LOWER BURMA RULINGS

BEING THE

PRINTED JUDGMENTS

OF THE

CHIEF COURT OF LOWER BURMA

VOLUME V

1909-1910

PUBLISHED UNDER THE AUTHORITY OF THE CHIEF COURT OF LOWER BURMA

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JUDGES OF THE CHIEF COURT OF LOWER BURMA

DURING

1909-1910.

CHIEF JUDGE.

THE HON'BLE SIR CHARLES EDMUND FOX, KT., *Barrister-at-Law.*

PUISNE JUDGES.

THE HON'BLE MR. A. M. B. IRWIN, C.S.I., I.C.S. (to 25th April 1909).

THE HON'BLE MR. H. S. HARTNOLL, I.C.S., *Barrister-at-Law* (on leave from 11th March 1909 to 5th September 1909 and from 23rd November 1910 to 22nd December 1910).

THE HON'BLE MR. E. W. ORMOND, B.A., *Barrister-at-Law* (on leave up to 11th September 1909 and from 22nd August 1910 to 22nd November 1910).

THE HON'BLE MR. D. H. R. TWOMEY, I.C.S., *Barrister-at-Law* (from 15th March 1910).

THE HON'BLE MR. S. M. ROBINSON, *Barrister-at-Law* (officiating Judge up to 11th September 1909 and temporary Additional Judge from 12th September 1909).

THE HON'BLE MR. C. C. LOWIS, I.C.S. (officiating Judge from 10th July 1909 to 5th September 1909).

THE HON'BLE MR. H. L. BELL, *Barrister-at-Law* (temporary Additional Judge up to 5th September 1909).

THE HON'BLE MR. L. M. PARLETT, I.C.S. (officiating Judge from 26th April 1909 to 14th March 1910 and temporary Additional Judge from 25th April 1910).

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CORRECTIONS

TO THE

"LOWER BURMA RULINGS," VOLUME V.

(1) *Cancel* the Ruling of the case of "(1) Maung Me, (2) Ma Ngwe Hlaing *v.* Ma Sein" in Special Civil 2nd Appeal No. 90 of 1908 at page 46.

(2) *Insert* the following *catch words* in the case of "J. Moment *v.* The Secretary of State for India in Council" in Civil Reference No. 5 of 1909, at page 163:—

> "*Legislative Powers of the Legislative Council of the Lieutenant-Governor of Burma—Jurisdiction of Civil Courts—Restriction thereof—Clause (b), section 41 of the Lower Burma Town and Village Lands Act ultra vires—Government of India Act, 1858, s. 65.*"

(3) *Add* the following to the *catch words* in the case of "(1) Maung Me, (2) Ma Ngwe Hlaing *v.* Ma Sein" in Special Civil 2nd Appeal No. 90 of 1908 at page 192:—

"—*Negotiable Instrument Act, s. 118.*"

Substitute "haven" *for* "heaven" in the 16th, 26th, 40th, 46th and 49th lines at page 225 of the 4th Quarter for 1910.

LOWER BURMA RULINGS.

Before Mr. Justice Irwin, C.S.I.

PO GYI *v.* MAUNG PAW AND MA THIN.

Special Civil 2nd Appeal No. 80 of 1907.

Feb. 6th, 1908.

D. N. Palit—for appellant (plaintiff).

M. Auzam—for respondents (defendants).

Suit regarding boundaries of land—identity of land—procedure in inquiry regarding land—inspection of land by Court—calling of witnesses by Court—Civil Procedure Code, 1882, s. 171.

In case of a boundary dispute, or where there is any possible doubt about the identity of land in suit, a good plan of the land is essential, and the Judge should either visit the land himself or issue a commission for a local investigation. Proper procedure in such cases explained.

This suit relates to a boundary dispute. It was instituted on the 4th January 1906 by Po Gyi, who said that he had 32·65 acres revenue paying land, being holding No. 23 of Daungmo *kwin*, which was settled in 1260; that in Tagu 1263 Revenue Surveyor Po Bwin took away part of the holding, on the east side, and gave it to Maung Paw; and he prayed for a decree for possession of this part, which was defined as the strip marked BIJ on the plan annexed to the plaint. The plan was made by Maung Sein, and is dated 14th December 1905.

Defendants said they worked only the land for which they had received a potta.

The plaintiff was not asked how he had acquired either title or possession of the land. A quantity of absolutely useless evidence was recorded, and a decree given for plaintiff. Defendants appealed to the District Court, and then plaintiff said he had obtained a grant of the land. This was vital both to his title and to the jurisdiction of the Court, as the land had been occupied less than 12 years. The District Court therefore referred the following issue to the Court of first instance for trial:—

> Has plaintiff obtained a grant of the land in dispute from the Government?

Further oral evidence was then recorded, and plaintiff put in two pottas, one granted to himself and the other to his son Tha E, and some revenue receipts and extracts from revenue rolls. The Township Court recorded no finding on the issue referred to it. The District Court found that plaintiff had failed to prove that the land in dispute was covered by the two pottas, and therefore reversed the decree and dismissed the suit. Plaintiff appeals.

The grants to Tha E and Po Gyi are Nos. 135 and 136, dated the 17th June 1898. They contain no plans except rectangles

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showing the lengths of the sides. The width of each plot from north to south is 10 chains; the length of Po Gyi's plot from east to west is 15 chains, that of Tha E's plot is 13 chains. The boundaries show that the two plots adjoined each other, Po Gyi's being to the north and Tha E's to the south. The eastern boundary of each is Nga Paw's potta. That shows that there was no vacant land between the lands granted to the plaintiff and his son and that granted to the defendant. Nga Paw's grant was subsequently resumed by the Deputy Commissioner because it included part of a grazing ground, but that makes no difference to this suit. If the strip now in dispute is within the boundaries of the plots granted to Po Gyi and Tha E, the civil Court has jurisdiction, and the plaintiff is entitled to succeed on the merits. If the strip in dispute does not fall within the boundaries of the grants the Court has no jurisdiction; the matter is one for a revenue officer to settle under section 19 of the Land and Revenue Act. The District Judge did not examine the documentary evidence in detail. I am inclined to agree with him that the evidence as it stands does not establish the fact that the disputed strip is within the boundaries of plaintiff's two pottas. Plaintiff certainly presented his case very badly. That however is not surprising, seeing that the Township Judge did not understand the nature of the issue which arose, nor the manner in which the fact in issue ought to be proved. Land cases are often very puzzling, especially when they depend for their decision on pottas granted in such a slipshod manner as those in the present case, and in total disregard of rules 43 and 44 of the rules framed under the Burma Land and Revenue Act. In rural parts it is frequently impossible to obtain the services of a pleader who is competent to put the case properly before the Court. Land cases of this nature cannot be properly tried unless the Judge takes great pains in ascertaining and fixing the real issues, and points out to the parties the exact nature of the evidence required to prove or disprove each point. He should also make free use of his powers under section 171, Civil Procedure Code. In case of a boundary dispute, or when there is any possible doubt about the identity of the land in suit, it is generally absolutely futile to take any oral evidence without first visiting the land. The Judge should first of all insist on a good plan, drawn to scale by a competent surveyor, being put in. That was done in this case. The Judge should then proceed to the land, and require the parties and all the witnesses who will speak about the land to attend on the spot. He should compare the plan with the land, and see that the plan is correct, and that all the points shown on the plan are suitably marked on the land. Each witness should be required to point out every mark that he refers to, and the exact boundaries of every area which he refers to, in his evidence. In no other way can any intelligible evidence about land be obtained from the average rustic, who rarely understands a plan sufficiently to make his evidence clear by reference to it.

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In some cases the inconvenience of visiting the spot may be so great as to justify the Judge in issuing a commission under section 392 for the purpose, but this should seldom be necessary in Township Courts, and in those Courts it may be difficult to obtain the services of a properly qualified person as commissioner.

In this case the documentary evidence, compared with a copy of part of the *kwin* map for 1902-03 which was produced by the appellant at the hearing of the second appeal, leads me to think that the appellant probably could prove his case if he knew the nature of the evidence required. The outline of the holding (23) on this plan agrees exactly with plaintiff's line on Maung Sein's plan. The area is 32·65 acres, composed of 28 acres 2nd class land and a strip on the south of 4·65 acres 4th class land. Plaintiff said that he had bought that strip in 1257 from Shwe Kya, as 5 acres. He produced tax receipts as follows:—

1257	Shwe Kya	...	... 5 acres.
1258	Po Gyi	...	... 5 ,,
1259	Po Gyi	...	... 5 ,,
1260	Po Gyi	...	... 5 ,,
1262	Po Gyi	...	... 4·65 ,,

The alteration in area seems to be a correction due to the cadastral survey and the settlement.

The grants were given in June 1898 (1260). The period of exemption was to 30th June 1902, but this was altered by the Deputy Commissioner to 30th June 1901. The first revenue roll produced is for 1901-02, and it shows previous year's holding 4·65 acres 4th class, and extension 28 acres 2nd class, with the note "potta (exemption) expired extension." This shows that the 28 acres assessed for the first time in 1901-02 (1263) were regarded by the *thugyi* as land held by Po Gyi under grant, and the area agrees with the pottas produced by Po Gyi. The shape does not quite agree, if the rough rectangles depicted on the pottas are accurate.

What is now required to complete plaintiff's case is extracts from the settlement map and all the subsequent annual *kwin* maps down to the institution of the suit, and oral evidence, if it can be procured, of the official who surveyed the land for the purpose of issuing the grant, and of any other persons who were present when he surveyed it. The fact to be ascertained is the exact points where boundary marks were fixed, on which the surveyor measured the length shown in the pottas. This evidence obviously must be taken on the spot, as I remarked above. If the *taikthugyi*, Maung Tha Kyu, who made notes on the pottas, under dates 5th and 6th January 1899, contradicting notes made by the Inspector on 4th January, is alive, he ought to know more about the truth of the matter than probably anybody else.

I direct that the District Court do cause additional evidence as indicated above to be taken by the Township Court. Both the Township Court and the District Court will then record

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findings on the point whether the strip in dispute or any of it is within the land granted to Po Gyi and Tha E. The records will then be resubmitted to this Court.

Criminal Appeal No. 695 of 1908.

Nov. 13th, 1908.

Before Mr. Justice Irwin, C.S.I.

MI MYIN *v.* KING-EMPEROR.

R. N. Burjorjee—for appellant.

Dawson, Assistant Government Advocate—for the King-Emperor.

Evidence of character—admission of accused's bad character elicited by defence—irrelevant fact—admissibility in evidence—corroborative evidence—evidence of previous statements of witnesses—order of examination of witnesses—Evidence Act, ss. 54, 136, 157.

A statement to the effect that an accused person bore a reputation as a thief was admitted in evidence as it was elicited in cross-examination by the defence.

Held,—that section 54 of the Evidence Act makes such evidence irrelevant, and that it cannot therefore be legally admitted in evidence, whether elicited by the prosecution or by the defence.

It is very doubtful whether section 136 of the Evidence Act gives a Judge discretion to permit evidence of previous statements by other witnesses to be given, for the purpose of corroborating them under section 157, before such witnesses have themselves given evidence. In any case such a course should not be allowed except for very special reasons, which must be recorded by the Judge.

Shwe Kin v. *King-Emperor*, (1906) 3 L.B.R., 240, followed.

The learned Sessions Judge remarked in his judgment that it was elicited in cross-examination by the defence that accused for a year had been reputed a thief. This, I must take it, is one of the facts on which the conviction of robbery is based. Obviously it was admitted in evidence because it was elicited by the defence. I think it was wrongly admitted. The law is, not that evidence of bad character is inadmissible as against the accused, but that the fact that the accused has a bad character is irrelevant (section 54, Evidence Act). Evidence may be given of such facts as are declared in the Evidence Act to be relevant, and of no others (section 5). The cross-examination, as well as the examination-in-chief, must relate to relevant facts (section 138). The evidence that Mi Myin was reputed to be a thief, then, is irrelevant, and was illegally admitted. It makes no difference whether it was elicited by the prosecution or by the defence. It evidently had some effect on the mind of the learned Judge in deciding the issue, though probably a very small effect in comparison with the other and more important evidence.

The principal witnesses for the prosecution are the ninth, Po Kywa, and the tenth, Ma Hmyin, who both say they saw appellant cross the fields from the village and enter the jungle, followed by the little eight-year-old girl Mè Tin. After this Mè Tin was never again seen alive by any of the witnesses. Next to

these in importance are the seventh, Mè Shwe Thin, and eighth, Ma Thè Byu, who saw the two girls together before they left the village, and describe certain acts of appellant which make it probable that she coveted Mè Tin's bracelets. Before any of these four witnesses were examined, the headman Maung Yo, sixth witness, was examined, and gave evidence of statements made to him by the seventh, eighth, ninth and tenth witnesses. In like manner the first witness Po Hmin was allowed to give evidence of a statement made to him by the seventh witness. This procedure, if it was not totally illegal, was grossly unfair to the accused. In *Shwe Kin* v. *King-Emperor* (1), I said that to allow a witness to be corroborated under section 157 of the Evidence Act before he himself is examined was objectionable even in a civil case, but doubly objectionable in a criminal case, and I expressed a doubt whether section 136 gives the Court any discretion to allow such a course. I adhere to that, and I feel the doubt more strongly than ever. I think it necessary to add that in no case can evidence of the kind now in question be lawfully admitted as a matter of course and without a special order, as was done in this case. It can only be very rarely and for very special reasons, if at all, that such evidence to corroborate a witness may be admitted before the witness himself is examined. The point must be considered by the Judge, and if such very special reasons exist they must be recorded by the Judge.

There were two points taken by the learned counsel for the appellant which deserve particular notice. First he pointed out that the first information which led to the discovery of the body was given to the headman by Ma Yit, and Ma Yit was not examined as a witness. The information she was said to have given was that Ma Hmyin and Po Kywa had seen the two girls together. This of course was absolutely inadmissible as Ma Yit was not called. There is no reason to suppose that Ma Yit could give any relevant evidence except to corroborate Maung Po Kywa and Ma Hmyin under section 157, Evidence Act; but as she supplied a link in the chain of information she ought to have been called. The other point put forward by the learned counsel is that Mè Tin's four-year-old brother Ba Sin or Ba Sein or Ba Shin was with her immediately before she left the village with appellant, and he ought to have been called. It is not likely that any intelligible evidence could be got from such a small child. If there had been no other flaw in the proceedings I should not be disposed to take action with regard to these two persons who might have been called but were not. But as the conviction is based partly on evidence of an irrelevant fact I think it expedient to leave no possible stone unturned to arrive at the truth.

I direct that Ma Yit and the little boy be examined by the Sessions Judge and that the record be then resubmitted to this Court.

(1) (1906) 3 L.B.R., 240.

Special Civil 2nd Appeal No. 30 of 1908.

Dec. 14th, 1908.

Before Mr. Justice Hartnoll.

SIT PI *v.* MA SAN.

Christopher—for appellant (plaintiff)

R. M. Das—for respondent (defendant).

Sale of land subsequent to attachment—previous oral agreement—contract of sale without registered conveyance—void alienation of land—Civil Procedure Code, 1882, s. 276—Transfer of Property Act, s. 54.

A attached a piece of land in execution of a decree against X. Previous to the attachment X had made an oral agreement to sell the land to Z; and a registered deed by which X purported to sell the land to Z for Rs. 100 was executed shortly after the attachment had been effected.

Held,—that as section 54 of the Transfer of Property Act had been in force throughout the time covered by these transactions, and as the property was worth Rs. 100, the oral agreement for sale did not create any interest in or charge on the property, and the sale was therefore void, under section 276 of the Code of Civil Procedure, against A's claims enforceable under the attachment.

Maung Sit Pi sued for declaration of his title to a piece of paddy land situated in Yebawgôn *kwin*, Pyinmabinhla circle, Yegyi township, Bassein district. The Court of first instance gave Maung Sit Pi the decree that he asked for; but the District Court reversed the decree. Maung Sit Pi bases his claim on a registered deed of conveyance dated the 9th May 1907, by which Maung Po Hla purported to sell him the land for Rs. 100. From the proceedings it is clear that Ma San had a money decree against Maung Po Hla, and in execution of it attached the land in dispute on the 5th May 1907. It is argued that the date of attachment has not been satisfactorily proved; but from a consideration of the evidence of Maung Hla and Maung Kywe and the copy of the attachment order it seems to me clear that the land was attached on May 5th. Maung Sit Pi brings evidence to the effect that he purchased the land by an oral agreement from Po Hla on the 18th March 1907. Whether this was so or not, it did not constitute a sale of the land, for section 54 of the Transfer of Property Act has been in force in the tract where the land is situated since the 1st January 1905, and in consequence as the land was worth Rs. 100 a valid sale or transfer of ownership could only be effected by a registered document. Section 54 of the Transfer of Property Act expressly lays down that a contract for sale does not of itself create any interest in or charge on such property. The 9th May was a date subsequent to the attachment, and so the alienation of the land to Maung Sit Pi under section 276 of the Code of Civil Procedure is void as against Mi San's claim enforceable under the attachment.

The decree of the District Court is varied, and it is ordered and decreed that as regards Mi San's claim enforceable under her attachment the deed of the 9th May 1907 is void, but that otherwise as far as Mi San be concerned it remain in full force and virtue.

The appellant will pay Mi San's costs in all Courts.

Before Mr. Justice Hartnoll.

Special Civil 2nd Appeal No. 25 of 1908.

1. MA ÔN BWIN
2. ÔN BWIN } *v.* THA YAN.

Dec. 14th, 1908.

May Oung—for appellants (plaintiffs).

S. N. Sen—for respondent (defendant).

Decision of Boundary Officer as bar to subsequent claim—jurisdiction of Civil Court in boundary dispute—appeal against Boundary Officer's decision—Burma Boundaries Act, 1889, s. 17.

A civil Court has no jurisdiction to entertain a suit regarding a disputed boundary when a decision has already been given under the Burma Boundaries Act.

The suit has arisen out of proceedings taken under the Bŭrma Boundaries Act (V of 1880). There is a small piece of land, measuring some ·13 of an acre, situated between land belonging to the appellants and land belonging to a monastery. In proceedings taken under the Burma Boundaries Act the Demarcation Officer included it in the monastery precincts; the Boundary Officer subsequently revised that order and gave the land to the appellants. On appeal to the Commissioner of the division he restored the order of the Demarcation Officer. The appellants then filed a suit in the Township Court for recovery and possession of the land and obtained the decree prayed for. An appeal was laid to the District Court, which set aside the decree of the Township Court on the ground that it had no jurisdiction to decide the suit. This appeal has accordingly been laid and it is argued that the Township Court had jurisdiction and that a decision under the Boundaries Act is based merely on the question of possession and does not bar a civil suit as to title. Section 17 of the Boundaries Act lays down that the order of a Boundary Officer in respect to a boundary is conclusive subject to the provisions relating to appeals from such an order. In the present case there was an appeal to the Commissioner but no further appeal to this Court, and so according to the Act the order of the Commissioner is conclusive. This being so, it seems to me that no further suit with respect to the boundary can be brought in the civil Courts. If it could be, the decision of the Commissioner would not be conclusive. It would be liable to be upset by the civil Courts. It is argued that a decision under the Boundaries Act is based merely on the question of possession and does not bar a civil suit as to title. I am unable to find anything in the Boundaries Act that prevents matters of title being gone into in the settlement of a boundary dispute, and it seems clear that such matters must be gone into in order to arrive at correct boundaries. The mere fact that in certain circumstances the Act allows an appeal to the highest civil Court that has jurisdiction with respect to the land goes to show that the Legislature intended litigation as to boundaries under the Act to be final and to bar the jurisdiction of the civil Courts.

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To hold otherwise would mean that there would be two trials on the same cause of action—one under the procedure laid down by the Boundaries Act and one under the rules applicable to a regular civil suit. Such needless litigation and expense was in my opinion never intended.

I must hold that the boundary in the present case has been finally and conclusively fixed by the procedure prescribed by the Boundaries Act, and that the civil Courts have no jurisdiction to entertain the present suit.

I accordingly dismiss this appeal with costs.

Civil Miscellaneous Appeal No. 77 of 1907.

Dec. 15th, 1908.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Irwin, C.S.I.

S. R. M. M. RAMAN CHETTY (Creditor No. 1)

v.

1. STEEL BROTHERS & Co., LTD. (Creditor No. 6).
2. C. RUNGASWAMY MOODLIAR (Creditor No. 4).
3. A. S. JAMAL BROTHERS & Co. (Creditor No. 5).

Lambert—for appellant. | *Lentaigne*—for respondents.

Possession of moveable property by incumbrancer—completion of incumbrancer's title by possession—priority of claim of incumbrancer in possession.

A had mortgaged certain moveable property to X as security for a debt. X took possession of the property included in the mortgage to him. Shortly afterwards A applied for the benefit of the Indian Insolvency Act, 1848, whereupon X handed over the property to the Official Assignee. He subsequently applied to the Court to direct the Official Assignee to sell the property and to pay the sale proceeds to him towards the amount due on the mortgage to him. Another creditor, Z, then put in a claim to the sale proceeds on the ground of his holding a mortgage of the same property prior in date to X's mortgage.

Held,—that X, being a mortgagee who had completed his title by obtaining possession, was entitled to priority over Z, who had not done so.

Daniel v. *Russell*, (1807) 14 Vesey, Jun., 393; *Ex-parte Allen*, (1870) L.R. 11 Eq., 209; referred to.

Dearle v. *Hall*, (1823) 3 Russell, 1; 38 English Reports, 475, at p. 483; followed.

This matter arose in the proceedings on the insolvency of one Maung Gyi. He was a trader in paddy. On the strength of his possession of a steam-launch and a number of cargo boats or lighters (curiously termed gigs in one of the documents) he succeeded in obtaining large advances from no less than four creditors, who each believed that the launch or cargo boats were a securit for the amounts advanced.

Maung Gyi applied for the benefit of the Indian Insolvency Act, 1848, on the 17th October 1906.

On the 15th September 1906 Messrs. Steel Brothers and Company, Limited, had taken possession of the launch and of 18 cargo boats included in the mortgage to them, and on the 25th October 1906 they handed them over to the Official Assignee. They

subsequently applied to the Court to direct the Official Assignee to sell the property and to pay them the proceeds of sale towards the amount due to them on their mortgage.

Creditor No. 1, S. R. M. M. Raman Chetty, put in a claim to the sale proceeds based upon a mortgage of the launch and boats to him.

Creditors 4 (C. Rungaswamy Moodliar) and 5 (A. S. Jamal Brothers and Company) do not appear to have put in any claim, and although they were made parties to this appeal they did not appear.

The contest is between creditors Nos. 1 and 6. We were informed that the proceeds of sale of the property are not sufficient to satisfy the amount due on the mortgage held by either of these creditors.

Creditor No. 1 holds a mortgage of the launch and 16 boats dated the 30th December 1903, which was registered at Prome on the 13th January 1904, and also an unregistered mortgage of two boats dated the 16th January 1904.

Creditor No. 6 holds an unregistered mortgage of the launch and 24 boats dated the 14th December 1905.

They claim priority over No. 1 creditor's mortgages first of all by reason of their having perfected their title by taking possession of the boats under their mortgage.

This was one of the grounds on which the learned Judge decided in their favour. He accepted Mr. Fisher's statement of the law in paragraph 1228 of his work on mortgages that if a *bonâ fide* incumbrancer upon chattels obtains possession, he shall generally be preferred to an earlier claimant who has not taken possession. It was argued before us that *Daniel* v. *Russell* (1), which is given by Mr. Fisher as an authority for the proposition he states, does not support it. The case, however, shows that the incumbrancer who had taken possession of the property, as far as it could be taken, was preferred to an incumbrancer whose security was of prior date. *Ex-parte Allen* (2) was relied upon by the appellant's advocate as showing that the taking of possession does not give a subsequent incumbrancer of chattels any advantage over a prior incumbrancer. The basis of that decision was that the Bills of Sale Act (17 and 18 Vict., c. 36, s. 1) seemed to assume that bills of sale are good against all the world, and only makes them void, if not registered in time, as against assignees in bankruptcy and execution creditors.

In this country there has been no legislation corresponding to the provisions of the Bills of Sale Act, and registration of a document of mortgage of moveables gives it no advantage.

The present case must, in accordance with sub-sections (*2*) and (*3*) of section 13 of the Burma Laws Act, 1898, be determined either according to the common law of England or according to justice, equity, and good conscience.

(1) (1807) 14 Vesey, Jun., 393. | (2) (1870) L.R. 11 Eq., 209.

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S. R. M. M. RAMAN CHETTY v. STEEL BROTHERS.

In *Dearle* v. *Hall* (3) Sir Thomas Plumer said :—

"The law of England has always been that personal property passes by delivery of possession; and it is possession which determines the apparent ownership. If, therefore, an individual who in the way of purchase or mortgage contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. * * * If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. * * * Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences."

Upon the appeal in the case Lord Lyndhurst said :—

"Where personal property is assigned, delivery is necessary to complete the transaction not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person who, in fact, is not the owner."

The above quotations are authority for Mr. Fisher's statement in paragraph 1226 of his work that "an assignee, whether by way of mortgage or otherwise, of personal chattels must, if he can, complete his title by possession," and they also support the statement in paragraph 1228 that if a *bonâ fide* incumbrancer upon personal chattels, without notice of prior charge thereon, obtains possession, he shall generally be preferred to an earlier claimant who has not taken possession.

It appears to be only just and equitable that this should be so in a country where registration of mortgages of moveables is not compulsory. In England such mortgages unless registered are of no legal validity, but if they are registered a person asked by the mortgagor to lend money on the security of moveables in his possession has the opportunity of searching a register to find out whether there is already a charge on such moveables in favour of some other persons. In this country search of a register for mortgages on moveables would not necessarily disclose one, even if one had been registered. For instance, if in the present case Messrs. Steel Brothers and Company, Limited, had searched the Rangoon register, which would be the one they would naturally search in the case of a would-be borrower who carried on trade in Rangoon, they would not have found any trace of creditor No. 1's mortgage. It had been registered at Prome, and it might have been registered in any other district.

I agree with the learned Judge in holding that the claim of the creditors who completed their title by taking possession is superior to and is entitled to priority over the creditor who, although his mortgage was prior in date, did not obtain possession, and on this ground I would dismiss the appeal with costs.

I hesitate to agree with the learned Judge's other ground for holding that Messrs. Steel Brothers and Company, Limited, were

(3) (1823) 3 Russell, 1; 38 English Reports, 475, at page 483.

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entitled to priority. The principle stated in section 78 of the Transfer of Property Act does not appear to me to be applicable in the present case. I do not find anything justifying the Court in saying that creditor No. 1 had been guilty of fraud or misrepresentation or gross neglect.

Irwin, J.—I concur.

Before Mr. Justice Irwin, C.S.I.

KAUNG HLA *v.* KA TI AND ONE.

Civil Reference No. 5 of 1908.

Dec. 16th, 1908.

Duty of appellate Court—grounds for setting aside a decree dismissing a suit.

A decree dismissing a suit should not be set aside unless the Court of appeal is in a position to decree the plaintiff's claim in whole or in part or to direct the lower Court to take action of some kind.

Plaintiff sued to recover a mango tree. The case was tried as a small cause, and dismissed. Plaintiff applied for review of judgment on the ground that it was not a small cause. Review was granted, the suit transferred to the regular side of the Court, retried, and again dismissed. Plaintiff appealed on the merits. The District Court did not consider the merits at all, but held that a Small Cause Court has no jurisdiction to set aside its own decree which was passed without jurisdiction. For this reason the learned Judge reversed the decree of the lower Court, but did not substitute any directions of his own. He pointed out that the party aggrieved might proceed under section 646B of the Code of Civil Procedure.

Plaintiff did not make any application under section 646B, but after 2½ months the District Judge himself has referred the case to the Chief Court under that section, because execution of the small cause decree has been applied for.

Assuming that the Township Court had no jurisdiction to set aside its own first decree, it is difficult to understand why the District Judge should consider that to be a reason for setting aside the second decree. The appeal was against the second decree, and the appellate Court had no concern with the first decree. Possibly the District Judge may have thought that the second trial was barred by the rule of *res judicata*. If so he was wrong, for the suit was the same, and the small cause side of the Court was not competent to try the issue; so whether the Court had jurisdiction to set aside its own decree or not the existence of the decree on the small cause side would not be a bar to the trial on the regular side,—section 33, Provincial Small Cause Courts Act.

But if the matter had been *res judicata* the second decree dismissing the suit would have been obviously correct (though the grounds of it were irrelevant) and ought to have been confirmed by the appellate Court. A decree dismissing a suit should not be set aside unless the Court of appeal is in a position to decree the plaintiff's claim in whole or in part or to direct the lower Court to

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take action of some kind. In the present case the appellate Court did none of these things and was not in a position to do any of them.

It is not necessary to express an opinion on the point whether the action of the Township Court in granting a review was *ultra vires* or not. The suit has been tried twice and dismissed twice. Plaintiff appealed, and though he got the decree set aside he obtained no benefit except escaping the liability to pay the defendant's costs of the regular trial. Either party could have appealed against the decree of the District Court; as they have not thought fit to do so, I see no reason why any action should be taken by this Court. The District Judge reports that the defendant has applied for execution of the decree on the small cause side. Any questions that arise in the execution proceedings are appealable to the District Court.

Let the records be returned.

Criminal Revision No. 338B of 1908.

Dec. 18th, 1908.

Before Mr. Justice Irwin, C.S.I

OBORNO CHARAN CHOWDRY *v.* KING-EMPEROR.

Lambert—for applicant.

Res judicata—previous acquittal—bar to prosecution—disobedience of successive directions of Municipal Committee—direction to alter building—jurisdiction of Court to consider nature of direction by Municipal Committee—lawful direction—order when prosecution barred as res judicata—Burma Municipal Act, ss. 92 (2) (3), 180—Code of Criminal Procedure, s. 403.

A gave notice to the Municipal Committee of his intention to erect a building, and almost immediately began to build. While the building was going on, and within six weeks from the receipt of A's notice, the Municipal Committee issued two notices, under section 92 (2) of the Municipal Act, requiring A to leave a certain space for ventilation and scavenging purposes. After about five months a third notice under the same clause was issued. A disobeyed all these notices, and was prosecuted for disobeying the first and third, and acquitted. Subsequently a notice was issued under section 92 (3) requiring him to alter his building so as to leave the space as directed in the three previous notices. He was again prosecuted for disobedience of this direction and was convicted. On revision it was argued that the prosecution was barred by the previous acquittals.

Held,—that the disobedience of the direction under section 92 (3) to alter the building was not the same offence as the disobedience of the former notices under section 92 (2), nor were the facts constituting such disobedience facts on which A might have been charged with a different offence at the former trials. Section 403 of the Code of Criminal Procedure, therefore, did not apply.

If a prosecution is barred on account of a previous conviction or acquittal, section 403 of the Code of Criminal Procedure directs that the person accused shall not be tried. An order of acquittal in such a case is therefore incorrect.

Section 180 of the Burma Municipal Act does not give the Courts jurisdiction to consider whether a direction given by a Municipal Committee is reasonable or not, but only requires that such direction should be lawful.

On 20th September 1907 Oborno Charan Chowdry gave notice to the Municipal Committee of Akyab of his intention to erect a building on a site facing Bazaar Road. About 22nd or 23rd September the foundations were laid, and on 10th October the

building was 6 feet high. This is the evidence of the third witness for defence.

On 3rd October the Committee issued to the applicant a notice to keep a passage between his building and the next building for scavenging purposes; the notice purported to be under section 121.

On 10th October the Committee passed this resolution: "Considered an application by Oborno Charan Chowdry for erection of a masonry building on Bazaar Road. Resolved that the application be granted on rules being carried out and a passage left for conservancy between buildings."

On 1st November the Committee issued a notice to the applicant, requiring him to leave space about the building, either on the east or west side, to secure free circulation of air and to facilitate scavenging. This was not obeyed.

On 10th January 1908 the applicant was prosecuted for disobeying the notice of 3rd October. The complaint was very badly drafted. The case was tried by the Honorary Magistrates, who acquitted the accused on the ground that access to the premises for scavenging purposes could be had from the back. The notice of 3rd October is not on the record, but the notice of 1st November is. The District Magistrate was asked to call for this case. He did not recommend the Local Government to appeal because the prosecution was so badly conducted. He suggested that the Committee should issue notices under clauses (*3*) and (*4*) of section 92.

The Committee did not take this advice, but on 3rd March issued a notice purporting to be under section 92 (*2*), requiring space to be left on one side or the other of the building within one month. On 19th May they instituted a prosecution for disobedience of this notice. The case was tried by the Township Magistrate, who acquitted the accused on the ground that he had been previously acquitted by the Honorary Magistrates on the same facts. I may remark that whether the decision was right in substance or not the order was wrong in form. Section 403 of the Code of Criminal Procedure does not direct that a person shall be acquitted, but that he shall not be tried. An order of acquittal cannot be passed without a trial.

On 2nd July 1908 the Committee issued a notice under section 92 (*3*), requiring the applicant within 30 days to alter the pucca building erected by him so as to leave space for scavenging as directed by the notices of 3rd October, 1st November and 3rd March. A prosecution for disobeying this notice was instituted on 24th August, and the case was referred to the Senior Magistrate for trial as a test case. The attendance of the accused in person was not required. His advocate pleaded that he had not obeyed the notices because there was sufficient means of access for scavenging purposes from the back, and that he had been twice before acquitted of the same offence. Both these defences were fully considered, and the accused was convicted.

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He applies for revision of the conviction and sentence on the grounds that—

(*a*) the two previous acquittals were a bar to the prosecution,

(*b*) the Magistrate erred in applying section 147 (*1*) of the Municipal Act,

(*c*) the order of the Committee was not lawful or reasonable, and

(*d*) the applicant had complied with the conditions upon which permission to build was given.

Applicant was first acquitted of disobeying a notice which purported to be issued under section 121, but was substantially issued under section 92 (*2*). Next he was acquitted of disobeying a notice issued under section 92 (*2*). Now he has been convicted of disobeying a notice issued under section 92 (*3*) after both the previous trials had concluded. I think it is impossible to say that this last offence is the same offence as either of the previous offences, within the meaning of section 403, Code of Criminal Procedure. It is immaterial that the later notice directs the applicant to put the building into the state in which it would be if he had not disobeyed the former notice. The offence does not consist of erecting the building in a particular way, but of disobeying an order to alter it after it had been erected.

Neither can it be said that applicant has been convicted on the same facts for another offence for which a different charge might have been made under section 236 of the Code of Criminal Procedure at the previous trial, for some of the facts which constitute the present offence were not in existence at the time of the former trials. Therefore section 403 does not apply.

The Magistrate no doubt made a mistake in saying that section 147 gives an appeal to the Commissioner against a notice issued under section 92, but that does not affect the case.

As to the third ground for revision, the notice issued on 1st November was given within six weeks of the receipt by the Committee of the notice which the applicant gave under sub-section (*1*), and it is strictly within the terms of clause (*c*) of sub-section (*2*). It was therefore a lawful notice. The building was erected in contravention of that notice, and therefore the notice issued on 2nd July under sub-section (*3*) was also a lawful notice.

Applicant claims that the notice is unreasonable and unnecessary, as there is access to the premises from the back, and the plot is so narrow that the building would be useless if a space were left at one side. As to this I need not refer to the evidence of the Civil Surgeon, because I think the Courts have no jurisdiction to consider whether the order of the Committee is reasonable or not. Section 180 only requires that the direction should be a lawful one.

The application is dismissed summarily.

Before Mr. Justice Irwin, C.S.I.

Civil 2nd Appeal No. 224 of 1907.

C. K. ABDULLA KAKA *v.* M. P. M. V. K. R. PALANEAPPA CHETTY.

Dec. 18th, 1908.

Bagram—for appellant (defendant).

Lambert—for respondent (plaintiff).

Computation of time requisite for obtaining a copy—Limitation Act, s. 12—time-barred appeal—procedure on receiving appeal apparently time-barred—postponement of issue of notice to respondent—Civil Procedure Code, 1882, s. 551.

The 'time requisite for obtaining a copy,' referred to in section 12 of the Limitation Act, must be computed by whole days, not by hours. Days must be reckoned from midnight to midnight, and if an appellant is entitled to deduct any part of a day, he is entitled to deduct the whole of that day.

If a Judge receiving an appeal has reason to think it is time-barred, he should, if it is otherwise admissible, admit it, but should fix a time for hearing the appellant under section 551 of the Code of Civil Procedure on the question of limitation before issuing notice to the respondent.

Sheogobind v. *Ablakhi*, (1889) I.L.R. 12 All., 105, referred to.

In this case the first appeal was dismissed by the Divisional Court as time-barred, and against that order of dismissal the appellant appeals.

The headquarters of the Delta Divisional Court are at Myaungmya. The appellant telegraphed from Rangoon to Myaungmya to ascertain whether the Judge was there. Finding that the Judge was at Pyapôn, he went to Pyapôn, and presented the appeal there on 18th May 1907. The last day for presenting the appeal was held to be the 17th of May, and this was never disputed. The learned Judge admitted the appeal and issued notice to the respondent, while noting on the diary: "It seems doubtful whether the appeal is not time-barred."

The appeal came on for hearing on 9th September, when the following was recorded on the diary: "Heard Bagram for appellant and Ram Gopal for respondent. Examined appellant as a witness to show whether the appeal should be admitted if time-barred. Bagram and Ram Gopal both agree that the question of sufficient cause for presentation of the appeal within time be decided on the deposition of appellant and propose to call no further evidence. Adjourned for judgment to 9th September 1907."

Judgment was given on 9th September, and the learned Judge held that appellant had not shown sufficient cause for not presenting the appeal in time.

It appears from the judgment that in the Delta Divisional Court it is the practice to require appeals to be presented to the Judge in person, no matter in what part of his division he may be. This seems to me to be a very inconvenient rule: inquiry will be made about it.

The appellant stated on oath that on 17th May, about 1 or 2 o'clock, he arrived in Pyapôn and went to the Court, but found that the Judge had gone upstairs, and the clerk refused to take

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his appeal, so he then took it to Mr. Dawson, advocate. The learned Judge records that he is by no means satisfied that the appellant went to Pyapôn at all on 17th or made any effort to present his appeal on that day, and he remarks that the appellant might have made this clear by asking the Court on 18th to make inquiry of the clerk concerned. I think the Judge ought himself to have made inquiry of the clerk, either on 18th May or on 6th September.

The learned Judge also recorded that he was bound to admit the appeal whether time-barred or not, and that it is not the duty of the Court to point out to the appellant at the time of presentation of the appeal that it is time-barred, if that be the case, and to inquire forthwith his reasons for not presenting it. Here he certainly went wrong. If a Judge receiving an appeal has reason to think it is time-barred, he should, if the appeal is otherwise admissible, admit it, but he should not at once issue notice to the respondent. The proper course is to fix a time for hearing the appellant on the question of limitation under section 551. After hearing the appellant under that section, if the point is still doubtful, notice should be issued to the respondent, who can of course raise the question of limitation if he thinks fit.

Mr. Bagram says he argued the appeal on the merits until 7-30 P.M., and he believed the question of limitation had been disposed of.

It seems to me that the appellant was placed at a disadvantage by the Judge's erroneous belief that it was not his duty to raise the question of limitation when the appeal was presented.

I think, however, that the present appeal must be decided on a different ground. The first appeal, in my opinion, was in time on 18th May. The material dates are as follows :—

Decree of Court of first instance ...	... 11th March.
Application for copy ...	... 12th March.
Estimate of cost delivered ...	... 15th March.
Copy sheets supplied ...	... 16th March.
Copy ready ...	... 19th March.
Appeal presented ...	... 18th May.

The Divisional Judge allowed only seven days as the time requisite for obtaining the copy, because the copy sheets were supplied the day after the estimate was furnished. From 12th to 19th March is eight days. The learned Judge does not say which day he disallows, 15th or 16th. I cannot find any precedent on this precise point. The point arose in *Sheogobind* v. *Ablakhi* (1), where the estimate of cost was delivered on 29th March, and the copy sheets were supplied on 5th April. The learned Judge did not decide whether six or seven days were to be disallowed on account of this delay. He allowed the appellant to deduct the whole period from the date of application, 28th

(1) (1889) I.L.R. 12 All., 105.

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March, to the date of delivery of the copy, 10th April, because the Court officials did not on 5th April tell the applicant when the copy would be ready. I cannot by any means follow that precedent, but I have no doubt that the "time requisite for obtaining a copy" (section 12 of the Limitation Act) must be computed by whole days, not by hours. This is a necessary consequence of rule 14, which requires that dates, not hours, shall be recorded on the back of the copy. I think days must be reckoned from midnight to midnight, and if an appellant is entitled to deduct any part of a day he is entitled to deduct the whole of that day. No other method is practicable without injustice.

On this principle appellant is entitled to deduct 12th to 15th March, four days, and 16th to 19th, four days, total eight days; and his appeal was within time when presented on 18th May.

I therefore set aside the decree of the Divisional Court, and direct that Court to readmit the appeal and proceed to dispose of it on the merits. The appellant will be granted a certificate for refund of the court-fee paid on the second appeal. The rest of the appellant's costs will be paid by the respondent.

Before Mr. Justice Irwin, C.S.I.

Criminal Miscellaneous Application No. 29 of 1908.

KING-EMPEROR *v.* CHAICHAL SINGH.

Jan. 8th, 1909.

Power of High Court to decide Court of trial—doubt regarding proper Court for trial—Court by which offence should be tried—jurisdiction—public convenience—Criminal Procedure Code, ss. 182, 185.

When under the provisions of Chapter XV of the Code of Criminal Procedure two Courts subordinate to different High Courts have concurrent jurisdiction to try an offence, section 185 of that Code empowers the High Court, within the local limits of whose jurisdiction the offender actually is, to decide by which Court the offence shall be tried.

On 9th November Sunder Singh presented to the District Magistrate of Rangoon a complaint in which he stated that Chaichal (Chanchal?) Singh had enticed his wife away from a place in Shwebo District, that he had traced them to Rangoon, where he had arrived that morning and had found they were about to embark for Calcutta. The Additional Magistrate, to whom the complaint was referred, issued a warrant for the arrest of Chaichal Singh for an offence under section 498, Penal Code, which warrant was executed. The complainant then applied to have the case transferred to the Court of the District Magistrate, Shwebo, on the ground that his witnesses all reside in Shwebo District, and the District Magistrate, Rangoon, has submitted the application to this Court for orders. The accused has appeared to-day before this Court, and said that he wishes the case to be tried in Shwebo District.

There is no doubt that the case ought to be tried in Shwebo District, and that extreme inconvenience to many persons, and probably to the public service also, would be caused by trying it in

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Rangoon. But no order can be made under section 526 of the Code of Criminal Procedure because Shwebo is not in Lower Burma, and the Courts of the Magistrates in Shwebo District are therefore not subordinate to this Court,—section 8, Act VI of 1900.

The Additional Magistrate has reported that as section 498 includes both enticing and detaining he considers that the offence is a continuing one, and that therefore he has jurisdiction, under section 182 of the Code of Criminal Procedure, to try the case. That was why he issued the warrant. I think he is right, and the case may be tried in either Rangoon Town or Shwebo District.

Section 185 of the Code of the Criminal Procedure seems to provide for the case. There may be room for argument as to the exact meaning of the words "the Court by which any offence *should* ..... be tried," but in my opinion the section is not restricted to cases in which there is doubt as to whether one Court or another has jurisdiction. It expressly refers to "the preceding provisions of this chapter." One of those provisions is section 182, and the word "should," taken in its plain ordinary sense, is wide enough to include a case in which the doubt is on the point whether the choice between two Courts, both of which have jurisdiction, should be decided on the ground of public convenience.

The fact that the words "the High Court" are followed by the words "within the local limits of whose jurisdiction the offender actually is" seems to indicate that the section was enacted chiefly to simplify procedure in cases in which the Courts of the two Magistrates are subordinate to two different High Courts, and to avoid the cumbrous method of a reference to the Governor-General in Council for an order under section 527 when the Court to which it is desired to transfer the case has already jurisdiction to try it.

I therefore decide, under the provisions of section 185 of the Code of Criminal Procedure, that the case shall be tried or inquired into by the District Magistrate of Shwebo or by such Magistrate exercising jurisdiction in that district as he directs.

I further direct that a copy of this order be sent to the Court of Judicial Commissioner of Upper Burma for information.

Civil 2nd Appeal No. 39 of 1908.

Jan. 8th, 1909.

Before Mr. Justice Irwin, C.S.I.

PO THEIN *v.* MAUNG TU.

Villa—for appellant (plaintiff).

Procedure in execution—duty of Judge in execution cases—description of property to be sold in execution—instructions to bailiff for sale—necessity for accurate information to bidders at auction.

Importance of attention to details in execution cases pointed out. It is the duty of the Judge, when an application for sale of property is made, to ascertain accurately what is to be sold, and to give explicit instructions to the bailiff to ensure that the bidders shall know exactly what they are buying.

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On 18th May 1906 Sukaran obtained a mortgage decree in suit No. 273 against Maung Po for Rs. 500 on a mortgage of a house with kitchen adjoining, the surrounding compound and the various trees thereon.

In execution of that decree the house was proclaimed for sale, and sold on 30th June, no mention of the kitchen, compound or trees being made in the proclamation of sale. The purchaser was Maung Tu. The price realized was Rs. 545. This did not quite satisfy the decree including costs.

On 30th July 1906, in suit No. 598, the present appellant Maung Po Thein obtained a money decree against Maung Po.

On 1st November 1906 Sukaran applied to have the compound and kitchen sold to realize the balance due on his decree (Execution Case No. 333). Maung Tu objected that on 30th June he had purchased the house, compound and kitchen complete at the Court auction. On this Sukaran put in a petition stating that he did not know before that the compound had been sold along with the house, but as he learned now that this was the case he abandoned his claim to sell the compound and kitchen. The execution proceedings were therefore closed on 13th November.

Next day, 14th November, Maung Po Thein applied for execution of his money decree by attachment and sale of the compound, trees and kitchen (Execution No. 349). Maung Tu applied for removal of attachment, and it was removed on 29th November.

On 15th January 1907 Maung Tu applied for a certificate of sale, and on 25th January a certificate was issued in which he is declared the purchaser of the house, compound and trees.

On 26th March 1907 Maung Po Thein instituted the present suit for a declaration that the site, trees and kitchen were the property of his judgment-debtor, Maung Po. The suit was dismissed, and an appeal to the District Court was also dismissed.

This case is a good example of the unnecessary litigation and expense to parties that are caused by Judges not paying attention to details in execution cases. When Sukaran applied to have the property sold, the Judge ought to have examined the application and the decree, and asked Sukaran whether he wanted to sell the whole of the mortgaged property or only the materials of the house. It was the Judge's duty to give explicit instructions to the bailiff to ensure that bidders should know exactly what they were buying. The bailiff stated in evidence that the house alone was worth about Rs. 400 or less. It is evident that Maung Tu thought he was buying the compound and everything in it, although only the house was mentioned in the proclamation.

Apart from the reasons which the lower Courts gave for dismissing the suit, it is to be noticed that if the site, trees and kitchen had not been sold the mortgage decree over them would be still subsisting, and Maung Po Thein would not be entitled to

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attach them as his debtor's property. He could only claim the surplus sale proceeds after Sukaran's decree was satisfied. It is also to be noted that Po Thein did not apply for attachment until the day after Sukaran had abandoned his claim to sell the compound and kitchen. This abandonment finally settled the question whether Maung Tu had bought the compound and kitchen as well as the house, and no outsider has a right to come in and say that he did not buy them at the auction. It might be otherwise if there had been collusion between Sukaran and Maung Tu, but it has never been suggested that there was any collusion.

The appeal is dismissed. There will be no order for costs.

Criminal Revision No. 370B of 1908.

Jan. 11th, 1909.

Before Mr. Justice Hartnoll.

1. AMEER BATCHA
2. SUBRAMONIAN
3. CHIDAMBARAM PATHER } *v.* KING-EMPEROR.

A. C. Dhar—for the applicants

Adjournment—summoning of defence witnesses—duty of Court—Criminal Procedure Code, s. 257.

In a warrant case tried summarily the Magistrate is bound to grant an adjournment, if desired by the accused, for the purpose of summoning witnesses for the defence under section 257 of the Code of Criminal Procedure, unless he considers, for reasons to be recorded, that such adjournment is asked for for the purpose of vexation or delay or for defeating the ends of justice.

Petitioners were tried summarily before the Magistrate for the offence of criminal intimidation punishable under section 506 of the Indian Penal Code, convicted and fined. After the case for the prosecution was finished and they had been charged, the Magistrate refused to grant an adjournment so that they might call their witnesses, and so the conviction took place without hearing their witnesses. The case was a warrant case, and so under section 262 (*1*) of the Code of Criminal Procedure the procedure prescribed for warrant cases should have been followed, and by that procedure the Magistrate was bound, under section 257 of the Code, to summon their witnesses, unless he could have refused to do so on the ground that application for such process was made for the purpose of vexation or delay or for defeating the ends of justice. It is not suggested that refusal should have been made on such grounds. The petitioners therefore were prejudiced by the Magistrate not carrying out the provisions of the law, and the convictions cannot stand.

The circumstances of the case are such that I will not put the petitioners to the inconvenience and expense of another trial. I set aside the convictions and sentences, and acquit the petitioners and direct that the fines be refunded to them.

Before Mr. Justice Irwin, C.S.I.

Criminal Revision No. 591A of 1908.

Jan. 26th, 1909.

KING-EMPEROR *v.* TAIK PYU AND NGA THAIK.

Resistance to arrest—lawful arrest—power of arrest—arrest by private person—power of police officer—Penal Code, s. 225.

The Code of Criminal Procedure confers no power on a police officer to send persons who are not police officers to make an arrest which he could lawfully make. Where a ten-house *gaung*, therefore, sent villagers to arrest certain persons suspected of theft, it was held that resistance to the villagers did not constitute an offence under section 225 of the Penal Code.

The terms of the findings in the judgment are, "I find Nga Taik Pyu guilty of the offence with which he is charged under section 324," etc., and "I find Nga Thaik guilty of the offence with which he is charged under section 225," etc. These findings do not comply with section 367 (2), Code of Criminal Procedure. The offence must be specified in the finding with the same precision as in the charge.

The charge against Nga Taik Pyu was: "did voluntarily cause simple hurt to San Tha and thereby committed an offence punishable under section 324," etc. The offence as described in the charge is not punishable under section 324 but under section 323. The error of omitting to specify that the hurt was caused with a dagger is repeated in the warrant of imprisonment.

The charge against Nga Thaik was "did intentionally offer resistance to the lawful apprehension of Taik Pyu for an offence, and thereby committed an offence punishable under section 225," etc. The maximum punishment for an offence under section 225 varies with the nature of the offence for which the "other person" is liable to be apprehended. Therefore that last-mentioned offence, and the punishment attached to it, ought to be specified in the charge. In some cases the offence of intentionally offering resistance is triable only by the Court of Session.

The record of the trial of Taik Pyu for the principal offence is not before me, but from the note at the foot of the warrant of imprisonment in the present case there is some reason to suppose that it was an offence punishable under section 75 of the Penal Code with transportation for life. If that be so, the offence committed by Nga Thaik was punishable under the second clause of section 225 with three years' imprisonment, and the order passed under section 562 is illegal.

The Magistrate does not seem to have considered the question whether the attempt to arrest Nga Taik Pyu was lawful. He begins his judgment by saying that ten-house *gaung* Maung Hlaw received information that Taik Pyu, who was wanted in connection with a case of theft or *pyan pe*, was lurking in a certain jungle, and he sent San Tha and other men to arrest Taik Pyu. *Pyan pe* obviously means an offence under section 215 of the Penal Code, which is non-cognizable, and arrest without warrant for it would not be lawful.

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The ten-house *gaung* says he received information that Taik Pyu had taken money to get back U Go's bull. That information was quite sufficient to create a reasonable suspicion that Taik Pyu had been concerned in the cognizable offence of theft. Every ten-house *gaung* has been invested with the powers of a police officer, and therefore Maung Hlaw could lawfully have arrested Taik Pyu under the power conferred by section 54 (*1*) (*first*) of the Code of Criminal Procedure ; but the Code confers no power on a police officer to send persons who are not police officers to make an arrest which he himself could lawfully make. It may be that Taik Pyu had been proclaimed as an offender under section 87, and if he was, a private person could lawfully arrest him under section 59, but in that case it would be necessary to prove the proclamation. As the record stands it does not appear that either San Tha or any person with him had lawful authority to arrest Taik Pyu, and for that reason I think it is not proved that any offence punishable under section 225 was committed.

The period for which Nga Thaik was bound to be of good behaviour has expired, and no application for revision was made. It is therefore not necessary to pass any formal order in the case. On the facts found by the Magistrate, Nga Thaik might have been convicted of assault, or of attempting to cause hurt to San Tha with a *da*.

Criminal Revision No. 2A of 1909.

Jan. 27th, 1909.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR *v.* THA KIN.

Whipping in lieu of other punishment—sentence of fine in addition to whipping—form of sentence of whipping—Whipping Act, s. 5.

A juvenile offender was sentenced to a whipping under section 5 of the the Whipping Act, and to pay a fine in addition.

Held,—that in view of the wording of section 5 of the Whipping Act, the sentence of fine was illegal.

The proper procedure when a sentence of whipping is passed in lieu of other punishment is to pass the sentence of whipping directly, not to commute any other sentence to one of whipping.

Tha Kin was found to be fifteen years of age ; he is therefore a juvenile offender within the meaning of section 5 of the Whipping Act of 1864. The District Magistrate sentenced him to three months' rigorous imprisonment and a fine of fifty rupees, or in default of payment six months' further rigorous imprisonment. The Magistrate then proceeds to say "under sections V and X of the Whipping Act, instead of the substantive term of imprisonment inflicted, I sentence him to receive 24 stripes with a light ratan in the way of school discipline."

The form of the sentence is wrong. The Whipping Act does not empower a Court, after passing sentence of imprisonment, to commute it to a sentence of whipping. The sentence of

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whipping should be passed directly. The case is analogous to that of section 59, Penal Code,—*Tha Zan* v. *Crown* (1).

The sentence of whipping and fine is in my opinion illegal. Under section 5 a juvenile offender who attempts to commit any offence which is punishable under the Indian Penal Code otherwise than with death may be punished with whipping in lieu of any other punishment to which he may for such attempt be liable. A person who attempts to commit rape is liable under the Penal Code to transportation and fine or imprisonment and fine. I have no doubt that the words "in lieu of any other punishment to which he may be liable" mean in lieu of the whole of the punishment to which he may be liable: the section does not authorize the Court to pass sentence of whipping in lieu of transportation or imprisonment under the Whipping Act and at the same time to pass sentence of fine under the Penal Code.

The construction which I place on section 5 is the same as was placed on section 2 by the High Court of Bombay in *Queen-Empress* v. *Dagadu* (2). That was supported by a previous ruling of the High Court of Bengal. The terms of section 2 are "any punishment"; those of section 5 are "any other punishment." I think this makes no difference to the sense.

Section 10, which the District Magistrate refers to, was repealed by Act XVI of 1874.

Apart from the illegality, fine is not a suitable punishment for a juvenile offender, unless there is reason to believe that he has separate property, independent of his parents.

With reference to the number of stripes, the attention of the District Magistrate is invited to the addition to paragraph 339 of the Lower Burma Courts Manual which was made by correction slip No. XII (8).

I set aside the sentence of fine, and direct that it be refunded.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Irwin, C.S.I.

Civil 1st Appeal No. 12 of 1909.

Feb. 1st, 1909.

MAHOMED AMEEN KHAN, PERSONALLY AND AS LEGAL REPRESENTATIVE OF MARIAM BEGUM (DECEASED) *v.* ABU ZAFFER KHORAISHI.

Halker—for appellant (plaintiff).

Valuation of suit—suit for declaratory decree against attachment—Civil Procedure Code, 1882, s. 283.

For purposes of jurisdiction the value of the subject-matter of a suit brought under section 283 of the Code of Civil Procedure against a decree-holder for a declaration that property is not liable to attachment is the value of the decree which it is desired to execute, if that be less than the value of the property attached.

Sevaraman Chetty v. *Maung Po Yin*, (1900) 1 L.B.R., 1, referred to.

The suit was one under section 283 of the Civil Procedure Code of 1882, for a declaratory decree. The defendant had

(1) (1902) 1 L.B.R., 292. | (2) (1891) I.L.R., 16 Bom., 357.

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attached some land in execution of a decree of the Small Cause Court, Rangoon, against one Shirazi. Plaintiff applied for removal of attachment, and failed. He says in his plaint that he bought the land for Rs. 3,000, and thereafter finding that it was subject to a mortgage he spent Rs. 2,300 in paying off the mortgage. The suit was instituted in March 1907 in the Subdivisional Court, and the plaint was on 13th May 1908 returned by that Court to be presented to the proper Court on the ground that the land which is the subject of the suit is valued in the plaint at Rs. 5,300, namely, the sum of the two sums which plaintiff alleged that he paid as set out above.

The suit was dismissed by the District Court, and the question now is whether the appeal lies to this Court or to the Divisional Court. This depends on the amount or value of the subject-matter of the suit,—section 28 (*1*) (*c*) and (*2*) (*b*), Lower Burma Courts Act, 1900.

It was held in *Sevaraman Chetty* v. *Maung Po Yin* (1) that the value of the subject-matter of a suit under section 283, in which the decree-holder is plaintiff, is for purposes of jurisdiction the value of the decree which it is desired to execute, if that be less than the value of the property. In other words, the value of the subject-matter of the suit cannot exceed the amount of the decree which it is desired to execute.

We think that the principle on which that ruling is based applies equally to a suit under section 283 in which the decree-holder is defendant. The issue in both kinds of suit is exactly the same, namely, whether the property is liable to be attached in execution of the decree.

In the present case the amount of the decree which it was sought to execute does not appear anywhere on the record, but the decree was a decree of the Court of Small Causes, Rangoon. The amount, including costs, could not exceed Rs. 3,000. It follows that the Subdivisional Court was wrong in returning the plaint, though no doubt the District Court had jurisdiction to try the suit. But even if the amount of the decree exceeded Rs. 3,000, provided it was less than Rs. 5,000 the appeal still lies to the Divisional Court.

We therefore direct that the memorandum of appeal be returned to be presented to the proper Court.

(1) (1900) 1 L.B.R., 1.

Privy Council.

(On appeal from the Chief Court of Lower Burma.)

Before Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

MAHOMED KALA MEAH *v.*

1. A. V. HARPERINK, L. O. SMITH, A. A. SMITH, J. H. HARPERINK AND W. MACDONALD (CARRYING ON BUSINESS IN CO-PARTNERSHIP AS MERCHANTS AND AGENTS UNDER THE STYLE AND FIRM OF HARPERINK SMITH & CO.).
2. KAIN CHOY.

Execution sale—duty of Court in connection with execution sale—necessity for accurate information to bidders at auction—sale induced by misrepresentation of Court officers—suit to set aside sale—Contract Act, s. 19, exception—Civil Procedure Code, 1882, s. 306.

A, who dropped in casually at an execution sale and heard the conditions read out in English, which he did not understand, was led by a vernacular statement purporting to be the conditions of sale, which was made by the auctioneer in the presence of the officer in charge of the sale, to believe that certain land was being sold free of incumbrances, although as a matter of fact it was being sold subject to incumbrances exceeding its value; and he purchased the land under this misapprehension.

Held,—that A was justified in relying on the auctioneer's statement, and that the exception to section 19 of the Contract Act had no application to the case. The sale was therefore ordered to be set aside.

In sales under the direction of the Court, it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or misrepresentation is found in the conduct of its ministers.

Devchand Khatoo v. *Birjee Coomaree*, (1903) 2 L.B.R., 91, and *Eshen Chunder Singh* v. *Shama Churn Bhutto*, 11 Moore's I.A., 7, referred to.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side. The following judgment of the Chief Court (Mr Justice Irwin, C.S.I., and Mr. Justice Hartnoll) was delivered on the 13th February 1907 by—

Civil 1st Appeal No. 58 of 1906.

Feb. 13th, 1907.

Irwin, J.—On 2nd May 1905 certain land adjoining Phayre Street in Rangoon Town was sold in execution of a decree of this Court. The plaintiff-appellant was the highest bidder, and became the purchaser at Rs. 38,000.

He sues to have the sale set aside on the grounds that he bid under the mistaken belief that the property was being sold free of the mortgages which were specified in the proclamation, and that mistake was caused by a statement made before the sale by the Assistant Bailiff, Mr. Innes, who was acting as auctioneer.

The decree-holder and the judgment-debtor were both made defendants. The decree-holder did not oppose the suit. The judgment-debtor denied all knowledge of the allegations relating to the mistake, and said that the allegations relied on in the plaint

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afforded no ground for setting aside the sale. The issue was whether the allegations relating to the statement made by the Assistant Bailiff were correct, and if so, whether they afford any grounds for setting aside the sale.

The learned Judge on the Original Side found that it was not proved that the Assistant Bailiff used the words attributed to him, and that even if he had used them an intimation that the property was to be sold free of mortgages could not by any process of interpretation be found in them directly or inferred from them indirectly. The suit was therefore dismissed.

The appeal is argumentative, and contravenes section 541 of the Civil Procedure Code. In substance it challenges both the findings referred to above, and as alternative relief asks for a declaration that there was no sale, and that for this purpose the prayer of the plaint may be amended.

The proclamation of sale, which was published in the papers and read out before the sale, sets out that the land is to be sold subject to four mortgages amounting to Rs. 66,000 and interest. Plaintiff's case is that one Hajji Shah Muhammad Ali said he did not understand English and wanted to know the contents of the proclamation, whereupon the Assistant Bailiff said "*Char mortgage hai. Is waste Court ka hukm se bikri hota. Title deeds Registrar ka office men dekhne sakta,*" which the Court interpreter very correctly, I think, rendered as "There are four mortgages. Therefore the sale takes place by order of the Court. The title deeds can be seen at the Registrar's office."

I think there can be no doubt at all that the plaintiff believed that the land was being sold free of the mortgages. He values the land at Rs. 40,000. Another bidder, Isaac Sofaer, says it is not worth more than Rs. 40,000 to Rs. 45,000. This evidence receives the best possible corroboration from the Bailiff's report made on the day of sale, *viz.*, "Their statement" (of the three bidders) "that they were bidding under a misapprehension appears to be perfectly genuine, and as the property in my opinion is not worth more than Rs. 40,000 to Rs. 45,000, at the most, I think it my duty" etc. It is preposterous to suppose that any sane man would bid several thousands of rupees for an equity of redemption which he believed to be worth less than nothing. The plaintiff's statement that he would not have bid a pice if he had known that the property was sold subject to four mortgages must be held to be perfectly true.

This brings me to the two issues involved in the main question, Was the mistake caused by what the Assistant Bailiff said before the sale?

On the one hand the certainty that plaintiff and the other bidders were under a misapprehension raises a considerable probability that there was a reasonable cause for that misapprehension. On the other hand the extreme levity with which the plaintiff entered on this important transaction suggests that he may have made a mistake without any adequate cause. One

would expect that an average man of business, before offering a large sum of money for any property, would take some effective means to ascertain exactly what was being sold and would make some examination of the seller's title. But what does the plaintiff say? "I heard of the sale on the day of the auction, as I was going along the road in a *gari*. A Court peon called to me and said a Court sale was taking place. I went to the spot." He knew no English, and the few words set out in Hindustani above was the only information he got. To bid a large sum under such circumstances as these might almost be called frivolity. I have no sympathy whatever with the plaintiff, and I think he richly deserved to lose heavily over the transaction.

On the question what were the exact words used by the Assistant Bailiff, it is unfortunate that he was not examined, but no inference adverse to the plaintiff can be drawn from his absence. He was duly summoned, and was reported absent from illness. It does not appear that an adjournment to secure his attendance was asked for, but in view of the ruling in *Devchand Khatoo* v. *Birjee Coomaree* (1) the plaintiff could not hope that such an application would be successful, and the learned Judge intimated plainly in his judgment that he would not have granted it. The omission to call Hajji Shah Muhammad Ali is not explained.

Ebrahim Esoof Bymeah corroborates the plaintiff exactly as to the words used by Innes. He adds: "The words convey to my mind that the mortgages were to be paid out of the sale proceeds."

Isaac Sofaer says he could not remember the exact words, but he says the effect of them was that the highest bidder would get the land, and that the mortgages would be paid out of the sale proceeds. He backed this interpretation to the extent of Rs. 37,000, but in doing so he was quite as careless as the plaintiff. He knows English and read the proclamation but admittedly paid no attention to it, and does not appear to have paid much attention to what the Bailiff said either.

Mr. Westra, Manager of the Trading Company, says a short man read out the proclamation in English, and added a few words in Hindustani, which he understood to mean that the property was mortgaged and had to be realized, and that the proceeds of sale would go to pay the mortgages as far as possible. The value of his evidence is somewhat discounted by the fact that he did not know the meaning of the English words "subject to the mortgages."

The evidence of Mr. Spencer, acting Bailiff, is truly described by the learned Judge as extremely vacillating, but with all respect I cannot agree in thinking that it is perfectly useless. Mr. Spencer was present. He was in charge of the sale and was responsible for the conduct of the sale, although his assistant was

(1) (1903) 2 L.B.R., 91.

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the actual auctioneer. The primary cause of the present unfortunate litigation was Mr. Spencer's omission to obey the plain directions contained in section 306 of the Civil Procedure Code when the deposit of 25 per cent. was not paid. This was bad enough, but his official competency must appear in a much worse light still if the plaintiff succeeds in proving that he was misled by Mr. Innes' words spoken in Mr. Spencer's presence and without any attempt made by Mr. Spencer to put him right. Mr. Spencer has a strong motive for making his evidence as little damaging as possible to himself and his assistant; and that I take to be the cause of the vacillation in his evidence. Mr. Justice Bigge acquitted him of all intention of trying to deceive, and so do I, but the motive alluded to above must have had effect on him, and in my opinion much weight should be given to any admissions he makes in favour of the plaintiff. He first said that Innes said "*Char mortgage hai isko upar*," but his final statement on this point was "I cannot say for certain that Innes before the sale used the words '*Char mortgage hai: is waste Court ka hukm se bikri hota hai.*'" It seems to me that considering the position Mr. Spencer was in, if he could have flatly denied that Innes used the words "*is waste*" he would have done so, and therefore I think his evidence goes a long way to corroborate the plaintiff.

Notwithstanding the careless and irresponsible way in which the bidders behaved, I think it is proved that the Assistant Bailiff used the words attributed to him by the plaintiff.

I am quite unable to agree with the learned Judge on the Original Side in thinking that the words in question could not bear the meaning the plaintiff assigns to them. I do not claim to be a good Hindustani scholar, but the sort of mixed patois which Innes spoke is quite familiar to me, and the use of the words "*is waste*" would cause me think that the land was being sold at the instance of the mortgagees. This is the meaning assigned to the words by four witnesses, and the fifth, Mr. Spencer, actually says: "I think any reasonable man would have thought that the land was being sold free of mortgages, had he not read the proclamation." I may add that, considering Mr. Spencer's knowledge of the value of the land, he can have had no doubt while the bidding was going, if he thought of the matter at all, that all the bidders were under a misapprehension. He cannot have thought that they were all irresponsible lunatics.

The suit was based on section 19 of the Contract Act. My finding on the facts is that plaintiff was induced to bid for the land by misrepresentation as defined in section 18, clause (*3*), of the same Act. But I have also found that the plaintiff had the means of discovering the truth with ordinary diligence and that he was culpably careless in failing to ascertain the truth in the obvious way, namely, by having the proclamation read and carefully translated to him. That being so, the exception to section 19 of

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the Contract Act puts him out of Court, and the contract is not voidable by reason of the misrepresentation.

But it was pressed on us in the alternative that if we cannot set aside the sale we should at least declare that there has been no sale at all. Several decisions of the Indian High Courts were referred to, but I do not think it necessary to examine them in detail, for the argument based on them was this: "Plaintiff may be the purchaser, but he is not the owner. The property in the land has not passed: therefore there has been no sale." This seems to me to be merely an attempt to confound two essentially different things, namely, a sale and a contract for sale. Under section 54 of the Transfer of Property Act, sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised. A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties, and it does not of itself create any interest in or charge on such property. These definitions do not govern the present case, because judicial sales are expressly excluded from the operation of the Act by section 2 (*d*). I have quoted the definitions because they show clearly the distinction between a sale and a contract for sale. A contract is created by proposal and acceptance (section 2, Contract Act), but it requires something more than such a contract to transfer the ownership of property. In the case of immoveable property that something is either the execution and registration of an instrument in writing, or in certain cases delivery of the property. In the case of moveable property the something additional is payment or delivery or tender, part payment or part delivery, or an agreement, express or implied, that payment or delivery or both shall be postponed (section 78, Contract Act).

In the present case the plaintiff's bid was a proposal and the fall of the hammer was acceptance. There is therefore a contract for sale. Whether the property in the land passed is a question of no consequence. What plaintiff wants is to get rid of the liability to pay the Rs. 38,000 which he promised to pay. His liability is exactly the same whether the property in the land passed or not.

For these reasons I think there is no need to decide the question whether the property in the land passed or not, nor to consider whether we should allow plaintiff to amend his plaint so as to include the alternative prayer in his appeal. As I find that there is a subsisting contract for sale I would dismiss the appeal.

Hartnoll, J.—I take the same view of the facts as my learned colleague, and I have no doubt that the bidders were bidding under a misapprehension. There is evidence, the reliability of which there is no ground for questioning, that the property free of encumbrances was not worth more than Rs. 40,000 to Rs. 45,000, and it is impossible to believe that appellants and Sofaer would have made the bids they did if they had known that they

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would have to take it subject to the heavy mortgages existing on it. In my opinion the words alleged to have been used by the Deputy Bailiff are proved to have been so used. They are a mixture of English and Hindustani, and their tenor is: "There are four mortgages. On this account (or therefore) there is a sale by order of Court. The title deeds can be seen in the office of the Registrar." They do not give full details; but they may certainly lead persons to believe that the property was not being sold subject to them, and that on the other hand it was being sold free of them. The Bailiff allows that the property in his opinion was not worth more than Rs. 40,000 to Rs. 45,000, and it is strange that he did not clearly explain beyond shadow of doubt the exact conditions of the sale, when he found that bids so far in excess of the value estimated by him were being made. I certainly find that there was misrepresentation as defined in section 18 (*3*) of the Contract Act. There remains for consideration the important question as to whether the exception laid down in section 19 of the same Act is not applicable to the case. It was apparently not argued in the Court of first instance, nor was it argued on appeal. The exception runs as follows: "If such consent is caused by misapprehension..... ..... the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence." To my mind the appellant had such means. He could have gone to the Court, and could have ascertained the exact conditions of the sale. He could have read the advertisement in the newspaper. Further, the conditions were read out in English at the sale.

The purchase of immoveable property of such value was no light matter, and the casual manner in which the appellant acted seems to me to display great negligence on his part. The exercise of ordinary diligence on his part in my opinion would have prevented him from being misled. A few questions to the Court officers at the auction answered in a mixture of English and Hindustani was not to my mind the exercise of ordinary diligence in a matter of so important a nature. The appellant undoubtedly had the means of discovering the truth with ordinary diligence, and I hold that the exception applies to him and therefore that the contract is not voidable.

The next point is whether the plaint should be allowed to be amended by adding to the prayer in it "or in the alternative for a declaration that there was no sale." The suit was one to set aside the sale on the ground of mistake, and the plaint assumes that there was a sale, and does not raise the question as to whether there was a sale or not. It is now desired to plead that the transaction did not amount to a sale, and that there was no sale. The effect of the amendment to my mind would be to convert the suit into one of another and inconsistent character, and so to conflict with the proviso to section 53 of the Code of

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Civil Procedure. In the case of *Eshen Chunder Singh* v. *Shama Churn Bhutto* (2), their Lordships of the Privy Council pointed out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, and further on in the same judgment they stated that they desired to have the rule observed that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from.

To allow the amendment now asked for would in my opinion infringe these rules of law.

I therefore concur with the finding of my learned colleague and would dismiss this appeal.

December 15th, 1908.

The judgment of their Lordships of the Privy Council was delivered on the 15th December 1908 by—

Lord Macnaghten.—Their Lordships regret to say that in their opinion there has been a lamentable miscarriage of justice in this case. It is an appeal from the Chief Court of Lower Burma. It was heard *ex parte*. But the facts are not open to dispute.

At an auction sale in execution held under the direction of the Court the appellant, who had dropped in quite casually, was tempted to bid and was declared the purchaser. The thing put up for sale was knocked down to him for Rs. 38,000. The sale was conducted by two officers of the Court, a Mr. Spencer, who was chief clerk and officiating bailiff, and a Mr. Innes, his deputy, who was the auctioneer. Mr. Innes read the proclamation in English, a language which no native present seems to have understood. It stated clearly enough that only the interest of the judgment-debtor was for sale. Then, in answer to a native who asked what the proclamation said, Mr. Innes made a statement in the vernacular to the effect that the land was being sold at the instance of the mortgagees. The appellant was thus led to believe that the invitation was an invitation to bid for a substantial property freed and discharged from all incumbrances. In the result he found himself the purchaser of a shadowy equity of redemption not worth one farthing. The value of the lot unencumbered was not more than Rs. 45,000. The charges upon it were over Rs. 64,000.

As soon as the appellant realised his position he explained to Mr. Spencer that he had bid for the property under a misapprehension. Mr. Spencer reported to the Court that the appellant's statement was supported by Mr. I. Sofaer and Mr. Hadji Shah Mahomed, the other two bidders at the sale, whom he had sent for and questioned. They too, it seems, were under the same

(2) 11 Moore's I.A., 7.

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misapprehension. He added that, as their statements appeared to be perfectly genuine, and as the property in his opinion was not worth more than from Rs. 40,000 to Rs. 45,000 at the most, he thought it his duty to refer the matter to the Chief Court for orders whether, under the circumstances, the sale should be set aside and the property put up again.

The learned Judge to whom the matter was referred declined to interfere.

The appellant then applied to the Court to be discharged from his purchase, submitting affidavits which showed that the misapprehension on his part was caused by a misrepresentation on the part of the auctioneer. Owing, however, to the opposition of the judgment-debtor—though there was no opposition on the part of anyone else—it was thought advisable to proceed by a regular suit.

The learned Judge of first instance dismissed the suit. Then there was an appeal to the Chief Court.

The two learned Judges who formed the Court of appeal were both satisfied that the appellant did bid for the property under a misapprehension, and that the misapprehension was caused by a misrepresentation made by the auctioneer. But they both held that the appellant's claim to relief failed for a reason which was not even suggested in argument either before the Court of appeal, or before the Court of first instance. They held that, although there was a misrepresentation as defined by section 18, clause 3, of the Indian Contract Act, the case fell within the exception in section 19, which provides that in case of "consent caused by misrepresentation" the contract is not voidable if the party whose consent is so caused had the means of discovering the truth with ordinary diligence. "To my mind," says one of the learned Judges, "the appellant had such means. He could have gone "to the Court and could have ascertained the exact conditions of "the sale. He could have read the advertisement in the news-"paper. Further, the conditions were read out in English at the "sale." No doubt the conditions were read out at the sale, and in English. But the appellant speaks and understands nothing but Hindustani. English is an unknown tongue to him. The other learned Judge takes the same view. He finds that the appellant was "culpably careless in failing to ascertain the truth in "the obvious way, namely, by having the proclamation read and "carefully translated for him." It is plain from these remarks that the negligence for which the learned Judges condemn the appellant is want of prudence in embarking so rashly on a transaction so important. The appellant had no means of discovering the truth when the auction was going on. He was perfectly justified in relying on what was said by the auctioneer in the presence and hearing of the chief clerk, who had charge of the sale.

The exception in section 19 of the Contract Act has no application to the case. And there is no defence to the suit.

So the matter would have stood if the question had arisen between outsiders, and the Court had had no concern in the matter beyond the duty of exercising its judicial functions. But over and above all this there is involved in this case a principle of supreme importance which the learned Judges of the Chief Court entirely disregarded.

It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconcientious as this.

Their Lordships are somewhat surprised to find that the learned Judges have nothing to say on this aspect of the case. They are still more surprised at the moral lesson which the presiding Judge draws from the story of this auction. He points out that the appellant made no investigation into the title beforehand and that he had absolutely nothing to depend upon but the announcement of the auctioneer. And his conclusion is that the appellant "richly deserved to lose heavily over the transaction."

Mr. Spencer was of course wrong in not keeping a stricter watch on the proceedings of his subordinate, but he was perfectly right in referring the matter to the Court. Both Courts censure him for not having proceeded under section 306 of the Civil Procedure Code. But that course was out of the question. If the truth had been published, nobody but a lunatic would have bid on the property being put up again. If the truth had been kept back, there would have been a gross and deliberate fraud. In either case a claim against the present appellant would have been both dishonest and futile.

Their Lordships think that the appeal should be allowed, the order of the Court of appeal and the judgment of the Lower Court discharged with costs, to be paid by the judgment-debtor, and a decree made setting aside the sale with costs against the judgment-debtor.

Their Lordships will therefore humbly advise His Majesty accordingly.

The judgment-debtor must pay the costs of the appeal.

Full Bench.

Criminal Revision No. 317B of 1908.

Jany. 12th, 1909.

Before Sir Charles Fox, Chief Judge, Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

KYAW WA *v.* KING-EMPEROR.

Security proceedings—preventive sections—security to keep the peace—order for security on expiration of sentence of imprisonment or transportation—commencement of period of security—time of demand of security—jurisdiction of Sessions Judge to pass order for imprisonment in default of furnishing security before commencement of period—time of Sessions Judge's order in security proceedings—Criminal Procedure Code, ss. 106, 118, 120, 123.

A was convicted before a Magistrate of an offence under section 326 of the Penal Code, and sentenced to seven years' transportation. He was further ordered, under section 106 of the Code of Criminal Procedure, to give security to keep the peace for two years after his release, such security to be given within a month of the date of the sentence. On the expiration of this month without security being given, the proceedings were submitted to the Sessions Judge, who ordered that A should undergo simple imprisonment in default of furnishing the security as ordered by the Magistrate.

On an application for revision to the Chief Court—

Held,—that in view of the provisions of section 120 (*1*) of the Code of Criminal Procedure, the Magistrate's order that the security should be given within a month of the sentence was illegal.

Held further (Irwin, J., dissenting),—that the Sessions Judge had jurisdiction to deal with the case under section 123 (*3*) before the expiration of the sentence of transportation, and the proceedings should have been laid before him for the purpose as soon as possible after the passing of the sentence.

The order was set aside on the ground that such an order is uncalled for when a sentence of transportation or imprisonment for so long a term as seven years is passed.

Nga Hnaung v. *King-Emperor*, (1905) 3 L.B.R., 43, and *King-Emperor* v. *Tha Hlaing*, (1907) 4 L.B.R., 205, referred to.

Fox, C.J.—The Magistrate sentenced the accused on the 6th April 1908 to transportation for seven years, and required him to give security in the following terms :—

"I further order that accused do furnish, on or before the 5th May 1908, security Rs. 75, with two sureties in the like amount for keeping the peace for two years after his release."

The accused appealed to this Court and his appeal was summarily dismissed.

On the proceedings being submitted to the Sessions Judge under section 123 of the Criminal Procedure Code in connection with the order for security, he made the following order :—

"I accordingly direct under section 123, Criminal Procedure Code, that after the expiration of the sentence which Nga Kyaw Wa is now undergoing, he suffer simple imprisonment until such time as he furnishes the security demanded by the Magistrate for a term not exceeding two years."

In my opinion the order of the Sessions Judge should properly have been in the form of an order of his Court requiring the accused to furnish security. The order made was for imprisonment until the accused furnished security. Sub-sections (*1*) and

(5) of section 123 provide for imprisonment if a person called on to give security by an effective order fails to do so. An order by the Sessions Judge ordering the accused to give security was required because, although a Magistrate may order an accused to give security for over a year, that order cannot be enforced and no penalty is attached to disobedience of it, except the temporary one of detention in prison until a higher Court passes its order on the case.

The opening words of sub-section (1) of section 123, "If any "person ordered to give security under section 106 or section 118 "does not give such security on or before the date on which the "period for which such security is to be given commences," read in conjunction with the provision in section 120 that when a person is, at the time of the order for security, sentenced to or undergoing imprisonment, the period for which the security is required shall commence on the date on which the sentence expires, do not, in my opinion, necessarily affect the question of when the Sessions Judge or High Court is to pass its order under sub-section (3) of section 123. It is not clear to me what the Legislature meant by the use of the words "as aforesaid" in sub-section (2) of the section, but looking at the special provisions as to ordering security for over a year it appears to me that it was intended that if a Magistrate orders security for over a year, he should submit his proceedings to a higher Court as soon as possible, and that Court must then pass its order, which, if it be an order requiring security, is the order to be given effect to under sub-section (5) of section 123.

A Magistrate may order security for a period up to a year at the time of passing sentence and that order is at once an effective order. A Sessions Court or High Court cannot of necessity order security for over a year simultaneously with a Magistrate's sentence and order for security for over a year, but it appears to me that it was intended that it should pass such an order, if it thinks fit, as soon as possible after it receives the Magistrate's proceedings, and that it was not intended that it should wait until the expiration of the sentence before passing any order.

The Magistrate's order in the present case was erroneous in so far as it named a day on or before which security was to be given. The case fell under sub-section (1) and not under sub-section (2) of section 120.

The Magistrate should, in my opinion, have submitted his proceedings forthwith to the Sessions Judge. If the latter after calling upon the accused to show cause against an order for security being made by him, and giving him an opportunity of showing cause, had ordered him to give security, I think such an order would have been within the Judge's jurisdiction, and I see no substantial objection to the addition to such an order of a direction that if the accused failed to give the security required he should be kept in the kind of imprisonment directed by law.

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What is, in my opinion, a fatal defect in regard to the order in the present case is that it was passed without giving the accused an opportunity of being heard by the Sessions Judge before it was passed, and for that reason I would set the order aside.

Such an order appears to me to be uncalled for when a sentence of imprisonment or transportation for so long a term as seven years is passed for the offence committed.

Irwin, J.—On 6th April 1908 the Senior Magistrate of Bassein convicted Nga Kyaw Wa of an offence punishable under section 326, Penal Code, sentenced him to seven years' transportation, and added this order: "I further order that accused do furnish, on or before 4th May 1908, security Rs. 75, with two sureties in like amount for keeping the peace for two years after his release."

The prisoner appealed to this Court against the conviction and sentence. The appeal was summarily dismissed on 15th May 1908.

On 11th August 1908 the Magistrate recorded this further order: "The accused has failed to furnish security and I have been unable to get sureties for him. I therefore submit the proceedings under section 123 (2) to the Court of Session for orders under section 123 (3) of the Code of Criminal Procedure."

The Sessions Judge on 28th August 1908 recorded an order in which he reviewed the facts, and concluded: "I accordingly direct under section 123, Criminal Procedure Code, that after the expiration of sentence which Nga Kyaw Wa is now undergoing he suffer simple imprisonment until such time as he furnishes the security demanded by the Magistrate for a term not exceeding two years."

It does not appear from the record that the Sessions Judge gave Kyaw Wa any opportunity of being heard, either personally or by pleader,—*Nga Hnaung* v. *King-Emperor* (1).

In the warrant issued by the Sessions Judge it is recited that Kyaw Wa was at the time of receiving sentence required by an order under section 106 of the Code of Criminal Procedure to execute a bond that he would keep the peace for two years from 6th April 1915. This is not the fact: the Magistrate's order is for two years after his release; his release will under ordinary rules probably take place many weeks before 6th April 1915, if he gives security. The terms of the Sessions Judge's own order are "two years after the expiration of sentence." I have no fault to find with this expression, but the date of "expiration" of the sentence must be held to mean the date on which the prisoner would be released if he were not detained for any other matter than the sentence of seven years' transportation.

The prisoner has appealed against the order of the Sessions Judge. As there is no appeal against the order, his petition is treated as a petition for revision.

(1) (1905) 3 L.B.R., 43.

The petition contains no intelligible grounds for interference, but as petitioner asks us to quash the order it has to be considered whether the Sessions Judge had any jurisdiction to make it.

The period for which the security was to be given was correctly fixed by the Magistrate under section 120 (*1*) to commence at the time when the sentence of transportation expires, but the order to give the security on or before the 4th of May is, in my opinion, illegal, because section 123 (*2*) only permits the Magistrate to take further action when the accused "does not give such security as aforesaid." It is clear that the word "aforesaid" operates as a repetition of the words of sub-section (*1*), namely, "does not give such security on or before the date on which the period for which such security is to be given commences."

If the words have not that meaning they are exceedingly vague, and it would be open to the Magistrate to submit the proceedings to the Sessions Judge on the same day on which he passes sentence. That, no doubt, would be in harmony with section 120 (*2*), but sub-section (*2*) does not apply here, and it would be entirely out of harmony with section 120 (*1*) and section 123 (*1*), and the direction to issue a warrant for his detention in prison pending the orders of the Sessions Judge would be superfluous. With respect to this warrant it is significant that while section 123 (*1*) makes provision both for cases in which the prisoner is in jail and cases in which he is not, section 123 (*2*) provides only for cases in which he is not in jail. This is another indication that it is not intended that the proceedings should be laid before the Sessions Judge in any case while the respondent is undergoing a substantive sentence of imprisonment.

But the most decisive indication of the meaning of clause (*2*) is contained in the words "except in the case next hereinafter mentioned" in clause (*1*). Clause (*2*) constitutes an exception to the directions contained in the latter part of clause (*1*); and the first part of clause (*1*), down to the word "commences," governs every case in which a person is ordered to give security under section 106 or section 118, whether for less or for more than one year.

The words "as soon as conveniently may be" are qualified by the condition that the prisoner must have failed to give security within the time allowed before anything further is done. The law allows the prisoner to give the security at any time he likes before the sentence of transportation expires, and if he does not give it within that time the Magistrate is required, under sub-section (*2*), when the sentence of transportation expires, to issue a warrant directing the prisoner to be detained in prison pending the orders of the Sessions Judge, and to lay the proceedings before the Sessions Judge. There is to my mind no room for doubt about the meaning of the section.

The submission of the proceedings to the Sessions Judge before the sentence of transportation expired was, I think, not warranted by anything in the Code. The Sessions Judge

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therefore, had in my opinion no jurisdiction to pass an order under sub-section (3).

The case is almost identical with that of *King-Emperor* v. *Tha Hlaing* (2). The only distinctions are (*a*) that in that case the accused was ordered to give security for six months only and was therefore sentenced by the Magistrate to six months' imprisonment in default instead of being sent before the Sessions Judge, and (*b*) that the prisoner in that case did not apply for revision. My learned colleagues held that it was not necessary to interfere with the Magistrate's order imposing imprisonment in default before the period for which the security was to be given commenced. If I understand the judgments aright the learned Chief Judge held that the Magistrate's order was irregular but convenient, while Mr. Justice Hartnoll held that it was not irregular, at any rate in substance. I am unable to distinguish the two cases. Both seem to me to be governed by the same law.

Apart from the legal aspect of the case, I think it is extremely inconvenient and undesirable that the prisoner should be pressed, or even encouraged, to furnish security at a date long before his sentence of transportation expires. If he did furnish security now, the sureties might be dead, or worth nothing, or might have removed to a distant place, before the sentence expires; if so, the bond would be worthless.

I have only to add, in view of the difficulties which appear to have influenced my learned colleagues in *Tha Hlaing's* case, that in all cases under section 106, Code of Criminal Procedure, whether the term of security be less or more than one year, I think the warrant issued for execution of the substantive sentence ought to contain a statement that an order to give security has been made, and a direction to the officer in charge of the jail to produce the prisoner before the Magistrate on expiry of the substantive sentence unless he meantime receives an intimation from the Court that security has been furnished. As I am of opinion that the Sessions Judge had no jurisdiction to deal with the case, I would set aside his order.

The opinion of the majority of the bench being different, I agree to setting aside the Sessions Judge's order on the ground that it is unnecessary in addition to such a long sentence of imprisonment as seven years.

Hartnoll, J.—The facts on which this reference has been made have been set out by my learned colleague and so there is no necessity to set them out again. It seems to me that the words used in section 123 (2) of the Code of Criminal Procedure are not too clear, and in order to arrive at the intention of the Legislature it appears necessary to consider the law and the object with which it was made. When proceeding under sections 106 and 110, the law allows the Magistrate to pass an order requiring security to be given for a period not exceeding three years. If the

(2) (1907) 4 L.B.R., 205.

security ordered to be given is for a period of one year or less, then, if the security is not given for the period for which it is demanded, the person placed on security is detained in jail for such period or until within such period he furnishes it; but where the security ordered to be given is for a period of more than one year, and it is not given, the proceedings have to be laid before a superior Court for further orders. The object of such legislation clearly is that the Magistrate's power to detain a person in jail in default of giving security shall be confined to the period of one year; but that if it is necessary for a person to be detained in jail for such default for a period exceeding one year it shall be on the order of a Court superior to that of a Magistrate—in this province of the Court of the Sessions Judge. It certainly seems to me that it could never have been the intention of the Legislature that in cases coming under section 106 the Sessions Judge should not pass orders until the substantive term of imprisonment inflicted for the proved offence has expired. Section 123 (*2*) states that the proceedings shall be laid as soon as conveniently may be before the superior Court; section 123 (*3*) contemplates further enquiry and evidence. Both in the interest of the prosecution and the accused it stands to reason that any further enquiry necessary should be held when the facts are fresh and when any further information or evidence necessary can, if possible, be obtained. As time elapses, facts become forgotten and evidence unobtainable through various causes such as death and change of residence. To take the present case, although this is a most unusual one, Maung Kyaw Wa might be seriously prejudiced by not having his order for security considered for the best part of seven years. To go back to the words of section 123 (*2*), I am not at all sure that the words 'as aforesaid' should be construed as referring to the date on which the period for which such security is to be given is to commence. They may merely refer to the security to be given. It may possibly be that the language of the section is defective and merely refers to orders passed under section 118. However that may be, and having regard to the last words of it and section 123 (*3*), I am certainly of the opinion that the Legislature intended cases like the present to be laid before the superior Court without undue delay after the order of the Magistrate has been passed. Applying this view to the present case I am of opinion that while the Magistrate was wrong in ordering Kyaw Wa to give security on or before the 4th May last, since he has time to do so up to the date of the expiration of his sentence, he may well have ordered that, if security had not been given by them, the proceedings should be laid before the Sessions Judge for orders. The form of the order of the Sessions Judge would seem to me to be fair and reasonable enough, and if firstly I agreed with him on the merits of the case and secondly his proceedings did not disclose a fatal defect in that he did not notice Kyaw Wa and give him an opportunity of being heard before passing the order

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he did, it would have been sufficient, in my opinion, to order that the warrant be brought into conformity with it. Such a warrant would merely be a direction to the Superintendent of the Jail to do what the law directs, and he could not act without such a warrant.

Coming to the merits of the case I am of opinion that the order to give the security after so long a detention in prison was unnecessary and an unduly severe order to pass, and on this ground I would set aside the order that Kyaw Wa should give security.

In this view it is unnecessary to consider the question of the defect in the proceedings of the Sessions Judge noted above.

Special Civil 2nd Appeal No. 88 of 1908.

Feb. 4th, 1909.

Before Mr. Justice Irwin, C.S.I.

MA DUN *v.* { 1. LU O. 2. MA KIN.

Ormiston—for appellant (plaintiff).

R. N. Burjorji—for respondents (defendants).

Burden of proof—possession of mortgaged property given to mortgagee subsequently to original mortgage—usufructuary mortgage—sale—effect of entry in Land Records Register IX—report of transaction already effected—admissibility of pyatpaing in evidence—signature of pyatpaing by person making report—written report—use of pyatpaing by receiver of report to refresh memory—Evidence Act, ss. 3, 161.

When land is mortgaged without possession, and possession is subsequently given to the mortgagee, the burden of proving that the transaction in which possession was given was an outright sale and not a usufructuary mortgage is on the mortgagee.

An entry in Land Records Register IX regarding the transfer of land cannot in itself effect the transaction to which it refers. It is at best nothing more than a note of a transaction which has already been effected.

A *pyatpaing* or outer foil of register IX which is not signed by the person making the report of the transaction to which it refers is not admissible to prove that report, as it does not become a written report unless so signed. But in such a case, if the official who made the entry in the register is called to give evidence of the oral report, he can refresh his memory by means of the *pyatpaing*, which thus becomes evidence within the definition in section 3 of the Evidence Act.

Ko Po Win v. *U Pe*, (1902) 11 Bur. L.R., 37, followed. *Ma U Yit* v. *Maung Po Su*, (1902) 8 Bur. L.R., 189; *Maung Po Te* v. *Maung Po Kyaw*, (1901) 1 L.B.R., 215; *Ma Dun Ma* v. *Maung Kyaw Zan*, (1905) 11 Bur. L.R., 253, and *Maung Cheik* v. *Maung Tha Hmat*, (1902) 1 L.B.R., 260, referred to.

This is a suit for redemption.

It is common ground that Ma Dun mortgaged her lands to Maung Lu O for Rs. 125, and that she subsequently, in *Pyatho* 1264, gave him possession of the lands on account of principal and interest Rs. 104. Ma Dun says the latter transaction was a usufructuary mortgage, Lu O says it was a sale outright.

The Court of first instance laid the onus of proof on plaintiff, and held that she had discharged it, and gave her a decree for redemption. The lower appellate Court held that the onus was

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rightly placed on plaintiff, and that she had not discharged it; the decree was therefore set aside.

The first ground of second appeal is that the onus was wrongly placed on the plaintiff. The following cases were referred to. In *Ma U Yit* v. *Maung Po Su* (1), the question of burden of proof does not seem to have been raised. Mr. Justice Birks said the burden was admittedly on the plaintiff. In *Maung Po Te* v. *Maung Po Kyaw* (2), the same learned Judge had concurred in a judgment in which the burden was laid on the defendant although he had this exceptional fact in his favour, that before taking over possession of the land he held a mortgage deed in which there was a clause providing that the property should be forfeited on failure to pay the mortgage debt with interest. In *Ko Po Win* v. *U Pe* (3), the last mentioned ruling was referred to, and adhered to so far as it was applicable, but it was held that proof of the fact that the plaintiff reported the transaction to the *thugyi* as an outright sale was sufficient to shift the onus to the plaintiff. In *Ma Dun Ma* v. *Maung Kyaw Zan* (4), Mr. Justice Birks sitting alone referred to the three previous cases and laid the onus on the defendant because she did not adduce any evidence of the entry in register IX.

I am bound by the ruling in *Ko Po Win* v. *U Pe* (3), and the effect of that ruling is that when land is mortgaged without possession, and possession is subsequently given to the mortgagee, the burden of proving that the transaction in which possession was given was an outright sale lies in the first instance on the mortgagee. The burden may be shifted by proof of a report of an outright sale made to the *thugyi*, but obviously it might equally be shifted by evidence of other relevant facts. The learned Chief Judge's view evidently was that the real question was one of fact rather than of burden of proof. The initial burden of proof is determined by facts on which there is absolute agreement. When disputed facts come to be considered it is idle to speak any longer about onus of proof. This is particularly so when a question of a report to a *thugyi* is in dispute. Even when the evidence that the plaintiff reported an outright sale is so weighty as to leave no room for doubt about the fact, there may still remain a doubt whether the parties meant that there should be an outright sale, or whether they had really agreed on a mortgage, but had agreed to report it as a sale in pursuance of the common custom. The only way to arrive at a correct decision is to weigh the evidence as to the report in the same scales with all the other evidence bearing on the agreement made between the parties.

In the present case a *pyatpaing*, that is to say, the outer foil of Land Records Register IX, was produced and admitted in evidence, but in giving judgment the Subdivisional Judge held that it was not admissible because it was not signed by the plaintiff. *Maung*

(1) (1902) 8 Bur. L.R., 189.
(2) (1901) 1 L.B.R., 215.
(3) (1902) 11 Bur. L.R., 37.
(4) (1905) 11 Bur. L.R., 253.

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Cheik v. *Maung Tha Hmat* (5) was cited. The lower appellate Court did not expressly say that the document was admissible, but pointed out that the report was proved by plaintiff's own witness and that she had admitted signing the original. The report to the *thugyi* as noted in the *pyatpaing* was not only taken as proved, but was used as a fact shifting the onus of proof to the plaintiff. Here I think the learned Judge was led into a fallacy. He said : "When a plaintiff admits a transfer in which it is noted that the transaction is an out-and-out sale, but claims to recover the land on a contemporaneous oral agreement at the time of transfer, the burden of proving this oral agreement lies on her." This assumes that the transaction was effected by the entry in register IX, which it certainly was not; such an entry at its best is nothing more than a report or note of a transaction which has already been effected, it may be orally or it may be by a formal document. Therefore it is a complete misdescription of facts to speak of an oral agreement contemporaneous with a transaction effected by an entry in the register. See the remarks of Mr. Justice Fox in *Ma U Vit* v. *Maung Po Su* (1).

The *pyatpaing* is not signed by Ma Dun, and it is therefore not admissible to prove the report. The defendant could have summoned the officer in whose custody the register (IX) was, to produce the register containing the counterfoil, which presumably was signed by Ma Dun. But it does not appear that the *pyatpaing* was used for the purpose of proving the report. A report of this nature to a *thugyi* is commonly made in the first place orally. When the person reporting signs the register he has made a written report in addition to the oral one. In the present case the *thugyi* was called and gave oral evidence about the oral report. He could have used the *pyatpaing* to refresh his memory and then section 161 of the Evidence Act would apply. A document used in that way becomes evidence, within the definition in section 3 of the same Act, and should be placed on the record. The *pyatpaing* seems to have been shown to the *thugyi* in cross-examination, though the learned Judge omitted to mark the point at which cross-examination began. Its admission or rejection was a matter of no consequence, as Ma Dun had already admitted the fact that the lands were shown in the *pyatpaing* as made over outright.

The issue is whether at the time when possession of the lands was given to the defendant it was agreed between the parties that plaintiff should retain the right of redemption. Plaintiff expressly admitted that she signed an entry in register IX in which it was recorded that the lands were made over outright in satisfaction of a debt of Rs. 204, but she says the real agreement was that she was to retain the right of redeeming the lands for Rs. 204, and that she told the *thugyi* that this was so.

(5) (1902) 1 L.B.R., 260.

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Lu O denies that he ever promised to allow Ma Dun to redeem. He says Aung Ba was present at the mutation of names, but Aung Ba was not called by either party. Lu O called two witnesses. His nephew's wife Ma So Nwe says she tried, at Ma Dun's request, to find a purchaser for the land for Rs. 350, but failed, as the lands are badly situated. Lu O's nephew Po Sin says that Ma Dun asked Lu O to take over the lands in satisfaction of the debt and he at first refused. This statement is so totally inconsistent with all the other evidence on both sides that I cannot place any reliance on this witness.

The principal witness is the *thugyi* Maung Shwe Ya. From his evidence there is no doubt that Ma Dun was very reluctant to surrender her lands altogether, and she bargained for a considerable time to induce Lu O either to take over the garden land alone and leave her the paddy land, or to take both on a usufructuary mortgage. He says they eventually "came to me and asked me to register an out-and-out transfer, which I did. Previous to making entries in the *pyatpaing* I asked them if they had come to terms, and plaintiff replied that they had, and that she agreed to an out-and-out transfer." When re-examined he said: "I mean to say that nothing was mentioned about redemption in the *pyatpaing*." "There was no agreement to my knowledge that redemption was to be or would be allowed." The *thugyi* seems to me to be in the main a truthful witness, but it is obvious that he would be afraid of laying himself open to censure from his official superiors if he admitted having recorded a report of a sale when he knew that the real agreement was a usufructuary mortgage. His first statement is a guarded one. He does not say that the parties reported that they had sold and bought, but that they asked him to register a sale. Ma Dun says she was led to believe that it was usual to mention the transfer as an outright one, and there is not the least doubt that mortgages were frequently entered in register IX as sales.

Ma Dun says Maung Taik and Tha Po were present at the mutation of names. Maung Taik does not say he was present. Tha Po, the headman, says he was present and heard the defendant promise to allow Ma Dun to redeem the lands when she liked: he went away, leaving them in the *thugyi's* house. The *thugyi* does not remember whether Tha Po was present or not. He says Ma Dun's brother Po Te was present, but Po Te denies this, and from a subsequent admission of the *thugyi*, made in answer to a question by the Judge, it is quite certain that he was not present.

Both Maung Taik and Po Te support Ma Dun's statement that some days before mutation Lu O promised to allow Ma Dun to redeem. Po Taik, aged 69, seems to be a perfectly impartial witness, and his story seems a most probable one. He says defendant first pressed Ma Dun to give him the lands outright, and failing to persuade her he asked her to sell them and pay his debt or give him a usufructuary mortgage.

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The *thugyi* says Ma Dun tried to redeem in 1904, before the price of land began to rise, and the garden land alone was worth Rs. 700. Ma Dun's only object in giving possession of the lands must have been to stop the accumulation of interest. She could gain nothing, and might lose largely, by giving up all her rights in 1903 without receiving a single pice for the right of redemption. She admits having asked Ma So Nwe to sell the lands, but says she required Rs. 300 for the garden land alone. I am disposed to believe her.

The *thugyi* says he advised Lu O to allow redemption in 1904 because he thought Ma Dun would win if she sued for redemption. I think this is a strong indication that there was an agreement for redemption, and that the *thugyi* knew it.

There is another indication of the laxity which the *thugyi* permitted himself in making entries in register IX. The land was never registered in Ma Dun's name at all, but in the name of her deceased father, Maung Mo. The *thugyi* was informed at the time that Ma Dun had a brother, yet he registered the sale without even seeing the brother, Po Te. It was only a month later that he got Po Te to sign the entry.

To sum up. It is notorious that the custom of reporting mortgages as sales, which Ma Dun says she was led to believe existed, really did exist. Defendant's statement that he did not promise to allow redemption is not supported by any direct evidence except that of his nephew, whose evidence is untrustworthy. Ma Dun is supported by her brother and by Maung Taik and headman Po Tha, both of whom appear to be impartial. Ma Dun could gain nothing by the transaction which defendant sets up, and no motive for such a foolish action appears on the record. The *thugyi's* evidence, even if it stood alone, would not establish the fact that the lands were sold outright.

I therefore set aside the decree of the Divisional Court, and restore that of the Court of first instance except as to the six months allowed for redemption.

The respondents will pay the appellant's costs in all Courts, including second appeal No. 230 of 1906, and as the sum of these costs considerably exceeds the mortgage debt the respondents will restore the lands to the appellant forthwith.

Civil 2nd Appeal No. 274 of 1908.

Feb. 11th, 1909.

Before Mr. Justice Irwin, C.S.I.

P. V. VARIVAN CHETTY AND THREE OTHERS } *v.* PO SAING.

R. N. Burjorji—for appellants (plaintiffs).

Advocate, Duty of—negligence of advocate—absence of advocate on day fixed for hearing of case—arrangements made by advocate for case called during his absence—Civil Procedure Code, 1908, Order XLI, rule 19.

An appeal was dismissed for default of appearance of the appellant. Application was made to re-admit the appeal, supported by affidavits, in which it was stated that A and B, the members of a firm of advocates who represented the appellant, were absent from Rangoon on the date fixed for

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the hearing. They had asked another advocate, C, to look after their cases, and C had told the head clerk of A and B to get the case mentioned by some other advocate. The clerk, through a mistake, was absent when the case was called.

Held,—that appellants had not shown that they were prevented from appearing by any cause except the neglect of their advocates, for which no adequate excuse was put forward. The application was therefore dismissed.

Held further,—that A and B had made no attempt to provide for having the appeal argued on the day fixed, and the affidavits did not disclose any excuse for this neglect, nor any grounds on which a postponement could have been granted if counsel had appeared.

In this appeal the 21st December was fixed for hearing the appellant under section 551 of the Code of Civil Procedure, 1882. Under sub-section (*2*) of that section it was dismissed for default of appearance. On 20th January the present application was made to re-admit the appeal under the new Code, Order 41, rule 19. In support of the application affidavits have been made by Mr. R. N. Burjorjee and by the head clerk of the firm of Messrs. Burjorjee and Dantra, the advocates for the appellants.

The case as stated in the affidavits is as follows. On 21st December the members of the firm of advocates were absent from Rangoon. They had asked Mr. R. N. Burjorjee to look after their cases. On the morning of 21st December the clerks of the firm went to Mr. R. N. Burjorjee with the briefs in the cases fixed for that day. Mr. R. N. Burjorjee directed the head clerk Maung Ba to look after the cases on the appellate side; he said he would come there if he could; otherwise Maung Ba was to have the cases mentioned by some other counsel; and Mr. R. N. Burjorjee instructed Maung Ba what was to be done in each case. Mr. R. N. Burjorjee then went to conduct a case in the Subdivisional Court of Insein. Maung Ba went and waited in Court No. 1, where the bench was to sit. He had the cause list in his hand, and he made the mistake of thinking that all the cases on the list would be called in one and the same Court. He did not notice that the single Judge, before whom the present appeal was set down, was sitting in Court No. 2. Maung Ba had to attend to three cases before the bench. When they were disposed of about 12 o'clock he went to the Small Cause Court, and returned in three minutes. He then only, after asking a question of one of the bench clerks, realized that this appeal was before the Judge in Court No. 2. He hastened there, and found that the case had been dismissed. Mr. R. N. Burjorjee does not say at what time he arrived in Court from the Subdivisional Court.

The printed cause list is perfectly clear, and Maung Ba's explanation of his failure to have some counsel ready to appear when the case was called is absurdly inadequate, but that is a very minor point. Even if Maung Ba had got some advocate to hold the brief, that advocate would be unable to say anything except that Messrs. Burjorjee and Dantra were absent. He would be entirely ignorant of the facts of the case, and unable

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to put forward any grounds on which postponement could reasonably be granted.

On consideration of the facts stated in the affidavits I am forced to the conclusion that Messrs. Burjorjee and Dantra did not even attempt to make any provision for having the appeal argued on the day fixed; and neither in the affidavits nor at the hearing of this application was any excuse whatever offered for this neglect. Mr. R. N. Burjorjee's affidavit indicates that he, too, failed to consider seriously the obligations that he had assumed by undertaking to "look after" the appeal.

Appellants have not shown that they were prevented from appearing on 21st December by any cause whatever except the neglect of their advocates, for which no adequate excuse is put forward.

The application is dismissed.

Before Mr. Justice Hartnoll.

Special Civil 2nd Appeal No. 90 of 1908.

1. MAUNG ME
2. MA NGWE HLAING } *v.* MA SEIN.

Hay for *N. C. Sen*—for appellants (plaintiffs).
K. B. Banurji—for respondent (defendant).

Feb. 25th, 1909.

Want of consideration for promissory note—grounds for inquiring into question of consideration—inquiry into question not raised in pleadings—Negotiable Instruments Act, s. 118.

A was sued by Z on a promissory note alleged to have been executed by A in favour of Z on account of principal and interest due in respect of a former debt. A in defence denied execution of the note. Both the lower Courts found that the promissory note was void for want of consideration, but on second appeal to the Chief Court it was argued that there was consideration.

Held,—that as on the facts proved or admitted it was possible that there might have been consideration, and as A did not plead that there was none the question of consideration could not be gone into.

Maung Me and Ma Ngwe Hlaing sued Ma Sein under the following allegations to recover Rs. 500 They stated that they lent her on the 4th August 1901 Rs. 95 at interest on the security of a piece of garden land which was transferred to them; that on the same day they lent her another sum of Rs. 85 on interest; that when a demand was made for the principal of the debts and interest she paid Rs. 31-12-3 of the interest and executed a fresh document for the balance of the interest, namely, Rs. 35, which was to bear interest; that on the 14th August 1903, when demand was made for the principal sums and interest, she only paid Rs. 48-13-2, and that as regards the balance of the principal and interest due, which was Rs. 250, a deed of mortgage was executed, which they filed. By the mortgage deed it was stated the same piece of land was mortgaged which had already been given as security for the Rs. 95. The deed is dated the 18th August 1903, and is to the effect that certain garden land is mortgaged for the balance Rs. 250 principal and interest, and that Ma Sein will pay the Rs. 250 in *Tagu*, and that if the money

cannot be repaid, the garden land can be taken outright. Ma Sein allows in her evidence that the Rs. 250 were to bear interest. The plaint goes on to say that when demand was made for principal and interest Ma Sein only paid Rs. 67 and did not pay the balance due, which was Rs. 450 ; that then Ma Sein said that she could not pay the said balance, principal and interest Rs. 450 yet, and asked plaintiffs to take as security the same ·22 acre of garden land, which had formerly been mortgaged and delivered, with regard to which names had been transferred, and to execute a fresh document; that therefore the promissory note marked (o) annexed and submitted had to be executed and signed with interest at Rs. 2-4-0 per cent. per mensem and with the said ·22 acre of garden land as security. The promissory note bears date the 2nd August 1906. The plaintiffs further allege that they have been paying revenue on the garden land, which is in their names, and that they have made further demands for payment without success. They then make a calculation that Rs. 606-15-0 are due and ask for a decree with costs to sell by auction on account of Rs. 500, as they forego their claim to the further Rs. 106-15-0, the ·24 acre of garden land which has been made over and delivered as security, and take the proceeds of the said auction sale, and if the debt be not satisfied and a balance remain, to recover the said balance from the defendant with the interest contained in the document.

It should be noted that the suit is brought on a cause of action that is alleged to have occurred on the 2nd August 1906.

Ma Sein in her written statement allowed that all the transactions alleged in the written statement inclusive of the last—the one dated 2nd August 1906—were correct, and then stated that the statement—14th *lazan Waguung* 1268 (2-8-06)—in the eighth paragraph is not contained in the preceding paragraphs and that therefore it is barred by limitation. It is difficult to understand what is meant; but in her examination Ma Sein denies that she signed the promissory note. She then went on to say that it was not according to law that, after defendant's borrowing Rs. 180 principal, the principal and interest were added to make a fresh principal and secured under a fresh document with interest; and further that on account of the principal and interest Rs. 500, although the garden land measuring ·24 acre was made over and delivered as security only, as registration was not effected, the mortgage was not valid; that moreover the recovery of principal and interest due on the ·24 acre of garden land which was made over and delivered as security is barred by limitation and so that the garden land should not be sold by auction.

Ma Sein was examined by the Township Judge and she acknowledged the correctness of the different transactions alleged, except that she denied the signing of the promissory note. This denial implied also a denial of the alleged last agreement with respect to the land.

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The Township Judge in giving judgment found that it was unnecessary to determine whether Ma Sein signed the promissory note, as it was void for want of consideration. He then went on to find that the mortgage bond of date the 18th August 1903 was a valid one and that over Rs. 500 was due on it and he finally gave a mortgage decree for Rs. 500.

On an appeal being laid, the District Judge found that the promissory note was void for want of consideration, as cancellation of previous debts took place when it was executed ; that the mortgage bond of date the 18th August 1903 was unregistered and so that no mortgage decree could pass on it, and further that the time for passing a money decree on it had expired. He then further discussed the mortgage bond and finally allowed the appeal and dismissed the suit.

This further appeal has now been laid, and at the hearing it was urged that there was consideration for the promissory note and that the previous debt was the consideration. On behalf of the respondent it was contended that as the mortgage bond had not been cancelled nor returned there was no consideration.

The decree of the Township Judge seems to me to have been clearly wrong in that the appellants sued for a sum due on the promissory note and made their cause of action the promissory note. The decree was passed on another cause of action, namely, the mortgage bond of the 18th August 1903. As the appellants were not suing on the mortgage bond in this suit, a decree should not in my opinion have been given on it. Ma Sein's defence as disclosed in her written statement is most vague. The Township Judge states that she pleaded in it that the promissory note was void for want of consideration. I am unable to find this plea in the written statement, and I am of opinion that her real defence must be taken to be that disclosed in her examination—namely, a denial of signing the promissory note. It is not as if the admitted facts show that there was no consideration for the promissory note, and that there could not possibly have been any consideration. In the case of *Fleming* v. *Bank of New Zealand* (1), their Lordships of the Privy Council quoted with approval a definition of consideration given by Lush, J., in which he said : "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one part, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

Again section 2 (*d*) of the Indian Contract Act is to the following effect : "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

(1) App. Cases, L.R., 1900, at page 586.

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Applying these definitions to the present case I would remark as follows. It may be that there was a settlement between the parties and that the appellants agreed to take no immediate action to recover the debt due, if the respondent signed the promissory note sued on. If there was such an agreement there might be a benefit to the respondent, and there would be forbearance on the part of the appellant. If the appellants in such case agreed to take no immediate action, such an abstinence would be a consideration for the obligation incurred by the signing of the note. I am therefore of opinion that the promissory note does not necessarily fail for want of consideration and that as Ma Sein did not plead that there was no consideration, but on the other hand that she denied signing the note—a plea quite inconsistent with the other—the question as to whether there was consideration or not for the note should not be gone into. Under section 118 of the Negotiable Instruments Act the presumption is that the note was for consideration, and the burden of proof lay on Ma Sein to prove that there was none. In the absence of her plea to this effect I am unable to allow the matter to be gone into.

That part of the claim that asks for a mortgage decree cannot prevail, as the principal money secured was over Rs. 100, and so under section 59 of the Transfer of Property Act, which was in force at the time the promissory note was executed in the locality where it was executed, a mortgage could only be effected by a registered document.

The following issue is fixed:—

"Did Ma Sein execute the promissory note sued on?"

The proceedings will be returned to the District Court, who will return them to the Township Court, which will try the issue and come to a finding on it. The District Court on again receiving the proceedings will notice the parties, and after giving them an opportunity of being heard will also come to a finding on the issue.

The proceedings will then be submitted to this Court for final orders.

Criminal Revision No. 596A of 1908.

Feb. 26th, 1909.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR *v.* TUN LIN.

Order of appellate Court for retrial—order of Sessions Judge—disregard of order for retrial by District Magistrate.

A conviction was on appeal set aside by the Sessions Judge on the ground of certain illegal procedure, and a new trial was ordered. On reading the order for retrial the District Magistrate wrote an order to the effect that the accused had already been sufficiently punished and that therefore no fresh trial was necessary.

Held,—that the District Magistrate had no authority to disregard the the Sessions Judge's order for a retrial.

The accused Tun Lin was tried by a third class Magistrate for an offence under section 448 of the Penal Code, and was sent up to the Subdivisional Magistrate under section 349 of the Code of

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Criminal Procedure for higher punishment. The Subdivisional Magistrate, without recording any evidence, framed a charge under section 506, and convicted the accused thereon, and sentenced him to two years' rigorous imprisonment.

On appeal the Sessions Judge rightly held that the conviction was illegal because the third class Magistrate had no jurisdiction to try an offence under section 506: the Subdivisional Magistrate ought to have dealt with the case as if it had been submitted to him under section 346. The Sessions Judge therefore set aside the conviction and sentence, and ordered a new trial by a first class Magistrate. On reading the order of the Sessions Judge the District Magistrate wrote: "The accused has undergone two months' rigorous imprisonment, which under the circumstances appears to be a sufficient punishment. No fresh trial therefore appears necessary"; and there the matter dropped, on 2nd January 1909.

The District Magistrate has no authority to disregard the order of the Sessions Judge directing that a new trial be had. The order of the Court of Session is dated the 19th December 1908, and on that day a warrant was issued, addressed to the Superintendent of the Jail, directing him to detain the accused as an undertrial prisoner and to produce him when required before such first class Magistrate as the District Magistrate might direct, for the purpose of the new trial. When the District Magistrate decided that a new trial was not necessary it does not seem to have occurred to him that it was necessary to take any steps for the release of the prisoner. If he had thought of that point he would probably have seen that neither he nor any Magistrate had authority to release the prisoner without further inquiry. The District Magistrate has been asked to report what has become of the prisoner, and he reports that he is confined in jail under a warrant of the Subdivisional Magistrate, Myanaung, in Case No. 209. It is not clear what kind of a warrant that is, but it may be presumed that it is a warrant for execution of a sentence of imprisonment.

I direct that the order of the Sessions Judge for a new trial be carried into effect.

Criminal Revision No. 36A of 1909.

Feb. 26th, 1909.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR *v.* MAUNG THIN.

Amount of compensation paid out of fine—expenses incurred in prosecution—compensation for injury caused by offence—Criminal Procedure Code, s. 545.

The accused was convicted of illegally demanding and receiving money for the use of water, under section 21 (*e*) of the Fisheries Act, and was fined three times the amount received. The whole of the fine was ordered to be

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paid to the persons from whom the accused had taken the money. The prosecution had been instituted on the report of an official, and there was nothing to show that the persons from whom the money had been taken had incurred any expenses in the prosecution except those of attending as witnesses. There was further nothing to show that these persons had suffered any loss beyond that of the actual sums they had given to the accused.

Held,—that the order for the payment of the whole of the fines as compensation was not justified under section 545 of the Code of Criminal Procedure.

The summons was issued under section 420, Penal Code, but the accused was tried under section 21 (*e*) of the Fisheries Act. The fly-leaf of the record was not corrected, and in consequence the case appeared in the monthly return as one of cheating.

The sentence of three months' imprisonment in default of payment of the fine is illegal,—section 65, Penal Code, and section 25, Burma Act I of 1898.

The accused was convicted of illegally demanding and receiving money from ten persons. He was fined three times the amount of the illegal receipts. The Magistrate directed the whole of the fine to be paid to the persons from whom the accused had taken money. The Magistrate does not say under what provision of law he made this last order. I presume he considered that he was acting under section 545, Criminal Procedure Code.

It appears to me to be a matter of very doubtful policy to give these persons three times the amounts that had been taken from them, and I think section 545 can hardly support such an order. The prosecution was instituted without complaint on the report of an official. The ten persons aggrieved do not appear from the records to have incurred any expenses in the prosecution except the expense of attending Court as witnesses, and for this they would in the ordinary course be paid by the Magistrate out of public funds. The Magistrate does not say that these persons suffered any injury beyond the loss of the sums which they paid to the accused. In cases of extortion of similar offences the victims may often have to borrow money and pay interest for it, but there is no suggestion that that was done in the present case. I think therefore that the amounts awarded are considerably in excess of the amounts which could properly be awarded under clause (*b*) of section 545 (*1*), and there are no materials on the record which would support any award under clause (*a*) of the same section.

As the order was made three months ago, and no application to revise it has been made by the Deputy Commissioner or by any officer on the part of the Executive Government, I do not think it necessary to interfere.

Full Bench.

Criminal Revision No. 16B of 1909.

March 1st, 1909.

Before Sir Charles Fox, Chief Judge, Mr. Justice Irwin, C.S.I., Mr. Justice Robinson and Mr. Justice Bell.

KING-EMPEROR *v.* MAUNG PWA.

Dawson, Assistant Government Advocate—for the King-Emperor.

Burden of proof—exception—possession of spirit or fermented liquor for private use—possession of spirit or fermented liquor for sale—Excise Act, ss. 3 (1) (n), 30, 51.

When a person is proved to have had in his possession more than the quantity of foreign spirit or foreign fermented liquor specified in section 3 (1) (n) of the Excise Act, the burden of proving that such possession falls within the provisions of sub-section (2) of section 30 lies on him.

King-Emperor v. *Nga Chi*, (1906) 1 U.B.R., 1904—6, Excise, 7, referred to.

Crown v. *Lipyin*, (1905) 11 Bur. L.R., 227, overruled.

Irwin, J.—Maung Pwa was convicted under section 51 of the Excise Act of illegally possessing 48 quart bottles of beer. The defence was that he bought the beer for his own use.

Section 30 of the Excise Act prohibits the possession by any person of more than 12 reputed quart bottles of foreign beer without permission from the Excise authorities, and sub-section (2) of the same section enacts that nothing in this section extends to foreign fermented liquor purchased by any person for his private use and not for sale.

The Magistrate placed on the accused the burden of proving that the 48 quarts of beer were possessed for his own private use and not for sale, following the ruling of the Judicial Commissioner of Upper Burma in *King-Emperor* v. *Nga Chi* (1), in which a previous ruling of this Court by Mr. Justice Fox (now Chief Judge) in *Crown* v. *Lipyin* (2) was considered and dissented from. The accused applied for revision to the Sessions Judge, who has reported the case to this Court, remarking correctly that the Magistrate was bound to follow the ruling of this Court.

But I think the view of the law taken by the learned Judicial Commissioner is correct. To my mind sub-section (2) of section 30 is essentially an exception to the general rule laid down in sub-section (1). This becomes clearer when one attempts to throw the two sub-sections into one. Sub-section (1) applies to all kinds of fermented liquor; sub-section (2) applies only to foreign fermented liquor. In the present case the Magistrate inserted in the charge the words "for sale," and if sub-section (2) is not an exception it would apparently be necessary for the prosecution to do this in every case; but I do not think I have ever seen it done before and I do not think it can be held to be necessary.

(1) (1906) 1 U.B.R., 1904—6, Excise, 7.
(2) (1905) 11 Bur. L.R., 227.

I think sub-section (*2*) is a special exception within the meaning of section 105 of the Evidence Act, and the burden of proving facts which bring the case within sub-section (*2*) lies impartially on every person accused of an offence under section 51, without any distinction of race. But it lies lightly on a rich man. It is sufficient to show that he can easily afford to buy the liquor, and that he is in the habit of, occasionally at any rate, consuming it himself or placing it before his guests, so long as the quantity found in his possession is not unreasonable for those purposes. In some cases these facts may be so patent that the Court would be right in not asking the accused even to open his lips or to adduce any evidence, but that is analogous to many cases of homicide. The facts are often such that it is impossible for the witnesses to give a true account of the crime without stating plainly the facts which bring the case within one of the exceptions to section 300 of the Penal Code, and then the accused is entitled to be acquitted of murder without saying anything more than "not guilty" and without calling any witnesses, even though the law lays on him the onus of proving the facts which reduce the offence to culpable homicide not amounting to murder.

If section 105 did not exist, I think section 106 would throw the burden of proof on the accused. "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." Both the illustrations to this section refer to criminal cases. It would hardly be too much to say that this section would throw the burden on the accused even if the matter contained in sub-section (*2*) were not in the form of a proviso or exception, but were incorporated in sub-section (*1*). The purpose for which a man purchases liquor must be especially within the knowledge of that man.

The learned Sessions Judge expressed an opinion that the evidence does not justify the conclusion that the beer could not have been possessed by the accused for his private use. This of course was on the assumption that the onus was on the prosecution. If the onus be on the accused I think there is nothing on the record that should lead us to suppose that the Magistrate's finding is not correct.

The Sessions Judge also said that the Magistrate visited the accused's shop and made an estimate of the stock-in-trade, and thereby made himself a witness in the case and incompetent to try it. I agree that this was an irregularity, but it is necessary to take care not to press this doctrine too far. In the case of *Queen-Empress* v. *Manikam* (3), which the Sessions Judge cited, there is a quotation of a dictum of the Privy Council, which referred to a Judge making use of facts which came to his knowledge long before the institution of the suit, a very different matter from taking a view of a locality while a trial is pending. The learned Judges in the Madras case said "such inspection should only be

(3) (1896) I.L.R. 19 Mad., 263.

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made for the purpose of enabling the Magistrate to understand the better the evidence which is laid before him, and it must be strictly confined to that." I agree with that.

The petition for revision contained no mention of the irregularity of the Magistrate making an estimate of the goods in accused's shop, and I do not think this mistake constitutes any sufficient ground for interference with the conviction.

Bell, J.—I have had the advantage of reading Mr. Justice Irwin's judgment in this case and, as I agree with his reasoning and conclusion regarding the question of law referred to us, namely, as to the incidence of the burden of proof when the defence is set up by an accused person that fermented liquor in his possession was purchased by him for his private use and not for sale, I propose to add only a few words with regard to a peculiar feature of the case which is now before the Court. It seems to me that, if our decision that the burden of proof rests upon the accused person is sound, the Magistrate's finding that he was guilty of the offence charged was the correct one for him to arrive at upon the evidence before him, even if the facts which the Magistrate believed that he learnt in the course of his visit to the shop be eliminated from such evidence In these circumstances I am of opinion that this visit to the shop was merely an irregularity of such a character as would not justify this Court in interfering with the conviction.

Robinson, J.—The question before the Full Bench may be stated thus :—

When a person charged with having in his possession any quantity of fermented liquor larger than that specified in section 3 (*l*) (*n*) of the Act pleads that he purchased it for his private use, does the onus lie on him to prove this fact or on the prosecution to prove that it was not so purchased?

In the case of *Crown* v. *Lipyin* (2), it was held that the onus lay on the prosecution to prove that an offence had been committed.

In *King-Emperor* v. *Nga Chi* (1), the contrary view was taken after a consideration of the former ruling.

The offence of being in possession of more than a specified quantity of spirit or liquor is created by section 30 (*l*) of the Act. It applies to all persons. The section then continues—

"(2) Nothing in this section extends to—

(*a*) any..... foreign fermented liquor.....purchased by any person for his private use and not for sale."

Is sub-section (2) merely an exception to sub-section (*l*)? If so, then by virtue of section 105 of the Evidence Act the onus lies on the accused.

The section makes mere possession over a certain quantity an offence, but excludes from the offence possession of that or a larger quantity if purchased for private use and not for sale. The result, whatever the language used may be, is that to render such possession no offence the fact of purchase for private use

and not for sale must be proved. Unless that is proved the possessor is guilty. In other words, it is no offence to possess for private use, and that is the commonest form of expressing an exception.

This provision follows on the main proposition and merely as a corollary. If it was intended to be a separate and distinct provision it would have appeared in a separate section. It, however, is merely a sub-section to the main provision and follows as a proviso or exception to it.

If it is not, then the result would be that an accused would merely have to plead that he bought for private use and thus the onus would be thrown on the prosecution to prove that which is peculiarly within the knowledge of the accused. The prosecution would not know from whom the accused had purchased and what his ordinary purchases were. The prosecution does not know his ordinary income or habits or any of the facts which might throw light on the matter. This would be contrary to the rule embodied in section 106 of the Evidence Act, and the Court would generally be thrown back on presumptions to be deduced from facts which could not easily be satisfactorily established. The accused would on the other hand be in a position to prove the facts bearing on the matter.

The general rule no doubt is that the prosecution must affirmatively establish the guilt of the accused, but here the Legislature has made certain acts an offence which are not in themselves criminal. The prosecution must prove those acts, but having done so the onus is shifted. The Act then provides that although those acts are proved it is nevertheless not an offence provided certain further facts are established. Those further facts being over and above the necessary ingredients of the offence, it appears to me the accused must prove them.

The Bill which eventually became Act XII of 1896 was introduced to incorporate the amendments and changes suggested in the Report of the Hemp Drugs Commission. It was, however, found that the old Act had already been amended on numerous occasions and so it was decided to repeal and re-enact it. This section is merely a verbatim re-enactment of section 21 of Act XXII of 1881. This was enacted only three years after the Opium Act of 1878, in which it is enacted that mere possession shall amount to guilt unless the possession is satisfactorily accounted for. A similar provision is to be found in the Abkari Acts for Bengal, Madras and Bombay. But the absence of such a provision cannot show that the onus is not on an accused. It would no doubt have been clearer, but we must interpret the Act as it stands, and I fail to see how the form of expression used makes the provision anything but an exception.

I would therefore hold the onus lies on an accused to prove the liquor had been purchased for private use and not for sale.

In the present case it has been proved that the accused is a petty trader. His position and income are not such as show he

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might buy the quantity of beer for his personal use or for the entertainment of his friends. These facts being proved presumptions must be drawn. I cannot agree with the learned Sessions Judge that the evidence of two other petty traders is reliable or that it establishes that his income was Rs. 5 or Rs. 10 a day. I would therefore hold that in this case the offence has been established.

Fox, C.J.—Upon reconsideration of the language of section 30 of the Excise Act, I concur in holding that when a person is proved to have had in his possession more than the quantity of foreign spirit or foreign fermented liquor specified in section 3, sub-section (*1*), clause (*n*), he is liable to conviction unless he satisfies the Court that he either had possession as a common carrier or warehouseman as such, or that he purchased it for his private use and not for sale.

My ruling in *King-Emperor* v. *Lipyin* (2) is overruled by this Full Bench decision. No interference with the conviction or sentence being called for on other grounds, the record will be returned.

Full Bench.

Criminal Revision No. 14B of 1909.

March 2nd, 1909.

Before Sir Charles Fox, Chief Judge, Mr. Justice Irwin, C.S.I., Mr. Justice Robinson and Mr. Justice Bell.

KING-EMPEROR *v.* NAWZU.

Dawson, Assistant Government Advocate—for the King-Emperor.

Seizure of opium—search of vessel for opium—authority to search for opium in boat—"in transit"—Opium Act, ss. 14, 15, 19.

Although opium which is being carried in a boat from place to place is "in transit" within the meaning of section 15 of the Opium Act, even when the boat is temporarily stationary, the section does not authorize an officer to enter and search a boat against the will of the person in charge of it between sunset and sunrise.

Fox, C.J.—Reading the reference as a whole it appears to me that what the District Magistrate wants a ruling on is the following question:—

"Is an excise officer who receives credible information that opium is being carried about for sale in a boat, which may at the time be at anchor or otherwise kept stationary, but which, he is told, has been and is in the course of moving about from place to place, authorized by section 15 of the Opium Act to enter and search the boat without a warrant between sunset and sunrise, and to seize any opium found in it which he has reason to believe to be liable to confiscation?"

Section 15 of the Act applies to and authorizes *all* officers of the Excise and other departments mentioned in section 14 to seize in any open place or in transit any opium which one of such officers has reason to believe to be liable to confiscation. Even a peon or constable can do this: consequently if the above question is answered in the affirmative, the precautionary provision in section 14 confining the right to enter a building, vessel or

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enclosed place to officers authorized by the Local Government, who must be above the rank of a peon or constable, would be nugatory.

In my opinion an entry by an excise officer into a building, vessel or enclosed place, to be justifiable, must be authorized under either section 14 or section 19 of the Act.

Opium which is being carried about from place to place in a boat is no doubt "in transit" although the boat may be temporarily anchored or otherwise fastened, so that if an officer who has entered on a boat lawfully sees opium in it, he may seize it if he has reason to believe that it is liable to confiscation; but section 15 of the Act does not authorize an officer to enter a boat without the permission of the person in charge of it. In order to justify entry and search of a boat between sunset and sunrise against the will of the person in charge or without his permission, an officer must obtain a warrant from another officer who must be authorized under section 19 of the Act.

Irwin, J.—I concur.

Robinson, J.—I concur.

Bell, J.—I also concur.

Before Mr. Justice Hartnoll.

Criminal Miscellaneous Application No. 2 of 1909.

March 10th, 1909.

SHWE MYAT *v.* V. M. C. P. SUBRAMONIAN CHETTY.

Palit—for applicant.

Place of trial—jurisdiction—consequences ensuing on act—Criminal Procedure Code, s. 179.

The words "any consequence that has ensued" in section 179 of the Code of Criminal Procedure mean a consequence such as requires to be proved to establish the offence alleged. They do not include remote consequences ensuing after the offence is complete, and not forming an integral part of the offence.

The deed that is alleged to be fraudulent was executed in the Tharrawaddy district according to the proceedings. If an offence has been committed under section 206 of the Indian Penal Code it was complete when the transfer took place. Section 179 of the Code of Criminal Procedure is as follows: "When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be enquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued." It is true that by reason of the transfer the Chetty firm may have been unable to execute a decree that it obtained at Paungde; but such a consequence does not seem to be a consequence such as is referred to in section 179 of the Procedure Code. The inability to execute the decree is a consequence following on the offence having been previously committed and is not a fact that must be proved to show that the offence has been committed. It is not an integral part of the offence but a consequence arising

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from it. As I read section 179, the consequence referred to there must be one of the facts to be proved to establish the offence. The illustrations show what is meant. I am therefore of opinion that section 179 is not applicable to the present case. We are therefore thrown back on the ordinary rule which is contained in section 177, and so the offence should be tried in the Tharrawaddy district.

In passing the order that is now objected to, the Magistrate should have confined himself to the point and not have recited facts that did not concern it. He thereby opened himself to the suggestion that he is biassed against the applicant.

I transfer the case to the Court of the District Magistrate, Tharrawaddy, or to the Court of such Magistrate as the District Magistrate may appoint to try it.

I see no reason to stay the case pending the disposal of the proceedings on the civil side.

Full Bench—(Civil Reference.)

Civil Reference No. 6 of 1908.

Dec. 18th, 1908.

Before Sir Charles Fox, Chief Judge, Mr. Justice Irwin, C.S.I., Mr. Justice Hartnoll, Mr. Justice Robinson, and Mr. Justice Bell.

MAUNG TUN
MA MIN MO } *v.* MA NGAN.

Lentaigne and *McDonnell*—for appellants (plaintiffs).

May Aung—for respondent (defendant).

Execution sale, absence of warranty in—conditions of execution sale—rights of purchaser of moveable property deprived of property for want of saleable interest—recovery of price paid at sale of moveable property in which judgment-debtor had no saleable interest.

When moveable property is sold in execution of a decree, and it is subsequently found that the judgment-debtor had no saleable interest in the property, and the purchaser is thereupon deprived of the property, the purchaser is not, in the absence of fraud, entitled to recover the price paid from the decree-holder.

San Baw Ri v. *Tun Pru*, (1907) 1 Bur. Law Times, 72; *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen*, (1878) I.L.R. 3 Cal., 806; *Sundara Gopalan* v. *Venkatavarada Ayyangar*, (1893) I.L.R. 17 Mad., 228; *Dorab Ally Khan* v. *Abdool Azeez*, L.R., 5 I.A., 116; *Sowdamini Chowdrain* v. *Krishna Kishor Poddar*, (1869) 4 Ben. L.R., F.B., 11; followed.

Munna Singh v. *Gajadhar Singh*, (1883) I.L.R. 5 All., 577; *Mo[illegible] Laul Roy* v. *Bhawani Kumari Debi*, (1902) 6 C.W.N., 836; *Shant[illegible] Chandar Mukerji* v. *Nain Sukh*, (1901) I.L.R. 23 All., 355; *Hira Lal* v. *Karim-un-nisa*, (1880) I.L.R. 2 All., 780; *Mohanund Holdar* v. *Aki[illegible] Mehaldar*, (1868) 9 W.R., 118; *Kanaye Pershed Bose* v. *Hur Chand Mano[illegible]* (1870) 14 W.R., 120; *Protap Chunder Chuckerbutty* v. *Panioty*, (1883) I.L.R. 9 Cal., 506; *Sant Lal* v. *Ramji Das*, (1886) I.L.R. 9 All., 167; *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*, (1875) L.R., 2 I.A., 131, at page 143; referred to.

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The following reference was made to a Full Bench by Mr. Justice Irwin :—

Defendant-respondent Ma Ngan attached in execution of a decree against Ma Kyi Yin a boat, which was sold by the Court and bought by plaintiffs-appellants in August 1905. In the following December Murgappa Chetti got a mortgage decree on the boat, and it was sold again under that decree. Plaintiffs sued Ma Ngan for compensation, and got a decree.

On appeal the learned Judge of the Divisional Court referred to the Full Bench ruling of the Allahabad High Court in *Munna Singh* v. *Gajadhar Singh* (1), which in his opinion justified the decision of the Court of first instance, but being bound by a contrary decision, as he thought, of this Court in *San Baw Ri* v. *Tun Pru* (2), he set aside the decree of the lower Court. He presumably meant to dismiss the suit, but did not do so.

The head note of the Allahabad ruling quoted above is, I think, a little misleading. The ruling is merely an exposition of the meaning of section 315 of the Code of Civil Procedure, which relates to immoveable property only. The Divisional Judge, I think, was clearly wrong in thinking that some words of Mr. Justice Brodhurst's which he cited meant that a purchaser of immoveable property has a right of suit independently of section 315. The substance of the ruling is that the right conferred by section 315 can be enforced either in execution or by a suit.

What was argued before me was that section 298 of the Code of Civil Procedure must have been overlooked. The learned counsel contended that the omission to mention the mortgage in the proclamation of sale was a material irregularity, and that under section 298 not merely a material irregularity but any irregularity gives a right of suit to the party injured by it. I was not referred to any authority directly bearing on the point. Mr. McDonnell cited *Moti Laul Roy* v. *Bhawani Kumari Debi* (3) as to the meaning of a material irregularity in section 311, but the facts in that case were such that I think it can afford no assistance in the present.

The ground of the decision in *San Baw Ri* v. *Tun Pru* (2) is that it has been repeatedly held that in judicial sales there is no warranty of title either by the Sheriff or by the judgment-debtor. Three authorities were cited:—*Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (4), *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5), and *Shanto Chandar Mukerjî* v. *Nain Sukh* (6). The first is a judgment of the Privy Council on the common law of England as administered in Presidency Towns. The property sold was land, and the English law relating to chattels was applied because the English distinction between real and personal estate does not exist in India. In the second case it does not appear whether the property sold was

(1) (1883) I.L.R. 5 All., 577.
(2) (1907) 1 Bur. Law Times, 72.
(3) (1902) 6 C.W.N., 836.
(4) (1878) I.L.R. 3 Cal., 806.
(5) (1893) I.L.R. 17 Mad., 228.
(6) (1901) I.L.R. 23 All., 355.

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moveable or immoveable: the learned Judge held that the decision of the Privy Council first mentioned is authority for holding that the implied warranty of title in respect of sales by private contract cannot be extended to Court sales, except so far as such extension is justified by the processual law in India. In the third case the property sold was land; the chief point decided was that when the judgment-debtor has some saleable interest the purchaser cannot recover under section 315; and incidentally it was affirmed that there is no warranty of title.

In the present case there is no question of fraud, and I think it is implied in the pleadings and judgments that the decree-holder knew nothing about the mortgage when she caused the boat to be attached and sold The case of *San Baw Ri* v. *Tun Pru* (2) was decided on similar facts. I have some doubt whether the decision in that case was correct. I express no opinion at present on the meaning of section 298. If that section does not confer a right of suit the decision must be according to justice, equity, and good conscience, under section 13 (3) of the Burma Laws Act. The boat was mortgaged for Rs. 1,400, and at the judicial sale it fetched only Rs. 630. Assuming that the decree-holder in good faith knowing nothing of the mortgage caused the boat to be attached and sold, is it just or equitable that she should be allowed to retain the sale-proceeds which she certainly would not have obtained if she and the purchaser had known of the mortgage? There is a good deal to be said against that proposition.

I therefore refer to a bench the question:—"When moveable property is sold in execution of a decree, and it is subsequently found that the judgment-debtor had no saleable interest in the property, and the purchaser is thereupon deprived of the property, is the purchaser, in the absence of any fraud, entitled to recover the price paid from the decree-holder?"

The opinion of the Bench was as follows:—

Fox, C.J.—In *San Baw Ri* v. *Tun Pru* (2), Moore, J., based his decision, which, if followed, would answer this reference in the negative, on the ground that it had been repeatedly held that in sales by a Court under decrees there was no warranty of the judgment-debtor's title to the property sold, either by the Court's officer or by the judgment-creditor. The decisions to which he referred are all based upon the decision of their Lordships of the Privy Council in *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (4), in which their Lordships stated at some length the principles applicable to a sale of property against the will of its owner, and distinguished such sales from sales by contract made by the owner. The facts on which the decision was given were that Khajah Moheeooddeen had obtained a decree against Khajah Abdoos Samut and Wazeer Khan in the Supreme Court at Calcutta. To enforce that decree Khajah Moheeooddeen's attorney requested the Sheriff of Calcutta to seize properties of the defendants in their possession which

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would be pointed out to him by Khajah Moheeooddeen. The Sheriff of Calcutta at the latter's instance seized and sold properties situate in a province not within the jurisdiction of the Calcutta Supreme Court. This sale was set aside by the Court having jurisdiction in that province. The executor of the auction-purchaser sued Khajah Moheeooddeen for recovery of the amount he had paid for the property. The case was first heard and decided on the preliminary point of whether the plaintiff had a cause of action and a remedy against the execution-creditor. The High Court decided that he had not. Their Lordships of the Privy Council distinguished the case of a sale by a Sheriff of property within his jurisdiction from the case of a sale by him of property not within his jurisdiction, and the case before them being one of the latter class, they reversed the decree of the High Court, and remanded the case for trial on the ground that the sale having become inoperative and ineffectual, solely because the Sheriff had acted beyond his jurisdiction, they could not say that the plaint and other documents on the record did not disclose a *primâ facie* case for some relief against the defendant Khajah Moheeooddeen.

Referring to the case of a sale by a Sheriff of property *within his jurisdiction*, their Lordships made the following remarks:—

> Now it is of course perfectly clear that when property has been sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor.

The reasons given for this are that all that is sold and bought at a Sheriff's sale is the right, title and interest of the judgment-debtor with all its defects, and that neither the Sheriff nor the judgment-creditor gives any covenant or warranty as to the judgment-debtor having a good title to the property.

Their Lordships agreed with the High Court in regarding Khajah Moheeooddeen, the judgment-creditor, as a principal in the transaction, but differed from the High Court's view that the case must be governed by the ordinary rules relating to vendors and purchasers upon voluntary sales. Their reason for this was that Khajah Moheeooddeen had directed the Sheriff to sell in his character of Sheriff, and he had not professed to sell, nor could he have sold, as for himself. He intended the sale should be, as in fact it was, a sale by the Sheriff as Sheriff, and with the incidents attaching to such a sale.

The sale had been of property outside a Presidency Town and it is to be observed that their Lordships applied the rules of English law to such a sale. As far as I can find, it has never been questioned that their statement of the law is applicable to all Court sales whether by Sheriffs or by Court bailiffs.

By the Civil Procedure Code of 1877 the Legislature gave a remedy to auction-purchasers of immoveable property when the judgment-debtor has no saleable interest in the property sold, and when for that reason the purchaser is deprived of it. Under

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section 315 the auction-purchaser might get back in execution proceedings his purchase-money, and possibly interest on it, from the person to whom it had been paid. In *Hira Lal* v. *Karim-un-nisa* (7), it was held that the provisions of the section could not be applied retrospectively, and in that case an auction-purchaser who was subsequently deprived of the property he had bought at a Court sale was held to have no cause of action or remedy against the judgment-creditor who had brought the property to sale.

In *Munna Singh* v. *Gajadhar Singh* (1), it was held that an auction-purchaser of immoveable property, in case it turned out that the judgment-debtor had no saleable interest in the property, might recover his purchase-money by suit, and that he was not limited to the special procedure in execution provided by section 315.

In *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5), Mr. Justice Muttusami Ayyar referred to their Lordships' decision in *Dorab Ally Khan* v. *Abdool Azeez* (8) in the following terms:—

> The decision of the Privy Council seems to me to be an authority for the proposition that the implied warranty of title in respect of sales by private contract cannot be extended to Court sales, except so far as such extension is justified by the processual law in India . . . What I hold is that where the Court sale is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by section 315. . . . It follows therefore that the judgment-creditor cannot be treated as if he was the vendor, and the Court sale cannot be treated as if there was an implied warranty of title as in a private sale, except so far as is warranted by the language of section 315.

Shanto Chandar Mukerji v. *Nain Sukh* (6) is another case in which the risks of a purchaser at a Court sale are pointed out. It was held that the purchaser must be taken to buy the property with all risks and all defects in the judgment-debtor's title, except as provided by sections 313 and 315, and that in the absence of fraud his only remedy is to recover back his purchase-money where it is found that the judgment-debtor had no saleable interest in the property at all, and that he cannot by suit, any more than by application, obtain a refund in proportion to the extent to which the judgment-debtor had no interest.

All the above cases were cases in which there had apparently been sales of immoveable properties: it may be taken as settled law that now a purchaser of immoveable property at a Court sale who is deprived of that property by some one else proving that the judgment-debtor had no saleable interest in the property may recover the purchase-money he paid from a judgment-creditor who received it. No provision similar to the 2nd, 3rd and 4th clauses of section 315 of the Code has been made by the Legislature for a case in which it turns out that a judgment-debtor had no saleable interest in moveable property sold as his at a Court sale, and if Muttusami Ayyar, J.'s view of the effect of their

(7) (1880) I.L.R. 2 All., 780. (8) L.R., 5 I.A., 116.

Lordships' decision and of subsequent legislation is correct, it must be confessed that the case of a purchaser of moveable property at a Court sale who is subsequently deprived of the property by some one proving a paramount title to it, is a hard one.

Section 298 of the Code deals only with irregularity in publishing or conducting a sale. The real owner can recover his property from the auction-purchaser by suit irrespective of any question of irregularity—see *Mohanund Holdar* v. *Akial Mehaldar* (9). The real owner may also recover the value of his property from a decree-holder who has wrongly brought it to sale—see *Kanaye Pershed Bose* v. *Hur Chand Manoo* (10). There is, however, no decision, as far as I can find, which is in favour of an auction-purchaser who is deprived of moveable property being able to recover from the decree-holder who received the purchase-money paid for the property.

It may seem inequitable that he should not have a right to recover his money from the man who can only have received it wrongly, but in the face of their Lordships' decision in *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (4), and in the absence of any legislative provision contemplating such a right, I am constrained to hold that he has none It cannot be assumed that their Lordships overlooked the rule that the Courts of India are bound to decide according to justice, equity, and good conscience, and it must be assumed that in appeals from the Indian Courts their Lordships themselves follow that rule. The explicit statement of the law as to the absence of right in an auction-purchaser at a sale by a Court's officer within his jurisdiction to recover from either the officer or the judgment-creditor, is binding on the Courts of India until their Lordships rule otherwise or until some legislative provision gives him a right.

I would answer the question referred in the negative.

Irwin, J.—The case of *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (4) was a suit on the Original Side of the High Court of Calcutta. The cause of action set out in the plaint was that the Sheriff of Calcutta, acting under a writ of *fieri facias* in execution of a decree of the late Supreme Court, had sold immoveable property outside the jurisdiction of the Court, the purchaser had subsequently been evicted because the Sheriff had acted outside the jurisdiction, and the purchaser therefore sued the decree-holder for the sale-proceeds as money had been received. The question was whether the plaint disclosed a cause of action, and their Lordships said they could not say that a *primâ facie* case for some relief was not disclosed.

The chief ground for that decision was that the Sheriff had acted *ultra vires*. The dictum which is of importance in this case relates to sales in which the Sheriff acts properly and within his jurisdiction. The whole judgment refers solely and exclusively

(9) (1868) 9 W.R., 118. (10) (1870) 14 W.R., 120.

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to the law administered by the Original Side of the High Court, and I do not think their Lordships would approve of the dictum being held to be binding on Courts which have to administer a different law.

But although I think that dictum is not binding on us in the present case I can find no authority for saying that in the mufassil either the bailiff or the decree-holder gives any warranty of title. It is well understood that only the right, title and interest of the judgment-debtor is sold. In this respect the law of the mufassil does not differ from the law which prevails in the Presidency Towns.

I do not think it is necessary to decide whether the Contract Act applies to judicial sales or not. My opinion is that section 109 of that Act cannot help the plaintiff by reason of the concluding eight words, "unless a contrary intention appear by the contract." If the judicial sale be governed by the Act it is still a sale with all the incidents ordinarily attaching to such sales, and as one of the ordinary incidents of such sales is that only the right, title and interest of the judgment-debtor is sold, without any warranty of title, it must be held that that intention appears from the contract. It is perhaps unfortunate that no special warning to that effect is required by law to be inserted, or is in fact inserted, in proclamations of sale, but that, I think, cannot effect the well-established rule that it is so.

As for section 298 of the Civil Procedure Code, 1882, I am unable to hold that the omission to mention a mortgage of which the decree-holder had no knowledge is an irregularity in publishing or conducting the sale.

As a last resort the plaintiff urges that the Court has an inherent power to compel the decree-holder to refund the sale-proceeds. If we assume that the Courts had last year under the old Code the same inherent powers as are expressly recognized by section 151 of the new Code, that only means that the absence of an express rule of procedure cannot hinder a Court from doing what is necessary for the ends of justice. A right of suit is quite a different matter from the machinery by which that right is enforced, which is the proper sphere of a procedure code.

I think it would be equitable that in the case specified in this reference the purchaser should be entitled to recover the purchase-money, but this would constitute a special exception to the established rule that there is no warranty of title. To make such an exception would be to legislate. The purchaser stands on an entirely different footing from the owner of property who is deprived of his property by attachment, and sale for his own action in bidding contributes to the situation in which he suffers loss, and he bids at his own risk.

I think it is unfortunate that paras. 2, 3 and 4 of section 315 of the Civil Procedure Code, 1882, were not extended to moveable property. The reason may be that occasion for such a rule can

seldom arise. It probably could never arise but for the recognition in this country of mortgages (as distinguished from pledges) of moveable property.

For the reasons above given I am constrained to answer the question referred in the negative.

Hartnoll, J.—Their Lordships in the case of *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (4) have made a clear statement as to what the law is, and that statement, as far as I can see, applies to the present case. Mr. Lentaigne urged that we should take into consideration section 109 of the Contract Act, but, as far as I can see, their Lordships in the case cited above laid down that sales in execution of decrees stand on a different footing to private sales, and that in a sale in execution of a decree it is only the right, title and interest, whatever that may be, of the judgment-debtor that is professed to be sold. It was urged that in every sale in execution the decree-holder asserts that the property belongs to the judgment-debtor and so warrants a good title. I am unable to agree to this.

It was also urged that a right of suit is given by section 298 of the Civil Procedure Code. I am unable to agree that any such irregularity as would come within the meaning of that section has been disclosed. Section 287 lays down that in the proclamation of sale certain particulars shall be specified as fairly and accurately as possible. It may not have been within Ma Ngan's knowledge that the boat was incumbered, and if it was not it would not have been possible for her to state the fact. It seems to be only possible, according to the present state of the law, for an auction-purchaser at a sale in execution of a decree to recover his purchase-money under the circumstances mentioned in section 315 of the old Code and which are reproduced in the Code that has just come into force. I would therefore answer the question referred in the negative.

Robinson, J.—The question referred to the Full Bench is as follows:—

"When moveable property is sold in execution of a decree, and it is subsequently found that the judgment-debtor had no saleable interest in the property, and the purchaser is thereupon deprived of the property, is the purchaser, in the absence of any fraud, entitled to recover the price paid from the decree-holder."

The first point for consideration is the dictum of their Lordships of the Privy Council in *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (4). Their Lordships say:—

> Now it is of course perfectly clear that when property has been sold under a regular execution and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor. This, however, is because the Sheriff is authorized by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warrant ing that title to be good.

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It is true that the case their Lordships were dealing with was one of sale of immoveable property and one where the Sheriff's action was *ultra vires*. But they held that the law applicable was the English law relating to the sale of chattels rather than that relating to the sale of real estate. *A fortiori* that law should govern the case of the sale of moveable property. It is true that they were dealing with a writ of *fieri facias*, which arises only in Presidency Towns. But the general statement of the law which I have quoted above applies in the case of a sale by the Court's bailiff when the attachment and sale are perfectly regular, as they were in this case that is before us. There is no warranty of title and consequently no remedy.

It has been urged that section 109 of the Contract Act shows that the law of England as it was when the Privy Council ruling was passed has not been adopted in India and that therefore the ruling is not now of binding force. But the ruling was passed after section 109 had been enacted. Moreover, section 109 applies to the case of a sale by the owner and not to the case of a sale *in invitum*. Here the judgment-creditor is the vendor, but vendor merely of what rights the judgment-debtor had. In the present case he was not, and could not well have been, aware of the mortgage and he did not warrant the title ; therefore the basis of the rule in section 109 does not exist. But sales of chattels in execution of a decree have never been included in section 109, and neither the bailiff nor the judgment-creditor can be held to have warranted the title.

This being so there is no question of the inherent power of the Court. It is not a question of administering equity. Section 298 of Act XIV of 1882 merely provides for a special case. The sale in the case of moveable property is not to be set aside for an irregularity in publishing or conducting the sale, and in the case of such an irregularity the purchaser is allowed to recover his money. But here there was no such irregularity, so the section does not apply.

But even if the ruling of their Lordships could be neglected on the ground that they were dealing with a sale of immoveable property under a writ taken from the English law and only in existence in Presidency Towns and that therefore the English law cannot be held to be applicable here, we have to decide as to a sale by a bailiff in execution of a decree under the Code of Civil Procedure. There being no warranty of title the rule of *caveat emptor* must apply. Equity might step in in the case of fraud, but in the absence of fraud what equity is there? I think none, for the purchaser buys subject to the chance of a paramount title being discovered later. I would therefore answer the question referred in the negative.

Bell, J.—The question which has been referred to the Full Bench is as follows:—

"When moveable property is sold in execution of a decree, and it is subsequently found that the judgment-debtor had no

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saleable interest in the property and the purchaser is thereupon deprived of the property, is the purchaser, in the absence of any fraud, entitled to recover the price paid from the decree-holder?"

Before dealing with this question, I feel bound to express a doubt as to whether it really arises in the case in which the present reference has been made. In this case the property sold was in fact the property of the judgment-debtor, though it was subject to an incumbrance which seems to have more than covered the value of the property. I do not desire to express a decided opinion on this point, which has not been argued before us, but, as at present advised, I confess that I am disposed to agree with the decisions in, for instance, the cases of *Protap Chunder Chuckerbutty* v. *Panioty* (11) and *Sant Lal* v. *Ramji Das* (12) as to the meaning of the words "no saleable interest."

Putting this on one side, I think that the question referred to us admits only of an answer in the negative, except in those cases in which there is an express warranty that the judgment-debtor has a good title to the property sold. This exception apart, it seems to me to be clear from the decisions of the Privy Council and of the High Courts at Calcutta and Bombay that the auction-purchaser could not have recovered the price under the law as it stood prior to 1872, and I do not think that there has been any alteration in the law on this point since that date. In *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (4), where the Sheriff of Calcutta, purporting to act under a writ of *fieri facias* which authorized him to seize the property of the debtor which lay within his territorial jurisdiction, sold property not within such jurisdiction, the Judicial Committee held that, as he had acted *ultra vires*, he was in the position of an ordinary person who had sold that which he had no title to sell. But their Lordships remarked that if the property had been sold under a regular execution and the purchaser had afterwards been evicted under a title paramount to that of the judgment-debtor, he would have had no remedy against either the Sheriff or the judgment-debtor, because the Sheriff was entitled by the writ to seize the property of the execution-debtor which lay within his jurisdiction and to pass the debtor's title to it without warranting that title to be good. Several reasons have been put forward why we should not follow the rule here indicated. Apart from the respect naturally paid to pronouncements of the Judicial Committee even when they are only *obiter*, the first reason, which is that these remarks were merely *obiter dicta*, seems to me to be of no weight, both because their Lordships were merely enunciating an undisputed rule of law and because this particular statement of the law has been followed in subsequent judgments of the Indian High Courts. The other objection is that, as their Lordships were dealing with a writ of *fieri facias* issued by the High Court of Calcutta in its Original Jurisdiction and applied the English law

(11) (1883) I.L.R. 9 Cal., 506. | (12) (1886) I.L.R. 9 All., 167.

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relating to the sale of chattels to the case, their remarks are of no assistance in determining what is the law of India relating to the sale of chattels in execution. It is true that the Procedure Code of 1859 did not apply to the proceedings in execution which were under consideration in that case, but, as I will point out later, that fact does not seem to me to detract from the value of their decision as a guide in cases governed by the Codes of 1877 and 1882, and in fact this decision has been followed in cases which have come before the Indian High Courts on appeal from mufassil Courts with regard to sales effected since 1877.

As to decisions under the Code of 1859, I need mention one only, as it is a decision of a Full Bench of the Calcutta High Court which was approved by the Privy Council in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (13). I refer to the case of *Sowdamini Chowdrain* v. *Krishna Kishor Poddar* (14), in which it was held that when an auction-purchaser at a sale in execution of a decree bought the right, title and interest of the judgment-debtor in the property sold in execution and it was subsequently found that the latter had no right, title or interest whatever in the property, no suit would lie against the decree-holder or the judgment-debtor to recover back the money which the auction-purchaser had paid. As Peacock, C.J., pointed out (page 16),—

> A purchaser at a sale in execution knows that all that he purchases is the right and title of the judgment-debtor. He knows that no one guarantees to him that the judgment-debtor has a good title and he buys the property with his eyes open and regulates the price which he bids for the land with reference to the circumstances under which he is purchasing and the risk he runs.

The property sold in that case was land situate not in Calcutta but in the mufassil of Bengal, and the case came up on appeal from a mufassil Court.

All the execution sales dealt with in the abovementioned cases were held before 1872, and it is suggested that the law has since been altered by the Legislature. One of the enactments appealed to in support of this contention is section 109 of the Indian Contract Act, but I do not think that the argument based on this section is a sound one. In the first place it seems to me to be in direct opposition to the views expressed by the Privy Council in *Dorab Ally's* case. Furthermore, even if we assume that in India the rule relating to sales made *in invitum* by an officer of the Court originally was adopted because the similar rule embodied in the maxim *caveat emptor* then governed private sales made by and with the free consent of owners, the former rule was well established in 1872. That being so it could be altered only by direct legislative enactment and could not be affected by an enactment which purported to deal only with private contracts entered into voluntarily by the owners of the property sold.

(13) (1875) L.R., 2 I.A., 131, at p. 143. | (14) (1869) 4 Ben. L.R., F.B., 11.

I agree therefore with Muttusami Ayyar, J.'s remarks in *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5), that the implied warranty of title in respect of sales by private contract cannot be extended to Court sales except in so far as such extension is justified by the processual law in India. The only changes in that law which have been put forward as making such an extension were introduced in 1877, though for the sake of convenience I shall refer to the corresponding provisions of the Procedure Code of 1882, which retained the alterations introduced in 1877, so far as they are material here.

In the Code of 1859, section 249 expressly provided that the sale proclamation should declare that the sale extended only to the right, title and interest of the defendant in the property specified in the proclamation. This provision has been omitted from the later Codes, but I cannot believe that the mere omission of a provision for the insertion of this express declaration in all sale proclamations altered the established rule of law that there is no implied warranty of the judgment-debtor's title at a sale in execution. Such a revolutionary change, if intended, would surely have been enacted in clear and express terms and not in the indirect way now suggested. Moreover, as has already been pointed out, this provision in section 249 could not have been under consideration when the Judicial Committee laid down the general rule which has been quoted above in *Dorab Ally's* case, though in fact in that particular case the Sheriff does seem expressly to have declared that he was selling the right, title and interest of the judgment-debtor. Also, if one considers the nature of the language employed, a proclamation to the effect that the right, title and interest of the judgment-debtor in specified property is to be sold surely warrants by necessary implication that he has a good title at least to some small interest in that property quite as much as a proclamation that that property is being sold in execution of a decree against the judgment-debtor. Hence, as the language in the former case has not been held to involve any such warranty by necessary implication, I do not see why the language in the latter case should be held to do so.

The other change introduced by the Code of 1877 which has been relied upon is contained in section 298 of the Code of 1882, but the terms of that section do not seem to me to help Mr. Lentaigne's client any more than the old section 252 would have done, for I fail to see how the omission to mention a mortgage of the existence of which the judgment-creditor was ignorant is an irregularity in publishing or conducting the sale of moveable property.

I am therefore of opinion that the law on the point under consideration has remained unchanged since 1872, and that the law as laid down in the earlier decisions above cited is still good law.

Mr. Lentaigne's last argument is that in any event the Court has inherent power to compel the decree-holder to disgorge this

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money, as justice, equity, and good conscience require that, where, as here, one of two innocent parties has suffered and the other has benefited by a transaction which ought never to have taken place, the parties ought, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction and that an obligation upon the defendant to repay to plaintiff his money by which defendant has benefited has arisen. If the view which I have taken of the case be correct, there is no substance in these arguments as regards the present case and it is unnecessary to deal with them. I may, however, point out that these points are considered in the judgment in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (13).

For the reasons given above I am of opinion that, except in cases in which there has been an express warranty in the sale proceedings that the judgment-debtor has a good title to the property sold, the question referred should be answered in the negative, and that the mere fact that the property is sold in execution of a decree against the judgment-debtor does not of itself amount to such a warranty.

Special Civil 2nd Appeal No. 35 of 1908.

March 10th, 1909.

Before Mr. Justice Hartnoll.

KAN GYI *v.* MA NGWE NU AND EIGHT OTHERS.

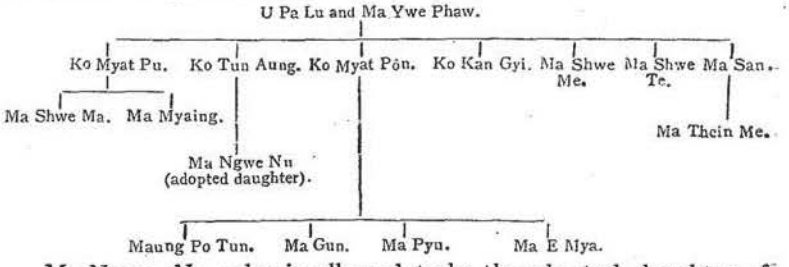
McDonnell—for appellant (1st defendant).
S. S. Patker—for 1st respondent (plaintiff).
Agabeg—for 6th to 9th respondents (defendants).

Buddhist Law: Inheritance—inheritance of estate of sister's child—exclusion of children of predeceased brother—exclusion of cousin from inheritance where uncle survives.

The rule of Buddhist law which lays down that the children of a person who predeceases his or her brother or sister are not entitled to share in the estate of that brother or sister, if another brother or sister survives, applies with greater force to the inheritance of the estate of a brother or sister's child.

Maung Hmaw v. *Ma Ôn Bwin*, (1901) 1 L.B.R., 104; *Ma Ma Gale* v. *Ma Me*, 2 U.B.R. (1905), Inheritance, 5; followed.

The sole question for decision in this case is one of Buddhist law. Ma Ngwe Nu, who is an adopted daughter, sued for a share of the inheritance of a deceased cousin. The following table illustrates the position:—



Ma Ngwe Nu, who is allowed to be the adopted daughter of Ko Tun Aung, sued for a sixth share of Ma Thein Me's estate.

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Ko Myat Pu, Ko Tun Aung, Ko Myat Pôn and Ma San are dead, and it is admitted that Ko Myat Pu, Ko Tun Aung and Ko Myat Pôn predeceased Ma San. The District Court further went into the question as to what share of Ma Thein Me's estate, if any, the children of Ko Myat Pu and Ko Myat Pôn were entitled to. It found that Ma Ngwe Nu was entitled to 1-24th of Ma Thein Me's estate, and that the children of Ko Myat Pu collectively and the children of Ko Myat Pôn collectively were also entitled to the same share. In accordance with that finding a decree was given in favour of Ma Ngwe Nu and the children of Ko Myat Pôn.

On appeal the Divisional Court varied this decree and gave Ma Ngwe Nu one-sixth, the children of Ko Myat Pu one-sixth between them, and the children of Ko Myat Pôn one-sixth between them. A further appeal is now laid by Maung Kan Gyi, and it is contended that Ma Ngwe Nu and the two groups of children are entitled to nothing. In support of this argument the cases of *Maung Hmaw* v. *Ma Ôn Bwin* (1) and *Ma Ma Gale* v. *Ma Me* (2) are relied on. The general principle of Buddhist law applicable is that only those closely related should inherit and that relations of the same degree should inherit to the exclusion of those of a more remote degree. There are exceptions to this general rule; but on searching the Dhammathats I am unable to find an exception applicable to the present case. It was argued on behalf of the respondents that the modern tendency is to equality of division. This may be so in some cases; but in a case like this I find myself quite unable to apply it. In the case of *Maung Hmaw* v. *Ma Ôn Bwin* (1), it was held that the children of a brother who predeceased a sister were not entitled to a share in the sister's estate when she died, if she left a surviving brother, and that the brother was the sole heir, and the reason given was that the deceased brother was not within reach of his sister's estate when he died. This decision was followed in the other case referred to. Applying it to the present case, if Ma San were the deceased whose estate was in issue, since Ko Myat Pu, Ko Tun Aung and Ko Myat Pôn predeceased Ma San, and Ko Kan Gyi, Ma Shwe Me and Ma Shwe Te, her brother and sisters, are alive, her brother and sisters would inherit and totally exclude the children of their deceased brothers, as they were not within reach of the inheritance. But it is not Ma San's estate which is in issue; it is the estate of Ma San's deceased daughter. The right to inherit Ma San's deceased daughter's estate can only come through Ma San, and if the children of the deceased brothers have no right of inheritance in Ma San's estate, *a fortiori* they can have no right of inheritance in her deceased daughter's estate.

I find the general rule of the nearer excluding the more remote applicable, and hold that the children of Ko Myat Pu, Ko Tun Aung and Ko Myat Pôn have no right of inheritance in the estate of Ma Thein Me.

(1) (1901) 1 L.B.R., 104. | (2) 2 U.B.R. (1905), Inheritance, 5.

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The appeal is therefore allowed and the suit dismissed. In this Court Maung Kan Gyi will be allowed his costs; but in the two lower Courts, since Maung Kan Gyi contested the suit on certain grounds that were found to be unjustified, each party will pay their own costs.

Full Bench.

Criminal Revision No. 78B of 1908.

March 10th, 1909.

Before Sir Charles Fox, Chief Judge, Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

KING-EMPEROR *v.* NGA PO.

Rutledge, Officiating Government Advocate.

Security proceedings—preventive sections—bad livelihood—general repute—current repute—nature of evidence to prove general repute—evidence of approver—Criminal Procedure Code, s. 110.

A was called upon to show cause against being ordered to give security as a habitual thief. The evidence for the prosecution as recorded by the Magistrate was to the effect that he was "currently reputed" to be a thief and a robber, that he had been previously convicted of house-breaking, that he associated with criminals, and that he was suspected in various specific cases. The Magistrate ordered him to find security for three years, but the Sessions Judge set aside the order on the ground that the evidence was insufficient to establish A's general repute.

Held,—that it was clear in the evidence which the Magistrate had recorded as concerning A's "current repute" that the witnesses meant his "general repute"; and that the Magistrate's order ought not to have been set aside.

One witness had been an approver in a dacoity case, and gave evidence implicating A in the dacoity.

Held,—that the uncorroborated evidence of such a witness was worthless in a bad livelihood inquiry.

King-Emperor v. *Shwe U*, (1903) 2 L.B.R., 166; *Emperor* v. *Raoji Fulchand*, (1903) 6 Bom. L.R., 34; referred to.

Hartnoll, J.—Nga Po was proceeded against under section 110 of the Criminal Procedure Code by an order dated the 18th July 1907 by the Subdivisional Magistrate, Yandoon. The order charged him that he was by repute an habitual robber and led a dishonest life, and called on him to show cause why he should not give security for his good behaviour for three years. The order was not quite in accordance with section 110 and should have run that information had been received to the effect that he was by habit a robber and thief. The words of the section should be adhered to.

Evidence was then recorded and certain statements were admitted that were not relevant to the enquiry, such as that he had once been convicted in an opium case and had been keeping out of the way in a bad livelihood case. In enquiries under section 110 the evidence should be kept strictly to the point at issue. But there was a considerable body of evidence to show that Maung Po was by habit a robber or thief. Maung Sein Aung, a

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Municipal tax-collector, stated that he had known Maung Po for some 10 years and that he lived at Yandoon, that he had once been convicted of theft and had the repute of attacking boats. He then gave specific instances of cases in which Nga Po was suspected and reasons for the suspicion, and went on to say that he had associated with a man who had been convicted of theft and a man who was under trial for dacoity, and that he was a wanderer and had no fixed abode nor work. The facts that a man charged under section 110 is an associate of convicted thieves, and is a loafer with no abode nor work, appear to me to be relevant in the enquiry as tending to corroborate evidence of general repute that he is by habit a thief when the object of the enquiry is to ascertain whether a man is by habit a thief. The next witness Maung Po Shein, the headman of a ward, stated that he lived in his ward, that he was once convicted of house-breaking and that since his release from jail he had the repute of attacking boats and committing thefts on boats, that this repute had been currently spread in the town and that he had had no fixed abode. He then gave specific instances in which he had been suspected and reasons for the suspicion. Maung Mya, a trader and elder of a block, stated that Maung Po lived in his quarter and had the repute of attacking boats and of committing thefts on boats. He then gave specific instances in which he was suspected and reasons for the suspicion, and concluded by stating that he associated with two men under trial for dacoity, had no fixed abode and wandered about. Maung Taing was the next to give evidence. He allowed that he had been in a dacoity on the 24th May 1907, and said that Nga Po was one of the dacoits also. He stated that he had been made an approver. The evidence of such a man, uncorroborated as it is, in an enquiry of this sort was in my opinion useless and should not have been admitted. He was even allowed to depose to Maung Po's general repute, himself being an admitted dacoit. The next witness Maung Tun Win was the Ganchaung *ywathugyi*, and he deposed that Nga Po was suspected in a boat robbery, giving his reason. He further deposed to certain admissions made by Nga Po. These may have been made in the presence of police officers and, if so, would be irrelevant. He went on to say that he was arrested with housebreaking implements in his possession. It would appear likely that he was not present at the arrest, and, if so, this statement would be hearsay and not admissible. The point was an important one, and the Magistrate should have taken clear direct evidence as to what implements were found with Maung Po and have caused their production. The next witness was Maung Po Thet, a boatman, and he deposed to Maung Po having the repute of attacking boats and stealing property from boats. He said that this repute was current in his village of Yanginsanya, which is apparently a suburb of Yandoon. A previous-conviction certificate was put in under section 457, Indian Penal Code, but not proved. Maung Po had no defence, and the two witnesses he examined gave evidence against him.

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On this evidence the Subdivisional Magistrate ordered Maung Po to give security for his good behaviour for three years, and as he did not give it the proceedings were submitted to the Sessions Judge under section 123 (2) of the Code of Criminal Procedure. The Sessions Judge in passing orders wrote :—

"On consideration I am of opinion that the statements made by the witnesses about the reputation of the accused are inadmissible. The context shows in each case that witness only means to say that he had heard rumours connecting accused with certain offences which have recently been committed. Not one of the witnesses go so far as to say that the body of accused's neighbours believe him to be an habitual thief. . . . . All that appears against the accused is that he was once convicted of theft, that he has no fixed abode, which appears to be a consequence of the fact that a year or two back proceedings were instituted against him under the punitive sections, and that in June last there was insufficient evidence of his having committed dacoity. . . . . The Magistrate should refrain from trying any more security cases until he understands the distinction between evidence of general repute and ordinary hearsay,—*King-Emperor* v. *Shwe U* (1)."

The Magistrate's order was accordingly set aside.

The Local Government then filed an application on the 13th March 1908 to revise the order of the Sessions Judge. The case was not heard till the 22nd February owing to the difficulty of serving Maung Po. It was urged at the hearing the words "current repute" used by the Magistrate was synonymous with the term "general repute," and that the Sessions Judge erred in holding that the statements of the witnesses as to the general repute of Maung Po were hearsay and inadmissible. Reference was made to the case of *Emperor* v. *Raoji Fulchand* (2).

In my opinion the admissible evidence on the record was sufficient to place Maung Po on security. When the witnesses said that Maung Po had the repute of attacking boats and committing thefts from them and that this repute was currently spread in the town, to my mind they clearly meant that this was the general repute in which Maung Po was held by the community. The evidence might have been more clearly recorded, but to my mind there is no doubt as to what the witnesses meant. They followed up their statements by specific instances where suspicion had attached, and by statements that Maung Po had no work, was a wanderer and associate of bad characters. The statements of the general repute were hearsay, but hearsay evidence of this kind is admissible in enquiries of this nature. The preliminary order was irregular, but not in my opinion so irregular as to vitiate the proceedings. I am therefore of opinion that the order of the Magistrate should not have been set aside for the reasons given.

(1) (1903) 2 L.B.R., 166. | (2) (1903) 6 Bom. L.R., 34.

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At the same time I would not now restore the order, as such a length of time has elapsed since it was set aside. It was set aside on the 4th October 1907. It is open to the Magistrates to proceed afresh against Maung Po if the history of the past year and a quarter shows that he has not mended his ways.

Irwin, J.—I concur.

Fox, C.J.—The Sessions Judge's decision appears to have been based upon the Magistrate having recorded the words "current repute" instead of "general repute." It is evident that what the witnesses were speaking about was the accused's general repute. I agree in thinking that the Magistrate's order should not have been set aside, and I also concur in the order proposed.

Before Mr. Justice Irwin, C.S.I.

Civil Revision No. 27 of 1908.

March 12th, 1909.

RAM DAM PANDAY *v.* { NARAYAN MURTI AND KURMAYA, LEGAL REPRESENTATIVES OF G. KRISTNA MURTI (DECEASED).

A. C. Dhar—for applicant (plaintiff).

Dismissal of part-heard case for default—discretion of Judge—necessity for adjudication on materials available—Civil Procedure Code, 1882, ss. 102, 157.

On the day to which a part-heard case was adjourned for further hearing, the plaintiff failed to appear, and the suit was dismissed simply by reason of his absence.

Held,—that as the case was part-heard, the Judge, in dealing with the case under section 102 of the Code of Civil Procedure, 1882, did not rightly use his discretion under section 157; and that he should have adjudicated on the merits of the plaintiff's case, so far as the materials on the record admitted.

Badam v. *Nathu Singh*, (1902) I L.R. 25 All., 194, referred to.

This suit was part-heard, and there were several adjournments. The 20th June 1907 was fixed for proceeding with the case. On that day, when the case was called, the plaintiff and his pleader were absent, defendants' pleader was present. The suit was dismissed simply for the reason that plaintiff did not put in an appearance.

Plaintiff applied under section 103 to have the order dismissing the suit set aside, but failed as there was no sufficient cause for his non-appearance. An application to this Court for revision of the order refusing to act under section 103 was also unsuccessful.

Plaintiff now applies for revision of the order dismissing the suit *ex-parte* on grounds which are substantially that the absence of the plaintiff was not of itself a sufficient reason for dismissing the suit.

In support of this application the case of *Badam* v. *Nathu Singh* (1) was cited. In that case the lower appellate Court held that the Court of first instance ought to have proceeded under

(1) (1902) I.L.R. 25 All., 194.

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section 158 to dispose of the suit. The High Court did not say whether section 158 applied, but held that the lower appellate Court was right in remanding the suit for trial on the merits.

In my opinion section 158 does not apply: it contains no reference to non-appearance, and it seems to be primarily intended for cases in which both parties appear. In the present case time was not granted to plaintiff to do anything. Section 157 seems to me to exactly fit the case. The chapter relates to adjournments, and section 156 expressly states that it applies at any stage of the suit, and a day shall be fixed for *further* hearing. That is exactly what was done in this case.

That being so, the Court had a discretion, under section 157, to dispose of the suit in one of the modes specified in Chapter VII, or to make such order as it might think fit. It does not seem to have occurred to the learned Judge that he had any such discretion.

He appears to have proceeded under Chapter VII, section 102, but even so he does not seem to have considered whether the defendant had admitted any part of the claim. It was necessary to consider this under section 102.

But when the case had been part-heard, and there was no reason to suppose that plaintiff had abandoned his claim, I do not think the Judge can be said to have exercised a proper discretion by proceeding under Chapter VII at all. He had some materials on which he could have adjudicated. Petitioner says he had closed his case, and nothing remained to be done but to hear the defendants' case. It seems from the interlocutory order of 3rd June that this was so, but whether it were so or not I think it was clearly the duty of the Judge to proceed to hear the defendant, unless on consideration of the evidence for plaintiff he was of opinion that the suit should be dismissed. In any case it was his duty to adjudicate on the merits.

I therefore set aside the order dismissing the suit, and direct the Court to proceed with the suit and dispose of it according to law.

The costs of this application will abide the result.

Civil 1st Appeal No. 15 of 1908.

March 15th, 1909.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Irwin, C.S.I.

P. T. CHRISTENSEN *v.* K. SUTHI.

Lentaigne—for appellant (defendant).

Agabeg—for respondent (plaintiff).

Pleadings—case set up by pleadings—basis of decision of civil case.

The determination in a cause must be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made.

Eshenchunder Singh v. *Shamachurn Bhutto*, (1866) 11 Moore I.A., 7; *Mylapore Iyasawmy Vyapoory Moodliar* v. *Yeo Kay*, (1887) I.L.R. 14 Cal., 801; followed.

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Fox, C.J.—In his plaint the plaintiff alleged that on the 24th January 1907 the first defendant, who is the appellant in this appeal, requested him to supply him with boats, and that a contract was then made between them for the supply of boats at the rate of Rs. 100 per day for each boat supplied. By the evidence he gave and produced, the plaintiff tried to prove that he had made a direct contract with the first defendant as alleged in the plaint. The learned Judge held that he had not proved this contract, but instead of dismissing the suit he came to the conclusion, upon his deductions from the evidence, that a contract had been made between the plaintiff and the first defendant, through the agency of the second and third defendants, for the supply of boats at a reasonable rate, and he gave the plaintiff a decree for the amount he claimed. This method of dealing with a case is directly contrary to the rule laid down by their Lordships of the Privy Council in *Eshenchunder Singh* v. *Shamachurn Bhutto* (1), which was reiterated in *Mylapore Iyasawmy Vyapoory Moodliar* v. *Yeo Kay* (2). That rule is that it is absolutely necessary that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made.

Counsel for the plaintiff-respondent has not argued that the plaintiff proved the direct contract he alleged, but has urged that he raised the question of a contract made through the agency of the second and third defendants by the statement in the 7th paragraph of the plaint, submitting that whether the boats were supplied direct or through the second defendant, the first defendant was liable to pay for the use of them. This submission was made in connection with previous statements that the plaintiff had learnt that a bill for the hire of the boats had been submitted to the first defendant in the name of the third defendant, that the first defendant had assured him that, notwithstanding this, payment would be made to him, and that he had subsequently learnt that the first defendant had treated the second and third defendants as the suppliers of the boats, and that he had paid them a considerable sum for their hire.

What the learned Judge held to be the case, and what the learned counsel for the respondent supports as being proved by the admitted facts, is nowhere disclosed in the plaint.

The contract alleged in that not having been proved, the only course open to the learned Judge was to dismiss the suit.

I think the appeal must be allowed and that the suit must now be dismissed with costs.

The plaintiff must also pay the first defendant's costs of this appeal.

Irwin, J.—I concur.

(1) (1866) 11 Moore I.A., 7. | (2) (1887) I.L.R. 14 Cal., 801.

Civil Miscellaneous Appeal No. 105 of 1907.

March 15th, 1909.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Irwin, C.S.I.

MA TÔK *v.* MA THI.

J. R. Das—for appellant.

Giles—for respondent.

Letters of administration—questions to be considered in proceedings for grant of letters of administration—objections to grant of letters of administration to person entitled thereto by natural relationship—proper person to administer estate—Probate and Administration Act, s. 23.

When an application for letters of administration is made by a person who is by admitted natural relationship entitled under section 23 of the Probate and Administration Act to make it, and whom the Court considers to be otherwise a proper person to administer the estate, the Court ought not to allow the proceedings to become protracted and costly by entering into disputed points such as questions of adoption of other persons by the deceased, which questions could be fought over again in suits for administration or for possession of the estate.

Annamoyi Dasi v. *Mohendra Nath Wadadar*, (1893) I.L.R., 20 Cal., 888; *Ma Chain* v. *Maung Tha Gyi*, (1900) P.J., L.B., 653; *Vanugopaul* v. *Krishnasawmy Mudaliar*, (1903) 10 Bur. L.R., 127; followed.

Ma Ket had been twice married, first to Po Saing and afterwards to Po Min. Po Min died on 12th June 1899, and Ma Ket died on 22nd April 1906, leaving no issue.

Ma Ket was the second wife of Po Min. Po Min left, by a former wife, one daughter, Ma Thi.

On Ma Ket's death Ma Thi promptly applied for letters of administration to her estate, claiming to be entitled to the whole estate as step-daughter of the deceased. Her application was opposed by Ma Tôk, who appears to be a second cousin, but claimed as an adopted daughter, of Ma Ket; by Yan Lin, who claimed to be an adopted son; by several first cousins and other relatives of Ma Ket; and by some brothers, nieces and a nephew of Ma Ket's first husband Po Saing. Ma Thi's application became Civil Regular No. 180 of 1906.

Of the caveators in that case, the only one who applied for letters of administration is Maung Yan Lin. His application became Civil Regular No. 372 of 1906.

Ma Thi's application was opposed, not only by Ma Tôk and Yan Lin severally on the ground that they were adopted children, but also by all the defendants on the ground that Ma Thi had been adopted by a lady called Ma Hlaing, with whom she lived, and that she therefore could not succeed to any part of Ma Ket's estate.

Ma Thi in her petition alleged that Ma Ket had left considerable property jointly acquired by Ma Ket and Po Min. This was denied, and it was alleged that all the property left by Ma Ket was her own and Po Min had no interest in it.

Issues were fixed as to the adoptions and as to whether there was any joint property of Po Min and Ma Ket, and other questions.

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Evidence was recorded at great length. The adoption of Yan Lin was found not proved. The adoption of Ma Tôk was found not proved. The adoption of Ma Thi by Ma Hlaing was found not proved. Letters of administration were therefore granted to Ma Thi as the step-daughter of Ma Ket.

Yan Lin has not appealed. Ma Tôk has appealed (No. 105). Ma Mya and Po Nu, niece and nephew of Po Saing, have appealed (No. 114). Ma Nyun and other first cousins of Ma Ket have appealed jointly with some other relatives of Po Saing (No. 125).

When these appeals came on for hearing we drew the attention of the learned advocates to the fact that as the authorities stand at present the findings of fact which have been arrived at in these cases would not operate as *res judicata* in subsequent suits for possession of the property, or a share of the property, comprised in the estate of Ma Ket. This was held in *Arunmoyi Dasi* v. *Mohendra Nath Wadadar* (1), and by the Court of the Judicial Commissioner of Lower Burma in *Ma Chein* v. *Maung Tha Gyi* (2), and by this Court in *Vanugopaul* v. *Krishnasawmy Mudaliar* (3). We were not referred to any decision to the contrary.

It appears to us, therefore, that when an application for letters of administration is made by a person who is by admitted natural relationship entitled under the terms of section 23 of the Probate and Administration Act to make it, and whom the Court considers to be otherwise a proper person to administer the estate, the Court ought not to allow the proceedings to become protracted and costly by entering into disputed points such as questions of adoption of other persons by the deceased, which questions could be fought over again in suits for administration or for possession of the estate.

We therefore declined to hear arguments on the question whether the fact of Ma Tôk's adoption is proved by the evidence on the record.

Without establishing her adoption Ma Tôk cannot succeed. Her appeal is dismissed with costs.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Irwin, C.S.I.

Criminal Appeal No. 79 of 1909.

MI PU *v.* KING-EMPEROR.

March 15th, 1909.

Palit—for appellant.

Dawson, Assistant Government Advocate.

Poison, attempt to administer—attempted murder by poison—attempted hurt by poison—evidence of effect of poison—proof of intention in administering poison—Penal Code, ss. 307, 328.

A was prosecuted for attempted murder by putting poison into B's food. She was proved to have put some powder into the food, and the food was

(1) (1893) I.L.R. 20 Cal., 888. | (2) (1900) P.J., L.B., 653.
(3) (1903) 10 Bur. L.R., 127.

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found by the Chemical Examiner to contain poison. There was no evidence, however, of the quantity of poison or of the probable effect on any one who ate the food.

Held,—that in the circumstances A could not be held to have intended to cause more than hurt, and could not therefore be convicted of anything more serious than an attempted offence under section 328 of the Penal Code.

Fox, C.J.—It appears to me to be unnecessary to discuss the legal difficulties which the learned Judge raised for himself in this case.

The appellant is proved to have put into the food which was being cooked for the prosecutor's family something which looked like powder to the witness who saw her do it. The food was submitted to the Chemical Examiner, who found in it vegetable matter similar in appearance to fragments of *datura* seeds, and it gave physiological reactions similar to those produced by atropine. There was, however, no statement or evidence of the quantity of poison found in the food, or of the probable effects on any one who might have eaten it.

Without such evidence it is not possible to say that the accused must have intended to cause more than hurt. She alone can have put the poison into the food, and having put it in in a secretive manner the conclusion must be that she intended to cause hurt at least.

I would alter the conviction to one of attempting to cause poison to be taken by others with intention to cause hurt, an offence punishable under section 328 and section 511 of the Indian Penal Code, and for such offence I would sentence the accused to rigorous imprisonment for three years.

Irwin, J.—I concur.

Criminal Appeal No. 101 of 1909.

March 23rd, 1909.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Moore.

PO SIN ALIAS PO SIN GYI *v.* KING-EMPEROR.

Agabeg—for appellant.

Murder—culpable homicide—intention to cause injury sufficient in the ordinary course of nature to cause death—intention to cause injury likely to cause death—Penal Code, ss. 299, 300, 304.

The distinction between the intention to cause injury sufficient in the ordinary course of nature to cause death, and the intention to cause injury likely to cause death, depends upon the degree of probability of death resulting from the act committed. Apart from cases falling within the second clause of section 300, if from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death.

Shwe Ein v. *King-Emperor*, (1905) 3 L.B.R., 122, referred to.

Fox, C.J.—On the 26th September 1908 the accused—a youth of 19 years of age—in anger owing to believing that the deceased had stolen his jacket which had money in it, attacked him with a

knife of some sort, and inflicted two stabs on him. One of the wounds caused was slight; the other was between the right shoulder blade and the spine, and was of triangular shape: it was 1¼ inches long by ½ inch broad on one side, and 1 inch long by ½ inch broad on the other, but the depth of it was not ascertainable during life owing to it being dangerous to probe it. There was a large swelling below the severe wound indicative of there being a collection of blood there. Under treatment this swelling subsided, and by the 4th October had disappeared. To all appearances the wounded man was making recovery, but on the 6th October he developed symptoms of injury to the pleura and lung. He died on the 13th October, the immediate cause of death being septic pneumonia set up by a septic discharge from the wound. Both the pleura and the lung had been affected by the poisonous matter which set up inflammation. The knife used by the accused had apparently not penetrated to either the pleura or the lung, but the position of the wound was such that any septic matter in the tissues tended to drain towards those parts, and eventually some septic matter reached them. The septic matter in the tissues may have been introduced by the knife which the accused used, being dirty at the time.

The learned counsel for the appellant has argued that under the above circumstances the accused cannot be held to have caused the death of the deceased, but this argument cannot be acceded to.

As Mr. Mayne says in paragraph 429 of his work on the Criminal Law of India, any one who puts the life of another in danger is responsible for the result. If a man receives a wound, which is not in itself mortal, but it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of death, this is murder or manslaughter in him that gave the stroke or wound, because the wound was the *causa causans* of the death.

The question remains whether the accused's act constituted murder. The learned Judge held that he must be presumed to have intended to cause the deceased injury which he knew to be likely to cause death. On this finding the learned Judge should have convicted the accused of culpable homicide not amounting to murder. To justify a conviction of murder when intentional injury is caused, the Judge must hold that the accused intended to cause death, or injury sufficient in the ordinary course of nature to cause death, unless the case be one of the description covered by the second clause of section 300—see *Shwe Ein* v. *King-Emperor* (1).

In the present case there is no evidence as to the size of the knife used. The Medical Officer said that the serious wound might have been caused by a sharp knife with a not very broad blade, like a penknife or a clasp knife. There is also no evidence as to the depth of the wound. Under the circumstances I think

(1) (1905) 3 L.B.R., 122.

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the accused must be given the benefit of the more favourable view as to the intention to be imputed to him when he caused the injury to the deceased.

The distinction between the intention to cause injury sufficient in the ordinary course of nature to cause death, and the intention to cause injury likely to cause death, depends upon the degree of probability of death resulting from the act committed. Apart from cases falling within the second clause of section 300, if from the intentional act of injury committed, the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death, and the conviction should be of murder unless one of the exceptions applies; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death, and the conviction should be of culpable homicide not amounting to murder.

In the present case I would alter the conviction to one of the last mentioned offence, and for such offence I would sentence the accused under the first part of section 304 of the Indian Penal Code to transportation for ten years.

Moore, J.—I concur.

Civil 2nd Appeal No. 116 of 1908.

March 25th, 1909.

Before Mr. Justice Irwin, C.S.I.

PO MYA AND MA MYIT *v.* MA LE BY HER AGENT PO GYI.

Ba Hla Aung—for appellants (defendants).
Higinbotham—for respondent (plaintiff).

Ground of second appeal not alleged in lower Courts—defence based on alternative title—gift—limitation by adverse possession.

In a suit for ejectment from a house the defendant pleaded that he had acquired the house as a gift from plaintiff's husband. In second appeal, the defendant raised the question of limitation by 12 years' adverse possession, although neither in the original pleading nor in first appeal had any such question been raised or any allegation of adverse possession been made.

Held,—that in the circumstances the question of limitation by adverse possession could not be raised in second appeal.

Ma Yin v. *Ma Pu*, (1907) 4 L.B.R., 238, referred to.

Plaintiff-respondent sued to eject appellants from a house.

They pleaded that they had acquired the house by gift from plaintiff's husband, since deceased. Both Courts have found that there was no gift and that defendants occupied the house under a bare license.

The ground of the second appeal is that the lower Courts ought to have come to a finding on the question of limitation by 12 years' adverse possession, and the case of *Ma Yin* v. *Ma Pu* (1) is relied on. In that case limitation was expressly pleaded, and was urged again in the first appeal. In the present case limitation

(1) (1907) 4 L.B.R., 238.

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was not pleaded, nor mentioned at all at the first appeal. In the written statement the defendants said they have been in possession for about 20 years and there had never been any objection or disturbance before. In the first appeal they said: "The presumption of ownership arising from long possession is unrebutted by any evidence produced by the respondent." Neither of these statements contains any distinct allegation that the defendants' possession was adverse to the plaintiffs, and limitation was never mentioned until the case came into this Court.

Limitation in this case would depend on the question of fact whether the possession was adverse for over 12 years. The finding that the defendants occupied the house under a bare license would be almost sufficient in itself to dispose of the plea of limitation if there were such a plea. When the defendant neglected to say anything about adverse possession in either of the lower Courts, they cannot be allowed to raise the point here.

The appeal is dismissed with costs.

Before Mr. Justice Moore.

Criminal Revision No. 44B of 1909.

ADAMS *v.* KING-EMPEROR.

April 6th, 1909.

P. D. Patel—for applicant.

Rutledge, Government Advocate.

Delivery of arms into possession of unauthorized person—nature of delivery and possession—Arms Act, s. 22.

A, when out shooting with his servant, B, found a deer recently killed by a tiger and fixed his rifle over it so as to form a trap. He then went home, leaving B to watch the trap from a neighbouring tree. He was convicted under section 22 of the Arms Act of having delivered the rifle into B's possession without first ascertaining that he was authorised to possess it. It was admitted that B was not so authorised.

Held,—that the delivery into possession contemplated by section 22 of the Act is such delivery as gives control over the arm and authority to use it; and that no such delivery was proved in the case. The conviction was therefore reversed.

Queen-Empress v. *Myat Aung*, 1 U.B.R. (1897—01), 1; *Queen-Empress* v. *Bhure*, (1892) I.L.R. 15 All., 27; *Emperor* v. *Harpal Rai*, (1902) I.L.R. 24 All., 454; referred to.

Petitioner G. Adams has been convicted under section 22, Arms Act, for delivering arms, namely, a ·303 rifle, into the possession of Nga Kaw, without previously ascertaining that Nga Kaw was legally authorised to possess the same. The conviction was confirmed on appeal by the Sessions Judge of Hanthawaddy, who, however, reduced the original sentence of Rs. 51 fine to a fine of Rs. 10. There is no dispute about the facts of the case. Petitioner was out shooting with his servant Nga Kaw. They came across a dear recently killed by a tiger. Petitioner fixed up his rifle over the kill so as to form a trap for the tiger, and went home leaving Nga Kaw to watch the trap from a neighbouring tree. A police officer came that day to petitioner's house and

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asked to see petitioner's gun. Petitioner volunteered the information that he had left one rifle in the jungle as described. The police officer sent another servant of petitioner's to fetch this gun, and this man and Nga Kaw appear to have returned together with the rifle.

The question for decision is whether upon these facts petitioner was rightly convicted under section 22 of the Arms Act; in other words, whether he delivered this rifle into the possession of Nga Kaw within the meaning of that section. It is admitted that Nga Kaw was not legally authorised to possess a rifle. In the case of *Queen-Empress* v. *Nga Myat Aung* (1) it was held that a servant who was carrying arms—in that case a shot gun and six cartridges—for a master who was legally entitled to possess arms and to go armed did not go armed within the meaning of section 17 of the Arms Act. Reference was made in that case to the case of *Queen-Empress* v. *Bhure* (2). In a later case in the Allahabad High Court, *Emperor* v. *Harpal Rai* (3), it was held that a person carrying a pistol to a gunsmith for the purpose of getting it repaired, committed no offence under the Arms Act although such person was not entitled legally to possess arms or to go armed. It was held that the mere temporary possession without a license of arms for purposes other than their use as such is not an offence under section 19 of the Arms Act. In the present case the petitioner left Nga Kaw to watch the rifle. He did not give Nga Kaw any authority to use the rifle, or even to take it away from the place in which he had left it. If petitioner had left his rifle in his house and had left a servant in charge of it, it could hardly be argued that he would have committed any offence under the Arms Act. He would equally have committed no offence had he left the rifle set in the trap without taking the precaution of leaving a servant to watch it.

I think that the delivery into possession contemplated by section 22 of the Arms Act is such a delivery as gives the person into whose possession the arm is delivered control over the arm and authority to use it as an arm. I hold that there was no such delivery proved in the present case and I therefore reverse the conviction and sentence, and acquitting accused I direct that the fine paid be refunded.

I have been asked to order the restoration to petitioner of all his arms. Under section 24 of the Arms Act the Magistrate who convicted petitioner might have ordered the confiscation of the rifle in question, but he did not do so, nor have I now before me any order confiscating all or any of petitioner's arms.

(1) 1 U.B.R. (1897—01), 1. (2) (1892) I.L.R. 15 All., 27.
(3) (1902) I.L.R. 24 All., 454.

Before Mr. Justice Hartnoll.

Civil Miscellaneous Application No. 93 of 1908.

March 8th, 1909.

MAHOMED HASSIM
MAHOMED ABDUL } *v.* (1) MA SEIN BWIN. (2) PO KA. (3) PO SIN.

Connell—for applicants.

Sealy—for respondents.

Representative of judgment-debtor—auction-purchaser—question arising between auction-purchaser and judgment-creditor—appeal—Civil Procedure Code, 1882, s. 244 (c).

The auction-purchaser of property sold in execution of a simple money decree is not a "representative" of the judgment-debtor within the meaning of section 244 (*c*) of the Code of Civil Procedure, 1882.

Imtiazi Begam v. *Dhuman Begam*, (1907) I.L.R. 29 All., 275; *Gulzari Lal* v. *Madho Ram*, (1904) I.L.R. 26 All., 447; *Phul Chand Ram* v. *Nursingh Pershad Misser*, (1899) I.L.R. 28 Cal., 73; *Kripa Nath Pal* v. *Ram Laksmi Dasya*, (1897) 1 C.W.N., 703; *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (1896) I.L.R. 24 Cal., 62; *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*, (1892) I.L.R. 19 Cal., 683; referred to.

This is an application for review of judgment in Civil Revision No. 118 of 1907 under the following circumstances. In Civil Regular Suit No. 12 of 1907 of the District Court of Hanthawaddy Maung Po Sin obtained a money decree for Rs. 12,397 with interest thereon and costs against Maung Po Ka and others. In execution thereof certain properties were sold on the 4th May 1907, and Ma Sein Bwin, one of the defendants, applied under section 310A of the Civil Procedure Code to set aside the sale with respect to certain of the lands sold and purchased by the respondents. On the 25th May the sale was set aside. The respondents then applied for a review of this order, and the District Judge granted it, and on the 8th July rescinded his order setting aside the sale, and ordered that the sale be confirmed. Against this order an application in revision was made to this Court, and on the 7th April 1908 my learned colleague Mr. Justice Ormond ordered that the order of the District Judge of the 8th July be set aside and that his order of the 25th May setting aside the sale of the properties was to stand good. Now a further application is made by the auction-purchasers to set aside the order passed by my learned colleague on the ground that there was an appeal against the order of the District Judge, and so an application for revision under section 622 of the Code did not lie. It is therefore argued that the order of this Court was without jurisdiction and so is bad.

The point turns on the meaning to be attached to the word "representatives" in section 244 (*c*) of the Code. Is an auction-purchaser at an auction sale in execution of a simple money decree a representative of the judgment-debtor within the meaning of section 244 (*c*)? Three cases are cited in the application for review in support of the applicant's contention. The Bombay one (21 Bom., 209) does not seem to apply. The Allahabad one,

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Imtiazi Begam v. *Dhuman Begam* (1), applies. In that case it was held that an order refusing to accept a deposit tendered under the provisions of section 310A was an order falling within the purview of section 244 (*c*) and was appealable as such. The decision was based on the decision in *Gulzari Lal* v. *Madho Ram* (2), in which it was held that an auction-purchaser at a sale held in execution of a simple money decree against the judgment-debtor whose property has been ordered to be sold at the suit of mortgagees in a mortgage suit is a representative of the judgment-debtor within the meaning of section 244 (*c*), and the learned Judges did not go into the distinction between an auction-purchaser who is bound by, or affected by, the decree, and an auction-purchaser who is not so affected. Moreover, the decree-holder seems to have been a party to the suit. The second case quoted was that of *Phul Chand Ram* v. *Nursingh Pershad Misser* (3). In that case the parties were the decree-holder and judgment-debtor, as also they were in the case quoted in the judgment—that of *Kripa Nath Pal* v. *Ram Laksmi Dasya* (4). The Calcutta cases referred to therefore are not to the point. The question at issue was considered by a Full Bench of the Calcutta High Court in the case of *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (5), in which it was held that the term 'representative' as used in section 244 of the Code when taken with reference to the judgment-debtor does not mean only his legal representative, that is his heir, executor or administrator, but it means his representative in interest and includes a purchaser of his interest, who, so far as such interest is concerned, is bound by the decree. In the course of the judgment, at page 71, it is said:—

> A purchaser of the interest of a party to a suit who is not affected by the decree cannot in any sense be regarded as a representative of that party within the meaning of section 244. Upon this point the authorities are all at one.

In the Allahabad case, *Gulzari Lal* v. *Madho Ram* (2), Banerji, J., said:—

> In my judgment the word 'representative' in section 244 means a person against whom the decree can be enforced either as the legal representative of the judgment-debtor or his representative in interest.

In the Privy Council case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (6), their Lordships said:—

> Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244 and that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed the fact that the purchaser who is no party to the suit is interested in the result has never been held a bar to the application of the section.

It will be seen that their Lordships did not hold that the auction-purchaser was always a "representative." In that case

(1) (1907) I.L.R. 29 All., 275.
(2) (1904) I.L.R. 26 All., 447.
(3) (1899) I.L.R. 28 Cal., 73.
(4) (1897) 1 C.W.N., 703.
(5) (1896) I.L.R. 24 Cal., 62.
(6) (1892) I.L.R. 19 Cal., 683.

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the conduct of the judgment-creditor and other judgment-debtors was also in question. In the Calcutta case cited by the applicant the point was not in issue, and the Full Bench Calcutta case is against applicant's contention. The Allahabad case cited does not go into the point, and the case on which the Allahabad case cited was based is not conclusive in view of the words of Banerji, J., which I have quoted. My own opinion is that an auction-purchaser at a sale in execution of a simple money decree is not a "representative" within the meaning of section 244 (*c*). He is not bound by, nor affected by, the decree. There is also no privity between him and the judgment-debtor, and he may be a purchaser against the wish of the judgment-debtor. He is the judgment-debtor's successor in interest, but I fail to see how he is his representative.

On this finding the contention of the applicants cannot prevail, and so I reject the application with costs.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

MA EIN *v.* TE NAUNG.

J. R. Das—for appellant (plaintiff).

Villa—for respondent (defendant).

Buddhist law : divorce—grounds of divorce—adultery—ill-usage of wife—cruelty to wife.

In the case of a Burman Buddhist married couple, adultery on the part of the husband does not alone, or even accompanied by a single act of cruelty, entitle the wife to a divorce.

Semble—the committing of adultery under the conjugal roof is not such cruelty as is contemplated by the Dhammathats as affording a ground for divorce.

Nga Nwe v. *Mi Su Ma*, (1886) S.J., L.B., 391 ; *Ma Ka U* v. *Po Saw*, (1908) 4 L.B.R., 340; referred to.

Ma In Than v. *Maung Saw Hla*, (1881) S.J., L.B., 103, followed.

This was an appeal from a judgment of the Chief Court on its Original Side. The following judgment on the Original Side was delivered on the 11th December 1907 by—

Civil Regular No. 290 of 1906.

Dec. 11th, 1907.

Moore, J.—Ma Ein sues Te Naung for a divorce on the grounds of adultery and ill-usage. There is no proof other than plaintiff's own statement of any actual ill-usage. Upon defendant's own admission it is clear that he repeatedly committed adultery with various women Shortly before the suit was filed he was keeping a woman named Ma Tin. He admits that this woman sometimes came to the house where he and plaintiff lived together, and that he had connection with her under the conjugal roof. Since the petition was filed he has parted with this woman, but admits visiting another woman.

The passages in the Dhammathats which deal with the right of a wife to claim a divorce from her husband are very conflicting. It is, however, generally accepted that the mere fact of the husband

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committing adultery or taking a lesser wife does not of itself entitle the wife to claim a divorce. The adultery, or the taking of a lesser wife, must be accompanied by cruelty. I can find no authority for the contention that the committing of adultery under the conjugal roof is such cruelty as is contemplated by the Dhammathats.

In my opinion, therefore, plaintiff is not entitled to a divorce and her suit is dismissed. Under the circumstances, I make no order for costs.

The judgment on the Appellate Side was delivered on the 11th May 1909 by—

Civil 1st Appeal No. 10 of 1908.

May 11th, 1909.

Parlett, J.—Appellant urges that under Burmese Buddhist law adultery alone is sufficient to entitle her to a divorce.

This argument is based on a passage in the case of *Nga Nwe* v. *Mi Su Ma* (1), in which it is pointed out that the Dhammathats allow either party to a marriage to claim a divorce against the will of the other "when there is no fault on either side, but their destinies are not cast together." Among the deeds which are then enumerated as justifying a Buddhist in severing his destiny from that of his or her partner, is included adultery. The authority whereby this list of crimes is laid down is not indicated. Inasmuch as another crime on the list is stealing, on mere proof of which it is, in my opinion, doubtful if the Courts would now grant a divorce, I do not consider that this passage of the Dhammathat alone is sufficient authority for the contention advanced.

Section 256 (Digest, Volume II, page 175) lays down that if the husband takes a second wife a divorce may be granted, but according to certain of the texts, ill-treatment of the chief wife and disturbance of domestic peace must ensue before a divorce can be claimed. Section 308 expressly lays down that though the husband has the right of putting away a wife guilty of misconduct, the wife has no such right against the guilty husband. Section 230, however, allows a wife to refuse to cohabit with a husband guilty of adultery.

Section 303, moreover, enjoins that a divorce should not be granted to a woman for a single act of cruelty from her husband, but only if repeated after he has given promise of amendment. Thus it appears from the Dhammathats that adultery on the part of the husband does not alone, or even accompanied by a single act of cruelty, entitle the wife to a divorce.

Appellant alleges only one act of physical ill-treatment after respondent took Ma Tin; it is not proved that the latter lived in the house, nor is any authority cited for holding that her doing so would amount to cruelty under Burmese Buddhist law.

Appellant speaks of Ma Tin as respondent's lesser wife: if she is his lesser wife intercourse with her is not adultery. Respondent denies that she is his wife, nor does the evidence bear it out.

(1) (1886) S.J., L.B., 391.

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Reference is then made to the case of *Ma Ka U* v. *Po Saw* (2), in which it was ruled that refusal on the part of the chief wife to live with her husband, if he has taken a lesser wife without her consent, does not deprive her of her right to maintenance. But not only is this ruling under the criminal, *i.e.* British, law, which is quite distinct from the Burmese Buddhist law, but the learned Judges expressly refrained from giving any opinion as to whether, under the circumstances, the chief wife would be entitled to a divorce. The case of *Ma In Than* v. *Maung Saw Hla* (3), which lays down that she is not so entitled, is therefore not overruled.

I would dismiss this appeal with costs.

Fox, C.J.—I concur.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

MA THAW *v.* MA SEIN.

R. M. Das—for appellant (defendant).

Giles—for respondent (plaintiff).

Buddhist law: adoption: inheritance—inheritance by adopted child from collaterals—position of adopted child in adoptive family—extent of rights of adopted child.

Under Burmese Buddhist law the rights of inheritance of an adopted child are not limited to inheritance from his or her adoptive parents, but extend to inheritance from collaterals in the adoptive family.

Ma Gyan and one v. *Maung Kywin and another*, 1 Chan Toon's L.C., 393, followed.

Mi San Hla Me v. *Kya Tun and others*, 1 Chan Toon's L.C., 279, referred to.

This was an appeal from the Chief Court on its Original Side. The following judgment on the Original Side was delivered on the 21st January 1908 by—

Civil Regular No. 295 of 1906.

Jany. 21st, 1908.

Moore, J.—Ma Sein applies for letters of administration to the estate of Ma Thein Yin, deceased, and caveats have been entered by Maung Myat San, Ma Bôn and Ma Thaw. The parties are Burman Buddhists. Ma Thein Yin died before marriage and her parents and grandparents predeceased her. Ma Sein claims by virtue of a double adoption. She alleges that she was adopted first by Ma Dun, who was sister of Ma Thein Yin's mother Ma Nyo Nyo, and that on Ma Dun's death she was again adopted by Ma Thein Yin's mother Ma Nyo Nyo. Her adoption by Ma Dun is admitted by the caveators. The adoption by Ma Nyo Nyo is denied. Ma Thaw is granddaughter of Ma Ma, sister of Ma Nyo Nyo. She is therefore first cousin once removed to Ma Thein Yin. Maung Myat San is grandson of Ma Pule, a sister of Ma Thein Yin's grandmother Ma Thu. He is therefore second cousin of Ma Thein Yin. Ma Sôn is daughter of Ma Bwin, a sister of deceased Ma Thein Yin's

(2) (1908) 4 L.B.R., 340. | (3) (1881) S.J., L.B., 103.

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paternal grandmother Ma Min Thu. She is therefore first cousin once removed to Ma Thin Yin. It has been found unnecessary to decide whether Ma Sein was or was not adopted by Ma Nyo Nyo as alleged by her. It is admitted that if either adoption gives Ma Sein the same right of inheritance from Ma Thein Yin as a natural child of either Ma Dun or Ma Nyo Nyo would have had, she would be entitled to obtain letters of administration. The question for decision is in effect whether adoption carries with it the right of inheritance from the adoptive parents only or whether the person adopted has the same rights of inheritance in the adoptive family as those of a natural child. No reported case in which this question has been directly in issue has been quoted to me, and I have been unable to find any direct authority upon the point. Cases of inheritance by collaterals are very rare, and the total number of reported cases dealing with the Buddhist law in inheritance is not large. It is therefore not strange that there should be no authority upon the point in issue. In the Dhammathats, moreover, the rules governing inheritance by collaterals are extremely meagre, and the question of adoption is not touched upon at all as affecting the rights of collaterals. It is argued against Ma Sein's right to inherit that adoption is an interference with the natural order of succession and that such interference should not be extended further than the Dhammathats expressly provide. A man may, it is urged, adopt heirs to himself, but cannot be allowed to adopt heirs to other people. Adoption is, I think, rather regarded by the Buddhist law as one means by which a man may obtain children, and I can see no strong reason why children by adoption should be regarded on a separate footing in any respect from natural children.

An adopted child loses all rights of inheritance in its natural family, and it seems inequitable that it should obtain in return only a limited right of inheritance in the family into which it is adopted. In the case of *Ma Gyan and one* v. *Maung Kywin and one* (1), it is stated that it has been the practice of the Courts, both in Upper and Lower Burma, to treat the adopted child generally as filling the same position as the natural-born child. In the case of *Mi San Hla Me* v. *Kya Tun and two* (2), it was ruled that the mother of an adopted child succeeds to his property to the exclusion of his brothers and sisters by adoption. In that case it was not contended that the brothers and sisters by adoption had no rights of inheritance from their adoptive brother. They were excluded merely because by Buddhist law a parent inherits before brothers and sisters.

In the written statements and in the issues framed by my predecessor Ma Sein is spoken of as the adoptive sister or adoptive cousin of deceased, and it is contended that no such relationship is known to Buddhist law. In my opinion this is not the way in which the position should be regarded.

(1) 1 Chan Toon's L.C., 393. | (2) 1 Chan Toon's L.C., 279.

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The usual, I think universal, rule of Buddhist law as regards heirs more than one degree remote is that they succeed by right of representation. Grandchildren or nephews and nieces accordingly share *per stirpes* and not *per capita*. They are regarded as representing their parents and taking the shares which their parents, if alive, would have received. Ma Thein Yin left neither children, parents, grandchildren, grandparents nor brothers and sisters. The next set of heirs would have been her aunts Ma Ma and Ma Dun. Both of them are dead, and in my opinion Ma Sein as the admitted adopted daughter of Ma Dun is entitled to represent her mother. Ma Thaw as granddaughter of Ma Ma may have a claim to a share in the estate, but I think that Ma Sein is clearly entitled to administer in preference to her.

I therefore order that letters of administration be granted to Ma Sein upon the usual security being furnished. Ma Sein's costs to be paid out of the estate; caveators to pay their own costs. Advocate's fee—5 gold mohurs.

Appeals against this judgment were preferred to the Appellate Side of the Court by Ma Sein and Maung Myat San. They were heard together, and the following judgment was delivered on the 11th May 1909 by—

Civil Miscellaneous Appeal No. 22 of 1908.

May 11th, 1909.

Parlett, J.—The question for decision is whether the rights of inheritance of an adopted child are limited to inheritance from his or her adoptive parents.

For the appellant it is argued that there are no passages in the Dhammathats indicating a right of inheritance as between collaterals and an adopted child, whereas certain passages do restrict the rights of inheritance of an adopted child as compared with those of a natural-born child.

Thus section 194 (Kinwun Mingyi's Digest, Volume I, page 254) lays down that where a coheir dies after his parents but before partition, only half his share shall go to his adopted child, half going to the other coheirs; whereas a natural-born child would succeed to the whole share.

Section 195 also lays down that if an adopted child does not live with his adoptive parents, he loses his right of inheritance. But the reason given for this loss is his ingratitude (Richardson's Laws of Menoo, page 280); and even a natural-born child who is undutiful or disobedient may forfeit his inheritance. Moreover, section 195 shows that the disqualification is complete only when there are natural-born children living; when there are none, the adopted child, though living apart from the adoptive parents, may still share the inheritance with the relatives of the adoptive parents.

Sections 190, 191 and 192, though not quoted for the appellant, appear to further restrict the rights of the adopted son by giving him a considerably smaller share than the *orasa* son. They appear to conflict with section 189, and in *Ma Gyan and one* v. *Maung Kywin and one* (1) the view was expressed that their

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provisions had "undergone qualification with a tendency to equality," their most authoritative form appearing in the *Manugyè Dhammathat*, which is embodied in section 189.

It is argued that these restrictions disclose the principle that the adopted child has not in all cases the full rights of inheritance of a natural-born child; and that as the relatives are not consulted before the adoption, and derive no benefit from it, it cannot be held that the adopted child acquires a right to inherit from them, when that right is not expressly declared to exist. To this it is replied that if the adopted child acquires no right to inherit from collaterals in the family of his adoption, he cannot lose his right to inherit from collaterals by blood. The Dhammathats appear to contain no indication that the latter right is retained, or that the adopted child does not pass completely out of the family of his birth into that of his adoption.

The adopted son is one of the six classes of sons entitled to inherit. Several sections tend to show that he stands in the same position as regards inheritance as the natural-born child. Section 189 declares his right to a share in his adoptive parents' estate according to the place he occupies among the natural-born children with reference to age. Section 193 declares his right, when the deceased leaves no direct descendants, to inherit the whole estate to the exclusion of the coheirs (*i.e.*, collaterals) of the deceased. In both these sections the forfeiture by the adopted child of the right to inherit from his natural parents is referred to. Section 196 gives the adopted son an equal portion with the natural-born sons in the parents' share of an undivided estate.

In the case of *Ma Gyan and one* v. *Maung Kywin and one*(1) referred to above, the learned Judicial Commissioner of Upper Burma held that it had "been the practice of the Courts, "both in Upper and Lower Burma, to treat the *kittima* adopted "child generally as filling the same position as the natural-born "child, and equitable principles seem to be in favour of this view. "The completely adopted child comes into the adoptive family "with the just and reasonable expectation of being placed on the "same footing as a natural child."

The Dhammathats are not exhaustive. They include adopted children among the classes of persons to whom the rules of inheritance apply. Then follow a few special rules regulating their shares in particular cases, in some instances placing them in a less favourable position than natural-born members of the family. But in my opinion it cannot be held that adopted children enjoy no rights other than those expressly conferred by the Dhammathats. On the contrary, it appears both more reasonable and more equitable to hold that they enjoy the rights of natural-born children except where those rights are expressly restricted or taken away.

The argument that it is a hardship to the relatives of the adopting parents that the adopted child should share with them is of little weight, since they are in no respect worse off than if

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a natural child had been born; and it has not been contended that the view of the learned Judge on the Original Side is incorrect, that heirs more than one degree remote succeed by right of representation.

In my opinion Ma Sein is entitled to a share in the estate of Ma Thein Yin, and the order that letters of administration should be granted to her should not be disturbed. I would dismiss these appeals with costs.

Fox, C.J.—I concur.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

Civil 1st Appeal No. 13 of 1908.

May 17th, 1909.

(1) AW NIN, (2) KHE TYAUNG, (3) TUN KIN, (4) ÔN ME, AND (5) ÔN MYA, LEGAL REPRESENTATIVES OF THE LATE NIMA. *v.* V. A. R. RAMAN CHETTY BY HIS DULY CONSTITUTED ATTORNEY CHOKALINGAM CHETTY.

Ba Hla Aung—for appellants (defendants).

P. N. Chari—for respondent (plaintiff).

Equitable mortgage created before application of Transfer of Property Act—assignment of equitable mortgage—effect of Transfer of Property Act—deposit of title deeds.

An equitable mortgage validly created before the Transfer of Property Act was made applicable to Burma stands on the same footing as an equitable mortgage by deposit of title deeds in Rangoon, and can be assigned by delivery of title deeds.

T. P. Pethapermal Chetty v. *James L. Phillips*, (1891) S.J., L.B., 555, referred to.

Fox, C.J.—There is no ground for holding that the execution of the promissory notes by Nima was not proved. Ramswami Chetty te-tified to the fact of Nima having executed them, and the plaintiffs produced his title deeds, which were deposited at the time. The deposit constituted an equitable mortgage of the properties, and the plaintiffs sued for a mortgage decree.

The limitation for such a suit is twelve years from the date on which the money sued for becomes due—see *T. P. Pethapermal Chetty* v. *James L. Phillips* (1). If the suit had been brought by the original mortgagee, there could be no question of limitation.

The plaintiff is the holder of the notes after endorsement. The title deeds deposited were handed over to him with the notes.

It was argued that as there was no written transfer of the mortgage to him, the plaintiff cannot enforce the mortgage. He is the holder of the promissory note and as such has a right to sue on it under the Negotiable Instruments Act. By section 137 of the Transfer of Property Act the provisions of Chapter VIII of the Act do not apply to Negotiable Instruments. As regards the mortgage the deposit of deeds constituting the equitable mortgage was before section 59 of the Transfer of Property Act applied to

(1) (1891) S.J., L.B., 555.

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this province, and equitable mortgages of lands outside Rangoon by deposit of title deeds were recognized before the application of the Act. The transfer, however, was after the application of the Act to the province. Section 59 of the Act says where the money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. As between the promisee of the promissory notes and the plaintiff who is the holder of them there is no question of effecting or creating a mortgage. Between them there was, or purported to be, merely an assignment or transfer of a mortgage already created. Section 2 of the Act says that nothing in it shall be deemed to affect any right or legal liability arising out of a legal relation constituted before the Act came into force, and section 9 says that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Before the Act came into force in the province the original equitable mortgagee had the right to assign his mortgage orally or by any act, such as delivery of the deeds, signifying and intended to be an assignment of the mortgage to another. There is nothing in the Act which expressly requires that an assignment of a valid existing equitable mortgage shall be in writing and registered. In my opinion this particular equitable mortgage, having been validly created before the Transfer of Property Act was made applicable to Burma, stands on the same footing as an equitable mortgage by deposit of title deeds in Rangoon, and could be assigned by delivery of the title deeds.

I would dismiss the appeal with costs.

Parlett, J.—I concur.

Full Bench—(Civil Reference).

Civil Reference No. 3 of 1909.

May 31st, 1909.

Before Sir Charles Fox, Chief Judge, Mr. Justice Moore, and Mr. Justice Bell.

IN RE P. L. R. M. N. PERCHIAPPA CHETTY } *v.* { 1. PO KIN. 2. PO NYUN. 3. MA KYI SU.

Giles—for plaintiff. | *Lentaigne*—for defendants.

Meaning of words "distinct subjects" in section 17 of the Court Fees Act, 1870.

A suit on several promissory notes in favour of the same payee, even though the notes were made on the same date and to liquidate the balance of an account which has been struck, embraces several distinct subjects within the meaning of section 17 of the Court Fees Act, 1870. The expression "distinct subjects" is equivalent to "distinct causes of action." It is not necessary for a suit to fall under more than one of the categories of suits mentioned in section 7 of the Court Fees Act before it can embrace distinct causes of action.

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Chamaili Rani v. *Ram Dai*, (1878) I.L.R. 1 All., 552; *Parshotam Lal* v. *Lachman Das*, (1887) I.L.R. 9 All., 252; *Kishori Lal Roy* v. *Sharut Chunder Mozumdar*, (1882) I.L.R. 8 Cal., 593; *Mulchand* v. *Shib Charan Lal*, (1880) I L.R. 2 All., 676; *Chedi Lal* v. *Kirath Chand*, (1880) I.L.R., 2 All., 682; followed.

Ramchandra v. *Antaji*, (1887) Bom. P.J., 271; *Chand Kour* v. *Partab Singh*, (1888) I.L.R. 16 Cal., 98; referred to.

The following reference was made to a Bench by Mr. Justice Bell:—

These are two suits by the same plaintiff against two sets of defendants, one of whom is a party to both suits. The plaint in Suit No. 55 of 1908 alleges that the defendants on different dates in or about June and December 1905 borrowed from the plaintiff various sums amounting in all to Rs. 1,550, and on the 10th and 11th June and 1st December 1905 jointly executed five promissory notes for the sums so advanced. The plaint in the other suit, which originally was filed in the Court of Small Causes, alleges that on the 29th October 1905 accounts of former dealings between the plaintiff and the defendants in that suit were settled and a balance of Rs. 1,500 was found to be due from the latter to plaintiff, and the defendants jointly executed three promissory notes for sums amounting in the aggregate to this balance of Rs. 1,500. Each plaint further alleges that from time to time certain payments were made on account of interest only, that towards the end of 1907 the plaintiff pressed for payment and threatened to sue the makers of the notes, that eventually it was agreed that plaintiff should refrain from filing suits and two of the makers of the promissory notes would secure the sums due on both accounts by mortgaging certain houses, that thereupon the plaintiff at the request of these two last-mentioned debtors, one of whom is a party to both suits and the other to Suit No. 55, gave up Rs. 168 of his claim and had a mortgage deed prepared from the balance of Rs. 4,000 then due in respect of the eight notes, and that at this stage one of the defendants got the eight notes from him by a trick and fraudulently refused to return them. Each plaint next sets out the amount due for principal and balance of interest upon the notes covered by that suit, states that the plaintiff has asked for payment of the amount due but has not been paid, and asks for a decree against the defendants for such amount together with interest thereon from the date of filing the suit. It will be noticed that the plaintiff did not bring one suit for the sum due in respect of all the eight promissory notes upon the alleged agreement to mortgage against the parties to that agreement, nor did he seek in any way to enforce or make any use of that agreement. He did not allege any merger of the original debts, but on the contrary brought two separate suits and included in each suit only claims arising out of promissory notes signed by the same set of defendants.

The defendants in each case admitted the original debts to plaintiff and execution of the various promissory notes referred to in the plaint, denied that the notes had been obtained by

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improper means as alleged in the plaint, and pleaded that the amounts due in each case were paid in full at the time of the return of the promissory notes. The two suits were tried together and in each case judgment was in favour of the plaintiff. As the point was not material there was no statement in the pleadings or the evidence as to the dates on which the promissory notes were payable but, as the point may possibly be material upon one of the questions referred by me, I have made enquiries and have been informed that they all were payable on demand.

In drawing up the decrees it occurred to the Assistant Registrar on the Original Side that the plaints had not been properly stamped as required by section 17 of the Court Fees Act (VII of 1870), and he accordingly brought the matter to my notice as the parties refused to pay the excess court-fee which he desired to levy. Each plaint bore the court-fee stamp required in an ordinary suit for the sum of money claimed in such plaint. His view was that the claim on each of the promissory notes was a "distinct subject" within the meaning of section 17 and that the court-fee leviable on each plaint ought to have been calculated on this basis. In support of this view he referred me to the decisions of the High Court of the North-West Provinces in the case of *Chamaili Rani* v. *Ram Dai* (1), and *Parshotam Lal* v. *Lackman Das* (2), and of the High Court of Bombay in *Ramchandra* v. *Antaji* (3). Mr. Giles for the plaintiff and Mr. Lentaigne for the defendants urged that these decisions were erroneous and conflicted as well with the long established practice of this Court and of its predecessor, the Court of the Recorder of Rangoon, as with the clear language of section 17 and the principle underlying a judgment regarding the meaning of this section delivered by a Full Bench of the High Court at Calcutta in the case of *Kishori Lal Roy* v. *Sharut Chunder Mozumdar* (4). They also relied upon certain unfortunate consequences that, they urged, would necessarily result from placing the meaning suggested by the Assistant Registrar upon the section, as showing that such meaning could not have been intended by the Legislature and contended that in any event the language of the section was ambiguous and therefore a meaning which favoured their clients should be placed upon it.

The points involved seem to me very important and I think that they require further consideration.

I therefore refer to a Bench, under section 11 of the Lower Burma Courts Act, 1900, the following questions :—

(1) Where several promissory notes have been made on different dates by a debtor in favour of the same payee in respect of sums advanced by the latter to the former on different dates and the payee brings one suit against the maker in respect of his claims upon all the promissory notes, does such suit embrace

(1) (1878) I.L.R. 1 All., 552.
(2) (1887) I.L.R. 9 All., 252.
(3) Bom. P.J., 1887, p. 271.
(4) (1882) I.L.R. 8 Cal., 593.

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distinct subjects within the meaning of section 17 of Court Fees Act, 1870?

(2) Where the balance of an account has been struck and in settlement of the account the debtor on one and the same date makes in favour of his creditor several promissory notes payable on demand for sums amounting in the aggregate to the balance so found to be due from him and the payee thereafter brings one suit against the maker in respect of his claims upon all the promissory notes, does such suit embrace several distinct subjects within the meaning of section 17 of the Court Fees Act, 1870?

The opinion of the Bench was as follows:—

Fox, C.J.—The answers to the questions referred depend upon the construction to be given to the words "two or more distinct subjects" in section 17 of the Court Fees Act, 1870.

The section is as follows:—

"Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act.

Nothing in the former part of this section shall be deemed to affect the power conferred by the Code of Civil Procedure, section 9."

Section 9 of the Code of Civil Procedure in force in 1870 ran as follows:—

"If two or more causes of action be joined in one suit and the Court shall be of opinion that they cannot conveniently be tried together, the Court may order separate trials of such causes of action to be held."

By the insertion of the second paragraph of section 17 of the Court Fees Act the Legislature indicated that but for it the power of a Court to order separate trials of different causes of action joined in one suit might be affected by the first paragraph of the section. This affords a clue to what it was referring in using the words "two or more distinct subjects." The meaning of the words has been the subject of much consideration in the Allahabad High Court, and has given rise to differences of opinion amongst learned Judges of that Court.

The various opinions from time to time expressed are set out in the report of a Reference under the Court Fees Act in 1894 (5). The majority of the learned Judges appear to have agreed in thinking that the words "distinct subjects" were synonymous with "distinct causes of action." One of the learned Judges thought that the former words would embrace more than the latter, and that "distinct kinds of relief" would fall under them also. This latter view, however, was not explicitly adopted by

(5) (1894) I.L.R. 16 All., 401.

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any of the other Judges who had considered the matter, and in the Full Bench case of *Kishori Lal Roy* v. *Sharut Chunder Mozumdar* (4) it was impliedly dissented from by a Full Bench of the Calcutta High Court.

Counsel for both parties to the present suit join in urging that the words "distinct subjects" should not be read as equivalent to even "distinct causes of action." It has been argued that section 17 of the Act must be read with section 7, and that for section 17 to operate so as to make a higher fee payable than what would be payable under section 7, there must not only be distinct causes of action, but these causes of action must fall under more than one of the categories of suits mentioned in section 7. This contention is in my opinion untenable. Section 17 is not expressly dependent on section 7, nor is it impliedly so. It appears to me that the word "subjects" in section 17 refers to the subjects of the suit. In the questions put to us, the subjects of the suit, or in other words what were sued upon, were the promissory notes, which were beyond dispute distinct subjects. Practically the words "distinct subjects" may be synonymous with "distinct causes of action," for, according to the judgment of their Lordships of the Privy Council in *Chand Kour* v. *Partab Singh* (6), the term "cause of action" means the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. The media would include the basis of each claim made in the suit, and in a suit on several promissory notes each note would be a distinct basis of claim.

On this view I would answer both questions referred in the affirmative: in each case the suit is upon several promissory notes, and the foundations of the claim are the same.

It was urged that it has not been the practice of this Court or of its predecessors to demand court-fees in the manner in which these answers, if adopted, will entail.

As far as I am aware, the questions have never before this case been raised, and there has been no previous ruling of the Courts on them. Now that they are raised we have to come to a decision upon them. I dissent from the view that a wrong practice becomes a right practice through age. If the practice of the Court has not been in conformity with what the Legislature has laid down, it must be altered, and a practice in conformity with law must be adopted.

Moore, J.—I concur.

Bell, J.—The answers to be given to the two questions referred depend upon the meaning that may be assigned to the words "two or more subjects" in section 17 of the Court Fees Act, 1870.

Before considering the language of this Act I think it will be convenient to refer to two rules of construction which, it was suggested, should guide the Court in interpreting that language.

(6) (1888) I.L.R. 16 Cal., 98.

In the first place, it was urged that, though the Court Fees Act was passed nearly forty years ago, it has never been the practice either of this Court or of its predecessors to levy court-fees in the manner that will become obligatory if either of the questions referred be answered in the affirmative. In other words, Mr. Giles and Mr. Lentaigne rely upon the principle of interpretation embodied in the old maxim " optima est legum interpres consuetudo." This maxim, however, does not seem to me to be applicable to the present case. In the first place, the correctness or otherwise of the practice relied upon does not seem ever to have been brought before a Judge in Rangoon for decision. It cannot therefore be said of this practice either that it has received judicial approval here or that it has been notorious, so that long acquiescence by the Legislature in the interpretation put upon its enactment may reasonably be regarded as some sanction or approval of that interpretation. Nor can it be suggested that any rights of property have grown up under this view of the law, which will be affected by its reversal. Moreover, as I shall have to point out directly, the Courts of at least one province in India have adopted a contrary view as to the interpretation to be put upon the language of section 17, and there is no reason to suppose that that view, if it be the one justified by the natural meaning of the language used in the Court Fees Act, has not prevailed in other provinces. In that case the practice here is no better than a mere local usage, which cannot be invoked to construe a general enactment, even for the locality in which that usage has prevailed.

The argument that the Act must be construed in favour of the subject because it is a fiscal law also seems to me to be of little weight. Having regard, in particular, to the tendency of recent decisions I think that the most that can be said to be required in the case of such a law is that the language of the Act shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment.

Section 17 of the Court Fees Act is as follows :—

" Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act.

Nothing in the former part of this section shall be deemed to affect the power conferred by the Code of Civil Procedure, section 9."

Section 9 of Act VIII of 1859, which is the Code referred to, was as follows:—" If two or more causes of action be joined in one suit and the Court shall be of opinion that they cannot be conveniently tried together, the Court may order separate trials of such causes of action to be held."

Clearly, therefore, the Legislature when enacting the Court Fees Act was of opinion that, in the absence of the express

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saving introduced by the 2nd paragraph of section 17, that section might affect the power of a Court to order separate trials of separate causes of action which had been joined in one suit. Though no conclusive inference can be drawn from this fact, it may fairly be regarded as lending colour to the view that the meaning assigned to the words " distinct subjects " by the majority of the Judges of the High Court of the North-Western Provinces in the cases of *Chamaili Rani* v. *Ram Dai* ( ), *Mulchand* v. *Shib Charan Lal* (7), *Chedi Lal* v. *Kirath Chand* (8), *Parsho'am Lal* v. *Lachman Das* (2), and a Reference under the Court Fees Act, 1870, section 5 (5), is the correct one and that these words are synonymous with " distinct causes of action." That this is the meaning of " distinct subjects " seems to me to be the view underlying the judgment of the Full Bench of the High Court of Bengal in *Kishori Lal Roy* v. *Sharut Chunder Mozumdar* (4), and indeed I do not see what wider meaning can reasonably be placed upon these words. It is true that it was argued that, as section 17 must be read with the other sections of the Act including section 7, the " distinct subjects " must be only such subjects as come under different sub-sections of section 7, and that therefore a suit, in which the relief claimed is money only, embraces only one subject, however numerous and widely different the causes of action on which it is based may be. I must, however, confess that I was unable to follow this argument, for which I can find no support in the language of either section or in any part of the Act.

It seems to me, therefore, that the answer to each of the questions referred must be in the affirmative, as each of the promissory notes included in each suit clearly gave rise to a distinct and separate cause of action.

Full Bench—(Criminal Revision).

Criminal Revision No. 76B of 1909.

June 2nd, 1909.

Before Sir Charles Fox, Chief Judge, Mr. Justice Bell, and Mr. Justice Moore.

MA NYEIN GALE *v.* { 1. NGA SEIN. 2. SHWE THAW. 3. NGA SAW.

Stone-throwing at a house—danger—mischief—insult—Penal Code, ss. 336, 426, 504.

The accused threw large pieces of brick at the back of complainant's house, complainant being at the time on the ground in front of the house and there being no one in the house. They were convicted of offences under section 336 of the Penal Code.

Held,—that as there was no evidence to show that human life or the personal safety of others was endangered by the accused's acts, the conviction was bad; and that the only offence that could be held to have been

(7) (1880) I.L.R. 2 All., 676. | (8) (1880) I.L.R. 2 All., 682.

committed, in the circumstances, was mischief, under section 426 of the Penal Code.

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Fox, C.J.—I understand the Magistrate to have found that five large pieces of brick had been thrown by the accused at the back of the complainant's house, and had hit it and fallen to the ground outside. There was no one in the house at the time. The complainant was on the ground in front of the house. She remonstrated with the accused, and they then came towards her and abused her grossly. The Magistrate convicted the accused of an offence punishable under section 336 of the Indian Penal Code for having thrown the pieces of brick. He did not convict in respect of the insult. The Sessions Judge is of opinion that the conviction was wrong. He thinks that the accused should have been convicted of offences punishable under section 504 of the Indian Penal Code, because the intention of the accused in throwing the pieces of brick, as judged from their subsequent conduct in abusing the complainant, was to insult her. I cannot agree in this view. It appears to me that the brick-throwing was merely wanton conduct on the part of rowdy young men, and that there was nothing to show that they meant by it to insult the complainant and thereby provoke her to break the public peace. The question arises as to what offence, if any, they committed in throwing the pieces of brick at the back of the house and hitting it with them. There being no evidence in the present case to show that human life or the personal safety of others was endangered by the accused's acts, the convictions under section 336 of the Indian Penal Code were not justified. The only defined offence in the Code which is applicable to the case is "mischief." Roofs and walls of dwelling houses are not put up to be pelted at with brick-bats, and owners have a right to be protected from even dents and marks being made in and on them without their consent. In a case such as the present where large pieces of brick were wantonly thrown at a house I think it may be taken that the house, having been hit, was to some extent altered in condition and damaged, and thereby wrongful loss or damage was caused to the owner.

The accused should in my opinion have been charged with offences punishable under section 426 of the Penal Code. I would set aside the convictions and sentences under section 336 of the Code, and in view of what the Sessions Judge says about the alleged willingness of the complainant to compromise the case, I would order the retrial of the accused for offences punishable under section 426 of the Code. That offence is compoundable, as is also the offence punishable under section 504 of the Code, if the complainant wishes to proceed against the accused in connection with the insult offered her after the brick-throwing.

It will be open to her to compound the offences if she so wishes.

Bell, J.—I concur.

Moore, J.—I concur.

Full Bench—(Civil Reference).

Civil Reference No. 2 of 1909.

June 7th, 1909.

Before Sir Charles Fox, Chief Judge, Mr. Justice Moore, and Mr. Justice Bell.

IN RE YEO ENG PWA AND OTHERS } *v.* CHETTY FIRM OF R.M.A.R.R.M.

Young, Government Advocate.

Giles—for the parties.

Definition of promissory note and bill of exchange in sections 4 and 5 of the Negotiable Instruments Act, 1881, and sections 2 (2) and (22) of the Indian Stamp Act, 1899—meaning of "certain" in the expression "a certain person."

The expression "a certain person" in sections 4 and 5 of the Negotiable Instruments Act, 1881, incorporated in section 2 (*2*) and (*22*) of the Indian Stamp Act, 1899, means a person who is capable of being ascertained at the time when the bill of exchange is accepted or the promissory note is made.

When, therefore, by an instrument which in all other respects is a promissory note within the meaning of the Negotiable Instruments Act, 1881, the sum named therein is made payable on a future date to "the members for the time being" of a specified firm, it is not a promissory note as defined by that Act.

If, however, the person to whom money is made payable by such an instrument is a certain person within the meaning of the Act, the fact that the money is expressed to be payable to him or his representatives will not affect the validity of the instrument as a promissory note, for on the true construction of the instrument the money is payable in the first instance to such person and his representatives are merely agents to receive payment on his behalf.

Mortgage Insurance Corporation Limited v. *Commissioners of Inland Revenue*, (1888) 21 Q.B D., 352, distinguished.

Gisborne & Co. v. *Subal Bowri*, (188.) I.L.R. 8 Cal., 284, at page 286; *Holmes* v. *Jaques*, (1866) L.R., 1 Q.B., 376; *Watson* v. *Evans*, (1863) 32 L.J., Ex., 137; *Yates* v. *Nash*, (1860) 8 C.B., N.S., 581; *Cowie* v. *Stirling*, (1856) 6 E. & B., 333; referred to.

The following reference was made by the Financial Commissioner, Burma, under section 57, sub-section (*1*), of the Indian Stamp Act, 1899 (II of 1899), as amended by the Lower Burma Courts Act, 1900 (VI of 1900), Schedule I:—

Under the provisions of section 57, sub-section (*1*), of the Indian Stamp Act, 1899 (II of 1899), I refer the case stated below to the Chief Court of Lower Burma. This case has been referred by the Collector of Rangoon Town under section 56 of the Stamp Act.

A document termed an agreement was made on the 22nd August between Yeo Eng Pwa and others on the one hand and the Chetty firm of R.M.A.R.R.M. on the other, securing the repayment of Rs. 36,000.

It is drawn up in the form of an agreement and, unless it can be shown to come clearly under another definition, is correctly stamped.

The case has been argued before me by Mr. Giles. If not an agreement, the document is either a bond or a promissory note.

The Collector dismisses with some brevity the question as to whether the document is a bond. A bond is a document by which a person obliges himself to pay money to another on condition that the obligation shall be void if a specific act is or is not performed, section 2 (5) (*a*), Stamp Act.

The document in question is one in which the debtor covenants to pay a certain sum of money to the creditor. In clause 3 there is a further covenant that the creditor will not sue on the original promissory notes which are merged in this document. The question arises whether this is a condition. If it is, the document is a bond, whether the debtor "obliges" himself to pay or "covenants" to pay.

It is urged by the learned advocate that the breach of the covenant in clause 3 would not make the obligation to pay void, but voidable only; that were the creditor to commit a breach of the covenant in clause 3 and demand or seek to recover on the original promissory notes the debtor could still hold him to the terms of this document; that a bond is a well-known form of document in this country with a penalty clause attached, and the meaning should not be strained to form the definition into a net to catch stray documents.

In the case of *Gisborne & Co.* v. *Subal Bowri*, Indian Law Reports, 8 Calcutta, 284, a bond is not described, but it is said to be very different from a covenant to do a particular act, the breach of which must be compensated in damages. The remedy upon a bond is described. In the case of a conditioned bond [under section 2 (5) (*a*)] the plaintiff recovers the actual damages he can prove he has sustained. It is a contract of a different form from a covenant with a penal clause. The document under consideration is certainly not a covenant with the penal clause, but this does not necessarily imply it is a bond. It is, however, a document under which the plaintiff could recover the actual damage he could prove he had sustained, and it would thus appear to be one answering to the description by Garth, C.J., in the above quoted judgment.

It is, however, not in the ordinary form of a bond as generally recognized in this country.

If not a bond, the question arises if it is a promissory note. The document contains a promise to pay a certain sum of money, it names the persons, and is signed by the maker.

Two questions then arise. Is it unconditional, and does it make the money payable to a certain person? The learned advocate again asks me to consider the form of the document, an argument which may easily be stretched too far, and result in making the form rather than the essence the criterion by which duty should be determined. He does not apparently contend that clause 3 is a condition but bases his argument on the explanation of the word "creditor" in the document which is said to include "the members for the time being of the firm, their

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representatives* and assigns†." The word "person" includes a company or association, and a body of individuals whether incorporated or not, and will therefore include the Chetty firm of R.M.A.R.R.M.; and inasmuch as the ordinary promissory note is not affected by the circumstance that it can be assigned to another by order, and is in fact expressly intended to be negotiable, I am of opinion that the introduction of the word "assigns" will not affect the character of the document so as to make it payable otherwise than to a certain person.

In the case cited at page 352, XXI Q.B.D., *Mortgage Insurance Company* v. *Commissioners of Inland Revenue*, the criterion by which a promissory note is determined is whether the promise to pay is the sole or one of a number of conditions. I am of opinion that clause 3 is the stumbling-block. The document is on the part of the debtor an unconditional undertaking to pay a certain sum of money on specified dates to a certain person, but by clause 3 if the creditor takes certain action the undertaking is voidable or damages could be recovered. I am of opinion that this does not affect the nature of the document which on the part of the debtors is a promissory note. If, however, it does so affect it, I consider the condition would make the document a bond.

I am, however, sufficiently in doubt in the matter to render it advisable to refer the matter to the Chief Court of Lower Burma.

The opinion of the Bench was as follows:—

Bell, J.—The subject matter of the present reference is a document which purports to be an agreement between a person therein called the "debtor" of the first part, three persons therein called the "sureties" of the second part and the Chetty firm of R.M.A.R.R.M. therein called the "creditor," which expression, it is stated in the document, shall include "the members for the time being of the firm of R.M.A.R.R.M. their representatives and assigns" of the third part. The recitals show that a sum of Rs. 36,000 was due from the debtor to the creditor in respect of principal upon six promissory notes, that the debtor had asked the creditor to accept a portion of the sum due and as to the rest to give him time and to receive it on certain specified dates by equal instalments, that in consideration for the creditors so doing the sureties had agreed to join with the debtor in making the said payments to the creditor and that the portion agreed to be paid in advance had been received by the creditor on or before the execution of the document. The document next set out that it was thereby mutually agreed in consideration of the premises that the debtor and sureties thereby jointly and severally covenanted with the creditor to pay him the said balance by the therein specified instalments on the dates specified therein and would also pay him certain interest.

* L.R., 1 Q.B., 370; 32 L.J., Ex., 137.
† Chalmers' Negotiable Instruments Act, 59.

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Then the 3rd clause of the agreement stated "That the Creditor doth hereby covenant with the Debtor and Sureties that he will not demand sue for recover or do any act to enforce payment of the principal sums of the said six promissory-notes It being hereby declared that the principal sums on the said six promissory-notes have become merged in these presents. Provided always that this provisions (*sic*) shall not affect or prejudice any way the right of the creditor to enforce payment of any instalment that may become due and interest thereon." The two remaining paragraphs provide that as between the sureties and the creditor the sureties were to be considered as principal debtor and state that the agreement was executed by all the parties in the presence of certain specified persons. The document and a schedule giving some particulars regarding the six promissory notes were signed by the debtor, sureties and agent of the creditor, but no one signed as an attesting witness.

This document therefore was in form an agreement and it has been stamped as such. The Financial Commissioner has referred the matter, as he is in doubt as to whether the document should not be stamped either as a bond or as a promissory note.

As the document is not attested by any witness, the definition of a bond, so far as it is material to the present case, is contained in clause (*a*) of section 2, sub-section (5), of the Indian Stamp Act, 1899. That clause, which is identical in language with the corresponding part of the definition of a bond in the old Stamp Acts, XVIII of 1869 and I of 1879, runs as follows:—"Any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed or is not performed, as the case may be."

As was pointed out by Garth, C.J., in *Gisborne & Co.* v. *Subal Bowri* (1), a case decided under the Act of 1869, this definition of a bond is precisely what is understood by a bond in England. In form the document under consideration obviously is wholly unlike what is ordinarily understood as a bond, and it seems to me also to be no less unlike such a bond in substance, even if one disregards the argument put forward by Mr. Giles that the word "obliges" in the definition of a bond must necessarily be taken to bear the technical meaning put upon it by conveyancers. This branch of the order of reference rests, I think, upon a misunderstanding of Garth, C.J.'s judgment, which has been cited above. The learned Chief Justice in discussing the remedies for a breach open to the holders of bonds pointed out that, in the case of a bond conditioned for the performance of covenants, the injured party could recover the actual damage which he could prove that he had sustained. He did not say or suggest that every document upon which an aggrieved plaintiff could recover such actual damage would be a bond.

(1) (1881) I.L.R. 8 Cal., 284, at page 286.

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Clause 3, which has been set out above, is the only one which contains any provision capable of being put forward as a condition that converts the document under consideration into a bond. But all that clause really does is to set out the consideration moving from the creditor for the promises made by the other parties to the agreement and the breach by the creditor of the covenant contained in that clause would not make the obligations of the other parties under this agreement void. At most it would make the agreement voidable at their option.

The document therefore clearly is not a bond and it becomes necessary to consider whether it comes within the description of a promissory note. The definition of a promissory note in the Stamp Act of 1899 is as follows:—"Promissory note means a promissory note as defined by the Negotiable Instruments Act, 1881; it also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen"

Section 4 of the Negotiable Instruments Act, 1881, defines a promissory note as "an instrument in writing (not being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

Section 5 of the Act, so far as it is material to the present case, provides that "the person to whom it is clear that the direction is given, or that payment is to be made, may be a 'certain person' within the meaning of this section and section 4, although he is mis-named or designated by description only."

Mr. Giles has based his objections to the inclusion of the document within the above definition of a promissory note on several grounds. In the first place he has contended that it cannot be said that this document substantially contains a promise to pay a definite sum of money and nothing more, and hence that it cannot be regarded as a promissory note. In support of his general proposition he has cited the case of *Mortgage Insurance Corporation Limited* v *Commissioners of Inland Revenue* (2). That decision undoubtedly is as good law here as in England, but it is suggested that this document in fact substantially contains a promise to pay a definite sum of money and nothing more, as clause 3 simply amounts to a recital of the consideration for the making of the promissory note by the debtor and sureties. Another objection urged by Mr. Giles is that the document under consideration is a bilateral contract containing reciprocal promises and signed by all the parties thereto, whereas the document contemplated by the above cited sections is an unilateral contract made and signed by the debtors alone. He also has contended that "assigns" cannot be treated as co-extensive with "order" and that no one connected with commerce would dream of attempting to negotiate this instrument by endorsement and delivery.

(2) (1888) 21 Q.B.D., 352.

If it were necessary to do so, I think I should have little hesitation in finding in Mr. Giles' favour upon all these points except perhaps the first. I do not, however, propose to go in detail into any of those questions because it seems to me that apart from them there is an indisputably fatal objection to the contention that this document is a promissory note, *viz*, the absence of certainty with regard to the person to whom or to whose order the money payable under the instrument is payable. No one suggests that it is payable to bearer, and it seems to me that the person to whom the money is payable, *i.e.*, "the creditor," including as the expression does "the members for the time being of the firm of R.M.A.R.R.M.," is not a certain person within the meaning of the Negotiable Instruments Act. If it were merely the inclusion of "representatives" in the expression "the creditor," that had to be considered, I do not think any difficulty would arise, for then I think on the true construction of the instrument the money would be payable in the first instance to the members of the firm, and their representatives would be merely their agents to receive payment on their behalf. This clearly would be the case under the English Common Law, as appears from, *inter alia*, the decisions in *Holmes* v. *Jaques* (3) and *Watson* v. *Evans* (4), and it seems to me that the paragraph quoted above from section 5 of the Negotiable Instruments Act merely reproduces the English Common Law with respect to the certainty of person required in the case of the payee of a note or bill. I have the less hesitation in so regarding this paragraph, as the same view of its effect is taken by the learned draftsmen of the English Bills of Exchange Act.*

But the inclusion in the expression "the creditor" of the members of the firm "for the time being" seems to me to stand upon a very different footing and to be absolutely fatal to the validity of the document as a promissory note. By the English Common Law, which has been reproduced in the paragraph of section 5 now under consideration, the payee of a bill of exchange or promissory note must be a person who is capable of being ascertained at the time when the bill is accepted or the note is made. That is laid down in very distinct terms as to bills of exchange in *Yates* v. *Nash* (5) and as to promissory notes in *Cowie* v. *Stirling* (6). In England the law on this point has been altered by the insertion in section 7 (*2*) of the Bills of Exchange Act, 1882, of an express provision which is unknown to the Indian Act. Clearly the members of the firm "for the time being," to whom the instalments under the agreement were made payable on dates from one to five years subsequent to the date on which the instrument was executed, were not capable of being ascertained on the date on which the alleged promissory note was made and hence the money payable under the instrument was not payable to, or to the

(3) (1866) L.R. 1 Q.B., 376.
(4) (1863) 32 L.J., Ex., 137.
(5) (1860) 8 C.B., N.S., 581.
(6) (1856) 6 E. & B., 333.
* Chalmers' Negotiable Instruments Act, p. 42, 3rd edition.

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order of, a certain person, as section 4 of the Negotiable Instruments Act requires it to be. It follows that this instrument cannot be regarded as a promissory note within the meaning of the Indian Stamp Act, 1899.

In my opinion, therefore, for the purposes of the Stamp Act of 1899 the instrument under consideration can be regarded neither as a bond nor as a promissory note and, if duly stamped as an agreement, has been correctly stamped.

Moore, J.—I concur.

Fox, C.J.—I agree in thinking that the document on which the reference is based is neither a bond nor a promissory note.

Special Civil 2nd Appeal No. 220 of 1908.

June 14th, 1909.

Before Mr. Justice Moore.

ARANACHELLUM CHETTY AND VELLIYAPPA CHETTY } *v.* ISMAIL HUSSAIN.

P. N. Chari—for appellants (plaintiffs).

Ba Hla Aung—for respondent (defendant).

Meaning of the words "handwriting of the person making the same" in section 20 of the Indian Limitation Act, 1908.

The term "handwriting" in section 20 of the Indian Limitation Act, 1908, refers to the whole written evidence of the fact of payment. An endorsement written by a person other than the person making the payment and signed by the latter is not covered by section 20.

The case of illiterates is different.

Mukhi Hajai Rahumttulla v. *Coverji Bhuja*, (1896) I.L.R. 23 Cal., 546; *Santishwar Mahanta and others* v. *Lakhikanta Mahanta*, 13 C.W.N., 177 followed.

Narsingh Das and another v. Bachatar Singh and others, (1884) Punjab Record No. 99, dissented from.

Madabhushi Seshacharlu v. *Singara Seshaya*, (1883) I.L.R. 7 Mad., 55; *Ellappa Nayak* v. *Annamalai Goundan*, (1883) I.L.R. 7 Mad., 76; *Joshi Bhaishankar* v. *Bai Parvati*, (1901) I.L.R. 26 Bom., p. 246; *Jamna* v. *Jaga Bhana and another*, (1903) I.L.R. 28 Bom., 262; referred to.

The plaintiffs-appellants brought this suit against respondent-defendant for recovery of Rs. 882-15-6 due upon an equitable mortgage of a house and its site by deposit of title deeds, and joined to their prayer for sale of the mortgaged premises a prayer for a personal decree against defendant, their claim to the latter remedy being based upon a promissory note executed at the time of deposit of title deeds. The promissory note is dated 28th December 1903 and the suit was instituted on the 3rd October 1907, plaintiffs alleging a payment by defendant of Rs. 10 towards principal upon the 20th December 1906.

The Court of first instance decreed plaintiffs' claim in full, granting them a mortgage decree and a decree against the defendant personally for the deficiency, if any, upon sale of the mortgaged property.

Against this decree defendant appealed to the Divisional Court on the ground that the suit was barred by limitation as far as defendant's personal liability was concerned. The learned Divisional Judge held that the suit was barred by limitation inasmuch as the fact of payment of principal did not appear in the defendant's handwriting, and setting aside the decree of the Court of first instance dismissed plaintiffs' suit with costs. It is admitted that the Divisional Judge erred in setting aside any portion of the lower Court's decree other than that which made defendant personally liable. Plaintiffs did not lose their rights under the mortgage even though their suit on the promissory note might be barred by limitation.

The endorsement upon the promissory note upon which plaintiffs rely runs as follows:—

"20-12-06 Paid Rs. 10/- ten rupees"

(Signed) "ISMAIL HUSSEIN"

The lower Courts agree in finding that this sum of Rs. 10 was actually paid, and was paid towards principal. It is admitted that the words "20-12-06 Paid Rs. 10/- ten rupees" were written not by defendant but by a third person. The signature to the endorsement is disputed by defendant. The Judge of first instance found that it was defendant's own signature. The Judge of the Divisional Court came to no finding as to whether the signature was defendant's writing or not. He held that the endorsement itself being admittedly not in defendant's handwriting, the fact of his having signed it would not, if true, avail to extend the period of limitation in the suit, the fact of the payment not appearing in the handwriting of the person making the same within the terms of section 20 of the Limitation Act. That section provides that when part of the principal of a debt is before the expiration of the prescribed period paid by the debtor or by his agent duly authorized in this behalf, a new period of limitation shall be computed from the date of such payment "provided that in the case of part payment of the principal of a debt the fact of the payment appears in the handwriting of the person making the same."

The question for consideration is whether the signature by defendant, who is literate, of endorsement of part payment of principal by a third person, not his agent, is a sufficient compliance with the conditions of this proviso.

In the case of *Madabhushi Seshacharlu* v. *Singara Seshaya* (1), defendant was illiterate. Endorsement of part payment of principal was made by a third person, not defendant's agent, and defendant affixed his mark beneath it. It was held by a Divisional Bench that signature by a mark was under the circumstances a sufficient compliance with the Act. No reasons for the decision are given.

(1) (1883) I.L.R. 7 Mad., 55.

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In the case of *Ellappa Nayak* v. *Annamalai Goundan* (2), the facts were the same as in the preceding case, *viz.*, the endorsement was not in the writing of the debtor, who was illiterate, but he affixed his mark to it. Hutchins, J., who held that this was a sufficient compliance with the requirements of section 20, based his decision upon the ground that "when there is a writing setting forth the fact of the payment and the debtor affixes his mark or signature thereto he adopts the writing and makes it his own and by his signature causes the fact to appear in his own handwriting." And he alludes to the practical inconvenience which would arise from a strict construction of the words of the section which would render it impossible to give the same effect to a payment by an illiterate as to one by an educated person.

Kindersley, J., expressed some doubt as to the correctness of this opinion, but was content to follow it as expressing the opinion of the majority of the Judges.

The Punjab Chief Court in the case of *Narsingh Das and another* v. *Bachatar Singh and others* (3) adopted the reasoning of the Judges of the Madras High Court in the above noted cases and held that when a debtor who is able to write attaches his signature to a statement of payment he adopts the writing as his own, and thereby causes the fact stated therein to appear in his own handwriting.

The Madras cases were considered by a Full Bench of the Calcutta High Court in the case of *Mukhi Haji Rahumttulla* v. *Coverji Bhuja* (4). The payment in this case was made by a duly authorised agent of the debtor. The entry of the payment was in the handwriting of the cashier of the agent. The learned Judges held that the words of section 20 were imperative and negatived the supposition that the handwriting of another person however authorized by him who made the payment could be contemplated by the proviso to that section. They held therefore that this entry was not a sufficient writing within the proviso.

In Bombay, in the case of *Joshi Bhaishankar* v. *Bai Parvati* (5), the facts held proved were that the debtor himself made the payment and being temporarily unable to write, owing to an affection of the eyes, directed another person to make the entry of payment. The lower Appellate Court following the Madras rulings held that the debtor had thereby adopted the entry as his own. A Divisional Bench of the High Court held that the entry not being in the handwriting of the person making the payment was not within the words of the section which were imperative and must be strictly followed. In *Jamna* v. *Jaga Bhana and another* (6), in the case of an illiterate person affixing his mark to an endorsement the Madras rulings were followed by Sir Lawrence Jenkins, C.J., who remarked that were the matter *res integra* he

(2) (1883) I.L.R. 7 Mad., 76.
(3) (1884) Punjab Record No. 99.
(4) (1896) I.L.R. 23 Cal., 546.
(5) (1901) I.L.R. 26 Bom., p. 246.
(6) (1903) I.L.R. 28 Bom., 262.

might have felt difficulty in arriving at the same conclusion but that it was of paramount importance, in matters entering into the daily life of the people, that a long settled rule of law should not lightly be disturbed. The long settled rule of law, however, only governs the special case of illiterate persons.

The latest authority on the point is the case of *Santishwar Mahanta and others* v. *Lakhikanta Mahanta* (7), which is on all fours with this case. It was there ruled that when the debtor can write an endorsement as to payment of principal written by another person but signed by the debtor himself is not sufficient under the provisions of section 20, Limitation Act, to create a new period of limitation.

The Madras cases were again referred to and distinguished as in those cases the person making payment could not write and as far as was possible, the fact of payment appeared in his own writing. But the *ratio decidendi* in the later Madras case seems to have been rather that the person who made his mark thereby adopted the handwriting as his own. And the learned Judges of the Madras High Court appear to have been of the opinion that the same reasoning would apply in the case of a literate person signing his name to an endorsement of payment by some other person. In their view he would by his signature adopt the handwriting as his own and it would thereby become his handwriting.

With due respect I am unable to concur in this reasoning. The section is very plainly worded and it requires the fact of the payment to appear in the handwriting of the person making the payment, not in handwriting which he may be held to have adopted as his own.

Section 19 of the Act which deals with acknowledgments of liability requires such acknowledgments to be "in writing signed by the party, etc.," and the difference in the wording of this section and of the proviso to section 20 indicates, I think, that it was the intention of the Legislature that the fact of part payment of principal should be recorded by the person making the payment and not merely that it should be recorded by some other person above his signature.

I think, therefore, that the case of *Santishwar Mahanta* v. *Lakhikanta Mahanta* (7) was rightly decided. And I therefore hold that in the present case the endorsement in question, even if signed by the debtor, is not sufficient to save limitation.

I therefore set aside the judgment and decree of the lower Appellate Court, and I set aside so much of the judgment and decree of the Court of first instance as makes defendant personally liable for the sum for recovery of which plaintiffs sued.

Costs in the Court of first instance to be borne by defendant. In this Court and in the lower Appellate Court each party to bear his own costs.

(7) 13 C.W.N., 177.

Civil 1st Appeal No. 11 of 1908.

June 29th, 1909.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

MA LE *v.* (1) MA HMYIN; (2) KAN AYE; (3) (*a*) MA THIN, (*b*) MA SHIN, (*c*) TUN TIN; (4) SHIN MYA; (5) MAUNG GYI; (6) PO PE; (7) MA LÔN; (8) SAN DUN; (9) PO SEIK; (10) MA TÔK; (11) MA SHWE HTAI; (12) MAUNG NGE; (13) SAN U; (14) PO NGO.

P. P. Ginwalla—for appellant (plaintiff).

Higinbotham—for respondents (defendants), Nos. 3 (*a*, *b* and *c*), 4, 5, 6 and 7.

What constitutes discontinuance of possession and adverse possession in the case of co-ownership—Indian Limitation Act, first schedule, articles 142 and 144.

In a suit for partition the land in question had originally been enjoyed in turn for a year at a time by plaintiff and defendants. Later, when plaintiff's turn came, she did not avail herself of it. No transfer of plaintiff's share of the land or lease by her to one of the co-owners was proved.

Held,—that so long as a co-owner who actually enjoys the profits of jointly owned property does not by some unequivocal act communicate to his co-owner, either directly or indirectly that he no longer recognizes any right of the latter in the property, and asserts that he holds the property as his own to the exclusion of the other, the possession of one continues to be the possession of both, and the one in possession can acquire no right against the other by adverse possession.

In this view the plaintiff in the present case did not discontinue possession by not taking her turns of actual possession, and Article 142 of the Limitation Act did not apply to the case.

Article 144 did not bar her right to a partition because for the same reason the objecting defendants did not make out a case of adverse possession against the plaintiff for twelve years.

Lachmeswar Singh v. *Manowar Hossein*, (1891) I.L.R. 19 Cal., 253; *Mahomed Ali Khan* v. *Khaja Abdul Gunny*, (1883) I.L.R. 9 Cal., 744; *Shurfunissa Bibee Chowdhrain* v *Kylash Chunder Gurgopadhya*, (1875) 25 W.R., 53; *Ittappan* v. *Manavikrama*, (1897) I.L.R. 21 Mad., 153; *Dinkar Sadashiv* v. *Bhikaji Sadashiv*, (1887) I.L.R. 11 Bom., 365; followed.

Fox, C.J.—The land of which the plaintiff claimed partition was admittedly the property of U Yan and Ma Khine, who died many years ago.

They had five children, and the land was admittedly enjoyed in turn for a year at a time by these children and by the plaintiff, who is a daughter of one of them.

The opposing defendants alleged that the plaintiff sold her share in the land to the wife of one of her uncles in the year 1890, but they were unable to prove such sale. It was common ground that in 1890 when it was the plaintiff's turn to enjoy the profits of the land her uncle's wife enjoyed them. The plaintiff alleged that she had leased them to her aunt for that year, but this the learned Judge has found to be false.

He has also found that she has not enjoyed the lands since 1890, although her turns would in due course have been in 1895, 1900 and 1905.

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Upon this he has held that the plaintiff's possession of the land discontinued in 1890, and that her present claim to partition and a share of the land is barred by the provisions of Article 142 of the Limitation Act. This makes the period of limitation (12 years) for a suit for possession of immoveable property, when the plaintiff while in possession of the property has been dispossessed or has discontinued possession, commence from the date of dispossession or discontinuance.

There is no question of dispossession in this case.

The only question is whether the plaintiff discontinued possession, and this is attended with difficulty because possession has all along continued with her co-owners, and has never passed to strangers.

I think that it is a mistake to regard the possession of the land as having been only with the co-owner during his or her enjoyment of the profits of the land. It appears to me that on the death of U Yan and Ma Khine possession was with all their heirs who became co-owners, and that all were in possession throughout, although each in turn took the fruits and produce exclusively for a year at a time. The question resolves itself into whether the plaintiff discontinued her possession by failure to enjoy her turns for taking the profits when they came round.

The case is one between co-owners, and the observations of their Lordships of the Privy Council in *Lachmeswar Singh* v. *Manowar Hossein* (1) must be borne in mind. They say:—

> The Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners, though they will do so in proper cases.

That case is an authority for the proposition that the enjoyment of the profits of a property by one co-owner alone does not necessarily affect the possession of his co-owner. In *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (2), it was said that many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land would, between joint owners, naturally bear a different construction. In *Shurfunnissa Bibee Chowdhrain* v. *Kylash Chunder Gungopadhya* (3), it was held that one co-owner's possession would not become adverse to another co-owner's until the one claimed or asserted some right in the land held by the other, and that right was denied. In *Ittappan* v. *Manavikrama* (4), Subramania Ayyar, J., made the following observations on the position of co-owners who are tenants in common:—

> Lastly as to the case of tenants in common, the special characteristic of their right is united possession. Each has a present right to enter upon the whole land and upon every part of it, and to occupy and enjoy the whole. And if one tenant in common occupied and took the whole profits, the other has, apart from statute, no remedy against the former whilst the tenancy in common continues, unless he was put out of possession when he might have

(1) (1891) I.L.R. 19 Cal., 253.
(2) (1883) I.L.R. 9 Cal., 744.
(3) (1875) 25 W.R., 53.
(4) (1897) I.L.R. 21 Mad., 153

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his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety and the other accepted that appointment, when an action of account would lie as against a bailiff of the owner of the entirety of the estate. Consequently sole occupation by one tenant in common is *primâ facie* not inconsistent with the right of any other tenant in common. And in such cases there is no ouster or adverse possession until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner direct or to be inferred from notorious acts and circumstances.

Dinkar Sadashiv v. *Bhikaji Sadashiv* (5) is another case in which a co-owner who had not participated in the profits of the jointly owned land for many years was held not to have lost his right to a partition of it. From the authorities I take it that the rule is that so long as a co-owner who actually enjoys the profits of jointly owned property does not by some unequivocal act communicate to his co-owner, either directly or indirectly, that he no longer recognises any right of the latter in the property, and asserts that he holds the property as his own to the exclusion of the other, the possession of one continues to be the possession of both, and the one in possession can acquire no right against the other by adverse possession.

In this view the plaintiff in the present case did not discontinue possession by not taking her turns of actual possession, and Article 142 of the Limitation Act did not apply to the case.

Article 144 did not bar her right to a partition because for the same reason the objecting defendants did not make out a case of adverse possession against the plaintiff for twelve years. I think that the plaintiff is entitled to a decree for partition. I would allow the appeal, set aside the decree and remand the case to the original Court for a decision on the third issue.

I would order the defendants 3 (*a*, *b* and *c*) 4, 5, 6 and 7 to pay the plaintiff's costs of the suit and of this appeal.

Parlett, J.—I concur.

Civil 1st Appeal No. 39 of 1908.

July 5th, 1909.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

LÔN MA GALE *v.* MAUNG PE.

Giles and *May Aung*—for appellant (defendant).
Lambert—for respondent (plaintiff).

Suit under Burmese Buddhist law for divorce only—whether it bars a subsequent suit for partition of property between the parties—meaning of cause of action—section 43, Code of Civil Procedure of 1882 (Rule 2 of Order II of the Code of 1908).

A obtained a decree of divorce only in the Township Court against his wife B under Burmese Buddhist law. He then sued her in the District Court for a partition of property and obtained a decree.

Held,—on appeal, that the foundation of a claim for divorce under Burmese Buddhist law and for a partition of property in consequence of such divorce is the same, since in each case it is the fault of the other party, that the

(5) (1887) I.L.R. 11 Bom., 365.

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cause of action is therefore the same, and that consequently section 43 of the Code of Civil Procedure of 1882 (Rule 2 of Order II of the Code of 1908) prevents suits for partition of property in consequence of divorce under Burmese Buddhist law being brought after a suit for divorce only, unless permission to omit the claim for a partition of property was given by the Court in the suit for divorce.

Ma Gyan v. *Maung Su Wa*, (1897) 2 U.B.R. (1897—01), 28; *Maung Pye* v. *Ma Me*, 2 U.B.R. (1902-03), Divorce, 6; *Maung Shwe Lôn* v. *Ma Ngwe U*, (1902) 2 Chan Toon's L.C., App., 177; *Mi Kin Lat* v. *Nga Ban So*, 2 U.B.R. (1904—06), Divorce, 3; referred to.

Maung Tha So v. *Ma Min Gaung*, 2 U.B.R. (1902-03), Divorce, 12, dissented from.

Maung Tha Chi v. *Ma E Mya*, (1900) 1 L.B.R., 7, overruled.

Fox, C.J.—The respondent, who was plaintiff in the suit, first filed a suit against his then wife, the appellant, in the District Court on the 11th January 1907. This suit was by consent transferred to the Township Court for disposal. In it the plaintiff asked for a decree of divorce only on the ground that his wife had committed a fault or offence which entitled him under Burmese Buddhist law to a divorce from her. The offence or fault alleged against her was that she had represented to him that a pair of nagats which were his separate property, and which he had entrusted to her care when he went away on a visit, had been stolen, whereas in fact they had not been stolen, but had been misappropriated by her. The defendant in answer to the suit denied that she had committed any matrimonial or other offence, but said that as the plaintiff claimed only a divorce she was willing to be divorced. The Judge thereupon passed an order granting divorce with costs. In the second suit the District Judge has found that the divorce was not by mutual consent, but that the plaintiff obtained a divorce from the defendant in the Township Court in a suit based on fault. It is unnecessary to discuss this enigmatic finding in view of the other matters which arise in the second suit.

In this second suit which was filed on the 30th August 1907, the plaint was almost word for word the same as in the first suit with additional allegations as to the plaintiff having obtained a decree for divorce, and as to what the separate property of each party and their joint property consisted of. The claim was for the plaintiff's separate property which, he said, the defendant had or was accountable for, for the net income of the defendant's land during three years, and for the value of some land and cattle purchased during the coverture. The District Judge in a judgment, which is, to say the least, most difficult to follow, held that the plaintiff had contributed Rs. 3,000 in cash to the marriage which he was entitled to recover, that the defendant was accountable to him for the value of the nagats (Rs. 2,250) and also for Rs. 872-9-0 as half the profits obtained during marriage. He regarded the cash and the nagats as having been *kanwin*, that is, property set apart at the time of marriage the the bridegroom or his parents for the joint purposes of by, married pair. The decision was based upon the plaintiff having

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obtained a divorce for fault on the part of the defendant, and to his consequently being entitled to the whole of the *kanwin* property and to half of the savings or surplus profit, beyond the necessary expenses of the couple, acquired during the marriage.

It has been argued for the appellant that apart from the merits the plaintiff was not entitled to any of the relief he claimed in this suit because he failed in the first suit to ask for enforcement of his rights regarding property. This is the first matter for consideration, and if it is decided in favour of the defendant the other matters need not be gone into. The following cases bearing on the question have been cited.

In *Ma Gyan* v *Maung Su Wa* (1), the head note represents Burgess, J.C., to have held that under Buddhist law a suit for a bare divorce without partition of property will not lie. In *Maung Pye* v. *Ma Me* (2), Adamson, J.C., disputed the correctness of the head note, and said that the real purport of Burgess, J.C.'s judgment was that a suit for a divorce merely would bar a subsequent suit for partition of property between the parties, and that such a suit might be unnecessary and superfluous if the husband did not object to divorce without partition. Subsequently, in *Maung Tha So* v. *Ma Min Gaung* (3), Adamson, J.C., distinctly dissented from what he took to be Burgess, J.C.'s ruling in *Ma Gyan* v. *Maung Su Wa* (1).

In *Maung Tha Chi* v. *Ma E Mya* (4), Birks, J., in this Court also dissented from Burgess, J.C.'s ruling. In his opinion the termination of the marriage status was in itself a sufficient cause of action, and until this question was settled the grounds for partition of the property do not arise.

In *Maung Shwe Lôn* v. *Ma Ngwe U* (5), Burgess, J.C.'s ruling was followed, and it was held that a Buddhist who had sued for divorce being himself in fault but offering no partition of property had no right of suit for a divorce only.

In *Mi Kin Lat* v. *Nga Ban So* (6), Shaw, J.C., took occasion to consider fully the Dhammathats and rulings bearing on the subject. It appeared to him to be perfectly clear that the Dhammathats treat the division of property as part of the law of divorce. He adopted as a correct statement of the Buddhist law a passage in Burgess, J.C.'s judgment in *Ma Gyan* v. *Maung Su Wa* (1), in which he said :—

> Throughout all the texts relating to the subject of divorce, the principal object of the rules laid down appears to be to provide for the disposal of the property pertaining to husband and wife.

I also agree in thinking that this passage contained a correct statement of the law, but I do not think it follows from it that, as stated in the head note to *Ma Gyan* v. *Maung Su Wa* (1), a

(1) 2 U.B.R. (1897—01), 28.
(2) 2 U.B.R. (1902-03), Divorce, 6.
(3) 2 U.B.R. (1902-03), Divorce, 12.
(4) (1900) 1 L.B.R., 7.
(5) (1902) 2 Chan Toon's L. C., App., 177.
(6) 2 U.B.R.(1904—06), Divorce, 3.

suit for bare divorce without partition of property will not lie, or that there is no cause of action for divorce without and as distinct from division of property.

Taking the case of a claim for divorce by a husband on the ground of fault in the other party, which is the case we have now to deal with, I think that the Buddhist law must be looked to, and by it must be determined the rights of the party aggrieved, and the remedies to which he is entitled; but as regards the form of suit he brings, and the consequences of his bringing a wrong form of suit, this being a matter of procedure, the Civil Procedure Code must determine the matter. Taking it to be the case that various specified forms of fault on the part of one of a married couple governed by Burmese Buddhist law give to the other party a right to a divorce and to a division of the joint property or to the whole of it, it appears to me that the fault committed constitutes the cause of action for both the divorce and the separate possession of either the whole or part of the property.

In *Maung Tha So* v. *Ma Min Gaung* (3), Adamson, J.C., said that a test in deciding whether the cause of action in two suits is the same is whether the same evidence would support both, and he proceeded to say that in a suit for divorce the cause of action is concerned with the conduct of the parties only and not with the property, whereas in a suit for partition the cause of action and the evidence would be entirely different. The foundation of the claims, however, is the same in both cases, and in neither case could the plaintiff succeed unless he proved the foundation of his claim, namely, the fault of the other party. The cause of action does not become different because when seeking two remedies arising out of one right more evidence has to be given than if only one remedy is sued for.

The cause of action being in my opinion the same, the law of procedure laid down for our Courts says that the whole of the claim which a plaintiff is entitled to make in respect of a cause of action must be made in any suit founded on that cause of action, and that if a person entitled to more remedies than one in respect of the same cause of action omits (except with the leave of the Court) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

In my view the remedies of a Burmese Buddhist spouse against his or her partner for matrimonial fault committed by him or her being in some cases a divorce and a partition of or declaration of right to the whole of the joint property or a decree ordering the other party to give up possession of it, the party who sues the other may ask for only a divorce if he or she so chooses, but if he or she chooses to sue for a divorce only, then unless the leave of the Court for a subsequent suit for the other remedies has been obtained in such suit, a subsequent suit in which such remedies are claimed is barred by the provisions of the Civil Procedure Code. On this view *Maung Tha Chi* v. *Ma E Mya* (4) in this Court was wrongly decided. I think that the suit from

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the decree in which this appeal is made was barred by the provisions of section 42 of the Civil Procedure Code of 1882.

I would allow the appeal, set aside the decree of the District Court, and dismiss the suit with costs.

I would also order the respondent to pay the defendant's costs of this appeal.

Parlett, J.—I concur.

Privy Council.

(On appeal from the Chief Court of Lower Burma.)

Before Lord Macnaghten, Lord Dunedin, Lord Collins, Sir Andrew Scoble and Sir Arthur Wilson.

MA YWET *v.* { 1. MA ME. 2. MA MI.

Buddhist Law : Adoption—proof necessary in absence of formal ceremony.

Not only is a formal ceremony not necessary to constitute adoption, but the fact of adoption can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and the amount of proof of publicity required is greater in cases of the latter category where no distinct occasion can be appealed to.

In the case of alleged adoption of an adult, when the inferences to be drawn from "bringing up" are necessarily ab ent, it is especially necessary that adequate proof of publicity or notoriety of the relationship by adoption should be insisted on.

Ma Mya Me v. *Ba Dun*, (1904) 2 L.B.R., 224; *Po The* v. *Ma Gyi*, Civil Regular No. 129 of 1905; *Ma Gun* v. *Ma Gun*, 1 Chan Toon's L.C., 147; *Ma Pwa* v. *Ma The The*, (1902) 1 L.B.R., 273; *Ma Me Gale* v. *Ma Sa Yi*, 11 Bur. L.R., 79; referred to.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side. The following judgment of the Chief Court (Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll) was delivered on the 12th March 1907 by—

Civil Misc. Appeal No. 45 of 1906.

March 12th, 1907.

Irwin, J.—U Tu and Ma Cho had four children, namely, U Mya, Ma Mi, Ma Me and Ma Ka.

U Tu died about 30 years ago, Ma Cho about 1899.

Ma Ka died about 1st November 1900, leaving one daughter Ma Ywet, who took out letters of administration to her estate.

U Mya died on 19th April 1905. Ma Mi and Ma Me applied for letters of administration to his estate. Ma Ywet contested the case, and applied herself for letters of administration, alleging that she was the adopted daughter of U Mya. These cross cases were tried together, and letters were ordered to be granted to Ma Ywet. Ma Mi and Ma Me appeal. The sole issue is whether Ma Ywet is the adopted daughter of U Mya.

It was pressed on us at the hearing of the appeal that the judgment of the learned Judge on the Original Side contains no

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finding or statement as to the time at which the adoption took place. It must be admitted that that is so. The learned advocate for the respondent met this argument by saying that the adoption took place when U Mya gave up his own house and moved to Ma Ywet's house a few days after Ma Ka's death. His position is that this moving of house was a definite act by which U Mya signified that he was fulfilling the promise which he had made to his dying sister to take Ma Ywet as his own daughter and never to part from her.

This position is certainly the highest which, on the evidence, Ma Ywet could possibly take up. It seems, however, to entirely nullify the observation made by the learned Judge near the beginning of his judgment that disputes between U Mya and his sisters are of importance as being the foundation of his determination that his sisters should not inherit from him; for the disputes did not arise until some years after the date now fixed for the adoption.

The learned Judge has found that U Mya spent a very considerable portion of his time after Ma Ka's death at Kawa and Thôngwa, and there is no doubt about the fact. Moreover, I think it is certain that when U Mya gave up his own house in Rangoon he removed his furniture, not to Ma Ywet's house, but to Ma Mi's house at Kawa. The giving up of his own house therefore has very little significance, and if his permanent residence was in any one place more than another it seems to have been at Kawa. But assuming that his permanent residence was at Ma Ywet's house, I find it very difficult to say that that fact can be regarded as signifying that he had adopted Ma Ywet. The learned Judge quoted a long passage from *Ma Mya Me* v. *Maung Ba Dun* (1), and the part of it which is relied on by respondent is this: "When Mr. Burgess spoke of an adoption not being a hole-and-corner affair, he referred not to the original taking so much as to the general publicity and notoriety of the relationship." With that I entirely agree, but the reason is given in the preceding words, *viz.*, "the investigation of these claims is commonly undertaken many years after the date of the alleged adoption." It might be added that the adopted child was usually adopted at such a tender age that he or she could not give any positive evidence of the act of adoption from his own knowledge In both these points the present case is totally different. Ma Ywet is alleged to have been adopted about five years before the suit, and when she was about 30 years of age. The reason therefore for not insisting on definite proof of the act of adoption entirely disappears. As to the adoption of a person of mature years we were asked to refer to the case of *Maung Po The* v. *Ma Gyi* (2), which was decided on the Original Side a few days before the present suit. In that case the plaintiff was an adult adopted in recent years, but he adduced very definite evidence of time and place at which the deceased called in

(1) (1904) 2 L.B.R., 224. | (2) Civil Regular No. 129 of 1905.

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elders for the special purpose of informing them as witnesses that he had adopted the plaintiff in order that he might inherit, and it was on this evidence that the suit was decided.

We were referred to a passage in *Ma Gun* v. *Ma Gun* (3), which has, however, been expressly overruled in *Ma Pwa* v. *Ma The The* (4), in which Mr. Burgess's view of the nature of the evidence required to prove adoption was approved.

In the case of *Ma Me Gale* v. *Ma Sa Yi* (5), their Lordships of the Privy Council made some observations which are strongly relied on by the respondent. But in that case Ma Me Gale was born about 1857. Her mother died about 1869. Their Lordships, while remarking that variance about the date of the adoption was not surprising, seeing the case was tried in 1899, held that the adoption probably took place some time before the natural mother's death, that is when Ma Me Gale was less than 12 years old. The parties to the suit were sisters by blood: it was not denied that Ma Sa Yi had been adopted by Ma Ye, and the decision turned largely on Ma Sa Yi's admission that Ma Ye treated both sisters alike. Moreover, the natural father gave direct and positive evidence of his consent to the adoption. The facts of the present case are so utterly different that the only observation of their Lordships which needs to be considered is the passage in which they speak of "the large body of evidence which goes to prove that Ma Ye called both girls her daughters and told people they were her daughters." This will be considered later.

The admitted principle is that the relationship must be public and notorious, and it is only because in most cases the adoption took place many years before the suit and when the person adopted was a child that definite evidence of the act of adoption is not required. When the alleged adoption was recent, and the person adopted an adult, it lies on the person asserting the adoption, in my judgment, to prove it by definite and direct evidence, or to give very substantial reasons for not doing so.

The finding of the learned Judge on the Original Side is based on the following points which he enumerates:—

1. Plaintiff's original natural relationship to U Mya.
2. His promise to her mother when dying to take her and treat her as his own daughter.
3. His abandoning his own house and going to live with her in the house where Ma Ka had died, and his continuing to live there till he died.
4. His undoubted affection for her.
5. His undoubted desire that she should inherit.
6. His allusions to her as his daughter, and to the Pôngyi U Ne Mein and Maung Thaw as his adopted daughter.

(3) 1 Chan Toon's L.C., 147.
(4) (1902) 1 L.B.R., 273.
(5) 11 Bur. L.R., 79.

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Points 1 and 4 require no remark.

U Mya's promises to Ma Ka do not, I think, amount to a promise to adopt Ma Ywet. It was precisely the occasion on which, if adoption were intended, it would have been expressly mentioned; and it was not mentioned. To say that U Mya's words, as reported by any of the witnesses, amounted to a promise to adopt, would be to take the very view which was repudiated in *Ma Pwa* v. *Ma The The* (4). Moreover, even a promise to adopt would avail nothing without proof that the promise was carried into effect.

Point 3 I have already dealt with.

U Mya's desire that Ma Ywet should inherit was manifested near the end of his life, and the only view I can take of it is that his desires to make a gift, or a will, or to execute a formal deed of adoption, if they have any significance at all, signify that he had not yet adopted her, for if she were adopted nothing more would be necessary to cause her to inherit. I do not lay stress on this, as any prudent man might guess that an adoption not effected by deed would be liable to be contested, but I merely remark that this part of the evidence does not help the respondent's case.

There remains the evidence that U Mya referred to Ma Ywet as his daughter or adopted daughter. After giving the fullest consideration to the words of their Lordships of the Privy Council above referred to, I think we are at liberty to rely on our own knowledge that Burmans use the words "father," "mother," "son," and "daughter" very loosely, and to say that Mr. Dhar was perfectly correct in saying, "It would be quite natural for an old man like that to refer to a niece who had lived with him for a long time as his daughter." This is the evidence of a witness for the respondent.

Mr. Justice Bigge observed, "One of the difficulties of this case is the obviously simple way in which the word 'adopted' can be interpolated into an otherwise correct statement." I agree with that, and I would go farther and say that this infirmity attaches to the evidence of even truthful witnesses when relating conversations which took place at a time when there was nothing to lead them to attach any importance to the word "adopted." The infirmity is still greater when the evidence has been recorded by a Judge who is not acquainted with Burmese and when the Burmese terms used by the witnesses, and translated "adopt" and "adopted," have not been recorded.

The learned Judge rejected, so far as the word "adopted" is concerned, all the evidence of U Mya's statement except that of U Ne Mein and Saya Thaw. Saya Thaw's statement seems to me extremely inconclusive. He begins, "He told me about disputes with his sisters and the adoption of his niece," but he immediately follows that up by a detailed statement which refers to nothing but the conversation at Ma Ka's death-bed. In cross-examination again he says, "In consequence of this he said

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he had brought her up as his daughter." That is quite a different thing from adoption for the purpose of inheritance. It was only when repeatedly pressed in cross-examination that he committed himself to the statement that U Mya said he had adopted her. I think this evidence is worthless.

But after all the point is whether the relationship of father and daughter was public and notorious, and there is no evidence that it was. The evidence such as it is relates to private conversations between U Mya and the witnesses, and the circumstances under which the statements were made are such that in nearly every case the witness seems to have been ignorant of the relationship until it was specially made known to him by a private conversation with U Mya. This seems to me rather to indicate that the relationship was not generally known, and if the evidence is true it merely proves that U Mya made statements which may or may not be true. The statements are admissible under section 32 (5) of the Evidence Act, but their value is not very great, and they tend to disprove, rather than to prove, that the relationship of father and daughter was notorious.

To sum up. Though no particular ceremony is necessary for adoption, yet adoption cannot take place without some overt act or speech on the part of the person adopting; and when the person adopted was an adult, and the act of adoption was recent, it lies heavily on the person asserting the adoption to prove the overt act by direct evidence. Even if good cause be shown for dispensing with such evidence, the relationship of father and son or father and daughter must at least be proved to have been public and notorious. In this case there is no evidence whatever of any overt act by which adoption was effected. There is also no proof of notoriety. The evidence consists only of statements of U Mya, and many of the witnesses say that U Mya said he had adopted Ma Ywet before her mother's death, statements which Ma Ywet is obliged to repudiate because she took out letters of administration to her mother's estate.

The evidence is, in my opinion, altogether insufficient to establish the fact of the adoption. I would therefore set aside the decree, and dismiss Ma Ywet's petition, and declare that Ma Mi and Ma Me are entitled to letters of administration to the estate of U Mya. Costs of both parties to be paid out of the estate of U Mya.

Hartnoll, J.—I concur.

The judgment of their Lordships of the Privy Council was delivered on the 9th July 1909 by—

July 9th, 1909.

Lord Dunedin.—The only question in this appeal is whether Ma Ywet, the appellant, has proved that she was the adopted daughter of the late U Mya, who died in 1905. If she was, then she inherits U Mya's estate. If not, that estate is inherited by the respondents Ma Me and Ma Mi, the sisters of the deceased.

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Ma Ywet is the daughter of Ma Ka, who was another sister of U Mya.

Ma Ka died in 1900, and up to that time there was no question of adoption, as Ma Ywet took out letters of administration to her mother as her child.

The story of the appellant is that, on the death-bed of her mother, her uncle U Mya promised her mother to adopt her, and that after her death he did so Admittedly there was no specific occasion on which this was done by any quasi-ceremony or in presence of any witnesses or other persons.

It is said, however, that he acknowledged to other persons the fact that he had adopted her, and that his life and conduct in relation to her were consistent with the fact. This is denied by the respondents.

The learned Judge on the Original Side, before whom the suit depended, found that the appellant had sufficiently proved the fact of adoption; but this judgment was reversed on appeal, the learned Judges of the Appellate Court holding that the appellant had failed to make out her case.

It has already been laid down by this Board that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. One may go further and say that, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to.

The present case is one of these, and it is on the question of the want of publicity that the learned Judges of the Court of Appeal have differed from the Judge of original jurisdiction.

In many cases the inference of the relationship existing, and the publicity of the relationship itself, may naturally be taken from the facts of the life of the parties apart from the verbal statements of those concerned. Thus when a child who has natural parents leaves those parents and its own home, and is brought up in the house of another who treats it as a father would a child, the inference is not difficult to draw, and the facts from which that inference is drawn are public facts necessarily known to all the person's friends and acquaintances. Some of the decided cases are instances of this sort. In the present case such considerations are unavailable, because before adoption is alleged to have taken place, Ma Ywet was 30 years old, was an orphan, and, as the niece of a childless uncle, was a natural person to live with him.

Accordingly the evidence of the publicity of the relationship alleged really comes to depend upon the testimony of Ma Ywet herself and the statements of the deceased U Mya spoken to by some of the witnesses. The learned Judges of the Appellate

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Court have held that the testimony falls short of being satisfactory. Their Lordships are unable to say that, in their opinion, the learned Judges are wrong in this opinion. In the case of an adult, when the inferences to be drawn from "bringing up" are necessarily absent, and where the consequence of adoption is disinherison of those entitled to succeed by law, it is, in their Lordships' view, especially necessary to insist on adequate proof. It would have been easy for the parties, by means of an actual, though not ceremonial, adoption in presence of witnesses, to have precluded the raising of subsequent questions. Where that has not been done, and where the fact of adoption is left to be inferred from past statements and conduct, it is, in their Lordships' opinion, a salutary rule that adequate proof of publicity or notoriety of the relationship should be insisted on.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

As the respondents have not appeared in the appeal, there will be no order as to costs.

Civil 1st Appeal No. 31 of 1908.

June 5th, 1908.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge, and Mr. Justice Ormond.

SAVAPATHI CHETTY AND PALLANEAPPA CHETTY, CARRYING ON BUSINESS UNDER THE STYLE OF R.M.P.L. BY THEIR ATTORNEY PIRIA KARPEN CHETTY.

v.

1. MAUNG SEIN.
2. MA BÔK SÔN.
3. SHWE NU.
4. MA WAING.
5. V. C. T. A. R. RANGANATHAN CHETTY.

Burjorjee and *Dantra*—for appellants (plaintiffs).

P. N. Chari—for 5th respondent (defendant).

Execution—Courts which can order stay of.

In 1908 application was made to the Chief Court for stay of execution in respect of decrees of a Subdivisional Court. No appeal against those decrees had been laid in the Chief Court, although one had been presented against the decree of the District Court in a connected suit.

Held,—that as section 545 of the Code of Civil Procedure, 1882, did not apply, and no other section was quoted, while there was no authority for the proposition that the Chief Court had inherent power to stay the execution, the application must be dismissed.

The Chetti firm of V.C.T.A.R. obtained decrees against Maung Sein and Ma Bôk Sôn in suits Nos. 124 and 125 of the Subdivisional Court of Thatôn. They attached before judgment some timber and paddy. The Chetti firm of R.M.P.L. applied to have the attachment removed on the ground that the timber and paddy were mortgaged to them for more than their market value. The application was dismissed. R.M.P.L. then sued on the mortgages in the District Court, making V.C.T.A.R. co-defendants. The suit was dismissed, and R.M.P.L. have appealed to this Court.

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The matter at present in question is an application by the appellants for stay of execution, on this wise. When appellants applied to the Subdivisional Court for removal of attachment they were allowed to retain and sell the property on giving a bond for Rs. 5,500.

V.C.T.A.R. applied for execution of their decrees by an order to R.M.P.L. to pay into Court the amount of their bond. Execution was stayed by the Subdivisional Court pending the decision of the present suit in the District Court When that suit was dismissed an application was made to the Subdivisional Court to further stay execution pending the result of the present appeal. This was refused. Hence the present application to stay execution of the decrees of the Subdivisional Court. The application does not mention under what section it is made. It is admitted that section 545 does not apply, because the decree, the execution of which it is desired to stay, is not the decree now appealed against. Appellants urge that this Court has inherent power to stay the execution. No authority for this proposition is adduced, and we cannot accept it.

It is also urged that appellant could have applied to the District Court for an injunction under section 492, and that therefore this Court can grant an injunction. As to that we say nothing, except that the present application is not for an injunction.

The application is dismissed.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

Civil 1st Appeal No. 106 of 1907.

July 26th, 1909.

RAMEN CHETTY, CARRYING ON BUSINESS AS BANKER AND MONEY-LENDER UNDER THE STYLE AND FIRM OF R.M.S.P. BY HIS DULY CONSTITUTED AGENT MARIMUTHU PILLAY, 3RD DEFENDANT. *v.* 1. PO SÔN. 2. MA TÔK.

Giles—for appellant (3rd defendant).

N. N. Burjorjee—for respondents (plaintiffs).

Transfer of immoveable property—nature of enquiry into the title of transferor required from transferee before he can rebut claims based on a prior title.

A applied in 1907 for a declaration of ownership in respect of land mortgaged by B to C. Ever since A's purchase of the land in 1885 up to the mortgage in 1904 B's name had been shown in the Revenue Registers as owner, but she had not been ever in actual possession of the land. C had advanced money on the strength of the entry in the Revenue Registers, of enquiries in the Land Records Office showing that the entry was of long standing and the advice of a *thugyi* of a circle other than that in which the land was situate.

Held,—that in view of the provisions of section 110 of the Evidence Act, which must mean that the person in *actual* possession is to be presumed to be the owner and of the Limitation Act's allowing 12 years for even an adult

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person entitled to property to bring a suit to recover possession of it, an enquiry into title which does not extend to enquiry as to the actual possession of the property for at least 12 years cannot be said to be such an enquiry as a reasonable and prudent man would or should make. In the present case, if C had gone or sent anyone to the land, he would have found that B was not at the time in possession of it, and if he had enquired as to previous possession he must have become aware that A had been in possession throughout the time the land had stood in B's name.

Ramcoomar Coondoo v. *John and McQueen*, (1872) Ben. L.R. (P.C.), 46, referred to.

The relevant facts of the case are as follows :—

In 1885 the first plaintiff, who is the husband of the second plaintiff, bought the lands which are the subject matter of the suit. The transactions were verbal. They were reported to the *thugyi* as purchases by the first defendant Ma Nyein Me. She had been adopted by the plaintiffs in her infancy, and was at the time of the purchases about eight years old. The first plaintiff's explanation of why he reported the purchases as having been made by her is that he did it for the sake of luck. Her name appeared in the Revenue Registers as the owner of the lands for many years, but until about the middle of 1904 the plaintiffs enjoyed the lands dealing with them as their own. In or about 1901 the first defendant eloped with and was married to the second defendant. After a time they returned to and lived in the plaintiff's house. In 1903 or the beginning of 1904 the first defendant again left the house in consequence of an accusation having been made against her by one of the family of putting poison in the food intended for the members. On the 9th February 1904 she and the second defendant executed a mortgage of the lands to the third defendant to secure a loan of Rs. 4,000 by him to them. On the 11th of the same month her pleader wrote to a tenant of the lands warning him against paying rent to any one but her, and giving him notice to quit. Later on in the year she gave leases of parts of the lands to other persons. The plaintiffs then brought a suit against her and two of these persons for a declaration that they were the absolute owners of the land sued for, and for possession of it, and a decree was given in their favour on the 3rd October 1904.

On the 17th May 1905 the third defendant instituted a suit against the first and second defendants on their mortgage to him for the amount due on it, and he obtained a decree on the 28th June of the same year. After the time allowed for payment of the amount due on the decree he applied for sale of the lands. Before the sale took place the plaintiffs filed the suit from the decree in which the present appeal is made. The plaintiffs again prayed for a declaration that they were the absolute owners of the land, and they also asked for a declaration that the first and second defendants had never had any right or interest in it, and that the mortgage by them was of no effect as against the plaintiffs or the land ; also for a declaration that they were not bound by the mortgage decree which the third defendant had obtained,

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and for an injunction restraining the third defendant from executing his decree against the land.

The first and second defendants were obviously bound by the decree which the plaintiffs had obtained against the first defendant. The case resolved itself into a contest between the plaintiffs and the third defendant. He disputed the plaintiffs' ownership of the land at the time of it being mortgaged to him, and in the alternative he set up that the first and second defendants were with the consent of the plaintiffs the ostensible owners of the property at the time of its mortgage to him, and that he had advanced money on mortgage of the land after taking reasonable care to ascertain that his mortgagors had power to mortgage it.

The plaintiffs proved again that they were the real owners of the property.

As owners they were entitled to the relief they claimed against the third defendant unless he could show that they had done something which debarred them from asserting their title as against him. The third defendant's case was based upon the entry of the first defendant's name in the Revenue Registers making her the ostensible owner of the property. This is a questionable proposition. No doubt the entry of a person's name in the Revenue Registers may be a matter which may be proved in support of a claim to ownership and possession, but it is not the best proof of them.

In a case like the present in which none of the parties have title deeds, it is questionable whether the person actually in possession is not the only person who can be said to be the ostensible owner. Section 110 of the Evidence Act gives the benefit of a presumption of ownership to the person in possession: this must mean the person in actual possession. However this may be, even admitting that the first defendant was the ostensible owner of the property, the defendant had to show that the plaintiffs were debarred by what they had done from setting up their title against him, and that he had acquired an interest in the property after having taken reasonable care to ascertain that the first and second defendants had power to transfer the property to him in mortgage.

A mortgagee as well as any other transferee of immoveable property cannot safely take a transfer of such property unless he inquires into the title of the person or persons who propose to transfer to him. No one can transfer to another a title which he himself has not got, and the real owner can recover from any one who has taken a transfer from one who has an imperfect title, unless the real owner's claim is barred by limitation, or unless he has done something which estops him from setting up his claim. Even if he has done something which might *primâ facie* estop him he may still recover if the transferee from the person with the imperfect title had either direct or constructive notice of the real title, or if circumstances exist which ought to have put him on

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an inquiry which, if prosecuted, would have led to a discovery of the real title.

These principles are laid down in *Ramcoomar Coondoo* v. *John and McQueen* (1) as resting on the general rules of justice, equity and good conscience.

A fortiori the real owner can recover against a transferee who has made no inquiry at all into the title of his transferor. This is what happened in the case of the third defendant. He advanced money to the first and second defendants on the strength of their producing to him a map of the land with the first defendant's name entered on it as owner, and possibly a tax receipt for the taxes on the land made out in her name. He says he also made enquiries in the Land Records Office and ascertained that the land had stood in the first defendant's name for many years. He also acted on the recommendation of a *thugyi* who was not *thugyi* for the circle in which the land was situate.

This cannot be said to have been an inquiry into title. In view of the provisions of section 110 of the Evidence Act, and in view of the Limitation Act allowing twelve years for even an adult person entitled to property to bring a suit to recover possession of it, an inquiry into title which does not extend to inquiry as to the actual possession of the property for at least twelve years cannot be said to be such an inquiry as a reasonable and prudent man would or should make. If the third defendant had gone or sent any one to the land he would have found that the first defendant was not at the time in possession of it, and if he had inquired as to previous possession he must have become aware that the plaintiffs had been in possession throughout the time the land had stood in the first defendant's name. Apart from this an inquiry from the plaintiffs as to the truth of the story which he says the first defendant told him about her father having given her the land as dowry would have disclosed to him that the first plaintiff denied having done so. It is manifest that the third defendant entered into the transaction with the first and second defendants blindly.

He acquired no rights over the land, and can scarcely claim sympathy for the loss of his money.

The appeal is dismissed with costs.

Parlett, J.—I concur.

(1) (1872) 11 Ben. L.R. (P.C.), 46.

Before Mr. Justice Parlett.

MA CHIT SU *v.* KING-EMPEROR.

Criminal Revision No. 64B of 1909.

May 14th, 1909.

Nicol—for applicant.

Section 562, Code of Criminal Procedure, 1898—Appeal from order under.

An appeal lies against a conviction without sentence under section 562 Code of Criminal Procedure, 1898.

Mi Shwe Nyun v. *King-Emperor*, 1 U.B.R. (1004—06), 7, and *King-Emperor* v. *Manohar Das and others*, 39 Punj. Record, 64; followed.

Ma Chit Su was convicted of theft on a regular trial held by the First Class Additional Magistrate of Minhla, and was released upon probation of good conduct under section 562 of the Criminal Procedure Code.

She now applies for the conviction and order to be set aside in revision.

It is necessary, therefore, to consider whether an appeal lay. If so, these proceedings by way of revision cannot be entertained under section 439 (5) of the Criminal Procedure Code.

I can find no published rulings of this Court upon the point, but in a similar case, *Mi Shwe Nyun* v. *King-Emperor* (1) in Upper Burma, it was held that an appeal did lie, and almost simultaneously the Chief Court of the Punjab arrived at the same conclusion in *King-Emperor* v. *Manohar Das and others* (2).

The only arguments now advanced in favour of the opposite view are :—

(1) That if it was intended that cases in which section 562 was applied should be appealable, sections 407 and 408 should expressly state so;

(2) that if an appeal against the conviction was preferred but failed, and then the offender was subsequently sentenced under section 563 (*2*), a second appeal might lie against the sentence; and

(3) that neither of the above quoted rulings bind this Court.

As regards the first point, it is necessary to apply the provisions of the law as they stand, without considering what they might have been.

As regards the second, it is a hypothetical case which it is unnecessary to consider in connection with the present application.

As to the third, the whole question was exhaustively discussed by both the Courts, and they arrived at the same decision on the same grounds. No flaw has been pointed out to me in their reasoning.

The general rule is laid down in section 408 that any person convicted on a trial held by a Magistrate of the first class may appeal to the Court of Session.

(1) 1 U.B.R. (1904—06), 7. | (2) 39 Punj. Record, 64.

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The exceptions are contained in sections 412, 413, and 414. The first and last clearly do not apply in this particular case. Neither does 413, since no sentence was passed.

I hold that the applicant had a right of appeal to the Court of Session under section 408. I therefore dismiss the application for revision.

Criminal Revision No. 328A of 1909.

August 23rd, 1909.

Before Mr. Justice Parlett.

KING-EMPEROR *v.* AUNG BA.

McDonnell, Assistant Government Advocate—for the King-Emperor.

"Arms," "Armed"—Definition of, in the Indian Arms Act, 1878.

On the principle that the purpose for which an implement is primarily intended decides whether it is an "arm" or not, a carving knife obviously manufactured for culinary purposes, even though carried about in a sheath like a dagger, is not an "arm." A knife not otherwise an "arm" is not converted into one by the mere addition of a sheath to carry it in.

Crown v. *Hmat Kyan*, 1 L.B.R., 271; *Ebrahim Dawoodji Babi Bawa* v. *King-Emperor*, 3 L.B.R., 1; *Crown* v. *Kya Nyo*, Cr. Rev. No. 556 of 1903; followed.

Accused was convicted of going armed with a cook's knife of the ordinary pattern sold in European shops. The Magistrate considered it to be an arm because it somewhat resembled and was not less dangerous than a Burmese "dahmyaung." Only one edge of the blade is sharp: it is rather wider near the handle and tapers to a somewhat finer point than an ordinary carving knife. There can be no question that the primary intention of the manufacturers of these knives is to supply an efficient implement for culinary purposes. The principle that the purpose for which an implement is primarily intended regulates whether it should be considered an arm was laid down in *Crown* v. *Hmat Kyan* (1) and again affirmed in *Ebrahim Dawoodji Babi Bawa* v. *King-Emperor* (2). Applied to the present case it shews that the cook's knife was not an 'arm.'

It has been argued, however, that accused's conduct in manufacturing a sheath for the knife to enable him to conveniently carry it about with him converts it into an arm. It is not suggested that he in any way altered the character of the knife itself, *e.g.*, by grinding it so as to make it double-edged. In *Crown* v. *Kya Nyo* (3) it was held that a table knife, however carried or intended to be used, is not an arm, and the same will apply to a cook's knife, notwithstanding that it is provided with a sheath.

The conviction and sentence are reversed and it is ordered that the fine be refunded to Nga Aung Ba.

(1) 1 L.B.R., 271. (2) 3 L.B.R., 1.
(3) Cr. Rev. No. 556 of 1903.

Before Mr. Justice Parlett.

Criminal Appeal No. 557 of 1909.

1. MI EIN THA
2. MI O ZA } *v.* KING-EMPEROR.

Sept. 4th, 1909.

A. C. Dhar—for appellants.

Confession—Definition of.

An admission as to the ownership of boxes found on search to contain opium and cocaine made to the Police before the search is a confession and cannot be proved under section 25 of the Indian Evidence Act, 1872, and when there is no other proof of ownership a conviction for illegal possession of those drugs cannot be sustained. Not only direct acknowledgments of guilt but inculpatory statements suggesting inferences of guilt are confessions. The motive of the party making the admission is not the criterion but the fact that it leads to an inference of guilt. A confession is an admission of a criminating circumstance which it is proposed to prove against a person accused of an offence and on which the prosecution mainly relies.

Queen-Empress v. *Babu Lal*, (1884) I.L.R. 6 All., 509; *Queen-Empress* v. *Jagrup*, (1885) I.L.R. 7 All., 646; *Imperatrix* v. *Pandharinath*, (1881) I.L.R. 6 Bom., 34; *Queen-Empress* v. *Nana*, (1889) I.L.R. 14 Bom., 260; *Queen-Empress* v. *Tribhovan Manekchand*, (1884) I.L.R. 9 Bom., 131; *Queen-Empress* v. *Mathews*, (1884) I.L.R. 10 Cal., 1022; *Queen-Empress* v. *Meher Ali Mullick*, (1888) I.L.R. 15 Cal., 589; *Queen-Empress* v. *Javecharam*, (1894) I.L.R. 19 Bom., 363; followed.

Appellants have been convicted of the illegal possession of cocaine and opium which were found in two boxes under the seat of a railway carriage occupied by the appellants and a number of other people. Appellants deny that the boxes were theirs or that they ever admitted that they were. No evidence is offered to show they were ever seen handling or carrying them, nor is there any evidence as to whether the boxes contained anything else except the opium and cocaine of which the ownership can be traced to appellants. Although the first information shews that the police constable expected to find opium, no list of articles found at the search appears to have been made as required by section 16, Opium Act, read with section 103 of the Code of Criminal Procedure. Consequently there is absolutely nothing but appellants' alleged statement to the police constable before the search that the boxes were theirs to in any way connect appellants with the possession of the opium and cocaine. Without proof of possession, the prosecution must fail.

It is perfectly clear that if appellants' admission of ownership of the boxes amounts to a confession, it is absolutely excluded by section 25 of the Evidence Act, and the case against them fails to the ground. A confession is not defined in the Evidence Act, but it has been many times interpreted by judicial decision. It has been defined as an admission made at any time by a person charged with a crime stating, or suggesting the inference, that he committed that crime. Therefore, not only statements which amount to a direct acknowledgment of guilt are confessions, but also inculpatory statements which, although they fall short of

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being actual admissions of guilt, yet suggest an inference of guilt and from which an inference of guilt follows. The factor determining whether a statement amounts to a confession or not is not the motive of the party making it but the fact that it leads to an inference of guilt. [See *Queen-Empress* v. *Babu Lal* (1) ; *Queen-Empress* v. *Jagrup* (2) ; *Imperatrix* v. *Pandharinath* (3) ; *Queen-Empress* v. *Nana* (4).] A confession is a statement which it is proposed to prove against a person accused of an offence to establish that offence ; it is an admission of a criminating circumstance on which the prosecution mainly relies. [See *Queen-Empress* v. *Tribhovan Manekchand* (5).]

Thus it was held that statements made to the police by accused persons as to the ownership of property which is the subject matter of the proceedings against them were inadmissible as evidence against them at the trial for the offence with which they were charged. [See *Queen-Empress* v. *Tribhovan Manekchand* (5)]; and again that an incriminating statement by an accused person to a police officer on which the prosecution relies is inadmissible. [See *Queen-Empress* v. *Mathews* (6); *Queen-Empress* v. *Meher Ali Mullick* (7) ; *Queen-Empress* v. *Javecharam* (8).]

In the present instance, not only is the alleged admission of ownership of the boxes a statement from which an inference of guilt follows, and not only is it a statement on which the prosecution mainly relies, but it is the sole fact appearing on the record from which any inference whatever can be drawn as to appellants' possession of the opium and cocaine, and its proof is therefore absolutely vital to the success of the prosecution.

I hold that such an admission amounts to a confession within the meaning of section 25 of the Evidence Act, and that proof of the alleged admission in the present case could not be given.

There being no other evidence of appellants' possession of the drugs, and no other facts from which such possession could be presumed, they are entitled to an acquittal.

The convictions of, and sentences on, both appellants are set aside and they will be released as far as this case is concerned.

(1) (1884) I.L.R. 6 All., 509.
(2) (1885) I.L.R. 7 All., 646.
(3) (1851) I.L.R. 6 Bom., 34.
(4) (1889) I.L.R. 14 Bom., 260.
(5) (1884) I.L.R. 9 Bom., 131.
(6) (1884) I.L.R. 10 Cal., 1022.
(7) (1888) I.L.R. 15 Cal., 589.
(8) (1894) I.L.R. 19 Bom., 363.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

Civil Miscellaneous Appeal No. 108 of 1908.

Sept. 6th, 1909.

PO CHO *v.* 1. MA NYEIN MYAT. 2. KYAW ZAN. 3. AUNG BA. 4. MAUNG NYUN.

P. N. Chari—for appellant. | *Villa*—for respondents.

Guardians and Wards Act, 1890, section 19 (b)—Right of natural father lost when he allows child to be brought up by second husband of divorced wife.

A and his wife, B, were divorced about the time C, their son, was born. Both married again. C was brought up and treated as a son by B's second husband. On B's death A applied for the guardianship of the person and property of C, who was still a minor, on the ground that the natural father cannot be deprived of his legal right under clause (*b*) of section 19 of the Guardians and Wards Act, 1890, to be guardian of the person of the minor, unless in the opinion of the Court he is unfit.

Held,—that, as regards the property of the minor, the Act gave the natural father no superior rights, and it was clearly undesirable that he should be the guardian of C's property.

As regards the guardianship of C's person, the Court will not support the rights of the father against the interests of the child. A had lost his rights as natural guardian of C's person on the following grounds:—

(*a*) A father may lose his right to the guardianship of his children when he has permitted another person to maintain and educate them, and it would be detrimental to the interests of the children to alter the manner of their maintenance or the course of their education;

(*b*) Under Burmese Buddhist law where, after a divorce, the children on reaching years of discretion live entirely with one of the parents, they lose their right to inherit from the other parent, and if the latter acquiesces in the arrangement, he forfeits his right to claim the custody of the children while still minors; and

(*c*) Such children being nearly in the position of children adopted into the family of the parent with whom they live, a principle similar to that of Hindu law will apply whereby the adoptive father acquires a right of guardianship even against the natural father.

In re Agar Ellis, (1883) 24 Ch. D., page 333; *Mi San Mra Rhi* v. *Mi Than Da U and 2*, (1902) 1 L.B.R., 161; *Maung Hmat and two others* v. *Ma Po Zôn*, (1898) P.J., L.B., 469; referred to.

Parlett, J.—Maung Po Cho applied to be declared guardian of the person and property of his minor son, now in his fifteenth or sixteenth year. Shortly before the birth of the son, Maung Po Cho and his wife, Ma Hnin Yin, separated, and a few months later were formally divorced. Both married again. The mother returned to her own people at Môksozeik village, and three years later married a man from there. There were no children by the second marriage, and her second husband, Maung Nyun, treated the child as his own, and intends to give him half his property. The boy lived with his mother throughout, except for two short periods, when his natural father took him away to Rangoon: it is said he was kidnapped and detained there; at any rate it is clear

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that his mother never acquiesced in his being kept there. His father never contributed towards his maintenance and education, and appears never to have been asked to do so. His mother's family appear to be well-to-do, and were willing and anxious to assume sole responsibility for the boy's up-bringing.

In about May 1908 his mother died, and the boy became entitled to property valued at over Rs. 3,400, then in the possession of his step-father and his mother's relations, and in July 1908 this application was filed. It was opposed by his step-father and his mother's brothers and sister.

The learned District Judge, after considering the existing and previous relations of the applicant with the minor and his property, the relative status in life of the applicant and his opponents, and the wishes of the minor, who is old enough to form an intelligent preference, came to the conclusion that it was for the moral, bodily and intellectual well-being of the minor and for the welfare of his estate, that the applicant should not be declared guardian, and dismissed his application.

This appeal is brought on the ground that the natural father cannot be deprived of his legal right, under clause (*b*) of section 19 of Act VIII of 1890, to be guardian of the person of the minor, unless in the opinion of the Court he is unfit.

The Act gives the father no superior rights to the guardianship of the property of his children, and therefore this argument need only be considered as regards guardianship of the minor's person. It is clearly undesirable that he should be guardian of the boy's property, especially as it appears that he has other children.

As regards his claim to be declared guardian of his person, where the summary powers of the Act are invoked, the Court will not support the rights of the father against the interests of the child (Trevelyan on Minors, Edition 1906, page 76).

A father may lose his right to the guardianship of his children when he has permitted another person to maintain and educate them, and it would be detrimental to the interests of the children to alter the manner of their maintenance or the course of their education. In *In re Agar Ellis* (1), Cotton, L.J., said :

> The father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have; as where a father has allowed * * * the child to live with a relative and be brought up in a way not suited to its former station in life, or to the means of the father (Trevelyan on Minors, Edition 1906, pages 88 and 89).

In the present case, though the father twice attempted to get and keep custody of the boy, he never before took any legal steps to enforce his rights, though the boy was long ago old enough to be separated from his mother; and he may be considered to have acquiesced in his up-bringing by the mother's

(1) (1883) 24 Ch. D., p. 333.

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family, whose place of residence and means are such that it is obviously to the minor's advantage that it should continue.

In this case the parents were divorced, and the appointment or declaration of a guardian must be made consistently with the law to which the minor is subject. He and the parties are all Burmese Buddhists. According to Burmese Buddhist law, in case of a divorce by mutual consent the father usually takes the son, but in the case of extreme youth he should be left with the mother. The Courts have repeatedly held that where, after a divorce, the children, on reaching years of discretion, live entirely with one of the parents, they lose their right to inherit from the other parent. [See *Mi San Mra Rhi* v. *Mi Than Da U and 2* (2), where the previous decisions are quoted and discussed.] It seems only right that that other parent, if he acquiesces in the arrangement, should forfeit his right to claim the custody of the children while still minors. He cannot cease to be their natural father in fact, but there is no reason why a divorce should not divest him of any part of his legal status as such father.

In *Maung Hmat and two others* v. *Ma Po Zôn* (3) the view was expressed that a child removed from the father's family and continuously resident with the divorced mother, after an age when she might assist in the affairs of the father's family, appears to be in the position nearly of a child adopted from the father's family into the family of the mother. In the present instance the stepfather seems to have done everything that he could short of formally adopting him to make the boy as his own son. Under Hindu law the adoptive father acquires a right of guardianship even against the natural father (Trevelyan on Minors, Edition 1906, page 64).

In my opinion a similar principle will apply here to divest applicant of his rights to guardianship of the person of the minor.

I would dismiss this appeal with costs. Advocate's fees two gold mohurs.

Fox, C.J.—I concur.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

Civil Miscellaneous Appeal No. 102 of 1909.

Sept. 13th, 1909.

AHMED CASSIM BAROOCHA *v.* { M.L.R.M.A., CHETTY FIRM CARRYING ON BUSINESS BY THEIR MANAGING - PARTNER, SOLIAPPA CHETTY.

N. N. Burjorjee—for appellant. | *Lentaigne*—for respondent.

Receivers—Principles of appointment of.

A firm sued as equitable mortgagees by deposit of title deeds to recover the amount due on the mortgages by sale of the mortgaged properties.

(2) 1 L.B. 161. | (3) (1868) P.J., L.B., 469.

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Interest was in arrears and the properties had been valued at less than the amount of principal and interest due. A receiver was appointed.

Held,—that as the wording of Order 40, Rule 1 of the Code of Civil Procedure, 1908, differed from that of section 503 of the Code of 1882 and had been taken from English law, the practice of the English Courts should be followed. These Courts have observed the following principles:—

(*a*) Receivers are usually appointed as a matter of course if the interest on mortgages, whether legal or equitable, is in arrears.

(*b*) Further, in the case of equitable mortgages (in which expression puisne mortgages are included) receivers are appointed if there is reason to apprehend that the property is in peril or is insufficient to pay the charges or incumbrances thereon.

In view of these principles a receiver was rightly appointed in the circumstances above described.

In re Pope, (1886) L.R. 17 Q.B.D., at page 749, and *Davis* v. *The Duke of Marlborough*, (1819) 2 Swanston, at pages 137 and 138; followed.

Fox, C.J.—The plaintiff firm sues as equitable mortgagees by deposit of title deeds to recover the amounts due on the mortgages by sale of the mortgaged properties. They allege that in January 1909, when the suit was brought, Rs. 1,12,250-2-0 were due on the mortgage, of which one lakh was for principal and the rest for interest. The defendant filed a written statement, the result of which has been to delay the hearing of the suit. In June the plaintiff firm applied for the appointment of a receiver of the mortgaged property on the grounds that the defendant had been collecting the rents thereof, but had not been paying interest on the loans, and on the ground that in consequence of depreciation in the value of landed property in Rangoon, the mortgaged properties were not then worth the amount due on the mortgage, this having increased to Rs. 1,15,000. The plaintiff firm had lent Rs. 1,08,000 on the properties in 1906, or had renewed loans to that amount. A valuer employed by the firm valued the properties in May 1909 at one lakh of rupees or thereabouts. A valuer employed by the defendant valued them in June at Rs. 1,25,000.

The learned Judge appointed a receiver on the ground that it was just and convenient to do so. The defendant asserted that he had other property worth Rs. 70,000, but as the whereabouts of it was not disclosed the learned Judge did not give any weight to the statement. The defendant appeals against the order and relies on this Court's decision in Civil Miscellaneous Appeal 123 of 1906. That decision was in a case to which the Code of 1882 applied: the wording of section 503 of that Code was materially different from the wording of Order 40, Rule 1 of the Code, now in force. The Legislature has adopted the language used in the English Judicature Act, and now a Court may appoint a receiver where it appears *just and convenient* to do so.

The words are very wide, but it may be assumed that the Legislature intended that the Indian Courts should, in applying them, have regard to the practice and precedents of the English Courts, they being the only Courts which have heretofore had to

apply them. It was said by one learned Judge *in re Pope* (1) that the 8th subdivision of the 25th section of the Judicature Act of 1873 had greatly altered the practice of the Court regarding the appointment of receivers by extending it to the granting of receivers at the instance of a legal mortgagee just as it formerly did at the instance of an equitable mortgagee. In Coote on Mortgages, Chapter XLVI, section 2 (ii), it is said that the appointment of a receiver will, as a general rule, be made as a matter of course on the application of a mortgagee, whether legal or equitable, if the interest payable under the security is in arrear. In Fisher on Mortgage, para. 830, it is said that a puisne mortgagee or other equitable incumbrancer is generally entitled to a receiver, provided the Court be satisfied of the existence of the equitable right in the applicant. The possession of deeds under circumstances consistent with a deposit by way of security raises a *primâ facie* case for the appointment of a receiver on an interlocutory application. In *Davis* v. *The Duke of Marlborough* (2), Lord Eldon said:

> The rule I take to be, that the Court will, on motion, appoint a receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior estates: * * * Provided it is satisfied, in that stage of the cause, that the relief prayed by the bill, will be given when a decree is pronounced, the Court will not expose parties claiming that relief, to the danger of losing the rents by not appointing a receiver of an estate, on which it is admitted they cannot enter.

The learned reporter remarked that the earlier instances of the appointment of a receiver before answer seem to have proceeded on the ground of fraud and danger to the property, but in later cases the Court had granted that prompt relief to a party possessing a clear equitable title by analogy to the ejectment of a legal incumbrancer.

Second or later mortgages were treated as equitable mortgages. (Woodroffe on Receivers, page 166.) It is enough to grant a receiver at the suit of a second or puisne mortgagee that the payment of interest is in arrear, or that there is reason to apprehend that the property is in peril or is insufficient to pay the charges or incumbrances thereon. In view of these authorities, it is, in my opinion, impossible for us to say that the learned Judge erred in appointing a receiver in the present case.

The appeal must be dismissed with costs.

Parlett, J.—I concur.

(1) (1886) L.R. 17 Q.B.D., a page 749.
(2) (1819) 2 Swanston, at pages 137 and 138.

Civil 1st Appeal No. 126 of 1907.

August 23rd, 1909.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Lowis.

1. SOOBRAMONIAN CHETTY
2. ARUNACHELLAM CHETTY
3. PALANEAPPA CHETTY, CARRYING ON BUSINESS UNDER THE STYLE OF Y. P. S. P. L., BY THEIR ATTORNEY, SUBRAMONIAN CHETTY.

v.

1. AGA RAJAT ALLY KHORASANI.
2. MA HNIN NYEIN.
3. S. C. PATHAKEE.
4. P. S. NAGAPPA CHETTY.

Giles—for appellant. | *K. B. Banurji*— for 3rd respondent.

Mortgagee—Rights of third—who pays off a first.

In this case one defendant's mortgage was prior in date to the plaintiffs', but the money advanced by the latter was partially devoted to paying off a mortgage prior to that of the defendant in question.

Held,—that the point to consider was the intention of the party paying off the charge, and that, in the absence of evidence to the contrary, it must be presumed that the intention was to keep the prior mortgage alive for that party's benefit.

The plaintiffs were entitled to a mortgage lien on the property to the amount advanced by them which was devoted to paying off the prior mortgage.

Gokaldas Gopaldas v. *Rambaksh Seochand*, (1884) I.L.R. 10 Cal., 1035; *Dino Bandhu Shaw Chowdhury* v. *Nistarini Dasi*, (1898) 3 C.W.N., 153; and *Amar Chandra Kundu* v. *Roy Goloke Chandra Chowdhuri*, (1900) 4 C.W.N., 769; followed.

Toulmin v. *Steere*, 3 Mer., 210, referred to.

The facts proved are as follows:—

On the 30th April 1900, the first and second defendants mortgaged the land mentioned in the plaint to Ko Kyin and Ma Ngwe Zan to secure a loan of Rs. 1,500. On the 20th August 1900, they again mortgaged the land to Ko Kyin and Ma Ngwe Zan to secure a loan of Rs. 1,000. On the 18th May 1903, the first defendant mortgaged the land to the third defendant to secure a loan of Rs. 10,000. On the 10th July 1903, the first and second defendants mortgaged the land to the plaintiffs to secure a loan of Rs. 6,000. On the 26th December 1906 the land was sold by public auction at the instance of the third defendant and was bought by fourth defendant for Rs. 7,831-5-6.

The plaintiffs instituted this suit on the 10th December 1906 against the first and second defendants in the first instance: the third and fourth defendants were added subsequently, and the plaint was amended.

In the amended plaint, the plaintiffs ask for a mortgage decree for Rs. 8,824, principal and interest due on the mortgage to them, or in the alternative for a declaration of their prior claim to the Rs. 7,851-7-6 paid by the fourth defendant for the land. This last claim may be dismissed at once, as obviously the plaintiffs cannot recover from the third defendant what he received from the fourth defendant. The only question is whether the plaintiffs are entitled to a mortgage decree and to have the land sold in order to satisfy their claim or any part of it.

No question of the validity of the sale by the third defendant to the fourth defendant has been gone into, although in view of the provisions of section 69 of the Transfer of Property Act it is evident that unless the land was sold under the order of a Court the sale by public auction of land outside Rangoon at the instance of a mortgagee could not be valid.

The third defendant's mortgage was prior in date to that in favour of the plaintiffs, but on behalf of the latter it is contended that they still have a mortgage lien on the property because the money they advanced was partially devoted to paying off the earlier mortgages to Maung Kyin and Ma Ngwe Zan. The learned Judge has found that Rs. 2,965 of the Rs. 6,000 advanced by the plaintiffs was so applied. The evidence establishes that Maung Kyin received repayment of the amount due to him from the plaintiffs' agent in the presence of the first defendant, and that the two mortgages to himself and Ma Ngwe Zan were then and there handed over to the plaintiffs' agent. The learned Judge has held that these facts did not avail to give the plaintiffs any preferential rights over the third defendant's mortgage under which the property was presumably sold by him.

The circumstances involve a question of law upon which there has been some conflict of opinion in the Indian Courts, but I think the matter has been set at rest by the decision of their Lordships of the Privy Council in *Gokaldas Gopaldas* v. *Rambaksh Seochand* (1).

That case was no doubt between a purchaser of the equity of redemption, who had paid off the first mortgage on the property, and a second mortgagee, but the principles which their Lordships lay down as applicable in such cases appear to me to apply with equal strength when the conflict is between a third mortgagee, who pays off a first mortgagee, and a second mortgagee.

Their Lordships refused to apply to Indian cases the doctrine laid down in *Toulmin* v. *Steere* (2), which was that a purchaser of an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice. There may be justification for such a doctrine in England where the practice of conveying has been systematic, and where a purchaser or subsequent mortgagee might, on paying off the first mortgage, have it assigned to him, in which case there would be little doubt that it would continue to have priority over a second mortgage. Their Lordships say that they could not find that a formal transfer of a mortgage is ever made, or an intention to keep it alive is ever formally expressed in India. To apply to such a practice the doctrine of *Toulmin* v. *Steere* (2) appeared to them likely not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.

They say that the obvious question to ask in the interests of

(1) (1884) I.L.R. 10 Cal., 1035. | (2) 3 Mer., 210.

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justice, equity, and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it, and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest.

This principle was in *Dino Bandhu Shaw Chowdhury* v. *Nistarini Dasi* (3) applied in the case of a subsequent mortgagee advancing money to pay off prior mortgages. In *Amar Chandra Kundu* v. *Roy Goloke Chandra Chowdhuri* (4), it was held that the presumption, generally speaking, in the absence of any evidence to the contrary, is that a person whose money goes to satisfy a prior mortgage intends to keep alive that prior mortgage for his own benefit.

In the present case, there is no evidence calling for the conclusion that the plaintiffs' agent did not intend to keep alive the mortgages to Maung Kyin and Ma Ngwe Zan for the plaintiffs' benefit, consequently the above presumption should be applied to the case. In this view the plaintiffs are still entitled to a mortgage lien on the property for Rs. 2,965 with interest thereon at the rate of Rs. 2½ per cent. per mensem from the 10th July 1903.

The decree of the District Court should be altered and there should be a decree of this Court declaring that there is due to the plaintiffs by the first and second defendants on the date of this judgment, the principal sum of Rs. 6,000 together with interest thereon at the rate of 2 per cent. per mensem from the 10th July 1903 to the date of this judgment, less Rs. 2,256 paid by such defendants towards interest, and the costs of the suit and of this appeal. The decree should contain directions as against the first and second defendants in accordance with clauses (*c*) and (*d*) of rule 2 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908.

As against all the defendants, the decree should declare that the plaintiffs are entitled to a mortgage lien on the land in suit for Rs. 2,965 with interest thereon at the rate of 2½ per cent. per mensem from the 10th July 1903 to the date of this judgment, less Rs. 2,256 paid by the first and second defendants towards interest, and should direct that if such amount is not paid to the plaintiffs on or before the date to be fixed in the direction under clause (*c*) of rule 2, the mortgaged property be sold, and that the proceeds of sale (after defraying thereout the expenses of sale) be paid into Court, and applied in payment of the said principal sum of Rs. 2,965 with interest thereon as above, together with subsequent interest on such principal sum at the rate of 6 per cent. per annum and the costs of the suit and of this appeal on the amount for which the plaintiffs have a prior mortgage lien, and that the balance (if any) be paid to the fourth defendant.

(3) (1898) 3 C.W.N., 153. | (4) (1900) 4 C.W.N., 769.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Pariett.

Civil Miscellaneous Appeal No. 43 of 1908.

Nov. 8th, 1909.

1. MRS. CECILIA KING
2. CHARLES D'ROCHE
3. EDMUND D'ROCHE

(BY THEIR CONSTITUTED ATTORNEY, MAUNG PO CHIT.)

v.

1. ARTHUR ABREU.
2. WILLIAM D'ROCHE.
3. ROBERT D'ROCHE.

Connell—for appellants (plaintiffs).

Anklesaria—for 1st respondent (defendant).

Succession Act, 1865, s. 48—Invalidity of Will.

A, the sole legatee of B, was in close attendance on the latter, who was in a state of weakness, before his death. The will, which was written by A, was signed about six days before B's death in the presence of at least one credible witness who heard B express his concurrence in the will. Revocation of probate was applied for on the ground of undue influence. A alleged that he had only fair-copied a will drafted by C on B's instructions, but did not produce C as a witness.

Held,—that the *onus probandi* lies on the person propounding a will, and he must satisfy the Court that the instrument propounded is the last will of a free and capable testator. Where a person benefiting under the will has written or prepared it, special scrutiny is called for.

The will was declared void.

Barry v. *Butlin*, (1838) 2 Moore P.C., 480, and *Finny* v. *Govett*, (1908) 25 Times Law Reports, 186; referred to.

Fox, C.J.—In the previous appeal in this case, the Court decided that the case had not been dealt with in connection with section 48 of the Indian Succession Act, and it was remanded in order that it should be dealt with in connection with that section. The appellants opposed the will and sought revocation of probate in these proceedings on the ground that the respondent had procured the execution of it by undue influence. This is a ground which is covered by section 48 of the Act. The learned Judge held that the burden of proving undue influence lay in this proceeding on the appellants, and that they have failed to prove it. In so far as he based his decision as to the burden of proof on anything stated in this Court's previous judgment, there is no justification for it. The judgment does not in any way deal with the question of burden of proof: it left the whole case to be dealt with *ab initio* on the question of whether the will was void under section 48 of the Act. I think that on this appeal the case must be dealt with on the footing that the burden of proof must be applied according to the law applicable to wills, although the proceeding out of which the appeal arises was one for revocation of probate, and not one started by an application for probate.

The facts to be dealt with are that the testator, James D'Roche, had for some years before his death suffered from diseases, one of which is generally considered repellent, and disinclines relatives and friends from living in the same house as the sufferer.

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The respondent, Arthur Abreu, however, lived in the same house with D'Roche for many years, up to the time of his death.

In the last days of D'Roche's life Abreu certainly attended to him. It is not clear how long the last illness lasted, or what condition D'Roche was in before it came on, or what amount of care and attention he received from Abreu previously. There is much conflict of evidence as to D'Roche's physical and mental condition during the month preceding his death. He died on the early morning of the 22nd March 1906. The disputed will was made by him or for him on the morning of the 16th March, that is about six days before his death. Apart from the evidence of Abreu and of D'Roche's relatives and the Burman witnesses they called, there is the evidence of Dr. Hilbert and of Father Boulanger who saw him on different occasions in March. Dr. Hilbert represents him as having been in a weak state of health but always conscious and of sound mind and able to speak. Father Boulanger's remembrance of his condition is professedly uncertain, but his impression was that D'Roche, on all except the last of the occasions on which he saw him, was able to hear and understand, but he was hardly able to speak during the week before his death. The last occasion on which he saw him was on the evening before his death. The irregular scrawl in which D'Roche's signature on the will was made affords some indication of his physical weakness at the time. The body of the will is in the handwriting of the respondent; by it D'Roche gives to his faithful friend and partner, Arthur Abreu, his whole estate and effects. His property was computed by the Collector to be of the value of over Rs. 13,000.

Abreu's story as to what occurred at and previous to the making of the will is, that two days before the will was signed D'Roche gave one Mr. Penha instructions for drafting a will. Penha brought a draft which D'Roche read, and asked Abreu to fair-copy. The fair copy he made was subsequently signed by D'Roche in the presence of Abreu, T. Cupusawmi Pillay, Darmalingum Mudaliar and Maung Kyet, a shampooer. T. Cupusawmi Pillay, who is an Honorary Magistrate, came to the house in consequence of a letter to him from Abreu, in which the latter says that D'Roche had asked him to write and ask Cupusawmi to call, and he (Abreu) supposed that D'Roche wanted him and another to be witnesses to his will.

Cupusawmi took Darmalingum with him. Cupusawmi said that when they got to the house D'Roche was lying on a cot: the already written-out will was handed to him (Cupusawmi) and he asked D'Roche if he was willing to sign it. D'Roche said that he was. He (Cupusawmi) then translated the will to Darmalingum in Tamil. The Burman (Maung Kyet) then raised D'Roche up on the cot. He (Cupusawmi) asked D'Roche if he wished to give Abreu all his property, and D'Roche replied that he did so wish because Abreu had been his friend for a long time. He appeared to understand what he was saying and doing. Beyond the fact

that D'Roche took some time in signing his name, and that he was held up by the Burman and that the paper was put on pillows when he signed, Cupusawmi did not notice anything else which made it difficult for D'Roche to sign his name. Abreu said that the scrawl of a signature was due to D'Roche's hand being swollen by leprosy: Cupusawmi did not notice this. The Burman Maung Kyet's story is that Abreu put a pen into D'Roche's hand, and guided the hand into making the signature. Darmalingum's story was the same as Cupusawmi's so far as it went, but owing to his not knowing English he could not speak to the conversation in English between Cupusawmi and D'Roche. Abreu's version of what D'Roche told Cupusawmi when he asked as to his willingness to give all his property to Abreu, is that D'Roche said, "Yes, because he is the only person who looked after me when I was ill." Some of D'Roche's relatives had been visiting him during his illness, but Abreu said that D'Roche did not want them to come to the house. Nothing was said to them about D'Roche's proposal to make a will, and the fact that he had made one was not disclosed to any of them until about two days before D'Roche's death.

The first question of law to be considered in connection with the case is whether Abreu was in a position to influence and dominate D'Roche. It appears to me that he was in such a position, just as much as a solicitor or a medical man, or a priest, or a nurse would have been. The law looks with suspicion upon all benefits obtained by persons in a position to dominate the will of the person benefiting them. Two special rules apply in the case of benefits conferred by testament: these are (1) that the *onus probandi* lies in every case on the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator, and (2) that if a person writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. These rules were stated in *Barry* v. *Butlin* (1) to be indisputable. In a recent case of *Finny* v. *Govett* (2) the Master of the Rolls has emphasized the importance of adhering closely to these rules, having regard to the safety and protection of all his Majesty's subjects in testamentary matters.

In the proceeding on the application for probate, the District Judge did not direct his mind to these rules, and on the application for revocation, the force of them was not apparent to him. Abreu came under both rules. The circumstances regarding the will could not be free from suspicion. Abreu was in the closest

(1) (1838) 2 Moore P.C., 480.
(2) (1908) 25 Times Law Reports, 186.

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attendance upon a man in the last stages of a wasting disease, his feebleness being further enhanced by attacks of fever. A man in such a condition is particularly liable to be influenced. Abreu represented that the will originated from D'Roche's own desire and his instructions to Penha. Bearing the second of the above stated rules in mind it was incumbent on Abreu to call Penha as a witness to show that this was so, and to remove the natural suspicion that he himself had suggested and prepared the will. The fact that Penha might be an unreliable person could not relieve him of the obligation to lay before the Court all the evidence available as to the origin and preparation of the will.

The question is, should the natural suspicion which arises in connection with the will be removed by the evidence which Abreu has produced? The Judge's impression of Abreu himself was that he was neither a truthful witness nor an honest man.

The only evidence of any value in support of the paper which was propounded being the true will of a free and capable testator is that of T. Cupusawmi Pillay. There is no reason to doubt the truth of his evidence as far as it goes, but he could only speak as to what occurred on the occasion when D'Roche signed the will. If Abreu influenced D'Roche to make a will in his favour, the same influence would lead him to tell Cupusawmi that he was willing to give Abreu all his property, and that he was willing to sign a will to that effect.

In my opinion, the suspicion in connection with the will is not removed by the evidence produced by the person who wrote it and set it up. According to the second rule of law above referred to, the will should not under such circumstances be given effect to. I would consequently declare it void under section 48 of the Indian Succession Act, and would revoke the probate of it.

The respondent, Arthur Abreu, should pay the costs of the appellants in both Courts.

Parlett, J.—I concur.

Civil 1st Appeal No. 76 of 1908.

Nov. 8th, 1909.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

ABDUL HAMID *v.* TORAB ALI.

Lentaigne—for appellant (plaintiff).

Agabeg—for respondent (defendant).

C.I.F. Contract—Effect of contract to sell goods C.I.F. at a port named.

One thousand tons of rice of a specified quality was sold at a certain price per bag C.I.F. Chittagong between the 1st February and 31st March. It was then resold several times in smaller quantities on the same terms except as regards the price. The purchaser of one portion of the rice, **A**, sued his immediate vendor, **B**, who had failed to tender any rice to him. Previously to this he had written to **C**, the original seller, claiming that the contract for the delivery of another portion of the rice which had been purchased from **C** by **D** and **E** had been endorsed by them to him. **C** refused to recognize **A**.

Held,—that on a sale C.I.F. the seller undertakes to ship the goods sold on a vessel bound to the port mentioned, and to deliver the goods on board such vessel by tendering to the buyer a bill of lading for them together

with a policy of insurance covering their insurance to the port to which the goods are to go, and the seller must be ready and able to endorse the bill of lading and to transfer the policy to the buyer on receiving payment of the price.

It is necessary for the seller to make such tender.

Therefore each seller was bound to tender to the buyer from him a bill of lading or bills of lading, and a policy or policies covering the exact amount he had contracted to sell. The original seller, C, was not bound to divide up the amount he had sold into lots to suit the various purchasers, and to obtain bills of lading and policies of insurance to cover such lots.

Ireland v. *Livingston*, (1872) L.R. 5 H.L., 395, at p. 406; referred to.

Fox, C.J.—In spite of the confusion and irrelevant matter introduced into the case the facts appear to be fairly clear. On the 7th January 1907 M. L. R. M. Palaniappa Chetty sold to Karamat Ali and Noor Ahmed by a written contract (Exhibit 7) 13,500 bags (approximately 1,000 tons) of rice of a specified quality at Rs. 7-2-0 per bag "C.I.F." Chittagong between 1st February and 31st March. Rs. 1,000 was paid by the purchasers at once in part payment, and a further part payment of another Rs. 1,000 within five days from the date of the contract was one of its terms. The rice was to be milled at a named mill, and the seller was to give the buyers 24 hours' previous notice of when the milling would commence.

Of the 1,000 tons Karamat Ali and Noor Ahmed bought they sold 500 tons to the defendant Torab Ali, 300 tons to the plaintiff Abdul Hamid, and 200 tons to a Hindu firm. The receipt (Exhibit P) shows the terms on which the 300 tons were bought by the plaintiff. These terms were the same as those on which Karamat Ali and Noor Ahmed had bought from the Chetty except that the C.I.F. price was Rs. 7-4-0 per bag. The defendant admitted that he sold to the plaintiff at Rs. 7-5-0 per bag what he called his right to delivery of the 500 tons which Karamat Ali and Noor Ahmed were to get from the Chetty and which he was to get from Karamat Ali and Noor Ahmed, and he admitted receiving Rs. 1,160 from the plaintiff partly as an advance payment and partly towards his profit on the transaction.

The matter of the sale of a right of delivery may be disposed of at once. There is no such thing known in law as a sale of a right to delivery. A right to delivery must arise out of either ownership or a contract. In the present case there can be no question that the defendant sold to the plaintiff 500 tons of rice which both parties relied on getting from Palaniappa Chetty, and the terms of delivery were to be those on which the Chetty had sold, *viz.*, C.I.F. Chittagong. The plaintiff in turn sold 500 tons of the rice to Ibrahim Sulaiman and Company and 300 tons to Hajee Tar Mahomed Ayah, in both cases at a profit. The receipt (Exhibit 11) shows that the plaintiff sold to Hajee Tar Mahomed Ayah on the same terms as to delivery C.I.F except that the contract provided for C.I F. Chittagong or Calcutta.

From Exhibits 7A and 4, it appears that Noor Ahmed gave the defendant notice of the milling of the rice on the 26th February

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and the 3rd March. The first notice appears to have been verbal. The second was by letter after 3,625 bags had been filled. The defendant sent the letter on to the plaintiff. He in his turn communicated with the buyers from him. He and they say that they went to inspect the rice. The plaintiff says that his buyers, Ibrahim Sulaiman and Company, told him verbally that they objected to the rice as not being of the stipulated quality, and that he informed the defendant of this, and that he would not take it. Ibrahim Sulaiman and Company's Manager, Nasim-ud-din, says he went to the mill and was told that there was no rice for the plaintiff there, but, nevertheless, he tested some bags and found they were short in weight and also that the rice was not of the quality contracted for. Whatever happened it does not appear that objections to the rice were ever communicated by any one to the Chetty. He, as he had a right to do, recognized only Karamat Ali and Noor Ahmed as his buyers. On the 5th March he gave them notice (Exhibit 19) that 5,800 bags were in course of shipment, and that if they did not pay for the rice on shipment, the advance they had paid would be forfeited and the rice disposed of at their risk. The purchase money was not paid, the vessel on which 5,799 bags had been shipped sailed for Chittagong and the Chetty resold the rice on the 11th March at the rate of Rs. 7-1-0 per bag (Exhibit 22). On the same day Noor Ahmed gave the plaintiff notice that the Chetty had cancelled the contract (Exhibit 16). On the 23rd March the plaintiff sent to the defendant a disingenuous letter asking when the latter would give delivery of the 500 tons of rice sold to him on the 3rd February. On the 24th March advocates' letters began. On the 29th March the plaintiff wrote to the Chetty informing him that the latter's contract with Karamat Ali and Noor Ahmed had been endorsed to him to the extent of 4,048 bags, and demanded delivery of these (Exhibit Z). The Chetty's reply (Exhibit Y) refused to recognize the plaintiff. It only remains to be said that the defendant did not tender to the plaintiff any rice with shipping and insurance documents.

A perusal of the evidence and documents shows that none of the parties, except the Chetty, had any but the smallest idea of what obligations are incurred by entering into C.I.F. sales of goods. The incidents attached to such sales by trade usage have been fully described by Blackburn, J., in *Ireland* v. *Livingston* (1). That was, however, a case between a merchant in one country and a commission agent in another. The present case is between traders residing in the same place. The usage in such case is accurately described by Mr. Orr in his evidence. On a sale C.I.F. the seller undertakes to ship the goods sold on a vessel bound to the port mentioned, and to deliver the goods on board such vessel by tendering to the buyer a bill of lading for them together with a policy of insurance covering their insurance to

(1) (1872) L.R. 5 H.L., 395, at p. 406.

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the port to which the goods are to go, and the seller must be ready and able to endorse the bill of lading and to transfer the policy to the buyer on receiving payment of the price.

It is necessary for the seller to make such tender.

Neither Karamat Ali and Noor Ahmed nor any of the string of persons who bought and sold portions of the 1,000 tons which the Chetty had contracted to deliver could have realised that the Chetty was not bound to divide up the amount he had sold into lots to suit them, and to obtain bills of lading and policies of insurance to cover such lots. They could also not have understood that each seller was bound to tender to the buyer from him a bill of lading or bills of lading, and a policy or policies covering the exact amount he had contracted to sell.

Nevertheless, they made contracts according to a term which has a definite meaning in trade, and each was bound by the usage of the trade. If they did not know the usage, it was their own fault that they did not ascertain it before they entered into such a contract. It is clear that the defendant did not do what he was bound to do, and, not having fulfilled the contract he made, he is bound to pay the plaintiff compensation. First of all the plaintiff is entitled to receive back the Rs. 1,160 which he admittedly paid the defendant in connection with the contract. He is also entitled to receive from the defendant the difference between the contract rate and the C.I.F. rate at Akyab on the last day of March which is the last day on which delivery could have been made. The plaintiff claims at the rate of Rs. 8 per bag, basing this on the rate of rice at Chittagong on the 31st March. The rate at Chittagong is not what has to be considered. The place of delivery C.I.F. was Akyab, and the rate to be considered is the C.I.F. rate at Akyab on the 31st March. Mr. Orr stated that on the 28th March he sold bags of 163 lbs. at Rs. 7-11-0 per bag f.o.b., and that then the freight to Chittagong was Rs. 6 per ton—something less than 8 annas a bag—and that the insurance rate was 4 annas per cent. less some allowances which he stated and 5 per cent. On the 1st April he sold at Rs. 8 per bag f.o.b. He said that the market had been rising steadily. On this evidence the rate on which the plaintiff claims damages is well within the mark.

I would allow the appeal, reverse the decision of the District Court and give the plaintiff a decree for the amount he claimed, with costs in the District Court and in this Court.

Parlett, J.—I concur.

Civil Reference No. 4 of 1909.

August 17th, 1909.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

MASHEDEE KHAN *v.* B. MAHOMED AZIM.

McDonnell—for appellant. | *Anklesaria*—for respondent.

Retrospective application of Statutes—Lower Burma Courts Act, 1900, s. 27—Effect of change made in—by Burma Act VII of 1907 on pending cases.

The general rule is that statutes do not operate retrospectively, but statutes dealing with procedure only, apply to pending matters. The giving of a right of appeal is not a matter of procedure. Therefore the right of appeal against decrees of the Small Cause Court, Rangoon, given by Burma Act VII of 1907, could not be claimed by a party to a suit instituted before that Act came into force, although the decree was passed later.

Gardner v. *Lucas*, (1878) L.R. 3 A.C., 601, and *Colonial Sugar Refining Company, Ltd.* v. *Irving*, (1905) L.R., A.C., 369; referred to.

The question referred is, "Does an appeal lie under section 27 (2) of the Lower Burma Courts Act, 1900, from a decree of the Judge of the Court of Small Causes, Rangoon, in a suit of value exceeding Rs. 1,000, the suit having been instituted before, but decided after, the coming into force of Burma Act VII of 1907?"

This last-mentioned Act substituted a new section 27 for the original section 27 of the Lower Burma Courts Act, 1900, and gave a right of appeal in certain cases which did not exist previously. The question amounts to whether a party to a suit instituted before the amending Act came into force became entitled to a right of appeal against the decree in his suit if it was passed after the Act came into force.

The general rule is that statutes do not operate retrospectively, but amongst the exceptions to this general rule is a rule that statutes dealing with procedure only apply to pending matters. —See *Gardner* v. *Lucas* (1).

The new section 27 of the Lower Burma Courts Act deals with procedure, but it also gives a right of appeal, and in so far as it does this latter, it is more than a statute dealing with procedure only. This view is supported by the decision of their Lordships of the Privy Council in *The Colonial Sugar Refining Company, Ltd.* v. *Irving* (2). The question in that case was whether a suitor who, when he had instituted his suit would have had an appeal by right to His Majesty, had been deprived of an appeal by statute subsequently passed.

Lord Macnaghten in delivering their Lordships' judgment said:—

"As regards the general principles applicable to the case there can be no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition (which asked that the appeal be dismissed on the ground that the right of appeal had been taken away by statute) is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities

(1) (1878) L.R., 3 A.C., 601. | (2) (1905) L.R., A.C., 369.

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extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

If the taking away of a right of appeal is not a mere matter of procedure, the giving of a right of appeal is equally not such a matter.

Consequently, the general rule that statutes do not operate restrospectively applies to the present case, unless a clear intention to that effect is manifested in the section itself. This, in our opinion, is not the case. We answer the question referred in the negative.

Before Sir Charles Fox, Chief Judge, Mr. Justice Ormond, and Mr. Justice Robinson.

Criminal Revision No. 336B of 1909.

Dec. 22nd, 1909.

J. S. BRISCOE BIRCH *v.* KING-EMPEROR.

deGlanville—for applicant. | *Dawson*—for King-Emperor.

Charge to the Jury—Meaning of the words "laying down the law" in s. 297, Code of Criminal Procedure, 1898, and of "misdirection" in s. 537 (d).

Under section 12 of the Lower Burma Courts Act, 1900, a reference was made to the Chief Court in respect of a conviction for criminal breach of trust by a public servant on the ground *inter alia* that the Judge in his charge to the jury had not complied with the provisions of section 297, Code of Criminal Procedure, 1898, in that he had not laid down the law.

Held,—(*Ormond, J.*, dissenting)—

(1) that to fulfil the requirement of "laying down the law" it is not sufficient to state that if certain facts are held to have been proved, the offence charged has been committed. The constituents of the offence must be explained;

(2) that failure to do this, being a disobedience to an express provision of law, is not an irregularity which can be cured by section 537 (*d*) of the Code.

Conviction set aside.

Subrahmania Ayyar v. *King-Emperor*, (1902) I.L.R. 25 Mad., 61, followed.

Hla Gyi v. *King-Emperor*, (1905) 3 L.B.R., 75, referred to.

Fox, C.J.—The case comes before this Bench under section 12 of the Lower Burma Courts Act, 1900, upon the following certificate of the Government Advocate of Burma:—

"I hereby certify that in my opinion it should be further considered by the Chief Court (*a*) whether the learned Judge who presided at the Special Sessions held at Rangoon on the 28th day of October 1909 and following days for the trial of J. S. Briscoe Birch sufficiently complied in his charge to the jury with the provisions of section 297 of the Criminal Procedure Code; (*b*) whether the said learned Judge contravened section 162 of the Criminal Procedure Code by admitting in evidence a letter written by one A. J. Renny, dated September 30th, 1909, to one James Law, Head of the Criminal Investigation Department."

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Clause (*b*) of this certificate may be disposed of by the answer that the letter in question was not a statement taken down in writing to which section 162 of the Criminal Procedure Code applied, consequently the learned Judge did not contravene that section in admitting the letter in evidence.

The question in clause (*a*) of the certificate is a wide one. For the prisoner it has been urged that the learned Judge did not sufficiently comply, and in one respect did not comply at all with the requirements of section 297 of the Code, in that (1) he did not sufficiently, and in some respects correctly, state the case of the accused, and sum up the evidence for the prosecution and defence, and (2) that he did not lay down the law by which the jury were to be guided.

I propose to deal with the second contention first, because if it is correct, and if there was an entire absence of "laying down" of the law by which the jury were to be guided, that may be a fatal defect which vitiates the trial, and consideration of the first contention may be unnecessary.

The ultimate thing which the jury in a trial of a person for a criminal offence have to do is to say whether the person is guilty or not guilty of the offence charged or of any offence put before them for consideration. Punishable offences are the creation of law, consequently it is essential that the jury should know, before they convict or acquit any one of an offence, what the constituents of the offence are in law. The Code provides for how they are to become acquainted with such constituents by enacting in section 297 that the Court, otherwise the Judge, shall, after the conclusion of the case for the defence and the prosecutor's reply, proceed to charge the jury * * * "laying down the law by which the jury are to be guided." The jury have then to decide which view of the facts is true, and to return the verdict which, under such view, ought, according to the direction as to the law which the Judge has given them, to be returned. It is not open to them to apply to the facts any views of the law which counsel have put before them or which any of them may possibly entertain: they are bound to accept the law as stated to them by the Judge, and before they can find the person charged before them guilty of an offence, they must come to the conclusion that such person has been guilty of an act or omission or of acts or omissions which, according to the directions of the Judge, constitute the offence. They have in effect to apply what the Judge tells them is the law to the facts.

The following extracts from the summing-up will show the way in which the case was put before the jury. At the beginning is the following passage:—

"It is my duty to * * * * put before you the question you have to decide. It is simply this—Did Birch take over the elephant as a Government Kheddah elephant, and did he, when he gave over charge to McHarg, know that it was a Government Kheddah elephant? If you

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decide that question in the affirmative, he is guilty of criminal breach of trust."

At the end is the following:—

"The question for you now to decide is—Was this elephant a Government Kheddah elephant when Birch gave over charge, and did he know it? * * * * * * *

If both these questions are answered in the affirmative then the accused is guilty."

The charge against the prisoner was that he, on or about the 26th August 1908 at Katha, being a public servant and in such capacity entrusted with certain property—to wit, a *muckna* elephant, "Cuttack," the property of the Government of Burma—committed criminal breach of trust with respect to the said property and thereby committed an offence punishable under section 409 of the Indian Penal Code. There is in the summing-up no explanation of and not even any statement as to what constitutes the offence of criminal breach of trust by a public servant. The result of the case is that the jury have by their verdict found the prisoner guilty of an offence the constituents of which they were not told by the Judge, whose statement alone as to what those constituents were they had to have from him and apply in the case before them. It must, I think, be held that in this trial section 297 of the Code was not complied with, in so far that the presiding Judge did not, in his charge to the jury, lay down the law by which they were to be guided.

The question then arises as to what consequences must ensue. In my opinion the provision that the Judge shall lay down the law to the jury is an all-important one, and that he should do so is a necessary and essential part of a trial by jury under the Code.

In *Subrahmania Ayyar* v. *King-Emperor* (1), no doubt the provisions of the Code which were not complied with were not the same as in the present case, but the remark that their Lordships were unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity, appears to me to apply to a case like the present where there was an absence of an essential required by the law. On the views expressed by their Lordships in the above case, I do not see how a total absence of direction by the presiding Judge as to the law can be cured under section 537 of the Code. Counsel for the Crown has invited us to examine the evidence in the case, and to say that the omission of the learned Judge could not possibly have made any difference in the result of the case. Here, again, the objection stated by their Lordships to such a course, in that it would transfer to Judges what should rest solely with a jury, appears to me to apply to the present case. I guard myself, however, from saying that in no case which comes before the Court under section 12 of the Lower Burma Courts Act, 1900, can the Bench look into the evidence with a view to considering

(1) (1902) I.L.R. 25 Mad., 61.

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whether an error, irregularity or omission has occasioned a failure of justice or not.

As to the actual order to be made in consequence of this review I think that, as in the case of *Hla Gyi* v. *King-Emperor* (2), the conviction of and sentence on the prisoner should merely be set aside and that he should be released so far as this case is concerned.

Robinson, J.—The question we have to consider is whether the charge to the jury in this case sufficiently complied with the requirements of section 297 of the Code of Criminal Procedure.

There was in the charge no laying down of the law by which the jury were to be guided in the manner in which this is usually understood. The learned Judge, both before and after summing up the evidence, placed certain questions of fact before the jury and directed them that if they found certain facts proved they were to convict and that if, on the contrary, they found certain other facts proved they were to acquit. It has been urged that the section does not require him to explain the law but only to lay it down; that the Judge alone has to decide as to what is the law and the jury are bound to obey his directions as to it.

Section 297 lays down in imperative language the duty of the Judge on the conclusion of the defence and the prosecutor's reply, "he shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided."

The summing up of the evidence is clearly distinct from laying down the law. What then does 'laying down the law' mean?

The offence with which an accused is charged is given in the charge in technical terms which convey little to the jury. By section 286 (*1*) the prosecutor is required, in opening his case, to read out to the jury the description of the offence and he explains it and its essentials to them. The counsel for the defence may also address the jury as to the law, and this was done in the present case. Then the Code requires the presiding Judge to lay down the law by which the jury are to be guided. If the jury have heard discussions of the law applicable to the offence charged from opposing counsel and have heard detailed criticism of the evidence with reference to the essential ingredients of the offence it is, I think, obvious that it is imperative that the possibility of doubt and confusion in their minds should be removed and that they should be told authoritatively what the law is. They must, for a proper understanding of the evidence and a due appreciation of its bearing on the offence charged, be told what the law is and what constitutes the offence charged and what matters must be proved to their satisfaction to constitute that offence. This, it appears to me, the Legislature has provided for in section 297, and this is why it is imperatively necessary for the presiding Judge to expound the law to them.

(2) (1905) 3 L.B.R., 75.

In the present case it was not explained to the jury nor were they affirmatively told what constituted criminal breach of trust, nor what would amount to any one of its various ingredients. They were not given the definition of "dishonestly," in fact they were not told what they must first find proved to constitute the offence, but were only told that if they found a few facts proved the accused was guilty. This was perhaps sufficient for a jury composed of lawyers, but I cannot think it was enough to enable the jury, composed as it was, to duly and properly decide the guilt or innocence of the accused. Nor do I think that if certain facts were admitted that would make it the less necessary for the Judge to point out to the jury that those details were required to make up the offence. To give one instance, the jury were told that if they found certain facts proved they should find the accused guilty. Nothing was said about the essential element of criminal breach of trust, namely, that he acted dishonestly. As the matter was put to them it appears to me that the Judge decided that if certain facts were proved he acted dishonestly, but this was for the jury to decide. It may follow as a necessary consequence that if he so acted he must have acted dishonestly, but as the jury were not told what constitutes "dishonestly," how far this was present to their minds does not appear.

I am therefore of opinion that in not laying down the law as required by section 297 there was a grave misdirection. Is this in any way cured by section 537? I think clearly not. It is true that that section refers to any misdirection, but the whole section is "subject to the provisions hereinbefore contained." One of these provisions is a laying down of the law for the guidance of the jury. That is an express provision of the law. The section is intended to apply to minor errors and irregularities, it cannot be intended to avoid total omissions of express provisions. Their Lordships, in *Subrahmania Ayyar's* case (1), were, it is true, dealing with clause (*a*) of section 537, but they laid down a general proposition which applies with equal force to the present case, and in my opinion renders section 537 totally inapplicable. It is not open for us, therefore, in this case to go into the evidence and consider whether the want of direction has in fact occasioned a failure of justice. I am not, however, as at present advised, prepared to hold that it is not open to the Court to do so in any case whatever.

On the second point I concur with the learned Chief Judge.

As to the order to be passed in the present case, I concur that we should merely set aside the conviction and sentence. I consider, however that we have the power to order a retrial. This point was not finally decided in *Hla Gyi's case* (2) and need not be considered now.

Ormond, J.—The following facts were common both to the case for the defence and the case for the prosecution:—That

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Birch was appointed officiating Superintendent of the Kheddah Department and, as such, was in charge of all Government Kheddah elephants that came under his control; that he had control over this elephant from the time that he took over charge from Clarke until it was seized by the police after he had given over charge to McHarg; that he gave over charge of the Department to McHarg under orders of Government and purposely did not put McHarg into possession of this elephant but removed it and retained possession of it as being an elephant belonging to Green.

At the conclusion of my charge I said, "the question for you now to decide is:—Was this elephant a Government Kheddah elephant when Birch gave over charge, and did he know it? If both these questions are answered in the affirmative, then the accused is guilty."

In my opinion that is a sufficient laying down of the law for the guidance of the jury. There was but one offence charged and the facts in issue were very simple. There can be no reasonable doubt that the jury understood this direction to mean that those two facts, together with the facts about which there was no dispute, were sufficient to constitute the offence. In effect I told the jury:—"The law is this: if certain facts are proved, the accused is guilty; otherwise he is innocent"; and the jury being guided by that laying down of the law, considered which verdict was applicable to the facts as found by them, *i.e.*, they applied to the facts the law as laid down by the Judge.

Under section 299, Criminal Procedure Code, "it is the duty of the jury to decide which view of the facts is true, and then to return the verdict which, under such view, ought, according to the direction of the Judge, to be returned." There was no question of fact to be decided as regards the above stated facts which were common to the cases of both sides; and it is not contended by the prisoner's counsel that the verdict in this case should be set aside on the ground that I did not ask the jury to come to a finding on the case which was common to both sides.

In laying down the law for the guidance of the jury, it is sufficient, I think, if the Judge informs the jury what facts must be found by them before they can bring in a verdict of guilty. It matters not whether the Judge tells the jury that the offence consists of such and such elements, or that such and such elements are necessary to constitute the offence. The jury are not concerned with the law, except to know what facts are necessary for them to find for the offence to be established. They are not concerned with the reasoning by which the Judge is led to the conclusion of law which he lays before them. The principle underlying all the cases in which a verdict has been set aside for misdirection in law, is that the jury could not have been sufficiently informed as to what facts they had to find in order to bring in a verdict of guilty. There are cases to shew that stating the law to the jury is a misdirection unless the jury are also

given to understand what facts they must find in order to bring in a verdict of guilty ; but I know of no case in which a verdict has been set aside on the ground of misdirection in law, where all the facts which were in dispute and which were necessary to constitute the offence were clearly put to the jury.

The fact of Birch's appointment as Superintendent of the Kheddah Department in charge of all Government Kheddah elephants involves, as a matter of law, an entrusting to him as a public servant of all Government Kheddah elephants of which he obtains control, provided he knows that such elephants are Government Kheddah elephants ; and that he wrongfully retained (which in legal terms is equivalent to a dishonest disposal of) this elephant in violation of his trust, would be merely another way of expressing a finding :—that he, knowing this elephant to be a Government Kheddah elephant on the plea that it was an elephant belonging to Green, removed and retained it and purposely did not hand it over to McHarg, although it was his duty to hand over all Government Kheddah elephants to him.

Assuming that there was an omission to lay down the law fully to the jury : this Court, before setting aside the verdict, must be satisfied that there was a reasonable possibility that the jury might have returned a different verdict if the law had been fully laid before them. This is very different to deciding questions of fact after weighing the evidence and thereby usurping the functions of a jury. The knowledge or absence of knowledge, on the part of the jury, of the law on the subject, could not have influenced them in their findings of the facts which I put to them ; so that all this Court would have to do in this case would be to consider whether the facts as found by the jury in conjunction with the facts common to both sides, are in law sufficient to constitute the offence.

In so doing, this Court would not be usurping the functions of a jury : but by refusing to do so, this Court is, I think, disobeying an express prohibition of law ; for though section 297 states that the Judge shall charge the jury, laying down the law by which the jury are to be guided, section 537 (*d*) provides that no verdict shall be set aside for any misdirection unless such misdirection has occasioned a failure of justice.

Unless the defect in my charge to the jury is something more than a misdirection—the case of *Subrahmania Ayyar* (1), which has been relied on by the prisoner's counsel, would have no application to the present case. That case decided that when the law says that a man shall not be tried for more than a certain number of offences in one trial : to do so, which is a disobedience to an express *prohibition* of law, is an illegality and a nullity from the beginning, and is not an irregularity within the meaning of section 537. That case also shews that, although all irregularities are in a sense contraventions of express provisions of law, they are curable under section 537.

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For these reasons, I think this Court should uphold the verdict, but as the majority of this Bench are of opinion that it should be set aside, the question arises:—Should this Court order a retrial? There being no precedent for ordering a new trial in such a case, I think the order should be that the conviction and sentence be set aside.

Civil 2nd Appeal No. 265 of 1908.

Jany. 6th, 1910.

Before Mr. Justice Hartnoll.

MA BI *v.* S. KALIDAS.

Sealy—for appellant (plaintiff).

R. N. Burjorjee—for respondent (defendant).

Surety to pay over debt attached before judgment or decretal amount—Liability of—when the suit, although dismissed by the lower Court, is decreed on appeal—sections 253, 483 of Code of Civil Procedure of 1882.

A debt due to the defendants in a suit was attached before judgment, but the attachment was withdrawn on A's giving security to pay over the money due or the decretal amount. The suit was dismissed by the lower Court, but decreed on appeal. It was then sought to recover the amount of the appellate decree from A.

Held,—that A's liability ceased with the dismissal of the suit, just as the attachment to remove which he gave security must have been removed then.

Suleman v. *Shivram*, (1888) I.L.R. 12 Bom., 71, followed.

In Civil Regular Suit No. 1316 of 1905 of the Township Court of Payagale, Ma Bi sued Maung Po Kin and Ma Thaw to recover Rs. 360. Before judgment an attachment was issued to attach certain money due to the defendants from the Pegu Municipality. Subsequently, the attachment was withdrawn on Kalidas, the respondent in this case, giving security to pay over the money so due, or the decretal amount. The suit was dismissed by the Township Court, but decreed on appeal. It was then sought to execute the amount of the appellate decree against Kalidas. The latter disputes his liability and has done so successfully in the Township and District Courts.

Ma Bi now appeals to this Court and argues that he is liable. The application for attachment before judgment was made under section 483 of the old Civil Procedure Code (XIV of 1882). That section authorizes the defendant being called on to furnish security to satisfy any decree that may be passed against him in such suit. As the defendants subsequently furnished security, the attachment was removed. When Kalidas gave security the section of the Code, that determines his liability, is section 253, which says that the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant.

It is urged in the present case that, though the suit was dismissed by the Court of first instance, yet since it was decreed on appeal, Kalidas is still liable for the order passed in appeal

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except for the costs allowed in appeal, and it is urged that section 483 should be read with section 583 of the Code. I cannot see that section 583 has anything to do with the matter. I am of opinion that Kalidas' liability ceased when the suit was dismissed by the Township Court. Section 488 states that the attachment itself must be removed when the suit was dismissed. If this is so, surely the surety ceases to be liable when the suit is dismissed. I am unable to read into section 483 that the surety gave security for any decree that might be passed in appeal in the suit. The section seems to me to merely contemplate security for any original decree that may be passed by the Court of first instance. This would seem to be made clearer by the words of section 253 which refer to the liability of surety in a decree passed in an original suit. The same views as I expressed above seem to have been taken in the case of *Suleman* v. *Shivram* (1).

Considering therefore that Kalidas' bond ceased when the suit was dismissed by the Township Court I dismiss this appeal with costs.

Full Bench—(Civil Reference.)

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, Mr. Justice Robinson, and Mr. Justice Parlett.

Civil References No. 6 of 1909.

Jany. 10th, 1910.

In re Revenue Stamp Case No. 19 of 1909-10 of the Collector, Prome.

Young—the Government Advocate.

Stamp Act, 1899, Schedule I, Article 5—Duty on agreement.

An instrument acknowledging the receipt of a sum of money and agreeing to settle the debt by a subsequent delivery of grain is not an agreement relating to the sale of goods exclusively and therefore does not come under *Exemption* (*a*) to Article 5, Schedule I, of the Indian Stamp Act, 1899.

Kyd v. *Mahomed*, (1892) I.L.R. 15 Mad., 152, followed.

The following reference was made by the Financial Commissioner, Burma, under section 57, sub-section (*1*), of the Indian Stamp Act, 1899 (II of 1899), as amended by the Lower Burma Courts Act, 1900 (VI of 1900), Schedule I :—

I am in doubt as to the interpretation of the document below. It is translated as follows :—

"We the undersigned take Rs. 15 from Ko Tôk Gyi and promise to deliver him or his agent at the harvest time twenty-five baskets of paddy at the rate of Rs. 60 per 100 baskets after the paddy has been winnowed and measured with the standard basket in the village."

It is somewhat similar to the ruling circulated with Financial Commissioner's Circular No. 15 of 1905, quoted after page 172A, Stamp Manual, 1903 edition, in that it consists of two parts, but differs from it in that the first is an acknowledgment of a debt, and the second an agreement to deliver agricultural produce.

(1) (1888) I.L.R. 12 Bom., 71.

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It is not, however, an acknowledgment of a debt as described in Article I, Schedule I, for it contains a promise to pay the debt. I am of opinion that it does not come under Article 5, *Exemption* (*a*), as it contains an acknowledgment of a debt and is not merely an agreement for the sale of goods. It is not a mortgage of a crop, under Article 41, for "Mortgage," section 2 (*17*), must create a right over specified property and the paddy is unspecified. It does not mortgage any particular crop. If, however, the words "from our holding No. ?", or words to that effect, were inserted after "paddy," it appears to me it would be taxable under Article 41.

If the document were subdivided thus—

We the undersigned take Rs. 15 from Ko Tôk Gyi

We the undersigned promise to deliver to Ko Tôk Gyi or his agent, etc.

the former would be an acknowledgment, and the latter an agreement exempted under Article 5, *Exemption* (*a*). It appears not a little hard to require duty on a document made in two parts neither of which is liable to duty, because the joinder of them prevents it from coming under the exemptions, but as I am in doubt in the matter and consider that the document as a whole comes under Article 5 (*b*), I refer the question to the Chief Court.

The final decision of the Full Bench is as follows:—

Hartnoll, J.—The question for decision is what stamp duty, if any, is chargeable on an instrument that is in the following terms:—

"On demand

Rs. 15

5th waning Tawthalin, 1270 B.E.

We, Ko Hmwe Ga and Maung Po Lin who sign the promissory note hereunder say: 'I (we ?) now take from Ko Tôk Gyi, the owner of the money, the sum of Rs. ..... being the value of 25 baskets of paddy at the rate of Rs. 60 per 100 baskets. In consideration of this money either of the signatories shall, on demand, when the harvest comes, winnow the grain well, measure at one and the same time 25 baskets of paddy in the standard basket commonly used locally and deliver them either to the owner of the money or to their order. So agreeing this promissory note is signed.'

N.B.—If the signatories be more than one it must be considered that they are jointly responsible.

(Sd.) PO LIN.

(Sd.) KO MWE GA."

It is for consideration whether the instrument is not exempt from stamp duty under *Exemption* (*a*) to Article 5 of Schedule I of the Indian Stamp Act. That *exemption* refers to an agreement, or memorandum of agreement, for or relating to the sale of goods or merchandize exclusively. In my opinion it cannot fall under that *exemption*. Even assuming that it is an agreement relating to the sale of goods, it is more than that, as it is an ackowledgment for a debt of Rs. 15. The debt being acknowledged, the instrument goes on to recite how the debt is to be

repaid and states that the paddy is either to be paid to the creditor or to his order. In the case of *Kyd* v. *Mahomed* (1), it was laid down as follows:—

"The test which should be applied is to see whether the document evidences only a transaction of sale or a sale and some other independent transaction, and if the former the number of subsidiary stipulations it may contain cannot alter the nature of the transaction. The material words of the exemption are "an agreement for or relating to the sale of goods or merchandize exclusively," and the intention was to exempt *bonâ fide* sales and purchases of merchandize from stamp duty."

I agree with this ruling. Even supposing the instrument under discussion is an agreement for the sale of goods it seems to me to be more than that and to be an acknowledgment of a debt.

I am of opinion that it should be stamped with an eight-anna stamp under Article 5 (*b*) of Schedule I.

Fox, C.J.—The document would appear to have been intended to be a Promissory Note, but it does not come within the definition of the term in the Stamp Act. It is an agreement which does not fall within clause (*a*) of Article 5 of Schedule I of the Act. The only clause of the exemptions which could apply is clause (*a*), and it does not appear to me to be within that, since it is not an agreement "for or relating to the sale of goods or merchandize exclusively."

Robinson, J.—The document acknowledges the receipt of Rs. 15 and, further, in consideration of this payment agrees to sell paddy. This being so, it is not a Promissory Note or an agreement for the sale of goods exclusively. It is not therefore exempt under clause (*a*) of the *exemptions* to Article 5 of Schedule I of the Act and must, I consider, be stamped eight annas under Article 5 (*b*).

Parlett, J.—In my opinion, the instrument is not an agreement for or relating to the sale of paddy, as the paddy was not ascertained. I take it to be an acknowledgment of a loan made to the signatories jointly, and an agreement that either of the signatories will repay the loan in the form of twenty-five baskets of paddy at any time after harvest when the lender or his agent shall demand it.

I consider therefore that the instrument is chargeable with stamp duty of eight annas under clause (*b*) of Article 5 of Schedule I to the Indian Stamp Act, 1899.

(1) (1892) I.L.R. 15 Mad., 152.

Criminal Appeal No. 856 of 1909.

Feby. 7th, 1910.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

PO SET *v.* KING-EMPEROR.

Nicol—for appellant.

McDonnell, Assistant Government Advocate—for King-Emperor.

Murder—Indian Penal Code, s. 300, Exception 5.

A and B voluntarily engaged in a fight, A knowing that B had a knife in his hand which he had threatened to use. A was fatally stabbed.

Held,—that murder had been committed. It is not sufficient for a claimant to the benefit of the *5th Exception* to section 300 of the Indian Penal Code, to satisfy the Court that the person whose life he took, voluntarily took the risk of death. He must prove that such person consented to the particular act being done and that he did so with knowledge that, if done, he would die or incur risk of losing his life.

Held, also,—that the death penalty was not called for, as it was not A's business to arrest B, who had not attacked or shown any intention of attacking anybody outside the compound within which he was standing.

Queen-Empress v. *Nayamuddin and others*, (1891) I.L.R. 18 Cal., 484, referred to.

Fox, C.J.—The facts according to the prosecution witnesses were as follows. About a month before the occurrence in which Maung Pyo On was stabbed the accused and his wife (aged respectively 22 and 18) had a quarrel over the loss of some gold which belonged to the wife's sister. In consequence of the quarrel the two were divorced before the village headman. The wife's ill-feeling towards the accused evidently continued, and on the day before the occurrence, the accused was sent off to the police station by the headman and his wife charged him with theft of the gold. It is not quite clear whether Maung P o On was one of the escort of villagers who took him. The police released him for want of any sufficient evidence against him. He returned to his father's house in the village. This house is opposite his wife's parents' house, and many of her relations live near by On the morning after his return to the village, the accused was heard shouting out from his father's house abuse of the villagers generally, taunting them with their failure to get him sent to jail, and using threats to them. From the headman's evidence as to his condition when he was subsequently brought to him, he must have drunk some liquor, but he was not drunk or incapable. His conduct showed that he was infuriated at the treatment he had received from the villagers in connection with the loss of the gold.

Maung Pyo On, who was a relation of both the accused and his wife, was returning home along a raised footway through the village. Between that and the fence of the land on which the accused's father's house stood there was a cart-track. Maung Pyo On commenced to bandy words with the accused, who was still in the front part of the house. He had a clasp knife in his hand. Different accounts are given of the words which passed between the two, but the dialogue was somewhat as follows:—

Maung Pyo On: "I have come along the road—stab me here if you dare."

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Accused: "If you want to be stabbed, come in here."
Maung Pyo On: "Come down from the house—will you stab me then?"
Accused: "I will"—adding foul abuse.
Maung Pyo On: "Do you mean it?"
Accused: "I do."
Maung Pyo On: "Witness all, I have nothing in my hand. Come on."
Accused: "Come on."

The two then rushed at one another and struggled together. In the course of the struggle Maung Pyo On received two stabs, one on his shoulder, and one just below the collar bone. A very deep wound was caused at the latter place. If the knife produced is the one used by the accused, he must have driven it so hard that part of the handle even penetrated into the hole made in Maung Pyo On's body: the blade went into one of the lungs. Maung Pyo On was the taller man of the two, and he either managed to force the accused to the ground or the latter fell and was under Maung Pyo On. Help arrived, the accused was secured, and the knife taken from him. Pyo On was mortally wounded, but lived some hours. The wound under the collar bone was necessarily fatal.

The accused's story was that he was attacked with *dahs* by Pyo On and three others, and in resisting them he took up the nearest thing at hand and brandished it in self-defence.

The defence urged for him was that what he did was justified by the right of private defence.

There can be no doubt that his account of having been attacked by four persons before he stabbed Pyo On is untrue, and there can also be no doubt that the version of the affair given by the prosecution witnesses is substantially true.

On that version both men voluntarily engaged in a fight, Maung Pyo On knowing that the accused had a knife in his hand which the accused had threatened to use. No question of the right of private defence arises. *Primâ facie* the accused's act which caused Pyo On's death amounted to murder. The Sessions Judge considered whether *Exceptions 1* and *4* to section 300 of the Penal Code could be applied to the case, and was of opinion that they could not. I agree with him in this. In one view, however, *Exception 5* might be applicable, for Maung Pyo On may be said to have voluntarily taken the risk of death, when he voluntarily left the footway, crossed the cart-track, entered the compound of the accused's father's house, and rushed at the accused, knowing that the latter had a knife in his hand, and knowing that the accused had threatened to stab him if he came to the house.

The words of the *Exception* are—

> "Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

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The last words seem very wide on first impression. The meaning of the *Exception* has been interpreted differently. The cases in which the question as to its applicability has arisen are set out in Ratanlal and Dhirajlal's "Law of Crimes."

In *Queen-Empress* v. *Nayamuddin and others* (1) a Full Bench of the Calcutta High Court held that it did not apply in the case of a premeditated fight voluntarily entered into by two bodies of men armed with deadly weapons. The judgments in the case deal with some seemingly fine distinctions, but the learned and experienced commentator, Mr. J. D. Mayne, in paragraph 447 of his "Criminal Law of India" considers that the judgment did not sufficiently distinguish between consenting to death and taking the risk of death. According to him a man consents to death when the infliction of it is a friendly proceeding which he authorises: he takes the risk of death when it is a hostile proceeding which he neither consents to nor authorizes, but which he foresees as the possible termination of a conflict on which he determines to enter.

With some diffidence as to disputing the view of such a learned author, I think that "taking the risk of death" cannot be confined to cases of hostile proceedings. As an instance of a case in which a person might take a risk of death in a friendly proceeding, I would give that of a woman who might consent to a person performing an illegal operation on her, knowing full well that her life might be endangered by it.

On Mr. Mayne's view of the exception the present case might be held to come within it. He sets out extracts from the reports of the Commissioners engaged in drawing up the Penal Code, and states that in his opinion the case of a man who killed another in a duel would come within the exception. It is unnecessary to consider whether this view is right or not. The Courts are now precluded by a decision of their Lordships of the Privy Council from taking into consideration the views expressed in such reports.

We have to take the language of the law as it stands, and give it its proper meaning. In the present case the accused's act in stabbing Maung Pyo On and thus inflicting on him a mortal wound was, as I have said, *primâ facie* no less a crime than murder. To bring it within any of the exceptions under which *primâ facie* murder is reduced to the less crime of culpable homicide, the person who committed the act causing death must show that the circumstances which he claims the benefit of existed when he did the act. What a person claiming the benefit of *Exception 5* has, in my opinion, to show, is that the person whose death he caused consented to have the act which caused death done upon him, knowing that it would cause his death or knowing that his life would be endangered thereby.

The words of the exception themselves and consideration of the other provisions of the Penal Code appear to me to show that

(1) (1891) I.L.R. 18 Cal., 484.

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it is not sufficient for a claimant to the benefit of this *5th Exception* to satisfy the Court that the person whose life he took voluntarily took the risk of death. He must prove that such person consented to the particular act being done and that he did so with knowledge that, if done, he would die or incur risk of losing his life.

For these reasons, I do not think that the conviction should be altered to one of the lesser crime of culpable homicide. I think, however, that confirmation of the death sentence is not called for in the particular circumstances of this case. The accused's conduct in shouting out abuse, taunts and threats may have been very annoying, but it was not the deceased's duty to stop him or to arrest him. Maung Pyo On should have recognized that the accused was in an infuriated excited state in which he ought to have been left alone unless the village authorities ordered him to be arrested.

The accused had done nothing and was not showing signs of any intention to do anything to anybody outside of his father's compound. Maung Pyo On virtually brought what happened to him on himself.

I would uphold the conviction for murder, but would reduce the sentence to one of transportation for life.

Parlett, J.—I concur.

Full Bench—(Civil Reference).

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, Mr. Justice Robinson, and Mr. Justice Parlett.

Civil Reference No. 5 of 1909.

J. MOMENT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Feby. 14th, 1910.

Pennell—for appellant.

The Government Advocate—for respondent.

The following reference was made to a Full Bench under section 11 of the Lower Burma Courts Act, 1900:—

"Is clause (*b*) of section 41 of the Lower Burma Town and Village Lands Act *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma?"

Held, (Robinson, J., dissenting)—that the clause in question which lays down that no Civil Court shall have jurisdiction to determine any claim to any right over land as against the Government contravened the provision of section 65 of the Government of India Act, 1858.

Per Robinson, J.—The object of section 65 of the Government of India Act, 1858, was to preserve in proceedings against Government the remedy open to persons against the East India Company, which would otherwise, in consequence of the Crown's taking over the government from the Company, have been converted into remedy by petition of right only. There was no intention of laying down that the remedy should be by proceeding in a Civil Court as distinguished from a Revenue Court.

Moment v. *The Secretary of State for India in Council*, (1905) 3 L.B.R., 165, overruled.

The Empress v. *Burah*, (1878) I.L.R. 4 Cal., 172, distinguished.

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The Peninsular and Oriental Steam Navigation Company against the Secretary of State for India, (1861) 5 Bom. H.C. Reports, Appendix A; *Narayan Krishna Laud* v. *Gerard Norman, Collector of Bombay*, (1868) 5 Bom. H.C. Reports, 1; *Premshankar Raghunathji* v. *Government of Bombay*, 8 Bom. H.C. Reports, 195; and *The Collector of Thana* v. *Bhaskar Mahadev Sheth*, I.L.R. 8 Bom., 264; referred to.

The following reference was made to a Full Bench by the Chief Judge and Mr. Justice Parlett:—

The learned Judge dismissed the suit on the ground that in consequence of section 41 of the Lower Burma Town and Village Lands Act the Court had no jurisdiction to entertain it. One of the grounds of appeal is that clause (*b*) of section 41 of that Act is *ultra vires* of the legislature.

We think that the question is one which should be considered by a Full Bench of the Court.

Under section 11 of the Burma Courts Act we refer for the decision of a Full Bench of the Court the following question:—

"Is clause (*b*) of section 41 of the Lower Burma Town and Village Lands Act *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma?"

The opinion of the Full Bench was as follows:—

Fox, C.J.—The question referred is—"Is clause (*b*) of section 41 of the Lower Burma Town and Village Lands Act *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma?"

The first part of the section is "No Civil Court shall have jurisdiction to determine—clause (*b*) is "any claim to any right over land as against the Government." The section in effect debars the Civil Courts from exercising jurisdiction in suits in which a claim to a right over land in a town or village as against the Government is involved. This construction was put upon it in the previous case between the parties, which was a suit by the Government to evict the appellant from certain land in the Cantonment of Rangoon.—*Moment* v. *The Secretary of State for India in Council* (1).

In that case no question was raised as to the validity of section 41 of the Lower Burma Town and Village Lands Act.

It is not disputed that this Court can inquire into the validity of it on the appeal in the present case, which is an appeal in a suit by Moment against the Government to recover compensation for wrongful acts done in respect to what he claims to have been his buildings on the land which was the subject-matter of the previous suit.

The Lower Burma Town and Village Lands Act was passed and received the assent of the Governor-General in 1898. At that time the powers of all legislative authorities in India were derived from the Indian Councils Acts which had been enacted in 1861, 1869, 1871, 1874 and 1892. The principal provisions,

(1) (1905) 3 L.B.R., 165.

binding all such authorities, are those contained in section 22 of the Indian Councils Act, 1861. The section is as follows:—

"22. The Governor-General in Council shall have power at "meetings for the purpose of making laws and regulations as "aforesaid, and, subject to the provisions herein contained, to "make laws and regulations for repealing, amending, or altering "any laws or regulations whatever now in force or hereafter to "be in force in the Indian territories now (or hereafter) under the "dominion of Her Majesty, and to make laws and regulations "for all persons, whether British or native, foreigners or others, "and for all courts of justice whatever and for all places and "things whatever within the said territories, and for all servants "of the Government of India within the dominions of princes and "states in alliance with Her Majesty;

"and the laws and regulations so to be made by the Governor-"General in Council shall control and supersede any laws and "regulations in anywise repugnant thereto which shall have been "made prior thereto by the Governors of the Presidencies of "Fort St. George and Bombay respectively in Council, of the "Governor or Lieutenant-Governor in Council of any presidency "or other territory for which a Council may be appointed, with "power to make laws and regulations under and by virtue of "this Act.

"Provided always, that the said Governor-General in Council "shall not have the power of making any laws or regulations "which shall repeal or in any way affect any of the provisions of "this Act, or any provisions of the Government of India Act, "1833, and of the Government of India Act, 1853, and of the "Government of India Act, 1854, which after the passing of this "Act shall remain in force:

"or any provisions of the Government of India Act, 1858, or "of the Government of India Act, 1859:

"or of any Act enabling the Secretary of State in Council to "raise money in the United Kingdom for the Government of "India:

"or of the Acts for punishing mutiny and desertion in Her "Majesty's Army or in Her Majesty's Indian forces respectively; "but subject to the provisions contained in the Government of "India Act, 1833, section 73, respecting the Indian Articles of "War:

"or any provisions of any Act, passed in this present session "of Parliament, or hereafter to be passed, in anywise affecting "Her Majesty's Indian territories, or the inhabitants thereof:

"or which may affect the authority of Parliament, or the "constitution and rights of the East India Company, or any part "of the unwritten laws or constitution of the United Kingdom "of Great Britain and Ireland, whereon may depend in any "decree the allegiance of any person to the Crown of the United "Kingdom, or the Sovereignty or dominion of the Crown over "any part of the said territories."

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Section 48 of the Act contains the direct authority under which the Lieutenant-Governor of Burma in Council was enabled to legislate.

The objections urged on behalf of the appellant to the validity of the clause of the Lower Burma Town and Village Lands Act which is the subject of the reference are that it infringed the proviso of section 22 of the Indian Councils Act, 1861, in that—(1) it affected one of the provisions of the Government of India Act, 1833, (2) it affected one of the provisions of the Government of India Act, 1858, (3) it affected the provisions of the Indian High Courts Act, 1861, and (4) it affected the prerogative of the Crown.

The provision of the Government of India Act, 1833, which it was argued was infringed, was that contained in section 46 of that Act: this prevented the Governor-General in Council from abolishing any of the Courts of Justice established by His Majesty's charters without the previous sanction of the Court of Directors of the East India Company. Those Courts were abolished by the Indian High Courts Act, 1861, a statute passed subsequent to the Indian Councils Act, 1861, and no question of abolishing one of the Supreme Courts arises.

Passing over for the present the second objection, the third is based upon the High Court of Judicature at Fort William in Bengal having possessed jurisdiction in Burma in 1898 under the Lower Burma Courts Act, 1889. The extent of such jurisdiction will be seen from the Act itself. If the Courts which were in existence then had continued, the Court of the Recorder would have had jurisdiction to hear and determine the present suit, and an appeal would have lain from his decision to the High Court at Calcutta, unless the clause which is the subject of the reference barred both Courts from determining the plaintiff-appellant's claim. It was urged that, although the Governor-General in Council might possibly alter and take away by legislation the jurisdiction of the High Court, the local legislature could not do so, because under section 48 of the Indian Councils Act, 1861, read with section 42 of the same Act a local legislature has not the power of making any law or regulation which shall in any way affect any Act of Parliament in force in its Province. The Act of Parliament said to be affected by the clause which is the subject of the reference is the Indian High Courts Act, 1861. The jurisdiction of the High Court at Calcutta in Burma was not derived from that Act; it was created by Acts of the Governor-General in Council; the first of such Acts was the Recorder's and Small Cause Court's Act XXI of 1863. The third objection appears to me to have no foundation.

The objection to the clause on the ground that it affects the prerogative of the Crown is based upon the argument that the right to sue in a Civil Court to assert a claim to land against Government being taken away, the right to appeal to His Majesty in Council from a decree in such a suit is also taken away. This

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no doubt is so, but what is taken away is the right of the subject, not the prerogative of the Crown.

Turning now to what must be regarded as the substantial objection to the clause which is the subject-matter of the reference, it has been urged on behalf of the appellant that it infringes an important provision contained in section 65 of the Government of India Act, 1858. Under that Act the territories at the time in the possession or under the control of the East India Company were transferred to and vested in Her Majesty, and thenceforth India was to be governed by and in the name of Her Majesty. Subjects who could previously have sued the East India Company were to come under the direct Government of the Crown, which no subject could sue as of right, and against whom a subject could only seek a remedy by Petition of Right, a proceeding which was not applicable to all claims for redress. Parliament determined that the people of India should not be in a worse position under the Crown than they were in under the Company in respect of proceedings against the Government, and the Act contains the following provisions :—

"65. The Secretary of State in Council shall and may sue "and be sued as well in India as in England by the name of the "Secretary of State in Council as a body corporate; and all "persons and bodies politic shall and may have and take the same "suits, remedies and proceedings, legal and equitable, against "the Secretary of State in Council of India as they could have "done against the said Company; and the property and effects "hereby vested in Her Majesty for the purposes of the Govern-"ment of India, or acquired for the said purposes, shall be "subject and liable to the same judgments and executions as "they would, while vested in the said Company, have been liable "to in respect of debts and liabilities lawfully contracted and "incurred by the said Company.

"66. The Secretary of State in Council shall, with respect to "all actions, suits, and all proceedings by or against the said "Company pending at the time of the commencement of this "Act, come in the place of the said Company, and that without "the necessity of substituting the name of the Secretary of State "in Council for that of the said Company.

"67. All treaties made by the said Company shall be binding "on Her Majesty, and all contracts, covenants, liabilities, and "engagements of the said Company made, incurred or entered "into before the commencement of this Act may be enforced by "and against the Secretary of State in Council in like manner "and in the same Courts as they might have been by and against "the said Company if this Act had not been passed."

Now if persons and bodies politic could, previous to the Act, have sued the East India Company in a Civil Court in respect of a claim to land, persons in Burma at the present day are in a different and obviously worse position in respect to claims as against Government to land in towns and villages from that in which people in 1858 were, for, if the clause under

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reference is valid, although they may institute suits in respect of claims to land they cannot have such claims determined by a Civil Court. On behalf of the Government, which supports the validity of the clause under reference, it has been urged that the words of section 65 "and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council as they could have done against the said Company" dealt with the then present state of things only, that they left things as they were before, effected no change, and prevented no change in the future. According to this construction the provision would not have prevented the Governor-General in Council enacting that for the future every dispute between a subject and Government in connection with a contract entered into by the Medical Department should be decided by a Medical Officer, any claim on a contract entered into by the Army Department, by an Army Officer, and so on. In my mind there is not the slightest doubt that the words above quoted embraced the future as well as the then present, just as the words of the section previous to and subsequent to them did. If anything were wanted to make it clear that Parliament intended that the provisions in question should apply to the future as well as to the then present, section 22 of the Indian Councils Act, 1861, emphasizes the continuance of the binding effect of the Government of India Act, 1858, as well as the other Acts therein mentioned.

For the appellant it was admitted that these Acts did not prevent the legislature from taking away rights which subjects may have had against Government, and that it was open to it even to lay down that the present appellant had no rights to land as against Government, but what it was not open to any legislature except Parliament to lay down was that a member of the public could not have a claim against the Government determined by a Civil Court.

The answer to the question referred must in my opinion depend upon whether the East India Company was liable to be sued for land or for claims in respect of land. The position of the East India Company was very fully dealt with in the case of *The Peninsular and Oriental Steam Navigation Company against the Secretary of State for India* (2).

The judgment in that case, and the judgment of Sir Michael Westropp in *Narayan Krishna Laud* v. *Gerard Norman, Collector of Bombay* (3), appear to me to leave no doubt that a suit for and in respect to land would have lain against the Company in the Supreme Courts. That a suit would also have lain against the Company in the Country Courts in the Regulation Provinces also appears clear from the following extracts from the Preamble of Bengal Regulation III of 1793:—

"To ensure, therefore, to the people of this country, as far as

(2) (1861) 5 Bom. H.C.R., Appendix A.
(3) (1868) 5 Bom. H.C.R., 1.

is practicable, the uninterrupted enjoyment of the inestimable benefit of good laws duly administered, Government has determined to divest itself of the power of interfering in the administration of the laws and regulations in the first instance, reserving only, as a Court of appeal or review, the decision of certain cases in the last resort; and to lodge its judicial authority in Courts of Justice, the Judges of which shall not only be bound by the most solemn oaths to dispense the laws and regulations impartially but be so circumstanced as to have no plea for not discharging their high and important trusts with diligence and uprightness. *They have resolved that the authority of the laws and regulations so lodged in the Courts shall extend not only to all suits between native individuals, but that the officers of Government employed in the collection of the revenue, the provision of the Company's investment and all other financial or commercial concerns of the public, shall be amenable to the Courts for acts done in their official capacity in opposition to the regulations: and that Government itself, in superintending these various branches of the resources of the State, may be precluded from injuring private property, they have determined to submit the claims and interests of the public in such matters to be decided by the Courts of Justice according to the regulations, in the same manner as suits between individuals.*"

In the interesting histories of subsequent legislation by regulation given in Field's Regulations and the Introduction to Morley's Digest (1850), I cannot find that the above main principles were ever departed from.

At page 101 of the 2nd Edition of Sir Courtenay Ilbert's work on the Government of India, he states that when Arakan and Tenasserim were conquered in 1824 and Pegu in 1852 these regions were specially exempted from the Bengal Regulations, instructions, however, being given to the officer administering them to conduct their procedure in accordance with the spirit of the regulations so far as they were suitable to the circumstances of the country.

No copy of the instructions in force in 1858 is available to us. The Pegu Civil Code sanctioned by Resolutions of the President in Council and issued in 1860 states that neither the Acts, Regulations, nor Circulars of the Bengal Sudder Dewany Adowlut were in force in the Province. It professed to contain full and copious instructions on every point of procedure that might arise in the trial of a Civil suit. *Inter alia* it provided that Civil Courts should take cognizance of all suits of a Civil nature with the exception of suits of which their cognizance was barred by any Act of Parliament, or by any Act of the Governor-General in Council, and that the Government might be made a defendant in any suit in its own name or in the name of its officers. The 36th to the 40th sections excepted certain matters from the jurisdiction of the Courts, but amongst them was not a claim to land by a subject against the Government.

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There is no reason to suppose that this Code introduced any change of law in this respect. In view of the very important declarations made so far back as 1793 as to the Government submitting claims against it to the jurisdiction of the Civil Courts, it is most improbable that the East India Company ever issued instructions to its officers in Burma debarring those who presided in the Civil Courts in the Province from taking cognizance of and determining claims to land as against the Government. In the absence of anything being shown to the contrary, I think it must be taken that before the transfer of the territories under the government of the East India Company to the Crown, members of the public in Burma could sue the Company upon claims to or in connection with land.

That being so, I think that the answer to the question referred must be that the provision of section 41 of the Lower Burma Town and Village Lands Act, 1898, that no Civil Court shall have jurisdiction to determine any claim to any right over land as against Government was *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma, because it infringed the 65th section of the Government of India Act, 1858, and the 22nd section of the Indian Councils Act, 1861.

The Government Advocate referred to several Acts of Indian Legislatures which he said also overstepped the limits of their powers if the provisions under reference did so. It is possible that the light fetters on legislation have sometimes been overlooked, but some of the Acts cited do not, in my opinion, lend any force to his argument. The Garo Hills Act (XXII of 1869) was one of those principally relied on. This Act was the subject of examination in the case of *The Empress* v. *Burah* (4). Their Lordships of the Privy Council gave the effect of it in these words: "The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it *under new Courts and Offices* to be appointed by and responsible to the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law or part of a law, which either already was, or from time to time might be, in force by proper legislative authority, in the other territories subject to his Government." The Act itself shows that abolition of Civil Courts was not contemplated; no question as to jurisdiction of the new Courts arose. This Act, in my opinion, has no bearing on the question whether it is open to the legislature to lay down that Civil Courts shall have no jurisdiction to determine claims to or in respect of land as against the Government.

I do not propose to deal with the other Acts cited because the question before us is not whether any parts of those Acts were

(4) (1878) I.L.R. 4 Cal., 172.

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ultra vires. The question before us is whether the provision mentioned in the reference was *ultra vires*. I would answer that question in the way previously stated.

Hartnoll, J.—The question referred is—"Is clause (*b*) of section 41 of the Lower Burma Town and Village Lands Act *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma?"

The Lower Burma Town and Village Lands Act was passed in 1898 and was an Act of the Lieutenant-Governor of Burma in Council, and the authority under which it was passed is that given by the 48th section of the Indian Councils Act, 1861 (24 and 25 Vict., c. 67). The Lieutenant-Governor in Council had no power to make any law which would in any way affect any of the provisions of the Indian Councils Act, 1861, or of any Act of Parliament in force in Burma. Attention was drawn to the 22nd section of the Indian Councils Act. It was argued that the clause of the section in question was invalid in that it affected (1) the 20th section of the Government of India Act, 1800 (39 and 40 Geo. III, c. 79), (2) the 46th section of the Government of India Act, 1833 (3 and 4 Will. IV, c. 85), and (3) the 65th section of the Government of India Act, 1858 (21 and 22 Vict., c. 106). It was also urged that it affected the prerogative of the Crown.

The 20th section of the Government of India Act, 1800, is to the effect that the power and authority and Supreme Court of Judicature in and for the presidency of Fort William shall extend over the Province of Benares and all places subordinate thereto and all districts hereafter annexed and made subject to the presidency of Fort William. The 46th section of the Government of India Act, 1833, provides that it shall not be lawful for the Governor-General in Council without the previous sanction of the Court of Directors to abolish any of the Courts of Justice established by His Majesty's charters. It was argued that by virtue of the 20th section of the Government of India Act, 1800, the Supreme Court for the presidency of Fort William had jurisdiction over Burma when it was annexed in 1852, and so that an Act of the local legislature respecting its jurisdiction was *ultra vires* as affecting an Act of Parliament, and as regards the 46th section of the Government of India Act, 1833, it was urged that a restriction of jurisdiction was equivalent to an abolition of jurisdiction. The two objections can be taken together. In the first place the learned counsel for the appellant stated as a fact not open to question that Lower Burma was annexed and made subject to the presidency of Fort William. The actual manner in which Lower Burma became part of British India was not related, nor was any proclamation in connection therewith produced. On the mere word of counsel, I am unable to accept the statement that Lower Burma was annexed and made subject to the presidency of Fort William. Further, even supposing that Lower Burma was annexed and made subject to the presidency of Fort William it by no means follows that the Supreme Court

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at Calcutta would have had jurisdiction to entertain this case, for the jurisdiction of the Supreme Court was limited outside Calcutta, as is evidenced by the existence of the Sudder Dewany Adowlut Court and the Courts subordinate to it in Bengal. The jurisdictions of the Sudder Dewany Adowlut and the Supreme Courts were separate and distinct. But even supposing that this suit would have fallen within the jurisdiction of the Supreme Court at Calcutta before the passing of the Indian High Courts Act, 1861 (24 and 25 Vict., c. 104), I am of opinion that the arguments of learned counsel for the appellant cannot prevail. The Supreme Court at Calcutta was abolished by the Indian High Courts Act, 1861. By that Act the High Court of Judicature at Fort William in Bengal took its place and that of the Sudder Adowlut Courts. Section 9 of the High Courts Act deals with the jurisdiction of the High Courts, but it is expressly stated that their jurisdiction is subject and without prejudice to the legislative powers of the Governor-General of India in Council. Section 11 of the same Act lays down that upon the establishment of the High Court in Bengal all provisions then in force in India of Acts of Parliament which at the time of such establishment were applicable to the Supreme Court at Fort William shall be taken as applicable to the High Court *but subject to the legislative powers of the Governor-General in Council in relation to certain matters, one of which was clearly jurisdiction.* In my opinion, the 20th section of the Government of India Act, 1800, and the 46th section of the Government of India Act, 1833, are both much affected by the provisions of the Indian High Courts Act, 1861, when it makes the jurisdiction of the High Court subject and without prejudice to the legislative powers of the Governor-General of India in Council and the applicability of Acts of Parliament in force at the time of its establishment subject also to the legislative powers of the Governor-General in Council. The whole question of the power of the Governor-General in Council to alter the jurisdiction of the High Court is discussed in the case of *Empress* v. *Burah* (4), in which their Lordships of the Privy Council held that such an exercise of legislative authority by the Governor-General in Council as might remove any place or territory from the jurisdiction of the High Court at Calcutta is expressly contemplated and authorized both by Statute and by the Letters Patent themselves. It was urged that the provisions of the Acts of Parliament, on which the first and second objections are based, were not brought to the attention of their Lordships in the case of *Empress* v. *Burah* (4), and that if they had been their decision might have been different. Whether they were or not, the provisions seem to me to have been so modified by the provisions of the Indian High Courts Act, 1861, that I have alluded to, that there is no justification for questioning, as has been done, the correctness of the decision of their Lordships on the ground that they were not brought to their notice, and no ground whatever is shown for not following the decision of their

Lordships, even supposing that such a course were open to this Court, which it is not. When the Lower Burma Town and Village Lands Act was passed, the Act that regulated the Courts in Lower Burma and their jurisdictions was the Lower Burma Courts Act, 1889. This was an Act of the Governor-General in Council. Following the decision in the case of *Empress* v. *Burah* (4) it must be held that that Act was valid and in no way *ultra vires* of the legislative powers of the Governor-General in Council. The only jurisdiction that the High Court of Judicature at Fort William in Bengal had over Lower Burma when the Lower Burma Town and Village Lands Act was passed was derived from the Lower Burma Courts Act, 1889, in my opinion, and such High Court did not, in my opinion, derive any of its jurisdiction in Burma from the 20th section of the Government of India Act, 1900. Both that section and section 46 of the Government of India Act, 1833, supposing they were applicable to Lower Burma when it was annexed, would be so affected as regards Lower Burma by the provisions of the Indian High Courts Act, 1861, and subsequent valid legislation in connection with Lower Burma, that any objections now based on them with reference to the validity of section 41, clause (*b*), of the Lower Burma Town and Village Lands Act cannot, in my opinion, stand. This disposes of the first and second objections.

The objection on the ground of infringement of the King's prerogative is, in my opinion, of no force. It is the right of the subject that is interfered with and not the prerogative of the Crown.

There is left for consideration the question of whether the 65th section of the Government of India Act, 1858, has been infringed. It is allowed that, if it has been, the clause of the section, which is the subject of the reference, is *ultra vires* of the local legislature. The second paragraph of the 65th section is as follows:—

"All persons and bodies politic shall and may have and take "the same suits, remedies and proceedings, legal and equitable, "against the Secretary of State in Council of India as they could "have done against the said Company."

The Government of India Act, 1858, was the Act by which the Crown directly took over the government of India, and which vested in the Crown all territories in the possession and under the government of the East India Company. Words to the same effect occur in the 10th section of the Government of India Act, 1833, by which the territorial possessions of the Company were allowed to remain under their government for another term of 20 years and were to be held by it "in trust for His Majesty, his heirs and successors, for the service of the Government of India." It was argued that as no legislation could affect the provisions of the Government of India Act, 1858, according to the express proviso contained in section 22 of the Indian Councils Act, 1861, and according to section 48 read with section 42 of the same Act, and

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as the effect of the second paragraph of the 65th section of the Government of India Act, 1858, is to give the subject a right to sue the Secretary of State in Council of India in respect to claims for land, the clause of the section now in question is *ultra vires* of the local legislature; but it was contended by the learned Government Advocate that the effect of the 65th section of the Government of India Act, 1858, is not as claimed by the appellant. The learned Government Advocate stated that the true construction of the 65th section is that it left things exactly as they were, that it produced no change but did not prevent any, that it did not interfere with subsequent legislation, and that its intention was to prevent the introduction of the principle that the Crown could not be sued in any of its Courts without its permission, and that except for this section the subject would have been debarred from any suit except by petition of right. The meaning of the words was elaborately discussed in the case, *Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India* (2), and with the judgment of the learned Chief Justice in that case I am in accord. It certainly seems to me that the second paragraph of the 65th section was enacted so as to prevent the remedy in England of only proceeding when the Crown was concerned by petition of right from coming into force in India, and to preserve to the people of India the right of having such suits, remedies and proceedings subsequent to its enactment as they had against the East India Company which was, or had been, a trading company as well as one that exercised the functions of government. In considering the meaning of the words it is important to notice the distinction between the right to bring a suit and the right to succeed in it. The question of a plaintiff's right to succeed is only one that arises after he has brought his suit. The suit may succeed and may fail. In arriving at the meaning of the words it is necessary to look into the history of the Company so as to see what was the practice during its existence. An extract from one of the earliest Bengal Regulations (III of 1793) is given in the judgment of the learned Chief Judge. An inspection of Macnaghten's Sudder Dewany Adowlut Reports shows that the practice was for the Company to sue and be sued in the Civil Courts in land suits. I would quote the following cases as typical examples of the practice :—

(1) *Collector of Moorshedabad* v. *Bishenath Rai and Shenath Rai*, Volume I, 174.
(2) *Collector of Tipperah* v. *Gholam Nubee Chowdry*, Volume II, 103.
(3) *Sheikh Mozuffer Buksh* v. *Collector of Tirhoot*, Volume II, 300.
(4) *Collector of Bundelkhund* v. *Ilache Geer*, Volume III, 56.
(5) *Collector of Goruckpoor* v. *Toorunt Geer and Sirda Geer*, Volume III, 351.

(6) *Doorgapurshad Mungraj* v. *Collector of the Northern Division of Cuttack and others*, Volume VII, 436.

In connection with the last case, it is instructive to read the preamble and the 38th section of Regulation No. XI of 1822, which show how the Company considered themselves to be liable to be sued. As regards the Supreme Court a perusal of the case of *Narayan Krishna Laud* v. *Gerard Norman, Collector of Bombay* (3), shows that before the passing of the Government of India Act, 1858, the Company sued and was sued in that Court in matters relating to land. The learned Government Advocate quoted to us a number of Acts in which the rights of the subject to bring suits were restricted. Some of these concerned revenue matters. By the 8th section of the East India Company Act, 1780, (21 Geo. III, c. 70), and the 11th section of the East India Company Act, 1797 (37 Geo. III, c. 142), jurisdiction was taken away from the Supreme Court and Courts in revenue matters. The history of jurisdiction in rent cases is given in sections 225, 226 and 227 of the Regulations of the Bengal Code edited by Field in 1875. It might possibly be shown that in the year 1858 the subject had not the right to bring a suit in the Civil Courts in respect of certain revenue matters; but that point is not now for decision, nor is the question whether the other Acts quoted are, or were, *ultra vires* or not. We are only concerned in this reference with suits for claims to land. There seems to me to be no doubt that in the Company's time the Company sued, allowed itself to be sued, and submitted itself to the jurisdiction of the Civil Courts in land disputes. In the second case of the Sudder Dewany Adowlut Court which I have quoted, the Board of Revenue directed the plaintiff to institute a suit in the Zillah Court so as to ascertain if he had the right he claimed. This direction was given prior to the institution of other suits which I have not referred to. It has been argued that the clause of the section under discussion does not take away all right of suit but merely transfers the right from the Civil to the Revenue Court, and so that the 65th section of the Government of India Act, 1858, is not infringed. I am unable to allow that this argument has any weight. From what I have written above it seems to me to have been the intention of Government to submit itself to the jurisdiction of the regular Civil Courts of Justice and, at any rate as far as suits for land are concerned, to have carried out its intention, and finally in support of my conclusion in this respect I would quote a passage in the preamble to Bengal Regulation No. 2 of 1793, which is as follows :—

"When the extension of cultivation was productive only of a "heavier assessment, and even the possession of the property "was uncertain, the hereditary landholder had little inducement "to improve his estate, and monied men had no encouragement "to embark their capital in the purchase or improvement of land, "whilst not only the profit but the security for the capital itself "was so precarious. The same causes, therefore, which prevented

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"the improvement of land, depreciated its value. Further "measures, however, are essential to the attainment of the "important object above stated. All questions between Govern- "ment and the landholders respecting the assessment and collec- "tion of the public revenue, and disputed claims between the "latter and their ryots, or other persons concerned in the collec- "tion of their rents, have hitherto been cognizable in the Courts "of Maal Adawlat, or Revenue Courts. The collectors of the "revenue preside in these Courts as judges and an appeal lies "from their decision to the Board of Revenue, and from the "decrees of that board to the Governor-General in Council in the "department of Revenue. The proprietors can never consider "the privileges which have been conferred upon them as secure, "whilst the revenue officers are vested with these judicial powers. "Exclusive of the objections arising to these Courts from their "irregular, summary, and often *ex-parte* proceedings, and from "the collectors being obliged to suspend the exercise of their "judicial functions whenever they interfere with their financial "duties, it is obvious that if the regulations for assessing and "collecting the public revenue are infringed, the revenue officers "themselves must be the aggressors, and that individuals who "have been wronged by them in one capacity can never hope "to obtain redress from them in another. Their financial occupa- "tions equally disqualify them for administering the laws between "the proprietors of land and their tenants. Other security, there- "fore, must be given to landed property and to the rights attached "to it, before the desired improvements in agriculture can be "expected to be effected. *Government must divest itself of the "power of infringing, in its executive capacity, the rights and "privileges which, as exercising the legislative authority, it has "conferred on the landholders. The revenue officers must be "deprived of their judical powers.* All financial claims of the "public, when disputed under the regulations, must be subjected "to the cognizance of Courts of Judicature superintended by "Judges who, from their official situations and the nature of their "trusts, shall not only be wholly uninterested in the result of their "decisions, but bound to decide impartially, between the public "and the proprietors of land, and also between the latter and "their tenants. The collectors of the revenue must not only be "divested of the power of deciding upon their own acts, but "rendered amenable for them to the Courts of Judicature, and "collect the public dues subject to a personal prosecution for every "exaction exceeding the amount which they are authorized to "demand on behalf of the public, and for every deviation from the "regulations prescribed for the collection of it. No power will "then exist in the country by which the rights vested in the land- "holders by the regulations can be infringed or the value of landed "property affected. Land must, in consequence, become the most "desirable of all property, and the industry of the people will be "directed to those improvements in agriculture which are as

"essential to their own welfare as to the prosperity of the "State."

With regard to Lower Burma in particular, according to Mr. Ilbert (page 101 of his work), though it was specially exempted from the Bengal Regulations, instructions were given to the officers administering it to conduct their procedure in accordance with the spirit of the regulations so far as they were suitable to the circumstances of the country.

The first Civil Code of the Province of Pegu allowed Government to sue or be used (sections 12 and 24). Section 36 gave the suits of which cognizance could be taken. Amongst them were suits respecting rights to real property. Section 37 laid down what suits the Courts were not to take cognizance of. No such prohibition is found there as is enacted by the clause of the section in question. In the case of *Empress* v. *Burah* (4) the question in issue in the present case did not arise. Moreover, I agree with the conclusion that the learned Chief Judge has arrived at with regard to it and with the reasons he has given.

I would answer the question in the affirmative.

Robinson, J.—Section 41 (*b*) of the Lower Burma Town and Village Lands Act runs as follows:—

"No Civil Court shall have jurisdiction to determine—

* * * * * *

(*b*) any claim to any right over land as against the Government."

The question referred is whether this clause is *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma.

It is argued that it is *ultra vires* on four grounds. First, because it is contrary to the provisions of section 46 of the Government of India Act of 1833. That section refers to abolishing Courts established by his Majesty's charters. There is no such abolition that I can see, as the section refers to total abolition.

Next, it was urged that it affected the provisions of the High Court Acts of 1861, as appeals lay to the High Court of Calcutta and the provision had the result of taking away those appeals. The fallacy of this argument is pointed out in *Premshankar Raghunathji* v. *Government of Bombay* (5) and in *The Collector of Thana* v *Bhaskar Mahadev Sheth* (6), and I need not add anything to the reasons therein given.

Next, it was argued that the effect of this clause was to infringe on the prerogative of the Crown by taking away a right of appeal to the Privy Council. There is no force whatever in this plea. The appeal to the Privy Council is a statutory right and the right of the subject to petition His Majesty is in no way touched.

Lastly, it is said that the clause affects the provisions of the Government of India Act, 1858, and this argument raises a very difficult question and requires the most serious consideration.

By section 22 of the Indian Councils Act, 1861, the extent of

(5) 8 Bom. H.C.R., 195. | (6) I.L.R. 8 Bom., 264.

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the powers of the Governor-General in Council to make laws at meetings for the purpose is laid down, and by the proviso thereto that power is limited. The Governor-General in Council is not to have the power of making laws which shall repeal or in any way affect any provisions of a number of specified Acts amongst which is the Government of India Act of 1858. By section 42 the extent of the powers of Governors in Council to make laws is laid down, and by section 48 Lieutenant-Governors in Council are given the same powers. These Acts must not in any way affect any of the provisions of the Act itself or of any other Act of Parliament in force or hereafter to be in force. They must not therefore in any way affect the Government of India Act, 1858.

Section 65 of this Act lays down that the Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council and continues:—"and all persons and bodies "politic shall and may have and take the same suits, remedies "and proceedings, legal and equitable, against the Secretary of "State in Council of India as they could have done against the "said Company;

" * * * * * "

It is said that by taking away the jurisdiction of Civil Courts to try claims to rights over land as against the Government persons are deprived of a suit, remedy or proceeding which they could have had and taken against the Company. Had the effect of clause (*b*) been to take away all right of suit and all remedy from the subject, no doubt there would have been a contravention of the provisions of section 65. But the clause in terms merely takes from Civil Courts their jurisdiction to try such questions. It does not deprive the subject of all remedy.

I am not quite clear whether it was intended to urge that special emphasis was to be placed on the word "same" in section 65. If it is urged that identically the same suits must remain untouched, that is the same in character and in the same Courts, then I consider that the argument goes too far and to this extent cannot possibly be allowed. If it is sound, then the Lower Burma Courts Act which created this Chief Court is *ultra vires*. But it is not to be assumed that any word used by Parliament was inserted without some reason and weight must be given to all. Thus it is urged that the same suits mean, where a right by Civil suit previously existed, that that right cannot be taken away.

To arrive at what was meant by Parliament when section 65 was enacted it is necessary to remember the occasion on which it was enacted and the history of the provision. When the Government of India Act of 1833 was passed the Crown took over the Government of India from the East India Company, but the Company continued to hold the Crown properties in trust for the Crown. A similar provision to that contained in section 56 of the Act of 1858 was enacted, and the reason for its enactment then was that no change should be made so far as subjects were

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concerned by the fact that the Crown had taken over the territories from the Company. The Crown did not take over the rights without admitting it was also subject to the same liabilities as the Company would have been. The Crown having assumed charge the only legal remedy of a subject would have been by petition of right. This remedy did not always exist and was not always granted, and the section was enacted to preserve the same rights to the subject that they would have had against the Company, and this was done in express terms so that no question as to petitions of right only should remain.

Then when in 1858 the Crown took the government of India under its immediate control and the Company ceased to hold in trust for the Crown, the same question as to the remedy of the subject arose and section 65 repeated the same provision and for the same reason. There was no change and none was intended. The object of the section was merely to lay down in express language that the subject's rights were not to be affected. They were to continue as they had existed before and were not to be limited as they were in England. The intention of Parliament was to lay down that the Crown in taking over the Government did not, so far as its subjects were concerned, assume any greater immunity than the Company had in the first instance or than it took when it assumed the government, leaving the Company in immediate charge as its trustee.

If this is so, and I think that there can be no doubt about it, it is clear that Parliament was dealing with rights in general and did not intend to enact anything as to rights in particular. It was not concerned with what the rights of subjects actually were, and had not in contemplation the preservation of any actual suit, remedy or proceeding. It was not dealing with the nature of any right or the manner in which it might have been enforced against the Company. It had no intention of considering whether the remedy was by a proceeding in this Court or that or whether it was by Civil suit or in a Revenue Court. If the argument put forward for the appellant correctly represents its intention and the true effect of the section, the result would be the complete paralysing of the local legislature as Mr. Justice West has expressed it in *Premshankar Raghunathji* v. *Government of Bombay* (5). Conditions change, and the method and manner of supporting and enforcing rights must also change. We are not concerned with the policy of the change in any particular case, but a change in the procedure is entirely distinct from a change of the right. Such changes in procedure have been innumerable and have never, as far as I am aware, been held to be an interference with the right itself.

To assign to section 65 the limited and restricted meaning we are asked to put upon it seems to me to prevent any change or advance and would be contrary to the intention of Parliament; it would necessitate assigning to Parliament an object which the history of the legislation on the point does not bear out, which is

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most improbable and would lead to disastrous results. There is the other view of the section which completely satisfies all that the language actually used requires, and in adopting this view there is no interference with any rights at all.

For the above reasons I would hold the clause was not *ultra vires*.

Parlett, J.—The question referred is whether section 41 (*b*) of the Lower Burma Town and Village Lands Act is *ultra vires* of the local legislature. That section runs:—"No Civil Court shall have jurisdiction to determine any claim to any right over land as against the Government."

The most important argument urged against the validity of this section is that it infringes section 65 of the Government of India Act, 1858, which enacts that subjects "shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the" East India Company.

By that Act the Crown took over the direct government of India which had previously since 1833 been administered by the East India Company as trustee for the Crown. If therefore subjects in what is now known as Lower Burma had, when the Government of India Act, 1858, was passed, a right of suit against the East India Company to establish a claim to rights over land in Towns and Villages, that right of suit would have continued until now, but for the enactment of section 41 (*b*) of the Lower Burma Town and Village Lands Act, and therefore that section by taking away that right contravenes the provisions of section 65 of the Government of India Act of 1858.

In my opinion the word "suit" in section 65 of the Government of India Act, 1858, must be taken as bearing its ordinary meaning of a Civil suit, ending in the remedy of a decree, which could be enforced by proceedings in execution. If the Lower Burma Town and Village Lands Act established a tribunal to hear such suits, it might be argued that the Act, without taking away the right of suit, merely effected a change of *forum*, but the Act appears to appoint no such tribunal and to make no provisions for the passing of a decree or for its execution. It appears therefore to take away the right of instituting a Civil suit without substituting any equivalent remedy.

Though part of the territory now known as Lower Burma was acquired at an earlier date, the greater part of it was conquered and annexed in 1852, when the soil vested in the conquerors. Thereafter the only rights which could exist in the land would appear to be—(*a*) rights existing prior to 1852 and continued by the British Government, (*b*) rights created by the British Government by grant or lease, or by specific enactment, and (*c*) prescriptive rights.

It might be argued that when continuing or creating such rights the Government had power to proclaim or enact that a Civil suit should not lie to establish them, and to continue or to

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create them only on that condition. But this would not apply to prescriptive rights: their acquisition would in my opinion carry with it the right to bring a Civil suit to establish them. When Lower Burma was annexed a new period of prescription with respect to rights over land would commence. Persons who claimed to have acquired such rights as against the Government could, prior to the passing of the Government of India Act, 1858, have sued the East India Company to establish their claim, and since the passing of that Act could sue the Secretary of State in Council of India. By taking away that right of suit with respect to land in Towns and Villages, section 41 (*b*) of the Lower Burma Town and Village Lands Act, I consider, contravenes section 65 of the Government of India Act, 1858. Again sections 4 (*3*) and 5 of the Act empower the Local Government to declare any area to be a town for the purpose of this Act and to define its boundaries. Section 10, however, provides that the extension of the limits of a town shall not affect the rights which a person in possession of land included within the extended limit may have acquired prior to such extension. So far as the Lower Burma Town and Village Lands Act is concerned, there is nothing to prevent any person from acquiring rights as against the Government over land outside Towns and Villages; and if Government were to invade those rights, he would be entitled to seek relief by means of a Civil suit.

But once that land is notified as falling within a town, section 41 (*b*) operates to deprive him of the remedy which he previously enjoyed and thereby causes an executive notification to override the provisions of section 65 of the Government of India Act, 1858.

In these two respects, therefore, I am of opinion that section 41 (*b*) of the Lower Burma Town and Village Lands Act is *ultra vires* of the local legislature, and I would answer the reference accordingly.

A Full Bench of the Court to which the question was referred having decided that clause (*b*) of section 41 of the Lower Burma Town and Village Lands Act was *ultra vires* of the legislature, and the case having been decided in the Original Court on the ground that the section barred the Court from exercising jurisdiction in the case, this appeal is allowed, the decree of the Original Court is set aside, and the case is remanded to that Court for trial on the issues framed and on such other issues as may be framed.

The defendant must pay the plaintiff's costs of this appeal including the costs of the reference to the Full Bench—20 gold mohurs allowed as advocate's fee on the latter.

A certificate will be granted under section 13 of the Court Fees Act for refund of the fee paid on the memorandum of appeal.

The decree to be satisfied within two months from this date.

Civil 1st Appeal No. 51 of 1906.

May 2nd, 1907.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

A. R. C. S. SOOBRAMONIAN CHETTY } *v.* { R. M. K. CURPEN CHETTY.

Lentaigne—for appellant (defendant).

Giles—for respondent (plaintiff).

Recovery on Hundi Drafts payable to bearer—Contract forbidden by law—Duty of Courts—Indian Paper Currency Act, 1882, section 25.

A sued B on certain hundi drafts drawn by the latter on his Rangoon agent and payable to bearer on demand.

Held,—that inasmuch as B acted in contravention of section 25 of the Indian Paper Currency Act, 1882, and as A had not proved that the documents came within the proviso to that section, A could not be permitted to sue on a contract made in direct violation of the provisions of an Act of the Legislature.

Bensley v. *Bignold*, (1822), 5 Barn. & Ald., 335, and 24 R.R., 401, and *Cope* v. *Rowlands*, (1836), 2 M. & W., 149, and 46 R.R., 532, followed.

Jetha Parkha v. *Ramchandra Vithoba*, (1892) I.L.R. 16 Bom., 689, dissented from.

Fox, C.J.—The question for decision is whether the plaintiff can recover on the documents he sued on.

They are in the following terms :—

(i) By the Grace of Siva.
12th Margali, Sobhakritu (corresponding to the 27th of December 1903).
R.M.L.M. of Keelachikappatti—credit;
A.R.S. of Athangudi—debit;

Rs. (1,000) One thousand only. Our Agent at Rangoon, Murugappa Chetty, is directed to pay on this (Hundi) with interest at the rate current in Rangoon to the bearer on demand and debit the sum to the account of A.R.S.

(Endorsed by) (Signature of)
R. M. L. M. A. R. S. SOOBRAMONIAN CHETTY.

(ii) By the Grace of Siva.
15th Margali, Sobhakritu (30th December 1903).
Paid by Keelachikappatti M.T.T.P.L.M.
Received by Athangudi A.R.S.

Rs. (1,000) One thousand only. Our Rangoon Agent, Murugappa Chetty, is directed to pay to the bearer the above sum together with interest at the current rate in Rangoon and debit A.R.S.

(Signature of)
A. R. S. SOOBRAMONIAN CHETTY.

(Translation of the Endorsement.)

(Signature of)
M. T. T. P. L. M.

(iii) By the Grace of Siva.
13th Margali, Sobhakritu (28th December 1903).
Paid by Keelachikappatti R.M.K.
Received by Athangudi A.R.S.

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Rs. (1,000) One thousand only. Our Rangoon Agent, Murugappa Chetty, is directed to pay to the bearer the above sum together with interest at the current rate in Rangoon and debit A.R.S.

(Signature of)
A. R. S. SOOBRAMONIAN CHETTY.

(Translation of the Endorsement.)

(Signature of)
R. M. K. KARUPPAN CHETTY.

These documents are hundi drafts by the defendant on his Rangoon Agent payable to bearer on demand.

There can be no question that in drawing them the defendant acted in contravention of section 25 of the Indian Paper Currency Act, 1882, which is as follows:—

"No body corporate or person in British India shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such body corporate or of any such person. Provided that cheques or drafts payable to bearer on demand or otherwise may be drawn on bankers, shroffs or agents by their customers or constituents in respect of deposits of money in the hands of such bankers, shroffs or agents and held by them at the credit and disposal of the persons drawing such cheques or drafts."

But for the observations of Farran, J., in *Jetha Parkha* v. *Ramchandra Vithoba* (1) to the effect that he did not see why a holder of such a document should not recover on it, I should have little doubt that a holder cannot recover unless he can bring the document within the proviso to the section. The learned Judge's observations themselves show that he had not fully considered the matter.

Assuming that the plaintiff has not shown that the documents are lawful documents under the proviso, the rule of law applicable is that stated in *Bensley* v. *Bignold* (2), *viz.*, that a party cannot be permitted to sue on a contract made in direct violation of the provisions of an Act of the Legislature.

Again in *Cope* v. *Rowlands* (3) Baron Parke said—"It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect." If we allowed the plaintiff to recover on the documents he sued upon, we should be giving effect to a form of contract expressly forbidden by law. It has been argued, however, that the documents come within the proviso to the section. I can only say that there is no evidence that they do. There is nothing to show that the defendant

(1) (1892) I.L.R. 16 Bom., 689.
(2) (1822) 5 Barn. & Ald., 335, and 24 R.R., 401.
(3) (1836) 2 M. & W., 149, and 46 R.R., 532.

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was a customer or constituent of his agent in Rangoon, or that the documents were drawn against or in respect of "deposits of money" in the agent's hands which were held by the agent at the credit and disposal of the defendants.

The appeal must in my judgment be allowed, the decree of the original Court set aside, and the suit dismissed with costs. The plaintiff must also pay the defendant's costs of this appeal.

Hartnoll, J.—I concur.

Civil Reference No. 1 of 1909.

June 7th, 1909.

Before Sir Charles Fox, Chief Judge, Mr. Justice Bell, and Mr. Justice Moore.

ARANACHELLUM CHETTY *v.* { PERIA CURPEN CHETTY AND 2 OTHERS.

Dantra—for appellant (defendant).

N. M. Cowasji—for respondents (plaintiffs).

Mortgages, Registered and oral—Priority—Notice—Registration Act, 1877, s. 48.

On a reference to a Full Bench of the following question—

"Does a registered mortgage of immoveable property take effect against an earlier oral mortgage of the same property without possession made at a time when section 59 of the Transfer of Property Act was not in force at the place where the property is situated, if the second mortgagee had notice of the existence of the oral mortgage at the time when the registered mortgage was made?"

Held,—that a registered mortgage deed does not take priority over an earlier valid oral mortgage of the same property if the second mortgagee had *actual* notice of the oral mortgage at the time when the registered mortgage was made.

Shankar Das and others v. *Sher Zaman*, Punjab Record, 1900, page 199; *Krishnamma* v. *Suranna*, I.L.R. XVI Madras, page 148; *Vohora Remat Rein* v. *Harilal Yekison*, Printed Judgments, Bom. H.C., 1896, page 778; *Abdool Hoosein* v. *Raghu Nath Sahu*, I.L.R. 13 Cal., page 70; *Diwan Singh and others* v. *Jadho Singh*, I.L.R. XIX All., page 145; followed.

Lehna v. *Ganpat and Kaka*, (1890) Punjab Record, 1890, No. 115, page 353, dissented from.

Chunder Nath Roy v. *Bhoyrub Chunder Surma Roy*, (1883) I.L.R. 10 Cal., 250; *Tun Zan* v. *Maung Nyun*, (1907) 4 L.B.R., 26; *Shreenanth Buttacharjee* v. *Ramcomul Gungopadya and others*, X Moore's I.A., page 220; and *Le Neve* v. *Le Neve*, White & Tudor, L.C., Vol. 2, page 175, 7th edition; referred to.

The following reference was made by the Hon'ble Mr. Justice Irwin under section 11, Lower Burma Courts Act, to a Bench:—

The parties to this suit are holders of two mortgage decrees against the same property, and the suit was one instituted by the respondents for a declaration that they are entitled to have their decree satisfied first out of the sale-proceeds.

Respondents' mortgage was an oral one, made in 1903. Appellant's mortgage is a registered deed dated 17th April 1906.

The respondents succeeded in both the lower Courts. The principal ground of the decision of the lower appellate Court is that the registered mortgage is not signed by any witness and is therefore invalid (Section 59, Transfer of Property Act). This is admitted to be a mistake of fact: the deed is duly attested by two witnesses.

The learned Judge was also wrong in holding that the deposit of a *pyatbaing* and the addition of the respondent's name in the Revenue Register constituted an equitable mortgage. Respondents' mortgage was an oral one and nothing more.

Appellant therefore relies on section 48 of the Registration Act, as making his registered mortgage good against the previous oral mortgage without possession.

Respondents reply that notwithstanding section 48 of the Registration Act the appellant must be postponed to them because the appellant knew of the previous oral mortgage when he took the registered mortgage. The learned advocate referred me to the case of *Chunder Nath Roy* v. *Bhoyrub Chunder Surma Roy* (1), in which a registered conveyance came into conflict, not with an oral sale or unregistered conveyance, but with an oral agreement for sale. There is, however, a published judgment of this Court which decides the precise point in issue, namely, *Tun Zan* v. *Maung Nyun* (2). In that case the learned Chief Judge applied the equitable doctrine of notice and gave an oral sale priority over a subsequent registered conveyance. That decision is binding on me.

But a Full Bench of the Chief Court of the Punjab, in *Lehna* v. *Ganpat and Kaka* (3), in construing section 50 of the Registration Act, reviewed the history of the registration legislation in connection with the doctrine of notice, and gave strong reasons for agreeing with the High Court of Madras in excluding the doctrine of notice. The point is a very important one, and I think it requires further consideration.

I therefore refer to a Bench, under section 11 of the Lower Burma Courts Act, 1900, the question,—

"Does a registered mortgage of immoveable property take effect against an earlier oral mortgage of the same property without possession, made at a time when section 59 of the Transfer of Property Act was not in force at the place where the property is situated, if the second mortgagee had notice of the existence of the oral mortgage at the time when the registered mortgage was made?"

The decision of the Bench was as follows:—

Moore, J.—The question referred is "Does a registered "mortgage of immoveable property take effect against an earlier "oral mortgage of the same property without possession, made at "a time when section 59 of the Transfer of Property Act was not

(1) (1883) I.L.R. 10 Cal., 250.
(2) (1907) 4 L.B.R., 26.
(3) (1890) Punjab Record, 1890, No. 115, p. 353.

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"in force at the place where the property is situated if the second "mortgagee had notice of the existence of the oral mortgage at "the time when the registered mortgage was made?"

In the course of the order of reference it is said that the learned Judge (of the Lower Appellate Court) was "wrong in "holding that the deposit of a *pyatbaing* and the addition of res-"pondent's name in the Revenue Register constituted an equitable "mortgage. Respondent's mortgage was an oral one and nothing "more." The record of the Court of first instance shows that at the time when the earlier or oral mortgage was effected no *pyatbaing* or other document was deposited, and the mortgage was therefore an oral one and nothing more. I think it desirable to make this clear, as the passage in the order of reference which I have quoted appear to me susceptible of being interpreted as laying down that a mortgage by deposit of a *pyatbaing* and the addition of the mortgagee's name in the Revenue Register would be an oral mortgage and nothing more—a proposition to which I should not be prepared to assent.

In the present case it is clear that the earlier mortgage was a mortgage by verbal agreement pure and simple. In other words, it was an oral agreement within the purview of section 48 of the Indian Registration Act, 1877, and the question for determination is whether the priority which that section confers upon registered documents as against oral agreements is forfeited in cases where the registered document is taken with notice of a prior oral agreement. The earliest Acts dealing with the registration of deeds in India appear to be Madras Regulation XVII of 1802 and Bombay Regulation IX of 1827. Both these Regulations expressly enact that registration shall not confer priority in cases in which the purchaser, transferee or mortgagee by the registered deed has knowledge of a prior unregistered deed of sale, gift or mortgage. And in the Madras Regulation it is explained that the object of registration being to protect persons dealing with property from being defrauded by previous transactions relating to such property of which they have no knowledge, such object is sufficiently attained when they are in fact actually apprized of the previous transaction.

These two Regulations were repealed by Act I of 1843 of the Governor-General. This Act recites in the preamble that the provisions regarding knowledge or notice contained in these Regulations had given rise to a complicated system of law and that much perjury had been committed in the investigations of the fact of such notice or knowledge. The provisions as regards notice above referred to were therefore repealed, and it was enacted that registered instruments should have priority over unregistered instruments, any alleged notice or knowledge of such prior instrument or conveyance notwithstanding.

This Act was itself repealed by Act XIX of 1843 except in so far as it repealed the provisions in the Bengal, Madras and Bombay Regulations regarding notice. And Act XIX of 1843 enacted

that registered deeds of sale, etc., should take priority over unregistered deeds, provided the authenticity of the registered deed be established to the satisfaction of the Court.

This Act was the subject of judicial interpretation by their Lordships of the Privy Council in the case of *Shreenanth Butcharjee* v. *Ramcomul Gungopadya and others* (4). The question of notice did not directly arise, but their Lordships in considering the meaning of the words "authenticity of the deed" remark that "it could not be intended by the Act that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as an honest and *bonâ fide* deed." This remark seems to me significant in view of the interpretation, in *Le Neve* v. *Le Neve* (5) and subsequent cases of the English Courts of Equity, of fraud as connected with notice. Act XIX of 1843 and previous Acts were repealed by Act XVI of 1864, section 68 of which enacts that every instrument of the description mentioned in clauses 1 and 2 of section 16 of the Act shall have priority if duly registered over any other unregistered instrument. This section was reproduced in section 50 of Act XX of 1866, which also provides in section 48 that "all instruments duly registered . . . shall take effect against any oral agreement or declaration relating to the same property. Section 48 of Act VIII of 1871 is the same as section 48 of the Act now in force, III of 1877. It reproduces section 48 of Act XX of 1866 with the addition of the words "unless where the agreement or declaration has been accompanied or followed by delivery of possession."

The interpretation of these successive enactments, and the question whether sections 48 and 50 of the present Act are to be construed subject to the English equitable doctrines of notice, have been the subject of numerous, and at one time conflicting, decisions of the Courts in India. All the High Courts and the Chief Court of the Punjab, however, seem now to be in accord in holding that a subsequent purchaser or mortgagee by registered deed is not entitled to priority to a purchaser or mortgagee of earlier date in cases where the former has actual notice of the earlier purchase or mortgage.

The contrary view was, it is true, taken in the case quoted by Irwin, J. (*Lehna* v. *Ganpat and Kaka*) (3), by a Full Bench of the Punjab Chief Court. But the ruling in that case has been overruled by a Full Bench of the Punjab Chief Court in the case of *Shankar Das and others* v. *Sher Zaman* (6). In Madras the leading case upon the point is that of *Krishnamma* v. *Suranna* (7), which deals with the case of a mortgage by bond which was not registered and a subsequent mortgage by registered deed. The subsequent mortgagee took his mortgage with notice of the earlier mortgage, but was not found to have acted fraudulently

(4) X Moore's I.A., p. 220.
(5) White & Tudor, L.C., Vol. 2, p. 175, 7th edn.
(6) Punjab Record, 1900, p. 199.
(7) I.L.R. XVI Madras, p. 148.

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otherwise. The earlier mortgagee obtained possession, but his mortgage not being an oral one but by deed, section 50 of the Registration Act, which contains no exception of cases where possession has been obtained, applied. And it was pointed out that if the doctrine of notice was not applicable a mortgagee by unregistered bond would be in a worse position than a mortgagee by a mere verbal agreement. The latter, if he obtained possession, would be protected against a subsequent mortgagee by registered deed; the former would not. This is an anomaly which can hardly have been intended, and which is avoided by giving effect to the doctrine of notice, as possession, if not itself notice, is very cogent evidence of notice.

In Bombay, in the case of *Vohora Remat Rein* v. *Harilal Yekison* (8), it was ruled that a registered mortgagee with notice of a prior valid oral mortgage is not entitled to preference.

In Calcutta, in *Abdool Hoosein* v. *Raghu Nath Sahu* (9), it was held that a purchaser, by registered deed, of property which had been mortgaged by an unregistered deed (registration being optional), if he bought with notice of the unregistered mortgage, took the property subject to that mortgage. This ruling was followed by the Allahabad High Court in a similar case, *Diwan Singh and others* v. *Jadho Singh* (10) The Privy Council Ruling under Act XIX of 1843 above referred to affords some ground for supposing that even under that Act, which expressly excluded the doctrine of notice, the Courts would have been justified in refusing to give priority to a subsequent registered deed over a prior oral agreement or unregistered deed if the subsequent registered deed was tainted with fraud. And there is ample authority for the view that the taking of a legal estate after notice of a prior right is a species of fraud.

Act XIX of 1843 having been repealed, and the subsequent enactments being silent upon the question of notice, I think that the doctrine of notice, though not specifically re-enacted, must be held to have revived, being no longer held in abeyance by statutory prohibition. The doctrine depends upon the principle that Courts of Equity will not allow a fraud to be perpetrated under cover of a Statute if they can help it. In the case of successive mortgages the fraud, though not perhaps so obvious, is, I think, as real as in the case of successive sales. "It is difficult to conceive "how it can be anything else but a fraud for a person, with "knowledge that another person has advanced money on the "faith of having a security upon certain property, to seek in "collusion with the person who has received the money, to make "use of the Registration Act to deprive the lender of his "security"(11).

(8) Printed Judgments, Bom. H.C., 1896, p. 778.
(9) I.L.R. 13 Cal. p. 70.
(10) I.L.R. XIX All., p. 145.
(11) I.L.R. XVI Mad., p. 180.

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I would therefore answer the question referred in the following terms:—"a registered mortgage does not take priority over an "earlier valid oral mortgage of the same property if the second "mortgagee had actual notice of the oral mortgage at the time "when the registered mortgage was made."

I have substituted the words "actual notice" for the word "notice" in the question as referred, because the notice alleged in the case in which the reference has been made was actual notice, and it is therefore unnecessary to go into the question whether a subsequent registered mortgage can be affected by any notice, other than actual notice, of an earlier mortgage by verbal agreement.

Bell, J.—I concur.

Fox, C.J.—I concur.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Twomey.

Civil Miscellaneous Appeal No. 134 of 1909.

March 29th, 1910.

(1) R. M. P. KALLEAPPA CHETTY
(2) M. A. L. KARUPPAN CHETTY
(3) A. L. V. E. V. VAIRAVAN CHETTY } *v.* MAUNG KYWE.

Chari—for appellants (creditors).
Sealy—for respondent (insolvent).

Discharge of Insolvent—Points to be considered before granting release to debtors—Application of Provincial Insolvency Act, 1907, s. 44 (3).

In dealing with an application filed by an insolvent for his discharge the Court should bear in mind the imperative nature of the provisions of sub-section (3), section 44, of the Provincial Insolvency Act, 1907: and should not grant release to an insolvent whose conduct has been reckless or dishonest.

This is an appeal from an order granting an insolvent his discharge.

On the 11th January 1908, after the Provincial Insolvency Act, 1907, had come into force, the insolvent presented his insolvency petition. His debts were stated to amount to over Rs. 12,000: his property and the amounts due to him were set out as being between Rs. 4,000 and Rs. 5,000, but one debt was put down as being doubtful of realization. The Receiver who was subsequently appointed reported that he had been able to realize only Rs. 150. On the 9th December 1908 the insolvent applied for his discharge. This was opposed by his creditors, who were all Chetty firms.

The learned Judge held that the petitioner's insolvency was due to speculations in which he was encouraged to indulge by his Chetty creditors, who advanced him large sums of money without security, and in view of their having knowingly taken the risk of losing their money if he failed in the speculations, and of the time which had elapsed since he was adjudicated an insolvent

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and since he had applied for his discharge, he granted the order asked for.

Even if the learned Judge's view of what had happened between the insolvent and his Chetty creditors were correct, it did not justify the learned Judge in neglecting to consider the provisions of section 44 of the Act under which a discharge of an insolvent may be granted. Sub-section (3) of the section is imperative, and obliges the Court to refuse to grant an absolute order of discharge on proof of certain facts. Among there is the fact that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of the insolvent's unsecured liabilities. In such case a discharge cannot be granted unless the insolvent satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible. If the learned Judge meant that the insolvent could not justly be held responsible for the insolvent's assets amounting to only Rs. 150 as against debts of over Rs. 12,000, he has not said so.

The account the insolvent gave of himself amounts to the following. When he started borrowing money he had no property of his own. With the money he borrowed he traded in paddy, but owing to floods and a granary being inundated he lost in his dealings about Rs. 1,600, but taking into consideration the interest he paid on borrowed money his total loss was Rs. 6,000. He also put Rs. 10,000 into a saw-mill, but that did not turn out remunerative and he sold his share for Rs. 8,350, and again taking interest into account he lost Rs. 3,000 over this venture. He also lent money to others: these are the persons entered in his schedule as debtors for Rs. 4,355, from whom only Rs. 150 has been recovered. No doubt the Chetty firms were very foolish to lend to such a man without security, but if a person enters into trade possessing no property and relying entirely on making a profit in order to repay what he borrows for the trade and interest on that, as well as to provide for himself and his family, it cannot be said that he is not justly responsible for his debts if a loss instead of a profit is the result of the trading. If a man borrows money he is responsible for the payment of it whether the man who lends him money is foolish or wise in lending it. No one is justified in incurring debts when he has no reasonable prospect of being able to discharge them.

This insolvent had nothing to fall back upon in case his trading resulted in a loss. He kept no proper books of account, and there is little but his bare word to show what he did with the money he borrowed. Under the Provincial Insolvency Act the Court is enabled to confer on debtors the benefit of release from their debts, but this benefit was intended for the honest debtor who by reason of misfortune is unable to pay his debts. It is not and could not have been intended for the reckless and careless borrower or the dishonest trader.

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The conduct of the seeker for the benefit of the Act, not the conduct of the creditors, is what has to be considered.

The Court should have refused to grant the insolvent his discharge having regard to the provisions of sub-section (3) of section 44 of the Act.

The order of discharge is therefore set aside.

Twomey, J.—I concur.

Before Sir Charles Fox, Chief Judge.

Special Civil 2nd Appeal No. 87 of 1909.

May 16th, 1910.

1. MAUNG PO THA
2. (*a*) MAUNG PO THA } LEGAL REPRESENTATIVES OF
   (*b*) MA KYAW } MA HNIN AING (DECEASED)

v.

L. D'ATTAIDES.

Israil Khan—for appellants (defendants).

Villa—for respondent (plaintiff).

Promissory note payable to bearer on demand—Contracts forbidden by law—Duty of Courts—Indian Paper Currency Act, 1905, section 24.

A sued B upon a promissory note payable to bearer on demand.

Held,—that inasmuch as the promissory note sued upon infringed the provisions of section 24, Indian Paper Currency Act, 1905, the plaintiff could not recover on it.

Bensley v. *Bignold*, (1822) 5 B. & A., 335, followed.

The plaintiff sued upon a promissory note in the following terms—

"Rs. 2,000.

On demand we the undersigned promise to pay to Mr. L. D'Attaides, pleader, or bearer the sum of Rupees Two thousand only, bearing interest at the rate of two per cent. per mensem for value received in cash."

The amount mentioned in the note is by its terms payable to the bearer of it on demand. Section 24 of the Indian Paper Currency Act, 1905, enacts—

"No person in British India shall draw, accept, make or issue "any bill of exchange, hundi, promissory note or engagement for "the payment of money payable to bearer on demand, or borrow, "owe, or take up any sum or sums of money on the bills, hundis "or notes payable to bearer on demand of any such person: "Provided that cheques or drafts, payable to bearer on demand "or otherwise, may be drawn on bankers, shroffs or agents by "their customers or constituents, in respect of deposits of money "in the hands of those bankers, shroffs or agents and held by "them at the credit and disposal of the persons drawing such "cheques or drafts."

It is clear that the promissory note sued upon infringed the provisions of this section, and that it is a contract forbidden by law, and consequently the plaintiff could not recover on it—see *Bensley* v. *Bignold* (1).

(1) (1822) 5 B. & A., 335.

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The appeal must be allowed, and the decree of the Divisional Court set aside and the suit dismissed.

The plaintiff's pleader has asked to be allowed to amend the plaint so as to make the suit one for money lent. This cannot be done, but I will allow the suit to be withdrawn with liberty to the plaintiff to bring a fresh suit. I express no opinion as to whether a suit for money lent will lie, or as to whether such a suit by the plaintiff would not be barred by limitation. Each party will bear his own costs throughout.

Special Civil 2nd Appeal No. 90 of 1908.

Feby. 25th, 1909.

Before Mr. Justice Hartnoll.

1. MAUNG ME
2. MA NGWE HLAING } *v.* MA SEIN.

N. C. Sen—for appellants (plaintiffs).

K. B. Banurji—for respondent (defendant).

Promissory note—Consideration thereof—Agreement between parties—Consequent abstinence from recovery of debts due—Indian Contract Act, 1872, section 2 (d).

On a settlement of debts between two parties, the agreement of one party to take no immediate action to recover the debt due must be regarded as the consideration for a promise defined in section 2 (*d*) of the Indian Contract Act (1872), inasmuch as there might be benefit to the latter and there would be forbearance on the part of the former.

Fleming v. *Bank of New Zealand*, (1900) L.R., App. Cases, at page 586, followed.

Maung Me and Ma Ngwe Hlaing sued Ma Sein under the following allegations to recover Rs. 500. They stated that they lent her on the 4th August 1901 Rs. 95 at interest on the security of a piece of garden land which was transferred to them, that on the same day they lent her another sum of Rs. 85 on interest, that when a demand was made for the principal of the debts and interest she paid Rs. 31-12-3 of the interest and executed a fresh document for the balance of the interest, *viz.*, Rs. 35, which was to bear interest, that on the 14th August 1903 when demand was made for the principal sums and interest she only paid Rs. 48-13-2, and that as regards the balance of the principal and interest due, which was Rs. 250, a deed of mortgage was executed, which they filed. By the mortgage deed it was stated the same piece of land was mortgaged which had already been given as security for the Rs. 95. The deed is dated the 18th August 1903, and is to the effect that certain garden land is mortgaged for the balance of Rs. 250 principal and interest and that Ma Sein will pay the Rs. 250 in *Tagu*, and that, if the money cannot be repaid, the garden land can be taken outright. Ma Sein allows in her evidence that the Rs. 250 were to bear interest. The plaint goes on to say that when demand was made for the principal and interest Ma Sein only paid Rs. 67 and did not pay the balance due, which was Rs. 450, that then Ma Sein said that

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she could not pay the said balance principal and interest Rs. 450 yet and asked plaintiffs to take as security the same ·22 acre of garden land, which had formerly been mortgaged and delivered and with regard to which names had been transferred, and to execute a fresh document, that therefore the promissory note marked (o) annexed and submitted had to be executed and signed with interest at Rs. 2-4-0 per cent. per mensem and with the said ·22 acre of garden land as security. The promissory note bears date the 2nd August 1906. The plaintiffs further allege that they have been paying revenue on the garden land which is in their names, and that they have made further demands for payment without success. They then make a calculation that Rs. 606-15-0 are due and ask for a decree with costs to sell by auction on account of Rs. 500, as they forego their claim to the further Rs. 106-15-0 the ·24 acre of garden land which has been made over and delivered as security and take the proceeds of the said auction sale, and if the debt be not satisfied and a balance remain to recover the said balance from the defendant with the interest contained in the document.

It should be noted that the suit is brought on a cause of action that is alleged to have occurred on the 2nd August 1906.

Ma Sein in her written statement allowed that all the transactions alleged in the written statement inclusive of the last—the one dated 2nd August 1906 were correct, and then stated that the statement—14th *lazan Wagaung* 1268 (2nd August 1906)—in the 8th paragraph is not contained in the preceding paragraphs and that therefore it is barred by limitation. It is difficult to understand what is meant; but in her examination Ma Sein denies that she signed the promissory note. She then went on to say that it was not according to law that, after defendant's borrowing Rs. 180 principal, the principal and interest were added to make a fresh principal and secured under a fresh document with interest; and further that on account of the principal and interest Rs. 500, although the garden land measuring ·24 acre was made over and delivered as security only as registration was not effected, the mortgage was not valid, that moreover the recovery of principal and interest due on the ·24 acre of garden land which was made over and delivered as security is barred by limitation and so that the garden land should not be sold by auction.

Ma Sein was examined by the Township Judge and she acknowledged the correctness of the different transactions alleged except that she denied the signing of the promissory note. This denial implied also a denial of the alleged last agreement with respect to the land

The Township Judge in giving judgment found that it was unnecessary to determine whether Ma Sein signed the promissory note as it was void for want of consideration. He then went on to find that the mortgage bond of date the 18th August 1903 was a valid one and that over Rs. 500 was due on it and he finally gave a mortgage decree for Rs. 500. On an appeal being

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laid the District Judge found that the promissory note was void for want of consideration as no cancellation of previous debts took place when it was executed, that the mortgage bond of date the 18th August 1903 was unregistered and so that mortgage decree could pass on it, and further that the time for passing a money decree on it had expired. He then further discussed the mortgage bond and finally allowed the appeal and dismissed the suit.

This further appeal has now been laid, and at the hearing it was urged that there was consideration for the promissory note and that the previous debt was the consideration. On behalf of the respondent it was contended that as the mortgage bond had not been cancelled nor returned there was no consideration.

The decree of the Township Judge seems to me to have been clearly wrong in that the appellants sued for a sum due on the promissory note and made their cause of action the promissory note. The decree was passed on another cause of action, namely, the mortgage bond of the 18th August 1903. As the appellants were not suing on the mortgage bond in this suit, a decree should not in my opinion have been given on it. Ma Sein's defence as disclosed in her written statement is most vague. The Township Judge states that she pleaded in it that the promissory note was void for want of consideration. I am unable to find this plea in the written statement, and I am of opinion that her real defence must be taken to be that disclosed in her examination—namely, a denial of signing the promissory note. It is not as if the admitted facts show that there was no consideration for the promissory note, and that there could not possibly have been any consideration. In the case of *Fleming* v. *Bank of New Zealand* (1), their Lordships of the Privy Council quoted with approval a definition of consideration given by Lush, J., in which he said: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

Again section 2 (*d*) of the Indian Contract Act is to the following effect:

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

Applying these definitions to the present case I would remark as follows. It may be that there was a settlement between the parties and that the appellants agreed to take no immediate action to recover the debt due, if the respondent signed the promissory note sued on. If there was such an agreement there might be a benefit to the respondent, and there would be forbearance on the part of the appellants. If the appellants in such

(1) L.R., App. Cases, 1900, at p. 586.

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case agreed to take no immediate action, such an abstinence would be a consideration for the obligation incurred by the signing of the note. I am therefore of opinion that the promissory note does not necessarily fail for want of consideration, and that as Ma Sein did not plead that there was no consideration, but on the other hand that she denied signing the note—a plea quite inconsistent with the other—the question as to whether there was consideration or not for the note should not be gone into. Under section 118 of the Negotiable Instruments Act the presumption is that the note was for consideration, and the burden of proof lay on Ma Sein to prove that there was none. In the absence of her plea to this effect I am unable to allow the matter to be gone into.

That part of the claim that asks for a mortgage decree cannot prevail, as the principal money secured was over Rs. 100 and so under section 59 of the Transfer of Property Act which was in force at the time the promissory note was executed in the locality where it was executed a mortgage could only be effected by a registered document.

The following issue is fixed :—

" Did Ma Sein execute the promissory note sued on ? "

The proceedings will be returned to the District Court, who will return them to the Township Court, which will try the issue and come to a finding on it.

The District Court on again receiving the proceedings will notice the parties and, after giving them an opportunity of being heard, will also come to a finding on the issue.

The proceedings will then be submitted to this Court for final orders.

Final Orders.

It has been found by both Courts that the execution of the promissory note is not proved. The suit must therefore fail as a sum due on the note was the cause of action. The appeal is accordingly dismissed with costs in all Courts.

Before Mr. Justice Hartnoll.

Civil 2nd Appeal No. 98 of 1909.

1. MAUNG SAN
2. MA NYEIN ZAN } *v.* SIT TWAN.

May 5th, 1910.

McDonnell—for appellants. | *Christopher*—for respondent.

Transfer before attachment—Differentiation between a transfer effected to secure a debt and one, to hinder the realisation of a decree—Fraud, how determined.

A obtained a decree against B and attached certain property. C objected and was successful.

A then sued C to establish his right on the ground of fraudulent transfer from B to C. It was argued that as C had merely taken measures to secure himself and have the property (land) conveyed to him, his action was not fraudulent.

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It was however held that inasmuch as **C** had not only intended to secure his own debt but also to prevent **A** from realising his decree, the transfer was fraudulent. A's claim must therefore be regarded as established.

Pullen Chetty v. *Ramalinga Chetty*, 5 Mad. H.C.R., 368, referred to.

Hakim Lal v. *Mooshahar Sahu*, I.L.R. 34 Cal., 999; *Lockrain* v. *Rastan*, (1899) 9 North Dakota, 434; followed.

Maung Sit Twan sued Maung San and Ma Nyein Zan to establish his right to attach certain property. The facts are that Maung Sit Twan sued Maung Pa Si and Ma Tôk on the 11th August 1906 to recover Rs. 2,100. They obtained a decree for Rs. 1,500, which is dated the 12th November 1906. On proceeding to execute it certain property was attached. This was in January 1907. Maung San and Ma Nyein Zan objected to the attachment. They were successful and the attachment was removed. This suit was then brought, and Maung Sit Twan alleges that there were fraudulent transfers to Maung San and Ma Nyein Zan by Maung Pa Si of his property so as to hinder him in executing his decree. Both the lower Courts have found in his favour and now this appeal has been filed. At the hearing it was stated that the appeal would only be with regard to the land concerned, and that the rest of the decree of the Subdivisional Court would not be appealed against.

It is admitted that Maung San and Ma Nyein Zan had a mortgage on the land to the extent of Rs. 2,000, and it is argued that, because Maung San took measures to secure himself and have the land conveyed to him, his action was not fraudulent. The case of *Pullen Chetty* v. *Ramalinga Chetty* (1) was relied on, where it was ruled that a sale made of immoveable property pending a suit against the vendors to recover a debt is valid, although the motive of the vendors may have been to prevent the land being attached and sold in execution. The point in issue in this case was exhaustively discussed in the case of *Hakim Lal* v. *Mooshahar Sahu* (2), and in that case the learned Judges ruled as follows:—

"In the absence of a law of bankruptcy, a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors, although the debtor in making it intended to defeat their claims, and the creditor had knowledge of such intention; if the only purpose of the creditor is to secure his debt and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent. If, however, the transfer is not in reality a preference of an actual debt, but is a mere colourable device to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purpose of a mere preference, so as to secure to the debtor some benefit or advantage, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent. The preferred creditor participates in the fraudulent intent of the debtor, where his purpose is not to secure the payment of his own debt, but to aid the debtor in defeating other creditors, in covering up his

(1) 5 Mad. H.C. Reports, 368. | (2) I.L.R. 34 Cal., 999.

property, in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit. Proof of a valid indebtedness does not necessarily disprove the existence of a fraudulent intent. The reasons of the distinction between one who purchases for a present consideration and one who purchases in satisfaction of a pre-existing debt have been very clearly formulated in the case of *Lockrain* v. *Rastan* (3):—

'A person who purchases for a present consideration is in every sense a volunteer; he has nothing at stake, no self-interest to serve; he may with perfect safety keep out of the transaction. Having no motive of interest prompting him to enter into it, if yet he does enter, knowing the fraudulent purpose of the grantor, the law very properly says that he enters into it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness; he has an interest to serve; he can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept voluntary preference that he has to obtain a preference by superior diligence; he may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and if he goes no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge.'

These reasons appear to us to be sound and unassailable, and we adopt them in justification of the principle laid down by us."

I agree with the conclusions arrived at in this case, and it remains to apply them in the present instance. Was Maung San's purpose merely to secure his debt, or was his intention also to aid Maung Pa Si in defeating Maung Sit Twan, in covering up his property, in giving him a secret interest therein, and in locking it up for Maung Pa Si's own use and benefit? The admitted debt of Maung Pa Si to Maung San and Ma Nyein Zan was Rs. 2,000. There may have been some interest; but there is no evidence as to how much it was. Maung San and Ma Nyein Zan obtained as rent for the land in 1906-07 some 600 baskets of paddy and so the interest would not seem to be much, if anything. There are two transfers by Maung Pa Si to Maung San and Ma Nyein Zan dated the 2nd December 1906. One transfers the land for Rs. 3,000 and the other transfers a house, boat, cart, three bullocks and some standing crops for Rs. 800. According to the evidence the real value of the property would be, exclusive of the crops,—

		Rs.
Land, some	... ...	3,750
House	... ...	400
Boat	... ...	60
Cart	... ...	40
Bullocks	... ...	140
	Total ...	4,390

(3) (1899) 9 North Dakota, 434.

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The only proved consideration is Rs. 2,000, the debt. Maung San says that he gave another Rs. 1,000 for the land and that the other property passed hands for old debts. The lower Courts have found that Maung San took back the Rs. 1,000—at once to fight Maung Sit Twan with—at least so he ostensibly said. That finding I accept. There is no good proof of any old debts amounting to Rs. 800. Indeed, if such existed, why should Maung San have given Maung Pa Si Rs. 1,000 at all? He could have set off Rs. 800 on account of such old debts, and Rs. 200 only need have passed hands. He took an undue interest in Maung Pa Si's affairs in trying to compromise with Maung Sit Twan and then saying that, if he would not, he would hinder him and use the Rs. 1,000 in hindering him. The circumstances are such that I must accept the evidence, that the transactions were not only to secure his own debt, but to go further, and that is, to hinder Maung Sit Twan from realising his decree. As it has turned out, he seems to have swindled Maung Pa Si as well, as he has not returned him any of his property. Whether he had that intention from the first is not clear. He may not have, and may in the first instance only have been attempting to secure his own debt, and the surplus and Maung Pa Si's property from attachment by Maung Sit Twan. In any case I must hold that the transfers were fraudulent, and I accordingly dismiss this appeal with costs.

Before Mr. Justice Harinoll.

RAMZAN ALI *v.* VELLASAWMI PILLE.

Civil Revision No. 92 of 1909.

Ba Hla Oung—for applicant (defendant).

May 12th, 1910.

S. N. Sen—for respondent (plaintiff).

Promissory note payable to order—Indorsement—Delivery for collection—Holder—Negotiable Instruments Act, 1881, ss. 8, 46, 50, 78.

A promissory note was drawn by **A** in favour of **B** or to his order. **B** indorsed it, and it was handed over to **C** for collection. **B** died.

It was argued that **B** being dead, as the note did not pass for consideration **C**'s authority ceased on death of **B** and so he could not recover the money without having obtained letters-of-administration or a succession certificate.

Held,—that **C** was the holder of the note and that by section 78, Negotiable Instruments Act, payment had to be made to him.

One Vellasawmi Pille sued one Ramzan Ali to recover Rs. 346-8-0 due on a promissory note, and the District Judge has given the plaintiff a decree for that amount. The promissory note is one drawn by Ramzan Ali in favour of M. A. P. L. Kaliappa Chetty or to his order. It is indorsed on the back by M. A. P. L. Kaliappa Chetty, and it is common ground that Kaliappa Chetty died after indorsing it, and that the note was only handed over to Vellasawmi Pille for collection. It is urged on behalf of Ramzan Ali that, this being so, as the note did not pass for

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consideration, and as Vellasawmi Pille's authority ceased on the death of Kaliappa Chetty, he could not recover the money without having obtained letters-of-administration or a succession certificate. The respondent, however, urges that he has a right to sue on the note. Now according to section 78 of the Negotiable Instruments Act payment of the amount due on a promissory note must, in order to discharge the maker, be made to the holder of it. The question therefore arises as to whether the respondent is the holder. In section 8 of the Negotiable Instruments Act a holder is defined thus:—A holder of a promissory note means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Section 46 lays down that a promissory note payable to order like the one sued on is negotiable by the holder by indorsement and delivery thereof, and section 50 lays down that the indorsement of a negotiable instrument followed by delivery transfers to the indorsee the property therein. In the present instance Kaliappa indorsed the note and delivered it to Vellasawmi Pille. The property in the note therefore passed to Vellasawmi Pille and he became holder of it. By section 78 payment has to be made to him. I am therefore of opinion that he had the right to bring this suit, and so dismiss the appeal with costs.

Before Mr. Justice Hartnoll.

Special Civil 1st Appeal No. 116 of 1909.

EBRAHIM BYMEAH ISMAILJEE *v.* CHAS. COWIE & Co.

May 19th, 1910.

Patker—for appellant (defendant).

Lentaigne—for respondents (plaintiffs).

Promissory note—Holder—For collection, or for value—Negotiable Security, when a conditional payment of a debt—Proof of non-productivity of security essential before a debtor can be sued as if he had given no security.

A carried on his deceased father's business which was assigned to him by B (his father's executor) on receipt of two promissory notes given to him as part consideration. B indorsed on these notes to C, to whom A's father was heavily indebted, as part satisfaction of the debt.

A pleaded that C was merely an agent of B for collecting the sum due on the notes. He further pleaded that any defence that held good against B also held good against C; and that as B had not made over to him the deed of assignment C was not able to sue for recovery of debts.

Held,—that a negotiable security given on account of a pre-existing debt and payable at a future date is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. The security is offered to the creditor and taken by him as money's worth: and until it has been proved unproductive the creditor cannot treat the security as a nullity, and cannot sue the debtor as if he had given no security C therefore was a holder for value and not merely an agent for collection The consideration was the pre-existing debt.

Solomons v. *The Bank of England*, 13 East., 135; *De la Chaumette* v. *The Bank of England*, 9 B. & C., 208; dissented from.

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Currie v. *Misa*, L.R., 10 Ex., 153; *Belshaw* v. *Mary Ann Bush*, 11 C.B., 191; *Peacock and another* v. *Purssell*, L.J.R., 32 C.P., 266; followed.
Fleming v. *Bank of New Zealand*, App. Cases, 1900, 586, referred to.

In this case the respondents sued the appellant for Rs. 2,000 due on two promissory notes, pleading that they were holders for value of the notes. The notes were drawn by appellant in favour of E. E. E. Mapara or to his order and have been indorsed by Mapara to the respondents. It appears that Mapara is the executor of appellant's deceased father and that the deceased dealt in hardware. On his death the appellant carried on his father's business, and finally on the 10th April 1908, Mapara assigned this business to the appellant by the deed of assignment which is on the file. The two promissory notes sued on are part of the consideration for the deed of assignment. The deceased, according to the evidence, was heavily indebted to the respondents, and this is not denied. It is also in evidence that in part satisfaction of the debt of deceased to the respondents Mapara indorsed over the promissory notes sued on to the respondents.

The appellant does not deny the execution of the notes, but he pleads that the respondents are not holders in due course, and that they are merely agents of Mapara for collection of the sums due on the notes and that therefore any defence that holds good against Mapara holds good against them. He further pleads that as regards Mapara the consideration has failed, as Mapara has not handed him over the deed of assignment and so he has not been able to sue for recovery of debts. The learned Judge of the Small Cause Court held that the defence could not succeed, and that the respondents were holders in due course, and gave the decree asked for. Hence this appeal has been laid. The same arguments have been raised in appeal as in the Court below. The one point for decision is whether the respondents are holders in due course. The cases of *Solomons* v. *The Bank of England* (1) and *De la Chaumette* v. *The Bank of England* (2) have been relied on by the appellant, and the case of *Currie* v. *Misa* (3) has been relied on by the respondents. The latest case is that of *Currie* v. *Misa* (3), and I am in accord with the reasoning of the majority of the learned Judges in that case. There they said: "The title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest on the implied agreement to suspend his remedies. The true reason is that given by the Court of Common Pleas in *Belshaw* v. *Mary Ann Bush* (4), as the foundation of the judgment in that case, namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized . . . . . The doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note

(1) 13 East., 135.
(2) 9 B. & C., 208.
(3) L.R., 10 Ex., 153.
(4) 11 C.B., 191.

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payable to order or bearer, whether it be the note of a country bank, which circulates as money, or the note of the debtor or of any other person. The security is offered to the creditor and taken by him as money's worth, and justice requires that it should be as truly his property as the money which it represents would have been his had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity and to sue the debtor as if he had given no security." In support of this last sentence the case of *Peacock and another* v. *Purssell* (5) was cited, in which it was held that if a creditor takes a bill of exchange from his debtor as collateral security for the payment of his debt and retains it until it becomes due, his duty is to present the bill for payment, and if the bill be dishonoured to give notice of dishonour in the same way as if he were the absolute owner of the bill, and that, if he omits to do this and the bill consequently becomes worthless, he cannot afterwards sue his debtor either on the bill or on the original consideration. The definition of "consideration" in *Currie* v. *Misa* (3) was quoted with approval in *Fleming* v. *Bank of New Zealand* (6), which was: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

In my opinion the respondents were not merely Mapara's agents for collection, but they were holders for value. The consideration was the pre-existing debt.

I therefore dismiss the appeal with costs.

Before Mr. Justice Hartnoll.

Civil Revision No. 97 of 1909.

May 27th, 1910.

MUSA MIA ALIAS MAUNG MUSA. *v.* M. DORABJEE, CARRYING ON BUSINESS AS "THE SUNLIGHT TRADING COMPANY," BY HIS DULY AUTHORIZED AGENT, DAWOODJI ISMAILJEE MAYAT.

N. C. Sen—for applicant (defendant).

Agabeg—for respondent (plaintiff).

Construction of contract—Hire and Purchase agreement—Contract of sale—Breach thereof—Compensation.

A brought a suit for Rs. 330 representing 33 months' hire at Rs. 10 per mensem against B the guarantor on an agreement made with C and alleged to be for the hire or purchase of a sewing-machine.

B pleaded that A was entitled to recover (*plus* a reasonable sum for damages) Rs. 80 only, the difference between the price of the machine Rs. 110 and Rs. 30, the amount paid by C to A.

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(5) L.J.R., 32 C.P., 266. | (6) App. Cases, 1900, 586.

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After consideration of the terms of the contract as a whole it was held that the contract was an agreement of sale and was much more than a mere contract of hiring. It was clearly the intention of the parties that not more than Rs. 110 was to pass under it. For its breach therefore A was entitled to damages only.

Singer Manufacturing Co. v. *Elahi Khan*, 2 U.B.R. (1892—96), 291; *Helby* v. *Matthews*, (1894) L.R., 2 Q.B., 262; *Lee* v. *Butler*, (1893) L.R., 2 Q.B., 318; followed.

The facts of this case are as follows:—M. Dorabjee, carrying on business as the "Sunlight Trading Company," alleges that by his agent he, under the agreement filed in the case dated the 22nd September 1905, let out to one Hayat Mustan a sewing-machine at a monthly rent of Rs. 10 payable every month in advance and on the other conditions stated in the agreement that Musa Mia, the present applicant, guaranteed the due performance by Hayat Mustan of the said agreement including the payment of all moneys becoming due thereunder and joined with him in the execution thereof, that moneys due under the agreement are stated therein to be payable at Mandalay, but it was understood by and between the parties thereto that all payments were to be made and the machine delivered up on the termination of the hiring to the plaintiff's agent at Rangoon, that the sewing-machine was in the possession of Hayat Mustan or of Musa Mia from the 22nd September 1905 to the 20th February 1909, on which date it was given up, that during this period one payment only of Rs. 10 was made for monthly hire, and this was made on the 22nd April 1906, the hire then being eight months in arrear, and that Rs. 330 is due and payable by Musa Mia under the agreement, being hire at Rs. 10 a month from the 22nd April 1906 to the 22nd January 1909.

In defence Musa Mia admitted that the machine was let out to Hayat Mustan under the agreement filed and that he was the guarantor under it, and stated that when it was hired a sum of Rs. 20 was paid towards the hiring of the machine. He further stated that the Rs. 10 was paid in or about December 1905 or January 1906 and not on the 22nd April 1906, and that the machine was returned to Dorabjee after having been hired for a period of three months, so that nothing was owing. He further pleaded that in the alternative the suit was bad as the machine having been hired to the defendant with the option of purchasing the same at its value, namely, Rs. 110, the plaintiff was only entitled to sue for its value less the amount paid by defendant. During the trial it was suggested that Dorabjee had tried to palm off the machine as a Singer. The learned Judge of the Court of Small Causes in the course of his judgment stated that Musa Mia added the further plea that in equity and good conscience the plaintiff was only entitled to receive the difference between the sum paid and the price of the machine at the most. The learned Judge found that the question of limitation had been falsely raised when Musa Mia said that the only Rs. 10 payment took place in December 1905 or January 1906, and that the hirer had possession down to the

20th February 1906. He also found that there was no foundation for the plea of fraud. He then wrote: "I have to determine whether or not the plaintiff is entitled to all he asks for. He has credited the sum of Rs. 30 for which credit is claimed, but the suggestion is that he could never establish a right to receive more than the price of the machine, which is Rs. 110, and that having received Rs. 30 all he can recover is Rs. 80. That certainly is not the contract which contemplates a regular performance month by month by the hirer of his duty of paying the agreed hire. Here there has been failure to discharge that duty. Upon a strict construction of the contract plaintiff is entitled to Rs. 330, but as I understand Mr. Brown he does not rest his case on law but on equity and good conscience." The learned Judge then proceeded to discuss this phase of the case and finally gave a decree for Rs. 330 and costs.

Against that decree this application in revision is made. Several grounds were entered; but at the hearing the argument for the applicant was confined to one point, and that was that the respondent was only entitled to recover Rs. 80 *plus* a reasonable sum for compensation. In reply it was urged that a false defence had been raised, that Rs. 10 was a fair and reasonable rent for the machine, and that it was never pleaded in the lower Court that this sum was too high. The question of what was the utmost due was raised in the written statement, as it was pleaded that the machine having been hired to the defendant with the option of purchasing the same for Rs. 110 the plaintiff was only entitled to sue for its value less the amount paid by defendant. I am therefore of opinion that the terms of the contract should be considered so as to see what is its exact meaning. It is one of those contracts that concerns the system of what is loosely described as hire and purchase.

The contract is as follows:—

No. 1.

AGREEMENT made the 22nd day of September 1905 Between the Sunlight Trading Company, Rangoon, herein called the "Owner" of the first part, and Mr. Hayat Mustan Budumiah, Tailor, of No. 18, Kandawglay, Rangoon, herein called the "Hirer" of the second part, and Messrs. Musa Mia Azgarally and Ma Tet O Sorn Aung, of No. 18, Kandawglay, and Municipal Bazaar respectively, hereinafter called the "Guarantor" of the third part; whereby the "Owner" agrees to let to the "Hirer" the Sewing Machine and Assessories described by endorsement hereon and

The Hirer having paid to the owner the sum of Rupees Twenty (and for which sum credit is not to be given on account of rent, unless and until a purchase be effected as hereinafter mentioned)

Agrees—

(*a*) To pay the Owner at Mandalay on and after this a rent of Rs. 10 payable regularly every month in advance.

(*b*) To keep the Machine and Accessories in good order and undefaced (damage by fire included), fair wear only excepted, and at all times to allow the Owner's agents and servants, or any other persons employed by him, to inspect the same.

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(*c*) To keep the Machine and Accessories in the Hirer's own custody at the abovementioned address, and not to remove them without the Owner's previous consent in writing.

(*d*) That if the Hirer do not duly perform this agreement and fails to pay rent of any month the Owner may (without prejudice to his right to recover arrears of rent and damages for breach of this agreement) terminate the hiring and retake possession of the said Machine and Accessories; and for that purpose leave and license is hereby given to the Owner and his agents and servants, or any other person employed by him, to enter any premises occupied by the Hirer, or of which the Hirer is tenant, to search for and retake possession of the said Machine and Accessories without being liable to any suit, action, indictment or other proceeding by the Hirer, or any one claiming under him or her.

(*e*) That when the hiring is terminated $\frac{\text{and}}{\text{or}}$ the Machine and Accessories are returned to the Owner, the Hirer shall not, on any ground whatever, be entitled to any allowance credit, return, or set-off, for payments previously made.

(*f*) That time, indulgence or concession granted by the Owner to the Hirer shall not alter or invalidate this agreement.

(*g*) That the Owner's right of lien on the Machine shall not be destroyed by any judgment he may obtain against the Hirer or the Guarantor.

The Owner agrees—

(*a*) That the Hirer may terminate the hiring by delivering up to the Owner at Mandalay the Machines and Accessories in thorough good order at his own expenses.

(*b*) That the Hirer may, at any time during the hire, become the Purchaser of the Machine and Accessories, by payment in cash at Mandalay of the hereon endorsed price, provided the payments of hire are regularly and duly made. If the hirer fails to pay regularly in advance, the whole transaction would be treated as on hire without any option of purchase.

(*c*) That if such purchase be effected, credit will be given for all payments previously made under this agreement.

The "Guarantor" agrees that in consideration of the Owner letting on hire to the aforesaid Hirer the Sewing Machine and Accessories described by endorsement hereon, he, the Guarantor, hereby guarantees the due performance and observance by the Hirer of the terms and condition of this Agreement, and engages to pay at Mandalay, all or any sum or sums of money which may become payable to the Owner, either by way of debt or damages, costs or expenses, by or concerning anything that may be done under this agreement.

And the Guarantor further agrees that any time granted to the Hirer, or any indulgence in respect of the terms and conditions herein contained, shall not prejudice the Owner's rights or relieve the Guarantor from this his guarantee. And that it shall not be necessary upon the Hirer being granted any such concession or indulgence as aforesaid for the Owner to give any notice to the Guarantor thereof.

That the Owner is at liberty to sue at his option either the Hirer or Guarantor jointly and severally for the amount or balance thereof, and the Guarantor further agrees and binds himself to pay the amount of judgment if any, with costs thereon, that the Owner might have obtained against the Hirer.

Unless and until a purchase be effected, the Machine and Accessories shall be and continue the sole property of the Owner, and the Hirer shall remain Bailee only thereof.

As witness the hands of the parties.

(Sd.)
(In Native Character)
Witness to the Signature of the said—(Hirer).

(Sd.)
(In Native Character)
(Sd.) ဖောင်မရှာဝါ
(Sd.) မသတ်ဝါ

(Sd.) MAHOMED ISHAH,
Witness to the Signature of the said—(Guarantor).

(Sd.)
(In Native Character)

On the back it is endorsed—

Account No. 417. Account No. 417.
Dated 22nd September 1905.

AGREEMENT BETWEEN

The Sunlight Trading Co.
and
Mr. Hayat Mustan ... ... *Hirer.*
Mr. Moosa Mia and Ma Te ... *Guarantor.*

Agreement for Hire and Guarantee of a Sewing Machine.

No. of Machine—$\frac{136742}{522167}$.
Style of Machine—C. B. Central Bobin, complete
Price—Rs. 110.
Amount paid on hiring—Rs. 20.

The learned counsel for the applicant asked the Court to construe it as a similar one was construed by Mr. Burgess, Judicial Commissioner of Upper Burma, in the case of *Singer Manufacturing Co.* v. *Elahi Khan* (1). I have read that case and also the cases of *Helby* v. *Matthews* (2) and *Lee* v. *Butler* (3).

The agreement in this case certainly seems to me to be one by which the Sunlight Trading Company agreed to sell, and Hayat Mustan agreed to buy, a sewing-machine for Rs. 110, payment to be made by a payment of Rs. 20 down and then by nine monthly instalments of Rs. 10 each, and I am of opinion that it is much more than a mere contract of hiring. The mere fact that the man placed in possession of the machine is called the hirer cannot suffice to make him a hirer and nothing else. The terms of the contract must be looked at as a whole so as to see what it really means and what was the intention of the parties when it was entered into. It seems to me to have been clearly the intention of the parties that not more than Rs. 110 were to pass under it, and that then the machine was to become Hayat Mustan's property. The respondent relies on clause (*b*) of his agreements,

(1) 2 U.B.R. (1892—96), 291. (2) (1894) L.R., 2 Q.B., 262.
(3) (1893) L.R., 2 Q.B., 318.

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and pleads that the hirer could only become the purchaser provided the payments of hire were regularly and duly made, and that if the hirer failed to pay regularly in advance the whole transaction would be treated as on hire without any option of purchase. Do these words turn the agreement into one simply of hire as the monthly payments were not regularly made? and what do they mean? May they not be held to refer to the regular payment of the nine monthly instalments, so that, if there was failure to pay regularly, the owner could treat the transaction as purely one of hire? and is it not reasonable to assume that such was the intention of the parties? With regard to the non-payment of the monthly advances the agreement contemplates time and indulgence and the hirer agreed that time and indulgence should not alter the agreement. In this connection the guarantor agreed that any time granted to the hirer, or any indulgence, should not prejudice the owner's rights or relieve the guarantor from his guarantee.

Looking at the facts of this case, was not time at once given to the hirer to pay? He gets the machine on the 22nd September 1905, and the plaintiff's case is that nothing is paid until the 22nd April 1906, and nothing afterwards. Then in April 1909, the respondent asks for Rs. 330 or 33 months' rent. Is it likely that the hirer would have rendered himself liable for such a large sum, when he could have possessed the whole machine for a further payment of Rs. 80? Such being so, did he understand the words "if he failed to pay regularly in advance the whole transaction would be treated as one on hire without any option to purchase" to have the meaning that it is now urged that they have. I am unable to hold that he did so understand them. There is nothing to show that the respondent warned him that he considered they had this meaning before bringing the suit. They appear in the middle of a fairly complicated document, and may be taken to refer to the nine monthly payments to be made to become the purchaser. Punctual payment is not insisted on from the beginning and the agreement contemplates time and concession.

I am therefore of opinion that the agreement is simply one of an agreement to sell and buy a sewing-machine for Rs. 110 by a payment down and by monthly instalments afterwards and that for its breach the respondent is only entitled to damages.

As regards what those damages should be, if Hayat Mustan had carried out his contract, the respondent would have received the Rs. 90 due on the agreement by the 22nd June 1906, and then Hayat Mustan would have owned the machine. Instead of Rs. 90 by that date the respondent had only received Rs. 10. He is therefore Rs. 80 out of pocket by Hayat Mustan's default; but he has been out of pocket to this extent since that date and so has lost the use of it. If Rs. 30 be allowed on that account, which will be over 10 per cent. per annum for a period from June 1906 to April 1909, when the suit was filed, that will be sufficient in my opinion. But against this must be set off the value of the machine

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which he has recovered, and which he valued at Rs. 15 during the trial. So I allow a total sum of Rs. 80 *plus* Rs. 15, or Rs. 95.

I therefore set aside the decree of the lower Court and instead thereof decree that the applicant do pay the respondent Rs. 95. Each party will pay their own costs in all Courts.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

Criminal Appeal No. 109 of 1910.

KING-EMPEROR *v.* HAMYIT.

May 30th, 1910.

Godfrey, Assistant Government Advocate—for the King-Emperor.

Definition of Arms—Dashe-úpyat—Arms Act, s. 4.

A *dashe-úpyat* of the usual type is primarily intended for domestic and agricultural purposes and is not an arm within the meaning of the Arms Act. It is the intention of the manufacturer and not of the possessor of a weapon as to the use to which it is to be put which determines whether a weapon is an arm or not.

Parlett, J.—The weapon in this case is a *dashe-úpyat* of the usual type. It is contended that it is an arm because it was primarily intended for purposes of offence and defence. Some of the witnesses say that they keep a *dashe* of this pattern in the house for protection, though it can be used for light domestic work. But none of these witnesses is of the cultivating or working class. It is the intention of the manufacturer and not of the possessor of a weapon as to the use to which it is to be put which determines whether a weapon is an arm or not.

In my experience *dashes* of this kind are in use in many villagers' houses for splitting wood and bamboo and for general domestic purposes, for which they are handier than the ordinary *dama*. They are also not infrequently carried by cultivators in the jungle for clearing light undergrowth and weeds. No doubt they are handy for purposes of offence and defence, but so are certain toddy-cutting knives which from their appearance alone might be considered daggers.

In my opinion the weapon referred to in this case was primarily intended for domestic and agricultural purposes, and is not an arm within the meaning of the Arms Act. I would therefore dismiss this appeal.

Fox, C.J.—I concur.

Full Bench—(Civil Reference).

Civil Reference No. 2 of 1910.

March 7th, 1910.

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, Mr. Justice Ormond, Mr. Justice Twomey, Mr. Justice Robinson, and Mr. Justice Parlett.

KALEE KUMAR NAG *v.* { 1. M. MAYAPPA CHETTY. 2. M. MUTHIA CHETTY. 3. P. R. PERIACARUPEN CHETTY.

Agabeg—for appellant (plaintiff).

Chari—for respondents (defendants).

Mortgage—Redemption—Subject-matter of suit—Value of subject-matter—Jurisdiction—Lower Burma Courts Act, 1900, s. 2—Suits Valuation Act, 1887, s. 8.

The following reference was made to a Full Bench under section 11 of the Lower Burma Courts Act:—

"In a suit for redemption by a mortgagor in possession of the mortgaged property, what is the subject-matter of the suit within the meaning of clause (*h*) of section 2 of the Lower Burma Courts Act, 1900: and on what basis should the value of the subject-matter be calculated for the purpose of determining the jurisdiction of the Court competent to try the suit?"

Held (Ormond, J., dissenting),—that in a suit for redemption by a mortgagor in possession of the mortgaged property the subject-matter of the suit within the meaning of clause (*h*) of section 2 of the Lower Burma Courts Act, 1900, is the mortgage, and that the amount of the principal money secured by the mortgage determines the jurisdiction of the Court competent to try the suit.

Maung Kyaw Dun v. *Maung Kyaw and another*, (1901) 1 L.B.R., 96, distinguished.

Janki Das v. *Badri Nath*, (1880) I.L.R. 2 All., 698; *Gobind Singh* v. *Kallu and others*, (1880) I.L.R. 2 All., 778; *Bahadur* v. *Nawabjan*, (1881) I.L.R. 3 All., 822; *Mana Vikrama, Zamorin Maharaja Bahadur of Calicut* v. *Surya Narayana Bhatta*, (1882) I.L.R. 5 Mad., 281; *Kubair Singh* v. *Atma Ram*, (1883) I.L.R. 5 All., 332; *Amanat Begam and another* v. *Ishajan Lal and others*, (1886) I.L.R. 8 All., 438; *Rupchand Khemchand* v. *Ralvant Narayan*, (1887) I.L.R. 11 Bom., 591; *Kondaji Bagaji* v. *Anau*, (1883) I.L.R. 7 Bom., 448; *Cotterell* v. *Stratton*, (1874) L.R. 17 Eq. C., at p. 545; *Modhusuddun Koer and another* v. *Rakhal Chunder Roy and another*, (1887) I.L.R. 15 Cal., 104; *Amritabin Bapuji and another* v. *Narubin Gopalji Shamji and another*, (1888) I.L.R. 13 Bom., 489; *Ramchandra Ba Ba Sathe* v. *Janardan Apaji*, (1889) I.L.R. 14 Bom., 19; *Vasudeva* v. *Madhava and others*, (1892) I.L.R. 16 Mad., 326; followed.

The following reference was made to a Full Bench by the Chief Judge and Mr. Justice Parlett:—

Parlett, J.—The plaintiff's case as set out in the plaint is that on 12th August 1905 he mortgaged three pieces of land to defendants for Rs. 800 and sixty-two head of cattle for Rs. 1,000, the plaintiff retaining possession of the mortgaged property. That he has since then paid to the defendants in cash and by delivery of goods and by the performance of services, a larger sum than is due as principal and interest on the mortgages. He therefore prays that accounts may be taken; that a declaration may be

made that the mortgage debt on the cattle has been fully discharged; that he may be allowed to redeem the three pieces of land upon payment of the sum, if any, found due to the defendants, and that the defendants be thereupon ordered to execute a reconveyance and to deliver up all documents relating to the land in their possession; and that if any sum be found due to plaintiff from the defendants, that they be ordered to pay the same with interest.

The present value of the land is given as Rs. 8,000.

The suit was filed in the District Court, but the Judge returned the plaint on the ground that the value of the suit did not, *primâ facie*, exceed Rs. 1,800.

Under section 2 of the Lower Burma Courts Act the value of a suit means "the amount or value of the subject-matter of the suit."

Section 8 of the Suits Valuation Act lays down that as a general rule when court-fees are payable *ad valorem* under the Court Fees Act, 1870, the value of a suit as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same; but suits such as are referred to in the Court Fees Act, 1870, section 7, paragraphs V, VI and IX and paragraph X, clause (*d*), are made exceptions to this rule. Paragraphs V and VI refer to suits for the possession of and to enforce a right of pre-emption in respect of land, houses and gardens, and the value of such suits for the computation of court-fees is fixed either at varying multiples of the annual revenue assessed upon the land or of the nett profits arising from it, or at the market value of the land, houses or gardens, according to circumstances. The value of the subject-matter of such suits for the purposes of section 2 of the Lower Burma Courts Act would, in my opinion, be, under all circumstances, the market value of the land, houses or gardens. Paragraph X, clause (*d*), refers to suits for specific performance of awards and need not be considered in this case.

Paragraph IX refers to suits against a mortgagee for recovery of the property mortgaged; to suits by a mortgagee to foreclose the mortgage; and to suits, where the mortgage is made by conditional sale, to have the sale declared absolute. The court-fees in such suits are computed upon the principal money expressed to be secured by the instrument of mortgage. Section 8 of the Suits Valuation Act declares that the principal money so secured shall not necessarily be the value of the suit for purposes of jurisdiction, but it does not lay down what that value shall be.

In my opinion, where the mortgagee is in possession of the mortgaged property so that the success of the redemption suit involves the recovery of its possession by the mortgagor, the subject-matter of the suit may be taken to be the mortgaged property and the market value of the property will determine the jurisdiction. A similar argument will, I think, apply to suits by a mortgagee to foreclose, or to have a conditional sale declared absolute, for the effect in both cases is that the plaintiff, if he succeeds, retains possession of the mortgaged property. It is for consideration

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whether the same principle should be applied to the valuation of suits for the redemption of property still in the possession of the mortgagor. In the case of *Maung Kyaw Dun* v. *Maung Kyaw and another* (1), it was ruled that "in a redemption suit the subject-matter of the suit is the land sought to be redeemed. Therefore the actual present value of that land at the time the suit is filed must determine any question as to the Court which is competent to try the suit." In that particular case the mortgagee was in possession of the mortgaged land, and though the ruling is expressed in general terms, applicable also to a mortgage without possession, it does not appear that such a case was considered or that the ruling was intended to apply to it. If it was intended so to apply, I feel bound to respectfully dissent from it, having regard to the apparently almost unanimous views to the contrary held by other High Courts. In the case of *Janki Das* v. *Badri Nath* (2), the Allahabad High Court held that a suit for money charged on immoveable property in which the money did not exceed Rs. 1,000, though the value of the immoveable property did exceed that sum, was cognizable by a Court having jurisdiction up to Rs. 1,000. It was pointed out that though the suit was to enforce a charge upon immoveable property and therefore one for the recovery of an interest in immoveable property, still the claim was to enforce that charge only to the extent of the debt due and no further.

Similar reasoning would, I think, apply to a suit brought to extinguish a charge upon immoveable property. In *Gobind Singh* v. *Kallu and others* (3), the plaintiffs sued for possession of immoveable property alleging that they had mortgaged it to the defendants, and that the mortgage debt had been satisfied out of the profits of the property. The same Court held that the "subject-matter in dispute" was the mortgage, and the mortgagee's rights under it; and that the value of the mortgagee's interests in the property and not the value of the mortgaged property itself determined the question of jurisdiction.

The same principle was followed in *Bahadur* v. *Nawabjan* (4) decided by the same Court.

In *Mana Vikrama, Zamorin Maharaja Bahadur of Calicut* v. *Surya Narayana Bhatta* (5), a question somewhat similar to that arising in the present case was considered, and two out of five Judges of the Madras High Court concurred in the opinion that "in suits for redemption, the subject-matter is the charge, not the land, which may or may not be in the possession of the mortgagor, and to which his title may or may not be disputed." The opinion appears to have been *obiter dictum* and was not dissented from by the other Judges. Reference is, however, made to the orders passed in review by a full Bench of three Judges in

(1) (1901) 1 L.B.R., 96.
(2) (1880) I.L.R. 2 All., 698.
(3) (1880) I.L.R. 2 All., 778.
(4) (1881) I.L.R. 3 All., 822.
(5) (1882) I.L.R. 5 Mad., 284.

2nd Appeal No. 201 of 1878 in which the following passage occurs :—

> The (Court Fees) Act imposing fees on suits and other proceedings according to the value of the subject-matter declares that in suits for the possession of lands, houses and gardens, the value of the subject-matter shall be ascertained in the manner therein prescribed, but it distinguishes between suits brought simply for possession of lands, etc., and suits brought against mortgagees for the recovery of the property mortgaged, and declares that the fees payable under the Act shall be computed according to the principal money secured by the instrument of mortgage. It is therefore clear that the framers of the Court Fees Act regarded the subject-matter of a suit for redemption as being not the property mortgaged but the charge that existed on it. Is not this view correct? The existence of the charge is of the essence of the claim in such suits, the raising of any question as to the title to the land is an incident.

In *Kubair Singh* v. *Atma Ram* (6), it was held that where the purchaser of the equity or redemption of certain land sued to redeem the same, and made the mortgagor and vendor of the land *pro formâ* defendant the value of the subject-matter of the suit was not the market value of the land, but the amount of the mortgage money. The same Court held in *Amanat Begam and another* v. *Bhajan Lal and others* (7) that the subject-matter in dispute in suits for recovery of mortgaged property is the amount of the mortgage debt and the mortgagee's rights which were sought to be paid off.

In *Rupchand Khemchand* v. *Balvant Narayan* (8), the Bombay High Court, following a previous decision in *Kondaji Bagaji* v. *Anau* (9), adopted the rule laid down in *Cotterell* v. *Stratton* (10), that the proper valuation of a suit for redemption is the amount remaining due on the mortgage.

These decisions were all come to prior to the 1st of July 1887, the date on which section 8 of the Suits Valuation Act came into force. Since that date there have been the following decisions.

In *Modhusuddun Koer and another* v. *Rakhal Chunder Roy and another* (11), the Calcutta High Court held that in a suit brought to test whether property which has been attached in execution is liable to pay the claim of the creditor, the amount which is to settle the jurisdiction of the Court is the amount which is in dispute, and which the creditor would receive, if successful, *viz.*, the amount due to him, and not the value of the property attached. In the following year a case somewhat similar to the present one was considered by the Bombay High Court in *Amritabin Bapuji and another* v. *Narubin Gopalji Shamji and another* (12), where it was laid down that "in a redemption suit the valuation of the subject-matter does not depend on the value of the mortgaged property. Where the mortgage itself is denied and the mortgagee does not say what

(6) (1883) I.L.R. 5 All., 332.
(7) (1886) I.L.R. 8 All., 438.
(8) (1887) I.L.R. 11 Bom., 591.
(9) (1883) I.L.R. 7 Bom., 448.
(10) (1874) L.R. 17 Eq. C., at p. 545.
(11) (1887) I.L.R. 15 Cal., 104.
(12) (1888) I.L.R. 13 Bom., 489.

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he claims in respect of the mortgage debt, the amount found to be remaining due on the mortgage, if any amount was due at the date of the suit, would represent the true valuation of the subject-matter of the suit."

In *Ramchandra Ba Ba Sathe* v. *Janardan Apaji* (13), the same Court held that in a suit upon a mortgage where the sum due upon the mortgage is unknown, what determines the value of the subject-matter of the suit is the amount of the mortgage the rights connected with which are the subject of contention.

In *Vasudeva* v. *Madhava and others* (14), the Madras High Court appears to have held almost as an axiom that the value for jurisdictional purposes of the subject-matter in a redemption suit is the amount of the mortgage debt.

The cases set out above do seem to indicate that the course of decisions has led towards the establishing of such a principle, and though I am not prepared to adopt it as applying to all redemption suits without distinction, I think it may reasonably be applied to suits which in no way affect the actual possession of the mortgaged property.

The question involved is of importance, and it seems to me desirable that it should be definitely settled by a decision of this Court.

I would therefore refer for a decision of a Full Bench under section 11 of the Lower Burma Courts Act the following question:—

"In a suit for redemption by a mortgagor in possession of the mortgaged property, what is the subject-matter of the suit within the meaning of clause (*h*) of section 2 of the Lower Burma Courts Act, 1900, and on what basis should the value of the subject-matter be calculated for the purpose of determining the jurisdiction of the Court competent to try the suit?"

Fox, C.J.—I agree in referring the above question for the decision of a Full Bench of the Court.

The opinion of the Bench was as follows:—

May 16th, 1910.

Fox, C.J., Hartnoll, J., Twomey, J., Robinson, J., and Parlett, J.—Having considered the authorities we are of opinion that in a suit for redemption by a mortgagor in possession of the mortgaged property the subject-matter of the suit within the meaning of clause (*h*) of section 2 of the Lower Burma Courts Act, 1900, is the mortgage, and that the amount of the principal money secured by the mortgage determines the jurisdiction of the Court competent to try the suit.

Ormond, J.—The subject-matter of a mortgage suit is, I think, the mortgage. The jurisdiction would therefore depend upon the "amount or value" of the mortgage. But the "amount of a mortgage" and the "value of a mortgage" are two different things. The amount of a mortgage is the amount of all principal

(13) (1889) I.L.R. 14 Bom., 19.
(14) (1892) I.L.R. 16 Mad., 326.

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moneys that have been advanced on or secured by the mortgage; whereas the value of a mortgage, for the purposes of jurisdiction, may be taken to be the amount presently due on the mortgage. If the valuation of a mortgage suit for the purposes of jurisdiction depends solely upon the amount of the mortgage, a Subdivisional Court would have jurisdiction to entertain a suit (say) for redemption in respect of a mortgage of Rs. 2,000, though the plaintiff offers to redeem upon payment of Rs. 4,000.

In my opinion the answer to the reference should be as follows :—That in a suit for redemption by a mortgagor in possession of the mortgaged property, the subject-matter of the suit, within the meaning of clause (*h*) of section 2 of the Lower Burma Courts Act, is the mortgage; and jurisdiction must be determined according to the amount of principal moneys advanced on or secured by the mortgage, or according to the amount due under the mortgage at the time of the filing of the suit, whichever amount is the greater.

Full Bench—(Civil Reference).

Civil Reference No. 3 of 1910.

April 25th, 1910.

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, and Mr. Justice Parlett.

1. PO SHAN
2. MA MEIK } *v.* MAUNG GYI.

Villa—for appellants (defendants).

Maung Kin—for respondent (plaintiff).

Official Receiver—Assignment by, outside terms of appointment—Invalidity of suits—Hand of the Court—Civil Procedure Code, 1882, s. 503.

The following reference was made to a Full Bench under section 11 of the Lower Burma Courts Act :—

"If a Receiver appointed under section 503, Civil Procedure Code, 1882, and empowered to bring suits for the collection of rents due to the estate of a deceased person, assigns for valuable consideration his right to collect such rents, is the assignee entitled by virtue of such assignment to maintain a suit against the persons by whom such rents are payable?"

Held,—that a Receiver is merely an officer of the Court: and as such acquires no proprietary rights or interest in the property of which he is appointed Receiver. He cannot therefore validly assign any title to it to any other person and his assignee cannot maintain a suit in respect of the property assigned.

The following reference was made to a Full Bench by Mr. Justice Twomey under section 11 of the Lower Burma Courts Act, 1900 :—

In January 1907 Mr. P. C. Sen was appointed by this Court (Original Side) Official Receiver of the estate of Ma Ket deceased. The order authorised him to collect the debts and rents due to the estate and conferred power on him to file suits for ejectment of tenants and for the recovery of all debts, rents and other moneys due or belonging to the estate.

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In July 1907 Mr. Sen by a registered instrument and for valuable consideration assigned to Maung Gyi, plaintiff-respondent, the right of collecting the rents of certain paddy land belonging to the estate. The defendant-appellants who were occupying part of the lands refused to pay and Maung Gyi then sued them as assignee of the Official Receiver. The rents were payable in kind and the amount which Maung Gyi sued for was the value of the paddy at the market rate *less* the amount paid as revenue by the defendant-appellants.

The Subdivisional Court dismissed the suit on the ground that the Receiver had no authority to assign the claim. On appeal by the plaintiff-respondent the Divisional Court reversed this decision holding that the Receiver acted within his rights. The Receiver had been empowered to recover rents falling due, and the learned Divisional Judge held that "to assign a debt is only one way of collecting it." He therefore gave a decree for Rs. 1,332 and costs. How that amount is arrived at is explained in the first (*ex-parte*) judgment passed by the Divisional Court on the 30th June (page 24 of the Subdivisional Court's record).

The only question raised in this second appeal is whether the view taken by the Divisional Court as to the maintainability of the suit is correct. There appears to be no definite authority on which to rely. On the one hand, it is clear that a Receiver has only such powers as the Court may choose to give him, and since the Court in this instance (*vide* Civil Regular Suit No. 180 of 1906 of the Chief Court, Original Side) empowered him only to sue for rents, etc., it is contended that he had no power to transfer any such actionable claim to another person. At pages 208 and 209 of Woodroffe's work on the law relating to Receivers the author cites various rulings showing the extent to which a Receiver may employ other persons to assist him in carrying out his duties. It is explained that if a Receiver delegates or entrusts to others duties which he ought to perform himself, and loss to the estate ensues, the Receiver is bound to make it good. But there is nothing, on the other hand, to show that acts done by a Receiver for the purpose of getting in the moveable property of the estate are necessarily void and of no effect, merely because the acts are not covered by the express terms of the order appointing him. Seemingly, he is amenable to the Court and the estate only, and his acts in so far as they affect outside parties do not appear to be invalid. The effect would no doubt be different if he did something which the order appointing him expressly prohibited. For example, if the order of appointment in the present case expressly authorized him to file suits for rents in his own name only, then he would presumably have no authority to assign his claim. But no such limitation is to be gathered from the terms of the order in this case. The intention was apparently to confer on the Receiver "all such powers as to bringing and defending suits . . . . . and for the collection of rents, etc., ... as the owner himself had"

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[*see* section 503 (*d*) of the old Code]. It seems clear that the deceased owner could have assigned her claim for paddy rents to another person because such claim constituted part of her "property" (section 6, Transfer of Property Act), and in the absence of any express or implied prohibition by the Court appointing him it should perhaps be held that the Receiver also, who in virtue of his office was in temporary possession of the estate, had inherent authority under his appointment order to assign such a claim. It may be that he ought not to have assigned the claim without getting the sanction of the Court, and that as he neglected to do so he acted at his peril and rendered himself liable for any loss that the estate might suffer in consequence of his act. But that is a very different thing from holding that the assignment was void and inoperative. It seems to me that it would be void only if it were "unlawful" in the sense of section 23, Contract Act, and I cannot see that the assignment falls under any of the heads of unlawful consideration or object specified in that section. It was not "forbidden by law," nor would it, "if permitted, defeat the provisions of any law." It was clearly not "fraudulent" and did not involve or imply injury to others. It was not "immoral" or "opposed to public policy." In fact in this particular case the assignment was certainly a convenient means of realizing part of the assets of the estate.

The point is not free from doubt, and as it is also one of some importance, I think it may with advantage be referred for the decision of a Bench of this Court.

I therefore refer the following question under section 11 of the Lower Burma Courts Act, 1900:—

"If a Receiver appointed under section 503 of the Code of Civil Procedure, 1882, and empowered to bring suits for the collection of rents due to the estate of a deceased person, assigns for valuable consideration his right to collect such rents, is the assignee entitled by virtue of such assignment to maintain a suit against the persons by whom such rents are payable?"

For the reasons stated above I incline to the opinion that the question should be answered in the affirmative.

The opinion of the Bench was as follows:—

June 8th, 1910.

Fox, C.J.—In my opinion the question referred should be answered in the negative.

The status of a Receiver is merely that of an officer of the Court. He is sometimes referred to as the "hand of the Court."* He acquires no proprietary rights or interest in the property of which he is appointed Receiver.† Having no title to the property he cannot convey or assign any title to it to any other person. The Court may direct him to sell property, but in such case he merely carries out the Court's order.

Hartnoll, J.—I concur.

Parlett, J.—I concur.

* Woodroffe on Receivers, 2. | † Woodroffe on Receivers, 3.

Special Civil 2nd Appeal No. 114 of 1909.

July 6th, 1910.

Before Mr. Justice Hartnoll and Mr. Justice Parlett.

TET TUN, BY HIS GUARDIAN *AD LITEM* MA E THA } *v.* { 1. MA CHEIN. 2. SAN PO.

S. N. Sen—for appellant (plaintiff).

Ormiston—for respondents (defendants).

Buddhist Law : Adoption—Keittima—Apatittha—Differentiation—Rights of a keittima and an apatittha son.

A sued the heirs of B for certain properties on the ground that he was the adopted son of C—the brother of B—and C's wife.

After B and his wife had taken over the property of C and his wife on the death of the latter, A signed an agreement (invalid, as A was a minor) renouncing his claims to the property on payment of Rs. 1,000 in cash. On consideration of the manner in which A was treated by C as well as of the probabilities of the case, it was *held* that the adoption was *keittima* and not *apatittha ;* and that therefore A's claim to the property of his adoptive parents was valid.

In this case Maung Tet Tun by his guardian Ma E Tha sued Ma Chein and Maung San Po for a decree for certain properties. He alleged that his natural parents were Maung Kyaw Dun Zan and Ma E Tha, that when he was about two years old his mother died, whereupon he was adopted by Ma Kywe, his mother's younger sister, and her husband Maung Po Nyun, as their *keittima* son, that they had no child of their own, that he then lived with them, that they sent him to school and initiated him into the priesthood, and that they died in the year 1269 B.E. He further alleged that Maung To, Maung Po Nyun's elder brother, and his wife Ma Chein then came and took over the property of his adoptive parents and that Maung To subsequently died. He also alleged that, before Maung To died, the latter first gave him two bullocks valued at Rs. 60, and went on to say in paragraph 6 of the plaint: "As he was not on good terms with Maung To he went away to his aunt Ma E Tha's house and lived there. That plaintiff then asked for the properties left by his adoptive parents from the said Maung To. That thereupon the said Maung To said that if plaintiff would be satisfied with Rs. 1,000 and execute a deed of agreement not to lay the matter before the arbitrators or file a suit in Court he would pay plaintiff the said Rs. 1,000. That accordingly plaintiff executed a deed of agreement in the presence of *lugyis* and received Rs. 1,000 from Maung To. That therefore the plaintiff had already received Rs. 1,000 and two bullocks valued at Rs. 60, *i.e.*, Rs. 1,060 in all." He therefore now sues Ma Chein and her son San Po for the property of his adoptive parents after deducting a sum of Rs. 1,400, which consisted of the Rs. 1,060 mentioned above and other items into which it is not necessary to enter.

The defendants in their written statement alleged that the allegation that Ma Kywe and Maung Shwe Nyun adopted the

plaintiff with right of inheritance was not true, that the said Ma Kywe and Maung Shwe Nyun said definitely in the presence of *lugyis* that they were not desirous of bringing up the plaintiff with right of inheritance, but that they would only bring him up till he reached the age of discretion, that as the plaintiff was thus brought up by the deceased he was not a *keittima* son, but that he is merely a *tilika* son brought up and adopted casually. They admitted that Ma Kywe and Maung Shwe Nyun sent the plaintiff to school at their own expense, and initiated him into the priesthood, and that after this he lived with them till they died. Paragraph 6 of their written statement is as follows: "That as the plaintiff is a *tilika* son of the deceased, Maung To gave him in the month of *Tazaungmôn* last a paddy land that had been accepted in mortgage for Rs. 600, three bullocks, a pair of gold earrings, and a *cheitlôngyi* and Rs. 50, cash out of the estate left by the deceased in the presence of plaintiff's father Nga Kyaw Dun Zan, his uncle Nga Shwe The and other *lugyis*. That as the plaintiff as well as his father and uncle agreed to it they took the said properties in full satisfaction of their claim. That, however, when the month of *Nayôn* came plaintiff and his father Nga Kyaw Tun Zan came and said to Maung To that they would rather take Rs. 1,000 cash than the properties that had already been given to them. That on this account Maung To borrowed Rs. 1,000 from other persons and gave it to the plaintiff, who then executed the document filed herewith with consent." The document is to the following effect: "I do not want to take from the inheritance left by father Maung Shwe Nyun and mother Ma Kywe the property, namely, the three pieces of paddy land, a house, seven bullocks, a pair of gold earrings and some paddy, the value of which is unknown. I want only Rs. 1,000 in cash. So I execute this document on a Rs. 2 stamp paper in witness that I shall be satisfied with this Rs. 1,000, and that I shall not appeal to arbitration by *lugyis* nor shall I go to a Court of law about this matter." In paragraph 11 of the written statement the respondents make a reference to section 25 of Volume X of the Manukyè and state that they are also entitled to their shares.

As it has been found Maung Tet Tun was a minor when he executed the document set out above it is not binding on him.

The Subdivisional Court found that Maung Tet Tun was a *keittima* son of Maung Po (Shwe) Nyun and Ma E Tha and gave him the decree that he prayed for. The Divisional Court, on the other hand, found that he was only an *apatittha* or casually adopted son, and so only gave him a half share in the estate. This decree is now appealed against, and the sole point for decision is whether Maung Tet Tun must be held to be the *keittima* or *apatittha* son of Maung Shwe Nyun and Ma Kywe. The *keittima* son has the full rights of inheritance of a natural son, whereas the *apatittha* son has only partial rights of inheritance. The *apatittha* son has nevertheless rights of inheritance,

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and the written statement of the respondents is inconsistent in this respect in the passage where it says that Ma Kywe and Maung Shwe Nyun said definitely that they were not desirous of bringing up Maung Tet Tun with right of inheritance. No doubt the burden of proof lies on Maung Tet Tun to prove that he was a *keittima* son, and the question is whether he has done so. It is clear that he was with Ma Kywe and Maung Shwe Nyun from about the age of two years until they died. It is admitted that they sent him to school and initiated him into the priesthood at their expense. Maung Tet Tun's natural father Maung Kyaw Dun Zan, his aunt Ma Tha Ya, and one Maung Talôk, who describes himself as a cooly, state that he was adopted with the right of inheritance. Again there is the treatment that he received from Maung To after the death of Maung Shwe Nyun and Ma Kywe. Maung To allowed that he had rights of inheritance and tried to satisfy his claim with the payment of Rs. 1,000.

The respondents produce no evidence that Maung Shwe Nyun and Ma Kywe stated that they were not desirous of bringing up Maung Tet Tun with the right of inheritance, but that they would only bring him up until he reached the age of discretion. Further, is it likely that his father would have parted with him if he was not to be adopted as a *keittima* son? Is it likely that he would have been content that his son should only have the status of an *apatittha* son? Moreover, looking at the definition of an *apatittha* son in the Digest of Buddhist Law the term would seem to refer to a foundling, a child casually adopted whether its parents and relatives are known or not, a child casually adopted and brought up in the family of the adoptive parents being abandoned by its natural parents, a child casually adopted through compassion, a destitute child casually adopted. The principle underlying the definition of the term seems to be that an *apatittha* adoption is a compassionate one which takes place in consequence of the child being destitute with no one to maintain it through abandonment by, or the decease of, its natural parents or some such similar cause. In this particular case such circumstances did not exist, as Maung Kyaw Dun Zan, the natural father of Maung Tet Tun, was alive when his mother died and able to take care of him. There is no suggestion made that he abandoned or neglected his child on the mother's death. It seems to me that there is no ground for holding that Maung Tet Tun was an *apatittha* son. He was either a *keittima* son, or was not an adopted son at all. The direct testimony as to his adoption is much strengthened by the admitted way in which Maung To treated Maung Tet Tun. He treated him as an heir. It is also confirmed by the manner in which Maung Tet Tun was treated by Maung Shwe Nyun and Ma Kywe and the fact that he lived with them from about the age of two years until they died. I therefore believe the direct testimony as to the adoption. Apparently Maung Shwe

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Nyun and Ma Kywe had no children, and when Ma Kywe's sister died, with the consent of the father they adopted her child. For the reasons already given I must hold that it was a *keittima* adoption.

I would accordingly allow this appeal, set aside the decree of the Divisional Court and restore that of the Subdivisional Court, with costs in all Courts.

Parlett, J.—I concur.

Before Mr. Justice Hartnoll.

Special Civil 2nd Appeal No. 108 of 1909.

AUNG BAN *v.* NAN KO.

July 26th, 1910.

S. C. Dutta—for appellant (defendant).

Kyaw Din—for respondent (plaintiff).

Mortgage—Suit for redemption—Payment of decretal amount after decision on appeal—Discretion of Court to postpone date fixed for payment on adequate grounds—Transfer of Property Act, 1882, ss. 92, 93.

A sued B to redeem certain land and obtained a decree ordering the payment of redemption money in March 1908. B appealed; but the appeal was decided against him on 23rd September 1908. On the 29th September 1908 A paid the redemption money explaining that the delay was due to the filing of the appeal. B objected and argued that A was debarred from enforcing the decree and that the right to redeem was extinguished under the provisions of section 93, Transfer of Property Act.

Held,—that the proviso to section 93 gives the Court power to extend the time for payment, and that it applies not only within the period fixed under section 92 but to an application made after that time has expired.

Further, that the period extends up to the time of the passing of any order of the nature contemplated by section 93. A's application to pay the money in September 1908 was therefore not out of date nor were A's reasons for delay inadequate.

Vallabha Valiya Rajah v. *Vedapuratti*, (1895) I.L.R. 19 Mad., 40, dissented from.

Nandram v. *Babaji*, (1897) I.L.R. 22 Bom., 771, followed.

In this case Ma Nan Ko sued Maung Aung Ban to redeem certain land, and on the 9th October 1907 obtained a decree for redemption. The decree ordered that the payment of the redemption money be made during the month of March 1908, and it was further ordered that if payment be not made as directed, or within such further time as the Court might allow, Maung Aung Ban should be at liberty to apply for an order for the sale of the mortgaged land. Maung Aung Ban appealed against this decree, and the appeal was decided on the 23rd September 1908. It was dismissed. Ma Nan Ko did not deposit the redemption money until the 29th September 1908, which was some six months later than the date fixed by the decree. Maung Aung Ban then objected to redemption being allowed on the ground that Ma Nan Ko had not deposited the redemption money within the time allowed by the terms of the decree, and that therefore she was debarred from redeeming the land. It was explained to the Subdivisional Judge that the delay in the payment of the redemption

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money was due to the appeal having been filed and to the result of it not being known until the 23rd September 1908. The case of *Vallabha Valiya Rajah* v. *Vedapuratti* (1) was cited in favour of Maung Aung Ban, and the Subdivisional Judge, being of opinion that Ma Nan Ko was debarred from enforcing the decree and that her right to redeem was extinguished under the provisions of section 93 of the Transfer of Property Act, dismissed her application. On appeal to the Divisional Judge he found that the order of the Subdivisional Judge was wrong, and stated that either time should have been allowed within which to redeem, or that Maung Aung Ban could have applied for sale. He put Maung Aung Ban's counsel to an election as to whether he desired an order for sale or whether he consented to time being allowed to Ma Nan Ko to pay the redemption money. Counsel elected to take the money, and the Divisional Judge passed an order that the money paid in Court be paid to Maung Aung Ban and that before the end of March 1909 he was to retransfer the land to Ma Nan Ko. This further appeal is now laid by Maung Aung Ban on the grounds that the Divisional Judge erred in holding that Ma Nan Ko was entitled to enforce her decree, and that her petition should have been rejected. The case cited before the Subdivisional Judge is in his favour; but I am not satisfied that it expresses a correct view. I incline to the view taken by the Bombay Court in the case of *Nandram* v. *Babaji* (2). There seems to me to be no doubt that the decree of the Subdivisional Judge of the 9th October 1897 was of the nature of a decree *nisi*. To make it absolute action of the nature of that described in section 93 of the Transfer of Property Act had to be taken. Though sections 92 and 93 of the Transfer of Property Act were not in force in the locality where the land to be redeemed is situated, their principles must be followed in mortgage suits. The proviso to section 93 gives time to the Court to extend the time for payment, and it seems to me that the proviso applies not only to an application made within the period fixed under section 92, but to an application made after that time has expired. Looking at the paragraph preceding it I am of opinion that it extends up to the time of the passing of any order of the nature contemplated by the section. In this view the application of Ma Nan Ko to pay the money subsequent to March 1908 was not out of date. It remains to see whether her reason for non-payment within the period allowed was adequate. The appeal was certainly pending to within a few days of the payment by her, and it was not an appeal by her but by Maung Aung Ban. I think that it was reasonable to enlarge the time for payment under the circumstances. There is therefore, in my opinion, no reason to interfere with the order of the Divisional Judge, and I dismiss this appeal with costs.

(1) (1895) I.L.R. 19 Mad., 40.
(2) (1897) I.L.R. 22 Bom., 771.

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, and Mr. Justice Twomey.

Criminal Reference No. 43 of 1910.

Sept. 8th, 1910.

PO THAUNG *v.* KING-EMPEROR.

Godfrey, Assistant Government Advocate—for the Crown.

Offences committed on the High Seas—Native Indian Subjects—Jurisdiction of Courts in India—Law to be applied—Indian Penal Code—English Law—21 and 22 Vict., Chap. 106—Indian Penal Code, ss. 2, 3.

Nullity of proceedings—Sanction of Local Government—Definition of territory—Code of Criminal Procedure, s. 188.

The following reference was made to a Full Bench under section 11, Lower Burma Courts Act:—

1. In trying Native Indian subjects for committing offences on the high seas, is the Indian Penal Code or the law of England to be applied as the substantive law governing the case?

2. Is the trial of a Native Indian subject alleged to have committed an offence on the high seas void without the sanction of the Local Government under section 188 of the Code of Criminal Procedure, 1898?

Held,—(1) that a Court of Criminal Justice in British India dealing with a Native Indian subject of His Majesty for an offence alleged to have been committed on the high seas is bound to apply the provisions of the Indian Penal Code to the act or acts alleged against him;

(2) that the word "territory" as used in section 188 of the Code of Criminal Procedure can refer only to territories of any Native Prince or Chief in India and does not include the high seas. The trial of a native Indian subject in the circumstances stated in the second question is therefore not void for want of the sanction of the Local Government.

Queen-Empress v. *Sheik Abdool Rahiman*, (1889) I.L.R. 14 Bom., 227; *King-Emperor* v. *The Chief Officer of the S.S. "Mushtari,"* (1901) I.L.R. 25 Bom., 636; *Queen-Empress* v. *Barton*, (1889) I.L.R. 16 Cal., 238; Criminal Law of India, p. 312, 3rd Edition, 1904 (J. D. Mayne); *The Queen* v. *Thompson*, (1867) 1 Ben. L.R., O. Cr., 1; *Reg.* v. *Elmstone*, (1870) 7 Bom. H.C.R., Cr., 89; *Queen-Empress* v. *Gunning*, (1894) I.L.R. 21 Cal., 782; *Reg.* v. *Kastya Rama*, (1871) 8 Bom. H.C.R., Cr., 63; *The Queen* v. *Keyn*, (1876) L.R. 2 Ex. Dn., 63; referred to.

The following reference was made to a Full Bench by Hartnoll and Twomey, JJ., under section 11 of the Lower Burma Courts Act, 1900:—

Twomey, J.—The present case is clearly covered by the English Statutes which confer on Indian Courts jurisdiction for dealing with offences committed at sea. The offence was murder, punishable in England as in India with death, and was committed on a British ship on the high seas by a Native Indian subject (whether within or without "territorial waters" seems immaterial). The Tenasserim Sessions Court had jurisdiction and authority to try, hear, determine and adjudge the offence as *if it had been committed within the limits of the Amherst District* (Section 1 of 12 and 13 Vict., Chap. 96, read with 23 and 24 Vict., Chap. 88).

Under section 2 of 12 and 13 Vict., Chap. 96, it was provided that offences tried under that Statute should be *punished* as if the offence were committed, enquired into, tried, determined and adjudged in England. But this proviso was rendered ineffectual

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by the Statute 37 and 38 Vict., Chap. 27, which lays down that the punishment is to be such as might be inflicted if the offence had been committed within the local jurisdiction of the trying Court. Subsequently section 2 of 12 and 13 Vict., Chap. 96, was repealed altogether by a Superannuated Laws Repeal Act (54 and 55 Vict., Chap. 67).

Criminal law may be considered as consisting of two parts—the law of procedure and the law of penalties. I think it may reasonably be argued that by the Statute 12 and 13 Vict., Chap. 96, and 23 and 24 Vict., Chap. 88, it was intended to apply the Indian law of Procedure, including the law of Evidence, to cases like the present, while it was intended by the latter Statute 37 and 38 Vict., Chap. 27, to apply the substantive law of penalties in force in India, *i.e.*, the Penal Code.

This view appears to be in accordance with the Bombay High Court decisions in *Queen-Empress* v. *Sheik Abdool Rahiman* (1) and *King-Emperor* v. *The Chief Officer of the S.S. "Mushtari"* (2). The analogous case of *Queen-Empress* v. *Barton* (3) may also be referred to as indicating that in trying persons under Admiralty jurisdiction the ordinary practice of local Courts is to be followed.

At the same time there is much to be said for the view that the substantive law to be administered under Admiralty jurisdiction is still the law of England and not the law of India. The jurisdiction was formerly exercised under Statutes of Will. III and Geo. III by Special Commissioners appointed for the purpose, and the preamble of the Statutes 12 and 13 Vict., Chap. 96, expressly refers to those earlier Statutes. Thus it may be contended that the jurisdiction transferred from the Special Commissioners to the Colonial (and afterwards the Indian) Courts was the jurisdiction to try offences which had formerly been triable only by the Special Commissioners. Those offences were offences created by the English law, and [in the words of Mr. J. D. Mayne (4)] "if the facts charged constitute no offence punishable in England, or an offence of a different character, the law of England must be looked to, and not that of the Colony" (or of India). If this view be correct, then it should no doubt be held that section 3 of the Statute 37 and 38 Vict., Chap. 27, does not affect the substantive penal law at all, but merely applies to the English Penal law the scale of punishments provided by the Indian Penal Code. The point dealt with above is not of vital importance in the present case, for there can be no doubt that the facts charged against the appellant, Po Thaung, constitute the offence of murder at English law as well as murder under the Indian Penal Code. But it is nevertheless desirable to have a definite decision as to what substantive law—the Indian Penal Code or the English

(1) (1889) I.L.R. 14 Bom., 227.
(2) (1901) I.L.R. 25 Bom., 636.
(3) (1889) I.L.R. 16 Cal., 238.
(4) Criminal Law of India, p. 312, 3rd Edition, 1904.

law—should be applied by the Criminal Courts in trying offences under the Statute 12 and 13 Vict., Chap. 96, or under section 686 of the Merchant Shipping Act, 1894.

As regards section 188 of the Code of Criminal Procedure, 1898, it seems doubtful whether this section was intended to apply at all to offences committed on the high seas. I cannot find in any reported case that the section has been so interpreted. It appears probable that all reference to the high seas was advisedly omitted from section 188, because it was recognized that offences committed at sea were already fully provided for under the English Statutes conferring Admiralty jurisdiction on the Indian Courts.

The section as it stands, however, is certainly wide enough to cover offences committed on the high seas and, as my learned colleague points out, the Statute 32 and 33 Vict., Chap. 98, expressly empowered the Indian Legislature to make laws and regulations for Native Indian subjects "without and beyond as well as within" British India. It may also be observed that if section 188 is applied to offences committed on high seas it is beyond question that the substantive law to be applied to British Indian subjects is the Indian Penal Code. But it appears to me that no Indian Legislature can derogate from the authority of the already existing Statutes which confer Admiralty jurisdiction on Criminal Courts in British India. Section 188 can at most confer on the Courts a concurrent jurisdiction side by side with the jurisdiction conferred by the Admiralty Statutes.

If it is held that under the Statute 12 and 13 Vict., Chap. 96, the Indian Penal Code cannot be applied even to Native Indian subjects, it will be convenient in future for Courts trying such cases as this to obtain the sanction of the Local Government under section 188 so as to try the case under the Indian Penal Code. But the effect of not obtaining such sanction can, in my opinion, only be to leave the Statute 12 and 13 Vict., Chap. 96, to its operation in the particular case which has to be tried. And I would hold that this is the only effect of the omission to obtain sanction of the Local Government in the present case.

The questions which I would refer to a Full Bench are therefore as follows:—

(1) Is the trial in the present case void for want of sanction of the Local Government under section 188 of the Code of Criminal Procedure, 1898?

(2) In trying Native Indian subjects for offences committed on the high seas, is the Indian Penal Code or the law of England to be applied as the substantive law governing the case?

Hartnoll, J.—Maung Po Thaung has been found guilty of murder under section 302 of the Indian Penal Code for causing the death of one Nga To on the night of the 15th December last, and has been sentenced to death. He appeals against the conviction. The murder is alleged to have been committed on a three-masted *kattoo* or native sailing vessel, which is said at the time

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to have been anchored opposite the mouth of Ye river, which is in the Amherst District. Nga Po Thaung appears to be a native of the Tavoy District. The murder, if it took place, was committed at sea, and the first point for consideration seems to be as to the jurisdiction of the Sessions Court of the Tenasserim Division to try the case, and as to the law to be applied to it. The scene where the alleged crime is alleged to have taken place is probably within three miles of low-water mark; but there is no positive evidence on the point, and so it becomes necessary to examine the position not only on the supposition that the scene of the alleged crime was within three miles of low-water mark, but also that it might have been beyond that limit.

As regards the jurisdiction of the Sessions Court of the Tenasserim Division to try the case, there seems to me that there is no doubt that such is conferred on it by the Admiralty Offences Act, 1849 (12 and 13 Vict., Chap. 96), section 1, the Admiralty Jurisdiction Act, 1860 (23 and 24 Vict., Chap. 88), section 1, and section 686 of the Merchant Shipping Act, 1894 (57 and 58 Vict., Chap. 60). It seems probable that Maung Po Thaung was first arrested for the offence with which he is charged within the limits of the Moulmein Township, and the thought presented itself to my mind that it might be a question as to whether, if this is so, he ought not to have been tried by jury in view of the Judicial Department Notification No. 20 of the Government of Burma, dated the 29th January 1910, which directs that the trial before the Court of Session for the Tenasserim Sessions Division of all offences alleged to have been committed in the Moulmein Township of the Amherst District shall be by jury; but on consideration I am of opinion that this was not necessary in that the alleged offence did not occur within the limits of the Moulmein Township and for offences committed outside that township the procedure of the Sessions Court of the Tenasserim Division is to try accused persons with the aid of assessors. Maung Po Thaung was tried with the aid of assessors, and the Court that tried him was clearly given jurisdiction to do so by section 686 of the Merchant Shipping Act, 1894 (57 and 58 Vict., Chap. 60).

The second point for consideration is as to the law that should have been applied at the trial. Should it have been the Indian Penal Code, or the English law? I will first deal with the alleged crime on the supposition that it occurred at a distance of more than three miles from low-water mark. In the cases of *The Queen* v. *Thompson* (5), *Reg.* v. *Elmstone* (6), and *Queen-Empress* v. *Gunning* (7), it was held that in the case of offences committed on the high seas they must be treated as offences against English law; but in the case of *Queen-Empress* v. *Sheik Abdool Rahiman* (1) it was held that the Indian Penal Code was applicable to trials in India for offences committed on the high

(5) (1867) 1 Ben. L.R., O. Cr., 1. | (6) (1870) 7 Bom. H.C.R., Cr., 89.
(7) (1894), I.L.R. 21 Cal., 782.

seas. The soundness of the rulings in the cases of *The Queen* v. *Thompson* (5) and *Reg.* v. *Elmstone* (6) was not questioned; but it was held that the Courts (Colonial) Jurisdiction Act, 1874 (37 and 38 Vict., Chap. 27), had altered the law applicable. The case was one of the year 1889. In order to determine whether the English law or Indian Criminal law is applicable in the present case it is necessary to examine both English and Indian legislation. The accused person in the present case appears to be a Native Indian subject, and the *kattoo* or brig seems to have been owned by a Native Indian subject, and so to have been a British ship as distinguished from a foreign ship. The Admiralty Offences Act, 1849, already mentioned, gave the Indian Courts jurisdiction to try the case. The preamble of it is as follows:—

"After reciting that by an Act, 10 and 11 Will. III, Chap. 7, it is enacted, that all piracies, felonies and robberies committed on the sea, or any heaven, river, creek, or place where the admiral or admirals have power, authority or jurisdiction, may be examined, inquired of, tried, heard and determined and adjudged in any place at sea or upon the land in any of His Majesty's islands, plantations, colonies, dominions, forts, or factories, to be appointed for the purpose by the King's commission, in the manner therein directed, and according to the Civil law and the method and rules of the Admiralty: and that by 46 Geo. III, Chap. 54, it is enacted, that all treasons, piracies, felonies, robberies, murders, conspiracies and other offences of what nature or kind soever, committed upon the sea, or in any heaven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction may be enquired of, tried, heard, determined, and adjudged, according to the common course of the laws of this realm used for offences committed upon the land within this realm, and not otherwise, in any of His Majesty's islands, plantations, colonies, dominions, forts, or factories under and by virtue of the King's commission or commissions under the Great Seal of Great Britain, to be directed to commissioners in the manner and with the powers and authorities therein provided: and that it is expedient to make further and better provision for the apprehension, custody, and trial in Her Majesty's islands, plantations, colonies, dominions, forts, and factories of persons charged with the commission of such offences on the sea, or in any such heaven, river, creek, or place as aforesaid."

Then follows the first section of the enactment, which is as follows:—

"That if any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or any other offence, of what nature or kind soever, committed upon the sea, or in any heaven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such heaven, river, creek, or place shall be brought for trial to any colony, then and in every such case

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all Magistrates, Justices of the Peace, public prosecutors, juries, Judges, Courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the Courts of Criminal Justice of such colony."

It will be observed that the Statute is one to make further and better provision for the apprehension to custody and trial of persons charged with the commission of offences on the sea. The law applicable to British ships on the high seas is beyond doubt in the absence of special legislation the English law and it seems to me to be clear that the Statute is one that deals with procedure only, and that it provides for the trial of such acts, as are offences according to the law of England, and enacts that the procedure of the British possession to which an offender shall be brought for trial shall be followed. It substitutes for King's Commissioners the ordinary Courts in British possession; but it was never meant, in my opinion, that the penal law of the colony, where the trial takes place, should be the law by which the accused person should be adjudged. When they are on a British ship on the high seas, the law applicable to accused persons in the absence of special legislation is clearly that of England, as the ship in law is considered to be a part of England. The Courts (Colonial) Jurisdiction Act, 1874, seems to me to have made no change as to the penal law applicable. It is an enactment that merely deals with punishment and sentences. Indeed, in its proviso it assumes that the crime or offence the accused is found guilty of may not be one punishable by the law of the colony in which the trial takes place. I am therefore of opinion that the law applicable to the accused in the present case is the English penal law in the absence of express legislation to the contrary, if the crime was committed outside the three-mile limit.

And this brings me to the consideration as to whether such express legislation exists. Section 4 of the Indian Penal Code is to the following effect:—"The provisions of this Code apply also to any offence committed by any Native Indian subject of Her Majesty in any place without and beyond British India." This section repealed a former section and was made law by section 2 of Act IV of 1898 of the Indian Legislature. It is for consideration as to whether it was within the power of the Indian Legislature

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to legislate for offences committed beyond British India by Native Indian subjects; but the matter seems to have been set at rest by the Indian Councils Act, 1869 (32 and 33 Vict., Chap. 98), an Act of Parliament which enacted in section 1 as follows:—"From and after the passing of this Act the Governor-General of India in Council shall have power at meetings for the purpose of making laws and regulations for all persons being Native Indian subjects of Her Majesty her heirs and successors without and beyond as well as within the Indian territories under the dominion of Her Majesty." This provision of law by the Imperial Parliament seems to be sufficient to authorize the Indian Legislature to provide as it has done that the provisions of the Indian Penal Code shall apply to Native Indian subjects of Her Majesty without and beyond British India. It would therefore appear that if the crime in the present case took place outside the three-mile limit the law applicable to the accused person, Po Thaung, is the Indian Penal Code. And now I come to section 188 of the Criminal Precedure Code (Act V of 1898), which, among other provisions, enacts as follows:—"When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found provided that . . . the sanction of the Local Government shall be required." This provision of law seems to be authorized by the Indian Councils Act, 1869, already quoted. But there is no sanction to prosecute Maung Po Thaung under section 302 of the Indian Penal Code assuming that the murder alleged took place outside the three-mile limit, and so it is for consideration as to whether, in the absence of such sanction, assuming that the murder alleged took place outside the three-mile limit, the procedings are not null and void. The question seems to be whether, in spite of the provisions of the Admiralty Offences Act, 1849, and section 686 of the Merchant Shipping Act, 1894, the provisions of section 188 of the Code of Criminal Procedure, 1898, must prevail. In that by the Indian Councils Act, 1869, the Imperial Parliament delegated its authority to the Indian Legislature to make laws for its Native Indian subjects beyond British India and empowered that Legislature to so make laws, it seems to me to be a question as to whether the proceedings in the present case are not void in view of the proviso to section 188 of the Code of Criminal Procedure, 1898.

I will now deal with the case assuming that the alleged crime took place within the three-mile limit. If it did, did it take place within Indian territory? The matter was discussed in the case of *Reg.* v. *Kastya Rama* (8); but that was a case decided before the great case of *The Queen* v. *Keyn* (9). That was a case in which the prisoner was indicted at the Central Criminal

(8) (1871) 8 Bom. H.C.R., Cr., 63.
(9) (1876) L.R. 2 Ex. Dn., 63.

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Court for manslaughter. He was a foreigner and in command of a foreign ship passing within three miles of the shore of England on a voyage to a foreign port, and whilst within the distance his ship ran into a British ship and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law. It was held by the majority of the Court that the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged, and the whole of the majority of the Court held that prior to 28 Hen. VIII, Chap. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore of England, that that and the subsequent Statutes only transferred to the Common Law Courts and the Central Criminal Court the jurisdiction formerly possessed by the admiral, and that therefore in the absence of statutory enactment the Central Criminal Court had no power to try such an offence. Two learned Judges—Kelly, C., and Sir R. Phillimore—further held that by the principles of international law the power of a nation over the sea within three miles of its coasts is only for certain limited purposes and that Parliament could not consistently with those principles apply the English criminal law within those limits. The result of that case was the passing of the Territorial Waters Jurisdiction Act, 1878 (41 and 42 Vict., Chap. 73), whereby it was declared that the rightful jurisdiction of Her Majesty extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions, and it was enacted that within one marine league of the coast measured from low-water mark an offence committed by a person, whether he is or is not a subject of Her Majesty, is an offence within the jurisdiction of the admiral . . . . and the person who committed such offence may be arrested, tried, and punished accordingly. In view of the discussion and decision in the case of *The Queen* v. *Keyn*, it seems to me that in the absence of the express authority of the Imperial Parliament the provisions of the Indian Penal Code cannot be held to extend over the seas adjacent to British India for a distance of three miles from low-water limit on the ground that the seas within such limits are a portion of the territory of British India. Therefore, assuming that the murder alleged to have taken place in the present case did take place within three miles of low-water mark, I am unable to hold that the Indian Penal Code is applicable on the ground that the coast within three miles of low-water mark is a portion of the territory of British India. In my opinion the offence, if it took place within the three-mile limit, must be regarded as one that took place on the high seas, and so within the jurisdiction of the admiral, as is declared by the Territorial Waters Jurisdiction Act, 1878. It must be held to have occurred beyond British India, and so the same considerations apply as to the law applicable as if it had occurred

beyond the three-mile limit, and the same question arises as to whether the proceedings are not null and void for want of sanction of the Local Government under the provisions of section 188 of the Code of Criminal Procedure.

Since writing the above, my learned colleague has considered the matter and I have had the opportunity of reading the views which he has expressed.

I concur with him in referring to a Full Bench the following questions :—

(1) Is the trial in the present case void for want of sanction of the Local Government under section 188 of the Code of Criminal Procedure, 1898?

(2) In trying Native Indian subjects for offences committed on the high seas, is the Indian Penal Code or the law of England to be applied as the substantive law governing the case?

The opinion of the Bench was as follows:—

Fox, C.J.—It will be convenient to answer the second of the questions referred first. Section 2 of the Indian Penal Code makes every person within the territories vested in Her late Majesty by the Statute 21 and 22 Vict., Chap. 106, liable to punishment under the Code for every act or omission contrary to its provisions of which he shall be guilty. Section 4 of the Code enacts that its provisions apply also to any offence committed by any Native Indian subject of Her Majesty in any place without and beyond British India.

The terms are the widest; there is no restriction on them: consequently a Native Indian subject is liable to punishment under the Indian Penal Code for every act contrary to its provisions done or omitted by him on the high seas or elsewhere outside British India.

Section 3 of the Code enacts that any person liable by any law passed by the Governor-General of India in Council to be tried for an offence committed beyond the limits of British India shall be dealt with according to the provisions of the Code for any act committed outside British India in the same manner as if such act had been committed in British India. Section 188 of the Code of Criminal Procedure, 1898, passed by the Governor-General of India in Council enacts that when a Native Indian subject of Her late Majesty commits an offence at any place without and beyond the limits of British India he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found, provided that if there is a Political Agent for the territory in which the offence is alleged to have been committed such Agent certifies that in his opinion the charge ought to be inquired into in British India; and where is no Political Agent for the territory, the Local Government gives its sanction. These provisions appear to clearly make it incumbent upon an Indian Court dealing with a

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Native Indian subject for an offence committed anywhere outside of British India to apply to him the law as to offences laid down in the Indian Penal Code. The high seas are not differentiated from any other part of the world outside of British India.

I would give the following answer to the second question referred :—

A Court of Criminal Justice in British India dealing with a Native Indian subject of His Majesty for an offence alleged to have been committed by him on the high seas is bound to apply the provisions of the Indian Penal Code to the act or acts alleged against him.

The answer to the first question appears to me to depend upon the meaning to be attached to the word "territory" in the first proviso to section 188 of the Code of Criminal Procedure.

In view of the context and of the limitations on the powers of the Indian Legislature, which are fully dealt with in Chapter V of Sir Courtenay Ilbert's "Government of India," it appears to me that the word is used in this proviso in reference only to territories of any Native Prince or Chief in India. The word cannot include the high seas, since they are not part of the territory of any State. Assuming that the offence alleged against the accused in the present case was committed on the high seas, I would answer the first question referred in the negative.

Hartnoll, J.—For the reasons given in my order of reference I concur in the answer proposed by the learned Chief Judge to the second question.

The answer to the first question seems to me to be the more difficult one to give. The words of section 188 of the Code of Criminal Procedure, 1898, are wide enough to cover the cases of Native Indian subjects charged with committing offences on the high seas; but it is necessary to look at the intention of the Legislature in enacting that where there is no Political Agent the sanction of the Local Government shall be required before enquiry is made into a charge of an offence alleged to have been committed outside British India. Considering that there were Acts of the Imperial Parliament empowering British Indian Courts to enquire into and try offences committed on the high seas, it would seem to be unlikely that the Government of India would legislate in a manner that may be said to conflict or be inconsistent with such acts; and taking the first proviso on section 188 as a whole it would seem to be a reasonable construction to put on it that the whole of it must refer to definite territories and not to the high seas. The first part of it only refers to territories, and it is reasonable to assume that the last portion of it only refers to territories where there are no Political Agents. I therefore concur with the learned Chief Judge in answering the first question in the negative.

Twomey, J.—I concur as to both questions.

Before Mr. Justice Hartnoll and Mr. Justice Parlett.

SHWE GÔN *v.* HNIN BWIN.

Civil 1st Appeal No. 26 of 1909.

June 14th, 1910.

McDonnell—for appellant (plaintiff).

Higinbotham—for respondent (defendant).

Buddhist Law : Inheritance—Parents entitled to inherit, failing descendants —Exclusion of parents only when deliberate neglect of ordinary duties proved.

A, a Burmese Buddhist, had three daughters, B, C and D. He set them up in business, B taking one stall, and C and D another.

D died and C took out letters-of-administration to the estate. Later C died; and as a result of a dispute as to the legal heir to the property of C, A sued B.

In the original suit and on appeal it was held on the facts that B did not trade in partnership with C and D, nor in partnership with C after D's death, and that C had not made a valid gift of all her property to B. It was further held that in the natural course of events A was the legal heir, on the principle that, failing descendants, the parents are entitled to inherit.

The issue on which disagreement existed was whether A had by his unnatural conduct forfeited his right to inherit. This was decided in the affirmative in the original suit.

On appeal it was held that only when desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred are proved can those naturally entitled to inherit be excluded from inheritance. The facts did not substantiate a charge of this nature against A, and therefore A was declared entitled to the property of C and D.

Pwa Swe v. *Tin Nyo*, 9 Bur. L.R., 88; *Ma Mya* v. *Maung Kywet*, 11 Bur. L.R., 228; *Shwe Bo* v. *Maung Pya*, P.J., L.B., 524; *Po Hmôn* v. *Maung Kan*, 2 U.B.R. (1897—01), 157 : 2 Chan Toon's L.C., 87; *Maung Chit Kywe* v. *Maung Pyo*, 2 U.B.R. (1892—96), 184 : 1 Chan Toon's L.C., 388; *Maung Seik Kaung* v. *Maung Po Nyein*, 1 L.B.R., 23 : 2 Chan Toon's L.C., 87; followed.

Hartnoll, J.—In this case U Shwe Gôn sued his daughter Ma Hnin Bwin for a declaration that under Buddhist law he is solely entitled to the property of his deceased daughters Ma Hnin Bu and Ma Hnin Ghine, or in the alternative for an enquiry as to the share to which he and Ma Hnin Bwin are respectively entitled under Buddhist law, for an account of the property of his deceased daughters that has come into Ma Hnin Bwin's hands or into the hands of any other person by her order and for her use, for an account of her dealings with the said property and for an order directing her to make over all the property of his deceased daughters or so much thereof as he may be held under Buddhist law to be entitled to. His case is that when his three daughters were young, Ma Hnin Bwin now being 45 years old, he traded in cocoanuts and sold them in the bazaar, that when Ma Hnin Bwin was some 17 or 18 years old he gave up the business and gave one stall to Ma Hnin Bwin and the other which he possessed to Ma Hnin Bu and Ma Hnin Ghine for them to carry on the business, that they did so and flourished, that they lived with him until about 1899, when they left his house owing to quarrels with their step-mother and his second family by her, that Ma Hnin Bu and Ma Hnin Ghine were always in partnership and Ma Hnin Bwin always traded separately from

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her sisters, that Ma Hnin Ghine died on the 25th May 1905 and Ma Hnin Bu obtained letters of administration of her estate and took possession of all her property and that Ma Hnin Bu died on the 24th June 1906, leaving property as set out in the schedule, that on Ma Hnin Bu's death Ma Hnin Bwin took possession of her property and that Ma Hnin Bwin refuses to hand over the property stating that she is wholly entitled to the same.

Ma Hnin Bwin's case is that when her father gave up business she and her two sisters traded in partnership in cocoanuts for many years and that they grew rich, that though they lived under their father's roof until 1899, they had to support him, their step-mother and the second family and that they were turned out of their father's house in 1899, that a year after this the partnership between her and her sisters was dissolved, and that after this she traded on her own account and Ma Hnin Bu and Ma Hnin Ghine traded together, that after Ma Hnin Ghine's death she again entered into partnership with Ma Hnin Bu, a partnership which continued until Ma Hnin Bu died, that by virtue of this partnership she is Ma Hnin Bu's heir, but apart from that she is heir to Ma Hnin Bu in preference to her father, and further that even supposing her father by law takes before her, he has lost his rights to the inheritance by his unnatural conduct towards his daughters.

The first point that arose was as to whether, when the father gave up the business, the three sisters traded in partnership, or whether Ma Hnin Bwin traded separately and the other two only traded in partnership. This was decided in Ma Hnin Bwin's disfavour by the learned Judge on the Original Side. This decision is now appealed against. The next point was as to whether, after Ma Hnin Ghine's death, Ma Hnin Bwin and Ma Hnin Bu traded in partnership. This was also decided in Ma Hnin Bwin's disfavour, and this decision is now appealed against.

The next question was whether Ma Hnin Bu had made a valid gift of all her property to Ma Hnin Bwin. This was also decided against Ma Hnin Bwin, and the decision is appealed against.

The next question was whether in the natural course the father or the sister would succeed to Ma Hnin Bu's estate. This question was also decided in Ma Hnin's Bwin's disfavour, and the decision is appealed against.

The last question was as to whether, by his unnatural conduct, the father had forfeited his right to inherit, and this question was decided in Ma Hnin Bwin's favour with the result that the suit was dismissed with costs. This decision is also appealed against.

As regards the question as to whether there was a partnership between the three sisters, when the father gave up business, there is no reliable evidence in support of Ma Hnin Bwin's assertion. The book of counterfoils of promissory notes is certainly not sufficient to prove it. There is the sworn evidence of U Kun and Ma Paw and also Ma U against it, and I must hold that no such partnership is proved.

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The next question is whether there was a partnership between Ma Hnin Bwin and Ma Hnin Bu after the death of Ma Hnin Ghine. It is allowed by U Shwe Gôn that there was a joint transaction between the two sisters in respect of three shiploads of Nicobar nuts, and counsel for the respondent contends that this being allowed the burden of proof is shifted to the appellant to show that there was not a partnership in respect of the whole business carried on by the two sisters. I am unable to agree with him. If it had been shown that Ma Hnin Bwin had a share in the whole of the business carried on by both the sisters—herself and Ma Hnin Bu—then in my opinion the burden would be shifted; but where it is only admitted that the two sisters traded jointly in respect of certain shiploads of nuts it seems to me that the burden still lies on Ma Hnin Bwin to prove that the partnership was in respect of the whole of the business carried on by her and her sister. She relies on the promissory note for Rs. 17,000, dated the 23rd November 1905, on the account book (Exhibit 25) and on the receipt for income-tax (Exhibit 23). The promissory note and the account book may well refer to the transactions in Nicobar nuts. It is alleged that the entry (*p*) in Exhibit 25 refers to Nagu nuts. This is not clear, for Ma Hnin Bwin allowed that some of the Nicobar nuts were small. The income-tax receipt is for Ma Hnin Bwin and one. It is not stated who the one was. It may be that it was drawn out to cover the Nicobar nut transaction. Ma Hnin Bwin states that she contributed nearly all the capital, and yet that no shares were fixed. Maung Gale only gives evidence as to Nicobar nuts. Maung Tha Zan's evidence on the point is not worthy of credence, as he first said that the sisters traded in Nicobar nuts. Then there is the evidence pointed out by the learned Judge who tried the case that the two sisters made remittances on the same day to the same broker. I must hold that any partnership in respect of the whole business carried on by the two sisters after the death of Ma Hnin Ghine is not proved.

The next point to be considered is whether Ma Hnin Bu gave all her property to Ma Hnin Bwin, and I have not the least hesitation in holding that such a gift is not proved. Ma Hnin Bwin in her written statement says that Ma Hnin Bu gave her all her property including the property included in the estate of Ma Hnin Ghine as a gift, and that she took possession of the same and was in possession of it when Ma Hnin Bu died. The case put forward now is that Ma Hnin Bu gave Ma Hnin Bwin her property and that Ma Hnin Bwin gave Ma Hnin Bu her property with the result that the property of both became jointly owned by both. The object of the gift seems to have been to prevent the father from inheriting at the death of either of the sisters. Such a gift was obviously made with the intention of defeating the regular devolution of inheritance according to Buddhist law, as that law does not allow the making of a will, and that being so it involves a question of inheritance, and therefore the rules of

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Buddhist law must be applied to the transaction so as to see whether the gift was a valid one or not. The remarks of Mr. Adamson, Judicial Commissioner of Upper Burma, in the case of *Pwa Swe* v. *Tin Nyo* (1) are applicable to this alleged gift also. It seems to me that no gift is proved. Maung Tha Zan's statement does not seem to me to be too trustworthy after his evidence about the cocoanut business. He says that Ma Hnin Bwin took the box to the Chetty, but that would hardly constitute delivery of possession, for according to Ariyan Chetty sometimes two of the sisters used to go to his house and keep their things there and sometimes one only used to go there and leave the box of the jewels of two, and the bag of the jewels of one separately and take them back, and Ma Hnin Bwin used to take back the jewel box of the other two even when they were alive and subsequently. Ma Paung saw no delivery and only relates a conversation. Subsequent to the alleged gift Ma Hnin Bu was admittedly wearing some of the jewels said to have been given away. I believe Ma Paw when she said Ma Hnin Bu had the key of her box when she died, the more especially when Ma Hnin Bwin's contradictory evidence about the number of keys to the box is considered and also the statement of Subramanium Chetty, which I see no reason to doubt that after Ma Hnin Bu's death Ma Hnin Bwin and Tha Zan came and opened Ma Hnin Bu's box. Why should Ma Hnin Bwin have done so, if she had been in possession at the time? I must certainly hold that no valid gift is proved.

The next question I will consider is as to whether U Shwe Gôn has by his unnatural conduct forfeited his right of inheritance. In this connexion it is contended that this part of the case was not set out in the pleadings and that by Buddhist law a father can never forfeit his rights. It certainly seems to me that it should have been specifically stated in the pleadings that such was going to be the case set up, and that paragraph 6 of the written statement was not sufficient notice. When U Shwe Gôn claimed from Ma Hnin Bu the estate of Ma Hnin Ghine no such assertion was made, and then Ma Hnin Bu in her application for letters put him down as one of the heirs. With regard to the Buddhist law aspect of the case I would refer to the case of *Ma Mya* v. *Maung Kywet* (2), in which it was said that the rulings quoted on both sides all go to show that those naturally entitled to inherit can be excluded from inheritance by the person who supports the deceased and performs the funeral ceremonies, when desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred are proved against them. The different rulings are quoted with these remarks. Section 17 of Volume II of the Digest on Burmese Buddhist Law gives the texts of the different Dhammathats as to the rights of disobedient

(1) 9 Bur. L.R., 88. | (2) 11 Bur. L.R., 228.

sons to inherit. The matter is again dealt with in section 21. Sections 314, 315 and 316 deal with the rights of strangers to inherit. The principle underlying these texts seems to be that, when desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred are proved against any one claiming to inherit, his or her right of inheritance is lost. Applying such a rule to the present case, is it proved that Maung Shwe Gôn has lost his right to inherit owing to his conduct? He appears to have started his daughters in business, and left them to manage their business themselves. He gave them a home and they did not leave it until 1899. Ma Hnin Bwin would then have been about 33 or 34 years of age. She started business, according to her father, when 17 or 18 years old. She says that she had to support the family. If she had to contribute to the expenses of the family and if her father insisted on her and her sisters doing so, would that be cruel and unnatural? I am of opinion that it would not be. The women of this country, when they come to the age of 16 or 17 years, do work and trade and support themselves and those dependent on them. It is a natural and usual course for them to adopt. Sections 24, 25 and 27 of the Digest show how the Dhammathats regard the duty of children towards their parents. Ma Hnin Bwin in her evidence stated that they were turned out of their father's house in 1899. In her written statement she said that she and her sisters left the house in consequence of quarrels with the step-mother and step-children. That appears to be the real reason for their leaving. How could her father prevent these quarrels? The three daughters were grown up and self-supporting, and if they and their step-mother and their step-mother's progeny chose to quarrel how could Maung Shwe Gôn prevent it? Ma Hnin Bwin herself says that she and her sisters were on good terms with her father up to the time of Ma Hnin Ghine's death, that her father visited the house during Ma Hnin Ghine's illness, and that she and her sisters used to back his bills when he borrowed money from a Chetty. Ma Hnin Bu in her application for letters put him down as one of the heirs. The ill-feeling between him and his daughters seems to have begun over a sale of land to Ma Hnin Bu and owing to his asking Ma Hnin Bu for Ma Hnin Ghine's property. It is not at all proved that he tried to cheat his daughter in respect of the land, for he sold it, according to the evidence, for a much bigger price than he asked Ma Hnin Bu not long after the transaction with her. The conveyance for Rs. 1,000 had probably to do with stamp duty. As regards Ma Hnin Ghine's property, if he considered that he had a right to it, was it unnatural conduct for him to ask for it? He at any rate did not go to law with Ma Hnin Bu over the matter. A quarrel over an inheritance matter of this sort is not a cause, in my opinion, to deprive Maung Shwe Gôn of his right of inheritance. It is not quite clear why he did not attend Ma Hnin Ghine's marriage, and this is not a reason to disinherit him. As regards

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his not going to Ma Hnin Bu sooner when she was ill, Ma Hnin Bwin seems in the first instance to have prevented him from being called. May she not have been acting from interested motives, as she knew that he asked Ma Hnin Bu for Ma Hnin Ghine's inheritance and then it seemed that Ma Hnin Bu's inheritance might just be falling in? I am of opinion that no such conduct is proved against U Shwe Gôn as to cause him to forfeit his right of inheritance.

The last question for consideration is as to whether, according to Buddhist law, U Shwe Gôn or Ma Hnin Bwin should succeed to Ma Hnin Bu's estate, or whether they should share it. The rules as to the devolution of property according to Buddhist law, in the absence of direct descendants, have been the subject of considerable judicial discussion. The last case in Lower Burma relating to the subject seems to be that of *Shwe Bo* v. *Maung Pya* (3), in which it was held that there is abundant weight of authority for the preference of parents to brothers and sisters, and the ruling in the case of *Chit Kywe* v. *Maung Pyo* (4) was quoted with approval. That ruling was: "The Buddhist law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and, failing them, to the first line of collaterals and, in the absence of heirs in that degree, to the grandfather and grandmother, and next line of collaterals." The latest case in Upper Burma seems to be that of *Po Hmôn* v. *Maung Kan* (5), in which the authorities were again considered and it was held that on the death of a person who leaves no surviving husband, wife or direct descendants his parents succeed to his estate in preference to all other relatives. The texts in the Dhammathats are conflicting on the point. The texts of the Dhammathats are summarized in sections 296 and 311 of the Digest. I have again fully considered them. I have also considered the position in which Burmese Buddhist parents and children stand with relation to each other. Sections 24, 25, 27, 28 and 97 all go to show what the relation has been, even though some of the rules laid down in those sections would not be followed now. Where the Dhammathats give parents such power over their children it seems to be only natural that, where their children have no heirs, they should have the first claim to their estate. Again it seems to me that the claim of the first line of collaterals can only come through the parents. It appears to be unnecessary to again discuss the Dhammathats, as they have been discussed in the two most recent cases I have referred to. The texts differ; but in my opinion the preponderating weight of authority is in favour of holding that, where the deceased has no direct descendants and leaves no surviving husband or wife, the parents should inherit to the exclusion of all other relatives, and I would hold accordingly. I would therefore set aside the decree

(3) P.J., L.B., 524. (4) 2 U.B.R. (1892—96), 184.
(5) 2 U.B.R. (1897—01). 157.

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of the learned Judge on the Original Side and declare that U Shwe Gôn is under Buddhist Law solely entitled to the property of his deceased daughters Ma Hnin Ghine and Ma Hnin Bu. The further provisions of the decree will, in accordance with the request of counsel at the hearing, be settled after further hearing counsel.

Parlett, J.—The chief point for consideration is whether the parents of a deceased Burman Buddhist succeed to his estate to the exclusion of his brothers and sisters. Most of the texts bearing on the point are collected in sections 310 and 311 of the Digest. The general rule is there repeatedly reiterated that "failing descendants, the parents are entitled to inherit." One or two texts suggest that, where the deceased leaves brothers and sisters, his parents are not his sole heirs, but I find only one by which brothers and sisters could be held to exclude the parents altogether, and a few by which younger brothers exclude elder brothers and parents.

For the defendant reference is made to section 165, which provides that if two brothers acquire property jointly, on the death of either without children the survivor inherits. No doubt this would exclude other brothers who had not shared in the joint acquisition, but there is nothing to indicate that the rule was intended to apply where the deceased's parents were still living. Sections 320 to 323, which deal with partition between parents and children-in-law, allot no share to the brothers and sisters of the deceased. Section 327 limits the rights of the parents-in-law to recover property in the hands of their children-in-law. This appears to be a special limitation of the general rule that the parents are the sole heirs made in favour of the husband (or wife) and children of the deceased, but where the deceased died unmarried no such limitation is necessary, and the general rule would apply.

Section 185 emphasizes the paramount rights of parents whose married children pre-decease them, not only over those of the surviving co-heirs, *i.e.*, brothers and sisters of the deceased, but even over those of the deceased's children.

In addition to the sections quoted by Mr. Justice Hartnoll as illustrating the ascendancy of parents over their children in Burmese Buddhist law, I would also refer to the following. Section 21 allows the parents to permanently retain the share of a child who has forfeited it by disobedience, and even gives them power to recover from him any property which has been given to him, while section 29 treats such a child as a thief. Section 23 allows parents in poverty to sell their children. Under section 26 parents in their lifetime may resume gifts made to their children, and with certain limitations one surviving parent may sometimes do so. Section 28 enunciates the parents' control over their children's property. By section 334, if parents appropriate and expend the property of their children, restitution cannot be insisted upon. Section 339 allows parents who have transferred their property to their children to resume it if

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they fail to support them, and such children may forfeit their right to succeed to it on their parents' death. These considerations justify the remark made in *Po Hmôn* v. *Maung Kan* (6), that the rule that parents succeed to the estate of a person leaving no husband, wife or direct descendant, in preference to all other relations, is in accordance with the ordinary rules of devolution of inheritance in Burmese Buddhist law. That rule was enunciated after consideration of the previous rulings in Lower Burma to a similar effect, in the later of which the Dhammathats were fully set out and discussed, and in my opinion it may be taken as established.

The next point to consider is whether the plaintiff by his conduct towards his daughters has forfeited his right to inherit from them. In this connection I would refer to a passage in *Maung Chit Kywe* v. *Maung Pyo* (7) to the effect that in order to support a plea of forfeiture of inheritance it must be shown "that the ordinary duties of affection or kindred have been intentionally and deliberately neglected, so as to raise a presumption of the rupture and interruption of the connecting bond." I agree that the test in such cases is whether the tie of relationship between the claimant and the deceased, on the strength of which the former claims, had been broken at the time of the latter's death, for as pointed out in *Maung Seik Kaung* v. *Maung Po Nyein* (8), there appears to be no law to show that misconduct after a right has accrued will defeat that right. In the present case, therefore, the question is whether, before his daughters died, the plaintiff had ceased to be a father to them otherwise than in name. As far as Ma Hnin Ghine's property is concerned this appears to be settled by defendant's admission that the daughters were on good terms with their father till Ma Hnin Ghine's death which occurred on 26th May 1905. Most of the allegations of unpaternal conduct now made refer to events which occurred prior to that date, and which therefore were at the time not regarded in that light. Thus in 1899 defendant now says they were turned out of their father's house, whereas the truth is that the daughters, who were all grown up, left, not out of any animosity towards their father, but because they could not get on with their step-mother and the second family: this was rather the misfortune than the fault of their father, who cannot be blamed if for the sake of peace and quiet he asked them to go and live elsewhere. He seems to have got his brother, U Kun, to look after them after they left his house, and U Kun and his wife lived with them at their request up to Ma Hnin Bu's death, and for part of the time their father's sister, Ma U, also lived with them. This shows that relations with their father's side of the family were not ruptured. He is said to have sponged on them. So far from this being the case I consider that such assistance as they gave

(6) 2 U.B.R. (1897—01), 137; 2 Chan Toon's L.C., 87.
(7) 2 U.B.R. (1892—96), 184; 1 Chan Toon's L.C., 388.
(8) 1 L.B.R., 23; 2 Chan Toon's L.C., 67.

him would, in the spirit of the Dhammathats, be regarded not as an unnatural burden laid upon them, but as no more than their bounden duty to discharge. The loans he has said to have taken from them were of old date: the date of the latest among the counterfoils of promissory notes produced by the defendant is January 1899. Plaintiff got his daughters to stand security for him with the Chetty, and he may be untruthful in denying that he executed promissory notes in favour of his daughters. It may be that, though he got cash only from the Chetty on their joint signatures, he gave his daughters promissory notes as security to them in case he failed to pay the Chetty. Be that as it may, it is admitted that the plaintiff duly discharged his liability to whomever due, and the fact that his daughters did stand security for him shows that relations between them were not ruptured nor even strained. I do not think much stress can be laid on his not attending his two daughters' marriages. The learned Judge on the Original Side was mistaken in referring to Ma Hnin Bu's marriage: she died unmarried. Ma Hnin Bwin was married in 1904. No reason, other than the one offered by the plaintiff, is suggested for his non-attendance. Ma Hnin Ghine was married in 1905. It may be that plaintiff disapproved of her marrying one not of her own race, and that such a marriage might not be accompanied by the social functions usual at a marriage between Burmans. But whatever the reason for plaintiff's absence from these marriages may have been, it clearly did not interrupt the friendly relations which subsisted up to Ma Hnin Ghine's death. It was after that that two events occurred which led to the present hostility between the parties. The first was plaintiff's sale of the garden land to Ma Hnin Bwin. That it led to a bitter quarrel is undoubted: but that plaintiff was to blame is not clear. It is admitted that directly Ma Hnin Bu objected to the transaction on the ground that she was being cheated, he at once had the property reconveyed to himself, and it is not suggested that any money passed between them. That so far from having escaped a bad bargain she actually refused a good one is proved by the fact that two years later the land sold for a price more than 36 per cent. higher than that at which she declined it. The other event was plaintiff's claim of Ma Hnin Ghine's estate. This again led to much bad feeling, but it cannot be contended that a well-founded claim of that sort is unpaternal conduct. In view of all the facts of the case it is difficult to avoid the conclusion that, though the father eventually came in for the brunt of it, his daughters' ill-feeling primarily arose against their step-mother and her progeny, from a jealous but not unnatural desire to prevent them eventually benefitting by the fruits of their exertions. I am of opinion that plaintiff has not been shown to have forfeited his rights of inheritance.

The next point is as to the existence of a partnership, first between the three sisters, and later between defendant and Ma Hnin Bu. As to the former partnership, as all the property except

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the house at No. 38, Sule Pagoda Road, was divided up when the partnership ceased, it need not be further considered now. As to the later partnership I agree that it has not been proved and have only a few remarks to make. In addition to the remittances on the same dates to the same brokers by Ma Hnin Bu and defendant set out in the judgment appealed against, there was a sixth on 30th June 1905. The inference drawn from such remittances is therefore strengthened. As to the entries in the credit account alleged to refer to Nagu nuts, I consider that the evidence points on the contrary to such entries referring to Nicobar nuts. Nagu nuts were usually sold in bags as received: only when sold in small quantities were the bags opened and the contents sold by tale. I find no entry of any sale by the bag. The two entries in Exhibit 25 (*p*) said to refer to Nagu nuts are sales of 200 nuts at a time: elsewhere in the account I find only one item of a smaller quantity, *viz.*, 100, which by the low price might refer to Nagu nuts. On the other hand, the usual price charged is Rs. 6 to Rs. 6-8-0 per 100: entries charged at Rs. 5 are noted as medium, and those at Rs. 3-12-0 to Rs. 4-8-0 as small. The inference is that the nuts were all of one kind but were sorted out by sizes and priced accordingly. As regards the income-tax receipt on account of the year 1906-07 in the name of "Ma Hnin Bwin and one," I would remark as follows:—The partnership in Nicobar nuts existed during parts of 1905 and 1906 and would be liable to assessment on account of income accruing during the year of assessment 1905-06. Section 38 of the Income-tax Act empowers the Governor-General in Council to make rules under the Act, and Rules 51 and 52 so made empowers the Local Government to make further rules and prescribe registers. A register known as Register IA has been so prescribed by the Local Government, which has also issued directions (*vide* Direction No. 3) that in preparing the assessment-roll the names of the assessees shewn in Register IA for the past year should first be copied in serial order and then obsolete entries deleted and fresh ones added. Now the partnership would rightly appear in the assessment-roll for 1905-06 and in Register IA, and according to the direction the entry would be copied into the assessment-roll for 1906-07. As Ma Hnin Bwin does not know English it is not surprising that the entry in the receipt, Exhibit 23, should be allowed to stand. That the entry, if it did purport to refer to Ma Hnin Bu, was inaccurate follows from the fact that she had been dead for two months when it was made.

Lastly, there is the question of the reciprocal gifts which I agree are not proved. Apart from the unsatisfactory nature of the evidence offered to prove them, I would point out their indeterminate and apparently Protean character. First it was stated that each told her sister she might take her property if the other died; as, however, this amounted to a verbal will and was ineffective, the transaction was changed to a mutual exchange of their property. If this was what was effected, plaintiff would

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still be entitled to obtain as part of Ma Hnin Bu's estate whatever property Ma Hnin Bwin made over to her at this exchange: the object of the transaction would thus be defeated. Hence it is now set up that what they really did was to pool their property and hold it jointly. Even if they were competent to do so in order to defeat the laws of inheritance, there is no proof that they did so. I consider it clear that the object of the transaction was to keep their father, and through him their step-mother and her children, out of their property by every means, even if necessary by destroying it, and that the conversation and pantomime gone through before witnesses were designed to enable the survivor, in the event of the death of either of them, to set up a gift to her by the deceased.

In my opinion they actually effected nothing.

I concur in reversing the decree and making the declaration proposed, the further provisions of the decree to be settled after further argument.

Full Bench—(Criminal Reference).

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, and Mr. Justice Twomey.

Criminal Reference No. 39 of 1910.

Sept. 5th, 1910.

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DeGlanville—for applicant. | *Dawson*—for respondent.

Written contract — Criminal proceedings — Parties—The Crown — The person or body at whose instance a criminal proceeding is instituted—Variation from the terms of a written contract—General rule of inadmissibility of oral evidence—Evidence Act, ss. 33, 92.

The following reference was made to a Full Bench under section 11 of the Lower Burma Courts Act:—

"Where a prosecution is instituted on the complaint of a private person, and where the terms of a contract between the complainant and the accused have been reduced to writing, does section 92 of the Evidence Act preclude oral evidence from being recorded for the purpose of varying, or adding to its terms?"

Held, (Hartnoll, J., dissenting),—

Where a party to a written contract institutes a criminal proceeding against another party to such contract which involves consideration and determination of what the contract between the parties was, no evidence of any oral agreement or statement is admissible in such proceeding for the purpose of contradicting, varying, adding to, or subtracting from the terms of the written contract, unless such oral evidence is admissible under one or more of the provisoes to section 92 of the Evidence Act.

Krishna Dhan Mandal v. *Queen-Empress*, (1894) I.L.R. 22 Cal., 377; *King-Emperor* v. *Aung Myat*, Criminal Appeal No. 340 of 1909 of this Court; *Queen-Empress* v. *Murarji Gokuldas*, (1888) I.L.R. 13 Bom., 389; *In re Ganesh Narayan Sathe*, (1889) I.L.R. 13 Bom., 600, at 622; *Regina* v. *Peter Adamson*, (1843) 2 Moody, 286; Dearsly on Criminal Process (1853), 3; referred to.

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The following reference was made to a Full Bench by Mr. Justice Hartnoll under section 11 of the Lower Burma Courts Act, 1900:—

Hartnoll, J.—In this case J. Reid, Assistant Manager, Arracan Company, Limited, on the 24th April 1909, charged Nga So Hlaing under section 420 of the Indian Penal Code with cheating and dishonestly inducing delivery of property, which was Rs. 20,000. The case was tried by the District Magistrate of Rangoon, who acquitted him under section 420 of the Indian Penal Code, but convicted him under section 409 of criminal breach of trust. No separate charge was framed under section 409, and so the conviction under that section took place in accordance with the provisions of section 237 (*1*) of the Code of Criminal Procedure. On appeal to this Court the conviction under section 409 was set aside and it was directed that a charge of criminal breach of trust be framed and the trial be recommenced from the point immediately after the framing of the charge. Subsequently this order in appeal was varied, and it was ordered instead that the case be tried by the District Magistrate, Hanthawaddy, and the final words of the order in appeal were: "As this order will necessitate a rehearing of much of the evidence for the prosecution, my order directing the framing of a charge no longer holds good. The District Magistrate, Hanthawaddy, after hearing the prosecution evidence can frame such charge or charges as he finds to be made out by the evidence. In fact the practical effect of the two orders is to direct a retrial." Nga So Hlaing was charged with misappropriating some Rs. 20,000, and when he received it he signed a promissory note for it. On the case being tried by the District Magistrate, Hanthawaddy, Nga So Hlaing was discharged. The District Magistrate considered that as regards the question of breach of trust that the case of *Aung Myat* was precisely similar to this case, that there was no written agreement to apply the money received to a specific purpose and that therefore he was bound by the judgment in *Aung Myat's* case, namely, that where there is a written promissory note oral evidence of an additional agreement as to conditions is not admissible, that if such evidence could not be taken into consideration there was no sufficient evidence to hold that a trust was constituted and no sufficient evidence to justify a charge of criminal breach of trust. The District Magistrate further considered that the order of this Court under which the case was being retried did not set aside the acquittal by the District Magistrate, Rangoon, on the charge of cheating and that therefore Nga So Hlaing could not be tried for cheating. He was accordingly discharged.

Application was then made to the Sessions Judge to direct further enquiry on the grounds that the contract between the complainant and the accused was not contained in the promissory note, and that the case of *Aung Myat* was not similar. The application was unsuccessful as the Sessions Judge found that the

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principle laid down in the case of *Aung Myat* applied to this case. A further application has now been made to this Court to direct further enquiry on the grounds (1) that the former judgment in appeal set aside the acquittal by the District Magistrate of Rangoon under section 420, Indian Penal Code; (2) that the provisions of section 92 of the Evidence Act only apply between the parties and do not apply where the Crown has taken action at the instance of one of the parties, and (3) that the contract between petitioner and the respondent was not contained in a promissory note.

In support of the first ground the case of *Krishna Dhan Mandal* v. *Queen-Empress* (1) was cited. I am in accord with the decision arrived at in that case. It certainly seems to me that when an act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an appeal from a conviction for any one of such offences must lay the whole case open to the interference of the appellate Court notwithstanding any order of acquittal by the first Court in regard to any of the other offences. To construe section 423 (*b*) of the Code of Criminal Procedure otherwise would, for the reasons given in the case cited, lead to a result that could never have been intended by the legislature and would render section 423 (*b*) and section 403 incompatible with each other. The present case is clearly one to which sections 236 and 237 of the Code of Criminal Procedure apply. I am therefore of opinion that the effect of the order of this Court in appeal was to lay the whole case open again, to set aside the order of acquittal under section 420, Indian Penal Code, and to enable the District Magistrate to frame any charge or charges that he might think fit after rehearing the evidence.

The next point is as to whether any evidence can be recorded as to what was the arrangement between the complainant and Nga So Hlaing in that when the latter received Rs. 20,000 he signed a promissory note for it. Does the fact that he signed a promissory note preclude the prosecution from putting forward oral evidence as to what was the actual arrangement made with the accused? For the accused it is urged that section 92 of the Evidence Act applies, and that such oral evidence is inadmissible, and in support of such submission the case of *King-Emperor* v. *Aung Myat* (2) was cited, in which in a similar case my learned colleague, Mr. Justice Parlett, so held. On the other hand, it was urged on behalf of the applicant that section 92 of the Evidence Act does not apply in a criminal prosecution. Section 92 of the Evidence Act applies as between the parties to any instrument to which it relates or their representatives in interest, and the question at once arises as to whether this proceeding is one between J. Reid on the one hand

(1) (1894) I.L.R. 22 Cal., 377.
(2) Criminal Appeal No. 340 of 1909 of this Court.

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and Nga So Hlaing on the other. It is a criminal prosecution, and in all prosecutions the Crown is the prosecutor. Section 493 of the Code of Criminal Procedure expressly says that, if a private person instructs a pleader to prosecute any person, the Public Prosecutor can cause such pleader to act under his instructions. Section 495 gives power to the Magistrate to permit persons to conduct prosecutions. There seems to be no doubt that a criminal trial is a proceeding between the Crown and the accused. This subject was discussed in the case of *Queen-Empress* v. *Murarji Gokuldas* (3). I am therefore inclined to disagree with my learned colleague and to consider that J. Reid and Maung So Hlaing are not the parties to the present proceeding. If I am correct, section 92 of the Evidence Act is not applicable and oral evidence as to the arrangement between the parties would appear to be admissible. Under section 11 of the Lower Burma Courts Act I refer to a Bench, or Full Bench, of this Court as the learned Chief Judge may direct the following question for decision:—

"Where a prosecution is instituted on the complaint of a private person, and where the terms of a contract between the complainant and the accused have been reduced to writing, does section 92 of the Evidence Act preclude oral evidence from being recorded for the purpose of varying, or adding to, its terms?"

The opinion of the Bench was as follows:—

Fox, C.J.—I understand that the prosecution arose on the complaint of Mr. J. Reid, an Assistant Manager of the Arracan Company, Limited, who complained that the accused and his wife had cheated the Company by representing to him that they had bought 20,000 baskets of paddy for which they had paid in part, and that they wanted Rs. 20,000 in order to pay for it in full, and they promised they would devote the money, if advanced to them, to paying in full for the paddy and would deliver the paddy to the Company at Rangoon within ten days. On their representations and undertaking he, on behalf of the Company, paid to them Rs. 20,000, and took from them a promissory note for the amount payable on demand in favour of the Company. The note bears interest at the rate of Rs. 1-8-0 per cent. per mensem. The paddy was not supplied, and the money was not repaid. Mr. Reid as a Manager of the Company laid a complaint before the District Magistrate of Rangoon asking for warrants to issue against the accused and his wife for an offence punishable under section 420 of the Indian Penal Code. The accused was arrested, and there have been proceedings against him before two Magistrates. An advocate employed by the Company has conducted the prosecution throughout. In the course of the proceedings the promissory note was produced and proved, so that the terms of section 91 of the Evidence Act

(3) (1888) I.L.R. 13 Bom., 389.

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were complied with. The prosecution, however, gave evidence to the effect that the transaction between the Company and the accused was not one of mere loan of money to him at interest as indicated by the promissory note, but it was an advance to him of the Rs. 20,000 to be applied by him to payment for the paddy he said he had bought, and an undertaking by him to deliver that paddy to the Company in Rangoon within a certain period. The second Magistrate who dealt with the case held that such evidence could not be taken into consideration.

Whether such evidence was admissible or not depends upon whether the Arracan Company was a party to the criminal proceeding against the accused within the contemplation of section 92 of the Evidence Act.

That section enacts that when the terms of any contract . . . . have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms. Exceptions to the rule are provided which cover cases of everything which would invalidate a document and for mistake, informality and the like.

It is to be observed that the rule applies only to written contracts, grants or other dispositions of property and to matters required by law to be reduced to the form of a document.

The principle of the rule is that, where the terms of an agreement are reduced to writing the document itself, being constituted by the parties as the expositor of their intention, is the only evidence in respect of that agreement which the law will recognize as long as it exists for the purpose of evidence. Consequently parties to the documents enumerated are not allowed to give oral evidence as to the terms of such documents unless such oral evidence is covered by one of the exceptions. Persons who are not parties to such a document may, however, give evidence of facts tending to show a contemporaneous agreement between the parties varying the terms of a written contract between them.

It was argued that the Company in this case was not a party to the criminal proceeding, because the only parties in a criminal proceeding are on the one side the Crown, and on the other side the accused. This view has the support of Mr. John Bruce Norton in his Law of Evidence. No doubt in this country it has been customary to head records of criminal cases as the Queen-Empress or King-Emperor against the accused, and in England also criminal cases are reported as The Queen or The King against the accused. It is difficult to trace how this custom arose. In proceedings by indictment in England, the form is not used, but the grand jury are described as "jurors for our lord the King," the offence charged being described as "against the peace of our lord the King his crown and dignity."

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Every one, however, is entitled, subject to certain exceptions, to prosecute another for a crime. Mr. Justice Jardine dealt fully with this subject in the case of *In re Ganesh Narayan Sathe* (4). Dearsly says, "Though every man is entitled to prefer an accusation against any one suspected of crime, criminal prosecutions for the most part are instituted in the name of the Crown" (5). In the large number of prosecutions for petty offences and offences not cognizable by the police, the Crown's officers have nothing to do with bringing the offenders to justice or with prosecuting them. The form of King-Emperor against an accused is in such cases a mere form: in reality the proceeding is one between the complainant and the accused.

No doubt a Public Prosecutor must, according to section 493 of the Criminal Procedure Code, conduct certain prosecutions, but the obligation of the section is confined to cases of which he has charge. Again under section 495, although any person may lay a complaint against another he is not entitled as of right to "conduct the prosecution" on his complaint. Nevertheless a complainant who charges another with an offence before a Magistrate is liable both in the Civil and Criminal Courts if he makes a false and malicious charge without reasonable and probable cause, and the accused is prosecuted on that charge.

Looking at reality and not at mere form it appears to me that a person or body at whose instance a criminal proceeding in instituted is a party to the proceeding and that the proceeding is in reality between him or it and the accused.

Section 33 of the Evidence Act recognizes this, and the fact that the provisions of the explanation are not repeated in section 92 does not appear to me to afford any strong ground for holding that a person who institutes a criminal proceeding by making a complaint of an offence against another to a Magistrate, and who produces evidence in support of his charge and in fact prosecutes the accused cannot be a party to the proceeding contemplated by that section.

Bearing in mind that the question can only arise in a criminal proceeding when some written contract, grant or other disposition of property entered into by the complainant and the accused is involved, and also bearing in mind the safeguards against fraud, etc., provided by the section, it appears to me that there is no strong reason why the main principle of the section should not be applicable to a complainant and accused in a criminal proceeding to as great an extent as it would be applicable to them if instead of proceeding in a Criminal Court the complainant brought a civil suit. Parties can avoid any embarrassment caused by the general rule by putting down plainly in writing what they agree to, instead of entering into documents which embody a contract never intended by them, or which does not represent the real contract between them.

(4) (1889) I.L.R. 13 Bom., 600, at 622.
(5) (1853) Dearsly on Criminal Process, 3.

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I would answer the question referred as follows:—

Where a party to a written contract institutes a criminal proceeding against another party to such contract which involves consideration and determination of what the contract between the parties was, no evidence of any oral agreement or statement is admissible in such proceeding for the purpose of contradicting, varying, adding to, or subtracting from the terms of the written contract unless such oral evidence is admissible under one or more of the provisoes to section 92 of the Evidence Act.

Hartnoll, J.—The answer to the reference resolves itself into a discussion as to who are the parties in a criminal prosecution. In a civil suit it is clear that the only parties are the plaintiff and the defendant, and the decisions in civil suits only affect matters in issue which concern the civil rights of the parties. The state is not involved in the decision of a Civil Court except when it is a party, and then only rights of a civil character are determined. But it seems to me that in a criminal prosecution, even where there is a complainant, different considerations arise. In criminal prosecutions the security and peace of the public are at stake. A person, who commits a crime, not only wrongs another individual, but commits a wrong against society at large. It seems to me that it is for that reason that a criminal proceeding is looked on as, and is, one between the King-Emperor and the accused person. With regard to some of the more serious of the crimes against society, the law of the land renders it obligatory on every one to give information of their commission, or of the intent to commit them, and the omission to give such information is rendered punishable by the penal law. In dealing with all cognizable crime the police force investigate it of their own motion and send persons up for trial, though for non-cognizable offences they require the order of a Magistrate to investigate them. Magistrates take cognizance of offences on their own information, knowledge or suspicion that they have been committed as well as on police reports and complaints. Government has kept to itself the power to conduct prosecutions as I have already pointed out in the order of reference, and Magistrates are given power by law to allow prosecutions to be conducted by certain persons, but no persons other than those mentioned in section 495 of the Code of Criminal Procedure have the right to conduct prosecutions without such permission. All these provisions of law seem to me to point to the fact that the State recognizes that it must be the prime mover in criminal prosecutions and have full powers over them. The State is responsible for the peace and security of its subjects, and to that end has declared what are criminal offences and how they are to be dealt with. Though it permits private persons to lay complaints and take means to bring persons to conviction, at the same time it reserves the right to conduct such prosecutions itself, and it gives discretion to the Magistracy to decide whether they will allow prosecutions to be conducted by other than certain specified Government

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officers. It also renders it obligatory on all persons in respect of certain of the more serious offences to give information of them. In this country Government pays the subsistence allowance of complainants and witnesses in cases of cognizable crime, and process fees are not required in such cases. When a complaint is instituted before a Magistrate, it is he who issues process for the purpose of enquiring into the offence. In respect of certain offences he is allowed to adjudicate on accused persons; but in respect of others he has to commit them for trial to Sessions. In the latter case it is the Magistrate who charges accused persons, and not the police or complainant. In the former case where the Magistrate himself adjudicates, even then he is the officer who charges accused persons, and it is not the complainant or police who do so, and so it would appear that the Magistrate is the mouth-piece or representative of the State in calling on accused persons to explain what there is against them. Criminal trials at Sessions are in general conducted by a Public Prosecutor, even though there may be a complainant who has his own counsel ready to do so. In certain cases it is even expedient in order to ensure fairness to an accused person that Government should itself conduct the prosecution and not allow privately instructed counsel to do so, who in the interests of a client may not desire to place the case with an unbiassed mind fairly and squarely before the Court with all its defects.

In a sense the person who lays an information against another may be regarded as a party to the proceeding; but the real party to me seems to be the King-Emperor as the head of the State. In any case the complainant cannot be said to be the only party. The King-Emperor is certainly one, and in my opinion must be considered to be the real one, as where offences are committed the security of the whole public is at stake. The fact that the Government does not interfere in large numbers of prosecutions relating to petty offences nor in certain more serious prosecutions does not take away its power to so interfere. In petty cases it is not worth its while to interfere in the interests of the public security and welfare, and so it does not do so; but even then it is the Magistrate who takes action and charges the accused, and he is the officer appointed by Government to deal with offences. I am certainly of opinion that section 92 of the Evidence Act should not be held to apply to criminal proceedings in that the real prosecutor in all such proceedings is the King-Emperor who is the head of the State.

To hold otherwise would seem to me to lead to anomalies or perhaps to injustice. In a case like the present where process has been issued on complaint to the Magistrate, if the question be answered in the affirmative, no evidence to vary the terms of the document is admissible; but suppose that the Magistrate has taken up the case of his own motion, or it had been reported to the police and sent up for trial, in that case it seems clear that the complainant, if he be regarded as a party, would certainly not

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be the sole party preferring the charge. Besides the complainant himself, the State would be moving by means of the Magistrate or the police, and so would clearly be a party. In such a proceeding, if the State wished to give evidence to vary the terms of a document I do not see how section 92 of the Evidence Act could be held to apply, as the document would not be one between the State and the accused. Again supposing that a complainant or person injured did not wish to move at all in such a prosecution as this one, and wished to drop the case, and supposing that in spite of his wish the police or the Magistrate insisted on the prosecution being carried to a finish, in such a case it could not possibly be said that the complainant was a party and so section 92 could not be held to apply. It would certainly to my mind be an anomaly to hold that in one set of circumstances section 92 applied and that in another it did not. Further, if section 92 be held to apply in cases where the prosecution wish to vary the terms of a written document, it seems to me that the converse must hold good and that it must be held to apply where an accused also wishes to show that the terms in the written document do not represent the true facts. Indeed, the establishment of his innocence may rest on his being able to prove that the real facts are not as represented in the document. I cannot think that it was intended to preclude him from doing so. It would be the greater anomaly if he is to be precluded from doing so when the prosecution is on complaint, and the complainant and his counsel are being allowed to conduct the case, whereas if the Public Prosecutor was conducting the case he would not be precluded from doing so.

Lastly, it seems to me that the explanation to section 33 of the Evidence Act is an indication as to how the law looks on criminal proceedings and as to who are parties to them. That explanation appears to have been inserted so as to enable a deposition in a criminal case to be subsequently put in as evidence in a civil case, and so the inference arises that as regards other sections of the Act complainants are not to be regarded as parties. The reason for enacting the explanation appears to be simple enough on the ground that the King-Emperor as the head of the State is the party to a prosecution on the one side as compared with the accused on the other side, and so that unless it existed depositions taken in criminal cases could not be used in subsequent proceedings for want of mutuality.

I would answer the question in the negative.

Twomey, J.—It is more than a mere form, I think, which designates the Crown as a party in criminal trials. The word "party" is not used at all in the Criminal Procedure Code in the sense in which it is used throughout the Code of Civil Procedure. Its ordinary meaning is "party to a civil suit." But so far as it is applicable at all to criminal proceedings I think it means the Crown on one side and the accused on the other. The object of the trial is to find out if the accused is guilty of an offence and to

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punish him for it if he is. The peace and well-being of the State are put in jeopardy by criminal offences, and thus it is primarily the State that seeks the punishment of offences. The parties are thus, primarily at least, the State (as personified by "the King" or symbolized by "the Crown") which endeavours to establish guilt, and the accused who denies it. In many criminal cases there is no private prosecutor at all, *e.g.*, cases against the State, counterfeit coinage offences, etc. The State in such cases acts through its own officers, and there can be no question that the State (*i.e.*, "the King" or "the Crown") is a party. The generality of this rule seems to be recognized by the explanation to section 33 of the Evidence Act. It does not lay down that, even when applying the provisions of section 33, the Crown is not to be deemed a party, but merely that a criminal trial or enquiry is to be deemed a proceeding between the prosecutor and the accused within the meaning of the section. Without this explanation it would be doubtful at least whether evidence given in a criminal trial, *King-Emperor* v. *B at the prosecution of A*, could ever be used in a subsequent suit between A and B concerning the same subject-matter.

But where there is a private prosecutor as in the present case, I think that he also must be regarded as a party for the purposes of section 92. From one point of view the contest in the trial for cheating of So Hlaing, as in a civil suit on the promissory note, is "as between" J. Reid and So Hlaing, and there is no valid principle on which extrinsic evidence which would be inadmissible in the latter case could be received in the former. It may be urged that this view will seriously obstruct officers of the Crown in bringing criminals to justice. But this apprehension appears to be groundless. The provisoes to section 92 provide for every legitimate exception to the general rule; and the principle of the rule itself—namely, that people who put their mutual engagements into writing must be presumed to have written down every material term and circumstance—is clearly one of general application. If it is unjust that A should succeed in a civil suit against B by proving an extrinsic oral agreement varying the document, it would be no less unjust that A should be able to prove such an agreement for the purpose of getting B punished criminally.

The provisoes to section 92 whittle down the general rule so much that the application of the section to criminal trials should not result in failures of justice any more than does its application to civil proceedings.

In the present case, for example, I think it is at least open to argument that the oral evidence offered by the prosecution is admissible under proviso 1 as being evidence of contemporaneous fraud which would invalidate the promissory note in question. The case in its main features resembles the English case of *Regina* v. *Peter Adamson* (6), which is the basis of illustration (*b*) to Article

(6) (1843) 2 Moody, 286.

92 of Sir J. Stephen's Digest of the English Law of evidence. The illustration is as follows:— 1910. REID v. SO HLAING.

"The question is, whether A obtained money from B under false pretences. The money was obtained as a premium for executing a deed of partnership, which deed stated a considera-tion other than the one which constituted the false pretence. B may give evidence of the false pretence although he executed the deed misstating the consideration."

Fifteen Judges decided that evidence as to Adamson's false pretence could be given and apparently they did not base their decision on any difference between the law of evidence in civil and criminal cases, or on the ground that the prosecutor is not a "party," but on the ground that the misstatement of the consi-deration in the deed was part of the prisoner's scheme of fraud. Such evidence would, I think, similarly be admissible in India under proviso 1 to section 92 of the Evidence Act, and it would be admissible in a civil suit no less than in a criminal trial.

For these reasons I concur in the learned Chief Judge's proposed answer to the reference.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Twomey.

Civil 2nd Appeal No. 237 of 1909. Sept. 27th, 1910.

1. VENKATACHELLAN CHETTY
2. NAGAPPA CHETTY
3. ALAGAPPA CHETTY
4. KUPTHAN CHETTY
5. ADAKAPPA CHETTY, CARRY-ING ON BUSINESS UNDER THE STYLE OF V.V.A.M. BY ADAKAP-PA CHETTY

v.

1. KYAUK LON.
2. SHWE THWE.
3. MA HNIT.
4. THI HLA.

Guy Rutledge—for appellants (plaintiffs).

Maung Thin—for respondents (defendants).

Pleadings—Inconsistent allegations of fact—Reasons why they may be set up—Embarrassment to opposite party—The duties of Courts.

The question was raised whether a party may plead or set up inconsis-tent allegations of fact in his pleadings. It was held that a party who has to answer before a fallible tribunal may plead inconsistent allegations of fact.

Any embarrassment which may be caused to the opposite party by such pleading may be met by the Court striking out anything which is really embarrassing or requiring its amendment.

Berdan v. Greenwood, (1878) L.R. 3 Ex. Divn. 251; *[illegible] v. [illegible]*, (18[illegible]) I.L.R. 18 All. 125, followed.

[illegible] (1887) L.R. 35 Ch. Divn. 492; *Mahomed Buksh Khan v. Hos[illegible] Bibi*, (1888) I.L.R. 15 Cal. 684; *Iyyappa v. Ramalakshmamma*, (1890) I.L.R. 1[illegible] Mad. 549; referred to.

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[illegible] the denial and the admission of execution are inconsistent [illegible] statements. But in another way, however, there is no [illegible] inconsistency in a defendant saying "I did not execute [the] note sued on, nor did I receive any consideration for executing [it]." [illegible] In such an answer a defendant in effect asks the [judge] [illegible] ges of fact to believe that he did not sign the note [illegible] event of it being believed that he did sign it, to at [illegible] that he did not receive consideration for it. In [illegible] to answer before a [illegible] tribunal there does [not] [illegible] any cogent reason why [he] should not be allowed [illegible] answer.

[illegible] dicature Acts and its orders and rules, on which [the] Code [of Civil] Procedure was to a great extent founded, a [defendant] [illegible] raise by his state[ment] of defence without leave [illegible] and separate and therefore inconsistent defences as [he] may think proper (per Thesiger, L.J., in *Berdan v. Gr[eenwood]* (1)). In *Re Morgan* (2) remarkably inconsistent [defences] [illegible] set up by an executor and were allowed. Some [illegible] however, of their Lordships of the Privy Council in [illegible] *Buksh Khan v. Hosseini Bibi* (3) were interpreted by [illegible] the Madras High Court in *Iyappa v. Ramalakshmi* [(4)] as [a] decision of their Lordships that the pleading of [inconsistent] allegations of facts is not permissible. The Allahabad [High Court], however, pointed out in *Jino v. Manon* (5) [that] their Lordships said that an issue embodying [illegible] whether a document had been executed by the [plaintiff] [or had] been manufactured without her consent, or was [executed under] undue influence, was improper, because the latter [was inconsistent] with the plaintiff's case that the document [illegible] they nevertheless said that [the] questions which [illegible] were, firstly, whether the document had been ex[ecuted] by the plaintiff; secondly, if so, were there any circumstances which [illegible] to prove that it ought not to be held binding on h[er]; thirdly, was the gift made by it valid under Mahomedan la[w]. [T]heir Lordships found that the plaintiff's plea of non-ex[ecution] was false, but they went on to consider whether the do[cument] she sought to set aside was executed by her under [undue] influence. The decision of their Lordships cannot, I think, [be regard]ed as a decisive pronouncement that it is not admissible [to plead] inconsistent allegations of fact. Any embarrassment [illegible] caused to the opposite party by such pleading may [be met under the C]ivil Procedure Code in the same way as they [may be met under t]he Judicature Act and its rules and orders, [illegible] by [illegible] out or requiring anything which is [illegible] to be amended.

(1) [1]878 L.R. 3 Ex. D. [illegible]
(2) [18]83 L.R. 35 Ch. Divn. 492.
(3) (1888) I.L.R. [illegible] Cal. 684.
(4) (1890) I.L.R. 13 Mad. 549.
(5) (1895) I.L.R. 18 All. 125.

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In the present case there was no embarrassment caused to the plaintiff by the third defendant's plea of want of consideration in addition to his denial of execution. The fact that there was no consideration was gathered from the plaintiff's agent's own evidence.

Under the circumstances I do not think that the appellants' first ground of appeal affords sufficient reason for interfering with the decree of the Divisional Court.

I would dismiss the appeal with costs.

Twomey, J.—I concur.

G. B. C. P. O.—No. 89, C. C., L. B., 10(a), 20-3-1911—500—K. X. das.

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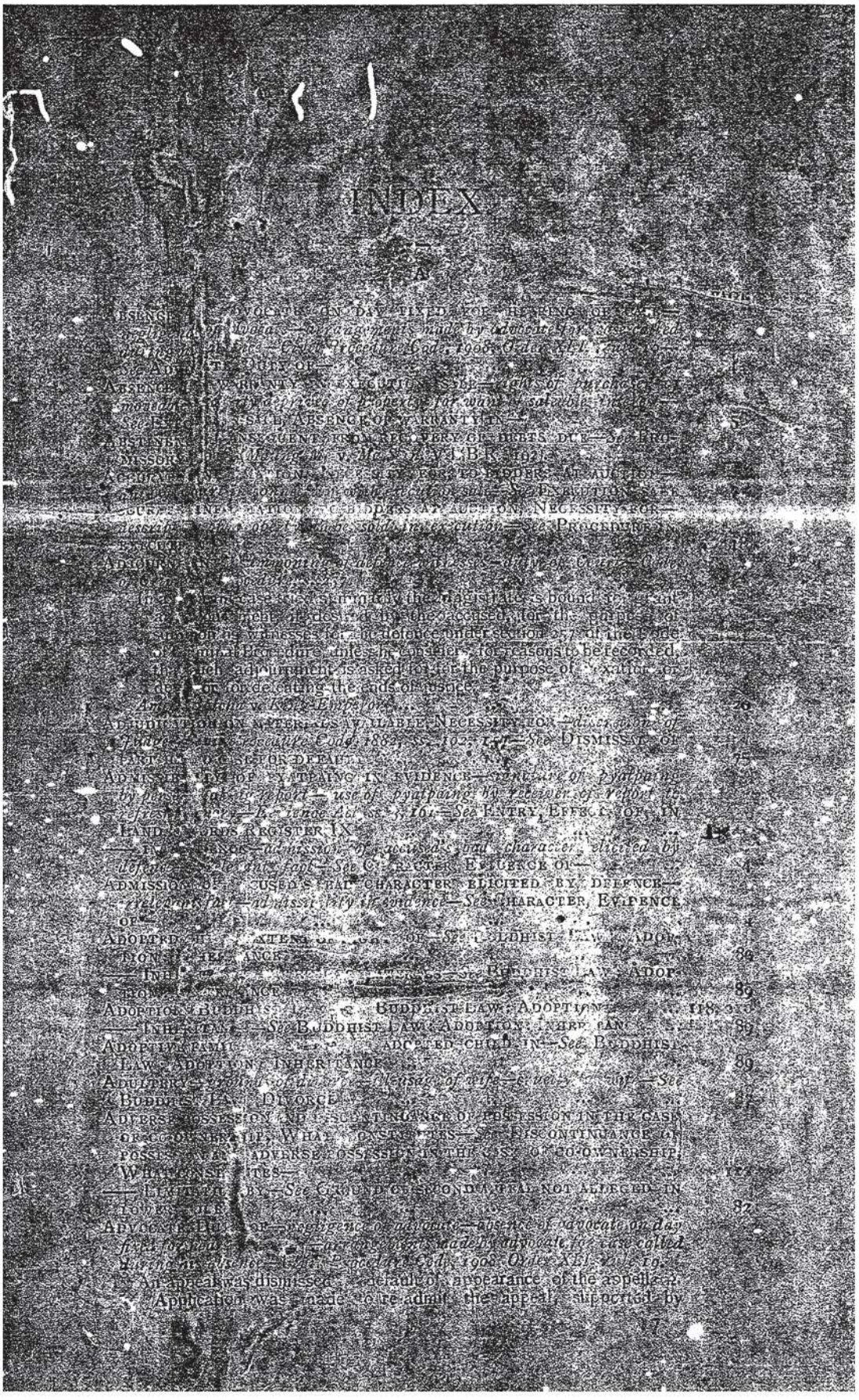

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