the date and/or the place so fixed for delivery without the buyers' consent; (2) that, as the sellers were not ready or willing to give delivery on the date or at the place fixed by them for delivery the claim to recover damages from the buyers for failure to take delivery failed; (3) that if the milling notices were not notices fixing the date and place of delivery the suit must also fail as in that event admittedly the sellers did not fix any date or place for delivery or give notice in that behalf to the buyers; (4) that the evidence did not establish the alleged usage.

Quaere whether the Court would have given effect to the alleged usage, if proved.

Brown v. *Royal Insurance Company*, 1 E. & E. 853; *Gath* v. *Lees*, 3 H. & C. 558; *Houck* v. *Muller*, 7 Q.B.D. 92; *Juggernath Khan* v. *Maclachlan*, I.L.R. 6 Cal. 681; *Reuter & Co.* v. *Sala & Co.*, 4 C.P.D 239—*referred to*.

The facts of the case are fully set out in the judgments of the Courts reported below. The judgment on the Original Side was delivered by—

1932

STEEL BROTHERS & CO., LTD v. TOKERSEY MOOLJEE.

DAS, J.—On the 18th of September 1930, by a set of Bought and Sold Notes, the plaintiff company sold, and the defendant firm agreed to purchase, four hundred tons Kanaungtoe Small Mills Quality cleaned rice at a price set out in the contract. The Bought Note is exhibit P. Clause 8 of the contract reads as follows :

> "Delivery to be taken ex-hopper, November 1930. Date at sellers' option and payment to be made in cash, before any rice is removed, but not in any case later than immediately after milling. Payment in cash on completion of the milling of each 1,000 bags if required."

The defendant firm admit having entered into this contract and state that on the 4th of November 1930, the plaintiff company tendered two Milling Notices, Nos. 380 and 381, each relating to 100 tons of rice, and intimated that the milling of the said rice would commence at 5 a.m. on the 4th of November 1930. They state that they had sold this rice to a third party, and that the purchaser sent gunnies and twine to the mill before the date of milling and attended the mill on the specified date but was informed that the plaintiff company had no paddy at that time and, therefore, could not mill, and asked the purchaser to attend on the 10th of November 1930, to take delivery ; but even on the 10th of November the plaintiff company were unable to give delivery as they had no paddy.

The defendant firm's contention is that the plaintiff company having once exercised their option of fixing the date of delivery could not postpone the delivery from that date, and having failed to deliver rice on that date had committed a breach of contract, and that the defendant firm could, and did, cancel the contract for that reason.

The plaintiff company filed a reply to the written statement, and in that reply they do not deny the allegations contained in paragraph 5 of the defendants' written statement, but admit the postponement of the time for milling and claim that by an established custom in the Rangoon trade millers are entitled to postpone the time of milling stated in their milling notice to any later hour or date within the contract time.

Five issues were settled in this suit, and the main issues are issues Nos. 2 and 3, which run as follows :

> "*No.* 2.—Was the plaintiff company entitled to postpone the time of milling, after milling notice had issued

fixing a date and the plaintiff company had failed to deliver rice ?

"*No.* 3.—Is evidence of custom, as set out in paragraphs 4 and 5 of the plaintiffs' reply, admissible ? If so, what is the custom ? "

The principal question to be decided in this case is the interpretation of clause 8 of the Bought Note. Clause 8 states that delivery is to be taken ex-hopper, November 1930. Date at sellers' option. It is admitted that the method of intimating the date of delivery ex-hopper is for the miller to issue a milling notice fixing the date for milling the rice.

It is contended on behalf of the plaintiff company that under clause 8 the miller has a right of delivering the rice at any time during the month of November, and that the issue of the milling notice does not mean that the seller has exercised his option of fixing the date of delivery.

It is contended on behalf of the defendant firm that the miller having issued the milling notice fixing a date for the delivery of the rice has exercised his option under the contract and cannot change the date of delivery without the consent of the purchaser.

To my mind the meaning of the clause seems to be very clear. The seller having issued the milling notice fixing the date of delivery has exercised his option of fixing the date under the contract and cannot alter the date of delivery without the consent of the purchaser. To hold otherwise would be to attach no meaning to the words " date at sellers' option " in the contract. Under the contract the seller has a right of fixing a date for delivery, in all November, and having fixed that date cannot alter it without the consent of the purchaser.

I may in this connection refer to the case of *Gath* v. *Lees and another* (1). That was a case where the plaintiff agreed to sell a quantity of cotton to the defendant to be delivered at seller's option in August or September 1864. The plaintiff intimated that he would deliver the cotton in August but did not do so, and contended that he was entitled to deliver the cotton in September also. Baron Martin in the course of the argument remarked : " Your construction gives no meaning to the words 'at seller's option'." He also observed : " The seller could not give two notices. When the notice was given the buyer was bound to be

(1) (1865) 140 R.R. 606.

1932

STEEL BROTHERS & CO., LTD. v. TOKERSEE MOOLJEE.

DAS, J.

ready with the money, which he might have had difficulty in getting, then is the seller to say, 'I will not deliver the cotton according to my notice, but will put you off until next month'?", and the Court decided in favour of the defendants.

This case was referred to in *Borrowman, Phillips & Co.* v. *Free and Hollis* (1). Lord Justice Bramwell at page 503 states as follows :

> "The defendants have relied upon *Gath* v. *Lees* (2), but the decision is distinguishable. In that case cotton was 'to be delivered at seller's option in August or September 1864'. The seller elected to exercise that option in August, and notice that it would be so exercised was accepted by the buyers. The seller had a right to exercise that option".

And Lord Justice Cotton at page 506 observed as follows :

> "* * * if there had been an election within the terms of the contract, it would have been binding upon the defendants ; * * * As to *Gath* v. *Lees* (2), I wish to remark that in that case the position of the defendants had been altered by their acceptance of the plaintiff's offer : the plea was good as an equitable defence ; but I also think it good as a legal defence. A contract had been arrived at, which was acceptable to both parties, and it could not be altered without the assent of both parties."

In this case also the plaintiff company had exercised their option of fixing the date and the defendant firm had accepted the same by sending their gunnies and men to take delivery. The plaintiff company could not after that change the date without the consent of the defendant firm.

I, therefore, hold on this issue that the plaintiff company having fixed the date of delivery by issuing a milling notice could not alter it without the consent of the defendant firm, and it is not alleged in this case that the defendant firm consented to the postponement of the delivery to a date later than the 10th of November.

The next question is whether evidence of custom, as alleged in paragraphs 4 and 5 of the plaintiff company's reply, is admissible.

---

(1) (1878) 4 Q.B.D. 500. (2) (1865) 140 R.R. 606.

Paragraphs 4 and 5 of the plaintiff company's reply run as follows :

"*Paragraph* 4.—Plaintiff company admits postponement of the time for milling and alleges that by an established custom of the Rangoon rice trade millers are entitled to postpone the time of milling stated in a milling notice to any later hour or date within the contract time.

"*Paragraph* 5.—At the time of making the contract in suit plaintiff company and defendant firm were both well aware of the said custom which in fact forms an implied term of the said contract."

It is argued on behalf of the plaintiff company that this evidence of custom is admissible under proviso 5 to section 92 of the Indian Evidence Act. That proviso runs as follows :

"Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract."

It is argued that this alleged custom is not repugnant to, or inconsistent with, the express terms of the contract as embodied in exhibit P, and that this is a custom usually annexed to contracts of that description. I do not agree. To admit the evidence of the custom alleged in paragraph 4 of the plaintiff company's reply would be to go against the express words of clause 8 of the contract and would nullify the words "date at sellers' option."

I may refer here to the case of *Edmund Bowes, J. B. Martin and W. L. Kent* v. *Charles Shand, Alexander Shand and R. A. Robinson* (1), where their Lordships say, "The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contracts relate, is for the Court."

It is not alleged in this case that there is anything peculiar in the words of the contract in suit, and it is for the Court to interpret the words of the contract.

I may also refer to the case of the *North-Eastern Railway Company* v. *Lord Hastings* (2), where their Lordships of the House of Lords held that "the words in the deed were plain

(1) (1876) 2 Ap. Ca. 455. (2) (1900) A.C. 250.

1932

STEEL BROTHERS & CO., LTD. v. TOKERSEE MOOLJEE.

DAS, J.

and unambiguous: that the fact that the parties had interpreted the words in a sense different from that which the words themselves plainly bore could not affect the construction."

The headnote in the case of *Palgrave, Brown and Son, Limited* v. *Owners of S. S. Turid* (1) runs as follows:

"A vessel was chartered to carry a cargo of timber to Yarmouth under a charter party which provided that the vessel should deliver the cargo at Yarmouth 'always afloat * * * cargo to be * * * taken from alongside the steamer at charterers' risk and expense as customary'. On her arrival at Yarmouth the vessel to lie 'always afloat' could not come nearer than thirteen feet out from the quay. In these circumstances the custom of the port was that a wooden staging should be erected between the ship about to discharge and the quay, and that stevedores employed by the shipbrokers on behalf of the shipowners should carry the cargo from the ship's rail over the staging and dump the same on the quay at not less than ten feet from the quay edge, and that the whole cost of this work should be borne by the shipowners. This work was done and was paid for by the shipowners under protest. In an action by the shipowners against the charterers for the difference between the cost of the whole work and the rate for delivery at the ship's rail:

Held, that the custom was inconsistent with the provision in the charterparty that the cargo should be taken from alongside the steamer at charterers' expense, and that the shipowners were entitled to succeed."

In this case the custom, even if proved, would be inconsistent with the express words of the contract and I do not think that such evidence would be admissible. But, as I have in this case admitted evidence to prove this alleged custom, I think it would be better if I decide the question whether the custom has been proved or not, because it is quite possible that I might be wrong in my view of the law regarding the admissibility of this evidence.

I will now consider the evidence called on behalf of the plaintiff company to prove this alleged custom. It may be mentioned from the beginning that none of the millers called on

(1) (1922) 1 A.C. 397.

behalf of the plaintiff company rely on this alleged custom, Mr. Howison relies on the interpretation of the contract which he states gives the miller a right to change the date of milling even after issuing milling notices as long as it is in the month of the contract. At page 15 of his evidence he states: "I should like to add that the seller could fix a date for delivery in a contract such as exhibit P and yet retain the option of altering the date thus fixed."

Mr. McEwen gives similar evidence. At page 10 of his evidence he says: "The right which I claim of postponing milling is contained in condition 8 of exhibit P and is to be gathered from it."

Mr. Fairweather gives similar evidence. At page 4 of his evidence he states: "I think the right of the miller to postpone milling is contained in condition 8 of exhibit P. My contention is that, as the seller has the option to fix the date of delivery ex-hopper, he has the option to postpone milling"; and at page 5 he says: "Since the words 'date at sellers' option' mean what I have stated, it is not necessary to fall back upon any custom for assistance, to obtain the meaning of those words."

It is, therefore, clear from this that the millers do not rely on any custom at all but on the interpretation of the contract itself.

Mr. Master, one of the directors of Adamjee Hajee Dawood & Co., at page 7 of his evidence says: "No contract is entered in the rice market, by which delivery is fixed for the whole of a month, with option to the seller to fix the date of delivery." At page 8 he says: "I repeat that there is no such contract in the market, by which delivery is allowed during a whole month with option to the seller to fix a date for delivery."

If, therefore, this witness has not heard of contracts like exhibit P, his evidence as to the custom of the market is not of much value, because it is admitted that all rice contracts contain a clause like clause 8.

Mr. Shamjee, one of the witnesses called on behalf of the plaintiff company, at page 11 of his evidence says: "There cannot be a clause 'for delivery for a whole month' side by side with a clause 'date at sellers' option' in a contract. I say that in a contract in which delivery is for the whole month, there cannot be a clause stating 'date at sellers' option'."

None of the other witnesses prove the custom as alleged by the plaintiff. On the other hand, the witnesses on behalf of the

1932

STEEL BROTHERS & CO., LTD. v. TORERSHI MOOLJEE.

DAS, J.

defendant, who are just as respectable as the witnesses called on behalf of the plaintiff company, positively state that there is no such custom, but the postponement of milling is by mutual consent and arrangement between the parties.

I am inclined to hold that there is no custom giving the millers a right to postpone the milling after they had issued a milling notice in terms of the contract against the wishes of the purchaser. It has always been, I am inclined to believe, a case of mutual arrangement between the miller and the shipper.

I must, therefore, hold that the custom, as alleged by the plaintiff company, is not proved. The plaintiff company's suit is, therefore, dismissed with costs. The defendant firm are entitled to special costs at fifteen gold mohurs a day after the first day of hearing for all the days of the hearing of this suit.

The Plaintiffs appealed.

Clifton for the appellants. A milling notice which states that rice is to be milled on a certain date and delivered ex-hopper does not necessarily mean that it is to be delivered on that day. The words "delivery to be taken ex-hopper" are followed by the word "Date" in the printed form of notice and this indicates that the seller has an option to fix the date of delivery. Goods have to come into existence before delivery can be made.

Where one of the parties to a contract has an option to make an election before the contract can be performed, until that election which can be made at any time, is made, the contract is not capable of performance, and no question of repudiation by the other party arises till then. See *Borrowman* v. *Free* (1). In this case the goods were not ready as they were unascertained till the milling would take place. Up to the moment of milling the seller can exercise his option to postpone the date of milling. It is only when the rice is milled and consequently ascertained

(1) 4 Q.B.D. 500, 503.

1932

STEEL BROTHERS & CO., LTD. v. TOKERSEE MOOLJEE.

that the seller cannot go back on his contract. [See Blackbourn on Contract of Sale (3rd Ed.), p. 138; *Aldridge* v. *Johnson* (1).]

The contract between the parties does not impose any liability on the seller to send a milling notice at all. The sending of a milling notice is probably a creation of custom. The milling notice does not fix the date of delivery, and in this respect the case is distinguishable from *Juggernath* v. *Maclachlan* (2) where a positive right was given to one of the parties to fix the date.

Also there is a custom prevalent in Rangoon whereby the miller can postpone the date of milling. Such a custom has been in vogue for a number of years, and consequently must be deemed to be reasonable. The unreasonableness of a custom must be shown to be patent on the face of the contract as in *Devonald* v. *Rosser & Sons* (3) and *Sagar* v. *H. Ridehalgh & Son, Ltd.* (4). And even though a custom is unreasonable, yet if the parties acquiesce in it, it is not for the Court to reject it, unless it outrages justice and commonsense: *Produce Brokers Company* v. *Olympic Oil and Cake Company* (5).

Every custom is in a sense inconsistent with the written terms of a contract because it adds something to it which is not there. It is only when the custom cannot be read together with the contract that the custom cannot be alleged to govern it. And to prove a mercantile custom there need not be the same antiquity or notoriety which is required of any other custom: *Jaggomohun* v. *Manickchund* (6).

Rafi for the respondents. *Juggernath* v. *Maclachan* (2) is on all fours with the present case. The seller

(1) 26 L.J. A.B. 296, 300.
(2) I.L.R. 6 Cal. 681.
(3) [1906] 2 K.B. 728.
(4) [1930] 2 Ch. 117.
(5) [1916] 2 K.B. 297, 301.
(6) 7 Moo. I.A. 263, 282.

1932

STEEL BROTHERS & CO., LTD. v. TOKHEIM MOOLJEE.

had an option to deliver during the whole month, with a notice of seven days for fixing delivery. Once that notice was given, the Court held that the date of delivery was fixed. The object of sending the milling notice is to fix the date of delivery. Further, the position of the respondents was altered after receipt of the milling notices because they made contracts depending upon the date fixed in the milling notices.

Apart from the milling notices no other intimation was given to the buyer of the date of delivery. And if a custom is sought to be introduced giving the seller the right to postpone the date of milling as specified in the notice such a custom would be unreasonable, because it would be absolutely one-sided. It would also be inconsistent with the written terms of the contracts: *Devonald* v. *Rosser & Sons* (1); *Palgrave Brown & Son, Ltd.* v. *Owners of S. S. Turid* (2); *Holmes Wilson & Co., Ltd.* v. *Bala Kristo De* (3); *W. N. Hillas & Co., Ltd.* v. *Rederi Aktiebolaget Acolus* (4); *Arlapa* v. *Narsi* (5).

The fact that a custom is long standing is not conclusive that it is legal and enforceable. *Sagar* v. *H. Ridehalgh & Son, Ltd.* (6).

PAGE, C.J.—This is an appeal from a decree of Das, J. dismissing a suit by the appellants to recover damages for failure to take delivery of 200 tons of rice. The contract is set out in the Bought Note, exhibit P, of which the material clauses run as follows:

"Rangoon, 18th September 1930. (1) We have this day bought from Steel Brothers & Co., Ltd., the undernoted rice

(1) (1906) 2 K.B. 728, 741.
(2) (1922) 1 A.C. 397.
(3) I.L.R. 54 Cal. 549.
(4) 43 T.L.R. 67.
(5) 8 Bom. H.C.R. 19, 22.
(6) (1930) 2 Ch. 117.

1932

STEEL BROTHERS & CO., LTD. v. TOKERSEE MOOLJEE.

PAGE, C.J.

of the description and on terms and conditions as follows :

400 tons bags at Rs. 355 per 100 baskets of 75 lbs. each, Kanaungtoe Small Mills Quality.

"(4) Gunnies and twine to be supplied by buyers or if sellers' gunnies are used, owing to late arrival at mill of buyers' gunnies, or other causes, Rs. 75 per 100 gunnies, and if sellers' twine is used Rs. 2 per 100 bags for the same will be charged.

"(7) The rice is to be milled by day or night at sellers' option.

"(8) Delivery to be taken ex-hopper November 1930, date at sellers' option and payment to be made in cash, before any rice is removed, but not in any case later than immediately after milling. Payment in cash on completion of the milling of each 1,000 bags if required.

"(9) If the market price of the abovementioned rice declines prior to milling, sellers shall have the right of requiring buyers to deposit with sellers the margin between contract price and market price of the day on which such milling notice is issued for the rice deliverable under this contract. Failing the deposit of such margin as stated prior to time fixed for commencement of milling sellers shall have the right of cancelling this contract, and of claiming on buyers for any difference between the sale price and market price of the day on which milling notice is issued for rice deliverable under this contract.

"(10) Sellers have the right of disposing of any rice milled against this contract by private or public sale on buyer's account should they fail to pay within 24 hours of presentation of bill. Where gunnies have been sent by the original buyers sellers shall have the right of appropriating the proceeds of the gunnies and twine towards any loss sustained on the resale.

"(11) All risk of fire, damage by rats, and other contingencies to be borne by buyers from the time the rice is milled.

"(16) Accidents to machinery, strikes or sickness of mill hands and coolies, always excepted.

"(17) No claim whatever to be made by buyers after delivery of the rice has been taken ex-hopper.

"(19) Sellers to have the right of delivering under the contract the milling of Messrs. Bulloch Bros. & Co., Ltd., and/or Steel Bros. & Co., Ltd., and/or The Burma Co., Ltd., and/or

1932

STEEL BROTHERS & CO., LTD. v. TOKERSEE MOOLJEE.

PAGE, C.J.

Ellerman's Arracan Rice & Trading Co., Ltd., and/or The Anglo-Burma Rice Company, Limited, and/or Joseph Heap & Sons, Ltd.

Broker—Messrs. R. Korsi & Co.

(Signed) Tokersee Mooljee & Co."

The first question that arises is, what is the meaning and effect of these clauses in the contract, and, in particular, of clauses 8 and 19?

"The rule of construction applicable in general to all written contracts is, that they are to be construed according to the real intention of the parties, to be collected from the language they have used; that effect is to be given, if possible, to every word used, and that every word is to be interpreted according to its natural and ordinary meaning, unless such construction would be contrary to the manifest intention of the parties, or would necessarily lead to some contradiction or absurdity." [Per Kelly, C.B. in *Coddington* v. *Paleologo* (1).] In my opinion the construction of this contract is free from difficulty. Under clause 8 delivery is to be taken in November 1930, and the sellers have the option of fixing any date in the month of November on which delivery is to take place. Under clause 19 the sellers have the right to select any mill from among the mills referred in clause 19 as the place where delivery is to be made, and in order that the buyers may know when and where they are to take delivery the sellers must give timely notice to the buyers of the date on which and the place where the sellers have fixed that delivery is to be effected: *Gath* v. *Lees* (2); *Juggernath Khan* v. *J. E. Maclachlan* (3); *Brown* v. *The Royal Insurance Company* (4); *Howk* v. *Muller* (5) and *Reuter, Hufeland & Co.* v. *Sala*

(1) L.R. (1867) 2 Ex. Ch. 193, 200.
(2) (1865) 3 H. & C. 558.
(3) (1883) I.L.R. 6 Cal. 681.
(4) 1 E. & E. 853.
(5) (1881) 7 Q.B.D. 92.

1932

STEEL BROTHERS & CO., LTD. v. TOKERSEE MOOLJEE.

PAGE, C.J.

& Co. (1). I am further of opinion, having regard to the form of the contract, that when the sellers have exercised the option of fixing the date and the place of delivery they are not entitled to alter the date and/or the place so fixed for delivery without the buyers' consent; and the reason is that upon receipt of a notice fixing the date and place of delivery the buyers become under an obligation to provide gunnies and twine at the date and place so fixed, and must send a representative to accept delivery or reject the rice as delivery is made ex-hopper (Cl. 17). Further, the buyers may be required "to deposit with sellers the margin between contract price and market price of the day on which such milling notice is issued for the rice deliverable under this contract". And under clause 8 the buyers must also be ready to pay the purchase price in cash "before any rice is removed, but not in any case later than immediately after milling. Payment in cash on completion of the milling of each 1,000 bags if required".

On behalf of the appellants it was urged that upon a true construction of the contract the sellers were at liberty to alter the date and place fixed for delivery as often as they chose, so long as delivery was given during the month of November, and that, although the buyers would be bound to take delivery on any day for which the sellers had sent a notice fixing the date and place of delivery, and must be ready with gunnies, twine, cash, and a representative at the mill on that day, the sellers were at liberty to postpone the milling and delivery *de die in diem* until the last day of November, if it was to the sellers' interest to do so. Such a construction, in my opinion, would be neither good

(1) (1879) 4 C.P.D. 239.

1932

STEEL BROTHERS & CO., LTD. v. TORRSSEE MOOLLIK.

PAGE, C.J.

sense, nor, having regard to the terms of the contract, good law. It may be that if the buyers rejected the rice tendered for delivery at the date and place fixed by the sellers for delivery the sellers would be entitled at a later date within the period named in the contract to make another tender of the rice under the contract: *Borrowman* v. *Free* (1); but that is not the question that arises in the present case. In my opinion the meaning and effect of the contract is clear and unambiguous, and the only substantial issue that falls for determination in the present case is whether the appellants in fact fixed the date and place when and where delivery was to be effected, and gave timely notice on that behalf to the respondents. If the appellants did not fix the date and place of delivery under the contract, and/or failed to give notice thereof to the respondents, the suit must fail, for it is clear that if the appellants did not inform the respondents of the date when and the place where delivery was to be taken they cannot recover damages from the respondents upon the ground that the respondents committed a breach of the contract in failing to take delivery of the rice. On the other hand, if the sellers exercised their option of fixing the date and place of delivery and gave timely notice in that behalf to the respondents, the further question will arise whether on the date and at the place fixed for delivery the appellants were ready and willing to make delivery of the rice.

Now, it is common ground that the delivery of rice ex-hopper is the last stage in the process of milling, for as the rice is milled it is passed down a shoot out of the hopper and projected into the

(1) (1878) 4 Q.B.D. 500.

buyers' gunnies. It follows, therefore—indeed, it was not a matter in dispute that in a contract in which delivery is to be ex-hopper the date fixed for milling is the date fixed for delivery. It is also common ground that in the rice-milling trade in Rangoon the only notice that is given of the date and place that has been fixed for delivery is by the sellers sending to the buyers what is called a milling notice. Milling notices in essential respects are in common form as used by rice millers in Rangoon, and it is an agreed fact that in the present case the only notice which the appellants as sellers gave to the respondents as buyers that they had exercised their option of fixing the date and place of delivery was by two milling notices, Nos. 380 and 381 (Exhibits Q 1 and Q 2). These milling notices are identical in form, and run as follows:

"Steel Brothers & Co., Ltd., Rangoon, 1-11-1930. Messrs. Tokersee Mcoljee and Company. Sale Note No. W. 460. Dear Sirs, This is to give you notice that we shall commence milling for you at our Lower Mill, Kanoungtoe, on the 4th November at 5 a.m. against above sale 100 tons S.M.S. Nov. Please arrange that gunnies and twine are at our Mill in good time, and that you have a representative to pass the rice during milling. If gunnies are not sent to our mill we will charge 75 per cent. This notice must be presented at our mill by the person appointed by you to pass the rice. Yours faithfully, per pro. Steel Brothers & Co., Ltd. . . . "

Now, it is the practice of the rice millers under a contract in the form of exhibit P to issue a milling notice for not more than 100 tons, or 1,000 bags, and this notice is usually sent a day or two before the date fixed for milling. Having regard to the course of trade, in my opinion, under the contract in suit the sellers were not bound to deliver the whole bulk of the 400 tons on the same date or at the same mill, and might

1932

STEEL BROTHERS & CO., LTD. v. TOKERSEE MOOLJEE.

PAGE, C.J.

deliver the rice on such dates under clause 8 and at such mills under clause 19 as they chose to fix. With regard to 200 tons of the 400 tons referred to in the Bought Note no question arises in this case, and the matter in dispute in the present suit relates to the 200 tons referred to in the milling notices Nos. 380 and 381. Now having regard to the form of the contract and the milling notices I am of opinion that *primâ facie* each milling notice was a notice that the seller had fixed the date and place of delivery of 100 tons of rice under the contract, and if that was the object and effect of these notices the suit must fail, for it is conceded by the appellants that neither on the 4th November 1930, nor on the 10th November (to which date the appellants purported to postpone the milling notices) were the appellants ready or willing or in a position to deliver 100 tons of rice or any part thereof pursuant to milling notices Nos. 380 and 381, or either of them. Now, it cannot be doubted, I think, that on the face of it a milling notice purports to fix the date and place of delivery, and the opinion that I have formed that this is the effect of a milling notice is strengthened when it is borne in mind that a contract in the form of exhibit P not only imposes serious obligations on the buyers, but that according to evidence adduced at the trial which I am prepared to accept, a milling notice is treated in the rice market as a tender of delivery of the amount of rice therein referred to. Moreover, under clause 9 of the contract the milling notice is expressly stated to fix the time for commencement of milling, and although in the present case where the terms of the contract are clear and unambiguous it is not necessary (if, indeed, it is permissible) to have recourse to *contemporanea expositio* it is not uninter-

esting to observe that the appellants' broker Korsi in the course of his evidence stated that

"If it is a contract for delivery in all January, if the purchaser has no right to fix the date of delivery and if the miller has the right to fix the date of delivery ex-hopper, and does so, the miller would be bound to make delivery ex-hopper, on the date thus fixed according to the terms of the contract".

And Mr. Adv, a rice broker who gave evidence on behalf of the appellants, stated that

"In a contract in which the buyer gives the seller the option to fix a date for the delivery of rice and the seller does so in writing, the date thus fixed becomes a fixed date for delivery, and the seller is bound to deliver on that day and is not entitled to postpone the milling".

On the 13th November 1930, the respondents claimed the right *quoad* the rice referred to in the two milling notices to cancel the contract of the 18th of September 1930. The appellants, however, did not treat the contract as at an end and on the 26th November 1930 wrote to the respondents

"Re cont. W. 460 M/N 380-100 tons S.M.S. November. Please note that our Lower Kanoungtoe Mill will commence milling the above at 5 a.m. on 27th instant. Kindly send your representative without fail. Yours faithfully. Per pro Steel Brothers & Co., Ltd. Sd. J. Kirkwood."

And on the same date the appellants sent a similar letter in respect of the milling notice No. 381.

Mr. Lorimer, the manager of the appellants' lower mill at Kanoungtoe, stated that

"We started milling against milling notices 380 and 381 on 27-11-30 and continued on 28-11-30. We completed 1,900 bags on 28-11-30—this was for the whole of No. 380 and 900 bags of No. 381. The last 100 bags of 381 were completed on 29-11-30. at Ellerman's Kanoungtoe. The whole 2,000 bags were in our own gunnies. The 2,000 bags left my mill after the sale which was arranged by the office through Morrison and Company."

1932

STEEL BROTHERS & CO., LTD. v. TOKHEIM MOOLJEE.

PAGE, C.J.

Now, in paragraph 4 of the appellants' reply to the respondents' written statement the appellants pleaded

"4) Plaintiff Company admits postponement of the time for milling, and alleges that by an established custom of the Rangoon rice trade millers are entitled to postpone the time of milling stated in a milling notice to any later hour or date within the contract time."

And in paragraph 3 they pleaded

"(3) Plaintiff Company denies that the issue of a milling notice is the exercise of an option to deliver rice."

It is to be observed that these two contentions are inconsistent, for in paragraph 4 it is assumed that the sellers had fixed the date of delivery but but were at liberty to cancel the date so fixed and issue a fresh notice, whereas in paragraph 3 it is assumed that the milling notice can never be treated as the exercise of an option to deliver rice.

A number of persons concerned in the rice-milling trade in Rangoon were called as witnesses to prove the custom alleged in paragraph 4 of the reply, but, as not infrequently happens when witnesses are called to prove a trade usage, the views expressed by the witnesses as to the nature of the usage were divergent and inconsistent. Some of the witnesses expressed the opinion that under the terms of a contract in the form of exhibit P, and apart from any trade usage, millers were entitled to issue and cancel as many notices fixing the date and place of delivery as they chose, provided the rice was delivered within the time and at a place prescribed in the contract.

For the reasons that I have stated, in my opinion, this contention would not only be unreasonable, but would fail to give effect to the clear terms of the contract, and cannot be accepted. Other witnesses who were called to prove the alleged

custom stated that according to the usage of the rice-milling trade in Rangoon a milling notice was a document of no importance, and was merely an intimation or warning given by the sellers to the buyers to enable the buyers to be present with their cash, gunnies, twine and representative at the mill in the event of the sellers electing to make delivery at the time and place set out in the milling notice. That was the usage upon which the learned advocate for the appellants, if I appreciated his argument, relied at the hearing of the appeal. He contended that, as the goods were unascertained goods at the time when the milling notice was given, it could not be held that the milling notice fixed the date or place for delivery of goods that were not then *in esse*. This argument, however, appears to me to be *nihil ad rem*, because in the present case the issue is not whether the property in the goods passed to the buyers, but whether the sellers gave notice to the buyers of the date and place when and where delivery was to be effected. A third set of witnesses stated that, according to the usage of the trade, while a milling notice operated as a notice to the buyers that the sellers had fixed the date and place of delivery so as to bind the buyers to take delivery of the rice if tendered pursuant to the milling notice, a milling notice did not operate as the exercise of the option given under the contract to the sellers to fix the date and place of delivery so so as to bind the sellers in that behalf, and that notwithstanding the issue of a milling notice the sellers, without regard to the wish of the buyers, were at liberty either to tender or to refuse to give delivery at the date and place fixed for delivery as they elected and were not in any way bound to conform to the terms of the milling notice. Whe-

1932

STEEL BROTHERS & CO., LTD. v. TOKHEIM MOOLTEE.

PAGE, C.J.

ther the Court would enforce a trade usage of this nature, if it was proved, it is unnecessary to consider for the purpose of deciding the present appeal, for it is to be observed that the evidence of the witnesses who were called to prove the custom alleged in paragraph 4 of the reply was inconsistent and inconclusive, and further that, even if the Court were to be of opinion that an usage in the rice market in one or the other of these forms was proved, in that event also the appellants' suit must fail, because it would be obvious that in the circumstances proved the appellants had not fixed the date and place of delivery or given notice in that behalf to the respondents, and thus were not entitled to recover damages from the respondents for failure to take delivery under the contract.

The learned trial Judge, however, came to the conclusion, as a matter of fact, that the alleged custom or usage was not proved. I agree. It seems to me clear upon the evidence that there was no custom proved to the effect that the sellers in a contract in the form of exhibit P, were entitled to cancel or postpone the milling notices once given as a matter of right. I regret that it has been thought desirable or necessary to fight this case to the bitter end, because there is evidence that for 25 years buyers and sellers of rice in Rangoon under contracts in the form of exhibit P, have been ready to do business in a spirit of "give and take" and have been prepared so far as was possible to accommodate each other in the matter of giving and taking delivery at the dates and places named in milling notices. In my opinion, however, it has not been proved that there is any usage in existence in the Rangoon rice market under which it becomes a term of a contract in the form of exhibit P that

the sellers have an unfettered legal right to give or refuse to give delivery at the place and on the date named in a milling notice without regard to, or it may be, against, the wish of the buyers. I think that no one can read the evidence in the present case without realising that where postponements take place it is normally because one party is prepared to accommodate the other, and not because one party is exercising a right under the contract which the other party is powerless to resist.

Mr. Howison, a representative of the appellants with considerable experience of the rice-milling trade in Rangoon, stated "I have no knowledge of any case in which the buyer has objected to the postponement of milling". And, later in his evidence, he added "I cannot now give an instance where we have postponed milling under a milling notice against the wish of the buyer". Again, Mr. Spearman, another witness called on behalf of the appellants, stated that "the custom is that the postponement is left to the will of the miller or seller, but I do not say that it is irrespective of the will or wishes of the buyer, I do not say that the will of the buyer is not to be consulted".

And Mr. Fairweather, another witness called on behalf of the appellants, stated "Buyers do object to postponement of milling, and in many instances such objections have prevailed".

Although, in my opinion, it may happen that the date or place set out in a milling notice sometimes is altered, I am not satisfied that it has been proved that whereas the buyers are bound by a milling notice the sellers are not in any way bound thereby, and can, if they elect to do so without the consent of the buyers give a fresh milling notice for any day in the period within which delivery is

1932

STEEL BROTHERS & CO., LTD. v. TOKEHEER MOOLJEE.

PAGE, C.J.

to be made under the contract It becomes unnecessary in these circumstances, as I have stated, to consider whether the Court would be prepared to give effect to such an usage if it were to be proved. It is sufficient to hold that whether the case presented on behalf of the appellants or that presented on behalf of the respondents is accepted, in either case the suit must fail, because if, as the respondents contend, the milling notices No. 380 and 381 fixed the date and place when and where delivery was to be effected under the contract, it is common ground that at the date and place named in these two milling notices the appellants were neither ready nor willing nor in a position to make delivery of rice pursuant to the contract of the 18th September 1930. On the other hand, if the milling notices did not operate as notices that the sellers had exercised their option of fixing the date and place of delivery under the contract, as it is common ground that no other notice in that behalf was given by the sellers to the buyers the suit in that event also must fail, because in such circumstances the sellers would not be entitled to recover damages from the buyers for breach of contract in failing to take delivery of the rice.

For these reasons, in my opinion, the appeal fails, and it is dismissed with costs.

MYA BU, J.—I agree.

The appellants are, in my opinion, in a dilemma. The case turns upon a short point as to the effect of the milling notices, exhibits Q 1 and Q 2, in this case. The appellants contend that although by those milling notices they fixed the date for the milling of the quantity of rice mentioned in the notices, they were not bound to mill the rice on the date

1932

STEEL BROTHERS & CO., LTD. v. TIKKRSEE MOOLJEE.

MYA BU, J.

so fixed but had an option to refuse to make delivery ex-hopper on the date mentioned in the milling notices. If this proposition holds good—but the evidence, in my opinion, is insufficient to establish the alleged usage in support of the proposition—then the appellants had not fixed the date of delivery, or, in other words, had not notified to the respondents the date of delivery, as they were bound to do under the contract, before complaining of a breach of the contract on the part of the defendants. That a notice fixing the date of delivery as contemplated by the contract was essential there can be no doubt, because the sellers had the option of choosing not only the date but also the place at which delivery was to be given. The appellants' letter to the respondents of the 26th of November 1930, is in the same form as the other milling notices in terms of which the appellants had failed to act. Therefore, by their letter of the 26th November 1930, the appellants are not placed in a better position than by the earlier milling notices. Then if, as the appellants contend, the milling notices carried no guarantee on their part that delivery would be made on the date mentioned, neither the milling notices nor the letter of the 26th November 1930, would have amounted to a notice calling upon the respondents to take delivery of the rice which they had contracted to buy; and in that case, the result will be that there would be no basis for the claim for damages for breach of the contract on the part of the defendants. If, however, the milling notices are given the importance that they are shown upon the evidence to deserve, *viz.*, that they are notices fixing the date of delivery, milling and delivery being inseparable processes in the making of ex-hopper delivery of rice, then the appellants failed to act up to the terms

1932

STEEL BROTHERS & CO., LTD. v. TOKHEIM MOOLLA.

MYA BU, J.

of their own notices by failing to mill the rice on the 4th of November 1930. Having thus failed to make commencement of delivery upon the date which the appellants had the option and were under an obligation to fix, they had no right to exercise the option again after the failure without the consent of the buyers: *Gath* v. *Lees* (1).

I do not think that there is anything which I can usefully add to the discussion of my Lord the Chief Justice with reference to the evidence of usage in this case. I entirely agree that the evidence failed to establish the allegation that sellers can postpone milling, and thus postpone delivery from the date mentioned in the milling notices entirely in their discretion and without regard to the wishes of the buyers.

CRIMINAL REVISION.

Before Mr Justice Brown.

1932

May 11.

KING-EMPEROR
v.
NGA SEIN PO.*

Excise Act (Burma Act V of 1917), s. 16—Finance Department Notification No. 77—Limit for possession of excisable articles—Limit for each article separately—Total of limits exceeding individual limits.

Finance Department Notification No. 77 prescribes the limits for possession of excisable articles under s. 16 of the Burma Excise Act, 1917. The limits prescribed is for each kind of excisable article separately, and there is nothing in the Act or the Notification to prevent the possession for each kind of article up to the limit prescribed, notwithstanding that the total of all the articles possessed may exceed the limit of each of them.

---

(1) (1865) 3 H. & C. 558.

* Criminal Revision No. 155a of 1932 from the order of the Third Additional Magistrate of Minbla in Criminal Regular Trial No. 13 of 1932.

1932

KING-EMPEROR v. NGA SEIN PO.

BROWN, J.—The accused Sein Po on his own admission has been found guilty under section 30 (*a*) of the Excise Act for the possession of seven quarts of country alcoholic liquor other than spirit and *tari*, and he has also been found guilty under section 37 of the Act for possession of half a quart of country spirit. He has been sentenced to pay a fine of Rs. 10 for each offence.

The proceedings have been submitted to this Court by the Sessions Judge of Tharrawaddy with a recommendation that the fine of Rs. 10 under section 30 (*a*) of the Excise Act be set aside. The reason given is that the double punishment transgresses the provisions of section 71 of the Indian Penal Code.

Section 16 of the Excise Act makes the posession of any quantity of any excisable article in excess of the limit prescribed by the Local Government by notification under the section illegal.

Finance Department No. 77, dated 18th of September 1917, as subsequently amended (page 42 of the Burma Excise Manual), prescribes the limits for possession of excisable articles under section 16. The limit for spirit included within the definition of country alcoholic liquor is one reputed quart bottle. The limit for country alcoholic liquor other than spirit and *tari* is also in the Tharrawaddy District one reputed quart bottle. There is nothing, however, that I can see in the Act, or the notification, to make it illegal for a person in the Tharrawaddy District to possess both one quart bottle of spirit and one quart bottle of country liquor other than spirit and *tari*. The limit prescribed is for each kind of excisable article separately, and there is nothing to prevent the possession for each kind of article up to the limit prescribed. In this view of the case I do not think it can be said that the possession of seven quarts of

1932

KING-EMPEROR v. NGA SEIN PO.

BROWN, J.

liquor under section 30 (*a*) and the possession of half a quart of country spirit under section 37 together make up one offence. Each kind of excisable article must be considered separately. Ordinarily speaking, when different kinds of liquor are seized together, as in this case, it is undesirable that more than one punishment should be inflicted; but the total fine in the present case of Rs. 20 cannot be looked upon as unduly excessive, and I do not think the order passed is actually illegal.

No application on the point has been made by the accused person himself, and I do not think that it is necessary to interfere in revision.

With these remarks the proceedings will be returned to the Sessions Judge.

APPELLATE CIVIL.

Before Mr. Justice Baguley.

1932

Mar. 2,

U BA PE AND ANOTHER *v.* MA LAY.*

Surety's discharge—Creditor's omission to sue principal debtor within limitation period—Debt not barred against Surety—Surety's liability—Contract Act (IX of 1872), ss. 134, 137.

When a creditor allows his remedy against the principal debtor to become barred by limitation, the surety is not discharged from liability to the creditor if the claim against him is not barred, by reason only of the creditor's omission to sue the debtor.

B. K Chowdhury v. *Hindustan Co-operative Insurance Society*, I.L.R. 44 Cal. 978; *Gopal Daji* v. *Gopal bin-Sonu*, I.L.R. 28 Bom. 248; *Hajarimal* v. *Krishnarao*, I.L.R. 5 Bom. 647; *Raghavendra* v. *Krishna*, I.L.R. 49 Bom. 202; *Subramania* v. *G. Aiyar*, I.L.R. 33 Mad. 308—*followed*.

Harbans Lal v. *Nathu*, (1919) P.R. 105; *Radha* v. *Kinlock*, I.L.R. 11 All. 310; *Ranjit Singh* v. *Nanhai*, I.L.R. 24 All. 504—*dissented from*.

* Civil Second Appeal No. 239 of 1931 from the judgment of the District Court of Sandoway in Civil Appeal No. 7 of 1931.

1932

U BA PE
v.
MA LAY.

Allison v. *Frisby*, 43 Ch. Div. 106; *Carter* v. *White*, 25 Ch. Div. 666—*referred to.*

Pandit for the appellants.

Chari for the respondent.

BAGULEY, J.—The respondent sued the two appellants on a bond which was executed by Ba Pe as principal and Oak Gyi definitely as surety. Certain defences were raised but the plaintiff was given a decree by the trial Court with costs. On appeal the learned Additional District Judge confirmed the decree of the trial Court, so this appeal would only lie on points of law. The bond appears on the face of it time-barred, but the lower Courts have found that Oak Gyi, the surety, made certain payments and endorsements on the bond which prevented limitation running as against himself. With regard to Ba Pe the findings are not definite; but there are no endorsements purporting to have been made on the bond by Ba Pe and this case was argued on the footing that limitation had set in as against Ba Pe so far as his own act was concerned, while Oak Gyi, the surety, had done certain acts which prevented limitation arising as against him.

In appeal it is argued on the one side that the claim being time-barred as against Ba Pe the liability of his surety must be held to be barred by limitation also. On the other hand, it is argued that because Oak Gyi in the body of the bond states that "in the event of Ba Pe's default he will pay on behalf of Ba Pe" any payments made by Oak Gyi must be regarded as payments on Ba Pe's behalf as his agent and, therefore, limitation cannot have come into existence as against Ba Pe. The point is rather a nice one, and there seems to be a divergence of opinion between some of the High Courts. The question to

1932

U BA PE
v.
MA LAY.

BAGULEY, J.

be decided is whether the liabilities of the principal and his surety, as far as the creditor is concerned, are entirely separate or are inseparably linked together. The High Court of Calcutta is definite on this point, *vide, Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-operative Insurance Society, Limited.* (1) :

" Though the liabilities of the debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct for the purpose of the application of section 20 of the Limitation Act."

The Bombay High Court has held that " the principal debtor and the surety can each keep his liability alive, though the remedy of the creditor may be barred as against the other on account of limitation ; " *vide, Raghavendra Gururao* v. *Mahipat Krishna* (2), where reference is also made to *Gopal Daji* v. *Gopal bin-Sonu* (3). And attention may also be drawn to *Hajarimal* v. *Krishnarav* (4). There is also an officially reported case of the Madras High Court—*Subramania Aiyar* v. *Gopala Aiyar* (5), in which it was held that

" the omission of the creditor to sue the debtor within the period of limitation is not an act, the legal consequence of which is the discharge of the debtor and such omission has not the effect of discharging the surety under sections 134 and 135 of the Indian Contract Act ".

It was argued as against this that the Madras High Court had not been consistent in following this owing to an unreported case, *viz., Velayudam Pillai* v. *Vaithialingam Pillai* (6), but this was a case in which the principal and his universal donee were sued. It was not a case of the principal debtor and his surety, and this case does not seem to have been officially reported. There is also an old ruling of the Chief

(1) (1917) I.L.R. 44 Cal. 976.
(2) (1924) I.L.R. 49 Bom. 202, 206.
(3) (1903) I.L.R. 28 Bom. 248.
(4) (1881) I.L.R. 5 Bom. 647.
(5) (1909) I.L.R. 33 Mad. 308.
(6) 24 M.L.J. 66.

1932

C BA PE v. MA LAY.

BAGULEY, J.

Court of the Punjab, *Suja* v. *Pahilwan* (1), in which, although the point was not really before the Court, the case arose out of a suit in which a surety had paid up the principal's debt to the latter's creditor after it had become time-barred as against the principal debtor, but not as against the surety, and nowhere is it mentioned that the surety was not really liable. On the other hand, the High Court of Allahabad in *Ranjit Singh* v. *Naubat* (2) held that where the judgment-debtor having made default in payment of the instalments, delayed taking out execution of the decree until execution had become time-barred, the creditor had forfeited his remedy against the sureties also, and in this case the Court followed the previous ruling of the Allahabad High Court—*Radha* v. *Kinlock* (3), the headnote of which runs as follows : "The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under section 134 of the Contract Act, even though the non-suing within such period arose from the creditor's forbearance." And the same view has been taken by the Chief Court of the Punjab in *Harbans Lal* v. *Nathu and Gulam Nabi* (4) in which *Gopal Daji* v. *Gopal* (5) was disapproved and an English case, *Allison* v. *Frisby* (6), was followed. It seems to me that *Allison* v. *Frisby* (6) is a misleading case so far as the Indian Law is concerned because it definitely turns upon the actual wording of the English Statute, Real Property Limitation Act, 1874, section 8, which lays down that certain suits are barred "unless, in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right

(1) (1874) P.R. 30.
(2) (1902) I.L.R. 24 All. 504.
(3) (1889) I.L.R. 11 All. 310.
(4) (1919) P.R. 105.
(5) (1903) I.L.R. 28 Bom. 248.
(6) 43 Ch. Div. 106.

1932

U BA PE
v.
MA LAY,

BAGULEY, J.

thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, ... " and the point which was taken in the judgment was that in this section nothing is said with regard to by whom the money must be paid. And it must be remembered that in the corresponding section of the Indian Limitation Act it is necessary that the payment which keeps the liability alive must be paid as such by the person liable to pay the debt, legacy or by his agent duly authorised on this behalf. *Allison* v. *Frisby* (1) also is not a general statement of the English Law which can be found in *Carter* v. *White* (2), where Lindley, L.J. states : " Is it the law that a creditor who neglects to sue his debtor till the statute has run will thereby discharge his surety ? There is no decision to that effect. On the contrary, the true principle is that mere omission to sue does not discharge the surety because the surety can himself set the law in operation against the debtor."

In my opinion, the Punjab case must be regarded as founded upon a misapprehension. It overlooks the difference in the wording of the statute with which *Allison* v. *Frisby* (1) was concerned while it states that *Valayudam Pillai* v. *Vaithialingam Pillai* (3) dissents from *Gopal Daji* v. *Gopal bin-Sonu* (4), whereas it seems to me that the ruling was on different facts. It was not a case in which the relative liabilities of the principal debtor and his surety were concerned. The Allahabad case is merely one of a series of Allahabad decisions in which this Court has held this view, and with respect I must dissent from it.

For these reasons I hold that the remedy of the plaintiff against Ba Pe is barred by limitation whereas

(1) 43 Ch. Div. 106.
(2) (1883) 25 Ch. Div. 666.
(3) 24 M.L.J. 66.
(4) (1903) I.L.R. 28 Bom. 248.

Oak Gyi is liable to pay the debt. I therefore vary the decree of the lower appellate Court and give the plaintiff-respondent a decree against Oak Gyi only. There will be no order for costs in this Court, but Oak Gyi must bear Ma Lay's costs in both the lower Courts.

1932

U BA PE
v.
MA LAY.

BAGULEY, J.

ORIGINAL SIDE.

Before Mr Justice Cunliffe.

MA JOO TEAN AND ANOTHER
v.
MA THEIN NYUN AND OTHERS.*

1932

May 27.

Title-deeds, deposit of—Creation of Mortgage—Tax receipt and a map as "documents of title"—Subsequent registered mortgage—Priority—Transfer of Property Act (IV of 1882), s. 58 (f).

A tax receipt and the copy of a map relating to immoveable property, even if they are the sole documents in respect of rights in the property, are not documents of title or title-deeds within the meaning of section 58 (*f*) of the Transfer of Property Act. A deposit of such documents, even with the intention of the parties to create a security thereby, cannot constitute a valid mortgage so as to have priority over a subsequent mortgage by a registered instrument.

Bekram v. *Sorabji*, I.L.R. 38 Bom. 372—*referred to.*

Goodwin v. *Weghorn*, 13 L.J. (N.S.) 172; *Official Assignee* v. *Basudevadoss*, I.L.R. 48 Mad. 454—*distinguished.*

J. Hormasji (*Miss Dantra* with him) for the plaintiffs. A mortgage by deposit of title-deeds can only be created under s. 58 (*f*) of the Transfer of Property Act. "Documents of title" as mentioned in the section include only documents establishing ownership to land, and documents under which title would pass. A tax receipt is not a document of title. The only inference to be drawn from it is that Government holds the person named therein responsible for the due payment of revenue in respect of certain specified land. At most, it can be said to indicate who is in possession

* Civil Regular Suit No. 141 of 1931.

1932

MA JOO TEAN v. MA THEIN NYUN.

of the land: *Nirman Singh* v. *Lal Rudra Partab Narian Singh* (1). Tax receipts are issued at recurring intervals, and if each of these was to be considered a "document of title" within the meaning of s. 58 (*f*) of the Transfer of Property Act, an uncontrollable number of mortgages over the same property could be created by depositing each tax receipt separately, and the result would be obviously contrary to that contemplated by the provisions of the statute. The same argument applies to copies of maps, which can be obtained by any person upon the payment of the necessary copying fee.

It was held in *Paw Wa* v. *O. A. R. Valliappa Chettyar* (2) that the duplicate of a report to the *Thugyi* stating that after the death of **X** land was inherited by **A** was not a document of title the deposit of which could create an equitable mortgage. In *Maung Po Nyein* v. *Maung Mya* (3) it was held that *pyatpaings* (*i.e.*, leases signed by both lessor and lessee) are not documents of title at all. See also *Rasulan Bibi* v. *Nandlal* (4).

Goodwin v. *Waghorn* (5) and *Official Assignee* v. *Basudevadoss* (6) can be distinguished from the present case in that there was no contest in those cases between competing mortgagees and the Courts were only concerned to ascertain the intention of the parties (*i.e.*, mortgagor and mortgagee) at the time when the deposit was made. The term "documents of title" was loosely interpreted in those cases where there was no issue before the Court between rival claimants.

K. C. Bose for the 3rd defendant. The question is whether the deposit of a tax ticket and the plan

(1) I.L.R. 48 All. 529, 539.
(2) 14 B.L.R. 211.
(3) 8 B.L.T. 85.
(4) 28 All. L.J. 1901.
(5) 13 L.J. (N.S.) 172.
(6) I.L.R. 48 Mad. 454.

of certain property constitutes a valid equitable mortgage and if so, if it has priority over a subsequent mortgage by registered instrument.

In *Goodwin* v. *Waghorn* (1) it was held that in the absence of title-deeds a receipt for purchase money and a plan were sufficient documents of title on the deposit of which an equitable mortgage could be created. See also *Simmons* v. *Montague* (2) where a deposit of a map of the property was held to create an equitable mortgage. In the case of *The Official Assignee of Madras* v. *Basudevadoss* (3) it was held that a ryotwari patta was a sufficient document of title for the purpose of an equitable mortgage. In that case Coutts-Trotter, C.J. observed that "to hold that the ryot cannot effect a valid equitable mortgage of that piece of paper, would be in effect to say that he could not equitably mortgage his land at all—a result which I cannot believe to have been the desire of, or contemplated by, the framers of the Transfer of Property Act". Maung Ba, J. in Civil Regular No. 289 of 1931 of this Court in *Re S.A.L.S. Chettyar Firm* v. *Mah Phwa Thin* held that tax tickets being the best evidence of title which the borrowers had the power of depositing at that time would, in the absence of more formal deeds, be "documents of title" within the meaning of s. 58 (*f*) of the Transfer of Property Act. In this case it is admitted that the mortgagor had obtained the land by an oral partition, and there are no formal title-deeds in connection with the land.

In Burma the Crown is the owner of all lands. A person who remains in possession of a piece of land and pays revenue for 12 years, acquires land-holder's rights. Before he does so he cannot be

(1) 13 L.J. (N.S.) 172. (2) (1909) 1 Ir. Rep. 87.
(3) I.L.R. 48 Mad. 454.

1932

MA JOO TRAN v. MA THEIN SYUN.

turned out of the land by anybody except the Government, and has what we may call a good possessory title as against the world. That possessory title he can transfer either by sale or mortgage or otherwise. In respect of this title, the only evidence would be the tax tickets showing that he pays the revenue, and his name in the survey maps showing that he is in possession. The tax ticket and the plan are the only documents of his possessory title by means of which title he can create a valid equitable mortgage.

[CUNLIFFE, J. In the English case of *Goodwin* v. *Waghorn* there was no question of competing mortgagees.]

If the mortgage is good as against the mortgagor, it must be good as against everybody. In India there is no difference between an equitable mortgage and a registered mortgage. See *Gokul Dass* v. *Eastern Mortgage and Agency Company* (1) and *Imperial Bank of India* v. *U Rai Gyaw Company* (2).

It is admitted that the defendant as well as the plaintiffs are the innocent victims of the mortgagor; equities being equal, priority in time must prevail.

CUNLIFFE, J.—The substantive point in this case is a short one. It turns however upon a question of considerable importance.

The plaintiffs are the holders of a registered mortgage on land belonging to the late U Po Loke. The 1st and 2nd defendants are the legal representatives of U Po Loke. They do not appear to defend the action. The 3rd defendants are a Chettyar Firm

(1) I.L.R. 33 Cal. 410. (2) I.L.R. 1 Ran. 637 (P.C.)

1932

MA JOO TEAN v. MA THEIN NYUN,

CUNLIFFE, J.

who claim to be the holders of a prior equitable mortgage upon the land mortgaged to the plaintiffs. The 4th defendant is the purchaser of part of the said land. The 5th, 6th and 7th defendants put in a written statement; but have come to a settlement with the plaintiffs. They no longer dispute the validity of the plaintiffs' mortgage.

The following are the material facts:

The date of the plaintiffs' registered mortgage is the 3rd of January 1928. It was executed by U Po Loke and his widow Ma Thein Nyun, the 1st defendant. Prior to this registered mortgage the plaintiffs claim to have lent money to U Po Loke and his wife on an equitable mortgage by a deposit of a tax receipt and a plan of the land. This equitable mortgage, however, need not be considered closely as, on taking legal advice, it was converted into the registered mortgage in suit.

As to the 3rd defendants they first advanced Rs. 15,000 to the late U Po Loke and his wife in the year 1926. To support this transaction U Po Loke also deposited a tax receipt and another plan of the property. In the year 1927 a further Rs. 15,000 was lent by the 3rd defendants, and a similar deposit was made. Later on, to be exact, on the 28th of November 1927, these two loans were consolidated and converted into one loan of Rs. 31,500; and again, the same deposit was made. On this occasion a memorandum in writing was also deposited. Subsequently, in the month of November 1929, a further collateral security in the form of a promissory note was executed in favour of the 3rd defendants by U Po Loke and his wife, the principal and interest then amounted to Rs. 41,300. It is also in evidence that U Po Loke and Ma Thein's land had no title-deeds. It became their property by an oral deed of

1932

MA JOO TEAN v. MA THEIN NYUN.

CUNLIFFE, J.

partition which is certified by U Thein Maung, an advocate of this Court.

The main conflict therefore is between the plaintiffs, the registered mortgagees and the 3rd defendants, the alleged equitable mortgagees. It is conceded that an equitable mortgage in India has the same value, if proved, as a registered mortgage ; but the plaintiffs deny that the 3rd defendants hold any equitable mortgage within the meaning of section 58 (*f*) of the Transfer of Property Act. Section 58 (*f*) is in the following terms :

> Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab and in any other town which the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf, delivers to a creditor or his agent *documents of title* to immovcable property with intent to create a security thereon the transaction is called a mortgage by deposit of *title-deeds*.

This is the only Indian statutory definition equivalent in form to the English equitable mortgage.

Now, I have been referred to, and read for myself, a number of cases showing what various Judges, at various times, and in various countries, considered to be equitable mortgages. The doctrine of equity with regard to the law of mortgages was evolved in England in the first quarter of the 19th century not without a great deal of opposition from the Courts of Common Law. Lord Eldon, for example, thought that the recognition of an equitable mortgage by mere deposit was most undesirable as it infringed an important section of the Statute of Frauds. Equitable mortgages and the power to create them have always been dangerous weapons in the hands of unscrupulous people.

It is obvious here that the late U Po Loke was a fraudulent person. He raised money twice over

on the same property without informing either of the lenders of what he had done. The tax receipt which is said to have constituted the document of title supporting the 3rd defendants' loan is of a different year to the tax receipt which supported the plaintiffs' loan before the registered mortgage was created.

At the present time in British India it does not seem to me to matter very much—although the text-book editors seem to think it does—that in England, many years ago, by the decision in *Goodwin* v. *Waghorn* (1) it was held that in the absence of title-deeds a receipt for purchase money containing the terms of an agreement for sale was a sufficient deposit, in equity, of a document of title. This case is greatly relied on by the 3rd defendants. I have read it more than once, very carefully. No question of competing mortgages was there before the Court. Nor were the exact provisions of a Statute being considered. The case was decided before the Conveyancing Act of 1881 ; and, of course, long before the recent Law of Property Act had been passed.

Nor do I derive much assistance, on principle, from a reference to an Irish authority in which the deposit of a map was considered to be sufficient deposit of a document of title. No report of that case is available to me. It is therefore impossible for me to know what the exact circumstances of the decision were.

In the case of the *Official Assignee* v. *Basudevadoss* (2) a Bench of the Madras High Court held that a *patta* of land is a document of title by deposit of which an equitable mortgage can be created. This decision is the nearest I can find to the case before me now. As in this case, there were no title-deeds available. It was pointed out by Srinivassa

(1) 13 L.J. (N.S.) 172. (2) (1924) I.L.R. 48 Mad. 454.

1932

MA JOO TEAN v. MA THEIN NYUN.

CUNLIFFE, J.

Ayyangar, J. that a *patta* or agreement of lease was the only document which a ryot could possibly have in his possession for the purpose of creating an equitable mortgage, and that the leasehold which was evidenced by the *patta* was universally recognized as an occupancy tenancy throughout the Presidency. There again, however, there were no competing mortgages; and I have an uneasy feeling (I only say so with great respect) that the learned Judges who decided that case may have unwittingly furnished a precedent to construe this particular section of the Transfer of Property Act in a different manner in different parts of British India. I do not consider that a peculiar custom in one province should be a material factor in deciding the meaning of an All-India Statute. Indeed, Coutts-Trotter, C.J. seems to visualise this point in his short concurring judgment.

In the case of *Behram* v. *Sorabji* (1) it was laid down that the three requirements for a mortgage under section 58 (*f*) are a debt, a deposit of title-deeds, and an intention that the latter should be the security for the former. It is conceded that there was a debt here; and I am quite satisfied that there was an intention (although subsequently a dishonest one) that the deposit should be security for the debt. We are thrown back therefore on the question whether a tax receipt and a copy of a map are documents of title or title-deeds within the meaning of the section. In my opinion they are not. They do not even afford reliable evidence of title. I decline to hold that the nature of a document the subject of a deposit may be merely symbolic and that, sanctified by the intention of the depositor, it can be metamorphosed and drawn by equity into

(1) (1913) I.L.R. 38 Bom. 372.

the requisite legal category laid down in the section.

If this were so, I apprehend that a series of tram tickets issued from a terminus, conveniently situated near the property to be encumbered, might well fulfil the test. I see no reason to extend the meaning of the expressions "documents of title" or "title-deeds" further than the natural meaning contained in these expressions. Presumably there is a slight difference between the expressions "title-deeds" and "documents of title". The words "title-deeds" no doubt connote more formality than the words "documents of title"; but it seems to me that the intention of the framers of the Act in section 58 (*f*) was to confine the necessary deposit to documents which are of such a nature that they would ordinarily and simply support an ownership of the property and would convey a legal title to any purchaser. Anyone can produce a tax receipt. We know that very often, for one reason or another, taxes on property are paid by people who are not the owners of the property at all. Anyone, too, can procure a copy of a map, or as many copies of a map as he chooses.

Finally, I may say that I deprecate strongly the use of English decisions in equity to abrogate the clear provisions of an Indian Statute. The principles of equity should, in my view, only be employed to modify the Common Law where operating harshly or unfairly between the parties concerned.

For these reasons I uphold the plaintiffs' claim against the claim of the 3rd defendants. The memorandum of the 28th November 1927, appears to me to be a mere recital and in no way constitutes the real bargain between the parties. It, therefore, can be disregarded. I hold that the 3rd defendants

1932

MA JOO TEAN v. MA THEIN NYUN.

CUNLIFFE, J.

possess no mortgage on the suit land within the meaning of section 58 (*f*).

As to the 4th defendant he claims to be a *bonâ fide* purchaser for value without notice of earlier encumbrances. I reject this contention. It is in evidence that a search was made on his behalf in the Register. That search was made so carelessly that I hold it comes within the meaning of gross negligence referred to in section 3 of the Act. I disbelieve the innuendo that the Register was faked. I do not agree with the elaborate argument under section 41. I think that argument is quite inapplicable to the facts.

In the result I find for the plaintiffs against defendants 1, 2, 3 and 4 in the terms of the prayer.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das, and Mr. Justice Ba U.

1932

June 14.

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON

v.

G. S. BEHARA & SONS.*

Rangoon Development Trust Act (Burma Act V of 1920), ss. 69, 86, 95—Terminal tax, collection and recovery of—Government rules under s. 95—Rules 1 and 3, ultra vires—Agent's liability for tax—Burma Land and Revenue Act, (II of 1876), ss 43, 44, 45—Condition precedent to exercise of special procedure—Demand from Agent not liable to pay—Attachment proceedings against Agent—Specific Relief Act (I of 1877), s. 45.

Under the provisions of s. 69 of the Rangoon Development Trust Act the Board of Trustees are empowered to levy a tax on sea-going passengers from Burma. The duty of collecting the tax and of paying it to the Board is imposed on the owner of the vessel. Further, the owner or his agent is required to furnish a quarterly list of the number of passengers carried by his vessels.

---

* Civil First Appeal No. 51 of 1932 from the judgment of this Court on the Original Side in Civil Regular No. 441 of 1931.

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

Under s. 86 of the Act, the Board can recover the tax from the person liable to pay the same, as if it was an arrear of land revenue recoverable in the manner provided in ss. 43 to 45 of the Burma Land and Revenue Act, 1876. Due notice in writing is required to be given to the person liable to pay the tax and on his default his property becomes liable to attachment and sale.

Under the powers conferred by s. 95 of the Act the Local Government made rules for the collection of the tax. Rule 1 imposed the duty of collection on the owner or agent of the vessel by means of a surcharge on fares. Rule 3 required the person collecting the tax to pay it (after deduction of authorised expenses) to the Board.

The Board demanded payment of a certain sum from the respondents who had collected it as terminal tax as agents on behalf of a steamship company. The respondents repudiated all liability to the Board, who thereupon, purporting to act under the abovementioned provisions of the Act, attached certain immoveable property of the respondents. The respondents filed a suit in the High Court praying for a declaration that the Board had no power to exact the tax from them which was due by the steamship company, and for the release of their property. The trial Judge decided in the plaintiffs' favour and issued a mandamus to the defendants, under s. 45 of the Specific Relief Act, 1877, requiring them to collect the tax according to the law laid down in s. 69 (2) of the Rangoon Development Trust Act, and in no other manner. The defendants appealed.

Held, (1) that under s. 69 (2) of the Act, the owner of the vessel alone was made responsible for the collection and payment of the tax; and that the word "owner" therein did not mean and include his "agent". The agent was liable only in respect of the due return of passengers under s. 69 (3); (2) that consequently Rules 1 and 3, except in so far as they referred to owners, were *ultra vires*, as under s. 95, Government could only make rules consistent with the provisions of the Act; (3) that for the operation of ss. 44 and 45 of Act II of 1876, it was a condition precedent that the appellants had the power to demand the terminal tax from the respondents, as agents of the owner, and that not being the case, the attachment proceedings were null and void; (4) that in the circumstances of the case the respondent-plaintiffs were entitled to a declaration that, being not liable for the tax, they were entitled to a release of their property, the attachment proceedings being wholly null and void as against them.

Bathishen Das v. *Simpson*, 25 I.A. 151; *Harendra Kumar* v. *Secretary of State for India*, I.L.R. 55 Cal. 1355; *Krishna Chandra* v. *Bhandar Company, Limited*, 36 C.W.N. 277; *Musammat Saraswati* v. *Surajnarayan*, 35 C.W.N. 444; *Sheik Mahomed* v. *Munshi Ganga Bishun Singh*, 38 I.A. 80—*referred to.*

An order under s. 45 of the Specific Relief Act is only to be made if the plaintiff has no other specific and adequate legal remedy.

Alcock Ashdown & Co. v. *Chief Revenue Authority, Bombay*, 50 I.A. 227—*referred to.*

The facts appear in the judgments reported below.

30

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

The defendants, *inter alia*, relied on s. 106 (2) of the Government of India Act which limits the jurisdiction of the High Court in revenue matters. The learned trial Judge dealt with the issue in his judgment. At the hearing of the appeal, the learned Advocate for the defendants conceded that the section was inapplicable in the present case, the defendants being not a revenue authority. The judgment on the Original Side was delivered by

CUNLIFFE, J.—This is an action brought by G. S. Behara & Sons against the Trustees for the Development of the City of Rangoon. The plaintiffs claim an injunction against the defendants restraining them from proceeding with the sale of their properties or from realising the sum of Rs. 9,508 from the sale thereof; a declaration that defendants have no right to the payment by them of the said sum of Rs. 9,508 in respect of the tax due from the Andhra Burma Steamship Company (1929), Limited, under section 69 of the Rangoon Development Trust Act; and such further or other relief as the Court may think fit.

In the plaint it is set out that the Andhra Burma Steamship Company, Limited, went into voluntary liquidation on the 31st May 1931 and that a concern called S. Zaman & Co. were appointed liquidators of the steamship company and were in charge of their assets. It is also set out that Messrs. G. S. Behara & Sons were appointed the steamship company's agents before it went into liquidation. It is further alleged that five houses belonging to the plaintiffs have been attached in execution of a revenue decree for the debt of Rs. 9,508 which the defendants say was due as a tax under section 69 of the Rangoon Development Trust Act, a tax which is known as the terminal tax and is applied to passengers leaving the port of Rangoon by steamship.

It is not now disputed—in fact, a letter to this effect written by the plaintiffs' legal advisors to the Trust was produced by consent—that the terminal tax was collected by Messrs. G. S. Behara & Sons and paid over subsequently to the liquidators.

The question is whether the plaintiffs in their capacity as agents of the Andhra Burma Steamship Navigation Company are personally liable in law to pay this tax to the Trustees.

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

CUNLIFFE, J.

The answer to the plaint put forward in the Written Statement is to the effect that the Rangoon Development Trust Act under which the defendants took their action is a statute which gives special powers to the Development Trustees to deal with questions of money due to them. Section 86 of the Development Trust Act in its material part runs as follows:

> "Any sum of money, or any tax, or fee due to or claimable by the Board may be recovered by the Board as if it was an arrear of land revenue."

Referring to the Land Revenue Act one finds that very drastic powers have been given to the authorities under Part 4. The appeal from an official collecting the revenue is merely to another higher official. In this connection see section 55 of the Act. And section 56 goes so far as to exclude the jurisdiction of a civil Court in almost all questions of revenue administration or any possible dispute which may arise between the subject and the officials of the Department.

The defendants further pray in aid the well-known section 106 of the Government of India Act which deals with the jurisdiction of High Courts generally in matters of revenue.

Section 69, sub-section (1), of the Rangoon Development Trust Act runs as follows:

> "Every male passenger liable to pay the full fare leaving Rangoon by sea-going vessel for a destination other than a port in Burma shall pay in respect of each journey so made by him a tax of such amount not exceeding Rs. 2 as the Local Government may determine."

Sub-section 2 says:—

> "The said tax shall be collected by means of a surcharge on fares by the *owner of the vessel* in which passengers are carried and shall be paid to the Board at such time as may be prescribed by a rule made under section 95 after making such deduction as the Local Government may approve to meet any expense incurred in connection with the collection of the tax."

The Rangoon Development Trust Act contains a provision that rules may be made by the Local Government consistent with the scope of the Act and my attention has been called to certain rules which were made by notifiation with regard to the collection and payment of the terminal tax. Rule 1

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

CUNLIFFE, J.

says that the terminal tax on passengers shall be collected by means of a surcharge on fares by the *owner or agent* of the vessel by which passengers are carried, and Rule 3 says "Every person collecting the terminal tax shall, within one month after the last day of each quarter, pay to the Chairman of the Board the amount of tax collected."

I am of the opinion that Rules 1 and 3 are clearly *ultra vires* of the Act. They are *ultra vires* because the appropriate section 69 on which they are based, and with which, in law, they must be consistent, does not mention an agent as being liable to collect or pay the tax in question. The duty of collecting and remitting the tax is thrown upon the owner alone. It is true that sub-section 3 of section 69 does mention the duty of an agent to make a return of all passengers but in no other connection does the Act impose a liability upon an agent but only upon the owner of the steamship.

The point however which now falls to be decided is whether this Court is precluded from giving any relief to the plaintiffs by reason of the provisions of section 106, sub-section 2, of the Government of India Act. That sub-section is in the following terms :—

> "The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force"

and this sub-section must be considered in conjunction with the exclusion of the High Courts' right which is laid down in the Burma Land Revenue Act, to which I have already referred.

It is to be noted that the provisions of the Land Revenue Act in this regard derive their authority from section 131 of the Government of India Act which lays down in sub-section 3 that nothing in this Act shall affect the power of the Indian Legislature to repeal or alter any of the provisions mentioned in the 5th Schedule of that Act or the validity of any previous exercise of this power. The 5th Schedule is headed "Provisions of this Act which may be repealed or altered by the Indian Legislature" and specifically refers to section 106 with reference to the jurisdiction, power and authority of High Courts. The Lower Burma Revenue Act is a statute passed by the Indian

Legislature by reason of the power given to that body by the Indian Councils Act of 1861.

Section 106 of the Government of India Act is virtually a re-enactment of section 8 of the East India Company Act of 1780 except that the words "according to the usage and practice of the country or the law for the time being in force" have been substituted for the words "according to the usage and practice of the country or the regulations of the Governor-General in Council".

In the year 1850 the Privy Council considered the effect in law of the old section 8 in relation to the jurisdiction of Supreme Courts in the matter of revenue. The case in question was *Richard Spooner* v. *Juddow* (1) and there Lord Campbell who delivered the judgment put the widest possible construction upon the statute in this connection. He held that matters of revenue were *coram non judice* as far as the Courts were concerned and he took the view that the position intended by the Legislature was that there were special Courts dealing with revenue and these Courts were quite separate from the original jurisdiction of the Indian Supreme Courts. He drew a parallel between the English system before the passing of the Judicature Act when all disputes as to revenue were dealt with in the Court of Exchequer, and if an action was brought in the old days either in the Courts of King's Bench or in the Courts of Common Pleas, a writ was employed to transfer the action to the Court of Exchequer. Lord Campbell quoted a case in the 7th year of James the First when this was done and spoke to his personal knowledge of the same procedure being adopted by himself when he was Attorney-General to the Crown.

At the present time in England, since the Judicature Act, disputes of this nature are always dealt with by a special Court of the King's Bench, proceedings before which are known as the revenue paper. There were in the old days Courts in India which dealt with matters of revenue apart from the Supreme Courts but there have certainly been none in Burma, the corresponding legal machinery at the present time being represented by hearings before Revenue Officials with a final appeal to the Finance Member. This machinery closely approximates to the quasi-judicial hearing before the Assistant Commissioner of Income-Tax

(1) (1850) 4 Moo. I.A. 353.

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS

CUNLIFFE, J.

with the appeal of the Income-Tax Commissioner. It is, however, to be observed that *Spooner* v. *Juddow* was an interpretation of section 8 of the East India Company Act referred to above and not of section 106 of the Government of India Act and was delivered before the establishment of the High Courts under the Act of 1861.

In the year 1876 a question arose whether the prohibition laid down by Lord Campbell still attached to the Courts since they were established by statute and had been given Letters Patent. In the case of *The Collector of Sea Customs* v. *Punniar Chitharbaram* (1) the Chief Justice of Madras was of the opinion that the prohibition still existed but his two colleagues on the Bench thought it did not. The considerations which actuated the majority of the Court appear to have been that they were entitled under their Letters Patent and the High Court Act to entertain suits of every description, so that section 106, sub-section 2, no longer strictly applied in law.

Many years afterwards, however, it was pointed out by Sir John Wallis in the case of *The Chief Commissioner of Income-Tax* v. *The North Ananiapur Gold Mines, Limited*, (2) that whatever the view of the majority of the Madras High Court might have been in 1876 the Government of India must have been of a different opinion, because when they passed the Government of India Act in 1915 section 8 of the old East India Company Act re-appeared in almost similar form with the slight difference in the wording to which I have already alluded. In that case Sir John Wallis, relying still on *Spooner* v. *Juddow*, came to the conclusion, as far as the collection of income-tax was concerned, that section 106, sub-section 2 of the Government of India Act still prohibited the High Courts from entertaining any application under section 45 of the Specific Relief Act. The learned Chief Justice was of the opinion that the power of the High Court in issuing the writ of mandamus to a public authority under section 45 of the Specific Relief Act was an exercise of original jurisdiction such as is mentioned in the sub-section, but that was not the view which afterwards was held by the Privy Council in the well-known case of *Alcock Ashdown & Co., Ltd.*, v. *Chief Revenue Authority of Bombay* (3).

That was also an income-tax case in which the question arose whether a mandamus could issue from the Bombay High Court to

(1) (1876) I.L.R. 1 Mad. 89. (2) (1921) I.L.R. 44 Mad. 718.
(3) (1922) I.L.R. 47 Bom. 742.

the Chief Commissioner of Income-Tax forcing him to state a case under the existing Indian Income-Tax Law. Lord Phillimore who delivered the judgment of the Court disapproved of the decision in the *North Anantapur Gold Mines* case. He used these words : "As the point was raised before their Lordships, it took the form of saying that even if the authority had a duty, the Court could not require him to exercise it : and for this purpose reliance was placed upon the well-known general purview of Indian legislation which excludes matters of revenue from the consideration of the ordinary Civil Courts, the principle being exemplified in the case of *Spooner* v. *Juddow*, decided in the year 1850, and upon section 106, sub-section 2, of the Government of India Act, and lastly, upon a recent decision of the High Court of Madras, given since this case was before the Court of Bombay." (Lord Phillimore was referring to the *North Anantapur Gold Mines* case). The learned Law Lord continued :

> "Upon the point thus broadly stated their Lordships have no difficulty in pronouncing a decision. To argue that if the Legislature says that a public officer, even a Revenue Officer, shall do a thing, and he without cause or justification refuses to do that thing, yet the Specific Relief Act would not be applicable, and there would be no power in the Court to compel him to give relief to the subject, is to state a proposition to which their Lordships must refuse assent."

Lord Phillimore then set out section 106, sub-section 2, of the Government of India Act and made this comment upon it :

> "In their Lordships' view the order of a High Court to a Revenue Officer to do his statutory duty would not be the exercise of original jurisdiction in any matter concerning the revenue."

Various others of the Indian High Courts have followed to the letter the decision in *Spooner* v. *Juddow* and have refused even to consider any relief to the subject in revenue disputes. On the other hand other High Courts, notably Calcutta, have afforded relief to the subject when the action of the Revenue Officer has been entirely without justification. For example Ashutosh Mukerji, J. interpreting the Bengal Revenue Sales Act in the case of *Mohunt Krishnan Doyal Gir* v. *Irshad Ali Khan* (1) afforded relief to a tax-payer whose property was sold when no arrears of taxation were in fact due. The learned Judge took the view that

(1) 22 Cal. L.J. 525.

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

CUNLIFFE, J.

an arrear of taxation was a condition precedent under the Act and that any action in other circumstances was unjustified and *ultra vires*.

Having regard to these decisions I shall now endeavour to apply what I conceive to be the principle underlying the issue of a writ of mandamus in the special circumstances of this case; for I think it is quite clear that the plaintiffs are not entitled to an injunction or bare declaration as they specifically claim. Had I been merely considering an ordinary Revenue Statute backed by the provisions of section 106, sub-section 2, of the Government of India Act I should have been in no difficulty as I think that, quite apart from the other cases, the decision in *Alcock Ashdown & Co.* (*supra*) must show that the highest Legal Tribunal has modified its view of the withdrawal of all Revenue matters from the ordinary Courts and by implication, at any rate now disagrees with Lord Campbell's view laid down in *Spooner* v. *Juddow* (*supra*). If a High Court is entitled to mandamus a Commissioner of Income-Tax for not carrying out his statutory duty, I can see no difference, in principle, from the case of a Government official acting *ultra vires* of any other statute which controls him. In this particular case, however, great stress was laid in argument on behalf of the defendants upon the contention that sections 55 and 56 of the Land Revenue Act which are to be deemed part of the Rangoon Development Trust Act, as we have seen, are even stricter than the provisions of section 106 of the Government of India Act. I am invited to say that, however illegally, however erroneously, however *extra vires*, the Trustees of the Rangoon Development Trust behave in the collection of their taxes, no recourse in any circumstances can be had to the Courts. I refuse to assent to such a proposition. In my opinion, whilst the High Court cannot be regarded as a Court of Appeal from the decision of the executive authorities, yet it has the power and will use the power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to them in law. The officials of the Development Board or of the Revenue are not autocrats, free to act as they please. Quite apart from the provisions of section 45 of the Specific Relief Act, they are subject to the inherent power of the High Court to safeguard the subject by the use of a Mandamus, a writ of High Prerogative, the writ of the King-Emperor himself.

In all these circumstances a mandamus will therefore issue ordering the Trustees of the Rangoon Development Trust to collect the terminal tax in question according to the law laid down in

section 69 of the Rangoon Development Trust Act and in no other manner.

Plaintiffs will have their costs of this action, 15 gold mohurs.

The defendants appealed.

Young for the appellants. Section 86 of the Rangoon Development Trust Act, 1920, provides that any sum due to or claimable by the Board may be recovered as if it were an arrear of land revenue. The appellants are not a revenue authority but that is where Part IV of the Lower Burma Land Revenue Act comes into operation. Once there is an arrear of revenue, section 45 of the Revenue Act states that it may be realised as if it were the amount of a decree for money passed against the defaulter in favour of any revenue officer appointed by the Local Government in this behalf. The Akunwun and the Land Officer have been appointed for this purpose, by a notification dated the 16th July 1931. Such a decree is not liable to be questioned.

[PAGE, C.J. Suppose a party not liable for the tax is declared to be a defaulter and the revenue procedure is applied against him, what is his remedy?]

He has his remedy before the appellate revenue authorities as indicated in the above notification. The appellate authority acts in a quasi-judicial capacity, and where a special tribunal is appointed to decide certain things the jurisdiction of the ordinary courts is ousted.

Section 69 of the Rangoon Development Trust Act imposes a terminal tax on passengers by outgoing vessels. Section 69 (2) states that the owner is the person to collect the taxes. Sub-section (3) casts a duty on the owner or the agent to make a return of

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

all the collections made by him; and section 87 imposes liability both on the owner and the agent for non-compliance with its provisions. Thus it is clear that the owner is equally liable with the agent, under section 69, to pay the terminal tax, collected by either of them, to the Board. Rules have also been made under section 95 of the Act making the owner and the agent equally responsible for the payment of the money.

In this case the respondent company has collected the tax, and even if they were not liable to pay the same to the Board, they could have urged their objections before the appellate revenue authority. Not having done so they cannot raise them before a Civil Court.

[PAGE, C.J. The question is whether the appellants have complied with the condition precedent to the application of the special procedure. If not, the Revenue Courts have no jurisdiction in the matter, and their proceedings are a nullity. See the observations of Lord Watson in *Balkishen Das* v. *Simpson* (1).]

That case is distinguishable from the present. There was, in fact, no arrear due at all in that case, no matter by whom. The agent here, being equally liable with the owner, a notice of demand had been served on him according to law, requiring him to pay the tax.

A mandamus should not have been issued against the trustees of the Development Trust. If a Revenue Officer acted without jurisdiction a writ of mandamus could have been issued against him. See *Alcock Ashdown & Co.* v. *Chief Revenue Authority of Bombay* (2).

(1) 25 I.A. 151, 159. (2) I.L.R. 47 Bom. 742 (P.C.).

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA AND SONS.

N. M. Cowasjee for the respondents. The tax on sea-going passengers is levied under section 69 and the obligation to collect and pay it to the Board is imposed on the "owner" alone. The Legislature has, for obvious reasons, adopted this course, for it would be unfair that an agent should have to answer two persons.

Sub-section (2) of s. 69 states that the owner shall collect the tax and shall pay it to the Board at such time as may be prescribed by rule made under section 95. Any rule made under the latter section, in order to be valid, must be consistent with the provisions of the Act. Under this sub-section a rule can only be made to regulate the time of payment of the tax collected; consequently the rule, made in this case, which seeks to render the agent also liable for payment to the Board is *ultra vires*.

The officers appointed by the Local Government, in this case, are merely officers of the Trust. Also the final appellate authority is the Chairman of the Board.

The Trust is a statutory corporation and the Court has power to issue a writ of mandamus against the trustees, under section 45 of the Specific Relief Act.

[PAGE, C.J. A mandamus will be issued only when there is no other adequate or specified remedy.]

The respondents have not prayed for a mandamus. They seek a declaration and a release of their property from attachment to which they are entitled.

PAGE, C.J.—The appellants are a body corporate with a common seal created by the Rangoon Development Trust Act (V of 1920). This corporation was brought into being because it was deemed expedient "to make provision for the improvement and expan-

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

PAGE, C. J.

sion of the City of Rangoon and for the development of certain areas in and around the said City with the object of securing proper sanitary conditions, amenity and convenience to the persons living in such areas."

As it was necessary that the Corporation should possess funds to enable it to give effect to the purposes for which it was created, provision was made for the acquisition of funds *inter alia* by the enactment of section 69 of the Act which runs as follows :

"69 (1) Every male passenger liable to pay the full fare leaving Rangoon by sea-going vessel for a destination other than a port in Burma shall pay in respect of each journey so made by him a tax of such amount not exceeding two rupees as the Local Government may determine.

"(2) The said tax shall be collected by means of a surcharge on fares by the owner of the vessel in which the passengers are carried and shall be paid to the Board at such time as may be prescribed by rule made under section 95 after making such deduction as the Local Government may approve to meet any expenses incurred in connection with the collection of the tax.

"(3) The owner or agent of the owner of every vessel referred to in sub-section (1) shall prepare and deliver, or cause to be prepared and delivered, to the Chairman, each quarter, a return, in the form prescribed by rule made under section 95, of all passengers carried by such vessel, by whom the tax imposed by that sub-section is payable ; and shall subscribe, at the foot of such return, a declaration of the truth thereof."

At the hearing of the appeal, Mr. Young on behalf of the appellants formally, properly and, I think, inevitably, abandoned the contention raised by the appellants in their defence to the suit that section 106 (2) of the Government of India Act, 1915, applied in the circumstances obtaining in the present case. He conceded that the appellants were not a revenue authority, and indeed it is obvious that they are not. They are a corporation created for certain specific

purposes with defined rights, including the right of recovering from defaulters the sums which they are entitled to receive under section 69 by means of a special form of procedure in execution.

Section 86 provides :

"(1) Any sum of money, or any tax or fee due to or claimable by the Board may be recovered by the Board as if it was an arrear of land revenue.

"(2) The Local Government may, by notification, prescribe by whose orders and on whose application such money, tax or fee may be recovered."

It is to be observed that under section 86 (1) the appellants for the purpose of recovering the amount due to them from persons liable to pay the terminal tax are given the right to have recourse to the procedure prescribed for the recovery of arrears of land revenue as if the sum due to them under section 69 (2) was an arrear of land revenue. The procedure under which arrears of land revenue are recovered is set out in Part IV of the (Lower) Burma Land and Revenue Act, 1876 (II of 1876).

"*Section* 43. Every sum payable under this Act on account of any revenue tax, rate, fee, duty, or composition, shall fall due on such date, and shall be payable at such place and to such person as the Local Government may from time to time by rule direct.

"*Section* 44. When any such sum has fallen due, and a written notice of demand for it has been served on any one of the persons liable for it or published in such manner as the Local Government may from time to time by rule direct, and ten days have elapsed from the service of publication of such notice without such sum having been paid, such sum shall be deemed to be an arrear, and every person liable for it shall [be deemed to be a defaulter.

"*Section* 45. An arrear may be realised as if it were the amount of a decree for money passed against the defaulter in favour of any Revenue Officer whom the Local Goverment may from time to time appoint in this behalf by name or as holding any office.

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

PAGE, C. J.

"Proceedings with a view to the realization of such arrears may be instituted by such officer before any other Revenue Officer whom the Local Government may from time to time appoint by name or as holding any office; and except in so far as the Local Government may otherwise by rule direct, such other officer may exercise all the powers conferred on, and shall conform to all rules of procedure prescribed for, a Court executing a decree by the Code of Civil Procedure."

Provision is made in section 55 for appeals to officers appointed by the Local Government with a power of review by the Financial Commissioner and the jurisdiction of the Civil Courts is restricted as provided in section 56.

Now, by Municipal and Local Department Notification No. 27 of the 27th January 1921, certain rules were passed by the Local Government pursuant to section 95 of the Act. Section 95 provides that

"The Local Government may make rules consistent with the provisions of this Act to provide for all or any of the following matters, ... (7) The collection of the duty and taxes imposed by sections 68 and 69 and the payment thereof to the Board".

Rule 1 runs as follows:

"The terminal tax on passengers shall be collected by means of a surcharge on fares by the owner or agent of the vessel by which the passengers are carried."

Rule 3 runs as follows:

"Every person collecting the terminal tax shall, within one month after the last day of March, June, September, December, pay to the Chairman of the Board the amount of tax collected during the previous quarters after making such deduction therefrom as the Local Government authorize on account of expense incurred in connection with the collection of the tax."

By a notification of the 16th July 1931 the Governor in Council appointed certain officers to perform the duties prescribed under the various sections in Act V of 1920. In this notification

for the purposes of section 45 of the Lower Burma Land and Revenue Act the officers appointed were *Akunwuns* and the land officer; and it was provided that appeals should lie to the Chairman from the orders and decisions of the Land Officer, and appeals from the orders and decisions of the other officers should lie to the Land Officer.

Now, purporting to act pursuant to section 69 (2) and Rule 1 made under section 95 of Act V of 1920 the appellants served a notice of demand under section 44 of Act II of 1876 upon the respondents in respect of a sum of Rs. 9,508 which was claimed as being the proceeds of the collection of terminal tax by the respondents as managing agents of the Andhra Burma Steamship Company (1929), Limited. The respondents having repudiated all liability in respect of this claim the appellants, purporting to act pursuant to the provisions of section 45 and the sections subsidiary thereto, caused certain immoveable property of the respondents to be attached in execution of the debt which they alleged that the respondents were liable to pay under the provisions of section 69 (2) and Rule 1 of Act V of 1920.

On 14th September 1931 the respondents filed the present suit against the appellants in which they claimed

(*a*) a declaration that the respondents have no right to claim payment of Rs. 9,508 or any sum from the plaintiffs in respect of the tax due from the Andhra Burma Steamship Company (1929), Limited, under section 69 of the Rangoon Development Trust Act;

(*b*) an injunction restraining the defendants from proceeding with the sale of the plaintiffs' properties mentioned herein or from realising the above sum of Rs. 9,508 or any sum from the plaintiffs in any other way;

(*c*) that the defendants do pay the costs of the suit; and

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

PAGE, C.J.

(*d*) that such further or other relief may be granted as in the circumstances of the case this Hon'ble Court may deem fit and proper.

The defendants filed a written statement in which they alleged that the sum of Rs. 9,508 was due and payable to the appellants by the respondents as being a debt due from the plaintiffs in the suit to the defendants as managing agents of the Andhra Burma Steamship Company (1929), Limited. In paragraph 6 of the written statement the defendants specifically pleaded

"that the plaintiffs are liable under the Rangoon Development Trust Act and rules made thereunder to pay to the defendant Board the said Rs. 9,508 collected as terminal tax by them".

On the suit being called for hearing the learned advocate who then appeared on behalf of the appellants stated that the determination of the case depended mainly on points of law, the only fact that it was necessary to prove other than those set out in the pleadings being that the sum in suit had been received by the plaintiffs in respect of the terminal tax payable by passengers in a vessel or vessels owned by the Andhra Burma Steamship Company (1929), Limited. Thereupon a letter of the 20th May (1931) written by Messrs. Cowasjee, Anklesaria and Jeejeebhoy on behalf of the plaintiffs to the Chairman of the Development Trust was tendered and accepted in evidence in which the plaintiffs admitted that the terminal tax was collected by them in their capacity as agents of the Andhra Burma Steamship Company (1929), Limited, and the sum so collected together with the passage money received had been credited in the accounts of the Andhra Burma Steamship Company with their Bankers. The case accordingly, by consent of the parties, has been heard and determined in substance

as upon a demurrer, the defendants contending upon the facts set out in the pleadings and in the letter of the 20th May 1931 that the plaintiffs were liable for the sum for which the attachment had been made, and that if they were liable it was not open to the respondents in this Court to challenge the validity of the proceedings taken pursuant to the special procedure prescribed for the recovery of sums due from defaulters under section 45 and the other relevant sections of Act II of 1876.

The plaintiffs on the other hand contended upon the admitted facts and the pleadings that they were not liable to pay the terminal tax, and that all the proceedings taken by the defendants culminating in the attachment of their property were *ultra vires* and void, and that they were entided to a declaration to that effect upon the ground that it was a condition precedent to the right to institute proceedings under section 45 that the persons against whom the proceedings were taken were liable to pay the terminal tax and were defaulters within section 45.

When the pleadings and the admitted facts are analysed, the determination of the case, in my opinion, will be found to depend upon whether the word "Owner" in section 69 (2) means and includes also the "Agent of the owner".

Now, under section 69 (2), it is specifically laid down that the terminal tax shall be collected by the owner of the vessel in which the passengers are carried, and shall be paid to the Board at such time as may be prescribed by rule made under section 95. Under section 95 the Local Government may make rules consistent with the provisions of the Act, and the defence of the appellants was based, and based solely, upon the alleged liability of the respondents under section 69 (2) read with the Rules

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

PAGE, C.J.

made by the Local Government pursuant to the provisions of section 95 of Act V of 1920.

Now, if Rule 1 and Rule 3 are *intra vires*, inasmuch as it is common ground that the sum in dispute represents the terminal tax on passengers collected by the agents of the Andhra Burma Steamship Company (1929), Limited, the respondents upon whom a written notice of demand was served under section 44 *ex concessis* are "persons liable" for the payment of the tax. But the Rules made by the Local Government under section 95 of Act V of 1920 must be consistent with the Act, and the question, therefore, that falls to be determined is: are Rules 1 and 3 consistent with section 69 (2) of Act V of 1920? My learned brother Cunliffe, J. who tried the case held that they were not. In the course of his judgment the learned Judge observed:

"I am of opinion that Rules 1 and 3 are clearly *ultra vires* of the Act. They are *ultra vires* because the appropriate section 69 on which they are based, and with which, in law, they must be consistent, does not mention an agent as being liable to collect or pay the tax in question. The duty of collecting and remitting the tax is thrown upon the owner alone. It is true that sub-section 3 of section 69 does mention the duty of an agent to make a return of all passengers, but in no other connection does the Act impose a liability upon an agent, but only upon the owner of the steamship."

In so holding the learned trial Judge in my opinion placed the true construction upon section 69 (2). It is to be observed that section 69 (3), which prescribes the duty to make a return of the passengers carried by the vessel, imposes the obligation to make the return upon both the owner and the agent of the vessel, and failure duly to make the return renders the owner or the agent liable to a fine not exceeding Rs. 1,000 under section 87 of the Act. What is the object of compelling the

owner or agent to make a return under section 69 (3)? Clearly, as I apprehend the matter, in order that the Trustees of the Development Trust may be in a position to ascertain the amount for which the person upon whom the obligation has been imposed to collect and pay the tax is liable to the Trustees. Many owners of steamships which ply between Rangoon and other parts, of course, have agents in Rangoon, but there are also many owners of vessels here who have no agents acting for them, or who may have one agent at one time and another agent at another. It may be that shipping agents in Rangoon anticipated that hardship might accrue, and that it would be unfair to them if they were made personally liable for the terminal tax in respect of fares which they collected as agents for the benefit, and on behalf, of their principals. Many reasons could be advanced why the agents of vessels should object to having the obligation imposed upon them of paying the terminal tax. Be that as it may it is significant that whereas both the owners and the agents of vessels are specifically made liable for the due return of passengers under section 69 (3), it is the owners alone who are made responsible for the collection and payment of the tax under section 69 (2). If the Legislature had been minded to make the agents liable for the collection and payment of the tax as well as their principals, nothing would have been easier than to frame section 69 (2) in that sense; and the fact that the Legislature has expressly refrained from including the agents in section 69 (2) strongly supports the view which I take as a matter of construction that under section 69 (2) it is the owners alone who are liable for the collection and payment of the tax. If the construction that I put upon section 69 (2) is correct, in my

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

PAGE, C.J.

opinion it follows that Rule 1 and Rule 3 (except in so far as they refer to the owners) are *ultra vires*. This can be demonstrated, I think, in the simplest way. I put to Mr. Young, who appeared on behalf of the appellants, and who, if I may be allowed to say so, presented an argument to the Court that was nonetheless cogent because it was succinct and candid, the following question. If an Act of Parliament says that **AB** shall pay a sum of money, and that rules may be made consistent with the Act and a rule is made that **CD** shall pay the money, will that rule be consistent with the Act? The learned advocate adroitly attempted to meet that question by replying that the answer depended upon whether **AB** and **CD** were the same person, but it is conceded that this case has proceeded on the footing that the respondents and the Andhra Burma Steamship Company (1929), Limited, are different entities, and when pressed for an answer the learned advocate perforce gave the only answer which common sense would allow, namely that such a rule would not be consistent with the Act.

Now, section 69 (2) provides that the owner of the vessel shall collect and pay the tax. The Rule provides that the owner or the agent of the vessel shall collect and presumably pay the tax. In my opinion it is manifest that Rule 1 and Rule 3 *pro tanto* are inconsistent with section 69 (2) and *ultra vires*. It follows that the respondents, who are sued and sued only as agents of the Andhra Burma Steamship Company (1929), Limited, are not liable for the payment of the terminal tax.

Further and different questions would have arisen if the case of the appellants had been that the special tribunal set up under section 45 had found as a fact that the respondents were the owners of the vessel

in respect of which terminal tax was payable, and as such liable to pay the tax as defaulters. (See sections 55 and 56.) But it must not be taken that I should hold that the appellants or the special tribunal could acquire an unchallengeable right to institute execution proceedings under section 45 against any person whom they selected, for instance a local agent, a local doctor or a local butcher, merely by holding *ex cathedra* that such a person was the owner of the vessel. See *Balkishen Das* v. *Simpson* (1) and *Harendra Kumar Roy Chowdhry* v. *Secretary of State for India* (2). No such question, however, arises in the present case for it is common ground and an agreed fact that the respondents are not the owners, and the appellants contend, notwithstanding that fact, that the respondents are liable to collect or pay the terminal tax under section 69 and the rules made under section 95 as agents for the owners and not otherwise.

Now, under sections 44 and 45 of Act II of 1876, it is a condition precedent to the right of the appellants to have recourse to the special procedure prescribed in that Act that a sum has fallen due for the terminal tax "and a written notice of demand for it has been served on any one of the persons liable for it".

It is common ground that in this case the only notice of demand that was served was upon the respondents, and if the respondents are not persons liable to pay the terminal tax it follows *ex necessitate rei* that there is no arrear due from them, and that they are not defaulters. It is only when such condictions are fulfilled that section 45 is brought into play.

(1) (1898) 25 I.A. 151 at p. 157. (2) (1928) I.L.R. 55 Cal. 1355 at p. 1359.

1922

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHURA & SONS.

PAGE, C.J.

Now, in my opinion, having regard to the facts and the pleadings upon which this case is to be determined, the conditions precedent to the adoption of the special procedure laid down and followed by the appellants in this suit have not been fulfilled. What is the result? In my opinion, the case is concluded against the appellants by well settled authority. Where it is provided that recourse may be had to a special form of procedure for the purpose of determining a dispute or recovering a valid demand upon the fulfilment of a condition precedent, and the condition precedent to the vesting of jurisdiction in the special tribunal has not been fulfilled, all the proceedings before that tribunal are null and void: [*Balkishen Das and others* v. *Simpson* (1); *Sheikh Mahomed Jan* v. *Munshi Ganga Bishun Singh and others* (2); *Harendra Kumar Roy Chowdhry* v. *The Secretary of State for India* (3); *Musammat Saraswati Bahuria* v. *Surajnarayan Chaudhuri and others* (4) and *Krishna Chandra Bhowmic* v. *Pabna Dhana Bhandar Company, Limited* (5)].

In *Balkishen Das and others* v. *Simpson* (1) Lord Watson in delivering the judgment of the Judicial Committee observed:

"Section 3 of the Act (XI of 1859) provides that, in default of payment of revenue, within the time appointed for each district by the Board of Revenue, the 'estates in arrear' in those districts 'shall be sold at public auction to the highest bidder'. The Act does not sanction and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of section 3 of Act VII of 1878 (Bengal), are framed upon the express footing that they are to be applicable to

(1) (1898) 25 I.A. 151.
(2) (1911) 38 I.A. 80.
(3) (1928) I.L.R. 55 Cal. 1355.
(4) (1931) 35 C.W.N. 444.
(5) (1932) 36 C.W.N. 277.

the sale of estates which are in arrear of duty. The enactments of 1859 and of 1868 are obviously intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negative, the sale will remain valid. But the chief and substantial objection upon which the appellants' plaint is based is that, at the time when their five-annas' share of the village Shahzadpore Anderkilla was sold, there were no arrears of revenue due by them in respect of it. It does not appear to their Lordships to admit of dispute that the objection is founded in fact.

"The result is that the whole proceedings of the collector, with a view to the sale of the five-annas' share were beyond his jurisdiction, and are not entitled to the protection given him by the Act in cases where sale is authorized, although it may be attended with some irregularity or illegality. Their Lordships are accordingly of opinion that it was rightly held by the subordinate Judge that he had jurisdiction to entertain the objection to the sale to which he gave effect."

In my opinion the observations of Lord Watson in *Balkishen Das's* case apply to the facts of the present case. The respondents were not liable to pay the terminal tax, and at the time when execution proceedings under section 45 were instituted against them they were under no obligation to give effect to the notice of demand that was served upon them; and having regard to the facts of the case, in my opinion, it does not admit of dispute that the objection of the respondents to the proceedings that have been initiated against them by the appellants is founded on fact.

Now, to what relief are the plaintiff-respondents entitled? The learned trial Judge came to the conclusion that the plaintiffs were entitled under section 45 of the Specific Relief Act to an order in the nature of a mandamus "ordering the Trustees of the Rangoon Development Trust to collect the terminal tax in question according to the law laid down in section 69 (2) of the Rangoon Development Trust Act and in no other manner".

1932

TRUSTEES FOR THE DEVELOPMENT OF THE CITY OF RANGOON v. G. S. BEHARA & SONS.

PAGE, C.J.

It must not be taken because this Court will not order a mandamus in the circumstances obtaining in the present case that I have any doubt that the learned Judge correctly held that an order in the nature of a mandamus would lie against the Trustees of the Development Trust under section 45 of the Specific Relief Act. If it were necessary so to hold I should agree with the view expressed by the learned trial Judge : [*Alcock Ashdown & Co.* v. *Chief Revenue Authority, Bombay* (1)]. But an order under section 45 of the Specific Relief Act is only to be made *inter alia* "if the plaintiff has no other specific and adequate legal remedy". Cunliffe, J. passed an order against the appellants under section 45 of the Specific Relief Act, because he was of opinion "that the plaintiffs are not entitled to an injunction or bare declaration as they specifically claim". With all respect to the learned trial Judge I am unable to that extent to agree with him. The learned trial Judge gave no reasons for holding that the relief claimed in the plaint could not be granted. No reference is made in the judgment, and it does not appear that his Lordship's attention was called to the line of cases of which *Balkishen Das and others* v. *Simpson* (2) is the leading authority.

For the reasons that I have stated to my mind the case presents no difficulty, and I am of opinion, following the case of *Balkishen Das and others* v. *Simpson* (2) and the authorities in consonance with it, that the respondents are entitled to claim a declaration that the proceedings that have been taken against them by the appellants are *ultra vires*, and null and void. If that be so, the Court must give effect to the relief to which the plaintiffs are entitled, and is not to issue an order under section 45

(1) (1923) 50 I.A. 227 ; I.L.R. 47 Bom. 742. (2) (1858) 25 I.A. 151.

of the Specific Relief Act. It is true that the relief which this Court is prepared to afford to the respondents was not the relief granted by the trial Court, but the relief which the learned trial Judge granted was not the relief which the plaintiffs claimed, and under Order 41, rule 33, of the Civil Procedure Code this Court is entitled to pass any decree or make any order which ought to have been passed or made as the case may require. In my opinion the proper decree to pass is that the respondents are entitled to a declaration that the proceedings taken against them by the appellants which have resulted in the writ of attachment are *ultra vires* and null and void, and must be set aside. There will be a further declaration that the writ of attachment is inoperative, and it is ordered that the respondents' property be released from attachment. The decree of the trial Court *pro tanto* will be varied.

As regards costs, although the form of the decree which is passed in favour of the plaintiffs by this Court differs from the form that was awarded by the trial Court, in my opinion, in substance the appeal fails, and must be dismissed with costs, advocate's fee 15 gold mohurs.

DAS, J.—I agree.

BA U, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Cunliffe.

1932
July 20.

LAWRENCE DAWSON AND ANOTHER
v.
J. HORMASJI AND OTHERS

A. C. J. BALDWIN
v.
J. HORMASJI AND OTHERS.*

Companies Act (VII of 1913), ss. 153, 202, 246—Letters Patent, cl. 13—Appeal from order rejecting scheme—Proxy forms—Court's jurisdiction to settle forms—Rules 144, 145 of the High Court—Scheme of re-organization—Considerations for Court's sanction—Function of the Court.

An appeal lies from an order rejecting a scheme both under s. 202 of the Companies Act and cl. 13 of the Letters Patent.

L. Dawson v. Hormasji, I.L.R. 10 Rang. 189; *Virangam Spinning Company v. Industrial Bank of Western India*, 27 Bom. L.R. 655—*referred to.*

Under s. 153 of the Companies Act, the Court has jurisdiction to settle the forms of the instrument of proxy to be used at the meeting of creditors in any form it thinks fit to prescribe, and any rule of the High Court purporting to fetter or restrict the Court's jurisdiction in that behalf is inconsistent with s. 153 and *pro tanto* inoperative and *ultra vires*.

In re Tata Iron & Steel Co., 30 Bom. L.R. 197; *In re English, Scottish and Australian Chartered Bank*, (1893) 3 Ch. 385—*referred to.*

It is not the function of the Court to substitute its own scheme for that of the creditors and if the Court thinks it could not sanction it without radical alterations, the Court ought to reject it. In considering a scheme presented for sanction, the Court must see that the provisions of the statute have been complied with, that the majority have acted *bonâ fide*, that there is no coercing of the minority, that the scheme is such that reasonable business men would approve it. The Court is not required merely to register the decisions of the creditors, but if the creditors have agreed upon a scheme to which no reasonable objection exists, the Court will not substitute its own opinion for that of the creditors.

In re English, Scottish and Australian Chartered Bank, (1893) 3 Ch. 385—*followed.*

In the circumstances narrated at I.L.R. 10 Rang. 143, the liquidators of Dawsons Bank submitted a scheme for the reorganization of the capital of the bank for the sanction of the Court. The depositors were given the option of taking either debentures or pre-preference shares so as to enable the bank to carry on

* Civil Miscellaneous Appeals Nos. 135 and 136 of 1932 from the order of this Court on the Original Side in Civil Miscellaneous No. 180 of 1931.

its business with more or less permanent capital. The scheme received the unanimous support of its shareholders and of the statutory majority of the creditors. *Held*, that the scheme (altered by the Court as to the rate of interest) was a practical and feasible one and satisfied the requirements of the law, and consequently could be sanctioned.

F. G. Robson v. *Dawsons Bank*, I.L.R. 10 Ran. 143—*referred to.*

Per CUNLIFFE, J.—The object of the section is to enable compromises to be made which are for the common benefit of the creditors as creditors. The Court would prefer a living scheme such as sensible business people approve to a compulsory liquidation bringing the company to an end without any hope of payment of its debts in full.

In re *Alabama, New Orleans, Texas and Pacific Junction Company*, (1891) 1 Ch. 213—*referred to.*

Macdonnell for respondents 1 to 4. There is a preliminary objection to this appeal. The order is not a judgment, so no appeal lies. An application to sanction a compromise arrived at between the creditors of the company was rejected on the ground that certain proxy forms did not comply with the form prescribed, and therefore there was not the requisite majority in support of the scheme. A fresh meeting was ordered to be held. This does not in any way dispose of the rights of the parties.

S. 153 of the Companies Act, which deals with the power of the Court to sanction a compromise with creditors, occurs in Part IV, whilst winding up is dealt with in Part V. S. 202 deals with appeals, and it mentions only appeals from decisions in the winding-up of a company. The Company in the present case is not being wound up, but is being re-constructed, and there can be no appeal in respect of an order under s. 153.

[The Court disallowed the objection.]

N. M. Cowasjee for the liquidators. There are two sets of proxies in this case, one prescribed by the Court, and the other under the Rules of the High Court under s. 246 of the Companies Act. The

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI.

Court has power to prescribe the form of proxies. The Rules (Rule 143 *et seq.*) made by the High Court indicate that they do not apply in the case of a voluntary winding-up. Therefore a contravention of the proxy forms as prescribed in the Rules is no ground for rejecting proxies which are in accordance with the form prescribed by the Court. The Court has also a wide discretion under s. 153 in respect of the ordering of meetings of creditors, and any rules made in the matter should not be construed so as to fetter that discretion. See In re *English, Scottish and Australian Chartered Bank* (1).

All that the proxy forms must do is to ensure that the votes of the shareholders are freely exercised : In re *Magadi Soda Company, Limited* (2).

As regards the scheme proposed by the majority of the creditors the Court will have regard to the wishes of the creditors. In sanctioning a scheme, the Court should look at the scheme from a business point of view. It will not sanction a scheme if it considers it unreasonable and highly deterimental to the minority. But at the same time it will have to see what is the alternative proposed by the dissentients to the scheme. The only alternative proposed in this case is a destructive one, namely, to wind up the bank. See the observations of Lindley L. J. in *The English, Scottish, etc., Bank case* (*supra*) at p. 413.

In the circumstances of the case, the scheme is both reasonable and feasible : *Robson* v. *Dawsons Bank* (3).

Mr. Baldwin, Chairman of the Committee of Creditors, in person supported the liquidators and explained the scheme.

(1) [1893] 3 Ch. 385, 395, 409. (2) (1925) 94 L.J. Ch. 217, 218.
(3) I.L.R. 10 Ran.143.

Macdonnell for respondents 1 to 4. The scheme as proposed is highly unreasonable. The money of the creditors is compulsorily locked up, and would only become payable after the lapse of many years. There is also no guarantee that the bank would be solvent after the scheme was sanctioned.

Wiseham for the 5th respondent.

PAGE, C.J.—This is a petition by the liquidators of Dawsons Bank, Limited, under section 153 of the Companies Act (VII of 1913) praying for the sanction of the Court to a scheme for the reorganization of the capital of the company. But for the fact that Das, J. has taken a different view from that which commends itself to me I should have thought that the case was free from difficulty.

Section 153 runs as follows:

"(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

"(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the companies or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

The scheme is supported by Mr. Baldwin, the Chairman of a Committee of creditors appointed at a meeting of the creditors on the 22nd July 1931.

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI.

PAGE, C.J.

Mr. Baldwin appears in person. The scheme is opposed by Mr. and Mrs Hormasji, Mrs. Matilda Brown and Mr. C. F. Brown, who are represented by Mr. McDonnell, and also by Sir Henry Pratt, for whom Mr. Wiseham appears.

A preliminary objection was raised by Mr. McDonnell upon the ground that no appeal lay from the order of Das, J. In my opinion an appeal lies from an order rejecting a scheme both under section 202 of the Companies Act and clause 13 of the Letters Patent: *L. Dawson* v. *J. Hormasji* (1); *The Viramgam Spinning & Manufacturing Company, Limited* v. *The Industrial Bank of Western India, Limited* (2).

On the 6th of May 1932, the scheme now presented to the Court for sanction was unanimously approved by the preference shareholders and by the ordinary shareholders of the company at meetings duly convened in that behalf.

On the 11th December 1931, a meeting of the creditors of the company was held under section 153, and it is contended on behalf of the liquidators that at that meeting the scheme was approved by the requisite majority of the creditors. The scheme is now opposed on two grounds: (1) that the statutory majority under section 153 (2) of three-fourths in value of the creditors present either in person or by proxy at the meeting of the 11th December 1931, did not agree to the scheme; (ii) that on the merits the scheme ought not to be sanctioned.

Whether or not the first objection can be sustained depends upon whether the proxy form approved by Sen, J. was valid.

The votes cast at the meeting were as follows:—

Including Mrs. Saigol, total	...	54,52,826
Three-fourths	...	40,89,619

(1) (1932) I.L.R. 10 Ran. 189. (2) (1925) 27 Bom. L.R. 655.

In favour of the scheme	...	41,32,479
Excluding Mrs. Saigol, total	...	53,76,092
Three-fourths	...	40,32,069
In favour of the scheme	...	40,55,745

It will be seen, therefore, that whether Mrs. Saigol is treated as being present at the meeting or not, in either event the statutory majority of three-fourths in value of the creditors present either in person or by proxy approved of the scheme.

Mrs. Saigol is a depositor with the bank to an amount of Rs. 76,734 and her proxy was present at the meeting, and voted in favour of the scheme.

The learned Judge in the course of his judgment stated: "In my opinion it is safer not to consider Mrs. Saigol as voting in favour of the scheme."

Now, the reason why the learned Judge expressed this opinion with regard to the vote cast by the proxy of Mrs. Saigol was that on the 16th of December 1931, a letter from Mrs. Saigol was received by the company in Rangoon purporting to cancel the proxy form empowering her proxy to vote at the meeting of the 11th December 1931, in favour of the scheme. I confess, with all due deference to Das, J. that I do not appreciate what the learned Judge meant by the passage in his judgment that I have cited; for with respect to the vote cast at the meeting on behalf of Mrs. Saigol the question to be determined is not whether it is safe or unsafe to allow that vote to count, but whether Mrs. Saigol's vote cast at the meeting in favour of the scheme by her proxy was valid or not.

Mr. McDonnell admitted that if Mrs. Saigol's proxy was duly appointed Mrs. Saigol voted in favour of the scheme; thus the question to be determined in connection with the proxies who voted in favour of the scheme is whether the proxy form

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI

PAGE, C.J.

approved by Sen, J. was valid or not, Mr. McDonnell frankly, and, in my opinion, inevitably, further conceded that Sen, J. had jurisdiction to prescribe and settle the terms of the proxy form by which proxies were to be appointed. There can be no doubt, in my opinion, on the construction of section 153 that the Court possesses jurisdiction in that behalf, and it has been so held both in India and in England—In re *Tata Iron & Steel Co.* (1); In re *English, Scottish and Australian Chartered Bank* (2).

The proxy form approved by Sen, J. is as follows :

"PROXY.

"I, the undersigned, an unsecured creditor of the above-named company, hereby appoint Mr. A. C. J. Baldwin, I.E.S. of Rangoon whom failing Mr. Lawrence Dawson Liquidator . . . . . as my proxy to act for me at the meeting of unsecured creditors to be held at the office of Dawsons Bank, Limited, 548, Merchant Street, Rangoon, on Friday, the eleventh day of December 1931, at eleven o'clock in the forenoon for the purpose of considering, and, if thought fit, approving, with or without modification, a scheme of arrangement proposed to be made, between the said company and its unsecured creditors, and at such meeting and any adjournment thereof, to vote for me and in my name *. . . . . the said scheme, either with or without such modification, as my proxy may approve.

Dated this . . . . . day of . . . . . 1931.

Signature.

Address.

[* If for, insert "for"; if against, insert "against" and strike out the words below after "scheme" and initial such alterations.]

Now, under section 246 of the Companies Act the "High Court may, from time to time, make rules consistent with this Act", and pursuant to the powers which the Court possesses under section 246

(1) 30 Bom. L.R. 197 at p. 218. (2) (1868) 3 Ch. 385.

the High Court at Rangoon passed Rules 144 and 145, which run as follows:

"*Rule* 144. Every instrument of proxy shall be in accordance with the form in the Appendix and every written part thereof shall be in the handwriting of the person giving the proxy or of any manager or clerk or other person in his regular employment or of a Commissioner to administer oaths.

"*Rule* 145. General and special forms of proxy shall be sent to the creditors and contributories with the notice summoning the meeting, and neither the name nor description of the Official Liquidator or any other person shall be printed or inserted in the body of any instrument of proxy before it is so sent."

The form of proxy prescribed under Rule 144, so far as material, is in the following terms:

"I . . . . . of . . . . . a creditor (or contributory) hereby appoint . . . . . to be . . . . general proxy to vote at the meeting of creditors (or contributories) to be held in the above matter on the . . . . day of . . . . . 19 . . . or at any adjournment thereof.

Dated this . . . . . day of . . . . . 19 .

Signature of witness . . . . . (Signed.)

Address. . . ."

The learned advocate for respondents 1 to 4 contended, notwithstanding that the Court possessed jurisdiction under section 153 to settle the proxy form which was to be used at the meeting, that all proxy forms were invalid unless they were in the terms of the proxy form prescribed under Rule 144, and it was urged that inasmuch as in the proxy form approved by Sen, J. there were inserted before the proxy form was sent out the words "Mr. A. C. J. Baldwin, I.E.S., of Rangoon whom failing Mr. Lawrence Dawson, Liquidator", the votes cast by each and every proxy appointed under the form approved by Sen, J. were invalid as contravening Rules 144 and 145. That argument has found

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI.

PAGE, C.J.

favour with Das, J. who in his judgment observed :

"It seems to me that the attention of the learned Judge who approved of the proxy form was not drawn to this rule framed by this Court regarding proxies. I therefore think that the learned Judge acted *ultra vires* and without jurisdiction in approving of the form submitted to him for approval."

With great respect I am unable to accept either this ruling of the learned Judge, or the reasoning by which it is supported. It seems to me that the learned Judge reversed the true position in law, for in effect he has held that the Act has to be consistent with the rules, whereas section 246 provides that the rules must be consistent with the Act.

It is common ground in the present case, and I hold, that under section 153 Sen, J. had jurisdiction to settle the terms of the instrument of proxy to be used at the meeting of the creditors on the 11th December 1931, in any form that he thought fit to prescribe ; and it follows that in so far as any rule of the Court purports to fetter or restrict the learned Judge's jurisdiction in that behalf it is inconsistent with section 153, and *pro tanto* inoperative and *ultra vires*. That this is so appears to me to be plain, and not to be open to doubt or controversy. I hold, therefore, that all votes duly cast by proxies appointed under the proxy form approved by Sen, J. were valid and must be accepted. The result is that the scheme received the approval of the statutory majority of creditors present either in person or by proxy at the meeting of the 11th December 1931, and the first objection to the scheme fails. In these circumstances it becomes unnecessary to refer to the proxy form issued on behalf of the respondents, except to observe that the proxy forms as issued by the respondents were consistent neither with the rules nor with the form approved by Sen, J. It would

seem that in connection with the proxy forms by reason of the beam in their own eye the respondents failed to discern that no mote lay in the appellants' eye.

As regards the second objection, namely, that the scheme should be rejected on the merits, I desire to repeat what I said with regard to the genesis of the scheme in *F. G. Robson* v. *Dawsons Bank* (1):

"Dawsons Bank was formed for a laudable object, which must have the sympathy of all persons who have regard to the welfare of a country like Burma. No one can live for any length of time in a province of the Indian Empire without being aware that one of the great difficulties that stand in the way of the cultivator is that he has not enough credit or capital to work as a free man should. Any bank, such as Dawsons Bank, which has for its object the financing of cultivators on honest and reasonable terms in order to enable them to cultivate the land without undue harassment and anxiety, is performing a public service. But the success of such a bank depends largely upon the proceeds of the paddy crop from year to year. A number of persons have deposited money with the bank for fixed periods, and the money so deposited has mainly been invested by way of loan upon petty agricultural adventures. Of course, so long as there is agricultural prosperity in Burma Dawsons Bank will be in a flourishing condition, and the normal variation in the crop from year to year will not seriously affect its stability. But in an agricultural country like Burma some temporary disaster, coincident perhaps with other transitory difficulties, may occur which for the time being will render the collection of the debts due by the cultivators to an agricultural bank a matter of great difficulty, and if such a period of depression is unduly prolonged the stability of the bank may grievously be diminished. The position of the bank, however, at any particular time must depend upon the circumstances then prevailing.

"Now, it so happens that Burma recently has been passing through a period of deep depression owing to the partial collapse of the paddy market. Such a situation necessarily would cause anxiety to those responsible for the management of an undertaking like Dawsons Bank. In April 1931, however, the problem

(1) (1932) 10 Ran. 143 at p. 153.

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI

PAGE, C.J.

became further complicated by reason of the rebellion which it was feared might seriously affect the volume of the paddy grown in Burma in the ensuing year. It was incumbent upon the management of Dawsons Bank in such circumstances to consider what steps they ought to take to meet the emergency that had arisen, and the directors of the bank made known to the general public how they appraised the situation. The directors took the view that for a prolonged period of depression the system of obtaining money by fixed deposits was inconvenient, and might be dangerous if it so happened that capital was required for the business of the bank at a time when a number of fixed deposits became payable. In that event the bank might temporarily become embarrassed, although the management of the company expressly stated that Dawsons Bank was in a position to pay its debts as and when they became due, and that if the condition of the paddy market improved and the rebellion was speedily crushed matters would right themselves. On the other hand they pointed out that if the period of depression was abnormally prolonged the result might be that whereas on the one hand the depositors might not be prepared to renew their deposits, on the other hand it would become increasingly difficult for the bank to collect the loans which it had made to the cultivators in the districts. They suggested, therefore, that the best scheme for ensuring the success of the bank in the future would be to change the system of raising capital by way of fixed deposits, and to substitute for it a system of long-term debentures, thereby guaranteeing fixed capital for the company, and, in their opinion, rendering the stability of the company and the position of the depositors more secure."

Now, the substance of the scheme under consideration is that in lieu of liquid capital in the form of deposits the depositors have been given the option of taking either debentures or pre-preference shares, thus enabling the company to obtain fixed and more or less permanent capital with which to carry on its business. This scheme has received the unanimous support of the present preference shareholders and ordinary shareholders, and also of an overwhelming majority of the creditors, and the liquidators now

petition the Court to sanction the scheme with such modifications (if any) as the Court may think it right to impose.

Now, what is the duty of the Court in such circumstances? It is certainly not the function of the Court to substitute its own scheme for the scheme presented to it for sanction, and if the Court is of opinion that unless some radical amendment is effected, or the scheme is fundamentally altered, it ought not to be sanctioned it is the duty of the Court to reject the scheme.

As to the manner in which the Court ought to approach the consideration of a scheme presented to it for sanction under section 153 after it has been approved by the statutory majority of the creditors I desire to cite, and make my own, certain observations of Lord Justice Lindley in In re *English, Scottish and Australian Chartered Bank* (1). In that case Lord Justice Lindley explained that

"What the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and secondly, that the majority have been acting *bonâ fide*. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bonâ fide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it."

(1) (1893) 3 Ch. 385.

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI

PAGE, C.J.

(*Ibid.*, p. 409). Lord Justice Lindley added that

"If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later.

"While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to show that there has been some material oversight or miscarriage."

Lord Justice Lopes, in the same case, observed that

"With regard to the word 'reasonably' it must always be borne in mind that the word 'reasonably' is a relative term; it means reasonably with regard to the particular circumstances of the case. What is reasonable in one case might be unreasonable in another. The reasonableness must be always regarded with reference to other alternatives. For instance, an arrangement giving a very small benefit to creditors, if the alternative were absolute ruin to the company and no benefit to the creditors, would I think be reasonable."

Now, the alternative to this scheme is the winding up of the company and the closing down of the business of the bank, and if it is not common ground in my opinion it is not a matter capable of dispute or open to challenge that any sudden realization of the assets, or anything like a forced sale, would be ruinous to the creditors.

In these circumstances it is not unnatural that certain desultory and fantastic suggestions should from time to time have been made which (so far as I find them intelligible) are to the effect that it

might be to the benefit of the creditors if the period for the liquidation of the bank's assets was extended by means of a *moratorium*, and the company in that way subjected to a lingering rather that a sudden death. I do not pause to examine these suggestions, for, as Lord Justice Lindley pointed out in In re *English, Scottish and Australian Chartered Bank* (1)

"If you lay before creditors a scheme which they think is sufficient, I do not think it is the province of the Court to say that every conceivable scheme which the ingenuity of man can suggest was not laid before them and submitted to them. They are business men. They have looked at it, they know their own interest, and they have approved the scheme by a vast majority in favour of it".

I am the less inclined to burden this judgment with a further discussion of those proposals because no argument based on a *moratorium* was presented to the Court on behalf of the respondents at the hearing of the appeal, and the suggestions to which I have referred have all been considered, and in my opinion properly rejected by the committee of creditors that was unanimously elected at the creditors' meeting on the 22nd July 1931.

Now, the scheme which has been presented to the Court for sanction appears to me *primâ facie* to be a reasonable and legitimate method that has been adopted by the bank for the purpose of surmounting the difficulties which it has been called upon to face through the recent partial collapse of the paddy market in Burma. But before the Court sanctions a scheme it must be satisfied that it is not only reasonable but practicable, and with a view to establishing that the scheme is a feasible proposition a number of figures and statements have been placed before us by the appellants (the correctness of which has not been challenged by the respondents), which

(1) (1893) 3 Ch 385.

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI

PAGE, C.J.

satisfy us that the scheme is one that an intelligent and honest creditor might reasonably regard as capable of realization.

It is unnecessary to embark upon a consideration of the facts and circumstances which have led us to this conclusion, at which we have arrived only after an exhaustive argument and anxious consideration of the materials that have been placed before us. The shareholders unanimously, and the creditors by a vast majority, are of opinion that the scheme ought to be supported, and that sanction should be given to it. It is neither the duty nor the business of the members of the Court to express their own opinion as to whether, if they happened to be creditors of the bank, they would or would not have voted in favour of the scheme. It is enough that the Court should hold—as we are prepared to hold—that the view taken by the creditors as to the feasibility of the scheme is one " as to which persons acting honestly, and viewing the scheme laid before them in the interests of of those whom they represent, take a view which can be reasonably taken by business men ".

In one respect, however, we are of opinion that the scheme requires modification. We observe that the *substratum* of the scheme is that the price of paddy should not fall unduly below the rate of Rs. 100 for 100 baskets. The present price is stated to be Rs. 110 for 100 baskets, and the scheme is based upon on estimated price of Rs. 100 for 100 baskets. Upon that hypothesis it would not be unreasonable to surmise that the scheme can and will be carried through. Moreover, the view taken by the statutory majority of the creditors has been strengthened by the events that have happened, for in 1931-32, a year of unprecedented depression, five per cent.

interest on the deposits has been paid out of revenue. We think in such circumstances that it is not unreasonable that the rate of the debenture interest should have been fixed for the first year at five per cent. But what of the future? Why should the debenture-holders, who as depositors were unsecured creditors receiving on an average about six per cent. interest on their deposits, receive as secured debenture-holders more than five per cent? The company during the prevailing period of depression has felt bound to forego some portion of the interest due to it from its debtors, and in such circumstances it is incumbent upon the Court to consider whether there is any justification for an undertaking by the company to pay the debenture-holders interest on their debentures at the rate of six per cent. for a period of 21 years out of the 23 years during which the debenture issue may remain outstanding. Can anyone prognosticate with anything approaching accuracy when the prevailing depression will pass away? In February 1932 it was suggested in a letter to the liquidators that a certain gentleman should be asked to undertake a thorough survey of the position of the bank, and I am disposed to think that the reply of the 21st February 1932, contained a shrewd appreciation of the situation by the liquidators when they observed :

"It cannot be assumed, as you have apparently assumed, that the value of the products of agricultural land in Burma has now became stabilised; much less can we assume that land values have become stabilised. Moreover, the profit derived from agriculture will depend upon whether the price of rice rises or falls relatively to the rise or fall of other commodities necessary to agriculturists and agriculture. . . . . We think for the reasons given above that *any competent person* holding a survey such as you suggest must come to the conclusion that time alone can determine at what prices stabilisation is likely to be effected, and

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI

PAGE, C.J.

that in the present confused economic conditions which prevail the qualification that is required for such a surveyor is a gift of prophecy. However impartial such a surveyor may be his personal views of the future must necessarily colour his report and there can be no kind of assurance that these views would be verified or falsified by the event."

Mr. Baldwin in his address to the Court stated that the committee of creditors had fixed the rates of interest set out in the scheme both because they thought that the company could afford to pay the progressive rates of interest on the debentures therein referred to, and also because the members of the committee were anxious so far as possible to compensate those depositors who might have wished to realize the capital that they had invested in the bank within a short period. But that is not the outlook of the business man, but of the utilitarian. In our opinion, having regard to the uncertainty in which the future of the agricultural industry of Burma is shrouded and the instability of paddy prices, the bank would not be justified in undertaking to pay interest on the debentures at a higher rate than 5 per cent. during the period in which the issue remains outstanding. This modification of the debenture interest will to some extent affect the rate of interest payable to the pre-preference shareholders, which we think ought to be 7 per cent. and not 7½ per cent.

The objections that have been raised to this scheme, in my opinion, are inconsistent, irrational and unreal. The respondent Sir Henry Pratt has expressed the opinion that the financial position of the bank is not unsatisfactory, and has made certain suggestions which he thinks, if followed, would enable the creditors to realize their capital or a substantial portion of it within a few years. Sir Henry Pratt however refused to meet the committee of creditors, who have been appointed on the 22nd July 1931, at the creditors'

meeting to investigate the affairs of the bank, for the purpose of discussing with them any relevant proposal that he might have to make. At the hearing of the appeal also the learned advocate who appeared for Sir Henry Pratt declined to present any argument to Court on his behalf, although I understood the learned advocate to state that he adopted the argument presented to the Court by Mr. McDonnell. The respondents for whom Mr. McDonnell appears are Mr. and Mrs. Hormasji, Mrs. Matilda Brown and Mr. C. F. Brown. Mrs. Matilda Brown is a depositor to a large amount, and the attorney for Mrs. Brown was appointed a member of the committee of creditors, and as representing Mrs. Brown approved of the scheme that was passed unanimously by the committee of creditors on the 1st September 1931. It appears that Mrs. Brown (who, we are informed, is an aged lady) afterwards changed her opinion, and she is now opposing the scheme. On behalf of respondents 1 to 4 the only criticism of the scheme that Mr. McDonnell was instructed to present to the Court was that the bank was capable of redeeming the whole of the debenture issue in ten years, and the learned advocate stated that if a provision to that effect was embodied in the scheme his clients would not object to the scheme being sanctioned by the Court. Of course the argument which Mr. McDonnell presented to the Court on behalf of the respondents 1 to 4, so far from providing a ground that would justify the Court in refusing to sanction the scheme, was a cogent argument in its favour, for if the financial position of the bank is so satisfactory that it is able out of revenue to redeem the whole of the debenture issue in ten years, *a fortiori* it will be in a position to do so in twenty-three years. Mr. and Mrs. Hormasji on the other hand have consistently stated that in their opinion

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI.

PAGE, C.J.

the bank is insolvent, and on the 22nd June 1931 these respondents filed a petition for the compulsory winding up of the bank upon the ground *inter alia* that the bank was "unable to pay its debts". I asked Mr. McDonnell if his argument was presented on behalf of Mr. and Mrs. Hormasji as well as of Mrs. Matilda Brown and Mr. C. F. Brown, and the learned advocate replied that it was presented on behalf of all his clients, and that Mr Hormasji has now changed his view as to the inability of the bank to meet its liabilities. It is a *volte face* on the part of Mr. Hormasji as complete as it is sudden.

In my opinion the objection of the respondents to this scheme comes to nothing, and, so far from satisfying the Court that the scheme is not a feasible arrangement that the Court ought to sanction, the argument presented on behalf of the respondents, for what it is worth, tells in favour of the practicability of the scheme.

For these reasons the appeal must be allowed, and the order of Das, J. set aside. The scheme modified in the sense that I have indicated is sanctioned.

As regards the costs in the Court below the only order that we make is that the costs of the liquidators be borne by the company. As regards the costs of of the appeal the costs of the liquidators will be paid by the respondents—20 gold mohurs.

CUNLIFFE, J.—I am of the same opinion, and on the technical point relating to the forms of proxy required I have nothing to add to what has been stated by my Lord.

On the merits of the scheme, however, and on the attitude to be adopted by the Court towards the reconstruction of a company, I desire to make certain observations.

The present position, or, I should say, the recent position of the bank, is conveniently shown in the tables and statements attached to a circular letter entitled "The scheme as a commercial proposition" which was distributed to those interested by the committee of depositors. From these tables and statements it will be seen that the proposals of the committee who are supported by the liquidators are broadly as follows:

They calculate that the future gross annual earnings of the bank will be Rs. 5,60,000. This figure is based on the assumption that there will be a steady market price for paddy at 100 rupees per 100 baskets, and that the amount of interest payable by agricultural debtors of the bank may be fairly computed at about 8 per cent., this figure, of course, being very much below the rate at which the original capital was put out at loan.

To this amount of the gross income must be added, Rs. 60,000, revenue from bank property and also a net interest on certain Government stock owned by the bank after deduction of interest on an overdraft payable by the bank for which this Government scrip has been deposited as security. To arrive at the estimated total net annual income of the bank, expenses of management were deducted—various annual items such as interest on the provident fund of employees of the bank, depreciation of buildings, the property of the bank, and provision for income-tax, were also taken into account. This calculation produces a net income of over Rs. 4 lakhs.

The actual proposal of the committee is that all depositors should convert their cash holdings either into debenture bearer bonds or stock in the form of pre-preference shares. The debentures to be redeemed over a term of 23 years by an annual system of

1932

DAWSON v. HORMASJI AND BALDWIN v. HORMASJI.

CUNLIFFE, J.

drawings on a small premium to be paid on each redemption.

The committee suggested that debentures should bear interest at 5 per cent. for the first year, 5½ per cent. for the second year and 6 per cent. to be maintained for the remaining years. The pre-preference shares to bear interest at 7½ per cent. per annum.

Various other figures and calculations were taken into account by the committee of depositors. It was recorded that applications for the preference shares would probably befin the neighbourhood of over Rs. 10 lakhs—nearly 58lakhs of debentures already being applied for.

It was pointed out that immediately on issue the debentures would have some market value and also that on the voluntary liquidation being determined and reconstruction being completed, the company would be at liberty to resume its ordinary business and obtain fresh capital if necessary.

Such then is the scheme regularly put forward by the statutory majority of the depositors ; and it may be noted that it has always been stated throughout the record that a qualified chartered accountant was advising the committee throughout. It is interesting also to note that while a complaint on the part of the objectors was that no signed statements of either the chartered accountant or an expert in banking were before the learned Judge on the Original Side, yet when it was suggested by counsel for the liquidators that such statements were available, counsel for the objectors at once took strong exception to their being produced.

The objectors represented before us by Mr. McDonnell and Mr. Wiseham had however no settled scheme of reconstruction to put forward as an alternative to the one above described.

Originally the Brown family, who are now objectors, represented by Mr. McDonnell, had formed part of

the majority of satisfied depositors. I still do not know what these objectors tangibly propose. A scheme of care and maintenance was adumbrated on their behalf based on the policy said to have been adopted by those responsible for the rubber industry ; but the details have never, in fact, materialised ; and also such a scheme was certainly never before the Judge on the Original Side. A suggestion that the debentures should be redeemed in ten years was also put forward ; but such a proposal would place even the most flourishing concern in difficulties.

Mr. McDonnell was in a difficult position too, because right up to the hearing in this Court he was representing not only the Brown family who took this optimistic view of the company's financial position but he was representing Mr. and Mrs. Hormasji, and they supported the compulsory winding up in which case only a fraction of the assets of the company would go to those who are creditors.

What then should be the attitude of the Court towards proposals such as these ?

I desire to quote and to adopt a passage in the judgment of Lord Justice Bowen In re *Alabama, New Orleans, Texas and Pacific Junction Railway Company* (1) and it will be remembered that this particular case was referred to in In re *English, Scottish and Australian Chartered Bank* (2) to which my Lord has already made reference. Lord Justice Bowen said this,

" A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it. Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible

(1) (1891) 1 Ch. 213 at p. 243. (2) (1893) 3 Ch. 385.

1932

DAWSON v. HORMASJI AND BALDWYN v. HORMASJI.

CUNLIFFE, J.

business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation. It is not that one person should be a victim, and that the rest of the body should feast upon his rights. Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such."

The Court is of course not a mere machine for registration. It will look into the proposed scheme much as a Court of Appeal will canvass, if asked to do so, the decision of a jury, to ascertain if there was reasonable evidence to support their verdict; but it will, I think, always also prefer a living scheme to a compulsory liquidation bringing about an end to a company and, usually, without any hope of payment in full. I incline also to think that the onus of showing that any scheme is unreasonable would *primâ facie* fall on the objectors.

I approve of the substantial reduction in debenture interest mentioned by my Lord and also of the slight reduction in the rate of interest on the new preference shares. Such a reduction will, in my opinion, give greater freedom to the committee and to the liquidators in the furtherance of their new arrangement and an increased power to deal with unforseen eventualities because the margin of liquid annual finance would be substantially enlarged.

There are objections to every scheme and I can see objections in this one here, but they are not insuperable or fundamental objections; and I therefore prefer this constructive compromise to the compulsory liquidation put forward by those who raise their objections in such a half-hearted way.

For these reasons I agree with the modified sanction proposed by the learned Chief Justice and that the appeal should be allowed.

G.B.C.P.O.—No. 79, H.C.R., 26-8-32.—3,000

ORIGINAL SIDE.

Before Mr. Justice Das.

AISHA BEE BEE

v.

NOOR MOHAMED AND OTHERS.*

1932

Feb. 4.

Halai Memons of Kathiawar and Gondal—Succession and Inheritance—Hindu Law, applicability of.

According to custom as established by evidence, Halai Memons who are residents of Kathiawar and Gondal are governed by Hindu Law as regards the succession of their properties.

Khatubai v. *Mahomed Haji Abu*, I.L.R. 47 Bom. 146 P.C.; *Mahomed Haji Abu* v. *Khatubai*, I.L.R. 53 Bom. 647—*referred to.*

Lambert for the plaintiff.
Rauf for the 1st defendant.
Anklesaria for the 2nd and 6th defendants.

DAS, J.—This is a suit for the administration of the estate of one Haji Saleh Mohamed Abdul Gani Gaziani, a Halai Memon of Gondal, who died at Gondal on the 11th November 1927, leaving a will and leaving him surviving a widow, four sons and three daughters. The present suit is filed by one of the daughters.

It is admitted by all the parties that the deceased was a resident of Gondal in Kathiawar and that the law regarding the succession to his property would be the law prevailing in Gondal.

The plaintiff's case is that the deceased was governed by Mohammedan Law and that the Mohammedan Law of succession applies to his estate and the deceased could not make a will which was not in accordance with the Mohammedan Law. The defendants 2 to 6 filed a joint written statement claiming that the deceased was a Halai Memon of

* Civil Regular Suit No. 271 of 1930.

1932

AMBA BAI BAI v. NOOR MUHAMMED.

DAL J.

Kathiawar and as such was governed by Hindu Law regarding succession; that the deceased could dispose of his property by a will and that the will was binding on the plaintiff. Defendant No. 1, one of the sons of the deceased, supported the plaintiff's contention. The other defendants did not file written statements.

The main question to be decided in this case is whether the deceased in the matter of succession and inheritance was governed by Hindu Law or Mohammedan Law. The deceased was a Halai Memon of Kathiawar and the question regarding the law of succession applicable to Halai Memons of Kathiawar was considered by the Bombay High Court in *Mahomed Haji Abu* v. *Khatubai and others* (1) where a Bench of the Bombay High Court went elaborately into the question as to who these Halai Memons were and the law regarding succession. Scott, C.J. at page 653 states as follows:

"Speaking generally the evidence which will later be referred to with more particularity establishes that the Memons of Kathiawar of whatever group or sect follow the Hindu rule of succession."

This case went up on appeal to the Privy Council. This is reported in *Khatubai* v. *Mahomed Haji Abu and others* (2). Their Lordships of the Privy Council went into the question as to what was meant by a Halai Memon. Though their Lordships confined themselves to the question of the law applicable to Halai Memons of Porebunder, they did not dissent from the general views expressed by Scott, C.J. that Halai Memons of Kathiawar were governed by the same law. These decisions are a clear indication that Halai Memons of Kathiawar are governed by Hindu Law as regards the succession of their properties; but as the deceased was a resident of

(1) (1918) I.L.R. 43 Bom. 647. (2) (1922) I.L.R. 47 Bom. 146.

Gondal in Kathiawar it will be necessary in this case to consider the evidence as to whether Halai Memons of Gondal are also governed by Hindu Law as regards the succession of their properties.

The contesting defendants in this case examined 21 witnesses on commission. The plaintiff though given an opportunity did not cross-examine any of these witnesses; nor did she examine any witness on commission though given an opportunity to do so. It will be necessary to go into the evidence taken on commission in this case.

[His Lordship discussed the evidence and continued as follows:]

All these witnesses are unanimous in stating that Hindu Law of succession governs Halai Memons of Kathiawar and particularly Gondal. The plaintiff did not take the trouble of cross-examining these witnesses and did not take the trouble of calling any witnesses in Gondal or other places in Kathiawar to prove that Mohammedan Law of succession applies to Halai Memons of Gondal. The plaintiff called certain witnesses in this Court but neither the plaintiff, nor her husband, nor the 1st defendant, gave evidence to prove that Mohammedan Law governs Halai Memons of Gondal. Not much attention need be paid to the witnesses called in this Court as most of them state that they never heard of Hindu Law being applied to Halai Memons of Kathiawar and some of them state that Halai Memons being Mohammedans, Mohammedan Law must be applied to them and many of the instances given by the witnesses in this Court were of persons with whose estates they were concerned and who had left wills.

It is admitted by the contesting defendants that Halai Memons can always dispose of their property

1932

AISHA BAI BEE v. NOOR MOHAMED.

DAS, J.

by will as they wish. It may be noticed here that Halai Memons had held a conference at Rajkot in Kathiawar and one of the resolutions passed at that conference was the following :

"This meeting of the All-India Memon Conference resolves that (as regards) the Hindu Law that has been continuing to apply to our community in the matter of inheritance in spite of our being staunch Mussalmans, considering the same to be against the 'Shariat' (Mohamedan religion) (this Conference) expresses (its) strong aversion towards it ; and in (our) status of being Mussalmans, (this Conference) cannot now, any longer, put up with this Law ; therefore (this Conference) strongly urges all our Memon Jamats as well as the public workers to destroy this evil and bring the Muslim Law into force.

"Moreover it humbly requests the (Kathiawar) Agency and the Native States that they as immediately as possible put such an important religious question into force (*i.e.* take it up so that the Mohamedan Law may be put into force)."

This resolution clearly shows that all Halai Memons of Kathiawar knew that Hindu Law was applicable to them as regards succession and that they wanted to change the law. I am clearly of opinion that there can be no doubt that Hindu Law of succession applies to Halai Memons of Kathiawar and especially Halai Memons of Gondal and that the deceased was governed by the Hindu Law as regards succession and was entitled to dispose of his property by will. It is admitted in this case that the deceased did leave a will and there can be no doubt that the provision of the will is binding on the plaintiff. By that will the deceased left a legacy to the plaintiff. In that will the deceased declared that he was governed by Hindu Law as regards succession.

I would therefore hold that the deceased was governed by Hindu Law as regards succession and that he could dispose of his property by will.

The plaintiff's suit must therefore be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Baguley.

KO PO KUN

v.

C.A.M.A.L. FIRM.*

1932

Feb. 12.

Retrospective effect of Statute—Amending Statutes—Non-Merger of incumbrance on Transfer—Continuance of incumbrance beneficial to Owner—Intention or express declaration when unnecessary—Transfer of Property Act (IV of 1882), s. 101—Transfer of Property (Amendment) Act (XX of 1929), ss. 51, 63.

Section 101 of the Transfer of Property Act as amended by Act XX of 1929 is not retrospective in its effect. No statute is to be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication.

Muhammad Abdus-samad v. *Qurban Husain*, I.L.R. 26 All. 119; *West* v. *Gwynne*, (1911) 2 Ch. 15—*referred to.*

Amending statutes are not to be construed as having retrospective effect if they affect vested interests.

Balaji Singh v. *Chakka Gangamma*, 99 I.C. 143—*referred to.*

The words " or such continuance would be for his benefit " in s. 101 before its amendment refer back to the word " unless ". If the continuance of the first charge or incumbrance is for the benefit of the owner, then it is not necessary for him to make an express declaration to that effect. A mortgagee, therefore, who has taken over the property in satisfaction of his mortgage debt, can assert his right to continue the mortgage, if it is for his benefit, independently of any intention he may or may not have had at the actual time of the transfer.

Malireddi v. *Gopal*, I.L.R. 47 Mad. 190; *Manglalal* v. *Chaudhari*, I.L.R. 57 Cal. 82; *N. V. N. Chettyar* v. *Ko Tha Zan*, I.L.R. 6 Ran. 488—*referred to.*

Bai Rewa v. *Vali Mahomed*, I.L.R. 46 Bom. 1009; *Jugal Kishore* v. *Ram Narain*, I.L.R. 34 All. 268—*dissented from.*

BAGULEY, J.—This appeal arises out of a mortgage suit brought by the respondent firm against the appellant and several others. The appellant and his wife were joined in the suit on the allegation that they had purchased the land in suit from the other defendants, the mortgagors, subsequent to the date of the mortgage, and as such they had the right to redeem. The trial Court gave a preliminary mortgage decree against the other defendants, but dismissed the

* Special Civil Second Appeal No. 224 of 1931 from the judgment of the District Court of Toungoo in Civil Appeal No. 12 of 1931.

1932

KO PO KUN v. C.A.M.A.L. FIRM.

BAGULEY, J.

suit as against Po Kun and his wife. On appeal to the District Court the learned Additional District Judge allowed the appeal and gave a preliminary mortgage decree in the usual form for the amount sued against all the defendants. Hence the present appeal.

The allegations of the appellant with which it is necessary to deal for the purpose of the present case are as follows. In 1915 Shwe Hman and his wife executed a registered mortgage in favour of appellant and his wife for Rs. 450, the mortgage being a usufructuary one. Possession was given the same year and has remained with the appellant ever since. On the 7th of May 1925 the same property was again mortgaged to Po Kun and his wife by Shwe Hman alone by registered deed, his wife having died in the meantime; but it is said that he had married again. He had children by his first wife. This mortgage was also a usufructuary one, and possession remained with Po Kun. On the 6th of November 1925 Shwe Hman and his children mortgaged three pieces of land, including the land already mortgaged, to the respondent firm for Rs. 800. The mortgage was a simple mortgage and registered. On the 28th of April 1928 Shwe Hman alone executed a deed of sale of the same land to Po Kun and his wife for Rs. 1,700.

The respondent firm in general denied all the appellant's allegations save that he had bought the land subject to the firm's mortgage. On facts the learned District Judge has found that the first mortgage of 1915 was not duly attested; that the first mortgage was absorbed in the second mortgage the total advanced up to that time being the Rs. 1,000 mentioned in the second mortgage deed and not Rs. 1,430; that the sale absorbed the second mortgage; and that the prior mortgage or mortgages were not kept alive for the benefit of the appellant.

1932

KO PU KUN v. C.A.M.A.L. FIRM.

BAGULEY, J.

With regard to the facts, it was not very seriously contended before me that at the time of the execution of the second mortgage deed Rs. 1,450 had been paid to Shwe Hman. The second mortgage deed itself does not look like a subsequent mortgage, and as regards the payment of Rs. 1,000 over and above the Rs. 450 the evidence is of practically no value. It must also be noted that with regard to the first mortgage not only is the proof of attestation doubtful, but there is no proof of any kind that Shwe Hman's wife executed it, and in the absence of proof of execution by Shwe Hman's wife the value of Po Kun's interest in the first mortgage would be reduced to a mortgage over Shwe Hman's interest in the land. As it has been found that only a further Rs. 550 was paid up to the time of the second mortgage, it is immaterial to the appellant whether he is regarded as holding one mortgage for Rs. 450 over Shwe Hman's interest dated 1915 and a second mortgage over the same interest for Rs. 550, or whether he is to be regarded as holding one mortgage dated 1925 for Rs. 1,000, over Shwe Hman's interest. This clears the ground to a certain extent.

We are left with the position that appellant had a mortgage over Shwe Hman's interest for Rs. 1,000; that that interest was subsequently mortgaged by Shwe Hman to the respondent firm by a simple mortgage without possession; and that subsequently Shwe Hman transferred his interest in the land to Po Kun and his wife for the sum of Rs. 1,700, which included the Rs. 1,000, already paid. It is shown that in addition to this thousand rupees which had been paid at the time of the second mortgage further sums were paid from time to time to Shwe Hman, and a balance payment was made at the time of the execution of the sale deed bringing the total up to Rs. 1,700.

1932

KO PU KUN v. C.A.M.A.L. FIRM.

BAGULEY, J.

The sale deed makes no mention of any encumbrance in favour of the respondent firm. It is a short and simple conveyance selling the land outright for Rs. 1,700, and the sale deed refers to the land as

"being free from prior mortgage, sale, gift and transfer and belonging to me solely".

and adds

"In the event in future of any one, such as an heir, interfering (I) will pay damages for the different expenditures incurred by the vendee as well as the current values of the paddy lands".

The question that is to be decided is whether Po Kun can put up the prior mortgage in his favour as a shield under section 101 of the Transfer of Property Act. The first question to be dealt with is whether the section 101 to be applied is the one now in force as altered by section 51 of Act XX of 1929 or whether we must deal with section 101 as it stood before this amending Act came into force.

The present suit was filed on the 27th of August 1930, that is, after Act XX of 1929 came into force, and the question is whether this amending Act will have retrospective effect. For the respondent firm it was admitted that section 101 in its new form would make it necessary to decide the appeal in favour of the appellant, but it is contended that the amending Act was not retrospective in its effect. On behalf of the appellant it is urged that section 63 of Act XX of 1929 expressly lays down that various amendments to the old Transfer of Property Act introduced by this amending Act shall not be retrospective in certain cases, and the alteration of section 101 is not one of the sections mentioned in this connection. It is argued that the fact that certain sections are definitely made not retrospective implies that the remaining sections must be regarded as having retrospective effect. There is certainly something to be said in this connection, but on

1932

KO PU KUN v. C.A.M.A.L. FIRM.

BAGULEY, J.

the whole I am satisfied that I cannot accept it. Turning to the well-known work, "Maxwell on the Interpretation of Statutes" (7th Edition) I find at page 186 the passage,

"It is a fundamental rule of English Law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication"

which, according to a foot-note, is a fundamental rule cited and approved by Kennedy, L.J. in *West* v. *Gwynne* (1).

In Beal's "Cardinal Rules of Legal Interpretation" (3rd Edition) beginning at page 468, there are a series of extracts from judgments of great authority in England between the years 1846 and 1912, which all point to the fact that

"statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object, subject-matter or context shows that such was their object."

Two of these extracts show that the rule is based on a canon of Lord Coke; and in one there is a dictum of Lord Blackburn (S.C. 3. App. Cas. at p. 603) stating that this is the general rule "not merely of England and Scotland, but I believe of every civilized nation".

So far as India is concerned there is a Bench ruling, *Girja Nandan Kalwar* v. *Hanuman Das Marwari* (2), in which this maxim appears to have been accepted by all the five Judges who formed the Bench so far as an Act which gives or takes away rights, although the Bench was divided as to whether it would apply to an amending Act which was merely of a declaratory nature; and in *Muhammad Abdus-*

(1) [1911] 2 Ch. 15. (2) (1928) I.L.R. 49 All. 25.

1932

KO PO KUN v. C.A.M.A.L. FIRM.

BAGULEY, J.

samad v. *Qurban Husain* (1) there is a dictum of the Privy Council:

"It is not, however, in accordance with sound principles of interpreting statutes to give them a retrospective effect."

In an unofficially reported case, *Balaji Singh* v. *Chakka Gangamma* (2) the question of the extent to which statutes can be regarded as retrospective is summed up by Devadoss, J. in the following words:

"1. Legislative enactments have no retrospective effect unless explicitly stated to be so in the enactments themselves.

"2. Amending statutes should not be construed as having retrospective effect if they affect vested interests."

(The remainder of the headings of the summing up related to statutes of a declaratory nature or affecting procedure with which we are not now concerned.)

In my opinion section 101 is a section which affects existing rights, and therefore despite section 63 of Act XX of 1929 I must hold that the new section 101 has no retrospective effect and that this case must be decided on section 101 in its old form.

I only have had one case of this Court quoted before me on the main point, *N. V. N. Natchiappa Chettyar* v. *Ko Tha Zan* (3), the headnote of which runs as follows:

"Where a purchaser buys immovable property which is encumbered, and the circumstances are such that it is for the benefit of the purchaser that the mortgages involved in the purchase should not be extinguished, they ensure for the benefit of the purchaser. Where in a case to which the concluding words of section 101 of the Transfer of Property Act apply, *i.e.*, where the continuance of an incumbrance is for the benefit of the purchaser, the question of intention of parties need not be examined."

This ruling is of course good law unless I consider it to be overruled by a Privy Council decision. The

(1) (1900) I.L.R. 26 All. 119 at p. 129. (2) 99 I.C. 143.
(3) (1926) I.L.R. 6 Ran. 488.

judgment is a very short one, and in view of the definite statements in many other cases that the question of intention is all important, I think it necessary to deal with the matter rather more fully.

On behalf of the respondent *Bai Rewa* v. *Vali Mahomed Miya Mahomed* (1) is quoted as showing that stress must be laid on intention. At page 1013 there is a passage,

"The law on the subject is enacted in section 101 of the Transfer of Property Act under which on the acquisition of superior right the inferior right is extinguished unless the owner declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit."

After this the judgment goes on to say that there had been no declaration as contemplated and that although stress must be laid on the last words of the section and as the appellant would be benefited by the continuance of the mortgage it must be held that there had been no merger. It further goes on to say

"The last clause of section 101 of the Transfer of Property Act, *i.e.*, the words 'continuance would be for his benefit' are merely a guide to the intention of the owner, . . ."

. . . . This case was a Letters Patent appeal, and in the judgment under appeal (which is fully reported) of Macleod, C.J. he states that his remarks in another appeal—which are reproduced in the footnote—applied to this case. In that judgment he referred to *Gokaldas Gopaldas* v. *Purannal Premsukhdas* (2) which was decided on facts which came into existence before the Transfer of Property Act came into force. The judgment goes on to say:

"But section 101 of the Transfer of Property Act makes it clear that now no effect can be given to an intention to keep alive a charge or other incumbrances unless it is formally expressed . . . ."

(1) (1922) I.L.R. 46 Bom. 1009. (2) (1884) I.L.R. 10 Cal. 1035.

1932

KO PO KUN v. C.A.M.A.L. FIRM.

BAGULEY, J.

With due respect I am unable to accept this statement of the law, for even on the narrow reading of section 101 I fail to see how a person can be said formally to express his intention when the section says that he could do so by necessary implication.

Reference is also made to *Fakiraya* v. *Gadigaya* (1) but the facts upon which this case arose came into existence in 1892 before the time the Transfer of Property Act came into force in Bombay, and the same applies to *Lomba Gomaji* v. *Vishvanath Amrit Tilwankar* (2). For the respondent *Jugal Kishore* v. *Ram Narain* (3) was also cited, where it was held that

> "In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property. If an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive."

This case deals with the point as though the intention of the purchaser was all important and it would appear to me that that intention must be what the purchaser intended at the time he obtained an assignment of the property and with the knowledge that he had at that time. The judgment at page 271 states that

> "The rule contained in section 101 of the Transfer of Property Act reproduces a rule well known to English Courts of Equity"

and it then goes on to consider the latest English case in which the point was considered, *viz.*, *Liquid-*

(1) (1901) I.L.R. 26 Bom. 88. (2) (1893) I.L.R. 18 Bom. 86.
(3) (1912) I.L.R. 34 All. 268.

1932

KO PO KUN v. C.A.M.A.L. FIRM.

BAGULEY, J.

ation Estate Purchase Company v. *Willoughby* (1). With due respect I am unable to admit that the Courts in this country must look to English rules of equity which are supposed to have been reproduced in Indian statutes law. To do so would be to endeavour to decide a case not on the words of the statute, but on the intentions of the Legislature, and this, it is well known, the Courts must not do. In any case even if it were admissible to look at the intentions of the Legislature at the time the Act was passed, that is, before 1882, it is still not admissible to look at an interpretation of a rule which was pronounced sixteen years after the Act came into force, and the only other authority on this point which is mentioned in the judgment is one dated 1883 which must have dealt with facts which happened before the Transfer of Property Act came into force.

Even if the doctrine that the owner must have a definite intention to keep a charge alive is accepted, there is a Privy Council ruling in *Malireddi Ayyaraddi* v. *Gopalakrishnayya* (2) in which at page 195 there is a statement that

"It is further to be presumed, and indeed the Transfer of Property Act, section 101, so enacts, that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit."

A recent Calcutta ruling, *Mangtulal Bagaria* v. *Upendra Mohan Pal Chaudhuri* (3) contains a statement :

"The plaintiff as mortgagee, therefore, is entitled to assert his right as such mortgagee against the defendant and may claim that his mortgage interest has been kept alive notwithstanding his purchase of the equity of redemption, as this was for his benefit: See section 101, Transfer of Property Act."

This reading of the section is exactly the same as to be found in the *Rangoon case* (4) before mentioned.

(1) (1898) A.C. 321.
(2) (1923) I.L.R. 47 Mad. 190.
(3) (1929) I.L.R. 57 Cal. 82 at p. 89.
(4) (1928) I.L.R. 6 Ran. 488.

1932

KO PO KUN v. C.A.M.A.L. FIRM.

BAGULEY, J.

If it is for the mortgagee's benefit he can assert his right to continue the mortgage independently of any intention he may or may not have had at the actual time of taking over the transfer. The only basis on which the respondent can succeed is by pleading what is known as the rule in *Toulmin* v. *Steere* (1). This, however, is a rule which the Privy Council refused to apply in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (2) which was a case on facts which existed before the Transfer of Property Act came into force, and their Lordships again refused to apply the rule in *Mohamed Ibrahim Hossain Khan* v. *Ambika Pershad Singh* (3).

For these reasons I am satisfied that there can be no possible doubt as to the correctness of the *Rangoon case* (4), and therefore the appellant is bound to succeed in this appeal.

It is admitted that as he has only a mortgage over Shwe Hman's share he is only entitled to a mortgage over Shwe Hman's half interest; and he is prepared to allow the property in question to be sold provided he has a first claim to the extent of a thousand rupees on half the sale-proceeds of Shwe Hman's interest in that holding.

For these reasons I vary the decree of the lower appellate Court. The property mortgaged will be sold, but the holding mortgaged to Po Kun must be sold separately, and out of the sale-proceeds of that holding Po Kun would be entitled to a half share up to a maximum of one thousand rupees; and if the respondent firm's mortgage is fully satisfied he will of course be entitled to half the balance left from the sale of that holding; the other holdings being sold first.

(1) (1817) 3 Mer. 210.
(2) (1884) I.L.R. 10 Cal. 1035.
(3) (1912) I.L.R. 39 Cal. 527.
(4) (1928) I.L.R. 6 Ran. 488.

CIVIL REVISION.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

MAUNG SHWE THA AND OTHERS
v.
MA U KRA ZAN.*

1932
May 18.

Civil Procedure Code (Act V of 1908), O. 33, rr. 5, 7 (3), 15—Dismissal of application to sue in forma pauperis under rule 7 (3) for non-compliance with rule 5 (a)—Dismissal whether a bar to fresh application—Application of rule 15 to all the provisions of rule 5.

Rule 15 of O. 33, Code of Civil Procedure, applies both to an order dismissing an application for leave to sue *in formâ pauperis* for non-compliance with the provisions of rule 5 (a) and to any infringement of rule 5 (b) to (e). The dismissal of an application under rule 7 (3) on the ground that it was not framed and presented in the manner prescribed by rules 2 and 3 operates as a bar to a fresh application for leave to sue *in formâ pauperis*.

A. C. Sen v. *Raja Peary Mohan*, 20 C.W.N. 669; *Khondkar Ali* v. *Tewari*, 40 C.L.J. 188; *Ranchod* v. *Bezanji*, I.L.R. 20 Bom. 86; *U Ba Dwe* v. *Maung Lu Pan*, I.L.R. 10 Ran. 357—*followed*.

Howa v. *Sit Shein*, 9 L.B.R. 93; *Ma Sein* v. *Ma Kya Huyin*, I.L.R. 4 Ran. 245; *Maung Pe Kye* v. *Ma Shwe Zin*, I.L.R. 7 Ran. 359; *Mussammat Bal Kaur* v. *Shib Das*, I.L.R. 1 Lah. 151; *P. Krishnamoorthy* v. *P. Ramayya*, I.L.R. 50 Mad. 63—*dissented from*.

Unsatisfactory state of the law contained in O. 33 commented upon.

Sein Tun Aung for the applicants. Rejection of an application for leave to sue *in formâ pauperis* on account of the applicant's failure to comply with the provisions of Order 33, r. 5 (*a*), of the Code of Civil Procedure is a bar to a second application in that behalf within rule 15. There is no distinction between the rejection under rule 5 and the refusal to allow a person to sue as a pauper under rule 7: *Atul Chandra Sen* v. *Raja Peary* (1); *Ranchod* v. *Bezanji* (2); *Khondkar* v. *Purna Chandra Tewari* (3). It is submitted that the decisions to the

* Civil Revision No. 140 of 1931 from the order of the District Court of Akyab in Civil Miscellaneous No. 47 of 1930.

(1) 20 C.W.N. 669. (2) I.L.R. 20 Bom. 86.
(3) 40 Cal. L.J. 188.

1932

MAUNG SHWE THA v. MA U KHA ZAN.

contrary in *Mussammat Bal Kaur* v. *Shib Das* (1) and *Howa* v. *Sit Shein* (2) are not correct.

Venkatram for the respondent relied on *Howa* v. *Sit Shein* (2).

PAGE, C.J.—This is a hard case, but the application in revision must be accepted.

In my opinion the time for redrafting Order XXXIII is long overdue. Rules of procedure should be clear and unambiguous, but the language in which the provisions of Order XXXIII are couched is obscure and difficult to interpret. In the present case the applicant for leave to sue *in formâ pauperis* made a similar application in Civil Miscellaneous Case No. 8 of 1930. In the former case the District Court did not reject the application under rule 5, but after hearing the parties dismissed the application for leave to sue *in formâ pauperis* under rule 7 (3) because the application did not comply with the provisions of Order XXXIII, rule 5 (*a*). Now, if an application for leave to sue *in formâ pauperis* is disallowed under rule 7 (3) such an application falls within rule 15, and the order dismissing the application for leave to sue *in formâ pauperis* operates as a bar to a second application in that behalf within rule 15. In my opinion, the Legislature could not have intended that an application for leave to sue *in formâ pauperis* should operate as a bar to a fresh application if the first application was rejected or disallowed merely because it was not in conformity with rule 5 (*a*). But the Court is concerned not with what the Legislature intended but what it enacted, and, in my opinion, any application for leave to sue *in formâ*

(1) I.L.R. 1 Lah. 151. (2) 9 L.B.R. 93, F.B.

pauperis which is disallowed under rule 7 (3) falls within the ambit of rule 15.

In *Howa* v. *Sit Shein* (1) a Full Bench of the Chief Court of Lower Burma (Young, J. dissentiente), held that the rejection of an application for leave to sue *in formâ pauperis* because of non-compliance with the provisions of rules 2 and 3 must be made under rule 5 (*a*) and could not be made under rule 7 (3), and that it made no difference that notice had been served upon the Government Advocate or the opposite party under rule 6, or an enquiry held under rule 7 (1) and (2). The *ratio decidendi* of that judgment appears to be that it was intended that the dismissal of an application for leave to sue *in forma pauperis* should only operate as a bar to a fresh application in that behalf when the application was dismissed upon one or more of the grounds set out in rule 5 other than rule (*a*) and, therefore, that rule 5 (*a*) was not one of the " prohibitions " referred to in rule 7 (2). It followed according to the reasoning in that case that it was not open to the parties to the application at an enquiry held under section 7 (2) to canvass or present an argument with respect to the question whether or not the application was in conformity with rule 5 (*a*).

With all respect it appears to me that the learned Judges in that case were endeavouring to mitigate the effect of what had been enacted by the Legislature. That, however, is to legislate, and not to administer the law. Moreover, in the recent case of *U Ba Dwe* v. *Maung Lu Pan* (2) a Full Bench of this High Court has expressly held that under rule 7 (2) the parties are entitled to present an argument for the purpose of satisfying the Court that the applicant has or has not complied with the terms of any of the clauses (*a*) to (*e*) of Order XXXIII, rule (5), and as I interpret the

(1) (1917) 9 L.B.R. 93. (2) (1932) I.L.R. 10 Ran. 357.

1952

MAUNG SHWE THA v. MA U KHA ZAN.

PAUL, C.J.

meaning and effect of Order XXXIII the Court would not be justified in holding that rule 15 applies to the disallowance of an application for leave to sue *in formâ pauperis* (whether the order purports to be made under rule 5 or rule 7) upon the ground that there has been a violation of rule 5 (*b*) to (*e*) ; and also in holding that rule 15 does not apply to the disallowance of such an application, whether the order is made under rule 5 or rule 7, upon the ground that the application was not in conformity with rule 5 (*a*). It may be that the law ought to be enacted in that sense, but I am of opinion that it is not the law as it stands at present. I can see no justification, having regard to the provisions of Order XXXIII, for differentiating between rule 5 (*a*) on the one hand and rule 5 (*b*) to (*e*) on the other or for holding that rule 15 does not apply to an order dismissing the application for non-compliance with the provisions of rule 5 (*a*). The view which I take is in consonance with the law laid down in *Ranchod Morar* v. *Bezanji Edulji* (1), *Atul Chandra Sen* v. *Raja Peary Mohan Mookerjee* (2), and *Khondkar Ali Afzal* v. *Purna Chandra Tewari* (3). The opinion expressed by the Full Bench of the Chief Court in *Howa* v. *Sit Shein* (4) was approved by a single Judge of this Court in *Ma Sein* v. *Ma Kya Hmyin* (5) and in *Maung Pe Kye* v. *Ma Shwe Zin* (6), and was followed by the Lahore High Court in *Mussammat Bal Kaur* v. *Shib Das* (7). The Madras High Court in *Polepeddi Krishnamoorthy* v. *Polepeddi Ramayya* (8), however, has held that Order XXXIII, rule 15, only refers to cases in which the application for leave to sue as a pauper was dismissed " on the merits ". With all due

(1) (1894) I.L.R. 20 Bom. 86.
(2) 20 C.W.N. 669.
(3) 40 C.L.J. 188.
(4) (1917) 9 L.B.R. 93.
(5) (1926) I.L.R. 4 Ran. 445.
(6) (1929) I.L.R. 7 Ran. 152.
(7) (1919) I.L.R. 1 Lah. 194.
(8) (1926) I.L.R. 50 Mad. 61.

respect I confess that I do not appreciate what is meant by dismissal "on the merits" in this connection. Does it mean when the applicant failed to disclose a cause of action in his application, or when he is not a pauper in fact, or when he has violated the provisions of rule 5 (*c*) or (*e*)? Whatever may be the intention of the Madras High Court in holding that rule 15 only applies where the application was dismissed "on the merits", one thing is clear that there is not a word to that effect to be found in rule 15. Rule 15 is drawn in wide and clear terms, and once again I take leave to say that, however meritorious the interpretation of the rule by the Madras High Court may be, that is a matter for the Legislature, and not for the Court.

For these reasons, in my opinion, the application in revision must be accepted, and the application for leave to sue *in formâ pauperis* dismissed. The effect of the recent Full Bench ruling in *U Ba Dwe's* case, in my opinion, is that the law laid down by the Full Bench of the Chief Court in *Howa* v. *Sit Shein* (1), and two single Judges of this Court in *Ma Sein* v. *Ma Kya Hmyin* (2) and *Maung Pe Kye* v. *Ma Shwe Zin* (3) was not correct, and these cases must be regarded as overruled. There will be no order as to costs.

MYA BU, J.—I agree that according to the provisions of rules 5, 6, 7 and 15 of Order XXXIII of the Code of Civil Procedure, the dismissal of an application by reason of the provisions of clause (*a*) to rule 5 after hearing argument under rule 7 (2) must be held to be a refusal under rule 7 (3) and a bar to a fresh application under rule 15. Inasmuch as the dismissal of an application by reason of the provisions of clause (*a*) to rule 5, either under rule 5 or under rule 7 (3), is based upon

(1) (1917) 9 L.B.R. 93. (2) (1926) I.L.R. 4 Ran. 245.
(3) (1929) I.L.R. 7 Ran. 359.

1932

MAUNG SHWE THA v. MA U KHA ZAN.

MA BYU, J.

some defect in the form, or in the manner of presentation of, the application, it would be hard to apply the bar of *res judicata* to a second application simply because the order of dismissal was made under rule 7 (3). But under the rules as they stand, this is unavoidable, and since the rules must be interpreted as they stand, we are constrained to hold, in this case, that the second application was barred by the provisions of rule 15. The rules need redrafting so as to obviate such hard results.

The application in revision succeeds. I agree in the order allowing the revision and making no order as to costs.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Cunliffe.

1932

June 1.

DAWOOD HASHIM ESOOF AND ANOTHER v. TUCK SHEIN.*

Restitution, principle of—Non-receipt of any money or benefit by Respondent—No loss to or possession by Appellant—Substituted parties—Civil Procedure Code (Act V of 1908), s. 144.

The principle of the doctrine of restitution is that on the reversal of a decree the law imposes an obligation on the party who received the benefit of the erroneous decree to make restitution to the other party for what he has lost thereby. But an order for restitution against a respondent who has never received the money or obtained any benefit from it, in favour of an appellant who never possessed the money and never lost it, is contrary to reason and the express provisions of s. 144 of the Code of Civil Procedure.

A suit for an injunction was dismissed by the High Court in favour of the defendant company who received their costs from the plaintiff. On appeal the plaintiff succeeded, and received from the company the costs of the appeal and of the suit amounting to about Rs. 2,700, and also by way of restitution the costs that he had already paid to the company. The company appealed to His Majesty in Council. In this appeal the present applicants were substituted in place of the company which had gone into liquidation, as assignees of the company's property. The respondent was substituted *in invitum* in lieu of the original plaintiff, as the mortgagee of the plaintiff's mill, the subject-matter of

* Civil First Appeal No. 23 of 1932 from the order of this Court on the Original Side in Civil Regular No. 565 of 1923.

1932

DAWOOD HASHIM ESOOF v. TUCK SHEIN.

the suit. The appeal was successful, and the respondent paid to the applicants the whole of the costs of the trial, of the appeal to this Court, and of the appeal to His Majesty in Council. The applicants now demanded the return of about Rs. 7,700 which the original defendant company had paid to the original plaintiff as and for the costs of the suit, and the appeal.

Held, that the applicants, who had never paid this sum, were not entitled to it from the respondent who had never received it.

Dorasami Ayyar v. *Annasami Ayyar*, I.L.R. 23 Mad. 306; *Jai Berhwa* v. *Kedar Nath*, I.L.R. 2 Pat. 10; *Rajjabali* v. *Fakn Bibi*, I.L.R. 58 Cal. 1070; *Raj Rajkubar Singh* v. *Jai Indha Bahadur Singh*, I.L.R. 42 All. 158—*referred to.*

Foucar for the appellants.

Kyaw Zan for the respondent.

PAGE, C.J.—This is an application for restitution under section 144 of the Code of Civil Procedure. It is an ingenious application, but it fails.

The appellants seek to have restored to them by the respondent a sum of money which the appellants never lost, and which the respondent never received. The application arises in this way. A suit for an injunction was brought in the High Court. It was dismissed with costs, and the defendants received from the plaintiffs their costs of the suit. An appeal was filed, and it was allowed with costs, the plaintiff-appellant receiving a sum of Rs. 2,708-13-0 as the taxed costs of the suit and of the appeal. This sum was paid by the defendant-respondents. The plaintiff also obtained restitution under section 144 of the sum which he had paid to the defendants as the costs of the trial. A further appeal was lodged by the defendants to the Privy Council in 1925. In 1928 the present applicants were substituted as appellants in lieu of the original defendants, and the respondent was substituted *in invitum* as respondent in lieu of the original plaintiff Leong Shain Sway. These orders for the substitution of parties were made by the Judicial Committee of the Privy Council because it appeared that the original plaintiff Leong Shain Sway was the mortgagor of the mill in respect

1932

DAWOOD HASHIM ESOOF v. TUCK SHEIN.

PAGE, C.J.

of which the suit had been brought, and the mortgagee had sold his interest in the mill to the present respondent; and the applicants were the assignees of the property of the defendant company which had gone into liquidation. The appeal of the applicants to the Privy Council was allowed with costs, and the respondent paid to the appellants the whole of the appellants' cost of the trial, and of the appeal to this Court, and of the appeal to His Majesty in Council. The present application is for an order upon the respondent that he do make restitution to the appellants of the sum of Rs. 2,708-13-0 which had been paid by the original defendants to the original plaintiff as costs pursuant to the decree of this Court on appeal from the trial Court. It was not contended that the appellants are entitled to recover this sum from the respondent under the decree of His Majesty in Council, but it was strenuously argued by Mr. Foucar on behalf of the appellants that, inasmuch as the appellants and the respondent had been substituted for the original parties to the suit an order ought to be passed that the respondent do make restitution of these costs under section 144 of the Code of Civil Procedure. Section 144 (1) of the Code of Civil Procedure runs as follows:

"Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

Now, it is quite clear that a claim under section 144 is governed by the same principles that apply to a claim for money had and received, and that where pursuant to a decree or order of the Court one party has been compelled to pay money or transfer property *in invitum* to another party it would be unconscionable upon the reversal of the decree or order that the party who had received the money or property through the wrongful act of the Court should be held entitled to retain such money or property as against the party who had wrongfully been ordered to pay it, and who was claiming restitution.

In *Jai Berhma* v. *Kedar Nath Marwari* (1), Lord Carson, delivering the judgment of the Judicial Committee, observed

"It is the duty of the Court, under section 144 of the Civil Procedure Code, to 'place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed'. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns, L.C. in *Rodger* v. *Comptoir d'Escompte de Paris* (2): 'One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression "the act of the Court", is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case'."

In *Dorasami Ayyar* v. *Annasami Ayyar* (3), Subrahmania Ayyar, J. laid down that

"It is not true, as was in a manner suggested on behalf of the respondents, that the granting of restitution is discretionary. The

(1) (1922) I.L.R. 2 Pat. 10 at p. 16. (2) L.R. (1878) 3 P.C. 465.
(3) (1899) I.L.R. 23 Mad. 306 at p. 310.

1932

DAWOOD HASHIM EBOOF v. TUCK SHEIN.

PAGE, C.J.

principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost . . . . . That obligation it is the duty of the Courts to enforce unless it is shown that restitution would be clearly contrary to the real justice of the case."

See also *Rajjabali Khan Talukdar* v. *Faku Bibi* (1). It is observed, however, that in *Raj Raghubar Singh* v. *Jai Indha Bahadur Singh* (2), Lord Phillmore, delivering the judgment of the Judicial Committee, added "But these sections apply only to the parties or the representatives of the original parties". Now, applying the provisions of section 144, as explained in these rulings, to the facts of the present case, in my opinion it becomes manifest that the appeal must fail, because the object of an application under section 144 at the instance of a "party entitled to any benefit by way of restitution or otherwise" is to "cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed". The position of the parties to the present application, however, was exactly the same both before and after the appellate decree of this Court had been passed. The effect of the appellate decree was neither to deprive the appellants of a single anna, nor to benefit the respondent to the extent of a single anna. The appellants did not pay and the respondent did not receive this sum of Rs. 2,708-13-0 or any part thereof by reason of the appellate order of this Court or otherwise, or at all. Can it be said in such circumstances that the appellants are "entitled

(1) (1930) I.L.R. 58 Cal. 1070.
(2) (1919) I.L.R. 42 All. 158 at p. 166

1932

DAWOOD HASHIM ESOOF v. TUCK SHEIN.

PAGE, C.J.

to any benefit by way of restitution", or that an order for restitution is necessary in order to "place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed"? Clearly not. For the purpose of disposing of the present application it is not necessary to consider what the legal position would have been if an application had been made under s. 144 by the original defendants against the original plaintiff, or the transferee or representatives of the original plaintiff. That is not the present case. An order for restitution against the respondent who has never received the money or obtained any benefit from it in favour of the appellants who never possessed the money and never lost it would offend as well against the dictates of conscience and reason as against the express provisions of s. 144. In my opinion neither on principle nor on authority can this appeal be sustained. The application was dismissed by my brother Das, J. In my opinion the appeal fails, and must be dismissed with costs, five gold mohurs.

CUNLIFFE, J.—I agree and have nothing to add.

CRIMINAL REVISION.

Before Sir Arthur Page, Kt., Chief Justice.

1932
June 7.

MAUNG SAN PE
v.
MA LAI MAI.*

Maintenance for child—Child living with mother—Mother's refusal to return to husband—Father's liability and remedy—Criminal Procedure Code (Act V of 1898), s. 488.

A father is bound by law to maintain his child, even though the child is living with its mother who refuses to return to her husband under a decree for restitution of conjugal rights. It is open to the father to apply to the Court for the custody of his child.

Nau Saw Shwe v. *Maung Hpone*, 6 L.B.R. 127—*referred to*

Thein Maung for the applicant.

Burjorjee for the respondent.

PAGE, C.J.—In this case a decree for restitution of conjugal rights was obtained by the husband against the wife. The wife refuses to return to her husband, but has retained custody of the child. If the Court is of opinion that her present application for an award of maintenance for the child is merely a device by which the wife is endeavouring to obtain maintenance for herself, then, no doubt, an order of maintenance ought not to be made. On the other hand, as Mr. Justice Hartnoll pointed out in *Nau Saw Shwe* v. *Maung Hpone* (1), "there was no decree that the father should have the guardianship of his child, and in my opinion as long as it remains with the mother the statutory obligation on him to maintain it remains still binding on him". I think that those observations apply to the facts of the present case.

* Criminal Revision No. 1158 of 1932 from the order of the Additional Special Power Magistrate of Kyaukse in Cr. Misc. 5 of 1932.

(1) (1912) 6 L.B.R. 127, 129.

The child is not to be allowed to starve merely because the husband and wife do not live together. I realize the force of the argument presented on behalf of the applicant that where a husband whose wife has deserted him and has taken the child with her is prepared to take the child, it ought not to be held that the father is neglecting or refusing to maintain his child within section 488 of the Code of Criminal Procedure.

In the present case, however, the child is four years old, and it is open to the applicant to apply as provided by law for the custody of the child. Meanwhile it seems to me that he is bound to maintain the child. The question is, how much ought the father to be ordered to pay? He certainly ought only to be required to pay such a sum as will be sufficient to maintain the child. If he is ordered to pay a sum which will leave a surplus after the maintenance of the child is provided for, it will be putting temptation in the wife's way to spend what remains over upon herself.

I think the proper order to make is that the applicant do pay to the mother of the child Rs. 5 a month from the date on which the application for maintenance was filed. How long this order will remain in force depends upon whether the father elects to apply that the custody of the child be given to him. The remedy lies in his own hands.

The result is that the application in revision is accepted, and the order of the lower Court is varied by ordering that in lieu of maintenance at the rate of Rs. 10 a month Rs. 5 a month be substituted as from the date when the application for maintenance was filed.

There will be no order for the costs of either party in either Court.

CRIMINAL REVISION.

Before Sir Arthur Page, Kt., Chief Justice.

1932

June 7.

MAUNG CHIT SEIN

v.

KING-EMPEROR.*

Criminal Revision—Order of Rangoon Magistrate—Jurisdiction of Sessions Judge of Hanthawaddy in revision—Judicial Notification No. 39 of 1931 *—Appeals and Committals—Jurisdiction of the High Court—Burma Courts Act [Burma Act XI of* 1922*], s. 27.*

Under Judicial Notification No. 39 of 2nd February 1931 of the Government of Burma, applications in revision from the Courts of the Magistrates in Rangoon under s. 435 of the Criminal Procedure Code should be filed in the Court of the Sessions Judge of Hanthawaddy. Under the provisions of s. 27 of the Burma Courts Act, appeals from the sentences and orders of the Magistrates exercising jurisdiction in Rangoon lie to the High Court, and they also commit prisoners for trial to the High Court.

Kyaw Myint for the applicant.

McDonnell for the Crown.

PAGE, C.J.—This application in revision is misconceived. Indeed, the moment that the legal position was pointed out to the learned advocate for the applicant he admitted that there were no grounds upon which the application could be supported.

It appears that a charge was framed against an accused person under section 324, Indian Penal Code, by the 3rd Additional Magistrate of Rangoon, and an application was presented to the Sessions Judge of Hanthawaddy in revision under section 435 of the Criminal Procedure Code for the purpose of obtaining an order that a charge under section 307 of the Indian Penal Code ought to be framed against the accused. At the hearing of the application a preliminary objection was taken on behalf of the respondent that the Sessions Judge of Hanthawaddy

* Criminal Revision No. 215B of 1932 against the order of the Sessions Judge, Hanthawaddy, in Criminal Revision No. 72 of 1932.

had no jurisdiction to entertain the application in revision. The learned Sessions Judge held that he possessed jurisdiction in that behalf under the Judicial Department Notification No. 91 of the 25th of June 1925. The Notification now in force is Judicial Notification No. 39 of 2nd February 1931. Under that notification and section 435 of the Criminal Procedure Code *primâ facie* the Sessions Judge of Hanthawaddy, Rangoon, is invested with revisional jurisdiction in connection with the application in question. Under the notification, however, it is

"provided that with respect to the Rangoon Town District this notification shall be construed subject to the provisions of the Letters Patent constituting the High Court of Judicature at Rangoon and of section 27 of the Burma Courts Act, 1922."

Section 27 of the Burma Courts Act provides;

"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, Magistrates exercising jurisdiction in the City of Rangoon when committing prisoners for trial shall commit them to the High Court.

"(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, all appeals which lie under that Code to the Court of Session from the sentences or orders of Courts or Magistrates exercising jurisdiction in the City of Rangoon would lie to the High Court and not to the Court of Session."

An application in revision is not an appeal, and I asked the learned advocate for the applicant whether, notwithstanding section 27 of the Burma Courts Act, a District Magistrate would possess revisional jurisdiction with respect to the application in question under section 435 of the Code of Criminal Procedure. The learned advocate frankly and properly conceded that he would have such jurisdiction. I then asked him if he could draw any distinction *quoad* the vesting of jurisdiction under section 435 of the Code of Criminal

1932

MAUNG CHIT SEIN v. KING-EMPEROR.

PAGE, C.J.

Procedure between the District Magistrate and the Sessions Judge, and again the learned advocate conceded that no such distinction could be drawn. The learned advocate stated that in these circumstances there was no ground upon which he could reasonably contend that the present application should succeed.

In my opinion the application fails, and must be dismissed. In future, applications in revision from the Courts of the Magistrates in Rangoon should ordinarily be filed in the Court of the Sessions Judge of Hanthawaddy.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice.

1932

June 9.

TAN WAING
v.
BO HEIN.*

"Gain", meaning of—Companies Act (VII of 1913), s. 4 (2)—Association doing money-lending business—Contribution by members—No profit to association through loans—Members standing to gain or lose their contributions—Interest employed in charity.

The word "gain" is not limited to pecuniary or commercial profits. It means acquisition, something obtained or acquired.

In re Arthur Average Association, 10 Ch. Ap. Ca. 542—*referred to*

A Chinese society was formed to aid indigent Chinese, and to lend money on reasonable interest to Chinese in temporary financial difficulties. The loan money was obtained from contributions by members who were to be repaid the amount so contributed at the end of three years, and the interest earned on the loans was to be spent in charity. If the money lent was not repaid, members stood to lose their contributions. *Held*, that whilst the association itself obtained no benefit from the money-lending transactions, the individual members stood to gain by them, and so, being composed of more than twenty members, the association required registration as a company under s. 4 of the Indian Companies Act.

W. Kraal v. *H. Whymper*, I.L.R. 17 Cal. 786—*distinguished.*

---

* Civil Miscellaneous Appeal No. 69 of 1932 from the judgment of the District Judge of Tavoy in Civil Appeal No. 5 of 1932.

1932

TAN WAING
v.
BO HEIN.

P. B. Sen for the appellant.

Pandit for the respondent.

PAGE, C.J.—This appeal must be allowed.

The suit is a representative suit brought by the President of the Sun Main Society, Tavoy, for the recovery of Rs. 1,568, money lent to the defendant. In the original plaint the plaintiff is described as the Sun Main Society, a Chinese firm carrying on money-lending business, by their President Bo Hein. An objection having been taken to the maintainability of the suit the plaint was amended, and in the amended plaint the plaintiff was described as Bo Hein, President of the Sun Main Society, on behalf of himself and all the other members of the Society, Zayit Quarter, Tavoy. The learned Subdivisional Judge of Tavoy dismissed the suit upon the ground that it fell within the ambit of section 4 of the Indian Companies Act, and that the Society being unregistered the suit could not be maintained. On appeal the learned District Judge reversed the decision of the Subdivisional Court, and remanded the case to be heard and determined on the merits, holding that the Society did not fall within the ambit of section 4 of the Indian Companies Act.

The question is whether the Society offends against section 4, sub-section (2), which runs as follows :

" No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business (that is other than banking) that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council or of Royal Charter or Letters Patent."

1932

TAN WAING v. BO HEIN.

PAGE, C.J.

The objects of the Society were set out in an application by the plaintiff for leave to sue under Order 1, rule 8, of the Civil Procedure Code. Paragraphs 1 to 3 of the application run as follows :

> " 1. That at Tavoy, on 1st January 1925, a Society named the Sun Main Society was formed with the object of providing a shelter for Chinese new arrivals until they secure some work, rendering assistance to them in time of privation and arranging funerals of any that die destitute.
>
> " 2. That every earning member is required to pay one rupee as monthly subscription.
>
> " 3. That, on 29th April 1928, at a general meeting of the Society it was resolved that members should pay one or more annas per day, and form a fund out of which any Chinese person whether member or not could get a loan at two per cent. per mensem in time of his difficulty, that such contributions should continue for three years, that at the end of the three years the amount contributed should be returned to the members and the interest accrued thereon by lending in the above manner, should be spent in charity."

Now, Sir George Jessel, M.R. in *Re Arthur Average Association for British, Foreign, and Colonial Ships* (1) observed :

> " If you come to the meaning of the word ' gain ', it means acquisition. It has no other meaning that I am aware of. Gain is something obtained or acquired. It is not limited to pecuniary gain. We should have to add the word ' pecuniary ' so to limit it. And still less is it limited to commercial profits. The word used, it must be observed, is not ' gains ', but ' gain ', in the singular. Commercial profits, no doubt, are gain, but I cannot find anything limiting gain simply to a commercial profit. I take the words as referring to a company which is formed to acquire something, or in which the individual members are to acquire something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything."

(1) 10 Ch. Ap. Ca. 542 at p. 546.

1932

TAN WAING P. BO HEIN.

PAGE, C.J.

Now, there is no doubt that the primary object of this Society is not to confer any benefit upon the association as a body or its individual members, the Society having been formed for the purpose of aiding the Chinese who are indigent or in temporary financial embarrassments on the other hand. There is no doubt that the Society carries on a money-lending business, and there is no doubt that the object of carrying on this business is the acquisition of gain. The question is ; is the object the acquisition of gain by the company, association or partnership or by the individual members thereof ? I do not think that the object of the Society in carrying on its money-lending business was the acquisition of gain by the company, because the company as such gained no benefit over which it had any disposing power at all. But was the money-lending business carried on with the object of the acquisition of gain by the individual members or some of the individual members of the Society ? I am bound to say that I think it was. In *W. H. Kraal and others* v. *H. J. Whymper* (1) the individual subscribers to the company never were entitled, however great the reserve fund in the possession of the Society might be, to recover back the subscriptions paid by them. The members of the Society as such would not receive any part of the funds in the possession of the company.

In the present case, however, the facts are different. The members of the Society, because of the resolution of the 25th April 1928 were under an obligation to pay one or more annas a day as a permanent contribution to the funds of the Society for three years. It was with the proceeds of these contributions that the Society carried on its business of money-lending. What was the object for which the gains resulting from the money-

(1) (1890) I.L.R. 17 Cal. 786.

1932

TAN WAING v. BO HEIN.

PAGE, C.J.

lending business were acquired? In my opinion partly to recoup the sums which the members had contributed to the Society for three years and partly in order that the Society should be in a position to expend the surplus of the gains from the business of money-lending upon charitable projects. Suppose the business of money-lending was carried on by the Society at a loss, what would be the result? Clearly, the members would lose the amount of their contributions. Suppose the business was carried on at a profit, what would be the result? The members would receive back the contributions that they had made for three years. Unless the business was carried on at a profit the members would lose all the money that they had contributed for the purposes of the Society. In these circumstances it appears to me that this association was formed *inter alia* for the purpose of carrying on a money-lending business that had for its object the acquisition of gain by individual members of the Society. If that be so, it follows that the Society falls within section 4 of the Indian Companies Act, and as it is admitted that the number of its members is 124, and that it is not registered as provided by law, the suit must fail.

The result is that the appeal is allowed, the decree of the District Court set aside, and the decree of the Subdivisional Court restored. No order for costs.

CRIMINAL REVISION.

Before Sir Arthur Page, Kt., Chief Justice.

KING-EMPEROR
v.
MAUNG CHIT SEIN.*

1932
June 10.

Magistrate's function—No prima facie case against accused—Duty to discharge—Petty cases—Cases of a complicated and serious nature—Committal to Sessions—Exercise of magistrate's discretion.

If a magistrate is of opinion that a *prima facie* case has not been made out against the accused such as would justify the accused being put on his trial, he must at once discharge him. If the evidence necessitates the framing of a charge the magistrate should exercise his discretion carefully as to whether he ought to try the case himself or to commit it to the Sessions, notwithstanding that the offence is triable by him. A magistrate's function is to dispose of petty cases himself, and cases of a complicated or serious nature should be committed to the Sessions.

McDonnell for the Crown.

Kyaw Myint for the accused.

PAGE, C.J.—In this case criminal proceedings were instituted against the respondent in the Court of the 3rd Additional Magistrate of Rangoon pursuant to a complaint that he had stabbed one A. M. Steven, who was the manager of the mill in which he was employed.

A number of witnesses were called for the prosecution, and the accused was examined by the magistrate. After hearing argument for and against the charge which it was contended ought to be framed, the 3rd Additional Magistrate, Rangoon, framed a charge against the accused under section 324, Indian Penal Code. Having decided to try the case himself the magistrate directed that the witnesses for the prosecution should be present for cross-examination on the 31st of May.

* Criminal Revision No. 378A of 1932 from the order of the 3rd Additional Magistrate of Rangoon in Criminal Regular Trial No. 393 of 1932.

1932

KING-EMPEROR v. MAUNG CHIT SEIN.

PAGE, C.J.

An application in revision was filed in the Sessions Court of Hanthawaddy. The ground of revision was that, having regard to the circumstances as disclosed in the depositions, the proper charge on which the accused ought to be committed for trial was a charge of attempted murder under section 307, Indian Penal Code. An objection was taken on behalf of the respondent to the jurisdiction of the learned Sessions Judge. The Sessions Court held that it possessed jurisdiction to revise the charge which had been framed, and the respondent thereafter presented an application in revision to the High Court against the order of the Sessions Judge of Hanthawaddy.

At the hearing of that application in revision it was held that the learned Sessions Judge of Hanthawaddy had revisional jurisdiction in the matter.

It transpired, however, that whether the Sessions Court of Hanthawaddy accepted the application in revision and framed a more serious charge against the accused, or rejected the application, in either event an application to revise the order of the Sessions Court in all probability would be presented to this Court.

In order to save time and further proceedings the High Court *suo motu* has called for the proceedings before the 3rd Additional Magistrate in revision, and the application now comes on for hearing.

In considering what is the proper charge to be framed against the accused I desire to say as little as may be about the facts or the merits of the case. It must not be taken that anything that falls from me to-day is intended in any way to prejudice the trial of the accused. In my opinion it is clear from a perusal of the evidence as disclosed in the depositions that the offence, if established, is a grave one

and it is manifest that a charge framed under section 324 of the Indian Penal Code would be inadequate. Upon the face of the depositions as they stand the proper charge upon which the accused should be tried is a charge under section 307 of the Indian Penal Code.

I desire to point out that magistrates generally, and magistrates in Rangoon and in the adjoining districts in particular, do not exercise sufficient care and discrimination in deciding whether cases should be committed to Sessions or tried in the Magistrate's Court. The effect of the evidence as set out in the depositions should be determined by the magistrate after considering the case as a whole, and endeavouring to take a broad and commonsense view of the situation. If the magistrate is of opinion that a *primâ facie* case has not been made out against the accused such as would justify the accused being put on his trial he must at once be discharged. On the other hand if the circumstances as disclosed in the depositions necessitate the framing of a charge against the accused for an offence the seriousness of which may vary according to the facts that are established, the magistrate should try the case himself if it is within his cognizance and the offence in the circumstances disclosed in the depositions appears to be a trivial one. *È contra* a magistrate ought not to take upon himself the responsibility of trying a case which taking a reasonable view of the effect of the depositions must be regarded as involving the trial of the accused for a grave offence or one in which complicated or difficult questions of law or fact arise. The function of a magistrate is to dispose of petty cases, and he ought to commit to Sessions cases of a complicated or serious nature which he is neither by training nor experience qualified to try. I have

1932

KING-EMPEROR v. MAUNG CHIT SEIN.

PAGE, C.J.

observed that magistrates do not always exercise a wise discretion in this respect. On the one hand cases not infrequently are committed to Sessions which are of a trivial nature, and which ought to have been tried in the Magistrate's Court. On the other hand I have observed that magistrates sometimes decide to try cases of a serious and complicated nature which, although triable by a magistrate, obviously ought to be tried by a higher and more experienced tribunal. The present case affords an illustration of the view that I have expressed. No judicial officer capable of appraising the value of evidence could fail to realise that the facts as set out in the depositions in the present case *primâ facie* disclose an offence of extreme gravity, which obviously neither the 3rd Additional Magistrate of Rangoon, nor, I venture to think, any other magistrate ought to try.

The result is that a charge under section 307 of the Indian Penal Code will be framed against the accused, and he will be committed to stand his trial at the ensuing Sessions of the High Court. The proceedings will be returned to the Court of the 3rd Additional Magistrate of Rangoon to act in conformity with this order.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Brown.

TAN MA SHWE ZIN

v.

TAN MA NGWE ZIN AND OTHERS.*

1932

June 29.

Final Order—Letters Patent, Clause 37—Remand Order—Order deciding cardinal issue in suit—Will of a Chinese Buddhist—Succession Act (XXXIX of 1925), s. 118—Decision as to law governing Chinese Buddhists—Effect of decision on charitable bequests.

An order of remand *prima facie* does not purport finally to dispose of the rights of the parties. But if the effect of the order is that the Court has finally determined the cardinal issue in the suit, and only subsidiary and subordinate issues remain to be decided, the remand order is a final order within clause 37 of the Letters Patent.

The Court of Appeal held that, inasmuch as the testatrix was a Chinese Buddhist, her will was not governed by the Indian Succession Act, but by the personal law to which Chinese Buddhists in Burma are subject. The case was remanded for further hearing. Thus the Court by its remand order finally disposed of the right of the applicant to set aside certain charitable bequests made in the will upon the sole ground that they were null and void by reason of s. 118 of the Succession Act. *Held*, that this being the cardinal issue in the suit the order was a final order within clause 37 of the Letters Patent

Bozson v. Altrincham Urban District Council, (1903) 1 K.B. 547; *Rakimbhoy v. Turner*, 18 I.A. 6; *Ramchand v. Goverdhandas*, 47 I.A. 124; *Syed Mazhar Hosein v. Bodha Bibi*, 22 I.A. 1—*referred to.*

Jeejeebhoy for the applicant. A suit to set aside certain bequests made by a deceased Chinaman on the ground that they did not conform to the provisions of section 118 of the Indian Succession Act was disposed of on the ground that Chinese customary law applied, and not the Succession Act. Such a decision relates to the "cardinal issue" in the case, and though the case is remanded for further hearing, it cannot be said that the order is not a "final order" for the purpose of appeal to His

* Civil Miscellaneous Application No. 39 of 1932 arising out of the order of this Court in Civil First Appeal No. 128 of 1931.

1932

FAN MA SOWE ZIN v. TAN MA NOWE ZIN.

Majesty in Council. The other issues are merely ancillary, and there are no other means by which the bequests can be set aside excepting by amending the plaint : See *Rahimbhoy* v. *Turner* (1) In *Soniram* v. *R. D. Tata & Co.* (2), their Lordships of the Privy Council gave special leave to the applicant where the High Court had given its decision on a preliminary point of jurisdiction. In *Ananda Gopal* v. *Nafar Chandra* (3) leave to appeal was granted when all that the High Court had decided in making the remand was that a notice under the Bengal Tenancy Act was properly served; the reason being that the "cardinal issue" in the case was decided.

Macdonnell for the respondents did not object to leave being granted.

PAGE, C.J.—This is an application for a certificate granting leave to appeal to His Majesty in Council.

It is common ground that the value of the subject-matter in dispute at the trial, and involved in the appeal to His Majesty in Council is over Rs. 10,000, and we are satisfied that a substantial question of law between the parties is involved in the appeal.

The question is whether the order from which an appeal to His Majesty in Council is sought is a final order within clause 37 of the Letters Patent.

Now, in *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand* (4) Lord Cave, who delivered the judgment of the Judicial Committee, observed :

"The question as to what is a final order was considered by the Court of Appeal in the cases of *Salaman* v. *Warner* (5), *Beason* v. *Altrincham Urban District Council* (6) and *Isaacs* v.

(1) I.L.R. 15 Bom. 155 ; 18 I.A. 6.
(2) I.L.R. 5 Ran. 451 P.C.
(3) I.L.R. 35 Cal. 618.
(4) (1920) 47 I.A. 124 at p. 127.
(5) (1891) 1 Q.B. 734.
(6) (1903) 1 K.B. 547.

Salbstein (1). The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties."

In *Bozson* v. *Altrincham Urban District Council* (2) Lord Alverstone, C.J. observed :

"It seems to me that the real test for determining this question ought to be this : Does the judgment or order, as made, finally dispose of the rights of the parties ? If it does, then I think it ought to be treated as a final order ; but if it does not, it is then, in my opinion, an interlocutory order."

Now, the order in question is an order of remand, and on the face of it such an order, which remands a case for further consideration, *prima facie* does not purport finally to dispose of the rights of the parties. But, as was pointed out in *Rahimbhoy Hibibhoy* v. *Turner* (3) and *Syed Muzhar Husein* v. *Bodha Bibi and another* (4), if the effect of the order is that the Court has finally determined the cardinal issue in the suit, and only subsidiary and subordinate issues remain to be decided the remand order is a final order within cl. 37 of the Letters Patent, and appealable as such.

In the light of the law thus enunciated can it be said that the order of remand from which it is contended that an appeal lies to His Majesty in Council in the present case was a final order ? To determine that question it is necessary to consider what were the matters in issue between the parties, and what the Court decided in the order under consideration.

We have heard the learned advocates on behalf of the applicant and the respondents, and it is common ground that the only matter that was in issue between the parties was whether the will of a Chinese Bud-

(1) (1916) 2 K.B. 139.
(2) (1903) 1 K.B. 547.
(3) (1890) 18 I.A. 6.
(4) (1894) 22 I.A. 1.

1932

TAN MA SHWE ZIN v. TAN MA NOWE ZIN.

PAGE, C.J.

dhist woman, under which certain property had been bequeathed to certain religious and charitable uses, was *pro tanto* null and void by reason of the provisions of section 118 of the Indian Succession Act (XXXIX of 1925).

The learned advocate for the applicant referred to paragraphs 5, 6 and 7 of the plaint, which run as follows:

"5. By the said will the late Tan Ma Thin bequeathed to religious and charitable uses the properties specified in the attached Schedule 'C' which plaintiff prays may be read as part of this plaint.

"6. The said will of the late Tan Ma Thin though executed more than 12 months before her death was not deposited in a place provided by law for the safe custody of the wills of living persons within six months from its execution or at any time.

"7. Plaintiff avers that the said bequests to religious and charitable uses of the properties set forth in the attached Schedule 'C' are null and void and that the said Tan Ma Thin died intestate in respect of the said properties."

Having regard to the form of the plaint the learned advocate for the applicant conceded that the claim of the plaintiff that the bequests of the property in Schedule "C" were null and void was based, and based only, upon section 118 of the Indian Succession Act, and that unless the plaint is amended it would not be open to the applicant to contend that such bequests were null and void upon any other ground. It follows, therefore, upon that footing that the cardinal issue in the case was whether or not this will was governed by the Indian Succession Act (XXXIX of 1925.)

The Court of Appeal has held that, inasmuch as the testatrix was a Chinese Buddhist, her will was not governed by the Indian Succession Act, but by the personal law to which Chinese Buddhists in Burma are subject.* It follows, therefore, that the Court by the

* Reported at (1932) I.L.R. 10 Rang. 97.—Ed.

remand order finally disposed of the alleged right of the applicant to set aside the bequests of the property in Schedule C upon the ground that such bequests were null and void by reason of section 118 of the Indian Succession Act.

In these circumstances, in my opinion, the remand order decided "the cardinal point of the suit, and as after the decision of the High Court that can never be disputed again, their order is final notwithstanding that there may be subordinate enquiries to make", per Lord Hobhouse in *Syed Muzhar Husein* and *Bodha Bibi and another* (1).

The learned advocate for the respondents did not oppose the present application, but it is incumbent upon the Court to be satisfied that the conditions precedent have been fulfilled before an order is passed granting leave to appeal.

For these reasons the application succeeds; and a certificate of leave to appeal to His Majesty in Council will issue.

BROWN, J.—I agree.

(1) (1894) 22 I.A. 1.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Brown.

1932

June 29.

AISHA BEE BEE

v.

NOOR MOHAMED AND OTHERS.*

Final Order—Letters Patent, Clause 37—Order refusing leave to appeal in formâ pauperis*—Appeal to His Majesty in Council.*

An order refusing to allow an applicant to appeal to the Court of Appeal *in formâ pauperis* is not a final order within clause 37 of the Letters Patent.

Ramchand v. Goverdhandas, 47 I.A. 124—*referred to.*

Kalyanwalla for the applicant.

Anklesaria for the 2nd to 6th respondents.

Khan for the 1st respondent.

PAGE, C.J. and BROWN, J.—This is an application for a certificate granting leave to appeal to His Majesty in Council from an order of this Court refusing to allow the applicant to appeal to the Court of Appeal *in formâ pauperis*. It is contended that such an order is a final order within clause 37 of the Letters Patent. Plainly it is not.

In *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratan* (1) Lord Cave, delivering the judgment of the Judicial Committee, laid down that

"the question as to what is a final order was considered by the Court of Appeal in the cases of *Salaman* v. *Warner* (2), *Bozson* v. *Altrincham Urban District Council* (3) and *Isaacs* v. *Salbstein* (4). The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties".

The order from which it is sought to appeal to His Majesty in Council does not purport to affect the merits of the suit in any sense, or to determine the

* Civil Miscellaneous Application No. 48 of 1932 in respect of the order of this Court in Civil Miscellaneous Application No. 24 of 1932.

(1) (1920) 47 I.A. 124 at p. 127.
(2) (1891) 1 Q.B. 734.
(3) (1903) 1 K.B. 547.
(4) (1916) 2 K.B. 139.

rights of the parties. This application is misconceived and is dismissed with costs, advocate's fee five gold mohurs.

1932

AISHA BEE BEE v. NOOR MOHAMED.

PAGE, C.J. AND BROWN, J.

CRIMINAL REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Baguley and Mr. Justice Ba U.

1932

July 4.

MAUNG BA THIN
v.
U PANNAWUNTHA AND OTHERS.*

Burma Municipal Act (Burma Act III of 1898), s. 114—Establishment of new markets since existence of Act—Necessity for license—Section only applicable to existing markets at date of Act.

The provisions of s. 114 (*1*) of the Burma Municipal Act (III of 1898) as amended by Act I of 1931 do not prohibit the establishment of a new private market which was not in existence at the commencement of the Act, *viz.* the 1st of July 1898, without a license from the Municipal Committee in whose area it is established. The prohibition, as framed, applies to markets already in existence at the date the Act came into force.

The following order of Reference was made by

BROWN, J.—The petitioners have been prosecuted for opening a market within the limits of the Thôngwa Municipality without a license from the Municipal Committee. Proceedings were taken against them under section 114 (*1*) of the Burma Municipal Act as amended by Act I of 1931.

A preliminary objection was taken that, as it was only alleged that the market was established in November 1931, the provisions of section 114 were not applicable. This objection was overruled by the trial Magistrate, and the applicants have now come to this Court in revision against his order on the point.

The relevant portion of section 114 (*1*) reads as follows :

"No person shall without, or otherwise than in conformity with the terms of, a license granted by the Committee in this behalf—

(*a*) keep open,

(*b*) newly establish,

(*c*) remove from one place to another,

*Criminal Reference No. 83 of 1932 arising out of Criminal Revision No. 139B of 1932 of this Court.

1932

MAUNG BA THIN v. U PANNAWUNTHA.

(*d*) re-open or re-establish after discontinuance for a period of not less than one year, or

(*e*) enlarge the dimensions of,

any private market lawfully in existence at the commencement of this Act ; . . . . . ."

The charge against the applicants is that they have newly established a market without a license. But this market was admittedly not in existence before November 1931. It is contended, therefore, that this section cannot apply, because the market cannot possibly be called a "private market" lawfully in existence at the commencement of this Act. The Magistrate recognized the difficulty in the way of the prosecution, but came to the conclusion that the section must be interpreted as covering a case such as the present. I find his reasoning on the point difficult to follow. It is true that the prohibition of the newly establishing of a private market lawfully in existence at the commencement of this Act is not of much value ; but the fact that a certain part of this section, as framed, is of little or no practical value does not justify the Court in reading into the Act a meaning which it clearly cannot have.

Quite clearly, the words "newly establish" have to be read with the words "any private market lawfully in existence at the commencement of this Act", and there is no prohibition of the newly establishing of any other kind of market.

It is difficult to believe that the framers of the Act intended that it should be possible to erect new markets without a license, whilst requiring a license in the case of a previously existing market. Section 10 of the amending Act of 1931 directed the deletion of clause (*f*) of section 142 of the Act of 1898, under which the Municipal Committee might frame bye-laws with regard to new private markets. It does not seem likely that the Legislature intended to do this without providing any substitute therefor. But whatever their intention on the point might have been, it is impossible to hold on the Act, as worded, that section 114 prohibits the newly establishing of any market, which was not a private market lawfully in existence at the commencement of the Act.

It is not suggested that the market in question in this case was in existence in 1898 when the Act commenced. I am of opinion, therefore, that the contention of the applicants must prevail. The question is, however, one of extreme importance affecting the rights of all Municipalities in Burma outside Rangoon, and it is,

therefore, very desirable that any decision on such a point should be authoritative.

I, therefore, refer for the decision of a Bench or a Full Bench according as the Chief Justice may direct the following question :

"Can the provisions of section 114 (*1*) of the Burma Municipal Act, as amended by Act I of 1931, be read as prohibiting without, or otherwise than in conformity with the terms of, a license granted by the Committee in this behalf the newly establishing of a private market which was not in existence at the commencement of this Act ?"

Kyaw Din for the Crown. Section 114 of the Burma Municipal Act, 1898, as amended by Burma Act I of 1931, was intended to make the establishing of new private markets without a license from the Municipal Committee punishable. It was based on s. 125 of the Rangoon Municipal Act, but the framers of the amending Act have defeated their object by making the words "newly establish", in s. 114 (*1*) (*b*), qualify the words "any private market lawfully in existence at the commencement of this Act". The section, as it stands, is meaningless. One cannot establish a new market which is already in existence. Moreover sub-clause (*d*) of sub-section (*1*) has made provision for the re-opening or re-establishing of a private market already in existence, but in disuse for some time. No conviction can therefore be had, under section 148, for the establishing of a new market not in existence at the commencement of the Act, namely, 1898.

Ba Si for the respondents was not called upon.

PAGE, C.J.—In November 1931 the applicants established a new private market in the compound of a *pôngyi kyaung* within the area of the Thôngwa Municipality. This market was established without the applicants having previously been granted a license by the Thôngwa Municipal Committee in that behalf. In

1932

MAUNG BA THIN v. U PANNAWUNTHA.

PAGE, C.J.

these circumstances the applicants were prosecuted in the Court of the Additional Special Power Magistrate of Kyauktan for having committed an offence under section 114 (*1*) (*b*), and thus becoming liable to be punished as provided in section 148 of the Burma Municipal Act (III of 1898 as amended). Upon the assumption (though without admitting) that the above facts could be proved the applicants took a preliminary objection that they had committed no offence under section 114 (*1*) (*b*) of the Act. The Additional Special Power Magistrate, however, overruled the objection, and ordered that the trial of the accused for the offence with which they were charged should proceed. The applicants then applied in revision to the High Court that the order of the Additional Special Power Magistrate, Kyauktan, should be discharged. The application was heard by my learned brother Brown, J. who referred the following question for determination by a Full Bench :

"Can the provisions of section 114 (*1*) of the Burma Municipal Act, as amended by Act I of 1931, be read as prohibiting without, or otherwise than in conformity with the terms of, a license granted by the Committee in this behalf the newly establishing of a private market which was not in existence at the commencement of this Act ?"

Brown, J. stated that, in his opinion, the answer to the question should be in the negative.

We have to consider whether the view that he formed was correct or not. In my opinion Brown, J. placed not only the correct but the only feasible construction that could be put upon section 114 of the Act, and I also would answer the question propounded in the negative.

The history of this section is not uninteresting. The Burma Municipal Act (III of 1898) came into force on

the 1st of July 1898. Under section 142 (*f*) the Committee was empowered to make bye-laws

"for rendering licenses necessary for the establishment of any new market and fixing the fees to be paid for such licenses and the conditions subject to which they may be granted and revoked".

By Burma Act III of 1906 section 4 the following clause was substituted for clause (*f*) of section 142 of the Act,

"(*f*) for prohibiting the establishment of any new private markets for the sale of meat, fish, fruit, vegetables or livestock in the municipality or in any specified portions thereof, either absolutely or except under a license, and, in respect of any license so permitted, for fixing the fees to be paid therefor and the conditions subject to which such licenses may be granted and revoked".

Now, it would seem that the authorities concerned were anxious to extend the power of prohibiting the carrying on of a private market without a license from the Municipal Committee to the extension or re-establishing of private markets in existence at the time when Act III of 1898 came into operation. Accordingly, by Burma Act I of 1931, section 9, section 114 (*1*), as it now runs, was substituted for the then existing section 142 (*f*); and by section 10 of Act I of 1931, clause 142 (*f*) of Act III of 1898 as amended by the Act of 1906 was deleted.

Section 114 (*1*) runs as follows:

"114. (*1*) No person shall, without, or otherwise than in conformity with the terms of, a license granted by the committee in this behalf—

(*a*) keep open,

(*b*) newly establish,

(*c*) remove from one place to another,

(*d*) re-open or re-establish after discontinuance for a period of not less than one year, or

(*e*) enlarge the dimensions of,

any private market lawfully in existence at the commencement of

1932

MAUNG BA THIN v. U PANNAWUNTHA.

PAGE, C.J.

this Act; provided that the committee shall not refuse, cancel or suspend any license for keeping open a private market for any other cause than the failure of the owner thereof to comply with some provisions of this Act or the rules and bye-laws thereunder or condition of his license after his attention has been drawn to such failure."

Now, the terms of section 114 (*1*) *pro tanto* are identical with the terms of section 125 (*1*) of the Rangoon Municipal Act (VI of 1922), and if the draftsman had been content to embody section 125 (*1*) in Act III of 1898 by the amending Act I of 1931 there is no doubt upon the facts as alleged in the present case that the applicants would have been brought within the ambit of section 114 (*1*), and section 148 of the Burma Municipal Act. In section 125 (*1*) of Act VI of 1922 the language used is the same as that in which section 114 (*1*) is couched, down to the words "any private market"; but it appears that the draftsman of section 9 of Act I of 1931 was so obsessed with the importance of enacting that the prohibition against establishing private markets without a license duly granted in that behalf, should apply to private markets in existence when Act III of 1898 came into operation that after "any private market" he added the words "lawfully in existence at the commencement of this Act"; which had the effect of making the prohibition applicable to private markets in existence on the 1st of July 1898, but failed to make the prohibition applicable to the establishment of any private market after the 1st of July 1898 when the Burma Municipal Act first became operative.

The terms of section 114 (*1*), in my opinion, admit of only one possible interpretation, namely, that the prohibition is in respect only of such private markets as were "lawfully in existence at the commencement of this Act", *i.e.*, Act III of 1898. It cannot be

1932

MAUNG BA THIN v. U PANNAWUNTHA.

PAGE, C.J.

doubted, I think, that this was not the intention of the Legislature; but it is not the function of the Court to legislate, but to interpret the law. The effect of the construction that I am disposed to put upon section 114 (*1*) is to render the provisions of section 114 (*1*) (*b*) meaningless; but that is the fault, not of this Court, but of the draftsman of the Act.

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

BAGULEY, J.—I agree.

BA U, J.—I agree.

FULL BENCH (CRIMINAL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Baguley and Mr. Justice Ba U.

1932

July 11.

KING-EMPEROR
v.
NGA PO MIN AND OTHERS.*

Accused person—Competency to testify—Evidence Act (I of 1872), s. 118—Competency as a witness—Oaths Act (X of 1873), ss. 5 and 6—Criminal Procedure Code (Act V of 1898), s. 342—Non-compliance with rules of procedure—Miscarriage of Justice—Just decision—Immaterial flaw in procedure.

An accused person is competent to testify within s. 118 of the Evidence Act, but he is incompetent to be a witness, for an oath cannot be administered to him, and without it no witness can be lawfully examined, or give evidence, by or before a Court.

Nafar Shaik v. Emperor, I.L.R. 41 Cal. 406—*referred to.*

The effect of non-compliance with the statutory rules of procedure must vary according to the gravity and the result of the breach, and the test in each case is whether the proceedings have resulted in a miscarriage of justice. If the accused is materially prejudiced by the breach of procedure, or if another mode of trial is substituted for that prescribed by the Legislature (in which case there is a presumption that the accused did not have a fair trial), in either case there has been a failure of justice. But a decision which is just and reasonable on the merits cannot be disturbed, merely because a flaw in the

* Criminal Reference No. 97 of 1932 arising out of Criminal Appeals Nos. 1541 to 1547 and 1575 of 1932 of this Court.

1932

KING-EMPEROR v. NGA PO MIN.

procedure is found which is not fundamental and which has not worked any injustice.

Abdul Rahman v. *King-Emperor*, 54 I.A. 96 ; *Emperor* v. *Erman Ali*, I.L.R. 57 Cal. 1228—*followed*.

The facts of the case are set out in the order of Reference which was made in the following terms by

OTTER and BAGULEY, JJ.—In Special Trial No. 2 of 1932 the learned Special Judge sitting at Prome had before him 11 persons sent up under section 396 of the Indian Penal Code read *inter alia* with section 34 of the Code.

The Special Judge charged them all firstly with dacoity under section 395 of the Indian Penal Code and secondly under section 302 read with section 34 of that Code.

The case for the prosecution was that these cases were connected with the rebellion and therefore section 9 (*1*) of Burma Act No. IV of 1931 was applicable.

In the result one of these accused was discharged and two others were acquitted. The remainder were convicted and appeal to this Court.

Among the list of defence witnesses for the first appellant Po Min appears the name of one Po Lwin, who was one of the persons tried jointly and convicted with the other appellants.

Po Lwin was duly sworn and called as a witness on behalf of Po Min on the 17th of May 1932.

His evidence shortly was that Po Min had been beaten with a cane by the police in order to extract a confession.

By section 342 (*4*) of the Criminal Procedure Code (1898) it is provided that no oath shall be administered to an accused.

It appears to us that the course adopted might affect the legality of the proceedings, and we, under Rule 12 in Chapter XI of the "Appellate Side Rules of Procedure (Criminal)", refer for the decision of a Bench or a Full Bench as the Chief Justice may direct, the following questions:

(1) Was the evidence of Po Lwin admissible? and if not admissible

(2) What effect in law, if any, has the admission of the evidence of this witness upon the trial and conviction of any or all of the appellants?

We have referred this matter as *prima facie* it would appear that the course taken being contrary to the express provision of the Code, was contrary to law.

It may be, however, that in the circumstances of the present case the legality of the trial of the appellant called or the remaining appellants would not be affected.

As, however, the point appears to us important, and as it may be thought advisable that some general expression of opinion on the subject under review should be given, we have thought it right not to dispose of the matter ourselves, but to take action under the rule above mentioned.

It will be convenient to state that there are certain reported cases in which similar questions have been considered and decided.

We would draw particular attention to the case of *Empress* v. *Durant* (1).

Other cases are *Reg.* v. *Hanmanta* (2); *Empress of India* v. *Asgar Ali* (3) and *Queen-Empress* v. *Dala* (4).

Tun Byu (Assistant Government Advocate) for the Crown. Section 118 of the Evidence Act declares that all persons are competent to testify unless they are physically incapable of doing so. But section 5 of the Oaths Act, 1873, states in express terms that no oath or affirmation can be administered to an accused person in a criminal proceeding. Section 342 (2) of the Criminal Procedure Code reiterates that no oath can be administered to an accused. All that this section says is that an accused can be examined to explain any of the facts appearing in the case against him; but his answers are not to incriminate him in any way: See *Akhoy Kumar* v. *Emperor* (5). An accused may, however, be a competent witness against a co-accused if they are tried separately: *Empress* v. *Durant* (1); *Gallagher* v. *Emperor* (6); *Reg.* v. *Narayan Sundar* (7).

(1) (1899) I.L.R. 23 Bom. 213.
(2) (1877) I.L.R. 1 Bom. 610.
(3) (1879) I.L.R. 2 All. 260.
(4) (1885) I.L.R. 10 Bom. 190.
(5) I.L.R. 45 Cal. 720.
(6) I.L.R. 54 Cal. 52, 56.
(7) 5 Bom. H.C.R. (Cr. C.) 1.

1932

KING-EMPEROR v. NGA PO MIN.

[PAGE, C.J. The reason for the rule is that so long as an accused person is on his trial, it is not to his interest to speak the truth.]

Section 167 of the Evidence Act states that the improper admission or rejection of evidence in a case ought not to be a ground for reversal or a new trial if there was sufficient evidence otherwise to justify the decision. Both under section 167 of the Evidence Act and s. 537 of the Criminal Procedure Code, it must be shown that the irregularity or illegality was such as to occasion a failure of justice : *Emperor* v. *Ernan Ali* (1). In this case, the lower Court has not given any weight to the evidence of the accused.

Ba Tun (2) for the accused. An accused has been illegally put on oath and his evidence taken. In cases of this sort where an illegal procedure has been followed, section 537 of the Criminal Procedure Code has no application, and proof that the accused was prejudiced in his trial is not therefore necessary.

PAGE, C.J.—The material facts are set out in the order of reference, and need not be repeated.

Two questions have been referred to the Full Bench for determination :

(1) Was the evidence of Po Lwin admissible ?

(2) If not, what effect in law (if any), has the admission of the evidence of this witness upon the trial and conviction of any, or all of the appellants ?

---

(1) I.L.R. 57 Cal. 1228.

As regards (1) there can be no doubt, in my opinion, that Po Lwin's evidence was inadmissible.

At common law an accused person cannot be either examined, or cross-examined, *R.* v. *Payne*, (1) and the reason is that there can be no sanction that such a person will speak the truth.

In India an accused person is "competent to testify" within section 118 of the Evidence Act (I of 1872), but such a person is incompetent to be a witness, for an oath cannot be administered to him, and all witnesses are required to take an oath or make an affirmation before they can lawfully be examined, or give evidence, by or before any Court. In *judicio non creditur nisi juratis.* [Oaths Act (X of 1873), sections 5 and 6, Code of Criminal Procedure (V of 1898), section 342 (*4*), *Nafar Sheik* v. *Emperor* (2).] It is common ground that, at the time when Po Lwin was permitted to take the oath and be examined and cross-examined as a witness, he was an accused person.

The answer to the first question propounded, therefore, is in the negative.

(2) As regards the effect which the admission of the evidence of Po Lwin had upon the trial it is to be observed that Po Lwin's name was mentioned as being a co-accused in the list of witnesses cited by the accused Po Min. In such circumstances it is highly improbable that the learned Special Judge, in allowing Po Lwin to be examined and cross-examined as a witness on oath contrary to law, acted through inadvertence ; and with all due deference it seems to me that the learned Special Judge misunderstood the plain terms of section 342 of the Code, founded as they are upon a well-known and time-honoured rule of

(1) 1 C. Cr. 347. (2) (1913) I.L.R. 41 Cal. 406.

1932

KING-EMPEROR v. NGA PO MIN.

PAGE, C.J.

the Common Law. However, as I had occasion to point out in *Emperor* v. *Erman Ali* (1)

" the effect of non-compliance with the statutory rules of procedure, in my opinion, must vary according to the gravity and the effect of the breach, and the test in each case is whether the proceedings have resulted in a miscarriage of justice ".

In that case I ventured to lay down, and I desire to affirm, the following test by which the effect of the failure of the Court to conform to the provisions of the Code of Criminal Procedure is to be measured and ascertained.

" The test to be applied, in cases where the prescribed rules of procedure have not been followed, to ascertain whether there has been a mistrial, is always essentially the same, namely, whether there has been a miscarriage of justice ; for if the Appeal Court is satisfied in point of fact that the accused has materially been prejudiced by the breach of procedure clearly a failure of justice has occurred ; while if, by reason of the breach of procedure, there has in effect been substituted another mode of trial for that prescribed by the legislature as affording the best means of obtaining a fair trial, it is presumed that a fair trial has not been accorded the accused, and in that case also there has been a failure of justice. In either case, therefore, the proceedings *pro tanto* will be set aside upon the ground that by reason of the breach of the rules of procedure a miscarriage of justice has been occasioned. On the other hand, if the Appeal Court is not satisfied that the breach of procedure falls within one or other of those categories, in my opinion, it ought not to hold that the proceedings have become vitiated merely because there has been a transgression of the prescribed rules by which such proceedings are to be regulated. It is ever to be borne in mind that rules and regulations are intended to be the handmaid and not the mistress of the law, and that, in criminal proceedings, it is of the utmost importance that a decision just and reasonable on the merits, should not be disturbed, because in the course of the proceedings some flaw can be detected that is not fundamental, and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure."

(1) (1930) I.L.R. 57 Cal. 1228 at p. 1246

Emperor v. *Erman Ali* (1) ; see also *Abdul Rahman* v. *The King-Emperor* (2).

I would answer the second question in this sense.

1932

KING-EMPEROR v. NGA PO MIN.

PAGE, C.J.

BAGULEY, J.—I agree.

BA U, J.—I agree.

CIVIL REVISION.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Baguley and Mr. Justice Ba U.

U BA THWIN *v.* MAUNG BA SHEIN.*

1932

July 11.

Revisional powers of the High Court—Order of District Judge on election petitions—Burma Rural Self-Government Act (Burma Act IV of 1921), *s.* 79, *rule* 39—*District Judge's jurisdiction to pass orders—Finality of the order.*

Under rules made pursuant to the provisions of the Burma Rural Self-Government Act (IV of 1921) the District Judge passed orders relating to the validity of the election of certain persons as members of the District Council of Myingyan. The District Judge had jurisdiction to pass them and under Rule 39 they were final.

Held, dismissing the applications, that, assuming the District Judge was acting as a Court subordinate to the High Court within s. 115 of the Civil Procedure Code, the orders were open to revision only if the District Judge was acting without jurisdiction.

Thein Maung (*Ba Si* with him) for the applicants. The rules under the Burma Rural Self-Government Act, 1921, clearly indicate that the District Judge in hearing election petitions acts as a "court" and not as a *persona designata*. For instance, rule 36 gives the District Judge power to transfer an election petition to any other Assistant Judge, which power would not be given to a *persona designata* ; rule 37 prescribes the same procedure in these election cases as obtains under the Civil Procedure Code,

(1) (1930) I.L.R. 57 Cal. 1228 at p. 1243. (2) (1926) 54 I.A. 96 ; I.L.R. 5 Ran. 53.

* Civil Revision Nos. 76, 89, 90, 91 and 101 of 1932 from the orders of the District Judge of Myingyan in Civil Miscellaneous Nos. 7, 4, 6, 8 and 13 o 1932.

1932

U BA THWIN v. MAUNG BA SHEIN.

and rule 39 provides for an appeal from the order of an Assistant Judge to the District Judge.

Rule 39 states that the order of the District Judge shall be "final"; but the High Court's power of revision under section 115 of the Civil Procedure Code is not thereby taken away, because the District Judge must be deemed to be acting as a court. Further, the revisional powers of the High Court should not be deemed to be taken away unless there are clear words to that effect: *Ramaswami* v. *Muthu Velappa* (1).

Even if the District Judge were held not to be a court, the High Court will still have power to interfere by way of *certiorari*: *Muniswami Chetty* v. *Board of Revenue, Madras* (2). But in this case it is clear that the District Judge is acting as a court and section 115 of the Civil Procedure Code is therefore applicable: *Parthasaradhi* v. *Koteswara Rao* (3) and *Balakrishna* v. *Vasudeva* (4).

In *The Municipal Corporation of Rangoon* v. *M. A. Shakur* (5) and in *Lakshmanan Chetty* v. *Kannappar* (6) the Chief Judge, Small Causes Court, in deciding election matters under the Municipal Acts was held to be a *persona designata* but the reason for the decision is that the Chief Judge was the particular person referred to out of a plurality of judges constituting the Court of Small Causes. Whether a person acts as a court or merely as a *persona designata* has to be decided on a consideration of the facts surrounding his appointment.

E Maung (*U Ni* and *Ko Ko Gyi* with him) for the respondents. The decisions are not unanimous.

(1) I.L.R. 46 Mad. 536.
(2) I.L.R. 55 Mad. 137.
(3) I.L.R. 47 Mad. 360.
(4) I.L.R. 49 Mad. 795.
(5) I.L.R. 3 Bur. 560.
(6) I.L.R. 50 Mad. 121.

Aziz v. *Kilyoboy* (1) was a case under the Rangoon Rent Act, and the decision of the Chief Judge, Small Causes Court, on a reference to him under the Act, was declared to be final, the Chief Judge being regarded in that case as a *persona designata*.

The word "final" means what it says, that is, "final for all purposes". Rule 39 of the Rural Self-Government Rules declares that the order of the District Judge shall be final. See *Krishna Mohan* v. *Raghunandan* (2); *Gangaram* v. *The Chief Controlling Revenue Authority* (3), which are cases under the Court Fees Act; *per contra*, *Phoman Singh* v. *A. J. Wells* (4), a case under Order XXI, rule 63, of the Civil Procedure Code.

PAGE, C.J.—These five applications are presented to the High Court with a view to the revision of certain orders passed by the District Judge of Myingyan. These orders related to the validity of the election of certain persons as members of the District Council of Myingyan. The applications were filed under section 115 of the Code of Civil Procedure, and, therefore, they cannot be maintained unless the orders of which complaint is made were passed by a Court subordinate to the High Court within section 115. Further, it is incumbent upon the applicants to satisfy the Court that the orders of the District Judge are open to revision, notwithstanding that under rule 39, made pursuant to section 79 of the Burma Rural Self-Government Act (IV of 1921), such orders are declared to be "final".

As at present advised we are disposed to think that the District Judge was acting as a Court

(1) I.L.R. 4 Ran. 304.
(2) I.L.R. 4 Pat. 336.
(3) I.L.R. 52 Bom. 61.
(4) I.L.R. 1 Ran. 276.

1932

U BA THWIN v. MAUNG BA SHEIN.

PAGE, C.J.

subordinate to the High Court within s. 115, and that the orders under consideration, although not subject to appeal, were open to revision if the District Judge in passing them was acting without jurisdiction. But in the circumstances obtaining in the present cases we do not think it necessarry finally to determine either of these questions.

It is a wholesome practice that the Court will decide only such questions as are necessary for the determination of the case under consideration, and on perusing these five orders of the District Judge it is apparent that there is no substance in any of the applications, and, whether or not the Court has jurisdiction to interfere with the orders of the District Judge by way of revision or otherwise, these applications inevitably must be dismissed.

In Maung Gwe Zin's case the District Judge dismissed the petition upon the ground that, although the votes at the election were not recorded by secret ballot, such irregularity was not "likely in his opinion to have materially affected the result of the election". It is not disputed that the District Judge had jurisdiction so to decide under rules 34 (*d*) and 38.

In Ba Thwin's case, on the other hand, the District Judge declared that the election of the successful candidate was void upon the ground that the votes were not recorded by secret ballot as provided in Rule 29, and that such irregularity in the circumstances of that case "was likely in his opinion to have materially affected the result of the election". That was an order that plainly he had jurisdiction to pass.

In Aung Thu's case and in Ba Swe's case, the District Judge dismissed the petition, and the learned advocate for the applicants frankly and inevitably

conceded that there was no ground upon which it was open to him to challenge the correctness of the orders of the District Judge.

In Lu Pe's case the election of U Lu Pe was declared void upon the ground *inter alia* that the successful candidate owed his election to bribery and to the supply of free transport within rule 34 (*a*). The learned advocate for the applicant in that case also has conceded that there was no ground upon which the order of the District Judge could be revised.

Having regard to rule 39, which provides that "the order of the District Judge, whether passed on trial of the petition or on appeal from the finding or order of an Assistant Judge, shall be final", this Court in our opinion ought not to exercise any revisional powers which it may possess under section 115 or otherwise in respect of such orders of the District Judge unless it is satisfied that the orders were made without jurisdiction. In none of the cases now under consideration was it contended that the District Judge had not jurisdiction to pass the order of which complaint is made, and it follows that, whether or not this Court has jurisdiction to interfere with the orders by way of revision or otherwise, these applications must be dismissed.

The result is that each of these five applications is dismissed with costs, advocate's fee ten gold mohurs. In Ba Thwin's case there will be no order for costs.

BAGULEY, J.—I agree.

BA U, J.—I agree.

CIVIL REVISION.

Before Mr. Justice Brown.

1932

July 14.

ZULAING
v.
YAMÈTHIN DISTRICT COUNCIL.*

Contracts with Corporation—Act requiring writing—Absence of writing—Right to sue on contract—Compensation for work done—Contract Act (IX of 1872), s. 70—Burma Rural Self-Government Act (Burma Act IV of 1921), s. 79, Chapter VIII, Rule 3.

On the orders of the Chairman of the defendant Council, plaintiff cleared a jungle and filled up low-lying places of a market belonging to the Council. He sued the Council for payment as on a contract.

Rule 3 of Chapter VIII (Miscellaneous Rules) made under s. 79 of the Burma Rural Self-Government Act provides that "every contract made by or on behalf of any District Council . . . . in respect of a sum or involving a value exceeding Rs. 100 shall be in writing".

Held, that although the plaintiff could not sue on his contract, he was entitled to compensation under the provisions of s. 70 of the Contract Act, for work done, the benefits of which had been accepted by the Council.

H. Young & Co. v. Corporation of Royal Leamington Spa, (1883) 8 Ap. Ca. 517; *Lingford v. Billericay Rural District Council*, (1903) 1 K.B. 772; *Mahomed Molla v. Commissioners, Port of Chittagong*, I.L.R. 54 Cal. 189; *Municipal Committee, Gujranwala v. Fazal Din*, I.L.R. 11 Lah. 121; *Radha Krishna v. Municipal Board of Benares*, I.L.R. 27 All. 392; *Secretary of State v. Sarin & Co.*, I.L.R. 11 Lah. 375—*discussed*.

Guha for the applicant.

Bose for the respondent.

BROWN, J.—The petitioner filed a suit against the respondent for the sum of Rs. 351-4, being the amount claimed to be due for work done on a contract with the District Council of Yamèthin.

In defence the District Council pleaded that they did not know whether the work had been done, and that, if, in fact, it had been done, the suit was not maintainable owing to the absence of a written contract.

* Civil Revision No. 44 of 1932 from the judgment of the District Court of Yamèthin in Civil Appeal No. 10A of 1931.

The trial Court gave the petitioner a decree. On appeal, the District Court set this decree aside on the ground that, as the terms of the contract were not reduced to writing, the contract could not be enforced. The petitioner has now come to this Court in revision.

The main question for decision is whether the want of a written contract is fatal to the petitioner's claim. It has not been suggested on behalf of the respondent that this Court is not competent to deal with the point in revision.

The case for the petitioner is that the work was undertaken under the direction of the then Chairman of the District Council, U Yaw That. Under section 56 of the Burma Rural Self-Government Act the Chairman was competent to execute the contract, but under rule 3 of Chapter VIII of the Rules appearing at page 209 of "The Burma Hand-Book of Rural Self-Government", the contract, being for over Rs. 100, was bound to be in writing.

In this case a report was made to U Yaw That that the work required doing, and he wrote on this report "Give the work to Zulaing", but the terms of the contract between Zulaing and the Council were never reduced to the form of a document.

It is contended on behalf of the District Council that the result of this is that Zulaing could make no claim against the Council either on his contract or on the principles of *quantum meruit*.

For the petitioner it is claimed that, although the petitioner is not entitled to relief directly on the contract, he can claim to be compensated for work actually done.

The question as to the validity of claims against Corporations for work done for them under contracts entered into not under the seal of the Corporation has

1932

ZELAYNE v. YAMETHIN DISTRICT COUNCIL.

BROOKS, J.

frequently been discussed in English cases. The two leading cases on the point now seem to be the case of *Lawford* v. *The Billericay Rural District Council* (1), and the case of *H. Young & Co.* v. *The Mayor and Corporation of Royal Leamington Spa* (2).

In the case of *Lawford* v. *The Billericay Rural District Council*, it was held that where the purposes for which a Corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the Corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the Corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the Corporation, and the absence of a contract under the seal of the Corporation is no answer to an action brought in respect of the work done or the goods supplied.

The decision in that case was based on the Common Law, and it does not appear that there was any statutory provision of law requiring the contract to be under the seal of the Corporation.

In the case of *H. Young & Co.* v. *The Mayor and Corporation of Royal Leamington Spa*, a claim was made against the Mayor and Corporation for work done under a contract, which was not in writing and sealed with the common seal of the Corporation. Under sub-section 1 of section 174 of the Public Health Act, 1875, the contract, being over the value of £50, was required to be in writing and sealed with the common seal of the Corporation. It was held that the provisions of the statute were clear, and that the plaintiff could not claim for work done by

(1) (1903) 1 K.B. 772. (2) (1883) 8 Ap. Ca. 517.

him in accordance with the contract, not in writing and sealed with the common seal.

The contention on behalf of the respondent is that the provisions of section 70 of the Indian Contract Act cannot apply against a Corporation such as a District Council.

A number of Indian cases have been cited before me, but I think it will be sufficient if I refer to four of them. In the case of *Radha Krishna Das and others* v. *The Municipal Board of Benares* (1), the principles laid down in *H. Young & Co.* v. *The Mayor and Corporation of Royal Leamington Spa* were followed, but in that case the Municipality, who were the defendants, had already paid for what they had actually received in accordance with the contract from the plaintiffs, and section 70 was held to have no application, because, as regards the rest of the balance for which they claimed, the Municipality had not enjoyed the benefit.

In the case of the *Municipal Committee, Gujranwala* v. *Fazal Din* (2), the Municipal Committee held an auction to sell to the highest bidder a contract entitling him to take for one year all the sweepings of the town. The contract was knocked down for Rs. 14,900 to the defendant, who paid a part only of the purchase money. In a suit by the Committee against the purchaser for the balance of the purchase money, it was held that the Committee was entitled to recover, as the defendant was bound to pay for what he had actually received and enjoyed as if there had been an implied contract between the parties, and this notwithstanding that the imperative provisions of section 47 of the Punjab Municipal Act, 1911, which required the contract to be reduced to

(1) (1905) I.L.R. 27 All. 592. (2) (1929) I.L.R. 11 Lah. 121.

1932

ZULAIHA v. YANETWIN DISTRICT COUNCIL.

BROWN, J.

writing, were not being complied with. The principles laid down in *Lawford* v. *The Billericay Rural District Council* were followed. The case of *H. Young & Co.* v. *The Mayor and Corporation of Royal Leamington Spa* does not appear to have been considered.

The same question was dealt with by the same Court in the case of *The Secretary of State and another* v. *G. T. Sarin & Co.* (1). In that case a contract was entered into by the Officer commanding a depôt at Jullundur on behalf of the Secretary of State for the supply of fodder for horses. The officer in question was not empowered to act on behalf of the Secretary of State. It was held that nevertheless the plaintiff was entitled to recover under section 70 of the Indian Contract Act for such fodder as was lawfully supplied. It was pointed out that the provisions of section 70 of the Contract Act were much wider than the English Law and went far beyond it.

The same principle has been followed in the case of *Mohamed Ebrahim Molla* v. *Commissioners for the Port of Chittagong* (2). In that case the Commissioners for the Port of Chittagong brought a suit for the recovery of money due as hire of a towing vessel lent to the defendant. By section 29 of the Chittagong Port Act the contract was required to be in writing and signed by the Chairman or Vice-Chairman and by two other Commissioners and to be sealed with the common seal of the Commissioners. The provisions of this section had not been followed, and, after considering the English cases on the point, the Court held that the plaintiffs could not recover on their contract. It was, however, held that the plaintiffs were entitled to recover *quantum meruit* for the services rendered by them to the defendant.

(1) (1929) I.L.R. 11 Lah. 375. (2) (1926) I.L.R. 54 Cal. 189.

Section 70 of the Contract Act reads as follows :

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

The wording of this section is, on the face of it, quite wide enough to cover the circumstances of the present case, and none of the cases that have been cited before me are authority for the view that the section cannot be applied. As pointed out in the case of *The Secretary of State and another* v. *G. T. Sarin & Co.* (1), whatever the law may be in England, the parties to this case are bound by section 70 of the Contract Act, which must be interpreted in accordance with its clear and explicit terms. The terms of this section appear to me to be sufficiently clear and explicit, and the balance of authority to be in favour of the view that its provisions may be applied when one of the persons concerned is a Corporation or other public body.

Although, therefore, the plaintiff in the present case could not sue on his contract, he could claim against the District Council compensation for work done for them, the benefits of which have been accepted by them. The work in the present case consisted of clearing a jungle and in filling up low-lying places in a certain market. It is not suggested that such a work is not within the ordinary scope of the District Council. The work was actually undertaken at the end of 1928. The evidence of U Yaw That, the Vice-Chairman, U Ba San, and the then overseer, Maung Kyu Hein, shows that the work was actually done in accordance with the orders of U Yaw That ; but by the time the suit was brought it was difficult to check what could be looked on as a reasonable value of the work done.

(1) (1929) I.L.R. 11 Lah. 375.

1932

ZULAING v. YAMETHIN DISTRICT COUNCIL.

BROWN, J.

The claim of the petitioner is for Rs. 100 for the jungle clearing; Rs. 100 for dressing; and Rs. 151-4 for filling up sand. Kyu Hein inspected the work whilst it was being done, and says that the rates claimed were not high. A. Hoosein, the present District Council Oveeseer, says that he had to verify the work under the orders of the Commissioner, and that he did this in March 1930. He estimated that the sum of Rs. 100 for jungle clearing was excessive, and that Rs. 50 was ample for that; otherwise he was unable to say that the amount claimed was in any way exorbitant.

It is, of course, for the petitioner to prove what would be a reasonable compensation for the work done by him. In the circumstances I think his claim may be accepted except as to the jungle clearing, and, for that, I would allow only Rs. 50 estimated by the present Overseer.

The result is that I set aside the decree of the District Court and pass a decree in favour of the plaintiff petitioner for Rs. 301-0-0 with costs on that amount in all three Courts.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice.

KO YAN AND ANOTHER
v.
MA MAI WI *

1932
July 28.

Title to immoveable property—Purchase without registered instrument—Suit for declaration of title—Transfer of Property Act (IV of 1882), s. 54.

A purchaser of immoveable property of the value of Rs. 100 and upwards cannot sue for a declaration of his title to the property (except by way of adverse possession for 12 years) without a registered instrument.

Ariff v. Jadunath Majumdar, I.L.R. 58 Cal. 1235 P.C.—*followed.*

Ba Su for the appellants.

Zeya for the respondent.

PAGE, C.J.—This appeal must be allowed.

A suit was brought by the respondent as the purchaser for a declaration that she is the absolute owner of certain lands. Her title is set out as having been derived from a purchase in or about the year 1923. After the purchase she alleges that she remained in possession of the land in suit. Both Courts have passed a decree in favour of the plaintiff. Unfortunately the purchase was not by a registered document, and therefore, having regard to the principles laid down by the Judicial Committee of the Privy Council in *Ariff* v. *Jadunath Majumdar* (1), her suit must fail.

The appeal is allowed, the decrees of the Lower Courts are set aside, and the suit is dismissed. I make no order as to costs.

---

* Civil Second Appeal No. 87 of 1932 from the judgment of the District Court of Henzada in Civil Appeal No. 75 of 1931.

(1) (1931) 58 I.A. 91 : I.L.R. 58 Cal. 1235.

NOTE.

P.C.* 1931 Jan. 23.

The judgment of the Privy Council in *Ariff* v. *Jadunath Majumdar* is as follows and was delivered by

LORD RUSSELL OF KILLOWEN. By this suit the appellant sought to recover possession of a parcel of land from the respondent, upon an allegation that the respondent was a monthly tenant at will thereof, whose tenancy had been effectively determined before suit.

The action was tried in the Court of the Munsif of Sealdah. He found, in favour of the appellant, that a notice to quit had been duly served; but he also found, in favour of the respondent upon other issues, that the respondent was a permanent tenant, and dismissed the suit. An appeal to the District Judge was dismissed.

The relevant facts as found in both these Courts may be shortly stated.

In 1913 a verbal agreement was made between the appellant and respondent, for the grant to the respondent by the appellant of a permanent lease of a small parcel of land at a total rent of Rs. 80 per month. In anticipation of the execution of the lease, the respondent was let into possession in June, 1913, and shortly thereafter he erected certain structures on the land with the knowledge and approval of the appellant. At some time in the course of the year 1914 the parties seem to have agreed that the lease should be a lease for five years, renewable at the end of every period of five years. No lease was ever executed; but in October, 1922, the appellant served upon the respondent a notice to quit, asserting that he was a monthly tenant, and requiring the premises to be vacated by November 1, 1922. This not being done, the suit was instituted in the month of April, 1923.

An appeal was preferred to the High Court of Judicature at Fort William in Bengal, which remitted the case to the District Judge in order to obtain findings of fact on two points—namely: (1) when the respondent had notice that performance of the verbal agreement of 1913 was refused by the appellant, and (2) whether the structures which the respondent erected on the land shortly after 1913, involved such an outlay of money as would reasonably strike the appellant as being an assertion of a permanent right in the land on the part of the respondent, or as would reasonably call for objection from a landlord who never intended to grant a permanent lease.

* PRESENT: Lord Atkin, Lord Russell of Killowen and Sir John Wallis.

The District Judge duly returned his findings to the High Court, and found (1) that the respondent had in December, 1918, a definite refusal in clear terms on the part of the appellant, to perform the terms of the verbal agreement of 1913, that the present suit was not instituted within three years of that notice, and that the respondent's claim for specific performance was barred in view of article 113 of schedule I of the Limitation Act, and (2) that the respondent erected on the land a godown at a cost of between Rs. 10,000 and Rs. 12,000, that the appellant was aware that this building had been constructed, that he must have realized that the respondent would not have constructed the building on the land unless he was assured of the possession of a permanent right in it, and that if the appellant had not intended to grant a permanent lease of the land it might reasonably be expected that he would have objected to the construction of such a building.

The High Court then proceeded with the hearing of the appeal, and on January 18th, 1928, made an order dismissing it with costs.

Before considering the grounds upon which the various Courts have refused relief to the appellant, it appears advisable to call attention to the fact that the appellant is the legal owner of the land; and as such he is entitled to possession thereof subject only to such right (if any) to enjoy it as may have been conferred upon the respondent by virtue of the verbal agreement, either alone or in conjunction with the other facts in the case.

Now it is clear that the verbal agreement alone could confer upon the respondent no such right. By s. 107 of the Transfer of Property Act, 1882, it is expressly enacted that "a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by registered instrument. All other leases of immovable property may be made either by an instrument or by oral agreement". This amounts to a statutory prohibition of the creation of such a right as is claimed here by the respondent, otherwise than by a registered instrument. No registered instrument exists, therefore the respondent can have no such right as he claims unless he can establish it by some means operating independently and in violation of the statute.

The Courts in India held that he had established the right to enjoy the property as a permanent tenant upon grounds which their Lordships now proceed to examine.

J.C. 1931

ARIFF v. JADUNATH MAJUMDAR.

The Munsif held that, by means of the equitable doctrine of part performance, the case was taken out of the provisions of the Transfer of Property Act, even if the respondent's right to sue for specific performance was barred. He held, however, that the respondent's right to sue was not barred and that his rights and liabilities were the same as they would have been if a lease had in fact been executed and registered. That, as their Lordships understand it, is the basis of his judgment; but he added a general statement, without entering into detail, that the appellant's claim was "barred by principles of waiver, estoppel and acquiescence".

The District Judge stated the question for decision as being, whether the equitable doctrine of part performance could override the provisions of the statutory law. He held that various decisions of the Courts in India had established that where there was a concluded agreement followed by part performance the English equitable doctrine of part performance would apply even if the requirements of the Transfer of Property Act had not been fulfilled, and even if the right to sue for specific performance of the contract had become barred.

In the High Court the principle judgment was delivered by Mukerji J. The other learned judge (Graham J.) agreed that the appeal failed, although the result would be the creation of a permanent lease without any registered instrument.

Mukerji J., in his judgment, starts with the proposition that the respondent, not having obtained a lease in the form of a registered instrument, could only resist ejectment if the case fell within some principle of equity.

He held that the case (being one in which an oral agreement and possession on the footing of it had been established) fell within what he calls the principle of *Maddison* v. *Alderson* (1), by virtue of which "it must be held that the plaintiff agreed to grant him and which equity will regard as having been so granted". He apparently realized that it might well be doubted whether such a doctrine could be applied or could operate in cases where statute law required creation of the title which the respondent claimed. In his opinion, however, the language used by this Board in two cases, to which reference will be made hereafter, was wide enough to remove any such doubt. He held that, while the respondent had no valid title as lessee in the absence of a

(1) (1883) 8 App. Cas. 467.

registered instrument, and had only such title as possession might confer, yet the appellant could not displace that possessory title by reason of the equities arising out of the executed contract.

The learned judge then discussed "the doctrine enunciated in the cases of which *Walsh* v. *Lonsdale* (1) is the type". This, he held, had no application to the present case, because the respondent's right to sue upon the verbal contract was barred.

Finally, he held that the case also fell well within what he called "the doctrine of equitable estoppel laid down in *Gregory* v. *Highell* (2), as explained in the case of *Ramsden* v. *Dyson* (3)". He quotes verbatim the two principles stated by Lord Kingsdown in *Ramsden* v. *Dyson*, and says that "the findings of the Court below, such as they are now, clearly bring the case within the first of the aforesaid two principles". The reference to the findings "as they are now" would seem to include particularly the detailed finding as to the character of the structures erected on the land.

Their Lordships cannot help feeling that some confusion of thought has prevailed in the Courts below in regard to the facts of this case, and the application of the authorities to those facts.

This is no case of money being expended by the respondent in any mistaken belief as to his legal rights, or of the appellant knowing of the existence of any such mistaken belief, or encouraging the respondent by abstaining from asserting a right inconsistent with the acts of the respondent. Observe the true facts. In 1913 the respondent obtained a verbal agreement for the grant of a perpetual lease, under which agreement he could have sued for and obtained and registered an instrument creating his title to enjoy the property in perpetuity. That agreement continued to be enforceable against the appellant until the month of December 1921. The structures were erected on the land many years before that date, and they were erected not in any mistaken belief by the respondent of his rights in regard to the land, but in assertion of rights which he correctly believed to be his; not by reason of any encouragement or abstention on the part of the appellant, but by reason of the agreement which he was then entitled to enforce against the appellant.

In these circumstances, how can "the case of *Maddison* v. *Alderson* (4)" assist the respondent? That case decided no new

(1) (1882) 21 Ch.D. 9.
(2) (1811) 18 Ves. 328.
(3) (1866) L.R. 1 H.L. 129.
(4) (1883) 8 App. Cas. 467.

J.C. 1931

ARIFF v. JADUNATH MAJUMDAR.

principle. It decided nothing except that upon the facts there proved, there was no part performance of a verbal contract sufficient to take the case out of s. 4 of the Statute of Frauds. It is only one of the many cases which deals with the English equitable doctrine by which part performance of verbal contracts concerning land, will dispense with the necessity of producing the memorandum of the terms of the contract signed by the party to be charged, which is required by s. 4 of the Statute of Frauds.

It is well settled that the Statute of Frauds only affects the right to sue on the contract. The contract subsists notwithstanding the absence of any signed memorandum. The Courts of equity in England, however, have decided that once the making of the contract has been established by the part performance of it, one of the parties to it shall not be permitted to use the Statute of Frauds as an instrument of fraud. These decisions have been described as "bold decisions on the words of the statute", and the doctrine as of a nature "not to be unwarrantably extended": see *Britain* v. *Rossiter* (1).

The basis of the doctrine of part performance has been stated in various ways. Cotton L.J., in *Britain* v. *Rossiter*, states it thus: "The true ground . . . is that if the Court found a man in occupation of land, or doing such acts with regard to it as would *primâ facie* make him liable at law to an action of trespass, the Court would hold that there was strong evidence that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken."

Any relief granted or protection afforded to the person in possession will be founded on the contract; but the fact of part performance renders unnecessary the protection provided by the statute, in its requirement of a memorandum of the terms signed by the party to be charged. It was stated in *Maddison* v. *Alderson* (2) that the equitable doctrine of part performance did not rest upon the view that equity will relieve against a public statute in cases which fall within it; but, as Lord Selborne expressed it, the Statute of Frauds only contemplates the case of a person being charged upon the contract only; it has not in view the case of a person being charged upon the contract, coupled with acts done in pursuance of the contract.

Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well

(1) (1879) 11 Q.B.D. 123, 129, 133. (2) (1883) 8 App. Cas. 467.

be doubted; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible. Whether any such authority exists will be considered later.

Their Lordships find themselves in agreement with the High Court in the view that *Webb* v. *Lonsdale* (1) has no application to this case, owing to the fact that the respondent's right to enforce the verbal contract had been barred long before the commencement of the present suit. The respondent was not in a position to obtain specific performance of the agreement for a lease from the same Court and at the same time as the relief claimed in this action. Had he been so entitled, the position would be very different, for then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could duly have registered, the appellant's ejectment action being stayed in the meantime. In these circumstances the respondent would obtain complete protection, but consistently with and not in violation of the provisions of the Indian statute.

There remains for consideration the other ground upon which the High Court based its decision—namely, that the case fell within the doctrine of equitable estoppel laid down in *Gregory* v. *Mighell* (2), as explained in the first principle stated by Lord Kingsdown in *Ramsden* v. *Dyson* (3). It appears to their Lordships that in this regard there has been some misapprehension. The relevant language of Lord Kingsdown is as follows: "If a man under a verbal agreement with a landlord for a certain interest in land or, what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the

(1) (1852) 21 Ch. D. 9. (2) (1811) 18 Ves. 328.
(3) (1866) L.R. 1 H.L. 129, 170, 171.

J.C. 1931

ARIFF v. JAGUNATH MAJUMDAR.

principle of the decision in *Gregory* v. *Mighell* (1), and, as I conceive it, is open to no doubt."

It will be noticed that Lord Kingsdown is dealing with the case of express verbal contract or something "which amounts to the same thing". He nowhere puts the case of estoppel; the word is not mentioned. He would appear to be dealing simply with the equitable doctrine of part performance. His reference to *Gregory* v. *Mighell* (1) confirms this view, for that case was simply an earlier instance of the application of the doctrine. In that case a bill for specific performance of a verbal agreement for the grant of a lease had been filed by a person in possession of the land. The Statute of Frauds was pleaded; but it was held that the possession being referable to the verbal agreement, there was part performance, and the Statute of Frauds affording in the circumstances no defence, specific performance was decreed. That is the whole decision in *Gregory* v. *Mighell* (1).

Reference is made by the learned judge to the case of *Forbes* v. *Ralli* (2) before this Board, but that decision was based upon an estoppel grounded upon a statement of fact. It was a case in which the plaintiff in ejectment was held estopped under s. 115 of the Indian Evidence Act 1872, from denying that a certain registered written agreement was an agreement for a permanent tenancy. It is obviously no authority to assist the respondent here.

Even if Lord Kingsdown's language was intended to cover something beyond the equitable doctrine of part performance in relation to the Statute of Frauds, and was intended to refer to circumstances in which a Court of equity will enforce a title to land against the person who at law is the owner thereof, the title must, nevertheless, in their Lordships' view, be based either upon contract express or implied, or upon some statement of fact grounding an estoppel. Their Lordships have already indicated their opinion that no act was done by the respondent otherwise than under the verbal contract which was then enforceable at his suit. No circumstances exist from which any other contract by the appellant can be implied; and as to estoppel there is no trace of any statement by him upon which any estoppel can be grounded.

In truth this case, when the true facts are appreciated, is simple enough. The acts of the respondent are all referable to a verbal contract, which was enforceable against the appellant at

(1) (1811) 18 Ves. 328. (2) (1925) L.R. 52 I.A. 178; I.L.R. 4 Pat. 707.

the time when the respondent's expenditure was incurred, and for long afterwards. Unfortunately for the respondent, he allowed his right to enforce his contract to become barred, with the result that he can only resist the appellant's claim to possession by seeking to establish a title the acquisition of which is forbidden by the statute. The statute disables him from contesting the appellant's right to possession.

Their Lordships think it unnecessary to discuss the numerous decisions of Courts in India which are referred to in the judgments and which were much discussed before the Board. They indicate conflicting views upon the questions which arise for decision here for the first time. It will, their Lordships think, be sufficient to consider the two cases before this Board in which, according to the High Court, language was used indicating that the respondent in the present case should be treated as a person having the rights which he would have enjoyed if the promised lease had been executed and registered. The cases referred to are *Mahomed Musa* v. *Aghore Kumar Ganguli* (1) and *Lakshmi Venkayamma* v. *Venkata Narasimha Appa Rao* (2).

Neither of these cases, as a decision, affects the case now under consideration by the Board. The matter which was relied upon by the respondent consisted of certain *obiter dicta* in the course of which English doctrines of equity were described in terms of the law of Scotland and stated to be applicable in India.

In the former case the appeal was dismissed upon the grounds that a contract to convey had been made and that at the relevant date no written conveyance was required, the Transfer of Property Act, 1882, not having been passed. In the latter case the decision rested entirely on the fact that a valid contract had been made and was enforceable by the appellant.

In each case, however, the judgment contains statements to the effect that even if the contract in question had been incomplete, the acts of the parties had been such that equity would in some way have bound the parties. Their Lordships do not understand these dicta to mean more than that equity may hold people bound by a contract which, though deficient, in some requirement as to form, is nevertheless an existing contract. Equity does this, as before stated, in the case of a verbal contract for the sale of land which has been partly performed. Their Lordships do not understand the dicta to mean that equity will

(1) (1914) L.R. 42 I.A. 1 ; I.L.R. 42 Cal. 801.
(2) (1915) L.R. 43 I.A. 138 ; I.L.R. 39 Mad. 509.

P.C. 1931

ARIFF v. JAGINATH MAITHDAR.

hold people bound as if a contract existed, where no contract was in fact made; nor do they understand them to mean that equity can override the provisions of a statute and (where no registered document exists and no registrable document can be procured) confer upon a person a right which the statute enacts shall be conferred only by a registered instrument.

In their Lordships' opinion, the doubt entertained by Mukerji J. whether the equitable doctrine which he thought was applicable could operate so as to nullify the statutory requirement of a registered instrument, was justified.

Their Lordships cannot find that the facts of this case raise any equity in favour of the respondent. Even if any such equity was established, their Lordships are of opinion that it could not operate to nullify the provisions of the Indian code relating to property and transfers of property.

For the reasons above given their Lordships are of opinion that this appeal should succeed. The decrees in the Courts below should be set aside and an order made for possession of the land in question. The case must be remitted to the Munsif to deal with the eighth issue on the footing of this judgment. The appellant does not claim that the structures should remain on the land; the respondent must accordingly be at liberty to apply to the Court below either to fix a time within which he may enter and remove the structures, or to suspend the operation of the order for a sufficient time to enable him to effect such removal. The respondent must pay the appellant's costs in the Courts below and of this appeal. Their Lordships will humbly advise His Majesty accordingly.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

SECRETARY OF STATE FOR INDIA

v.

MUNICIPAL CORPORATION OF RANGOON.*

1932
Aug. 2.

Assessment of Railways—City of Rangoon Municipal Act (Burma Act VI of 1922), ss. 80 (2), 92—"Profit basis" principle—Fundamental principles of rating—Contractor's test—"Train mileage" system—"Route mileage" system—s. 92 (1) inapplicable to Railways concerned—Transfer of Railways to Government—Railways Act IX of 1890, s. 135.

The correct method of ascertaining the annual value of a railway undertaking for the purpose of assessment under s. 80 (2) of the City of Rangoon Municipal Act is to find out the annual assessable value of the railway undertaking as a whole, and after deducting the annual assessable value of the indirectly productive portion of the whole undertaking, to multiply the resultant figure representing the annual assessable value of the directly productive portion, that is, the running lines, by the gross receipts earned in the municipal area of the City of Rangoon, and to divide the said sum by the gross receipts earned by the railway undertaking as a whole.

This is the method of assessment known as the "profits basis" principle, and is suitable for such concerns as railways, canals and gasworks. It conforms to two fundamental principles of rating, *viz.* (1) that the aggregate of the rates payable by the railway in the various municipal areas through which it runs must not exceed the rates payable by the undertaking as a whole, and (2) that the assessment of the hereditament in each area must be based upon the profits earned in the locality in which the hereditament is situate. Any formula for ascertaining the annual value of a hereditament, whatever its nature, must, in accordance with the fundamental principles of rating law, take into account and be based upon the actual or estimated profit-earning capacity of the hereditament in the locality in which it is situate.

Great Central Railway v. Bunbury Union, (1909) A.C. 78; *Great Western and Metropolitan Railway Companies v. Kensington Assessment Committee*, (1916) A.C. 23; *Kingston Union v. Metropolitan Water Board*, (1926) A.C. 331; *Narayan Chandra Das v. Chairman, Panihati Municipality*, I.L.R. 57 Cal. 162—*followed*.

The method of assessing railways hitherto adopted by applying the "contractor's test" is unsuitable and incorrect.

Neither the "train mileage" method of apportionment which ignores the fact that all train miles are not of equal values, nor the "route mileage" system where the value of route miles varies in every municipal area through which the railway runs, are proper methods of assessment.

Queen v. London Brighton, etc., Railways, (1851) 15 Q.B. 339—*referred to*.

* Special Civil First Appeal No. 63 of 1931 from the order of the Chief Judge of the Small Cause Court of Rangoon in Municipal Appeal No. 2 of 1929.

1932

SECRETARY OF STATE FOR INDIA v. MUNICIPAL CORPORATION OF RANGOON.

s. 92 (2) of the City of Rangoon Municipal Act does not apply to the buildings of the Burma Railways whose assessment, notwithstanding its transfer to Government, is regulated by s. 135 of the Indian Railways Act.

Leach for the Burma Railways. Prior to the assessment in question the Burma Railways had been assessed to municipal taxation in Rangoon on the basis of the "contractor's test". The municipal assessor had departed from that mode of assessment and had adopted a mixture of the Scottish and Irish systems. The Scottish system provided for the assessment of the track on the basis of route miles; whereas the Irish system provided for assessment on the basis of train miles. The Burma Railways had no objection to the assessment of the Railway on a "profits basis" system provided that the track was valued on the basis of route miles and not train miles.

An assessment on the basis of train miles would work a great hardship to the Burma Railways because the receipts per train mile in Rangoon were much less than the receipts per train mile outside Rangoon. The suburban trains which the Railways had to run were responsible for this. The route miles system was the most equitable as far as the Burma Railways were concerned.

If the Burma Railways were not entitled in law to an assessment of the track on the basis of route miles then they contended that the assessment should be based on the English "parochial system" which fitted in with the provisions of the City of Rangoon Municipal Act, 1922. *The Justices of the Peace for Bombay* v. *The Great Indian Peninsula Railway Company* (1); *R.* v. *London, Brighton & South Coast Railway Company* (2); *Great Central Railway* v. *Bambury Union* (3); *The Great Western & Metropolitan*

(1) 9 Bom. H.C.R. 217. (2) (1851) 15 Q.B. 313.
(3) (1909) A.C. 75.

Railway Companies v. *The Kensington Assessment Committee* (1) quoted.

The residential properties belonging to the Railway had been assessed on the basis of capital values. They should, under s. 92 of the City of Rangoon Municipal Act, be assessed on the basis of the rents paid by the occupants. S. 135 of the Railways Act did not prevent the application of s. 92 of the City of Rangoon Municipal Act to houses owned by the Secretary of State and occupied by the Railway officials. Such houses were the property of Government and s. 92 (*1*) provided for the mode of assessment.

The Corporation in assessing the indirectly productive portion of the undertaking had taken 4 per cent. on the capital value of land and 8 per cent. on the capital value of buildings. These percentages were too high. The learned Chief Judge of the Small Causes Court had accepted these percentages simply because they had been recognised for many years in Rangoon for valuation purposes. Property in Rangoon had decreased in value and the assessment should be in accordance with the value ruling to-day. The case should therefore be remanded for further consideration on this point.

N. M. Cowasjee for the Corporation. The train mileage method of apportionment is best suited for the assessment of a railway undertaking. It is more equitable than the route mileage system, as the latter ignores the fact that the assessable value of route miles varies in every municipal area through which the railway passes. According to the train mileage method a railway undertaking would be assessed as a whole, and the assessment apportioned according to train miles amongst the various rating areas through which the railway runs. This principle is also in conformity with

(1) (1916) 1 A.C. 23.

the English Railways (Valuation for Rating) Act, 1930, and is suited to the conditions prevailing in Burma, the method of arriving at the gross annual rent being not provided for in the City of Rangoon Municipal Act.

This case would not have been complicated had the railway authorities maintained a separate set of accounts showing the earnings on the Rangoon suburban lines. In the absence of such accounts the municipal assessor has tried to adopt a fair method of assessment.

S. 92 of the City of Rangoon Municipal Act does not apply to the rating of railways, because under s. 135 of the Indian Railways Act this is provided for. The Local Government erred in appointing an officer by a notification under s. 92 (2) to determine the rental value of the buildings. Realising the error, however, Government cancelled this notification in view of the provisions of s. 135 of the Railways Act.

Appellants desire to have the case remanded for the hearing of the issue whether 4 per cent. on the capital value of land and 8 per cent. on the capital value of buildings is not too high an assessment. This is a question of fact which has been determined by the learned Chief Judge of the Small Causes Court on the materials before him, and is not open to review in this Court.

Reference was made, in the course of the argument, to *Kingston Union* v. *Metropolitan Water Board* (1).

PAGE, C. J.—This is appeal under s. 91 (3) of the City of Rangoon Municipal Act of 1922 against the "basis or principle of assessment" which the learned Chief Judge of the Rangoon Small Cause Court has held must be applied in assessing the Burma Railways to municipal taxation in Rangoon. In

(1) [1926] A.C. 331.

s. 80 (2) it is provided that " property taxes " shall be levied upon

" the gross annual rent for which buildings and lands liable to taxation may reasonably be expected to let, from year to year, and in the case of houses, may be expected to let unfurnished ".

Now,

" the term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent. This standard of value can be readily applied to ordinary house property, or, indeed, to any undertaking entirely contained within the boundaries of one rating authority; but when the subject of consideration is the property of a railway company, whose lines thread through numbers of parishes, its application is far from simple. Nevertheless, it must be remembered that the sole standard is the standard of rent payable for the use and occupation of the particular property by a tenant from year to year."

[Per Lord Buckmaster, L.C. in *Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee* (1).]

And

" the rent must be fixed in accordance with the real value of the section to the company concerned, because that is the footing on which a tenant would base his offer of rent if he be not exposed to extortion ".

[Per Lord Loreburn, L.C. in *Great Central Railway* v. *Banbury Union* (2).]

Now, the difficulty of laying down any principle of assessment pursuant to which a railway can be made amenable to taxation upon a fair and reasonable basis was foreseen long ago. It is this. A railway is an undertaking extended through a multitude of rating areas. Generally

(1) (1916) 1 A.C. 22 at p. 35. (2) (1909) A.C. 78 at p. 85.

1932

SECRETARY OF STATE FOR INDIA v. MUNICIPAL CORPORATION OF RANGOON.

PAGE, C.J.

no section of it situated in any rating area would be rented by any tenant except as a component part of the system. Yet the governing statute requires the rateable value of every such section to be 'the rent at which the same might reasonably be expected to let from year to year' after making the prescribed deductions. Obviously a natural way of ascertaining the rateable value of such a section in obedience to the statute is to consider at what rent it would be hired by the railway company to which the entire system belongs; usually no other tenant is conceivable. In such a state of things the railway company might be willing to pay almost any rent for a section of the main line without possession of which its whole business might be dislocated and half ruined. But the statute speaks of a rent which might 'reasonably' be expected, and this excludes the idea of an oppressive demand fixed upon imagined necessities."

[Per Lord Loreburn, *ibid.*, at p. 84.]

In these circumstances from time to time various formulæ or hypotheses have been enunciated as supplying a reasonable test for ascertaining the annual rent that a hypothetical tenant might be expected to pay for the use and occupation of the section of the railway comprising the hereditament to be assessed. As I had occasion to point out in *Narayan Chandra Das* v. *Chairman, Municipal Commissioner of the Panihati Municipality* (1),

"in exceptional cases where the rent that a hypothetical tenant might reasonably be expected to pay for the holding cannot be ascertained by methods which would be efficacious in normal and ordinary cases, for example, where the holding consists of land upon which a railway, a gasworks, a catchment area, or a building such as the Bodleian Library at Oxford is situate, rough and ready tests alone may be available for ascertaining the annual rent that a hypothetical tenant of the holding might reasonably be expected to pay, but in every case the annual rental value is the basis of the assessment".

I am clearly of opinion, however, that any formula or test for ascertaining the annual value of a heredi-

(1) (1929) I.L.R. 57 Cal. 162 at p. 167.

tament, whatever its nature may be, that does not take into account and is not based upon the actual or estimated profit-earning capacity of the hereditament in the locality in which it is situate must *ex necessitate rei* be fallacious and will offend against a fundamental principle of rating law.

Now, in England from time immemorial until the enactment of the Railways (Valuation for Rating) Act, 1930 (20 and 21 Geo. 5, Ch. 24), railways were assessed under the "parochial system". But, inasmuch as that system has never been adopted for rating purposes in Burma, and it has been abandoned in Great Britain and Ireland in favour of the "whole undertaking" or "profits basis" system, it is unnecessary, and I do not pause to consider the principle upon which the "parochial system" of assessment is based.

In Burma, until the present assessment was made the "annual value" of the Burma Railways undertaking for the purposes of municipal taxation was ascertained by applying what is commonly called "the contractor's test", that is, the interest on cost which a contractor might reasonably expect to obtain if he provided the land and buildings for the person in occupation of the hereditament. In my opinion an assessment based upon "the contractor's test" in the case of a railway is open to grave objection; it does not provide even an approximate estimate of the profit-earning capacity of the particular hereditament under assessment, and it might well result in the aggregate of the rates paid by the railway in the several areas in which the line was situate exceeding the rates reasonably payable upon an assessment of the annual value of the railway undertaking as a whole.

In order to meet objections such as those inherent in "the contractor's test" system the "whole

1932

SECRETARY OF STATE FOR INDIA v. MUNICIPAL CORPORATION OF RANGOON.

PAGE, C.J.

undertaking" or "profits basis" principle of assessment was devised, under which assessees who owned hereditaments in several taxing areas, such as canals, gasworks, or waterworks, were assessed upon the basis of the profits earned by the whole undertaking.

In *Kingston Union* v. *Metropolitan Water Board* (1), Lord Atkinson observed :

"The method followed in the case of waterworks which run through and supply several parishes is apparently this. The rateable value of the whole undertaking is estimated by the method prescribed, as I shall presently show, in the Parochial Assessment Act of 1836. Then from this sum, in order to ascertain the rateable value of the portion of these works situate in a given parish, the rateable value of the indirectly productive parochial portion of the whole undertaking is deducted. The remainder is the ascertained rateable value of the productive works of the whole undertaking, which sum is then apportioned among the several parishes through which the works of the undertaking run and which they supply. The method of apportionment is apparently this. The sum to be apportioned is divided amongst the different parishes according to the proportion which the amount of the gross or net receipts earned in each parish bears to the receipts of the same character, like to like, earned by the whole undertaking. The rateable value of the indirectly productive portion of the undertaking situated in each parish is then separately ascertained and added to the value of the directly productive works so ascertained. The rateable value, however, if ascertained by this method, for all the parishes which the undertaking supplies, and in which portions of its works are situated, must never in the aggregate exceed the amounts of the rateable value assessed upon the undertaking as a whole."

The "profits basis" principle of assessment thus explained by Lord Atkinson, in my opinion, should now be adopted in Burma for the purpose of assessing the Burma Railways undertaking under s. 80 of the Rangoon Municipal Act. This "profits basis" principle of assessment has been accepted in England,

(1) [1928] A.C. 331 at p. 346.

in the "route mileage" system which the appellant urges the Court to sanction and uphold. For the value of the route miles also is not uniform, but varies more or less in every municipal area through which the railway system runs. It follows, therefore, that whether the apportionment of the annual assessable value of the running lines throughout the whole system between the several taxing areas is made by means of the "train mileage" or of the "route mileage" method it cannot be sustained either on grounds of law or of good sense. The result is that the "profits basis" principle of assessment, the nature of which I have indicated, must be followed in assessing the Burma Railways undertaking within the Rangoon municipal limit.

It was further contended on behalf of the appellant that, inasmuch as the Burma Railways are now an undertaking belonging to Government, s. 92 (*1*) of the Municipal Act applies to railway property "occupied for residential purposes, and the occupants of which pay rent to Government". In my opinion there is no substance in this contention. I agree with the opinion expressed by the learned Chief Judge of the Small Cause Court upon this question, and the reasoning upon which it is based. Section 92 must be read as a whole, and section 92 (*1*) does not purport, and in my opinion cannot reasonably be held, to refer to the "buildings and lands" of the Burma Railways. At the time when the Rangoon Municipal Act of 1922 was enacted the levy of taxes by local authorities upon the Burma Railways undertaking was governed and controlled by s. 135 of the Indian Railways Act (IX of 1890). Now, s. 92 is a general section relating to "buildings and lands" belonging to Government, and no mention is made in the section of the Burma Railways. In

1932

SECRETARY OF STATE FOR INDIA v. MUNICIPAL CORPORATION OF RANGOON.

PAGE, C.J.

these circumstances, in my opinion, the principal of *generalia specialibus non derogant* applies, and for this, among other sufficient reasons, I hold that notwithstanding the enactment of s. 92 and the transfer of the undertaking to Government, the assessment of the Burma Railways by local authorities continued to be regulated by s. 135 of the Indian Railways Act, and that s. 92 (*1*) does not apply to the buildings of the Burma Railways undertaking.

It was also contended by Mr. Leach on behalf of the appellant that the proceedings ought to be remanded to the Chief Judge of the Small Cause Court for the rehearing of the issue whether 4 per cent. on the capital value of land and 8 per cent. on the capital value of buildings set out in Statement "C" is not an unreasonably high assessment in respect of the indirectly productive portion of the undertaking. This, however, is a question of fact, and the decision of the learned Chief Judge of the Small Cause Court on this question of fact is not open to review under s. 91 (3). It is not disputed that the buildings and lands in question are liable to assessment, but the learned advocate contended that the learned Chief Judge did not, and did not purport, to base his decision upon any evidence or upon the merits. I do not so read his judgment. There were materials before the learned Chief Judge upon which his finding could have been based, and this Court has no jurisdiction to interfere with it.

For these reasons the order of the learned Chief Judge of the Small Cause Court is varied in the sense that I have indicated. There will be no order for costs in either Court.

MYA BU, J.—I concur in the judgment of my Lord the Chief Justice.

G.B.C.P.O.—No. 50, H.C.R., 21-10-32—3,000.